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SHERMAN ACT LIMITATIONS ON NONCOMMERCIAL CONCERTED REFUSALS TO DEAL

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SCOPE AND PURPOSE OF THE INQUIRY

Section 1 of the Sherman Act[1] outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." The legality under this provision of a form of group economic action called a "boycott" or, less invidiously, a "concerted refusal to deal"[2] has frequently been tested in the courts.[3] In its simplest aspects, a boycott or concerted refusal to deal is nothing more than an agreement among a number of economic actors to sever or limit economic relations with another economic actor or actors. Where the only object of the concerted refusal to deal is higher profits for the members of the combination, the courts have consistently condemned the combinations as section 1 violations.[4] One reading of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[5] which has found

1. 15 U.S.C. § 1 (1964).

2. The term "boycott" will be used interchangeably with "concerted refusal to deal" without any intent to attach a pejorative connotation to the former.

3. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930). *See generally* H. BLAKE & R. PITOFSKY, ANTITRUST LAW 439-56 (1967).

4. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

5. 359 U.S. 207 (1959).

some support among the commentators,[6] finds in that case a rule that all boycotts are illegal per se. The soundness of this reading is discussed below.[7]

A group can agree to deal on certain terms with, or cut off completely, another person or business in order to achieve a wide variety of objectives. The purpose of the group's action could be nothing more praiseworthy than the elimination of a troublesome competitor in order to increase the group's profits. A group of businessmen or consumers formed to work for equal employment opportunities for disadvantaged minorities could agree to boycott a business establishment which the group felt engaged in discriminatory hiring practices. Used car dealers in a certain area might form a trade association, mutually agreeing to refrain from deceptive advertising practices or "high pressure" sales techniques. Violations of the agreement might be sanctioned by the revocation of the association's "Fair Dealer" seal and expulsion from the association.[8] There seems to be no limit to the range of public purposes—as opposed to narrow economic self-interest—which a group might attempt to promote through the use of their collective economic power in a boycott.[9]

It is analytically useful to classify the kinds of purposes which can motivate a concerted refusal to deal in terms of the degree of material benefit the group will obtain from the realization of their objective.[10] A group's purpose will be considered *commercial* if the objective is profit, and the group is composed entirely of businessmen. A group's purpose is *economic* if the objective is the advancement of the group's economic self-interest and is not a commercial purpose as defined above. A group's purpose is *noneconomic* if it has "no substantial content of material self-interest."[11] Accordingly, a labor union's strike for higher wages would have an economic, but noncommercial purpose. A boycott of stores which do not employ a certain number of Negroes would have an economic purpose only if the boycotting group were composed

6. *See* Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843, 862 (1959); 57 MICH. L. REV. 1244 (1959).

7. See notes 120-61 *infra* and accompanying text.

8. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 383 (1967).

9. *See* Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 708 (1962).

10. This framework is derived from Professor Coons's presentation. *Id.* at 712-13.

11. *Id.* at 713.

of Negroes or people likely to benefit materially from an increase in Negro employment. The term "*noncommercial* purpose," therefore, includes purposes both economic and noneconomic.

The focus of this article is the interaction between the policies of the Sherman Act and noncommercial concerted refusals to deal. The question is to what extent the Sherman Act does or should impose restraints on private attempts to pool economic power to further noncommercial goals by inflicting economic harm on others. If restraints on the aggregation of private economic power are found to be required by the policies of the Sherman Act, the inquiry will then turn to what constitutes an appropriate judicial response to the problem of defining and limiting those restraints.

PRELIMINARY DEFINITIONS AND ISSUES

Problems in Defining the Necessary Agreement in Noncommercial Boycott Situations

A concerted refusal to deal can be illegal under section 1 of the Sherman Act only if two threshold requirements are met: there must be (1) some effect on "trade or commerce among the several States,"[12] and (2) sufficient agreement to constitute a "contract, combination . . . or conspiracy."[13] For purposes of the present analysis it is assumed that the concerted refusal to deal sufficiently affects interstate commerce to provide a basis for federal jurisdiction under the Commerce Clause.[14] The problems involved in finding the necessary agreement in noncommercial boycott situations deserve further discussion, however.

The question of when a conspiracy or agreement can legitimately be inferred solely from parallel action of competitors has long troubled courts enforcing the Sherman Act.[15] Parallel action by competitors might be explainable as no more than the aggregate of independent responses to identical market considerations. But

12. 15 U.S.C. § 1 (1964).

13. *Id.*

14. U.S. CONST. art. 1, § 8. The effects on interstate commerce necessary to establish federal power to regulate under the Commerce Clause are quite easy to meet in practice. *See, e.g.*, Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (allegations that white real estate brokers' conspiracy to prevent Negroes from owning or renting property in white neighborhoods had impeded the flow of interstate commerce of persons, mortgage financing, and building materials held sufficient).

15. *See, e.g.*, Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

parallel action could also be a manifestation of the actors' agreement on a common course of conduct. Proving agreement from such parallel action in boycott situations is especially difficult because a group of competitors may stop dealing with someone for as many reasons as there are group members. The test adopted by the courts, according to one commentator, is whether "the decisions of the alleged conspirators were *interdependent*, that [is] the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way."[16] If the decisions are not interdependent, that is, if each actor could explain his decision in terms of factors valid regardless of the actions of other members of the alleged group, then under the rule of *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*[17] it is not proper to infer an agreement from the bare fact of parallel action.

Under the *Theatre Enterprises* test of interdependence of decision, finding the requisite agreement in noncommercial concerted refusals to deal may be difficult. In a noneconomic boycott, where the parties by definition are acting without any purpose to advance their own "material self-interest,"[18] the decision of each party to boycott is not an economic decision and, arguably, would not depend on the other parties' reaching a similar decision. This argument, however, fails to recognize that a potential boycotter may be unwilling to suffer the consequences of a boycott in which he is the sole actor. Thus, his decision to refuse to deal with a certain company might well be an interdependent decision. But, where the danger to the decisionmaker who boycotts alone is insignificant—for example, the danger to a consumer from an abortive consumer boycott of a nonessential commodity—the degree of interdependence can become miniscule. It may be more difficult, therefore, to show interdependence in a noncommercial boycott, than to show interdependence where the person is avowedly acting for a commercial purpose, but it is by no means impossible.

Where no explicit agreement can be found, it is appropriate to define the essentials of a section 1 "agreement" in terms of the

16. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962).

17. 346 U.S. 537 (1954) (parallel refusal by defendants to license first-run film exhibitions in plaintiff's theatre held insufficient to require the directing of a verdict in plaintiff's favor in light of evidence suggesting valid business reasons for each to refuse to deal individually).

18. *See* Coons, *supra* note 9, at 712-13.

distinction between interdependent and independent decisions. If the decisions had in fact been independent, then presumably the same decision would have been reached by each actor, regardless of the others' conclusions. Finding an agreement and imposing liability because of the fortuity of the simultaneous occurrence of a number of individual and otherwise lawful refusals to deal would seem an interference with an individual's freedom of trade neither warranted by the wording of the statute nor justified by its policies.[19]

Concerted Refusals to Deal: Definitions and Categories

The term "concerted refusal to deal" can thus be applied to a great many differing patterns of economic interaction among individuals and groups. It will facilitate analysis to break down the broad category of concerted refusals to deal into the three most frequently observed types of boycotts, drawing distinctions based on the differing relationships between the group and the victim. A *primary* concerted refusal to deal is a trade pattern in which a number of economic actors at one level of the productive or distributive process discontinue economic relations with an actor or actors at another level, or are willing to continue relations only on certain terms.[20] A boycott of a certain product, such as grapes, by consumers would be an example of a primary boycott, as would the concerted refusal of retailers to sell certain products to the public. The distinguishing feature of a primary boycott is that the only direct economic harm is suffered by businesses which are not competing with the members of the combination. In a *secondary* boycott, the group threatens to boycott economic actors at another level to force them in turn to refuse to deal with someone else—usually a competitor of the boycotting group.[21] An agreement among retailers to refuse to buy from wholesalers who sell to certain other retailers would be a secondary boycott.[22] A third variety of concerted refusals to deal may arise when a group establishes a joint facility, such as a product-testing or research laboratory, or a trade

19. *Cf.* Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

20. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930), first held that a group's refusal to deal except on certain terms could constitute an unlawful concerted refusal to deal.

21. *See* Note, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171, 178 (1962).

22. *E.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

association.[23] Limitations on access to this joint facility could constitute a concerted refusal to deal.

Since a concerted refusal to deal can be effective only against those who would otherwise have dealings with the combination, a primary boycott could not be used by a group to force any of their competitors out of business or to compel acquiescence in the group's demands concerning trade practices.[24] To eliminate competitors or force them to discontinue offending competitive practices, the group must use either a secondary boycott or restrictions on the competitor's access to a group facility. In a secondary boycott, there is a harm not found in other kinds of concerted refusals to deal: the extension of a group's economic power through the conscription of neutrals, involving them and their economic power in the dispute, and forcing them to choose between losing the group's business or losing the victim's business.

These various kinds of refusals to deal are not mutually exclusive; they can and do occur in assorted combinations [25] The definitions are set out at this point because the terms keep recurring in the reported boycott cases, and because it is believed that their use will make easier the task of describing the harms, benefits, available alternatives, and appropriate judicial responses in noncommercial refusal to deal situations.

POTENTIAL HARMS FROM CONCERTED REFUSALS TO DEAL

Economic Harms in Concerted Refusal to Deal Situations, Regardless of Purpose

The obvious economic harm in a concerted refusal to deal is the injury to the victim,[26] the severity of the harm depending upon the

23. *See* 30 U. CHI. L. REV., *supra* note 21, at 180 & n.49.

24. *Id.* at 178 & n.36.

25. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), where the complaint alleged that a trade association composed of utility companies, gas distributors, and gas appliance manufacturers had refused to approve plaintiff's gas burner and that the utilities thereafter refused to supply gas for use in plaintiff's burner. The complaint was held sufficient to state a cause of action under section 1 of the Sherman Act. In Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967), the complaint alleged (1) that defendant real estate brokers' association refused to admit Negro realtors to membership (denial of access to a group facility) and (2) that members of the association had agreed not to sell or rent homes in white neighborhoods to Negroes (partial boycott of prospective Negro purchasers or lessees of such homes).

26. A businessman can be driven out of business by an effective primary boycott aimed at supply or demand, due to his inability either to buy needed supplies or sell to customary

market power of the group itself and, in the case of a secondary boycott, the additional market power of conscripted neutrals. The impact of a supplier's boycott, for example, would depend on (1) how essential the supplied product is to the victim's operations—a function of the availability and cost of substitute supplies; (2) what share of the market in the supplied product the victim usually buys; and (3) what share of the relevant market the group controls. Without such an examination of the facts of any given boycott, the precise amount of economic harm which the boycott will cause cannot be determined. It can only be said that as the share of the relevant market controlled by the combination increases, and the availability of substitutes decreases, the impact on the victim caused by the boycott will become increasingly harmful.

In secondary boycott situations the level of economic harm suffered by the victim is determined by the market power of the neutrals that the group can persuade to boycott. The amount of influence that the group can bring to bear on the neutrals depends in the first instance on the group's market power. With respect to group facilities, the amount of harm caused by the denial of access is directly related to the significance of the competitive advantage which access provides.[27] The competitive advantage provided by access can vary from the determinative—membership in a news wireservice for a newspaper[28]—to the marginal—membership in a rather inactive trade association.[29] It is impossible to make predictions about the economic harm to the victim from a denial of such access without an examination of the facts of each case.

The argument that harm to the victim should not be given much weight in the determination of a boycott's legality because the victim

buyers. Even if he is not driven out of business, he can be placed at a competitive disadvantage by having either his purchasing or selling opportunities arbitrarily limited by the group's action. To maintain sales in the face of a demand boycott, he would have to raise his selling costs to reach new sources of demand, while to maintain production when suppliers boycott, he would have to pay more for his needed supplies, if any are available. The economic injury to the victim is consequently one of the harms most frequently mentioned in the cases finding boycotts illegal under the Sherman Act. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42-43 (1930); Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 311 (1923); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

27. *See* Coons, *supra* note 9; 30 U. CHI. L. REV., *supra* note 21.

28. *See* Associated Press v. United States, 326 U.S. 1 (1945).

29. *Cf.* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

can always avoid the harm by acquiescing in the group's demands, contains an unstated premise: that the group should be allowed to force the victim to choose between surrender and economic harm. This premise can be valid only if harm to the victim would be outweighed by the interests which are to be advanced by the group. There is a logical flaw in the argument which assumes a priori that the benefits of group action outweigh the harms, and then uses this assumption to justify slighting the importance of the harms in all boycott situations.

In addition to the economic harm to the victim, a concerted refusal to deal may cause a second kind of harm—injury to competition in the market in which the victim sells or buys. If suppliers boycott a certain retailer and deprive him of essential sales items, the retailer cannot be as vigorous a competitor in the retail market as he was before. Similarly, if retailers boycott a certain supplier and force him to reduce his production, the competitive force provided by the supplier's demand will be eliminated from the market in which the supplier buys. The courts have emphasized on several occasions that concerted refusals to deal can injure not only the individual competitor, but competition as well.[30] Consequently, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[31] the Supreme Court came very close to equating harm to the victim from a suppliers' boycott with harm to competition, with no more than a passing reference to the structure of the market in which the victim sold:

> [A concerted refusal to deal] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.[32]

The degree of harm to competition resulting from the injury to a competitor by a concerted refusal to deal cannot be estimated without a fairly extensive analysis of market structure and competitive behavior. For example, if the relevant market were highly concentrated and the victim were the price cutting maverick of the industry, significant impairment or destruction of the victim's

30. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914); Montague & Co. v. Lowry, 193 U.S. 38, 45 (1904).

31. 359 U.S. 207 (1959).

32. *Id.* at 213 (footnote omitted).

ability to compete would obviously be far more detrimental to competition than if the market were relatively unconcentrated or the victim merely a price-taker. Even if the precise amount of injury cannot be determined, it is clear, at any rate, that some injury to a competitor will not improve competitive conditions in the relevant market. Perhaps for this reason the Court in *Klor's* declined to undertake such an extensive analysis, holding that allegations of injury to the individual victim alleged sufficient harm to the public interest in competition to state a cause of action under the Sherman Act.[33]

Until now this discussion has centered on economic harms found in varying degrees in all concerted refusal to deal situations. Secondary boycotts and denials of access to a group facility contain special potential for anticompetitive harm. In a secondary boycott, the neutral may bear the brunt of the economic harms mentioned previously, because the neutral who refuses to go along with the group's demands to boycott another becomes himself the victim of a primary boycott. If he decides to accede to the group's wishes, the group has added his power to the economic power it already possessed, and becomes that much more powerful.[34] The neutrals are compelled to choose between doing business with the combination or doing business with the victims.[35] Whatever the neutrals' decision,

33. Two other types of economic harms involved in concerted refusal to deal situations have been mentioned in the cases. Further inquiry will show, however, that they are either restatements of harms previously discussed, or little more than makeweight arguments. Thus, at times the courts have noted that one deleterious economic effect of a concerted refusal to deal is the decline in the volume of interstate trade which occurs when the victim is cut off from buyers or normal suppliers. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 312 (1923). It is difficult to see what economic or competitive interest is advanced by policies which preserve the volume of interstate trade, aside from the rather narrow interests of interstate shipping companies. It is more likely that the courts used the reduction in the volume of interstate trade as a jurisdictional basis to justify federal regulation under the Commerce Clause, rather than as an independent economic harm. *See* Loewe v. Lawlor, 208 U.S. 274, 301 (1908).

Another economic harm which has been found in concerted refusals to deal is the limitation on the freedom of action of the group members. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959). It is somewhat difficult to justify regarding this self-imposed limitation as an economic harm separate and distinct from the anticompetitive effects harmful to outsiders resulting from the limitation. If a group of consenting adult businessmen wanted to limit their individual freedom of action in a way that has no harmful effect—economic or noneconomic—on others, it is hard to see why the Sherman Act should stand in the way.

34. 30 U. CHI. L. REV., *supra* note 21, at 181.

35. Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 441 (1910). In *Grenada*, the Court

they stand to lose at the very least either the victim's business or the group's business whichever is smaller.

There is still another danger to competition in situations involving secondary boycotts or denials of access to group facilities, where the group and the victim are usually competitors. The danger is that a number of competitors will pool their economic power to force other competitors to compete less vigorously or less effectively. In these situations, there is a competitive risk if the victim either resists the group's demands or gives in to them. In the former situation, injury may result to the victim and to competition in the market in which he competes, while in the latter situation, there will be a possible reduction in the victim's competitive effectiveness. A group might agree to boycott suppliers who continue to supply an offending competitor until he discontinues any competitive practice, including lawful practices, which the group might term "unfair."[36] In *Eastern States Retail Lumber Dealers' Association v. United States*,[37] retail lumber dealers objected to competition from wholesalers selling directly to consumers and, in effect, agreed to boycott any wholesaler engaged in this trade practice, called by the retailers "unfair dealing."[38] The threat to competition posed by groups of competitors sitting in judgment on the propriety of other competitors' trade practices—and willing to enforce those judgments by inflicting economic harm on any dissenters—needs no elaboration.

In summary, the most significant of the foregoing economic harms are: (1) the economic injury to the victim, (2) the effect on competition when the victim's ability to compete is undermined or when the purpose and effect of the combination is to force the victim to renounce certain competitive practices and become less

held that Mississippi did not violate the fourteenth amendment by requiring the dissolution of a retail lumber dealers' association (which engaged in the same activities held illegal in Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914)), for violation of the Mississippi antitrust statute.

36. The converse of this situation occurred in Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941), where certain dress manufacturers agreed to boycott retailers purchasing dresses from certain other manufacturers who allegedly copied the dress designs of group members. The object of the combination was to destroy competition from manufacturers who copied dress designs of group members.

37. 234 U.S. 600 (1914).

38. *Id.* at 606.

competitive, and (3) the harm to neutrals who are caught in the middle of a secondary boycott.[39]

Noneconomic Harm in Concerted Refusal to Deal Situations, Regardless of Purpose

Concerted refusals to deal pose a *noneconomic* threat of a different order. The argument, in one form, is that by pooling their economic power the members of a concerted refusal to deal have in effect established their own private government.[40] They can formulate their own standards of conduct and sanction violators through the use of their collective economic power. In *Fashion Originators' Guild of America v. FTC*,[41] the Court called attention to this aspect of concerted refusals to deal:

> In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 [1899].[42]

Milton Handler has stated the argument differently and more forcefully:

> Just as price-fixing may be analogized to the imposition of a sales tax by private parties for private purposes, a boycott smacks of a licensing system likewise imposed by private groups for private purposes. The boycotting

39. It is difficult to see any difference in the scope or severity of economic harms caused by a concerted refusal to deal where the group is assembled at one economic level rather than another. Therefore, it is puzzling to read that "[o]ne type of group boycott which probably should be outside the scope of the Sherman Act is the *consumer boycott*, because it presumably reflects the play of market forces which that act meant to preserve." Note, *"Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation*, 74 YALE L.J. 567, 576 n.54 (1965). For a similar argument see Comment, *Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices*, 1969 DUKE L.J. 1011, 1045-53. There are market forces playing at all levels of the economy, and there is no reason to think that the Sherman Act was concerned solely with the preservation of market forces at the consumer level.

40. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 19 (1945); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465, (1941); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242 (1899).

41. 312 U.S. 457 (1941).

42. 312 U.S. at 465. It should be noted that the quotation from *Addyston Pipe* was the Court's response to the defendant's argument in that case that Congress's power under the commerce clause was limited to the prevention of state obstructions of interstate commerce and could not reach purely private obstructions.

> parties determine who shall enter, who shall remain in, and who shall be excluded from a field of economic activity.[43]

In essence, the argument is that the exclusionary powers of the combination are "sovereign" powers which should only be exercised "pursuant to legislative grant and subject to proper judicial review."[44]

A difficulty with this private government argument is that it seems to apply only where the members of the combination possess market power in a degree approaching a shared monopoly. No persuasive private government objections could be made to a combination which merely established standards of conduct which are to be followed *voluntarily* by the members themselves and which have only incidental effects on outsiders. For example, an agreement among used car dealers not to disparage each other's cars or sales practices might not be so objectionable. A combination becomes a private government only when it has the willingness and the power to coerce others to conform to its standards. Members of a combination can limit themselves in any way they like which does not impair competition, so long as they lack the power to force their judgments on others. It should be obvious that not every combination engaging in a concerted refusal to deal can muster sufficient market power to warrant description as a private government. Where the boycotting group's share of the relevant market approaches 100 per cent, or access to the group facility is essential for a business to compete effectively, it may be accurate to speak of a private government exercising exclusionary powers which only the sovereign should possess. But the problem of private usurpation of essentially governmental powers is certainly not present in all or most concerted refusals to deal.

Nevertheless, the policy behind the private government objection to concerted refusals to deal may, if refined, still apply with considerable force to a broad range of boycotting situations. The argument would be that a potential for undesirable aggregations of private power exists whenever groups are allowed to pool their economic power for collective action in pursuit of private goals with

43. Handler, *supra* note 6, at 864.

44. FTC Advisory Opinion Digest No. 59, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,573, at 22,845 (FTC 1966). The language was used by the FTC in disapproving the plans for a private group advertising review board proposed by the businessmen of a certain locality.

no more than self-imposed restraints on harms caused to others. The danger is in the collective possession of power itself, not merely in the use of collective power to achieve goals antithetical to public policy, such as the suppression of competition. Group action without effective review by some body or agency acting in the public interest can be overzealous, arbitrary, and capricious even in the pursuit of lawful and proper objectives. The point seems to be that groups should not be able to join together to inflict economic harm on others without some system of checks and balances like those deemed necessary to prevent arbitrary action by governments.[45] The possibility of arbitrary action by a group would appear to exist whenever the power to inflict more than minimal economic harm exists, not just in those coercively successful boycotts where the group exercises quasi-sovereign powers.

The difficulties involved in choosing between *regulating* the use of private aggregations of power and *preventing* their existence present recurring problems in the administration of the antitrust laws. A fundamental question in noncommercial boycotts is whether regulation of the exercise of group boycotting power can be effective enough to allow the power to exist at all. The problems of finding adequate regulatory institutions and setting appropriate guidelines for regulation may well prove too complex in the light of the rather limited benefits that analysis may show group boycotts capable of producing.

The Relationship Between the Purpose of the Boycotting Combination and the Scope and Intensity of Resulting Harms

A question remains whether the harms involved in a concerted refusal to deal for a noncommercial purpose[46] are likely to be *more* or *less* significant than the harms experienced in a commercially motivated refusal to deal. Arguably, the economic injury inflicted would be less only if group action to achieve a noncommercial purpose is less effective than commercially motivated group action. If the group's purpose were noneconomic, it could be argued that collective action is more likely to break down because the tie that binds the combination together is not greed but some lofty purpose

45. See note 40 *supra* and accompanying text.

46. It should be remembered that a "noncommercial" purpose can be either "economic" or "noneconomic." Coons, *supra* note 9, at 712-13. See notes 10-11 *supra* and accompanying text.

easily displaceable by greed. It could be argued just as convincingly, however, that a group boycotting for a noneconomic purpose is likely to be composed of zealots, who would be willing to impose unremitting economic harm on the victim until their noneconomic purpose is achieved. Thus, there seems little reason to think that the harms involved in an economic or noneconomic concerted refusal to deal would be any less because of the noncommercial nature of the group's purpose.

POTENTIAL BENEFITS FROM CONCERTED REFUSALS TO DEAL

In view of the economic and noneconomic harms accompanying concerted refusals to deal, it is not surprising that the courts have been reluctant to find that the benefits from a boycott outweigh the harms. Responses by the courts to various attempts to demonstrate the reasonableness of restraints imposed by boycotts are analyzed below.

Justifications Based on Economic Advantage to the Combination

Where a combination inflicts economic harm on others simply for the members' own economic benefit, their concerted refusal to deal has uniformly been held to be a section 1 violation. These decisions are easily supportable, for private efforts to restrain trade to effect a redistribution of income from the victim to the group do not deserve immunity from the operation of the antitrust laws.[47] *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners*[48] provides a good example of a concerted refusal to deal used to advance the group members' economic interests. There, certain theatre owners refused to purchase plaintiff's motion pictures until more favorable contract terms were offered. The Third Circuit without much difficulty ordered the lower court to enjoin this conduct.[49] Similarly, an agreement among master plumbers to boycott manufacturers and dealers in plumbing supplies in order to force them to sell to the public only through the master plumbers was held to be a criminal conspiracy in restraint of trade.[50]

47. This assumes the absence of a specific congressional exemption. For example, see the partial exemptions given to agricultural organizations and labor unions by section 6 of the Clayton Act, 15 U.S.C. § 17 (1964).

48. 93 F.2d 714 (3d Cir. 1937).

49. *Id.* at 720.

50. Knauer v. United States, 237 F. 8 (8th Cir. 1916).

Before Congress granted labor unions an exemption from the antitrust laws,[51] and before the courts gave more than a grudging reading to the exemption,[52] the fact that the purpose of a union boycott was to promote plant unionization and benefit workers—an economic but noncommercial purpose—did not save the boycott from illegality. In the famous Danbury Hatters case,[53] the complaint, alleging that union members were boycotting a manufacturer's products to force unionization of his plant, was held sufficient to state a cause of action under section 1 of the Sherman Act.[54] In *Duplex Printing Press Co. v. Deering*,[55] more than ten years later, even after the Clayton Act, the Court was equally unmoved by the boycotting union's argument that its purpose was to get a closed shop, an eight-hour day, and a union wage scale, and to prevent the loss of these benefits already won from plaintiff's competitors.[56] Ultimately, congressional action was necessary to make clear to the courts that section 20 of the Clayton Act deserved a broader reading, and that strikes and primary boycotts to advance the goal of unionization were not unlawful.[57] This congressionally sanctioned justification for labor boycotting activity has been judicially recognized only where the activity has been sufficiently related to the purpose of unionization.[58]

51. Clayton Act § 6, 15 U.S.C. § 17 (1964).

52. *See* United States v. Hutcheson, 312 U.S. 219 (1941). Recent applications of exemptions from the Sherman Act include Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965).

53. Loewe v. Lawlor, 208 U.S. 274 (1908).

54. The precedential weight of *Loewe* is weakened by the fact that it was decided three years before the Supreme Court adopted the so-called "rule of reason" in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Until *Standard Oil*, the Court had been operating under the rule of United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), which read section 1 of the Sherman Act as broadening common law rules against restraints of trade and outlawing every restraint of trade no matter how slight.

55. 254 U.S. 443 (1921).

56. *Id.* at 480-81 (Brandeis, J., dissenting). The case is remembered today more for its tortured construction of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1964), 29 U.S.C. § 52 (1964), than the Court's response to union attempts to justify the boycott.

57. *See* Norris-LaGuardia Act, 29 U.S.C. §§ 101-02 (1964); Wagner Act, 29 U.S.C. § 157 (1964). Congress has never legalized secondary boycotts. *Cf.* 29 U.S.C. § 158(b)(4) (1964).

58. I.P.C. Distribs., Inc. v. Chicago Moving Picture Mach. Operators Local 110, 132 F. Supp. 294 (N.D. Ill. 1955) (union's motion to dismiss action against union for instructing its members not to show a certain film denied, because legitimate union objectives do not include suppression of films distasteful to the union). The Court has shown some reluctance to extend to other groups the privilege granted to labor to use primary boycotts to advance union

Concerted refusals to deal except on identical terms—mechanisms utilized to enhance the bargaining power of the group and to obtain more favorable contract terms than each could get through individual bargaining—have met with a similar fate in the courts. Refusal of distributors to lease films except on the basis of a standard contract requiring arbitration of all disputes arising under the contract was held illegal despite defendants' contention that the arbitration provisions were well adapted to the needs of the motion picture industry and had been worked out through extended discussions among all the parties.[59] A boycott by distributors to force an exhibitor out of business because he would not agree to deal with all the distributors was held illegal without much discussion,[60] as the only justification the defendants offered for their action was the advancement of their own business interests at plaintiff's expense.[61] If an individual competitor lacks the bargaining power to get a particular contract term, the courts apparently will not let him join with other competitors and use their collective bargaining power to compel the insertion of such a term in the contract, no matter how desirable.

The rule developed in the foregoing cases is reasonable: attempts by a group to use a concerted refusal to deal for no loftier purpose than turning the terms of trade in their favor are illegal. There is nothing in the legislative history or policies of the Sherman Act to indicate that individuals should be privileged to form groups to inflict economic harm on others for their own benefit. Commercial refusals to deal designed to preserve dealers' profit margins[62] or the

objectives, in the absence of congressional action. Hughes v. Superior Court, 339 U.S. 460 (1950) (contempt conviction for violating state court injunction against peaceful picketing to encourage boycott where object of picketing was more Negro employment affirmed). Justice Frankfurter would accord to a union the protection afforded by section 20 of the Clayton Act only "[s]o long as [it] acts in its self-interest *and does not combine with non-labor groups* . . . ." United States v. Hutcheson, 312 U.S. 219, 232 (1941) (emphasis added). *But see* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (Norris-LaGuardia Act prevented federal district court from enjoining Negro boycott and picketing to achieve higher percentage of Negro employees in grocery store).

59. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930). Use of an agreed standard-form lease contract in the one-way trailer rental business was enjoined in United States v. Nationwide Trailer Rental Sys., Inc., 156 F. Supp. 800, 806 (D. Kan.), *aff'd mem.*, 355 U.S. 10 (1957).

60. Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923).

61. *Id.* at 301 (Argument for Defendants in Error).

62. United States v. General Motors Corp., 384 U.S. 127 (1966). The Court held that an agreement among Chevrolet dealers not to sell cars to "discounters" was a "classic

price structure of a group[63] from pressure by competitors, have also been struck down under this rationale.

Justification Based on Prevention of Arguably Unfair or Unlawful Competitive Practices

It is very difficult to draw satisfactory lines between boycotts for the group's economic advantage and boycotts to prevent trading practices which are arguably illegal or unfair. Too often these two purposes coalesce in the same boycott. What seems unfair to members of a particular industry may appear to disinterested observers to be nothing more than vigorous but acceptable methods of competitive struggle. In *Eastern States Retail Lumber Dealers' Association v. United States*,[64] lumber retailers thought it an unfair pre-emption of their trading opportunities for wholesalers to sell directly to lumber users and boycotted wholesalers who did so. The Court properly enjoined the data dissemination activities essential to the boycott, for if a group were to be allowed to set its own standards of what constitutes "fair" competition and were to be allowed to boycott to put pressure on a competitor deemed "unfair," the protection afforded competition by the antitrust laws would be minimal, at best.

Similar problems have arisen in the construction industry where subcontractors object to the practice of general contractors called "bid shopping." A general contractor presumably would use the lowest subcontractor's bid in preparing his final bid on a given construction project. If, after winning the contract award, he asks other subcontractors to underbid the subcontractor who was the lowest initially, the contractor is engaging in bid shopping. For obvious reasons, subcontractors resent this practice of renegotiating their price after the general contractor gets the contract. Yet, it is not readily apparent why the general contractor's effort to get a lower bid should be considered unfair, or unethical, or materially

conspiracy" in restraint of trade "not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles . . . ." *Id.* at 140, 146.

63. Taylor v. Local 7, Horseshoers, 353 F.2d 593 (4th Cir. 1965), *cert. denied*, 384 U.S. 969 (1966) (refusal of defendant horseshoers to shoe any horses unless the owner agreed to use union horseshoers exclusively held an illegal boycott, not a labor dispute within the meaning of the Norris-LaGuardia Act).

64. 234 U.S. 600 (1914). See text accompanying notes 37-38 *supra*. A similar objective was involved in the boycott in Knauer v. United States, 237 F. 8 (8th Cir. 1916).

different from his attempt to get the lowest possible price on building materials. For this reason, when a group of subcontractors formed a bid depository and, in order to prevent bid shopping, required that general contractors using the depository agree to let the subcontract to the lowest bidding depository member, the requirement was struck down as an illegal boycott of nonmembers of the depository.[65]

The case is harder when the purpose of the boycott is to prevent methods of dealing more vulnerable to challenge on grounds of fairness. The courts, for the most part, have remained steadfast in their condemnation of boycotts even when this justification has been offered. The leading case in this area is *Fashion Originators' Guild of America v. FTC*.[66] Members of the women's garment industry who claimed to be creators of original dress designs became concerned over what they called "style piracy"—other manufacturers copying their designs and selling the copies. To eliminate this practice, the members agreed to refuse to sell to any retailer who sold garments copied from members' designs. "An elaborate system of trial and appellate tribunals"[67] was established to determine whether a garment in fact was a copy of a design registered with the Guild. The FTC attacked the Guild as an "unfair method of competition" under section 5 of the Federal Trade Commission Act,[68] and prevailed in the Second Circuit.[69] Affirming, the Supreme Court noted that original dress designs could not be copyrighted or patented and viewed the boycott as intended to supress a form of competition unpalatable to the combination.[70] The Court also affirmed the FTC's refusal to hear evidence offered by the defendant as to the evils of style piracy and its illegality under state law. "In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."[71] When forced to balance the competitive evils of the boycott against the benefit of restraining conduct tortious under state law, the Court

65. Christiansen v. Mechanical Contractors Bid Depository, 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966).

66. 312 U.S. 457 (1941).

67. *Id.* at 462.

68. 15 U.S.C. § 45 (1964).

69. 114 F.2d 80 (1940).

70. 312 U.S. at 465, 467.

71. *Id.* at 468.

unhesitatingly outlawed the boycott.[72] The value choice implicit in the Court's decision has been spelled out elsewhere. "The fact that the person boycotted is engaged in illegal activities is immaterial, since no private group should ever have the power to impose penalties or punishment on a stranger because of a wrong he may have done."[73] The argument that tortious invasions of business interests should be punished or compensated for only under the law, with no power in a private group to add to the punishment at its whim, seems unassailable.

There has been some confusion concerning the legality of concerted refusals to deal to prevent other kinds of commercial wrongs, such as breaches of contract. In 1905 the Supreme Court affirmed a decree enjoining livestock buyers and slaughterers from conspiracy to fix livestock prices, but permitted the joint "establishing and maintaining [of] rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers . . . ."[74] A few years later, motion picture distributors, concerned about the frequency of changes in theater ownership made by prior owners to escape their contractual obligations, agreed to require cash dealing or the posting of a standard deposit before dealing with a new owner who refused to assume the prior owner's outstanding contracts. Such an agreement was held illegal in *United States v. First National Pictures, Inc.*[75] Since there seems to be no valid reason to distinguish boycotts to prevent torts from boycotts to prevent breaches of contract, the result in *First National* seems sound.[76]

72. The Court's ready disposition of the case may have been assisted by the presence of restraints in addition to the boycott, such as prohibitions on members' participation in retail advertising, regulations on sale days, and limitations on allowable discounts. *Id.* at 463.

73. Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 387, 400 (1942).

74. Swift & Co. v. United States, 196 U.S. 375, 394 n.1 (1905).

75. 282 U.S. 44 (1930).

76. Although concerted refusals to deal to punish businessmen for wrongful conduct unrelated to the proposed dealings have generally been held illegal, the courts have at times been receptive to boycotts entered into to prevent dealings likely in themselves to be fraudulent. *See* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925) (dissemination of information in order to prevent contractors from fraudulently demanding delivery of cement under more than one specific job contract did not violate section 1 of the Sherman Act).

Justifications Based on the Advancement of Public Policy Goals Unrelated to the Group's Immediate Material Advantage

Protection of the public in a multitude of ways has been a favorite, if not always successful, justification proffered for concerted refusals to deal.[77] *Union Circulation Co. v. FTC*[78] involved the concern of a number of magazine subscription solicitation agencies that the deceptive practices of many door-to-door subscription salesmen were giving the entire industry an unsavory reputation. To enhance agency discipline and control of salesmen's conduct, the dominant agencies entered into "no-switching" agreements by which they agreed not to hire any salesman who had worked for another agency within the previous year. The Court of Appeals for the Second Circuit upheld the Commission's finding that these agreements constituted an unreasonable restraint of trade under the Sherman Act and hence an unfair method of competition under the Federal Trade Commission Act.[79] The Court of Appeals found that the agreements raised barriers to new entry or expansion by existing companies by deterring employees from taking the risk of working for an expanding or new company which later might have to discharge them, with a resultant cost to the employee of one year's unemployment. In addition, the court may have believed that there were equally effective ways of dealing with salesmen's fraudulent or deceptive practices which would not raise such barriers to entry.[80] In order for a noncommercial—economic or noneconomic—purpose to save a boycott from illegality, at the very least it must be clear that there is no way apart from the boycott to deal with the problem adequately.

Furthermore, it is apparent that a noble purpose will not save a concerted refusal to deal unless a sufficient connection is established between the restraint imposed and the purpose to be achieved. For example, in *Council of Defense v. International Magazine Co.*,[81] a

77. The various approaches taken by the courts in reviewing concerted refusals to deal where the purpose is related either tangentially or not at all to the economic self-interest of the combination is the basis of this discussion. There is no bright line test which permits an easy separation of these cases from those preceding. Often the purpose to advance public policy goals will be inseparable from the purpose to advance the group's self-interest. The one common characteristic of the cases discussed here is that the groups do not act with the intention of obtaining an immediate material benefit for themselves.

78. 241 F.2d 652 (2d Cir. 1957).

79. *Id.* at 658.

80. *Cf. id.*

81. 267 F. 390 (8th Cir. 1920).

number of state and local officials were enjoined from engaging in and encouraging a boycott of plaintiff's magazine, which contained allegedly un-American and pro-German sentiments of plaintiff's principal stockholder, William Randolph Hearst. Relying on the fact that the corporation "had published no objectionable matter in its magazines, and it had nothing to do with the Hearst newspapers,"[82] the court avoided the harder question whether the boycott would be justified if the magazines had contained thoughts objectionable to the boycotting group.

Even in cases where the boycotting combination is acting solely upon moral grounds, without any chance of confusing the good of society and the good of their profit margins, justifications based on noncommercial purposes have not been well received. The sending of notices to book and magazine dealers which communicate a private group's belief that certain publications violate the law and their intention to seek prosecution was enjoined in *American Mercury, Inc. v. Chase*.[83] The court's opinion specifically rejected this justification:

> The defendants have the right of every citizen to come to the courts with complaints of crime; but they have no right to impose their opinions on the book and magazine trade by threats of prosecution if their views are not accepted . . . . The facts that the defendants are actuated by no commercial motive and by no desire to injure the plaintiff do not enlarge their rights in this respect . . . .[84]

The FTC did not find a moral justification for a doctors' and hospital's boycott of the products of a commercial blood bank to be sufficient to outweigh the competitive harms in *Community Blood Bank of the Kansas City Area, Inc.*[85] The opinion of the Commission dismissed defendant's contention that buying and selling blood for profit was immoral:

> A group of private citizens, no matter how public spirited or altruistically motivated, may not relegate to themselves the essentially governmental function of determining the standards which will be applied in the interstate operation of blood banks and band together to inhibit the development of

82. *Id.* at 411.

83. 13 F.2d 224 (D. Mass. 1926).

84. *Id.* at 225. It should be noted that the defendants here went beyond a refusal to deal to threats of criminal prosecution to get their views accepted. The comments of the court on the potential evils of private enforcement of private moral judgments are quite in point, however.

85. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,728 (FTC 1966), *order set aside and annulled on other grounds*, 405 F.2d 1011 (8th Cir. 1969) (lack of FTC jurisdiction).

> licensed commercial banks which meet governmental but not their own self-imposed standards. Nor may they take such action because they hold the opinion that the buying and selling of human blood is morally wrong.[86]

In ruling upon these justifications, the courts have repeatedly stressed the danger involved in allowing private combinations to set their own standards of behavior and attempt to compel others, through threats of economic and anticompetitive harm, to conform to those standards.[87]

Cases involving attempts by professional groups to advance the ethical standards of their profession can raise complex problems of antitrust and private government. Group action can range from denial of membership in a professional association to those who do not comply with the group's ethical standards to more coercive practices, such as the secondary boycott involved in *American Medical Association v. United States*.[88] Believing that salaried medical practice under contract was unethical because it put an intermediary between doctor and patient, the Medical Society of the District of Columbia expelled two members who engaged in contract practice. In addition, the society warned hospitals that they might lose its approval, which was essential to attract interns, if they permitted expelled members to use hospital facilities, and threatened members with expulsion for engaging in consultation with the expelled doctors.[89]

It would be very difficult for an antitrust court to resolve the ethical questions raised by prepaid medical practice, especially when such practice can undercut the fees and income of those on one side of the argument. A court is in a real quandary when ethics and group self-interest happen to coincide.[90] The court had little difficulty, however, in condemning this attempt through secondary boycott to enforce compliance with the group's ethical standards:

> Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting or punishing

86. *Id.* at 23,036.

87. See note 40 *supra* and accompanying text.

88. 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).

89. This statement of facts is taken from an earlier opinion in the same case, 110 F.2d 703, 706 (D.C. Cir. 1940), upholding the sufficiency of the indictment in the principal case.

90. The fact that both the American Medical Association and the D.C. Medical Society saw no ethical problems with contract practice unless the quality of medical services was undermined or unless there was interference "with reasonable competition among the physicians of a community," 130 F.2d at 238 n.23, may have eased the burden of decision in this case.

> . . . . Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extragovernmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands. . . . [A]lthough persons who reason superficially concerning such matters may find justification for extra-legal action to secure what seems to them desirable ends; this is not the American way of life.[91]

The view of the District of Columbia Circuit has not gone unchallenged. In 1952, the Supreme Court indicated in dictum that there may be considerable room for ethical justifications in concerted refusals to deal by professional societies.[92] This justification is much more likely to be accepted when offered not to justify a secondary boycott, but where the concerted refusal to deal takes the form of denial of membership in the professional society and where lack of membership will not be a significant barrier to professional advancement.

Justifications Held Sufficient to Outweigh Harms of Boycott

In the preceding cases the courts have consistently held that the justifications offered, ranging from pure self-interest[93] to the advancement of high public policy,[94] were insufficient to outweigh the harms caused by concerted refusals to deal. The inquiry into the actual harms of the boycott in question has ranged from the minimal[95] to the fairly detailed.[96] But based on whatever analysis the court was willing to make, the harms have been held to outweigh the benefits, and the concerted refusal to deal has been outlawed.

In a relatively few cases, however, a restraint which could be

91. 130 F.2d at 249.

92. United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952) (dictum). *See also* Levin v. Doctors Hosp., Inc., 233 F. Supp. 953, 954 (D.D.C. 1964), *rev'd on other grounds sub nom.* Levin v. Joint Comm'n on Accreditation of Hosps., 354 F.2d 515 (D.C. Cir. 1965). *But see* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 488-89 (1950) (attempted eithical justification for price-fixing rejected). Majorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, 302 F. Supp. 459 (D.D.C. 1969).

For a discussion of the applicability of the antitrust laws to bar association minimum fee schedules, see J. Leary & M. Douty, Minimum Fee Schedules and the Antitrust Laws: A Preliminary Analysis, Sept. 1958 (American Bar Foundation Research Memo, Series No. 12), *cited in*, S. OPPENEHIM & G. WESTON, FEDERAL ANTITRUST LAWS CASES AND COMMENTS 130 n.16 (3d ed. 1968).

93. See notes 47-63 *supra* and accompanying text.

94. See notes 77-92 *supra* and accompanying text.

95. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

96. Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

called a concerted refusal to deal has survived judicial scrutiny under the antitrust laws. In *Chicago Board of Trade v. United States*,[97] the Court upheld the legality of a "call" rule, under which members agreed to bid for grain sold on a "to arrive" basis only at the price prevailing when trading ceased, until trading began the next day. The rule was in effect a concerted refusal to deal except at a certain price for a certain part of each day. The Board argued that the purposes of the call rule were to reduce members' business hours and break up a monopoly in "to arrive" grain.[98] These "benefits" were held sufficient to outweigh the competitive harm arising from the limited concerted refusal to deal.[99] The refusal by Underwriters Laboratories to test a fire alarm device which did not meet the Laboratories' threshold standards of approval has been held lawful.[100] The fact that the stockholders of the laboratory were insurance companies who could have no competitive motive for arbitrarily denying the Underwriters' seal to the plaintiff unquestionably facilitated the court's decision.[101]

Exclusionary conduct by sports leagues and sport trade associations has been held justified in several cases.[102] In *Molinas v. National Basketball Association*,[103] a professional basketball player who had been indefinitely suspended from the NBA for betting on his own team charged the league members with engaging in a concerted refusal to deal with him. The district court dismissed the complaint, noting that "a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined."[104] When the United States attacked the rules and regulations of the United States

97. 246 U.S. 231 (1918).

98. *Id.* at 237.

99. The case retains vitality today primarily because of Justice Brandeis's listing of factors to be considered in determining the reasonableness of a trade restraint.

> To determine that question [whether the restraint promotes or suppresses competition] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. 246 U.S. at 238.

100. Roofire Alarm Co. v. Royal Indem. Co., 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd mem.*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

101. *Id.* at 168.

102. *See generally* Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967).

103. 190 F. Supp. 241 (S.D.N.Y. 1961).

104. *Id.* at 244.

Trotting Association, providing for the licensing of tracks and drivers and forbidding horses to race on tracks not members of or sanctioned by the USTA, the regulations were upheld as reasonable restraints, necessary to keep full records of horses' performance to avoid "ringing," the practice of racing a horse under another horse's name and record to get a handicap advantage.[105]

With equal ease, a rule of the Professional Golfers' Association restricting eligibility in PGA-sponsored tournaments was held lawful and justified by the need "to insure that professional golf tournaments are not bogged down with great numbers of players of inferior ability."[106] The same court two months before had labeled as illegal per se a condition on eligibility for bowling tournaments sponsored by a state trade association of bowling alley owners which required that the entrant have done his organized bowling only in establishments owned by trade association members.[107] The court was unimpressed by the argument that the eligibility rule was necessary to prevent "sandbagging," the use of unreliably low scores in handicap computation. Here, as in *Union Circulation*,[108] the restraint was outlawed because it was more restrictive than necessary to accomplish the purpose. Instead of denying eligibility to bowlers doing any organized bowling in nonmember alleys, the rule could have required merely that only scores obtained at member establishments could be used in computing handicaps.

The lesson of these cases is that where a concerted refusal to deal takes the form of an eligibility rule or limitation *ancillary* to but *essential* for the operation of a lawful joint facility such as a trade association or league, the rule can escape condemnation under the antitrust laws. The rule or restraint must be sufficiently related to the lawful purpose for which the joint facility is established,[109] and

105. United States v. United States Trotting Ass'n, 1960 Trade Cas. 79,954 (S.D. Ohio 1960).

106. Deesen v. Professional Golfers' Ass'n, 358 F.2d 165, 170 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

107. Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966).

108. See notes 78-80 *supra* and accompanying text.

109. Therefore, there is some antitrust danger in giving league or trade association officials blanket powers of expulsion or suspension for conduct "detrimental to the best interests" of the league or association. If Molinas had been suspended from the NBA because he was a conscientious objector or a member of the Ku Klux Klan, it is most probable that the suspension would be held to constitute an illegal concerted refusal to deal. For an example of a potentially dangerous grant of this kind of power to association officials, see United States v. United States Trotting Ass'n, 1960 Trade Cas. 76,954, 76,959 (S.D. Ohio 1960).

must impose no more competitive harm than is necessary to accomplish that purpose. If the restraint satisfies these conditions, the fact that the joint facility or association has complete control over access to the industry will not by itself make the restraint unlawful.

There is one rather troubling case involving an alleged agreement among motion picture producing and distributing companies to refuse employment to certain industry personnel accused of membership in or affiliation with the Communist Party or other subversive organizations.[110] Several screenwriters, actors, or directors have allegedly been "blacklisted" since 1947 when they refused to testify about their political associations or beliefs before the House Committee on Un-American Activities. In 1961, a suit was brought to enjoin the "blacklisting" as an unlawful concerted refusal to deal. The case is yet to be heard on the merits. In *Young v. Motion Picture Association of America*,[111] the district court refused plaintiffs' motion to preclude pre-trial discovery into their political associations and beliefs on the ground that the need to control Communist and subversive influences in motion pictures might be relevant in determining the legality of the boycott. If the inquiry were allowed in order to determine if each individual defendant could have had proper individual reasons for refusing to hire the plaintiffs regardless of the action taken by his competitors, then the district court's decision may have some validity. It would seem, however, that the determination of the interdependence of the defendants' employment decisions should presumably be based on what was known at the time about plaintiffs' beliefs and associations, not what they actually were. If the inquiry were allowed because the court believed that defendants' purpose of rooting out elements they deemed subversive from the motion picture industry might be sufficient justification, the district court's approach must be rejected. Ad hoc private aggregations of economic power employed to regulate political associations and beliefs in an industry are the least deserving of protection from the operation of the antitrust laws.[112]

110. Young v. Motion Picture Ass'n of America, 299 F.2d 119 (D.C. Cir. 1962).

111. 28 F.R.D. 2 (D.D.C. 1961). In Young v. Motion Picture Ass'n of America, 299 F.2d 119 (D.C. Cir. 1962), the court affirmed the district court's denial of plaintiff's motion for a preliminary injunction against the boycott on grounds of adequate remedy at law, laches, and an unwillingness to supervise the employment practices of an entire industry.

112. 74 YALE L.J., *supra* note 39.

Justifications Based on Statutory Mandate, Express or Implied

In certain rare instances, Congress has acted to impose, explicitly or impliedly, a duty of self-regulation on an industry. For example, section 6(b) of the Securities Exchange Act of 1934[113] requires for an exchange's registration as a national securities exchange that "the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade . . . ."[114] Congress clearly contemplated that national securities exchanges would enforce those exchange rules and regulations found by the SEC to be "just and adequate to insure fair dealing and to protect investors,"[115] and would do so through exclusionary activities which might otherwise violate the antitrust laws.

The most recent and most celebrated conflict between an exchange's power of self-regulation and the policies of the Sherman Act occurred in *Silver v. New York Stock Exchange*.[116] The Exchange ordered its members to remove private direct telephone wire connections between their offices and the office of Mr. Silver, a Texas over-the-counter broker-dealer. The direct-wire connections were necessary to get the accurate and rapid security price quotations essential for the conduct of the broker-dealer's business. The Exchange gave Silver no notice or opportunity to be heard before issuing its order and refused to divulge the reasons for its order until his treble damage suit based on allegations of a concerted refusal to deal was brought.[117] The Court first observed that the concerted refusal of Exchange members to deal with the plaintiff would be unlawful per se in the absence of the statutory duty of self-regulation imposed by the Exchange Act. The Court seized upon the denial of notice and opportunity for a hearing, and held that, as a

113. 15 U.S.C. § 78a (1964).

114. *Id.* § 78f(b).

115. *Id.* § 78f(d).

116. 373 U.S. 341 (1963).

117. The reasons disclosed in the district court's opinion for the Exchange's action were: (1) Silver's failure to list on his application two corporations with which he and his wife had been connected; (2) the Silvers' security clearance had been suspended by the Defense Department under the Industrial Personnel Security Program held unlawful and void in Greene v. McElroy, 360 U.S. 474 (1959); (3) the Silvers had taken stock under an "investment letter" and sold it two months later; and (4) the Exchange had further information "derogatory to the Silvers" which it declined to reveal. Silver v. New York Stock Exchange, 196 F. Supp. 209, 216-17 (S.D.N.Y. 1961).

result, the Exchange "plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation."[118] In essence, *Silver* stands for the proposition that, even where Congress has authorized the pooling of economic power required for self-regulatory boycotts, the institution can validly exercise the boycotting power only by observing the bare minimum of procedural steps which fairness requires—notice and an opportunity for a hearing.[119] Where private power is allowed to aggregate, *Silver* imposes due process safeguards on the exercise of that power.

THE SEARCH FOR AN APPROPRIATE JUDICIAL RESPONSE TO THE PROBLEMS OF NONCOMMERCIAL BOYCOTTS

An obvious response to noncommercial concerted refusals to deal would be to apply the general rule—found in several Supreme Court dicta[120]—for commercial boycotts to noncommercial boycotts and hold that all noncommercial boycotts are illegal per se. Nevertheless, there is some question whether the Supreme Court really means it when it says that all *commercial* boycotts are per se violations of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[121] has been interpreted by many[122] as the latest expression of this approach. In *Klor's*, a San Francisco appliance store alleged that a department store chain, Broadway-Hale, had used its buying power to induce ten national appliance manufacturers and their distributors to stop selling to the plaintiff. The defendants submitted affidavits to show that the boycott had no discernible effect on competition in the consumer retail appliance market. The district court granted defendants' motion for summary judgment, holding that there had been no "public wrong" proscribed by the Sherman Act, and the Ninth Circuit affirmed.[123] The Supreme Court reversed, holding that

118. 373 U.S. at 365.

119. *See also* Cowen v. New York Stock Exchange, 256 F. Supp. 462 (N.D.N.Y. 1966), *aff'd*, 371 F.2d 661 (2d Cir. 1967) (Exchange's good faith efforts to discipline plaintiff for violations of equitable principles of trade are exempted from the antitrust laws) (dictum).

120. White Motor Co. v. United States, 372 U.S. 253, 259-60 (1963) (dictum); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (dictum); United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948) (dictum).

121. 359 U.S. 207 (1959).

122. See note 6 *supra* and accompanying text.

123. 255 F.2d 214 (9th Cir. 1958).

the boycott's harm to an individual trader constituted sufficient public injury for Sherman Act liability to attach. Justice Black stated that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden [per se] category."[124]

The problem with *Klor's* is that it is difficult to derive a per se rule from a case in which the defendants offered no justification whatsoever for their conduct.[125] An equally plausible reading is that the Court summarily reviewed the harms, benefits (of which none were alleged), and less-restrictive alternatives to the boycott and expressed its conclusion in a summary formulation.[126] A hint that the Court did not really adopt a true per se rule is contained in the Court's dictum in *Silver* that the Exchange's termination of the direct-wire connections would be illegal per se "absent any justification derived from the policy of another statute *or otherwise* . . . ."[127] Regardless of the resolution of the question whether the Supreme Court has adopted a rule of per se illegality for commercial boycotts, inquiry should not be foreclosed into the relative merits of a per se approach to noncommercial boycotts.[128] If the problem of noncommercial boycotts lends itself to resolution by means of a per se rule, then a per se rule should be adopted no matter what course the law takes concerning commercial boycotts.

An alternative judicial response would be to follow the lead of the lower court cases holding that only commercial boycotts are illegal per se.[129] Noncommercial boycotts would be judged individually through a balancing of each's harms and benefits. To know the harms involved, the court would have to examine in some detail the market structure and past market behavior in the markets

124. 359 U.S. at 212.

125. *See* Question Presented, Brief for Respondents in Opposition at 3, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

126. *See* 359 U.S. at 213.

127. 373 U.S. at 348-49 (emphasis added).

128. The Court in *Klor's* seemed receptive to the possibility of distinguishing commercial from noncommercial boycotts, observing in a footnote that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." 359 U.S. at 213 n.7.

129. United States v. Insurance Bd., 188 F. Supp. 949, 955 (N.D. Ohio 1960) (only commercial concerted refusals to deal marked by coercive economic pressure are illegal per se); United States v. United States Trotting Ass'n, 1960 Trade Cas. 79,954 (S.D. Ohio 1960). See text accompanying note 104 *supra*.

in which the victim buys and sells. The court would also have to determine what noneconomic or noncommercial policy goals motivate the concerted refusal to deal, their desirability, and the probability of their realization or significant advancement by the group's action. Then the court would have to balance economic harms against benefits to society from the concerted refusal to deal and determine whether, in the aggregate, harm or benefit prevailed—a kind of "rule of reason" approach.[130]

The per se rule and the rule of reason are the polar alternatives for possible judicial responses to the problem of noncommercial boycotts. A multitude of intermediate approaches are possible through manipulation of the burden of proof to impose on defendants whatever burden of establishing the validity of their justification is desired, or through defining the categories of justifications to which the courts will listen. It seems clear that plaintiffs should not have to disprove the existence or the value of whatever public policy justifications are offered by the defendant. But beyond that, it is not at all clear which justifications should be listened to, or what burden of persuasion should be placed on the defendant. Thus, should the defendant be required to show only that benefits will outweigh harms, or that benefits will substantially outweigh harms? The following analysis will focus on the advantages and disadvantages of the possible judicial approaches to noncommercial boycotts and attempt to derive the basics of a sound approach.

Application of the Rule of Reason to Noncommercial Boycotts: Benefits and Costs

At the outset, it should be noted that applying the rule of reason to the typical noncommercial concerted refusal to deal would be a long and arduous task. In order to determine the probable effects on the victim caused by a primary boycott, the court would have to estimate the market power possessed by the combination. This estimate requires answers to difficult economic questions. First, what are the limits of the relevant market? This raises the problems of availability and sufficiency of substitutes for the combination's product. Second, what is the combination's share of the relevant market? And, finally, what portion of the relevant market must the

130. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). See note 99 *supra*.

victim be able to buy or sell in order to stay in business or compete effectively?

In order to determine the extent of competitive harm, the court would have to examine in detail the structure and past behavior of the market in which the victim buys or sells to determine if impairment of his ability to compete would significantly affect competition in that market. If denial of access to a joint facility were the basis of the alleged violation, the court would have to determine how crucial access to the facility was to the excluded party's ability to compete and the extent of harm to competition from the impairment of the victim's competitive ability. In a secondary boycott situation the court would have to estimate not only the market power of the combination, but also the market power of those at the different economic level whom the combination can coerce into implementing the actual boycott. Economic questions of this kind cannot be answered without lengthy and highly complex factual inquiry and sometimes cannot be answered with a fair amount of certainty even with such an inquiry. It was the difficulty of getting reliable answers to questions such as the effect on competition from the loss of one competitor or the relationship between market structure and market power which led the Court to the use of presumptions based on market shares in horizontal merger cases.[131]

Most questions of economics, however, are at least susceptible to reasoned analysis. This is not necessarily true when the court turns to the benefits side of the balancing act. There are two troubling problems confronting a court weighing competitive harms against asserted beneficent public policies implemented. First, by what standard is the court to weigh the various public policy goals which may be alleged as justifications by the combination? Second, how competent is the court to distinguish boycotts genuinely motivated by a noncommercial purpose from those alleging such purpose but motivated in fact by an exclusionary purpose?

In the absence of explicit legislative endorsement or prohibition, the purposes for which a group may decide to inflict economic harm can range from the barely legal to the highly desirable. For example, if John Birch Society members were to agree to boycott a grocery chain selling Polish hams, the Society would argue that the purpose

131. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

of the boycott was to put economic pressure on a totalitarian regime. The grocery chain could assert that it was "building bridges to the East" by selling the hams and planned to continue to sell imported foods until prohibited by the Department of State. It would make most judges distinctly uncomfortable to have to choose between those two competing policies. Policy decisions of that magnitude are essentially legislative, ill-suited to the judicial process, and should be made only by the elected representatives of the people. There is no body of precedent available to judges to guide them in their choice. The only justification that judges could offer for their decisions is that in their opinion the value of the public policy goals asserted either did or did not outweigh the economic harms caused by the boycott. The rule of reason approach would call upon judges to decide cases based on nothing more convincing or persuasive than their own set of values and policy preferences which may or may not be shared by the public at large or their elected representatives. As one commentator has phrased it, "[t]he Sherman Act, moreover, is not an invitation to de novo judgments by courts as to the desirability of goals sought to be achieved by anticompetitive practices."[132]

There are those, like Professor John E. Coons, who are confident in the ability of courts operating under the Sherman Act to distinguish "among the noneconomic goals of defendants on the basis of policies unrelated to the protection of competition."[133] The one example he cites, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[134] would not provide much reassurance to those concerned about the competence of courts to weigh competing public policy justifications in noncommercial boycott situations. In *Noerr*, the Supreme Court held that an organization of railroads could not be held liable under the antitrust laws for instigating a public relations campaign—at times unethical—to obtain tighter state restrictions on the operations of their competitors, the truckers.[135] It is difficult to infer from the Court's affirmance of the people's right to petition state governments, certainly a basic and protected freedom, a broader competence or willingness in judges in general to make policy choices where the

132. 74 YALE L.J., *supra* note 39, at 579.
133. Coons, *supra* note 9, at 709.
134. 365 U.S. 127 (1961).
135. *Id.* at 139-40.

values are not so clear-cut. The problems of choice will multiply where state policy differs from federal policy, or where federal policy is unformulated and state policies vary.

Some of the difficulties inherent in the rule of reason approach have been experienced by state court judges called upon to decide whether a concerted refusal to deal was a tortious invasion of the victim's rights or was privileged. The Restatement of Torts sets out in section 765 some "important factors" bearing on the issue of justification or privilege, which may serve as an appropriate summary of the factors noted previously.[136] But stating the variables does not tell the court how to weight them or how to decide cases. As a result, some courts, utilizing means other than the Sherman Act, have retreated from the onerous task of choosing among competing values and policy justifications.[137] The rule of law has developed that economic actors are privileged to refuse to deal *in combination* as a means of advancing their own economic self-interest.[138] When forced to choose among competing values, the state courts had to and did abdicate their responsibility by recognizing a privilege of immense scope.[139]

The response to the questioning of judges' competence and willingness to choose among competing public policy goals could be the argument that one of the reasons for having a judiciary is to have

136. [T]he following are important factors:

(a) the objects sought to be accomplished and the interests sought to be advanced by the actors' conduct;

(b) the extent of the hardship caused to the person against whom the actors' conduct is directed and his opportunities for mitigating the hardship;

(c) the appropriateness of the actors' conduct as a means of advancing their interests and the availability of less harmful means to that end;

(d) the relations between actors and the person against whom the conduct is directed and their relative economic power;

(e) the effects of the actors' conduct and of its objects on the social interest in business enterprise and competition. 4 RESTATEMENT OF TORTS § 765 (1939).

137. *See* Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893); Macauley v. Tierney, 19 R.I. 225, 33 A. (1895); *cf.* Edelstein v. Gillmore, 35 F.2d 723 (2d Cir. 1929); Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n, 150 F. 413 (C.C.S.D. 1907).

138. 4 RESTATEMENT OF TORTS § 765, Illustration 6 (1939) reads: "The members of an association of retailers agree to refuse and do refuse, to patronize a wholesaler who also sells at retail in the market which they serve. Their refusal is justified under the rule stated in this section." *See* Edelstein v. Gillmore, 35 F.2d 723 (2d Cir. 1929) (Actors Equity Association members' concerted refusal to deal with agents except on standard terms not enjoined because purpose was to advance members' self-interest).

139. See note 137 *supra*.

men who can make hard choices, and the difficulty in making the choice is no reason not to attempt it. This argument is not wholly satisfactory, however. First, it is not entirely clear that it is the province of the judiciary to make the sweeping value judgments which ruling on noncommercial justifications for concerted refusals to deal would require. Second, there should be available some more fundamental ground of decision to justify the hard choices which have been made than the set of values of an individual federal judge. Finally, the argument assumes that reaching the "right" result in each noncommercial concerted refusal to deal is worth the costs it imposes on the courts and enforcement agencies in terms of lengthy factual inquiry and complex balancing of values.

There is a second problem in addition to questions of legitimacy and judges' competence to make the broad range of value choices that the rule of reason would require. Questions of motive and purpose are particularly tricky questions of fact. It is not at all inconceivable that combinations might seek to justify their combination for exclusionary purposes by wrapping it in the mantle of high public policy. At times the evasion is transparent, as in *Eastern States*[140] where retailers attempted to justify their boycott of wholesalers who sold to consumers directly by arguing that the boycott was "necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities . . . ."[141] But where the combination's members are not quite so candid about equating self-interest with the public interest, determination of the group's true purpose may not be so easy. For example, the gas trade association which refused its seal of approval to the plaintiff's burner in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*,[142] might have had nothing but the public safety in mind. Yet, it is equally possible that the association was trying to exclude the burner from the market because it was superior to the members' products or used too little gas. Without a voluminous study of the safety characteristics of the various burners—a study for which the average judge has neither the time nor the technical training—there is no way of determining which purpose was the real purpose of the group.

The problem of exclusionary purposes masquerading as public

140. See notes 37-38, 64 *supra* and accompanying text.

141. 234 U.S. at 613.

142. 364 U.S. 656 (1961).

policy purposes can arise only where a group is putting economic pressure on a competitor. But when it does arise, it is a problem of considerable difficulty even though, in a few cases, judges have been able to unmask the group's real purpose.[143] Moreover, the rule of reason provides no easy answers to the problem of mixed commercial and noncommercial motives. For example, suppose the motion picture companies in *Young*[144] had alleged two purposes for their political blacklist of certain actors, directors, and screenwriters: (1) to do their part to fight what they regarded as Communist attempts to subvert the movie industry and (2) to increase public confidence in the motion picture industry and attract the public back into movie theaters. To decide the legality of the blacklist under the rule of reason, the court would first have to determine how important the noncommercial purpose has to be to immunize the boycott from the antitrust laws. Must it be the only purpose, the dominant purpose, a significant purpose, or merely a purpose present in some degree? This is another question not capable of easy resolution. The point is that following the rule of reason approach to noncommercial boycotts will involve great expenditures of time and effort to reach an appropriate result. Whether or not the expenditures must be made is discussed immediately below.

Advantages and Disadvantages of a Per Se Approach to Noncommercial Boycotts

The distinguishing feature of the per se approach is a stringent limitation approaching an outright prohibition on certain justifications for boycotting conduct. The advantages of a per se rule can be easily stated. By avoiding the need for both a detailed analysis of market structure and conditions and the delicate weighing of competing public policy interests, a per se rule would save a great deal of time, for both the enforcement agencies and the courts. In addition, a per se rule provides a bright line indicator separating lawful from unlawful conduct and facilitating public compliance with the law. The cost of adopting a per se rule is the outlawing of those concerted refusals to deal (1) which would be upheld by a court employing the rule of reason approach and (2)

143. United States v. Insurance Bd., 144 F. Supp. 684 (N.D. Ohio 1956) (purpose of Board's membership restrictions was not to preserve the independence of insurance agents as alleged but to protect their policy expiration rights).

144. See notes 111-12 *supra* and accompanying text.

which should be upheld because the benefits to society and the economy outweigh the harms involved.[145]

Justice Black sounded some familiar themes in indicating why the Court has taken a per se approach toward certain trade practices:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[146]

The case for a per se approach to noncommercial boycotts thus rests ultimately on the proposition that in comparing the broad range of harmful and beneficial boycotts, the aggregate of harm in all the harmful boycotts so far outweighs the aggregate of benefit in beneficial boycotts that "the cost of distinguishing harmful and beneficial situations by an examination of the relevant circumstances is not worth incurring."[147]

The deciding issue is what interests would be sacrificed by making noncommercial boycotts illegal per se that would not be lost under a rule of reason approach. The gain in lessened administrative burdens and ease of enforcement would then have to be balanced against this cost to reach a decision as to the merits of a per se approach to noncommercial boycotts. The adoption of a per se rule would discourage a number of concerted refusals to deal where the benefits would have outweighed the harms. It would overstate the costs of a per se rule, however, to use this number of beneficial boycotts deterred as an indication of cost. A certain number of these

145. The per se rule has a corollary advantage in that it outlaws those concerted refusals to deal where a court applying the rule of reason would erroneously find that the benefits of the boycott exceeded the costs. Both the cost mentioned in the text and this minor advantage are premised on the assumption that the values or benefits and their ranking are sufficiently clear so that a decision can be said to be "correct" or "erroneous." If this is not true, then there is no cost at all to having a per se rule.

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

147. C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 143 (1959).

boycotts would have been deterred even by a rule of reason approach, because the members of the combination may lack confidence in their ability to impress a judge with the validity of their justification. The number deterred by a rule of reason may be fairly high in view of the inherent unpredictability of results when judges' own values become the criterion for decision. Therefore, the cost of a per se rule would be the number of beneficial boycotts deterred, which would not have been deterred by a rule of reason approach—where the combination would have had a chance to offer its justification. The loss caused by the deterrence of these beneficial boycotts would be the failure of certain desirable public policy goals to advance closer to realization because the combination was not allowed to inflict economic injury to promote these goals.

The desirability of the public policy goals which a group might seek to advance by a boycott may vary widely. The combination's objective could be clearly illegal, for example, a boycott to force a certain businessman to discriminate on the basis of race in his hiring practices.[148] The proposition that boycotts designed to achieve an illegal object should be illegal per se seems indisputable.[149] Alternatively, the group's purpose could be lawful, although not the object of particular solicitude under any state or federal statute. A boycott to force a store to close on Sunday in a jurisdiction without Sunday closing laws would exemplify this alternative. The group's purpose could be an objective which Congress or a state legislature has endorsed without indicating any desire for private groups to take affirmative action to implement its declaration of policy. This kind of purpose would be found in a boycott against businesses which do discriminate in their hiring practices, or which stay open on Sunday in a jurisdiction requiring Sunday closing. Finally, the objective sought may be a purpose endorsed by Congress which clearly contemplated the use of boycotts as necessary enforcement mechanisms, as in the case of stock exchange self-regulation in *Silver*.[150]

One more refinement is required before undertaking the task of

148. *See* 42 U.S.C. § 2000e-2(a) (1964).

149. *See* United States v. American Livestock Comm'n Co., 279 U.S. 435, 438 (1929) (members of American Livestock Association would not commit an unfair practice under the Packers and Stockyards Act by refusing to deal with Producers Commission Association, where such dealings by PCA would be ultra vires) (dictum).

150. See notes 116-19 *supra* and accompanying text.

balancing the losses to be incurred under a per se rule against the benefits achieved in terms of lessened administrative burdens and increased ease of enforcement. The possible existence of a less harmful alternative to a boycott should be recognized in the balance. Even under a per se rule, the combinations would be able to advance their public policy objectives through the use of the "safer and more kindly weapons of legitimate persuasion and reasoned argument . . . ."[151] Therefore, the cost of a per se rule must be discounted by the degree to which the group would be able to advance their desirable policy objectives without the use of their collective economic power. The cost of adopting a per se rule then becomes the loss of the marginal increase in the level of group public policy purpose achievement provided by the use of the group's economic power but unattainable by legitimate persuasion and reasoned argument alone.

Even with the above refinement, there is no way to measure the costs of a per se rule with any precision. Some have argued that the loss would be great for those groups whose powers of peaceful persuasion are limited and must therefore be able to resort to their collective economic power to achieve their objectives. Chief Judge Traynor of the California Supreme Court made the argument in a case involving the right of Negroes to boycott a store to obtain preferential hiring of Negroes:

> In their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. . . . Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality.[152]

This is a cost to be sure, but its significance is open to question. The statement contains an unstated premise with which not all would agree. The statement assumes that if a group is unable to achieve its noncommercial goals by persuasion and reasoned argument, it should be allowed to advance those goals by inflicting economic harm on others. This is valid only under a further assumption that it is better in some situations to have economic conflict and warfare than for a group's goals to fall short of realization by the increment which concerted economic pressure alone can provide.

151. American Medical Ass'n v. United States, 130 F.2d 233, 248 (D.C. Cir. 1942).

152. Hughes v. Superior Court, 32 Cal. 2d 850, 868, 198 P.2d 885, 896 (1948) (dissenting opinion), *aff'd*, 339 U.S. 460 (1950). See note 58 *supra* and accompanying text.

The question then becomes in how many situations is the above assumption valid, and how significant are these situations. It is submitted that the situations would be rare enough so that the costs of a per se rule would be outweighed by the gains. To talk of a group's valid interest in promoting its goals is to mention only one side of the equation. There is an interest in the victim's ability to promote the lawful public policy objectives of which he approves, as well as his interest in free access to markets unrestrained by concerted group action for noncommercial goals. One of the interests deserving protection under the Sherman Act is the public interest in decentralized economic decisionmaking and the prevention of aggregations of economic power from imposing their will on those lacking the power to resist effectively.[153]

In a proper weighing of harms and benefits, it does not seem likely that the marginal increment of goal achievement obtainable only by concerted economic pressure would very often be worth the costs in terms of economic harm. The marginal increment of goal achievement would be significant only in those cases in which the group's goals are incapable of adequate protection by noncoercive group action or governmental action, either because of the inherent nature of the goals[154] or because the group lacks effective means of reasoned argument and peaceful persuasion. It is not easy to imagine the above conditions prevailing very frequently. It could be argued that, where possible, private resolution of disputes is preferable to public resolution for a variety of possible reasons, such as speedier resolution and the group's greater access to potentially intricate facts useful in settling the dispute. Once again, this comparison is misleading. The proper comparison is among private resolution by noncoercive means, private resolution by economic warfare, and public resolution, which complicates matters considerably.

If, as argued above, the proper question is not where group action can be helpful, but where group action implemented by concerted refusals to deal can be significantly helpful and group action relying on peaceful persuasion cannot, the force of a great many of the arguments against a per se rule for noncommercial boycotts is considerably weakened. Statements such as the following comment on *Radiant Burners*[155] illustrate such weakness:

> Perhaps the greatest danger of applying a per se rule to trade associations is

153. *See generally* 74 YALE L.J., *supra* note 39.

154. For example, the protection of religious dogma might be such a goal.

155. See notes 25-26, 142 *supra* and accompanying text.

> that fear of treble damage actions may discourage many economically and socially desirable group self-betterment activities. . . . In [*Radiant Burners*], the defendants were prepared to justify their activities on the ground that public reaction to applicance failures reduced the market for gas appliances and consequently for gas itself. Self-imposed restrictions as to manufacturing standards thus could provide the public with more dependable appliances and, by encouraging public acceptance of gas appliances, benefit all segments of the gas industry. These positive functions of trade associations should not be overlooked when evaluating the wisdom of applying a rule of per se illegality.[156]

The point of the complaint in *Radiant Burners* was not that the manufacturers of gas appliances had set safety standards for their own appliances, but that gas companies would not install appliances or supply gas for them if they failed to meet these standards.[157] That trade associations and other forms of group action can have beneficial results is not in dispute. What is in dispute is how frequently the members have to be able to pool and use their collective economic power to accomplish the beneficial results.

In summary, the case for making all noncommercial boycotts illegal per se rests on the following propositions. First, it is unlikely that in very many cases the benefit to society from the additional increment of group goal realization, achieved by allowing groups to go beyond peaceful persuasion and use their collective economic power, will be worth the costs in terms of economic harm. In other words, in a proper weighing of interests under the rule of reason approach, most noncommercial concerted refusals to deal would be held illegal. Second, attempting to sift out of all the noncommercial boycotts those instances where the value of the marginal goal achievement outweighs the harm would place a burden on the enforcement agencies and judicial system clearly disproportionate to the aggregate of benefits to be achieved. It is submitted that the sounder arguments establish the validity of both these propositions, and that all noncommercial boycotts should be illegal per se.[158]

This result may seem to call for an intrusion by the federal judiciary into the conduct of public affairs of potentially unlimited scope. If members of a church youth group stop patronizing a certain drug store until the owner stops selling salacious magazines,

156. Note, *Antitrust: Trade Association's Refusal to Deal Held a Per Se Violation*, 1961 DUKE L.J. 302, 306.

157. 364 U.S. at 658.

158. See notes 162-77 *infra* and accompanying text, for an exeeption to such a per se rule.

is this a per se violation of section 1 of the Sherman Act to be remedied by a treble damage action? The requirement that the boycott affect interstate commerce would be the first barrier to such de minimis actions.[159] The requirement of "agreement" may well prove a more formidable barrier. In the absence of explicit agreement among the members of a combination, it is unlikely that any sufficient showing of interdependence of decisions can be made in most consumer boycott cases.[160] Finally, after *Eastern Railroad Presidents Conference*,[161] it is unlikely that the antitrust laws would be construed to prevent group activities aimed at providing information to the public, which may or may not induce others to refuse to deal on an individual basis with a certain party, so long as no interdependence of decision is found.

FASHIONING AN EXCEPTION TO THE PER SE RULE: PROBLEMS AND PROSPECTS

If it were possible to describe with sufficient precision certain categories of concerted refusals to deal where the increment of public policy purpose achievable only by boycott would be likely, in a significant number of cases, to outweigh the harms involved, then certain exceptions to the per se rule should be made. If the majority of the cases in which a proper rule of reason approach would legalize the boycott could be found within the confines of a well-defined category, then the case for applying a per se approach to cases outside that category would become substantially more convincing. Thus, a carefully drawn exception could provide the best of both worlds—summary disposition of cases where harms are likely to outweigh benefits most of the time, and preservation of the court's time for a reasoned analysis of those boycott cases where advantages are likely to outweigh the social costs involved. The exception must be carefully drawn in order to prevent lengthy controversy over whether a given boycott fits within the exception, for such considerations, if prolonged, would dissipate the primary advantages of the per se approach.

159. See note 14 *supra*.

160. See text accompanying notes 12-19 *supra*.

161. See notes 134-35 *supra* and accompanying text. This proposition is but a logical extension of the rationale of *Eastern Railroad Presidents Conference* to cases where the right of free speech is involved instead of the right to petition governmental agencies for the redress of grievances.

Several attempts have been made to define categories of concerted refusals to deal which should be tested under the rule of reason rather than outlawed as illegal per se. One suggested line of demarcation distinguishes between concerted refusals to deal intended to coerce the conduct of third parties or secure their removal from competition and concerted refusals to deal without those intentions and involving no more than the acceptance of limitations on individual freedom to deal.[162] There are two problems with defining the exception in these terms. First, it requires determination of intent or purpose, and one of the reasons urging the adoption of a per se rule was the difficulty in isolating the "real" purpose motivating a certain action. Second, since any self-limiting refusal to deal has effects on third parties,[163] applying this test would involve a determination of whether the effect on third parties or competition is direct or indirect,[164] thereby adding another complex variable to the analysis. Another commentator would exempt from the per se rule only those boycotting activities of a self-regulatory nature which affect solely the interrelations of the members.[165]

There seem to be no pressing reasons to exempt primary or secondary boycotts from the operation of the per se rule. It is only concerted refusals to deal involving denial of access to group facilities which present rather troubling problems. There are certain economically productive[166] and socially beneficial associations which can operate only if some restrictions—which arguably could constitute a concerted refusal to deal—are placed on access. One example, the stock exchange, has been discussed previously.[167] There a congressional mandate exists for self-regulation through use of the exchange's exclusionary power. Another example is the news gathering operations of wire services such as the Associated Press. In order for a wire service to attract members and operate

162. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 872 (1955).

163. For example, if a group of toy stores agreed not to buy or sell airplane glue because of its hallucinogenic use by young people, the manufacturers of airplane glue would certainly be affected.

164. *See* Barber, *supra* note 162, at 877.

165. *See* Kirkpatrick, *supra* note 73, at 305.

166. These have been found where a group takes action in concert "in order to overcome the impracticability of any one member's amassing sufficient capital for the project or in order to eliminate the economic waste involved in duplication of effort." Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1536 (1958).

167. See notes 116-19, 150 *supra* and accompanying text.

effectively, members must agree to sell local news only to the service, and the wire service must be able to expel members for violating this agreement.[168] Those nonmembers who try to buy local news from a member will see the agreement as a concerted refusal to deal. If a court following a per se rule agreed, the benefits that AP provides by avoiding the need for costly duplication of news gathering systems would be lost. Another example would be professional sports leagues, where the necessary effect of having a schedule is a boycott of nonleague teams.[169]

The common characteristic of situations where the marginal gain in public policy purpose achievable only through collective economic power is likely to outweigh attendant harms is the industry's need for self-regulation through collective action.[170] Where the need for self-regulation has been statutorily recognized and a scheme of federal regulation established which clearly contemplates self-regulation,[171] application of the per se rule would frustrate this scheme. Boycotts should not be exempted from the per se rule, however, merely because their purpose is to further a statutory policy. Rather, it must be clear that the policy of the statute contemplates the exercise of boycotting power to further the statutory purpose. It has been suggested that an equally valid authorization for industry self-regulation might be found in nonstatutory sources, such as declarations by courts, administrative bodies, or even "authoritative policy statements by governmental officials."[172] To avoid having to decide whether a public official's toasting the joys of self-regulation at a trade association banquet is sufficiently "authoritative," the sounder rule would be that in the

168. Associated Press v. United States, 326 U.S. 1 (1945), held that restrictions on access to membership in AP could not be stricter for competitors of existing members than for noncompetitors. The Court declined to hold that prohibitions on members selling news to anyone not a member of the Association were illegal. *Id.* at 21-22.

169. *See* 81 HARV. L. REV., *supra* note 102, at 419-20; notes 102-05 *supra* and accompanying text.

170. It may seem that the AP's purpose in probibiting members' selling of local news to nonmembers is purely commercial, intended only to reduce members' costs of newsgathering and thus increase their profits. A distinction should be drawn between a group's intention to increase profits primarily by harming others (no social gain), and an intention to increase profits by lowering the costs to society and to themselves of carrying on their business activities (a net gain). The latter is enough of a noncommercial purpose to warrant discussion at this point in the analysis.

171. *See, e.g.*, Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

172. Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1500 (1966).

absence of statutory recognition of a need for self-regulation, the declarations of other branches of government, state or federal, should be considered as no more than evidence of an industry's need for self-regulation, to be given as much weight as their reasoning compels and no more.

The need for industry self-regulation might be found not only in the express mandate of Congress, but in the structural requirements of the industry itself.[173] The successful operation of the joint facility virtually compels some exercise of exclusionary power for such collective ventures as stock exchanges, wire services, and professional sports leagues. A similar exception to the rule of per se illegality should be made for collective refusals to deal essential for self-regulation, where the industry structure itself requires self-regulation.[174]

But what would be the limits on the exception to the per se rule for industries where the need for self-regulation is recognized by statute or inherent in the structure of the industry itself? One limitation would be a requirement that the exercise of exclusionary power be germane to the need for self-regulation. Thus, if the National Basketball Association were to bar a player from competition because he was an atheist, or had refused to submit to induction into the army, a court could properly avoid applying the rule of reason and hold such exclusionary practice illegal per se. A similar result would follow if the Associated Press were to expel a member for violating agreed-upon standards as to what constitutes prejudicial pretrial publicity for criminal defendants. A second limitation would be that the exercise of exclusionary power must be the minimum necessary to achieve the regulatory goal.

A third limitation necessary to deal with the twin dangers of

173. *Id.* at 1499-1502.

174. As conditions in the industry change, it is quite possible that a limitation on access to a joint facility which was once required for the successful operation of the facility may no longer be necessary. For example, the absolute limitation on the number of seats on the New York Stock Exchange, N.Y.S.E. CONST. art. IX, § 1 (1817), may well have been necessary in the pre-electronic days when the exchange was composed of floor traders transacting business with each other within the confines of a single room. The limitation must be considered suspect, however, now that modern communication systems have eliminated the necessity that all traders in the market be physically present in the same room. *See* Memorandum of the United States Department of Justice on the Fixed Minimum Commission Rate Structure, *In re* Commission Rate Structure of Registered National Securities Exchanges, Securities and Exchange Commission No. 4-144, at 149-52, Jan. 17, 1969.

arbitrariness and anticompetitive motives masquerading as regulatory motives in group action was suggested in *Silver*.[175] In view of such dangers, the Court there held that the Exchange could not even reach the "threshold of justification"[176] for its action without affording to the excluded person notice of the proposed action and an opportunity to be heard. Requiring notice and a hearing of some sort would provide a record from which the antitrust court could determine (1) whether the particular exercise of exclusionary power is germane to and justified by the need for self-regulation found in statute or industry structure, and (2) whether less harmful means could have been used to achieve the valid regulatory goal. Such a requirement would also provide a partial answer to the troubling problems of private power. If it is not in the public interest to break up these particular aggregations of private economic power, at the very least the requirements of procedural due process should be imposed on their exercise.[177]

CONCLUSION

It is submitted that the most appropriate judicial response to the problems raised by noncommercial boycotts is a rule of per se illegality, *with an exception*. The exception would be for group exclusionary activities in an industry in which the need for self-regulation is established by statute or required for the successful operation of the joint facilities which comprise the industry. In order to be judged under a rule of reason, the exercise of exclusionary power must meet at least these conditions: First, it must be preceded by notice and an opportunity for a hearing to the person excluded. Second, it must be germane to the recognized need for self-regulation. Finally, it must be no more harmful than necessary to achieve the group's valid self-regulatory goals. Application of the above approach would maximize the benefits of a per se rule in an area where the costs incurred by the rule's summary treatment would be least, and would preserve a role for the rule of reason in those cases where the benefits to be achieved are likely to be worth the time and effort that such an inquiry entails.

175. See notes 116-19, 150 *supra* and accompanying text.

176. 373 U.S. at 365.

177. The problem of what combination of criminal penalties, treble damage actions, and injunctive relief provides the most appropriate remedy for illegal noncommercial concerted refusals to deal is beyond the scope of this paper. The difficulties in fashioning a suitable remedy once a violation is discovered are not particularly relevant in deciding whether a rule of reason or a per se approach would be preferable.