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## Conscious Parallelism and the Sherman Act: An Analysis and a Proposal

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# NOTE

## Conscious Parallelism and the Sherman Act: An Analysis and a Proposal

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### I. INTRODUCTION

Since it became law in 1890, the Sherman Antitrust Act<sup>1</sup> has been the subject of numerous academic controversies and an enormous amount of litigation concerning the proper functions of a competitive economy and the methods best suited to the maintenance of the ideal of free enterprise. Over the years, the various issues created by the passage of the Sherman Act have been resolved judicially, only to be replaced by new problems arising from changes in the character and structure of American business. A current and very controversial problem caused by the recent trend toward concentration in many American industries is whether the practice among some oligopolists of deliberately aligning their business practices and policies, known in antitrust litigation as conscious parallelism, can or should be prohibited under the Sherman Act.

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1. 15 U.S.C. §§ 1-7 (1970).

Traditionally, conscious parallelism has been dealt with under section 1 of the Sherman Act, which prohibits all contracts, combinations, and conspiracies in restraint of trade.<sup>2</sup> Increasingly, however, the use of section 2,<sup>3</sup> which deals primarily with offenses related to monopoly status, has been suggested as a more effective means by which the anticompetitive effects of conscious parallelism can be curtailed.<sup>4</sup> This Note will examine the problem posed by conscious parallelism from an economic<sup>5</sup> and legal perspective, review the current proposals of Professors Donald F. Turner and Richard A. Posner, the two leading commentators<sup>6</sup> on the subject, and suggest an alternative method of dealing with conscious parallelism.

## II. BACKGROUND

### A. *An Economic and Legal Analysis of Conscious Parallelism*

In an oligopolistic or highly concentrated<sup>7</sup> industry, in which no single firm possesses a sufficiently large share of the relevant market to constitute a monopoly, the anticompetitive behavior of the several largest firms often approaches or equals that of the classic single firm monopolist. The term "conscious parallelism" refers to the common practice among firms in a concentrated industry of conducting their similar businesses in a uniform manner, aware that their counterparts are pursuing the same course of action.<sup>8</sup> The natural result of such accordant activity is the elimination of competition among the participants and the restraint of trade in general.

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2. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1970 & Supp. 1975).

3. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1970 & Supp. 1975).

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

5. The economics of conscious parallelism is both complex and lengthy. In the interest of clarity and because of space limitations, the economic analysis of conscious parallelism will be kept to a minimum. For more detailed treatments, see P. SAMUELSON, *ECONOMICS*, chs. 2-4, 20-26 (9th ed. 1973) and R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

6. Donald F. Turner is a Professor of Law at Harvard Law School and was formerly the head of the Justice Department's Antitrust Division. Richard A. Posner is a Professor of Law at the University of Chicago Law School.

7. An industry's concentration is usually expressed as the total market share controlled by the four or eight largest firms in the industry as compiled by the United States Census Bureau.

8. 28 ST. JOHN'S L. REV. 286, 287 (1954). Though each may decide independently upon

Section 1 of the Sherman Act, however, applies only to those cases in which two or more firms act in sufficient concert to form a contract, combination, or conspiracy.<sup>9</sup> Because consciously parallel business behavior alone traditionally does not constitute any of the three forms of concerted activity prohibited by section 1, such conduct generally goes unpunished under the Act. The anticompetitive effects of conscious parallelism nevertheless are similar to the effects of an overt conspiracy to restrain trade. Consequently, conscious parallelism has evolved into a legal substitute for conspiracy, which provides an extremely valuable tool to those who desire to avoid the rigors of open competition and who are sufficiently astute to circumvent section 1 as it is now applied by the courts.<sup>10</sup> There is a current need to prohibit oligopolists who adroitly avoid collusion from achieving anticompetitive results through the use of parallel business practices and policies. The focus of the Sherman Act thus must be shifted from a preoccupation with conspiratorial behavior to a greater concern for harm to the public and injury to competition.

### B. *Conscious Parallelism in the Courts*

The courts gradually have relaxed the traditional criminal law requirements of conspiracy when considering alleged violations of section 1 of the Sherman Act.<sup>11</sup> They no longer require, for example, that a formal agreement be shown before an unlawful conspiracy can be established.<sup>12</sup> The Supreme Court has gone so far as to hold that "[a]ny combination which tampers with price structures is engaged in an unlawful activity."<sup>13</sup> Additionally, it is a well settled principle that conspiracies under the Sherman Act are not depen-

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its own course of action, any major decision takes into account the prospective reaction of the other firms. Thus the decisions are, in effect, interdependent.

9. See note 2 *supra*.

10. The development is especially apparent in instances of parallel pricing. Although an informal pricing arrangement is undoubtedly valuable to the participants, price is too critical a control to be used, even in an informal manner. Despite the need to regulate informal pricing arrangements, conscious parallelism in pricing is not forbidden even though an actual conspiracy to fix prices has been considered illegal *per se*. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

11. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942).

12. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). For example, in *Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958), the court held that evidence of a conspiracy could be established by showing that the defendants, knowing that concerted action was contemplated and invited, had participated in such action.

13. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). Apparently, however, the Court's use of the word "any" was an exaggeration as it has never been held

dent upon any overt act other than the act of conspiring,<sup>14</sup> and the machinery employed by the defendants to effectuate the conspiracy is immaterial.<sup>15</sup>

The Supreme Court nonetheless views conscious parallelism as a practice that falls short of an illegal conspiracy. Although the Court has recognized that parallel business behavior is admissible circumstantial evidence from which an agreement may be inferred,<sup>16</sup> it has held that such behavior does not itself constitute a violation of the Sherman Act.<sup>17</sup> The Court has been willing to concede that conscious parallelism, when offered as evidence of an illegal conspiracy, should be weighed heavily<sup>18</sup> but has refused to bestow any further importance upon it. This refusal was first expounded in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*:

But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.<sup>19</sup>

Although the lower courts have echoed this sentiment with virtual unanimity,<sup>20</sup> the importance of the above quotation from *Theatre Enterprises* appears to have been greatly exaggerated in view of the limited holding actually rendered in the case. In reality, the Court held only that evidence of conscious parallelism does not compel a directed verdict on a charge of conspiracy to restrain trade under section 1 of the Sherman Act. It did not hold, as is widely believed, that a jury may not infer conspiracy from evidence demonstrating that the parties engaged in parallel business behavior.<sup>21</sup>

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that conscious parallelism constitutes an illegal contract, combination, or conspiracy.

14. *Nash v. United States*, 229 U.S. 373, 378 (1913).

15. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223.

16. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). Some commentators justify this view by insisting that conscious parallelism is only arguably a § 1 violation or even proof of such a violation. See, e.g., Note, *Structural Shared Monopoly Under FTC 5: The Implications of the EXXON Complaint*, 26 CASE W.L. REV. 615, 647 (1976).

17. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. at 541.

18. *Morton Salt Co. v. United States*, 235 F.2d 573, 577 (10th Cir. 1956).

19. 346 U.S. at 541.

20. *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 330 (9th Cir. 1973) (mere parallelism does not establish an agreement); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-03 (3d Cir. 1961) ("conscious parallelism is not yet a conclusive legal substitute for proof of conspiracy"); *Pevely Dairy Co. v. United States*, 178 F.2d 363, 369 (8th Cir. 1949) (mere uniformity of prices in sale of standardized product is not in itself evidence of a violation).

A few lower courts have recognized that the holding of *Theatre Enterprises* is more limited than it appears and have been reluctant to dismiss proof of conscious parallelism as merely circumstantial evidence. Consequently, they have given it a greater role in establishing the existence of an illegal contract, combination, or conspiracy. For example, in *Wall Products Co. v. National Gypsum Co.*<sup>22</sup> the court held that in certain oligopolistic industries, in which the sellers engage in parallel practices aimed at halting declining prices, such conduct "may well constitute a tacit understanding . . . to effectuate a price fixing agreement."<sup>23</sup> Even before *Theatre Enterprises*, some courts saw the need to provide conscious parallelism with an expanded role and, if certain factors were present, to give conscious parallelism more weight. Thus in *Milgram v. Loew's, Inc.*<sup>24</sup> the court held that uniform action that contradicts apparent self-interest is sufficient to establish an unlawful conspiracy under section 1 because such conduct by the participants is totally inconsistent with decisions arrived at independently. The lower courts also have resorted to the use of "plus factors"<sup>25</sup> to bridge the conceptual gap between conscious parallelism and conspiracy. In *C-O-Two Fire Equipment Co. v. United States*,<sup>26</sup> for example, the court held that the presence of such factors as deliberately standardized products, identical prices regardless of the point of sale, and an active trade association were sufficient to convert conscious parallelism into an illegal conspiracy.

The Supreme Court, prior to its decision in *Theatre Enterprises*, also seemed willing to ascribe more importance to a showing of conscious parallelism. In *Interstate Circuit, Inc. v. United States*,<sup>27</sup> the Court stated that absent an actual agreement, a showing that the defendants adhered to and participated in a scheme of uniform activity contemplated by all is sufficient to prove a violation.<sup>28</sup> Likewise, in *American Tobacco Co. v. United States*,<sup>29</sup> the Court found an illegal agreement to suppress competition in the tobacco industry based upon the defendants' uniformity of action although virtually no direct evidence of an agreement existed.

Despite these aberrations, the law remains that conscious par-

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21. Turner, *supra* note 4, at 658.

22. 326 F. Supp. 295 (N.D. Cal. 1971).

23. *Id.* at 316.

24. 192 F.2d 579 (3d Cir. 1951).

25. 45 MARQ. L. REV. 633, 634 (1962).

26. 197 F.2d 489, 497 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952).

27. 306 U.S. 208 (1939).

28. *Id.* at 226.

29. 328 U.S. 781 (1946).

allelism alone does not establish an illegal conspiracy. The most persuasive reason for this position is that courts are extremely reluctant to interfere with the internal management decisions of an enterprise.<sup>30</sup> The clearest statement of their reasoning is found in *Orbo Theatre Corp. v. Loew's, Inc.*,<sup>31</sup> in which the court held that courts may not dictate to the management of business concerns how to conduct their enterprises but are confined to deciding whether particular operations actually transcend the law.<sup>32</sup>

The judicial unwillingness to consider conscious parallelism itself unlawful is much less apparent when the action is brought under section 5 of the Federal Trade Commission Act<sup>33</sup> as an unfair method of competition.<sup>34</sup> The difference in the attitude of the courts can be explained by the fact that the plain meaning of the words of the Sherman Act does not indicate whether the concept of "structural agreement" is included, while the wording of the Federal Trade Commission Act is more easily applied to that concept.<sup>35</sup>

Although the Sherman Act has prevented the emergence of classic monopolies, it has not proven effective against hard core oligopolies, adept at keeping their parallel business behavior from becoming a traditional conspiracy in the eyes of the courts. As a result, the position that such an antiquated law should be allowed to regulate parallel business activity that has a direct and harmful effect upon the national economy has become increasingly untenable.

### III. TURNER AND POSNER ON CONSCIOUS PARALLELISM

Two of the leading commentators on the subject of conscious parallelism are Professor Donald F. Turner of Harvard and Professor Richard A. Posner of the University of Chicago.<sup>36</sup> Although their views on the issue generally conflict, they do agree that the effects of conscious parallelism in an oligopolistic industry are sufficiently anticompetitive to warrant some new type of remedial action.

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30. The Supreme Court itself has demonstrated this reluctance. *Maple Flooring Ass'n v. United States*, 268 U.S. 563 (1928).

31. 156 F. Supp. 770 (D.D.C. 1970).

32. *Id.* at 778.

33. 15 U.S.C. §§ 41-58 (1970).

34. *FTC v. Cement Inst.*, 333 U.S. 683 (1948). The Commission itself believes that conscious parallelism violates § 5 although its decisions are grounded largely in traditional conspiracy. *FTC, Notice to the Staff: In Re Commission Policy Towards Geographic Pricing Policies* (Oct. 12, 1948).

35. *See Note, supra* note 16, at 629.

36. *See note 6 supra*.

*A. Professor Turner's Proposal*<sup>37</sup>

Turner's premise is that conscious parallelism is and rightfully should be beyond the reach of section 1 of the Sherman Act.<sup>38</sup> Although his discussion focuses primarily upon parallel pricing, it reflects his views of other types of uniform business activity as well. Initially, Turner argues that if monopoly status and monopoly pricing are not unlawful per se, neither should oligopoly pricing be unlawful per se absent a traditional agreement.<sup>39</sup> He admits that there have been instances in which behavior, lawfully engaged in by competitive firms, has been forbidden to monopolists or the leading firms in a highly concentrated industry,<sup>40</sup> and he concedes "that consciously parallel decisions can reflect noncompetitive behavior without actual agreement having taken place."<sup>41</sup> Turner nevertheless maintains that to prohibit oligopolists from taking into account the probable reactions and decisions of the competition is to require them to act in an economically irrational manner.<sup>42</sup> Examining the behavior of firms in a competitive industry, Turner concludes that it seems questionable to characterize the behavior of oligopolists in setting their prices as unlawful when the behavior in essence is identical to that of sellers in a competitive market.<sup>43</sup> Finally, he claims that the only effective remedy available under section 1 would be a "public utility-type regulation," which the courts are ill-equipped to administer.<sup>44</sup>

Turner, however, does recognize that the problem of conscious parallelism must be dealt with in some manner. He suggests that the best method of eliminating the effects of uniform activity among oligopolists is to charge those involved with an unlawful attempt to monopolize under section 2 of the Sherman Act.<sup>45</sup> Turner submits that section 2 is intended to supplement section 1 in order to prevent subornation of section 1 under any guise.<sup>46</sup> Thus he argues that if it is appropriate to make conduct having relatively minor anticompe-

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37. Turner's position on uniform business activity first appeared in an article in the *Harvard Law Review*. See note 4 *supra*. It was later expanded in Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).

38. Turner, *supra* note 4, at 665-66.

39. *Id.* at 668.

40. *Id.* at 666.

41. *Id.* at 662.

42. *Id.* at 669.

43. *Id.* at 666.

44. *Id.* at 670.

45. *Id.* at 682.

46. Turner, *supra* note 37, at 1226.



titive effects the basis for illegality in a single-firm monopoly case, it is no large step to extend that principle to a shared monopoly.<sup>47</sup> Turner maintains that an attack on shared monopoly power is an important aspect of every effective competitive policy.<sup>48</sup>

As a remedy, Turner favors divestiture. Starting with the fundamental premise of antitrust law that competitive markets will perform better than their monopolistic counterparts, he claims that the "cost of applying divestiture . . . to economically significant monopolies and concentrated industries would be far outweighed by prospective gains."<sup>49</sup> Further he believes that the disruptive effects of such a remedy would be short run.<sup>50</sup> He favors divestiture because, as a structural remedy, it is better suited to the elimination of concentration, a structural condition that he believes is the proximate cause of conscious parallelism. To this end, he has proposed a new statute, which would limit unreasonable market power by reforming market structure and reducing concentration through dissolution and divestiture, especially when it appears that injunctive relief would not adequately dissipate the market power within a reasonable time.<sup>51</sup>

Turner's principal reason for opposing the application of section 1 to conscious parallelism—because the participants are merely acting in an economically rational manner—is unpersuasive in light of the harmful economic consequences of such activity, regardless of the rationality or irrationality of the participants' conduct. Strict observance of economic rationality by those who individually or collectively wield monopoly market power is quite likely to damage significantly what little competition remains in the market and is destined to suppress any re-emergence of competition. For example, a monopolist who sets his prices at an artificially high level is acting rationally and in a profit-maximizing manner, but such activity is usually prohibited because of its harmful anticompetitive results.<sup>52</sup> Similarly, although oligopolists who openly conspire to fix prices are acting rationally, such a practice is also illegal because of its anticompetitive effects. Turner, however, would excuse such effects when they are achieved through conscious parallelism merely because its practice among oligopolists is rational.<sup>53</sup>

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47. *Id.* at 1230.

48. *Id.* at 1207.

49. *Id.* at 1215.

50. *Id.* at 1216.

51. C. KAYSEN & D. TURNER, *ANTITRUST POLICY* 80, 113-15, 244 (1959); Turner, *supra* note 37, at 1230.

52. *United States v. Aluminum Co. of America*, 148 F.2d 416, 427-30 (2d Cir. 1945).

53. The question to be decided is whether the same practices, on the basis of their

Turner's argument that rationality is the touchstone of the legality of parallel activity is untenable for an additional reason. Absent enormous amounts of economic evidence and proof of the defendants' motives, it would be extremely difficult to distinguish between those oligopolists who are in fact acting rationally and those who are merely taking advantage of their ability to circumvent the traditional conspiracy requirement of section 1. If, however, it is assumed that rationality affords no excuse for uniform behavior, such problems of proof should not arise since the participants' motives will be immaterial and harmful effects will be prohibited regardless of motive.<sup>54</sup>

Turner's second justification for opposing the application of section 1 to conscious parallelism—his concern with the difficulty of effectively regulating conscious parallelism by means of injunctive relief—should not be allowed to preclude the use of section 1 as an instrument for eliminating the anticompetitive effects of consciously parallel activity. Properly focused injunctions, aimed at any overt acts that aid the practice of conscious parallelism, would be helpful in ensuring that defendants found guilty of "conspiracy" could not effectively re-establish their tacit collusion.<sup>55</sup> Further, although the courts are admittedly ill-equipped to administer a remedy of a complexity that may approach that of public utility regulation, other agencies, such as the Federal Trade Commission or a specially created branch of the Justice Department, would not be so handicapped.

### B. Professor Posner's Proposal

Posner, unlike Turner, maintains that conscious parallelism

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rationality alone, should be permitted in all industries regardless of concentration and despite disparate effects on the market. The question is, of course, but another way of examining the problem raised by Judge Learned Hand in the *Alcoa* case:

In such cases, a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: . . . The successful competitor, having been urged to compete, must not be turned upon when he wins.

*Id.* at 430. Nevertheless, the courts have not been reluctant to forbid the use of rational economic practices to those controlling a significant market share while at the same time allowing smaller firms to engage in them freely. *Id.* at 431. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953); *United States v. American Can Co.*, 230 F. 859 (D. Md. 1916); *Grand Caillou Packing Co.*, 66 F.T.C. 799 (1964), *enforced sub nom. LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966).

54. If, however, some of the defendants are relatively small or otherwise pose little or no threat to competition, it may be advisable to admit testimony concerning their motives. This will prevent their being unjustly lumped together with the firms actually restraining competition.

55. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346-47 (D. Mass.

can be combatted effectively under section 1 of the Sherman Act.<sup>56</sup> He argues that if a particular industry demonstrates characteristics that encourage conscious parallelism, and if certain economic tests indicate that the market is indeed anticompetitive because price is substantially above a competitive level,<sup>57</sup> the uniform activity of the participants should constitute a violation of section 1, regardless of the absence of a traditional conspiracy to restrain trade.<sup>58</sup> Posner rejects Turner's argument that conscious parallelism is in no sense a conspiracy and maintains that it is no distortion of language to consider "tacit collusion"<sup>59</sup> a form of concerted activity.<sup>60</sup> Unconvinced by the argument that his proposal might punish the innocent along with the guilty, he further claims that "[b]usinessmen should have no difficulty . . . in determining when they are behaving noncompetitively [because] [t]acit collusion is not an unconscious state."<sup>61</sup>

Posner suggests twelve market conditions conducive to tacit collusion<sup>62</sup> and twelve economic indicia, which he believes constitute evidence of actual collusive behavior.<sup>63</sup> Upon a sufficient showing of the existence of such conditions and indicia, a violation of section 1<sup>64</sup> would result under Posner's "economic approach."<sup>65</sup> Posner notes that the Supreme Court frequently has declared that section 1 does not require proof of express collusion,<sup>66</sup> and thus he

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1953). See text accompanying note 113 *infra*.

56. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

57. POSNER, *supra* note 5, at ch. 4.

58. *Id.* at 42.

59. "Tacit collusion" as used by Posner is the same as conscious parallelism.

60. See Posner, *supra* note 56, at 1575.

61. *Id.* at 1592.

62. These include fixed market shares, exchanges of price information, identical sealed bids and price discrimination, regional price variations, price, output and capacity changes at the formation of the "cartel," resale price maintenance, declining market shares of the leaders, small fluctuations in price, demand elasticity, a high level of profits, and a system of basing-point pricing. POSNER, *supra* note 5, at 55-62.

63. These include the degree of concentration, inelastic demand, entry barriers, product standardization, the industry's prior antitrust record, the absence of a fringe of small competitors, numerous customers, the firms being all at the same level in the chain of distribution, the relative importance of price competition, a high ratio of fixed to variable costs, a static or declining level of demand and a practice of sealed bidding. *Id.* at 62-71.

64. "The major implication of viewing noncompetitive pricing by oligopolists as a form of collusion is that section 1 of the Sherman Act emerges as *prima facie* the appropriate remedy." Posner, *supra* note 56, at 1575.

65. POSNER, *supra* note 5.

66. Posner, *supra* note 56, at 1577. See, e.g., *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

suggests that it would be easier to sell his approach to the Court than to Congress.<sup>67</sup>

Additionally, Posner disagrees strongly with Turner's assertion that conscious parallelism among oligopolists is economically rational. Posner claims that it is quite rational for an oligopolist to refuse to collude and to expand output until the return to investors is roughly equal to what they could otherwise earn.<sup>68</sup> Further, he maintains that it is not irrational for such a firm to set a price that approximates marginal cost rather than one that is artificially high.<sup>69</sup> He does agree with Turner that "public-utility type" regulation is the only effective means of remedying the problem,<sup>70</sup> but unlike Turner, he feels that the elimination of concerted restraints of trade justifies the administrative difficulty involved.<sup>71</sup>

Posner admits that his proposal contains one major shortcoming, the inherent difficulty of proving collusive behavior by the complex, technical, and often inconclusive character of economic evidence.<sup>72</sup> The proposal would require a thorough examination of each of the market conditions and economic indicia mentioned above. Because of the high stakes normally involved in antitrust suits, Posner's proposal thus can be expected to produce considerable litigation over each of these criteria. For example, the first of the factors, the degree of market concentration, invites disagreement over the minimum allowable number of firms and the market shares that can be lawfully controlled by each. When similar effort must be expended on each of the factors, the practicality of implementing Posner's proposal diminishes significantly.

The remainder of this Note will suggest an alternative approach to the problem of conscious parallelism in highly concentrated industries. Given the inherent difficulty of eliminating the harmful effects of conscious parallelism, it is doubtful that any one approach will supply an effective remedy. The following proposal thus should be used as a supplement to, not as a substitute for, the other proposals.

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67. Posner, *supra* note 56, at 1565.

68. *Id.* at 1591.

69. *Id.* at 1571.

70. *Id.* at 1564-65.

71. *Id.*

72. POSNER, *supra* note 5, at 75.

#### IV. AN ALTERNATIVE APPROACH: CONSCIOUS PARALLELISM AS PRIMA FACIE EVIDENCE OF A CONSPIRACY TO MONOPOLIZE

##### A. *The Background of the Proposal—Monopoly Status and the Alcoa Doctrine*

The proposal contained herein is grounded firmly in the regulation of monopolization under section 2 of the Sherman Act. In every major monopoly case won by the government, the market share of the defendant has been high.<sup>73</sup> Whether market share alone, however, constitutes a violation of section 2 is a question that has repeatedly confronted the Supreme Court. Although the Court ostensibly has refused to make mere size unlawful,<sup>74</sup> many of its decisions indicate that, in reality, if the market share of the defendant is large enough, a violation of section 2 will be predicated upon almost any activity in which the defendant is engaged. The clearest statement of the Court's position, the *Alcoa* doctrine, is contained in *United States v. Aluminum Co. of America*:<sup>75</sup>

Starting . . . with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. . . . Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies, for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.<sup>76</sup>

73. The defendant controlled 87% in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), 75-80% in *United Shoe*, 68-80% in *American Tobacco*, and over 90% in *Alcoa*. It is probable that a firm will be deemed to have a monopoly if it controls between 60% and 90% of the relevant market. For an excellent discussion of this point, see Kozik, *Oligopoly and the Concept of Workable or Effective Competition: An Economic Analysis of Recent Antitrust Cases*, 21 U. Prrr. L. Rev. 621, 634 (1960).

74. *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948).

75. 148 F.2d 416 (2d Cir. 1945).

76. *Id.* at 427-28. Numerous opinions have adopted the *Alcoa* doctrine and have recognized that the primary design of the framers of the Sherman Act was to prevent the concentration in a few hands of control of American industries. See, e.g., *United States v. Griffith*, 334 U.S. 100, 107 (1948) ("So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control."); *United States v. American Can Co.*, 230 F. 859, 901 (D. Md. 1916) ("It is easy to conceive that . . . [size and power] might be acquired honestly and used as fairly as men who are in business for the legitimate purpose of making money for themselves and their associates could be expected to use them, human nature being what it is, and for all that constitute a public danger, or at all events give rise to difficult social, industrial and political problems."). See generally cases cited in note 53 *supra*.

The reason for the Court's suspicious attitude toward the conduct of monopolists is that size carries with it an opportunity for abuse that cannot be ignored, especially if such opportunity is shown to have been taken advantage of in the past.<sup>77</sup> Thus good behavior on the part of the monopolist is normally considered irrelevant.<sup>78</sup>

The courts similarly have not been convinced by claims of ingenuity or increased economies of scale regularly raised by monopolists in an attempt to excuse their status.<sup>79</sup> Consequently, the Court has placed several obstacles in the path of a monopolist that would justify its size. The Court, for example, does not require proof of an intent to monopolize,<sup>80</sup> and it places the burden of showing that monopoly power has not been abused on the defendant.<sup>81</sup> The Court also has held that the mere retention of monopoly power may violate the Act<sup>82</sup> even though the means utilized to achieve monopoly status are otherwise innocuous.<sup>83</sup> A firm controlling a sufficiently large share of the market thus can do little to avoid a violation of section 2.

### B. *The Proposal*

The proposal is based on the premise that oligopolists whose conduct produces the same or similar anticompetitive<sup>84</sup> effects on the market as the activities of a monopolist should be treated as an

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77. *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932).

78. "[Congress] did not condone 'good trusts' and condemn 'bad' ones; it forbad all." *United States v. Aluminum Co. of America*, 148 F.2d at 427.

79. "What appears to the outsider to be a sensible, prudent, nay even a progressive policy of the monopolist, may in fact reflect a lower scale of adventurousness and less intelligent risk-taking than would be the case if the enterprise were forced to respond to a stronger industrial challenge." *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347 (D. Mass. 1953).

80. *United States v. Griffith*, 334 U.S. 100, 105 (1948).

81. *United States v. Aluminum Co. of America*, 148 F.2d at 427.

82. *United States v. Griffith*, 334 U.S. at 107.

83. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953).

84. Ideally, the law should react similarly when the result of uniform activity is harmful regardless of how many or few entities are responsible, and the means of effectuating or perpetuating the harm should be immaterial. "There seems to be substantial agreement among economists that an industry may be as effectively 'monopolized' by the uniform action of several large firms as by control vested in a single enterprise." Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743, 755 (1950). Drawing this analogy between oligopolists who act in collusion and a classic monopolist leads to the application of § 2 of the Sherman Act, but the particular offense charged under that section is largely a matter of preference. Basically there are three separate offenses under § 2—monopolization, attempted monopolization, and conspiracy to monopolize. The first is traditionally reserved for cases in which only one defendant is involved. Attempted monopolization is usually charged along with

actual monopolist under section 2 of the Sherman Act. Although it probably is not advisable to consider any particular degree of concentration a per se violation of the Sherman Act, it does seem advisable to extend the *Alcoa* doctrine to the dominant firms in highly concentrated industries and to forbid their participation in certain business practices that would not offend the Act if engaged in by smaller firms in less concentrated industries.<sup>85</sup> Parallel behavior of several "competing" firms, especially when such behavior influences the price structure in the market,<sup>86</sup> often has the same harmful effects on the market as the exercise of monopoly power by a single enterprise, which is forbidden by section 1. Furthermore, just as no monopolist unconsciously monopolizes, no oligopolist inadvertently engages in conscious parallelism.<sup>87</sup> Thus business practices that are forbidden to monopolists because of their size can and should be forbidden to oligopolists whose collective market power, wielded through conscious parallelism, approaches that of a single firm monopolist.<sup>88</sup>

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monopolization and its use has also been largely limited to cases involving a single defendant. As mentioned above, Turner prefers this charge as a means of dealing with conscious parallelism. On the other hand, conspiracy to monopolize is an infrequently used weapon in the § 2 arsenal, its primary function seemingly reserved for the relatively rare instance of intraenterprise conspiracy. See *Kiefer-Stewart v. Joseph Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

It is generally held that a monopolist, determined by a certain percentage of market share, may not engage in many otherwise lawful activities because of the attendant harm to competition, *United States v. Aluminum Co. of America*, 148 F.2d at 427-30, but that oligopolists may engage in the same activities with impunity and may freely indulge in uniform business practices, so long as no traditional conspiracy is involved. This is permitted despite the fact that the anticompetitive effects can, and often do, approach those created by a monopolist. Thus, as far as market performance and the public good are concerned, the Sherman Act is often illogical and inconsistent, and places greater emphasis on technicalities than on the consequences of a given course of conduct.

This inconsistency is the end product of the differing aims and objectives of the Act's first two sections. Section 1 prohibits certain activities, the purpose of which is to restrain trade. These activities, when performed in concert, are unlawful regardless of their effect, that is, regardless of whether or not they succeed. Conversely, § 2 is primarily concerned with the result of certain practices as they are manifested by the defendants' size. Section 2 often will be violated by the status of the defendant with little or no regard as to how that status was achieved. See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

85. Professor Posner explicitly rejects this approach: "It may not be entirely easy to decide what market justifies classifying a single firm as a monopolist, but it would be far more difficult to decide when a firm was an oligopolist for the purpose of triggering an extended *Alcoa* doctrine." Posner, *supra* note 56, at 1597.

86. Price fixing invariably is considered illegal per se. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

87. *United States v. Aluminum Co. of America*, 148 F.2d at 432.

88. "Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Others have recognized the need for a doctrine

Extension of the *Alcoa* doctrine to oligopolists could be implemented judicially by reliance on the extensive body of monopoly case law under section 2. The standards enunciated in the monopoly cases can be applied to most oligopolies in a similar manner and with a similar degree of effectiveness.<sup>89</sup> Determining those oligopolists to whom the doctrine should be applied poses only a small problem. Generally, it should apply to any group of firms that through the use of any form of concerted action, including conscious parallelism, has monopolistic effects on the market. Economic evidence of the minimum number of firms and the maximum market share allowable could be ascertained by the courts, beyond which a violation of section 2 could occur from various practices that otherwise would be inoffensive.<sup>90</sup>

Specifically, this Note proposes that the extended *Alcoa* doctrine be implemented under section 2 by providing that the existence of conscious parallelism among the largest firms in a highly concentrated industry shall constitute prima facie evidence of a conspiracy to monopolize. Conspiracy to monopolize under section 2 is distinguishable from and independent of conspiracy to restrain trade, which traditionally has been employed to regulate consciously parallel activity. Although the traditional view differentiates between section 1 and section 2 on the basis of the number of firms involved,<sup>91</sup> the two sections also may be distinguished on the basis of what they regulate.

Thus, while section 1 pertains to offenses heavily dependent upon the concerted conduct of the defendants, such as price fixing, boycotting, and market division, section 2 is primarily concerned with offenses based upon the size and status of the defendant, with little or no regard for its behavior.<sup>92</sup> A charge under section 1 must,

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of this sort that would make oligopoly status combined with some otherwise lawful but anticompetitive conduct a violation of the Act. A similar doctrine, for example, has been made the basis of the pending FTC complaint that charges the four largest cereal producers with possession of a "shared monopoly." Kellogg Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898 (1972).

89. Difficulty may be encountered initially in determining the number of firms that properly constitute an oligopoly. Once this problem is resolved, however, the analogy becomes fully applicable. The theory of the Commission is that the defendants have created and maintained a shared monopoly among themselves through the use of various practices that, when taken together, violate the prohibition of unfair trade practices under § 5 of the Federal Trade Commission Act.

90. Suggested examples are contained in the Concentrated Industries Act, S. 1167, 93d Cong., 1st Sess., 119 CONG. REC. 7320 (1973).

91. Section 1 applies when more than one defendant is charged; § 2 applies when only one defendant is charged.

92. *United States v. Aluminum Co. of America*, 148 F.2d at 427-30; see text accompanying note 52 *supra*.



by its very nature, be supported by strong evidence of a conspiracy to commit the act because the act alone, without the conspiracy, is not an offense and could be engaged in freely by an individual nonmonopolist firm.<sup>93</sup> A charge of conspiracy to monopolize under section 2, however, does not depend quite so heavily upon proof of an actual conspiracy because of the section's primary emphasis on size and status. Since section 2 and the offenses thereunder are decidedly more concerned with the results of a conspiracy rather than with the conspiracy itself, conscious parallelism alone should be sufficient to constitute prima facie evidence of a conspiracy, given the anticompetitive results of such activity. Thus, if the defendants control a monopoly share of the market, however monopoly status may be defined, conscious parallelism alone should raise a presumption of a violation of section 2 rebuttable only by clear and convincing evidence to the contrary.<sup>94</sup>

Although an essential element of the offense of conspiracy to monopolize is the specific intent to destroy competition or to build a monopoly,<sup>95</sup> there should be little harm to the defendants when such intent is presumed in cases in which the participants in a scheme of conscious parallelism control a monopoly share of the market. If separate entities that together control a monopoly share engage in uniform activity to increase their collective market power and to reduce competition, it cannot be argued that they lack the requisite intent to monopolize. Although no single firm may possess intent to gain a monopoly share for itself, all are intent on gaining such a position for the members of the conspiracy collectively.

Traditionally, the offense of conspiracy to monopolize has been available for use against all participants in concerted activity regardless of their size and power. Thus a conspiracy to monopolize may exist although the offenders actually do not possess or realistically could not attain a monopoly share of the market.<sup>96</sup> Conscious

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93. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Wisconsin Liquor Co. v. Park & Tilford Distillers Corp.*, 267 F.2d 928 (7th Cir. 1959).

94. Here the proposal runs counter to the belief of Professor Turner. "Nor could mere parallel non-competitive pricing reasonably be made the basis for charging firms with 'conspiracy' to monopolize, or with 'combining' to monopolize . . ." Turner, *supra* note 37, at 1227.

95. Generally, it is unnecessary to allege a specific intent to conspire. *United States v. Chas. Pfizer & Co.*, 367 F. Supp. 91, 99 (S.D.N.Y. 1973); *American Football League v. National Football League*, 205 F. Supp. 60, 64 (D. Md. 1962); *United States v. General Elec. Co.*, 80 F. Supp. 989, 1016 (S.D.N.Y. 1948); *United States v. Patten*, 226 U.S. 525, 543 (1913).

96. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

parallelism should not be considered as prima facie evidence of a conspiracy to monopolize, however, unless the participants, in the aggregate, actually possess or in all probability will obtain a monopoly share of the relevant market. In industries that are not highly concentrated and that contain no nucleus of dominant firms, honest reasons may exist for engaging in conscious parallelism. In a concentrated industry, however, the probability of the firms engaging in conscious parallelism for innocent reasons is minimal,<sup>97</sup> and it is reasonable to raise a presumption of conspiracy to monopolize when conscious parallelism is found.

Before conscious parallelism can be considered prima facie evidence of a conspiracy, the types of economic evidence that can be used to establish the existence of conscious parallelism must be determined. Although evidence of conscious parallelism is frequently of an inferential or circumstantial nature,<sup>98</sup> the following factors can be considered in establishing evidence of conscious parallelism, which if engaged in by oligopolists, forms prima facie evidence of a conspiracy to monopolize:

- (1) the absence of economic pressures compelling the firms to behave uniformly,<sup>99</sup>
- (2) a history of price leadership by the largest firm,<sup>100</sup>
- (3) the frequent exchange of price information,<sup>101</sup>
- (4) the simultaneous or near simultaneous announcement of price increases,<sup>102</sup>
- (5) the improbability of several firms all reaching one of many possible decisions in response to the same economic stimulus,<sup>103</sup>
- (6) major changes in business methods being undertaken simultaneously,<sup>104</sup>

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97. There of course may be instances in which external influences such as governmental action, fluctuations in the general economy, or developments affecting the entire industry may be responsible for the uniform activity. In these cases, however, the innocent cause of the conscious parallelism would be readily apparent.

98. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939); *Standard Oil Co. v. Moore*, 251 F.2d 188, 210 (9th Cir. 1957).

99. See *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 203 (3d Cir. 1961).

100. *American Column & Lumber Co. v. United States*, 257 U.S. 377, 407 (1921).

101. *United States v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 393 (1921).

102. *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397, 400 (4th Cir. 1958).

103. See *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 205 (3d Cir. 1961).

104. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223 (1939).

- (7) uniform action inconsistent with individual self-interest,<sup>105</sup> and
- (8) in some cases in which the activities of the defendants parallel each other for an extended period of time and for no apparent reason, the concept of *res ipsa loquitur*.<sup>106</sup>

Because the proposal would permit mere proof of conscious parallelism to establish a prima facie case of conspiracy to monopolize, safeguards necessarily must be provided to protect particular defendants from those who would assert spurious claims.<sup>107</sup> If uniform activity based upon economic evidence that is sometimes complex and often inconclusive is to be the basis of an offense that carries with it serious consequences, and if juries continue to be allowed to act upon probable and inferential as well as direct proof,<sup>108</sup> it is necessary to balance the burdens on the litigants to ensure that the plaintiff will not prevail on the basis of mere allegations supported by sparse evidence. It is therefore recommended that if the evidence of conspiracy to monopolize consists solely of the uniform activity of the participants, no individual defendant should be found guilty unless the evidence against it constitutes a substantial preponderance of the total evidence adduced.

An alternative method to protect defendants against spurious claims is to make conscious parallelism available as a prima facie case of conspiracy to monopolize solely in actions brought by the government, leaving unchanged the present role of conscious parallelism as mere circumstantial evidence of a conspiracy in private actions.<sup>109</sup> Because the proposal would arm a complaining party with a powerful and perhaps irresistible weapon against a defendant, it might be wise to restrict its availability to financially disinterested plaintiffs, such as the Department of Justice, which would not be motivated by the possibility of obtaining treble damages.

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105. Such action is evidence of conscious parallelism because it is inconsistent with decisions independently reached. *Milgram v. Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951); see text accompanying note 24 *supra*.

106. *Rahl*, *supra* note 84, at 758. This has been denounced judicially in *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533, 545 (7th Cir. 1946), *rev'd on other grounds sub nom. FTC v. Cement Institute*, 333 U.S. 683 (1948).

107. In criminal cases, of course, the evidence against the defendant would have to surpass the reasonable doubt standard. These safeguards are necessary because once a conspiracy is proved, a relatively small amount of evidence will suffice to sustain a guilty verdict.

108. *Bausch Mach. Tool Co. v. Aluminum Co. of America*, 72 F.2d 236, 241 (2d Cir. 1934).

109. *Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770, 775 (D.D.C. 1957).

### C. Remedies Under the Proposal

Any discussion of antitrust remedies must begin with an appreciation of what measures a busy court with limited resources and minimal expertise reasonably can be expected to administer. In conspiracy to monopolize cases, whether actual or based upon conscious parallelism, the three principal objectives of the judicial decree should be to eradicate the practices that have caused the offenses, to restore workable competition as far as possible,<sup>110</sup> and to deny the guilty parties the fruits of their violation.<sup>111</sup>

Dispersal of the economic power through divestiture and dissolution of the defendants is perhaps the most effective means to restore competition in the market,<sup>112</sup> and it is ordered regularly when the creation of a combination is itself the violation.<sup>113</sup> Given the drastic nature of this remedy and the inability of many courts to supervise dissolution effectively, properly focused and administered injunctions might provide a more viable alternative. Through their use, those practices that are found to constitute conscious parallelism can be eliminated. Trade associations can be disbanded or severely limited in their function, advance price announcements prohibited, the exchange of price information enjoined, and intercorporate meetings made public. Such a remedy probably would be preferred by both the court and the parties. The court would have less difficulty supervising an injunction than administering a dissolution, and the complaining party nevertheless would be assured that the uniform activity from which the complaint arose would not be repeated. The defendants, of course, would prefer the harshest injunction to dissolution. The weakness of this remedy, however, is that market structure would remain unchanged, possibly encouraging a reoccurrence of the problem.<sup>114</sup> Despite this apparent drawback, injunctive relief aimed at the wrongful conduct, rather than divestiture aimed at market structure, probably is the most desirable remedy for an offense grounded in uniform activity.

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110. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346-47 (D. Mass. 1953).

111. "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944).

112. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347 (D. Mass. 1953).

113. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944).

114. *President's Task Force Report on Productivity and Competition*, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,108, at 55,134 (1972).

*D. The Proposals Compared*

Because the foregoing approach is offered as a supplement to the proposals of Professors Turner and Posner, this Note will next compare the three proposals, which may be joined to increase the likelihood of eliminating the anticompetitive effects of conscious parallelism.

The instant proposal differs from that of Professor Posner in two respects. First, the proposal utilizes section 2 of the Sherman Act rather than section 1, under which conscious parallelism constitutes no more than circumstantial evidence of concerted action. Because the case law on conscious parallelism and conspiracy to monopolize under section 2 is largely undeveloped, it is reasonable to expect that the courts will be more willing to accept a new application of conscious parallelism under section 2 than to overrule the considerable authority defining its traditional function under section 1.<sup>115</sup> Thus, getting the instant proposal adopted into the law would be easier than persuading the courts to accept Posner's approach in the face of substantial authority to the contrary.

Second, Posner's theory requires the economic and legal analysis of as many as twenty-four factors to determine if the participants are guilty of a conspiracy to restrain trade. Most of these factors have not been examined thoroughly in the antitrust cases and therefore will require a great deal of litigation before acceptable standards of proof can be established. The problem would not arise under the instant proposal, however, since the courts would have access to the extensive economic and legal analysis already performed in other monopoly cases under section 2.

Professor Turner's proposal<sup>116</sup> also can be supplemented by the suggested approach. For example, under his proposal a defendant whose market share is smaller than the shares of the others engaged in parallel conduct may avoid being found guilty of an attempt to monopolize because alone it does not come dangerously close to achieving monopoly status.<sup>117</sup> The same defendant, however, can be convicted of a conspiracy to monopolize by its participation in a scheme of conscious parallelism because the basis of that offense is the conspiracy itself, not its objective. Although such a charge generally should not be used against those who do not actually possess

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115. This is even more likely in the lower courts, where such authority cannot be overruled without a Supreme Court reversal.

116. See note 37 *supra* and accompanying text.

117. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

a monopoly share of the market,<sup>118</sup> there will be instances in which it is desirable to include as defendants some firms with market shares much smaller than those dominating the industry. For example, if a small firm that engages in conscious parallelism with larger firms appears ready to increase its market share substantially, it too should be charged with conspiracy to monopolize.

The suggested approach also provides a desirable complement to the doctrine of "shared monopoly" currently being proposed by the FTC.<sup>119</sup> First, there is no offense of "shared monopoly" under section 2, and the courts may be unwilling to accept it since every industry constitutes a shared monopoly and only economic evidence of the degree of concentration could separate those industries that violate the doctrine from those that do not. The courts in all likelihood would be reluctant to draw this line as well as a line between those firms within the industry that are large enough to include in the charge and those that are not. Supplementing the charge with the instant proposal eliminates the latter problem. Because those firms to be charged will be those whose business practices are consciously parallel, the line can be drawn on the basis of participation in the scheme of uniform activity.

## V. CONCLUSION

When the largest firms in a concentrated industry deliberately maintain uniform business practices and policies in order to eliminate competition between themselves and to restrain trade in the industry, serious anticompetitive effects and harm to the economy are inevitable. Under the prevailing rule, these firms cannot be sanctioned by the Sherman Act unless an actual contract, combination or conspiracy is proved. By the use of conscious parallelism the more sophisticated oligopolists thus are able to chill competition in a particular industry without violating the law.

When the Act was passed, its wording was adequate to deal with the obvious monopolies and overt conspiracies then existing. The Act, however, has been rendered somewhat obsolete by the ingenuity of those firms adept at avoiding a violation of the law while achieving the desired end of lessening competition. Although judicial interpretation of the Act has changed in order to alleviate partially the discrepancy between the law and economic reality, it has stopped short of condemning conscious parallelism.

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118. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). See text accompanying note 93 *supra*.

119. See text accompanying note 100 *supra*.

Clearly, if the result of certain activity is harmful, and the harm is serious, the legality of the activity should not turn upon technicalities in the wording of a statute specifically designed to prevent the harm. In the absence of a significant amendment to the Sherman Act, the problem posed by conscious parallelism can be dealt with under a new and different interpretation of the Act. The proposals of Posner and Turner, and the "shared monopoly" doctrine of the FTC, provide three methods of accomplishing this end. Each, however, suffers from some infirmity that may impair its implementation or effectiveness. The suggested approach thus offers an additional method by which the harmful effects of conscious parallelism in concentrated industries can be eliminated or at least curtailed.

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