

## St. John's Law Review

---

Volume 44  
Number 5 Volume 44, Spring 1970, Special  
Edition

Article 51

---

December 2012

### Oligopoly Under Attack: New Approaches to an Old Problem

Don T. Hibner Jr.

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

#### Recommended Citation

Hibner, Don T. Jr. (1970) "Oligopoly Under Attack: New Approaches to an Old Problem," *St. John's Law Review*: Vol. 44 : No. 5 , Article 51.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss5/51>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# OLIGOPOLY UNDER ATTACK: NEW APPROACHES TO AN OLD PROBLEM

DON T. HIBNER, JR.\*

## INTRODUCTION

The Sherman Antitrust Act<sup>1</sup> has served as the cornerstone of anti-trust policy for nearly 80 years. As a result of its constitutional broadness and the judiciary's willingness to give its provisions continually widened interpretations, it has been an apt vehicle for adapting to the tempers of the time. In the 1890's the Act was successfully utilized to denounce the most flagrant types of abuse by monopolies and dominant combinations in key industries.<sup>2</sup> And again, in the 1920's and 1930's, it was useful in restricting a variety of specific trade practices, such as tie-in sales, exclusive dealings, group boycotts, and territorial division of markets. However, while the Sherman Act was able to cope with a variety of trade abuses arising from concerted action, it was not until the 1940's that attention was focused on different forms of economic behavior. Monopoly power, while a target under the earliest of Sherman Act cases, was attacked primarily on the grounds of combinations and conspiracy.<sup>3</sup> With *United States v. Aluminum Co. of America*<sup>4</sup> (*Alcoa*) and *American Tobacco Co. v. United States*,<sup>5</sup> the mere possession of monopoly power was put in issue — where it had been deliberately acquired or purposely maintained.<sup>6</sup> It was suggested that various types of trade practices might be illegal in the context of monopoly power even where the same practices would otherwise have been perfectly permissible.<sup>7</sup>

During this same period a group of renowned economists,<sup>8</sup> and at least one law professor,<sup>9</sup> popularized the view that oligopoly power

---

\* Member of the California Bar. A.B., Stanford University, 1955; LL.B., Stanford University, 1962.

<sup>1</sup> 15 U.S.C. § 1 (1964).

<sup>2</sup> See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Addyston Pipe & Steel Co. v. United States*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

<sup>3</sup> See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Swift & Co. v. United States*, 196 U.S. 375 (1905).

<sup>4</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>5</sup> 328 U.S. 781 (1946).

<sup>6</sup> *Id.*; 148 F.2d 416 (2d Cir. 1945).

<sup>7</sup> See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. Griffith*, 334 U.S. 100 (1948).

<sup>8</sup> J. BAIN, *INDUSTRIAL ORGANIZATION* 530-31 (1959); E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* ch. 3 (8th ed. 1962); W. FELLNER, *COMPETITION AMONG THE FEW—OLIGOPOLY AND SIMILAR MARKET STRUCTURES* ch. 1 (1949); G. STIGLER, *MONOPOLY AND OLIGOPOLY BY MERGER* 40 (1950); Kaysen, *Collusion Under the Sherman Act*, 65 Q.J. ECON. 263 (1951).

<sup>9</sup> See Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. Chi.

was almost as objectionable as monopoly power, and should not be condoned.<sup>10</sup> Oligopoly refers to a form of imperfect competition where there are but few sellers in the market. According to theory, there is an "interdependence" among these few sellers, and each seller is aware that any action he takes may induce a predictable reaction upon the part of his few competitors. As a result a static market that has many of the earmarks of a monopoly may exist—even in the absence of any overt collusion.<sup>11</sup> Because "oligopoly" is by definition a condition falling short of monopoly, in which a single company has the power to control the whole market, it has not been subject to traditional Sherman Act regulation.

While the Sherman Act has not yet been successfully used to attack vested oligopoly,<sup>12</sup> the Justice Department and the courts are now keenly aware not only of the problem of oligopoly, but also of the economic lore of oligopoly theory. In nine key decisions since 1962, the Supreme Court has repeatedly struck down mergers which would have further entrenched oligopolistic market power.<sup>13</sup> Not only has the Supreme Court recognized the views of the economists, but it has granted to their writings a virtual *imprimatur*. For example, Stigler, Bain, Machlup, Markham and Mason are now cited with approval along with judicial precedent in *United States v. Philadelphia National Bank*,<sup>14</sup> and contrary economic evidence offered by a defendant may even be dismissed as too time consuming.<sup>15</sup> Indeed, the approved writings of these economists have given rise to rules of presumptive illegality. In *Philadelphia Bank*, the Supreme Court, citing Stigler, Bain, Mason, Markham, and Machlup, ruled that any horizontal merger would be presumed illegal if it "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market . . ."<sup>16</sup> In the particular case before the Court in *Philadelphia Bank*, the test was met since the merger would have produced a surviving firm with a market share of 30 percent, while increasing the share held by about one-third. One reason for the presump-

---

L. REV. 567 (1947). See also Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949).

<sup>10</sup> See, e.g., J. BAIN, *supra* note 8, at 530-31.

<sup>11</sup> See generally E. CHAMBERLIN, *supra* note 8, at 12-25, 30-55; G. HALE & R. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 131-37 (1958); G. STOCKING & M. WATKINS, MONOPOLY AND FREE ENTERPRISE 85-95 (1951).

<sup>12</sup> Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 295 (1967).

<sup>13</sup> See FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962). Cf. United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (joint venture).

<sup>14</sup> 374 U.S. 321, 363 nn.38-39.

<sup>15</sup> *Id.* at 362-63.

<sup>16</sup> *Id.* at 363.

tive rule was to enable lower courts to dispense with having to assess all of the relevant economic data in determining the probable future effects of a merger. The burden is now shifted to the defendant to present evidence "clearly showing that the merger is not likely to have . . . anticompetitive effects." Thus, it is evident that the main emphasis in merger law at least since *Brown Shoe Co. v. United States*<sup>17</sup> and *Philadelphia Bank* has been to prevent the further "tightening" of oligopolistic markets through acquisition of existing or potential competitors.

A problem that is a corollary to preventing further concentration in oligopolistic markets is how to cope with problems presently existing in such markets. If it is sound policy to prevent mergers that would further concentration, it is at least a valid hypothesis that it is sound policy to deconcentrate markets where such concentration already exists. Proposals for attacking existing oligopolistic markets are not new. Professor Eugene Rostow made such proposals as early as 1947,<sup>18</sup> when he urged utilization of section 2 of the Sherman Act. Carl Kaysen and Donald Turner, in the well known work *Antitrust Policy*, suggested a statute condemning "unreasonable market power" and proposed that firms possessing such power should be dissolved.<sup>19</sup> However, nothing was done, either judicially or legislatively to implement either proposal, and the merger field remained the arena for the formulation of oligopoly policy.

Since the adoption of oligopoly theory by the Supreme Court, more proposals have been advanced. One is the *Department of Justice Merger Guidelines*.<sup>20</sup> While the *Guidelines* do not address themselves specifically to the deconcentration of existing oligopolies, they certainly evidence the concern of the Justice Department in this area. Indeed, it has been suggested that the stringency of the *Guidelines* may reflect in part the earlier view of the Chief of the Antitrust Division, Donald Turner, that once a market has become highly concentrated, there is little that can be done under existing law to prevent noncompetitive pricing.<sup>21</sup> The first exhaustive article on oligopoly power in a legal context was written by Joseph F. Brodley, and was entitled *Oligopoly Power Under The Sherman and Clayton Acts — From Economic Theory to Legal Policy*.<sup>22</sup> After carefully chronicling the marriage between oligopoly theory and merger policy, Mr. Brodley con-

---

<sup>17</sup> 370 U.S. 294 (1962).

<sup>18</sup> Rostow, *supra* note 9.

<sup>19</sup> C. KAYSEN & D. TURNER, *ANTITRUST POLICY* 110 *et seq.* (1959).

<sup>20</sup> U.S. DEPARTMENT OF JUSTICE, *MERGER GUIDELINES*, in 1 TRADE REG. REP. ¶ 4480, at 6683-85 (1968).

<sup>21</sup> Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1566 (1969). That little could be done via section 1 of the Sherman Act has been Professor Turner's thesis for some time. See Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 HARV. L. REV. 655, 660-66 (1962).

<sup>22</sup> Brodley, *supra* note 12.

cluded that he would utilize additional rules of presumptive illegality in merger cases, but would not grapple with the concept of dissolution of an existing oligopoly.<sup>23</sup> Others, however, would go farther. Richard A. Posner recently authored an article entitled *Oligopoly and the Antitrust Laws: A Suggested Approach*.<sup>24</sup> Professor Posner's thesis is that section 1 of the Sherman Act can be utilized to condemn the results of classic oligopoly pricing. In his view, the "interdependence" of the oligopolists is tantamount to "tacit collusion," and should be prosecuted as such.<sup>25</sup> Although Professor Turner took an opposite position in a recent article,<sup>26</sup> he did express the view that section 2 of the Sherman Act can and should be interpreted to authorize the dissolution of leading firms in highly oligopolistic industries.<sup>27</sup> In addition, Professor Turner recommended legislation which would hopefully effect the necessary relief but would exclude criminal sanctions and private rights of action.<sup>28</sup> Finally, the *White House Task Force Report on Antitrust Policy*<sup>29</sup> has recommended specific legislation to deconcentrate highly concentrated industries, and has drafted a "Concentrated Industries Act."

The purpose of this article will be to analyze the feasibility of these various proposals in the light of (a) the present state of knowledge of the behavior of oligopolistic markets and (b) the effects on antitrust policy, if any, that would result should one or more of the suggestions be adopted. It is the author's conclusion that in each case the medicine is worse than the disease. What makes sound merger policy does not necessarily make good sense when applied either to an extension of the Sherman Act or to new legislation aimed at dissolution of highly concentrated oligopoly markets.

#### BASIC OLIGOPOLY THEORY — THE PROBLEM

##### *The Classic Oligopoly — Its Behavior*

The impetus to present day oligopoly theory probably had its genesis in *Theory of Monopolistic Competition*, published by Professor Chamberlin in 1933.<sup>30</sup> Professor Chamberlin's thesis was that the structure of the oligopoly market rendered it almost as objectionable as monopoly itself.<sup>31</sup> Oligopoly means "few sellers." It has been defined as "the form of imperfect competition which obtains when sellers are few in number and any one of them is of such size that an increase or decrease in his output will

<sup>23</sup> *Id.* at 342-45.

<sup>24</sup> Posner, *supra* note 21.

<sup>25</sup> *Id.* at 1605.

<sup>26</sup> Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1225-31 (1969).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 1968 PRESIDENTIAL TASK FORCE REPORT ON ANTITRUST, 115 CONG. REC. 5642 (daily ed. May 27, 1969) [hereinafter cited as NEAL TASK FORCE REPORT].

<sup>30</sup> E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933).

<sup>31</sup> E. CHAMBERLIN, *supra* note 8, at ch. 33. For a good analysis of oligopoly theory, see G. HALE & R. HALE, *supra* note 11, at 131-37.

appreciably affect the market price.”<sup>32</sup> Because each of the sellers can affect market price by unilateral action, such a structure is fundamentally different from the classical model of “perfect competition.” There, a single seller, through increase or decrease in output, cannot affect the shares of the other sellers, and accordingly cannot affect price either. When sellers are few, each is aware that any action he may take is likely to induce a reaction upon the part of his competitors. If he cuts price, or increases output, the other sellers may be expected to do likewise, and everyone is worse off.<sup>33</sup> Should one seller raise his price, he does not know whether his fellows will follow suit. If they do, all may profit, unless increased prices encourage entry by more participants. If they do not follow suit, however, our seller may lose sales to his rivals and will have to lower prices once again. Because of the small number of sellers, any change by any one of them will have a profound effect on each of the others. Rational business behavior, without any overt collusion, would dictate that changes in output, price, or both will be fewer than in markets with many more sellers. Because a seller can anticipate a prompt reaction that will nullify his gain, the oligopolist seller and his competitors are said to be “interdependent” in their pricing behavior.<sup>34</sup> That is, the decision of any one of them is interdependent with the anticipated countermoves of the others. The natural result is a tendency to avoid rigorous price competition. Thus, the rational self-interest of the sellers will be to charge similar prices, and sooner or later, to charge prices that will yield the largest return, depending on the degree of ease of entry into the market, the level of technology in the industry, and numerous other facts that necessarily differ from market to market. Where potential competition is great and/or where entry requirements are low, the price equilibrium may be no higher than in a market with many more sellers. Where entry requirements are high, and where price competition is minimal, the oligopoly market may exhibit other characteristics. Selling expenses may increase, particularly in advertising. The product will be “differentiated” by each seller. Each seller will induce customers to think that his product is of higher quality than that of rival firms.<sup>35</sup> The promotion of brand names may be a phenomenon in aid of this principle. In short, there will be increased competition as to claims of quality and service, and less as to price.

Where one of the firms in the oligopoly is particularly larger or more innovative than the others, “price leadership” may result. This firm, in effect, will make all of the pricing decisions within the market, and the other oligopolists will follow suit. In this situation, the traditional analysis

---

<sup>32</sup> C. WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* (TNEC Monograph No. 21, 1940).

<sup>33</sup> G. HALE & R. HALE, *supra* note 11, at 131-32.

<sup>34</sup> TURNER, *supra* note 21, at 660-66.

<sup>35</sup> G. HALE & R. HALE, *supra* note 11, at 131-33.

has been that the price leader will hold a price "umbrella" over the smaller firms, enabling them to sell their output at higher prices. Professor Markham described it in the following manner:

The rationale behind the partial monopolist type of price leadership is as follows: in an industry composed of one larger producer and a number of small ones, the large producer sets a price on the basis of the visualized demand schedule for the commodity, after allowing for the quantities that will be supplied at all possible prices by the small producers. The required conditions are that the dominant firm sell a sufficiently large proportion of the commodity, that the small firms individually ignore any effect they may have on price, and that the dominant firm must behave passively—it sets a price and sells the remainder after the small producers have sold all they wish at the prevailing price.<sup>36</sup>

There are a number of studies that tend to confirm the above hypothesis as to price behavior in oligopolistic markets.<sup>37</sup> A study by Professor Bain has indicated that there is a positive correlation between concentrated oligopoly markets and high profits. The study, covering 42 industries over a five year period, showed that where eight firms in an industry accounted for at least 70 percent of the sales, above average profits resulted. Professor Bain also noted that the same pattern did *not* hold in cases where more than eight sellers accounted for the same percentage.<sup>38</sup> It is important to note that such oligopoly behavior will be expected even in the absence of any formal or informal agreement whatsoever. The key difference between an oligopolistic market and an unconcentrated market is that oligopolists have more information upon which to base their decisions.<sup>39</sup> Indeed, it is rational behavior that causes the oligopoly problem.

While oligopolies are expected to behave "anticompetitively" without the necessity of collusion, such markets are nevertheless prime candidates for "hard core" Sherman Act violations. The very fact that one seller can affect the fortunes of every other seller may be an impetus for a price-fixing or market-sharing arrangement. The fact that the sellers are few makes it easier to police such an agreement.<sup>40</sup> There are fewer forces to contend with and "cheating" is more easily discovered and eliminated. Where the size of the participants varies greatly, costs and pricing judgments may vary considerably, and an administered arrangement may seem necessary

---

<sup>36</sup> J. MARKHAM, *COMPETITION IN THE RAYON INDUSTRY* 101 (1952). Cf. F. MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 476 (1952).

<sup>37</sup> J. BAIN, *supra* note 8, at 266-315; W. FELLNER, *supra* note 8, at 175-91. While these studies generally yield positive relationships, the Stigler Committee has pointed out that concentration is not a major determinant of differences in profitability among industries. 1969 PRESIDENTIAL TASK FORCE ON PRODUCTIVITY AND COMPETITION, 115 CONG. REC. 6475 (daily ed. June 16, 1969) [hereinafter cited as STIGLER TASK FORCE REPORT].

<sup>38</sup> J. BAIN, *supra* note 8, at 411-16.

<sup>39</sup> See Turner, *supra* note 21, at 665-66.

<sup>40</sup> For a good example of the difficulties in administering a price-fixing agreement, see Demaree, *How Judgment Came For The Plumbing Conspirators*, *FORTUNE*, Dec. 1969, at 96.

to avoid destructive price wars from breaking out periodically. Every highly concentrated or "tight"<sup>41</sup> oligopoly has the potential of lapsing into a serious Sherman Act violation simply because of its structure. Where other variables are eliminated, this potential may be even more dangerous. Where a product is specified or standardized, the danger increases. Where the purchasers are relatively few in number, and the size of individual sales substantial, the danger is still greater. The potential of an oligopoly, however, is only an argument for vigorous enforcement of the Sherman Act as it now exists. No one can seriously doubt that the Sherman Act is an effective method for prosecuting the blatant hard core price-fixing conspiracy. The *potential* for collusion cannot be used as an argument for the proposals that will be discussed in this article.

### *A Dissenting View*

The question remains as to whether sufficient knowledge is currently available to support the traditional thesis that oligopolies behave "anticompetitively." A further question persists — whether there are more than a few oligopolies that meet the conditions of the classical model. Market definition, degree of technology, ease of entry, and trend of demand are all factors that may alter the behavior of any particular market having few sellers. George and Rosemary Hale have taken the position that the analysis offered by Professor Chamberlain in 1933 is now viewed as incomplete and inconclusive.<sup>42</sup> The real world may simply be too imperfect for Professor Chamberlin's laboratory conditions to be met. Professor Galbraith has been one of the severest critics. He stated as far back as 1949 that:

In dealing with small numbers or oligopoly, Professor Chamberlin, who went farthest with the problem on a general theoretical level, did little more than resurrect the engaging but largely irrelevant novelties of Cournot and Edgeworth. . . . One certain fact about oligopoly (and its counterpart on the buyer's side of the market) is that the entire market solution can be altered unilaterally by any single participant. This is at once the simplest and the most critical distinction between oligopoly and pure competition. It also means that the methodological device by which the competitive market has been analyzed, i.e. laying down general assumptions about the group response of numerous individuals to common stimuli, is inadmissible. Rather the assumptions must be sufficiently comprehensive to cover the behavior of each participant in the market. . . . Edgeworth and Cournot and, in that tradition, Chamberlin, merely derived the market solution that followed from two or three out of a near infinity of possible behavior combinations. It follows that they were not

---

<sup>41</sup> The term "tight" oligopoly is defined as a market in which eight or fewer firms supply 50 percent of the market, with the largest firm having 20 percent or more. A "loose" oligopoly is defined as a market in which fewer than 20 firms supply 75 percent of the market, and where no single firm supplies more than 10 percent to 15 percent. C. KAYSER & D. TURNER, *supra* note 20, at 72.

<sup>42</sup> G. HALE & R. HALE, *supra* note 11, at 133. The report of the Stigler Committee reaches a substantially similar result.



offering a theory of duopoly or oligopoly but displaying a few examples. Little progress has been made to an analysis of oligopoly by this route and little could be expected.<sup>43</sup>

There is a not insignificant body of evidence indicating that oligopoly is perfectly compatible with active price competition.<sup>44</sup> There may be sufficient evidence at this time to support the current *Merger Guidelines* as to horizontal mergers, at least where a "tight oligopoly" is involved. The social costs in a merger possibility thwarted or foregone may not be of overwhelming significance. When the inquiry shifts from merger policy to dissolution of existing market structures, however, the social costs may be staggering. It is submitted that if dissolution is the domain of discourse, not enough is presently known about oligopoly to warrant the implementation of a positive course of action.<sup>45</sup>

Even should sufficient data exist to support the general thesis of "interdependence" in oligopoly pricing, too little is known as to how to properly identify or classify the oligopoly. There is evidence that oligopolists are moved by motives other than profit maximization. Furthermore oligopoly power in a given market may be illusory when the power of a few large buyers is analyzed; and it is noteworthy that great technological progress has been made in the tightest of oligopolies. If account is taken of these and similar factors, it is difficult at best to predict what an oligopolist will do.

One of the key problems in identifying the oligopolistic market is in defining the relevant product and geographic markets. It is elementary that market definition is of critical importance not only in cases under section 7 of the Clayton Act,<sup>46</sup> but in appraising oligopoly power as well. Market definition will determine, in effect, whether the market is a "loose" oligopoly, a "tight" oligopoly, or indeed, an oligopoly at all. If there are close substitutes available, to which consumers would turn in the event of price increases, there is no oligopoly power.<sup>47</sup> The producers of the substitutes should therefore be included in the market for oligopoly analysis. This is particularly important because it is the *structure* of the market and not its *performance* that may be under analysis. Probable performance is a deduction drawn from the structure of the market.

The proposals of Professors Posner and Turner and the White House Task Force are alarming not so much for what each proposes, but in light of what the Supreme Court has already done in the field of market definition. With increasing frequency, the Supreme Court has defined the geographic and product dimension of the relevant market in the narrowest

---

<sup>43</sup> Galbraith, *Monopoly and the Concentration of Economic Power*, in A SURVEY OF CONTEMPORARY ECONOMICS 99, 101-02 (H. Ellis ed. 1948).

<sup>44</sup> See G. HALE & R. HALE, *supra* note 11, at 135, for a collection of authorities in support of this proposition.

<sup>45</sup> STIGLER TASK FORCE REPORT at 6475.

<sup>46</sup> 15 U.S.C. § 18 (1964).

<sup>47</sup> G. HALE & R. HALE, *supra* note 11, at 137.

of terms.<sup>48</sup> The Supreme Court evidenced a strong preference since *Brown Shoe* for analyzing mergers in the context of horizontal market power. Several of the more recent merger decisions are particularly disturbing. In *Brown Shoe* the relevant markets were defined as separate cities of a population of 10,000 or more. In a number of cities the postmerger share was five percent or less. In *United States v. Aluminum Co. of America*,<sup>49</sup> Alcoa, a producer of aluminum conductor wire, proposed to merge with Rome Cable, 90 percent of whose business involved the production of copper wire. The district court had made a finding<sup>50</sup> that aluminum and copper were competitive as to some uses. The Supreme Court, however, ignoring this finding, noted that while Rome was a 90 percent producer of copper wire, it was also a producer, although a small one, of aluminum wire. This enabled the Court to seize upon the narrow overlap of identical products, and to define the line of commerce (relevant product market). The Court found, again contrary to the district court, that bare and insulated aluminum wire constituted a single line of commerce. There is no discussion as to what the shape of the market would have been had aluminum and copper wire been regarded as the relevant line of commerce. In *United States v. Continental Can Co.*,<sup>51</sup> a producer of metal cans (Continental) merged with a producer of glass containers (Hazel-Atlas). Neither had any production in the other's industry. The Court found a justification for combining metal cans and glass containers, although it acknowledged that inter-industry competition did not exist for many end uses. For other end uses, however, plastic containers provided competition; yet the Court did not include the plastic alternate in the line of commerce. Only by this tortuous process was the Court able to come up with market share percentages that would bring into play the rule of presumptive illegality established in *Philadelphia Bank*. One is tempted to draw the inference that it was the desired result that determined what the market definition would be. What is even more disturbing, however, is the fact that in *Brown Shoe* the Court promulgated market definition rules that took into account the economic realities of life. There, the Court specifically mentioned cross-elasticity of demand, industry or public recognition, the products' peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.<sup>52</sup> The Court stated:

Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant.<sup>53</sup>

---

<sup>48</sup> Hibner, *Attempts To Monopolize: A Concept In Search of Analysis*, 34 A.B.A. ANTITRUST L.J. 165, 168 (1967).

<sup>49</sup> 377 U.S. 271 (1964).

<sup>50</sup> 214 F. Supp. 501, 509 (N.D.N.Y. 1963).

<sup>51</sup> 378 U.S. 441 (1964).

<sup>52</sup> 370 U.S. at 325.

<sup>53</sup> *Id.* at 336-37.

The Court's departure from these principles is not limited to merger cases. In *United States v. Grinnell Corp.*,<sup>54</sup> the Court held that the defendant had violated section 2 of the Sherman Act by the willful acquisition or maintenance of monopoly power in the accredited central station systems industry (burglar alarms, fire alarms and sprinkler supervisory service). Grinnell, which controlled 87 percent of this market (an "accredited" system is one approved by insurance underwriters), argued that protective services other than accredited central station systems should have been included within the relevant market. The Court combined burglar alarms and fire alarms into one product category of "protection of property."<sup>55</sup> It refused, however, to include other alarm and watchman services, although the district court found that this competition affected the price Grinnell could charge for its services.<sup>56</sup>

The recent Supreme Court decisions in the merger field, as well as the decision in *Grinnell*, when considered in light of the equivocal state of economic knowledge as to oligopoly behavior, should put us on notice that extreme caution should be exercised in dealing with vested oligopoly power. The power may well be non-existent or ephemeral. George and Rosemary Hale sum it up this way:

While some economists take a more optimistic view of the problem, we can scarcely say that the case for illegality of oligopoly is so well established as to provide a firm foundation for recommendations to courts and legislatures.<sup>57</sup>

#### SUGGESTED EXTENSION OF THE SHERMAN ACT

##### *Suggested Extension of Section 1*

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade. . . ."<sup>58</sup> Can section 1 be used as a weapon against vested oligopoly power? Where the oligopoly has degenerated into price fixing, group boycott or other joint exclusionary activities, the answer is obvious. But what of the oligopoly in which "interdependence" exists in the absence of any overt collusion? One of the hallmarks of the classical oligopoly model is a marked degree of parallel or "consciously parallel" action. "Conscious parallelism" became a word of antitrust art with *Interstate Circuit, Inc. v. United States*.<sup>59</sup> There, an exhibitor of motion pictures sent form letters to competitors asking them to maintain a minimum admission price. Although there was no direct evidence of agreement, the Court nevertheless found a violation.

---

<sup>54</sup> 384 U.S. 563 (1966).

<sup>55</sup> *Id.* at 572.

<sup>56</sup> *Id.* at 574.

<sup>57</sup> G. HALE & R. HALE, *supra* note 11, at 137.

<sup>58</sup> 15 U.S.C. § 1 (1964).

<sup>59</sup> 306 U.S. 208 (1939).

This case could be used to support an argument that mutual forbearance constitutes a meeting of the minds and is all the agreement that the Sherman Act requires. Accepting that premise, it is not difficult to apply the same reasoning to interdependent oligopolists, who are also engaging in an arms length type of "mutual forbearance." Such an argument would not read agreement out of the Sherman Act anymore than did *Interstate Circuit*. That case simply holds that an inference of agreement can be drawn from (a) a proposal of a scheme of action; (b) subsequent near unanimity of action; and (c) the failure of defendants to call as witnesses the officials who would have had knowledge of the existence or nonexistence of an agreement.<sup>60</sup> Thus the trial court was justified in drawing the conclusion that defendant's officials would have testified adversely. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*<sup>61</sup> does not alter the fact that *Interstate Circuit* was probably correctly decided on its facts. The dictum in *Theatre Enterprises* that "[c]onscious parallelism has not yet read conspiracy out of the Sherman Act entirely"<sup>62</sup> is consistent with *Interstate Circuit*. While the facts in *Theatre Enterprises* were entirely consistent with noncollusion, in *Interstate Circuit* they were not, especially when coupled with the adverse inference drawn as to defendant's failure to call its officials as witnesses. Both cases are consistent with the proposition that actual agreement is still required by section 1 of the Sherman Act, and neither case is particularly helpful in determining the merits of extending the Sherman Act to cover oligopoly situations where "interdependence" but not active collusion is present.<sup>63</sup>

Professor Posner seems to agree that actual agreement is a necessary element.<sup>64</sup> He nevertheless argues that Sherman 1 can be used to declare illegal the "tacit collusion" that occurs because of the interdependent structure of the oligopoly market. His view is that the only difference between a formal cartel and tacit collusion is that the latter is easier to conceal.<sup>65</sup> Where is the collusion? It apparently occurs in a fashion similar to the formation of a unilateral contract. An "offer" communicating a restriction on output is "accepted" by the actions of the rivals in following suit.<sup>66</sup>

---

<sup>60</sup> *Id.* at 221.

<sup>61</sup> 346 U.S. 537 (1954). In *Theatre Enterprises*, the petitioner brought suit under the Clayton Act for treble damages and an injunction, alleging that the defendants had violated the antitrust laws by conspiring to restrict first-run pictures to downtown Baltimore theatres, thus confining petitioner's suburban theatre to subsequent runs and unreasonable "clearances."

<sup>62</sup> *Id.* at 541.

<sup>63</sup> One commentator has argued that an actual agreement must be proved because the Sherman Act is a criminal statute. See Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U.L. REV. 137, 147 (1962).

<sup>64</sup> Posner, *supra* note 21.

<sup>65</sup> *Id.* at 1575.

<sup>66</sup> *Id.* at 1576.

Recognizing the inherent difficulty of proof in such a situation, Professor Posner then proposes a series of economic tests from which inferences can be drawn.<sup>67</sup>

As does Professor Turner,<sup>68</sup> I have a great deal of difficulty with this argument. It may well be that certain permissible inferences could be drawn from Professor Posner's economic tests. Coupled with some evidence of active collusion, a garden variety case of conspiracy might be made out. Beyond that, however, Professor Posner's thesis could create arbitrary results and impending chaos. First of all, we do not know enough about any particular oligopoly market. There may well be forces operating in that market that prevent it from operating like Professor Chamberlin's model. The market may not be "interdependent" at all. In that situation would any inference about "accepting" an "offer" be warranted? More important perhaps is Professor Turner's criticism.<sup>69</sup> In responding to a rival's curtailment of output, the oligopolist is behaving rationally. The only difference between our oligopolist and any other businessman is that because of the market structure, the oligopolist has more information upon which to base his decision. We should encourage businessmen to make rational business decisions based upon all of the information legally available to them. It would be bad law and probably impossible psychologically<sup>1</sup> to punish a businessman for rationally responding to the actions of a competitor, no matter what the market structure.

It is submitted that section 1 of the Sherman Act should be used only where sufficient evidence of actual agreement, or actual concerted exclusionary practices, is evident. Professor Posner's suggestion does not meet the requirements of *Interstate Circuit*, and should therefore be discarded. Any inferences that could be drawn from the type of evidence he suggests would be conducive of conflicting inferences, not simply "tacit collusion."

#### *Suggested Extension of Section 2*

Section 2 of the Sherman Act, unlike section 1, condemns unilateral as well as concerted action. Section 2, at first blush, would appear to be better suited to the "interdependent" behavior which the oligopoly market theoretically exhibits. Yet, section 2 really defines three separate crimes,<sup>70</sup> none of which are readily adaptable for use in attacking oligopolies. It provides:

Every person who shall monopolize, or attempt to monopolize, or

<sup>67</sup> *Id.* at 1578-84. The proof would be established by evidence of systematic price discrimination, prolonged excess of capacity over demand, existence of fixed market shares over a period of time, filing of identical bids on non-standard items, static nature of market prices, abnormal profits, and price leadership.

<sup>68</sup> See Turner, *supra* note 26, at 1226-27; Turner, *supra* note 21, at 663-71. Similarly, Professor Turner would not extend the concept of "combination," as was recently done in *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968). Turner, *supra* note 26, at 1227.

<sup>69</sup> Turner, *supra* note 21.

<sup>70</sup> 15 U.S.C. § 2 (1964).

combine or conspire . . . to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a misdemeanor . . . .<sup>71</sup>

Because three separate crimes are set out in the statute, each must be analyzed separately. Because combination or conspiracy to monopolize requires the same proof of concerted action as is required for a violation of section 1, it is no more available for use against oligopoly power than section 1. The crimes of monopolization and attempted monopolization may, however, arise through unilateral as well as concerted action.<sup>72</sup>

### A. Monopolization

Monopolization under section 2 consists of two elements. These are (1) possession of monopoly power in the relevant market, and (2) the "purposeful acquisition or maintenance of monopoly power." Thus, "monopoly" in the economic sense does not constitute the offense of monopolization. Instead, it is the possession of a degree of economic power with the additional element of an "intent" or "purpose" to acquire the power or to use that power once acquired.<sup>73</sup> "Monopoly power" has been defined as "the power to control prices or exclude competition."<sup>74</sup> Because the power to exclude competitors or to control prices is an elusive concept at best, the courts have looked to a more concrete indicia, holding that monopoly power may be inferred from the predominance of the market share of the alleged monopolist.<sup>75</sup> In the famous *Alcoa* case, Judge Hand stated that 90 percent of a market was a clear monopoly, 60 percent, doubtful, and 30 percent, clearly not.<sup>76</sup> There may well be oligopoly industries where one firm may have such a predominant market share as to be guilty of monopolization. But what of a three-firm market where the shares are 40 percent, 30 percent and 30 percent. Such a market would certainly be defined as a highly concentrated one, and should be expected to exhibit anti-competitive behavior. Under the Learned Hand dictum, none of the three firms would be guilty of monopolization. Professor Turner would reason otherwise. In his view, there is not enough difference between individual and "shared monopoly" to warrant different treatment.<sup>77</sup> Because of "interdependence," the monopoly power that would be possessed by one firm in a single firm industry

<sup>71</sup> See *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946).

<sup>72</sup> See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 (1962).

<sup>73</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Where the power has been maintained for a substantial period, the element of intent is close to being conclusively presumed, and improper tactics are largely irrelevant. Judge Learned Hand said: "To read the passage [section 2] as demanding any 'specific' intent makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945).

<sup>74</sup> *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781, 784 (1946).

<sup>75</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

<sup>76</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

<sup>77</sup> Turner, *supra* note 26, at 1231.

would be shared by the oligopolists. In an oligopoly that is behaving similarly to a monopoly, "monopoly power" would be present even where the individual market shares would not otherwise support that inference. Professor Turner discusses the point in the context of *Alcoa*, and is addressing himself to long-term, relatively rigid market structures that are substantially impervious to erosion by market forces,<sup>78</sup>

My criticism of this approach is basically the same as that directed to Professor Posner's "tacit collusion" theory. Not enough is known about oligopoly markets to warrant such an extension.<sup>79</sup> It is improper to assume that monopoly power is in fact "shared." If the market shares of the oligopolists have remained stable, there are conflicting inferences that can be drawn from that fact alone. Where there is no evidence of overt collusion or serious exclusionary conduct, the inferences suggest that monopoly power is either *not* being shared, or is not being used or purposely maintained. The oligopolists, through pressure from potential entrants, reasonably interchangeable substitutes, or ignorance, may have charged very low prices; the fact of low prices may, in turn, have deterred either entry or a switch to reasonably interchangeable substitute products. Even if the oligopolists had charged monopoly prices, entry may still have been deterred because of superior technology or because the oligopolists, through efficiency, had lower costs than the new entrant would have had. Unless we can answer all of these questions, it is unwarranted, as reported in the *Stigler Report*, to use the antitrust laws to deconcentrate highly oligopolistic industries through dissolution of the leading firms.<sup>80</sup> Only where the elements of actual monopolization are proven — monopoly power plus purpose — should this portion of section 2 of the Sherman Act be utilized. Market share is only one indicia of monopoly power. There may be other means of showing that it is present in firms with market shares falling below Learned Hand's "doubtful" 60 percent, but monopoly power cannot be assumed to be shared simply because a relevant market has few sellers.

### B. Attempts to Monopolize

Very little is known about attempts to monopolize under section 2 of the Sherman Act, and there has been a definite split of authority over what the precise elements of the crime are.<sup>81</sup> Some commentators have reported that only a specific intent to monopolize plus an overt act in furtherance thereof are required.<sup>82</sup> Under that analysis, monopoly power or market share was irrelevant. If the proper intent could be proved, there would be

<sup>78</sup> *Id.*

<sup>79</sup> See STIGLER TASK FORCE REPORT at 6475.

<sup>80</sup> *Id.*

<sup>81</sup> Compare *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964) with *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) and *Hiland Dairy Inc. v. Kroger Co.*, 402 F.2d 968, 975 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

<sup>82</sup> Turner, *Antitrust Policy And The Cellophane Case*, 70 HARV. L. REV. 281, 294 (1956).

no reason why any act of unfair competition would not constitute an attempt to monopolize. This view, however, has remained a minority one, and more recent cases have continued to support the majority position.<sup>83</sup> In *American Tobacco Co.*, the Supreme Court approved the following instruction, which sets forth the required elements:

The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment.<sup>84</sup>

Thus, because an "attempt" must be an attempt to commit the substantive crime, it is necessary for the plaintiff to establish that the acts constituting the act would have been reasonably effective in creating an actual monopoly. The issue in an attempt case is, therefore, whether the defendant would have succeeded in acquiring monopoly power had the acts he set in motion been properly executed. As one commentator noted:

Potential power to control requires proof of the same character, but not necessarily the same quantum as that necessary to establish the existence of monopoly power where the charge is monopolization.<sup>85</sup>

It is not absolutely necessary that a defendant accused of attempted monopolization have any particular market share, since, as in monopolization, market share is merely evidence from which monopoly power may be inferred. In the normal situation, however, market share evidence is the crux of the matter. There may be no other available means of proving monopoly power other than looking to the actual market share of the defendant. It would be the unusual situation for a company without an appreciable market share to be able to acquire monopoly power.<sup>86</sup>

On the above analysis, it is clear that an oligopolistic market structure, without more, would not supply the necessary ingredients for an attempt to monopolize attack. This is so for at least two reasons. First, a specific intent to achieve monopolization must be proven. While such an intent may be inferred from contemporaneous documents and from a history of business conduct,<sup>87</sup> it is oftentimes inferred from the particular business

---

<sup>83</sup> See, e.g., *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 975 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969).

<sup>84</sup> 328 U.S. at 785.

<sup>85</sup> Johnston, *Monopolize or Attempt to Monopolize*, 3 A.B.A. ANTITRUST SECTION 72, 77 (1953).

<sup>86</sup> In *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969), the court held that a monopolist must control a substantial part of the market to be able to raise or lower price, or to restrict competition. It stated that 20 percent was insufficient.

<sup>87</sup> See *United States v. Jerrold Electronics Corp.*, 187 F. Supp 545, 567 (E.D. Pa. 1960); Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 GEO. WASH. L. REV. 227, 231-32 (1958).



practices complained of.<sup>88</sup> The structure of an oligopoly market cannot supply acts upon which any finding of specific intent could be based. Secondly, the structure of the oligopolistic market will not supply proof of an approach to monopoly power. Structure, without more, may be subject to any number of competing inferences.

Professor Turner took the position in an earlier paper that specific intent, as shown by coercive conduct or absence of "normal business purpose," became the only element of the offenses of attempt to monopolize and conspiracy to monopolize. This approach has been criticized as confusing "conspiracy" and "attempt," and has not been followed by the courts.<sup>89</sup> Professor Turner has recently reiterated this view and urged that

Where oligopolists sharing monopoly power have engaged in restrictive conduct lacking any substantial justification, they may appropriately be said to have unlawfully attempted to monopolize.<sup>90</sup>

This statement is no more analytical than its predecessor. If specific intent to monopolize plus an approach to monopoly power can be proven, that is one thing. The statute requires nothing less. To make the leap from exclusionary acts to attempt to monopolize is another matter. Not every business tort should be regarded as an attempt to monopolize.

#### LEGISLATIVE APPROACHES

In 1959, Carl Kaysen and Donald Turner made several suggested legislative approaches which were designed to deconcentrate concentrated oligopolies. One suggestion was to condemn "unreasonable market power" and dissolve firms possessing it. An extremely complicated series of economic criteria were required to be established by the Government. A second approach was to use presumptive rules of illegality to dispense with the complicated economic proof required by the first approach. Market power was to be conclusively presumed where, for five years or more, one company had at least 50 percent of the sales in the relevant market, and four companies had 80 percent of the sales.<sup>91</sup> In a later article, Professor Turner reiterated that a "suitably drafted new statute" would be the best solution, and that where "moral dereliction" was not involved, criminal sanctions and private rights of action should be excluded.<sup>92</sup> The problem with the first Kaysen and Turner approach is that it is overly complicated and impractical, while the "conclusive presumption" approach presumes that we possess knowledge as to oligopoly pricing that we in fact do not.

A more recent legislative approach was suggested by the *White House*

---

<sup>88</sup> *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 975; *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

<sup>89</sup> Turner, *supra* note 82.

<sup>90</sup> Turner, *supra* note 26, at 1230.

<sup>91</sup> C. KAYSEN & D. TURNER, *supra* note 20, at 110-19.

<sup>92</sup> Turner, *supra* note 26, at 1226.

*Task Force Report on Antitrust Policy*, released May 21, 1969 (hereinafter *Neal Report*). This report not only recommended specific legislation on the subject of oligopolies, but drafted a proposed "Concentrated Industries Act," which directs the Attorney General and the Federal Trade Commission to investigate the structures of markets which appear to be oligopolies. When the Attorney General determines that a specific market is an oligopoly, he is to institute a proceeding in equity for the "reduction of concentration."<sup>93</sup> A court must then determine whether the market under attack is an oligopoly, and which of the companies are oligopoly firms. No affirmative relief should be taken for a one year period so that "voluntary steps looking toward reduction of concentration" can be taken.<sup>94</sup> If none are taken, a further proceeding is to be held, and within four years, the market shares of the oligopolists are not to exceed 12 percent. A decree may require substantial modification of existing contractual relationships and/or methods of distribution. In section 4 of the proposed Act, the terms are defined. An "oligopoly industry" is a market where four or fewer firms have an aggregate market share of 70 percent during seven of ten and four of the most recent base years. An "oligopoly firm" is one with a market share in excess of 15 percent during two of the three most recent base years.<sup>95</sup> A "market" is a "relevant economic market" with aggregate sales of at least \$500 million during each of at least four out of five base years.

The major deficiencies of this approach are several. First, as one dissenter pointed out, the Act is based upon shaky structures which, upon correlation, prove nothing.<sup>96</sup> More importantly, the cost to society of implementing such a program may be beyond measurement. The dismemberment of the major companies of the country is not a step to be taken in haste or in anger. Simply stated, once done, it cannot be undone. Present knowledge is too sketchy for the heavy handed approach of the *Neal Report* to be sanctioned.

These facts were pointed out in an even more recent report. In the Report of President Nixon's Task Force On Productivity and Competition (hereinafter *Stigler Report*), Professor Stigler's Committee made the following comments on oligopoly control:

[T]he economists have not succeeded in fully identifying the characteristics of an industry which determine whether it will behave competitively or monopolistically.<sup>97</sup>

The Committee made several other noteworthy observations on the oligopoly problem. They questioned whether even collusive behavior in an

---

<sup>93</sup> NEAL TASK FORCE REPORT at 5649.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 5657 (separate statement of Robert H. Bork).

<sup>97</sup> STIGLER TASK FORCE REPORT at 6475.

oligopolistic industry required as radical a remedy as dissolution. In addition, they questioned whether the standards of permissible concentration should be wholly different for pending mergers than for established enterprises. Concentration, they noted, is not a major determinant of differences among industries in profitability, although it may sometimes be a significant factor. Finally, they stated:

Concern with oligopoly has led to proposals to use the antitrust laws (perhaps amended) to deconcentrate highly oligopolistic industries by dissolving their leading firms. We cannot endorse these proposals on the basis of existing knowledge. As indicated, the correlation between concentration and profitability is weak, and many factors besides the number of firms in a market appear to be relevant to the competitiveness of their behavior.<sup>98</sup>

#### CONCLUSION

Oligopoly industries undoubtedly present the most difficult problems in antitrust policy. There is a body of evidence that suggests that oligopoly industries — at least some — behave in a manner that is different from less concentrated industries. Economic theory suggests that this is because the decision-making process is altered by the fact that a decision by one firm will necessarily have an effect on the total market and on all of the other participants. Evidence also suggests that oligopoly markets have within their structure the seeds for future hard-core antitrust violations.

Based upon the evidence at hand, and upon honest desires to reduce concentration in key industries, various commentators have suggested judicial and legislative extensions of antitrust doctrines. In each case, however, they would overcure the patient and possibly cause serious damage. The state of our economic knowledge is all too imperfect. All industries with few sellers do not behave in the same manner. The correlation is simply too weak a foundation upon which to base radical change in antitrust policy. Additional studies of particular oligopoly industries are needed. As the *Stigler Report* suggests, the Antitrust Division should maintain a policy of strict and uncommitting scrutiny of highly oligopolistic industries. Radical swifery, however, is not warranted at this time, as it is not supported by a clear preponderance of the evidence.

---

<sup>98</sup> *Id.*