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Some Thoughts on "Antitrust Policy" and the Antitrust Community

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In this article, Professor Levy uses a recent book recommending extensive changes in the antitrust laws as a springboard for discussion of one of the most complex and difficult problems of antitrust administration: the lack of competition in the "concentrated," or oligopolistic, industries. The author suggests that reform through legislation is probably impossible because of the current climate of opinion and the effectiveness of numerous antitrust "hucksters"—lawyers and businessmen who frequently sacrifice accuracy and objectivity in pursuing results they favor. Professor Levy suggests a new interpretation of the present Sherman Act to avoid the difficulties of legislative modification. His recommendation would make it possible to reduce concentration, and thus assure more competition, in many important industries.

Robert J. Levy*

Much of the fascination of antitrust is lost to the casual, the uninitiated observer. Naively he assumes that the Sherman Act and the rest concern only the arid tracts and opaque axioms of economics; he is *sure* that the discipline demands confident and constant use of technical jargon which gives pause even to the most pedantic lawyer. How much this novice misses! Of course, the legal and economic skills are essential. But beyond them lie equally exciting, if dissimilar, endeavors. One of the most notable is a form of "hucksterism"—pervasive, at times extreme—which often complements the technics of antitrust and even characterizes some of its practitioners. Sophisticated observers are aware

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In part, this essay is a "review" of the thoughts and recommendations Professors Carl Kaysen and Donald F. Turner expressed in their recent book ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS. Cambridge: Harvard University Press, 1959. Pp. xxiii, 345. Their ideas are certainly significant enough to antitrust law development to warrant extended treatment. In addition, however, this "review" serves as a framework for some views of the writer.

of fairly constant attempts by devotees of the art to woo the public, to establish an "image," without exceeding the flexible bounds of "truth."[1] Although much of the hucksters' effort is directed at professional audiences, their messages frequently reach, and are often meant for, less sophisticated ears.

The periodic conferences on antitrust law and practice are one of the hucksters' regular fora; their speeches and papers provide the welcome trappings for professional relaxation. In this congenial atmosphere, suggestions to avoid the evil of "administered prices" became attempts to "atomize industry"; and the atomizers' folly merited stern warning:

> The yearning to return to an era of small economic units is wasted effort. Interplanetary rockets are not produced in basement machine-shops and atomic generators don't come out of kitchen laboratories.[2]

Almost every ceremonial event furnishes the opportunity for huckstering. A book celebrating DuPont's sesquicentennial anniversary reported company officials' approval "of the aims and emphases" of the Sherman Act; but—

> present legal interpretations . . . often have created confusion and have had the effect of overruling public interest. Weird new elements have been introduced into economics: in the post-war shortages of cellophane, a delay of nearly three years in supplying needed capacity was occasioned by a suit charging that DuPont already had too great a share of the total U.S. output.[3]

Of course, defendants and their counsel are not alone in huckstering; an Assistant Attorney General has told the Congress that "absolute size is absolutely irrelevant."[4] Nor are the hucksters only businessmen and lawyers; editorial writers and academicians have frequently indulged and shown great talent. When the An-

1. At the Spring, 1959 meeting of the Antitrust Section of the American Bar Association, Edward F. Howrey, former Federal Trade Commission Chairman, made such a vicious attack on FTC procedures that the following colloquy took place in the subsequent panel discussion:

"Mr. Hill (Sherman R. Hill, Director, Bureau of Investigation, FTC): . . . Mr. Howrey, your account was fictional insofar as the processing of matters within the Bureau of Investigation?

"Mr. Howrey: Absolutely." 14 ABA ANTITRUST SECTION REP. 47 (1959). The printed proceedings contained an entirely different address by Mr. Howrey. Howrey, *Some Thoughts on Commission Fact Finding and Judicial Review,* 14 ABA ANTITRUST SECTION REP. 32 (1959).

2. Simon, *Administered Prices and the Sherman Act,* 12 ABA ANTITRUST SECTION REP. 29, 41 (1958).

3. DUPONT, THE AUTOBIOGRAPHY OF AN AMERICAN ENTERPRISE 138 (1952).

4. Testimony of Stanley N. Barnes, Assistant Attorney General before Senate Judiciary Committee, June 7, 1955, quoted in Simon, *Administered Prices and the Sherman Act,* 12 ABA ANTITRUST SECTION REP. 29, 38 (1958).

titrust Division questioned the merger of the Texaco and Superior oil companies the Wall Street Journal commented:

> For it turns out that Texaco is the nation's "biggest" oil producer and Superior is the nation's "biggest" independent. Nobody went so far as to say Texaco is the nation's biggest oil company; it isn't. Jersey Standard is. Someone might easily argue that competition would be furthered if the merger made Texaco closer to Jersey's size and strength . . . .
>
> And if it is fear of bigness [that directs such decisions], can the country come to expect the Department of Justice to oppose a merger on the ground that one company is the "biggest" in Kankakee and the other company the "biggest" in Wauwatosa?[5]

The Federal Trade Commission succeeded in prohibiting a multiple basing point system;[6] the trade journals responded by reporting "industrial plants . . . about to relocate . . . and various specified and unspecified industrial centers . . . about to become 'ghost towns.' "[7]

Congressmen—whether "pro" or "anti-antitrust"—have displayed remarkable versatility and ingenuity. Objecting to "the theory that all mergers are good," one Congressman, noted for his vigorous support of antitrust enforcement, presented the following proof that not every merger strengthens competition:

> It is sometimes convenient to forget . . . that normally news of strengthened competition is interpreted to mean lower profit margins and therefore a decline in stock market prices. How account then for the almost invariable increase in stock market prices when these so-called "competition strengthening" combinations occur?[8]

The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws—itself no "Simon Pure" in the huckstering art,[9] provoked extensive congressional rebuttal. One considered judgment read:

> It (the report) is a gigantic brief for the nonenforcement of the antitrust laws. It is a massive sedative designed to be absorbed by the

5. Wall Street Journal, Sept. 29, 1959, p. 16, col. 1. Another § 7 complaint provoked the insight that "the new anti-trust enthusiasts have apparently come to believe that the quickest way to keep down badness is to keep business little even if it finally puts the economy over a barrel." Wall Street Journal, Oct. 6, 1959, p. 16, col. 1.

6. FTC v. Cement Institute, 333 U.S. 683 (1948).

7. Wallace and Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission*, 19 U. Chi. L. Rev. 684, 695 (1952).

8. Celler, *Corporation Mergers and Antitrust Laws*, 7 Mercer L. Rev. 267, 272 (1956).

9. See Schwartz, *Dissent*, 1 Antitrust Bull. 37 (1955); Schwartz, *Committees, Politics, Scholarship and Law Reform: Antitrust Studies in Perspective*, 104 U. Pa. L. Rev. 153 (1955). For some specific examples see Kefauver, *The Attorney General's Committee Report in Perspective*, 7 Mercer L. Rev. 258 (1956).

> enforcement agencies and the courts in the prosecution and trial of anti-monopoly cases. The result can only be complete immobility on the monopoly front. To paraphrase General Sherman, if a complaint is received it won't be investigated. If it is investigated, it won't be brought to trial, and if it is brought to trial, it won't be won.[10]

Congressman Patman's succinct comment on the *Standard Oil* decision[11] bears repeating here: "Thus the bitterest pill of all, and one of the most ironic developments in all of our antitrust history, befell a valiant effort to arrest the march of monopolistic price discrimination."[12]

Since almost everyone is party to this antitrust diversion, only innocent outsiders lose by it. The gambits seem to be made in good humor for the most part, and most of the responses are in kind. It seems likely, in fact, that members of the antitrust community relish huckstering at least as much as their more traditional tasks.[13] But if honesty and objectivity are injected into this atmosphere the results may be painful for advocates of all persuasions along the antitrust spectrum. The huckster is disconcerted when the veil is pierced—even if it results in support for his own position. *Antitrust Policy,* the latest in an unfortunately small group of objective studies of antitrust problems, will cause much of this discomfort. Its authors were well qualified to assay antitrust law and enforcement; Carl Kaysen, Professor of Economics at Harvard College, was the famous "law clerk" to Judge Wyzanski in the *United Shoe* case;[14] Donald F. Turner, Professor of Law at Harvard Law School, had produced, prior to this latest venture, two excellent articles on antitrust problems.[15] But Kaysen and Turner plainly failed to "play the game." Is it appropriate that an analysis of legal and economic problems should frequently admit the existence and even take account of reasonable alternatives? Can the authors be forgiven for public denunciation of favorite

10. Statement of Senator Estes Kefauver before the Committee on the Judiciary, United States House of Representatives, May 9, 1955, quoted in Kefauver, *The Attorney General's Report in Perspective,* 7 MERCER L. REV. 258 (1956).

11. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

12. Patman, *For H.R. 11 and S. 11 to Strengthen the Robinson-Patman Act and Amend the Antitrust Law Prohibiting Price Discrimination,* 11 VAND. L. REV. 399, 444 (1958).

13. Of course, to the extent that one decides it is the lawyer's responsibility to use all platforms and every method to promote his client's interests, "traditional tasks" include those of the huckster.

14. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 337 U.S. 521 (1954); see KAYSEN, UNITED STATES V. UNITED SHOE MACHINERY CORPORATION (1956).

15. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958); Turner, *Antitrust Policy and the Cellophane Case,* 70 HARV. L. REV. 281 (1956). Professor Turner holds a graduate degree in economics.

non sequiturs, for failing to treat the unproved, and possibly unproveable, as established fact?

It is not difficult to predict that *Antitrust Policy* will have an impact. In part, of course, response to the book will reflect honest difference of opinion on factual and value judgments. But the huckster element of the antitrust community will hardly be content merely to disagree. The book may be ignored, dismissed as academic, made the occasion for dire threats that its suggestions will wreak havoc on our economy; or it may even be misrepresented. In a pioneering foray *Fortune* took an interesting tack:

> [Acting Assistant Attorney General] Bicks's antitrust program . . . is to try to prevent Congress from passing bad antitrust laws or from trying to make antitrust the most important public economic policy. This year a disturbing new book, *Antitrust Policy* . . . proposed giving antitrust a new and dominant role in our economic system by a special statute. . . . Bicks, who does not favor new basic legislation . . . but strong enforcement of existing laws . . . stands ready to open up on the Kaysen-Turner thesis if Congress gives it a tumble.[16]

The authors must have expected to harvest discontent; certainly they fertilized their product liberally with censure. Thus, one of the factors favoring a precise statute is that it "can be more readily enforced by personnel of average capabilities." (p. 234). Prolix records are attributable in part to government complaints with "disorganized ill-thought-out presentation" (p. 250); delays in FTC proceedings may be traced partially "to inefficiency, and to lethargy." (p. 249). While their censure is frequently without mercy, it is also without favoritism: "defendants have prolonged antitrust proceedings unduly by insisting on disputing issues of negligible significance, and by contesting facts which they have no serious hope of overturning" (p. 250); "economists and economic theory offered little guidance to the courts . . . and the testimony of economic experts in antitrust cases was often sterile and usually diametrically conflicting" (p. 240); "the treatment of [economic] issues and the economic analysis in judicial opinions often leave something to be desired" (p. 241). Congress is severely criticized for failing to aid small business in a significant way (p. 230); for "passing on to enforcement agencies [in the regulated industries]—with barely concealed sighs of relief—political policy conflicts that Congress itself might have, and should have, substantially resolved" (p. 236); and for maintaining a "structure of

16. Smith, *What Antitrust Means Under Mr. Bicks,* Fortune, March 1960, pp. 120, 262. For a balanced, and favorable, review see Fuchs, Book Review, 109 U. PA. L. REV. 146 (1960); see also Keyes, Book Review, 29 GEO. WASH. L. REV. 184 (1960).

taxation [which] operates to promote mergers, and so adds another impulse toward greater concentration." (p. 217).

Yet the book's major evil, to the antitrust hucksters, will be the presentation of a fresh, vigorous survey and analysis of antitrust doctrines and policies. It should surprise none of the initiated that Kaysen and Turner have recommended many extensive legislative modifications. A new class of five year "petty patents" is suggested to prevent the creation of industry cartels and to deter the use of patent accumulations for exclusionary purposes. (p. 172). With a careful analysis of economic realities, they urge two new statutes to replace the Robinson-Patman Act. The authors do not deny the hucksters' lament that "price discrimination is often an indispensable element of price competition"; but neither do they neglect to affirm (what is usually recognized but never publicly admitted by the hucksters) that "some degree of market power is always necessary for a firm to practice price discrimination." (p. 180). They eschew, for persuasive reasons, the familiar cry that price discrimination should be tested by section 2 of the Sherman Act.[17] (p. 184). Section 7 of the Clayton Act will incorporate a rigorous "quantitative substantiality" test.[18] Properly

17. It might be appropriate here to indicate that some of the book's recommendations are not given the complete discussion accorded the central "market power" concept. For instance, the authors are content to suggest that it is "inevitable" that the Robinson-Patman Act does not apply to "the common kind of discrimination in which mark-ups differ among *different products* sold by the same producer." (p. 182). (Emphasis added.) And, without definition, their proposed statute applies—as does the present § 2(a)—to "goods of like grade and quality." See p. 186. The authors might well have quieted some of the huckstering cries for exemption of sales of identical but untrademarked goods by the use of this clause. See Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 27–48 (1956); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 158–59 (1955). See also p. 182. The discussions of freight absorption and the possible alternatives to the present patent system are both less than adequate. See pp. 185; 160–79.

18. A presumption of illegality would apply when any company, with 20% of sales in a market for five years or more, acquires any competitor not insolvent or in obviously failing circumstances. See pp. 99, 133. The authors certainly could not conclude that "there is a rational connection between the stated facts and the presumed result, so that the result is likely to be in fact correct in the vast majority or [*sic*] instances." (p. 99). They would be "less reluctant" to accept the presumption if a less rigorous standard were applied. *Ibid.* See note 34 *infra.*

The authors indicate that some form of "quantitative substantiality" is probably the law now. (p. 130). ("Substantial share of the market" might be a more accurate term. See Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 316 (1956).) Decisions subsequent to publication of their book bear witness to their accuracy. See, *e.g.*, Brillo Mfg. Co., Inc., TRADE REG. REP. ¶ 28667 (FTC April 15, 1960). Needless to say, it is always possible to make the doctrine a personal kind of ogre and then reject it vehemently:

Even the most ardent "splitter-uppers" should realize that "quantitative identified tieing contracts are to be, if they are not already,[19] per se violations (p. 157); specific trade association price reporting practices are to be absolutely condemned. (pp. 150–52).

But the book's central thesis is devoted to the problems of oligopoly in American industry. A number of preliminary assumptions are made. Some antitrust policy is necessary or desirable because there is a "minimum level of competition which it is necessary to achieve in the market-controlled sector if that sector is to be allowed to remain a market-regulated rather than a government-controlled one"; and "this level is not self-maintaining" (p. 4). Moreover, some quantum of antitrust policy is worth its cost since "the level of competition which would persist in the absence of any policy is far enough away from what could be achieved so that the administrative, political, and economic costs of government intervention . . . are worth incurring." (p. 5). This latter assumption rests upon the factual judgment that "economies of scale under present technology do not indicate the desirability of a radically *greater* concentration of output in a small number of large firms, so that antitrust policy is not hopelessly at variance with the underlying cost situation" (p. 6); it rests also upon the

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> substantiality" will not be consistently or frequently applied under existing law, and that it can only be a haphazard element which destroys the predictability and consistency of judicial enforcement, bringing all antitrust law into disrepute.

Adelman, *Economic Aspects of the Bethlehem Opinion,* 45 VA. L. REV. 684, 687–88 (1959).

Kaysen and Turner also indicate that "unless *DuPont-GM* is *sui generis* because of the large size of the companies involved, the 'relevant market' will be narrowly defined; no *Cellophane* refinements will be pertinent in a Section 7 vertical merger proceeding." (p. 130). Again, later cases have indicated the accuracy of this estimate. See, *e.g.,* United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), *cert. granted,* 363 U.S. 825 (1960). Of course, on occasion hucksters have apparently failed to see any distinction between the economic model of a market and the criteria for violation of a legislative norm. Thus—

> comparing a six-ounce can for pickles with a twelve-ounce can for peaches, each type of can "has unique physical characteristics, is distinct one from the other, has different end uses, and is recognized by [can] producers and consumers as a distinct product." Obviously so —six ounces are not twelve, and pickles are not peaches. But nobody will take seriously the idea that the two types of cans constitute two lines of commerce, or two separate products.

Adelman, *Economic Aspects of the Bethlehem Opinion,* 45 VA. L. REV. 684, 689–90 (1959). (Footnotes omitted.) Professor Turner, in one of his earlier efforts, carefully took account of the distinctions. Turner, *Antitrust Policy and the Cellophane Case,* 70 HARV. L. REV. 281, 315 (1956).

19. See Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958). *Cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd,* 365 U.S. 567 (1961).

speculation that "no sharp change in technology . . . will in the near future dictate a substantial increase in concentration among market-controlled firms." (p. 7).[20]

The general goal of antitrust policy must be the protection of competitive processes, as an end in itself:

> It is the fact that the competitive market *compels* the results of its processes which is the ultimate defense against the demand that economic decisions be made or supervised by politically responsible authorities. Without such market compulsion, that demand appears ultimately irresistible in a society committed to representative government. (pp. 48–49).

"Performance" (efficiency and progressiveness) must be rejected as a primary aim of antitrust policy because adequate evidence for comparisons, disinterested experts, and a conceptual framework for analysis are all unavailable[21] (pp. 52–56). Other possibilities

20. Needless to say, in this non-huckstering essay the authors have taken care to avoid assumptions which do not have substantial factual justification. Thus, "all of the technical economies of scale are achieved at the level of the plant rather than of the firm, and the greatest part of the size difference between very large [over $500 million in assets] and large [$50 to $500 million in assets] firms . . . lies in the number of plants they operate rather than in the size of the plants themselves"; (p. 6) moreover, variation in firm sizes within major industries "shows no tendency to diminish over time; giant firms are not generally outcompeting smaller ones, by any tests now available." (*Ibid.*)

They also assume that "it is not the case that a few firms, managed by men of superior gifts, can and will continue to attract the small number of superior managers, and thus will be enabled to outperform all rivals in all fields, were they permitted and motivated to do so." (p. 9). They believe that enough first grade managerial talent exists to go around and that employee loyalties will not be so strong as to make it impossible for firms to hire away other firms' superior management personnel. It may be "best to label this assumption an article of democratic faith and leave it at that." (*Ibid.*) See also note 22 *infra*.

21. "Efficiency" and "progressiveness" are economists' terms of art. The first refers to "a state in which no rearrangements of outputs among products and no distribution of inputs among firms could increase consumer satisfaction." (p. 12). As applied to a single firm its elements are "the efficient relations between prices and costs, capacities and outputs, demands and capacities; and production at efficient scale in efficient locations." (*Ibid.*) Progress consists in "increasing output, in increasing output per unit of input by the development of new techniques, and in producing new and better final products." (p. 13).

Some economists, utilizing that beguiling term "workable competition," argue that judgments about the functioning of markets should be made by studying "over-all . . . performance, usually with heavy weight given to progressiveness." (p. 82). This view ignores the fact that "any over-all evaluation of performance . . . [is] impossible and therefore delusive" (*ibid.*); it also ignores the importance of competition as a process.

In any case, Kaysen and Turner are unwilling to accept the major premise of the argument—that a "competitive process" (market power) standard would unduly interfere with the attainment of a high rate of progress by firms and industries. They are willing to concede some merit to the Schumpeterian thesis that there are substantial economies of scale involved are also rejected: "fair dealing," because it would be equally difficult, if not impossible to administer (pp. 56–58); and "general limiting of big business power" because if it means more than promoting competitive processes, it "would be so costly in terms of other goals . . . ."[22]

Kaysen and Turner start with the premise that "economic theory and experience indicate the likelihood of a monopoly problem in the structurally oligopolistic market" (p. 25). An analysis of Census Bureau data leads to the conclusion that structural oligopoly is the numerically dominant form of market organization in manufacturing industries with national markets. Even if one considers only "Type One oligopolies"—which the authors define as those in which the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent—oligopolistic industries outnumber those which are unconcentrated.[23] The problems for cogent antitrust policy posed by the in-

in the process of research, development, and promotion of new products and processes. (p. 83). But competition itself "is clearly a stimulus to invention." Moreover, the focus is upon firms in the $500 million to $5 billion range rather than those in the $50 million to $500 million—"business units at least as large as those necessary for efficient production and distribution . . . ." (p. 84).

Nor will a competitive process standard produce a significant diminution of one of the important sources of progress—vigorous entrepreneurship. The many substantial limitations placed by the New Deal and the Fair Deal on the freedom of business decision—in labor relations, tax policy, public utility regulation—have not resulted in over-all qualitative effects in business performance. Rather, "the motivations which conduce to effective entrepreneurship and management are apparently built deep into American society. They do not operate merely at the level of visible economic rewards, or even at the level of current symbols of business achievement in terms of size and growth. Rather, they stem from the whole structure of American society . . . ." (pp. 88–89).

It should be noted that the authors consider the other sense in which "workable competition" is frequently used—to describe markets which cannot be made more competitive consistent with the requirements of efficiency and the recognition of the realities of consumer preferences and geography—to be essentially similar to their own standard.

22. This last aim is ascribed to "certain Jeffersonian symbols of wide political appeal and great persistence in American life" (p. 17); moreover, "these doctrines, often in inchoate form, undoubtedly provide an important emotional substratum on which political support for antitrust policy of some kind rests." (p. 18). But the costs of a "one-plant, one-firm" program, both transitional and in sacrifice of economies, would be tremendous. Even a program of less drastic proportions (splitting the 1000 largest manufacturing enterprises into at least ten parts no one of which would have assets of more than $125 million) would "make little difference in the relative importance of small proprietorships on the Jeffersonian model." (p. 52).

23. Type Two is defined by a market share of 33% for the eight largest sellers, with the rest of the market unconcentrated. "The distinguishing feature of this market is the existence of an unconcentrated sector which may constitute a competitive restraint of varying significance on the concentrated firms." (p. 27). The authors arbitrarily call industries with

dustrial status quo are most serious and most difficult. Only the huckster will wail of "interplanetary rockets" and "basement machine-shops"; serious students of business affairs and all who are interested in the healthy functioning of a free enterprise system must be troubled by these figures. Of course, Kaysen and Turner are not the first in recent years to call attention to the problem;[24] but they come equipped with carefully prepared and understated statistical data which dramatize its seriousness. The problem is fairly easy to articulate—when a few firms in an industry (no one knows how few) have amongst them a sufficient amount of the business in the industry (no one knows how much), the industry's performance will not conform to the economist's model of a competitive market but rather will resemble the monopolistic model. These industries, then, will exhibit less competition (no one knows how much less) than do industries which are not so structured.[25] Or the problem may be stated by definition: "A structurally oligopolistic market is one in which the few largest sellers in the market have a share of the market sufficient to make it likely that they will recognize the interaction of their own behavior and their rivals' response in determining the values of the

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these concentrations oligopolistic "because in the majority of markets with which we are familiar, a smaller number of firms with larger shares of the market generally accompany, to a significant degree, the kind of behavior" by which they characterize oligopoly.

In several important respects, the authors have understated the extent of concentration and its economic significance. In the first place, use of Census Bureau figures required consolidation of numerous census products to make economically meaningful markets; since the authors' careful and conservative adjustments were "all in one direction, the result is a probable understatement of the number of structurally oligopolistic markets." (p. 29). Secondly, because the least concentrated industries are those which have least "economic significance," (pp. 32–34) "it follows that the distribution of industries by size between concentrated and unconcentrated overstates the importance of the unconcentrated industries." (p. 34). Finally, the mineral industries—a sector of great "economic significance"—seem to be much more concentrated than the manufacturing industries. (pp. 37–39).

24. *E.g.*, STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE (1951); EDWARDS, MAINTAINING COMPETETION (1949); Schwartz, *New Approaches to the Control of Oligopoly*, 109 U. PA. L. REV. 31 (1960); Schwartz, *Dissent*, 1 ANTITRUST BULL. 37 (1955); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949); Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947).

25. The classic recent example, of course, is provided by the *American Tobacco* case, in which a jury was permitted to find a violation of § 2 of the Sherman Act ("conspiracy to monopolize") in part from evidence that the three major companies always raised and lowered their prices simultaneously and identically. American Tobacco Co. v. United States, 328 U.S. 781 (1946). "If we dismiss the jury's finding of conspiracy as erroneous . . . we find that the behavior that was condemned was indeed thrust upon the defendants, given the market structure and the desire to maximize profits." (p. 93 n.60). See text at note 87 *infra*.

market variables." (p. 27). It is much more difficult to suggest modes of dealing with the problem which (1) have some substantial probability of insuring some (or more) competition; (2) will not unduly interfere with efficiency and progressiveness; (3) are politically and economically feasible.

Kaysen and Turner determine initially that "present law" is inadequate to deal with the problem posed by structurally oligopolistic markets. Despite the flurry of law review suggestion after *Alcoa*[26] and *American Tobacco*[27] that section 2 of the Sherman Act could now be utilized to attack the concentrated industries,[28] they contend—and probably correctly—that the "doctrine" of "conscious parallelism" will not permit prosecutions of oligopolists who, in a considerable number of industrial markets, "acting jointly, possess substantial degrees of market power . . . ." (p. 110).[29] They suggest, instead, a new approach—embodied in a new statute without criminal penalties—which would proscribe "unreasonable market power." (p. 77).

The Kaysen-Turner thesis is that a firm—or group of firms—possesses "market power when it [or they] can behave persistently in a manner different from the behavior that a competitive market would enforce on a firm [or firms] facing otherwise similar cost and demand conditions." (p. 75). When market power is held by a group it is likely that the power is the "collective attribute of a number of firms whose several actions have certain interrelations, and that, strictly speaking, one firm alone might not possess the power." (p. 77). A judgment that market power is exercised in a particular market depends upon a careful delineation of the market (pp. 101–02); whether or not prior efforts of courts and counsel have been adequate, this, at least, is not an unfamiliar task to antitrust students and practitioners. Since market power is basically a structural concept,[30] the

26. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

27. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

28. NICHOLLS, PRICE POLICIES IN THE CIGARETTE INDUSTRY 397 (1951); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947); Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947).

29. See pp. 108–09. See also the discussion in text following note 45 *infra*. The authors point out that remedies courts have been willing to grant, "frequently fail to make structural changes through dissolution, divorcement and divestiture." (p. 111). See the discussion in the text at note 93 *infra*.

30. Structure refers to "those conditions external to the firm which are relatively permanent or which change only slowly, and which affect, if they do not determine, the way the firm operates." (p. 59). But particular conduct is frequently a product of the structural features of a market—*e.g.*, "administered prices." The authors prefer describing as "conduct" only

market share of the group or individual firm must be established and other aspects of the market's structure investigated: the conditions of entry for new sellers and expansion of existing sellers;[31] the character and importance of product differentiation; the degree of independence of action among buyers and sellers. (pp. 71–75). But "conclusions about the functioning of any concrete market depend on the joint study of both structure and performance." (p. 61). "[W]hat the firm's performance has been . . . [is] the best evidence of what it can be." (p. 75). Moreover, in oligopolistic markets, relations among the existing large sellers must be examined to determine "whether the rival firms are acting so as to limit each other's market power, or whether they are acting so as to maintain a situation of considerable market power, exercised by all of them jointly." (pp. 104–05). Judgments about performance demand a direct examination of the efficiency dimensions of performance: "price-cost relations, output-capacity relations, capacity-demand relations, technical efficiency . . . ." (p. 105).[32]

The government prosecutor, a member of a newly created administrative agency,[33] will bring "unreasonable market power" actions in a newly created, special constitutional court. A presumption will substantially ease the Government's problem of proof: "Market power shall be conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of such sales." (p. 98). The authors are

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that which is "subject to alteration by injunction" (*ibid.*); administered prices, then, would be considered a structural condition.

31. Market conditions affecting entry include: optimum scale of the plant in relation to the size of the market and the actual scales of existing sellers; large absolute optimum size; barriers preventing free access to technology, such as patents, secret know-how and control of scarce, trained personnel; access to industrial supplies, access to capital, the character of distribution channels. (pp. 71–75).

32. See the discussion of these factors at pp. 62–67. The last, technical efficiency, is described as "production . . . by efficient methods ('on' the cost curve), in plants of efficient scale, and at efficient locations." (p. 67). "When these three sets of conditions are met, production is efficient in the sense that no reorganization of inputs would lead to greater outputs from the given bundle of resources." (*Ibid.*) For the same reasons they reject "progressiveness" as an independent standard for antitrust policy, see text & note 21 *supra*, they conclude that progressiveness should not be examined in determining whether market power exists.

33. A new prosecuting agency is suggested because better personnel could probably be attracted to a new agency, because a single function can be most efficiently performed by a group charged only with that duty, and, finally, "as between an independent agency and the Antitrust Division—we would prefer the former because we believe some degree of immunization from day-to-day political currents would produce a greater consistency in the development and application of the program." (p. 261).

"cautiously optimistic" that even if this presumption is "likely to be correct only in a bare majority of—or even fewer—cases, the application of the law to those cases where the presumption is not in fact true will cause no social harm, or will cause harm that is largely outweighed by gain in effective enforcement." (p. 99).[34]

Proof of market power alone will be insufficient to establish illegality. Three defenses will be available because the total abolition of market power in many markets would result in a significant reduction in the level of performance: "where economies of scale are such that only a very small number of sellers can survive"; "where market power rests solely on barriers to entry arising from the legal use of basic patents"; "where market power rests on the introduction of new processes, products, or marketing techniques." (pp. 78–79). None of these defenses should engender much opposition; for the most part, in fact, each of them might be recognized by the antitrust practitioner as more or less implicit in the "thrust-upon" exception to a monopolization charge.[35] Doubts will be resolved "in favor of reducing market power rather than maintaining performance" (p. 81) by placing the burden of proof of the reasonableness of market power on defendants.

Of course, "an increase in the number of competitors and a decrease in the relative market positions of the larger of them is usually a sufficient condition for the reduction of market power in any market." (p. 79).[36] Therefore, dissolution and divesti-

34. Kaysen and Turner would be "reluctant" to conclude that "there is a rational connection between the stated facts and the presumed result, so that the result is likely to be in fact correct in the vast majority or [*sic*] instances." (p. 99). They admit that the plausibility of any presumption rests upon a "careful definition of markets . . . [which] requires in many cases an examination of much the same economic evidence that is pertinent to a determination of whether or not market power exists. In short, the certainty contributed to these arbitrary tests is to a substantial extent delusive." (*Ibid.*) Yet they "are inclined to favor it on the ground that it would simplify proof in a large number of cases where fuller study would substantiate the conclusion that these percentage figures would suggest; and on the ground that the [newly created] enforcement agency, particularly with inevitably limited resources, would have the common sense to avoid inappropriate proceedings." (p. 268).

35. See pp. 19–20, 107–08; United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945). The authors admit that "the 'justifications' of market powers . . . closely resemble those suggested by Judge Wyzanski in *United Shoe*." (p. 268). It should also be noted that only the first is likely to be of any importance, especially in oligopolistic markets. The applicability of the others might well depend upon joint practices illegal in themselves. See text at note 38 *infra*.

36.

> Put crudely, the proposition is that the market with ten moderately large and thirty small firms will be much more competitive than the same one would be with four very large firms and thirty small ones. . . . Small numbers make it likely that each firm will serve a similar segment of the whole market. The larger the number, the greater is

ture—including vertical reorganization when necessary to make entry less difficult—will occupy a preferred position. Exceptions will be recognized only where the remedy would require dissolution of an existing plant, where divestiture would not result in the creation of viable firms with reasonable prospect for survival or where reorganization would result in a significant reduction in the progressiveness dimension of the firm's performance. (p. 80).[37] Again, the burden of proof on these issues would be on the defendant.

Finally, the authors' program includes standards for the regulation of conduct. Their formulation, not unlike the prohibitions of existing antitrust doctrine, would preclude arrangements—such as mergers, requirements contracts, exclusive dealing arrangements—which have a tendency to lead to an increase of market power or contribute to its maintenance, even though they might have important business justification.[38] Other kinds of conduct—such as price fixing, boycotts, tieing arrangements—would be prohibited by per se rules because they are "probably harmful whatever the market context in which they appear." (p. 90). Because a residuum of market power will not be affected by the program, some scope will remain for the regulation of conduct in terms of fairness; the price discrimination statute suggested by the authors offers an example. In many cases regulation of conduct will serve a dual function: "some practices are both unfair and contributory to the growth of market power." (p. 91).[39]

Antitrust Policy will exert a great influence upon antitrust law development. It is a major effort to translate the insights of

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> the likely diversity among firms: in costs, in the part of the market which they serve, in the range of products offered, in the kind and volume of expenditures devoted to innovation, in the expectations of executives concerning future changes in cost and demand. These diversities in turn increase the probability that some of the firms in the oligopoly group will find independent action rather than joint action advantageous, and so make less likely a pattern of action which approaches joint profit maximization.

(p. 115). The same reasons make it less likely that a well-functioning cartel can operate. Moreover, any reduction in absolute size of the largest sellers in a market will lower the entry barrier to new firms. (pp. 116, 73).

37. As to the last criterion, see note 21 *supra* and accompanying text. Moreover, "we doubt—to the point of perhaps striking it as a defense—that there would be many cases where dissolution of a firm would cause a permanent substantial loss of economies. (pp. 116–17).

38. "Regulation of such conduct requires fairly complete investigation of the market situation in which it occurs, though it may not be necessary to have as complete an investigation as is required for a proposal aimed at reorganizing market structure." (p. 89). See also pp. 127–36.

39. Injunctive remedies will play an important role even where reorganization remedies are given—both to abolish practices which may have contributed to the maintenance of market power, and to insure against unfair practices. See p. 118.

economists into a positive and complete program for legal doctrinal reform. But its impact is likely to be on theory and as a prototype. Not that the suggestions are necessarily unwise or infeasible! Rather, the existence, numbers and effectiveness of the antitrust hucksters will preclude serious congressional consideration of the authors' suggestions. The Public Utility Holding Company Act will serve as a case in point. Despite a vigorous campaign by the entire Roosevelt Administration,[40] section 11—the death sentence provision—was initially defeated in the House of Representatives.[41] The private utility hucksters were diligent and effective in opposition—indulging in everything from falsified messages to members of Congress to innuendoes as to the mental competence of the President. The Act finally passed only after a Senate investigation of the utilities' huckstering which, to one commentator at least, "seemed to bear out George Norris's old thesis that the utilities were the source of all corruption and David Lilienthal's contention that the power trust was out to take over the Government"; and even then a compromise was required to ameliorate the death sentence![42] All of this took place when the private utility holding companies were enjoying what can most charitably be described as something less than an enviable reputation.

But today we live in a different era; Elmo Roper tells us that "the average American admires bigness in business . . . ."[43] And almost every industry makes a serious effort to preserve and foster that "good image of bigness, the responsible use of power." The shocked public response to the "electrical company indictments"—which included everything from newspaper editorials to Chamber of Commerce proposals for a Code of Business Ethics—should have been sufficient to indicate that the majority no longer shares Adam Smith's suspicions.[44] With acceptance of this "image" of

40. Such an Administration campaign is certainly not to be expected for an "unreasonable market power" statute in times when "big business" representatives commonly fill important positions near the summit.

41. For a general background of the Act and a detailed history of the legislative battle prior to passage, see SCHLESINGER, THE POLITICS OF UPHEAVAL 302–24 (1960). The vote in the House "decisively rebuffed" President Roosevelt. *Id.* at 316.

42. *Id.* at 320. See also the description of the congressional campaign for a bill designed to "legalize" freight absorption after the *Cement Institute* case. Wallace & Douglas, *Antitrust Policies and The New Attack on the Federal Trade Commission,* 19 U. CHI. L. REV. 684 (1952).

43. Roper, *The Tales They Tell Tell the Tale,* Saturday Rev., April 18, 1959, p. 37.

It is true that "a bad image can be associated with bigness . . . if there is any suspicion of monopoly or price fixing. . . ." *Ibid.* Imagine the selling job that would be necessary to explain to the American public that the cigarette manufacturers are as "bad" as monopolists because they jointly possess "market power"!

44. "People of the same trade seldom meet together, even for merri-

American business has come more than deserved respect for the hucksters and added weight to their already influential voices in the Congress. In short, it is hard to believe that the book might become the foundation for immediate legislative action.

Nor should it! If we can accomplish under existing law the ends Kaysen and Turner seek, "antitrust enthusiasts" will be that much more secure from "the slings and arrows of outrageous" hucksters. After all, congressional inertia alone makes it much more difficult for even the most accomplished lobbyists to institute their own legislative modification than to oppose Kaysen and Turner's. And this "enthusiast," at least, is unwilling to conclude that "present law" cannot deal with the problems of structural oligopoly.

It does seem fairly certain by this time that it is neither always feasible nor wise to prosecute the major firms in oligopolistically structured industries for "*conspiring* to monopolize." It might be true that in *American Tobacco*[45] "there was practically no overt evidence of combination or conspiracy in developing . . . price policy" and that "the jury inferred such an understanding on the part of the big companies out of their continued course of action."[46] Yet later cases make it improper to conclude that "parallel action based on acknowledged self-interest within a defined market structure is sufficient evidence of illegal [conspiratorial] action."[47] One explanation, of course, is the accuracy of the prediction that "it will be a rare case, whatever the degree of monopoly present, that will again present the peculiarly radical price movements and wierd [*sic*] practices found in the tobacco industry in the 1930's."[48] In addition, antitrust defendants and their counsel have become much more sophisticated about explaining parallel industry action as individual responses to "market condi-

ment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." 1 SMITH, WEALTH OF NATIONS 192 (1776).

45. American Tobacco Co. v. United States, 328 U.S. 781 (1946). See generally NICHOLLS, PRICE POLICIES IN THE CIGARETTE INDUSTRY (1951).

46. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 581 (1947).

47. *Id.* at 584. More recently Dean Rostow has suggested a new method for attacking the oligopolistic industries—by suing one of the major firms as a "combination" under § 1 of the Sherman Act: "Any company whose history includes an episode of merger therefore faces the risk that it is a 'combination' . . . and a perpetual, standing, and incurable 'combination,' to boot. The mark of Cain is upon it." ROSTOW, PLANNING FOR FREEDOM 300 (1959). In view of the suggestions made later in this essay, it would be improper to object that this strains the statutory language. See text following note 53 *infra*. Whatever else might be said for and against Dean Rostow's suggestion, the proposal offered here appears to present no more obstacles to acceptance and fewer difficulties in implementation.

48. Rahl, Book Review, 43 ILL. L. REV. 421, 424 (1948).

tions"—and their sophistication has been reflected in company records and before juries.[49] Finally, and probably most important, judges and juries have occasionally been convinced by the explanations,[50] and the Supreme Court has shown no disposition to interfere.[51] As long as the Antitrust Division must cautiously allocate precious personnel and inadequate resources to a limited number of cases, it is too much to ask for a "big case" against the major firms in a major industry when the result is likely to depend upon the vagaries of a jury's verdict.

But it would be no more than usual lawyers' craftsmanship—if not, in this case, statesmanship—to mold the "monopolization" provision of section 2 to meet the exigencies of today's economic and industrial problems. Trading on a cliche which might well have been a casual bit of judicial huckstering, we should start with the proposition that the Sherman Act, "as a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[52] To this should be added awareness that "one of the peculiarities of the Sherman Act is the frequency with which, under expanding interpretations of the Supreme Court, the Act has successively been found to be amply effective to accomplish one after another of most things that

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49. See Davis, *A Trial Lawyer's Viewpoint*, 30 Wis. Bar. Bull., April 1957, p. 54 (1957), quoted in SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 360 (1958).

> The key to legality or illegality, in situations of the type suggested, is whether the corporate action complained of was taken unilaterally or as the result of an express or implied agreement with competitors. . . .
>
> It is not impossible for those responsible for the establishment of the client's prices, sales and distribution policies to make a study of such policies and to determine . . . what are the reasons therefor. It has occurred that such a study disclosed the client's ability profitably to change such policies. No matter what result obtains, if a record be made of the fact that the study was unilaterally made and of the conclusions reached as a result thereof, the trial lawyer will be in much better position to attack against the Government's claims rather than merely to deny their validity.

See also the advice offered the antitrust bar as to how oligopolists should change "administered prices" to avoid conspiracy charges. Schwartz, *Administered Prices, Oligopoly and the Sherman Act*, 12 ABA ANTITRUST SECTION REP. 17, 27–28 (1958).

50. See, *e.g.*, United States v. Arkansas Fuel Oil Corp., TRADE REG. REP. (1960 Trade Cas.) ¶ 69619 (D. Okla. 1960); United States v. Eli Lilly & Co., TRADE REG. REP. (1959 Trade Case.) ¶ 69536 (D.N.J. 1959); Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 201 F.2d 306 (4th Cir. 1953), *aff'd*, 346 U.S. 537 (1954).

51. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954). *Cf.* Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950), one of the infrequent cases in which an appellate court has reversed a jury verdict.

52. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933).

economists, publicists and even several presidents of the United States at one time or another have assumed were quite beyond the scope of the Act."[53] With this stock, it should not be difficult to concoct a recipe; it can whet the appetite, however, only if one recognizes that this is a formula for tomorrow's soup, not a description of today's menu.

Is it too late—or perhaps too early—to suggest that *any one* of the leading firms (in terms of market shares) in an oligopolistically structured industry may be "monopolizing" within the meaning of section 2? The first objection, of course, is verbal: "monopolizing," in common usage, is just not "oligopolizing." Yet it does not seem disingenuous to repeat that "in law as in economics, and despite the dictionary, monopoly is an affair of several sellers, as well as of one."[54] And, if competition is equally negligible when industries are oligopolistically structured, why should we not exploit an admittedly general and undefined term? After all, "we must never forget, that it is *a constitution* we are expounding"![55] This is not to say that any one of the companies in the *Tobacco* case had the market power independently to control price or exclude competitors; there is no need to deny that in many situations market power "is possessed not by one but by a group of firms and is dependent on the mutual interrelations of their behavior." (p. 76). Rather, we must recognize, as did the Supreme Court in *Columbia Steel,* that "the relative effect of percentage command of a market varies with the setting in which the factor is placed."[56] When any, *or all,* of the firms in a given industry *can consider every aspect of the market, including the size, strength and market shares of its, or their, competitors* and "behave persistently in a manner different from the behavior that a competitive market would enforce on a firm [or firms] facing otherwise similar cost and demand conditions" each and all of them may be found to be "monopolizing." (p. 75).

The number, market shares and conduct of its business "rivals"

53. Montague, *Proposals for the Revision of the Antitrust Laws,* in HANDLER, THE FEDERAL ANTITRUST LAWS 23, 62 (1932). Significantly, Montague continues: "Another peculiarity of the Act is that its periods of greatest growth have always immediately followed the periods when its critics have been most firmly convinced that the Act is hopelessly inadequate. History shows that the Sherman Act marches best and furthest to meet the changing conditions of economic life after it has been prodded and goaded by sincere critics who have become convinced that the Act has reached an impasse." *Ibid.*

54. Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. CHI. L. REV. 567, 584 (1947).

55. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

56. United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948). See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 49 (1955); Turner, *supra* note 18, at 295–96.

are important, if not essential, data with which a firm must deal in making business decisions. There is no reason why this data should not be relevant as well to a decision on the monopolization issue. If high profit margins, the ability to ration output in periods of high demand, as well as other evidence of barriers to entry,[57] are all indicia of monopoly power,[58] are they less so when they result from an individual firm's knowledge that its own conduct will be copied by the few other major firms in the industry? Certainly the authors seem to think that the "traditional" criteria of "monopoly power" provide the type of evidence which will be indicative, if not dispositive,[59] of the existence of "market power," whether individually or jointly held. In their draft statute, Kaysen and Turner suggest that market power may be proved by:

> (1) persistent failure of prices to reflect substantial declines of demand or costs, or to reflect substantial excess capacity;
> (2) persistence of profits that are abnormally high, taking into account such factors as risk and excess capacity; or
> (3) failure of new rivals to enter the market during prolonged periods of abnormally high profits or of persistent or recurrent rationing. (p. 266).

There is little that is new or surprising here; whatever we might think of the "morass of economic data in which . . . [trial judges] are now plunged,"[60] Kaysen and Turner's criteria have been the stuff of section 2 cases at least since *Alcoa.* As long as these factors may be shown to apply to an individual firm, does it matter—for purposes of "monopolization"—that they apply because of the willing and predictable cooperation of its oligopolistic brethren? The individual firm—market "leader" or willing follower—makes predictions and chooses among alternative courses of action as readily in this situation as it would if it had a much larger fraction of the market, a valid patent on an invention of consequence, or ownership of a sole source of essential raw materials.

In short, the market does not compel its results in an oligopolistic industry; rather, results are chosen by a single firm (or a

57. This is not to suggest that evidence of barriers to entry would be conclusive: "the existence of substantial barriers to entry in a particular market may not lead to the possession of market power by any of the sellers in it. The behavior of existing sellers may be such as to leave none with significant power." (p. 77). See also the text at note 85 *infra.*

58. See generally ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 50–55 (1955); Turner, *supra* note 18, at 296.

59. "The categories of evidence [quoted in the text, *infra*] are not exclusive, but probably indicate the most common indicia of substantial market power." (p. 267).

60. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343 n.1 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

number of such single firms) because of its knowledge of, and power in, the market in which it operates.

It seems neither unfair nor unusual to accomplish a desired result by this expansive interpretation of section 2. The expansion is not unlike Judge Hand's accomplishment in *Alcoa*. Nor is it more unorthodox than the suggestion, extensively and persuasively urged by Professor Turner himself, that the "relevant market" should be more restrictively delineated for section 2 cases which involve "attempts" or "conspiracies" to monopolize rather than "combinations" to monopolize or "monopolizations."[61] Of course, this "attenuation of the monopoly concept"[62] may be less difficult to justify: the notion of a "market" is more vague than the term "monopolization," and the problem of market definition has received relatively recent recognition as a matter of essential concern; moreover, the attenuation is indulged because "the kind of conduct that typically establishes the requisite 'specific intent' in attempt and conspiracy cases is clearly conduct which has no social or economic justification."[63] Nonetheless, that

61. See Turner, *supra* note 18.

62. *Id.* at 305. The argument is made that the attenuation accomplished by ignoring the effect of substitute products in the market is "the law." *But cf.* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 60 (1955): "As for monopolization through combination rather than by a single company's growth, the test is the same [as for 'monopolization']." The most that can be said is that the second *Yellow Cab* case (United States v. Yellow Cab Co., 338 U.S. 338 (1949)) and *Cellophane* itself (United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956)), leave the matter in doubt.

63. Turner, *supra* note 18, at 305. See the discussion of intent at note 78 *infra*. Some of the types of conduct described are predatory price-cutting and coercive refusals to sell.

> If defendants are attempting to drive someone out of the market by foul means rather than fair, there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes.

Ibid. But, as Professor Turner himself recognized elsewhere, "typically the restrictive effects [of particular kinds of conduct] will vary directly with the market power of the firm involved." *Id.* at 314. Ignoring substitute products in all "attempt" cases, therefore, involves value judgments about particular kinds of conduct without regard to their economic setting. Whether or not this is a good idea, it seems clear that the restriction of market delineation cannot be justified solely on the ground that the conduct element obviates any need for concern with "market power." To this extent, at least, Professor Turner's suggestion represents as much an innovation as the suggestion presented here.

It might be added that the authors' proposal, and the current Supreme Court view, would permit a *Cellophane*-type market analysis in "monopolization" cases. (pp. 101–03). There should be less objection, therefore, to an expansion of the meaning of "monopolization." *Cf.* Turner, *supra* note 18, at 308: "If conduct is to play so insignificant a role, there is good reason for not applying the law until the court is convinced that a company such efforts have been made, and—at least *Alcoa's*—subsequently accepted with some enthusiasm in the Supreme Court and many other quarters, indicates that it is not inherently improper to suggest this expansive interpretation of the language of the Sherman Act.

Alcoa thus provides a precedent for expansion; its restrictions should not be taken as the last word. We must reject Judge Hand's famous dictum that over ninety percent control of the aluminum market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[64] This is hardly a major hurdle. Even ignoring subsequent case law,[65] it is not unfair to attribute the statement to then still virulent precedent to which the *Alcoa* judges, sitting as a court of last resort, felt it necessary to pay at least some formal respect.[66] In any case, considering the acrobatics of the *Alcoa* market analysis,[67] the dictum must have given little comfort to prospective defendants with some smaller percentage of what they considered their "market." And even if some *Alcoa*-like arithmetic is deemed essential, we need only add to the market share of a single firm the shares of its fellows if the Government shows that the single firm makes business choices with reasonable confidence that its rivals will adopt identical courses. As long as the major firms are acting identically to maximize profits, then, each of them individually is exercising the market power which all of them would have exercised had they in fact "combined."

The *Alcoa* opinion does suggest a difficulty with applying "monopolization" to the concentrated industries that cannot be so easily sloughed. It is necessary to find an element of "deliberateness"—a purpose or intent to exercise the power to raise prices or exclude competitors.[68] The underlying policy is well known and frequently articulated; when a monopoly position is the " 'inevitable' consequence of ability, natural forces, or law,"[69] it should not be penalized. The classic statement is Judge Hand's:

[or companies] has a substantial degree of monopoly power over which the producers of reasonably interchangeable substitutes have only a slight check."

64. United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).

65. See Turner, *supra* note 18, at 292–97; Rostow, *Monopoly Under The Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 763–76 (1949).

66. United States v. International Harvester Co., 274 U.S. 693 (1927); United States v. United States Steel Corp., 251 U.S. 417 (1920).

67. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 587 (1947).

68. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 55–60 (1955); United States v. Griffith, 334 U.S. 100, 107 (1948).

69. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 57 (1955).

> 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: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.[70]

Without belaboring complete restatements of the doctrine[71] it should suffice to suggest that the offense of monopolization is not complete without "some kind of conduct which conceivably the offender could have eschewed." (p. 91).

A good argument might be made that *Alcoa* did away with this requirement;[72] it is certainly easy to agree with one member of the Attorney General's Committee that the *Report's* exegesis of *Alcoa* expresses the "deliberateness" requirement of section 2 "in terms of an intent which in itself can scarcely be meaningful."[73] But we need not go so far. Oligopolies may be attacked under section 2 as long as one of the companies, or all of them, utilize methods which are "exclusionary" in fact or intent and are not "eco-

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70. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

71. See Turner, *Antitrust Policy and the Cellophane Case, supra* note 18; Johnston & Stevens, *Monopoly or Monopolization—A Reply to Professor Rostow*, 44 ILL. L. REV. 269 (1949); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 770–76 (1949); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341–43 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Some of the cases are compiled in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 55–57 (1955).

72. United States v. Aluminum Co. of America, 148 F.2d 416, 429–31 (2d Cir. 1945). Turner, *supra* note 18, at 292:

> With the court of appeals' narrow definition of the market was coupled an objective definition of purpose and intent that came close to making monopolization out of any monopoly maintained over a substantial period of time. The court conceded a difference between monopolization and monopoly; the unwitting monopolist would not violate the act. . . . Yet, in holding that Alcoa was not "the passive beneficiary of a monopoly," the court cited as evidence of the company's "determination to maintain the control" its constant expansion of capacity in anticipation of increased demand and before others could enter the field. . . . But the line between "skill, foresight and industry" and "expanding capacity in anticipation of increased demand" was dim indeed.

73. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 56 n.211 (1955). Kaysen and Turner comment: "To be sure, intent can be read to mean that any firm with market power intends to have it and use it, and therefore any firm with market power violates Section 2 of the Sherman Act. But this is a strained construction, and projection of the rationale of cases like *Alcoa* and *Tobacco* to sustain it appears unwarranted." (p. 93). See text at note 83 *infra*. These considerations—combined with the fact that "we can neither predict market performance from market structure, nor can we tell from structure alone how competitive the processes of the market are" (pp. 60–61)—indicate the difficulty with accepting Professor Fuchs' suggestion that remedial action be based in many instances on structural evidence alone. See Fuchs, Book Review, 109 U. PA. L. REV. 146, 148 (1960).

nomically inevitable," even though they may be "honestly industrial."[74]

The authors even question this traditional, "more exclusionary than necessary," test of "deliberateness." They point out "an *Alcoa* decision based on the finding that Alcoa's conduct in respect to power contracts, bauxite sites, and the Duke transaction at Saguenay was exclusionary, would hardly have been surprising." (p. 107). It is true that the district court's findings obviously "ran contrary to . . . [the court's] sense of the facts." (*Ibid.*) But these observations cannot settle the issue; we may accept them and still refuse to return to the old-fashioned, now discredited, "abuse" theory.[75] Even the authors "advisedly call weak enforcement" (p. 20) the periods now infamous for the series of cases of which *United States v. United States Steel Corp.*[76] is "the most extreme expression."[77]

If "deliberateness" functions to preclude liability for those "who do not seek, but cannot avoid" monopoly power,[78] the oligopo-

74. See United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341–45 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See generally American Tobacco Co. v. United States, 328 U.S. 781 (1946).

75. Turner, *supra* note 18, at 292: "At any rate, *Alcoa* clearly consigned the abuse theory of monopolization to limbo." *But cf.* Johnston & Stevens, *Monopoly or Monopolization—A Reply to Professor Rostow*, 44 ILL. L. REV. 269 (1949). See Levi, *A Two Level Anti-Monopoly Law*, 47 Nw. U.L. REV. 567 (1952). The quotations in the text indicate the extent to which Kaysen and Turner's estimates of "existing law," especially with respect to the central notion of "market power," are consistently conservative and restrictive. Their treatment of the *United Shoe* contribution to "deliberateness" is another example:

> Again, the ease with which this ["less competitive than possible"] standard can be transfered to other cases is questionable. Not every single-firm monopoly has an origin legally protected from scrutiny by the trial court; without this, *United Shoe* might have been another *DuPont Powder* or *International Harvester* case. Further, the identification of practices not dictated by the circumstances of the market, and more restrictive of competition than feasible alternatives open to the firm, cannot always be made with the clarity that the special circumstances of United's leasing program made possible." (pp. 107–08).

Indeed, although the authors find the decided cases inadequate to deal with the concentrated industries, their consistent conservatism leads one to suspect that they are seeking to foment efforts to expand "existing law" to accommodate a "market power" standard. See note 53 *supra*.

76. 251 U.S. 417 (1920).

77. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945). Judge Hand explains the case as an extreme example of the "thrust-upon" exception. See Dean Rostow's suggestion that the early cases stated a market structure test of illegality which was later obfuscated by *United States Steel* and *International Harvester*. ROSTOW, PLANNING FOR FREEDOM 295 (1959); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 770–71 (1949). See also Turner, *supra* note 18, at 286–87.

78. United States v. Aluminum Co. of America, *supra* note 77, at 431.

listically structured industries may be attacked under section 2 without unfairness. Old friends will be useful on occasion. Evidence of loosely knit cartels and predatory practices will, as always, convert each major firm's "monopoly" to monopolization.[79] But more subtle means will also suffice. If an individual firm, with awareness that the others are doing likewise, indulges in conduct which (as a firm or—what is more likely—an industry practice) will create or maintain barriers to entry, it is acting "deliberately." Such conduct includes any voluntary practice affecting entry:[80] existence of a closed patent pool, acquisition of sources of scarce industrial supplies, extensive product differentiation, heavy ("mutually stultifying") advertising[81] and selling expenses, integration of distribution channels.[82] The Government should not be permitted to rely upon those indicia of market power—high

79. Of course, where one firm's predatory practices cannot be attributed to all of the major firms in the industry, only that firm would be guilty of "monopolizing." See Professor Turner's analysis of the "attempt" cases. Turner, *supra* note 18, at 304–07. *Cf.* the evidence of business reprisals and punitive boycotts in FTC v. Cement Institute, 333 U.S. 683 (1948). See also Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), *aff'd per curiam by an equally divided Court, sub. nom.*, Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 210–21 (1955).

80. Although size and optimum size in relation to the market are barriers to entry, they should not suffice to prove "deliberateness"; they are essentially neutral. Size alone is just too easily explained by "superior skill, superior products, natural advantages, . . . economic or technological efficiency . . ." to permit inferences as to exclusionary conduct. See United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Needless to say, this does not alter the famous *Swift-Griffith* modification of the *U.S. Steel* dictum as to size when the issue is individual monopolization: "But size is of course an earmark of monopoly power." United States v. Griffith, 334 U.S. 100, 107 n.10 (1948). And see United States v. United Shoe Mach. Corp., *supra* at 343 n.1.

81. See the discussion of advertising—one of the facets of "the appropriateness of expenditures on selling and promotion"—as an aspect of "progressiveness." (pp. 69–71). Although the authors conclude that progressiveness factors should not be considered in determining market power or its unreasonableness, see note 21 *supra*, that does not prevent its being used to determine "deliberateness." This is especially true since advertising and product differentiation have a direct bearing on ease of entry. See p. 74.

82. *Alcoa* and *United Shoe* together seem to indicate that substantial forward integration by acquisition (whether or not it would constitute a "combination") will make the § 2 case relatively easy for the Government. See Turner, *supra* note 18, at 305–07.

Professor Turner's basic objection to relying upon "conduct" in defining the offense of individual monopolization is based upon the vagueness of the concept of "bad conduct" and the fact that the badness of conduct may depend upon the economic context in which it occurs. *Id.* at 314–17. The objection is met in the suggestion offered here because *Cellophane* is accepted and because the conduct relied upon is adopted by a group when it is, and collectively knows itself to be, the dominant force in the market.

price-cost margins and non-price rationing—from which, in turn, an inference of barriers to entry can typically be drawn; this route leads back to the expansive view of *Alcoa* and would deprive "deliberateness" of any separate meaning.[83]

The "conduct" evidence, it should be noted, serves multiple purposes. It will be relevant in establishing joint "market power" or "monopoly power"—as useful for the purpose as proof of optimum size, market share, price-cost margins, and non-price rationing in periods of high demand.[84] The evidence will also be relevant to the issue of "deliberateness," as proof of the voluntary adoption of business methods "more exclusionary than necessary," which completes the offense in the *United Shoe* context. Finally, it will be important to establish the prerequisite of a finding that the oligopoly is a monopoly—economically as well as legally: an inference of "mutual awareness of jointly held monopoly power." But the Government will also be able to establish this last inference by the performance data which lead to a conclusion of market power. "Mutual awareness" may be established by evidence of long-continued, industry-wide practices such as price leadership, rationing, basing point pricing, consistent failure to lower prices when there has been substantial excess capacity or industry-wide cost declines. Or "mutual awareness" might be indicated when sellers are "offering somewhat different products, and simply failing to invade each other's product lines and price aggressively." (p. 93 n. 60).[85] As long as "deliberateness" and "mu-

83. See notes 72 & 73 *supra*.

84. See the reliance on long term leases as an indication of market power as well as "deliberateness" in United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343, 344 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

85. The objection might be made that although "deliberateness" has retained some independent significance, this is not true of "mutual awareness" because it may be proved by evidence of the indicia of market power. Yet common sense seems to call for this result. Non-price rationing is some evidence of monopoly power because under competitive conditions new firms would enter when existing firms are not adequately meeting demand. In the other dimension, since we are speaking of an industry in which no single firm has ultimate power in economic terms, no firm is likely to fail to expand unless it is reasonably convinced that the others will not. The failure of each to expand, then, must be probative of the fact that each is taking all of the others into account in making decisions.

Another objection is that these standards will require impossibly long and involved trials. Kaysen and Turner make suggestions for lightening the burden of trial of the issues in a "market power" proceeding. (pp. 262–66). Dean Rostow maintained that an "economic study" of an industry could be accomplished more expeditiously than if the trier were concerned with "specific intent." Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 779 n.78 (1949). The conduct required to prove "mutual awareness" here is provided by inferences from performance of firms in the industry—that is, from evidence which would be marshalled in any event to determine the issue of monopoly power. To that extent, at least, the trial should not be lengthened.

tual awareness" continue to have vitality, application of section 2 fits within the traditional framework. Each company is instructed, to adopt the football coach's exhortation: "Get out there" in the market "and compete!" We can assume that it is true that—

> the uncertainties of the law in defining what "monopolizing" conduct is may act to restrain efficient performance by large firms which are not now possessors of putatively illegal market shares. General Motors and Alcoa, for example, may fear to lower prices and expand capacity, even though they may be (and are widely believed to be) more efficient than their rivals, for fear that such action will lead to large increases in their market shares and subsequently to liability as monopolizers under section 2. (p. 111).

The answer, under the proposed interpretation of section 2, is clear; General Motors will be on notice, whatever its share of the market, that as long as the automobile "market" is structurally an oligopoly, it may *escape* liability only by seeking to pass on to consumers its greater efficiency and by expanding its capacity as demand increases.[86]

A major objection to this approach, equally applicable to the effort to attack oligopolies as "conspiracies to monopolize," is that in some of the concentrated industries the conduct made illegal has been "thrust upon" the major defendants. Thus, in the tobacco industry the market structure is such that it leaves "sellers no policy short of joint maximization that would be tolerable or justifiable in business terms . . . ." (p. 105). The statement is confusing unless it means merely that as industry members become less constrained by competition (*i.e.* possess more and more market power) and become more aware of their joint power, joint maximization policies become "the natural, normal and intelligent consequences of an oligopolistic market structure."[87] But this is hardly equivalent to describing the conduct as "inevitable." No matter how sensible it might seem to economists, the man in the street, as well as the judge on the bench, will find it difficult to accept the argument made by an official of one of the *American Tobacco* defendants that "his company thought the price rise was a mistake, but felt that unless it followed suit it would have less

86. General Motors might have to discontinue some of its arrangements with dealers. Any agreements which result in vertical integration sufficient to create or maintain barriers to entry might cause difficulty. It hardly seems unfair—or so "uncertain" as to make General Motors' lawyers hesitate in counseling—to permit the major automobile manufacturers to enter requirements contracts with their dealers but to preclude the imposition of exclusive dealing agreements. *Cf.* Standard Oil Co. v. United States, 337 U.S. 293 (1949); Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Illegality under the Clayton Act,* 98 U. PA. L. REV. 10 (1949).

87. NICHOLLS, PRICE POLICIES IN THE CIGARETTE INDUSTRY 401 (1951).

money than the others to spend for advertising, and thus be in a position of competitive disadvantage."[88] It is common sense to believe that if a company ignores its oligopolistic rivals, consistently seeks to lower costs and prices, and expands capacity to meet demand, its long run profits will not be significantly less than would result from policies designed to maximize profits in light of the conduct of its rivals. Certainly, the basic philosophy of the antitrust laws would permit us to ignore *any* advantage to the firm which the latter course might entail.[89] Moreover, the authors tell us that economists' "analytic apparatus is inadequate to the task" of describing "to what extent any observed pattern of performance was compelled by the structure of the market, and to what extent it was the result of policy choices by firms, which could well have been other than they were." (p. 60). Under the circumstances, the compulsion to "individual enterprise" suggested here should receive the benefit of the doubt. Of course, if all of the firms are "behaving rivalrously in such a way as to prevent any one from enjoying any significant degree of market power for more than the very short run" (p. 104), none of the companies is "monopolizing"; and this will appear from the evidence of industry performance which the Government will have to introduce on the issue of monopoly power.[90]

With these notions of "deliberateness" and "mutual awareness," it might not even be improper to retain the criminal sanctions of the Sherman Act. The authors would preclude criminal penalties, however, because of their view of the inevitability of the exercise of market power in many markets: "It is hardly in the spirit of

88. Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. CHI. L. REV. 567, 582 (1947). See American Tobacco Co. v. United States, 328 U.S. 781, 805 (1946).

89. *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945):

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them.

90. There is always the risk that the members of the industry might be adjudicated as violators of § 2 even though they have in fact "competed" rather than jointly maximized. But there is no *more* risk of error under the "new" § 2 proposed here than there is under the old one, or, for that matter, under a "market power" standard.

The approach to § 2 suggested here does not, of course, obviate the problem of disincentives. At least it can be said that this suggestion does not make the problem any more difficult than Kaysen and Turner's market power proposal. See note 21 *supra.* Their proposal has its dissenters on this score. See Dean Mason's preface to ANTITRUST POLICY at *xix.*

our legal tradition to apply criminal sanctions to someone because of a situation in which he finds himself willy-nilly." (p. 91). But the existence of criminal penalties does not destroy the efficacy of the Sherman Act as an enforcement tool. In the first place, we should be able to rely upon the good sense of the Government not to prosecute criminally in the oligopoly situations; conviction of the corporations can result in no effective equitable remedy, and fines can hardly be considered substantial when levied against the defendants we are concerned with here.[91] If this is not adequate protection against arbitrary prosecution, nothing precludes a suggestion, by the court which expands "monopolization," that a criminal prosecution would require some "specific intent." This suggestion might not be a bad idea even for the traditional instances of individual monopolization.[92]

One of the major reasons the authors advance for preferring a new statute is that "remedy orders in cases involving large firms which singly or jointly dominate particular markets frequently fail to make structural changes through dissolution, divorcement, and divestiture." (p. 111). The observation seems to be accurate, even if its explanation is open to some question.[93] Others have

91. The authors themselves recognize that some faith must be placed in the wise discretion of enforcement officials. See note 35 *supra*. See also Turner, *supra* note 18, at 316 n.84. *But see* American Tobacco Co. v. United States, 328 U.S. 781 (1946). As to the effect of fines, see Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 588 (1947): "The small fines of the *Tobacco* case are an almost comic consequence for such a major piece of litigation."

92. *But cf.* Northern Sec. Co. v. United States, 193 U.S. 197, 401-02 (1904) (Holmes, J., dissenting):

> The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort.

93. The authors suggest that "the caution of courts in applying what are considered drastic remedies is natural, given both the vagueness of the standard of liability and the tremendous area of discretion in making remedies, not in any way limited or guided by the legislation." (p. 111). See also United States v. United Shoe Mach. Co., 110 F. Supp. 295, 347-48 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). In part, however, as the authors seem to recognize (p. 109), the problem has been that the Government has not proposed feasible dissolution plans in situations where they could have been devised. In addition, Government counsel have not been astute to educate the judges as to the importance of dissolution in the oligopolistically structured industries. This seems to be the most logical (or perhaps only the most optimistic?) explanation of the Supreme Court's remark in United States v. National Lead Co., 332 U.S. 319, 352-53 (1947): "There is no showing that four major competing units would be preferable to two, or . . . that six would be better than four. . . . To

recognized the need for remedies which "fit the crime."[94] Little more can be added. If effective enforcement of competition in the concentrated industries cannot be achieved—either because no "bold, original court"[95] will apply section 2 to them or because that court will not provide the essential remedy—we should look to Congress for help. There is some indication, despite the *Attorney General's Report's* not so subtle huckstering on the subject,[96] that divestiture relief may be more easily obtained in the future. Of course, old shibboleths have not lost their vitality: "punishment for past transgressions" continues to be a rallying cry when the Government seeks the "drastic" remedy; appellate judges will not soon lose the knack of placing trial court discretion beyond dispute when the result below is to their liking;[97] the three objectives of divestiture stated in *Schine*[98] have been, and often will be, raised to the status of *sine qua non*.[99] Despite all of this, it

separate the operating units of going concerns without more supporting evidence than has been presented here to establish the need for, or the feasibility of, such separation would amount to an abuse of discretion." This is not to suggest that other considerations, and even other theories, might not have been operative—in *National Lead* and other cases.

94. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 588–89 (1947). See also Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 182–83 (1947).

95. United States v. United Shoe Mach. Co., 110 F. Supp. 295, 343 n.1 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

96. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 353–56. Dean Rostow and others felt it necessary to express their concern "that the tenor and emphasis in this section is liable to be misconstrued. There is nothing special about the remedy of busting trusts." *Id.* at 356.

97. Mr. Justice Frankfurter objected in the *Paramount* case to the majority's decision overruling the trial court and ordering divestiture. United States v. Paramount Pictures, Inc., 334 U.S. 131, 178–81 (1948) (dissenting opinion). In International Boxing Club, Inc. v. United States, 358 U.S. 242 (1959), where the majority affirmed the trial court's divestiture order, Mr. Justice Frankfurter commented:

> While I have heretofore expressed views in favor of the almost controlling deference to be paid to a District Court's considered formulation of the provisions appropriate to a decree . . . those views have not prevailed . . . and this Court has felt free to modify and eliminate provisions of an antitrust decree, particularly when a single judge has imposed an unconventional and drastic remedy.

Id. at 263 (dissenting opinion).

Most recently, in the *DuPont-G.M.* appeal, the same Justice, again in dissent, criticised another reversal of the trial court's refusal to order divestiture: "Certainly we ought not to reverse the carefully wrought results of a conscientious trial judge without a showing amounting almost to a demonstration that he exceeded the fair limits of judicial choice which this Court explicitly reposed in him." United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 372 (1961) (dissenting opinion).

98. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128–29 (1948).

99. See, *e.g.*, United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 366 (1961) (dissenting opinion).

may not be too optimistic to believe that *International Boxing Club*[100] and *duPont-G.M.*[101] indicate some sympathy, by the Supreme Court at any rate, for divestiture. This much is sure: to the extent that there is a "traditional statement of the law" of divestiture, in *duPont-G.M.* it was expressed in the dissenting opinion! Although the dispute concerned a remedy for violation of section 7 of the Clayton Act, the prevailing opinion contains apparently more than casual dicta applicable to section 2 cases:

> The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it.
>
> . . . .
>
> But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.
>
> . . . .
>
> Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control. . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.
>
> . . . .
>
> We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.[102]

But it remains to be seen whether divestiture will be so easily approved when the "monopolization" involves neither "abuses" nor the patent restraints on existing and potential entrants of a *United States v. Paramount Pictures, Inc.*[103] The judicial conserv-

100. International Boxing Club, Inc. v. United States, 358 U.S. 242 (1959).

101. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961). If it is thought that trial courts might be more hesitant, the Supreme Court plurality also indicated that they stood ready to police their decisions: "the decree was fashioned in obedience to the mandate which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our mandate was scrupulously and fully carried out." *Id.* at 325. Moreover, "we assign to the District Courts the responsibility *initially* to fashion the remedy, but recognize that while we accord due regard and respect to the conclusions of the District Court, we have a duty ourselves to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws." *Id.* at 323.

102. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 323, 326, 329–31, 334 (1961).

103. 334 U.S. 131 (1948).

atism espoused by Judge Wyzanski is not without justification.[104] Reliance upon Congress has its own risks. Since a "divestiture" statute is likely to incur as much huckstering opposition as the complete revamping Kaysen and Turner suggest, it would be in order to seek the greater modification. It is also likely that, even ignoring the hucksters, Congress will require as much, if not more, convincing of the propriety of divestiture as a normal remedy; the Antitrust Division has no excuse, therefore, for not trying initially to find that "bold, original court."

104. United States v. United Shoe Mach. Co., 110 F. Supp. 295, 347–48 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).