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Consciously Parallel Action in Restraint of Trade

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CONSCIOUSLY PARALLEL ACTION IN RESTRAINT OF TRADE

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Economic theory as a tool for the solution of social problems in the markets for goods and services is useful only if it can be demonstrated logically how the theory is applied to the specific factors of any given practical situation. As applied to criminal prosecution under the federal anti-trust laws this postulate is stated: "Guilt cannot be inferred from an unsupported economic theory."[1] It is the purpose of this paper to analyze the application of the economic theory of oligopoly to the analogous legal doctrine of consciously parallel action in restraint of trade.

The economic theory of oligopoly explains how, in a market of only a few firms, these firms may adopt price-output policies like or similar to those which would result if they combined to restrain trade (a monopoly) and how they are able to accomplish this without an actual or tacit agreement. The legal doctrine of conscious parallelism of action developed as an extension of cases decided under Section 1 of the Sherman Act, which makes conspiracies or agreements in restraint of trade illegal. This doctrine in effect holds that like marketing policies of the firms in a few-firm market resulting in undue restraints of trade are illegal, even though the classical requisite of a conspiracy or agreement is not present. It is the transference of the inductive conclusions of the economic theorist to the deductive application of legal doctrine that is investigated here.

ECONOMIC BACKGROUND

The economic model of oligopoly describes a market in which the number of sellers are few.[2] Fewness, for purposes of a more detailed general definition, cannot be stated numerically, but only operatively. It is thus the market structure, in this case the external interdependence which occurs when firms in the market are

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1. Maryland & Virginia Milk Producers Ass'ns v. United States, 193 F. 2d 907, 917 (D.C. Cir. 1951); see Dession, *The Trial of Economic and Technological Issues of Fact,* 58 Yale L. J. 1019, 1243 (1949).

2. The correlative term denoting a market in which the buyers are few is oligopsony. All the subsequent discussion is applicable to either oligopolistic or oligopsonistic markets. For 1947 statistics on the large number of manufacturing industries in which a few firms made a major portion of sales, see H. R. Comm. on the Judiciary, Part 2B (Sen. Doc. No. 14, 81st Cong., 1st Sess. 1950) 1436 *et seq.*; see also Nat. Resources Comm., The Structure of the American Economy, 248-259 (1939).

few, that is the basis of the classification. The four essential conditions to an oligopolistic market situation are:[3]

1. Two or more firms in the market.
2. Absence of agreement or tacit agreement among the firms.
3. Each firm, in determining price-output policy, takes into account its direct influence on price.
4. Each firm, in determining price-output policy takes into account its indirect influence on price.

The first two conditions differentiate oligopoly from monopoly. If there is only one firm in the market or a few firms that combine, the result in terms of rational profit maximization can only be a monopoly price. In the monopoly case, the firm or group face an estimable demand function. This, together with the cost function or functions, allows determination of the output which will maximize monopoly profits. This is not necessarily true in the oligopoly case, as will be shown below.

The third condition differentiates oligopoly, and the other forms of imperfect competition, from the competitive model. The firm is aware that it cannot sell an unlimited amount of product at the market price; it can increase sales only at a lower price. If the firm has an estimable demand function at all, it is aware that its sales vary inversely to its price. Most firms in the economy not dealing on organized exchanges meet this condition.[4]

The fourth condition differentiates oligopoly from other forms of imperfect competition. Not only is the firm aware that it has an influence on price (condition 3), but it is also aware that the other firms selling like or similar products consider it of such significance in the market that they will react to changes in output-price policy of the first firm. Each firm in such a group can estimate its most profitable marketing policies only after making a conjecture as to the reactions of the other members and their effects upon the market. This recognition by firms of both their direct and in-

3. Chamberlin, Theory of Monopolistic Competition 31 (4th ed. 1942). For a statement of these conditions in terms of cross-elasticities of demand, see Triffin, Monopolistic Competition and General Equilibrium Theory 104 (1941). See also Fellner, Competition Among the Few 3-50 (1949); Machlup, Economics of Sellers' Competition 347 *et seq.* (1952).

4. Sraffa, *The Laws of Returns Under Competitive Conditions,* [1926] Economic Journal 535-550; Burns, The Decline of Competition 3 (1936); Wilcox, Competition and Monopoly in American Industry 5 (T.N.E.C. Monograph 21, 1940); Florence, The Logic of British and American Industry 121 *et seq.* (1953).

direct influence on price may be characterized as recognized circular interdependence in pricing.[5]

The price and output conditions that will prevail in an oligopolistic market depend upon both the nature of the product and the structure of plants and firms in the particular market. Dynamic market factors such as a rapidly changing technology[6] or easy entry of new firms into the market[7] may result in aggressive price or product rivalry.[8] The market effect of such rivalry may approach the competitive model.[9] But, absent significant dynamic forces, oligopolistic interdependence implies non-aggressive policies. The Chamberlinian thesis is that when the firms are few, so that each will take account of his total influence upon price, direct and indirect, "the equilibrium result is the same as though there were a monopolistic agreement between them."[10]

One of the simplest of oligopolistic models will illustrate the Chamberlinian theory. Given like or similar cost functions, the conjectural interdependence of the firms manifests itself as a disinclination to price rivalry. By experience each firm has learned that if it cuts price, the others will follow, and the initial price cutter will not gain sales from the others. Each has also learned that price raises will not be followed. The result is a rigidity of prices and insensitivity to changes in economic factors in the market.[11] The joint profit maximization of rational oligopolists in their individual price decisions will thus produce non-competitive market

5. Nicholls, Imperfect Competition within Agricultural Industries 114-131 (1941).

6. Stocking and Watkins, Monopoly and Free Enterprise 106-107 (1951); see Jacoby, *Perspectives on Monopoly,* 59 J. Pol. Econ. 514, 520 (1951); Conant, *Competition in the Farm Machinery Industry,* 26 Journal of Business 26, 34-36 (1953).

7. Triffin, *op. cit. supra* note 3, at 117-123; Edwards, Maintaining Competition 186-248 (1949); Fellner, *op. cit. supra* note 3, at 161-162.

8. Cassels, *Excess Capacity and Monopolistic Competition,* 51 Q. J. Econ. 426-443 (1937).

9. Clark, *Toward a Concept of Workable Competition,* 30 Am. Econ. Rev. 241-256 (1940); Markham, *An Alternative Approach to the Concept of Workable Competition,* 40 Am. Econ. Rev. 349-361 (1950); Adelman, *Effective Competition and the Antitrust Laws,* 61 Harv. L. Rev. 1289, 1291-1304 (1948); Bowman, *Toward Less Monopoly,* 101 U. of Pa. L. Rev. 577, 631-641 (1953).

10. Chamberlain, *op. cit. supra* note 3, at 48.

11. Sweezy, *Demand Under Conditions of Oligopoly,* 47 J. Pol. Econ. 568-573 (1939); Hall and Hitch, *Price Theory and Business Behavior,* Oxford Economic Papers No. 2, 12-45; *cf.* Stigler, *The Klinky Oligopoly Demand Curve and Rigid Prices,* 55 J. Pol. Econ. 432-449 (1947); Sen. Doc. No. 13, 74th Cong., 1st Sess. (1935); Means, *Notes on Inflexible Prices,* 26 Am. Econ. Rev., Supp. 29 (1936); Neal, Industrial Concentration and Price Inflexibility (1942).

consequences.[12] The market effect of oligopoly will tend toward the monopoly model, depending upon the degree of certainty with which each firm can conjecture the reactions of its rivals.[13]

Since the power to influence a group of rival firms by one's own price and product changes is characteristic only of a non-competitive market situation, each firm in an oligopolistic market is said to be exercising some monopoly power.[14] Price and marketing policies are, of course, adopted with a recognition of this power. And, profit maximization in such a market, in the absence of dynamic factors of market change, tends to result in a market price approaching the monopoly one. It is in this manner that firms acting independently can create the same market result as a price fixing agreement. The firms' profits will tend to be proportional to their ability to "get along" with the other firms in their market.[15] Price cutters and "chislers," it is said, tend to "spoil" the market. Such aggressive marketing policies upset the oligopolistic equilibrium that has resulted from each firm's response to the existence of its monopoly power.

The above explication of oligopoly as an economic model distinct from conspiratorial monopoly is demonstrative of one basic fact; the difference is not one of kind, but of degree. As Professor Machlup has stated in the consideration of collusion in an oligopolistic market, the question "is not one of 'whether,' but of 'how much'."[16] Reliance on similar expectations to regiment a market or the signing of a formal agreement to do so can be viewed as merely different types of collusion.[17] They are distinguished only by the degree of confidence with which a member of the group can rely on

12. Fellner, *op. cit. supra* note 3, at 120-141. For an analysis of another common oligopoly model, see Markham, *The Nature and Significance of Price Leadership,* 41 Am. Econ. Rev. 891 (1951); Kaysen, *Collusion Under the Sherman Act,* 65 Q. J. Econ. 263 (1951); Handler, A Study of the Construction and Enforcement of the Federal Antitrust Laws 42 (T.N.E.C. Monograph 38, 1941).

13. Chamberlain, *op. cit. supra* note 3, at 51-53; Machlup, *op. cit. supra* note 3, at 414-448; Robinson, Monopoly 24-30 (1941); Von Neumann and Morgenstern, The Theory of Games and Economic Behavior (2d ed. 1947).

14. Machlup, *op. cit. supra* note 3, at 350; Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power,* 1 Rev. Econ. Studies 157 (1933).

15. Position in the market, as manifested by business planning for security against price wars, is one of the major aspects of oligopoly pricing. Rothschild, *Price Theory and Oligopoly,* 57 Economic Journal 299, 308-319 (1947); *cf.* Conference on Price Research, Cost Behavior and Price Policy 275 (1943).

16. Machlup, *op. cit. supra* note 3, at 436-437; Stocking and Watkins, *op. cit. supra* note 6, at 89-91.

17. Adelman, *supra* note 9, at 1322; Sen. Doc. No. 27, 81st Cong., 1st Sess. 57-58 (1949).

his rivals not to violate the adopted policies and initiate aggressive market policies.

Oligopoly which has resulted in a non-competitive market condition, being collusive in nature, may be called collusive oligopoly. This new concept presented to the agencies charged with enforcing competition a new means to attack multi-firm monopolistic practices.[18] To create a legal concept analogous to collusive oligopoly and introduce it into the maintenance of competition has put a strain on the existing narrow legal categories into which the Supreme Court has segmented the anti-trust laws. Thus, conscious parallelism of action has had to be imported into the law by a gradual lessening in the burden of proving conspiracy,[19] although it is really collusion of a different, more subtle kind.

THE RULE

The point of departure in the development of consciously parallel action in restraint of trade as a legal doctrine is two cases under Section 1 of the Sherman Act in which some evidence of a preconceived plan still remains. In both the *Interstate Circuit*[20] and *Masonite*[21] cases, there was evidence of tacit conspiracy sufficient for conviction, followed by the concert of action of the firms in joining the plan. In the *Interstate Circuit* case, agreement was instigated by a form letter from defendant Interstate, owner of virtually all the first-run motion picture theatres in six Texas cities, to each of the eight major distributors of motion pictures. The letter invited a plan to market films which resulted in a series of contracts between Interstate and each distributor. They provided that in licensing Class A pictures to second run theatres, the dis-

18. See Mason, *Monopoly in Law and Economics*, 47 Yale L. J. 34-49 (1937) for a discussion of the differences in the connotations of monopoly in law and economics that have lessened the effectiveness of the antitrust laws; *cf.* Adelman, *supra* note 9, at 1304-1327; as to the effectiveness of monopoly prosecutions, see Levi, *The Antitrust Laws and Monopoly*, 14 U. of Chi. L. Rev. 153, 181 (1947), and dissent of Justice Douglas in United States v. Columbia Steel Co., 334 U. S. 495, 536 (1948).

19. Milgram v. Loew's, Inc., 94 F. Supp. 416, 419 (E.D. Pa. 1950), *aff'd*, 192 F. 2d 579 (3d Cir. 1951), *cert. denied*, 343 U. S. 929 (1952); Fanchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84 (S.D. Cal. 1951), *cert. denied*, 345 U. S. 964 (1953); Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 564 (7th Cir. 1951), *cert. denied*, 342 U. S. 909 (1952).

20. Interstate Circuit, Inc. v. United States, 306 U. S. 208 (1939).

21. United States v. Masonite Corp, 316 U. S. 265 (1942). The concert of action doctrine of these two cases was followed in other cases in which there was also found circumstantial evidence of agreement. See United States v. United States Gypsum Co., 333 U. S. 364, 393-394 (1948); C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489 (9th Cir.), *cert. denied*, 344 U. S. 892 (1952); see also United States v. Paramount Pictures, Inc., 334 U. S. 131, 142 (1948).

tributor would require those theatres not to charge less than 25 cents admission, and not to screen such pictures as part of a double feature program. The District Court found that the distributors had conspired among themselves and with Interstate in making these contracts.[22] The Supreme Court affirmed,[23] but added the now famous second ground for its decision based upon the firms' concert of action in the scheme.[24]

In the *Masonite* case, each of the competitors of defendant Masonite, producer of patented hardboard, was invited to and did become a del credere agent of Masonite to sell masonite board. Though each agency agreement with its price fixing clause was made independently, each signer was informed of the terms of each of the agreements previously made with others. ". . . [I]t is clear that, as the arrangement continued, each became familiar with its purpose and scope."[25] This is substantial evidence of agreements among the sellers and, under the Sherman Act, sufficient for conviction. But in this case, as in the *Interstate Circuit* case, the court chose to emphasize the knowing participation of the firms in a non-competitive marketing program. For the group of cases in which there is not illegality per se, these two cases initiated the trend away from stress upon the agreement aspect of Section 1 of the Sherman Act. The emphasis was shifted to group adherence to an unreasonable restraint of trade, the illegal objective of Section 1.

The traditional requirement of an agreement, actual or tacit, in which the sellers join, was abandoned in the broadened concert of action doctrine of the second *American Tobacco* case.[26] The

22. United States v. Interstate Circuit, Inc., 20 F. Supp. 868 (N.D. Tex. 1937).

23. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Interstate Circuit, Inc. v. United States, 306 U. S. 208, 227 (1939).

24. "While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined." *Id.* at 226-227.

25. 316 U. S. 265, 275 (1942).

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

Court affirmed the conviction of the "Big Three" tobacco processors, producers of from 68 to 73 per cent of small cigarettes, for conspiracy to monopolize and monopolization under Section 2 of the Sherman Act. The Court affirmed the finding of power and intent to exclude competitors, and pointed out that actual exclusion of competitors was unnecessary. The evidence, however, though not of agreement, was of consciously parallel action in adopting and pursuing non-competitive marketing policies.[27] It was thus from the market performance and resulting market conditions that the conspiracy and monopolization were inferred.

Evidence was presented to the jury that defendants refused to bid in established or in new tobacco markets unless the other defendants were also present. Buying agents were instructed as to top prices to pay and percentages of total offerings to bid for. Distinctive grades of tobacco were established for which only one company would bid. Thus, by a program of entire market control, consciously followed by each major firm, with awareness as to the similar policies of the other major firms, competition was eliminated.[28] Hence the convictions under Section 2 of the Sherman Act were affirmed.

The major development of the doctrine of consciously parallel action in restraint of trade under the Sherman Act has taken place in cases involving the local distribution of motion pictures. The *Bigelow*[29] case was the first case under Section 1 of the Sherman Act to abandon the requirement of some plan or organizational activity, such as was found in the *Interstate Circuit* case. The suit alleged conspiracy among the major motion picture distributors

27. American Tobacco Co. v. United State, 147 F. 2d 93, 100 *et seq.* (6th Cir. 1944). The market results of these policies reinforce the inference of collusion of some type, since the defendants raised cigarette prices in 1931 when costs were falling. *Id.* at 103. As to other monopolistic marketing practices in tobacco buying, see Stocking and Watkins, *op. cit. supra* note 6, at 136-166, and Nicholls, Price Policies in the Cigarette Industry (1951).

28. "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." American Tobacco Co. v. United States, 328 U. S. 781, 809-810 (1946).

29. Bigelow v. RKO Radio Pictures, Inc., 150 F. 2d 877 (7th Cir. 1945), *rev'd as to proof of damages,* 327 U. S. 251 (1946); the rule of this case was followed in another case affirming a jury's inference of conspiracy of distributors to deny plaintiff first-run film. Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 176 F. 2d 594 (2d Cir. 1949).

to maintain the "Chicago system of release." Under this distribution system, each theater was classified as to how many weeks after loop first-run it would be allowed to license and screen films. The contracts between the distributors and the Chicago exhibitors uniformly contained schedules of minimum admission prices on the basis of playing position assigned.[30] The facts established the operation of a feudal system of market regimentation.

Relying upon the *Interstate* and *Masonite* cases, the Court of Appeals found the verdict of the jury for plaintiff to be supported by substantial evidence.[31] However, it reversed the trial court's judgment on the ground that plaintiff had not proved damages. On appeal, the Supreme Court held the proof of damages sufficient, reversed the Court of Appeals and affirmed the judgment of the district court.

The Court of Appeals of the third circuit has given substantial strength to the doctrine of consciously parallel action in restraint of trade in three suits alleging conspiracy to deny plaintiffs first-run films for their theatres. In the first two, the *Goldman*[32] and *Ball*[33] cases, plaintiffs each acquired a theatre in a Pennsylvania city and requested the distributors who formerly licensed film to those theatres to license to them. In spite of offers of higher license fees than rivals were paying, the distributors uniformly refused first-run film to the new operators in both cases. Both cases were tried without juries, and judgments were entered for defendants.[34]

The Court of Appeals in the *Goldman* case, relying on the rule in the *Interstate Circuit* case, reversed the lower court. It held that the evidence established a monopolization by Warner Brothers of first-run exhibition in Philadelphia resulting from defendants' uniform denial of first-run films to plaintiff. Noting defendants' failure to present testimony that there was no agreement among them for concerted action, the Court also held that conspiracy was neces-

30. Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 257 (1946).

31. "True no specific agreement to enter into such conspiracy on the part of the defendants was proven, but that was not necessary. Knowing participation by competitors without previous agreement in a plan, the necessary consequence of which if carried out is unreasonable restraint of interstate commerce, is sufficient to establish an unlawful conspiracy." Bigelow v. RKO Radio Pictures, Inc., 150 F. 2d 877, 882 (7th Cir. 1945).

32. William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738 (3d Cir. 1945), *opinion on remand*, 69 F. Supp. 103 (E.D. Pa. 1946), *aff'd*, 164 F. 2d 1021 (3d Cir.), *cert. denied*, 334 U. S. 811 (1948).

33. Ball v. Paramount Pictures, Inc., 169 F. 2d 317 (3d Cir. 1948) (2-1 decision).

34. William Goldman Theatres, Inc. v. Loew's, Inc., 54 F. Supp. 1011 (E.D. Pa. 1944); Ball v. Paramount Pictures, Inc., 67 F. Supp. 1 (W.D. Pa. 1946).

sarily inferrable from the evidence.[35] In the *Ball* case, though the uniform denial of first-run films to plaintiff did not give one of the defendants a monopoly of first-run exhibition in Amridge, the case was nevertheless reversed. After taking cognizance of defendants' past "proclivity to unlawful conduct," the Appeals decision held that there did exist an inference of conspiracy among the distributors in their uniform denial of first-run films to plaintiff.[36] Relying on the *Goldman* ruling quoted below and on the *Interstate Circuit* and *Paramount* cases, the Court stressed the monopolistic power of the distributors in their adherence to the same restrictive marketing practice.[37]

As a legal doctrine, consciously parallel action in restraint of trade appears to have reached complete acceptance in the *Milgram* case.[38] In 1949, plaintiff built a drive-in theatre on the outskirts of Allentown, Pennsylvania. Though first-run pictures had been exhibited up to that time only in downtown conventional type theatres, plaintiff requested the eight major distributors to license first-run films to him. Upon their uniform refusal, he filed a suit under the antitrust laws. The evidence was entirely of consciously parallel action. The trial court put substantial emphasis on its finding that in this "novel problem of keenest interest to every branch manager," every distributor must be aware of how the others had de-

35. "Plaintiff's evidence shows that there is concert of action in what has been done and that this concert could not possibly be sheer coincidence. We think that there must have been some form of informal understanding." William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738, 743 (3d Cir. 1945).

"Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is the restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us." *Id.* at 745.

36. "They [defendants] say further that each appellee simply did not know the others were shunning the Penn, and that statement is incredible. They all knew Paramount's vital interest in the State. This was Paramount's ordinary theatre arrangement throughout the United States with which he other distributors were constantly dealing. . . . They, experienced, shrewd business people as they claim to be and as, in fact, they are, had to know the picture bookings and the entire situation at the State." Ball v. Paramount Pictures, Inc., 169 F. 2d 317, 320 (3d Cir. 1948).

37. "When an industry is so powerful that it can and actually does refuse to permit the existence of an individual enterprise within its confines (and that's what the shutting off of first runs from Penn probably amounts to) that industry is going beyond its freedom to trade as it chooses. It comes into sharp conflict with the statutory provisions of the Sherman and Clayton Acts. It is acting unlawfully in restrain of trade." *Id.* at 321.

38. Milgram v. Loew's, Inc., 192 F. 2d 579 (3d Cir. 1951) (2-1 decision), *cert. denied*, 343 U. S. 929 (1952).

cided to respond to the Milgram's demands.[39] After reviewing the earlier conscious parallelism cases, the trial court concluded:

> "In practical effect, consciously parallel business practices have taken the place of the concept of meeting of the minds which some of the earlier cases emphasized. Present concert of action, further proof of actual agreement among the defendants is unnecessary, and it then becomes the duty of the court to evaluate all the evidence in the setting of the case at hand and to determine whether a finding of conspiracy to violate the act is warranted."[40]

In affirming the decree for plaintiff, the Court of Appeals relied on the fact that the portion of the *Paramount* case concerned with proof of a "conspiracy to fix minimum admission prices and establish uniform clearances and runs was essentially consciously parallel business practices."[41] The Court also relied upon the *Interstate Circuit, Goldman,* and *Ball* cases. The rule of these cases was extended to the point where the Court was stating in effect that no evidence of conspiracy, actual or tacit, is necessary for a finding of conspiracy.[42] As will be shown below, this is an unnecessary and incorrect reduction in the evidence required to prove conspiracy. What the Court should have said was that undue restraint of trade violates Section 1 of the Sherman Act, whether accomplished by conspiracy or by independent decision of each firm to adopt policies identical to those of the other sellers in the market.

As shown above, all the conscious parallelism cases under the Sherman Act took the form of lessening the necessary requirements to prove conspiracy. However, the leading case under the supplementary antitrust statutes introduced consciously parallel restraints as a separate and distinct cause of action. The *Rigid Steel Conduit* case[43] arose as a petition for a review of a Federal Trade Commission cease and desist order under the broad prohibitions of Section 5 of the Federal Trade Commission Act.[44] The first count of the com-

39. "It is incredible that each proceeded in ignorance of how the others were dealing with it." Milgram v. Loew's, Inc., 94 F. Supp. 416, 418 (E.D. Pa. 1950).

40. *Id.* at 419.

41. Milgram v. Loew's, Inc., 192 F. 2d 579, 583 (3d Cir. 1951) citing United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 341-346, *aff'd,* 334 U. S. 131, 146-147 (1948).

42. Milgram v. Loew's, Inc., 192 F. 2d 579, 584 (3d Cir. 1951).

43. Triangle Conduit and Cable Co. v. FTC, 168 F. 2d 175 (7th Cir. 1948), *aff'd by a divided court sub nom.* Clayton Mark & Co. v. FTC, 336 U. S. 956 (1949). See Kittelle and Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing,* 15 Law & Contemp. Prob. 227 (1950); Sen. Doc. No. 27, 81st Cong., 1st Sess. 43-63 (1949).

44. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45(a) (1946). This broader prohibition of anti-com-

plaint charged the fourteen corporate respondents with conspiracy to restrict competition by adopting a basing point method of quoting prices for rigid steel conduit. Two of the respondents were exonerated by the Commission from the conspiracy charge. However, all of the respondents were found to have violated the second count based upon "conscious parallelism of action." It charged a violation "through their concurrent use of a formula method of making delivered price quotations with knowledge that each did likewise, with the result that price competition between and among them was unreasonably restrained."[45] In support of the first count was a finding of collective consideration of pricing policies by representatives of defendants through November, 1939. In support of the second count were findings of uniform adherence to the specific basing point formula of pricing and to many other marketing policies.

Upon appeal, the petitioning corporations alleged that the extended findings of the Commission's opinion did not produce direct evidence of conspiracy.[46] The Court of Appeals held that there was direct proof of conspiracy, but it stated that such direct proof of agreement was not necessary. It stressed the facts which demonstrated consciously parallel action in restraint of trade.[47] The Court

petitive activity does not require the existence of a conspiracy. FTC v. Cement Institute, 333 U. S. 683, 721 (1948).

45. Triangle Conduit & Cable Co. v. FTC, 168 F. 2d 175, 176. Background to this decision were a group of cases alleging conspiracy and holding illegal a "planned common course of action" to maintain a delivered price system. Salt Producers Ass'n v. FTC, 134 F. 2d 354 (7th Cir. 1943); American Chain & Cable Co. v. FTC, 139 F. 2d 622 (4th Cir. 1944); United States Maltsters Ass'n v. FTC, 152 F. 2d 161 (7th Cir. 1945); Milk and Ice Cream Can Institute v. FTC, 152 F. 2d 478 (7th Cir. 1945); Fort Howard Paper Co. v. FTC, 156 F. 2d 899 (7th Cir.), *cert. denied*, 329 U. S. 795 (1946); FTC v. Cement Institute, 333 U. S. 683 (1948); see Edwards, *Geographic Price Formulas and the Concentration of Economic Power*, 37 Geo. L. J. 135 (1949); Wright, *Collusion and Parellel Action in Delivered Price Systems*, 37 Geo. L. J. 201 (1949).

46. Rigid Steel Conduit Ass'n, 38 F. T. C. 534 (1944).

47. "As already noted, each conduit seller knows that each of the other sellers is using the basing point formula; each knows that by using it he will be able to quote identical delivered prices and thus present a condition of matched prices under which purchasers are isolated and deprived of choice among sellers so far as price advantage is concerned. Each seller must systematically increase or decrease his mill net price for customers at numerous destinations in order to match the delivered prices of his competitors. Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect, invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation." Triangle Conduit & Cable Co. v. FTC, 168 F. 2d 175, 181 (7th Cir. 1948).

". . . [P]rice uniformity especially if accompanied by an artificial price level not related to the supply and demand of a given commodity may be evidence from which an agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred." *Id.* at 179.

then affirmed the Commission's order as to all the respondents, including the two which had been dismissed from the first count but not the second. However, the court also affirmed the Commission's finding that the individual use of the basing point method constituted an unfair method of competition.[48] This may lessen the strength of the ruling as to conscious parallelism of action.

Two subsequent attacks on delivered pricing practices under the Federal Trade Commission Act firmly establish the doctrine of consciously parallel action in restraint of trade for delivered pricing cases. In both the *Book Paper*[49] and *Crown*[50] cases, although there was some initial organizational activity by the trade associations in the field, the evidence of a continuing conspiracy had to be inferred from the evidence of uniform adoption and maintenance of a pricing pattern. In the former case, there was a finding of "uniform quantity discounts, uniform finishing differentials, uniform base prices, and a uniform zoning system with uniform zone differentials, all without regard to a particular petitioner's costs of production and distribution."[51] In the latter case, from the evidence of product standardization and a freight equalization scheme, the court found "the indisputable fact that through the business practices followed by petitioners it has resulted that in an industry of which they control 85% there has been no price change in ten years, and absolutely no price competition whatever."[52]

THE COUNTER-RULE

Anti-monopoly law is one of the key points in an enterprise economy where the basic legal problem of adjusting the free volition of individuals to the enacted social control is clearly and constantly before the courts.[53] In the area in which the law is expanding to embrace more subtle forms of anti-competitive activity, appellate courts are faced with determining the fine point of balance between these two opposing forces.[54] It is here that new concepts,

48. *Id.* at 181; Dawkins, *Defenses Available in Cases of Geographic Price Discriminations,* 37 Geo. L. J. 217 (1949); Head, *Validity Under the Robinson-Patman Act of a Uniform Delivered Price of One Seller,* 31 Minn. L. Rev. 599 (1947).

49. Allied Paper Mills v. FTC, 168 F. 2d 600 (7th Cir. 1948), *cert. denied,* 336 U. S. 918 (1949).

50. Bond Crown & Cork Co. v. FTC, 176 F. 2d 974 (4th Cir. 1949).

51. Allied Paper Mills v. FTC, 168 F. 2d 600, 608 (7th Cir. 1948).

52. Bond Crown & Cork Co. v. FTC, 176 F. 2d 974, 981 (4th Cir. 1949).

53. See comment on the legal problem in Kessler and Sharp, Contracts Cases and Materials 2 (1953); Carlston, *Role of Antitrust Law in the Democratic State,* 47 Nw. U. L. Rev. 587 (1952).

54. Whether courts are equipped for it or not, antitrust decisions require the application of economic analysis. Jackson, dissenting in Standard

such as consciously parallel action in restraint of trade, are born. And it is here that one is likely to find two opposing rules of law being applied to groups of cases of very similar factual situations. The different viewpoints of courts and the whims of juries become determinants of whether a particular case comes within the developing rule of law or its counter-rule.[55] The major cases restricting the application of the doctrine of consciously parallel action in restraint of trade are summarized below and illustrate the development of the counter-rule.

The majority of cases limiting the doctrine of consciously parallel action in restraint of trade also originated in the motion picture industry. In the usual pattern, these cases arise from the uniform refusal of the major motion picture distributors to license films to the plaintiff exhibitor in the particular run he requests. One of the earliest cases, typical of those in the industry, was the *Westway* case.[56] The complaint charged seven of the eight major motion picture distributors with conspiracy to refrain from licensing films to plaintiffs theatre in Baltimore until 14 days after the films had been shown at the Edgewood Theatre. Upon its dismissal of the bill, the court found an absence of two of the basic requisites for liability. First, it found complete independence of judgment of the distributors and hence no joint action in adopting like patterns of distribution. It thus concluded that no inference of conspiracy could be made.[57] Second, the court distinguished the *Interstate Circuit* case and found the run and clearance provisions in each of the individual contracts between defendants and plaintiff to be reasonable restraints of trade. These provisions were held to be legal incidents of the film copyright.

In the other motion picture cases denying relief, some stressed the finding of no inference of conspiracy or that such finding by a trial judge was supported by the evidence.[58] Another affirmed such a judgment based upon a verdict of a jury.[59] Two other cases,

Oil Co. of Calif. v. United States, 337 U. S. 293, 322 (1949); Paramount Pictures, Inc. v. United Motion Pictures Theatre Owners, 93 F. 2d 714, 719 (3d Cir. 1937).

55. Compare the dissent of Judge Hastie with the opinion of the court in Milgram v. Loew's, Inc., 192 F. 2d 579, 587 (3d Cir. 1951).

56. Wesway Theatre Co. v. Twentieth Century-Fox Corp., 30 F. Supp. 830 (Md. 1940), *aff'd,* 113 F. 2d 932 (4th Cir. 1940).

57. "Uniform action is not necessarily concert of action." *Id.* at 833.

58. Gary Theatre Co. v. Columbia Pictures Corp., 120 F. 2d 891 (7th Cir. 1941); Windsor Theatre Co. v. Walbrook Amusement Co., 189 F. 2d 797 (4th Cir. 1951); G. & P. Amusement Co. v. Regent Theatre Co., 107 F. Supp. 453 (N.D. Ohio 1952).

59. Fifth and Walnut, Inc. v. Loew's, Inc., 176 F. 2d 587 (2d Cir. 1949).

while first finding no conspiracy, emphasized the second aspect of these cases, that the patterns of runs and clearances adopted were reasonable restraints of trade.[60] Independent reasonable business decision was pointed to as a key factor.[61]

Under the more strict burden of proof of a criminal case, a conviction for conspiracy under Section 1 of the Sherman Act, based on the verdict of a jury, was reversed in the *Pevely Dairy* case.[62] In that case, consciously parallel action in pricing by the two largest dairies in St. Louis, processors of 63 per cent of the fluid milk in the marketing area, was shown by the evidence. There were conflicting interpretations of the market significance of the data on prices and costs and their changes. The judgment was reversed and a new trial ordered though the evidence of consciously parallel pricing was not refuted.[63] The ground for the order was that from the market evidence it was possible to infer that no restraint of trade resulted.[64] The Court of Appeals was of the opinion that the evidence tended to show that each price change was the result of a change in costs and that the consciously parallel pricing of the two dairies did not stabilize prices.

The cases restricting the enlargement of the doctrine of consciously parallel action in restraint of trade have reached a climax in the *Theatre Enterprises* case.[65] In 1949 plaintiff built the Crest, a new theatre, in a shopping center 6 miles from downtown Baltimore. Although all the theatres previously showing first-run films in the competitive area were in downtown Baltimore, plaintiff demanded first-run film from the eight major distributors. Upon their uniform refusal to license first-run films to him, plaintiff filed suit for an injunction and damages, alleging conspiracy in violation of the Sherman and Clayton acts. Plaintiff presented evidence

60. Fanchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84 (S.D. Cal. 1951), *cert. denied,* 345 U. S. 964 (1953); Chorak v. RKO Radio Pictures, Inc., 196 F. 2d 225 (9th Cir. 1952), *cert. denied,* 344 U. S. 887 (1952), Justices Black, Reed and Douglas noting dissent from the denial.

61. ". . . [A]ll of the clearance negotiations and arrangements of the distributor-appellees resulted from nothing more than common business solutions of identical problems in a highly competitive area." *Id.* at 230.

62. Pevely Dairy Co. v. United States, 178 F. 2d 363 (8th Cir. 1949) (2-1 decision), *cert. denied,* 339 U. S. 942 (1950).

63. "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act." *Id.* at 369. Chamberlin, Theory of Monopolistic Competition (4th ed. 1942), quoted *id.* at 368.

64. Where there is only circumstantial evidence of conspiracy," [t]o sustain conviction, it must not only have been consistent with the defendants' guilt, but must have been inconsistent with their innocence." *Id.* at 370.

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

of guaranteed offers to license first-run films at higher rentals than bid by the downtown theatres, but defendants attacked these as not being made in good faith. From a judgment on a general verdict for defendants, plaintiff appealed, charging error in the trial court's refusal to instruct the jury that the only question for their decision was the amount of damages which plaintiff had suffered. Plaintiff contended that he should have received a directed verdict as to defendants' violation of the antitrust laws.

The Court of Appeals affirmed the judgment for defendant, stating that the evidence would support the inference of both of the opposing parties.[66] In affirming this decision, the Supreme Court delimited the necessary and possible inferences of consciously parallel action as follows:

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."[67]

In its preoccupation with the absence of actual or tacit conspiracy, the Court failed to comment on the fact that plaintiff was just as effectively excluded from bidding and competing in the first-run market by the consciously parallel action of defendants in denying him first-run films as he would have been had they planned his exclusion.

Factual Basis of Liability

Two basic conditions appear essential to proof of illegal conscious parallelism of action in a market. The first of these is parallel price and marketing policies with a mutual awareness by each firm that the others in the group are following the same or similar price and marketing policies. The second is a non-competitive market result from their total pricing or marketing policies, which the court finds to be an unreasonable restraint of trade. These conditions follow logically from the transference of concepts from the economic theory of collusive oligopoly to the legal doctrine of consciously parallel action in restraint of trade.

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66. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 201 F. 2d 306, 313 (4th Cir. 1953).

67. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537, 540-541 (1954).

Uniform or parallel prices alone, of course, are not evidence of any market structure or condition. A one-price market is characteristic of perfect competition, perfect monopoly, and many oligopoly models. The mutual awareness of rivals policies, making necessary a conjecture as to expected reactions of rivals to changes in one's own policies, is the result of few firms being in the market. This is the unique aspect of the oligopoly model. In the prosecution of a lawsuit, mutual awareness of each other's policies might be established by the testimony of corporate officers as to what factors they considered in deciding price and marketing policies. It might also be inferred from the market structure itself, if the firms are very few and the products highly substitutible. For example, if certain retailers demand from each of their few suppliers the same non-competitive market behavior and their demand is complied with, it is a fair inference that each supplier was informed of the others' acquiescence.[68] It is unlikely that a firm in an industry containing less than 20 large firms would not be aware that the other firms will react to its market policy changes. Thus the awareness might be inferred backward from continued non-competitive market performance by the firms in a market. Such monopolistic market patterns are evidence of long-run business planning for market stability that is possible only if rivals will "cooperate" and do not institute aggressive price or marketing policies. Each firm has a certain degree of confidence that the other firms will not upset the established marketing pattern.

The second necessary condition for illegality arises from the fact, discussed in Part I above, that an oligopolistic market structure need not necessarily result in market performance that fails to approach the competitive ideal. Dynamic market factors may induce rivalry whose consequence is effectively competitive market performance. Hence, substantial non-competitive market conditions must be shown to have resulted from the adherence of the firms to parallel price or marketing policies.[69] From an economic point of view, the failure to take advantage of short-run profit possibilities by changing price, product, technology or marketing methods, or failure to react to changing underlying conditions of market structure and supply as reflected in costs, are significant evidence of

68. Milgram v. Loew's, Inc., 94 F. Supp. 416, 418 (1950).

69. To establish a Sherman Act violation, it is unnecessary to prove complete monopoly or total suppression of all substitutes. Paramount Famous Lasky Corp. v. United States, 282 U. S. 30, 44 (1930); Lorain Journal Co. v. United States, 342 U. S. 143, 151 n. 6 (1951).

the absence of competition.[70] Such conditions exist only in the absence of dynamic forces which induce aggressive rivalry for business opportunities.[71] Hence, even though a one-price market is evidence of nothing, price inflexibility over a long period in a changing economic scene is evidence of non-competitive market adjustment.[72]

In the two cases applying the consciously parallel action doctrine in its purest form, illegal restraints of trade were clearly shown. In the *Milgram* case, the use of a feudal system of status classification of theatres as the basis for allocating film to them instead of the enterprise system of bid and offer of prices, and the consistent refusal of a higher price for the product were actions quite inconsistent with competitive rivalry.[73] In the *Rigid Steel Conduit* case, the failure to cut delivered price by a seller whose actual delivery cost is less in order to take customers away from distant firms who are invading the area closest to the seller's own plant is also inconsistent with competitive rivalry.[74] The other cases detailed in Part II above each reveal some specific type of restraint of trade or exercise of monopoly power.

Courts refusing to apply the consciously parallel action concepts have done so by finding at least one of the two requisite conditions to be missing. In the *Pevely Dairy* case, proof was offered that, in spite of the oligopolistic structure, market prices were established by a rivalry between firms which reflected response to the basic supply conditions of the milk market.[75] Hence, under the

70. The profit, investment, entry, and technological change indicia of the degree of competition or monopoly are discussed in Mason, *The Current Status of the Monopoly Problem in the United States*, 62 Harv. L. Rev. 1265, 1281 *et seq.* (1949); Edwards, Maintaining Competition 9-10 (1949); Wright, *Toward Coherent Anti-Trust*, 35 Va. L. Rev. 665, 685 (1949); Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 Va. L. Rev. 1083 (1951); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised Antitrust Policy*, 50 Mich. L. Rev. 1139, 1182-1198 (1952); Kahn, *Standards for Antitrust Policy*, 67 Harv. L. Rev. 28, 33-42 (1953).

71. Bond Crown & Cork Co. v. FTC, 176 F. 2d 974 (4th Cir. 1949); C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 497 (9th Cir. 1952) where the court said, "Price increases which occur in times of surplus or when the natural expectation would be general market decline, must be viewed with suspicion." See Rothschild, *supra* note 15, at 5.

72. FTC v. Cement Institute, 333 U. S. 683, 715 (1948); Levi, *supra* note 18, at 120.

73. 192 F. 2d 579 (3d Cir. 1951).

74. 168 F. 2d 175 (7th Cir. 1948), *aff'd sub nom.* Clayton Mark & Co. v. FTC, 336 U. S. 956 (1949); Wooden, *The Concept of Unlawful Discrimination as it Applies to Geographic Price Differences*, 37 Geo. L. J. 166, 170 *et seq.* (1949); Stocking, *The Economics of Basing Point Pricing*, 15 Law & Contemp. Prob. 159, 162-164 (1950); Mund, *The Development and Incidence of Delivered Pricing in American Industry*, 15 Law & Contemp. Prob. 141, 147-151 (1950); Machlup, The Basing-Point System (1949).

75. 178 F. 2d 363, 370 (8th Cir. 1949).

criminal burden of proof, the appellate court found that the second condition, a restraint of trade, was not proven. It is this type case, where the chief monopoly manifestation alleged is a price higher than would exist under competitive rivalry, that proof becomes extremely difficult. Comparative data with similar other markets as to the profits necessary to keep firms in the industry might be quite relevant in this instance.

In the *Westway* and other motion picture cases won by defendants, the courts, while refusing to infer collusion from consciously parallel action, put stress on their findings that the runs and clearances attacked were reasonable restraints of trade; *i.e.*, legal exercises of monopoly power.[76] In many of the cases no finding was made as to the oligopolistic character of the motion picture licensing market. However, its existence can easily be demonstrated.[77] It was thus the second condition, an unreasonable restraint of trade, which the courts did not find.

The cases thus fall into the pattern. Where the firms in a market are few, the adherence of the firms to one specific price or marketing policy is characteristic of the awareness by rivals of each other's policies. The resulting non-competitive condition becomes present only to the degree that the firms each have confidence that the others will not cut price or change other policies in an effort to take sales from each other.

Legal Basis of Liability

Sections 1 and 2 of the Sherman Act should provide useful supplements to each other as a statutory basis for most suits for consciously parallel action in restraint of trade. The relation between the two sections is discussed below after the discussion of Section 1.

Under Section 1 of the Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade is declared illegal.[78] The emphasis of the cases brought under Section 1, following the language of the statute, has been upon the conspiracy or agreement, the preconceived plan to commit a restraint.[79] Previous to the conscious parallelism cases, judgments

76. See the author's forthcoming article analyzing antitrust cases of local motion picture distribution. The theory is there presented that any system of runs and clearances must be illegal because it is the exercise of a discriminating monopoly by distributors who were granted only a simple or limited monopoly by the copyright laws.

77. Milgram v. Loew's, Inc., 94 F. Supp. 416, 418 (1950); McDonough and Winslow, *The Motion Picture Industry: United States v. Oligopoly*, 1 Stan. L. Rev. 385 (1949).

78. 26 Stat. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U. S. C. § 1 (1946).

79. Peppin, *Price Fixing Agreements under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297, 667 (1940).

of conviction in Section 1 cases appear to be based upon some evidence of agreement, either actual or tacit. Congress, by stressing the conspiracy element, did not in so many words declare restraint of trade itself illegal. However, it follows logically that an agreement to commit a legal act by legal means could not be illegal. Hence, criminality must enter the conspiracy laws through an illegal objective or illegal method of carrying out the proposed acts. It has thus been held that the gist of criminal conspiracy is an agreement to accomplish an illegal purpose or a legal purpose by illegal means.[80] And in a Sherman Act case, it was held that it is not the form of the combination or the particular means used, but the results to be achieved that the statute condemns.[81] Thus, in spite of the indirect language of Section 1, it is not surprising for the Court to state in another context: "Section 1 outlaws unreasonable restraints on interstate commerce, regardless of the amount of commerce affected."[82]

In the Section 1 cases prior to 1942, and especially in the common law background of agreements in restraint of trade, the idea of a multi-party restraint of trade in the absence of an agreement is difficult even to conceive.[83] However, the scope of the Sherman Act, condemning combinations by trust *or otherwise,* should be broad enough to encompass collusive restraints resulting merely from the adjustments of the firms in a market to each others policies.[84] The absence of actual or tacit agreement in the pure conscious parallelism case nevertheless leaves a situation where illegal restraint of trade may occur. Senator Sherman's comments on his original draft of the statute stress the market consequences. He pointed out that it is not the intention of the firm or firms which is significant, but the results of their activities.[85]

80. United States v. Falcone, 311 U. S. 205 (1940); Pettibone v. United States, 148 U. S. 197 (1893); Harno, *Intent in Criminal Conspiracy,* 89 U. of Pa. L. Rev. 624, 628 *et seq.* (1941).

81. American Tobacco Co. v. United States, 328 U. S. 781, 809 (1946).

82. United States v. Yellow Cab Co., 332 U. S. 218, 225 (1947).

83. Rahl, *Conspiracy and the Anti-Trust Laws,* 44 Ill. L. Rev. 743, 745 (1950).

84. Congress, in passing the Sherman Act, left no area of its constitutional power to curb restraints of trade unoccupied. Apex Hosiery Co. v. Leader, 310 U. S. 469, 495 (1940); United States v. Frankfort Distilleries, 324 U. S. 293, 299 (1945).

85. "In providing a remedy, the intention of the corporation is immaterial. The intention of a corporation can not be proven. If the natural effects of its acts are injurious, if they tend to produce evil results, if their policy is denounced by the law as against the common good, it may be restrained, be punished with a penalty or with damages. . . . It is the tendency of a corporation, and not its intention, that the courts can deal with." 21 Cong. Rec 2456 (1890).

Conspiracy, then, is not a prerequisite to liability under Section 1 of the Sherman Act. The conscious parallelism cases have merely utilized that which must be true by virtue of the logic of statutory construction. Undue restraint of trade, regardless of the method of accomplishment, is illegal. However, a non-competitive practice by only one firm may be held a reasonable restraint of trade.[86] But that which one firm does with impunity may become illegal when all the firms in an industrial group adopt the same policy.[87] Hence, in the conscious parallelism cases, proof of illegal restraint and the conscious adherence thereto by the members of the industrial group, are both necessary and sufficient for conviction.

A number of commentators have leveled deprecatory criticism upon the doctrine of conscious parallelism.[88] In reviewing the cases in which the doctrine emerged, they point out that the courts have mistakenly construed evidence of consciously parallel market practices to imply the presence of conspiracy. Hence conscious parallelism has in its early childhood been nicknamed "implied conspiracy." The criticism finds basis in the fact that the doctrine did emerge as an adjunct to proof of conspiracy in both Section 1 and Section 2 cases and that some courts have made the incorrect inference of conspiracy from mere conscious parallel action.[89] These writers have been preoccupied, however, with the erroneous assumption that conspiracy is a prerequisite to liability under Section 1 of the Sherman Act. Thus they have failed to recognize the true nature of consciously parallel restraints of trade.

For example, one commentator writes critically of the use of conscious parallelism of action as part of the evidence for a Section 1 violation because it lacks the subjective elements of conspiracy, characterized by "meeting of the minds," "unity of purpose," "col-

86. Refusal to deal by one firm without proof of an intent to monopolize is legal. United States v. Colgate & Co., 250 U. S. 300 (1919); Brosious v. Pepsi-Cola Co., 155 F. 2d 99 (3d Cir. 1946); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911 (5th Cir. 1952); Comment, *Refusals to Sell and Public Control of Competition*, 58 Yale L. J. 1121 (1949).

87. *See* United States v. Crescent Amusement Co., 323 U. S. 173, 183 (1944); see Sheehy, *The Legal and Factual Content of Recent Geographic Pricing Cases*, 37 Geo. L. J. 183, 199 (1949).

88. Rahl, *supra* note 83; Note, 3 Stan. L. Rev. 679, 693 (1951); Sunderland, *Changing Legal Concepts in the Antitrust Field*, 3 Syracuse L. Rev. 60, 68 (1951); Wood, *The Supreme Court and a Changing Antitrust Concept*, 97 U. of Pa. L. Rev. 309, 329-331 (1949).

89. The Court of Appeals of the Second Circuit affirmed within one month two motion picture cases involving evidence of consciously parallel action in restraint of trade. In the first, a jury had inferred no joint action from evidence of parallel action. Fifth and Walnut, Inc. v. Loew's, Inc., 176 F. 2d 587 (1949). In the second, a jury had inferred joint action from evidence of parallel action. Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 176 F. 2d 594 (1949).

lusion," "common design."[90] Of course the inference of conspiracy is incorrect and for purposes of the democratic requirement of exactness in criminal law it should not be drawn.[91] But, as stated above, the independent interdependence of the firms in planning is collusion in one of its more subtle forms. Although they do not meet or communicate directly, theirs is a "meeting of the minds" that each will be non-aggressive in price or marketing policies in the then existing manner as long as his rivals are of the same mind. There is a "unity of purpose" to keep prices stable, not to spoil the market, and to avoid "cutthroat" competition. And this same purpose may be called a "common design," though reached independently by each firm in adjusting to the presence and possible reactions of his rivals in the market.[92] Upon proof of a non-competitive market condition resulting from such parallel action, the necessary conditions for conviction under Section 1 of the Sherman Act have been established. The confusion of the courts in searching for conspiracy when the adherence by the firms in the market to an unreasonable restraint of trade was the real question before them has muddled and impeded the growth of the antitrust laws in attacking this type of multi-firm monopoly manifestation.

This logically necessary construction of Section 1 of the Sherman Act leads directly to the question of how that section is correlated with Section 2 of the Act. Chief Justice White's interpretation of the interrelation between the two sections demonstrated the breadth of the legislative intent.[93] After stating that Section 2 was intended to supplement and prevent evasion of Section 1, the prohibition of which was any undue restraint of trade, he goes on to state that:[94]

> ". . . monopoly and the acts which produce the same results as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade."

This is a recognition of the economic conclusion that restraining trade in any manner is the exercise of some monopoly power; conversely, monopolizing or the exercise of monopoly power restrains trade.

90. Rahl, *supra* note 83, at 752.

91. Jackson, concurring in Krulewitch v. United States, 336 U. S. 440, 445, 451-452 (1949); *cf.* Frankfurter dissenting in Nye & Nissen v. United States, 336 U. S. 613, 626 (1949).

92. American Tobacco Co. v. United States, 147 F. 2d 93, 107 (6th Cir. 1944).

93. Standard Oil Co. of N. J. v. United State, 221 U. S. 1, 60-62 (1911).

94. *Id.* at 61.

Senator Hoar reported the bill in its final form out of the Judiciary Committee. He concluded that, after monopolies by patent from the king were all abolished, monopolizing came to have the same meaning as engrossing.[95] He indicated that the effect of the bill was to extend common law prohibitions to interstate and international commerce. It is significant that the engrossing could be effected by one firm and does not necessarily require combination.[96] This early interpretation by Senator Hoar finds support in Justice Douglas's statement that ". . . the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1."[97]

Justice White's opinion suggests that after monopoly had come to mean engrossing, one form of restraint of trade, its connotation was broadened to become synonymous with restraint of trade generally.[98] However, even if monopoly is interpreted to mean only engrossing, appreciable non-competitive market activity was to be found illegal, whatever its source. The pervasiveness of this section of the opinion was, of course, offset by the dictum that, following the common law, the act declared illegal only those restraints which a court should find to be unreasonable in light of the facts of the case.[99]

95. 21 Cong. Rec. 3152 (1890); *cf.* Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act,* 31 Harv. L. Rev. 246, 258-263 (1931), where it is argued that monopolizing was a collective term to denote the three common law offenses of engrossing, forestalling and regrating.

96. Senator Edmunds quoted Webster's Dictionary as authority for a general definition of monopolizing as the acquisition of market control by a single firm. 21 Cong. Rec. 3152 (1890).

97. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 226 n. 59 (1940).

98. "As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article. . . . [A]nd by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produce, such acts came to be referred to as in restraint of trade." Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 53-54 (1911).

99. The original draft submitted by Senator Sherman held void ". . . all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition. . . ." 21 Cong. Rec. 1765 (1890). Senator Sherman stated that this draft merely codified and extended the geographical scope of the common law and was more limited than "[i]f this bill were broader than it is and declared unlawful all trusts and combinations in restraint of trade. . . ." *Id.* at 2461. The revised bill reported out of the Judiciary Committee, *id.* at 2901, 3145, which was the form in which the law was passed, used this language which Senator Sherman had said was broader than the common law. Compare the opinion of Mr. Justice Harlan, Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 82 (1911).

Justice White's interpretation of restraint of trade supports the view stated above that Section 1 not only holds agreements in restraint of trade illegal, but must also mean that the restraints of trade themselves are illegal. Since both sections were designed to curtail restraints of trade and monopoly (or the exercise of monopoly power), no matter how the result is accomplished, it must be illegal.

The recent recognition of the significance of this interpretation of the Sherman Act in the *Griffith* and *Lorain Journal* cases[100] is in effect a challenge to the rather sharp dichotomy which the Supreme Court has created between Section 1 and Section 2 cases.[101] The general failure of Section 2 prosecutions during the first fifty years of the Act[102] as contrasted with the general success of Section 1 prosecutions could hardly have happened if the Court had recognized that the two sections are so closely interrelated. From the recent language of the Court, it appears that the mere exercise of substantial monopoly power, regardless of the percentage of the market controlled, has become the basis of Section 2 conviction. Thus that section would have a newer, broadened interpretation.[103] However, the *Griffith* and *Lorain Journal* cases both involved substantial control by one firm of the entire local market. And the recent *Times-Picayune* case has re-emphasized substantial monopoly control of the market concerned as a necessary condition to Section 2 conviction.[104] As the law now stands, it appears that the exercise of monopoly power; *i.e.,* monopolistic abuses, are not illegal if the firm (or group of firms acting together) involved does not have a monopolistic position (substantial control) of the market concerned.[105]

If the present interpretation of Section 2 of the Sherman Act were as broad as Mr. Justice White's statement, it would present an alternative avenue for the prosecution of illegally consciously parallel marketing policies. The oligopolistic group can be success-

100. United States v. Griffith, 334 U. S. 100, 106 (1946); Lorain Journal v. United States, 342 U. S. 143, 153-154 (1951).

101. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 226 (1940); American Tobacco Co. v. United States, 328 U. S. 781, 788 (1946).

102. Levi, *supra* note 18; Handler, *supra* note 12; United States v. United States Steel Co., 251 U. S. 417 (1920); United States v. International Harvester Co., 274 U. S. 693 (1927).

103. Rostow, *Monopoly Under the Sherman Act: Power or Purpose,* 43 Ill. L. Rev. 745 (1949).

104. Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 608 (1952).

105. Much of the indeterminateness of the scope of § 2 grows out of the courts' uncertainty as to the meaning and content of the monopoly. Levi, *A Two Level Anti-Monopoly Law,* 47 Nw. U. L. Rev. 567 (1952).

ful in establishing and continuing stable market policies that avoid competitive rivalry only if the large majority of firms in the group adhere to the non-aggressive policies. Aggressive price cutting or product change by one firm could upset any stable equilibrium the group had reached. Hence the market manifestation of oligopolistic collusion will be that most of the firms in the industrial group will be following the same non-competitive policies. One firm in a multifirm group may be held to restrain trade reasonably or exercise some monopoly power with impunity. However, common non-competitive action by a majority of firms in an industry or locality is in essence the same as a monopoly of the type conventionally attacked under Section 2.[106] The group's action tends more to resemble a single firm monopoly as the coordination or confidence among the firms in each other's policies increases.

Under the Supreme Court's interpretation of Section 2, unless a firm has substantial control of an entire industry,[107] its monopoly power becomes illegal only when it is abused.[108] Since, in many cases no one firm in an oligopolistic group has by itself substantial control in its industry, a theory of monopoly abuse by the group would appear to be the route through which Section 2 prosecution would be effective here. This, of course, coincides with the underlying economic analysis. An industrial group may be oligopolistic, but dynamic market factors may preclude collusive adjustment of any kind. It is when the market stabilizes and rivalry becomes non-aggressive that oligopolistic abuses should become readily subject to prosecution under the anti-monopoly laws.

One major objection may arise to prosecution under Section 2 of the Sherman Act. That is that it may be impossible to prove a specific intent to monopolize. This objection can be obviated, however, by the fact that oligopoly is illegal only when non-competitive market manifestations result. In this class of cases, a specific intent to restrain trade need not be shown. It is sufficient that a restraint of trade or monopoly, within the purview of the act, results as a

106. United States v. Paramount Pictures, Inc., 334 U. S. 131 (1948); American Tobacco Co. v. United States, 328 U. S. 781 (1946). The first of these cases involved some elements of actual conspiracy.

107. United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945); United States v. Columbia Steel Co., 334 U. S. 495 (1948).

108. United States v. Griffith, 334 U. S. 100 (1948); Johnson and Stevens, *Monopoly or Monopolization*, 44 Ill. L. Rev. 269, 278 (1949); Levi, *The Antitrust Laws and Monopoly*, 14 U. of Chi. L. Rev. 153, 157 (1947). Even with its emphasis upon power and intent to monopolize as conditions for § 2 conviction, intent was inferred from evidence of monopolistic abuses. American Tobacco Co. v. United States, 328 U. S. 781, 786 (1946); Kahn, *Standards for Antitrust Policy*, 67 Harv. L. Rev. 28, 29 (1953).

consequence of the firms' conduct.[109] This follows Senator Sherman's view that market effect, not intention, should be the basis of illegality under the act.[110] And this rule is correlative with the central conclusion of this paper as to Section 1 of the Sherman Act; namely, that market effect, group adherence to a restraint of trade, is the crucial question for liaiblity. Hence, conspiracy in the form of a previous agreement, the element of intent in Section 1, is not a necessary condition for liability if the undue restraint of trade is proven.

In the conventional conspiracy case, evidence of independent decision and action by those accused is sufficient defense to the charge. However, this is no defense in the conscious parallel action case. Independent action is the criteria of the consciously parallel action case that distinguishes it as a type of collusion distinct from conspiracy. Nor is it a defense in the conscious parallelism case that the best business judgment of all of the firms in an industry prompted them to their similarity of conduct.[111] The justification or motive for price or trade practices in any type market from competitive to monopolistic is profit maximization.[112] This is the "best business policy" justification for any firm's market action. The defense of individual decision that a specific policy will maximize profits is not only consistent with a monopolistic result, given oligopoly as the market structure, it is the expected result. The only defense is to show that the consequent market conditions demonstrate an absence of interferences with competition and market rivalry responding to the basic supply conditions of the market.

A point of emphasis in the analysis of conscious parallel action must be upon the facts that collusive oligopoly is a manifestation of monopoly. The problem is basically one of market structure, of fewness of firms in a market and the consequent tendency to a monopoly equilibrium. In such a market an injunction restraining conscious parallel action would be, in most cases, an unworkable remedy. It would be comparable to ordering a single firm monopoly

109. United States v. Patten, 226 U. S. 525, 543 (1913); United States v. Masonite Corp., 316 U. S. 265, 275 (1942); United States v. Griffith, 334 U. S. 100, 105 (1948); *see* United States v. Columbia Steel Co., 334 U. S. 495, 525 (1948); Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 614 (1953).

110. See note 85 *supra*.

111. G. & P. Amusement Co. v. Regent Theater Co., 107 F. Supp. 453 (N.D. Ohio 1952); Chorak v. RKO Radio Pictures, Inc., 196 F. 2d 225 (9th Cir. 1952); Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 201 F. 2d 306, 313 (4th Cir. 1953).

112. The prohibitions of the Sherman Act can not be evaded by good motives. Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49 (1912).

not to set a monopoly price or not to adopt other policies which would maximize the profits of his monopoly. The only effective and lasting remedy to a monopoly or collusive oligopoly is to alter the basic market structure by dissolution of the one or few firms into many firms.

CONCLUSION

The doctrine of conscious parallelism of action brings to anti-monopoly law a new basis for prosecution in its weakest area, monopolistic market practices in the few-firm industry. In focussing the weight of Section 1 prosecutions on the restraint of trade or monopolistic practices, courts may come to recognize that conspiracy is not a prerequisite for liability under Section 1 of the Sherman Act.[113] The alternative of prosection as a monopoly under Section 2 of the Act, upon the showing of the oligopolistic interferences with competition, would make the sections supplementary to each other in this type of case. The effect could be to broaden the scope and strengthen prosecutions under both sections of the Sherman Act. This would revitalize the earlier interpretation which stressed the close interrelation between the two sections as means to more effective monopoly prosecution.

Given the conclusion that conspiracy is not a necessary condition for liability under Section 1 of the Sherman Act, the province of the jury in the antitrust case in the few-firm industry should be substantially lessened. The jury would need only to find whether there existed similar or parallel action, if the firms were aware of each other's adherence to such marketing policies, and the resulting conditions in the market. This would eliminate the mystic speculation by both courts and juries as to how much independent parallel action in this type case can be said to add up to joint action. There would thus be a recognition that collusion can be of a type (or degree) other than conspiracy, and the confusion between conscious parallelism and conspiracy could be ended.

In order to utilize the doctrine of consciously parallel restraints as an effective tool of social control, courts must face squarely in each case the question whether marketing or price policies and their resulting market conditions are non-competitive. This necessarily requires the extensive use of economic analysis. Once it is recognized that the nebulous legal device of inferring conspiracy where

113. It has been suggested that uniformity of action might be considered prima facie evidence of illegal combination, and then the defendant would have to present evidence to rebut the presumption of illegality. Handler, Anti-trust-New Frontiers and New Perplexities, 6 Record of the Ass'n of the Bar of the City of New York 59, 67 (1951).

none exists is but an evasion of the real problem of market results economic analysis becomes the necessary tool to measure the legality of marketing policies.

Non-competitive market results are, of course, manifestations of monopoly power. However, under present law, non-competitive marketing policies and market conditions are not all illegal restraints of trade. The "rule of reason" has put very great discretion into the hands of courts to hold restraints of trade legal.[114] This is an assumption of administrative or regulatory power to weigh so-called mitigating circumstances in deciding what are good and what are bad restraints of trade.[115] In the conscious parallelism cases, where an economic analysis of the market results should be the crucial factor in the decision, courts are thus given a possible means to exempt from punishment or liability such non-competitive activity as they find grounds to hold fair or reasonable.[116] It is this abyss in effective legal control which can defeat the development of the conscious parallelism doctrine even if the phantom of inferred conspiracy is destroyed.

Application of the analytic techniques for conscious parallelism cases developed above impels some critical comment as to the recent Supreme Court case limiting the doctrine. In the *Theatre Enterprises* case, the facts as recited in the Court of Appeals opinion showed the existence of both of the factors suggested above as necessary and sufficient for liability.[117] A uniform marketing policy toward plaintiff was admitted. Awareness that the other distributors were following like policies can be inferred from the very fewness of

114. Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?*, 63 Yale L. J. 348 (1954).

115. One of the greatest of American jurists has labeled this assumption of regulatory power by the Supreme Court as *judicial legislation*. Mr. Justice Harlan, dissenting in part in Standard Oil Co. of N. J. v. United States, 221 U. S. 1 at 82, 90 (1911). He went on to quote Senator Nelson's almost omniscient prediction: "*. . . the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries.*" *Id.* at 97.

116. Feudal regulation of markets on the basis of fairness or reasonableness, as opposed to the self-executing economic controls of competition in as pure a form as can be enforced, is but one major example of the twentieth century retreat from a free society. See Yankwich, *Competition, Real or Soft?*, 14 F. R. D. 199 (1952); Pound, *The New Feudalism*, 16 A. B. A. J. 553 (1930). As to the inherent weaknesses that make for a breakdown of administrative regulation of markets, see Gray, *The Passing of the Public Utility Concept*, 16 J. Land & P. U. Econ. 8 (1940), reprinted in Readings in the Social Control of Industry 280 (1942).

117. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 201 F. 2d 306 (4th Cir. 1953), *aff'd*, 346 U. S. 537 (1954). See p. 810 *supra* for a discussion of the facts of this case.

sellers in the market. This inference is supported by defendants' concerted refusal to license films to plaintiff at higher fees than bid by other exhibitors. Such a sacrifice of short run profits for the possibility of long run profits in not upsetting the oligopolistic pattern of distribution can continue only as long as all sellers join in the pattern. Each knows that deviating from the established marketing pattern may induce aggressive rivalry in marketing resulting in lower monopoly profits for all. A resulting restraint of trade was also shown, in that plaintiff was excluded from the market for first-run films. The regimented system of film distribution in this case was strikingly similar to the one found illegal in the *Milgram* case.[118]

In affirming the judgment for respondents, the Supreme Court rejected plaintiff's contention that the trial judge should have directed a verdict in its favor and submitted to the jury only the question of the amount of damages. Based on the pleadings before the court, this ruling was correct. Plaintiff had pleaded conspiracy in restraint of trade. It had presented substantial evidence that trade was restrained, but none of conspiracy. The trial court thus considered it a jury question as to whether conspiracy could be inferred from the parallel business behavior shown. On the basis of the pleadings before it, the trial court might well have directed a verdict for defendants.

From the point of view of this paper, plaintiff's failure in the *Theatre Enterprises* case was essentially one of pleading. His evidence established the existence of consciously parallel action in restraint of trade, but he had pleaded conspiracy in restraint of trade. A suggestion as to pleading more in conformity with the proof is found in the *Rigid Steel Conduit* case, an unfair competition suit.[119] Following that case, plaintiff should have pleaded an additional separate count for consciously parallel action in restraint of trade. Such a cause of action would be an innovation to Sherman Act pleading, but its adoption follows logically from the theory presented herein. Proof was made of consciously parallel business policies which restrained trade, though evidence of a preconceived plan to restrain trade was lacking. The resulting market conditions showed a deviation from competition, a restraint of trade, in which the major sellers in the market had joined. A separate cause of action pleading this restraint of trade, as distinguished from the

118. Milgram v. Loew's, Inc., 192 F. 2d 579 (3d Cir. 1951).

119. Triangle Conduit & Cable Co. v. FTC, 168 F. 2d 175 (7th Cir. 1948), *aff'd by a divided court sub nom* Clayton Mark & Co. v. FTC, 336 U. S. 956 (1949). See p. 806 *supra* for a discussion of this case.

unprovable count for conspiracy, would allege those provable market restrictions in which the major sellers did join and which did injure plaintiff. Under the legal theory of this paper, these restraints of trade themselves are deviations from competition which the Sherman Act was designed to remedy.

The *Theatre Enterprises* case has demonstrated that oligopolistic restraints of trade can not be attacked through the avenue of conspiracy because, by definition, they lack the essential prerequisite of joint planning. If the doctrine of consciously parallel action in restraint of trade is to survive and to contribute to the growth of anti-monopoly law, it must stand as a distinct cause of action. Hence, it must be based upon a revitalization of the pervasive prohibitions against all forms of restraints of trade and monopolies that the 51st Congress wrote into the Sherman Act.