Criminal Enforcement of Section 2—How Significant Is the Threat?

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The Department of Justice (DOJ) has recently reasserted its power to bring criminal prosecutions under section 2 of the Sherman Act. This represents a dramatic break from the DOJ's long-established practice of reserving criminal antitrust prosecutions for "hard-core" cartel behavior assessable under the per se rule rather than the rule of reason. This Article sets out the historical precedent for section 2 criminal prosecutions and explores the many challenges that the DOJ would need to overcome in order to succeed in any such prosecution at trial. The Article concludes that criminal prosecution of alleged unilateral monopolization offenses would present intractable difficulties for the DOJ in particular, given the high criminal standard of proof and the number and complexity of the issues that would need to be proved pursuant to a highly nuanced rule of reason analysis. The Article notes that such a policy would also move the United States further away from the approach to antitrust enforcement in other jurisdictions around the world, with potential knock-on implications for cooperation among enforcers.

I. INTRODUCTION

Since its inception in 1890, the Sherman Act has, as a technical matter, criminalized any actions contravening either the prohibition against agreements in restraint of trade under section 1 or the prohibition against monopolization, attempted monopolization, and

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conspiracies to monopolize under section 2.[1] In practice, however, the majority of antitrust enforcement has been civil, and, for the past half century or so, criminal enforcement by the Antitrust Division of the DOJ has, as a policy matter pursuant to prosecutorial discretion, been conducted nearly exclusively under section 1.[2] Recent statements by Assistant Attorney General (AAG) Jonathan Kanter and others at the DOJ signaling an intention to bring criminal prosecutions pursuant to section 2 when appropriate,[3] together with telling updates to the DOJ's published policy guidance,[4] represent an unexpected and significant policy change.[5] In fact, in October 2022, the DOJ entered a plea agreement with

1. Sherman Act, 15 U.S.C. §§ 1–2. Initially, violations of the Sherman Act were misdemeanors, punishable by no more than one year in jail. *Id.* Since the Antitrust Procedures and Penalties Act of 1974, they have been felonies. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16. They are currently punishable by up to ten years in jail, with maximum fines of $1 million for individuals and $100 million for corporations. 15 U.S.C. § 2.

2. *See, e.g.*, Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy: Criminal Enforcement of Antitrust Laws: The U.S. Model (Sept. 14, 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model [https://perma.cc/D9JP-HXY6] ("At the same time, the Division focuses its criminal enforcement only on hard core violations. By focusing narrowly on price fixing, bid-rigging, and market allocations, as opposed to the 'rule of reason' or monopolization analyses used in civil antitrust law, we have established clear, predictable boundaries for businesses. This narrow focus also helps conserve prosecution and judicial resources by reducing the number of potential cases and also by reducing the complexity of proof: proving the existence of an agreement establishes the violation without the need for the detailed economic testimony common in civil antitrust actions.").

3. *See* Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers [https://perma.cc/K7MH-DQ5A] ("And when Congress passed the Sherman Act in 1890, it made Section 2 a crime as it did with Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes. So if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law."); Richard A. Powers, Deputy Assistant Att'y Gen., Crim. Enf't, U.S. Dep't of Just., Keynote Address at the University of Southern California Global Competition Thought Leadership Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern [https://perma.cc/YS53-RKRP] ("[S]ince the late 1970s, the Antitrust Division effectively ignored Section 2 when it came to criminal enforcement. Going forward, the division will no longer ignore Section 2.").

4. *Compare* ANTITRUST DIV., U.S. DEP'T OF JUST., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 4 (2005), https://www.justice.gov/atr/file/761666/download [https://perma.cc/8QAA-528U] ("Violations of Section 2 are generally not prosecuted criminally. Criminal prosecution is warranted, however, in circumstances where violence is used or threatened as a means of discouraging or eliminating competition, such as cases involving organized crime."), *with* U.S. DEP'T OF JUST., JUST. MANUAL § 7-2.200 (2022) ("[The DOJ] may also bring, and has brought, criminal charges under Section 2."). Most recently, in October 2023, the DOJ further updated its published policy guidance to note that the anticompetitive conduct that the Division prosecutes criminally under Section 2 generally involves "predicate criminal conduct [which] need not be violent." ANTITRUST DIV., U.S. DEP'T OF JUST., FEDERAL ANTITRUST CRIME: A PRIMER FOR LAW ENFORCEMENT PERSONNEL 6 (2023), https://www.justice.gov/media/967286/dl?inline [https://perma.cc/4V33-WXC3].

5. The present Administration's overall approach to antitrust enforcement was set out in President Biden's Executive Order, "Promoting Competition in the American Economy." Exec. Order No. 14036, 86 Fed. Reg. 36987, 36988 (July 14, 2021) ("This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets, agricultural markets, Internet

a defendant pursuant to section 2 for the first time in decades.[6] Just weeks later, the DOJ indicted a number of individuals in the car shipping business allegedly linked to Mexico's notorious Gulf Cartel on the grounds of threats and conspiracy to monopolize, including through threats and acts of violence (as well as on grounds of section 1 conspiracy to fix prices and allocate the market, extortion, and money laundering).[7]

In this Article, we argue that this policy change will face a number of hurdles. The recent *Zito* and *Martinez* cases charged under section 2 involve, in the former case, a market allocation *attempt*, and in the latter case, an alleged violent criminal syndicate. These were not what most commentators expected in connection with statements by the DOJ over the past year about increased enforcement of section 2.[8] Instead, the *Zito* plea resembles a section 1 claim (although apparently no agreement was actually reached between Zito and the other parties involved), and the *Martinez* indictment actually includes a section 1 claim, seemingly with respect to the same conduct. To the extent that the DOJ intends to bring charges in other cases for *unilateral* monopolization (whether attempted or actual),[9] it is not clear how it intends to prove such an offense beyond a reasonable doubt. Certainly, it would appear to be a challenge if the claim is brought under the rule of reason, where the analysis would be highly complex and nuanced as to whether the conduct violates section 2. Moreover, given the uncertain state of the law on monopolization, a criminal conviction for unilateral conduct under section 2 may also run afoul of the Due Process Clause by virtue of the vagueness of the prohibition.[10] In any event, criminal prosecution of alleged

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platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.").

6. Plea Agreement, United States v. Zito, No. 22-cr-00113 (D. Mont. Sept. 19, 2022). The DOJ released a press release related to this case. Press Release, U.S. Dep't of Just., Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization [https://perma.cc/87G8-SKWJ].

7. Indictment, United States v. Martinez, No. 22-cr-00560, (S.D. Tex. Nov. 09, 2022). The DOJ released a press release related to this case. Press Release, U.S. Dep't of Just., Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0 [https://perma.cc/3LVS-L5N8].

8. *See*, *e.g.*, Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york [https://perma.cc/YJ34-43JQ] ("One area where there's been a growing divide between antitrust doctrine and market realities is Section 2 of the Sherman Act. Approximately 20 years passed between the filing of major DOJ monopolization cases, even as competition languished in vital industries. The result is that there is a dearth of Section 2 case law addressing modern markets.").

9. On June 7, 2023, the DOJ's Special Counsel on section 2 Criminal Enforcement, Andrew Schupanitz, told attendees at a conference that criminal prosecutions of unilateral conduct are "not off the table," and that "[i]f we see conduct that is egregious and clearly anticompetitive and has clear intent to monopolize, and we think that the law warrants it, I think we would bring that unilateral case." Anna Langlois, *DOJ Official: Section 2 Charges May Target Unilateral Conduct*, GLOB. COMPETITION REV. (June 8, 2023), https://globalcompetitionreview.com/gcr-usa/article/doj-official-section-2-charges-may-target-unilateral-conduct [https://perma.cc/4CXL-GEWJ]. Mr. Schupanitz also stated that calls for further guidance as to the circumstances when the DOJ would bring such cases are "maybe a little bit misplaced." *Id.*

10. Due Process includes "three related manifestations of . . . fair warning," including vagueness and preventing "courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 520 U.S. 259, 266 (1997). For greater discussion, see *infra* notes 52–59 and accompanying text.

monopolization offenses would be at odds with the policy of antitrust enforcement regimes elsewhere in the world, where criminalization of competition claims is generally absent (and would appear even less likely for a monopolization claim).[11]

The remainder of this Article is structured as follows. Part II briefly summarizes the existing precedent for section 2 criminal enforcement. Part III sets out the nature of the considerable challenges which the DOJ would face in achieving a successful conviction on such a charge. Part IV considers the broader international implications. Ultimately, criminal enforcement of most forms of *unilateral conduct* would appear to be ill-conceived.

II. SECTION 2 CRIMINAL ENFORCEMENT—BRIEF HISTORY

The Sherman Act's status as both a civil and criminal statute has meant that, over time, the balance between civil and criminal enforcement has ebbed and flowed. In its early years, the DOJ's enforcement under the statute was essentially civil, save in a small number of labor cases involving violence.[12] Around the Second World War, during AAG Thurman Arnold's tenure, the proportion of criminal cases increased markedly, reflecting AAG Arnold's belief that "[a]s a deterrent, criminal prosecution is the only effective instrument under existing statutes" and that "[t]he civil suit has a useful place as a supplement to the criminal proceeding—not as a substitute."[13] According to a later speech by AAG Donald Baker in 1978, AAG Arnold "clearly went beyond present standards of due process. His actions invited criticism that businesses were branded as criminals on the basis of uncertain conduct and unpredictable rules."[14] There followed a relatively quiet period for criminal cases,[15] and to this day, the number of civil cases brought pursuant to the Sherman Act (whether by the DOJ, state attorneys general, or private litigants) dwarfs the number of equivalent criminal cases.

Throughout these ebbs and flows, one constant throughout the Sherman Act's history has been a marked preponderance of section 1 criminal enforcement over section 2 criminal enforcement. Daniel A. Crane has recently conducted a detailed survey based upon a

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11. *See* Emmanuelle Auriol, Erling Hjelmeng & Tina Søreide, *Corporate Criminals in a Market Context: Enforcement and Optimal Sanctions*, EUR. J.L. & ECON. 4 (2023) ("Competition in markets is regulated primarily as a non-criminal matter.").

12. Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 410 (1978).

13. Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, 7 L. & CONTEMP. PROBS. 5, 16 (1940).

14. Baker, *supra* note 12, at 411.

15. In guidance issued in 1967, the DOJ articulated:

> [A] firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law, and that one of two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing *per se* offenses—willfulness will be presumed. . . . Second, if the acts of the defendants show intentional violations—if through circumstantial evidence or direct testimony it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct—willfulness will be presumed.

PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967).

review of every DOJ enforcement action reported in CCH's Trade Regulation Reporter.[16] This survey revealed just 175 cases alleging criminal monopolization—the most recent having been brought 45 years ago, in 1977.[17] As Crane notes, it is important to consider the nature of these 175 cases. By Crane's count, only 20 of them involved unilateral conduct.[18] The remainder involved charges (typically brought in conjunction with section 1 charges) of conspiracy between rival firms or individuals to monopolize—conduct which, since 1977, has been charged criminally exclusively under section 1, and not also under section 2.[19]

If the DOJ intends to continue prosecuting alleged conspiracies exclusively under section 1,[20] then one should view the DOJ's recent statements as a reference to criminal enforcement of section 2 with respect to unilateral conduct—although, markedly, this was not the case in its two recent section 2 prosecutions. Moreover, of the 20 precedent cases in this category, Crane records that only 12 resulted in guilty findings (usually via a *nolo contendere* plea) and fine impositions (the largest of which—a $187,000 fine imposed on Safeway Stores in 1955—would be worth about $2 million today), and of those 12, only three resulted in a prison sentence.[21] Of those three, two—United Pacific in 1933 and Barrett in 1939—involved actual crimes of violence.[22] In the third, Molasky in 1973, about which little information remains available, an individual appears to have served one month in prison for attempted monopolization not involving violence—albeit the conduct at issue appears to have included direct threats to competitors to put them out of business or otherwise harm them economically.[23]

III. PROVING A CRIMINAL CHARGE UNDER SECTION 2

A. Per Se *Versus Rule of Reason*

A threshold distinction drawn in any case involving alleged antitrust infringement is between, on the one hand, a small group of so-called "hard core" practices considered so inherently anticompetitive as to be *per se* illegal because they have "no purpose except stifling of competition"[24] and "always or almost always tend to restrict competition and

16. *See generally* Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment*, 84 ANTITRUST L.J. 753 (2022) (explaining how the enforcement of criminal violations under section 1 of the Sherman Act has consistently outweighed the enforcement of section 2).

17. *Id.* at 764.

18. *Id.* at 765. In *Copperweld Corp. v Independence Tube Corp.*, the Supreme Court established the so-called *Copperweld* doctrine that a parent corporation and its wholly owned subsidiaries are a single entity for the purposes of antitrust law, such that intra-firm agreements cannot by themselves breach the section 1 prohibition against agreements in restraint of trade or the section 2 prohibition against conspiracies to monopolize. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767–69 (1984). Crane's count of 20 excludes those cases prior to 1984 which were framed as 'conspiracy to monopolize' cases, but which involved purely intra-firm schemes. *Id.* at 762–63.

19. *See* Crane, *supra* note 16, at 755, 762.

20. *See infra* Part III.B. It is difficult to see an incentive for the DOJ to pursue conspiracy cases on the basis of section 2 as well as or instead of section 1.

21. Crane, *supra* note 16, at 765–66.

22. *Id.*

23. *Id.*

24. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (quoting United States v. Topco Assocs., Inc., 405 U.S. 569, 608 (1972)).

decrease output"[25] and, on the other hand, practices requiring so-called "rule of reason" analysis involving a fact-specific assessment of market power and market structure, including weighing the various benefits and disbenefits of the practice in the round, in order to reach a conclusion on illegality.[26] The rule of reason approach typically involves complex economic analysis—something that the DOJ routinely attempts to exclude in criminal prosecutions under the antitrust laws.[27]

Categorization of conduct as *per se* illegal carries severe consequences for defendants. It leaves a plaintiff or prosecutor only to prove that the relevant conduct in fact occurred; there is no need to consider other factors such as market definition, market power, the reasonableness or otherwise of the conduct, or its effects in practice. The list of practices that have been established to be *per se* illegal is narrow, typically involving horizontal collusion among competitors to, for instance, fix prices or allocate markets. The list is not closed, but courts have shown themselves extremely reluctant to expand it to other trade practices, requiring that the practice in question has a particularly "pernicious effect on competition" and lacks "any redeeming virtue."[28]

B. Concerted Conduct—No Incentive to Prosecute Under Section 2

One common feature of all practices established today as *per se* illegal is that they involve collusive agreements among rival firms or individuals (i.e., cartel conduct), as outlawed by section 1. One type of cartel conduct—that of conspiracy to monopolize—is in theory capable of being tried under section 2 as well as section 1.[29] However, it is unclear whether courts today would be prepared to find that any conspiracy to monopolize could constitute a *per se* section 2 infringement. For instance, a number of courts have found that, beyond simply establishing that the relevant conduct occurred, an essential element of analyzing a section 2 conspiracy to monopolize claim is to establish the relevant product and geographic markets.[30] Furthermore, courts have found it necessary to prove a specific intent to monopolize on the part of multiple conspirators.[31]

In addition to the heightened forensic hurdles likely to be involved, it is difficult to see any policy incentive for additionally prosecuting such cartel conduct under section 2, rather than simply undertaking the more straightforward task of prosecuting under section 1. Historically, when fines for Sherman Act offenses were paltry in comparison to today,

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25. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985)).

26. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 68 (1911) (describing the "rule of reason"); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–25 (1979) (developing the more modern rule of reason analysis).

27. *See* Joseph J. Bial, *Criminal Antitrust Trials: The Case for Economics*, *in* 2 LIBER AMICORUM: AN ANTITRUST PROFESSOR ON THE BENCH (Nicolas Charbit & Thomas Moretto eds., 2020). For an interesting discussion of similar efforts to exclude expert economic evidence in the context of antitrust class actions, see generally Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147 (2014).

28. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

29. Combination and conspiracy to monopolize has been included as a count in the recent *Martinez* indictment. *See* Indictment, *supra* note 7.

30. *See, e.g.*, Auraria Student Hous. Regency, LLC v. Campus Vill. Apartments, LLC, 843 F.3d 1225, 1240 & n.5 (10th Cir. 2016) (compiling cases).

31. *See, e.g.*, *id.* at 1241, n.7 (compiling cases).

the DOJ did sometimes implement this dual strategy with some success in order to secure increased fines.[32] But, over the years, Congress has raised the applicable fine (and prison sentence) thresholds dramatically,[33] as well as passing a statute allowing the DOJ to seek an amount double any defendant's ill-gotten gains.[34] Antitrust offenses are now punishable by up to ten years in jail, with maximum fines of $1 million for individuals and $100 million for corporations.[35] Additionally, the United States Sentencing Commission Guidelines now provide that "[a]ll counts involving substantially the same harm shall be grouped together,"[36] making it more challenging for prosecutors to secure increased sanctions through joint section 1 and section 2 indictments in any event.

These are presumably some of the factors that account for the 45-year hiatus since the DOJ last brought an indictment based on conspiracy to monopolize under section 2 (as well as under section 1),[37] during which time the DOJ's public articulations of its policy were either silent on section 2 criminal enforcement or explicit in limiting criminal enforcement to section 1.[38] These are also reasons why it seemed highly doubtful that dual enforcement of conspiracy to monopolize conduct under section 2 as well as section 1 was what the DOJ had in mind in its recent statements concerning criminal enforcement of section 2.[39]

C. Unilateral Conduct—Proof to Criminal Standard Highly Challenging in the Context of Rule of Reason Analysis

Unilateral practices under section 2, i.e., unilateral monopolization (whether actual or attempted), have not been deemed by the courts to be hard-core and so *per se* illegal. It seems unlikely that this will change in the foreseeable future.

Accordingly, the courts have thus far consigned unilateral conduct claims under section 2 firmly to rule of reason analysis. A finding of infringement of section 2 on that basis requires the plaintiff to establish not only that the alleged conduct in fact occurred, but also at least the following matters:

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32. *See, e.g.*, Montrose Lumber Co. v. United States, 124 F.2d 573, 575 (10th Cir. 1941) (examining the argument that parallel charges under section 1 and section 2, in relation to the same conduct, would offend the Double Jeopardy Clause).

33. Antitrust Procedures and Penalties Act (Tunney Act) of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (amended 2004); Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879 (amended 2004); Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665. It is notable that, in each case, the congressional focus was squarely on cartel offenses under section 1, with no mention of monopolization offenses under section 2.

34. *See* Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 6, 101 Stat. 1279 (codified at 18 U.S.C. § 3571) (finding the so-called 'double the gain or double the harm' alternative maximum).

35. 15 U.S.C. § 1.

36. U.S. SENT'G GUIDELINES MANUAL § 3D1.2 (U.S. SENT'G COMM'N 2021).

37. The most recent previous indictment occurred in *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977). *See* Crane, *supra* note 16, at 755 (listing *Braniff* as the last section 2 enforcement until recently).

38. *See*, *e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 2.1 (1995) (reserving criminal enforcement for "traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities").

39. *See* sources cited *supra* note 4 (explaining updates to the DOJ's published policy guidance).

- The defendant's intent and purpose in carrying out the conduct was to monopolize.[40]
- The conduct had, in fact, (or, in the case of attempted monopolization, would have had) a harmful effect on the competitive process,[41] this in turn requiring the establishment of:
    - the relevant market;[42] and
    - monopoly power on the part of the defendant within that market (or direct evidence of monopoly power).[43]
- To the extent that the defendant proffers justifications for its conduct in the form of procompetitive benefits, such benefits are outweighed by the anticompetitive harm caused.[44]

These are all highly complex, fact-specific, and nuanced issues, which make proof of a section 2 unilateral conduct infringement under the rule of reason a vexed enough proposition in a civil context, where the applicable standard of proof is "on the preponderance of the evidence," i.e., "more likely than not." To make matters worse for plaintiffs (and would-be prosecutors), the Supreme Court tide currently appears to be on the side of defendants as regards the final issue, namely the force of countervailing procompetitive justifications for conduct challenged under section 2.[45] In any event, the courts have yet to articulate consistent principles for separating legitimate competition from illegitimate exclusion. Indicative of these difficulties even in a civil context are the statistics in the DOJ Antitrust Division's latest published Ten-Year Workload Statistics Report.[46] Between 2010 and 2019 (inclusive), the DOJ filed just one civil proceeding alleging infringement of section 2 (in 2011; the suit was settled). In the same time period, the agency filed 24 civil proceedings alleging infringement of section 1.[47]

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40. Spectrum Sports, Inc., v. McQuillan, 506 U.S. 447, 456 (1993).

41. *See* Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC, 843 F.3d 1225, 1240, n.6 (2016) (compiling cases).

42. Courts have, in certain section 1 cases, been prepared to accept a somewhat pared-back version of the rule of reason known as the 'quick look' approach, in which less in-depth market analysis is required—but only where the anticompetitive effect of the conduct is so self-evident that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). For the reasons given above, it is difficult to see how section 2 unilateral conduct could ever fit within this category.

43. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (holding that controlling 90% of the market "constitute[s] a monopoly"); United States v. E.I. du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377, 391 (1956) (permitting a finding of monopoly power if the firm has the "power to control prices or exclude competition").

44. *Cal. Dental Ass'n*, 526 U.S. at 774–75.

45. *See, e.g.*, Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458–59 (1993).

46. ANTITRUST DIVISION, U.S. DEP'T OF JUST., WORKLOAD STATISTICS FY 2010–2019 (2023), https://www.justice.gov/media/1098696/dl?inline= [https://perma.cc/MTD4-TJTS].

47. *Id.*

In a criminal context,[48] the standard of proof is of course considerably higher: the defendant must be found guilty "beyond a reasonable doubt," meaning that the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime. It would seem beyond a mere challenge (assuming that the conduct did not involve some form of violence)[49] to prove that such a standard could be met for each of the complex constituent elements of the rule of reason analysis outlined above—not least the *mens rea* element of needing to prove that the defendant's intent and purpose was to monopolize.[50] This is *a fortiori* in circumstances where the lines between what is lawful and what is not under section 2 are, as discussed, unclear and widely contested.

Above and beyond the immense forensic challenges which the DOJ would face were it to press a unilateral conduct charge under section 2, the defendant may mount a defense based on the Due Process Clause, which "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[51] The argument would run that the defendant had not received fair notice that the conduct at issue could result in criminal sanctions, in particular given the Government's long history of declining to prosecute such conduct, both in practice and in the DOJ Antitrust Division's previous written policy guidance,[52] as has been reflected in the shaping of the modern sentencing system.[53] Although federal courts have not always been receptive to such arguments,[54] here, the argument that the Government appears never to have brought a felony section 2 prosecution since the offense

48. As a technical matter, there is no bar to criminally prosecuting alleged antitrust infringements under the rule of reason. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 440–41 (1978).

49. Such as two criminal antitrust cases in the 1930s involving racketeering in the fur trade, which have the distinction of being the only cases whose protagonists were the subjects of FBI "wanted" posters for antitrust violations. *Fur Dressers Case*, FBI, https://www.fbi.gov/history/famous-cases/fur-dressers-case [https://perma.cc/P678-WN6Y]. The conduct alleged in the recent section 2 indictment in *Martinez* appears to be of a similar nature.

50. While criminal prosecutions of *per se* offenses need only show an intent to enter into the infringing agreement, criminal prosecutions of monopolization offenses must demonstrate a general intent to exercise monopoly power (or, in the case of attempted monopolization offenses, a specific intent to monopolize). *See* Smith v. Burns Clinic Med. Ctr., P.C., 779 F.2d 1173, 1176 (6th Cir. 1985) (finding that, in criminal prosecutions of monopolization offenses, the government must demonstrate general intent); United States v. Empire Gas Corp., 537 F.2d 296, 299 (8th Cir. 1976) (finding that, in attempted monopolization cases, the government must demonstrate specific intent).

51. United States v. Lanier, 520 U.S. 259, 267 (1997).

52. *See supra* note 5. This policy was reflected in every edition of the Antitrust Division Manual from the first edition in 1979 through to 2022. It was also positively espoused by the Government in court. *See, e.g.*, United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1274 (10th Cir. 2018) ("Practically, the Government's preference to proceed under a per se rule is not just strongly held, it is a matter of institutional decree.").

53. For instance, the U.S. Sentencing Commission's guidelines on criminal antitrust violations, which focus exclusively on bid-rigging, price-fixing, and market-allocation agreements on the basis that "[t]here is no consensus . . . about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated." U.S. SENT'G GUIDELINES MANUAL § 2R1.1 & cmt. background (U.S. SENT'G COMM'N 2021).

54. *See, e.g.*, Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury, 912 F.2d 897, 906 (7th Cir. 1990) ("There have been occasional suggestions . . . that the sudden revival of a long forgotten law carrying harsh penalties . . . might encounter a defense of desuetude. But if there is such a defense it is surely reserved for more extreme cases than this one.").

was converted from a misdemeanor to a felony in 1974[55] could not lightly be dismissed.[56] This is not to say that the DOJ would not proceed with such a prosecution, but it is conceivable that strength would be added to any Due Process challenge by the vagueness of the law at issue itself.[57]

IV. THE BROADER INTERNATIONAL PERSPECTIVE

After the seminal judgment against Microsoft in civil proceedings under section 2 in 2001,[58] AAG R. Hewitt Pate was asked the following question by a Chinese official: "Since you in the United States put people who violate antitrust laws in jail, and your courts have found Microsoft is a violator of antitrust laws, please explain why your government does not imprison Bill Gates."[59] AAG Pate considered that this remark demonstrated the Chinese philosophy that "once the government decides that a violation has been committed, the next step must be strong and decisive enforcement of the decision and submission by the offender. . . . The idea of some government enforcement decisions being treated as more clearly right than others did not strike a chord."[60]

In that sense, the remark draws out rather evocatively how different the United States' philosophy is (or at least has been up until now). As AAG Pate notes:

> The suggestion of criminal prosecution based on U.S. findings of violations of Section 2 of the Sherman Act by Microsoft may strike the experienced American antitrust practitioner as the strangest of all. . . . [T]here has been no criminal case brought under Section 2 for decades and no serious suggestion that there should be.
>
> It is well accepted in the United States, and increasingly in Europe, that antitrust enforcement outside the hard-core cartel area must necessarily involve close calls or issues about which reasonable people trying to predict the economic future can disagree. These are not the sort of decisions where criminal enforcement is appropriate.[61]

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55. The tiny handful of section 2 criminal cases brought between 1975 and 1977 are likely to have related to conduct pre-dating the Antitrust Penalties and Procedures Act of 1974, and so would have been charged as misdemeanors.

56. *See* Gregory Werden, *Criminal Enforcement of Section 2: What Would Be the Point?*, COMPETITION POL'Y INT'L (Aug. 14, 2022), https://www.competitionpolicyinternational.com/criminal-enforcement-of-section-2-what-would-be-the-point [https://perma.cc/DK22-SKE2] (discussing criminal enforcement of section 2).

57. Additionally, a court might be inclined to apply the Rule of Lenity in order to give the defendant the benefit of the doubt, on the basis that ambiguous criminal laws should be interpreted in favor of defendants. Conceivably, a criminal prosecution under section 2 might even prompt a defendant to invite the court to assess whether the Vagueness Doctrine should be invoked to render section 2 void entirely, on the basis of the vagueness of the concept of "monopolization."

58. United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

59. *See* R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195, 197 (2008).

60. *Id.* at 207–08.

61. *Id.* at 207. As recently as 2020, the DOJ expressed the same sentiment in a statement to the Organization for Economic Cooperation and Development (OECD) that the success of its criminal enforcement regime was a consequence of its "unwavering commitment to ensuring predictability and transparency in its criminal antitrust enforcement efforts" arising from its "decision to pursue hardcore cartel behavior." Org. for Econ. Coop. and

Another obvious point arising out of the Chinese official's remark is that there was no equivalent criminal antitrust regime in China at the time. The same continues to be true for much of the rest of the world. The list of countries that do have such a regime is growing, but in all cases[62] it is thus far strictly limited to cartels.[63] With the exception of Canada (whose criminal antitrust law dates back to 1889—making it a year older than the Sherman Act), other countries' criminal cartel regimes are generally nascent and relatively untested: custodial prison sentences have only rarely been ordered outside the United States (and have not been ordered in Canada since 1996).[64] In the United Kingdom, for example, individuals participating dishonestly in a cartel arrangement have faced the prospect of prison sentences since 2003,[65] but there have been only a small handful of convictions to date.[66] Nonetheless, there is now considerable international momentum behind effective cartel deterrence and cross-border cooperation in the cartel sphere.[67]

There is no such international dialogue—let alone momentum—in the sphere of monopolistic conduct. On the contrary, bringing criminal prosecutions into this sphere under section 2 would move the United States' antitrust enforcement regime further apart from those in the rest of the world.

V. CONCLUSION

In conclusion, the Government's recent foray into prosecution of anticompetitive conduct pursuant to section 2 is faced with a number of hurdles (and particularly in the instance of unilateral conduct). It is also a departure from decades of cases brought by the

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Dev. [OECD], *Criminalisation of Cartels and Bid Rigging Conspiracies—Note by the United States*, at 14, OECD Doc. JT03462056 (June 9, 2020), https://www.justice.gov/atr/page/file/1316546/download [https://perma.cc/DT47-L7M9].

62. Ironically, the closest exception to this is China. In August 2022, amendments to China's Anti-Monopoly Law came into force which opened the door to potential future criminal prosecution of serious antitrust violations. However, it is not yet clear whether unilateral monopolization could fit within this bracket, and China's Criminal Code has not yet been updated to criminalize anti-competitive conduct.

63. Canada's regime used to allow for criminal enforcement of some forms of unilateral monopolization conduct, such as predatory pricing, but the relevant provision was repealed in 2009. *See* Susan M. Hutton, *Primer on Amendments to Canada's Competition Act and Investment Canada Act*, STIKEMAN ELLIOTT (Mar. 23, 2009), https://www.stikeman.com/en-ca/kh/competitor/primer-on-amendments-to-canada-competition-act-and-investment-canada-act [https://perma.cc/CS6U-RXJG] ("Stakeholders on all sides have long recognized the criminal sanctions [for predatory pricing and price discrimination] to be inconsistent with modern economics.").

64. OECD, *Criminalisation of Cartels and Bid Rigging Conspiracies—Note by Canada*, at 6 n.14, OECD Doc. JT03464347 (June 9, 2020), https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)3/en/pdf [https://perma.cc/43U9-VWTL].

65. U.K. Enterprises Act, (2002) §§ 188, 190.

66. *See* Frances Murphy et al., *UK: Summary of Cartel Enforcement Action*, GLOB. COMPETITION REV. (July 14, 2021), https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2022/article/uk-summary-of-cartel-enforcement-action [https://perma.cc/J89H-PPX3] (outlining and reviewing relevant cartel enforcement actions).

67. For example, the OECD's updated recommendations concerning effective action against hardcore cartels, adopted in July 2019, which seek "to guide domestic reforms and improve the effectiveness of cartel enforcement on the basis of commonly agreed standards." *See Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD 1, 3 (2019), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452 [https://perma.cc/K8RC-NGSE].

DOJ. It remains unclear how the injection of uncertainty into a well-established area of antitrust will benefit the market.