CRIMINAL ENFORCEMENT OF SECTION 2 OF THE SHERMAN ACT: AN EMPIRICAL ASSESSMENT

DANIEL A. CRANE*

In early 2022, the new leadership of the Justice Department's Antitrust Division made waves by announcing that the DOJ would consider bringing criminal cases for monopolization under Section 2 of the Sherman Act. This dramatic change in policy—Section 2 has not been criminally enforced in decades—was first announced in a speech in March by Deputy Assistant Attorney General Richard Powers,[1] asserted again a month later in another speech by Assistant Attorney General Jonathan Kanter,[2] and then confirmed in an updated Antitrust Division Manual released in April.[3]

If the point was to get the attention of the defense bar and the companies they represent, these bombshell announcements succeeded. Defense-oriented law firms rushed to release a slew of client alerts, warning of a "significant departure from modern DOJ criminal antitrust enforcement policy,"[4] and a

* Frederick Paul Furth, Sr. Professor of Law, University of Michigan. Many thanks to Shay Elbaum and the research team at the University of Michigan Law Library for copiously pulling together the database of cases from which this article's findings are drawn. Wesley Ward provided excellent research assistance.

[1] Kathryn Hellings & Daniel Shulak, *Head of DOJ Criminal Antitrust Unit Says that Criminal Monopolization Cases May Be on the Horizon*, HOGAN LOVELLS: ENGAGE (Mar. 3, 2022).

[2] Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Division, Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022).

[3] *Compare* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL § 7-2.200 (2022) ("[The Justice Department] may also bring, and has brought, criminal charges under Section 2."), *with* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL § III-12 (2015) ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.").

[4] Sydney Cooper et al., *Monopolists Going "Directly to Jail?" DOJ Announces Intent to Criminally Prosecute Section 2 Violations*, JDSUPRA (Mar. 9, 2022), www.jdsupra.com/legalnews/monopolists-going-directly-to-jail-doj-3688936.

"surprising"[5] and "significant policy shift"[6] with "far-reaching" implications.[7] And, although the Justice Department has not yet identified possible targets, it is no secret that the Biden administration has ongoing monopolization cases against Google and Facebook, has investigations open as to other Big Tech companies as well, and generally takes the position that Section 2 has been dramatically underenforced and that a reckoning is due.[8]

Whatever the administration's plans, and whatever the policy considerations of bringing criminal monopolization cases, it is clear that historical precedent will play a considerable role in arguments for and against a renewed regime of criminal enforcement. In response to assertions that criminal Section 2 enforcement would constitute a dramatic break with precedent, the administration answers that criminal monopolization enforcement was once standard practice and that the last several decades of non-enforcement are the aberration. In a June 7, 2022 speech, Deputy AAG Powers defended the possibility of bringing criminal monopolization cases as "'not a novel idea or theory'" but one that represents a revival of previous agency practice.[9] He added: "Historically, the antitrust division did not shy away from bringing criminal monopolization charges when companies and executives committed flagrant offenses intended to monopolize markets . . . and by my count, the Justice Department has brought over 100 criminal monopolization cases."[10]

So, what exactly is the historical record on criminal Section 2 enforcement? Surprisingly, there is no source authoritatively compiling the record. In contrast to Mr. Powers' assertion of over 100 cases, a study in 2002 reported 87 criminal monopolization cases, without providing any significant detail about them.[11] Estimates of when the last criminal monopolization case was brought have varied, with one scholar asserting that "[t]he last major criminal monop-

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[5] Lindsey Olson Collins & Ann M. O'Brien, *Antitrust Division Announces Newfound Intent to Pursue Monopolization Cases Criminally*, BAKER & HOSTETLER (Mar. 4, 2022).

[6] Hellings & Shulak, *supra* note 1 ("Powers' statement represents a significant Antitrust Division policy shift[.]").

[7] Nicholas J. Giles et al., *DOJ Signals Intent to Bring Criminal Charges for Monopolization*, MCGUIREWOODS (Mar. 7, 2022).

[8] *See* Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021) ("Promoting Competition in the American Economy").

[9] Michael Acton, *US DOJ's Exploration of Criminal Charges for Monopoly Breaches Follows Decades of Underenforcement, Powers Says*, MLEX (June 7, 2022).

[10] *Id.*

[11] Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 115–16 (2001) ("To construct the database of monopolization cases, I assembled all the relevant cases from the CCH Abstracts from 1890 to 1996. Of the more than 4,000 entries, I found 423 cases for which sufficient information was available and that met the initial criteria—a consent decree or a finding against the defendants in a monopolization case brought by the government. Of the 423 monopolization cases, eighty-seven were criminal cases and 336 were civil cases. All eighty-seven criminal cases resulted in monetary fines.").

olization case the federal government brought was against American Tobacco in 1940,"[12] and other scholars estimating that the last criminal monopolization case (major or not) was brought in 1967, 1969, or 1972.[13] In fact, the Justice Department brought a criminal monopolization case as recently as 1977.[14] According to a study by Richard Posner, the only criminal monopolization jail sentences were between 1925 and 1929.[15] As will be shown, that also is not quite accurate or complete.

This article aims to provide a comprehensive account of the Justice Department's historical record on criminal Section 2 enforcement. Based on a review of every Justice Department enforcement action reported in CCH's Trade Regulation Reporter, I have assembled a table of 168 criminal monopolization cases, with the first (against Federal Salt) brought in 1903 and the last (against Braniff Airlines) brought in 1977. That table is included as an online-only appendix.[16]

The raw numbers are not the most important headline. A far more significant question is what sort of criminal monopolization cases the Justice Department historically brought. In particular, were these criminal conspiracy cases of the type that today would still be charged criminally, but only under Section 1 of the Sherman Act, or were these cases involving unilateral exclusionary conduct—cases of the type that the Justice Department has rarely brought even civilly in recent decades (but of which there are hundreds of private cases)?[17] The answer to this question is significant because the Justice Department's announcement of criminal monopolization charges seems to be aimed at unilateral monopolization offenses rather than as a mere supplement to its anti-cartel Section 1 criminal enforcement. Claims that criminal monopolization enforcement is historically grounded in agency practice thus turn primarily on the Department's historical practice with respect to unilateral conduct offenses—a topic on which there is scant academic work.

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[12] Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 147 (2009).

[13] Spencer Weber Waller, *Corporate Governance and Competition* Policy, 18 GEO. MASON L. REV. 833, 882 n.331 (2011); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI. K. L. REV. 207, 216 n.48 (2003).

[14] *See infra* note 66.

[15] Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 391 (1970).

[16] The appendix to this article is available at ambar.org/criminal-enforcement-appendix.pdf.

[17] During the eight years of the Bush administration, the Justice Department brought no monopolization cases (even civil ones) at all. During the eight years of the Obama administration, the Justice Department brought only one such case. Jad Chamseddine, *Obama No More Aggressive Than Bush on Mega-Mergers*, CQ MAGAZINE (June 27, 2016) ("Almost eight years into his presidency, Obama's Justice Department has brought just one minor monopolization case, suing a small Texas hospital, United Regional Health Care System of Wichita Falls, for using its dominant market position to hurt competitors.").

My findings can be summarized briefly as follows: Out of 168 cases in which the Justice Department brought a criminal charge under Section 2, only 20 involved unilateral conduct. In 8 of these cases, the criminal charges were dismissed as to all defendants, or all of the defendants were found not guilty. In the remaining 12 cases, the defendants were found guilty, usually via a nolo contendere plea, and a fine was imposed. The largest fine—$187,000—was imposed on Safeway Stores in 1955 and would be equivalent to about $3 million today. In three cases, a prison sentence was imposed. Two of those cases—*United Pacific* (1933) and *Barrett* (1939)—involved crimes of violence.[18] In one curious outlier case in 1973, an individual apparently served one month of prison time for unilateral monopolization not involving violence.

The remainder of this article proceeds as follows. Part I establishes the parameters of the research question, in particular the distinction between hard core antitrust offenses and those analyzed under the rule of reason, as bearing historically on the question of criminal enforcement. Part II presents my empirical findings based on my review of the CCH database and supplementary sources. Part III considers the historical record's implications for the Justice Department's ambition to revive criminal Section 2 enforcement.

I. RESEARCH QUESTION

A. DISTINGUISHING HARD CORE AND RULE OF REASON VIOLATIONS OF THE SHERMAN ACT

The Sherman Act is simultaneously a civil and criminal statute. Textually, it is a felony to violate Section 1 by entering into any "contract combination or conspiracy . . . in restraint of trade" or Section 2 by "monopoliz[ing]," "conspir[ing] . . . to monopolize," "or attempt[ing] to monopolize."[19] But, historically, the vast majority of antitrust enforcement has been civil—whether suits by the Justice Department or state attorneys general in equity, private lawsuits for treble damages, or civil enforcement of Section 5 of the Federal Trade Commission Act by the FTC (which has no criminal powers). The question is not whether the Justice Department has the legal power to bring criminal cases for any particular violations of the Sherman Act—it does—but whether it should do so in its prosecutorial discretion.

Two fundamental distinctions in antitrust doctrine are important to understanding the prosecutorial decision. The first is between concerted and unilateral action. By its terms, Section 1 of the Sherman Act requires concerted

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[18] The appendix to this article, *see supra* note 16, includes information on each of the cases used in the empirical analysis.

[19] 15 U.S.C. §§ 1, 2.

action—some sort of agreement.[20] In contrast, purely unilateral conduct is covered by Section 2. However, Section 2 also prohibits conspiracy to monopolize, and so Section 2 covers much ground that Section 1 covers as well.

The second fundamental distinction is between "hard core" behavior governed by a rule of per se illegality where the mere form of the agreement makes it unlawful, and other behavior the anticompetitive properties of which are more ambiguous and therefore require analysis under a searching inquiry into market definition, market power, anticompetitive effects, and procompetitive justifications.[21]

In contemporary doctrinal terms, the only "hard core" offenses meriting per se condemnation are those involving "naked" horizontal agreements among competitors, such as price fixing or market division cartel agreements.[22] Any other type of agreements—for example joint ventures among competitors and vertical agreements—are governed by the rule of reason.[23] Hence, unilateral monopolization behavior actionable under Section 2 is generally governed by the rule of reason and requires proof of market power in a properly defined relevant market, anticompetitive effects, and consideration of offsetting efficiency justifications.[24]

Courts sometimes assume that all of Section 2 is governed by rule of reason analysis, but that is not quite true. A naked horizontal conspiracy to monopolize would be actionable as per se illegal under Section 1 and there would be no good reason to apply a different standard to the same behavior under Section 2. There is very little recent case law on this topic because there is no obvious reason to bring a separate Section 2 conspiracy to monopolize case if the same behavior is per se illegal under Section 1, apart from the possibility of a sentencing enhancement in a criminal case.[25]

A further important distinction concerns the overlap between collusion and exclusion. Many cartel agreements also involve agreements to exclude rivals. One of the best-known criminal monopolization cases—*American Tobacco*—involved both a price-fixing conspiracy and a conspiracy to exclude competitors.[26] A study by Margaret Levenstein and Valerie Suslow found that 36 per-

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[20] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[21] *See* Ohio v. Am. Express Corp., 138 S. Ct. 2274, 2283–84 (2018).

[22] *Id.*

[23] *Id.*

[24] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 60 (D.C. Cir. 2001).

[25] *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 788–89 (1946) (holding that separate Section 1 and Section 2 liability may be found for the same conduct because the two claims require separate proof).

[26] *Id.* at 788 ("In the present cases, the court below has found that there was more than sufficient evidence to establish a conspiracy in restraint of trade by price fixing and other means, and

cent of cartels engage in strategic activities designed to exclude entry.[27] Much of the per se illegal behavior charged under Section 1 of the Sherman Act also involves exclusionary behavior that could be charged under Section 2. Thus, for example, an agreement among competitors to engage in predatory pricing would be per se illegal as collusion even though unilateral predatory pricing is adjudicated under the rule of reason.[28] A 1994 study by Joseph Gallo and co-authors found that 2 percent, or a total of 33, of the 1,522 criminal antitrust cases brought by the Justice Department between 1955 and 1993 involved exclusionary practices.[29] However, my own review suggests that few cases in that set involved unilateral behavior that would be judged under the rule of reason or, to put it the other way, that most of them must have involved per se unlawful collusive agreements to engage in exclusionary behavior.

The Supreme Court has held that there is no bar to prosecuting antitrust violations criminally under the rule of reason.[30] As discussed next, however, the Justice Department has long shied away from doing so.

B. THE JUSTICE DEPARTMENT'S EVOLVING POLICY TOWARD CRIMINAL ANTITRUST ENFORCEMENT

The Justice Department's policy on criminal enforcement of the Sherman Act has evolved over the decades since 1890. As an entry point to this history, it is useful to begin with a speech given in 1978 by Assistant Attorney General Donald Baker that presented a retrospective on the Justice Department's understanding of its own history on criminal antitrust enforcement.[31] Baker's speech came at a significant moment for purposes of my analysis here. Although Baker's focus was criminal Section 1 rather than Section 2 cases, it coincided with the Justice Department's abandonment of criminal monopolization cases—the last one ever having occurred the year before Baker's speech. It is also significant that Baker worked for the Carter administration and was not particularly reflecting Chicago School influences, which were only beginning to be adopted in the courts.

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also a conspiracy to monopolize trade with the power and intent to exclude actual and potential competitors from at least a part of the tobacco industry.").

[27] Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration*, 54 J.L. & ECON. 455, 472 (2011).

[28] USA Petroleum Co. v. Atl. Richfield Co., 972 F.2d 1070, 1074–75 (9th Cir. 1992), *rev'd on other grounds*, 495 U.S. 328 (1990).

[29] Joseph C. Gallo et al., *Criminal Penalties Under the Sherman Act: A Study of Law and Economics*, 16 RSCH. L. & ECON. 25, 28 (1994).

[30] United States v. United States Gypsum Co., 438 U.S. 422, 440–41 (1978).

[31] Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978); *see also* John H. Shenefield, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Division, Remarks, Antitrust Enforcement to Preserve the Competitive Market Place (Apr. 18, 1979).

According to Baker, "Originally, the Department of Justice viewed the [Sherman Act] as essentially civil, and, except in a handful of labor cases involving violence, used [the Act to] obtain equitable relief."[32] Thus, from 1890 to 1903, the Justice Department brought 16 civil cases and seven criminal cases under Section 1.[33] Fifty years later, the "Sherman Act assumed a new role" under Thurman Arnold's leadership at the Antitrust Division.[34] Arnold believed that "[a]s a deterrent, criminal prosecution is the only effective instrument under existing statutes" and that the civil suit should only be a supplement, not a substitute, for criminal enforcement.[35] Thus, between 1938 and 1943, the Antitrust Division brought 340 Section 1 cases, 231 of which were criminal prosecutions.[36] Some of these involved "old-fashioned price-fixing conspiracies," but others "raised novel issues."[37] According to Baker, Arnold "clearly went beyond present standards of due process" and "[h]is actions invited criticism that businesses were branded as criminal on the basis of uncertain conduct and unpredictable rules."[38] Hence, in 1955 the Attorney General's National Committee to Study the Antitrust Laws recommended that criminal cases only be brought "where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade."[39] In a statement submitted to the Committee, the Justice Department "drew the line somewhere between" Arnold's view and the Committee's,[40] stating that in general criminal prosecutions should be limited to:

> (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts, for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been[ ] violating the antitrust laws may warrant indictment for a second offense.[41]

According to Baker, the question of criminal enforcement was less important in the decades following the Attorney General's Report because the Antitrust Division brought relatively few criminal cases.[42] In 1967, the Justice

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[32] Baker, *supra* note 31, at 410.

[33] *Id.*

[34] *Id.*

[35] *Id.* (citing Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, 7 L. & CONTEMP. PROBS. 5, 16 (1940)).

[36] Baker, *supra* note 31, at 410.

[37] *Id.*

[38] *Id.* at 411.

[39] *Id.* (quoting REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955)).

[40] *Id.*

[41] *Id.* (quoting REPORT OF ATTORNEY GENERAL, *supra* note 39, at 350).

[42] *Id.* at 412.

Department issued new guidance on its criminal enforcement intentions in antitrust cases, stating that it would typically only bring a criminal prosecution in one of two cases: (1) where "the rules of law alleged to have been violated are clear and established—describing *per se* offenses—" typically price fixing; or (2) "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."[43] Baker described this position as "fair and useful today" and reflecting current agency practice.[44]

A year after Baker's speech, the first edition of the Antitrust Division Manual made no mention of bringing criminal monopolization cases and assumed that criminal cases would be brought under Section 1.[45] Consistently with Baker's speech, it articulated the guidelines for bringing a criminal case as follows:

> Because the Sherman Act is both a civil and a criminal statute, the Division historically has proceeded by criminal investigation and prosecution in two types of cases: (1) cases involving *per se* antitrust violations; for example, price fixing, bid rigging, and horizontal customer and territorial allocations; and (2) cases where there is evidence that the defendants knew that they were violating the law and acted with flagrant disregard for the legality of their conduct. There are a number of situations, however, where, although the conduct may appear to be a *per se* violation of law, criminal investigations or prosecution may not be considered appropriate. These situations involve areas where: (1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) there is confusion caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.[46]

The language from the 1979 edition was repeated in the Second Edition in 1987.[47] A year later, Assistant Attorney General Charles "Rick" Rule outlined his views about criminal enforcement of Section 2.[48] In his view, "[B]ecause unilateral conduct alleged to be illegal monopolization is generally not clearly anticompetitive, it has rarely been a target of criminal prosecution."[49] How-

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[43] *Id.* (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUST., TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967)).

[44] *Id.*

[45] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL IV-82 (1979) ("A significant portion of Antitrust Division cases that go to trial are cases brought as criminal violations of Section 1 of the Sherman Act.").

[46] *Id.* III-11.

[47] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-12 (1987).

[48] *60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division*, 57 ANTITRUST L.J. 257, 265–66 (1988) [hereinafter *60 Minutes with Rule*].

[49] *Id.* at 265.

ever, "a criminal monopolization case would be warranted" in some circumstances, such as conspiracies among competitors involving "some obviously and irrefutably harmful conduct to keep out interlopers—for example, blowing up their plants," where both Section 1 and Section 2 counts might be brought, or unilateral cases involving conduct involving threatened or actual violence.[50] However, Rule did not "believe criminal prosecution would be appropriate if the alleged exclusionary conduct was nonviolent, commercial conduct such as pricing or investment."[51]

Subsequent editions of the Antitrust Division Manual made even more explicit that criminal enforcement was reserved for Section 1 cases. In 1998, the Third Edition issued by the Clinton administration largely repeated the 1979 language but began with the caveat: "On its face, Section 1 of the Sherman Act . . . makes any contract, combination or conspiracy in restraint of trade a criminal offense,"[52] thus suggesting again that criminal enforcement should be confined to Section 1 cases. In 2008, the Fourth Edition stated: "In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."[53] The same language was repeated by the Obama administration in the Fifth Edition.[54]

In consequence, from the first edition of the Handbook until the previously noted change in the 2022 Sixth Edition, the antitrust violations criminally prosecuted were principally naked horizontal agreements charged under Section 1 of the Sherman Act. This remains a robust area of criminal enforcement, with scores of individual defendants sentenced to prison sentences averaging 15-20 months and corporate fines reaching the hundreds of millions.[55] The Justice Department also brought some criminal challenges against practices that were considered per se illegal at the time but would now be governed under the rule of reason. For example, in 1978, the Justice Department indicted Cuisinarts for resale price maintenance,[56] a practice that was per

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[50] *Id.* at 265–66.

[51] *Id.* at 266.

[52] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-16 (1998).

[53] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-20 (2008).

[54] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-12 (2015).

[55] *Criminal Enforcement Trends Charts*, U.S. DEP'T OF JUSTICE (Nov. 16, 2021), www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

[56] *In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1009–10 (D. Conn. 1981), *aff'd*, 665 F.2d 24 (2d Cir. 1981).

se illegal at that time but has since become subject to the rule of reason[57] and is virtually not challenged even in private civil cases.[58]

C. How to Understand the Historical Record on Criminal Monopolization Cases

That the Justice Department has enforced only Section 1, and not Section 2, criminally since the late 1970s sets the stage for analyzing the Department's prior historical record. In particular, it raises the question of whether the scores of criminal Section 2 cases previously brought were essentially criminal conspiracy cases charging the same types of hard-core cartel behavior that today would only be charged under Section 1, or whether they included cases of purely unilateral conduct, or to put it in Rick Rule's words, of "exclusionary . . . nonviolent, commercial conduct."[59]

There is an easy answer to this question, but also a harder one. The easy answer is that, as discussed in the following Section, almost every one of the 168 cases in which monopolization was criminally charged asserted conspiracy to monopolize. From this, it would be tempting to discount the Justice Department's criminal monopolization cases as simply duplicative of Section 1 theories and not charging the sorts of unilateral conduct offenses of current interest. But that would be misguided due to a wrinkle in antitrust law—the *Copperweld* doctrine—that arose a few years after the Justice Department stopped bringing criminal monopolization cases.

In *Copperweld*,[60] the Supreme Court held that a parent corporation and its wholly owned subsidiary are a "single entity" for purposes of antitrust law and hence that intra-firm agreements are not agreements at all for the concerted action requirement of Section 1. The *Copperweld* doctrine has been applied more generally to cover Section 2 conspiracy claims agreements among agents of the firm and the firm.[61] A firm and its officers or employees are legally incapable of conspiring within one another to commit an antitrust violation. But this was not always so.

Consider, for example, one of the cases discussed below, the Justice Department's 1939 criminal monopolization charge against Barrett Company

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[57] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[58] John Asker & Heski Bar-Isaac, *Vertical Information Restraints: Pro- and Anticompetitive Impacts of Minimum-Advertised-Price Restrictions*, 63 J.L. & Econ. 113, 117 (2020) (observing that, post-*Leegin*, RPM cases have failed to gain traction).

[59] *60 Minutes with Rule*, *supra* note 48.

[60] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

[61] Las Vegas Sun, Inc. v. Adelson, 2020 WL 7029148, at *9 (D. Nev. Nov. 30, 2020); Tonal Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease, P.C., 2009 WL 2596493, at *13–14 (D. Colo. Aug. 21, 2009); Gucci v. Gucci Shops, Inc., 651 F. Supp. 194 (S.D.N.Y. 1986).

and 12 of its officers. The indictment alleged a combination and conspiracy to restrain and monopolize interstate trade and commerce in sulphate of ammonia, a nitrate fertilizer. The anticompetitive behavior charged was essentially an intra-firm scheme to corner the market on sulphate of ammonia through exclusive contracts with large producers. The "conspiracy" charged seems to have been among the officers of firm and the firm itself. Today, that would not count as a conspiracy at all, since the relevant agreements occurred within a "single entity." To code *Barrett* as a conspiracy case would miss the fact that, today, *Barrett* would be considered a unilateral conduct case and could only be charged under Section 2, if it was charged at all.

Hence, in categorizing the Justice Department's historical criminal monopolization cases as to whether they charged unilateral conduct, I did not rely exclusively on whether the indictment or information charged conspiracy which, as noted, almost all of them did. Instead, I reviewed the case description of the Justice Department's allegations and made a qualitative determination as to whether the conduct charged involved collusive agreement among rival firms or individuals, or whether instead involved essentially unilateral exclusionary behavior. In a number of cases, I had to read judicial decisions concerning the case to determine whether the conduct alleged was concerted or unilateral.[62]

Of necessity, these categorization decisions involved a degree of judgment. Some cases involved aspects of concerted action, but the thrust of the case was unilateral, in which case I coded it as unilateral. The table in the appendix to this article contains a description of the allegations in all of the 168 criminal monopolization cases, and others may reach different conclusions as to whether a case involved what would today be considered conspiracy or concerted action, or unilateral conduct. In the following section, I describe my findings, including a detailed discussion of each of the cases that I categorized as involving unilateral monopolizing behavior.

II. FINDINGS

In order to create a set of all potentially relevant cases, I began by compiling a spreadsheet of all Justice Department antitrust actions filed in federal court from 1890–1979 reported in the CCH Trade Regulation Reporter—a

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[62] For example, in January 1943, the Justice Department brought separate criminal Section 1 and Section 2 cases against Kroger Grocery and Baking Company and Safeway Stores in the District of Kansas, charging conspiracy to restrain competition and monopolize the sale and distribution of food products. Although the two corporations were charged in separate cases, a district court opinion makes clear that the Justice Department was charging the two companies with concerted action to monopolize and fix prices. United States v. Safeway Stores, Inc., 51 F. Supp. 448, 450 (D. Kan. 1943).

total of 2,352 cases.[63] (As noted, the FTC does not bring criminal cases). I next categorized the cases as either civil or criminal. Criminal cases were initiated mostly by indictment, and in a few instances by information.[64] Of the 2,352 cases, 1,059 were criminal—987 initiated by indictment and 72 by information.[65] For the criminal cases, I next ascertained whether a violation of Section 2 of the Sherman Act was alleged. From about 1940 forward, CCH usually specified the section or sections of the Sherman Act alleged in the indictment or information, so my coding simply tracked CCH's designation. For earlier years (and occasionally in later ones), the CCH record did not spell out the statutory section. I therefore reviewed the case description to determine whether the charging instrument asserted any of the substantive offenses covered by Section 2 of the Sherman Act—monopolizing, conspiring to monopolize, or attempting to monopolize, and coded the case as asserting a Section 2 case if it did. Where CCH abstracts were ambiguous as to whether a Section 2 theory was alleged, I searched for other publicly reported information about the case, such as judicial decisions.

Of the 1,059 criminal cases, 168 included monopolization allegations. The earliest case (*Federal Salt*) was brought in 1903 and the last (*Braniff*) in 1977.[66] As shown in the figure below, the cases were heavily concentrated in the 1940s and 1950s.

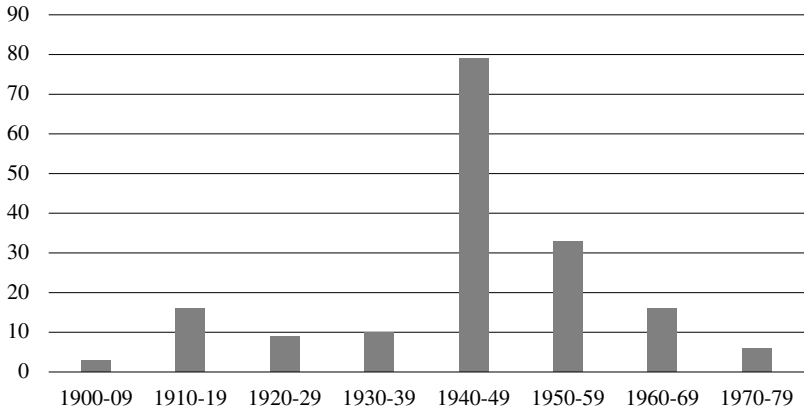

FIGURE: CRIMINAL MONOPOLIZATION CASES BY DECADE

[63] To confirm that no criminal monopolization cases were brought after 1979, I ran additional searches on the CCH database for 1980-1996, when CCH stopped printing its case updates. My search located no criminal Section 2 cases filed in this period.

[64] In contrast, civil cases were generally initiated by petition or complaint.

[65] In a number of instances, the Justice Department filed a civil action concurrently with the criminal challenge.

[66] The appendix to this article, *see supra* note 16, includes information on each of the cases used in the empirical analysis.

For each case, I next determined whether the charging instrument alleged coordinated anticompetitive behavior or unilateral exclusionary conduct. The vast majority of the cases alleged coordinated behavior among or between competitors, such as price fixing, market division, customer allocation, or group boycotts, and charged both Section 1 and Section 2. At least 60 complaints named associations, trade organizations, societies, or unions as defendants and typically alleged that these organizations served as facilitators of collusive schemes. In many other cases, the charging instrument alleged anticompetitive agreements or cartel conduct among competitor companies.

Out of 168 cases in which the Justice Department brought a criminal charge under Section 2 of the Sherman Act, 20 involved unilateral conduct. In 8 of these cases, the criminal charges were dismissed as to all defendants, or all of the defendants were found not guilty. (In one of these 8 cases, the criminal charges were dropped in favor of a consent decree in a related civil case). In the remaining 12 cases, the defendants were found guilty, usually via a nolo contendere plea, and a fine was imposed. The largest fine—$187,500—was imposed on Safeway Stores in 1955. In three cases, a prison sentence was imposed for which time was served. Two of those cases—*United Pacific* (1933) and *Barrett* (1939) involved crimes of violence.[67] In one curious outlier case—*Molasky* (1973)—an individual apparently served one month of prison time for unilateral monopolization not involving violence.[68] In 1973, Missouri magazine wholesaler Allan Molasky pleaded guilty to attempting to monopolize the wholesale distribution of magazines and paperback books in the Gulf Coast area by attempting to acquire all of the local wholesale agencies located in the area between Victoria, Texas and Pensacola, Florida and threatening to put out of business anyone who refused to sell. He received a sentence of one year, with 11 months suspended (and two years of probation). Mr. Molasky's exceptional case may have done the trick because it was the last time the Justice Department ever charged unilateral monopolization conduct criminally.

The table below presents a summary of the 20 cases and, for cases involving a fine, the amount of the fine in 2022 dollars.[69]

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[67] The appendix to this article, *see supra* note 16, includes information on each of the cases used in the empirical analysis.

[68] *Id.*

[69] Present value of fines were calculated using the U.S. Bureau of Labor Statistics, CPI Inflation Calculator: www.bls.gov/data/inflation_calculator.htm. The appendix to this article, *see supra* note 16, includes information on each of the cases in the table.

TABLE: SECTION 2 CRIMINAL CASES INVOLVING UNILATERAL CONDUCT

Defendant	**Year**	**Outcome (Guilty: G; Not Guilty: NG)**	**Present value of fine (May 2022)**
Winslow	1912	NG	---
Rockefeller	1914	NG	---
Nash Bros.	1917	NG	---
Ludowici-Celadon	1929	G	$85,466
Union Pacific	1933	G	$22,659
Barrett	1939	G	$20,879
Chattanooga News	1940	G	---
NY Great A&P	1944	G	$2,939,759
Gamewell	1946	G	$694,605
Kansas City Star	1953	NG	---
National Linen	1955	G	$240,843
Safeway Stores	1955	G	$2,052,640
Harte-Hanks	1958	NG	---
Jas. A. Matthews	1958	G	$492,634
General Motors	1961	NG	---
H.P. Hood	1963	NG	---
United Fruit	1963	G	$38,460
Union Camp	1963	G	$1,298,025
Empire Gas	1973	NG	---
Molasky	1973	G	$686,141
Total fines			$8,572,111

The following paragraphs summarize the allegations and outcome of each of the 20 cases I coded as unilateral monopolization offenses:

- *United States v. Winslow* (D. Mass. 1912). The prosecution alleged the combination of several shoe machinery companies through merger into United Shoe and tying arrangements in lease agreements. The district court sustained demurrers to some counts of the indictment, which the Supreme Court affirmed in *United States v. Winslow*, 227 U.S. 202 (1913). The case was subsequently withdrawn by the prosecution, which filed a nolle prosequi.

- *United States v. Rockefeller* (S.D.N.Y 1914). William Rockefeller, railroad company officers, and directors of New York, New Haven & Hartford Railroad Company were named as defendants. The allegation was that the defendants conspired to monopolize the transportation facilities of New England. The jury disagreed as to five defendants, and six defendants were found not guilty; pleas of immunity were sustained as to four defendants, and a nolle prosequi was entered as to the remaining defendants.

- *United States v. Nash Bros.* (D.N.D. 1917). The prosecution alleged a conspiracy to monopolize trade in fruit by seeking to prevent competitors from purchasing fruit from growers and distributors and by cutting prices to cause competitors to sustain losses in the sale of any fruit purchased. Demurrer sustained; case dismissed.

- *United States v. Ludowici-Celadon Co*. (N.D. Ill. 1929). The prosecution alleged a conspiracy to monopolize interstate commerce in the manufacture and sale of roofing tile by the acquisition of the business, property, and assets of competing corporations and by various unlawful acts and agreements to exclude and prevent competition in the sale and installation of roofing tile. The defendant pleaded nolo contendere and a fine of $5,000 was imposed.

- *United States v. Union Pacific Produce Co*. (S.D.N.Y 1933). Officers of the company were also named as defendants. Case alleged conspiracy to restrain and monopolize interstate commerce in artichokes by preventing, through threats, intimidation and violence, artichoke receivers, jobbers, retailers, push-cart peddlers and others, their customers and employers, from dealing in artichokes in the metropolitan area of New York except through the company. Guilty pleas by all defendants, a fine of $1000 was imposed on the company, and a sentence of six months' imprisonment was imposed on each of two individual defendants. The sentences of two other defendants were suspended and those defendants were placed on probation for a period of five years.

- *United States v. Barrett Company* (S.D.N.Y. 1939). The prosecution alleged a combination and conspiracy to restrain and monopolize interstate trade and commerce in sulphate of ammonia, a nitrate fertilizer. The indictment charged that defendants entered into exclusive sales contracts with numerous large producers of sulphate of ammonia and purchased for resale substantial quantities from other producers, as a result of which defendants were enabled to establish uniform, noncompetitive

prices. Nolle prosequi was entered as to all defendants in view of the consent decree entered in the related civil case.

- *United States v. Chattanooga News-Free Press Co.* (E.D. Tenn. 1940). Two individuals were also named as defendants. The case alleged a conspiracy to restrain and an attempt to monopolize interstate commerce by preventing the operation of competing afternoon newspapers in Chattanooga, Tennessee. The information further charges that contracts for advertising space in issues of the Chattanooga News-Free Press required advertisers to use that paper exclusively for afternoon advertising in Chattanooga. The jury found the defendants guilty on count one and not guilty on count two of the indictment. A fine of one cent was imposed on each defendant in lieu of costs.

- *United States v. New York Great Atlantic & Pacific Tea Co.* (E.D. Ill. 1944). The defendant corporation, 11 of its subsidiaries, 16 officers and directors, Business Organization, Inc., and public relations counsel were all named as defendants. The government alleged that the A&P group by virtue of its dominant position in the industry was able to control policies and practices in the production, processing, manufacturing, and distribution of both wholesale and retail, of food products throughout the United States. Trial of the case was before the court without a jury. The court found three defendants not guilty and all remaining defendants guilty on both counts of the information, and fines totaling $175,000 were imposed. The Court of Appeals for the Seventh Circuit affirmed the district court judgment of conviction against the defendants, holding that the A&P group had abused their mass buying and selling power, and that their business practices restrained trade and tended toward monopoly. The court upheld the liability of the manufacturing subsidiaries because of their interlocking directorates, and affirmed the conviction of Carl Byoir and Business Organization, Inc. because of their advisory capacity. Fines assessed by the district court totaling $175,000 were paid by 10 corporate and 13 individual defendants.

- *United States v. Gamewell Company* (D. Mass. 1946). Five company officers were also named as defendants. The prosecution alleged a conspiracy in restraint of interstate commerce and monopoly of municipal fire alarm equipment. The American District Telegraph Co. and its President were also named as defendants in the first two counts of the indictment, alleging a conspiracy to monopolize trade in the leasing of equipment to public and private institutions and the sale of equipment to

municipalities. The government alleged that defendants attempted to monopolize the industry by buying out competitors, acquiring patents and trademarks, cutting prices, rigging specifications so as to make it impossible for competitors to bid, and threatening litigation. All of the defendants pleaded nolo contendere and were fined a total of $43,250.

- *United States v. The Kansas City Star Co.* (W.D. Mo. 1953). The Kansas City Star Co., Kansas City, Mo.; Roy A. Roberts, chairman of the board and president of the Star Co.; Emil A. Sees, treasurer and director of the Star Co., and advertising director of its newspapers were also named as defendants. The two-count indictment alleged that the defendants attempted to and were then monopolizing the dissemination of news and advertising in metropolitan Kansas City and that they excluded all others from publishing daily newspapers in Kansas City. According to the indictment, the defendants, among other things, refused and threatened to refuse to accept advertising, or discriminated as to space, location, or arrangements of advertising if the advertiser used competing media, or a larger ad in competing media, and these threats and refusals were implemented by an elaborate system of surveillance of competing publications. It further alleged that the Star Company's rate structure for local display advertising provided for tie-in sales which excluded advertisers from using other media. The grand jury also charged that national and classified advertisers were required to purchase advertisements in both the Star and Times, even though they desired to advertise in only one of these newspapers; and that subscribers to these papers, numbering in excess of 300,000, were required to pay for delivery of the Times, the Star, and the Sunday Star in forced combination, even though they desired to purchase only one or two of these three newspapers. The indictment also alleged that news carriers, operating as independent businessmen, were required to refrain from delivering competing advertising media. The grand jury further charged that special discounts for advertising in defendants' newspapers were offered to those who advertised on the defendants' radio station and that advertisers not using the defendants' newspapers were denied access to the Star's television station. The criminal case was tried and defendants found guilty. The defendants appealed to the Court of Appeals for the Eighth Circuit. On January 23, 1957, the Eighth Circuit affirmed. The case was ultimately resolved by a consent decree in an accompanying civil case.

- *United States v. National Linen Service Corp.* (N.D. Ga. 1955). Four company officers were also charged with attempting to monopolize and

monopolizing the linen service industry in various southern states. The grand jury charged in the indictment that National had excluded competitors in the linen service business in the South by buying out hundreds of competing linen service concerns and had threatened to force out of business existing competitors and concerns desiring to engage in the linen service business. According to the indictment, National had prevented and suppressed competition by conducting price wars; lowering prices in areas where National had competitors until competition was eliminated; offering customers service at below cost or free; and giving customers rebates and other inducements not to deal with competing linen service concerns. The indictment also charged that National had circulated defamatory or misleading reports among customers to induce them to refrain from patronizing competing linen service concerns. It was further charged that, in selected areas, National had induced or compelled linen service concerns to enter into agreements with it eliminating competition. After a consent judgment was entered against the defendants in a related civil case, defendants pled nolo contendere, and the court imposed fines of $10,000 on the corporation and $4,000 on each of the three individual defendants.

- *United States v. Safeway Stores, Inc*. (N.D. Tex. 1955). Two company officers were also charged. Violations of the Sherman and Robinson-Patman Acts were alleged. The indictment was in three counts. The first charged that the defendants engaged in a conspiracy to monopolize the retail grocery business in various cities in Texas and New Mexico. The second count charged that the defendants were attempting to monopolize this business. The third count brought under Section 3 of the Robinson-Patman Act named only Safeway and Warren as defendants. It charged that Safeway sold goods in its stores in Texas at prices lower than those it charged in other parts of the United States and below cost for the purpose of destroying competition. According to the indictment, Safeway established sales quotas for each of its stores in Texas and New Mexico, amounting to from 25 to 50 percent of the total retail grocery business and insisted that the store managers meet these quotas. It was further charged that Safeway engaged in price wars in these areas for the purpose of destroying competition and that for that purpose during the course of these wars it sold groceries below its invoice cost for these commodities. According to the indictment, one of the effects of the defendants' activities had been to drive some independent grocers in Texas out of business. The original indictment was voluntarily dismissed by the government in favor of filing a parallel criminal case (by information) and civil injunctive case. All defendants pled nolo contendere. The

court imposed a fine totaling $187,500 and one-year prison sentences on the individual defendants, which were probated.

- *United States v. Harte-Hanks Newspapers, Inc.* (N.D. Tex. 1958). Three companies and three individuals engaged in the operation and publication of the Herald-Banner newspaper in Greenville, Texas were also charged. The indictment alleged that, prior to October 1956, there had been published and distributed in the Greenville area two newspapers, The Morning Herald and The Greenville Banner. These two newspapers were the only significant sources of local news, advertising, and other information disseminated regularly for the residents of the Greenville area through the publication and circulation of newspapers, according to the indictment. The indictment charged that the defendants, who had controlled and operated the Banner since 1954, conspired to eliminate the competition of the Herald, and in fact did do so. The indictment charged that the defendants conspired to, and did eliminate the competition of the Herald by intentionally operating the Banner at a loss, utilizing revenues from other Harte-Hanks newspapers to finance such losses, lowering subscription rates for home and mail delivery of the Banner, distributing copies of the Banner free of charge, reducing the display and classified advertising rates of the Banner, increasing the Banner's advertising staff and the number of pages published, endeavoring to purchase and purchasing the Herald, and seeking to curtail credit resources available to the Herald. On January 21, 1959, the United States District Court for the Northern District of Texas ruled that the defendants did not violate the antitrust laws.

- *United States v. Jas. H. Matthews & Co*. (W.D. Pa. 1958). The Vice-President of the company was also charged. The company was the nation's largest manufacturer of bronze grave markers allegedly controlling at least 75 percent of industry sales. The indictment charged the defendants with achieving and maintaining a monopolistic position in the industry by conspiring with its cemetery customers to restrain trade in the sale and distribution of bronze grave markers. According to the indictment, the company had suggested, and the cemeteries had adopted, certain restrictive devices designed to prevent the installation of any bronze grave marker not purchased from the particular cemetery where the marker was to be installed. In return for this assistance in eliminating their bronze marker sales competition, the cemeteries were said to have agreed to purchase their own marker supplies predominantly from the company. The United States District Court for the Western District of Pennsylvania accepted the defendants' pleas of nolo contendere. The

court imposed a fine of $10,000 on each of the four counts in the indictment against Jas. H. Matthews & Co., and a fine of $2,500 on each of two counts was imposed on N. Neilan Williams, with sentence suspended on the other two counts.

- *United States v. General Motors Corp.* (S.D.N.Y. 1961). The company was indicted by a federal grand jury on charges of using its vast economic power illegally to monopolize the manufacture and sale of railroad locomotives. Attorney General Robert F. Kennedy announced the return of the indictment, which charged that General Motors violated Section 2 of the Sherman Antitrust Act. Two. substantial competitors were driven from the market and General Motors captured 84.l percent of the locomotive business. As a result, the indictment asserted that "the purchasers of locomotives and the public in general have been deprived of the benefits of competition." The indictment listed at least 14 ways in which General Motors assertedly misused its economic power to force most of the nation's 40 railroads to buy locomotives. The indictment pointed out that General Motors is the largest manufacturing corporation in the United States in terms of total sales and assets and is probably the nation's largest shipper of freight. As a result, the complaint asserted, General Motors was able to vary its price and rate of return in locomotive sales, make investments in manufacturing facilities for railroad locomotives, and establish production capacity in a manner which no competitor could meet. This power, the indictment asserted, was "unlawfully acquired and maintained." Among the ways in which General Motors did so, the indictment said, included: (1) routing rail shipments to favor purchasers of General Motors locomotives and withholding or reducing shipments from lines which purchased locomotives from General Motors' competitors; (2) building plants, warehouses, and storage areas near lines of railroads for the purpose of persuading the railroads to purchase General Motors locomotives; (3) obtaining steel from General Motors suppliers on terms which were substantially more advantageous than those available to its competitors; (4) financing the sale or lease of locomotives on terms its competitors could not match; (5) participating in preparation of locomotive specifications for use in obtaining competitor bids, which prevented other manufacturers from competing; and (6) selling locomotives at a loss in segments of the market where it had competition. On December 28, 1964, the court granted the government's motion to nolle prosequi the case.

- *United States v. H.P. Hood & Sons, Inc.* (D. Mass 1963). The Great Atlantic & Pacific Tea Company, Inc. and H.P. Hood & Sons of Boston,

the largest milk wholesaler in New England, were indicted on charges of trying to drive out of business milk dealers who sell milk at cheaper prices in glass jugs. The indictment charged Hood with illegally cutting prices in selected areas, often below cost, in order to destroy competition from "jug handlers." Attorney General Robert F. Kennedy said the indictment further charged that Hood conspired with the Great Atlantic & Pacific Tea Company to restrain competition and to monopolize the Greater Boston milk market. Approximately 350,000,000 quarts of milk, worth about $70,000,000 are sold there annually. The indictment said Hood paid secret rebates to A&P for milk sold in its Boston area stores. Jug handlers process, sell, and distribute milk in gallon and half-gallon jugs, a cheaper form of packaging than the milk cartons used by Hood and other dairies. The jury found defendants H.P. Hood and The Great Atlantic & Pacific Tea Co. not guilty of the charges.

- *United States v. The United Fruit Company* (S.D. Cal. 1963). The case alleged the unlawful monopolizing of the banana market in seven western states. Attorney General Robert F. Kennedy said the antitrust indictment also charged United with trying unlawfully to drive out budding competition by flooding the market and by predatory pricing. The defendants maintained substantially higher prices in the western states than in markets where they faced competition, the indictment said. They also were charged with strictly limiting banana imports to shelter the western market from oversupplies which might have brought down prices. This count said the defendants refused to sell to a number of wholesalers and allocated bananas in such a way that customers had to buy excessive amounts during periods of oversupply to increase their allotments during periods of short supply. Starting in July 1960, two other banana companies—the Standard Fruit and Steamship Company and Ecuadorian Fruit Import Corporation—joined to import bananas into Los Angeles by ship. The other two counts charged the defendants with conspiring and attempting to eliminate this competition. They did so, the grand jury charged, by (1) increasing their imports, to flood the area with an oversupply of bananas; (2) maintaining maximum inventories with customers to forestall purchases from Standard-EFIC; (3) deliberately reducing wholesale prices, starting July 9, 1960, to keep Standard-EFIC from making any profit; and (4) causing the Port of Los Angeles to deny Standard-EFIC a pier assignment for its banana cargoes. On October 23, 1963, the following fines were imposed on nolo contendere pleas: United Fruit, $2,000; United Fruit Sales Corp., $1,000; Joseph H. Roddy, $500; and Marion E. Wynne, $500.

- *United States v. Union Camp Corp.* (E.D. Va. 1963). Two manufacturers of paper bags, and two officials of one of the firms were charged with conspiring to exclude competitors through use of an allegedly invalid patent. The charges related to patents for a paper bag with a mesh-covered "window" to permit contents such as potatoes and onions to be seen and ventilated. According to the indictment, Union was issued a product patent in 1947, and in 1950 initiated a licensing arrangement with selected competitors through which it collected $50,000 in royalties annually and exerted major control of the industry. Bemis acquired a patent in 1953 covering the apparatus which produced such bags, and later transferred all licensing rights under the patent to Union. The government charged that both firms were aware the Bemis patent was invalid. Through use of the invalid Bemis patent, Union, according to the indictment, then extended its power to collect royalties and to block additional competition another six years after its own patent expired in 1964. The government said Union and Bemis used the invalid patent to force a manufacturer of window-front bag attachment machinery to restrict sales to Union licensees. Following nolo contendere pleas, fines totaling $135,000 were imposed as follows: Union Camp, on the conspiracy count, $50,000 and on the monopoly count, $25,000; Bemis, $50,000; Mr. Calder and Mr. Bauer, $5,000 each.

- *United States v. Empire Gas Corp.* (W.D. Mo. 1973). Two individuals were also charged. A federal grand jury indicted Empire Gas Corp. of Lebanon, Missouri—one of the largest liquified petroleum gas distributors in the United States—and two individuals on charges of violating the antitrust laws and conspiring to violate federal firearms law in connection with an unsuccessful attempt to dynamite a tank truck belonging to a competitor. The jury acquitted defendants.

- *United States v. Molasky* (E.D. La. 1973). A Missouri magazine wholesaler and its two principal officers were charged with attempting to monopolize the wholesale distribution of magazines and paperback books in the Gulf Coast area. The defendants attempted to monopolize by trying to acquire almost all of the local wholesale agencies located in the area between Victoria, Texas and Pensacola, Florida. In addition, the indictment charged that the defendants induced wholesalers to sell their businesses by threatening to put them out of business or otherwise to injure them economically. The defendants entered pleas of nolo contendere over the objections of the government. On February 12, 1975, the court accepted Allan Molasky's plea of nolo contendere. On March 11, 1975, each of the defendants was fined $50,000. A sentence of one

year, with 11 months suspended, plus two years' probation was imposed on Mark Molasky.

I have three concluding observations about these cases: First, the fines meted out for unilateral monopolization were concentrated in five cases: *NY A&P, Gamewell, Safeway, Jas. H. Matthews*, and *Union Camp*. The fines imposed in other cases were largely nominal. The total amount of all fines imposed for unilateral monopolization offenses in 2022 dollars is $8,572,111. This seems like a pittance compared to the hundreds of millions in fines levied against cartelists today. All of these decisions were rendered before the Antitrust Procedures and Penalties Act of 1974, which dramatically increased the maximum penalties under the Sherman Act,[70] and long before the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which raised the penalties even further.[71] In any event, criminal monopolization enforcement operated in a much more modest penalty environment than criminal antitrust enforcement operates today.

Second, the government failed to achieve a criminal conviction in a comparatively large share of these cases—8 out of 20. In his empirical study of antitrust enforcement, Richard Posner estimated the Antitrust Division enjoyed an 81 percent success rate in the antitrust cases it brought in roughly the same time period as the one studied here—1890 to 1967—and that the FTC also had an 81 percent success rate in antitrust cases brought from 1915 to 1969.[72] My sample of 20 unilateral monopolization cases is small, but gives some reason to believe that, even during periods in which the government was routinely winning civil monopolization cases, criminal cases were a tougher sell with the courts.

Third, the success rate and fine levels in the unilateral conduct cases were lower than in coordinated conduct cases. Looking at the 155 coordinated conduct cases, in 99 of the 155 cases (64 percent), a party was either convicted, plead guilty, or pled nolo contendere (compared with in 60 percent of the unilateral cases). In 2022 dollars, $88,171,770 in fines were imposed in 98 successful cases, averaging $899,712 for successful cases or $568,850 on average for all coordinated conduct cases.[73] The comparable figures for the unilateral conduct cases are an average of $714,343 in the successful cases and

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[70] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974) (raising maximum penalty from one year imprisonment and $50,000 fine to three years imprisonment and $1 million fine).

[71] Pub. L. No. 108-237, §§ 201–221, 118 Stat. 661 (2004) (raising maximum penalty to ten years in prison and $100 million fine).

[72] Posner, *supra* note 15, at 381 tbl.11.

[73] Some fines were suspended or remitted, decreasing these values immaterially to $86,978,309; $887,534; and $561,150 respectively.

$428,606 in all cases. Thus, the historical data show that the government's criminal enforcement in unilateral conduct cases tended to result in lower conviction rates and lower fines than its conspiracy to monopolize enforcement involving cartel behavior.

III. IMPLICATIONS

What are the implications of these findings for the recently renewed prospect of criminal Section 2 enforcement? On the one hand, the Antitrust Division's leadership is not wrong to say that, historically, Section 2 was criminally enforced on a significant scale. Indeed, the raw number of cases previously brought—168—seems a generous cushion to the agency's own estimate of "over 100" cases.[74] Further, some of these cases did involve the sorts of unilateral conduct offenses that the Justice Department may be considering again today. Predatory pricing, tying, exclusive dealing, price discrimination, and leveraging patents were all theories that the Justice Department brought criminally.

On the other hand, the vast majority of these monopolization cases were horizontal conspiracy cases involving price fixing or similar per se offenses and the Section 2 claim added little of substance. Given the substantial fines and jail sentences available for Section 1 offenses today, there seems to be little need to begin bringing criminal monopolization cases for price fixing again today. And that does not seem to be the Justice Department's intention in announcing a renewed policy of Section 2 criminal enforcement.

As to the 20 unilateral offense cases, peeling away the layers of the onion skin leaves relatively little as a robust historical precedent. Only 12 of the cases resulted in a finding of criminal liability, and in most of those cases the penalty was insignificant. Even in the five cases with comparatively large fines, the fines were trivial compared to the fines imposed in cartel cases today. As to the possibility of prison time—which seems to be driving much of the political theater behind the Justice Department's recent announcements[75]—the historical record is de minimis: one executive served one month in prison for a unilateral monopolization offense not involving violence or threats of violence.

This article has sought only to establish the historical record, not to engage directly with the normative questions raised by the Justice Department's plan to begin bringing criminal monopolization cases again. However, as to the

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[74] Hellings & Shulak, *supra* note 1.

[75] *See* David Reichenberg, *Biden's DOJ Antitrust Division Teases Potential Jail Time for Monopolization*, FORBES (Mar. 14, 2022).

normative question, there are a variety of strategic and moral considerations, including:

- the advisability of taking on a heightened standard of proof given the difficulties plaintiffs have in winning monopolization cases even under the civil standard;
- potential political backlash if the Justice Department were perceived to overreach;
- the fairness of bringing criminal challenges under indeterminate liability standards where outcomes are difficult to predict;
- the intentions and purposes of Congress in criminalizing monopolization; and
- whether criminal defendants might mount a successful desuetude challenge to the renewal of a criminal enforcement program abandoned a half decade ago.

The Justice Department's evocation of the historical record in announcing its new intentions suggests that past precedent will play a considerable role in the determination of these questions. The Biden administration has already played a historical card in aligning its antitrust enforcement policy with the philosophy of Justice Louis Brandeis.[76] As previously noted, criminal antitrust enforcement reached its peak under the leadership of AAG Thurman Arnold who, while not quite a full-blown Brandeisian,[77] is held up as a model of antitrust enforcement by the neo-Brandeisians.[78] However, only two unilateral criminal monopolization cases—*Barnett* and *Chattanooga News-Free Press*—were initiated during Arnold's tenure at the Justice Department. Of the almost 80 criminal monopolization cases brought during the 1940s under Arnold and his successors at the Antitrust Division, only three involved unilateral exclusion theories. For better or worse, criminal Section 2 enforcement

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[76] *See* Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531 (2019).

[77] Jerry Fowler, *"That Man from Laramie:" Thurman Arnold and the Future of Antitrust*, 21 WYO. L. REV. 267, 285 (2021).

[78] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 78–83 (2018) (describing Arnold's actions against monopolies and cartels that had overtaken what "was once a nation of small businesses and farms"); Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1095 (2020) (describing "impact of Brandeisian worldview, in combination with Thurman Arnold's enforcement strategy" as leading to "a default suspicion of mergers and of concentration in business"); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 63 (2014) (describing Arnold's role in bringing "antitrust and competition policy to the center of the Roosevelt administration's economic policy").

for non-violent unilateral exclusionary conduct has never been a significant part of the Justice Department's enforcement practice.

IV. CONCLUSION

The Justice Department has historically brought a fairly significant number of criminal cases for violation of Section 2 of the Sherman Act—168 of them to be precise. However, only 20 of those involved charges of what today would be considered unilateral monopolization offenses. Of those, at least three involved violence or threats of violence, only 12 of the 20 resulted in a conviction, and the penalties in the successful cases were comparatively small. Hence, if the Justice Department carries through on its recent threats to begin bringing criminal monopolization cases again and it does so for non-violent unilateral conduct offenses and seeks significant penalties, it will be breaking new ground.