Criminal Enforcement of Section 2 of the Sherman Act

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THE U.S. DEPARTMENT OF JUSTICE recently announced its intention to pursue criminal prosecutions under Section 2 of the Sherman Act, explaining that "if the facts and the law, and a careful analysis of Department policies guiding our own prosecution discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law."[1] That new policy breaks sharply from the prior, decades-long policy that reserved criminal enforcement of the antitrust laws for (in the words of DOJ's 1995 Antitrust Enforcement Guidelines for International Operations) "traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities."[2] The DOJ has not provided specifics about the kinds of conduct that may lead it to enforce Section 2 criminally, and has not addressed how (or whether) this shift in U.S. policy should affect the policies of other jurisdictions.[3] As of the date of submission of this article, the DOJ's most comprehensive public policy announcement of which we are aware is contained in an April 2022 update to a document entitled *An Antitrust Primer for Federal Law Enforcement Personnel*. Prior versions of that document disclaimed Section 2 criminal enforcement except "in circumstances where violence is used or threatened."[4] The April 2022 version deleted that limitation, addressed conspiracies to monopolize, and included the following footnote:

> Because the focus of this primer is on criminal antitrust conspiracies, we will cover only Section 2 conspiracies to monopolize, and not unilateral conduct prohibited under Section 2, e.g., actual or attempted monopolization.[5]

The first part of this Article discusses the historical development of the DOJ's cartel-only criminal policy, focusing on Congress's amendments to the Sherman Act and prior DOJ statements of policy respecting the criminal enforcement of the antitrust laws.

The second part of this Article details the history of Section 2 criminal enforcement. As best we are able to determine from public sources (which are difficult to access given their age), grand juries have returned 38 indictments with Section 2 charges since 1938.[6] Only four of those indictments involved Section 2 alone. For the other 34, the DOJ brought a Section 2 count alongside another count or counts (typically under Section 1 of the Sherman Act) based on the same underlying conduct, an enforcement practice that was informed by the modest maximum fines available under Section 1 during that time period. The last returned indictment under Section 2 appears to have come in 1977, and the last public acknowledgement of the convening of a grand jury to investigate a Section 2 violation appears to have occurred in 1984.

The third and final part of this Article outlines several potential defenses if the DOJ were to act upon its new policy and initiate criminal Section 2 proceedings. The DOJ's long-standing policy limiting criminal enforcement to Section 1, and 45 years of enforcement history consistent with that policy, may give rise to concern that criminal prosecutions under Section 2 are inconsistent with the Due Process Clause. Similarly, the DOJ's long history of disclaiming the appropriateness of criminally enforcing Section 2 strengthens potential *mens rea* defenses, particularly for cases involving actual or attempted monopolization lacking similarity to traditional Section 1 claims. And Section 2 jurisprudence in general has evolved considerably in the decades since the DOJ's last criminal actions under Section 2, making it unclear which, if any, precedents are reliable guides to how courts would approach criminal Section 2 matters today. Those constitutional and statutory defenses could make it difficult for the DOJ to obtain convictions in Section 2 prosecutions brought under the new policy.

The History of Section 2's Criminal Provisions and the DOJ's Statements of Enforcement Policy

Since 1890, the Sherman Act has prohibited both agreements in restraint of trade under Section 1 and monopolization,

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attempted monopolization, and conspiracies to monopolize under Section 2.[7] The statute has always provided for criminal enforcement of both sections. For much of the Act's history, violations of the Sherman Act were misdemeanors (that is, punishable by less than one year in jail), and the Antitrust Division was rarely able to obtain jail sentences for violations.[8]

Congress first amended Section 2 of the Sherman Act in 1955, when it increased the maximum fine from $5,000 to $50,000. A few months before that amendment, the Attorney General's National Commission to Study the Antitrust Laws issued a report calling on Congress to increase the Sherman Act's fines.[9] As the report explained, a majority of the Commission's members favored doubling the maximum fine from $5,000 to $10,000 to keep up with inflation, with a few members supporting the more substantial increase that Congress ultimately pursued. Even at that time, however, support for stiffer penalties was not unanimous. Some members opposed increasing the fines on the ground that criminal sanctions of any kind were inappropriate under the Sherman Act, noting the "gross injustice resulting from the application of these criminal laws to cases where uncertainty is so great that neither the Department of Justice nor the attorneys for the parties involved can know in advance whether their actions are unlawful."[10] The international ramifications of Sherman Act criminal enforcement during the 1940s and 1950s was top of mind for these dissenting members, who noted that "of all the great industries that contributed most to the winning of the war there is hardly one that has not been branded by either indictment or injunction suit as violators of this criminal statute. Our enemies do not fail to take advantage of that strange anomaly, in their never-ending charges that we are a nation of criminal monopolists."[11]

The Sherman Act first became a felony through the Antitrust Penalties and Procedures Act of 1974, which increased the maximum prison sentence from one to three years.[12] The 1974 Act also increased the maximum fine, allowing the DOJ to seek up to $1 million from a corporation and $100,000 from an individual defendant.[13] Congress increased the fines again in the Antitrust Amendments Act of 1990, which set a new maximum of $10 million for corporations and $350,000 for individuals.[14] The fourth and final amendment came in 2004, when Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"). That law authorized jail sentences of up to 10 years, and fines of up to $10 million for a corporation or $1 million for an individual defendant.[15] It also included a provision that spurred criminal enforcement against cartels by offering incentives to cartel participants that first report a violation of the antitrust laws.

Apart from the four amendments to Section 2, the fines available under the Sherman Act were also functionally increased through the Criminal Fine Improvements Act of 1987. That statute allows the government to seek a fine of "not more than twice the gross gain or twice the gross loss" in criminal cases where a defendant's conduct resulted in ill-gotten gains or caused pecuniary loss to victims.[16]

Each of the four amendments to the Sherman Act increased criminal fines or jail terms under Section 1 and Section 2 in tandem. Throughout Congress's deliberations over these amendments, however, the focus was squarely on criminal prosecutions against cartels. For instance, President Ford's speech kicking off the 1974 reforms warned of the harms caused by "price-fixing and bid rigging," a concern that was echoed by legislators supporting the bill in Congress.[17] During the hearings on the 1990 legislation, then-Acting Assistant Attorney General Michael Boudin explained that the Division's "number-one antitrust enforcement priority is to root out clearly anticompetitive antitrust violations through criminal prosecution. Examples of conduct that the Department prosecutes criminally are government procurement fraud, bid rigging, price fixing, and market allocation among competitors."[18] In 2004, Senator Herbert Kohl, the sponsor of ACPERA, noted the importance of deterring hard-core cartel violations, and then-Assistant Attorney General R. Hewitt Pate greeted the law's passage by explaining that it would "greatly enhance one of the Division's core missions, its anti-cartel enforcement program."[19]

The congressional focus on the use of Section 1 to stop price-fixing and bid rigging is not surprising. For decades, the Division has maintained a policy of focusing its criminal enforcement efforts on *per se* violations of Section 1 of the Sherman Act.[20] Over time, that focus solidified into a criminal enforcement policy of pursuing only hard-core cartel behavior, particularly after the Sherman Act became a felony in 1974. The cartel-only criminal policy was reflected in the Antitrust Division Manual in its first edition in 1979, published during the Carter administration. It has since been reflected in every subsequent edition of the Manual until March 2022, when the Antitrust Division removed the Manual from the DOJ website because it was "undergoing revision."[21] The Division also cited that policy in federal courts,[22] and Division leadership from both political parties routinely espoused it.[23] Former Assistant Attorney General Thomas O. Barnett's comments are illustrative, and highlight the importance of the Division's narrow criminal focus to its overall antitrust enforcement program:

> 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.[24]

This view was so entrenched that the bipartisan Antitrust Modernization Commission ("AMC"), writing 15 years ago and without dissent from any of its 12 members, recommended that "the Antitrust Division . . . should continue to limit its criminal enforcement activity to 'naked' price-fixing, bid-rigging, and market or customer allocation agreements among competitors,"[25] a recommendation consistent with the ABA Antitrust Section's submission to the AMC.[26]

The Division's cartel-focused criminal enforcement policy also underlies the modern sentencing system. The U.S. Sentencing Commission first promulgated a Guideline for criminal antitrust violations in 1987. It focused exclusively on "bid-rigging, price-fixing, and market-allocation agreements."[27] The Commission justified that approach by explaining 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."[28] Following ACPERA's enactment in 2004, which increased the maximum jail sentence from three years to 10 years, the Commission revised the Guideline to increase the penalties, while maintaining a singular focus on *per se* Section 1 violations. As a result, as the ABA Antitrust Section pointed out to the AMC, "the commentary and very structure of the Sentencing Guidelines clearly contemplates the criminal prosecution of hard-core cartel conduct only."[29]

The Division's cartel-focused policy is reflected in its guidance to DOJ enforcers tasked with discovering and investigating Sherman Act violations. Its 2005 *Antitrust Primer for Federal Law Enforcement Personnel* stated that "[p]rice-fixing, bid rigging, and market allocation by companies and individuals are violations of Section 1 and generally are prosecuted criminally."[30] The guidance also states that "[v]iolations of Section 2 are generally not prosecuted criminally." The only exception to that rule was for cases involving violence and organized crime.[31] The same language was included in the earlier version of the Primer released in 2003. As noted above, the DOJ updated that document in April 2022 to address criminal conspiracies under Section 2 and allude to potential criminal prosecution of either "actual or attempted monopolization."[32]

Finally, the United States has frequently advanced its cartel-focused criminal policy on the world stage. The United States has always been an outlier for the breadth of its criminal antitrust laws. Most countries have no criminal antitrust enforcement regime. Among those that do, criminal enforcement is directed squarely at cartels.[33] The United States has often encouraged this exclusive focus on the criminal prosecution of cartels.[34] For instance, the Division's 1995 Enforcement Guidelines for International Operations explained that U.S. criminal enforcement was targeted at *per se* violations precisely because that conduct "would also be [a] violation[] of the law in other countries," thereby making extradition feasible.[35] And as recently as 2020, the Division explained in a statement to the Organization for Economic Cooperation and Development (OECD) that the success of its criminal enforcement was the result of its "unwavering commitment to ensuring predictability and transparency in its criminal antitrust enforcement efforts," which stemmed from its "decision to pursue hardcore cartel behavior."[36]

This consistent policy has helped harmonize U.S. practice with competition law around the world, leading to enhanced cooperation among enforcers.[37] In 1998, the OECD's Recommendation on Hard Core Cartels "marked the first time" the organization had "defined and condemned a particular kind of anti-competitive conduct," a move that facilitated international coordination.[38] Those recommendations were updated in 2019 to call for further coordination among international authorities in their efforts to target hard-core cartels.[39]

The History of Section 2 Criminal Enforcement

The DOJ did not always limit its criminal enforcement policy to cartel-type conduct. Between 1938[40] and 1977, the DOJ used its Section 2 criminal authority in at least 38 cases. Throughout that time, the DOJ rarely relied solely on Section 2 to challenge the defendant's conduct. It typically brought Section 2 charges alongside other counts, most often under Section 1, to target the same acts, with the result of increasing the total fines imposed on the defendant.

Section 2 covers three different types of conduct: monopolization, attempted monopolization, and conspiracy to monopolize.[41] While Section 2 is most often associated with unilateral conduct by a monopolist, the conspiracy provisions can cover coordinated conduct by multiple actors. Accordingly, there are a number of situations where the DOJ can pursue Section 1 alongside Section 2.[42] There are also situations in which the Section 2 count implicated other crimes, like extortion.[43]

The table below summarizes returned indictments since 1938 that we were able to locate and include a Section 2 charge. The information is based on a review of the Westlaw and CCH Vital Law databases for decisions involving criminal indictments and monopolization.[44] For each case, the table provides a brief summary of the allegations and identifies whether the DOJ brought the Section 2 charge on its own or alongside other charges.

Criminal Section 2 indictments since 1940

	Case	Summary	Section 2 only	Section 2 and other charges
1	United States v. Shapiro (S.D.N.Y. 1939)	Agreement to restrain trade and monopolize the market for fur skins.		X
2	United States v. Lumber Inst. of Alleghany County (W.D. Penn. 1940)	Agreement to restrain trade and monopolize the millwork trade by sharing price information and suppressing competitive bidding.		X
3	United States v. American Tobacco (E.D. Ky. 1940)	Agreement among the "Big Three" cigarette companies to fix prices and exclude competitors by coordinating tobacco purchases and retail price levels.		X
4	United States v. Montrose Lumber Co. (D. Colo. 1941)	Agreement to coordinate distribution and limit output for lumber, lumber products, cement, and other building materials.		X
5	United States v. Wayne Pump Co. (N.D. Ill. 1941)	Agreement between manufacturers and trade association to fix the prices of computer pumps.		X
6	United States v. Gen. Elec. Co. (S.D.N.Y. 1941)	Agreement among firms to fix prices in the market for hard metal compositions.		X
7	United States v. Se. Underwriters' Ass'n (N.D. Ga. 1942)	Agreement among firms to fix prices for fire insurance across five states and to boycott competitors that were not part of the agreement.		X
8	United States v. Safeway Stores (D. Kan. 1943)	Agreement by grocery stores to destroy competition through acquisitions of independent grocers, price-fixing, and predatory pricing.		X
9	United States v. N.Y. Great Atl. & Pac. Tea Co. (N.D. Tex. 1943)	Agreement to control the market for food and food products.		X
10	United States v. Tarpon Springs Sponge Exch. (S.D. Fla. 1944)	Agreement to coordinate all sales of natural sponges in the United States through one central exchange. Included limiting membership, boycotts on those operating beyond the exchange, and discriminatory charges for non-members.		X
11	United States v. A.B. Dick Co. (N.D. Ohio 1947)	Agreement among competitors to control the market for duplicating machines, stencils, and duplicating supplies.		X
12	United States v. MacLeod Bureau (D. Mass. 1947)	Agreement among coal companies to fix prices for soft coal.		X
13	United States v. Consumers Ice Co. (W.D. La. 1948)	Agreement to monopolize manufacture and distribution of ice through market allocation, acquisitions, and predatory pricing.		X
14	United States v. Metro. Leather & Findings Assoc. (S.D.N.Y. 1948)	Agreement to fix prices and engage in exclusive dealing to charge higher prices for leather and shoe findings.		X
15	United States v. National City Lines (N.D. Ill. 1947)	Agreement among competitors to exclude competition for public transportation.		X
16	United States v. Kansas City Star (W.D. Mo. 1953)	Monopolization case based on the refusal to sell advertising space to advertisers that also advertised in competing newspapers and the requirement to advertise in both the morning and evening editions of the paper.	X	
17	United States v. Michigan Tool Co. (E.D. Mich. 1953)	Agreement to allocate the market and fix prices for industrial machines through patent licensing and cross-licensing agreements.		X
18	United States v. Safeway Stores (N.D. Tex. 1955)	Attempted monopolization through predatory pricing.	X	
19	United States v. Maryland State Licensed Beverage Ass'n (D. Md. 1955)	Agreement among trade associations, manufacturers and wholesalers to fix prices in the alcohol industry.		X
20	United States v. Melrose Distillers, Inc. (D. Md. 1955)	Agreement to fix the wholesale and retail prices of alcoholic beverages.		X
21	United States v. McHugh (D. Mass. 1956)	Agreement among union and trade association to limit the amount and type of fish caught in New Bedford, to fix prices for those fish, and boycott dealers purchasing fish from others.		X

	Case	Summary	Section 2 only	Section 2 and other charges
22	United States v. Consolidated Laundries Corp. (S.D.N.Y. 1957)	Agreement to allocate market and to enter non-competes among eight corporations in the linen supply business.		X
23	United States v. Bitz et al. (S.D.N.Y. 1959)	Agreement by labor union and distributors to control wholesale distribution of New York City newspapers through boycotts and threats.		X
24	United States v. Harte-Hanks Newspaper (N.D. Tex. 1959)	Monopolization case based on acquisition of a failing competitor.	X	
25	United States v. Greater Blouse & Neckwear Contractors' Ass'n (S.D.N.Y. 1959)	Agreement among contractors that made ladies' blouses to fix prices for services and to enforce the agreement through exclusive arrangements.		X
26	United States v. Huck Mfg. Co. (E.D. Mich. 1961)	Agreement between two firms in the lockbolt business to fix prices and exclude competition.		X
27	United States v. Minn. Mining & Mfg. Co. (C.D. Ill. 1961)	Agreement to ensure dominance of a single firm in the market for pressure sensitive tape, magnetic recording tape, and aluminum pre-sensitized lithographic plates.		X
28	United States v. Chas. Pfizer & Co. (S.D.N.Y. 1961)	Agreement among drug companies to allocate the market for antibiotics at non-competitive prices.		X
29	United States v. Johns-Manville Corp. (E.D. Pa. 1962)	Agreement between two manufacturers to control the market for asbestos-cement pipes and couplings.		X
30	United States v. Am. Oil Co. (D.N.J. 1965)	Agreement among fuel companies to fix retail prices for fuel and to restrict output.		X
31	United States v. Dunham Concrete Prods., Inc. *et al.* (E.D. La. 1969)	Agreement to monopolize concrete products market through strikes, work stoppages, and property damage at construction sites.		X
32	United States v. Union Camp Corp. (E.D. Va. 1976)	Agreement among two patent owners to extend the terms of patents known to be invalid.		X
33	United States v. Empire Gas Corp. (W.D. Mo. 1972)	Attempted monopolization case based on attempts to enter into territorial-allocation and non-compete agreements with competitors and through alleged predatory pricing.		X
34	United States v. Morgan Drive Away, Inc. et al. (D.D.C. 1972)	Agreement among companies that transport mobile homes to exclude competitors and fix prices.		X
35	United States v. Molasky (E.D. La. 1973)	Attempted monopolization of book wholesalers around the Gulf Coast through the attempt to enter into non-compete agreements and attempted and completed acquisitions of competitors.	X	
36	United States v. General Motors Corp. (E.D. Mich. 1974)	Agreement to coordinate discounts offered for vehicle fleets.		X
37	United States v. Dunham Concrete Prods., Inc. (E.D. La. 1974)	Agreement to harm competitors through the use of labor racketeers, including assaults and destruction of property.		X
38	United States v. Braniff Airways (W.D. Tex. 1977)	Attempt by two airlines to agree on rates in order to harm a competitor.		X

Significantly, it does not appear that a grand jury has returned a criminal Section 2 indictment in more than four decades, and it has been nearly 50 years since a grand jury returned an indictment with only a Section 2 charge. In addition, an appellate court decision notes that the DOJ initiated grand jury proceedings under Section 2 in a case involving the acquisition of a newspaper's assets in 1984, although the matter did not result in an indictment.[45]

As the table above helps illustrate, the Division's Section 2 prosecutions fit into two broad categories. In the first category, a Section 2 charge was part of an indictment that sought to punish the same conduct through a different statutory provision—typically Section 1 of the Sherman Act. *American Tobacco Co.* is illustrative. There, the defendants were the "Big Three" tobacco companies: American Tobacco, Liggett & Myers, and R.F. Reynolds. They were accused of agreeing to fix prices and entering into agreements to participate in exchanges only when all three of them were present.[46] Those allegations would fall squarely within the Division's cartel-focused criminal prosecution policy. As noted, for many of the cases in this first category, the Section 2 charge relied on the same agreement alleged under Section 1. In *Wayne Pump*, for example, the Supreme Court noted that the charges brought under Sections 1 and

2 were so similar that "it [was] not necessary to make further differentiation between the counts."[47]

This category of cases illustrates that Section 2 charges could complement a prosecution against cartel activity by increasing the available fines—a prosecution strategy employed in the days of low fines for Sherman Act violations. For instance, the defendants in *American Tobacco* were fined $5,000 for each violation. But the need to bring charges under both sections to ensure an adequate fine was eliminated by changes to the law post-dating these prosecutions. Since 1987, the DOJ has been able to pursue an amount double any defendant's ill-gotten gains under the Criminal Fine Improvements Act.

With the first group of indictments set to the side, there are only four cases left in the second category: indictments under Section 2 alone. Taken together, they show that standalone criminal enforcement of Section 2 played a minimal role in the DOJ's enforcement mission even in the decades leading up to the DOJ's affirmative disavowal of the intention to enforce Section 2 criminally.

1. ***Kansas City Star*: Exclusivity and tying (1953)**. *Kansas City Star* involved a claim that a local newspaper in Kansas City, Missouri had, among other actions, (1) refused to sell advertising space to advertisers that also placed ads with rival newspapers, and (2) required advertisers to buy ads in both the morning and evening editions of the defendant's newspaper, rather than selling ads for each edition separately. The defendants were found guilty of both attempt to monopolize and monopolization. The district court held that the attempt offense merged into the completed offense and fined the company $5,000, without imposing a jail sentence. The conviction was affirmed on appeal.[48]
2. ***Safeway Stores*: Predatory pricing (1955)**. In *Safeway Stores*, the indictment charged a grocery store chain for attempting to win sales from competing grocers in towns throughout Texas and New Mexico. According to the indictment, the stores attempted to grow by "operating … stores below the cost of doing business," "selling numerous items … below the invoice cost," and selling some items in selected cities for lower prices than those charged in other cities.[49] The DOJ's indictment focused on the allegedly harmful competitive consequences of "depress[ing] the general retail price structure for groceries in various cities"—that is, charging low prices for food—and made no allegations respecting the likelihood of recoupment.[50] The defendants entered pleas of nolo contendere, which were accepted by the district court.[51]
3. ***Harte-Hanks Newspapers*: Acquisition of a failing competitor (1959)**. This case arose from the acquisition of a small newspaper by its larger competitor in Greenville, Texas, a town of 17,000 people. The smaller newspaper was having difficulty obtaining credit to continue operations. Following this acquisition, the DOJ charged the owner of the larger paper with a criminal violation of Section 2. The district court dismissed the case without sending it to a jury. According to the court, the indictments charged nothing more than "a fight for existence" between two papers in a town that was only large enough to support one. The court also noted that the price for advertising fell after the acquisition was complete.[52]
4. ***Molasky*: Attempted monopolization (1973)**. In *Molasky*, the DOJ challenged a scheme by a book wholesaler operating in the Gulf Coast region. The indictment alleged various acts, including the acquisition of competing wholesalers in the area, attempts to win clients from remaining competitors, and offers to enter into non-compete agreements to allocate territory. The indictment also alleges that the defendants "entered into an agreement with the owner of a controlling interest in the ID wholesale agency in Beaumont, Texas, whereby in return for his sale of that interest, [defendants] would not compete in other territories served by other ID wholesalers controlled by him or his family."[53] That allegation constitutes a market allocation, which is a *per se* violation of Section 1. The district court denied the defendants' motion to dismiss the indictment.[54]

Potential Defenses to Criminal Charges Under Section 2 of the Sherman Act

If the DOJ moves forward with criminal Section 2 prosecutions, the preceding historical record may be relevant to defenses available to the targets of these prosecutions. In particular, the DOJ's long and repeated disclaiming of intent to bring criminal charges for Section 2 violations, and history of not doing so, may strengthen defenses grounded in the Due Process Clause, which requires fair notice of the conduct that could give rise to criminal sanctions.[55] That history could also strengthen *mens rea* defenses, as litigants may be able to argue that the DOJ's many statements about the imprecision of Section 2 suggest that they could not have reasonably known their conduct was criminal.

The Sherman Act is open ended. Through broad concepts like "restraint of trade" and "monopolize," it reaches particular circumstances that Congress could not have imagined in 1890. Unsurprisingly, defendants charged with crimes under the Sherman Act have long raised arguments about the fairness of criminal prosecution, whether through constitutional arguments under the Due Process Clause or statutory arguments based on the statute's *mens rea* requirements. To date, these arguments generally have not succeeded, in part because of the consistency with which the Sherman Act has been applied.[56]

The consistency with which the Division has pursued criminal charges has also discouraged Congress from considering amendments to the statute to clarify the Sherman Act's

criminal reach. The ABA Antitrust Section made this point in its comment to the Antitrust Modernization Commission:

> For generations, the Antitrust Division has been judicious in limiting criminal enforcement to hard-core cartel conduct. . . . While [that] safeguard [is not an] absolute guarantee[] against the criminal prosecution of anticompetitive conduct other than hard-core cartel conduct, [it does] reflect a long-standing, near universal consensus that only such conduct is appropriately subject to criminal prosecution. Given [that] safeguard[], the Section believes that it is unnecessary to, and highly unlikely that Congress would, 115 years after the passage of the Sherman Act, parse the statute into separate criminal and civil parts based on the type and degree of anticompetitive conduct.[57]

The Division's latest foray into expanded criminal enforcement—the 2016 guidance on wage-fixing and no-poach agreements—offers an interesting case study on that score. The 2016 guidance explained that the Division understood wage-fixing to be a variant of price-fixing, and therefore within the *per se* rule that long governed criminal prosecutions brought under Section 1. When the first defendant prosecuted for wage-fixing argued that the government's theory violated his Due Process rights, the district court rejected the argument on the ground that "the Supreme Court has long recognized that § 1 categorically prohibits *per se* unlawful restraints across all markets and industries—including restraints on the buyer side and in the labor market."[58]

Given the lack of comparable support for *per se* Section 2 liability, defendants faced with monopolization prosecutions would likely have stronger arguments than defendants in the no-poach or wage-fixing cases. *First*, a defendant indicted under Section 2 could argue that the charge violates the Due Process Clause because the alleged violation had not been "fairly warned of" and "made specific" by prior decisions interpreting the Sherman Act.[59] The Due Process Clause "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."[60] Under that rule, a defendant charged on a novel theory of liability cannot be punished for engaging in conduct that he or she could not have known was criminal *ex ante*.[61] Given the Supreme Court's statements concerning Section 2, defendants charged under that provision could have a strong argument that the conduct described in the indictment was not known to be illegal: as the Court put it, "under the best of circumstances, applying the requirements of § 2 can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad."[62]

Second, defendants may attempt to revisit the Supreme Court's holding that the Sherman Act is not unconstitutionally vague.[63] The vagueness doctrine "bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[64] The Court first rejected an antitrust defendant's vagueness challenge to the Sherman Act in 1913.[65] The following year, however, the Court struck down as unconstitutionally vague a state antitrust statute that prohibited all agreements that resulted in prices different from the "real value" of the goods. In doing so, the Court contrasted that state law with the Sherman Act, which the Court described as having a "great body of precedents on the civil side, coupled with familiar practice" that helped to clarify the bounds of liability.[66] Since that time, the vagueness doctrine has been applied to criminal laws with greater frequency.[67] And the bounds of Section 2 of the Sherman Act have changed too, as the Supreme Court has recognized that many "exclusionary" practices require detailed factual analysis before finding liability.[68] The more frequent use of the vagueness doctrine, combined with the imprecision of Section 2 under today's law, could bolster a defendant's vagueness challenge to that statute.

Third, even if Division prosecutions under Section 2 survived constitutional scrutiny, the *mens rea* requirement could remain a considerable barrier to liability. The DOJ's long-standing position is that an ordinary *per se* criminal prosecution requires only an intent to enter into the unlawful agreement.[69] By contrast, completed monopolization offenses require a general intent to exercise monopoly power, while attempted monopolization cases require specific intent to monopolize.[70] For an attempt prosecution, the specific intent requirements make the defendants' motives for engaging in the challenged conduct relevant—even if the act in question (for instance, tying, exclusive dealing, or predatory pricing) is otherwise unlawful.[71]

In the Section 2 context, in which the charged conduct may well not be clearly unlawful *ex ante*, these *mens rea* arguments may have considerable force. A leading case on the Sherman Act's *mens rea* requirement, *United States* v. *Gypsum*, explained that "the imposition of criminal liability . . . for engaging in conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence."[72] To date, the *mens rea* argument generally has not been a viable option for defendants in view of the Division's policy of limiting criminal enforcement to hard-core cartel behavior.

In addition, concerns about Section 2's imprecision in criminal cases may have consequences for civil proceedings as well. Under the Rule of Lenity, ambiguous criminal laws are construed in favor of defendants.[73] The Supreme Court has never resolved whether that interpretive principle should apply to statutes like the Sherman Act, which use the same prohibition to create both civil and criminal liability.[74] If courts decide that Section 2 defendants should benefit from the Rule of Lenity in criminal prosecutions, the narrower construction of the statute could well limit the reach of Section 2 in civil cases as well.

Finally, we note the general difficulty of proving liability under Section 2, even in the civil context. In the years since the DOJ's last criminal Section 2 indictments, the Supreme Court has issued a series of decisions highlighting potential

procompetitive justifications for many kinds of conduct challenged under Section 2.[75] Those decisions have raised the bar considerably for civil suits against alleged monopolists. Applying those same principles in the criminal context, where a jury could be called upon to conclude that an antitrust defendant should lose his or her liberty because of a Sherman Act violation, could prove even more challenging. ■

[1] Remarks of Assistant Att'y Gen. Jonathan Kanter at 2022 Spring Enforcers Summit (April 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers. *See also* Remarks of Dep. Assistant Att'y Gen. Richard Powers at American Bar Association White Collar Conference (March 2, 2022).

[2] U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 2.1 (1995).

[3] Former Assistant Attorney General R. Hewitt Pate recounted a story from his travels illustrating the connection between U.S. and non-U.S. enforcement policy. A Chinese official asked why, if the United States believed that Bill Gates had violated the Sherman Act, it was not putting him in jail. R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 Antitrust L.J. 195, 207 (2008).

[4] U.S. Dep't of Justice, Antitrust Div., An Antitrust Primer for Federal Law Enforcement Officials 2 (April 2005), https://appliedantitrust.com/03_criminal/doj_materials/antitrust_primer.pdf.

[5] U.S. Dep't of Justice, Antitrust Div., An Antitrust Primer for Federal Law Enforcement Personnel (April 2022) [2022 Primer], https://www.justice.gov/atr/page/file/1091651/download.

[6] In 1938, Thurman Arnold became the head of the Antitrust Division. His tenure is associated with an uptick in antitrust enforcement. *See* Gregory J. Werden, *Individual Accountability Under The Sherman Act: The Early Years*, Antitrust 100, 102 (Spring 2017).

[7] *See* 15 U.S.C. §§ 1, 2.

[8] *See, e.g.*, 120 Cong. Rec. H10760 (Nov. 19, 1974) (Letter from Assistant Attorney General W. Vincent Rakestraw) ("The Antitrust Division has for many years sought to obtain jail sentences in antitrust cases, but courts have been reluctant to impose them.").

[9] *See* Report of the Atty Gen.'s Nat'l Comm'n to Study the Antitrust Laws iv (March 31, 1955).

[10] *Id*. at 352.

[11] *Id*. at 353.

[12] Pub. L. 93-528 § 3, 88 Stat. 1706, 1708 (1974).

[13] *Id*.

[14] *See* Pub. L. 101-588, 104 Stat. 2879 (1990).

[15] Pub. L. 108-237, 118 Stat. 661 (2004).

[16] Pub. L. 100-185, § 6, 101 Stat. 1279 (1987) (codified at 18 U.S.C. § 3571).

[17] *See* President Gerald R. Ford's Address to a Joint Session of Congress on the Economy (Oct. 8, 1974). *See also* 120 Cong. Rec. H10758, H10761 (Nov. 19, 1974) (Statement of Rep. Hutchinson) (supporting the legislation because it would "convey a message that conspiracies in restraint of trade will no longer be worth the risk").

[18] *See* Hrg. Before Subcomm. on Econ. & Comm. Law, H. Comm. on Jud., 101st Cong., 1st Sess. 13 (June 15, 1989).

[19] *See* 149 Cong. Rec. S13520 (Oct. 29, 2003) (Statement of Sen. Kohl) (referencing "price fixing and bid rigging" as "criminal antitrust violations"); U.S. Dep't of Justice, Statement of R. Hewitt Pate on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 23, 2004) (noting that the "law will greatly enhance one of the Division's core missions, its anti-cartel enforcement program").

[20] *See generally* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 694-95 (2001) ("Over time, however, the DOJ, and more importantly the courts, gradually developed distinguishing lines between the kinds of anticompetitive conduct that should be punished criminally and the remaining conduct, which would only be subject to civil injunctions by the government and private damage cases by injured victims. Thus, price-fixing, bid-rigging, and customer and market allocations came to be regarded as criminal, while most other conduct (for example, joint venture rules, standard setting practices, and vertical restraints) came to be regarded as only suitable for civil prosecution.").

[21] *See* U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual, at III-12 (5th ed. 2018) ("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."); U.S. Dep't of Justice, Antitrust Div., Antitrust Div. Manual, at III-12 (2d ed. 1987) (noting the same *per se* violations, along with "cases where there is evidence that the defendant knew that they were violating the law and acted with flagrant disregard for the legality of their conduct"); U.S. Dep't of Justice, Antitrust Div., Antitrust Div. Manual, at III-11 (1st ed. 1979) (same). *See also* U.S. Dep't of Justice, Antitrust Div., Division Manual (Mar. 1, 2022), https://www.justice.gov/atr/division-manual.

[22] *See, e.g.*, *United States* v. *Kemp & Assoc., Inc*., 907 F.3d 1264, 1274 (10th Cir. 2018).

[23] *See, e.g.*, Assistant Att'y Gen. R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Address Before ABA Section of Antitrust Law Annual Meeting 6 (Aug. 12, 2003); Deputy Assistant Att'y Gen. Gary Spratling, Transparency in Enforcement Maximizes Cooperation From Antitrust Offenders (Oct. 15, 1999) ("[C]urrent Division policy is to proceed by criminal investigation and prosecution in cases involving hard-core, per se unlawful agreements such as price fixing, bid rigging and horizontal market allocation."). *See generally* Antitrust Modernization Committee, Report and Recommendations 297 (April 2007).

[24] Remarks of Assistant Att'y Gen. Thomas O. Barnett, Criminal Enforcement of Antitrust Laws: The U.S. Model (Sept. 14, 2006), Criminal Enforcement Of Antitrust Laws: The U.S. Model | ATR | Department of Justice.

[25] Antitrust Modernization Commission, *supra* note 22, at 296.

[26] Comments of the ABA Section on Antitrust Law in Response To The Antitrust Modernization Commission's Request For Public Comment on Criminal Penalties 4-5 (Nov. 14, 2005) [ABA AMC Comments] ("The Section applauds the Division's self-imposed discretion . . . limiting enforcement to hard-core cartel enforcement . . . and fully anticipates its continuation"), https://govinfo.library.unt.edu/amc/public_studies_fr28902/criminal_pdf/051114_ABA_Criminal_Remedies.pdf.

[27] U.S.S.G. § 2R1.1.

[28] *Id*. (background).

[29] ABA AMC Comments, *supra* note 26, at 5.

[30] U.S. Dep't of Justice, Antitrust Div., An Antitrust Primer for Federal Law Enforcement Officials 2 (April 2005).

[31] *Id*. at 4.

[32] *See supra* notes 4 and 5 and accompanying text.

[33] *See* Keith Jones & Farin Harrison, *Criminal Sanctions: An Overview of EU and National Case Law*, e-Competition: National Competition Laws Bulletin (July 2020). While Canada formerly allowed for criminal enforcement for some forms of unilateral conduct, like predatory pricing, it recently abandoned that approach. *See* Susan M. Hutton, Primer on Amendments to Canada's Competition Act and Investment Canada Act, Strikeman Elliott (March 23, 2009) (noting that "[s]takeholders on all sides have long recognized the criminal sanctions" for predatory pricing and price discrimination "to be inconsistent with modern economics"); Osler, Hoskin & Harcourt LLP, Update: Significant Changes to Canada's Competition Law and Foreign Investment Regime (March 12, 2009) (noting repeal of Section 50 of the Competition Act, which criminalized predatory pricing).

[34] *See, e.g.*, U.S. Dep't of Justice Antitrust Div., Note by the United States, Criminalisation of Cartels and Bid-Rigging Conspiracies, Organization for Economic Cooperation and Development 2 (June 9, 2020) ("To increase transparency and create certainty for businesses, the Division focuses its criminal enforcement efforts narrowly, on only per se conduct, or hardcore cartel activity: price fixing, bid rigging, and market or customer allocations.").

[35] U.S. Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Enforcement Guidelines For International Operations § 2.1 (April 1995) ("Violations of the Sherman Act may be prosecuted as civil or criminal offenses. Conduct that the Department prosecutes criminally is limited to traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities that would also be violations of the law in many countries.").

[36] *Id*. at 14.

[37] *See* Organization for Economic Cooperation and Development, Hard Core Cartels 18 (2000). *See also* Baker, *supra* note 19, at 707 (describing circumstances where the DOJ obtained jail sentences for foreign executives found guilty of *per se* violations).

[38] OECD/ICN Report on International Co-Operation in Competition Enforcement 77 (2021).

[39] *See* OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (Jan. 2019).

[40] Our paper addresses DOJ enforcement back through 1938 because of the difficulty of gathering earlier materials. 1938 is also the year that Thurmond Arnold became the Assistant Attorney General in charge of the Antitrust Division. *See supra* note 6.

[41] *American Tobacco Co.* v. *United States*, 328 U.S. 781, 783 (1946). *See also* 2022 Primer, *supra* note 5, at 2.

[42] Defendants in early cases involving parallel charges brought under Section 1 and Section 2 argued that the charges violated the Double Jeopardy Clause because they were based on the same underlying conduct. Courts rejected that argument. *See, e.g.*, *Montrose Lumber Co.* v. *United States*, 124 F.2d 573, 575 (10th Cir. 1941) ("We shall assume, without deciding, that the indictment charged but one agreement. Even if the defendants, as a part of a single transaction or agreement, agreed that they would act together to accomplish the object of restraining trade, and further agreed that they would act together to accomplish the object of monopolizing trade, we are of the opinion that they would be guilty of separate and distinct offenses.").

[43] *See, e.g.*, 18 U.S.C. § 1951(b)(2) ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.").

[44] The table includes the year of the indictment when that information was available. For some prosecutions, the relevant database does not include any date for the indictment. For those prosecutions, the date listed in the table is based on the earliest court opinion in the matter.

[45] *In re Antitrust Grand Jury*, 805 F.2d 155, 159-160 (6th Cir. 1986) ("The underlying theory of the government was that the Plain Dealer induced the Press to close by buying its assets for substantially more than their actual value in an attempt to monopolize the newspaper market in Cleveland."). Sullivan & Cromwell represented the intervenors-appellants in that case, which is the last publicly disclosed criminal Section 2 matter of which we are aware.

[46] *American Tobacco Co.* v. *United States*, 147 F.2d 93, 101 (C.C.A. 1944).

[47] *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 202 (1942).

[48] *See Kansas City Star* v. *United States*, 240 F.2d 643 (8th Cir. 1957).

[49] Indictment at 6, *United States* v. *Safeway Stores Inc. et al.*, Crim. Action No. 9564 (N.D. Texas July 7, 1955).

[50] *Id*. at 7.

[51] *See United States* v. *Safeway Stores*, 20 F.R.D. 451 (N.D. Texas 1957). The authors have requested information from the district court to determine whether this prosecution resulted in jail time. At the time of this publication, records relevant to that question were not identified.

[52] *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227, 227 (N.D. Tex. 1959).

[53] Indictment at 6, *United States* v. *Molasky*, Crim. Action No. 73-514B (E.D. Tex. Oct. 11, 1973).

[54] *See United States* v. *Molasky*, 1974 WL 970 (E.D. La. Nov. 6, 1974).

[55] Some scholars and litigants have argued that the "sudden revival of long forgotten law carrying harsh penalties might encounter a defense of desuetude." *Central Nat. Bank of Mattoon* v. *Dep't of Treasury*, 912 F.3d 897, 906 (7th Cir. 1990). Federal courts typically have not accepted those arguments. *Id*.

[56] *See United States* v. *Nash*, 229 U.S. 373, 376-77 (1913) (rejecting a constitutional vagueness challenge to a prosecution under the Sherman Act). For instance, the first Antitrust Division Manual, issued in 1979, explained that criminal enforcement is not appropriate when "(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 prosecution 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 actions." U.S. Dep't of Justice, Antitrust Div., Antitrust Div. Manual, at III-11 (1st ed. 1979).

[57] ABA AMC Comments, *supra* note 26, at 5.

[58] *See* Order at 20-22, *United States* v. *Jindal*, No. 4:20-cr-358 (E.D. Texas Nov. 29, 2021). A similar argument was rejected in the first no-poach prosecution as well. *See* Order at 17, *United States* v. *DaVita Inc.*, No. 1:21-cr-229 (D. Colo. Jan. 28, 2022).

[59] *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

[60] *Id*. at 267.

[61] Courts have applied this doctrine by looking to the judicial decisions at the time of the defendant's allegedly unlawful conduct, rather than asking whether the defendant was subjectively aware of what the law required. *See, e.g.*, *United States* v. *Melendez*, 2004 WL 162937, at *7 (E.D. Mich. 2004).

[62] *Verizon Comms. Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

[63] *See* supra note 56.

[64] *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 291 (1926)).

[65] *See Nash*, 229 U.S. at 376.

[66] *Int'l Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 216, 223 (1914).

[67] *See Manning* v. *Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc) (striking down as unconstitutionally vague a state law that turned on an individual's classification as a "habitual drunkard"). In *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1213 (2018), the Supreme Court held that the vagueness doctrine was not confined to criminal cases and applied in the immigration removal context. The Supreme Court has not yet applied the vagueness doctrine to other civil laws.

[68] *See Brooke Grp.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (requiring extensive factual allegations to plead predatory pricing claims).

[69] *See* Primer for Law Enforcement Personnel, *supra* note 5, at 7.

[70] *See Smith* v. *Burns Clinic Medical Center, P.C.*, 779 F.2d 1173, 1176 (6th Cir. 1985) (explaining that monopolization requires "general intent"); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 299 (8th Cir. 1976) (explaining that attempted monopolization requires "specific intent").

[71] *See Spectrum Sports, Inc.* v. *McQuillian*, 506 U.S. 447, 456 (1993).

[72] *United States* v. *Gypsum*, 438 U.S. 422, 441 (1978). In explaining this risk, the Court was careful to note that it does not arise "for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effect."

[73] *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000).

[74] *See* Caleb Nelson, *Statutory Interpretation* 136–137 (2011).

[75] *See, e.g.*, *Trinko*, 540 U.S. at 407–08 ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *Brooke Grp.*, 509 U.S. at 223 ("As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting."); *Spectrum Sports*, 506 U.S. at 458–59 ("It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which inherently is fraught with anticompetitive risk.").