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Are Antitrust Violations Crimes Involving Moral Turpitude?

On March 13, 2012, the United States obtained its first trial convictions ever against foreign nationals for antitrust violations under the Sherman Act. A Northern District of California jury found two of the five defendants, all from Taiwan, guilty of conspiring to fix the prices of thin-film transistor liquid crystal displays. The jury acquitted two other defendants and one received a mistrial after the jury failed to reach a verdict as to that defendant.

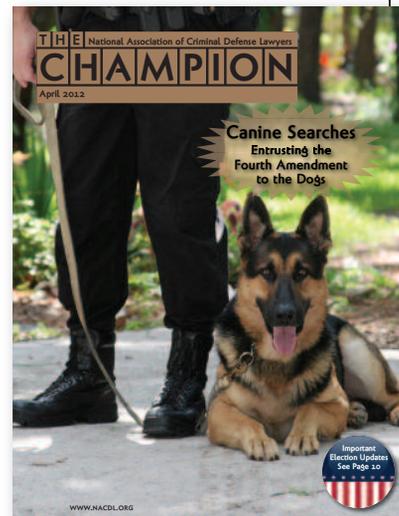
Prior to these first-ever trial convictions, the Antitrust Division of the U.S. Department of Justice reported that since 1999 the DOJ had obtained jail-time convictions for more than 50 non-U.S. executives for violations of the Sherman Act. Each of these convictions was by plea agreement, rather than by trial, and at least eight more pleas by non-U.S. individuals under the Sherman Act are currently pending court approval.¹

One common element in virtually all of these plea agreements is a provision in which the government agrees to waive application of the immigration consequences created by the March 15, 1996, Memorandum of Understanding (MOU) between the Antitrust Division and the DOJ's former Immigration and Naturalization Service (INS) (now the Bureau of Immigration and Customs Enforcement (ICE) within the Department of Homeland Security).

The immigration consequences derive from the MOU's provision that: "the INS considers criminal violations of the Sherman Antitrust Act, 15 U.S.C. § 1, to be *crimes involving moral turpitude*, which may subject an alien to exclusion or deportation from the United States[.]"² Under U.S. immigration statutes, if an alien who has no U.S. immigration status is convicted of a "crime involving moral turpitude" (CIMT), the alien is subject to exclusion from the United States for a minimum of 15 years.³ Conviction of a CIMT can also establish a basis for deportation, under varying circumstances, of aliens who have some U.S. immigration status.⁴

On the one hand, the MOU creates a serious potential immigration penalty for non-U.S. antitrust defendants by deeming Sherman Act convictions to be CIMTs. On the other hand, the government will lift this potential penalty

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by waiving the immigration consequences created by the MOU if an alien defendant pleads guilty to a Sherman Act violation. Critically, however, if an alien chooses to defend himself at trial and subsequently is convicted under the Sherman Act — even if the conviction does not result in a jail sentence — the penalty created by the MOU takes effect, triggering the alien's exclusion from the United States for at least 15 years. (This article will speak in terms of exclusion rather than deportation because most of the relevant antitrust prosecutions have been against foreign nationals who have no U.S. immigration status.)

For many non-U.S. executives, a 15-year ban on travel to the United States is potentially more of a career killer than a relatively shorter prison term. The MOU itself says almost as much: “the possibility of exclusion or deportation from the United States significantly impacts decisions by aliens about whether to submit to the jurisdiction of the U.S. courts for purposes of entering pleas and providing assistance to the Antitrust Division in its investigations[.]” Similarly, in a 2011 *Financial Times* article, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement described the DOJ's leverage under the MOU: “It's a good carrot.”²⁵

The underpinning of this leverage is the MOU's provision that the government “considers” a criminal Sherman Act violation to be a CIMT. The rub is that no federal court or immigration judge — the settled arbiters of what crimes constitute a CIMT — has ever actually held a conviction under the Sherman Act to be a CIMT. And the MOU's provision that the DOJ “considers” criminal violations of the Sherman Act to be CIMTs is not only unprecedented, it is almost certainly erroneous.

First Principles: What Are CIMTs and Who Decides?

“Moral turpitude” is an age-old term in the law that defies precise definition. *Black's Law Dictionary* vaguely defines moral turpitude as an “act of baseness, vileness, or the depravity in private social duties which man owes to his fellow men, or to society in general, contrary to accepted and customary rule of right and duty between man and man.”²⁶ In a seminal U.S. Supreme Court case addressing CIMTs, the Court observed in 1951, “The term ‘moral turpitude’ has deep roots in the law[.]” and that, in the U.S. immigration law context, the term was first used in an 1891 statute providing for “the

exclusion of ‘persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.’”²⁷ From that 1891 statute until present-day immigration laws, Congress has used the term “crime involving moral turpitude” as a basis for excluding aliens from the United States. Because Congress never has defined the term, however, robust case law adjudicating what criminal offenses constitute CIMTs has ensued.

The majority of case law on CIMTs has developed from removal proceedings for aliens who have been convicted of a crime. If an alien contests removal, an administrative immigration judge (IJ) within the DOJ's Executive Office of Immigration Review renders the initial decision on whether the alien's offense constitutes a CIMT. Appeal may be had to the Board of Immigration Appeals (BIA), a multi-member, administrative law panel that can issue precedential decisions on what offenses constitute a CIMT. Finally, the alien can appeal to a U.S. Court of Appeals.⁸ The U.S. courts are the final arbiter of what crimes constitute a CIMT.⁹

Under varying judicial tests, the essential inquiry on CIMTs historically has been whether the elements defining the offense, rather than the specific conduct of an individual defendant, constitute a CIMT.¹⁰ Decades of this offense-by-offense, case law approach have resulted in relatively settled decisions on which offenses are CIMTs and which are not. For example, to guide U.S. consular officers reviewing visa applications on which crimes have been held to constitute a basis for exclusion as CIMTs, the State Department Foreign Affairs Manual provides: “The presence of moral turpitude is determined by the nature of the statutory offense for which the alien was convicted, and not by the acts underlying the conviction. ... The most common elements involving moral turpitude are: (1) Fraud; (2) Larceny; and (3) Intent to harm persons or things.”¹¹ The State Department's manual also provides running lists of specific crimes that are CIMTs (e.g., robbery, murder, willful tax evasion, and transporting stolen property “with guilty knowledge”) as well as crimes that are not CIMTs (e.g., tax evasion “without intent to defraud,” firearms violations, black market violations, and smuggling and customs violations “where intent to commit fraud is absent”). Perhaps because no judicial or administrative decision ever has addressed whether a Sherman Act conviction constitutes a CIMT, antitrust offenses are not included on either of the State Department's lists.

Origins of the MOU: The 1993 Amnesty Program And the Lysine Cartel

The DOJ created the MOU in 1996, a crucial time when the DOJ was striving to strengthen its enforcement against international cartels detected through applications received under the DOJ's amnesty program launched in 1993, and when the DOJ was working on its watershed prosecutions of the international lysine cartel (which the DOJ famously detected through informant Mark Whitacre, an Archer Daniels Midland executive, rather than the amnesty program). Prior to the MOU, these new enforcement opportunities were stymied both by the DOJ's inability to extradite non-cooperating individuals as well as its inability to assure potentially cooperating defendants of the consequences under U.S. immigration law of a guilty plea for a Sherman Act violation.

In February 1997, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, then Gary R. Spratling, delivered a speech describing the DOJ's pre-MOU predicament:

Obtaining jurisdiction over non-resident aliens charged with antitrust offenses may raise significant problems for the Division. For the most part, our cooperation agreements with foreign antitrust authorities have focused on the challenge of obtaining foreign-located evidence as opposed to the extradition of culpable defendants. For that reason, *many alien defendants are able to escape prosecution so long as they are willing to forfeit their ability to travel into the United States or into any other country with whom we have an extradition treaty applicable to antitrust offenses.*¹²

Spratling observed that these elusive non-U.S. individuals were “almost always executives of international businesses who put a high premium on their ability to travel without fear of being detained or arrested.” According to Spratling, the DOJ sought a way to leverage the desire of these executives for unfettered travel into cooperation with the DOJ: “The inducement of ‘getting the matter behind them’ and avoiding deportation or exclusion from the United States is so great that criminal aliens are sometimes willing to

accept responsibility in the United States for the criminal conduct in return for a promise of future immigration relief. ...”

The DOJ found the solution for its enforcement needs in the MOU, which according to Spratling, established the “certainty of the immigration relief which the Division can offer to cooperating aliens in plea agreements.” The MOU was a game changer, and Spratling confirmed its unprecedented status:

The MOU is unique in the Department of Justice. ... Heretofore, cooperating aliens could not be assured that they would receive the benefit of immigration relief by agreeing to cooperate and plead guilty, even though the promise of immigration relief may have been the foremost, indeed only, incentive from the alien’s perspective for entering into such an agreement.¹³

Spratling’s speech also details how the MOU similarly strengthened the DOJ’s hand with corporate defendants: “It is important to understand that the MOU is not only instrumental in inducing foreigners to plead guilty and cooperate in our cases, but it also facilitates our ability to enter into plea agreements with the corporate defendant as well.” In particular, Spratling stated that “the MOU was instrumental in securing the momentous plea agreements in the lysine investigation in August 1996[,]” because “the foreign individual and corporate defendants were unwilling to go forward with the contemplated plea agreements without a promise of immigration relief by the INS.”

While Spratling’s speech thoroughly details the enforcement leverage that the MOU created for the DOJ, the speech does not specify that the MOU achieves that result, in the first instance, by deeming Sherman Act convictions to be CIMTs that will subject aliens to exclusion from the United States for at least 15 years. It is only by virtue of the CIMT provision that the government’s waiver of immigration consequences in exchange for plea agreements becomes operable. More recent speeches by officials of the DOJ expressly acknowledge that the CIMT provision is the lynchpin of the MOU: “The [INS/ICE] considers Sherman Act offenses to be crimes of moral turpitude. As a result, a foreign national convicted of an antitrust offense is subject to deportation and exclusion from the United States, whether for personal or business travel.”¹⁴

What the MOU Implicitly Acknowledges

The MOU “considers” criminal violations of the Sherman Act to be CIMTs, but no federal court or immigration judge ever has.

It is conspicuous that the MOU provides that INS considers Sherman Act convictions to be CIMTs. That usage implicitly acknowledged two things that are important to analyzing both whether the MOU’s CIMT provision has a basis in law as well as the propriety of its enforcement impact. First, the MOU was acknowledging that the Antitrust Division and the INS were *not* empowered themselves to establish that Sherman Act convictions are CIMTs under U.S. law. That determination belongs to the adjudicatory process, outlined above, that begins with an administrative IJ and ends potentially with an alien’s appeal to the U.S. courts. Second, the MOU was acknowledging that the adjudicatory process for determining which crimes constitute CIMTs had, in fact, never been applied to a Sherman Act conviction. Significantly, the MOU’s CIMT provision would *not* be entitled to deference from a federal court because the MOU results from neither an administrative adjudication nor an agency rulemaking under the Administrative Procedure Act.¹⁵

As the MOU confesses, the most that such an agency memorandum can accomplish is to indicate that the government would “consider” a Sherman Act conviction to be a CIMT and, accordingly, seek to win a ruling from an IJ excluding an alien on that basis. But the question of whether a Sherman Act conviction would actually be held a CIMT warrants serious scrutiny. The MOU provides that “in a small number of cases each year, the Antitrust Division may need to include as a term in a plea/cooperation agreement a cooperating alien’s ability to travel to the United States[.]” Instead of a few cases, however, the MOU’s waiver of immigration consequences in exchange for plea agreement has been a part of virtually every plea agreement that the DOJ has negotiated with a non-U.S. citizen under the Sherman Act since 1999. That fact, along with the fact that until March 13, 2012, the DOJ had never successfully convicted a non-U.S. individual for a Sherman Act violation at trial, calls into question whether non-U.S. antitrust defendants are forfeiting their right to trial — along with a substantial chance of acquittal — and accepting prison sentences in exchange for protection from illusory

immigration consequences.

From another perspective, rather than creating the current MOU to address its enforcement predicament of the late 1990s, the DOJ could have created an MOU in which the DOJ agreed not to seek exclusion of non-U.S. antitrust defendants who plead guilty *or* submit to U.S. jurisdiction for purposes of trial. That would have overcome the hurdles to extradition and likewise would have permitted immigration assurances — but without weighing on an individual’s right to trial. If this trial deterrence is a concern that could be gleaned only in hindsight, the DOJ can revise the MOU going forward to apply to pleading defendants as well as to those who voluntarily appear in the United States to stand trial. The availability of this fair and equally effective alternative brings into sharp focus the urgency for determining the propriety of the MOU’s CIMT provision: if Sherman Act convictions are not actually CIMTs, then the DOJ’s prosecutorial success under the MOU has been *in terrorem* rather than by legitimate inducement.

Would a Judge Hold a Sherman Act Conviction To be a CIMT?

The DOJ, immigration judges, and the courts all agree with the core principle that “to qualify as a crime involving moral turpitude for purposes of the [Immigration and Nationality] Act, a crime must involve both reprehensible conduct and some degree of scienter[.]”¹⁶ This standard generally is met when one or more of the following conditions are satisfied: (1) the crime is *malum in se* (inherently wrong) rather than merely *malum prohibitum* (statutorily prohibited); (2) the crime contains an element of fraud, larceny, or intent to harm a person or thing; or (3) the crime requires evil intent or knowledge of the illegality of the conduct.¹⁷

Malum Prohibitum, Not Malum in Se

CIMT precedents “distinguish between acts that are seen as ethically wrong without any need for legal prohibition (acts wrong in themselves, or *malum in se*), and those that are ethically neutral and forbidden only by positive enactment (acts wrong because they are so decreed, or *malum prohibitum*).”¹⁸ Under these settled precedents, “[m]oral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of

it which renders a crime one of moral turpitude.”¹⁹

Important early Sherman Act prosecutions held that a Section 1 offense is not *malum in se*, but merely *malum prohibitum*. In adjudicating a criminal plea in 1938 in *United States v. Socony-Vacuum Oil Co.*, the district court was “of the opinion that the wrong here complained of is not *malum in se*, but rather *malum prohibitum*, one peculiarly of an economic nature.”²⁰ The same court said in *United States v. Standard Oil Co. (Indiana)*: “Violations of the anti-trust laws are different from crimes which are *mala in se*. The Department of Justice has, in each case where it believes a violation has occurred, the choice of a civil or criminal proceeding.”²¹

These early holdings that criminal Sherman Act violations are not inherently reprehensible are supported by the Act’s language, structure, and history. Section 1 of the Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Significantly, the Act’s provision that violative agreements are “hereby declared to be illegal” reflects that there was no criminal offense for such agreements at common law. In 1898, then-Circuit Judge William Howard Taft observed in *United States v. Addyston Pipe & Steel Co.*, “Contracts that were unreasonable restraint of trade at common law were *not unlawful in the sense of being criminal*, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the court.”²² Similarly, during the Senate’s debates on the Sherman Act in 1890, Sen. Sherman likewise observed that the common law penalty for anticompetitive agreements was limited to nullification: “Similar contracts in any state in the Union are now, by common or statute law, null and void.”²³

The Supreme Court’s seminal decision in *United States v. U.S. Gypsum Co.*, which imposed a “knowing” criminal intent requirement for a conviction under the Sherman Act, also demonstrates that the offense is not inherently reprehensible:

The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . *Simply put, the Act has not been interpreted as if it were primarily a criminal statute*; it has been construed to have a “generality and adaptability comparable to that found to be desirable in constitutional provisions.”²⁴

The *Gypsum* Court observed that, from the beginning, Congress intended the “open texture of the statutory language” to be defined by the courts, and the Court quoted Sen. Sherman’s debate commentary on this point: “I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations.”²⁵ Moreover, Sen. Sherman acknowledged that prior to judicial interpretation, the Act’s criminal penalty could not be enforced: “In the present state of the law it is *impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment.*”²⁶ Sen. Sherman’s remarks were prescient in that during the first two decades of Sherman Act enforcement, there were few criminal prosecutions, and it was not until 1913 that the Supreme Court resolved in *Nash v. United States* that the Sherman Act’s criminal provision was not void for vagueness.²⁷ Notably, upon enactment in 1890, Section 1 of the Sherman Act, in language otherwise identical to today’s Act, imposed only a misdemeanor sentence of no more than one year and a maximum fine of \$5,000.²⁸

It seems far-fetched that an offense so nebulous that it could not support an indictment upon enactment but only after extensive judicial interpretation would be sufficiently morally reprehensible to constitute a CIMT. That conclusion appears inescapable when one considers that it was only one year later, in 1891, that Congress passed the original immigration statute excluding “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” A new misdemeanor, non-existent at common law, too vague to support an indictment hardly seems infamous.

Finally, one of the DOJ’s primary motivations for creating the MOU was the DOJ’s inability to extradite foreign nationals for Sherman Act offenses, which in turn resulted largely from the lack of “dual criminality,” i.e., the anticompetitive conduct alleged was not a criminal offense in the other country.²⁹ Although roughly 120 countries enforce competition laws, only about one-tenth of those provide a criminal penalty, and most of those were enacted relatively recently.³⁰ The paucity of criminal competition law offenses around the world is consistent with the conclusion that while antitrust offenses are statutorily prohibited, they are not inherently reprehensible.

No Element of Fraud

Even if an offense is only *malum prohibitum*, it may be a CIMT if the offense includes an element of fraud, larceny, or intent to harm a person or thing. In a criminal antitrust prosecution, “to establish its *prima facie* case under Section 1 of the Sherman Act, the government needs to show only (1) the existence of a *per se* illegal conspiracy; (2) that the defendant knowingly entered into the conspiracy; and (3) that the conspiracy affected interstate or foreign trade and commerce.”³¹ To start, larceny is not an element of the Sherman Act offense because larceny requires the specific intent to deprive. A Sherman Act violation is not a specific intent crime, and “[t]he government need not prove independently that a defendant intended to restrain trade unreasonably or to injure competition.”³² Next, the “intent to harm” prong refers to serious physical harm, which plainly is inapplicable to an antitrust offense.³³

The pertinent question, then, is whether the Sherman Act offense includes an element of fraud. The Supreme Court has observed: “Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.”³⁴ And all species of fraud require some element of false or deceitful conduct intentionally aimed at another.³⁵

Despite the fact that antitrust violations sometimes are committed with deceitful acts, the Sherman Act offense does *not* contain any element of deceit or false representation — neither on its face nor as it has been interpreted by the courts. In fact, under the Sherman Act, there is no “defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had

some good results. If there was, in fact, a conspiracy as charged in the indictment, it was illegal.³⁶ Furthermore, the Sherman Act offense cannot include an element of fraud because fraud requires at least a “willful” criminal intent, but under settled Sherman Act case law — mirrored in model jury instructions — “proof of ‘willfulness’ is not required for a conviction under the Sherman Act.”³⁷

The DOJ’s pronouncements that only hardcore, per se violations of Section 1 of the Sherman Act will be prosecuted criminally do not alter this conclusion. In 1955, the Attorney General’s National Committee to Study the Antitrust Laws reported:

[I]t may be difficult for today’s businessman to tell in advance whether projected actions will run afoul of the Sherman Act’s criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade.³⁸

Likewise, “[i]n 1967, the Antitrust Division refined its guidelines to emphasize that criminal prosecutions should only be brought against willful violations of the law.”³⁹ The DOJ nonetheless subsequently proceeded criminally in *Gypsum* against inter-seller price verification that the defendants claimed to have undertaken for purposes of complying with the price-discrimination strictures of the Robinson-Patman Act:

In *Gypsum*, the Antitrust Division challenged an exchange of pricing information as a criminal violation of Section 1 of the Sherman Act. The defendants denied any wrongful intent, claiming they had not agreed to fix prices, but only to exchange information in a good faith effort to comply with the Robinson-Patman Act. The Court overturned the defendants’ convictions after finding that the jury had been improperly instructed to presume unlawful intent as a matter of law if they found that the “effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices.”⁴⁰

In overturning the trial convictions in *Gypsum*, the Supreme Court observed that

“the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.”⁴¹ Fraudulent conduct is not difficult to distinguish from acceptable and justifiable conduct.

Even after *Gypsum*, there remains a realistic probability that the DOJ will proceed criminally under the Sherman Act against non-fraudulent conduct. For example, in 1992 in *United States v. Alston*, the Ninth Circuit upheld the DOJ’s Sherman Act convictions of dentists who had acted collectively to increase their co-payment fees:

They met with about fifty local dentists at Dr. Alston’s office to discuss the fees, after which many of those present at the meeting mailed letters to the plans requesting higher fees. The plans did in fact revise their fee schedules, resulting in higher costs to plan members for some services.⁴²

The *Alston* court noted that the DOJ had compared the dentists’ conduct to that of about 100 boycotting lawyers that was held illegal per se under the Sherman Act by the Supreme Court in the Federal Trade Commission’s (FTC) civil prosecution in *FTC v. Superior Court Trial Lawyers Association*: “The government analogizes the dentists here to the lawyers in *SCTLA*, and argues that the per se rule is thus applicable.”⁴³

The DOJ’s criminal Sherman Act prosecution in *Alston* did not target deceit, misrepresentation, or any other fraudulent conduct. It was about the dentists’ collective conduct, which the DOJ itself analogized to the lawyers’ boycott that the FTC pursued civilly in *SCTLA*. And the *Alston* court pointedly stated: “it is not our place to question the government’s motives in elevating to the criminal level a dispute normally handled as a civil enforcement matter[.]” The provision in the Antitrust Division Manual on what per se violations of the Sherman Act are appropriate for criminal prosecution is almost exactly the same today as it was when the DOJ prosecuted the dentists in *Alston*.⁴⁴ Plainly, fraud is neither legally required for criminal Sherman Act prosecutions nor always present in them as a practical matter.⁴⁵

No Evil Intent or Knowledge Of Illegality Required

For similar reasons, a criminal Sherman Act violation neither requires nor realistically always entails the “corrupt

scienter” inherent in a CIMT. A conviction under the Sherman Act does not require that the defendant knew his conduct was illegal,⁴⁶ and *Gypsum* and *Alston* exemplify the realistic probability that DOJ will proceed criminally even when defendants plausibly believe that their conduct was legal.

As to evil intent, *Gypsum* held that a Sherman Act conviction cannot be based on strict liability, but instead the government must prove “knowing” conduct by the defendant. “Nearly all of the U.S. Courts of Appeals have interpreted *Gypsum* to imply that when a per se violation of Section 1 of the Sherman Act is charged, the requisite criminal intent may be established by proving a defendant knowingly agreed to participate in the alleged conspiracy.”⁴⁷ As discussed, “[t]he government need not prove independently that a defendant intended to restrain trade unreasonably or to injure competition.” And the act of conspiring does not render the Sherman Act offense any more sinister for purposes of the CIMT analysis because “a conspiracy to commit an offense involves moral turpitude only when the underlying substantive offense is a crime involving moral turpitude.”⁴⁸ Furthermore, “Sherman Act Section 1 offenses, unlike offenses under the general federal criminal conspiracy statute (18 U.S.C. § 371), do not require proof of an overt act.”⁴⁹

“Knowing” in the sense required for a Sherman Act conviction merely means that the defendant acted purposefully, not by accident. “[E]ven after *Gypsum* the intent element of a criminal antitrust violation does not include any finding of malice; nothing more is required than a showing that the defendant engaged in conduct that is a per se violation of the Sherman Act. . . .”⁵⁰ Moreover, as demonstrated in the fraud analysis above, good intentions will not preclude a criminal prosecution under the Sherman Act, either as a matter of law or the DOJ’s prosecutorial discretion.

Sherman Act Offenses Are Not CIMTs

As shown, a criminal violation of the Sherman Act neither requires nor always realistically includes turpitudinous conduct. The MOU’s provision that “considers criminal violations of the Sherman Antitrust Act, 15 U.S.C. § 1, to be crimes involving moral turpitude” is unsupported by any of the litmus tests that IJs, the BIA, and the courts always have used to determine whether a crime is a CIMT. For added measure, it is a set-

tled canon in construing whether a crime constitutes a CIMT that “any doubts in deciding such questions must be resolved in the alien’s favor.”⁵¹

The conclusion that Sherman Act offenses are not CIMTs is wholly consistent with the fact that criminal Sherman Act violations can inflict enormous harm on consumers, businesses, and society at large, both in the United States and abroad, and must be subject to vigorous criminal prosecution — including stiff criminal sentences for individuals. The seriousness of Sherman Act offenses does not, however, make them CIMTs. CIMT precedents hold: “[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. It is rather a question of the offender’s evil intent or corruption of the mind.”⁵² Since the inception of Congress’s exclusion of aliens for CIMTs, there has been a settled “distinction between crimes involving moral turpitude (which trigger specific immigration consequences) and criminal conduct generally (which the government has a valid interest in punishing whether or not it qualifies as morally offensive or involves scienter). . . .”⁵³ This point applies with equal force after Congress’s relatively recent increase of the maximum sentence and fine under Section 1 of the Sherman Act in 2004; Congress simultaneously enacted identical increases under Section 2 of the Sherman Act (monopolization offenses), and the DOJ does not consider the Section 2 offense to be a CIMT or even enforce Section 2 criminally.

Vigorous prosecution must remain principled. If, as concluded here, the Sherman Act offense is not a CIMT, it is inappropriate for the DOJ to rely on the MOU’s CIMT provision as leverage in extracting criminal pleas. The Supreme Court has held that for aliens facing criminal charges in the United States, “preserving the possibility of [immigration] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.”⁵⁴ Furthermore, as the Supreme Court held on March 21, 2012, in *Missouri v. Frye*, “it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”⁵⁵ Thus, the MOU’s offer of relief from immigration consequence in exchange for plea agreement — when that immigration consequence is unsupported by the law — necessarily impinges the alien’s choice of whether to plead or stand trial. Reciprocal treatment of U.S. citizens by enforcers abroad would be equally inappropriate.

If the DOJ remains unconvinced, the DOJ should consider revising the MOU to apply equally to non-U.S. defendants who voluntarily appear for trial, at least until the courts can conclusively determine whether Sherman Act offenses are CIMTs. This suggested revision to the MOU would not undermine the Antitrust Division’s enforcement and cooperation goals because, among other reasons, foreign nationals who refuse to cooperate, plead, or voluntarily appear for trial are subject to arrest around the world under INTERPOL “Red Notices.”⁵⁶ Thus, even if the foreign national is not subject to extradition for antitrust offenses in his home country, any international travel will subject the individual to arrest and potential U.S. extradition.⁵⁷

Unless and until the MOU is revised to apply to non-U.S. defendants who voluntarily appear for trial, defendants will continue entering pleas, at least in part, for fear of immigration consequences that are unsupported by the law. With the two recent convictions in the liquid-crystal display case, there may finally be an opportunity for a judicial resolution of the Sherman Act CIMT issue.

Notes

1. See U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION UPDATE SPRING 2011: CRIMINAL PROGRAM (2011), available at <http://www.justice.gov/atr/public/division-update/2011/criminal-program.html> (“Since May 1999, 49 foreign defendants have served, or are currently serving, sentences in U.S. prisons for violating the Sherman Antitrust Act or obstructing a Federal antitrust investigation.”). The 49 defendants mentioned in the Spring 2011 update include UK national, and former Morgan Crucible CEO, Ian P. Norris, whom the DOJ convicted at trial for conspiracy to obstruct justice, but not for violating the Sherman Act. The remaining 48 defendants entered plea agreements for antitrust violations. Since the release of the DOJ’s Spring 2011 update, based on the Antitrust Division’s press releases to date, there have been at least five additional plea agreements by non-U.S. individuals under the Sherman Act.

2. Memorandum of Understanding Between the Antitrust Division United States Department of Justice and the Immigration and Naturalization Service United States Department of Justice at 1 (Mar. 15, 1996) (emphasis added), available at <http://www.justice.gov/atr/public/criminal/9951.pdf>. The immigration waiver provided for by the MOU is present in 44 of the 49 criminal antitrust plea agreements that are publicly available on the DOJ website. In the remaining five plea agreements, four include unique, personalized immigration arrange-

ments between the DOJ and the defendants. The fifth agreement, for a defendant who additionally pleaded guilty to a charge of criminal conspiracy to violate the Foreign Corrupt Practices Act, has no reference to a waiver of immigration consequences.

3. See Immigration and Nationality Act (INA) § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) (excluding alien for CIMT conviction); INA § 212(h)(1)(A)(i), 8 U.S.C. § 1182(h)(1)(A)(i) (2006) (providing for possibility of waiver of exclusion after 15 years).

4. See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (providing for deportation of an alien convicted of a CIMT within five years of admission into the United States, or within 10 years of admission if the alien obtained lawful permanent resident status under the alien informant provision of 8 U.S.C. § 1255(j)); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (providing for deportation of an alien who, at any time after admission, is convicted of two or more CIMTs not arising out of a single scheme of criminal misconduct).

5. Kara Scannell, *US Accused of Unfair Antitrust Tactic: Foreigners Driven to Offer Guilty Plea: Fear of Restrictions on Travel Play Role*, FIN. TIMES, Sept. 20, 2011 (quoting Scott D. Hammond, the Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement); see also Vesna Jaksic, *Foreign Execs Feel Antitrust Crackdown: Looming Threat of ‘Moral Turpitude’*, NAT’L L.J., Oct. 29, 2007 (quoting Mr. Hammond on the MOU: “We have a number of tools available to use that are more powerful and that has shifted the balance in the favor of the Department of Justice[.]”).

6. BLACK’S LAW DICTIONARY 1008 (6th ed. 1990).

7. *Jordan v. De George*, 341 U.S. 223, 227, 229 n.14 (1951) (quoting Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, and holding that the crime of conspiracy to defraud the United States of taxes on distilled spirits constituted a CIMT).

8. This adjudicatory process is detailed in U.S. Dep’t of Justice, Executive Office for Immigration Review, EOIR at a Glance (Sept. 9, 2010), available at <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

9. See, e.g., *De George*, 341 U.S. at 232 (affirming that conspiracy to defraud the United States of taxes on distilled spirits is a CIMT); *Mata-Guerrero v. Holder*, 627 F.3d 256, 259 (7th Cir. 2008) (“Because the classification of a crime as one of moral turpitude is a question of law, we have jurisdiction.”); *Cabral v. INS*, 15 F.3d 193, 195 (1st Cir. 1994) (“The legislative history leaves no doubt, therefore, that Congress left the term ‘crime involving moral turpitude’ to future administrative and judicial interpretation.”).

10. See, e.g., *Sanchez Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) ("To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both this Court and the BIA have historically looked to 'the inherent nature of the offense[.]'" (quoting *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002)); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) ("Whether a crime is one with intent to defraud as an element, thereby making it a crime involving moral turpitude, is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction."); *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022–23 (2d Cir. 1931) ("Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition [the crime] does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.").

11. U.S. Dep't of State, Foreign Affairs Manual, 9 FAM 40.21(a) notes at N2.1–N2.2 (2011), available at <http://www.state.gov/documents/organization/86936.pdf>.

12. Gary R. Spratling, Criminal Antitrust Enforcement Against International Cartels, Remarks Before the Advanced Criminal Antitrust Workshop: A Practical Approach to Criminal Investigations at 10 (Feb. 21, 1997) (emphasis added), available at <http://www.justice.gov/atr/public/speeches/1056.pdf>.

13. *Id.* at 11 (emphasis added).

14. Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All, Remarks Before the OECD Competition Committee Working Party No. 3 at 16 (Oct. 17, 2006), available at <http://www.justice.gov/atr/public/speeches/219332.pdf>.

15. See, e.g., *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008) (emphasis added) ("[A] delegation of authority to an agency by the enactment of a vague statute that the agency must administer confers interpretive latitude on the agency rather than the court (that's the meaning of *Chevron*), provided that the agency uses rulemaking or adjudication to exercise its discretion.").

16. *In re Cristoval Silva-Trevino*, 24 I. & N. Dec. 687, 689 n.1 (Op. Att'y Gen. 2008). In response to the varying judicial tests that the U.S. Courts of Appeals have used in recent decades to decide whether an offense is a CIMT, the U.S. Attorney General in *Silva-Trevino* withdrew his delegation of authority to the BIA on an ad hoc basis for one removal proceeding and issued his own precedential opinion establishing a uniform administrative test for determining when an offense constitutes a CIMT. The most controversial

aspect of the Attorney General's opinion is that it empowers immigration judges to look to an individual defendant's specific conduct rather than making the CIMT determination based on what conduct the elements of the offense require. To date, four circuits have rejected the Attorney General's opinion and one has upheld it. See *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012) (rejecting Attorney General's opinion); *Sanchez Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011) (same); *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010) (same); *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009) (same); *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010) (adopting Attorney General's approach to CIMT analysis). This unsettled debate on the intricacies of the analytical framework for CIMTs is beyond the scope of this article for two reasons. First, the principal disagreement between the Attorney General's opinion and the circuits that have rejected it concerns the extent to which an individual defendant's conduct should be a part of the CIMT analysis. That disagreement does not, however, implicate the MOU, in which the DOJ categorically considers all Sherman Act convictions to be CIMTs regardless of an individual defendant's specific conduct. Second, to the extent the Attorney General's opinion synthesizes varying circuits' CIMT tests to set a new, lower threshold for crimes to be adjudicated categorically as CIMTs, Sherman Act offenses do not appear to satisfy even the Attorney General's lower, "realistic probability" CIMT threshold.

17. See *Ali v. Mukasey*, 521 F.3d at 740 (on *malum in se* versus *malum prohibitum*); U.S. Dep't of State, Foreign Affairs Manual, 9 FAM 40.21(a) notes at N2.1–N2.2 (2011) (on fraud, larceny, or intent to harm); *In re L-V-C*, 22 I. & N. Dec. 594, 597, 599 (BIA 1999) (on evil intent and knowledge of illegality).

18. *Ali v. Mukasey*, 521 F.3d at 740.

19. *In re Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994).

20. 23 F. Supp. 531, 532 (W.D. Wis. 1938).

21. 23 F. Supp. 937, 938 (W.D. Wis. 1938), *rev'd on other grounds sub nom.* *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809 (7th Cir. 1939), *rev'd* 310 U.S. 150 (1940); see also, e.g., *United States v. B. Goedde & Co.*, 40 F. Supp. 523, 528 (E.D. Ill. 1941) (rejecting argument by unions that they were not subject to criminal prosecution under Section 8 of the Sherman Act: "I know of no sound reason why they can not reasonably be punished for violating a statute creating an offense *malum prohibitum* in character.").

22. 85 F.2d 271, 279 (6th Cir. 1898) (emphasis added), *aff'd* 175 U.S. 211 (1899).

23. 21 CONG. REC. 2,456 (1890).

24. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978) (emphasis added) (internal citations omitted) (quoting Appalachian

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

25. *Id.* at 438 n.14 (quoting 21 CONG. REC. 2,460 (1890)).

26. 21 CONG. REC. 2,456 (1890) (emphasis added), quoted in *Gypsum*, 438 U.S. at 439 n.19.

27. See 229 U.S. 373 (1913).

28. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2006)). Violation of the Act first became a felony, punishable up to three years, in 1974, and Congress increased that maximum sentence to 10 years in 2004. Interestingly, Congress originally viewed Section 8 offenses, punishing trusts and interlocking directorates, as more serious than those under Section 1 in that each Section had the same maximum penalty, but Section 8 had, and still has, a mandatory minimum sentence of three months. 15 U.S.C. § 8 (2006).

29. See Gary R. Spratling, Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases, Remarks Before the National Institute on White Collar Crime at 16–17 (Mar. 4, 1999), available at <http://www.justice.gov/atr/public/speeches/2275.pdf> ("[A] number of countries have no extradition treaty [with the United States] or no extradition treaty that covers antitrust crimes. ... [The MOU] significantly increases the incentive for a foreign citizen to submit to U.S. jurisdiction, plead guilty, and cooperate with the Division's investigation.").

30. Rachel Brandenburger (Antitrust Division Special Advisor for International Matters), Challenges and Opportunities in International Competition Policy, Remarks Before the Law Society's European Group at 5 (Nov. 9, 2010), available at <http://www.justice.gov/atr/public/speeches/272860.pdf> (noting the number of countries with competition laws); James A. Wilson, *Extradition: The New Sword or the Mouse That Roared?*, ANTITRUST SOURCE, Apr. 2011, at 3 ("[T]he number of jurisdictions that have adopted criminal sanctions for antitrust violations (e.g., hard core cartel conduct) remains relatively small. The United Kingdom, Israel, Ireland, South Korea, Australia, Japan, Canada, Greece, Brazil, and Russia have adopted criminal antitrust penalties for cartel offenses.") (internal footnotes omitted).

31. ABA SECTION OF ANTITRUST LAW, 1 ANTITRUST LAW DEVELOPMENTS 736 (6th ed. 2007).

32. *Id.* at 735–36.

33. See, e.g., *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010) ("A review of BIA and Ninth Circuit precedent reveals that non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of

victim [such as a child].”).

34. *Jordan v. De George*, 341 U.S. 223, 232 (1951); *see also id.* at 227 (“[A] court of appeals has stated that fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude.”) (citing, with approval, *United States ex rel. Berlandi v. Reimer*, 113 F.2d 429 (2d Cir. 1940)).

35. *E.g., In re P—*, 6 I. & N. Dec. 193 (BIA 1955) (“[T]he term ‘fraud’ has been defined as consisting of a misrepresentation of a material fact, made with knowledge of its falsity and with intent to deceive another, which representation must be believed and acted upon by the person deceived to his own damage.”).

36. ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 54 (2009).

37. *Id.* at 74; *see also* *Notash v. Gonzales*, 427 F.3d 693, 698 (9th Cir. 2005) (“Willfulness [sic] alone accordingly does not categorically indicate an intent to defraud.”).

38. UNITED STATES, REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955), *quoted in* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978).

39. *Gypsum*, 438 U.S. at 440 n.15 (citing THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT — AN ASSESSMENT 110 (1967)).

40. ABA SECTION OF ANTITRUST LAW, 1 ANTITRUST LAW DEVELOPMENTS 735 (6th ed. 2007).

41. *Gypsum*, 438 U.S. at 440-41 (emphasis added).

42. *United States v. Alston*, 974 F.2d 1206, 1207-08 (9th Cir. 1992).

43. *Id.* at 1208-09 (discussing *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990)).

44. *Compare* U.S. Dep’t of Justice, Antitrust Division Manual, Ch. III § C.5, at III-20 (4th ed. 2008), *available at* <http://www.justice.gov/atr/public/divisionmanual/atrdvman.pdf> (“There are a number of situations where, although the conduct may appear to be a *per se* violation of law, criminal investigation or prosecution may not be appropriate. These situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been 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.”), *with* U.S. Dep’t of Justice, Antitrust Division Manual, Ch. III, § III.D, at III-12 (2d ed. 1987) (“There are a number of situations, however, where, although the conduct may appear to be a *per se* violation of law, criminal investigation or prosecution may not be con-

sidered 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.”).

45. Notably, when the DOJ failed to extradite UK executive Ian P. Norris for a Sherman Act violation because there was no criminal competition law offense in the United Kingdom at the time of his conduct, the DOJ unsuccessfully argued that the Sherman Act violation was equivalent to fraud, which would have been a basis for extradition. *See* J. Mark Gidley & Patrick Evers, *A Good Carrot? U.S. Travel Restrictions in Cartel Enforcement*, COMPETITION POL’Y INT. ANTITRUST CHRON., Oct. 2011, at 5, *available at* <https://www.competitionpolicyinternational.com/file/view/6555> (“The U.K. Law Lords have expressly rejected U.S. Sherman Act price-fixing as being equivalent to fraud, in considering the question of dual criminality between the United Kingdom and the United States, prior to the enactment of the U.K. [competition] statute.”).

46. ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 76 (2009) (“It is not necessary for the prosecution to prove that the defendant knew that an agreement, combination, or conspiracy to [fix prices] [rig bids] [allocate customers] [allocate territories], as charged in [Count ___], is a violation of the law.”); *see also, e.g.,* *United States v. Nippon Paper Indus.*, 109 F.3d 1, 7 (1st Cir. 1997) (“[D]efendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws.”).

47. ABA SECTION OF ANTITRUST LAW, 1 ANTITRUST LAW DEVELOPMENTS 735 (6th ed. 2007).

48. *Goldshtein v. INS*, 8 F.3d 645, 647 n.6 (9th Cir. 1993) (citing *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980)).

49. ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CRIMINAL CASES 69 (2009).

50. *United States v. Koppers*, 652 F.2d 290, 298 (2d Cir. 1981).

51. *In re Serna*, 20 I. & N. Dec. 579, 586 (BIA 1992) (collecting cases).

52. *Id.* at 581 (citing *In re Flores*, 17 I. & N. Dec. 225 (BIA 1980), and *In re Abreu-Semino*, 12 I. & N. Dec. 775 (BIA 1968)).

53. *In re Cristoval Silva-Trevino*, 24 I. & N. Dec. 687, 709 (Op. Att’y Gen. 2008).

54. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

55. 566 U.S. ___, No. 10-444, 2012 WL 932020, at *6 (March 21, 2012).

56. *See* Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks Before the National Institute on White Collar Crime

at 14 (Feb. 25, 2010), *available at* <http://www.justice.gov/atr/public/speeches/255515.htm> (“The Division’s use of red notices clearly raises the stakes for foreign executives who hope to avoid prosecution by simply remaining outside of the United States.”); *see also* INTERPOL, List of Member Countries, *available at* <http://www.interpol.int/Member-countries/World> (last accessed Mar. 5, 2012) (noting INTERPOL membership of 190 countries).

57. *See, e.g.,* Dalip Singh, *Japanese Held*, THE TELEGRAPH (India), Dec. 22, 2002, *available at* http://telegaphindia.com/1021222/asp/nation/story_1505528.asp (describing the arrest by Delhi INTERPOL of a Japanese national indicted in the United States for Sherman Act violations, despite the lack of dual criminality for antitrust offenses in the Extradition Treaty between the United States and India). ■

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