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The Conceptual Utility of *Malum Prohibitum*

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ABSTRACT: As a means for thinking more precisely about the moral content of criminal offenses, this article argues that we should think of malum in se *and* malum prohibitum *not as binary categories into which an offense does or not fit, but rather as contrasting, scalar qualities that all criminal offenses, to one degree or another, possess. Under this approach, an offense is* malum in se *to the extent that it criminalizes conduct that is morally wrong independent of the law, while it is* malum prohibitum *to the extent it criminalizes conduct that is morally wrong (if at all) in virtue of its being illegal.*

RÉSUMÉ : Afin de réfléchir plus précisément au contenu moral des infractions criminelles, il est soutenu ici que nous devrions envisager le malum in se *et le* malum prohibitum *non pas comme des catégories binaires dans lesquelles peuvent — ou pas — être classées les différentes infractions, mais plutôt comme des qualités contrastées et scalaires que toutes les infractions criminelles possèdent à un degré ou à un autre. Suivant cette approche, une infraction est* malum in se *dans la mesure où elle criminalise une conduite qui est moralement répréhensible indépendamment de la loi, alors qu'elle est* malum prohibitum *dans la mesure où elle criminalise une conduite qui est moralement répréhensible (si elle l'est) en vertu du fait qu'elle est illégale.*

Introduction

For retributivists, who believe that criminal sanctions should be used to punish only conduct that is blameworthy, the so-called *mala prohibita* offenses have always been a source of concern: When the conduct being criminalized is

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wrongful prior to and independent of its being illegal—as it is with presumptive *mala in se* offenses like murder and rape—the path to blameworthiness is relatively clear. But when the wrongfulness of the conduct depends on the very fact of its being illegal—as is said to be the case with presumptive *mala prohibita* offenses, like fishing without a license and buying drugs without a prescription—the argument in favour of criminalization becomes more difficult to sustain. Unless one believes that law-breaking as such is morally wrongful, criminal penalties would seem hard to justify.

That, in any event, is the standard liberal, retributivist view. As I shall argue, however, things are considerably more complicated than this account would suggest. No real-world offense is wholly *malum in se* or wholly *malum prohibitum*. Rather, the concepts of *malum in se* and *malum prohibitum* should be understood as contrasting, scalar qualities that all criminal offenses, to one degree or another, possess. Under such a conception, an offense could be, say, 80% *malum in se* and 20% *malum prohibitum,* or 20% *malum in se* and 80% *malum prohibitum*. Thinking about *malum in se* and *malum prohibitum* in this way can help us make a more precise assessment of the moral content of criminal offenses, taking account of the various ways in which law and legal institutions inform their moral content, the reasons people obey such laws, and what it means to 'obey' the law in the first place.

A. Confusion about the Meaning of Malum Prohibitum

As originally used, the term *mala in se* referred to criminal acts that derived their wrongfulness from a source higher than civil authority, such as God or natural law.[1] The term *mala prohibita*, for its part, referred to crimes that derived their wrongfulness from being prohibited by positive law. In a modern, secular system of law that does not appeal to God as a source of law, we can say, preliminarily, that an offense is *malum in se* to the extent that it criminalizes conduct that is morally wrong independent of the law, while an offense is *malum prohibitum* to the extent that it criminalizes conduct that is morally wrong (if at all) in virtue of its being illegal.

Some modern courts and commentators who have departed from this traditional usage have used the term *malum prohibitum* in a number of misleading ways. First, some have used it as if it were synonymous with the terms 'strict liability' and 'public welfare.'[2] This usage is problematic. 'Strict liability,' in its formal sense, refers to those offenses that have at least one material element for

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[1] The analysis in this section borrows from Stuart P. Green, "Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses," *Emory Law Journal* 46: 1533–1615, especially 1570–1572 (1997).

[2] Wayne LaFave, *Criminal Law* (West Publishing, 4th ed. 2003), at 36–39 (characterizing cases that have used the term in this incorrect manner, but elsewhere stating the distinction more or less correctly).

which there is no corresponding *mens rea* element.[3] 'Public welfare offenses' are a subset of strict liability offenses, involving regulatory matters and reflecting relatively low stigma.[4] The fact that an offense is *malum prohibitum* tells us nothing about the requirement of *mens rea*: There are presumed *mala prohibita* offenses that require a showing of intent (such as criminal contempt), and presumed *mala in se* offenses that do not require such a showing (such as statutory rape). Treating these concepts as synonymous creates unnecessary confusion.

Second, the term *malum prohibitum* has sometimes been used as if it were synonymous with the term 'regulatory crime.' For example, the list of *mala prohibita* offered by Joshua Dressler in his textbook on criminal law includes "statutes that prohibit the manufacture or sale of impure food or drugs to the public, anti-pollution environmental law, as well as traffic and motor-vehicle regulations."[5] This usage is also problematic. Most people would probably agree that selling impure food and drugs and polluting the environment should be viewed as morally wrongful even apart from the fact that they are legally prohibited. There would thus seem to be regulatory crimes that are not *mala prohibita*. Moreover, there are crimes that are *mala prohibita* even though they do not necessarily involve regulatory matters, including, I would argue, contempt of court, perjury, and obstruction of justice. (I will have more to say about the *malum prohibitum* character of such offenses below.)

Third, the term *mala prohibita* is sometimes used to refer to crimes that 'carry no moral baggage' or involve no 'moral offense,' 'sin,' or 'guilt.'[6] Such usage is also confused, since it defies the literal meaning of the term, is at odds with its historical meaning, and begs the important question of when, if ever, such offenses really are morally neutral.

B. Malum Prohibitum *and* Malum In Se *as Scalar Qualities*

The concepts of *malum prohibitum* and *malum in se* have *something* to do with the relationship between an act's being legally prohibited and its moral wrongfulness. But exactly what that relationship is remains to be explained.

It is easiest if we focus first on *malum prohibitum*–ness. There are three possible meanings we could ascribe to the concept. First, an offense's being *malum prohibitum* could mean that it is wrong *solely* because it is prohibited.

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[3] There are other meanings of strict liability, but I have argued that this is the one that should be preferred. Stuart P. Green, "Six Senses of Strict Liability: A Plea for Formalism," in A.P. Simester (Ed.), *Appraising Strict Liability* (Oxford University Press, 2005), at 1.

[4] The *locus classicus* is Francis Bowes Sayre, "Public Welfare Offenses," *Columbia Law Review* 33: 55–88 (1933).

[5] Joshua Dressler, *Understanding Criminal Law* (LexisNexis, 5th ed. 2009), at 147.

[6] William Blackstone, *Commentaries on the Laws of England*, vol. 1, *57–58, 524 (1765).

Second, it is could mean that a given offense is wrong *in part* because it is prohibited. Third, it could mean that a given offense is wrong *primarily* because it is prohibited. For reasons I shall now explain, I believe that the third of these choices offers the best understanding of what it means for an offense to be *malum prohibitum*.

1. Wrong Solely *because Prohibited*

The problem with defining the *mala prohibita* as offenses that are wrong *solely* because they are prohibited is that no such offenses exist, and if they did, they likely could not survive judicial scrutiny. The set of offenses defined as such is thus a null set.

On some occasions, Douglas Husak has spoken about the *mala prohibita* in this manner.[7] Husak offers an example of what he regards as representative "of the entire category of *mala prohibita offenses*"—namely, money laundering.[8] A person commits this offense when he deposits in the bank more than $10,000 in funds obtained from an illegal source, such as a theft or drug trafficking. According to Husak, "although it is obviously wrongful to profit from illegal conduct, it is hard to see why a person who merely deposits his profits in a bank commits a *second* wrong that is prior to and independent of law."[9]

The example that Husak chooses shows precisely why this approach to defining the *mala prohibita* is flawed. Contrary to what Husak says, there *are* several ways in which the person who deposits ill-gotten gains in a bank commits a wrong independent of prohibition. First, it seems likely that the person depositing the money is making it harder for his victim or the police to recover the goods. So the act reflects a wrongful quality of 'covering up.'[10] Second, the depositor is helping to create a market for ill-gotten gains. Presumably, thieves would have less incentive to steal, and drug dealers less incentive to sell drugs, if it was very costly for them to 'launder' the proceeds of their illegal activities. The money launderer thus seems to 'ratify' or 'compound' the harms and wrongs perpetrated by the original actor, whoever that may be.[11] If money laundering is a paradigmatic example of a *malum prohibitum* offense, it is not a very impressive one.

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7 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008), at 105–107 (distinguishing between "pure" *mala prohibita* and "hybrids").

8 Ibid., at 105.

9 Ibid.

10 On the moral content of covering up, see Stuart P. Green, "Uncovering the Cover-Up Crimes," *American Criminal Law Review* 42: 9–44 (2005b).

11 For a discussion of the analogous crime of receiving stolen property, see Stuart P. Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012a), 180–194.

Even the most purely regulatory offense would still be wrong at some level because of its underlying moral content. Consider a law that made it a crime to practice medicine without a license.[12] Admittedly, the underlying conduct here would seem pretty morally neutral, at least in cases in which the person practicing medicine without a license was properly qualified and adhering to the norms of the profession. Although we might legitimately wonder whether this is an appropriate use of the criminal law, it nevertheless seems wrong to say that the underlying conduct is entirely without pre-legal moral content.

One possibility is that a violation of this sort would make it more difficult for the government to regulate the medical profession. Imagine that a public health authority wanted to notify all of the doctors in a given locale regarding a public health emergency. The list of doctors maintained by the local licensing authority would be an obvious place to start. But a doctor who was unlicensed would presumably not appear on the list and, therefore, might not be notified of the emergency. As a consequence, the health of the unlicensed doctor's patients could be endangered. In such a case, one might argue that even the otherwise qualified doctor's failure to obtain a license would be wrongful for a reason other than that it was a violation of the law (and apart from the fact that the unlicensed doctor probably would not have paid the fee that might otherwise have been used for socially beneficial activities).

Assuming that the state has *some* legitimate interest in regulating in this area, it seems improper to say that the offense derives all of its moral content from the fact that the conduct is legally prohibited. At some level, the law seems sensible. That is, the reason people would obey it is not simply because it is illegal but also because there are good and moral reasons to avoid engaging in such conduct independent of its illegality.

Although perhaps theoretically possible, in the real world, an offense involving conduct that was wrong *solely* because it was prohibited would not stand up to due process analysis. What would such a law look like? Imagine a despotic regime in which the king ordered that everyone wear green on Tuesdays. Here, the underlying content of the law would seem to be entirely arbitrary (I am assuming the law is not intended to fix what has been called a "coordination problem"[13]). There would be no moral reason to wear green on Tuesdays other than that the law commands it. The problem with such a law is that would be unlikely to survive scrutiny in a modern democratic legal system. For example, even under the lowest standard of U.S. constitutional scrutiny, a law must be "rationally related to a legitimate government purpose."[14]

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12 The discussion in this paragraph borrows from the discussion in Green, "Why It's a Crime to Tear the Tag Off a Mattress," at 1576.

13 Cf. Leslie Green, "Law, Co-ordination and the Common Good," *Oxford Journal Legal Studies* 3: 299–324 (1983).

14 See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

2. Wrong Partly *because Prohibited*

Another approach to defining *malum prohibitum* is to say that an offense should be regarded as such if it derives at least *some* of its moral content from the fact that it is legally prohibited. The problem with this approach, however, is that *every* offense derives at least some of its moral content from the fact that it is legally prohibited. This is true even of offenses that would seem to be leading candidates for classification as *malum in se*. For example: (1) we can't say whether *D* engaged in a morally wrongful act of killing unless we know what the law regards as a human being; (2) we can't say whether *D* engaged in the morally wrongful act of nonconsensual sex without knowing how the law defines consent, force, deceit, and coercion; (3) we can't say whether *D* committed the morally wrongful act of stealing unless we know how the law of property defines key concepts such as property, possession, abandonment, and the like; (4) we can't say whether *D* committed tax evasion unless we know what taxes he owed; and (5) and we can't say the full extent to which *D* was wrong not to rescue *V* unless we know whether *D* lived in a jurisdiction with a Good Samaritan law. My point is not just that our legal judgments about such questions will be affected by what the underlying legal rules provide. Rather, I am arguing that our *moral* judgments are likely to be affected as well.

Imagine a case in which *D* finds lost property. Is it morally permissible for him to keep it? Should he leave it where it was found? Must he look for the owner? We can easily imagine our moral judgment about *D*'s act being affected by the fact that *D*'s act was or was not committed in violation of the law.

There is also an important sense in which the law helps define not just the wrongfulness, but also the social *harmfulness*, of various acts. Consider the offense of criminal contempt. The act is wrong (assuming it is) because conducted in defiance of a court or other governmental body. But it is also harmful in the sense that it risks harm to an important institution of law. Something similar is true of perjury and obstruction of justice. None of these offenses could exist prior to or independent of law. In that sense, they are *mala prohibita*. On the other hand, they also reflect some characteristics of *malum in se*-ness. For example, a person who lies on the stand in a criminal trial, falsely inculpating a criminal defendant, does that person a grave wrong that is independent of the law. The same could be said of someone who destroys or fabricates material evidence in the course of a judicial proceeding.[15]

3. Wrong Mainly *because Prohibited*

If there is any sensible use of the term *malum prohibitum*—and I think there is—it should refer to those offenses that fall within the scope of category

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[15] See Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (Oxford University Press, 2006) 178–179.

(3)—offenses that are wrong *mainly* or *primarily* because they are prohibited by law. Examples include not only offenses such as buying drugs without a prescription, but also fishing without a license, failing to file a monthly discharge monitoring report, and tearing the tag off a mattress.

Even better, rather than speaking of *malum in se* and *malum prohibitum* as precise categories into which specific offenses either fit or don't fit, we should speak of them as contrasting qualities along a continuum that, to one degree or another, characterize all criminal offenses. On the *malum in se* end of the continuum would lie offenses like murder and rape. On the *malum prohibitum* end of the continuum would lie offenses like fishing without a license. In other words, *malum prohibitum*-ness would be understood as a scalar rather than binary concept. Under this approach, an offense such as practicing medicine without a license would be viewed as, say, 90% *malum prohibitum* and 10% *malum in se*, while an offense like rape would be viewed as, say, 90% *malum in se* and 10% *malum prohibitum*.

C. Subjectivity of Malum In Se *and* Malum Prohibitum

So far, we have been looking at criminal statutes as if they had a fixed, universal moral content. Under this approach, a given law is obeyed either because people recognize the underlying moral wrongfulness of the act or because they want to obey the law, or because of some combination of the two.

But, of course, not all people comply with law for the same reasons. Holmes believed that, in determining how to legislate, we would do best to adopt the perspective of the 'bad man,' who is unconcerned with the morality of the law.[16] Rather, he is concerned only with the degree of punishment certain acts will incur by the public force of law.

Hart criticized this approach in *The Concept of Law*, arguing that Holmes' theory reduces the normativity of law to mere prudence or self-interest.[17] Holmes' approach, Hart said, is inadequate to explain what it means to have an obligation to do what the law requires. It fails to appreciate what Hart called the "internal" aspect of legal rules—their status as reasons for acting as we do. As for the "bad man," Hart asks, "[w]hy should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is? Or with the 'man who wishes to arrange his affairs' if only he can be told how to do it?'"[18]

In the contemporary literature of social psychology, it is often claimed that people refrain from engaging in conduct that is criminalized not because they fear sanctions if they do, but because they recognize that the

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16 Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10: 457–478 (1897).

17 H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1st ed. 1961) 39.

18 Ibid. at 40.

conduct is morally wrong.[19] However useful this insight may be, it tells us only part of the story.[20] Some people, in some cases, may decide to comply with a given law because they believe that the underlying conduct it prohibits is morally wrongful. In other cases, they may decide to comply because they fear the penal and stigmatizing consequences of failing to do so. And in yet other cases they may decide to comply because they wish to obey the law as such. Very often, it seems, people obey the law because of some combination of these reasons. To cite just one example: most people refrain from driving while intoxicated because they recognize the serious unjustified risks that such conduct poses; but they also do so because they want to avoid the possibility that they might be arrested and punished for doing so; and perhaps because they wish to be the sort of people who obey the law because it is the law.

The fact that different people obey different laws for different reasons makes generalizations about the *malum in se*-ness or *malum prohibitum*-ness of any given law even more complex than indicated previously. Imagine five paradigmatic citizens:

The virtuous but libertarian citizen feels strongly that murder and rape and theft are bad acts, and would never engage in them even if they were made legal. He understands that they are illegal, but this fact makes no difference to him, since he does not believe that there is a moral obligation to obey the law and in fact is normally suspicious of state control.

The virtuous and law-abiding citizen feels strongly that murder and rape and theft are bad acts, and would never engage in them even if they were made legal. But the fact that they are illegal offers him another reason not to engage in such conduct, because he respects the majesty of the law and takes seriously the moral obligation to obey it.

The virtuous but oblivious citizen feels strongly that murder and rape and theft are bad acts, and so does not engage in them. He was unaware that they are illegal, however, and therefore has no view on how their illegality affects his obligation to obey.

The evil but law-abiding citizen says that if murder and rape were not criminalized, he would use every opportunity he had to engage in such acts. However, he believes in the importance of the rule of law, and that one has a moral obligation to obey the law, and for this reason he will comply with it.

The evil but coerced citizen says that if murder and rape were not criminalized, he would use every opportunity he had to engage in such acts. He feels no particular moral obligation to obey the law. However, he is risk averse, and does not want to spend time in prison, and so he obeys the law purely to avoid the sanctions that it potentially entails.

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19 The *locus classicus* is Tom R. Tyler, *Why People Obey the Law* (Yale University Press, 1990).

20 There is, of course, an extensive philosophical literature on the question of whether there really *is* a moral obligation to obey the law. For a summary, see Green, "Why It's a Crime to Tear the Tag Off a Mattress," at 151–185.

In each case, the extent to which a given law is properly understood as *malum prohibitum* or *malum in se* seems to vary depending on the moral inclinations of the individual actor. Thus for the virtuous-but-libertarian citizen, as well as for the virtuous-but-oblivious citizen, murder and rape seem to be pure *mala in se* offenses. By contrast, for the evil-but-law-abiding citizen, they are pure *mala prohibita*. As for the virtuous-and-law-abiding citizen, they seem to be some of both. And for the evil-but-coerced citizen, they seem to be neither. Moreover, there could be endless gradations of this scheme. A person could be, say, 80% virtuous, 10% law-abiding, 10% coerced, and so forth—depending on the law in question and various personal attitudes and characteristics.

So which is the relevant perspective here? With respect to some offenses, such as murder and rape, we should be able to say that the 'normal,' 'healthy,' or 'correct' view is that of the virtuous citizen. It seems obvious that such acts are largely wrong prior to and independent of the law, and anyone who fails to recognize this should be regarded as a deviant, perhaps sociopathic. What is less clear is the extent to which even the virtuous citizen should also be affected by the fact that such acts are against the law.

There are other kinds of offenses, however, that are much harder to classify. Consider illegal downloading from the Internet, prostitution, consensual adult incest, insider trading, and tax evasion. Reasonable, morally sensitive people can, and often do, differ in their views about the wrongfulness of many of these acts. Where any of these offenses lie along the continuum of *malum in se* and *malum prohibitum* would thus seem to differ from actor to actor, reflecting deeply contested questions about the legitimacy of such laws.

Before we could say where on the continuum of *mala in se* and *mala prohibita* such offenses lie, we would also need to know more about the social context in which such offenses function. For example, in a society in which all property was owned by a small, hereditary oligarchy, the moral content of theft or other property crimes would look very different from the moral content of theft in a capitalistic democracy in which property was freely alienable. While theft committed by a member of the oligarchy would still have a strong claim to being *malum in se*, theft committed by someone outside the ruling class arguably would not.[21] Something similar could be said about disfavored citizens who evade taxes in a regime in which the tax code is deeply unjust.

Conclusion

If we are truly committed to the idea of retributivism, even as a side constraint on punishment, we need to have better and more accurate means of assessing

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[21] This argument is developed at greater length in Stuart P. Green, "Just Deserts in Unjust Societies," in Antony Duff and Stuart Green (Eds.), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2012b), 371–373.

moral wrongfulness in would-be criminalized conduct. We also need to assess moral content for purposes of grading. Thinking of *malum prohibitum* and *malum in se* as scalar qualities that characterize all criminal offenses to one degree or another, rather than as discrete categories into which offenses can be placed, offers a useful tool for assessing the moral content of criminal offenses. But it is really just an intermediate step in the process. The notion of *malum in se* and *malum prohibitum* that I have presented here is meant to be a fluid and capacious one: it reflects not just the nature of the conduct prohibited, but also citizens' attitudes about morality and law-compliance, and the particulars of the legal and moral culture in which they live.

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