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Crimes *Mala in Se*: An Equity-Based Definition

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Legal scholars have used the terms *mala prohibita* and *mala in se* to draw the distinction between legally proscribed and morally proscribed offenses. The former are those offenses that are wrong simply because there exist formal, codified rules prohibiting them. Efforts to define *mala in se*, on the other hand, have resulted in vague, often conflicting meanings that leave the analyst with little but examples to serve as definitions. As a result, some have argued that the distinctions *mala in se* and *mala prohibita* be abandoned altogether. If one examines *mala in se* from an equity theoretical viewpoint, incorporating the concepts of intent and harm, it may be possible to arrive at a more understandable and useful concept.

Keywords: *mala in se; mala prohibita; equity theory*

There are several problems with the concept of *malum in se* as Blackstone and subsequent writers (e.g., Klotter, 1983; J. F. Stephen, 1976) have defined it. Chambliss and Seidman (1971) note that the distinction between *malum in se* and *malum prohibitum* breaks down when the concepts are applied to specific crimes. For example, how would one classify statutory rape, an offense in which the criminality inheres not so much in the conduct per se but in the age of the victim (Prassel, 1979)? A similar problem arises with the abortion of a girl who has been raped (Gray, 1995; Hall, 1960): On one hand it could be argued that a life is intentionally taken, making the act a *malum in se*; on the other hand, if the legal prohibition against abortion changes from era to era, then is it not more appropriately categorized as a *malum prohibitum*?

Another problem has to do with the connection between Blackstone's conception of *malum in se* and the so-called laws of God. It is evident that Blackstone's definition was grounded in the tenets of Christianity. Connecting *mala in se* to divine law through the use of words such as *evil* and *sin* to describe such offenses suggests a universal quality (Wolfe, 1981) that may not exist. As a practical matter, it may be preferable to formulate a rationale for the classification of crimes that is independent of a religious belief system. Anglo-American law and Judeo-Christian ethics may be historically and otherwise inextricably interwoven and consequently inseparable. But some legal vestiges such as the concept of *mala in se* argue for a fresher, secular approach.[1] Modern laws govern the behavior of believers and nonbelievers alike and

as such should have a rationale aside from that which is tied to the belief in a divine power and all that implies.

A final problem with *mala in se* relates to its continued use in modern times. Ordinarily one might argue that the distinction *malum in se* is of mere historical interest and therefore does not warrant further scholarly attention. However, most criminal justice textbooks continue to discuss it as if it were a valid and useful concept. This suggests a tendency on the part of at least some criminal justice scholars to uncritically accept the concepts bequeathed them by the founding legal fathers. This acceptance has been reinforced during the past 200 years by the use of *mala in se* and *mala prohibita* by justices of the U.S. Supreme Court in their opinions. Such seemingly blind adoption ignores the problems discussed above and perpetuates a concept that remains murky at best.

In view of these problems, the purpose of this article is threefold: (a) to provide a brief overview of the concepts of *mala in se* and *mala prohibita* as discussed by Blackstone and subsequent scholars and jurists, (b) to offer a more secular conception of *mala in se* that is grounded in equity theory and that is not defined primarily by examples, and (c) to discuss the implications of this reconceptualization of *mala in se* for criminal justice theory, policy, and practice.

Definitions of *Mala Prohibita* and *Mala in Se*

According to *Black's Law Dictionary* (Black, Nolan, & Nolan-Haley, 1990), offenses *mala prohibita* are simply "a wrong prohibited; a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law" (p. 960). They are illegal for no reason other than they are sanctioned by codified laws. A crime *malum in se*, on the other hand, is "a wrong in itself; an act or case involving illegality from the very nature of the transaction" (p. 959). "An act is said to be *mala in se,*" according to Black's, "when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequence, without any regard to the fact of its being noticed or punished by the law of the state" (p. 959). Although there is reason to believe that the terms *mala in se* and *mala prohibita* predate Blackstone's *Commentaries* (Gray, 1995; Hall, 1960; Wolfe, 1981), his appears to be the most oft-cited explication of them.

The majority of writers who make reference to *mala in se* and *mala prohibita*, including justices of the U.S. Supreme Court, cite Blackstone as their source. Blackstone, like more contemporary legal scholars, apparently had little difficulty defining crimes *mala prohibita*. These consist of those offenses society saw fit to punish through formal law. Implicit in Blackstone's definition was that there is nothing inherently bad in crimes *mala prohibita*. They are wrong simply because they are prohibited by law. As such, crimes *mala prohibita* do not require *mens rea* (Sieh, 1990).

There is a latent social purpose behind defining behaviors as *mala prohibita*. According to Hagan (1998), laws prohibiting these less serious offenses promote predictability and orderliness for citizens. Swigert (1984) notes that society objects to the public nature of the behaviors associated with those who find themselves charged with

crimes *mala prohibita*. Prostitutes, homosexuals, drug addicts, and public inebriates do not occupy the same statuses as do murderers, rapists, and arsonists. Still, when the conduct of the former group includes public displays of the objectionable conduct, society will express its disapproval by passing laws prohibiting such conduct. One might infer that if the disapproved conduct remained behind closed doors, society might not deem it necessary to enact laws against certain offenses *mala prohibita*.

Contemporary examples of *mala prohibita* include gambling, prostitution, vagrancy, disorderly conduct, public intoxication, possession of marijuana, and speeding. It is easy to imagine places where or points in time when such offenses would not be subject to criminal penalties. Offenses *mala prohibita* do not stir the same strong community sentiments evoked by violent and other more serious crimes. If the terms *mala prohibita* and *mala in se* were meant to be both mutually exclusive and exhaustive, then the list of offenses *mala prohibita* should include everything that falls outside the definition of *mala in se*.

By contrast, offenses *mala in se* acquire no additional force from being defined as illegal (Blackstone, 1941). These crimes are so reprehensible that ordinary people agree on their seriousness and would continue to do so in the absence of codified laws. They can include those offenses against individuals and their property and can conceivably encompass newer forms of behavior that can threaten entire communities (Robinson, 1978). So other than the works of previous legal scholars, what was the authority on which Blackstone relied to label these offenses as inherently wrong?

It should be noted that Blackstone was a deeply religious person. Warden (1938) writes that from the time the distinguished English jurist was a child, he was instilled with "great religious principles." So prominent was religion in the upbringing of Blackstone and his brothers that two of them became clergymen and one a deeply religious lawyer. Blackstone's Christian convictions were said to be so strong in his later life that he had little tolerance for those who did not believe as he did. Ordinarily a scholar's religious beliefs would not be germane to a discussion of legal concepts.[2] But it is clear from Blackstone's writings that his devotion to his Christian beliefs heavily influenced his legal writings, including his discussion of the concept of *mala in se*, which he regarded as sin (Perkins, 1983). Consequently, the religious foundation for *mala in se* is highly relevant to any analysis of the term's definition and utility.

Theft was mentioned by Blackstone as an example of a *malum prohibitum*. This is indeed curious in that "thou shall not steal" is the 7th of the Ten Commandments found in the Old Testament of the Holy Bible. One would expect someone as devout as Blackstone to incorporate the Commandments into his conception of *mala in se*. He nevertheless maintained that theft is not a moral offense and that the only obligation for the offender is to submit to the penalty (Warden, 1938). What makes this all the more problematic for the contemporary analyst is that since Blackstone, a number of other writers (e.g., Beccaria, 1872; Cole, 1986; J. F. Stephen, 1976; Teevan, 1977) have used theft as an example of *malum in se*.

In his own commentaries on the laws of England, H. J. Stephen (1845) admonishes us that in the case of murder, executions are administered "by the immediate command of God himself to all mankind" (p. 63). In doing so, Stephen reinforces Blackstone's

religious foundation for the concept *mala in se* and fails to offer other justifications for the distinction between crimes *mala in se* and *mala prohibita*.

Several years after Blackstone's *Commentaries* appeared, English philosopher Jeremy Bentham wrote a critical "Comment on the Commentaries." With regard to Blackstone's use of the concepts *mala in se* and *mala prohibita*, Bentham was snidely dismissive, pronouncing that these terms had no meaning whatsoever (Gray, 1995). Although the tone of Bentham's critique was ad hominem, his point that the terms were meaningless may have had some merit.

Cesare Beccaria (1872), an Italian contemporary of Bentham, makes reference in his famous *An Essay on Crimes and Punishment* to so-called natural laws that apply to all men in all ages and that nature has bestowed on humankind. One might infer that *nature* is either a pseudonym for God or at the very least is part of the divine realm over which God presides and as such has the authority to promulgate moral imperatives that ought to be heeded without question. Beccaria proceeds to list examples of violations of these natural laws: theft, violence (presumably assault and similar acts short of homicide), homicide, ingratitude to beneficent parents, perjury against innocence, and conspiracies against one's country. And although murder and treason may typically hold places on lists of crimes *mala in se*, the contemporary scholar would have difficulty indeed defending the gravity and timelessness of ingratitude to beneficent parents, especially given its prevalence and the relative impunity with which it occurs. Beccaria's concept of natural laws was later echoed by another Italian criminologist, Raffaele Garofalo, who stated that such crimes "cause deep offence to the sentiments of pity and probity prevalent in all classes of a particular society" (cited in Radzinowicz & King, 1977, p. 101). Unfortunately, Garofalo's alliterative prose does little to move the discussion toward a greater understanding of *mala in se.*

Jerome Hall (1960) argues that it is impossible to disentangle our value judgments from the influence of positive law. How can we assess what is intrinsically evil when all such behaviors have been the subject to codified laws for these many centuries? Witchcraft and heresy, as examples, were once on the books as major crimes (Radzinowicz & King, 1977). Moreover, Hall contends that despite arguments to the contrary (e.g., Sieh, 1990), we cannot identify offenses that have been morally wrong both throughout the ages and cross-culturally. Even murder, he asserts, is not now what it was in Bracton's day. One could infer from Hall's arguments that society should identify extralegal justifications for what is proscribed by law because laws are continuously subject to change.

In line with Blackstone, Gross (1979) asserts, "When a crime is *malum in se* the interest whose violation constitutes the harm has an existence that is independent of any legal recognition of it" (p. 122). The moral prohibition against incest, for instance, would remain in the absence of legal punishment (Adenaes, 1966). According to Gross, the law merely defines the wrong for citizens who would otherwise be unclear as to what specifically is permissible. But his assertion suggests a gray area between the extremes of the most serious and the least serious crimes, on which there may not be universal agreement, requiring definition through codification. However, by simply asserting that offenses *mala in se* exist without grounding them historically, philo-

sophically, or empirically, Gross fails to provide answers to the questions set out above. In fact, it could be argued that his explanation is less substantiated than Blackstone's. His reference to harm, however, may well have provided a clue as to how a better definition might be developed.

More recently, Gray (1995) argues for the elimination of the distinction between *mala in se* and *mala prohibita*. He further maintains that these terms should be kept out of the administration of justice. Gray's arguments, like those of Bentham, are difficult to rejoin.

Mala in Se as Used by the U.S. Supreme Court

Legal scholars alone have not been responsible for keeping alive *mala in se* and *mala prohibita*. For the past 200 years, various justices of the U.S. Supreme Court have made occasional reference to these concepts in their written opinions. In 1879, for example, the Court, in deciding a lottery case, asserted, "But in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but, as we have just seen, may properly be *mala prohibita*" (*Stone v. Mississippi*, 1879). Here we get a hint not about what a *malum in se* is, but instead what it is not.

Speaking to the issue of whether knowledge of wrongdoing by the defendant is necessary for indictment and prosecution of a crime, Justice Taft wrote in *United States v. Balint et al.* (1922) that

> many instances of this are to be found in regulatory measures in the exercise of what is called police power where the emphasis of the statute is evidently upon achievement of some social better rather than the punishment of the crimes as in the cases of *mala in se*.

Justice Taft seems to imply that defining offenses as *mala prohibita* serves social rather than moral ends and in doing so offers a rationale for their existence similar to that of Hagan (1998).

A decade later, Justice Field, in *United States v. Kirby* (1932), noted in his opinion that

> it may be doubtful whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*.

Once again, the analyst gets the impression that the jurist knows at least in a gross sense the difference between the two categories.

In a remanded case revolving around whether it is legal to use the mail for lottery purposes (*In re Rapier*, 1892), counsel for the petitioners argued that although Congress had the right to forbid the use of the mails in cases of crimes *mala in se*, they did not have the right to do so for crimes *mala prohibita*. The Court disagreed with the petitioners, noting that "it would be for Congress to determine what are within and what without the role." Unfortunately, the case sheds little light on the meaning of these terms.

Table 1
***Mala in Se* or *Mala Prohibita* in Criminal Justice and Criminology Texts**

Author(s)	Title	Date	*Mala in Se* or *Mala Prohibita* Discussed? Yes	No
Albanese	*Criminal Justice*	2002	X	
Bohm and Haley	*Introduction to Criminal Justice* (3rd ed.)	2002	X	
Fagin	*Criminal Justice*	2003	X	
Hagan	*Introduction to Criminology* (4th ed.)	1998	X	
Marion	*Criminal Justice in America*	2002	X	
Reid	*Crime and Criminology* (10th ed.)	2003	X	
Senna and Siegel	*Introduction to Criminal Justice* (9th ed.)	2002		X
Travis	*Introduction to Criminal Justice* (4th ed.)	2001	X	

Note: Subtitles were omitted because of space considerations.

The Court in *L'Hote v. New Orleans* (1900) made reference to the deterioration of a neighborhood "into a resort for vice and the establishment of nuisances *mala in se*." This expression *nuisances mala in se*, based on the discussion above, seems oxymoronic. Even according to a dictionary definition the era in which the opinion was rendered, a nuisance is "that which annoys or gives trouble and vexation; that which is offensive or noxious" (Webster's Revised Unabridged Dictionary, 1913). Here the Court's application of the term *mala in se* only confuses us further by associating it with minor transgressions.

Interesting enough, the Court in *Harriman v. Northern Securities Company* (1905) claimed that the "distinction between *mala in se* and *mala prohibita* has been abandoned." Yet the Court goes on to assert that if the distinction were meaningful, authority exists for defining as *mala in se* "any act contravening public policy and a penal statute." This is clearly contradictory and further confuses those wanting to understand the meaning of the terms.

High respect is accorded the justices of the Supreme Court, and rightly so. As jurists in the highest court in the United States, they interpret and rule on the most important issues facing Americans. Still, in reexamining the definitions and uses of legal terms such as *mala in se*, even their application of such terminology should be questioned. Only in doing so will we understand the extent to which these concepts are or are not sufficiently understood.

The Treatment of *Mala in Se* in Criminal Justice Texts

The discussion of ambiguous criminal justice terms such as *mala in se* in textbooks serves to perpetuate not only their use but also the problems outlined above. Some authors, much like members of the Supreme Court bench, have unquestioningly included *mala prohibita* and *mala in se* in their texts. Table 1 lists a number of criminal justice and criminology texts, in addition to those criminal law texts cited by Duff

(2002), that continue to discuss *mala prohibita* and *mala in se* as important legal concepts.

It is clear that there remains overwhelming support for the concepts *mala prohibita* and *mala in se*. Again here is additional evidence of what seems to be a largely uncritical acceptance of long-standing legal terms. Perhaps more important, students trained with these texts might reasonably be expected to continue the use of the terms in the various roles they eventually occupy, especially if those roles relate to legal scholarship or practice.

Other Scholarship Using *Mala in Se*

Criminal justice researchers have also played a role in perpetuating the idea that the distinction between *mala prohibita* and *mala in se* is comprehensible and useful. In their early test of deterrence theory, Waldo and Chiricos (1972) examined the extent to which various types of crimes could be deterred. They employed the distinctions of *mala prohibita* and *mala in se*, describing the FBI's crime index as consisting of offenses mala in se.[3]

Teevan (1976), in his research on deterrence, took issue with the Waldo and Chiricos (1972) study because the researchers imposed their own definitions of *mala prohibita* and *mala in se* on their participants. To address this bias, Teevan (1976) permitted his survey respondents to self-define the behaviors in question as either *mala prohibita* or *mala in se*. He found that his respondents differed on how they categorized laws against marijuana. With respect to self-reported deviance, he found that those who defined marijuana as *mala prohibita* were more likely to have used marijuana themselves.

Not long ago, Duff (2002) took Walker (1969) to task for pronouncing that the criminal law should not prohibit acts solely for retributive purposes. In his critique, Duff makes the assumption that the distinction between *mala prohibita* and *mala in se* is clear and useful. He contends that offenses *mala in se*, in fact, call for retributive punishment.

As recently as 2003, Gabor used the term *mala in se* in his plea for research to inform the debate over gun registration in Canada. He notes that failing to register a firearm is not a *malum in se*. By implication, he obviously considers it a *malum prohibitum*. Important for the present discussion is the fact that he used the concept *mala in se* to make his point.

It is clear that in formulating and applying the concepts of *mala in se* and *mala prohibita*, scholars and jurists alike have reacted to a qualitative or quantitative difference they perceived between crimes regarded as somehow inherently wrong and those that societies sometimes choose to prohibit for what they believe to be the public good. Unfortunately, on closer examination, it is also the case that most if not all of those who have used these terms, especially *mala in se*, have done so without a clear understanding of their meanings. As one of the most widely used legal dictionaries, Black's (Black et al., 1990) choice of the word *evil* to define *mala in se* further muddies our

ability to understand exactly what sets these grievous offenses apart from lesser crimes. But instead of deriding our forebears for missing the intellectual mark, we can try to improve our collective aim at defining *mala in se* by availing ourselves of theoretical perspectives not available to earlier generations of scholars. One such perspective is equity theory.

An Equity Theoretical Alternative

Equity theory, a social psychological perspective whose roots can be traced back at least as far back as Thomas Hobbes (West & Wickland, 1980), posits that humans are socialized to believe in fairness in their dealings with other humans. When individuals perceive that their outcomes do not approximate their inputs, they suffer distress. Research has shown that people suffer in greater measure when they receive less (Tremblay, Cordeau, & Ouimet, 1994). Distributive justice in dyadic social relations, according to equity theory, is defined by principles of fairness based on equity as opposed to equality, need, or some other competing definition of distributive justice (Walster, Walster, & Berscheid, 1978).

Equity theory casts humankind as innately hedonistic. It rests on the assumption that people naturally pursue their own self-interests at the expense of others. This view of criminal motivation has been adopted in the past by criminologists who subscribe to various social control perspectives including older versions such as those proposed by Reckless (1971), Hirschi (1969), and more recently Gottfredson and Hirschi (1990). But although humans may naturally be hedonistic, according to equity theory they eventually are socialized to learn that if they behave equitably, they will be rewarded. Behaving equitably means offering inputs commensurate with outcomes. Conversely, if people take more than that to which they are entitled, they should expect to be punished (Walster et al., 1978).

Reciprocity is the fundamental norm at the heart of equity theory. Gouldner (1960) maintains that the norm of reciprocity is universal and is based on two premises: "(1) People should help those who have helped them and (2) people should not injure those who have helped them" (p. 171). Although Gouldner acknowledges the universality of the norm of reciprocity, he asserts that it is not unconditional. The conditions under which reciprocity occurs are determined by two factors: (a) the value of the benefit received and (b) the internalized rights and obligations of an individual to participate in reciprocity. These rights are internalized through socialization.

Notions of equity and fairness in law go back at least as far as Aristotle (Ferguson & Stokke, 1976; Fox, 1993). In presenting their comprehensive theory of crime, Wilson and Herrnstein (1985) suggest that these norms play an instrumental role not only in crime and crime control but also in everyday life:

> The universal recognition of the importance of equity arises, we think, from the fact that a concern for equity is naturally expressed in all personal relationships. Take something from another person without his permission and he will feel angry; let the other obtain a

> larger salary without having displayed any recognized superiority of skill, effort, or merit, and you will feel angry. Fail to return a favor when asked, and the person who asks will be upset; do a favor for someone who cannot reciprocate and he will feel uncomfortable. (p. 58)

Equity theory has been employed in research on a number of crime- and justice-related topics including equity in police promotions (Buckley, McGinnis, & Petrunik, 1992) and motivation (Cordner, 1978), explaining vandalism (Fisher & Baron, 1982), the effects of seriousness and responsibility on perceptions of punishment (Longshore, 1979), the fairness of drug-testing policies (Wagner & Moriarty, 2002), the implications of equity theory for restitution (Utne & Hatfield, 1978), and others.

Using equity theory, we can posit that offenses *mala in se* violate the norm of reciprocity by yielding for the perpetrator an outcome to which he or she is not entitled. Crimes *mala in se*, however, do not have to be exploitative in nature. They also include efforts by offenders to restore a real or perceived inequity through various forms of retaliatory acts. For example, the victim of a personal theft who takes it on himself or herself to restore equity by killing the alleged thief would be guilty of violating equity norms because in exacting revenge through murder, the victim of the theft nets an outcome that is out of proportion to the original wrong.

But do not certain offenses *mala prohibita* also net undeserved outcomes for the offender? Theft, if classified as a *malum prohibitum*, is not fair because the thief has derived an outcome (goods or services) without having made the appropriate inputs (payment, etc.). The same can be said for a simple assault, which essentially takes something away from the victim, but in many assault cases, physical, mental, and emotional healing is not only possible but also probable. It is conceivable that the assault victim who has sustained a cut or contusion might consider equity restored by the reimbursement for medical bills or even a public apology. What, then, sets the more grievous offenses apart from those that are simply illegal but not immoral?

The Degree of Harm

Most minor offenses lend themselves to some form of restitutive measure. The victim of a property offense can have the property returned or else receive the equivalent sum of money. There are, however, offenses so traumatic in their consequences that they do not lend themselves to reparation. The homicide victim cannot be brought back to life. A person shot during the commission of the crime who is permanently paralyzed cannot expect equivalent or otherwise meaningful reparation from the offender. It could be argued that victims of rape cannot be restored to the mental, emotional, and even physical state they enjoyed prior to the criminal act. Restitution for those hurt physically and emotionally is important but problematic (Utne & Hatfield, 1978). In their discussion of what they termed the magnitude gap between the perpetrators' and victims' interpretations of the same act, Baumeister and Campbell (1999) put it this way:

> Rape victims may suffer anxiety, nightmares, and impaired sexual functioning for years, in contrast to the fleeting and feeble pleasure gained by the rapist. Murder costs the victim his or her life, plus inflicts conflicts considerable grief and suffering on the victim's social network, whereas nothing the murderer gains by the act can match that value. (p. 211)

The effect of the loss of life and limb can and often does extend to those other than the direct victim. The experience of so-called secondary victims such as survivors of homicide victims also does not lend itself to reparation. Most would agree that there is nothing than can adequately compensate a person for the loss of a loved one. In cases of capital murder, surviving relatives of the victim may support the execution out of a desire for justice and a need for closure. But common sense suggests that the void left by the loved one's death remains regardless of the severity of the criminal justice system's response.

Irreparable harm need not be limited solely to life, limb, and property. Although one can argue that the crime of embezzlement, for example, lends itself to restitutive measures, the trust that is broken through the commission of such an offense may not be recoverable. This may explain why Gross (1979) categorizes embezzlement as a *malum in se* even though the financial aspect of the crime certainly lends itself to restitutive efforts by the perpetrator. Such is also the case of the pharmacist who dilutes life-saving drugs to maximize profits. The recipients of the drugs have every reason to trust that the pharmacists will perform their duties competently and ethically. "The continued existence of a society of any worthwhile kind," writes criminal justice ethicist John Kleinig (1978), "will depend on the general maintenance of a fair measure of trust between its members. Trust is perhaps the most important ingredient in the social glue" (p. 35). This is reinforced by recent theoretical and empirical work on the importance of trust in various social relations (e.g., Tyler, 2000, 2001). Once that trust is broken, as through the pharmacist's sale of diluted or inert medication, the social glue begins to lose its bonding properties.

From an equity viewpoint then, our new *malum in se* is an act that violates the norm of reciprocity, most likely through serious forms of exploitation or retaliation for which reparation or restoration is not possible. Bracton may have had just such a distinction in mind when he assigned greater seriousness to the rape of a virgin (Pollack & Maitland, 1968). The virgin—and Bracton says nothing of the victim's age—has suffered a loss that cannot be recovered.

Mens Rea

When the analyst imposes the requirement of unredressable inequities on specific acts, it too breaks down. If, for example, an individual is cleaning a firearm and it accidentally discharges, killing another, a life that cannot be restored has been taken. But is this type of accidental killing bad in and of itself? Most people would say no. And the laws of most jurisdictions would support that opinion. The accidental killing of another is often a chargeable, punishable crime, but the penalties for an offense such as involuntary manslaughter reflect society's preference that it be treated far more

leniently than, say, premeditated murder or even killing in the heat of passion. It is at this point where the analysis must turn to the age-old precondition of *mens rea*, or criminal intent.

Mens Rea, or literally "guilty mind," evolved to separate those acts that have the potential of being deemed criminal from others deserving of official sanctions. Implicit in the concept *mens rea* is that the offender intended to carry out the illegal act. In fact, Hall (1960) tells us that the distinction *mala in se* has been used in the past to set apart those offenses in which *mens rea* was an element. Sebba (1984) argues that to be truly meaningful, the consideration of crime seriousness must include intent. In failing to do so, the analyst is left with a sterile list of events, as Sellin and Wolfgang (1964) referred to them, that may well convey harm but that say little or nothing about criminal responsibility. Intent, according to Sebba, increases the seriousness of the event.

For the unredressable harm to qualify as a *malum in se*, then, it must be established that the perpetrator in fact possessed criminal intent. This of course is not a problem peculiar to an equity-based approach to the classification of offenses because the substantive and procedural criminal law is already forced to confront this issue.

Mens rea does not always have to attach to the specific act that results in irreparable harm. The armed robber who, during the holdup of a store, drops his gun, which discharges and kills the clerk, has committed a *malum in se* under the new definition. Inasmuch as he intended to engage in wrongdoing, any harm associated with his actions during his intended offense becomes part of that offense. Hence, legally there are no unfortunate accidents during the commission of a crime. The intent of the offender, even if he or she is engaging in what would be considered a *malum prohibitum* such as shoplifting or selling a bag of marijuana, attaches to every legally consequential act performed.

The new conception of *mala in se* represents offenses that compose a smaller and far more serious subset of what previous scholars have embraced with their definitions. These new offenses *mala in se* would include, but not necessarily be limited to, acts of terrorism resulting in death or maiming; forms of multiple murder including serial, mass, and spree murder; murder during the commission of a felony; treason; kidnapping; and rape and other forms of sexual assault including incest. They come much closer to the evil about which earlier scholars wrote and in fact may be akin to the Biblical *skandala*, offenses so reprehensible that Jesus, the loving and forgiving son of God, suggested that for the perpetrator, "it would be better that a millstone were hanged around his neck and he were cast into the sea" (Arendt, 1994, p. 762).

Discarding the Dichotomy

Much of the problem related to the distinction between *mala in se* and *mala prohibita* has to do with its dichotomous nature. An offense necessarily has to be one or the other; there is no gray area or middle ground. This leaves us with a highly unrealistic portrayal of criminal offenses because the distinctions may even blur over time (Wolfe, 1981). Across both violent and property crimes there are varying degrees of

Table 2
Crime Seriousness Scores for Selected Offenses

Offense	Seriousness Score
Murder	16.2
Rape	12.3
Drug offense	11.7
Robbery	10.3
Blackmail	8.5
Serious assault	7.2
Bribery	6.6
Deception fraud and forgery	5.1
Indecent assault	4.2
Burglary	3.7
Snatching	2.2
Possession of arms	2.4
Criminal damages	2.1
Theft	1.1

Source: Kwan, Chiu, Ip, and Kwan (2002).

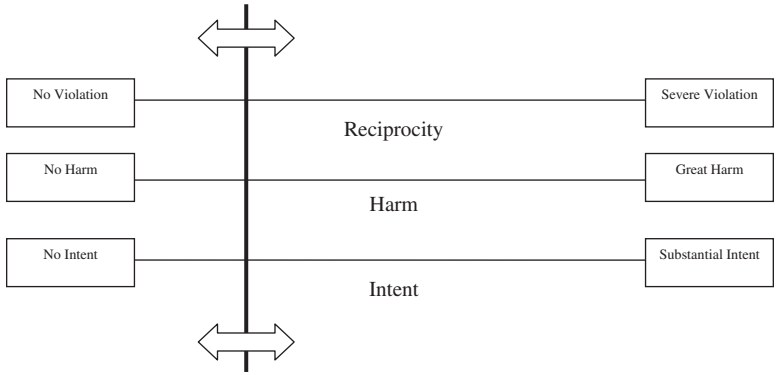
seriousness, and studies of crime seriousness (e.g., Sellin & Wolfgang, 1964) attest to this. This is supported by Teevan (1977) who found that his survey respondents were divided on how to categorize various offenses. Duff (2002) concludes that *mala prohibita* is not the unitary concept as it has been portrayed.

A much more realistic portrayal of both *mala prohibita* and *mala in se* is a wide spectrum of behaviors ranging from those considered not at all serious to the most reprehensible. We could refer to such a spectrum as a scale of crime seriousness. At the most serious end of the scale would be those intentional acts whose consequences are irrevocable, such as premeditated murder. At the least serious end we would expect to find public order offenses such as disorderly conduct and public intoxication. In between would lie a wide array of criminal offenses of varying seriousness. As can be seen in Table 2, it would difficult if not impossible to draw a meaningful line of demarcation between offenses *mala prohibita* and offenses *mala in se*.

If we were to draw the line between serious assault and bribery, for instance, we potentially would misclassify several offenses. Alternatively, if we follow the lead of Waldo and Chiricos (1972) and classify index crimes as mala in se, then we end up with two index crimes, burglary and theft, below the line. Moving above the line to what should be offenses *mala in se*, we find drug offense, certainly a form of behavior whose legal status as a crime can change from time to time and place to place.

We could lay the scale on its side, but such a horizontal scale by itself is no real improvement over existing, rank-ordered lists of offenses developed through crime seriousness studies. To represent the improvements suggested above by our new conception of *mala in se*, the spectrum of offenses needs to incorporate reciprocity, harm, and intent, as depicted in Figure 1. The most important dimension, reciprocity, would range from no normative violation at all to extremely severe violations at the opposite end of the spectrum. In between these two extremes are a wide range of behaviors that

Figure 1
Spectrum of Behaviors Defined as Criminal



represent varying degrees of violations of the norm of reciprocity, exploitation, and retaliation in particular.

The harm dimension, which can range from no harm at all to irreparable harm, represents the extent to which reparation is possible. In equity theoretical terminology, the restoration of either real or psychological equity clearly is not possible at the most serious end of the spectrum.

Although some may argue that intent is dichotomous—either one has it or does not have it—it could be argued just as persuasively that like reciprocity and harm, there are varying degrees of intent. An example from somewhere in the middle of the scale might be the driver of the getaway car for a gang of burglars. The driver may have had little reason to think that his fellow burglars would kill the house's occupant who awoke and confronted the intruders. Truly, he is culpable from a legal standpoint, but his degree of intent could arguably be less than those who actually committed the unanticipated homicide.

Using the vertical bar with the arrows, we can move from one end of this scale to another. At the extreme left side is where we would find the least serious offenses. These offenses do not violate the norm of reciprocity; they lack criminal intent, and they are not harmful to society. They would include public order offenses such as public intoxication and disorderly conduct.

Offenses at the extreme right side of the scale are the most serious crimes as described above. They are likely to be regarded as horrific historically and cross-culturally.

In between these two extremes lie all other crimes. Each one is theoretically a unique combination of (a) the extent to which an offense violates the norm of reciprocity, (b) the degree of harm to the victim(s), and (c) the amount of intent on the part of the offender. For purposes of illustration, the vertical reference bar that theoretically moves across the scale is represented by a straight line. In reality, any given offense

would likely consist of a varying combination of degrees of reciprocity, harm, and intent and would perhaps be better represented by a zigzag line.

Mala in Se and the Penal Philosophy and Practice

The concept of *mala in se* as defined above may serve as a better justification for the severe punishment of those intentional offenses whose consequences are both serious and irrevocable. In fact, we should expect these new offenses *mala in se* to elicit the most severe responses society has to offer. Conversely, those offenses lending themselves to restitutive measures and those for which the offender had little or no intent should be punished less severely. From an equity theoretical viewpoint, one could argue that the restoration of equity to the victim is more important than the meting out of arbitrary penal sanctions. This is not to deny the state its right to vindicate the moral order through the use of legal sanctions; it is only to assert that the needs of society may be better met through restitution than through other sanctions whose utility is at best not demonstrable and at worst counterproductive and inhumane.

Analysts should also consider the implications this new definition may have for the traditional justifications for punishment, namely, retribution, incapacitation, deterrence, and rehabilitation. For example, are the offenders most in need of being deterred those who commit or are contemplating offenses *mala in se*? The same questions can be asked for incapacitation. Should we expect that those who have committed crimes *mala in se* will be more difficult to rehabilitate? Does it mean jurists should focus on one or two to the exclusion of the others, or are they all possibly reconcilable using the equity-based conception of crimes *mala in se*?

Retribution

As one of the principal rationales for punishment, retribution is the officially sanctioned counterpart of revenge. Its purpose is not to reform offenders, to ensure public safety, or even to cause individuals to think twice the next time they contemplate committing an illegal act. It simply represents society's attempt to visit suffering on the offender for the wrong done (Bedau, 1978).

Retribution is completely compatible with an equity-based definition of *mala in se*. After all, retribution expresses society's attempt, however feeble it may be, to restore either real or perceived equity for the victim. It also serves to reinforce for the offender the importance of the norm of reciprocity and the consequences of violating it. Offenses *mala in se*, according to Duff (2002), are precisely those that call for retribution.

Incapacitation

Incapacitation is necessary to ensure the safety of society. There are those whose behavior is so dangerous to society that it demands that they must be locked away, at least from law-abiding people. Whether we believe in the possibility of reformation or

not, we insist that we be protected from individuals whose actions threaten life, limb, and even property.

If we accept the new definition of *mala in se*, we must admit that those who are capable of intentionally inflicting harms so serious that restoration is not possible may well have to be physically separated from civil society. These offenders will most likely be regarded as the worst of the worst, that is those most likely to recidivate in ways that threaten health and safety.

Deterrence

Deterrence expresses society's desire to foster legal behavior in those who have already been convicted of engaging in illegal behavior, and it also extends to those who might be contemplating such illegal acts. Specific deterrence represents society's ability to prevent the individual offender from again engaging in crime. General deterrence, in contrast, consists of a broad legal threat aimed at those who might be contemplating such acts.

If we agree that the new offenses *mala in se* are extremely serious, and if we also accept that deterrence is possible, then the punishments to dissuade would-be offenders would likely have to be extremely severe. Inasmuch as the research on the effectiveness of deterrence is mixed, this rationale for our new conception of *mala in se* is perhaps the weakest and therefore least applicable.

Rehabilitation

The serious violation of the norm of reciprocity as represented by our new definition of *mala in se* also has implications for the rehabilitation of convicted offenders. The rehabilitative ideal rests on the assumption that many offenders can change, enabling them to once again return to society as law-abiding, productive citizens.

It could be argued that some offenders, through inadequate socialization, have internalized maladaptive responses to the norm of reciprocity, namely, harmful forms of exploitative and retaliatory behavior. Interventions that have shown promise, such as cognitive behavioral therapy, might be considered as ways to correct thinking errors that contribute to such offending.

Restoration

The movement toward restorative justice during the past couple decades represents a marked departure from the rationales for punishment discussed above. Born partly as a result of the victim-offender reconciliation projects and informed by Native American justice including sentencing circles, restorative justice seeks to bring about individual and collective healing in the aftermath of a crime (Gehm, 1998). What sets restorative justice apart is the emphasis it gives to "repairing harm; victim, community, and offender in the justice response; and attempting to address the diverse justice needs of communities" (Bazemore, 1998, p. 776).

Restorative justice is particularly well-suited to our new conception of *mala in se*. These offenses as they have been redefined clearly do not lend themselves to traditional remedies. Consequently, the criminal justice system and other agents can facilitate the healing process for the direct and indirect victims of intentional, irreparable crimes.

Implications for Future Research

Implicit in this new conception of offenses *mala in se* are some possible avenues for future criminal justice research. For example, in line with this new definition of offenses *mala in se*, we should expect that punishments spelled out in the criminal code for specific crimes would be commensurate with the seriousness of the crimes. The most severe penalties on the books, including death and imprisonment for life, should be associated with offenses that meet the new definition. In the case of rape, now defined as a *mala in se* because it is the result of an intentional act that resulted in unrestorable harm, the punishment should be far greater than that for what we would regard as offenses *mala prohibita* such as felony theft or felony drug possession. If we find it is not, there could be two possible explanations: Either rape is not punished severely enough according to the new definition of *mala in se*, or the offenses *mala prohibita* are treated more severely than is warranted. Because of the attention that rape and other forms of sexual assault have gotten in recent years, the latter explanation is more plausible than the former. A close examination of the array of criminal offenses and their associated penalties should illuminate the extent to which the criminal code supports the new conception of *mala in se*.

An alternative way to test this new distinction would be through the analysis of crime seriousness data such as those collected in the study by Sellin and Wolfgang (1964). Such studies generally present participants with a series of vignettes, each of which describes a criminal act. The represented offenses range from public order offenses to those considered most serious such as multiple murder. Respondents assign a numerical score that reflects how serious they consider each act to be. The researcher can employ either a Likert-type scale (ranging from *extremely serious* to *not at all serious*) or can use the magnitude estimation technique that permits the respondent to assign to each vignette any number larger than zero that represents how serious the rater considers that act to be.

For the purposes of testing the new conception of *mala in se*, we could then use a data reduction technique such as factor analysis to see if some of the items loaded on a factor representing offenses *mala in se* as redefined herein. A visual inspection of the items composing each factor would reveal the extent to which the more serious of these offenses met the newly proposed criteria for offenses *mala in se*. In the process, one could also test Wolfe's (1981) conjecture that the concept *mala in se* may arise from value consensus.

Another important test for the new definition of *mala in se* would be the cross-cultural application of the seriousness study. Would Muslims living in the Middle East, for example, rank intentional offenses resulting in irreparable harm similarly to the way Christians in the United States would rank them? Cross-cultural studies of offense seriousness, such as that conducted by Al-Thakeb and Scott (1981), would help answer whether the new *mala in se* was truly universal.

Conclusion

Legal concepts such as *mala prohibita* and *mala in se* are not merely of historical interest. Appellate jurists continue to cite these concepts as they make rulings on remanded criminal cases, and criminal justice texts include them in their discussions of basic concepts in criminal law as if they were still valid and useful. Moreover, criminal justice researchers have employed them in empirical and other scholarly work. So in response to Wolfe's (1981) question as to whether *mala in se* is a disappearing doctrine, a quarter century later we can answer with a resounding no.

Some of these applications, especially appellate court decisions, can have concrete consequences. We therefore have an obligation to question and clarify the meaning of legal terms and their continued usage.

The reconceptualization rather than the rejection of dated legal terminology is more consistent with the long-standing tradition of common law that supports an evolutionary process of incremental change over time. Despite Bentham's (cited in Gray, 1995) and Gray's (1995) own compelling arguments for abandoning the distinction between crimes *mala in se* and *mala prohibita*, it seems more reasonable to refine the definition in light of newer theories, research findings, and practices. The distinction will remain absurd only if we cannot identify meaningful criteria that discriminate between the two. It is the author's hope that this analysis has proven Perkins (1983) right and has moved the general discussion in the direction of greater understanding.

The concept of *mala in se*, rather than being defined by "an intentional act that results in unrestorable harm," can perhaps be replaced by it. Where restoration of an intentional harm is not possible, the victim is likely to suffer in greater measure than in cases lending themselves to some form of reparation. And because of the grave consequences of these offenses, they are more likely to be regarded as among the most serious of crimes even across cultures. Abandoning the term *mala in se* might help jettison the baggage that accompanies it.

The distinction outlined above identifies at least one common thread that runs throughout social norms and their codified forms, namely, reciprocity. Because it is based on a principal norm found in many societies, our new definition should be less susceptible to changes in legislative fad and fashion. Grounding terms such as *mala in se* in more general norms in turn may serve as a further step toward understanding and reconciling the etiology of crime, the laws and institutions that exist to deal with crime, and the responses of those who control those institutions.

Notes

1. Religious references still pervade legal processes. For example, the oath under which witnesses must swear in a court of law usually bears the qualifier, "So help you God." This perpetuates the notion that for certain forms of wrongful conduct, including perjury in the case of the oath, the perpetrators not only face legal consequences associated with committing perjury, they also will have to answer to a "higher court."

2. This is similar to discussions of the religious background on some of the early sociologists and criminologists. Edwin H. Sutherland, regarded as a major figure in the field of criminology, was the son of a Baptist minister and may have been profoundly influenced by his Midwestern Protestant upbringing (Snodgrass, 1985).

3. The FBI's crime index consists of murder and nonnegligent homicide, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. The crime of arson is sometimes added to what is then referred to as the modified crime index.

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