

The Malum prohibitum—Malum in se Distinction and the Wrongfulness Constraint on Criminalization

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ABSTRACT: *The criminal law distinction between conduct malum in se and malum prohibitum is five centuries old in common law jurisdictions and yet both its meaning and its usefulness remain matters of debate. I join the fray, arguing (a) that the terms cannot be interpreted literally, but that (b) there is a way of drawing the distinction that is both plausible and useful. Conduct mala in se is conduct that must be prohibited in any just polity, while mala prohibita conduct may but need not be criminalized. I employ concepts from social contract theory in the explanation.*

RÉSUMÉ : *La distinction de droit pénal entre la conduite malum in se et malum prohibitum est vieille de cinq siècles dans les juridictions de common law, et pourtant son sens autant que son utilité continuent d'être débattus. Je me joins à la mêlée, en faisant valoir (a) que les conditions ne peuvent pas être interprétées littéralement, mais que (b) il existe un moyen d'établir la distinction qui est à la fois plausible et utile. Une conduite mala in se est un comportement qui doit être interdit dans toute société politique juste, alors que la conduite mala prohibita peut être criminalisée, mais ne doit pas absolument l'être. Je sollicite dans mon explication des concepts de la théorie du contrat social.*

The Distinction

The literal rendering of the *mala prohibita* / *mala in se* distinction is between actions that are 'wrong because prohibited' and actions that are 'wrong in themselves' or intrinsically, regardless of their criminal or other legal status. *Mala in se* conduct is wrong prior to and independently of its prohibition in law; its criminalization merely recognizes its pre-legal wrongfulness and proclaims it to be a public wrong in a specific community.¹ The wrongfulness of *mala prohibita* conduct, by contrast, depends upon its prohibition in criminal law. As Stuart Green shows in his companion essay, there are plenty of competitor accounts of how the distinction should be drawn, though many that he mentions seem subject to too many counter-examples to be plausible as descriptions of the difference within Anglo-American law as practiced. Although my ultimate goal is to reconcile the moral and political approaches to criminal law, and thus provide (if possible) an account of *mala prohibita* conduct that can be reconciled with plausible wrongfulness and desert requirements, I don't reach that destination in this paper. Instead, I pause to consider some difficulties that arise on the *mala in se* side of the distinction. I offer what I hope is a useful way of characterizing *mala in se* behaviour. Embracing my account requires, though, significant refinement of the simple formula—wrong prior to or independently of law. I then very briefly suggest ways in which this characterization of *mala in se* might help illuminate the properties in virtue of which some conduct is *mala prohibita*. What follows should be taken as exploratory, however, rather than definitive; I ask more questions than I answer, and I consider multiple lines of argument that might have promise, though I don't develop them in any detail or

¹ Duff 2002.

undertake their evaluation here. My hope in putting them out is to stimulate greater interest in the topic among philosophers, and to suggest some possibly fruitful avenues for future research.

Rejecting the Literal Interpretation of '*Mala in se*'

The literal meaning of '*malum in se*' is 'wrong in itself.' We might think this implies various further features: that conduct wrong in itself is unconditionally wrong, categorically wrong, wrong in virtue of its intrinsic properties, and the like. At the very least, almost everyone who addresses the topic thinks that the wrongfulness of *mala in se* actions must exist prior to and independently of the prohibition of those actions in criminal law.²

Despite its etymological credentials, we should reject this way of characterizing *mala in se* conduct because it would severely limit the scope of *mala in se* crimes: virtually to only certain crimes against the person and environment. Physical violence against other persons is wrongful, and involves wrongs we can identify without reference to any prior legal act or decision (including but not limited to the decision to criminalize the acts constituting such wrongs). Physical violence can be wrongful even when committed outside of any political state, between two people who are not members of the same political community, or within the territory of failed states, and so its wrongfulness does not depend upon contingent political facts about what the legal status of violence might be.³ Violence against the person (murder and assault in their various forms, kidnapping, rape, and the like), as well as violations of persons' reputations (slander and libel, for example), can be committed and their wrongfulness ascertained outside of political society. We don't suppose that we must wait until we learn the legal context in which (non-defensive) violence is inflicted upon someone by another to make the moral judgment that what the assailant did was wrong.

But crimes against the person are a small fraction of modern criminal codes. The vast majority of crimes would be excluded from the category of *mala in se* offences if we accepted this characterization of them, including many serious crimes of very long standing. Thus we should reject the literal meaning of *mala in se* on grounds of descriptive inadequacy: drawing the distinction this way would reverse a number of common assumptions about *mala in se* offences—that most criminal prohibitions target *mala in se* conduct, that the commonness of offences in the core of the penal codes enacted by just societies reflects the fact that their origins are pre-political and universal, that *mala in se* wrongs are typically the most serious crimes, and that contemporary codes in places like the United States have become considerably less just because of the expansion of *mala prohibita* offences in recent years, among others.⁴ If it turns out that (a) almost all crimes are *mala prohibita* and (b) enacting *mala prohibita* crimes cannot be justified (because contrary to the wrongfulness constraint or the principle of just punishment, or for other reasons), this would present a profound challenge to the legitimacy of criminal law as we know it.

² Duff 2007.

³ Assuming the violence is not used in necessary and proportionate self- or other-defence.

⁴ Husak claims that a significant cause of recent 'overcriminalization' is the adoption of many more *mala prohibita* offences than previously had been considered properly criminal matters; see Husak 2008 and 2010, Chapter 16.

To see how restrictive such an interpretation would be, we might first note that it would deny the label *mala in se* to all acts interfering with property rights. To steal, embezzle, destroy, deface, hide, or counterfeit someone else's property, or otherwise to prevent a property owner from enjoying her own property, cannot be done prior to the establishment of a property regime, and such a regime is a creature of law. Property just is a set of legally enforceable rights, and so property cannot exist prior to law.⁵ Violations of property are wrongs that can be committed only within a framework of property rights set by law.

Consider, too, crimes against the state and its institutions. There are a large number of long-standing crimes in the core of criminal law that literally cannot be pre-legally wrong, or wrong independently of the law, because the conduct complained of is impossible without law.⁶ Within this large class of offences are such serious crimes as treason and espionage, perjury and counterfeiting, bribery of public officials and obtaining public services to which one is not entitled. All of these and their many ilk are ontologically dependent upon the existence of the state and its central institutions: a government to which one can be disloyal, state secrets to share, fact-finding courts to deceive, legal currency to counterfeit, public officials to bribe, and publicly-supplied goods to fraudulently attain.

Calling all property crimes, as well as crimes against state institutions, (mere) *mala prohibita* offences does not capture the nature of their wrongfulness. True, wrongfulness cannot be manifested in any of these ways without the prior existence of the state institutions against which they offend, but it would be a mistake to conclude that they are only 'legal wrongs.' In each case, in fact, it seems like the wrong-making features of these kinds of actions is not itself legally-dependent.⁷

The Wrong-Making Features of Conduct *Mala in se*

But perhaps my treatment of conduct *mala in se* in the previous section was too fast. Recall the various crimes mentioned there: crimes against property and crimes against the state and public institutions. Even if performing those precise actions can be done only in a political community with public law, the *reasons that they are morally wrong* are not similarly dependent on such political facts. Stealing or destroying the property of others is wrong for various reasons, in virtue of features that are independent of law: because they cause harm, violate trust or legitimate expectations, are unfair, or interfere with the ability of property owners to do various things requiring or involving their property, and are contrary to the values of autonomy, liberty, and wellbeing. Treason is wrong because disloyalty is wrong, because it violates a duty individuals have to support just institutions, or because the legitimate interests of others will be put at risk should their government collapse; selling state secrets or aiding an enemy is wrong for similar reasons, as well perhaps as an offence against the autonomy of the citizens if they have democratically chosen the government; deceiving a judicial fact-finder offends

⁵ Apologies to committed Lockians who hold that property is a natural rather than a juridical relation between persons, their bodies, and objects in the external world.

⁶ Green takes these and many other examples as evidence that the property of being *mala in se* is scalar, a matter of more or less, rather than binary, which is instantiated or not.

⁷ I thank Wayne Sumner and Tom Hurka for helpful discussion on this point. I also thank colleagues at Canterbury University, Christchurch NZ, for comments on an earlier version of this paper, presented while I was an Erskine Fellow (2013), who pressed in the same direction.

against justice and is designed to interfere with the accurate findings of an institution in which people must have considerable faith; producing counterfeit currency is, like perjury, an instance of deception, and (when traded for goods and services) is theft by deception, in addition to threatening the integrity of the country's financial institutions; bribery of public officials creates all the harms of corruption, from inflated costs for services, to environmental degradation, to unsafe conditions in some areas of society (e.g., the risk that people will be harmed by release of tainted meat into the food system that bribery of food inspectors makes possible); to take public goods to which one is not entitled is a form of theft, in addition to deception and other obvious wrongs that actions like welfare fraud involve. Thus the features—disloyalty, disappointment of reasonable expectations, deception, violation of important values like justice, autonomy, liberty, and welfare, etc.—in virtue of which these various behaviours are wrongful, are features that are not dependent or conditional on the acts having any specific legal status. True, one cannot deceive a judge until there are judges and courts, but deception is morally wrong prior to and independently of such political realities. Deceiving a court is simply a token of the immoral type 'deception.' The law doesn't make deception immoral, of course, even though it creates new ways in which that moral vice can be exhibited. This is what is meant by saying that *mala in se* conduct is morally wrongful prior to and independently of its legal status. Or so a defender of the traditional way of drawing the distinction might insist.

But this route, invited on the moral approach, obscures more than it illuminates. First, it forces us once again to confront the question: why are *these* specific acts of disloyalty or deception treated differently than other acts bearing the same morally-relevant properties (disloyalty to one's employer or deception of one's spouse, for example)? It is an ill-advised route for an even more important second reason as well, namely, that any *mala prohibita* conduct, the prohibition of which can be justified, will also have this feature. All *mala prohibita* conduct, the criminalization of which is legitimate, shares this feature of being conduct that can be characterized as violating first order morality, even if the conduct cannot be committed prior to or outside of a polity. When the law creates new action types, types that did not exist prior to law—driving the wrong way down a one-way street, bribing a judge, counterfeiting currency—those action types can be assessed against first order morality. If the conduct targeted by a law, whether *malum in se* or *malum prohibitum*, is morally wrongful, it will be so for reasons outside of law. The law can create new action types, but it cannot create new moral types. Only if driving the wrong way on a one-way street, bribing judges, and counterfeiting currency are morally wrong can the criminalization of such action types be justified. And, if it is morally wrong, it is morally wrong in exactly the same way, whether the conduct is *mala in se* or *mala prohibita*.

I suspect that this fact is responsible for the seeming inability of theorists who defend the distinction to offer plausible examples of *mala prohibita* conduct. Certainly the great contemporary textbook writers have served up a motley crew of cases: various traffic offences (like driving the wrong way down a one-way street), environmental pollution, and manufacturing or selling impure foods or drugs.⁸ It's hard to believe that anyone thinks such conduct is not wrongful unless it's criminalized: that placing the safety of other road users in peril, damaging the environment, and making or selling

8 Dressler 2006, p. 157; LaFave 2003, pp. 36-39. Duff adds examples in Duff 2007, pp. 89-93.

products unfit for consumption would not be wrongful unless criminalized. Yet, despite the dearth of plausible examples, Husak claims that the proliferation of *mala prohibita* crimes is responsible in large measure for what he calls *the problem of overcriminalization*, suggesting thereby that there are lots and lots of such offences cluttering up modern penal codes.⁹ If true, one would think there would be more and better examples available than those just mentioned.

The example of a *malum prohibitum* Husak prefers is the conduct prohibited under money laundering statutes. If successful it would be a good example, since many states have enacted such laws as part of their attempts to discourage drug trafficking and other forms of organized crime, and they are vigorously enforced; many people have been convicted of money laundering offences and punished under them with long prison sentences. The conduct in question is depositing more than \$10,000, known to be derived from a specified range of criminal activities, into a bank. “The offense is not *malum in se*; 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.”¹⁰

I think money laundering serves no better than the others as an example of conduct supposedly *malum prohibitum*. Depositing criminally derived money into a bank just is a way to profit from that crime. Criminals need to launder their money through legitimate institutions in order to reap the full benefits of it. Allowing people to use the financial system for such purposes incentivizes future crime, whereas prohibiting money laundering might well provide some deterrent effect: why amass a fortune in ill-gotten gains if one cannot then use them to satisfy one’s desires? Presumably such conduct could also undermine the financial integrity of a country’s banking system if it became widespread.

But notice how importantly different would be the situation if the laws in question waived the requirement of ‘knowledge.’ Under positive law, one must *know* that the funds being deposited were derived from specific criminal activity in order to be guilty of money laundering. This matters because knowledge is necessary to establish the wrongfulness of the conduct. It would not be wrongful (at all or at least to the same degree) if the person depositing the money was non-culpably ignorant of its origins. The requirement of subjective fault on the part of the money launderer, in the form of high level *mens rea*—knowledge—suggests that the conduct is *malum in se*. If those drafting money laundering statutes were to revise them so that they became strict liability offences (i.e., offences one can commit without fault, because they criminalize only *actus rei*, requiring no subjective element of fault, like knowledge, intention, purpose, or awareness), they would be making laws that are unjust. Only culpable money laundering is properly prohibited.

Now consider my favourite example of a *malum prohibitum* offence: filing the serial number off a firearm that you wholly and rightfully own. This is an unusual crime. One is not typically forbidden to deface or damage one’s own property. (And the conduct in question does not actually damage the gun, from a function point of view.) Why, then, might this conduct be wrong? Defenders of this offence can be expected to say something like the following. We are entitled to regulate the possession and use of

9 Husak 2008, §2.IV. See also Husak 2010.

10 Husak 2008, p. 105.

objects that are inherently dangerous to others. Guns are within the class of such objects.¹¹ Assigning a unique serial number to every gun is one way in which they are regulated in order to reduce the risk of their misuse. There is no legitimate reason to file the serial number off a gun, but there are illegitimate ones, such as thwarting the efforts of law enforcement officials in tracing weapons to those who misuse them. So, though filing the serial number off one's own gun would not be pre-legally wrong, it becomes wrong once its prohibition is adopted as part of a general scheme to make the investigation and prosecution of crimes easier for officials. Filing the serial number off one's guns is wrongful, on this view, only post-legally and because prohibited. Thus it really does look like a true *malum prohibitum*.

I doubt this approach can succeed. First, I'm not sure that merely working to make law enforcement (really crime investigation and prosecution) more difficult is morally wrong *tout court*. We certainly shouldn't accept the general principle that there is a legitimate state interest in deterring all conduct that might make detection or conviction of those who commit crimes easier for the state. Such a principle would license the criminalization of a vast array of conduct, and would be incompatible with our most crucial rights against the state in the investigation and prosecution of crimes: the presumption of innocence, the impermissibility of hearsay evidence, the right to counsel, spousal immunity, freedom from arbitrary search or seizure, etc., all make it more difficult for the state to detect or prosecute crimes and so would conflict with recognition of a state interest in minimizing barriers to the investigation of crimes and conviction of criminals. Second, the hypothesized defence of the crime of filing off a gun's serial number implicitly suggests that citizens need to have legitimate interests to do what they want to do; this puts the onus on citizens to show that they have legitimate reasons to act as a proposed law would condemn. But, as Husak has persuasively argued, the onus must always be on the proponent of a coercive restriction to justify its use; the onus must always be on the state to show that it has a legitimate state interest in the conduct. That the justificatory burden is on the state is a central tenet of liberalism, and is at the heart of the presumption of innocence. Merely making the conviction of persons under criminal law easier for state actors is not a legitimate state objective. The conduct in question must constitute a wrong, and the state must show that its criminal response to that wrong is proportionate, reasonable, etc., i.e., that using the criminal law against it is justified.

My own view is that simply filing the serial number off one's own gun should not be a criminal offence. When read as a genuinely *malum prohibitum* law, it is unjust. Filing the serial number off a gun should only be a crime if it is done with intent or purpose to obstruct justice. This would be genuinely wrongful, and the type of wrong that is of legitimate concern to our fellow citizens as such. There is nothing special about guns on this approach. We could prohibit people from filing the serial number off any number of items, including kitchen appliances, power tools, and electronic equipment, if done to subvert justice or for other improper purposes, such as defrauding an insurance company or masking the fact that one is selling stolen property. But then filing the serial number off the object would be wrong in virtue of features that are

¹¹ Husak has denied this in a series of publications, pointing out the obvious fact that the vast majority of gun owners (in the United States) never commit an offence and never harm anyone with their guns. But whether guns really are inherently dangerous is not important to my argument in the text.

independent of law; it would be wrong because it constitutes an attempt to interfere with the administration of justice or because it involves theft or deception. So, if it is a *malum prohibitum* offence, understood the traditional way, it is unjust; revising it so that it becomes just requires changes that would convert it into a *malum in se*. We have, thus, failed to generate convincing examples of *mala prohibita* conduct that may nonetheless be justly criminalized.

The (admittedly tentative) conclusion I draw from these observations is that the standard way of dividing offences into *mala in se* and *mala prohibita*—as those targeting conduct that is pre-legally wrongful and conduct that is wrong only because prohibited in law, respectively—should be rejected. The features in virtue of which conduct is wrong must be features it has independently of its criminal status. There are no justifiable *mala prohibita* if that category of crimes is drawn in the usual way.

We might, perhaps, state the point this way: if the reason we may criminalize conduct is found in its moral properties, it must have the relevant properties prior to its criminalization. This is so because no act of any human legislature has the power to confer moral properties on anything. Moral properties are not amenable to unilateral creation or modification, and they cannot be conferred at will upon human actions. Thus, if creating *mala prohibita* offences is thought to *make* something morally wrong that was not already morally wrong via legislative fiat, there can be no acceptable *mala prohibita* crimes. Law cannot create morals, anymore than morality can make law. But, if I am right in what I have said so far, we have secured the wrongfulness constraint for all laws whose justification derives from the immorality of the conduct prohibited.

Perhaps another way of putting the point is to say that the traditional distinction is really tracking the difference between (the quite small number of) actions that can be done outside of a legal context and those that cannot be. Bribing officials and counterfeiting currency, like treason and espionage, literally cannot be done outside of a legal context. One might think, metaphysically, that if an action A cannot be performed outside of a legal system, then it cannot have any specific moral properties outside of a legal system either: if A cannot exist in circumstances C then A cannot have moral properties, good or bad, in C. This would again restrict *mala in se* crimes to those few crimes of violence and environmental harms that can be done outside of a polity. Most criminalized conduct would then be *mala prohibita*.

I would be in good company should I conclude that all of this shows that the distinction is meaningless or useless.¹² But that is not the only open option. Instead, we can provide a directly political evaluation of the legitimacy of using both *mala in se* and *mala prohibita* crimes, one that justifies the criminalization of conduct on independent political grounds. The immorality of the conduct in question may trigger the decision to criminalize it; but, even so, we can evaluate the decision to criminalize, i.e., in the case of *mala prohibita* actions, the decision to create new action types with important normative implications—such as the creation of duties and the possibility of punishing violations of those duties—on grounds other than first order morality. The decision to criminalize is a political decision, one that demands a public justification, given what criminalization does, in the name of the public or the people: criminalizing action A expresses a collective, state-level condemnation of A; it deters (i.e., coerces) some law-

12 Among its notable critics are Bentham 1776-1777; Gray 1995; and Williams 1961.

abiding persons from engaging in A, who otherwise would A (if the law is not otious); and it exposes persons who A to state condemnation and punishment.

The decision to criminalize can be justified on grounds that our best conception of the state or best theory of political legitimacy gives it either permission to or a duty to engage in that complex act of condemnation, coercion, and punishment. If one primary duty of the state is to constrain the free use of violence, for example, then it has a duty to enact criminal offences condemning, deterring, and punishing various forms of violence. If the state has the right to enter into bi-lateral or multi-lateral international agreements with other nations, it has at least a permission to criminalize acts contrary to their fulfillment.

I offer an alternative characterization of the *mala in se* / *mala prohibita* distinction. I think it sorts cases in ways that are both descriptively adequate as a characterization of our legal practices and normatively attractive. Unlike the traditional distinction, which makes all crimes except crimes of violence *mala prohibita*, and leaves us without resources to justify the criminalization of any actual *mala prohibita* conduct, the alternative proposal sorts the core crimes in historic and modern criminal codes in such a way that many fall within the *mala in se* group, and yet room is made for the enactment of some *mala prohibita* offences in specific circumstances.

The Distinctive Property of Wrongs that Are ‘*Mala in se*’: They *Must* be Prohibited

I propose that we characterize *mala in se* conduct as follows: *mala in se* is conduct that *must* be prohibited in order for a polity to be legitimate, and a source of justified demands upon its members. Consequently and as we should expect, we find the same core set of offences articulated and prohibited in criminal codes across all reasonably just states, and we identify deviations from the common core as sources of injustice within otherwise just legal systems.¹³ *Mala prohibita*, by contrast, are types of conduct that *may* be (but need not be) criminalized. Here I develop and defend this conception of *mala in se* as conduct that any just state must prohibit.¹⁴ In the remainder of this paper, I describe and motivate my way of characterizing *mala in se* crimes as

13 Readers familiar with criminal law theory will know that the core / periphery dichotomy is itself the subject of contestation, and sometimes even used to draw the very distinction we are after between *mala in se* (core crimes) and *mala prohibita* (offences on the periphery). I think my treatment of the *mala in se* / *prohibita* dichotomy shines new light on the core / periphery dichotomy, though establishing the latter is not a task I undertake in this paper.

14 This is but the preliminary step in the development of a complete theory on the subject. A theory remains incomplete (though perhaps illuminating in multiple ways) until it provides the necessary and sufficient conditions for legitimately exercising the permission to make *mala prohibita* laws; what conditions must hold if the permission to criminalize *mala prohibita* actions is actualized? Ideally, an account will also explain why various competitor theories of the distinction, though ultimately unsuccessful, seemed to have something going for them (descriptively and/or normatively): e.g., that the *mala in se* / *mala prohibita* distinction tracts other, somehow more basic, dichotomies like more serious and less serious crimes, felonies and misdemeanors, common law and statutory crimes, true crimes and regulatory or public welfare offences, crimes from which legislators may exempt persons and those they cannot, etc. These tasks—defending a comprehensive set of conditions necessary for the legitimate criminalization of *mala prohibita* conduct and providing an error theory explaining why those advocating competitor ways of drawing the distinction have gone wrong—await other occasions and, I hope, other contributors.

prohibiting conduct that must be declared 'public wrongs' and prohibited on pain of punishment.

In explaining the wrongfulness of *mala in se* conduct, I invoke the conceptual framework of the social contract tradition. This framework is useful for thinking about this question: what kinds of conduct *must* a polity prohibit using the distinctive mechanism of the criminal law? If legally allowing some or all people in society to perform action A is incompatible with that society being committed to providing benefits to all its members on terms they could accept *ex ante*, then A is *mala in se* and ought to be criminalized.¹⁵

That human beings are social creatures is platitudinous; that we need to accept limits on our natural liberty (that which we *can* do) in order to live well together is not. It is the core insight of the social contract tradition in moral and political philosophy. Contractarians take as their primary task determining how to identify the limits on liberty that are needed to create justified polities. Social contract theory is thus a theory of justification—justification of the limits on liberty that are necessary for the realization of conditions that enable us to live well together and to achieve mutual fulfillment in society on terms fair to all.¹⁶ If we are to achieve peace (which is the most basic pre-condition of a justifiable polity and thus enjoined by the first law of nature: 'seek when possible'), we must be willing to accept limits on our natural liberty. As Thomas Hobbes says, the second law of nature is "That a man be willing, when others are too, as far forth, as for Peace, and defence of himself he shall think it necessary, to lay down [his] right to all things; and be contented with so much liberty against other men, as he would allow other men against himself."¹⁷ This basic principle reflects both the equality of persons and the reciprocal nature of just norms in Hobbes's thought. We will give up any of our liberty (thereby accepting moral duties owed to others just in virtue of our shared membership in political society) only if others do so too: "if other men will not lay down their Right, as well as he; then there is no Reason for any one, to divest himself of his: For that were to expose himself as Prey, (which no man is bound to) rather than to dispose himself to Peace."¹⁸ And we will give up only as much of our natural liberty as is necessary to achieve peace and the conditions of mutually beneficial cooperation, i.e., only as much as is necessary to form a justified polity.

Modern contractarians add to Hobbes's basic story two important elements. First, they locate the source of the human predicament in structural features of the conditions of interaction themselves. Second, beyond securing peace, modern contractarians know that the 'cooperative surplus' made possible by peace and cooperation within

15 Nothing hinges on acceptance of contractarianism, however; contractarianism is really a theory of normative justification, and so the arguments can be read as invoking a standard of mutual benefit on fair terms as its justificatory foundations, without mentioning agreements, actual or hypothetical.

16 The 'contract' element here can be understood literally (as requiring some kind of actual agreement) or metaphorically or hypothetically (with consent merely a heuristic for what is really important, namely mutual benefit, as the standard of public justification). Relatedly, contractarianism may be rendered as an ideal or non-ideal theory. When speaking of the terms of agreements that are necessary to create a justifiable polity, we are engaged in ideal theory, but when we use the 'contractarian test' (discussed just below) to assess real practices within ongoing societies, we are engaged in non-ideal theory. I'll help myself to concepts made popular by the classic social contract theorists: the state of nature, the right of nature, and laws of nature, for example, when doing so offers illumination.

17 Hobbes 1651, Part I, Chapter 14, p. 190.

18 Hobbes 1651, Part I, Chapter 15, p. 215.

societies must also be shared on conditions that each would find acceptable. Contractarians insist that, in order to be justified, the political (including criminal) restrictions imposed upon the liberty of all must provide maximal benefit to each. Only rules that produce outcomes that are Pareto-superior¹⁹ to unrestrained general liberty, as well as to any viable alternative set of rules, will be deemed acceptable. Thus it matters very much to modern contractarians how peace is secured, and how the burdens and benefits of peace are distributed. Criminal law is the most important liberty-restraining set of rules enacted and enforced by polities. Those criminal laws that are needed to achieve peace and form a justified polity will be part of the original social contract, and they will determine which limits on our natural liberty must be accepted as conditions of membership in the polity. Provided those laws are Pareto-superior to available alternatives (unrestrained freedom or alternative rules), they are justified.

Contractarianism is the view that restrictive or liberty-restraining norms (of which criminal laws are a paradigmatic but not exclusive type) are justified if those who are bound by them would rationally agree to be so bound. Persons in the 'circumstances of justice'²⁰ will rationally accept a system of norms provided it offers maximal benefits shared on terms that are fair. Applying contractarian reasoning to any given normative system requires evaluating its norms using what David Gauthier calls *the contractarian test*.

The contractarian test applied to a norm or set of norms is simply whether, were the persons within the scope of the norm or set of norms to be in a position to determine their conditions of interaction, it would then make sense for each of them, deliberating rationally, to agree on such conditions, and to include the norm or set of norms among the agreed conditions. Social institutions and practices, the opportunities and limitations, the rights and duties, that they create are thus seen as justifiable in terms of a hypothetical agreement, and indeed only in such terms. Without supposing that the appeal to hypothetical agreement is widely available for justificatory purposes, the contractarian maintains that it offers the best possible defense of a system that normatively regulates the interactions of individuals when some such system would be beneficial to everyone, but any actual system must largely pre-exist the real persons who enjoy its benefits and fall under its constraints.²¹

States should adopt only criminal laws that pass the contractarian test. For the core of the criminal law, which specifies those limits on liberty we must accept as the

¹⁹ Named after the Italian economist Vilfredo Pareto, Pareto superiority is a comparative relation that holds between two state of affairs under the following conditions: state A is superior to state B iff at least one person is better off in A than in B and no one is worse off in B than in A. Expressed as a preference relation, A is Pareto superior to B iff at least one person prefers A to B and no one prefers B to A.

²⁰ The phrase refers to a set of circumstances articulated variously by Hobbes, Locke, Hume, Rousseau, Rawls, and Gauthier. The 'circumstances of justice' are a combination of external features of the environment and internal forces of psychology that make cooperation both potentially beneficial and risky for each; they are the conditions under which mutually beneficial cooperation is both possible and rational but difficult to achieve and maintain.

²¹ Gauthier 1997, pp. 132-133.

condition of membership in political society, we should demand of its provisions that they could reasonably be agreed to by members of society reasoning *ex ante*, as terms of peace and stable, ongoing cooperation. Such rules will prohibit conduct that is *mala in se*. Criminal law will prohibit (or require) a determinate range of conduct, specifically, conduct that cannot be permitted to anyone *qua* member of the polity if one is to create and sustain a political community that can be justified under the contractarian test.

We don't need to invoke controversial assumptions about human nature, human circumstances, a state of nature, or original position to say that there are some actions that must be prohibited if a group of people are to create a political society that promises benefit to all *ex ante* on terms that are mutually acceptable, and that we can discover what they are. As Hobbes said, we must be willing to lay down some of our natural liberty if we are to achieve peace and create a polity for mutual advantage. A proposed society in which all members would retain (or be granted) the right to do anything to others they thought useful to themselves (including the right to engage in pre-emptive violence, or violence for mere "delectation only"²²), would be a 'society' offering no potential benefits to individuals that they would not enjoy without any polity at all. Likewise, a proposed society in which some individual or group retains (or is granted) the right to appropriate the property of others or to inflict violence upon others, while the others in turn would surrender (or be denied) the right to do the same, would not promise mutual advantage *ex ante*, and thus could not be agreed to by the group that would be disadvantaged under that assignment of rights.²³ Joining a polity is a sensible thing to do only if everyone agrees to a set of rules limiting natural liberty, and those rules impose reciprocal and common restraints on the liberty of all. These restraints are the core of criminal law. Violation of these norms is *mala in se*.

Mala in se offences are violations of the basic terms of the social contract, that is, the agreement to join a common polity committed to mutual benefit. They prohibit conduct that *cannot be allowed in any society* committed to cooperation on terms each could rationally accept. *Mala in se* is conduct that no self-respecting individual could agree to suffer, and conduct no one genuinely seeking peace could insist on retaining (or being granted) the right to perform. If such conduct were freely allowed within a group of people, that fact would *ipso facto* indicate that the group does not form a polity. If it were allowed only to some, against others, within a group, that fact would *ipso facto* indicate that the society is not one committed to mutually beneficial cooperation on terms acceptable to all. In either case, there would be no justifiable polity. We assess the justice of various penal codes, our own and others', by determining whether any specific code contains all the *mala in se* offences it should (all the core crimes against persons, property, and state institutions are prohibited in the code), and investigation and prosecution of those offences is conducted equitably (the 'no Jim Crow' restraint). *Mala in se*, then, is conduct that must be prohibited in any society united for mutual benefit on terms that are fair to all.

The Public Wrongfulness of Conduct *Mala in se*

22 Hobbes 1651, Part I, Chapter 13, p. 184.

23 Rational choice contractarians like Gauthier and me don't impose any 'veil of ignorance' on our hypothetical contractors; everyone knows whether she is in privileged or disadvantaged position in this thought experiment. The 'veil of ignorance' was a fairness-securing device in Rawls 1971.

I have elsewhere defended the view that conduct having this character is *wrongful* in the way necessary to justify its criminalization.²⁴ I was led to this conclusion because there seems something absolutely right about the claim (made by such luminaries of the philosophy of criminal law as Duff, Husak, Moore, as well as Andrew Simester and Andreas von Hirsch) that conduct must be wrongful if it is properly criminalizable; conduct that is not wrong ought not to be criminalized. That *mala in se* conduct cannot be permitted in a society designed to enable mutually beneficial cooperation, and so cannot be accepted as a norm of the social contract, is my explanation of its wrongfulness.

Because this is a political rather than a moral conception of *wrongfulness*, positing it as a necessary condition of just criminalization allows me to avoid the problem that theorists utilizing the moral approach have had to confront: how to determine which moral wrongs are properly criminalizable (again, assuming that not every kind of wrongdoing is properly responded to through criminal law). As mentioned in the Introduction, theorists who insist that only morally wrongful conduct is criminalizable must explain why some kinds of wrongdoing should be criminalized while some other kinds of wrongdoing should not be criminalized. Although each of the theorists named above gives a different answer to this question, the common strategy (adopted by all but Moore, who reaches the same result via a different route) is to distinguish 'public wrongs' from the rest, and to hold that only public wrongs are properly criminalizable.

What makes violations of the social contract—*mala in se* conduct as I characterize it—*public* wrongs rather than *private* wrongs? The answer comes in three parts. First, violations of the set of prohibitions that must be adopted if a group of people are to form a polity that can be justified under the contractarian test are public wrongs because they are incompatible with society being for mutual benefit. A person who engages in such conduct and would allow others to act similarly simply rejects the conditions that are necessary to form a polity governed by public reason.²⁵ Insofar as our imagined person thus challenges the foundations of political community, *his wrong is one that impacts the interests of all his fellows*, since all must expect to do worse in the absence of mutual restraints than they would in a justified political community. That is one sense in which his wrong is public.

Second, conduct that cannot be allowed in any society united for mutual advantage is a *public* wrong in the sense that it *calls for a public response*. Consider the use of violence in society. The first substantive rule of the social contract would be a prohibition on the free use of violence against fellow members of the polity. No one could reasonably expect to flourish unless widespread security from violence is achieved, and everyone expects to benefit more from a norm of mutual restraint of violence than any other viable rule, or no rule at all. Suppose now that one member inflicts violence upon another in a way that is contrary to the core norms of the social contract. The victim of such an attack would, then, have reason to distrust his attacker; there is now good reason for him to doubt that his attacker is committed to interacting on terms each can rationally accept. But, if his fellows, those with whom he has joined

²⁴ Dimock 2014.

²⁵ I'll explain how I understand 'public reason' shortly, but just note that I do not mean by the term Rawlsian 'public reasons,' as invoked by Flanders in this issue.

in forming a society committed to mutual benefit, did nothing in response to his victimization, he would also have reason to distrust them and their commitment to the mutuality that is at the heart of the social contract. This point is most clearly seen, perhaps, by considering the treatment of reviled minorities who have suffered widespread injustice within their own societies. I criticize this phenomenon under the heading of a 'no Jim Crow' restraint; a contemporary example can be seen in the 'Black Lives Matter' campaign, which protests, *inter alia*, the unequal enforcement of the core penal rules against violence in North America along racial lines.²⁶

When young black men are killed by white citizens or white police officers, and the public does not protest and condemn the conduct, young black men have reason to doubt that society really is "a joint venture for mutual advantage" (to quote Rawls's well-worn but still apt phrase).²⁷ Likewise, if men can inflict sexual violence upon women and girls with impunity, without facing serious negative public responses, women and girls have good reason to distrust their compatriots and not just their assailants. They have good reason to think that public officials are lying (or at least so woefully ignorant as to border on willful blindness) when they say they are committed to mutual benefit for all. The examples could, sadly, be expanded. But the point should now be clear: if we are a society united for mutual benefit, we must not only adopt public rules that condemn conduct that would victimize some in ways they could not reasonably accept *ex ante*, but when those rules are violated, we must respond with public denunciation and punishment. This is necessary not just to re-establish feelings of inclusion and safety for victims of violence (subjective feelings of security), but also, and even more importantly, for continued commitment to the norms of mutual restraint to be fully *rational*. Public toleration of, or acquiescence in, the victimization of any member of the polity undermines the rationality of the political commitment that makes justified political community possible, for both victims and others.

The third of the three senses²⁸ in which violations of the basic terms of the social contract are *public* wrongs is that each person can demand of all the rest that they refrain from such conduct just in virtue of their shared citizenship (or ongoing membership in the polity). That is, we can demand that others refrain from *mala in se* conduct just in virtue of the fact that we are members of the same polity; they are *demands we make as citizens to our fellow citizens*. We are enjoined from committing *mala in se* conduct just as citizens; there is no other description that must be true of us in virtue of which the norms apply to us. And we are enjoined against committing *mala in se* conduct against, or with respect to, others who we may identify just by their fellow citizenship or membership in the polity. The core criminal prohibitions relate persons *qua* citizen to persons *qua* citizen.²⁹ In committing to form a polity on terms our fellows

26 The importance of trust was the topic of Dimock 1997.

27 Rawls 1971, p. 4.

28 I don't claim that these three are the only ways in which the publicness of wrongs can be established; on the contrary, I believe there is much more to say on how to distinguish public from non-public wrongs within political theory.

29 Duff challenged a claim like this that I made in my plenary presentation to the conference that concluded the "Criminalization Project" in Stirling, Scotland in 2011. He says we have duties to refrain from violence in virtue of our shared humanity, rather than our shared citizenship. But contractarians don't think we have extensive duties to others outside of mutually beneficial cooperative practices. Thus, while Duff thinks I have a duty to refrain from using violence against a stranger I just happen upon while hiking

can accept, we agree to replace our individual reason with public reason, and to be guided by the latter. Criminal law is an expression of public reason when it prohibits conduct that is incompatible with society meeting the contractarian test. Violating it is thus a public wrong.

The original social contract, then, includes agreement on the prohibition of *mala in se* conduct and the public condemnation of such conduct via core criminal prohibitions. The social contract consists of the norms by which a polity constitutes itself as a unity, in the face of ongoing reasonable value pluralism, committed to mutually beneficial cooperation on fair terms. In order to achieve our purposes in entering into political society together, we must secure the conditions of social cooperation. This requires a general renunciation of violence against fellow members. Thus the varied forms of attack are rejected as options in future deliberation. It also requires a commitment to some form of property rights. And it requires that we erect governmental institutions capable of securing the interests of members in ways they could not without them. Supposing that the institutions we establish are acceptable because contributing to the common good, interference with them must be put off-limits. Crimes against the state and public institutions, as well as crimes against persons and property, form the common core of all justifiable penal codes. We must accept deliberative limitations in which these are categorically ruled out. That is the minimum commitment of membership, the price of admission.

The Canadian Criminal Code, being of relatively recent origin but informed by the centuries of common law that it incorporates, is but one of a large number of codes whose structure and history reflects this understanding of the role of criminal law among the foundational political structures of a polity. We find in its earliest incarnations exactly what we would expect to find if this contractarian story about criminal law were true. In addition to offences against persons and reputation and against property rights, we also find offences against public order and the administration of law and justice, fraudulent transactions, contracts and trade, and offences related to currency. Many of the offences involving public institutions are such that they cannot be committed prior to law, for it is only possible to commit treason or sedition, to hold an unlawful assembly, to counterfeit currency, to commit perjury, and the like, once the necessary public institutions have been established and the relevant laws enacted. Nonetheless, and this is the important point, the wrongfulness of such conduct can be established prior to the laws that create the specific offences. The wrongfulness of such conduct is pre-legal in the sense that it is established via traditional contractarian reasoning: in agreeing to form a polity for mutual flourishing, we must establish a state with a range of central political institutions, including but not limited to legal institutions. Once we have created a government, a court system, official currency, a communications system, international trade agreements, etc., conduct that interferes with the operations of those institutions is wrongful because it violates the agreement to form and live in a just state. In other

in the hills of Glen Coe, I think I have only one duty, namely, to seek peace with him if it is possible. Peace is possible only if we both agree to renounce violence; unless and until we agree to seek peace in our interactions, and so agree to accept limits on our natural freedom, I have no duty to refrain from violence. If, having come upon him suddenly in the hills, I extend my hand offering 'Peace?' and he refuses it, then I have no duty whatsoever to refrain from violence, should I judge it the best means to my own good. Here I suppose is the most minimal form of fellowship: that achieved by the mutual renunciation of violence, which places us outside the state of nature with respect to one another.

words, if our institutions are basically just (as determined by the contractarian test), then they make possible cooperative social practices that promise *ex ante* benefit to all and distribute those benefits fairly. Each individual has a duty to accept such arrangements when offered, as they are the embodiment of an offer of mutually beneficial peace with one's fellows. Conduct contrary to public order, corruption of official documents or currency, bribery of state officials, and conduct designed to undermine the administration of law and justice are wrongful because they violate basic terms of the social contract; they are violations of the terms of membership in the polity.

Please note that this does not mean that all *mala in se* crimes are wrong for the same reason, namely that they are contrary to our agreements or constitute a form of advantage taking or free riding on the law-abidingness of others.³⁰ This would be utterly implausible; crimes such as assault, kidnapping, murder and rape, as well as counterfeiting, stealing, etc. are wrong because they inflict unjustified harm or violate the rights of their victims. But which rights people have is itself determined by the social contract. Thus all violations of *mala in se* offences have as one of their wrong-making features the fact that they violate necessary terms of the social contract. This is what makes them *public* wrongs and not just violations of rights that could, at least in principle, be fully compensated for using private law (using tort or contract law, for example). They are the rightful concern of the offenders' fellows and not just their victims because they involve conduct that must be prohibited if the resulting criminal code is to be justifiable. Their wrongfulness is thus pre-legal, even when the specific offences can only be committed given the satisfaction of prior legal conditions (like the adoption of an official currency or the creation of a judicial branch of government). Criminalization doesn't *make mala in se* conduct wrong; it is wrong because it is intolerable to a group of people who want to live on acceptable terms with one another, and that's why it should be criminalized.³¹ That is the element of truth in the traditional understanding of *mala in se* conduct as wrong prior to and independently of law.

When the Creation of *Mala prohibita* Offences is Permissible

Let's now revisit *mala prohibita* offences and their standard characterization as conduct that is wrongful *because* it is prohibited. *Mala prohibita* is conduct that is not wrong prior to law or its prohibition in positive law. This suggests, to critics of *mala prohibita* crimes, that their wrongfulness must be *created* by the act of prohibition, by some kind of mysterious legislative fiat. For anyone who accepts the wrongfulness constraint on criminalization, *mala prohibita* crimes will seem deeply problematic. If the conduct targeted in a *malum prohibitum* offence is not wrongful prior to its criminalization, it seems it cannot be wrongful in the way needed for legitimate criminalization. A successful treatment of *mala prohibita* crimes will enable us to escape this tangle by identifying the conditions necessary for the legitimate adoption of *mala prohibita* offences. Though I cannot provide such an account here, I can briefly set the stage for the account to come.

30 Something like this criticism has been raised against me in Duff 2007, p. 52. Law-abidingness is the one exception to the claim that 'law does not create morality': the creation of law creates also the corresponding virtue of law-abidingness.

31 Duff 2002.

Justifying the use of *mala prohibita* crimes begins with recognition of the fact that peace and cooperative social conditions make possible an infinite array of new activities and practices, participation in which is valued by some members of society. Cooperation makes possible the realization of benefits that would be impossible to achieve without it. The social contract sets the terms of peace and cooperation among citizens, and violating those terms is *mala in se*. But within ongoing societies conditions can be expected to arise that make it reasonable for groups of individuals to accept additional constraints on their conduct (by, for example, granting to certain others new rights imposing corresponding duties upon themselves) because doing so is necessary to realize the benefits or to secure the value the practice promises participants. There will be many conditions on the use of criminal law to secure conformity with the rights and duties such practices require: practices must have sufficient value to participants that they remain choice-worthy, even when the costs of criminalizing breach of the duties internal to them are factored into assessments of their utility; the value of the practice cannot be realized (to an acceptable degree or at all) unless participants commit to this set of rights and duties enforced by criminal law; the conduct in question relates participants to one another in ways more specific than mere co-citizenship (as parent-child, employer-employee, public official-citizen, financial advisor-client, etc.); and the practice generates temptations for participants to violate the rules even while they hope that others will conform to them. This is by no means an exhaustive list. My general point can now be made, however: within ongoing reasonably just societies, particular practices, institutions, organizations, and activities can arise that promise benefits to their participants but require constraints on the conduct of each in conformity with a set of rights and duties if those benefits are to be realized. Violating those rights and duties can then be judged wrongful, even though the conduct causing or constituting such violations would not have been pre-legally wrong or wrong independently of law.

Consider, by way of illustration, the *malum prohibitum* called ‘insider trading.’ Insider trading occurs when one person provides another person with information about a publicly traded financial instrument like stocks and bonds, when the information shared is not publicly available and having it allows the person receiving it to profit from it. On its face, this seems like morally innocent conduct. There is generally nothing wrong with a person truthfully telling a friend about a good investment opportunity, and nothing wrong with making investment decisions on the basis of whatever relevant information one has, including credible advice from one’s friends.³² And yet such conduct is criminalized. If conveying information or investing in such circumstances is wrongful, it looks like it’s wrongful only *malum prohibitum*. Neither the conduct of the friend who discloses the information nor the action of the person who makes specific investments on the basis of it seems to meet the test of *malum in se* as I have drawn it: societies need not criminalize insider trading in order to form a justifiable polity. It might, though, be permissible for them to do so. Supposing that having public markets in such financial products is beneficial to the participants and that their integrity depends upon their products being priced according to principles of a free and competitive market, conduct that knowingly undermines the conditions of freedom and competitiveness is wrongful. Persons with insider knowledge (information that is unavailable to other

³² See Green 2005 and 1997.

players in the market) gain an unfair advantage over others in the competitive environment. Thus the rule requiring persons not to engage in insider trading can be justified—the conduct it targets is wrongful in the right way—even though it was not *malum in se*. Given that the *mala in se / prohibita* dichotomy is supposed to be mutually exclusive and exhaustive, conduct that is not *malum in se* must be *malum prohibitum*. But, as with the previous examples, once we fully describe the situation, it becomes clear that the feature in virtue of which insider trading is wrongful—its unfairness—is pre-legally wrong. Thus we still don't have an example of conduct legitimately criminalizable the doing of which is wrongful only because it is prohibited. In every case, the wrongfulness must precede its prohibition. But that is compatible with treating insider trading as an action type constructed by law, an action type that is created for a purpose within a practice and intentionally brought forth with normative implications. If those implications are *criminal*, the decisions to criminalize can be assessed according to the contractarian test. There are no justified *mala prohibita* crimes understood in the traditional way, though there are likely many that pass the contractarian test and so are eligible for adoption within ongoing societies.

Conclusion

I have argued that the traditional distinction between *mala in se* and *mala prohibita* conduct should be rejected, but that there is an alternative characterization of it that might play the same role in jurisprudential thought. Instead of sorting crimes according to whether the wrongs they target pre-date their prohibition, I suggest we distinguish between wrongs legitimate societies *must* criminalize and those they *may but need not* criminalize. *Mala in se* are wrongs no society that purports to be for the mutual advantage of its members can allow and include attacks on the person, property and reputation of our fellows, attacks on or misuse of public institutions, crimes against the state and against the administration of justice, and crimes of endangerment when the targeted conduct falls below the level of care demanded of all in the terms of our social contract. *Mala prohibita*, by contrast, are those wrongs that offend against rights and duties assumed by participants within valuable social practices, when participants are tempted to violate the rights of others or to neglect their own duties and doing so would undermine the practice or deprive it of its value. Specifying exactly what conditions must be met before any proposed *malum prohibitum* offence could be justly adopted is the next task in the development of this view.

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