

# NOTES

## ELIMINATING THE (ABSURD) DISTINCTION BETWEEN *MALUM IN SE* AND *MALUM PROHIBITUM* CRIMES

### I. INTRODUCTION

In the mythical United States state of Matadonia, anti-abortion<sup>1</sup> groups have succeeded in passing a law that prohibits all abortions except those necessary to save the life of the mother.<sup>2</sup> The statute punishes performing physicians as well as “persons who undergo an abortion procedure without life-saving necessity.” The statute does not explicitly require that the mother know the procedure is life-saving; the statute only extends to those women who *undergo* abortions.<sup>3</sup>

Jill Doe,<sup>4</sup> a citizen of Matadonia, is pregnant as the result of a traumatic rape.<sup>5</sup> Two months after the rape, and after confirming pregnancy, she visits Physician. Physician, a pro-abortion-rights doctor who opposed the passage of the Matadonia anti-abortion statute, feels that delivery of a child that is the result of such a traumatic experience may be detrimental to the psychological well-being of both mother and child. Therefore, unbeknownst to Ms. Doe, he falsifies the medical report so that abortion of the two-month-old fetus appears necessary to preserve the life of Ms. Doe. Upon Physician’s recommendation, and believing her life to be in danger, Ms. Doe undergoes the abortion procedure.

Assuming legal authorities<sup>6</sup> discover the situation and decide to prosecute Ms. Doe, a key question of law will be whether *scienter*, or a defendant’s guilty knowledge as a predicate to criminal liability,<sup>7</sup> is

---

1. For purposes of clarity, this Note will use the terms “anti-abortion” and “pro-abortion-rights.” This terminology speaks directly to the issue at hand, abortion, and avoids using the politicized terms of the abortion debate, “pro-life” and “pro-choice.”

2. For purposes of this Note, assume that this law is valid under the United States Constitution.

3. Therefore, the statute avoids explicitly requiring *scienter* which is “used to signify the defendant’s guilty knowledge.” BLACK’S LAW DICTIONARY 1345 (6th ed. 1990).

4. Of course, all names and occurrences in this Note, unless documented, are fictitious.

5. The term “traumatic rape” may seem a redundancy, but the particularly severe nature of Ms. Roe’s rape contributes to Physician’s decision to falsify the medical report.

6. Here, “legal authorities” are those responsible for the daily execution of society’s laws, not those responsible for the creation of case law or law review articles.

7. See *supra* note 3.

required as an element of the offense. An important factor in determining whether *scienter* is required as an element in any given crime is whether the crime is classified as *malum in se* or *malum prohibitum*.<sup>8</sup> A crime is *malum in se* if it is intrinsically bad, evil, or morally wrong. A crime is *malum prohibitum* simply because society has labelled it as such, via statutory law.<sup>9</sup> Generally, *scienter* or intent is a required element of *malum in se* crimes but not *malum prohibitum* crimes. Defendants violating *malum prohibitum* crimes are strictly liable and violation equals guilt.<sup>10</sup>

Further assuming that *State v. Doe* goes to trial, another question may be whether Ms. Doe is entitled to trial by jury. Among other factors, such as the severity of the potential sentence,<sup>11</sup> determining whether the offense

---

8. See RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE 536 (7th ed. 1989); see also *United States v. American Cyanamid Co.*, 354 F. Supp. 1202, 1205 (S.D.N.Y. 1973) (finding that *scienter* is not required as an element of a *malum prohibitum* crime); *Emory v. State*, 647 A.2d 1243, 1254 (Md. Ct. Spec. App. 1994) (stating that intent is a formal element in every crime except *malum prohibitum* crimes).

9. For a distinct black-letter definition of *malum in se* and *malum prohibitum*, see *infra* notes 24 and 25 and accompanying text.

10. *United States v. American Cyanamid Co.*, 354 F. Supp. 1202, 1205 (S.D.N.Y. 1973) (holding that "*scienter* is not required [and that] [t]he offense charged is *malum prohibitum*."). See also *United States v. Balint*, 258 U.S. 250, 251-52 (1922); *United States v. Interlake Steel Corp.*, 297 F. Supp. 912, 915 (N.D. Ill. 1969); *Whitlock v. State*, 216 S.W.2d 22, 24 (Tenn. 1948); *State v. Smith*, 562 P.2d 659, 661 (Wash. Ct. App. 1977); *Emory v. State*, 647 A.2d 1243, 1254 (Md. Ct. Spec. App. 1994). See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 118 (1987).

Perhaps the seminal case discussing a *scienter* requirement as a criminal element is *Morissette v. United States*, 342 U.S. 246 (1952). In *Morissette*, the court convicted the defendant of conversion. The defendant gathered discarded bomb casings, which belonged to the federal government, and sold them as scrap metal. *Id.* at 247-48. The defendant thought the federal government had abandoned the casings; therefore, he claimed he did not possess criminal intent. *Id.* at 248-49. The Court, however, held that mere omission of intent from a statute does not mean that a court cannot require intent before finding a conviction. *Id.* at 263. The consequence is that courts still must analyze a crime's nature, perhaps including a *malum in se/malum prohibitum* analysis, to determine whether *scienter* may be required as an element of the offense.

11. Whether the crime is a "petty crime" determines whether a defendant may be denied a jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968). Petty crimes may be prosecuted without a jury trial. *Id.* The bright-line, threshold test is that no offense with a punishment of greater than six months imprisonment may be considered "petty." *Baldwin v. New York*, 399 U.S. 66, 69 (1970). If a case does not meet the bright-line test, the court must consider the seriousness of the offense, indicated by its intrinsic nature and the maximum potential penalty. *United States v. Jenkins*, 780 F.2d 472, 473-74 (4th Cir. 1986). See also *Parham v. Municipal Court for Sioux Falls*, 199 N.W.2d 501, 504 (S.D. 1972). Finally, in determining the intrinsic nature of an offense, the main analysis is whether the offense is *malum in se* or *malum prohibitum*. *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930).

For a discussion opposing strict application of the six-month petty crime rule, see *Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989). In *Blanton*, Justice Marshall wrote that "an offense carrying a maximum prison term of six months or less [does not] automatically qualify[y] as a 'petty' offense . . . ." *Id.* at 543.

is *malum in se* or *malum prohibitum* will help determine whether Ms. Doe is entitled to a jury trial.<sup>12</sup> If a crime is labelled "*malum in se*" it is usually removed from the "petty crimes" category.<sup>13</sup> Such crimes require a jury trial.

Doe's case exemplifies the vitality of the *malum in se/malum prohibitum* distinction in today's legal world. In the instant case, examine your own feelings.<sup>14</sup> Is undergoing a non-medically-necessary abortion an intrinsically immoral act? Is it a morally blameless act? Is it somewhere in the middle? From where do your feelings originate? Religious teachings? Empathy (with the mother)? Empathy (with the fetus)? Sexual or gender-based politics?

The American population is far from reaching a consensus on this issue.<sup>15</sup> Therefore, having a judge determine whether undergoing an

For criticism of the six-month petty crime rule, see *Cheff v. Schnackenberg*, 384 U.S. 373, 386-91 (1966) (Douglas, J., dissenting). Justice Douglas cites the *malum in se/malum prohibitum* distinction as a relevant factor in a "petty crime" determination. *Id.* at 390.

12. See *Colts*, 282 U.S. at 73 (finding the *malum in se/malum prohibitum* dichotomy key in identifying a petty crime); see also *Landry v. Hoepfner*, 818 F.2d 1169, 1176 (5th Cir. 1987) (holding that DWI is a *malum in se* crime requiring jury trial); *United States v. Stewart*, 568 F.2d 501, 502 (6th Cir. 1978) (citing *Colts* in determining that the petty crime of assault does not require a jury trial); *United States v. Sanchez-Meza*, 547 F.2d 461, 464 (9th Cir. 1976) (concluding "that appellant was entitled to a jury trial, first, because the crime with which he was charged was an indictable and serious offense at common law, and second, because the crime itself is morally offensive and *malum in se*"); *United States v. Morrison*, 425 F. Supp. 1235, 1239 (D. Md. 1977) (finding that speeding is a *malum prohibitum* activity, therefore it qualifies as a petty crime, and therefore requires no jury trial); Douglas E. Lahammer, *The Federal Constitutional Right to Trial for the Offense of Driving While Intoxicated*, 73 MINN. L. REV. 122, 130 (1988) ("If a court determines that an offense is inherently wrong or *malum in se*, the defendant may invoke the right to a jury trial.").

13. See *Duncan*, 391 U.S. at 158; *Baldwin*, 399 U.S. at 69.

14. Whether one believes in a collective morality or not, one's individual morality is important in examining any question of law and morality. If one believes in a collective morality, then the building blocks are each citizen's sense of morality. If one does not believe in collective/universal morality, then one's personal morality may be the sole guide for moral actions. This is not to say that individual morality is the only guide or check on behavior. After all, the basic premise of this Note is that courts should not consider issues of morality when applying the law. Once a legislature prohibits or requires behavior via "law," the legal system provides society's main checks on this behavior. Others may include ostracism, unemployment, low societal status, etc. One of the most common checks may be religious teachings, such as a belief in eternal damnation, or a belief in returning as a lower form of being. However, the judiciary should only be concerned with legal aspects of behavior, not the moral aspects.

15. Opinion polls show that the American people are evenly split on the moral issue of abortion. A recent Gallup poll shows that 53 percent of the public opposed Republican proposals to restrict abortion access, while 44 percent of the public favored such restrictions. Mary Otto, *Abortion Foes Look to Congress[:] GOP May Try for Change in Small Steps*, DET. FREE PRESS, Dec. 30, 1994, at 1A. Of course, polls on abortion tend to yield varying and contradictory results. One writer cited polls that

abortion under these circumstances is *malum in se* or *malum prohibitum* necessarily entails interjecting a judge's personal morality into law—with real consequences. Whichever outcome the judge reaches will conflict with the views of roughly half of the American people.<sup>16</sup>

This Note proposes the elimination of judicial authority to determine whether a crime is *malum in se* or *malum prohibitum*. Courts should simply follow legislative direction when applying criminal law. If the denoted crime requires *scienter*, the legislature, federal or state, should say so in the statute.<sup>17</sup> If the question whether a jury trial is warranted in a particular case arises, the factors adjudging a crime's severity can still be utilized,<sup>18</sup> while eliminating the *malum in se/malum prohibitum* dichotomy. In short, the court's moral judgment should be removed from its application of criminal law. Instead, the popularly-elected legislature should make such judgments.<sup>19</sup> Under this approach, the decisions concerning the regulation of crimes will remain in the legislative body, the branch of government designed to be most responsive to the will of the people.<sup>20</sup>

Because the statute does not require any criminal intent, Ms. Doe's actions would likely lead to criminal liability. Of course, prosecutorial

---

indicate 75 percent of Americans favor keeping abortion legal, while 67 percent believe most abortions are immoral. Karen Schnieder, *Searching for Common Ground*, DET. FREE PRESS, Jan. 17, 1993, at 1F. For an excellent newspaper article examining Americans' views on the legality and morality of abortion, see Amy Wilson, *Numerical Conceptions[:] Why do Polls About Abortion Have Such Different Results?*, DET. FREE PRESS, Feb. 18, 1992, at 1C. Wilson reports that one poll shows that 68 percent of the public favors keeping abortion legal, while another shows that 53 percent are against abortion. *Id.* In any event, it is safe to assume that the morality of abortion remains a divisive issue in America.

16. See *supra* note 15.

17. The legislative practice of explicitly requiring intent as an element of a crime is quite prevalent. A multitude of murder statutes require "premeditation," "malice aforethought" or "purposeful" action. See, e.g., MO. REV. STAT. § 565.001 (Vernon 1978) (defining capital murder as killing "unlawfully, willfully, knowingly, deliberately, and with premeditation"); S.C. CODE ANN. § 16-3-10 (Law Co-op. 1985) (stating "'murder' is the killing of any person with malice aforethought"); N.J. STAT. ANN. § 2C:11-3 (West 1982) (declaring that murder consists of "purposely" or "knowingly" causing death); see also *Morissette*, 342 U.S. at 263.

18. See *supra* note 11.

19. For an in-depth analysis of the ramifications and justifications of leaving such judgments to the legislature, see *infra* notes 196-212 and accompanying text.

20. For an affirmation of people's ability to affect the composition and decisions of legislatures, observe the 1994 House and Senate election results. For the first time since the mid-1950s, the Republican party gained control of the United States House of Representatives. Republicans also regained control of the Senate after being out of power since the mid-1980s, and lost not a *single* incumbent House, Senate, or governor's race. See, e.g., *U.S. Senate Election 1994*, THE BALT. SUN, Nov. 10, 1994, at 16A. This type of control over the legislative branch allows people to express their will by electing representatives—an ability which, in large part, does not extend to control over the judicial branch.

discretion or jury nullification<sup>21</sup> may preclude her liability. Additionally, other branches of government may give Ms. Doe remedial help. The executive branch, usually the governor, may grant clemency, via pardon or commutation.<sup>22</sup> The legislature may feel that it should have included criminal intent as an element of the offense, revisit the issue, and revise the statute accordingly.<sup>23</sup> Ideally, the legislature will learn if repeated revisions are necessary, and decide the question of whether intent should be required as an element of any particular crime when drafting the original legislation.

## II. THE DISTINCTION

*Malum in se*: "A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. . . . An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by

---

21. Assuming that the crime is not "petty," see *supra* note 11, the court would mandate a jury trial. With a jury trial, the possibility of jury nullification arises, whereby the jury may decide in favor of a criminal defendant regardless of the law or facts involved. The usual justification for allowing jury nullification is that the jury interposes the conscience of the community between the calculus of the law and the actions of any particular defendant. For an expansion on the justifications and machinations of jury nullification, see Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281 (1993).

22. Clemency, pardon, and commutation are disparate concepts, administered differently in different states. Clemency describes the broadest of the three acts. It is a state executive act that reduces or eliminates an individual's criminal penalty. See BLACK'S LAW DICTIONARY 252 (6th ed. 1990). According to one author, thirty-one states vest full clemency power in the governor, ten place the power in a specially-appointed board, seven have a board-governor combination, and two (California and Rhode Island) have governor-based systems with special requirements. SAMUEL P. STAFFORD II, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE I (1977).

Pardon may be viewed as a subset of clemency, and occurs when a state's executive branch releases an individual from the entire punishment and reinstates his civil liberties. BLACK'S LAW DICTIONARY 1113 (6th ed. 1990). However, one author has recognized that pardons need not be "full," but may be partial, relieving a defendant of only some legal consequences. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 5 (1989).

Commutation, another subset of clemency, may be distinguished from pardon in that commutation usually substitutes "a lesser for a more severe sentence," and furthermore, it does not restore a defendant's civil liberties, which courts revoke upon criminal conviction. *Id.*

The state's executive branch (or the federal executive branch in the case of a conviction for a federal crime, see BLACK'S LAW DICTIONARY 1113 (6th ed. 1990)) may utilize the various forms of clemency to mitigate the harshness or perceived injustice of any particular criminal conviction. Therefore, the existence of these executive powers provides an avenue to mitigate the effects of a legislature's faulty statutory drafting. For example, the legislature may have neglected to require, or consciously omitted, *scienter* as an element of an offense where the populace supports such a requirement.

23. For a general discussion of the explicit inclusion of intent as an element of a statutory offense, see *supra* note 10.

the law of the state."<sup>24</sup>

*Malum prohibitum*: "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; an act involving an illegality resulting from positive law."<sup>25</sup>

### III. HISTORY OF THE DISTINCTION

The first known judicial recognition of a *malum in se/malum prohibitum* distinction occurred in England in the late 1400s.<sup>26</sup> The *malum in se/malum prohibitum* dichotomy was originally employed as an adjunct theory to the divine right of kings<sup>27</sup> because it separated crimes which the king could grant leave to commit, from those for which he had no such power.<sup>28</sup> Therefore, at least theoretically, *malum in se* crimes derive from a source higher than the king. Since the king was God's representative on Earth,<sup>29</sup> the logical source of *malum in se* crimes would be God Him-

24. BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

25. *Id.* at 960.

26. ROLLINS M. PERKINS, CRIMINAL LAW 784 (2d ed. 1969) (citing Y. B. Mich. 11 Hen. VII, f. 11, pl. 35 (1496)). See Note, *The Distinction Between Mala Prohibita and Mala in Se in Criminal Law*, 30 COLUM. L. REV. 74 (1930). Although unsigned, this work was written by Herbert Wechsler, a prominent professor for many years at Columbia University. During his career Mr. Wechsler wrote the textbook CRIMINAL LAW AND ITS ADMINISTRATION. For over twenty years, Professor Wechsler headed the American Law Institute and took part in publishing the ALI Restatements. See Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 868 (1993). Mr. Wechsler's article is a helpful source for information on the historical foundation of the *malum in se/malum prohibitum* distinction. See also PERKINS, at 784.

Although the first explicit appearance of the distinction occurs in the 1496 decision, some commentators believe the distinction has much deeper roots in jurisprudential thought. See, e.g., JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 338 (2d ed. 1947) ("The distinction *mala in se-mala prohibita* reflects an ancient and revered theory that is much older than Fineux [author of the 1496 decision] and Coke.")

27. The Christian theory on the divine right of kings held that the monarch was the representative, or liaison, of God for God's people here on Earth. Therefore, the monarch was not only the sovereign of his political area, but also the administrative head of his particular "church." See generally THE COLUMBIA HISTORY OF THE WORLD 372-73 (John A. Garraty & Peter Gay, eds., 1972).

28. As stated in one treatise:

Whether any Offence can be pardoned before it is committed: It seems agreed, That the King can by no previous License, Pardon, or Dispensation whatsoever, make an Offence punishable which is *malum in se*, i.e. unlawful in itself, as being either against the law of Nature, or so far against the Public Good, as to be indictable at Common Law. For a Grant of this Kind tending to encourage the Doing of Evil, which it is the Chief End of Government to prevent, is plainly against Reason, and the Common Good, and therefore void.

WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 389 (Arno Press ed. 1972) (1721).

29. See *supra* note 27.

self.<sup>30</sup> In fact, during the 15th and 16th centuries, persons also referred to higher law as “eternal law,” “law of nature,” and “law of God.”<sup>31</sup>

From its inception in 1496 through the next two centuries, the *malum in se/malum prohibitum* doctrine denoted those crimes pardonable prior to commission,<sup>32</sup> and also determined whether an accidental killing constituted murder, manslaughter, or sheer accident.<sup>33</sup> If the accidental killing occurred during the commission of a *malum in se* act, it was murder. If it occurred during the commission of a *malum prohibitum* act, it was manslaughter. If the killing was purely accidental, then it was not a criminal act at all.<sup>34</sup> Presumably, the moral opprobrium of the original *malum in se* act carries over to the accidental killing. Because the actor was already doing something wrong, the accidental killing is murder.

In the late 1760s, Sir William Blackstone published what may be the most widely-read legal publication ever, his famous COMMENTARIES.<sup>35</sup> The COMMENTARIES entrenched the *malum in se/malum prohibitum* distinction firmly into English jurisprudence, with these words:

[D]ivine or natural duties [do not] receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior<sup>36</sup> legislature. For that legislature in all these cases acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.<sup>37</sup>

Thus did Blackstone denote *malum in se* crimes as being extra-legal, in that

30. Or Herself.

31. For a discussion of this distinction, see Note, *supra* note 26, at 75.

32. See *supra* note 28.

33. See PERKINS, *supra* note 26, at 785.

34. *Id.* See also *People v. Cameron*, 30 Cal. App. 4th 591, 604, 26 Cal. Rptr. 2d 656, 663 (Cal. Ct. App. 1994) (“at common law any killing caused by the commission of a felony *malum in se* was murder”). For a widely-cited early twentieth century application of this doctrine, see *State v. Horton*, 51 S.E. 945 (1905). See also 40 AM. JUR. 2D *Homicide* § 77 (1968).

35. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (15th ed. 1809) [hereinafter “COMMENTARIES”]. Although the original COMMENTARIES were published between 1765 and 1769, see THE COLLECTED WORKS OF JEREMY BENTHAM XIX, (J. H. Burns & H. L. A. Hart, eds., 1977), the 1809 edition was used to research this Note.

36. Here Blackstone means inferior to God and the law of God.

37. I COMMENTARIES, *supra* note 35, at 54.

legislative pronouncements have no effect on whether these acts are wrong. Owing to their nature, *malum in se* acts are inherently wrong.

It did not take long for another eminent legal commentator, Jeremy Bentham, to answer Blackstone's COMMENTARIES. In the mid-1770s Bentham wrote A COMMENT ON THE COMMENTARIES,<sup>38</sup> in which he stated:

[Blackstone's presentation of *mala in se*] is the first occasion of our hearing of the acute distinction between *mala in se*, and *mala prohibita*: which being so shrewd, and sounding so pretty, and being in Latin, has no sort of occasion to have any meaning to it: accordingly it has none.<sup>39</sup>

Thus the battle commenced—the battle between those who believe in the self-evident, intrinsically wrong criminal activity, and those who believe that any distinction between intrinsically wrong criminal activity and statutorily prohibited criminal activity has “no meaning.”<sup>40</sup> Bentham also targets a contradiction in Blackstone's COMMENTARIES, namely that Blackstone treated theft as *malum in se* in one section, and *malum prohibitum* in another.<sup>41</sup>

During the period of Blackstone's and Bentham's writing, the *malum in se/malum prohibitum* doctrine made its way to the United States<sup>42</sup> via the importation of British common law.<sup>43</sup> In large measure, American courts interpreted the distinction as coterminous with the distinction between common law and statutory law.<sup>44</sup> Since statutory law began to replace common law as the basis for criminal prosecution,<sup>45</sup> the importance of the

38. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES (1776), reprinted in COLLECTED WORKS OF JEREMY BENTHAM, at 3, 63 (J. H. Burns & H. L. A. Hart, eds., 1977).

39. *Id.* at 63. See also Nancy Travis Wolfe, *Mala in Se: A Disappearing Doctrine?*, 19 CRIMINOLOGY 131, 141 (1981).

40. See *supra* notes 38 and 39. For a more in-depth discussion of the philosophical sources and criticisms of the *malum in se/malum prohibitum* doctrine, including additional thoughts of Bentham and Hart, see *infra* notes 62-87 and accompanying text.

41. BENTHAM, *supra* note 38, at 63-64.

42. An early American case arising from events during the Revolutionary War held that prisoners of war could be tried for murder in the country where the murder occurred because murder was *malum in se*. *People v. M'Gregory*, 14 Mass. 499 (1780).

43. Various states utilized the British common law in forming their own law in the 1600s and 1700s. See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 45 (1985).

44. See *Magnolia Pipe Line Co. v. State*, 243 P.2d 369, 380-81 (Okla. Crim. App. 1952) (stating that “most all of the offenses at common law” were *malum in se* crimes); *Hildreth v. State*, 223 S.W.2d 757, 758 (Ark. 1949) (finding that *mala in se* crimes are robbery, arson, murder, manslaughter, assault, and rape).

45. This phenomenon occurred largely during the post-Civil War period, when nascent penal codes enabled statutory codification of existing criminal law. See FRIEDMAN, *supra* note 43, at 292-93.

distinction has somewhat abated. However, even in statutory jurisdictions such as Matadonia,<sup>46</sup> the distinction remains. As the following chart shows, contemporary courts still recognize the *malum in se/malum prohibitum* distinction.<sup>47</sup>

NUMBER OF CASES MENTIONING:	1990s	1980 - present
<i>Malum in se</i> , in federal courts	39	119
<i>Malum in se</i> , in state courts	89	291
<i>Malum prohibitum</i> , in federal courts	28	90
<i>Malum prohibitum</i> , in state courts	89	295

More than two hundred years after Bentham's haughty dismissal of its rationale,<sup>48</sup> the distinction remains prominent in American criminal law.

In many modern cases and articles,<sup>49</sup> the phrase "moral turpitude" appears to serve the same function and have the same meaning as *malum in se*.<sup>50</sup> One judge even combined the two terms, calling statutory rape "moral turpitude per se."<sup>51</sup> No apparent difference exists between the two primary phrases. The newer phrase, "moral turpitude," appears to be an attempt to describe the same concept as *malum in se* without using the more tenuous terminology.<sup>52</sup> This Note uses the phrases synonymously.

46. See *supra* at notes 1-14 and accompanying text.

47. The search was conducted on WESTLAW on March 13, 1995. I searched the terms "*malum in se*" and "*malum prohibitum*" in the ALLFEDS and ALLSTATES databases under the following date restrictions: after December 31, 1989, and after December 31, 1979, yielding the eight figures reported in the text.

48. See *supra* notes 38-41 and accompanying text.

49. See, e.g., Hall v. Hall, 402 S.E.2d 726, 727 (Ga. 1991) (questioning "whether DUI is a crime of moral turpitude"); People v. Ferguson, 286 N.Y.S.2d 976, 981 (N.Y. Sup. Ct. 1968) (distinguishing crimes of moral turpitude from crimes *mala prohibita*); Orlando v. Robinson, 262 F.2d 850, 851 (7th Cir. 1959) ("All crimes *mala in se* involve moral turpitude."). But cf. Du Vall v. Board of Medical Examiners of Arizona, 66 P.2d 1026, 1030 (Ariz. 1937) ("Generally speaking, those crimes that are *malum in se* involve moral turpitude while those that are *malum prohibitum* do not. But this is not always so."). See also Note, *supra* note 26, at 84-86.

50. In fact, one dictionary equates the terms "moral turpitude" and "*malum in se*," referring to *malum prohibitum* as an antonym for both definitions. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1369, 1469 (1986).

51. Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976). For an analysis of whether statutory rape constitutes "moral turpitude per se," activity *malum in se*, or moral turpitude, see *infra* notes 151-66 and accompanying text.

52. See Note, *supra* note 26, at 86.

In addition to the impact on the element of *scienter*,<sup>53</sup> the right to trial by jury,<sup>54</sup> and the determination of culpability in an accidental homicide case,<sup>55</sup> the *malum in se/malum prohibitum* distinction continues to exist in many areas of criminal and tort law. In criminal law, deportation hearings often turn on whether alleged activity constitutes *malum in se* or *malum prohibitum* activity.<sup>56</sup> In tort law, *malum in se/malum prohibitum* analysis can affect third party liability. Respondeat superior liability may be easier to obtain when the offense complained of is *malum prohibitum* rather than *malum in se*.<sup>57</sup> In some jurisdictions one may not be able to obtain contribution from a joint tortfeasor when the original action is *malum in se*.<sup>58</sup> Similarly, a proprietor may be liable for third parties' acts if the acts are not *malum in se*.<sup>59</sup> In a final analogous situation, one may be responsible for anticipating third parties' intervening *malum prohibitum* actions but not their *malum in se* actions.<sup>60</sup>

Today the distinction may be utilized in several areas of law.<sup>61</sup> An examination of the distinction must begin with an analysis of its philosophical underpinnings. We turn now to some scholarly jurisprudence.

#### IV. PHILOSOPHY/POLITICS OF THE DISTINCTION

The debate over the validity of the *malum in se/malum prohibitum* distinction corresponds with the relationship between the concepts of

---

53. See *supra* notes 3, 7-10 and accompanying text.

54. See *supra* notes 11-13 and accompanying text.

55. See *supra* notes 33 and 34 and accompanying text.

56. See *Orlando*, 262 F.2d at 851-52 (deporting an alien following commission of crime involving moral turpitude); *Pena-Cabanillas v. United States*, 394 F.2d 785, 788-89 (9th Cir. 1968) (finding that a statute, making re-entry of a deported alien a felony, describes activity *malum prohibitum*).

57. See *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33, 77 (Mass. 1971); *Terminal Transport Co. v. Cliffside Leasing Corp.*, 577 S.W.2d 455, 459 (Tenn. 1979); *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 478 (N.Y. 1918) (Crane, J., concurring); *Meigs v. State*, 114 So. 448, 449 (1927); see generally Rollin M. Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832, 835-36 (1952).

58. See *Mackey v. Irisari*, 445 S.E.2d 742, 747 (W.Va. 1994).

59. *Taylor v. Atlanta Center Ltd.*, 430 S.E.2d 841, 843 (Ga. Ct. App. 1993).

60. *Hercules v. Lewis*, 309 S.E.2d 865, 866 (Ga. Ct. App. 1983).

61. Another area of law in which the *malum in se/malum prohibitum* distinction may be applied is international law. In this area, the determination of a *malum in se* crime might be useful in combatting *ex post facto* prosecution of crimes against humanity. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 134-36 (1992); see also Benjamin B. Ferencz, *Cherif Bassiouni, Crimes Against Humanity in International Criminal Law*, 88 AM. J. INT'L L. 204 (1994) (book review). This Note will focus only on the domestic aspects of the *malum in se/malum prohibitum* distinction.

natural law and positive law. Natural law holds that there is an extra-human source for human law, whether that source is nature or the Judeo-Christian God.<sup>62</sup> Positive law is “actually and specifically enacted or adopted by proper authority for the government of an organized jural society.”<sup>63</sup> As such, positive law, or specific, man-made law,<sup>64</sup> may be fairly equated with laws *malum prohibitum*, in that laws *malum prohibitum* are defined as those made criminal by the enactment of positive law.<sup>65</sup> Viewed another way, *malum prohibitum* laws are created through the exercise of positive law.<sup>66</sup>

Here, Professor Woodard’s<sup>67</sup> categories of “absolute natural law” and “exhortatory natural law”<sup>68</sup> are noteworthy. Absolute natural law was the classic formulation of natural law as the law of *nature*. Today, absolute natural law has evolved into the natural sciences, or man’s quest to discover and explain the world around him.<sup>69</sup> Exhortatory natural law—which concerns the actions, motivations, and limits on human behavior—has evolved into the fields of religion, philosophy, and law.<sup>70</sup> Therefore, in discussing natural law as legal philosophy, we need only concern ourselves with exhortatory law, or law as related to human behavior, and disregard the broader concept of law as intertwined with nature itself.

When observed in this light, the belief in natural law, or law that originates in non-human sources,<sup>71</sup> implies a belief in a higher being.<sup>72</sup>

62. See generally Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 786-87 (1989).

63. BLACK’S LAW DICTIONARY 1162 (6th ed. 1990).

64. Positive law need not be codified, or even written. The common law system, whereby the judicial branch’s decisions constitute substantive law, may constitute positive law as absolutely as a legislature’s enactments, providing that judicial decisions are based upon community standards and/or previously written laws, and not the “laws of God.”

65. See *supra* note 25 and accompanying text.

66. After all, *malum prohibitum* laws are defined as those acts “expressly forbidden by positive law.” BLACK’S LAW DICTIONARY 960 (6th ed. 1990). One interesting case posits that crimes *malum in se* are made crimes *malum prohibitum* through the enactment of statutes, or positive law. *United States v. Donahue*, 948 F.2d 438, 441 (8th Cir. 1991). See also *infra* note 181. Thus, the court avoids the necessity of determining whether a crime is *malum in se* or *malum prohibitum*.

67. See *supra* note 62.

68. Woodard, *supra* note 62, at 786-87.

69. *Id.* at 786.

70. *Id.* at 787. Any further discussion of “natural law” undertaken in this Note is limited to Woodard’s exhortatory natural law, leaving the absolute natural law to Steven Jay Gould and his colleagues.

71. See *supra* note 62 and accompanying text.

In order to fully subscribe to such a system of law, individuals must either acknowledge or at least be aware of the religious foundation upon which the system rests. As modern America becomes increasingly multicultural and multireligious, full subscription to a collective religious foundation is less universal.<sup>73</sup>

Positive law, on the other hand, is the express law of a given society.<sup>74</sup> Positive law results from the official processes<sup>75</sup> of a society, and as such, theoretically stems from the wishes of all members of that society. Positive law requires society's fundamental belief in the political system from which the law emanates—in short, a belief in one's government.

Jeremy Bentham, in usual Bentham fashion, scathingly scorned the notion of natural law.<sup>76</sup> After summarizing Blackstone's<sup>77</sup> descriptions of natural law, Bentham stated that "nothing that is at once intelligible and true can be collected from anything said by our Author [Blackstone] or by anyone else of the phantom of the Law of Nature . . ."<sup>78</sup> Thus, as early as the late 1700s, commentators attacked the theological underpinnings of law, as expressed via natural law.

Modern commentators continue to examine the precepts of natural law and positive law. Professor Woodard provides one of the most interesting commentaries.<sup>79</sup> In a 1989 article, Woodard offers several paradigms to illuminate the interrelationship between law and morality.<sup>80</sup> Of these, the

72. See Woodard, *supra* note 62, at 787 ("Natural law . . . [is b]ased on the same form of super-human authority.").

73. The First Amendment also requires that religion be kept separate from official governmental operations. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

74. See *supra* note 64 and accompanying text.

75. Usually, these processes will be the deliberations and pronouncements of a popularly elected legislature. However, positive law need not be confined to legislative workings. See *supra* note 64. Common law may also be viewed as positive law.

76. In Bentham's time, the term of art for natural law was "Law of Nature." Bentham uses this term throughout his reply to Blackstone's COMMENTARIES. See BENTHAM, *supra* note 38, at 10-21.

77. *Id.* at 10-17.

78. *Id.* at 17.

79. See Woodard, *supra* note 62.

80. See Woodward, *supra* note 62, at 786. The six paradigms are:

PARADIGM I: Law and morality are inseparable. Without morality, law is not law at all: it is naked power. Therefore the very idea of law implies morality.

*Id.* (alteration in original).

PARADIGM II: Law, like morality, is a social sanction used to control human behavior; as such, it should be used to promote some moral purpose. In order to make law most effective for that (or any other) purpose, the task of Jurisprudence, as a science, is first to understand the nature of law itself in order to determine its basic attributes, the ways in which it differs

first paradigm, that law reflects morality, expresses the concept of natural law.<sup>81</sup> The second paradigm, that law and morality are different and separate, expresses the concept of positive law.<sup>82</sup> Woodard concludes by stating that the choices individuals and societies make determine the morality of law.<sup>83</sup> Compare these choices with the choice the reader is asked to make at the end of this Note.

Aside from the jurisprudential implications of the *malum in se/malum prohibitum* doctrine, political implications arise. A desire to scrap the doctrine because it allows the judicial branch to make moral judgments evidences a view that the judicial branch should have no role in forming legislation. The very word legislation suggests that it should be formed by legislators and not courts. Once legislation is enacted, the proper role of the judiciary is to implement the legislation.<sup>84</sup>

Finally, the *malum in se/malum prohibitum* dichotomy implicates a debate concerning the American division between tort and criminal law. Increasingly, public welfare offenses,<sup>85</sup> or offenses equated with crimes *malum prohibitum*,<sup>86</sup> proscribe conduct that was previously tort law.<sup>87</sup> As

from other social sanctions, and where and how it can be used most effectively. For this purpose, it is necessary to isolate law from all other social sanctions, including morality.

*Id.* at 791. Woodard labels this paradigm the Utilitarian-Positivist paradigm. *Id.*

PARADIGM III: The morality of law is found not in common notions of morality, and not in the just result reached in specific cases. It is found, rather, in the studied impartiality of the legal process itself.

*Id.* at 793.

PARADIGM IV: Law does not exist for its own sake. It is but a tool that exists to serve humankind. Like hammers and laser beams, its only relationship with morality is in the uses to which it is put and the results it helps bring about in the real world.

*Id.* at 795.

PARADIGM V: Law and morality are integral parts of, but different stages in, a nation's own ever-developing form of civilization. They are organically linked together but the actual relationship between them, on any specific issue, depends on the degree to which members of the nation share attitudes and beliefs with respect to that issue: the greater the consensus, the closer law and morality are to one another. Where there is no consensus, however, law must remain dormant and morality must do its work alone.

*Id.* at 796.

PARADIGM VI: Law is institutionalized immorality.

*Id.* at 797. Students interested in jurisprudence should read the Woodward article.

81. *Id.* at 786.

82. *Id.* at 791.

83. *Id.* at 804.

84. See *infra* notes 206-07 and accompanying text.

85. See *infra* note 166 and accompanying text.

86. See *infra* note 166 and accompanying text.

87. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991). Coffee argues that the distinction

more human activities become statutorily prohibited or mandated, fewer activities will be handled through the tort system, which is largely privately-administered. Thus, the will of the people will be able to further shape the parameters of human behavior.

## V. CASES DEALING WITH THE DISTINCTION

An examination of recent United States cases<sup>88</sup> reveals that courts often confuse, or at least disagree over which actions constitute *malum in se* activity and which constitute *malum prohibitum* activity.<sup>89</sup> During the 1900s, courts discussed these terms in literally thousands of cases.<sup>90</sup> This Note discusses only a few of the more unorthodox cases, beginning with what is often cited as a classic *malum prohibitum* activity: the violation of automobile traffic laws.

between tort and crime is significant only at the sentencing stage, when a court determines the appropriate social sanction for a defendant's behavior. *Id.* at 194. This argument makes sense considering that both tort and criminal cases resort to the same forum, use the same trial techniques, and share the same procedural constraints. The only difference is at the conclusion of a trial. Criminal courts declare culpable defendants *guilty* of violating laws against society; whereas, civil courts declare culpable defendants *liable* for violating laws against individuals.

88. The term *recent* means from the mid-twentieth century to the present. The earliest case examined in this section is *People v. Pavlic*, 199 N.W. 373 (Mich. 1924). This Note only examines United States jurisprudence. However, British case law also discusses the distinction.

89. Again, please note that the strict phrases "*malum in se*" and "*malum prohibitum*" are not necessarily the sole terms for focusing on the distinction between intrinsically immoral activity and activity which is simply banned by society. Such phrases as "moral turpitude" and "public welfare offenses" are also employed by courts discussing the same concepts. *See supra* notes 49-52 and accompanying text, and note 166, *infra*, and accompanying text. *See also* DRESSLER, *supra* note 10, at 118-19 (discussing "public welfare offenses" and "traditional offenses").

90. A search parallel to the 1990s search, *see supra* note 47, revealed the following numbers for the period from 1900 to the present:

NUMBER OF CASES MENTIONING:	1900 - present
<i>Malum in se</i> , in federal courts	271
<i>Malum in se</i> , in state courts	874
<i>Malum prohibitum</i> , in federal courts	276
<i>Malum prohibitum</i> , in state courts	916

This search was conducted on WESTLAW on March 13, 1995. The terms "*malum in se*" and "*malum prohibitum*" were searched in the ALLFEDS and ALLSTATES databases under the following date restriction: after December 31, 1899. The WESTLAW database does not contain full coverage of all state and federal cases back to 1900, so the numbers provided still fall short of the actual usage of *malum in se* and *malum prohibitum* during this time period.

### A. Automobile Violations

A frequently cited Supreme Court case, *District of Columbia v. Colts*,<sup>91</sup> declared that “driving recklessly”<sup>92</sup> is “in its very nature . . . *malum in se*.”<sup>93</sup> As a consequence of the *malum in se* declaration, the defendant was entitled to trial by jury.<sup>94</sup> The only specific act alleged against the defendant in *Colts* was that he operated his automobile at twenty-two miles per hour.<sup>95</sup> Referring to this act as “reckless,”<sup>96</sup> the Court concluded that operating a motor vehicle at a speed of twenty-two miles per hour was morally offensive, or *malum in se*.<sup>97</sup> This conclusion seems extreme, and there is great irony when one considers that the *defendant himself* wanted the court to declare the act *malum in se*. With such a declaration, the defendant would then be entitled to trial by jury.<sup>98</sup> That a defendant could declare his own conduct inherently evil in order to achieve a self-serving result seems somewhat incongruous.

The Tennessee Supreme Court reached a conclusion similar to *Colts* in *Grindstaff v. State*,<sup>99</sup> holding that reckless driving is a *malum in se* crime. The court concluded that the defendant committed an act *malum in se* when he continued to drive despite being aware of his drowsy condition. The defendant drifted into the wrong lane and ran head-on into an oncoming automobile, killing one person.<sup>100</sup> The supreme court affirmed the trial court’s manslaughter conviction.<sup>101</sup>

Interestingly enough, the Tennessee Supreme Court had reached a quite different conclusion in the earlier case of *Hurt v. State*.<sup>102</sup> In *Hurt*, the

---

91. 282 U.S. 63 (1930). *Colts* provides a basis for determining whether a criminal defendant is entitled to trial by jury. *Id.* at 70-74.

92. *Id.* at 72.

93. *Id.* at 73.

94. *Id.* at 74.

95. *Id.* at 70.

96. *Id.*

97. *Id.* at 73.

98. *Id.* at 74.

99. 377 S.W.2d 921 (Tenn. 1964).

100. *Id.* at 926.

101. *Id.* at 927. In *Colts*, see *supra* notes 11-13 and accompanying text, the Court applies the *malum in se* analysis to determine the defendant’s right to a jury trial. See *supra* note 11. *Grindstaff* is a practical application of a *malum in se* analysis used to determine the degree of culpability of an “accidental” killing. *Id.* at 926. Interestingly, the *Grindstaff* court uses the *malum in se* determination to affirm a manslaughter conviction. *Id.* at 927. Usually murder springs from such a determination, and manslaughter springs from *malum prohibitum* activity. See *supra* notes 33-34 and accompanying text.

102. 201 S.W.2d 988 (Tenn. 1947).

court held that driving at an excessive speed *and* on the left side of the road, resulting in a collision and the death of two, constituted *malum prohibitum* activity.<sup>103</sup> As in *Grindstaff*, the central *malum in se/malum prohibitum* inquiry was whether the defendant committed manslaughter. The court determined that Hurt's manslaughter conviction was unjustified.<sup>104</sup> Thus, two cases tried by the same court seventeen years apart, with virtually identical facts, resulted in disparate *malum in se/malum prohibitum* determinations—and consequently, different holdings for two defendants accused of manslaughter.

In line with *Hurt* in its determination of *malum prohibitum* driving activity are *United States v. Morrison*<sup>105</sup> and *People v. Treen*.<sup>106</sup> In *Morrison*, the district court held that driving at twenty-five miles per hour in a fifteen-mile-per-hour zone constituted *malum prohibitum* activity, and therefore, the defendant was not entitled to a jury trial.<sup>107</sup> In *Treen*, the Herkimer County court concluded that driving an automobile without sufficient lights constituted *malum prohibitum* activity.<sup>108</sup> Therefore, the defendant could be convicted without the state's proving any intent.<sup>109</sup>

Thus, in the relatively uncontroversial area of automobile operation, there are five disparate cases. *Colts* and *Grindstaff* describe reckless driving and speeding as *malum in se* activities.<sup>110</sup> *Hurt*, *Morrison*, and *Treen* describe reckless driving, speeding, and automobile equipment deficiency as

103. *Id.* at 989-90.

104. *Id.* at 991. *Hurt* and *Grindstaff* contain similar facts (cars driving on the wrong side of the road, collision, and death), consistent principles of law (in Tennessee, accidental killing during the commission of a *malum in se* act constitutes manslaughter, whereas accidental killing during the commission of a *malum prohibitum* act does not), and were heard in the same forum, (the Tennessee Supreme Court). *Hurt*, 201 S.W.2d at 988-89; *Grindstaff*, 377 S.W.2d at 922-23. However, *Grindstaff*, only seventeen years after *Hurt*, does not cite *Hurt*. *Id.* at 921-26. Both cases employ the same law and both find that manslaughter does not result from *malum prohibitum* activity. Most likely, the lack of citation is because the *Grindstaff* court wanted to reach a different conclusion than the *Hurt* court, and could not sufficiently distinguish the facts.

105. 425 F. Supp. 1235 (D. Md. 1977).

106. 33 Misc. 2d 571, 225 N.Y.S.2d 787 (Herkimer Cty. Ct. 1962).

107. *Morrison*, 425 F. Supp. at 1239. The court in *Morrison* cites and discusses *Colts*, but solely to establish the governing jury trial law. *Id.* at 1238. The court does not attempt to compare the *Morrison* facts to the *Colts* facts. Instead, the court simply declares that "[h]erein the petty offense is only *malum prohibitum*, not *malum in se*." *Id.* at 1239.

108. *Treen*, 225 N.Y.S.2d at 789.

109. *Id.* at 789. *Treen* presents a third use of the *malum in selmalum prohibitum* determination, convicting defendants of strict liability crimes. It is analogous to Jill Doe's predicament in *Matadonia*. See *supra* notes 7-10 and accompanying text.

110. See *supra* notes 91-101 and accompanying text.

activities *malum prohibitum*.<sup>111</sup> Can these decisions be logically reconciled?<sup>112</sup> If so, how? If not, they stand as a testament to the inconsistent application of the *malum in se/malum prohibitum* doctrine.

### B. *Driving While Intoxicated*

A study of cases that include facts increasing the moral ambiguity of a situation reveals an increase in inconsistent holdings and rationales. For example, some courts examining automobile violations find it necessary to determine whether driving while intoxicated (DWI)<sup>113</sup> is a *malum in se* or a *malum prohibitum* activity.<sup>114</sup> In this situation, courts subtly mix attitudes about the morality of alcohol in general with the morality of activities undertaken while under the influence of alcohol. The ultimate issue in most of the following DWI cases is whether the defendant was entitled to a jury trial.<sup>115</sup>

First, observe the language and reasoning from cases that conclude that DWI is a *malum in se* activity. This Note examines four: *Bronson v. Swinney*,<sup>116</sup> *Parham v. Municipal Court of Sioux Falls*,<sup>117</sup> *Landry v. Hoepfner*,<sup>118</sup> and *United States v. Woods*.<sup>119</sup> In *Bronson*, the court did not hesitate to find the defendant guilty of *malum in se* activity where, "after consuming alcohol [the defendant] endanger[ed] the lives of countless people."<sup>120</sup> In *Parham*, the court determined that DWI was a

111. See *supra* notes 102-09 and accompanying text.

112. Certainly, it is easy to criticize cases from different jurisdictions and different time periods because incongruity and disagreement nearly always exist among courts. Virtually any doctrine, not just the *malum in se/malum prohibitum* doctrine, may be applied inconsistently by different courts. However, such a criticism, while accurate, does not dilute the argument that the difficulty of applying the *malum in se/malum prohibitum* doctrine diminishes its usefulness. Also, *Grindstaff* and *Hurt* illustrate how even closely connected courts can inconsistently apply the same doctrine. See *supra* notes 99-104 and accompanying text.

113. Some states use the phrase "driving while intoxicated" (DWI); others use "driving under the influence" (DUI). This Note uses these phrases synonymously.

114. See *infra* notes 116-33 and accompanying text.

115. See *supra* note 11. Of the seven cases examined, two do not deal with a jury trial, *Hall v. Hall*, 402 S.E.2d 726, 727 (Ga. 1991) (stating that DUI is not a crime of moral turpitude and therefore, not admissible for impeachment purposes) and *State v. Parker*, 666 P.2d 1083, 1084 (Ariz. Ct. App. 1983) (finding that DWI is *malum prohibitum* and therefore, does not require a culpable mental state).

116. 648 F. Supp. 1094 (D. Nev. 1986).

117. 199 N.W.2d 501 (S.D. 1972).

118. 818 F.2d 1169 (5th Cir. 1987).

119. 450 F. Supp. 1335 (D. Md. 1978).

120. *Bronson*, 648 F. Supp. at 1099.

*malum in se* activity “[b]ecause of the consequences.”<sup>121</sup> This language indicates that the court did not consider whether the actor was morally culpable because of the intrinsic nature of the undertaking. Instead, the court found that morality hinged upon the potential *outcome* of the activity. In *Landry*, the court stated conclusively that “[i]t is abundantly clear that the act of DWI is evil in itself.”<sup>122</sup> Finally, in *Woods*, the court flatly held that DWI is a *malum in se* offense.<sup>123</sup> In each case the *malum in se* determination entitled the defendant to a jury trial.<sup>124</sup>

Directly contradicting these four cases are *Hall v. Hall*,<sup>125</sup> *State v. Parker*,<sup>126</sup> and *United States v. Jenkins*.<sup>127</sup> In *Hall*, after equating crimes of moral turpitude with those that are *malum in se*, the court stated that “a misdemeanor conviction for DUI is not a crime of moral turpitude.”<sup>128</sup> In *Parker*, the court stated that “DWI is . . . an offense which is wrong because it is prohibited by law.”<sup>129</sup> Finally, in *Jenkins*, the Fourth Circuit affirmed a lower court’s determination that DUI may be labelled a “petty crime”<sup>130</sup> under South Carolina law, and therefore, the defendant was not entitled to a jury trial.<sup>131</sup> Notably absent from the opinions in these three cases is the tone of moral condemnation found in the four previously discussed cases which held that DWI is *malum in se* behavior.<sup>132</sup>

The cases present a four to three split on the question of whether driving while intoxicated is a *malum in se* activity.<sup>133</sup> While these cases may be

121. *Parham*, 199 N.W.2d at 505 (emphasis added).

122. *Landry*, 818 F.2d at 1176.

123. *Woods*, 450 F. Supp. at 1348.

124. See *supra* note 11.

125. 402 S.E.2d 726 (Ga. 1991).

126. 666 P.2d 1083 (Ariz. Ct. App. 1983).

127. 780 F.2d 472 (4th Cir. 1986).

128. *Hall*, 402 S.E.2d at 727.

129. *Parker*, 666 P.2d at 1084.

130. See *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

131. *Jenkins*, 780 F.2d at 475.

132. See *supra* notes 116-24 and accompanying text. While not included in the main discussion, language from *State v. Budge*, 137 A. 244 (Me. 1927), provides another interesting viewpoint on the morality of driving while intoxicated. In *Budge*, the court states that “driving a motor car while intoxicated must be also deemed [*malum in se*] . . . but [similar activity while] under the influence of liquor . . . is only *malum prohibitum*.” *Id.* at 247. Is there a cognizable difference between intoxication and the supposedly lesser state of “under the influence?” This ambiguous distinction seems inapplicable in practice.

133. Four of the seven cases agree that DWI constitutes *malum in se* activity. However, any pro- or anti-defendant bias held by the court may explain some of the inconsistency. Under this analysis, five of the seven cases are pro-defendant. The four *malum in se* cases may be properly labelled as pro-defendant because obtaining a jury trial was the goal of the defendant in each case. Also, *Hall*, 402

analyzed and compared in other ways,<sup>134</sup> the analysis in this Note indicates that a court may interpret essentially identical activity as either *malum in se* or *malum prohibitum*. Such inconsistency<sup>135</sup> can be eradicated by eliminating the *malum in se/malum prohibitum* distinction as a basis for examining human activity in a court of law.<sup>136</sup>

### C. Possession of Liquor and Other Drugs

A related area where the *malum in se/malum prohibitum* distinction produces disparate results is the possession and/or consumption of mind-altering substances. Three cases, *In re Birner*,<sup>137</sup> *United States v. Haynes*,<sup>138</sup> and *People v. Pavlic*,<sup>139</sup> discuss the illegal sale of alcohol. Only one case, *Pavlic*, is directly a Prohibition-era case.<sup>140</sup> The other two cases involve possible violations of existing liquor laws that were not outright bans.<sup>141</sup> In all three cases, the courts determined the sale of alcohol to be *malum prohibitum*.<sup>142</sup> The most salient language comes from *Haynes*: "The selling of moonshine liquor . . . is not an offense *malum in se* . . . but an act which is *malum prohibitum* . . . not involving any moral dereliction which carries with it a disregard of the obligation of an oath."<sup>143</sup>

When comparing these alcohol-related decisions with courts analyzing the issue of other mind-altering drugs, an interesting dichotomy results. In the same time period as the three alcohol cases, the court in *Du Vall v.*

---

S.E.2d 726, may be seen as pro-defendant because the court cannot impeach the defendant's testimony with evidence of a prior DUI conviction. Both *Jenkins*, 780 F.2d at 475, denying the defendant a jury trial, and *Parker*, 666 P.2d 1083, affirming a DWI conviction, are clearly anti-defendant.

134. See *supra* note 133.

135. Inconsistencies among courts occur frequently in many areas of law. However, the inconsistency of the *malum in se/malum prohibitum* application is only one criticism of the overall doctrine. See *supra* note 112.

136. For a thorough, general discussion of the right to jury trial in federal DWI cases, see Lahammer, *supra* note 12, at 122-70.

137. 155 Misc. 722, 282 N.Y.S. 257 (Sup. Ct. 1935).

138. 81 F. Supp. 63 (W.D. Pa. 1948).

139. 199 N.W. 373 (Mich. 1924).

140. *Id.* at 373 (holding a vendor of alcohol innocent of manslaughter because the illegal sale that led to the death was a *malum prohibitum* act).

141. *Birner* involved a determination of whether contracting for the purchase and sale of intoxicating liquors was *malum prohibitum* absent statutory prohibition. 282 N.Y.S. at 257. *Haynes* involved a criminal prosecution of persons in violation of state regulations concerning alcohol production. 81 F. Supp. at 65.

142. See *Birner*, 282 N.Y.S. at 260; *Haynes*, 81 F. Supp. at 69; *Pavlic*, 199 N.W. at 374.

143. *Haynes*, 81 F. Supp. at 69.

*Board of Medical Examiners*<sup>144</sup> held the sale of narcotics to be a *malum prohibitum* act.<sup>145</sup> However, two modern courts, the *Thrift* court in 1971<sup>146</sup> and the *Lewis* court in 1979,<sup>147</sup> both label the sale of illegal drugs *malum in se*.<sup>148</sup>

How may the courts differentiate between the sale of alcohol, which is rarely labelled a *malum in se* activity,<sup>149</sup> and the sale of narcotics? This inquiry exemplifies the debate concerning the legalization of illegal drugs, such as marijuana, and examines the relative morality or immorality of various legal and illegal substances. The two most frequently examined legal substances are alcohol and tobacco (i.e., nicotine). Where can the line be drawn? Even courts have not drawn the line where substances are deemed illegal, as the *Du Vall* decision illustrates.<sup>150</sup> A better solution would be to disregard the *malum in se/malum prohibitum* distinction, and simply punish the sale or possession of those substances which legislatures deem illegal.

#### D. Statutory Rape

Another controversial and contentious area is courts' treatment of statutory rape. In addition to the *Castle* decision,<sup>151</sup> which labelled statutory rape "moral turpitude per se,"<sup>152</sup> an important and oft-cited case

144. 66 P.2d 1026 (Ariz. 1937).

145. *Id.* at 1030. Furthermore, this court does not fully equate crimes *malum in se* with crimes of moral turpitude. See *supra* notes 49-50 and accompanying text.

146. *State v. Thrift*, 480 P.2d 222 (Wash. Ct. App. 1971).

147. *Lewis v. State*, 254 S.E.2d 830 (Ga. 1979).

148. In *Thrift*, the illegal substance was identified as neomorphan, a narcotic drug. 480 P.2d at 223. In *Lewis*, the illegal substance was cocaine. 254 S.E.2d at 832.

Another more recent court disagrees. In *In re Chase*, the Oregon Supreme Court found that the crime of attempted possession of cocaine does not involve moral turpitude, implying that the crime is not *malum in se*. 702 P.2d 1082, 1086 (Or. 1985); see also *supra* note 50 and accompanying text. However, *Chase* can be distinguished from *Thrift* and *Lewis*. In *Chase*, the crime consisted only of attempted possession, not actual possession, use, or sale. 702 P.2d at 1082.

149. This conclusion is based on data collected from WESTLAW searches conducted on March 5, 1995, with the following parameters: (1) alcohol w/50 "*malum in se*" in the ALLSTATES database; (2) alcohol w/50 "*malum in se*" in the ALLFEDS database; (3) liquor w/50 "*malum in se*" in the ALLSTATES database; (4) liquor w/50 "*malum in se*" in the ALLFEDS database. The only opinion labelling alcohol sale or possession as *malum in se* was the dissent in *State v. Johnson*, 82 So. 2d 24, 32 (La. 1955). The dissent wrote that "certain crimes in Louisiana . . . are classified as crimes *malum in se* . . . such as the possession of intoxicating liquor in a dry territory . . ." *Id.* (Moise, J., dissenting). The statement is not supported with a citation or other authority.

150. See *supra* notes 144-45 and accompanying text.

151. *Castle v. INS*, 541 F.2d 1064. See *supra* note 51 and accompanying text.

152. *Castle*, 541 F.2d at 1066.

is *People v. Hernandez*.<sup>153</sup> In *Hernandez*, the California Supreme Court held that the defendant's lack of knowledge of a female's age, and therefore, lack of specific intent to commit statutory rape, may be raised as a defense to a statutory rape prosecution.<sup>154</sup> In allowing such a defense, the court implies that it would view consensual sexual intercourse with an underage female as a *malum in se* activity requiring criminal intent.<sup>155</sup> Yet, curiously, in one footnote the court states, "when [consensual] age limits are raised to sixteen, eighteen, and twenty-one, when the young girl becomes a young woman, when adolescent boys as well as young men are attracted to her, the sexual act begins to lose its quality of abnormality and physical danger to the victim."<sup>156</sup> The court adopts the paradoxical positions that statutory rape both is and is not a *malum in se* activity. This position can be partially explained by recalling the discussion accompanying the automobile violation cases.<sup>157</sup> In both situations, the defendant *benefits* from the court labelling his activity *malum in se*. In the automobile violation cases, the defendant benefitted by obtaining a jury trial as a consequence of his *malum in se* activity.<sup>158</sup> In *Hernandez*, the defendant benefits by being able to assert the defenses of ignorance, mistake of fact, or lack of intent. When a court determines that the defendant's conduct is intrinsically immoral, the defendant may benefit.

Not many statutory rape cases have followed *Hernandez* in allowing mistake of fact regarding the age of the female to be employed as a defense.<sup>159</sup> For example, one case stated that "[s]everal jurisdictions have, subsequent to the decision in *Hernandez*, specifically rejected the rationale of the California court."<sup>160</sup> Presumably, in rejecting the importance of the actor's intent in such cases, these jurisdictions label statutory rape as a

---

153. 393 P.2d 673 (Cal. 1964).

154. *Id.* at 677.

155. *Id.* See *supra* note 10 and accompanying text.

156. *Hernandez*, 393 P.2d at 676 n.3 (quoting MORRIS PLASCOWE, *SEX AND THE LAW* 184 (1951)).

157. For a discussion of the automobile violation cases, see *supra* notes 91-112 and accompanying text. Recall that declaring an activity *malum in se*, and calling it evil, can actually help a defendant. First, in this manner a defendant may obtain a jury trial. See *supra* notes 11-12. Second, the *malum in se* designation may force the prosecution to demonstrate intent. See *supra* notes 7-8.

158. See *supra* notes 91-98 and accompanying text.

159. See generally *State v. Silva*, 491 P.2d 1216 (Haw. 1971). In *Silva*, the court specifically held that the defendant's reasonable mistake regarding the consenting female's age was immaterial. *Id.* Further, in discussing the effect of *Hernandez* the court found that no other jurisdiction allowed the intent of the actor to affect the charge. *Id.*

160. *Id.*

*malum prohibitum* activity.<sup>161</sup> Still, a lengthy dissent in one case, *Garnett v. State*,<sup>162</sup> lends support to the majority's position in *Hernandez*. The dissent illustrates the confusion in applying the *malum in se* doctrine to particular cases. The judge conveys the message that statutory rape is not a morally offensive (i.e., *malum in se*) activity by noting "where fornication is itself not criminal it should not become criminal merely because the defendant has made a reasonable mistake about the age of the girl with whom he has had intercourse."<sup>163</sup> The dissent presents a discourse on the nature of *malum in se*, moral versus immoral activity, and the wisdom of courts' attempts to label such activities. However, the dissent proceeds to state that "although . . . the defendant engaged in sexual relations with a girl thirteen years old, a minor below the age of consent, his conduct is not *malum in se*, . . . and, so, strict liability is not justified."<sup>164</sup> However, as previously observed,<sup>165</sup> strict liability normally applies when the activity is *malum prohibitum*, not *malum in se*. Again, the confusion is resolved by remembering that writers and judges want to make it easier to punish *malum in se* activities, because the actor should have known that his or her acts were inherently wrong. However, the doctrine of strict liability as applied to "public welfare" crimes<sup>166</sup> works conversely—the *malum prohibitum* crimes are easier to punish, and the *malum in se* ones more difficult.

### E. Pollution

Three 1970 cases, *United States v. Interlake Steel Corp.*,<sup>167</sup> *United States v. United States Steel Corp.*,<sup>168</sup> and *United States v. American*

161. See *supra* note 10 and accompanying text.

162. 632 A.2d 797 (Md. 1993).

163. *Id.* at 812 (Bell, J., dissenting) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 219 (1972)).

164. *Id.* at 814.

165. See *supra* note 10 and accompanying text.

166. The courts often use the phrase "public welfare crimes" as a synonym for *malum prohibitum* crimes. The theory behind this equation is that *malum in se* crimes are crimes because they are morally wrong, and *malum prohibitum* crimes are crimes because they harm the public welfare. See Coffee, *supra* note 87, at 215-16. See also DRESSLER, *supra* note 10, at 118. However, does not the prevention of *malum in se* crimes also promote the public welfare? This rhetorical question highlights the inadequacy of relying on public benefit as a means of distinguishing between *malum in se* and *malum prohibitum* crimes.

167. 297 F. Supp. 912 (N.D. Ill. 1969).

168. 328 F. Supp. 354 (N.D. Ind. 1970).

*Cyanamid*,<sup>169</sup> adopt the questionable position that pollution is merely a *malum prohibitum* crime. Each court examined whether a showing of *scienter* is required for finding a violation of environmental statutes. Each court, with its *malum prohibitum* declaration, found that *scienter* was not required, and affirmed their respective convictions.<sup>170</sup> Again, a finding of pollution as merely a *malum prohibitum* activity permits easier convictions and therefore, can be viewed as more stringent than labelling the activity morally wrong. However, in examining the basis upon which these cases were decided, how can it be said that “discharging iron particles and an oily substance” into a river<sup>171</sup> is not morally wrong? Many persons in the modern environmental movement would not hesitate to morally stigmatize a person or company involved in such an activity. Legally, an easy way to avoid the determination and its attendant problems is for the legislature to provide a *scienter* requirement in the statute.<sup>172</sup> If the statute does not include a *scienter* requirement, then the crime would be a strict liability crime.

#### F. Other Instances

Other cases provide examples of courts haphazardly labelling an activity as *malum in se* or *malum prohibitum*. One court labelled the burning of an American flag as a *malum in se* activity.<sup>173</sup> In reaching this conclusion, the court determined that the prosecution must demonstrate the defendant’s intent to desecrate the flag.<sup>174</sup> Once again, this conclusion allows the court to label the activity *malum in se* and to evaluate the morality of the defendant’s activity. Yet, the court, by requiring the prosecution to

---

169 354 F. Supp. 1202 (S.D.N.Y. 1973).

170. *Interlake Steel*, 297 F. Supp. at 915; *United States Steel*, 328 F. Supp. at 356; *American Cyanamid*, 354 F. Supp. at 1205.

171. These are the facts as alleged in *Interlake Steel*, 297 F. Supp. at 913.

172. See *supra* note 17 and accompanying text.

173. *State v. Turner*, 474 P.2d 91, 94-95 (Wash. 1970). The court stated that:

as we read the flag desecration statute applied either to a principal or to one who aids and abets in its violation, it does not define crimes *mala prohibita* but rather offenses *mala in se*. In essence, to defile or hold up to contempt is conduct involving moral turpitude. Therefore, to sustain a conviction of desecrating the flags as defined by that statute, the acts must have been done knowingly and intentionally with an intent or purpose of defiling and desecrating it or holding it publicly up to contempt.

*Id.* So, even one who does not burn a flag, but merely aids and abets one who does, has committed an offense *malum in se*. Perhaps an ardent flag burner would challenge the court’s conclusion of what constitutes moral turpitude, by arguing that it does not involve moral turpitude to defile or hold up to contempt that which deserves to be defiled or held up to contempt.

174. *Id.*

demonstrate the existence of intent, simultaneously reaches a more lenient legal conclusion concerning the defendant's activity.<sup>175</sup> Other courts have reached the opposite conclusion, finding flag desecration a *malum prohibitum* act.<sup>176</sup>

Another court declared that a medical professional's refusal to administer emergency medical treatment to a mother in labor constituted a *malum in se* activity.<sup>177</sup> In *People v. Anyakora*, the court found this conduct *malum in se* because "guilt does not consist 'entirely in violation of a legislative fiat,' but rather a legislative determination to criminalize professionally improper conduct."<sup>178</sup> Essentially, the court applied a reverse *malum* analysis. Instead of first determining whether the offense was intrinsically immoral and then using that determination to decide whether intent or *scienter* should be required as an element of the offense,<sup>179</sup> the court started with the fact that the statute did not impute strict liability.<sup>180</sup> Therefore, failure to do the commanded activity is *malum in se*. This reverse application of the *malum in se/malum prohibitum* doctrine offers another example of a fallacy that can be avoided by abolishing the *malum in se/malum prohibitum* distinction in criminal law.<sup>181</sup>

175. See *supra* notes 151-66 and accompanying text.

176. See, e.g., *Robey v. State*, 351 N.Y.S.2d 788 (N.Y. Ct. Cl. 1973). For an extensive presentation of cases on both sides of this issue, as well as a discussion of flag burning in general, see Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535 (1990).

177. *People v. Anyakora*, 616 N.Y.S.2d 149, 155 (N.Y. Sup. Ct. 1993).

178. *Id.* (quoting *People v. Munoz*, 172 N.E.2d 535 (N.Y. 1961)) (citation omitted).

179. For a discussion of intent as an element of *malum in se* crimes, see *supra* notes 7-10 and accompanying text.

180. Recall that strict liability is one hallmark of a "public welfare" or *malum prohibitum* offense. See *supra* note 10 and accompanying text.

181. The reader should not conclude that all courts mangle and misunderstand the *malum in se* and *malum prohibitum* doctrines. In fact, two courts made interesting points concerning the connection between the two concepts.

In *People v. Boxer*, a New York court made the intriguing statement that "[a]n offense '*malum prohibitum*' is not naturally an evil, but *becomes* so in consequence of its being forbidden . . ." 24 N.Y.S.2d 628, 632-33 (N.Y. Ct. Spec. Sess. 1940) (emphasis added). This characterization subtly obliterates the primary definitional difference between *malum in se* and *malum prohibitum* crimes—that *malum in se* crimes are intrinsically wrong, or "evil," while *malum prohibitum* crimes are not "evil" per se, but are merely statutorily prohibited. See *supra* notes 24-25 and accompanying text. If something becomes "evil" because it has been forbidden, could this not explain the attachment of "evil" to the long-forbidden common law crimes, whose illegality might have arisen in much the same way as any current so-called *malum prohibitum* crime?

In *United States v. Donahue*, the court stated that a bank robbery statute "merely makes *malum prohibitum* . . . that which is already *malum in se*." 948 F.2d 438, 441 (8th Cir. 1991). Here, the court essentially inverts the *Boxer* court's analysis. Instead of consolidating the two areas of crime (post-statute) by seeing both as "evil," the *Donahue* court keeps each distinct, even when viewing a singular

Even the United States Court of Appeals for the the Sixth Circuit has declared the common-law crime of assault a "petty" crime not requiring a jury trial.<sup>182</sup> In *United States v. Stewart*, the court determined whether the crime was "petty" or "serious"<sup>183</sup> by focusing on the severity of the potential penalty.<sup>184</sup> The court also cited *Colts' malum in se* analysis with approval.<sup>185</sup> Therefore, the *Stewart* court implies that assault is only a *malum prohibitum* activity. Of course, one need not look far to find courts that disagree. A concise example is the aforementioned Tennessee case, *Whitlock v. State*<sup>186</sup> which states, "[o]bviously, therefore, the assault and battery . . . was *malum in se*."<sup>187</sup>

In a fairly recent decision, one dissenting judge although flatly declared that "[s]odomy is *malum in se* . . . ."<sup>188</sup> This case illustrates that, in the mid-1980s, there were still individuals on the bench who were willing to make a *malum in se* determination based upon private sexual conduct.<sup>189</sup> Is society willing to allow such personal determinations to affect the administration of criminal justice in America?

activity. Thus, something can be both *malum in se* and *malum prohibitum*. It is not necessarily one or the other.

182. *United States v. Stewart*, 568 F.2d 501, 502-03 (6th Cir. 1978).

183. *See supra* notes 11-13 and accompanying text.

184. 568 F.2d at 503-04.

185. *Id.* at 503. *See also supra* note 11.

186. 216 S.W.2d 22 (Tenn. 1948).

187. *Id.* at 24.

188. *National Gay Task Force v. Board of Educ. of Okla. City*, 729 F.2d 1270, 1276 (10th Cir. 1984) (Barrett, J., dissenting). The judge did not declare homosexual activity, but rather sodomy in general, *malum in se*. *Id.* This distinction may be important to those who hold different moral views about sodomy and homosexuality. Sodomy generally covers any nonvaginal sexual activity and may be practiced by heterosexuals as well as homosexuals. *See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 2165 (1986).

189. Perhaps such a determination should not be so surprising. Two years later, the Supreme Court upheld a Georgia statute that purported to punish private, consensual sexual conduct between homosexuals. *Bowers v. Hardwick*, 478 U.S. 186 (1986). This decision led one student author to imply that a majority of the Supreme Court has determined that homosexual conduct is a *malum in se* offense. Daniel Leonard Pulter, Note, *Constitutional Line Drawing: Abortion Versus Homosexuality—Why the Difference?*, 12 OKLA. CITY U. L. REV. 865, 904 (1987). Pulter also concludes that one may argue that the Court has declared abortion a *malum prohibitum* offense in the *Roe v. Wade* decision. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)). This conclusion appears to apply to the problem of Jill Doe, *see supra* notes 1-23 and accompanying text, as well as the nature of illegal abortion. *See infra* notes 190-95 and accompanying text. Pulter's final conclusion is that "the individual justices' measure of morality was based upon the lengths of their own respective arms." Pulter, *supra*, at 905. Compare Pulter's conclusion to *supra* notes 14-17 and accompanying text.

### G. Abortion

Finally, this Note evaluates cases that have directly addressed whether abortion constitutes *malum in se* activity.<sup>190</sup> Two 1954 cases, *State v. Elliott*<sup>191</sup> and *Estate of Karger v. Commissioner*,<sup>192</sup> declared that performing an abortion is a *malum in se* activity. Perhaps these cases reflect the sentiments of an earlier time, but as current opinion polls<sup>193</sup> indicate, many Americans hold the same sentiments today.

Any *malum in se/malum prohibitum* analysis of abortion by the Matadonian court in *State v. Doe* would have a profound effect on Ms. Doe's life. The conclusion would determine whether full knowledge regarding the circumstances surrounding her abortion is required for a conviction, and whether she has a right to trial by jury.<sup>194</sup> Is society willing to allow such a personal determination to affect the administration of criminal justice in America?<sup>195</sup>

## V. PROPOSAL

Examining whether a crime is *malum in se* or *malum prohibitum* should play no part in the administration of criminal justice. These terms denote whether a crime is *morally* wrong. Today, it is easier to distinguish between *moral* wrongs and *legal* wrongs.<sup>196</sup> The moral and legal systems are two distinct checks on human behavior.<sup>197</sup> The moral system keeps human behavior in check internally, through informal social mechanisms. The legal system keeps human behavior in check externally, through the formal social mechanisms that govern the administration of "justice"—whether the offending behavior is murder or a parking violation. The junction at which law and morality intersect should be in the *formation* of the law, where legislative deliberation and the influence of the popular will

190. The landmark case on abortion, *Roe v. Wade*, 410 U.S. 113, does not engage in a *malum in se/malum prohibitum* analysis.

191. 277 P.2d 754 (Or. 1954).

192. 13 T.C.M. (CCH) 661 (1954).

193. See *supra* note 15.

194. See *supra* notes 7-13 and accompanying text.

195. Assuming, of course, the passage of such a statute as exists in the state of Matadonia.

196. See *supra* notes 62-87 and accompanying text.

197. This belief was nicely stated in Woodard's article, *supra* note 80, in Paradigm II: that law and morality are separate, unique systems which can and should be separately analyzed and utilized in controlling human behavior. Woodard, *supra* note 62, at 791.

can assure, as closely as possible, that the public will be followed.<sup>198</sup> Restricting the influence of morality to the formation of law, and excluding it from administration or application of the law, will not perfectly match the morality of our laws to the aggregate morality of the American people. However, it will certainly come closer to the public's morality than will the moral judgments—i.e., *malum in se/malum prohibitum* determinations—of individual judges.

The illustration of murder cases versus traffic violations is a classic example of the polarity of those human offenses against others versus those against society. The illustration underscores the *malum in se/malum prohibitum* distinction. However, even these simple cases are not so philosophically distinct.<sup>199</sup> If the answer to the question, "Why is murder wrong?" is that, "It just is," no rational basis supports the response. The response is most easily explained as a manifestation of individual morality. If you turn to external justifications, most boil down to two premises: utilitarian or religious. Thus, murder is either wrong because a proscription of murder is necessary to further human interaction and allow the formation of societies, or it is wrong because it violates some religious ethic or precept. The precept that murder goes against the "law of God," or an ethically based duty to one's fellow man exemplifies such a religious precept. While this Note does not purport to be a treatise on religious philosophy, the "Philosophy/Politics of the Distinction" section<sup>200</sup> demonstrated that a religious basis for banning any activity as a "crime" must ultimately rest in one's subjective belief in any particular religious faith or creed. In a governmentally secular and religiously multicultural society such as the United States, subjective religious beliefs are invalid bases upon which to rest the administration of justice. Either murder is

---

198. See *supra* note 20.

199. Professor Hall ably demonstrated that even traffic laws may have moral qualities:

It is argued, e.g., that traffic laws are mere conventions—the English drive on the left side, we on the right. This is superficially persuasive but, on reflection, it must be recognized that travel in opposite directions simultaneously is an essential condition of modern traffic. The essence of any traffic regulation is the maintenance of order in the flow. This can be achieved in various ways (some streets are one-way drives) but what is not a matter of mere convention is the separation of one-direction traffic from opposite-direction traffic. Similarly, regulations as to stopping at intersections, speed limits, display of lights at night, etc., are arbitrarily designated "conventions." Such laws do not exist in the Sahara, but in modern cities there is need for them; there is as much reason for them in relation to urban conditions, values and objectives as for any law, however traditional. . . . *So long as the public good requires any regulation, that regulation is not merely conventional.*

JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 339 (2d ed. 1947) (emphasis added).

200. See *supra* notes 62-87 and accompanying text.

wrong because it is banned; or it is banned because it is wrong. Either parking in spot A is wrong because it is banned, or it is banned because it is wrong because a legislative body<sup>201</sup> deems such activity against the public good.

When dealing with statutory proscriptions, there is no occasion or reason to decide which premise explains the proscription. In the administration of criminal justice, it is enough to know that the legislature has banned an activity, i.e., it is "against the law." Once the courts know that something is illegal, by definition they have all the necessary information to determine whether a law has been violated. If the legislature has properly performed its job by including all the potential elements of a crime in the statutory definition, then sentencing should easily follow the factual determination that a law has been broken. No *malum in se/malum prohibitum* analysis is necessary.<sup>202</sup>

Modern law deals exclusively with statutory crime; unwritten, common law crimes are but a memory, antiquated relics relegated to sections in Criminal Law casebooks.<sup>203</sup> Both state and federal legislatures have the opportunity and knowledge to include or omit criminal intent in the description of a crime. Therefore, if intent should be an element of a crime, citizens should encourage the legislature to either write or revise the law to include this element.

This Note does not advocate the abandonment of morality as the underpinning of criminal law. Indeed, legislatures do, and should, make such moral judgments. The deliberative legislature is the appropriate forum for debating such moral and societal questions. However, once the legislature has accomplished its task and given<sup>204</sup> the populace laws to follow (and the judicial branch laws to apply), the time for moral determination and deliberation is past; the law is established. Just apply it.

If a law seems unjust or unwise, criminal defendants still have many

---

201. In the case of a parking ordinance, a city council or other municipal law-making body will enact the statute.

202. Essentially, the functions of the legislative and judicial branches of government flow from the separation of powers doctrine. The legislature makes the law, and the judiciary interprets it.

203. With the widespread adoption of various versions of the Model Penal Code, much of American criminal law, even among the various states, is uniform. See generally RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURES: CASES AND MATERIALS (7th ed. 1989).

204. One can see the legislature in many ways; as "giving" the people the laws which the people must follow, or as "codifying" or "distilling" the laws which the people wish to enact, through their representative legislators.

remedies.<sup>205</sup> Initially, every law must pass constitutional muster, both under the United States Constitution and applicable state constitutions. The bedrock, inviolate principles of our nation are embodied in the United States Constitution and state constitutions, and cannot be circumvented by legislative acts.<sup>206</sup> Judicial review<sup>207</sup> ensures that courts play a role in determining the constitutionality, and therefore, at some level, the correctness of any legislative enactment.

The executive branch also administers criminal justice. If the populace is outraged by a defendant's conviction, the executive may commute or pardon<sup>208</sup> a defendant to rectify miscarriages of justice. Presumably, any outrage substantial enough to bring about an executive pardon or commutation would also cause the legislature to review the statute in question. If not, the populace could use the most "tried-and-true" method of political expression—voting in the next election.

The legal propositions in this Note rest on the belief that there should be a bright line between legislative and judicial powers in a republic. The legislators should legislate, and the judges should judge. The justification for this bright line separation of duties is the responsiveness of the legislature to the will of the people, compared to the relative insularity of largely-appointed judges.<sup>209</sup>

Finally, to resolve the case of Ms. Doe, one executive power, that of prosecutorial discretion,<sup>210</sup> could be utilized. A simple refusal to prosecute would allow Ms. Doe to avoid criminal liability, while leaving the letter of the law intact. However, a refusal to prosecute could be perceived as the executive branch's own *malum in se/malum prohibitum* determination. A better, long-term solution would be to follow the letter of the law—and let the chips fall where they may. This avenue will encourage more attentive and responsive legislative representation and ensure that the laws governing society are exactly as the populace desires—not as an individual judge desires.

In the end, the most cogent criticism of the *malum in se/malum*

---

205. Two examples are jury nullification and executive clemency. See *supra* notes 21 and 22.

206. All laws, including legislative acts, municipal ordinances, and administrative regulations must pass Constitutional muster.

207. The doctrine of judicial review, which holds that the court system, and ultimately, the Supreme Court, is the final arbiter of what is Constitutional, is rooted in *Marbury v. Madison*, 5 U.S. 137 (1803).

208. See *supra* note 22.

209. The 1994 Congressional elections provide a recent example of legislative transformation. See *supra* note 20.

210. See *supra* notes 21-23 and accompanying text.

*prohibitum* classification of crimes is that based on logic. Either laws are laws, and as such govern norms of our communities and societies because they proscribe conduct that is inherently immoral, or laws are laws because they proscribe conduct that would otherwise hinder a community's or a society's ability to run efficiently.<sup>211</sup> Turned on its head, this encapsulation of laws presumes that conduct is wrong and therefore, proscribed either because it violates some moral "law" or code, or because it is detrimental to the orderliness of society.<sup>212</sup> One may arguably subscribe to one view or another, but logically, one may not mix-and-match. From murder to abortion to speeding, all societal offenses should be viewed uniformly and coherently. Either society says activities are wrong because they are inherently so; or activities are wrong because society says so. Make a choice.

*Richard L. Gray*

---

211. Instead of "*efficiently*," one may insert *safely, coherently, logically, or morally*, depending upon one's philosophical thoughts on the reasons and goals of forming societies. The key, however, is to acknowledge that societal rules promote an orderly society, no matter how one chooses to characterize that orderliness.

212. A closely-related view that allows more governmental regulation and management of individual lives is that conduct may be wrong not just when it is detrimental to society, but when it is not *beneficial* to society. Similarly, some may view omissions as strictly as illegal acts. Under this view, failure to buckle a seat belt or to file one's tax returns may become punishable offenses.