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# Real Crimes and Quasi Crimes

P. J. Fitzgerald

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BETWEEN crimes like murder, assault, and theft on the one hand and on the other hand offenses against modern statutory regulations concerning industry, transport and other aspects of present-day life there seems to be a deep and self-evident distinction. It is not simply that the former are more serious and harmful than the latter, for this is not always the case. Nor is it simply that one group is triable by a different procedure and punishable with higher penalties. In England, at any rate, many offenses of both groups are triable either summarily or on indictment, and the penalties for some in the second group may exceed those for some in the first; and in any case distinctions between procedure and penalties are purely artificial ones created by law. The real or natural distinction is that enshrined in the well-known theory that crimes may be classified into those which are *mala in se* and those which are *mala prohibita* — a theory which, it is often said, was exploded a long time ago,[1] but which, like an inveterate trouper, refuses to desert the stage. Arrayed in a new and more fashionable costume, it is now trying to make a comeback with the support of Lord Devlin, who has argued that crimes such as murder and stealing are real crimes, i.e., sins with legal definitions, while the other sort are quasi crimes or technical offenses which, though possibly founded ultimately on some moral basis, consist often of "fussy regulations whose breach it would be pedantic to call immoral."[2] Indeed, the lack of moral content in much of the quasi-criminal law can be seen from the law's lack of concern whether or not the man charged is the actual wrongdoer, for this is a part of the law where both strict and vicarious liability are prevalent.

Now this theory has an ancient lineage.[3] Its origin it owes partly to Aristotle[4] and the distinction which he drew between natural and conventional justice, and partly to a Judeo-Christian law conception of ethics. Blackstone, for instance, in language reminiscent of Antigone,[5] talks of *mala in se*

[1] See Bensley v. Bignold (1822) 5 B. & Ald. 335, at 341; 106 Eng. Repts. 1214, at 1216.

[2] Patrick Devlin, "Law and Morals" (Published by the Holdsworth Club of the Faculty of Law, of the University of Birmingham, 1961), p. 3. Reprinted in DEVLIN, THE ENFORCEMENT OF MORALS 26-42 (1965).

[3] See *The Distinction between "Mala Prohibita" and "Mala in Se" in Criminal Law*, 30 COLUMBIA LAW REVIEW 74 (1930).

[4] NICHOMACHEAN ETHICS 1134[b].

[5] SOPHOCLES, ANTIGONE 453-7.

as "prohibited by superior laws and therefore contracting no additional turpitude from being declared unlawful by the inferior legislature."[6] In the hands of common law judges the distinction has served various purposes. It served the political purpose of restricting the royal dispensing power.[7] It assisted the judges to develop the criminal law of homicide,[8] the defenses of mistake[9] and consent,[10] and it has not been without importance in certain noncriminal areas of the law.[11]

And now, when it has lost much of its support and fallen into comparative disrepute, Devlin suggests that this distinction should determine our choice of procedure.[12] In view of the lack of moral content in quasi-criminal crimes and in view of the fact that the force behind obedience to law is the citizen's sense of obligation, he contends that we should avoid blurring the distinction between the real criminal law and the quasi-criminal law just as we should avoid jumbling morals and sanitary regulations together. Otherwise law and morals are set at odds with each other, the citizen becomes distressed at seeing technical offenders treated as real criminals, and society is confused into an inability to see the difference between illegality and immorality. Eventually stealing may be considered as really no worse than parking offenses — both being equally contrary to law — with the result that law in general may lose its force. To avoid such consequences he suggests that only real crimes should be punishable with imprisonment while technical offenses should be subject to some lesser kind of penalty; and, secondly, that real crimes should be tried by juries, since these are particularly suitable for dealing with moral offenses, while technical offenses should be tried by magistrates, since juries are not well equipped for dealing with what are in effect offenses of discipline, because in such matters they naturally tend to identify themselves with the accused.

Now clearly if such a distinction is made by common sense, no reasonable legislator can afford to disregard it. To go further, however, and base upon it a whole system of criminal procedure and punishment would be justified only if common sense were right. To take an analogy, if most people regard homosexual behavior as particularly vicious, then the law should perhaps

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[6] BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 42.

[7] 7 B. Mich. 11 Hen VIII f. 11 pl. 35 (1496); Godden v. Hales 6. St. T. 1165; Thomas v. Sorrell, Vaugh. 330; 124 Eng. Repts. 1098.

[8] 1 Hale P.C. 475; FOSTER, CROWN LAW 259 (3rd ed.); cf. State v. Horton 139 N.C. 588, 51 S.E. 945 (1905).

[9] See R. v. Prince, (1875) L.R. 2 Cr. Cas. Res. 154; R. v. Tolson, (1889) 23 Q.B.D. 168.

[10] R. v. Donovan, [1934] 2 K.B. 498.

[11] See Re Piper, [1946] 2 All E.R. 503, at 505; HANBURY, MODERN EQUITY 598 (8th ed.): "For crimes that are *mala in se* the injunction is inappropriate."

[12] Devlin, *op. cit. supra* note 2.

take this into account; it should not, however, let the popularity of this belief obscure the possibility of its falsity, for it may well turn out that homosexuals cannot help their behavior and stand in need of treatment rather than punishment. Or again if the greater part of society considers that only the death penalty will suffice to deter murderers, then the legislator should pay heed to this, but again without closing his mind to the possibility that evidence may show the death penalty to have no unique deterrent effect. If popular opinion were wrong about homosexuality and the death penalty, then the legislator could hardly justify the retention of laws proscribing homosexuality and prescribing capital punishment simply on the ground of public demand; in such cases the legislature must lead rather than bow to public opinion.

Ultimately the question must be faced whether the commonsense distinction between these two sorts of crimes can be logically supported. The purpose of this article is to examine some of the objections which may be levelled against the theory and its usefulness. One objection is that there are no such things as acts which are wrong in themselves. Another is that acts forbidden by law can no longer be regarded as simply *mala prohibita.* A third objection is that even if there are intrinsically wrong acts and even if indifferent acts forbidden by law can be regarded as merely *mala prohibita,* nevertheless this distinction has no practical use for the criminal law.

## I

THE VIEW that certain acts are intrinsically wrong is open to attack on two different grounds. First it may be objected that the wrongness of an act is never simply a matter of intrinsic quality but depends rather on the circumstances, the consequences, and the motives of the agent. A second objection is that such a view commits us to the presupposition that objective truth in morals is possible and that no such presupposition can be maintained.

Now the notion that acts are themselves morally indifferent and derive their moral quality from motives, circumstances, and consequences conflicts sharply with the commonsense view that certain actions, such as the deliberate killing of an innocent person, are in some way intrinsically wrong. It also conflicts with the traditional scholastic view that the primary determinant of the moral character of an act is its object, which may be good, bad, or indifferent, and that circumstances and consequences are only secondary determinants which help to establish this character but which are not the sole criteria.[13] On this view if the object of an act, i.e., the act itself as contrasted with its circumstances or consequences, is morally evil, then no matter how

[13] HENRY DAVIS, S.J., 1 MORAL AND PASTORAL THEOLOGY 54 (7th ed., London, 1958); HERIBERT JONE, O.F.M. CAP., MORAL THEOLOGY 17 (16th ed., Westminster, Md., 1955).

laudable the motive and how beneficial the consequences, the act is not permissible. For example, deliberate blasphemy is never permissible, because the object of such an act violates an eternal value which must be preserved unconditionally.[14]

This traditional view seems also reflected in the common law, which distinguishes between acts which only attract liability by reason of motives, circumstances, or consequences and acts which attract liability regardless of these. The criminal law appears to draw this sort of distinction between offenses against the person and offenses against property. Although the former admit of such defenses as self-defense, there seems to be an overall limiting factor in that the deliberate killing of an innocent (i.e., known to be innocent) victim is never allowed, no matter how great the necessity or how noble the aim (deliberately to kill an innocent person is murder even though perhaps the deceased's life is such a burden to him that death comes as a merciful release[15]); for here the law adopts Aristotle's maxim that the citizen is not allowed to be wiser than the law and substitute his own notions of right and wrong for the rules fixed by law. Contrast offenses against property, where such definitional terms as "unlawfully," "maliciously," and "fraudulently" allow for the taking or destruction in cases of necessity of the property even of innocent persons.[16]

In the eyes of the law an innocent life is something which can never be subordinated to other considerations, whereas property rights may have to give way to more important claims. Nor is this unreasonable, because in theory at least one can always obtain or be given other property to compensate for what was lost, whereas life once taken cannot be restored. Likewise, the law of tort distinguishes between acts which are tortious regardless of the defendant's motive and those which are in themselves indifferent but which can become torts by reason of his malice or improper motive.[17]

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[14] DAVIS, *op. cit. supra* note 13, at 55.

[15] See GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW ch. 8; pp. 311-350 (1st ed., New York, 1957). This is not to say that necessity could never be a defense to murder, but there is a lack of clear authority on the extent to which it could operate. Most of the situations where it is suggested that necessity would avail concern not the deliberate, intentional killing of one person *as a means* to some further laudable end, but rather the deliberate performance of an act which (a) will cause death and (b) will achieve a laudable end; and here the death is neither intended nor in itself the means to the end — the means is the act itself.

[16] On necessity and larceny see GLANVILLE WILLIAMS, CRIMINAL LAW (*The General Part*) s. 231, s. 236 (2nd ed.).

[17] STREET, THE LAW OF TORTS 6 (London, 1955); SALMOND ON TORTS 31 ff. (11th ed. by R.F.V. Heuston, London, 1953). This distinction between acts which incur liability regardless of motive and those which do so by reason of motive is of course different from the distinction between crimes requiring *mens rea* and offenses of strict liability. The latter offenses dispense not only with motive but with intention also; whereas in the former, intention is always, but motive only sometimes, relevant.

Trespass to land and conversion of chattels make little allowance for motive; nor indeed could they, for if they did, the common law would have no effective means of establishing title to land and goods. Malicious prosecution, defamation in certain circumstances, and certain kinds of nuisance on the other hand are actionable only if the defendant has acted from some unlawful motive. The law of tort also reflects a difference between acts wrong in themselves and acts wrong by reason of their consequences, distinguishing between torts such as trespass and libel which are actionable *per se* and torts like nuisance, deceit, and slander which are in general actionable only on proof of damage.[18] Similarly the law of contract appears to take note of the difference between acts which are and acts which are not intrinsically wrong. Though the rules of English law relating to illegal contracts are an amalgam of different principles, the courts have drawn a distinction between the total illegality of agreements to commit wholly wrongful acts such as crimes, frauds, and sexually immoral acts, and the less than total illegality of agreements which are wrong solely by reason of detriment to the community, e.g., contracts in restraint of trade.[19]

Now of course the fact that common sense, Christian teaching, and the common law endorse this distinction only raises a presumption in its favor; it is not conclusive. In one way, to be sure, the claim that all acts are morally indifferent *per se* could be made indisputable. This could be done by adopting the kind of definition of an act advanced by Browne, Austin, and, later, Holmes, according to whom an act consists of a willed muscular contraction.[20] Accordingly if I shoot Smith dead, my act is the voluntary contracting of my finger; this in itself is without any moral quality and attracts moral and legal culpability solely from my intention to kill Smith, from the circumstance that my finger is on the trigger and from the consequence that the contraction of my finger causes the gun to fire a bullet at him.

Now the advantage of such a definition is the precision which it substitutes for the vagueness of ordinary language, in which the word "act" enjoys no such comparable exactness. In law there are two particular aspects in which such precision would appear beneficial. First we need to be able to state for jurisdictional purposes exactly where and when an act took place; secondly we need to be able for substantive purposes to distinguish a man's acts (his voluntary conduct) from bodily events less than acts (involuntary behavior) since normally we wish to impute responsibility only to the former.

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[18] SALMOND, *op. cit. supra* note 17, at 20.

[19] See CHESHIRE & FIFOOT, LAW OF CONTRACT 309 (4th ed., London, 1956).

[20] O. W. HOLMES, THE COMMON LAW 45-46 (ed. Mark DeWolfe Howe, Cambridge, Mass., 1963).

On the face of it the "willed muscular contraction" theory will help to solve these two kinds of problem.[21]

In fact, however, it helps in neither case. Consider first the jurisdictional problem.[22] If A standing in the territory of one state shoots and kills B, who is standing in the territory of another, the questions that arise for the law of each state are really questions of policy. For the one the question is whether to exercise jurisdiction over a homicide begun within its territory but completed without; for the other it is the converse, whether to exercise jurisdiction over a homicide resulting in a death within the state's territory although the killer acted from without. Argument can be advanced to suggest that one state rather than the other should exercise jurisdiction, or that both should do so. But such arguments will be based on considerations of maintaining order, protecting the citizens, and preserving good interstate relations. The least satisfactory way of settling such a question would be by deriving a conclusion from some such premise as the definition of an act. Indeed such questions are not in practice solved by reference to such a definition, and need no such theory. Moreover, solution on the basis of such a theory would result in the same answer being given to a jurisdictional question about a crime of dishonesty, as to a question concerning a crime of violence. Yet policy may well require different answers in each case, since different considerations arise. Accordingly the "willed muscular contraction" theory is here at best unhelpful and at worst could be an undesirable straitjacket.

If we consider the problem of involuntary behavior, we find the definition equally unhelpful. The theory draws its strength from the fact that in any act (in the less precise sense) there are certain parts about which the actor cannot be a hundred per cent certain. To take the example of my shooting Smith: I can never be sure that Smith will die from the shot, that the bullet will actually hit Smith, or even that the gun will fire; for I know that any or all of these things may fail to take place. At best I can only predict that they will happen. But in that case how can I be said to have full control over my act? Holmes's definition sets out to separate out that part of my behavior about which I can be certain and over which I have control. He finds this to be that narrow area where there is no incongruence between the actual and the expected. Between the expected contraction of my finger and its actuality lies no room for mischance; guns may misfire but muscular

[21] See P. J. Fitzgerald, *Acts and Involuntary Acts*, in OXFORD ESSAYS IN JURISPRUDENCE 1-28 (ed. Guest, London, 1961).

[22] SALMOND, JURISPRUDENCE 406 (11th ed.).

contractions do not. But this is not true.[23] From experience we know that very occasionally the muscular contraction fails to obey the will: numbness, paralysis, or some other unusual condition may be the explanation. The difference between the gun misfiring and the muscular contraction misfiring is not one of kind but only of degree. Indeed the theory bids fair to lead to the conclusion that the only acts which are fully under our control and completely voluntary must be acts with no physical element, i.e., mental acts.[24] Such a conclusion would be of little help to the lawyer, or the moralist, intent on explaining the difference between involuntary behavior and conduct which is not involuntary. The suggested definition turns out here too to be practically unserviceable and theoretically disastrous. The answer to the practical problem is to be found by other methods. The theoretical problem of describing what an act is will not be advanced by a theory which drives us ultimately into a misleading picture of human conduct as the movements of an external puppet controlled by the strings of an inner man.

Now the ordinary use of the word "act" is vague. But then so is all ordinary usage: clear boundaries are not to be found outside technical disciplines. Again, ordinary usage has no theory of what an act consists of. But then again this is true of all ordinary usage: theories are not to be found in this territory. Ordinarily — i.e., when we are not talking philosophy or jurisprudence — the word "act" is used to cover both events constituting acts for Holmes, e.g., intentionally contracting my finger, and acts in a wider sense, e.g., killings, assaultings, and so on. Concede for a moment, however, that only the former shall be called acts. Where then stands the question whether acts are morally indifferent? Why, nowhere at all. For if this is what is meant by "act" the question becomes trivial: of course they are indifferent, by definition. But note how the old question is not thereby answered but arises in a new form. Suppose that the act is the contracting of the finger and the rest of what happens is called the *action*. The question now is whether all actions are indifferent *per se* morally and rendered good and bad only by their further consequences. Why then not simply ask whether an act in the ordinary wide sense of the word is rendered good or bad only by its consequences?

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[23] See H. L. A. Hart, *The Ascription of Responsibility and Rights*, 69 PROCEEDINGS OF ARISTOTELIAN SOCIETY 179 (1948-9). Reprinted in LOGIC AND LANGUAGE (First Series) (ed. A. G. N. Flew, New York, 1951). For criticism of ascriptivism see P. T. Geach, THE PHILOSOPHICAL REVIEW 221 (1960).

[24] See H. L. A. Hart, *Acts of Will and Responsibility*, in JUBILEE LECTURES 115 (London, 1960).

This consequential view was advanced by Bentham[25] against the distinction between *mala in se* and *mala prohibita*. To the contention that murder is an act wrong in itself but nonpayment of taxes is merely *malum prohibitum* Bentham would reply that both are wrong, neither intrinsically nor by virtue of legal injunction, but because of the evil consequences which both produce.

Now in one sense his reply is at odds with the contention it seeks to refute, since that contention is that certain actions are morally quite indifferent but that because the law has forbidden them they have become wrong. Bentham's argument that they are wrong by virtue of their harmful consequences cannot be universally accepted, because it may well be that some *mala prohibita* are found on inspection not to involve pernicious consequences at all. Suppose the legislator is wrong in his factual predictions: he may impose a tariff on the import of certain goods in order to protect home industries and so secure the common good of the community, but it may be that such protective legislation is in fact inimical to the common good. Or suppose he is perverse and seeks to outlaw practices whose consequences are good, albeit regarded by him as bad: he may seek to set limits to academic and scientific freedom because he considers that criticism of accepted beliefs is always bad, whereas in fact healthy critical examination of our beliefs may well be desirable. Given, however, that the legislator is neither obviously mistaken nor clearly perverse and that his laws are all in fact enacted for the good of society, could Bentham's argument now be right? Would there now be really no difference between laws forbidding murder, rape, and theft and laws forbidding the use of a radio without a license, the importation of a watch from abroad without payment of duty, and the driving of a motor vehicle without insurance? Are both these sorts of act wrong only because they result in harmful consequences, and is common sense mistaken in drawing a distinction?

Now in judging acts according to their consequences it is clear that it is not the actual consequences which are in point. First, as Kant pointed out, an act is not wicked simply because of some unforeseen but disastrous outcome.[26] During the Second World War a great number of combatants

[25] Jeremy Bentham, *The Influence of Time and Place in Matters of Legislation*, 1 WORKS 193 (London, 1843).

[26] The good will is not good because of what it affects or accomplishes or because of its adequacy to achieve some proposed end; it is good only because of its willing, i.e., it is good of itself and regarded for itself if it is to be esteemed incomparably higher than anything which could be brought about by it in favour of any inclination or even of the sum total of all inclinations. Even if it should happen that by a particularly unfortunate fate or by the niggardly provision of a stepmotherly nature this will should be wholly lacking in power to accomplish its purpose and if even the greatest effort should not avail it to achieve anything of its end and if there remained only

died from overdoses of morphia. It was standard practice to give any serious casualty an injection of morphia, and many unfortunately received a second injection from rescue parties unaware that a first injection had already been administered. In such cases no one would claim that the action of such a rescue party was immoral as well as unfortunate.

Quite clearly if consequences are relevant to the assessment of moral worth it is those which are intended or foreseen which count. The question then is whether there are any acts which are wrong despite the fact that the performer intends or foresees good consequences which may outweigh the anticipated harmful consequences.

Secondly, in discussing acts generally little difference need be made between intended and foreseen consequences. If *mala in se* such as killing and stealing are wrong because of their consequences, it is both because of intended and because of foreseen consequences: the malefactor intends to deprive the victim of his life or property, and the likely consequences are clearly foreseen. In an individual case, however, it may be vitally necessary to distinguish between the two. Suppose Smith is drowning and I rescue him knowing that he is a thief who may cause society considerable havoc: it may be that on balance his death would have been a greater benefit to society than his survival, but so far as I am concerned these consequences are only foreseen and it would be, to say the least, odd to take them into account in evaluating my act. Even odder, of course, would it be to draw no difference between his survival, which I do intend, and his continuing criminal career, which I do not.[27]

One way of reconciling Bentham's not unattractive argument with the promptings of common sense is that of Austin, who, while accepting the principle of utility, would argue that certain acts are so manifestly productive of harmful consequences that we look on them as much more grave and evil than others whose consequences are less obviously pernicious.[28] On this view we should expect every legal system to have laws prohibiting acts like murder whereas we should not necessarily expect to find laws relating to driving without insurance. This restricted brand of utilitarianism allows one to accept the view that the ultimate moral principle is that happiness ought to be maximized without also holding that the true test of the

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the good will (not as a mere wish but as the summoning of all the means in our power) it would sparkle like a jewel in its own right as something that had its full worth in itself. Usefulness or fruitfulness can neither diminish nor augment this worth. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSIC OF MORALS 10 (tr. Lewis White Beck, 1959).

[27] See G. E. M. Anscombe, *Modern Moral Philosophy,* PHILOSOPHY 1, 11 (1958).

[28] Austin's *Lectures* (5th ed., New York, 1875) lecture xxv, p. 484; lecture xxxii, p. 289.

morality of each individual action is its tendency to maximize happiness.[29] As Austin observed,

> . . . we must not consider the action as if it were *single* and *insulated,* but must look at the *class* of actions to which it belongs. The probable *specific* consequences of doing that single act, of forbearing from that single act, or omitting that single act are not the objects of the inquiry; the question to be solved is this: if acts of the *class* were *generally* done or generally forborne or omitted what would be the probable effect upon the happiness or good?
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> Considered by itself a mischievous act may seem to be useful or harmless, considered by itself a useful act may seem to be pernicious.
>
> For example if a poor man steals a handful from the heap of his rich neighbour the act considered by itself is harmless, or positively good. One man's poverty is assuaged with the superfluous wealth of another.
>
> But suppose that thefts were general (or that the useful right of property were open to frequent invasions) and mark the result.[30]

On this view the principle of utility is an overall principle by which we judge of classes of acts and from which we can derive more specific rules of conduct such as "do not kill" or "do not steal"; and in considering the rightness or wrongness of an individual act we may not in general invoke the principle of utility but must rely on the rules derived therefrom. If, having promised to do something, I ask, "Why should I do this?" the answer, "Because you promised," is sufficient to close the argument. To proceed further and ask why promises should be kept is a different enquiry concerning the social rules and institutions derived from the general principle of utility. This restricted brand of utilitarianism regards the reasons relevant to the criticism and justification of individual actions and those relevant to the criticism and justification of social practices and rules as not necessarily identical. An outstanding example of this distinction is afforded by the case of Socrates, who, though unjustly condemned to die, refused to escape and avoid execution, because this would have been to ignore his duty of respecting the verdict and sentence of the court: considerations of consequences were not relevant to the question of escaping but only to that of accepting or repudiating in general the Athenian constitution and moral code.[31]

Adopting this restricted utilitarian approach, we could now distinguish

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[29] For a discussion of Extreme and Restricted Utilitarianism see R. A. WASSERSTROM, THE JUDICIAL DECISION 118-137 (Stanford, Calif., 1961).

[30] AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 38-9 (ed. with intro. by H. L. A. Hart, New York, 1954).

[31] S. TOULMIN, THE PLACE OF REASON IN ETHICS 151 (1953).

*mala in se* and *mala prohibita* in two different ways. First, *mala in se* are as a class so pernicious in their consequences that general moral rules forbidding them are easily derivable from the principle of utility.[32] By contrast *mala prohibita* are not so self-evidently pernicious, and in their case morality provides no prohibitory rules to accompany those imposed by law. Accordingly the existence of general moral rules forecloses the possibility of evaluating any individual *malum in se* by reference to its consequences, whereas the absence of such rules leaves us to assess an act which is not *malum in se* (which may or may not be legally prohibited) by reference to its consequences. Nevertheless, as society changes, the evil tendencies of such an act in general might become more obvious, with the result that the principle of utility might well give rise to new moral rules prohibiting it and transforming it from *malum prohibitum* into *malum in se*. It is possible that, in a community where road accidents are frequent and insurance usual, noninsurance could become so manifestly undesirable as to make insurance demanded by some moral rule. Here justice would seem to demand that those who undertake an activity fraught with danger to others should ensure that they can, if necessary, compensate their victims, and the duty of insurance would seem inherent in the status of road-user. Or, to approach the matter from another angle, it might be argued that in a community where everyone insures and the law enjoins insurance, other citizens expect me to insure just as they expect me to honor my promises; and insurance, like promise-keeping, becomes not so much a duty as an obligation. Or again it could be contended that from the principle of utility there can be derived (if you think it needs to be derived at all) the principle that one should not reap an unfair advantage over others by accepting all the benefits of society while avoiding all the burdens. To enjoy the benefit of others insuring while not oneself insuring is to gain just such an unfair advantage.

There is, moreover, another distinction, not always glimpsed by the utilitarian approach, between *mala in se* and *mala prohibita*. The former are forbidden by rules which are fundamental in a way in which rules about taxes, import duties, and motor insurance are not.[33] Even if the above discussed rule about insurance came to be looked on as a moral rule, it would hardly seem a fundamental one. With such fundamental rules as those forbidding killing and stealing and so on we can contrast (a) what may be called neutral rules, e.g., the rule of the road, where some rule is necessary

[32] J. S. Mill in fact considered that the legal subordination of one sex to another *wrong in itself:* THE SUBJECTION OF WOMEN (1869) cited by Marcus G. Singer, *Moral Rules and Principles,* in ESSAYS IN MORAL PHILOSOPHY 189 fn. 15 (ed. by A. I. Melden, 1958).

[33] For this distinction between fundamental, neutral, and local norms see Singer, *op. cit. supra* note 32, at 176 ff.

but where no particular version of the rules is to be preferred to any other;[34] and (b) local rules, e.g., rules concerning taxes and other matters which are dependent upon local social conditions.[35] Both neutral and local rules, as we should expect, vary from society to society. Fundamental rules, however, in essence if not in detail, are invariable and indeed seem to be the preconditions of any society. A society in which there were no acceptance of the notion that killing and other forms of violence are wrong would hardly qualify as a society at all.

Fundamental rules differ from neutral and local rules in yet another respect. They forbid acts which violate the rights of some determinable individual or group of individuals, whereas neutral and local rules forbid acts which do not necessarily involve harm to any obviously assignable victim.[36] For example, murder violates the right of one particular deceased; driving without insurance or the nonpayment of taxes does not necessarily violate the rights of any particular member or members of society, but only of society as a whole. Any offense of violence not only causes alarm in the community but also involves injury to one specific person. Offenses created by neutral or local rules, however harmful to the community at large, lack this immediately injurious effect. If we inquire why crimes with assignable victims are worse than those without, two answers suggest themselves. First, the suffering of the actual victim of the first type of crime may well be enormous, whereas the second type of crime imposes on the community a burden which, however large, can be spread and which therefore falls only slightly on each individual. Secondly, the feeling that crimes injuring specific victims are worse than crimes injuring the community only is connected with the view that society exists for its members and not vice versa. In a society aiming to provide a satisfactory life for its members one of the first targets should be to eradicate just those offenses which make individual life insupportable. Thereafter society can look to offenses against itself: society is large enough to look after itself; the individual is not.

Because of these differences *mala in se* appear much more obviously wrong than *mala prohibita*. Murder is more wrong than driving without insurance or nonpayment of taxes, partly because these harm only society

[34] Cf. "Such rules are neutral because it would make no moral difference if their opposites were adopted" and "The characteristic of a neutral norm is that the same results would have been attained by adopting precisely the opposite, while it is necessary to adopt *some* rule." Singer, *ibid.*

[35] Examples of two different local rules regarding the same problem are the two systems of water land in the United States, the riparian and the appropriation. Singer, *op. cit. supra* note 32, at 181-82, citing BENJAMIN N. CARDOZO, THE GROWTH OF LAW 118-119 (New Haven, Conn., 1924).

[36] See Singer, *op. cit. supra* note 32, at 190.

whereas murder harms a particular person as well, and partly because if everyone committed murder all the time the consequences would be far more disastrous: society would become impossible in a way in which a society without taxes and motor insurance is not. It may be difficult to find or establish today a society without taxation, but such a society is not inconceivable; certainly societies without compulsory motor insurance are, unfortunately, in existence. A society whose members continually committed murder would be impossible not only in the sense that it would not work but in the sense that such a state of affairs would not count logically as a society. Part of the notion of a society is just the absence of this sort of behavior.

At this point one might still argue that *mala in se* are nevertheless wrong because of their consequences, one of which is the injury to the actual victim. But by now the claim has become rather odd: murder is wrong because one of its consequences is that the victim dies! Yet the idea implicit in the consequentialist claim was that sometimes the other more general consequences can outweigh this particular immediate harm. The consequentialist claim is by no means self-evident. Certainly it is no more compelling than the contrary view that the wrongness of certain acts is never outweighed by the beneficial nature of their remoter consequences. Each view seems to rest on a principle which is accepted rather than proved. The very contention that acts are not intrinsically wrong rejects one value judgment and substitutes another; it must maintain that certain consequences are intrinsically wrong, unless it is to result in an infinite regress.

Now the attraction of utilitarianism is that it provides a reason for claiming acts to be wrong whether they are *mala in se* or *mala prohibita;* and the opposition to the traditional distinction may well result from dissatisfaction with the idea that acts may be wrong for no reason at all. To say that killing is wrong not for any reason but just intrinsically is hardly satisfactory, though this might be obscured by our general acceptance of this proposition and by the obviousness of the reasons that support it. But suppose someone were to assert that whistling is wrong and refuse to proffer any reason for this statement: what sense could this make and what should we understand him to mean?

But if utilitarianism provides a reason for the rightness and wrongness of acts, it by no means provides the only or even the best reason. One could equally well advance others, such as that God has so ordained or that certain acts are in accord with or contrary to the needs of human nature. This is not the place to examine these or any other alternative systems in any detail. It may, however, be remarked that the utilitarian principle and the principle

of divine command are superior to a principle based on the needs of human nature in one respect, namely that they have a unifying simplicity not obvious in the multiplicity of human needs and desires. And over the divine command principle utilitarianism has a superiority which is both apparent and real. Its apparent superiority lies in substituting for the *ipse dixit* of authority a rational principle immediately acceptable to the human mind. That someone has forbidden such and such an act seems a less convincing reason for holding it to be morally wrong than does the fact that it is likely to maximize suffering. This, however, is to misunderstand the nature of a divine command ethic, by regarding "God has ordained" as analogous to "Smith has said," whereas the vital feature of the former statement is that God's nature is considered such that whatever He says is right: it is because it is right that God has commanded it and not *vice versa*. Hence, of course, the importance for moral theology of a full synthesis with dogmatic theology.[37] Utilitarianism does, however, have real superiority in one respect, namely that reliance on divine command depends on belief and revelation, which have not been vouchsafed to all. In a sense, however, there is no conflict if the principle of utility is regarded, as it was by Austin, as an index to the divine will.[38] The disadvantage of the complexity of an ethic based on human needs, is, of course, outweighed by the fact that it gives far more concrete principles than the single principle that happiness should be maximized. From human needs and human nature one can work out the preconditions for the survival of human life and for society.

This argument against the notion of intrinsically wrong acts, then, is less than wholly insuperable. A restricted version of the consequence argument allows for such acts, while the more extreme utilitarianism is found to depend in any case on the acceptance of a value judgment which has no self-evident superiority to the judgment that certain types of acts are wrong in themselves. But this leads to the second ground on which the notion is open to attack.

## II

IT IS SOMETIMES objected that the common law definitions of such typical *mala in se* as murder and theft are clearly too artificial and too arbitrary to denote acts which are wrong in themselves.[39] If such crimes were intrinsically wrong, their definitions would be obvious and they would be invariable from state to state. This, however, is not the case. Some of the details of the

[37] See BERNARD HÄRING, 1 THE LAW OF CHRIST ch. 2 (1963).
[38] AUSTIN, *op. cit. supra* note 30, at 37 ff.
[39] See [Notes], 72 LAW QUARTERLY REVIEW 318-19 (1956).

definitions of murder and larceny in the common law are, to say the least, far from obvious. Is dishonest borrowing, for instance, self-evidently outside the scope of the moral wrong which larceny is supposed to enshrine? Again, why is the criminal law of each state not identical as regards *mala in se?* The answer to this objection is that while the real criminal law enshrines moral principles, these are extremely hard to enclose exactly. Moral principles have a flexible and a subtle character adaptable to every possible nuance and circumstance; rules of law operate in a cruder framework and must often draw hard and fast lines in the interests of practical necessity. As Devlin observes, the law must trim the edges; it may build a citadel to protect the sanctity of life but this will not be exactly coterminous with the moral principle, for the architecture of the law runs in straight lines.[40] That different legal systems should trim the edges differently and draw slightly different lines around their citadel is no matter for surprise.

In many cases, however, the differences are more radical than mere discrepancies of detail. What is regarded as murder in one society is not so regarded in another. One community may use the criminal law to protect private property while another may not even recognize this as an institution. One legal system may impose a legal duty of rescue while another may leave the citizen free to stand idly by without coming to the aid of another. Further, even within one and the same country, moral views change and with them the criminal law which reflects them. Heresy, witchcraft, and attempted suicide, all once criminal offenses in England, are no longer so today. Which moral beliefs, then, are the true ones — those prevalent in Western societies or those elsewhere? Those now prevalent in England or those prevalent in Blackstone's time? Surely, it is argued, all morals are relative and there is no such thing as an act wrong in itself. "There is nothing either good or bad but thinking makes it so."[41]

One reply to this argument is that in any society there will be a current positive morality according to which certain things are wrong, quite apart from any question of legal prohibition. If such acts are also prohibited by law, then they are *mala in se;* where acts are prohibited by law only without being contrary to current morality, they are merely *mala prohibita.* Recognition of this sort of distinction need not necessarily commit us to absolutism in morals.[42]

This, however, is too short a way with the objection. It is an undoubted fact that rules of law are not always in harmony with those of current

[40] Devlin, *op. cit. supra* note 2, at 5.

[41] J. W. C. TURNER, MODERN APPROACH TO THE CRIMINAL LAW 220 (1948).

[42] See P. J. Fitzgerald, *Crime, Sin and Negligence,* 79 LAW QUARTERLY REVIEW 353-4 (1963).

morality, and a sensible legislator will strive to minimize the discrepancy between them. If stealing is considered morally worse than speeding, he will not set higher penalties for the latter than for the former. But the bringing of law into accord with morality need not be a one-way operation only. A wise legislator can use the law to enlighten and educate and so bring current morality into sympathy with it. Now the relativist argument that there is nothing either good or bad but thinking makes it so suggests that while moral beliefs must as a matter of practical policy be taken into account, still such beliefs are accidental and may, like our views about architecture and other matters of taste, gradually change. Implicit in Devlin's thesis and in the whole distinction between *mala in se* and *mala prohibita* is the idea that our moral beliefs are not contingent and that there is a real difference between the two sorts of acts, a difference which both explains and justifies the distinction made by common sense. If this is true, then a legal system that disregards the distinction will be not only practically unsuccessful but morally reprehensible.

We cannot ultimately escape the charge that the belief in the existence of acts wrong in themselves presupposes some sort of moral objectivity. Now to try to establish any such objectivity in ethics would be far outside the scope of this article, which will merely suggest that denials of the possibility of moral objectivity may rest upon a mistaken view as to the nature of moral reasoning.

The idea that moral objectivity is somehow logically impossible arises in the following way. Moral arguments differ both from factual disputes and from disagreements over matters of taste. Unlike the former, moral arguments seem incapable of settlement by processes of verification and falsification. Unlike the latter, however, they appear to be not concerned just with subjective feelings but with real arguments about objective matters. A statement like "slavery is morally permissible" is not, it seems, completely incorrigible in the same way as a statement like "coffee is a pleasant drink." On the other hand such statements are not, it seems, corrigible by reference to objective criteria in the same way as statements like "bats have feathers" or "smoking causes lung cancer." Yet, if such moral statements are corrigible, then they must be so by reference to some criteria, criteria presumably to be found in certain fundamental moral principles, such as that God has so commanded, that man's nature so requires, that such and such will maximize happiness, and so on. On such basic principles it is that different moral systems may be built.

The difficulty, however, with any such criteria was made clear by the

wedge which Hume was supposed to have driven between moral and factual propositions. According to Hume, the former could not be deduced from the latter.[43] If, for example, such and such an act is productive of happiness, is in accordance with divine command, or is in conformity with human needs, it does not necessarily follow that we ought to do it, unless there is some general ethical proposition to the effect that anything which is productive of happiness, is in accordance with divine command, or is in conformity with human needs ought always to be done. For ought propositions can only be deduced from other ought propositions, but no ought proposition is self-evident.

Hume's wedge, as we know, has driven some to an intuitive theory of ethics and led others to abandon the notion of objectivity in morals. Yet surely the assertion that propositions like "if this act is one divinely ordained, then I ought to do it" are not necessary truths like those of logic and mathematics, prompts the reply "who in the world ever imagined that they were?" Of course such propositions are quite unlike such statements as "if ABC is a triangle, it has three sides." Statements like this are true independently of all empirical fact and can be neither established nor refuted by evidence. This is because we so use the word "triangle" that to have three sides is part of what being a triangle consists in. Accordingly if someone says, "here is a triangle with more (or less) than three sides," we know at once that this cannot be true, not because the world does not contain non-three-sided triangles but because the expression "triangle without three sides" is allowed no application within our linguistic framework; it describes no possible situation because we do not permit it to do so. But if this is so — and this is the usual modern philosophical account — then statements like "if ABC is a triangle, then it has three sides" tell us nothing about the world but are true in every possible situation. The only information such a statement could give us would be information about how the words in it are being used, but this we know already.

Clearly moral propositions are quite unlike this. "If this act is divinely

[43] In every system of morality, which I have hitherto met with, I have always remark'd that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God or makes observations concerning human affairs; when of a sudden I am surpriz'd to find that instead of the usual copulations of propositions, *is* and *is not*, I meet with no proposition that is not connected with an *ought* or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. DAVID HUME, A TREATISE ON HUMAN NATURE (ed. Selby-Bigge, London, 1960) bk. 3. 1. 1 (p. 469).

ordained, then I ought to do it" purports at least to provide information, and moreover information not confined to the meanings of the words employed. Nor indeed would we have it otherwise. What use would there be in moral statements that provided no information about what is good and evil, what right and wrong? If moral statements were necessarily true, they would all be of the same type as "wrong actions are actions which one ought not to do"; i.e., they would be tautologous.

But if moral reasoning is not deductive, how, we are tempted to inquire, can it be valid? Now of course the paradigm case of validity has always been the deductive type of reasoning, so that any kind of argument, such as moral argument, that falls short of this cannot, it seems, be fully valid. Accordingly philosophers have sometimes lamented that morals lack that ultimate validity to be found in logic and mathematics. Yet does it really make sense even to wish that moral reasoning were valid in this kind of way, to criticize it as in some way falling short of this ideal?

Much the same mistake was made about the inductive reasoning of science.[44] For the scientist too is faced with a gap, a gap between the observed and the unobservable. The fact that a phenomenon has always occurred given certain conditions is no absolute guarantee that given the selfsame conditions tomorrow the identical phenomenon will take place. So here too we have a gap which cannot be bridged. All the same, to regret that this is the case, to grieve that induction is not deduction and to lament the impossibility of "proving" the truths of science is surely an error. For if scientific laws were deductive in character, they would provide no factual information. Meanwhile inductive processes work and are useful. And meanwhile it seems eminently reasonable to use them. If asked, "Is it reasonable to use induction?" we should answer, "What else would you have us do?" This type of reasoning has its own type of validity.

But if this is true of scientific argument, may not the same hold good of morals? May not this too have its own sort of validity? Of course "I promised to do x" does not entail "I ought to do x"; but it does provide very good reason for saying that I ought to do it. But is it a good kind of reason really? Well, what other sort of reasons could there be? All moral reasons will be factual statements like this, e.g., God has so ordained, human nature so requires, and this will maximize happiness. And if this is not a reasonable way of arguing, what other kinds of arguing are desired?[45]

Just because fact statements do not strictly (in the sense of logical entailment) imply moral propositions, we must not jump to the conclusion that

[44] See TOULMIN, *op. cit. supra* note 31, at chs. 7 and 8.
[45] TOULMIN, *op. cit. supra* note 31, at 162.

they have no bearing on moral propositions whatsoever.[46] Moral propositions can be derived, though not deduced, from factual premises. If an act has certain factual characteristics, then there is a prima facie case that it is wrong. If an act is liable to maximize happiness, it is reasonable to conclude that it would be a good act. Now this suggests a solution to the problem raised by the fact that different persons and peoples have had different moral views. Suppose a man agrees that certain conduct involves the wanton infliction of pain on another and that in this case there is no contrary consideration to justify such infliction of pain, but nevertheless will not concede that there is anything wrong in persisting in such conduct. Suppose he says, "But I like inflicting pain: why shouldn't I hurt people?" Now we feel that if ethics has any validity and any value at all, then we should be able to convince him that he is wrong. Of course, we can point out to him that in general an act endowed with this property is said to be wrong and so one that ought not to be committed. Perhaps we may show that to contend that such an act is not wrong, even though it involves hurting others, is at least logically odd and even possibly logically impossible. But all this will not *force* him to stop doing it. But then, of course, "to show that you ought to choose certain actions is one thing: to make you *want to do* what you ought to do is another."[47] A man in whom self-interest is so dominant that he is not convinced by any ethical argument is unreasonable, and it is a mistake to think or hope that any reasoning could convince the unreasonable.

But where whole societies take opposite views about right and wrong it is less easy to talk of unreasonableness and corrupt minds. Many such disagreements, however, may be based on different beliefs as to matters of fact. Eskimo belief in a duty to kill off one's parents in their prime of life was based on a belief that the dead entered the next life in the same condition in which they left this one, so that to let one's parents linger on to a feeble old age appeared to be utterly wrong. Clearly Christianity involves belief in a whole set of facts, e.g., original sin and eternal destiny, which will differentiate the Christian's moral judgments from those of the non-Christian, e.g., the atheist, whose range of facts extends only to this life. On the other hand, while there is here a disagreement as to what facts to accept, there may be little or no argument as to moral attitudes based on shared beliefs of fact. Whether communities could share the same factual beliefs and differ entirely in moral outlook seems doubtful. In all societies there seem to be accepted certain fundamental norms proscribing violence, dis-

[46] See HUGO MEYNELL, SENSE, NONSENSE AND CHRISTIANITY 22 ff. (1964) for a more extended treatment of this approach.

[47] TOULMIN, *op. cit. supra* note 31, at 163.

honesty, lying, and certain other types of behavior; and while the detailed application of such norms may vary, the underlying rules in broad outline appear the same. But this should cause no surprise, because such fundamental rules provide the necessary conditions of any social life, the preconditions of living in a community at all. And *mala in se* are acts which violate these fundamental rules. Anyone who will not agree that violence, dishonesty, and lying are wrong, whether or not the law prohibits them, must surely be convicted of having a corrupt mind.

## III

THESE CONSIDERED objections to the view that certain acts are wrong in themselves are not, it is submitted, insuperable. The question now arises whether an act which is originally indifferent but which is forbidden by law can still be regarded as morally indifferent. Once an act is forbidden by law, does it not now become immoral to perform it? It may be *malum quia prohibitum* but it is still *malum*. "In divine as in human law, some things are commanded because they are good or forbidden because they are evil. Others again are good because they are commanded or evil because they are forbidden."[48] In other words, how do we reconcile Devlin's commonsense plea that there is nothing morally wrong in disobeying minor regulations of the quasi-criminal law with the fact that one has a general duty to obey the law? If one is morally bound generally to obey the law, must one therefore obey every fussy legal regulation?

To establish on natural grounds that the individual ought morally to obey the law is no simple matter. Some philosophers consider obedience to law as a moral obligation, others regard it rather as a duty. The distinction drawn by moral philosophers between obligation and duty is that obligations are created primarily by a man for himself, the typical example being promising, whereas duties are owed by a man to others by virtue of his station or position.[49] Now the social contract theory would make respect for law an obligation, based, of course, on a fictitious contract or agreement. Nor is this analogy between promises and the citizen's relation to the law without point, especially in democratic societies where government by consent is the rule and where it is possible, legally at any rate, to withdraw from the state and its legal system and start a new life elsewhere; and certainly anyone who does take up residence in a new country is in a position similar to one joining a club, who promises impliedly to abide by the rules.

[48] THOMAS AQUINAS, SUMMA THEOLOGIAE 2a-2ae, lviii, 2, ad 3.
[49] See E. J. Lemmon, *Moral Dilemmas*, 71 THE PHILOSOPHICAL REVIEW 139 (1962).

This account, however, of why one should obey the law is of only limited application. In many countries governments rule without the consent of the governed, and the citizen is not free to leave the country and opt out of his society. Yet even in such countries obedience to law seems morally necessary. The most fitting explanation would seem to be that the fact that one ought to obey the law is a moral duty, a duty owed to others by reason of one's station in life. Much as the servant owes a duty to his master, the child to his parents, and the pupil to his teacher, so the citizen can be said to owe a duty of obedience to the sovereign. This view too has its attractions, especially when it is remembered that many modern societies developed from a feudal system under which the tenant owed duties of allegiance to his lord, who in turn owed reciprocal duties of protection to his tenant. It harmonizes also with the traditional Christian view that all authority comes from above and has to that extent a title to obedience. One shortcoming of this approach, however, is that it fails to account for customary law, which is important not only in quaint survivals, but also in commercial practice, international law, and above all in the fundamental rules of constitutional law. The rule in England that Parliament is sovereign is itself a customary rule which was not, and could not logically be, enacted by any Parliament. In countries with written constitutions the *grundnorm* that the constitution must be obeyed must surely be just such a customary rule of law.

The inadequacy of both these theories suggests that the fact that one ought to obey the law must be derived rather from a general moral principle. One possible moral principle would be that human welfare needs human societies, and human societies cannot function without law. Alternatively one can seek some other moral principle such as the principle of utility. But any such principle will roughly lead to the same standpoint that obedience to law is something required by the common good.

If law observance is based on a moral principle, the question arises how far total obedience is required. Clearly, not all individual rules and regulations necessarily carry with them this general title to obedience. Traditional natural law thinking recognizes two kinds of law disobedience to which is permissible.[50] First, if a law is enacted by a usurper or by someone without any right to be obeyed, then one is not morally bound to obey, because such an edict, not proceeding from the lawful ruler or sovereign, would not be law at all. In due course, however, if the usurper's position became well established, the common good might now require obedience to his decrees; in other words, the usurper

[50] AQUINAS, SUMMA THEOLOGIAE la-2ae, 95, 2; la-2ae, 96, 4; 2a-ae, 104, 6. See HÄRING, *op. cit. supra* note 37, at 272.

would have now become the sovereign. Secondly, a law which is unjust need not be obeyed, because being contrary to natural law it would not be law at all but a mere abuse of law. Here a distinction must be drawn between laws which command that evil acts be done, e.g., laws ordering the commission of murder, adultery, etc., and laws which, though not ordering evil acts to be done, make unjust demands upon the subject, e.g., laws imposing excessive and unfair taxes. The former type of law may on no account be obeyed; the latter are not binding morally, except that the greater good of preserving the general order in society may outweigh the individual good and demand that they be obeyed. Apart from these two exceptions, Aquinas would teach that one is bound to obey the law.

Now the "fussy regulations" with which Devlin is concerned fall into neither of these categories. They are neither intrinsically unjust nor unjust in their demands. Indeed some of them may have a general moral basis, on which a legal superstructure has been built for different reasons. Sometimes it is difficult to enclose a moral principle, and so the law "builds an outpost against the direction from which it thinks danger is most likely to come."[51] On the ground that it would be wrong for children to be exposed at too early an age to certain stimulants such as alcohol, the law not only prohibits the sale of this to children but goes further and makes it an offense to allow a child into a licensed bar at all. "The law prevents the enemy from getting anywhere near his objective; it means that he must be denied admission to territory where he could go without any moral offence at all." Here there is something analogous to the Jewish notion of putting a hedge around the law to keep people at safe distance from forbidden ground through the invention of additional restrictions, in the belief that if they do not break these latter they will never break the law itself.[52]

Sometimes the regulations are more by way of detailed applications of a basic moral principle. Indeed the moral foundation of much of the quasi-criminal law may be found in some broad principle to the effect that an individual should not seek his own well-being without any regard for others and that in striving to profit himself he must be careful not to injure his fellows. Accordingly many of these technical offenses, whether aimed at moral or economic targets, are based on a general principle that it is immoral to break the rules of society and gain an advantage at the expense of others who keep them.

In this area of law too, therefore, the legislator enacts regulations whose

[51] Devlin, *op. cit. supra* note 2, at 5.

[52] J. L. Montrose, *Broom v. Morgan and the Nature of Juristic Discourse,* 6 RES JUDICATAE 411 (1954).

ends are ultimately concerned with promoting the common good. Now whereas in the case of "real" crimes the judgment of the state and of the citizen as to the proper end and the appropriate means to this end coincide, in the case of the quasi-criminal law they may diverge in more than one way. Both citizen and legislator may be at one as to the end but at odds as to the means best calculated to achieve it. An efficient transport system may be a goal commending itself to both, but the citizen may doubt whether the vehicle licensing procedure adopted by the authorities is geared to produce such efficiency. In such a case, where he will in all probability lack the time and expert knowledge at the disposal of the legislator, the citizen will be prepared to give authority the benefit of the doubt, and, deferring to its wisdom, observe even laws which strike him as foolish. He will do this also where, though he disagrees with the legislator as to the means adopted, he recognizes that there is room for more than one view on the matter and that if a choice must be made then it is for the legislature to make it. In other cases he may have extremely good reasons for believing — being perhaps an expert himself — that the regulations in question are absolutely futile and incapable of procuring the desired end.

The citizen's disagreement may, however, relate to the ends themselves. He may, for instance, dispute the notion that the end aimed at by the legislation is desirable. The welfare state, for example, might not commend itself to every citizen as an end intrinsically good. Here again, however, the common good would seem to demand that the choice be left to the state, for this is the only method of solving such problems which is justifiable in a democracy and perhaps feasible in any state. But suppose the dispute over ends is more crucial than this. In *Chandler v. D.P.P.*[53] the appellants were convicted of conspiring to break section 1 of the Official Secrets Act 1911 by entering a prohibited place for "a purpose prejudicial to the safety or interests of the state." In fact they had planned to demonstrate at an Air Force Station against nuclear weapons, their immediate purpose being to immobilize the base. Their argument was that it would be beneficial to Great Britain to give up nuclear armament; but they were not allowed to call evidence to establish this, and their conviction was upheld. In such a conflict the citizen may think the outcome too serious to be left to a counting of heads, and there may come a point at which respect for the constitutional procedures may be outweighed by the urgency of the danger.

Thirdly there may be a clash between the end aimed at by the state and the legitimate aspirations of the individual citizen. A scientist, not engaged in

[53] [1962] 3 All E.R. 142.

military or other defense research, may be offered an attractive post in another country, to which he is prevented from going by the legislation of his own country which, anxious to prevent a "brain drain" but unable to do so by paying sufficient remuneration, prohibits scientists from leaving for overseas employment without official permission. Would this be an unjust law of the first type under the natural law tradition? It surely involves no command to do anything intrinsically wrong. Is it a law that makes unjust demands? In wartime or national emergency it might well be conceded that the state has a right to ensure that it is not deprived of the services of those essential to its survival; and even in peacetime some would extend this principle to those who work on defense and other secret projects of national importance. Is the case of our hypothetical scientist so far removed from this? Yet one may well feel that in his case the law is overstepping the limits: it is one thing to lay down rules for those who are free (at any rate in a legal sense) to leave their state, withdraw from their own legal system, and seek a new life elsewhere; it is quite another to legislate that the subject may not legally even withdraw and cease to be subject to the legal system itself. In this type of case, where the offense would be *malum prohibitum,* the violation of the rule does not seem necessarily to involve any immorality, and this could be argued either on the basis that such a law would make an unjust demand or on the ground that this was a matter in which the citizen was not really subject to the legislator. This, however, will be a rare kind of situation. More common are the others mentioned above, where disobedience to the law seems less easy to justify.

Quite apart from the question of the coincidence of the judgment of the state and the citizen, the quasi-criminal law differs from the real criminal law in another respect. In real crimes, as we saw, the law may trim the edges of the moral principles which the law enshrines. With technical offenses too, insofar as they are based on some very general moral principle, this is the case, but in much greater detail. From the general moral principle that one should not harm others can be derived moral rules to the effect that motorists should take care to avoid injuring others. But no general principle can serve to lay down the precise measures which the motorist must take in order to avoid such injury: morality leaves each case to be decided on its merits. Law, however, does not operate in this fashion but proceeds to prescribe the exact speed which must not be exceeded, the type of lighting which the vehicle must satisfy, and so on. Likewise morality as well as ordinary common law requires an employer to take reasonable care for the safety of his employees. In England, however, the Factories Acts and the regulations made thereunder have descended into a wealth of detail impossible to deduce

from the general moral principle and particularizing extensively the duties of employers in different industries.[54]

Now this wealth of detail is a natural phenomenon in law and serves a highly important function. In the first place, law, unlike morality, cannot deal with each individual case on its merits but must provide for the general run of cases. This being so, law tends to lay down hard and fast rules, even though they may not apply to every case with equal success. Secondly, in law there is much to be said for having standards written down in black and white rather than existing simply in the breasts of the judges, for if a precise rule is written down then everyone knows where he is and so we obtain a "government of laws and not of men."

Unfortunately such mass of detail, besides producing complexity, results in undesirable rigidity. Situations may arise where the application of such detailed regulations is totally unnecessary to the common good. To observe the speed limit or to obey traffic signs is obviously necessary for the common good under normal driving conditions, but in certain cases, e.g., on straight deserted roads at times where all other traffic is absent, such observance, it could well be argued, is totally inessential. Ideally the law would consist not of detailed rules but rather of broad rules and possibly of detailed directives which would suggest, without actually ordering, the precise measures that should be taken and which would accordingly leave room for liberal consideration of the individual case. To some extent we have this already. In England the traffic legislation, detailed as it is, does not concern itself with the actions and procedures of the driver himself. This is left to the highway code, which lays down what the driver must do before turning across the line of traffic, before overtaking, etc. But the code is not law, and transgression of the code constitutes no legal offense.[55] Its force is that transgression may be an important factor to take into account in deciding whether a motorist has driven carelessly or dangerously contrary to the traffic legislation itself. For instance, the rule of the road in England is laid down by the highway code and not by law. Consequently, to drive on the right-hand side of the road is in itself no offense in English law. Except in very rare circumstances, however, to diverge from the code in this respect in contexts where the rest of the traffic observed the code, would be dangerous driving and so criminal. Likewise the Code of Practice for the Protection of Persons Exposed to Ionising Radiation in Research and Teaching issued by the Minister of Labour (1964) is hortatory rather than legally binding, though it would be an extremely unwise university or college that disregarded it. Nevertheless

[54] See Redgrave's Factories Acts (20th ed., 1962).
[55] Road Traffic Act 1960. s.74 (4).

the virtue of such codes and their advantage over the traditional method of devising detailed rules of law is that they can allow for special treatment of special cases. If all law adopted this character, the problem about *mala prohibita* would disappear. As it is, the problem still arises over the "fussy regulation": is the citizen obliged to obey in every detail these regulations of the quasi-criminal law? Or can we reconcile the proposition that one is obliged to obey the law with a certain flexibility allowing derogation in certain situations?

One solution is provided by the theory of penal law. According to this, rules creating technical offenses do not in fact oblige in conscience. The legislator is deemed not to intend to bind the subject morally to obey this type of law, but to leave him free to choose whether to obey the law or to violate it and pay the prescribed penalty. The only moral obligation, it is contended, is to submit to the just penalty for disobedience.[56] A motorist, for example, who violates the speeding regulations in some quiet deserted area where there is no possible danger to anyone is devoid of moral blame. Should he be caught, however, and convicted of such a violation, then he cannot refuse to pay the fine imposed by the court without rendering himself guilty of immorality. In normal traffic conditions, however, to exceed the speed limit might involve moral wrong, though not by reason so much of the actual violation of the regulation but in virtue of infringing the general moral duty to have care for the safety of other road users.

This approach preserves a measure of flexibility from a moral standpoint and in essence reduces such regulations to codes like those instanced above. It does, however, raise certain difficulties as it stands.[57] First, it involves imputing to the legislature an intention which is difficult to substantiate. Secondly, it suggests that the legislature is competent, if it wishes, to go further than to order and prohibit types of behavior; it suggests that it is competent to oblige subjects in conscience; and this too is doubtful. Thirdly, it suggests that there can exist laws which are not obligatory. And fourthly, there is the difficulty of establishing that if a law is not morally obligatory there can be a moral obligation to submit to a penalty for its infraction.

The third and fourth objections, it is submitted, are not wholly convincing. Of course, in one sense it is true to say that a nonobligatory law

[56] DAVIS, *op. cit. supra* note 13, at 121. JONE, *op. cit. supra* note 13, at 24. A. Jannsen, *Les Lois Penales,* 50 NOUVELLE REVUE THEOLOGIQUE (1923) at 121-124, 232-243, 292-303 contains an outstanding discussion of the problem of penal laws. See also Jean Tonneau, O.P., *Les Lois Purement Pénales et la Morale de l'Obligation,* in 36 REVUE DES SCIENCES PHILOSOPHIQUES 30-51 (1952); Ed. Brisbois, S.J. *A propos des lois purement penales,* 65 NOUVELLE REVUE THEOLOGIQUE 1072-4 (1938).

[57] See Josef Fuchs, S.J., *The Authority of God in Civil Authority,* 12 THEOLOGY DIGEST 104 (1964).

is no law at all, because law is a rule that is obligatory. So for the legislature to say "this is something which must be done, but there is no obligation to do it" would be self-contradictory. But surely there is a difference overlooked by this objection between moral and legal obligation. Obviously all laws are by definition legally binding. On the other hand surely we can say that some laws may not be morally binding; surely we could argue that a rule to the effect that one must under no circumstances drive in some specified area at a speed exceeding thirty miles per hour involves a legal but not a moral "ought."

Now if we look on positive human law as deriving its legal validity from the moral principles of natural law, we may, it seems, be driven to conclude that any law that is not immoral must be either morally obligatory or not law at all. Certainly those who with Goodhart[58] regard law as consisting of rules recognized as morally binding must take this view. On the other hand if we approach the matter by asking what conditions are necessary before we can say that a society recognizes a rule as legally obligatory, the facts suggest that the requisite conditions are, first, that in this society there should exist a habit of obedience to the rule, i.e., that there should be a general practice of observance of the rule in question; and secondly, that in addition to this there should also exist a general practice of using the rule as a standard of behavior so that deviations from the rule are criticized simply by virtue of being against the rule, and of using the rule as a reason for doing what the rule requires and for supporting demands that others do likewise.[59] If there is a legal rule in a community that what the Ruler says is law, this means that, first, the citizens by and large habitually do what the Ruler says; and secondly, that they use what he says as a standard of behavior in this manner, to criticize, justify, and support demands. In other words, they will say "you ought to do such and such because the Ruler has so commanded."

Now is this a moral "ought," and if not, what sort of "ought" can it be? Clearly it is not an instrumental "ought" such as is to be found in statements like "If you want to know what the positivist theory of law contends, then you ought to read Austin." Must it then be a moral "ought"? In one sense, perhaps, yes; law is undoubtedly necessary for the common good and therefore there is a general moral obligation for societies to have laws and for the citizens to observe them. But this does not mean that there is any moral obligation to have *one particular system of law* rather than any other.

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[58] A. L. GOODHART, ENGLISH LAW AND THE MORAL LAW 28 (1953).

[59] See H. L. A. HART, *Legal and Moral Obligation*, in Melden, *op. cit. supra* note 32, at 82 and H. L. A. HART, THE CONCEPT OF LAW 79-88 (London, 1961).

Natural law and utilitarianism are at one in that some law is necessary, but neither tells us which; the choice of law is neutral. Accordingly a society may be morally bound to observe some such rule as that what Parliament enacts must be obeyed, without being morally obligated to this particular rule itself. And the importance of this distinction is that since such basic rules or *grundnorms* are necessarily outside the ambit of legislation, there is no way of altering them by legislation. If they are to be altered, and there is no absolute moral reason why the rule about Parliament, for example, should not be altered, this could only be done by adopting some new rule, and this would entail deviation from the existing one. Were such basic rules *morally* obligatory we could never with moral justification deviate from them, so that, morally speaking, all constitutions save unjust ones would be immune from change. The rule that what Parliament enacts should be obeyed, it is submitted, is in England legally but not morally obligatory, in the sense that there is no moral duty to continue forever to accept this as the basic constitutional rule. But if it makes sense to speak of this sort of rule as having legal but not moral obligation, then the same, it is suggested, applies to other legal rules. There is nothing logically impossible in the idea of a law lacking absolute moral obligatoriness.

Likewise with the argument that if there is no moral obligation to obey the regulation in question, then there can be no obligation to submit to a penalty for violation. The argument is that if one is obliged to submit to the penalty, then one must be guilty, whereas there is no guilt in disobeying a law which one is not bound to obey. Here too the objection conflates law and morals by identifying legal and moral guilt. Yet we have seen that even so far as concerns *mala in se* law is cruder and more rigid than morality, so that it is possible for cases to arise where legal and moral guilt may not coincide, though within the framework of the law we must do the best we can with our imperfect legal instrument. By contrast, the penal law theory draws a valuable distinction between disobedience to *a* law and disobedience to *the* law. The former, e.g., refusing to obey a particular regulation, can be looked upon as a sort of passive resistance. The latter is tantamount to setting the whole legal system and machinery of justice at nought, and this is surely active contumely. Nor is this an unfamiliar distinction; it is one well known within the civil areas of the common law. It is one thing to commit knowingly and deliberately the tort of trespass to land; it is quite another to continue to do so in the face of a court order enjoining me to desist. It is one thing to violate the planning legislation by turning your land into a caravan site without obtaining permission from the planning authority, but quite another to persist in so doing contrary to a court injunction. Or

again there is a vast difference between the motorist who breaks the law by driving without a license and the motorist who continues to drive despite a court order that he must not do so.[60] The former act, in each case, has violated the law and is quite possibly morally culpable. The latter involves not just simple violation of the law but contempt of court; the offender has flouted the whole system of law, and this is something not only legally but surely also morally much more reprehensible. This was the basis of Socrates' refusal to escape and avoid the punishment set by law, even though that punishment was unjust. On the penal law theory, it is arguable that though disobedience to a minor regulation may not involve moral fault, refusal to submit to the punishment set by law would be morally wrong, for it would constitute just this rejection of the very instrument or institution of law.

The other objections to the theory, however, are more difficult to rebut. The idea that the legislator intends not to bind in conscience but only to prescribe a penal law is not really establishable on empirical grounds. There is no question of actually inquiring of the legislator what his real intention was. It might well be that, if asked, the legislator would say that of course he meant to bind the citizen morally; he wanted his laws to be as strong as possible. Moreover, from the wording of such technical regulations it is not easy to gather that he had this limited aim. If someone in authority wants to deter certain sorts of behavior, he can adopt different procedures. He may make it difficult to perform the action, by laying down that if it is done, certain other things have to be done. Suppose it is desired to prevent people from driving without third-party insurance. The legislator may provide that anyone applying for a license for a motor vehicle shall pay a substantial fee but that if he can produce a certificate of insurance this fee shall be remitted. In this case there would be nothing illegal or immoral in driving uninsured, but practical expediency will lead most motorists to insure. Alternatively he could provide that motorists must either insure or pay a special fee. Here again there would be nothing wrong in not insuring, but the legislator is now ordering the citizen either to insure or to pay the sum; and to do neither would be against the law. Finally he can do what is usually done: he can provide that to drive while uninsured shall be an offense subject to a penalty of such and such a fine. In this case the citizen is given no choice at all, and uninsured driving is laid down as against the law. Now since most regulations of the quasi-criminal law are of this nature, it is, to say the least, odd to infer that in reality the lawmaker intended to allow a choice

[60] Driving without a license is punishable with a maximum fine of £20 (Road Traffic Act 1960. 2. 985); driving while disqualified, by a maximum prison sentence of six months, and the court must imprison unless there are special reasons to the contrary. R.T.A. 1960 s. 110. (This has been altered by Road Traffic Act 1962.)

and did not intend that the citizen be bound by the main limb of the regulation. It is odd simply because if this is what he had meant, he could so easily have said so.

Still it could be argued that since the legislator cannot foresee all possible cases and since he cannot, when an individual case arises, be asked his opinion, it is for the courts and the citizen to try to spell out from the wording of the regulation the real policy and intention of the law. Since courts are used to interpreting laws according to their spirit and purpose, it is only reasonable in a common law system to assume that laws are made against a background and in a context in which such interpretation is operative. In other words, even if we cannot ask the legislator for his intention, we can still try to extract what he would have said had he been faced with the concrete situation in question.

The most difficult objection to the penal law theory is that it suggests that there is something which the legislator could do if he wished but which he has chosen not to do, i.e., oblige in conscience, whereas this is something which no human legislator is competent to do at all. For if an act is not morally wrong, no *ipse dixit* of any human lawmaker can make it wrong. If driving without insurance is morally indifferent, then no law requiring insurance can make this immoral. What a legislator or anyone else in authority can do is to issue a valid order, disobedience to which involves moral fault. This, however, does not mean that to do what he has forbidden is wrong in any other way than that it involves disobedience to a lawful order. In other words he can say, "Do not drive without insurance." He cannot order that "Driving without insurance is morally wrong." This is something which no man may do. Men may only declare that certain things are wrong; they cannot constitute them wrong by order.

The penal law theory is stating in a misleading way something that could quite well be expressed unobjectionably in another manner. The claim enshrined in the theory is that in the case of technical regulations, while disobedience in general would be wrong, nevertheless it might not be morally wrong in all cases. Generally disobedience would be wrong (a) because in general one ought not to disregard the provisions of the law without good cause and (b) because disobedience would probably involve an act in any case detrimental to the common good. On the other hand there can be good cause, and circumstances alter cases. In fact one is permitted to use one's common sense. Where there is no possible harm involved in violating the provision in a certain instance and where nonviolation might cause serious inconvenience, then there would be nothing morally wrong in violation

(though even here, anyone convicted would be bound to undergo a legally just penalty for disobedience). Indeed the law itself often operates in this way. The Road Traffic Legislation provides that it is an offense to cross a double white line in order to overtake, and this like similar offenses is presumably one of strict liability.[61] Nevertheless if the vehicle in front had broken down, common sense suggests that the rule could be disregarded unless this would involve some danger. Here there would seem to be scope for the defense of necessity. And if the law itself is subject to an overriding requirement of reasonability in the circumstances, surely the moral position is at least as flexible.

An alternative way of stating the position, preserving much of the good in the penal law theory without some of the objectionable features, is that the laws of the ruler have moral authority only insofar as he is exercising his function of caring for the common good of society.[62] Better still would be to restate it in this way, that the citizen is morally obliged to obey any law only insofar as the law in question promotes the common good. This approach not only avoids the difficulties involved in the notion of the legislator's obliging the citizen in conscience but also extricates us from the problem of trying to infer the presumed intent of the legislature. Instead we can examine each law on its merits and inquire whether it serves to promote the common good, and this allows for an application of the law according to the dictates of reasonability. Moreover, it is far more serviceable as regards a complex legal system in which different parts of law have different origins, some being the creature of legislation, others the result of judicial development, and yet others the consequence of customary growth. In such a system it makes little sense in many instances to speak of *the* lawgiver. Furthermore, this approach has more relevance to a system of law such as obtains in England, where there exists no rule for cessation of law by reason of obsolescence but where rather "age cannot wither nor custom stale" a statute.[63] Statutes long since obsolete remain on the statute book, whose modernization is prevented by lack of Parliamentary time. To contend that such statutes are no longer binding in conscience because the legislator never intended that they should be in present circumstances is fictitious and artificial; more realistic is the suggestion that they no longer have this binding force because they no longer fulfil the function of promoting the common good.

It is suggested, therefore, that a *malum prohibitum* need not necessarily

[61] R.T.A. 1960 s. 14, and Highway Code para. 20.
[62] See Fuchs, *op. cit. supra* note 57.
[63] See CARLETON K. ALLEN, LAW IN THE MAKING 454 ff. (5th ed., London, 1951).

be a moral wrong, that disobedience to the quasi-criminal law can in certain cases be morally permissible, and that this is not because such a law is unjust in either of Aquinas's senses (it neither commands evil nor makes an unfair demand) but because the inherent inflexibility of law fails to allow either for cases where a law no longer serves society well or for particular situations in which observance of a particular law fulfils no useful purpose.

If the above arguments are right, there is nothing impossible either in the notion that certain acts are intrinsically wrong (*mala in se*) or in the idea that sometimes there is nothing morally wrong in the commission of a technical legal offense. This does not entail, however, that we should adopt the twofold procedural classification outlined by Devlin. We can agree that *mala in se,* sins with legal definitions, acts contrary to fundamental rules, ought, in order to reflect the seriousness with which they are viewed by the citizen, to be punishable with more than nominal penalties; and that, therefore, the protection of the individual requires trial by jury. We can also agree that many of the *mala prohibita,* technical offenses of the quasi-criminal law, involve little if any moral blame and should accordingly carry only minor penalties; and that for this reason trial by jury is probably inappropriate. We can go further than Devlin here, however, and suggest that perhaps the best way of dealing with such matters is to substitute for strictly legal regulation the kinds of codes of practice and behavior illustrated above. But where Devlin's dichotomy breaks down, it seems, is in omitting the case of the *malum prohibitum* which falls midway between the real crime and the pure technical offense. For some of these, though not based on any fundamental moral norm, are nevertheless founded on some neutral or local norm. In these cases no moral rule dictates the choice that a community must make, but morality in general demands that *some* choice be made; and once the choice is made, and society adheres to the norm, then obedience is clearly required by the common good, just as violation runs counter to that good, and may contravene the fundamental norm that one must not unjustifiably cause harm to others. Though such offenses differ from real crimes in that in rare circumstances their commission may involve little harm and therefore little moral blame, on the whole they are too serious to be branded as trivial. Accordingly, stronger than minor penalties may be necessary both to reflect the seriousness with which common sense views them and to assist in educating public opinion to look on such offenses as significantly wrongful. One of the difficulties with the law of road traffic is that so far public opinion has not accepted that careless and dangerous driving is seriously wrong morally. To leave such offenses to be visited with merely minor penalties

will not help to educate the public to a proper sense of responsibility in this regard. In this intermediate area jury trial is obviously necessary too if more than minor penalties are to be awarded.

The objection to Devlin's enlightened approach, which draws new strength from an old source, is not that it is fundamentally wrong. In fact it is fundamentally right; its defect is that it fails to take account of the complicated area of *mala prohibita* which, though not real crimes in the strict sense, merit more serious treatment than purely technical offenses.