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1 The Problem of *Mala Prohibita*

What happens when law and morality diverge? What should you do when the law requires doing something you seem to have no moral reason to do – that, for all you can see, would not be morally wrong to refuse to do? Would it be fair for the law to punish you in such a case when it is reasonable for you to be confident that you have done nothing morally wrong and much of the public would agree? Or would you feel unfairly treated if you are punished for doing something that morality appears not to prohibit but which political actors decided to criminalise anyway? When the requirements of the law seem not to be underpinned by the precepts of morality, which one takes precedence and what does this mean for the legitimacy of the criminal laws passed in the absence of clear moral grounding?

These are big questions, which this Element aims to shed light on. To sharpen the issue, consider Rhea, a highly trained chemist with several decades' experience disposing of hazardous waste for large mining companies. She now heads up the waste disposal unit at Big Bore Inc. As a hard-nosed scientist, she is impatient with red tape and paperwork she deems pointless.

The company begins disposing of a new type of regulated waste – 'stinkum' – which causes skin burns and cancer if not handled properly but becomes inert and harmless if disposed of using the right chemical processes. Given its dangers, stinkum disposal requires a permit. It is (let us suppose) covered by the US Resource Conservation and Recovery Act, which makes it a crime to knowingly dispose of a listed form of hazardous waste without a permit – punishable by up to five years in prison plus fines of up to $50,000 per day of violation.[1]

However, Rhea knows as well as anyone how to safely dispose of stinkum, as she has designed and implemented such disposal processes many times before. Given her disdain for bureaucracy, she does not go through the laborious process of getting the required permit before commencing the disposal process – though the disposal is entirely safe and even in excess of industry standards.

Rhea has committed a crime. But has she done anything morally wrong? Perhaps not. If not, is it legitimate to punish her plausibly unobjectionable conduct? This, in a nutshell, is the puzzle posed by mala prohibita offences[2] – that is, conduct

[1] 42 USC § 6928(d)(2)(A).

[2] When talking about multiple offences, we use the plural: 'mala prohibita offences' or just 'mala prohibita'. But when talking about a single offence, we use the singular: 'a malum prohibitum offence' or 'malum prohibitum conduct'.

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that is not wrong in itself, but which the law nonetheless singles out and deems to be criminal. Mala prohibita offences abound in modern legal systems – often as part of regulatory schemes aimed at protecting public health or promoting trustworthy and efficient markets (as with laws requiring financial disclosures or registering securities to sell them). Looking widely at other jurisdictions, further examples might include walking on the grass, chewing gum, driving on the 'wrong' side of the road, gambling, being drunk in public, exposing one's face or ankles, and more.[3]

Because a criminal conviction conveys society's strongest condemnation, a traditional view (dubbed the 'wrongness constraint' in Section 1.2) is that we cannot properly criminalise a type of conduct unless it is morally wrong. After all, the criminal law's condemnation would be neither deserved nor accurate unless the conduct condemned *really is* morally wrong. So how do we make sense of mala prohibita offences, given that they are not in themselves morally wrong? Wouldn't criminalising them when not morally wrong violate the wrongness constraint, which is built into traditional views of the criminal law's aims and proper scope?

Given that Rhea has not done anything inherently dangerous, risky or particularly irresponsible, one might wonder how it can be legitimate to deem her seemingly unobjectionable conduct to be criminal. If she has not done anything plausibly morally wrong, then the wrongness constraint would preclude the criminalisation and punishment of what she did. Cases like this are bound to come up regularly, and so the challenge is to explain how the many mala prohibita offences in modern legal systems are not broadly incompatible with the wrongness constraint.

In the rest of this section, we examine more carefully what this puzzle involves and what is at stake in thinking about it. First, we take a closer look at what mala prohibita are and how they relate to other nearby concepts like proxy crimes. Then we explicate the conventional view that criminalisation requires moral wrongness, both to understand more precisely what this wrongness constraint requires and to lay out the motivations behind it. Finally, we return to the puzzle of mala prohibita and discuss what is at stake here and what kinds of solutions to it can be offered. We close by outlining how the rest of this Element is structured.

[3] These are illustrative examples only. For an entertaining discussion of a wide range of mala prohibita in US federal law, see Chase 2019.

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1.1 What Are *Mala Prohibita*?

1.1.1 Mala In Se *versus* Mala Prohibita

Mala prohibita are to be contrasted with mala in se offences.[4] The latter are types of conduct – like murder, theft and rape – that are[5] morally wrong in themselves, or independently of the law. By contrast, mala prohibita offences (roughly) are acts that have been declared crimes although not morally wrong in themselves; rather, if they are wrongful at all, this is because the law has prohibited them.[6]

For example, it is a crime in the United States for a person engaged in trade to fail to report cash transactions over $10,000 to the tax authorities.[7] Absent a prohibition on such conduct as part of an anti-money-laundering regulatory regime, who would have thought that failing to report such a cash transaction was morally wrongful? Without the state establishing this regulatory regime, it is unlikely that any individual would have reached the conclusion of their own accord that this conduct is morally wrong. In this sense, this offence is a good example of conduct that is not mala in se (i.e. morally wrong independently of law), but rather purports to be wrongful only because it has been singled out as criminal.

[4] For some of the intriguing history of the malum in se versus malum prohibitum distinction, see Ristroph 2011b: 582–4. Ristroph explains that originally mala prohibita were offences the king could grant exceptions to as they were theoretically his creation, while the king could not similarly authorise the performance of mala in se offences.

[5] If you are a moral anti-realist (i.e. someone who rejects the notion of 'objective' or mind-independent moral truths), you can replace 'are' in the above sentence with 'are considered to be'. For present purposes, we set aside the thorny metaethical debate between moral realism and anti-realism. We will generally write as if moral realism is true, but this is just a simplifying assumption. Our arguments and conclusions can be recast to fit within anti-realist views by redescribing our talk of what morality requires or prohibits, or is supported by moral reasons, and so on, as claims about what is generally regarded in the relevant society as morally required, prohibited or supported by moral reasons. Thus, we join the many criminal law theorists who want their conclusions about the relationship between criminal law and morality to be plausible regardless of which metaethical theory proves correct. These claims just have to be interpreted slightly differently depending on which metaethical view is adopted. (Note also that even if realism is true, there can be disagreement about which actions are morally right or wrong. The existence of objective moral facts does not entail that there will be a universal consensus about what these facts are.)

[6] For the avoidance of doubt, we do not intend the terms 'morally wrong' and 'morally wrongful' to convey any substantive difference. Some theorists distinguish these terms, but such a usage requires defence. Here we use them interchangeably.

[7] This is a combination of the following statutes: 26 USC § 6050I and 26 USC 7203. Individuals engaged in trade must use IRS Form 8300 to report such cash transactions to the IRS. Likewise, banks are required to report any cash transactions over $10,000 for reasons related to combatting money laundering. 31 USC § 5313. It is also an offence to 'structure' such transactions into amounts below this threshold to evade the relevant requirement. 31 USC § 5324. (Note while many of our examples are drawn from US law, the theories and arguments considered here apply broadly to any modern jurisdiction, though especially common law jurisdictions.)

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One way of understanding this distinction[8] is to contrast mala in se with mala prohibita by saying the former covers conduct that is pre-legally wrongful while the latter covers conduct which is not pre-legally wrongful.[9] However, this temporal definition faces difficulties. It is not always important what was or would have been wrongful before the relevant laws were passed. Perhaps the relevant conduct was impossible prior to the relevant law and was only brought into existence with the passage of the statute in question. For example, prior to the laws establishing the requirements for submitting individual income tax returns, and the associated criminal penalties for lying on the required tax forms – such as Form 1040 in the United States – it would not have been possible to commit the particular offence of lying on Form 1040, and so it would not have been pre-legally wrongful. Nonetheless, this does not mean that lying on the required tax form is a malum prohibitum. Lying – particularly on a solemn official statement to the government – is plausibly malum in se. The new laws here merely created a new instance of something that was already morally wrong.

So, in understanding what a malum prohibitum offence is, what is important to focus on is not what conduct would have been wrongful or not wrongful *prior* to the passage of the relevant law (or the establishment of a legal system in general), but rather on whether the conduct is wrong in itself independently of what the law says. If the existence or operation of law merely makes an incidental contribution to explaining why the conduct would be wrongful, as in fleshing out or making more concrete the details about how an independently existing wrong can be committed in a modern context (as with the 1040 tax form), this does not detract from thinking that the conduct is malum in se. This is why adding mere 'jurisdictional' elements to a crime (for example, the requirement that wire, radio or TV communications were used to commit a fraud for it to violate 18 USC § 1343) does not change the offence from malum in se to malum prohibitum. The core of the conduct is still malum in se, despite the addition of jurisdictional elements. The law is not the substance of the explanation of why that conduct is wrongful; rather, it is incidental to this explanation. By contrast, when the law aims to make a piece of otherwise innocent conduct wrongful *by declaring it to be so* (as when the law criminalises engaging in a given activity without obtaining a necessary licence), then this is a strong indicator that the conduct is malum prohibitum. Thus, when the law itself is essentially involved in the substantive explanation of why the conduct is putatively wrong (i.e. why the conduct at least purports to be appropriate for

[8] For another interesting but non-mainstream way of construing the distinction, see Dimock 2016.
[9] For discussion of related issues, see note 30.

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criminal punishment), then this is a good indicator that the conduct is malum prohibitum.[10] To summarise:

- Conduct is **malum in se** if it is morally wrong independently of the law not thanks to the existence, content or operation of the law.
- Conduct is **malum prohibitum** if it is not morally wrong independently of the law, but rather the existence, content or operation of the law is substantially and ineliminably (not merely incidentally) involved in explaining why this conduct is putatively wrong (i.e. is seen from the law's point of view as the sort of moral wrong that would be appropriate for criminalisation and punishment).

Youngjae Lee suggests it can be helpful to distinguish mala in se from mala prohibita components of a given offence (Lee 2021: 228). For example, if one drives dangerously over the speed limit, then the dangerous driving component of the conduct may be malum in se while the component consisting of exceeding the speed limit may be malum prohibitum.

While an illuminating suggestion, this approach also raises difficult questions about act individuation. For example, in an act of driving dangerously over the speed limit, there may seem to be simply two overlapping offences here – driving dangerously and driving over the speed limit – one that is malum in se and the other malum prohibitum. The same conduct may satisfy the elements of multiple distinct crimes, after all, and one can be punishable for all of them if proven beyond a reasonable doubt.

To avoid such complications, we will focus, where possible, on clear-cut cases of either malum prohibitum or malum in se conduct. So as not to become embroiled in questions of taxonomy, we largely side-step offences that might seem to contain an equal mix of malum in se and malum prohibitum elements and instead aim to focus on offences that more clearly fall on one side or the other of the line between malum in se and malum prohibitum. Moreover, we refer to crimes that have substantial malum prohibitum components simply as 'mala prohibita offences'.

[10] Note that we describe mala prohibita as conduct that 'purports to be wrongful' or 'is putatively wrongful' because we mean to leave it an open question whether the conduct at issue actually is wrongful on closer inspection or not. When an act type is criminalised, it is plausible that at least in the view of the legislators passing the statute – or more abstractly, from the point of view of the law – the conduct is taken to be morally wrongful. However, both the law and the legislators behind it may of course be mistaken. The conduct may on reflection turn out not to be wrongful at all. We do not want to pre-judge matters by defining malum prohibitum conduct as that which *really is* wrongful only because prohibited or because of the operation of law. Rather, we say that it is conduct that at least *purports* to be wrongful only because of the law (and not independently thereof).

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1.1.2 Distinguishing Mala Prohibita from Related Concepts

There are several other partially overlapping concepts in the neighbourhood of mala prohibita, but these are nonetheless distinct and should be kept separate.

Proxy crimes. These are crimes that punish some explicitly defined offence conduct (the proxy) *as the means* to combatting some other conduct (the target conduct) that the legislature is actually interested in combatting, but which is more difficult to detect and prosecute. This legislative strategy is generally chosen because the proxy conduct is seen as correlating with or being closely connected to the target conduct, but is easier to identify and prosecute than the target conduct.[11] For example, if the legislature wishes to combat money laundering (itself as a means to combatting the criminal activity that generates the money to be laundered), it may be insufficient to simply make money laundering a crime directly and leave it at that. After all, money laundering tends to occur in secretive contexts that are covered up and intermingled with legitimate income streams (think of the car wash in *Breaking Bad* or the print shop in *The Wire*), and thus can be difficult to detect. Accordingly, the legislature may find it beneficial to also battle money laundering by criminalising other types of conduct that are more easily detected and tend to correlate with or provide red flags of money-laundering activity – such as failing to report large cash transactions or other suspicious activities.

While proxy crimes might often be mala prohibita, they need not be. For example, while failing to report a cash transaction over $10,000 might be both malum prohibitum and a proxy crime for money laundering, other crimes that are more plausibly mala in se – like evading tax reporting obligations or submitting a misleading disclosure to the regulators – might also be proxies for money laundering (and criminalised in part for that reason). Thus, the notion of a proxy crime is distinct from a malum prohibitum, even if many crimes can exemplify both.[12]

Regulatory offences. Regulatory offences are part of a statutory scheme aimed at regulating some profession, activity or domain of life – from public health and safety to financial markets to the different aspects of the environment (such as waste disposal or emissions). Regulatory offences can of course be proxy crimes, though they need not be. For example, licensing requirements (e.g. the one Rhea faced in our earlier example) frequently figure into regulatory

[11] For more on proxy crimes, see Lee 2022b.

[12] While inchoate offences – like attempt or conspiracy – could likewise be supported by the desire to make it easier for prosecutors to secure convictions and increase the criminal law's deterrent effect, inchoate offences still plainly are distinct from mala prohibita. The inchoate crime of, say, attempted murder is a core malum in se offence.

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schemes, but the failure to obtain a required licence to engage in some regulated activity is not necessarily a proxy crime. Regulatory offences likewise can often be mala prohibita – like failing to obtain a required licence – but they can also be mala in se, as with environmental crimes that consist in releasing or disposing of waste in ways that cause harm.

Over-broad offences. With offences of this kind (sometimes also called 'prophylactic crimes'), the statutory text defines a certain type of conduct as a crime although a substantial proportion of the act tokens meeting the statutory definition are not wrongful or culpable in ways that merit punishment (or the specified amount of punishment) – even after all available affirmative defences (justifications and excuses) are taken into consideration. Thus, over-broad offences are plausibly unjust in imposing criminal penalties in a wider swath of cases than are actually warranted based on the desert of the offender. The overbreadth mentioned here is relative to the class of cases in which the offender actually deserves the amount of punishment imposed.

For example, the preparatory offences in the UK Terrorism Act 2000 have been criticised as over-broad (Simester 2012). Notoriously, section 57 of the Act makes it a crime to possess 'an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'. This offence covers a wide swath of conduct that is unlikely to be culpable, particularly in circumstances where one innocently interacts with individuals who the authorities believe to be engaged in terrorist activities – perhaps especially parents or friends. Thus, if Jessica possesses a box of tools that she plans to give her son, then if the son actually is planning an act of terrorism, she will have committed an offence – even though she may have only had vague concerns about his activities given that he hangs around with shady characters. The circumstances here might provide the authorities with a *reasonable suspicion* that Jessica had the purpose to aid a terrorist act. This is all that is required for her to be liable for the section 57 offence, even when *ex hypothesi* Jessica did not have any such purpose. It seems implausible that Jessica has committed a wrong simply because authorities have a reasonable suspicion about her intentions. As this example with Jessica shows, there is a good case to be made that this offence is over-broad relative to the underlying moral desert of offenders, as it also encompasses actions that are either not culpable wrongs or at least not sufficiently so to merit such severe punishment (potentially up to fifteen years in prison).[13]

[13] It is little help that the Act allows one, as an affirmative defence, 'to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism', since individuals who blamelessly find themselves in circumstances the jury

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One might thus see a tight connection between mala prohibita and over-broad offences – even if no one would take these two concepts to be co-extensive. Of course, the target conduct of preparing to commit an act of terrorism that section 57 of the Terrorism Act arguably sought to combat – perhaps on a proxy basis – is very plausibly malum in se, not malum prohibitum. Still, some might think that mala prohibita offences are problematic precisely insofar as they are over-broad and encompass conduct that is not wrongful or culpable (or at least not very much). Indeed, a similar concern will be the focus of our discussion of the wrongness constraint in a moment.

Nonetheless, we would resist this claim that mala prohibita are always or necessarily over-broad. As will become clear later (see Sections 1.4 and 4), there are interesting arguments purporting to show that many mala prohibita offences do, on closer inspection, involve significant forms of moral wrongness – albeit ones that depend on the state having good moral reasons for singling out new categories of conduct as crimes and the ways in which these reasons also serve to make the individual's non-compliance with such laws turn out to be morally wrongful. We will not ruin the surprise by spelling out the arguments of Section 4 now. But it remains a live possibility that on closer inspection some malum prohibitum offences might turn out to be wrongful and thus not actually over-broad at all. Still, it is plausible that the mala prohibita we really should be worrying about are those that display substantial overbreadth, as this would involve punishing the innocent or disproportionate punishment.

Strict liability offences. Strict liability offences allow one to be convicted without one being culpable or at fault in any way. More technically, these are crimes whose offence definition does not contain a mental state requirement (or *mens rea* – meaning 'guilty mind') as to one or more material elements of the offence definition, as the criminal law normally requires. In general, conduct is not a crime unless one had the right kind of mental state as to the consequences of or facts about what one was doing. The required mental state might be either an intention to produce those consequences or circumstances, knowledge they do or will obtain, awareness of a risk that they do or will obtain (recklessness) or at the very least being in circumstances that *should* have made one aware that these consequences or circumstances do or will obtain (negligence). Not requiring any such mental state as to certain material elements of the crime would mean that one could be convicted without being culpable or at fault in regard to

takes to be 'suspicious' may often have little concrete evidence available to prove their innocent intentions that would convince a jury. Furthermore, it is arguably unfair to the defendant to burden her with the task of exculpating herself in all such cases given the low bar that must be met for accusing her of this crime. See also text between notes 64 and 65.

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