

MALUM IN SE

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October 26, 2025

RECOMMENDED CITATION

mohammad looti (2025). *MALUM IN SE*. PSYCHOLOGICAL SCALES. Retrieved from <https://scales.arabpsychology.com/?p=61673>

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Primary Disciplinary Field(s): Criminal Law, Jurisprudence, Philosophy of Law

1. Core Definition

The legal concept of **Malum In Se** is derived from Latin, translating literally to "wrong or evil in itself." It denotes a class of actions or crimes that are inherently immoral, universally condemned, and recognized as wrong by the fundamental moral standards of human society, regardless of whether a formal statute prohibits them. These acts violate the natural moral order and are considered evil not because the law says so, but because they are intrinsically harmful or depraved. Examples traditionally include violent crimes such as murder, rape, and assault, as well as property crimes like theft and arson, which violate established societal norms of justice and security.

This classification is crucial in distinguishing fundamentally wicked acts from regulatory offenses. A crime characterized as **malum in se** carries an inherent moral turpitude, implying a corrupt or evil state of mind (*mens rea*) on the part of the perpetrator. This intrinsic wrongfulness is often rooted in Natural Law theory, which posits that certain moral truths are discoverable by reason and are universally applicable, transcending specific governmental decrees. Therefore, an individual committing a **malum in se** offense is considered to be acting against the conscience of humanity, not merely against a legislative body.

The primary utility of this designation lies in determining legal intent and culpability. In many jurisdictions, the penalty, societal condemnation, and even the requirement for specific criminal intent (where the act itself proves the intent) differ significantly for acts that are inherently evil compared to those that are merely statutorily prohibited. This fundamental distinction underpins much of Western criminal jurisprudence, establishing a hierarchy of offenses based on their moral gravity and impact on the societal fabric.

2. Etymology and Historical Context

The distinction between acts that are inherently evil and those that are only illegal due to regulation traces its roots deep into Western legal tradition, particularly the influence of classical Roman law and subsequent development in English common law. While the precise phrasing **malum in se** crystallized later, the underlying philosophical separation between moral offenses and regulatory infractions was recognized by scholars and jurists studying the nature of justice and governmental authority. Early common law relied heavily on community standards and religious principles to identify actions that were fundamentally unacceptable, such as homicide or trespass against persons.

During the evolution of the common law system, particularly in the medieval and early modern periods, jurists sought clear principles to categorize crimes. This need became pronounced as state authority grew and began legislating behaviors not traditionally seen as morally repugnant, such as specific tax regulations or trade practices. The recognition of **malum in se** provided a stable anchor--a set of offenses that were universally wrong, predating and existing independent of parliamentary decree. This ensured that the gravest offenses remained crimes even if explicit statutory definitions were incomplete or absent, relying instead on the established moral framework of the community.

Legal commentators like Sir William Blackstone formalized this categorization in his *Commentaries on the Laws of England*, solidifying its place in American and Commonwealth legal systems. Blackstone distinguished between offenses that required demonstration of moral guilt (inherently evil acts) and those that were simply violations of policy. This historical trajectory illustrates how the concept served not merely as a descriptive tool, but as a normative foundation for determining the legitimate scope and moral force of criminal law, ensuring that the state did not conflate minor regulatory violations with profound moral transgressions.

3. Philosophical Underpinnings: Natural Law

The concept of **malum in se** is intrinsically linked to the philosophical school of **Natural Law**. Natural Law theorists argue that moral standards are objective, inherent in nature or decreed by a divine source, and are accessible to human reason. Consequently, certain actions inherently violate these universal principles. When a crime is classified as **malum in se**, it is an acknowledgment that the act transgresses these primary moral obligations--the obligation not to take innocent life, not to steal, and not to harm others without justification, duties recognized irrespective of state legislation.

This perspective stands in stark contrast to pure Legal Positivism, which holds that law is purely a social construct, valid only because it has been enacted by a legitimate authority. While a positivist might acknowledge that murder is illegal because a legislature banned it, the proponent of **malum in se** argues that murder is banned by the legislature precisely because it is already evil. The law merely codifies an existing moral truth. This difference is not merely academic; it influences judicial interpretation, particularly in cases involving defenses based on conscience, necessity, or the interpretation of criminal statutes lacking explicit intent requirements.

The enduring significance of Natural Law in this context is its role in providing moral justification for legal principles. It suggests that criminal law is not arbitrary, but rather a necessary instrument for protecting fundamental human rights and maintaining a morally sound society. The classification of an act as **malum in se** serves as a rhetorical and legal tool to invoke the deepest moral condemnation the state can express, asserting that the conduct is universally deplorable,

transcending local customs or temporary political arrangements, thereby strengthening the perceived legitimacy of legal prohibitions against serious wrongdoing.

4. Key Characteristics and Examples

Offenses designated as **malum in se** typically share several defining characteristics. Firstly, they involve an element of moral depravity or turpitude. The commission of the act implies a fundamentally wicked or corrupt character disposition, suggesting the perpetrator acted with malice or inherent ill will. Secondly, the harm caused by the act is self-evident and direct, impacting the physical integrity, property, or fundamental rights of the victim in ways that are easily understood as damaging across cultural divides. The societal injury is immediate and recognizable.

Thirdly, these crimes almost universally require proof of a culpable mental state, or **mens rea**. While there are limited exceptions (such as transferred intent or extreme recklessness), the general principle is that the perpetrator must have intended the harm or acted with criminal negligence bordering on malice. This requirement reinforces the moral dimension, as accidental harm, while potentially civilly actionable, is not classified with the same moral severity and stigma as intentional malice, which reflects the actor's evil will.

Classic examples of **malum in se** crimes include:

Homicide: Murder and voluntary manslaughter, as they violate the most fundamental right to life.

Rape and Sexual Assault: Acts violating bodily autonomy, dignity, and integrity.

Arson: The malicious destruction of property, often endangering lives through intent to burn.

Larceny/Theft: The wrongful taking of property belonging to another, violating fundamental property rights based on inherent dishonesty.

Kidnapping: Unlawful confinement and movement of a person, fundamentally violating liberty.

These examples illustrate acts that would likely be considered wrong and punishable in virtually any organized human society that values individual life, safety, and property rights, highlighting their universal nature.

5. The Distinction: MALUM IN SE vs. MALUM PROHIBITUM

The concept of **malum in se** gains its clearest definition through its contrast with the concept of Malum Prohibitum ("wrong because prohibited"). This distinction is pivotal in criminal theory. While **malum in se** acts are evil by nature, **malum prohibitum** acts are wrong solely because a legislature has enacted a statute forbidding them. These regulatory offenses lack the inherent moral turpitude associated with natural crimes; they are crimes of convenience designed to ensure public order and efficient governance.

For example, running a red light, violating a specific health code ordinance, or failing to obtain a mandated operating license are typically considered **malum prohibitum** offenses. There is nothing inherently wicked or evil about these behaviors; the wrongfulness arises entirely from the law designed to regulate public safety or economic efficiency. If the law were repealed, the act would cease to be criminal, whereas murder remains morally offensive and fundamentally wrong whether or not it is specifically codified in a state's penal code, demonstrating the dependence of the latter category on legislative decree.

This differentiation carries profound practical implications, particularly concerning criminal intent. Historically, many **malum prohibitum** offenses were designated as strict liability crimes, meaning the prosecution did not have to prove *mens rea* (criminal intent). Conversely, **malum in se** crimes almost always require proof of intent because the moral culpability is central to the offense. Furthermore, courts often interpret the scope and severity of penalties, community service requirements, and eligibility for certain legal privileges (like parole) differently based on this classification, reserving the harshest sentences and greatest social stigma for those who commit crimes that are **malum in se**.

6. Application in Modern Jurisprudence

Although the Latin terms themselves are used less frequently in routine courtroom discourse today, the underlying distinction between inherently evil crimes and regulatory violations remains vital across several areas of modern law, including torts, insurance, and the interpretation of criminal statutes. In tort law, for instance, the concept influences the assessment of punitive damages; conduct that is **malum in se** (e.g., fraudulent behavior, intentional assault, or defamation) is far more likely to warrant high punitive awards, reflecting society's desire to punish and deter truly malicious behavior, than merely negligent actions.

In the interpretation of specific criminal statutes, especially those relating to conspiracy or felony murder, the classification is often determinative. The **felony murder rule**, for example, which allows a defendant to be charged with murder if a death occurs during the commission of a felony, often applies only when the underlying felony is deemed inherently dangerous, which correlates strongly with the concept of **malum in se** (e.g., armed robbery, aggravated burglary, or kidnapping). If the underlying felony is merely **malum prohibitum** (e.g., failure to properly license a firearm), courts are generally reluctant to apply the harsh felony murder doctrine.

Moreover, the classification significantly impacts procedural safeguards, professional licensing, and immigration law. Acts involving "moral turpitude"--a legal phrase almost synonymous with **malum in se**--are frequently used in immigration law to determine deportability or inadmissibility to the country, and in professional licensing reviews to assess an applicant's ethical fitness for practice. The inherent evil of the act signifies a deep moral failing deemed relevant to the

individual's future societal role, demonstrating the concept's powerful residual influence beyond archaic legal vocabulary.

7. Debates and Criticisms

Despite its foundational importance, the distinction between **malum in se** and **malum prohibitum** faces substantial academic and practical criticism. The primary critique revolves around the inherent subjectivity of defining "evil" or "natural law." Critics argue that what constitutes moral turpitude is not universal but culturally relative, evolving over time and differing drastically between societies and even within diverse modern nations. For instance, behaviors related to sexuality, commerce, or even self-defense have varied widely throughout history, challenging the idea of a timeless, stable definition implied by the **malum in se** designation.

A second major criticism highlights the difficulty in maintaining a clear boundary between the two categories in complex modern statutory law. As regulatory complexity increases, many statutes blur the lines between moral and regulatory offenses. For example, severe corporate environmental pollution might be codified as **malum prohibitum** (a regulatory violation), but its consequences--widespread harm, illness, and even death--give it the moral weight and social condemnation traditionally reserved for a crime **malum in se**. Courts often struggle to classify hybrid offenses where the prohibited act, though statutory, results in inherently evil outcomes if done intentionally or recklessly.

Furthermore, some legal realists dismiss the distinction as functionally irrelevant in modern jurisdictions where virtually all criminal law is now codified by statute. They argue that once an act is formally illegal, the primary inquiry should be the specific statutory definition and prescribed penalty, not the philosophical roots. While acknowledging the historical value, critics contend that relying too heavily on the moral classification can introduce unnecessary ambiguity and potential judicial bias into legal analysis, preferring clear, objective statutory language over subjective moral judgments concerning inherent evil.

Further Reading

[Natural Law - Wikipedia](#)

[William Blackstone - Wikipedia](#)

[Legal Positivism - Wikipedia](#)

[Malum Prohibitum \(Legal Information Institute, Cornell Law School\)](#)