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COMMENT

ALIEN ETHICS: TESTING THE LIMITS OF ABSOLUTE LIABILITY

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I. INTRODUCTION

The student of history knows that our Western civilization is the story of Christendom and its great work in Europe.[1] Imperial Rome is thought to have suffered a violent death at the hands of foreign invaders, yet by all credible accounts it was transformed from within. Indeed, the decay of the Roman Empire became the fertile soil from which the European nations emerged;[2] and by the Middle Ages, there had been a continuity of European civilization, under the discipline and moral authority of the Catholic Church, for over a thousand years.[3] It was during this period that powerful minds would affirm that final end of man, which is (and shall ever be) happiness.[4] That freedom should be exercised in the pursuit of happiness is a familiar concept in the Land of the Free.[5] But the medieval man was taught a truer doctrine than we, for he was, in a sense, the firstborn of faith and reason, and therefore heir to the greatest flowering of philosophy the

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1. *See John* 14:12 (English Standard Version) ("[G]reater works than these will he do . . . ."). Subsequent citations to Holy Scripture are to the ESV unless otherwise indicated.

2. There is a short-lived exception in the case of the Roman province of Britain, whose silence between the middle of the fifth century until the landing of St. Augustine and his missionary priests in A.D. 597 has become the source of many unhistorical speculations generally described as the "Anglo-Saxon conquest." For an account of that period of Britain's history, and of the history of Europe generally, see HILAIRE BELLOC, EUROPE AND THE FAITH 70–101 (Dodo Press 2007) (1920).

3. *Id.* at 108–09. Indeed, it was the Catholic Church, and not the popular and false explanation of barbarian invasion, which transformed the old Roman order, thoroughly Pagan, into a unified Christian civilization. *Id.* at 51.

4. *See, e.g.*, 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA bk. I. pt. II. Q.1, art. 7, sed contra (Fathers of the English Dominican Province trans., Christian Classics 1981) (c. 1265).

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

world has ever known. It was not to last, however, and by the eighteenth century, the children of an older Europe, now fathers of a nation, came to inherit the tired remains of a supernatural ethic, which these men raised as the banner of their newly minted government. That flag still flies today, though its colors have since faded.

"Happiness" is a universal calling, as varied as life itself. But humanity errs if it concludes that "happiness" is simply subjective, merely relative, or without transcendent meaning. Even happiness has its limits, which common sense since birth has taught us. The truth is we ought not indulge our heart's every urge, as the prophets of old had warned.[6] Happiness, we learn, is not the same as pleasure;[7] one is spiritual, the other sensual. Thus, the mystery of freedom is counted among those paradoxes for which the Christian faith is known, often attacked, and has made its business to defend against the errors of every age. As one esteemed writer has recently reminded us, "Liberty is a power perfecting man, and hence should have truth and goodness for its object."[8] The paradox, then, is simply this: that man is most free when he knows his limits—and walks within them. Therefore, if authentic liberty be our guide, the way is narrow indeed, but it is the only way which secures our happiness.[9]

This principle is fundamental, but especially so to the criminal law, which is chiefly concerned with judging human actions that have strayed from the straight and narrow. Consequently, the law's machinery is generally tooled to operate along the cliffs of human nature; that is, where the use of freedom is safely viewed by all as immoral. In all cases, however, freedom is the key to culpability. Thus, it is said that coercion will in some cases excuse an unlawful act,[10] since coercion is contrary to freedom,[11] the exercise of which is an essential catalyst of crime and therefore punishment.

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6. *Jeremiah* 17:9–10.

7. Many ethical writers have confused the two. The errors of utilitarianism, a philosophy of ethics in opposition to the classical notion of virtue, is one such example. *See, e.g.*, JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 1–24 (Prometheus Books 1988) (1789).

8. LEO XIII, IMMORTALE DEI para. 32 (Nov. 1, 1885), *reprinted in* THE PAPAL ENCYCLICALS 1878–1903 at 107, 114 (1990), *available at* http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html.

9. *See Matthew* 7:14.

10. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 438–39 (photo. reprint 2005) (2d ed. 1960).

But not all coercion does violence to freedom, otherwise law itself would be a nullity. In the American tradition, as with the Western legal tradition in general, the goal of government is the "public good."[12] To this end laws are promulgated, their power coercive.[13] In the United States, however, government finds its source in the people.[14] Thus, under the American form of government, freedom is, in theory,[15] bound by majority rule,[16] save those subjects which the people have expressly withdrawn from government's competence.

But even without the legislator and the coercive power of human law, there is another lawgiver and another law—a higher law—that tugs on our conscience. If human nature was in perfect accord with God's higher law, then a sort of supernatural justice would be the hallmark of the living: love

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11. "*Actus me invito factus non est meus actus*, an act done by me against my will is not my act...." JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE CRIMINAL LAW § 288 (7th ed. 1882) (internal quotation marks omitted).

12. THE DECLARATION OF INDEPENDENCE para. 3; *see also* 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.90, art. 2.

13. Frederic Bastiat defined law as force in defense of the collective right to life, liberty, and property. *See* FREDERIC BASTIAT, THE LAW 6, 24, 28 (Dean Russell trans., The Found. for Econ. Educ., Inc. 1950) (1850).

14. *See* THE DECLARATION OF INDEPENDENCE para. 2 ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

15. The political theory of social contract is contrary to St. Paul's doctrine. *See Romans* 13:1-2 (teaching that the *power* of ruling comes from God); *see also* LEO XIII, *supra* note 8, paras. 24-26 (criticizing the social contract theory of government). "[T]he pact which they allege is openly a falsehood and a fiction," says Pope Leo XIII, "and that it has no authority to confer on political power such great force, dignity, and firmness as the safety of the State and the common good of the citizens require." LEO XIII, DIUTURNUM para. 12 (June 29, 1881), *reprinted in* THE PAPAL ENCYCLICALS, *supra* note 8, at 53, *available at* http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_29061881_diuturnum_en.html.

16. *But see* HILAIRE BELLOC, AN ESSAY ON THE RESTORATION OF PROPERTY 31 (2002) ("Parliaments have everywhere proved irreconcilable with democracy. They are not the people. They are oligarchies, and those oligarchies are corrupt because they pretend to a false character and to be, or to mirror, the nation."). Hilaire Belloc is a notable historian and ardent defender of private property and true economic freedom, as opposed to industrial capitalism, which has plunged both England and the United States back into the ancient institution of slavery. *See also* G. K. CHESTERTON, THE OUTLINE OF SANITY 7 (1927) ("The truth is that what we call Capitalism ought to be called Proletarianism. The point of it is not that some people have capital, but that most people only have wages because they do not have capital.").

would be the rule,[17] and all would freely abide by it. Of course, it is not that simple. Freedom has been polluted and man's will weakened. "[W]hen I want to do right," the Apostle complains, "evil lies close at hand. For I delight in the law of God, in my inner being, but I see in my members another law waging war against the law of my mind . . . ."[18] That "other" law is a natural craving for pleasure, a kind of coercion from within, which often comes into conflict with our spiritual good.[19] When that happens a struggle ensues; to yield is to sin. It is a life-long struggle that engages us. The taming of that wild and freedom-filled creature called Man is one reason for the law of crimes. Admittedly, the law is powerless to absolve us of our sins. Yet, for some, its avenues point the way back to basic freedoms and, hopefully, the road to forgiveness. For the vast majority, however, the law stands as a living sentinel, the immortal guardian of civilization, whose promise of public vengeance, fueled by the memory of a moral tradition centuries in the making, preserves every generation in relative safety and happiness.

Nevertheless, the modern world has changed dramatically in the last two hundred years, and it continues to do so at a frantic pace. The memory of older things, better things, has faded in so much novelty and blind progress, or has dissolved in the emptiness of skepticism. As societies become increasingly complex so do their laws, and the strain on legal systems to provide for the common good are pressed to their natural limits. Ironically, however, the growing number of laws invoking the primitive doctrine of absolute liability are both sign and symptom of our civilization's drift back to barbarism. These so-called "public welfare offenses" represent a dangerous departure from established principles of crime and punishment, settled throughout all Europe by the High Middle Ages.

This Comment examines the constitutional limits of the public-welfare-offense doctrine, which, since its formal recognition in the mid-nineteenth century, has snowballed into a very real menace. It is difficult to imagine any conduct that cannot be proscribed and therefore punished by the police power; and the only effective limits thus far seem to be the ancient requirements of legality and proportionality. But the latter is on shaky

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17. *John* 13:34 ("A new commandment I give to you, that you love one another: just as I have loved you, you also are to love one another.").

18. *Romans* 7:21–23.

19. *Galatians* 5:17 ("For the desires of the flesh are against the Spirit, and the desires of the Spirit are against the flesh, for these are opposed to each other, to keep you from doing the things you want to do.").

ground and would benefit from entrenchment. The rule of construction recognized in *Morissette v. United States*[20] has been helpful when a statute is silent as to mental elements; and *Lambert v. California*[21] has certainly slowed the doctrine's progress for crimes of omission. But these two modest roadblocks cannot defend against the urgent pace and direction the United States is headed.

This Comment suggests, first, that the doctrine of mens rea with respect to traditional crime should be protected by the Due Process Clause of the Fourteenth Amendment—the state cannot alter the fundamental nature of crime. Second, public welfare offenses that are sufficiently grave violate the First Amendment to the United States Constitution, unless the state proves, under the test proposed in this Comment, that such laws are legitimate exercises of the police power. Third, the willful offender's actual knowledge of a public welfare offense is always sufficient for conviction, and therefore constitutional in all circumstances, so long as other constitutional requirements are satisfied. We turn now to the concept of crime.

II. BACKGROUND

Until relatively recent times, the criminal law in England and the United States was primarily concerned with establishing the moral guilt or innocence of the accused. Punishment in the early cases was severe and often deadly; thus, the law grew sensitive to the rights of the accused. That sensitivity fueled its central inquiry: mens rea.[22] Like a magician, the law's main act was a revelation, the very faculty of freedom in a flash of light and puff of smoke. (The fact of its existence was itself a revelation long ago.) But today's criminal law is quickly losing interest in the show; it is growing up, or so it thinks. Magic is an amusement fit for children but not the modern rascal, infinitely skeptical of all things supernatural. In time, such doubting is certain to penetrate even the natural order. Thus, the mature skeptic who first declared that all magic is superstition now campaigns for the abolition of all magicians. Meanwhile, the magician patiently waits for the believer, practicing his art with the knowledge that law is not invention; law is magic. Sir William Blackstone believed in magic. "[T]o constitute a crime against human laws," he writes, "there must be, first, a vicious will; and, secondly,

20. Morissette v. United States, 342 U.S. 246 (1952).

21. Lambert v. California, 355 U.S. 225 (1957).

22. Mens rea is a Latin phrase that means "guilty mind." In the context of criminal law, it generally signifies the mental element necessary to convict for any crime.

an unlawful act consequent upon such vicious will."[23] The visible and invisible coalesce in Blackstone's doctrine. To understand it, we turn once more to the medieval man, whose metaphysics would become the foundation for the common law of crimes.

A. *A Tradition Rooted in Antiquity*

We begin our story a mere century after the onset of the Middle Ages and with the *Leges Henrici Primi*,[24] compiled about the year 1118. The *Leges* has been described as one of the earliest compilations of "true English law that was neither Roman nor canon law."[25] Despite this potentially misleading description,[26] the *Leges* is purportedly an effort to translate into Latin the legal codes of the Anglo-Saxon kings, whose settlements along Britain's eastern shore severed the Roman province from continental

23. 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

24. LEGES HENRICI PRIMI (L. J. Downer ed. & trans., Oxford Univ. Press 1972) (c. 1118).

25. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 978 (1932).

26. The statement suffers from a modern notion of nationalism. In the twelfth century, however, no such feeling existed among the peoples of Western Europe. Moreover, Professor Sayre's description of the *Leges* echoes the unhistorical thesis that Britain, and therefore English civilization, became a barbaric and German thing, and this since the middle of the fifth century. *See supra* note 2. It is professed by the following distortions of history that the institutions common to all Europe during the decline of Roman civilization were, in Britain, the product of a wholly new order, German in origin, which conquered the Roman province by the combined violence of its Pagan neighbors to the north and bands of local pirates long remembered by the name of "Saxon." BELLOC, *supra* note 2, at 80–81, 100. In his lectures on the common law, Pollock likewise speaks of the virtues of his "heathen ancestors" and their lasting influence on the isle. SIR FREDERICK POLLOCK, THE GENIUS OF THE COMMON LAW 8–11 (photo. reprint 2003) (1912). But as truth would have it, Britain survived that period of random warfare and institutional decline, 150 years in all, with but few novelties added, namely, the admixture of German with Latin dialects, or what is called "Teutonic." BELLOC, *supra* note 2, at 86, 94–95. "By the time that this old Roman province of Britain re-arises as an ordered Christian land in the eighth century," writes Belloc, "its records are kept not only in Latin but in the Court 'Anglo-Saxon' dialects . . . ." *Id.* at 101. But no permanent break in the continuity of European civilization was thereby effected. Professor Berman also perpetuates this false thesis throughout his book *Law and Revolution*, which is especially evident in his discussion of the history of London. HAROLD J. BERMAN, LAW AND REVOLUTION 381 (1983) ("Although Roman legions had occupied the town from the first to the fifth centuries A.D., little that was Roman survived the Anglo-Saxon invasions except for the remains of roads and buildings and the great stone wall."). On the contrary, Belloc explains, "One thing did *not* disappear, and that was the life of the towns." BELLOC, *supra* note 2, at 91. "The supposition that the Roman towns disappeared is no longer tenable," he continues, "and the wonder is how so astonishing an assertion should have lived even for a generation." *Id.* at 94.

Europe for 150 years, from the middle of the fifth century until the landing of St. Augustine and his missionaries in the year 597.[27]

The *Leges* contains an assortment of laws, ecclesiastical and secular, and maxims. Its significance in the study of criminal law stems from its sanction of absolute liability for a great number of offenses. As Professor Sayre observes, the *Leges* contains much law that "smacks strongly of liability without fault and certainly without criminal intent."[28] For example, "[i]f some one in the sport of archery or other form of exercise kill another with a missile or by some such accident, let him repay; for the law is that he who commits evil unknowingly must pay for it knowingly."[29] Such is the supposed novelty of the Germanic tribes. But the historian Mr. Hilaire Belloc teaches otherwise. Money damages for injuries were among the "institutions . . . common to all Europe. Nothing but ignorance," he says, "can regard them as imported into Britain . . . by the Pirates of the North Sea."[30]

Whatever its source, it is a tradition in tension with another, for the *Leges* also illustrates the beginning of an ever-growing concern with moral guilt as a requisite to punishment. Among the many "passages strongly impregnated with the surviving notion of absolute liability irrespective of guilty intent," Professor Sayre points out an exception—a "scrap copied in from the teachings of the church"[31]—and the object of our inquiry. In a section discussing perjury, it is said that a person is not guilty unless his intention is guilty: "*Reum non facit nisi mens rea.*"[32] The Latin proverb

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27. *See supra* note 2 and accompanying text.

28. Sayre, *supra* note 25, at 979. *But see* Percy H. Winfield, *The Myth of Absolute Liability*, 42 L. Q. REV. 37, 50 (1926) (stating that absolute liability in medieval law is a "rather inaccurate generalization").

29. Sayre, *supra* note 25, at 978 (quoting LEGES HENRICI PRIMI c. 88, 6).

30. BELLOC, *supra* note 2, at 95.

31. Sayre, *supra* note 25, at 983. In fact the *Leges* is littered with such scraps: "No one shall give the sacrament to a person who delays submitting to the judges he has chosen, until he obeys." LEGES HENRICI PRIMI, *supra* note 24, c. 5, 5b. "The apostle says that an accusation against a priest is not to be entertained without two or three proper witnesses; how many more then should there be in the case of bishops . . . ?" *Id.* c. 5, 15. "The sins of others shall in no way be prejudicial to anyone who has led a good life in the church." *Id.* c. 5, 18d. "There shall be dealt with first the due rights of the Christian faith; secondly pleas of the crown, and finally the causes of individuals shall be settled with proper amends." *Id.* c. 7, 3. "A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess." *Id.* c. 70, 16b.

32. *Id.* c. 5, 28b.

comes from St. Augustine of Hippo. In a sermon on James 5:12,[33] the Catholic bishop stated to the effect that "if a man believing that no rain fell in a certain spot, nevertheless for self-interest testifies that it did rain there, even though in fact it did rain he is a perjurer in the eyes of God."[34]

Because of the maxim's odd placement in the *Leges*, however, and due to the overall disunity of the work, it is thought by some to supply a contextual, rather than general, rule of liability.[35] Even assuming this is the case, and as Professor Lévitt concludes, the author of the *Leges*—himself a cleric—would have been familiar with "the principle of mens rea as a necessary ingredient of sin"[36] through the influence of the penitential books,[37] particularly those of St. Finnian of Clonard, of the Irish church, and St. Theodore of Tarsus, the seventh Archbishop of Canterbury.[38] Indeed, the entire volume is saturated with the truth of Lévitt's thesis. Appearing under the heading of homicide, for example, one finds that homicide "is also committed in self-defense or in a just cause,"[39] followed by the words of St. Augustine:

> If homicide is killing a man, it can sometimes happen without committing sin; for a soldier who kills his enemy, and a judge a criminal, and a person from whose hand a spear flies perhaps

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33. "But above all, my brothers, do not swear, either by heaven or by earth or by any other oath, but let your 'yes' be yes and your 'no' be no, so that you may not fall under condemnation." *James* 5:12.

34. Sayre, *supra* note 25, at 983 n.30; *accord* HALL, *supra* note 10, at 80 (suggesting that St. Augustine was the "likely point of dissemination among medieval legal scholars"); Winfield, *supra* note 28, at 41. And St. Thomas, in his *Summa*, quotes the Catholic bishop as having said that "it is by the will that we sin, and we behave aright." 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.20, art. 1, sed contra. St. Thomas thus concludes that "moral good and evil are first in the will." *Id.* However, some scholars trace the doctrine, or at least its wider legal acceptation, to later developments. *See, e.g.*, Albert Lévitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, 588–89 (1923) (stating that "the doctrine of mens rea came into the common law through the penitential books of the Catholic church in England in the ninth century"); BERMAN, *supra* note 26, at 181–82.

35. *See* Winfield, *supra* note 28, at 40–41; Bernard Brown, *The Emergence of the Psychical Test of Guilt in Homicide 1200–1550*, 1 TAS. U. L. REV. 231, 232 (1959).

36. Albert Lévitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. R. 117, 135 (1923).

37. "The basis of these books are the patristic writings," says Lévitt, and various church councils. *Id.* at 132.

38. *Id.* at 132, 135.

39. LEGES HENRICI PRIMI, *supra* note 24, c. 72, 1b.

> involuntarily or accidentally, do not seem to me to commit a sin when they kill a man.[40]

Therefore, in the context of sin and the ecclesiastical law, the principle of mens rea seems evident, even advanced. A similar sentiment, equally antique yet legally sophisticated, is found in a quote from St. Jerome in the very next sentence: "Punishing murderers and those who commit sacrilege is not a shedding of blood, but the due application of the laws."[41]

By the late twelfth century, however, men would still resort to the ordeal[42] to adjudge culpability, "as trial by jury or by the oaths of witnesses was not yet an accredited method of procedure."[43] Perjury was commonplace, as it is arguably even today, and compurgation by oath therefore invoked the distrust of men accused of capital offenses. The *Leges* provided that "[n]o one shall be convicted of the more serious charges on evidence alone."[44] "[T]he *judicium Dei*," says Mr. Edward J. White, "was supposed to take the place of the false standards, too often erected by ordinary mortals."[45] Thus, it would seem that a belief in a guilty mind, and its theological underpinnings, which had taken firm root by the early twelfth century, was not yet in harmony with everyday legal procedure.[46] The doctrine would be merely floating and without foundation in secular law until the reign of Henry III, who abolished the ordeal throughout England in response to the decrees of the Fourth Lateran Council, which forbade "the clergy to take part in the ceremony of the ordeal."[47]

The onset of the Middle Ages is marked by its emergence from darker times, in which the old pagan order was slowly purged from Europe by the

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40. *Id.* c. 72, 1c. Professor Sayre seems to be in agreement: "Although the man who unwittingly caused another's death through pure misadventure may have been criminally liable under the early Anglo-Saxon law, to punish him with death violated the ideas of moral guilt derived from the canonists." Sayre, *supra* note 25, at 980.

41. LEGES HENRICI PRIMI, *supra* note 24, c. 72, 1d (internal quotation marks omitted).

42. *See id.* c. 18, 1; c. 65, 3, 3a, 3b, 3c, 5; *cf. Numbers* 5:11–31 (the Mosaic law of jealousies).

43. EDW. J. WHITE, *Trial by Ordeal, in* LEGAL ANTIQUITIES: A COLLECTION OF ESSAYS UPON ANCIENT LAWS AND CUSTOMS 155 (1913).

44. LEGES HENRICI PRIMI, *supra* note 24, c. 31, 5.

45. WHITE, *supra* note 43, at 154.

46. Professor Sayre notes that the "growing power of the king" to pardon a convicted felon was among the first procedural devices with which a felon could escape the death penalty. Sayre, *supra* note 25, at 980–81.

47. WHITE, *supra* note 43, at 158 n.57. The ordeal was briefly revived in the reign of James I. in cases of witchcraft and sorcery. *Id.*

Catholic Church. And in the flowering of that high civilization, in which Europe is said to have awoke, legal institutions were likewise clothed in greater sophistication. Criminal law, at last, emerged from its pagan shell; and the learned authors all agree the Church played an important, if not the leading, role in the development of criminal law.[48] The very language of the law, and the punishments[49] it imposed, invoked the sacramental system.[50] For at least eight centuries, however, the Church had provided sinners and criminals alike with a means of reconciliation with the faithful. The idea was

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48. *See, e.g.*, Winfield, *supra* note 28, at 42 (stating that "the Church's influence [was] at work"); *see also* Sayre, *supra* note 25, at 980 ("The canonists had long insisted that the mental element was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation of legal guilt was making itself strongly felt."); BERMAN, *supra* note 26, at 188 (discussing categories of intent developed by the canonists).

49. "Anyone who kills a monk or cleric shall give up his arms and enter the service of God; and if he has done this accidentally and unintentionally, he shall do penance for seven years; if he did it intentionally he shall do penance until his life's end." LEGES HENRICI PRIMI, *supra* note 24, c. 68, 7. "Anyone who is a party to homicide shall do penance for seven years, being for one year confined to bread and water." *Id.* c. 68, 10. "A person who kills any relative of his shall make amends by the fruits of penitence worthy in the sight of God, and the measure of penance to be performed shall depend on whether his action was intentional or unintentional." *Id.* c. 75, 5.

50. One easily forgets how great were the developments in Christian doctrine arising out of the Novatian schism. Novatian, a Roman priest, asserted the Church had not the means to pardon the fallen, who, because of sins committed after baptism, were excluded from its communion. *See* JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 384–85 (Univ. of Notre Dame Press 6th ed. 2005) (1878). "There must be some provision in the revealed system for so obvious a need," writes Newman, since the Sacrament of Baptism could not be repeated. *Id.* at 384. The controversy was settled by the end of the third century, at which time "as many as four degrees of penance were appointed, through which offenders had to pass in order to a reconciliation." *Id.* at 385. In modern times, the power to pardon, from which we learn the Latin *indulgentia* or indulgence and the grossly misunderstood doctrine going by the same name, is taken for granted by all democratic nations. *See, e.g.*, U.S. CONST. art. 2, § 2 ("The President . . . shall have Power to grant . . . Pardons for Offenses against the United States . . . ."). Though not a common practice of the infant Church, *see* NEWMAN, *supra*, at 385, 395, Scripture records St. Paul granting an indulgence to a man guilty of incest. 2 *Corinthians* 2:10 ("For, what I have pardoned, if I have pardoned any thing, for your sakes have I done it in the person of Christ.") (Douay-Rheims Version); *see also* 5 AQUINAS, *supra* note 4, supp. Q.25, art. 1, sed contra (concluding that St. Paul could indeed "remit the punishment of a sin without any satisfaction"; that is, without need of the Sacrament of Penance). Therefore, "whatever remission is granted in the court of the Church holds good in the court of God." *Id.* Q.25, art. 1, respondeo. Ironically, indulgences are today even more prevalent than in the Middle Ages, for the modern American criminal is often the beneficiary of a relaxed sentence by way of plea bargaining with the prosecuting official.

at once liberal and life-giving; and by the twelfth century, the medieval man would have benefited greatly by the infusion of mercy in a system founded on a "rough and ready justice."[51]

What ought we to conclude, then, of the doctrine known as mens rea, that fundamental principle on which our criminal law is founded? First and foremost, that it is a Christian doctrine that prompted a kind of spiritual progress toward the solidarity of the human family. Second, it is a defense against arbitrary power by the sovereign, who must, at a minimum, show that a man is deserving of punishment. On these twin pillars medieval life emerged from its fatalistic adolescence, and yet many continue to doubt the doctrine's continued vitality.[52] However imperfect, the concept of moral guilt survives today in the halls of secular justice.[53]

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51. Sayre, *supra* note 25, at 978.

52. *See, e.g.*, Lévitt, *supra* note 34, at 588–89 ("A crime does not consist of an act and an intent, but simply of an act. . . . [I]n the criminal law of England and the United States *there is no place now for a doctrine of intent as a necessary ingredient of a crime.*"); HALL, *supra* note 10, at 56 (noting the trend in the United States "at present, by psychiatrists, for the complete elimination of prescribed penalties"). In a manner characteristic of the author, C. S. Lewis repudiates what he calls the "Humanitarian Theory of Punishment." *See* C. S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 225 (1953) ("My contention is that this doctrine, merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being."); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 37 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) ("In the language of Kant, it treats man as a thing, not as a person; as a means, not as an end in himself.").

53. According to G. K. Chesterton,

> The fact is this: that the modern world, with its modern movements, is living on its Catholic capital. It is using, and using up, the truths that remain to it out of the old treasury of Christendom; including, of course, many truths known to pagan antiquity but crystallized in Christendom. But it is *not* really starting new enthusiasms of its own. The novelty is a matter of names and labels, like modern advertisement; in almost every other way the novelty is merely negative. It is not starting fresh things that it can really carry on far into the future. On the contrary, it is picking up old things that it cannot carry on at all. For these are the two marks of modern moral ideals. First, that they were borrowed or snatched out of ancient or mediaeval hands. Second, that they wither very quickly in modern hands.

G. K. CHESTERTON, THE THING: WHY I AM A CATHOLIC (1929), *reprinted in* 3 THE COLLECTED WORKS OF G. K. CHESTERTON 147 (1990).

B. *Mens Rea in the Modern Era*

As shown thus far, the doctrine of mens rea was a development that arose in the Christian tradition and strengthened in the Middle Ages. Its primitive formula, however, is easily traced to Jesus' teaching as witnessed in the Bible:

> And [Jesus] said, "What comes out of a person is what defiles him. *For from within, out of the heart of man, come evil thoughts,* sexual immorality, theft, murder, adultery, coveting, wickedness, deceit, sensuality, envy, slander, pride, foolishness. All these evil things come from within, and they defile a person."[54]

The doctrine was later studied, expounded, and systematized in the scholasticism of the Middle Ages. Bracton was the first conduit to import Roman law concepts into English criminal law.[55] Thus, Professor Sayre concludes that the Latin phrase found in the *Leges* of Henry I was merely "seized upon and used as a convenient label for the newer ideas"[56] the Roman law books inspired in legal thought at that time. "*Mens rea*," he says, "in the period following Bracton, thus smacked strongly of general moral blameworthiness."[57] By the seventeenth century, the doctrine was well settled as accepted law.[58]

Humanity has struggled with whether evil exists, and why, since the very beginning. As the successor to a worthy tradition, Anglo-American law has answered the first question in the affirmative and left the second to better teachers. Despite the skepticism of our time, the capacity for evil has

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54. *Mark* 7:20–23 (emphasis added).

55. Sayre, *supra* note 25, at 983 (noting the "Roman law conceptions of *dolus* and *culpa*" influencing Bracton).

56. *Id.* at 988. *But see* Lévitt, *supra* note 36, at 118 (concluding that "mens rea does not . . . come to us from the Roman law").

57. Sayre, *supra* note 25, at 988.

58. *Id.* n.51. Evil thoughts alone, however, are generally not cognizable by the criminal law and, thus, escape punishment by the civil authorities. *See, e.g.*, 4 BLACKSTONE, *supra* note 23, at *21 ("For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intention of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. . . . And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all."). As noted elsewhere, the doctrine is not without precedent. *See, e.g.*, 1 *Samuel* 16:7 (Douay-Rheims Version) ("[N]or do I judge according to the look of man: *for man seeth those things that appear, but the Lord beholdeth the heart.*") (emphasis added).

universally been shown to dwell inside each of us. It is a result of the simple equation, God plus Man plus Freedom. No longer may we point to Nature to exculpate us; neither may we claim, "The Devil made me do it," or worse yet, God. The doctrine of mens rea stands as a testament to that terrible truth: that we are all free moral agents and therefore responsible to God and neighbor for our actions. Even legal positivists who advocate a non-moral theory of penal liability generally admit the moral dimension in which the criminal law operates. In the words of Justice Holmes, "[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the law."[59] Nevertheless, for Holmes, the only reality is that of the outward, visible sign: legal distinctions between innocent and culpable conduct have nothing to do with the discovery of a real presence within, what one might loosely refer to as a person's sacramental innards; instead, the distinctions arose in response to the uniquely human desire to avenge the victim of intentional violence. According to Justice Holmes, "Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done."[60] For, as Holmes characteristically observes, "even a dog distinguishes between being stumbled over and being kicked."[61]

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59. HOLMES, *supra* note 52, at 100.

60. *Id.* at 6–7. Here we see a fine example of the mature skeptic, speaking through Mr. Justice Holmes, eager to uphold his doctrine by undermining the dignity of man. As is often the case with genius, it is alarming how an astute thinker like Holmes can come so close to the truth and miss it completely; it is the tragedy of every man who abandons faith for the emptiness of materialism. For that is the fundamental problem with putting some things first which ought to be last. Vengeance does not import a feeling of blame because it is a reaction *to* violence, which is first in time; on the contrary, blame (i.e., culpability) imports the need for lawful vengeance, which today we simply call by a different name—retributive justice. In the same vein, unrestrained passion is indeed the enemy of the just, *see Romans* 7:5, 21–23, and for that reason the power of retributive justice is, in our system of government, first vested in the state and diffused thence among judge and jury.

Oddly enough, St. Thomas affirms the general notion laid down by Holmes, that vengeance ought to be confined to intentional wrongs. 3 AQUINAS, *supra* note 4, bk. II. pt. II. Q.108, art. 4, sed contra ("Punishment is due to sin. But every sin is voluntary according to Augustine. Therefore vengeance should be taken only on those who have deserved it voluntarily.") (internal citation omitted). Vengeance is a special virtue (i.e., a species of justice), which "consists in the infliction of a penal evil on one who has sinned." *Id.* Q.108, art. 1, respondeo. Paradoxically, then, the lawfulness even of an act of vengeance turns on the intention of the avenger. *Id.*; *see also supra* note 41 and accompanying text.

61. HOLMES, *supra* note 52, at 7. It seems doubtful, however, that the Dumb Ox of Sicily would have concurred with Justice Holmes's implied assertion that a dog can discern a man's intention and therefore is presumably capable of vengeance. *See* 2 AQUINAS, *supra* note 4, bk.

By the eighteenth and early-nineteenth centuries, the maxim *actus non facit reum nisi mens sit rea*[62] was oft repeated by legal scholars in both England and the United States.[63] The American treatise writer Mr. Bishop says, "[t]he doctrine which requires an evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal."[64] Likewise, in his treatise on jurisprudence, Sir John Salmond writes, "there are two conditions to be fulfilled before penal responsibility can rightly be imposed .... [The first is] the doing of some *act* by the person to be held liable.... [The other] is the *mens rea* or guilty mind with which the act is done."[65] And again, in 1846,

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I. pt. II. Q.31, art. 3, respondeo (explaining that irrational animals do not feel joy but only delight, for joy results "when delight follows reason"); *see also id.* Q.40, art. 3, respondeo (proving that, in a limited sense, "hope and despair are in dumb animals").

Thomas was nicknamed the Dumb Ox by his schoolmates on account of his size and quiet demeanor. According to G. K. Chesterton, when the great Albertus Magnus learned of his pupil's nickname, he "broke silence with his famous cry and prophecy; 'You call him a Dumb Ox; I tell you this Dumb Ox shall bellow so loud that his bellowings will fill the world.'" G. K. CHESTERTON, SAINT THOMAS AQUINAS 71 (Doubleday 1956). Indeed, the renowned 13th century scholastic, Doctor of the Church, and the author's hero, is without a doubt the most brilliant and insightful philosopher to have ever lived. "It was the outstanding fact about St. Thomas that he loved books and lived on books .... When asked for what he thanked God most, he answered simply, 'I have understood every page I ever read.'" *Id.* at 21. Belloc praises him as "the summit of expository power ..., surely the strongest, the most virile, intellect which our European blood has given to the world." BELLOC, *supra* note 2, at 121.

The Angelic Doctor's intellectual pursuits came to an abrupt and miraculous end, when "[o]n the feast of St Nicholas [in 1273, Thomas] was celebrating Mass when he received a revelation which so affected him that he wrote and dictated no more, leaving his great work, the *Summa theologiae*, unfinished." BUTLER'S LIVES OF THE SAINTS 29 (Michael Walsh ed., HarperCollins concise rev. ed. 1991) (1756). Said Thomas: "The end of my labours is come. All that I have written appears to be as so much straw after the things that have been revealed to me." *Id.* at 29–30 (internal quotation marks omitted).

62. "[T]he act itself does not make a man guilty unless his intention were so...." BISHOP, *supra* note 11, § 288 (internal quotation marks omitted).

63. Sayre, *supra* note 25, at 974.

64. BISHOP, *supra* note 11, § 287. In a section entitled "Moral Science," Bishop writes, "The calm judgment of mankind keeps this doctrine among its jewels." *Id.* § 289.

65. SIR JOHN SALMOND, JURISPRUDENCE § 127 (7th ed. 1924). Salmond continues,

> It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer. For although the act may have been materially or objectively wrongful, the mind and will of the doer may have been innocent.

Judge Turley opined, "It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime."[66]

Despite such firm foundations, history has shown that the doctrine of mens rea is malleable. Beginning in the mid-nineteenth century, a new kind of wrongdoing, made to answer under authority of the criminal law, was being recognized in England and the United States. As one commentator coined the phrase, "public welfare offenses"[67] formed a new category of statutory offenses permitting convictions on the basis of conduct alone, irrespective of guilty intent. They ordinarily carried light penalties and were enacted for the protection of public health. In his treatise on evidence, Simon Greenleaf writes of the emerging doctrine:

> [W]here a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril.[68]

Courts and commentators were at once resistant to ascribe the quality of a true crime[69] to this new class of statutory offenses, and often justified convictions on the nature of the proceeding, which, "although . . . criminal in form, . . . is really only a summary mode of enforcing a civil right."[70] It is

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Id.

66. Duncan v. State, 26 Tenn. (7 Hum.) 148, 150 (1846) (reversing the conviction of a steamboat captain indicted under Tennessee law for transporting a slave without his knowledge).

67. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933).

68. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 21 (4th ed. 1857).

69. Sayre, *supra* note 67, at 67 ("One is a class of acts which . . . are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty." (quoting Sherras v. De Rutzen, [1895] 1 Q.B. 918 at 922 (Eng.))).

70. *Id.* (quoting *Sherras*, 1 Q.B. at 922).

noteworthy that the movement began independently in "both England and the United States at about the same time,"[71] hence the widely accepted rationale that it was no "historical accident but the result of the changing social conditions and beliefs of the day."[72]

One of the first English cases to dispense with the requirement of mens rea was *Regina v. Stephens*,[73] in which the Court of Queen's Bench affirmed the conviction of the owner of a slate quarry whose workers, without his knowledge, threw garbage from the quarry into a nearby river and obstructed it. The Court justified this outcome on the basis that the action was civil in nature, as a public nuisance, and thus indictment was proper.[74] By the early twentieth century, all manner of convictions were being sustained under statutes protecting the public welfare. The English case of *Provincial Motor Cab Co. v. Dunning*[75] upheld the conviction of the defendant company, whose car was found to be running without a rear light as required by statutory regulations.[76] The Chief Justice began by noting that the object of the regulation was "for the protection of the public."[77] He then added that "a breach of the regulation is not to be regarded as a criminal offense in the full sense of the word; that is to say, there may be a breach of the regulation without a criminal intent or *mens rea*."[78] He concluded with what has been viewed as the mature doctrine: the requirement of "criminal intent does not apply to criminal offenses of that

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71. *Id.* at 67.

72. *Id.* Professor Sayre asserts that "the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests. The result was almost inevitable." *Id.*; *see also* Morissette v. United States, 342 U.S. 246, 253–54 (1952) (discussing new dangers flowing out of the Industrial Revolution as "engender[ing] increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare").

73. Regina v. Stephens, (1866) 1 L.R.Q.B. 702.

74. Sayre, *supra* note 67, at 59 n.16. Under the law of nuisance, a private nuisance required proof of special injury different from that which the public suffered. The Court, understanding this limitation, was simply providing a remedy. "Inasmuch as the object of this indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment." *Id.* (quoting *Regina*, 1 L.R.Q.B. at 704).

75. Provincial Motor Cab Co. v. Dunning, [1909] 2 K.B. 599.

76. *Id.* at 602.

77. *Id.*

78. *Id.*

particular class which arise only from the breach of a statutory regulation."[79] Thus, the categorical distinction between offenses *malum in se*, which require proof of mens rea, and offenses *malum prohibitum*, which do not, was the rule in the early cases.[80]

By the middle of the nineteenth century, American courts also began to recognize this unique breed of regulatory offense, first under regulations restricting the sale of liquor[81] and adulterated milk.[82] Before that time, however, American courts strictly adhered to the familiar rule which required proof that the defendant had knowledge of the criminality of his act.[83] By 1876, a year after *Regina v. Stephens* was decided in England, Massachusetts courts had "independently evolved the modern conception of the public welfare offense"[84] by extending the decisions in the liquor and adulterated milk cases to other public welfare regulations. For instance, in *Commonwealth v. Raymond*,[85] the Supreme Court of Massachusetts held that one could be convicted under a public health statute for killing a calf less than four weeks old even without knowledge of its age.[86] Said Judge Foster:

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79. *Id.*

80. *See, e.g.*, Gardner v. People, 62 N.Y. 299, 304 (1875) ("[T]he rule on the subject appears to be, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry is, has the law been violated."). Professor Sayre, however, maintains that the distinction of whether an offense is "inherently immoral . . . is an unsound criterion to follow." Sayre, *supra* note 67, at 71. He justifies his position by noting that many types of crimes universally thought to be immoral ("[t]he keeping of a house of ill-fame or the illegal sale of narcotics") do not require mens rea while other non-moral offenses ("solicitation of political contributions by United States officials") do require mens rea. *Id.*; *see also* Lévitt, *supra* note 34, at 587 (finding "no difference between the two classes of crimes" and noting that "more persons are killed by automobiles than are murdered each year").

81. Sayre, *supra* note 67, at 63 (citing Barnes v. State, 19 Conn. 398 (1849) (upholding conviction for the sale of liquor to a common drunkard, punishable by a fine of ten dollars, without knowledge that the buyer was a common drunkard)); *see also* Commonwealth v. Boynton, 84 Mass. 160 (1861) (upholding conviction for the sale of intoxicating liquor without knowledge of its intoxicating quality).

82. Sayre, *supra* note 67, at 65 (citing Commonwealth v. Farren, 91 Mass. 489 (1864) (convicting the defendant for selling adulterated milk although he did not know it to be adulterated)).

83. *Id.* at 62 n.27 (citing cases).

84. *Id.* at 66.

85. Commonwealth v. Raymond, 97 Mass. 567 (1867).

86. Sayre, *supra* note 67, at 65 n.41.

> [T]he defendant is bound to know the facts and obey the law, at his peril. Such is the general rule where acts which are not *mala in se* are made *mala prohibita* from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed.[87]

With the public-welfare-offense doctrine firmly planted in both English and American soil, its application quickly spread to all manner of statutory offenses, thereby creating a plethora of regulatory and police offenses punishable without proof of criminal intent.[88] The following discussion will examine the doctrine as applied in more recent decisions in the United States.

C. *Line Drawing by the High Court*

In 1922, the Supreme Court decided *United States v. Balint*,[89] which held that criminal intent need not be alleged nor proved to convict for the sale of a prohibited substance in violation of section 2 of the Anti-Narcotic Act. The Act imposed heavy penalties—a maximum of five years imprisonment or $2,000 fine or both.[90] In construing the statute, the Court said:

> While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court.[91]

The Court also quickly dismissed the petitioner's Fourteenth Amendment due process challenge, citing *Shevlin-Carpenter Co. v. Minnesota*[92] for the proposition that a state may, in the exercise of its police power, prohibit and punish conduct as a matter of public policy.[93] As Chief

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87. *Raymond*, 97 Mass. at 569.

88. *See* Sayre, *supra* note 67, at 84–88 (listing offenses).

89. United States v. Balint, 258 U.S. 250, 254 (1922).

90. Sayre, *supra* note 67, at 80–81.

91. *Balint*, 288 U.S. at 251–52.

92. Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) (recognizing "exceptions" where "the public welfare has made it necessary to declare a crime, irrespective of the actor's intent").

93. *Balint*, 288 U.S. at 252.

Justice Taft observed, "Many instances of this are to be found in regulatory measures . . . where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."[94] Only one year earlier, however, the Court in *Baender v. Barnett*[95] affirmed a lower court's construction of a statute prohibiting counterfeiting as requiring both knowledge and a willful act, despite its silence as to mens rea: "[t]he statute is not intended to include and make criminal a possession which is not conscious and willing."[96] Even though the *Baender* Court avoided the petitioner's Fifth Amendment due process challenge, it hinted that an alternate construction might have worked "manifest injustice or infringe[d] constitutional safeguards."[97]

Some thirty years later the Court decided *Morissette v. United States*,[98] a well-researched opinion authored by Justice Jackson. In *Morissette*, a unanimous Court held that criminal intent is an essential element of the crime of conversion of government property.

Mr. Morissette had gone deer hunting on a tract of rural land where the government established a practice bombing range. Morissette was convicted under a federal law that made it a crime to "knowingly" convert government property. In open daylight, he loaded three tons of spent bomb casings on his truck and later sold them for $84. He was convicted and sentenced to either imprisonment for two months or a $200 fine.[99] In his defense, Morissette thought the casings were abandoned, and he therefore argued that he lacked the intent to steal the government's property.[100] But the trial court refused to permit Morissette's counsel to argue to the jury that Morissette acted innocently; all that needed to be proved, thought the trial court, was that Morissette took property that did not belong to him, which he readily admitted.[101] The Court of Appeals affirmed the decision.

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94. *Id.*

95. Baender v. Barnett, 255 U.S. 224, 225–26 (1921).

96. *Id.* at 225. In all likelihood, the Court's holding was easily reached by the fact that the petitioner, who claimed that he had ignorantly acquired certain dies used to counterfeit coin, pleaded guilty to the indictment. *Id.*

97. *Id.* at 225–26.

98. Morissette v. United States, 342 U.S. 246 (1952).

99. *Id.* at 248. The statute carried substantially higher penalties, including fines of not more than $10,000, ten years imprisonment, or both; but if the value of the converted property did not exceed the sum of $100, the fine was reduced to not more than $1,000, one year imprisonment, or both. *Id.* at 248 n.2.

100. *Id.* at 247–49.

101. *Id.*

Citing *Balint* and similar precedent,[102] the Court of Appeals reasoned that "the failure of Congress to express such a requisite" was a deliberate decision by Congress to dispense with the requirement of mens rea.[103] The *Morissette* Court, however, did not construe those holdings so expansively. At the outset of his opinion, Justice Jackson stated, "In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction."[104] But then Justice Jackson backpedaled, recognizing the obvious tension between the powers vested in Congress and the foundations of criminal justice. "Indeed," he continued, "such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind."[105] Siding with the traditions and hard-earned wisdom of Western civilization, Justice Jackson concluded:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[106]

Although the public-welfare-offense doctrine received deferential approval in *Morissette*, the Court was careful to distinguish traditional crime and preserve its fundamental character.[107] Moreover, *Morissette* rejected the rationale in *Balint* and other cases that inferred a congressional intent to dispense with mens rea where a penal statute is silent as to mental elements on the theory that proof of criminal intent would obstruct the statute's purpose. If that were true, the Court reasoned, "[t]he purpose of every

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102. The Court of Appeals also relied on *United States v. Behrman*, 258 U.S. 280 (1922), decided on the same day as *United States v. Balint*, 288 U.S. 250 (1922), in which the U.S. Supreme Court determined that an indictment under the Anti-Narcotic Act "need not charge such knowledge or intent." *Behrman*, 258 U.S. at 288.

103. *Morissette*, 342 U.S. at 250.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 252–56.

statute would be 'obstructed' by requiring a finding of intent."[108] Instead, the Court adopted a different rule of interpretation, one which presumes that Congress *did not* intend to dispense with mens rea, at least for traditional categories of crime:

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.[109]

Thus, there emerged the rule of statutory interpretation still in use today; and like most good rules, its vigor comes from its stability, recognizing that long-standing traditions not only color the conscience of a civilization, but also preserve the meaning of language.[110] "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," writes Justice Jackson, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."[111]

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108. *Id.* at 259.

109. *Id.* at 262. It is noteworthy that Justice Jackson's presumption in favor of requiring mens rea divides along common-law crimes and those "new to general law," which is yet another way of distinguishing between *mala in se* and *mala prohibita*. A nearly identical rule was laid down over seven decades earlier in the case of *Regina v. Prince*, (1875) 2 L.R.C.C.R. 154, in which the Court for Crown Cases Reserved declared that "where a statute creates a crime, the intention of the legislature should be presumed to be to include 'knowingly' in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears." *Id.* at 171.

110. God, too, commands a continuity of relations with those who love him. So much is implied when He asks of Israel, "What iniquity have your fathers found in me, that they are gone far from me, and have walked after vanity, and are become vain?" *Jeremiah* 2:5 (King James). The modern conception of liberty blissfully discards every signature of tradition. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

111. *Morissette*, 342 U.S. at 263. "In such case," says Justice Jackson, "absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.* Justice Jackson's common-sense approach is not new. Indeed, a similar rule was promulgated in the first century by St. Paul for the preservation of the Christian faith. *See* 2 *Thessalonians* 2:15 ("So then, brothers, stand firm and hold to the *traditions* that you were taught by us, either by our spoken word or by our letter.") (emphasis added); 2

Shortly after *Morissette* was decided, a Fourteenth Amendment due process challenge came before the Court in *Lambert v. California*.[112] In *Lambert*, a Los Angeles municipal ordinance required convicted felons to register with the Chief of Police if they remained in Los Angeles for a period of more than five days. Failure to do so was punishable as a felony, and each day's failure constituted a separate offense.[113] Ms. Lambert was charged with violating the registration law (she was previously convicted for forgery, a felony in California). At her trial, Lambert's due process objections had gone unheeded. Her case was tried to a jury and she was found guilty, fined $250, and placed on probation for three years. The Appellate Department of the Superior Court affirmed the judgment.[114]

The *Lambert* Court first noted that the language of the ordinance contained "no element of willfulness";[115] and the lower courts did not construe the ordinance as requiring one. Therefore, the ordinance was construed as imposing absolute liability. The Court noted further that Lambert had no actual knowledge of her duty to register. From these two facts the Court framed the question: "[W]hether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge."[116] The Court answered in the affirmative and reversed, although it struggled to justify its conclusion. First, the Court declared that "[e]ngrained in our concept of due process is the requirement of notice."[117] According to the Court, however, notice is only "*sometimes* essential so that the citizen has the chance to defend charges."[118] Unable to reconcile the requirement of notice with notions of absolute liability,[119] the Court nevertheless held that the lack of notice was

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Thessalonians 3:6 ("Now we *command* you, brothers, *in the name of our Lord Jesus Christ*, that you keep away from any brother who is walking in idleness and not in accord with the *tradition* that you received from us.") (emphasis added); 1 *Corinthians* 11:2 ("Now I commend you because you remember me in everything and maintain the *traditions* even as I delivered them to you.") (emphasis added).

112. Lambert v. California, 355 U.S. 225 (1957).

113. *Id.* at 226.

114. *Id.* at 226–27.

115. *Id.* at 227.

116. *Id.*

117. *Id.* at 228.

118. *Id.* (emphasis added).

119. *Id.* at 228 (stating that "ignorance of the law will not excuse").

inconsistent with the demands of due process.[120] In so holding, the Court focused on the character of the offense (i.e., a crime of omission) and the fact that Ms. Lambert lacked actual or probable knowledge.[121]

III. PROBLEM

This Comment attempts to answer the following question: When may the state dispense with the ingredient of intent—mens rea—from statutory offenses enacted pursuant to the police power?

The Supreme Court "has never articulated a general constitutional doctrine of mens rea."[122] Therefore, the concept of crime has traditionally been left to the states.[123] But that needs to change if America is to maintain

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120. *Id.* at 229-30. "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." *Id.* at 229.

121. It seems the Court found sufficiently persuasive the distinction between crimes of omission and crimes of commission to justify its holding: "It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.* at 228. The Court also denounced the rule laid down by Blackstone, *supra* note 23, because, as the Court observed, "conduct alone without regard to the intent of the doer is often sufficient." *Lambert*, 355 U.S. at 228.

122. Powell v. Texas, 392 U.S. 514, 535 (1968).

> The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Id. at 536.

123. *Id.* Unless, of course, if the definition of crime happens to invade one's right to privacy or, far worse, furthers a belief that certain conduct is immoral. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that a Texas penal law prohibiting homosexual sodomy "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"); Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."). If we are to accept this dangerous trend in legal reasoning (i.e., the divorce of law from morality), the entire concept of crime and therefore criminal law as an institution must be abandoned. As Justice Scalia observed, "This effectively decrees the end of all morals legislation." *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

Practically speaking, however, such a reality is a long way off, if not utterly impossible, for it is unlikely the Court's conclusions will gain momentum in the long run. The common sense of people and the spirit of our Western civilization militate against it. Crime is fundamentally about good and evil, the enduring trademarks of morality. *See*

the moral allegiance of its people. Because regulation is a more expedient device for the attainment of political objectives than individualized prosecution under the criminal law, societies must be guarded against the kind of misguided reliance on regulation that ends ultimately in alienating our Creator. Otherwise, what is to prevent the gradual, but inevitable tyranny of little laws which suffocates the creative energy of a culture?[124] And what is to prevent the consequent decay in morals, as individuals gradually cease to be profited by what the Schoolmen called "the discipline of [the] laws"?[125]

The question presently under consideration is especially significant today, as American life continues to adapt to the demands (and worries) of an increasingly complex civilization. Left unguarded, the reaction to regulate in lieu of punishment will likely become the source of an all-too-common injustice, namely, the sacrifice of human dignity in the name of utility. Moreover, the corrosion of criminal law, and our abandonment of the principles that animate it, will perpetuate this unhealthy affair through the mood and conduit of the people, whose reverence for the rule of law will surely diminish under a dominion of pure utility. No longer will the law serve to punish wrongdoing and therefore promote virtuous living; law will

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CHARLES P. NEMETH, AQUINAS ON CRIME 41 (2008) ("Criminal laws are value-driven judgments about good and evil."). As one ancient source of our legal tradition bears witness, "secular justice and compulsion are necessary in the case of . . . secular ordinances, because many people cannot otherwise be recalled from their evil-doing and many are unwilling to dispose themselves to the worship of God and the practice of lawful behaviour." LEGES HENRICI PRIMI, *supra* note 24, c. 11, 16; *accord* 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.95, art. 1, ad. 1 ("Men who are well disposed are led willingly to virtue by being admonished better than by coercion: but men who are evilly disposed are not led to virtue unless they are compelled."); *Romans* 13:3–4 (Douay-Rheims Version) ("For princes are not a terror to the good work, but to the evil. . . . For he is God's minister: an avenger to execute wrath upon him that doth evil.").

124. A notable account of the opposite extreme can be found in St. Thomas More's mythical commonwealth. THOMAS MORE, UTOPIA (George M. Logan et al. eds., Cambridge Univ. Press 1995) (c. 1516). As retold by More, Raphael Hythloday tells of his experience with the Utopians:

> They have very few laws, for their training is such that very few suffice. The chief fault they find with other nations is that even their infinite volumes of laws and interpretations are not adequate. They think it completely unjust to bind people by a set of laws that are too many to be read or too obscure for anyone to understand. As for lawyers, a class of men whose trade it is to manipulate cases and multiply quibbles, they exclude them entirely.

Id. at 195.

125. 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.95, art. 1, respondeo.

merely make of citizens a fuel for the great machine of which they are a part.

Yet there is an even greater danger than all of this, one which by its very nature results in retrogression—moral, intellectual, political—until at last we arrive at a kind of spiritual starvation. God asked of the prophet Jeremiah, "What iniquity have your fathers found in me, that they are gone far from me, and have walked after vanity, and are become vain?"[126] Thus, the danger our civilization faces, one which crept in through the rise of modernism in the sixteenth century, is the sin of idolatry: the worship of man in place of God. Therefore, with all due respect for the commandment[127] and the dangers to which it speaks, we turn now to analyze the limits of state power with respect to crime and punishment.

IV. PROPOSAL

It has been said that "[o]ne half the doubts in life arise from the defects of language";[128] the other half results from a lack of faith in it. Although language alone is never self-defining, we must trust in it because it is the only art form we have to express complex ideas. And whether the goal is to convey a simple fact or an inscrutable mystery, the language of our criminal law is patterned after the moral dogmas which are its makeup. Thus, for example, "the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it."[129] But this principle is at once problematic, for if that is true, why did the Court in *Morissette* not uphold the conviction? If we presume that Mr. Morissette in fact knew that taking the discarded bomb casings constituted a federal crime (which he was bound to obey), how, then, could the Court conclude

126. *Jeremiah* 2:5 (King James).

127. *See Exodus* 20:3–6 (King James):

> Thou shalt have no other gods before me.
>
> Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.
>
> Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me;
>
> And shewing mercy unto thousands of them that love me, and keep my commandments.

Id.

128. Gibbons v. Ogden, 22 U.S. 1, 232 (1824) (Johnson, J., concurring).

129. M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 723; 10 Cl. & F. 200, 210.

that he had not transgressed the law when he freely and consciously gathered three tons worth? Or was the trial court correct when it instructed the jury?[130] The answer is discoverable with little effort. Rightly understood, the rule that ignorance of the law will not excuse is no mere tool of utilitarian justice; it is a metaphysical reality.

If one finds solace in the story of origins, and the belief that even the English common law is the flowering of pagan customs, Sir Frederick Pollock's discussion of the "less corrupted tradition of natural law"[131] among the heathen Germans may provide a safe harbor to explore the precept above. "[I]n claiming justice for our pagan ancestors," Pollock writes, "I have no desire to be less than just to the Church." The rest of his words bear repeating in full:

> All the Germanic virtues,[132] in so far as they agree with the precepts and commendations of the Church, belong to the law of nature in the regular scholastic usage of the term: that is to say, they are the following of general rules binding on all men as moral and rational beings, and discoverable by human reason without any special aid of revelation.[133] According to the

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130. The trial court instructed the jury:

> [I]f this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here.... The question of intent is whether or not he intended to take the property.

Morissette v. United States, 342 U.S. 246, 249 (1952).

131. POLLOCK, *supra* note 26, at 11.

132. Of the virtues the German people naturally possessed before their conversion by the Roman evangelists, Pollock recites (on authority of Tacitus) respect for women and monogamy in marriage; courage and valor; and a great public life grounded in the will of the people, save on occasion of war, with decision-making authority vested in free men assembled in arms. *Id.* at 8–9. Nevertheless, Pollock admits that "it would be foolish to claim for the Teutonic nations or kindred an exclusive title to any one of the qualities noted by Tacitus." *Id.* at 10. In this respect, Belloc would have concurred. *See* BELLOC, *supra* note 2, at 95 (stating that "a little knowledge of Europe will teach us that there was nothing novel or peculiar in such customs"). "[A]s the Dark Ages approach and advance," Belloc writes, there was everywhere "the meetings of armed men in council, the chieftain assisted in his government by such meetings, the weaponed assent or dissent of the great men in conference, the division of land and people into 'hundreds,' the fine for murder, and all the rest of it." *Id.*

133. In his epistle to the church at Rome, St. Paul teaches that the Ten Commandments are universally binding on all men:

> accepted teaching of the Schoolmen,[134] if I am rightly informed, there is no sufficient cause, indeed no excuse, for man even in his fallen state not to know the law of nature; his defect is not in understanding but in will, and his works are unacceptable for want of obedience rather than of knowledge.[135]

Thus, even Pollock's patriotism bows to that legal order fully fashioned in the Middle Ages, of which the moderns know very little today. Strictly speaking, therefore, the maxim *ignorantia juris neminem excusat* only

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> For when Gentiles, who do not have the law, by nature do what the law requires, they are a law to themselves, even though they do not have the law. They show that the work of the law is written on their hearts, while their conscience also bears witness, and their conflicting thoughts accuse or even excuse them on that day when according to my gospel, God judges the secrets of men by Christ Jesus.

Romans 2:14–16.

134. *See, e.g.*, 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.90, art. 4, ad. 1 ("The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally.").

135. POLLOCK, *supra* note 26, at 11. Blackstone would have concurred:

> [I]gnorance or mistake is another defect of will: when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. . . . For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence.

4 BLACKSTONE, *supra* note 23, at *27. Blackstone is here describing the Aristotelian principle that only ignorance with respect to "particulars," and not "universals," renders an act involuntary. *See* ARISTOTLE, NICOMACHEAN ETHICS bk. III, at 50–51 (David Ross trans., Oxford Univ. Press 1925) (c. 384 B.C.) ("For it is on these [particulars] that both pity and pardon depend, since the person who is ignorant of any of these acts involuntarily."); *cf.* 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.6, art. 8, respondeo ("If ignorance cause involuntariness, it is in so far as it deprives one of knowledge, which is a necessary condition of voluntariness . . . ."). The principle that only a voluntary act is a moral one was later reconciled with the Catholic doctrine of actual sin (i.e., mortal sin), of which St. Augustine was the first to propose a definition. *See id.* Q.71, art. 6.

The latter half of Pollock's discussion, in which he speaks of understanding and will, is likewise in accord with the teaching of St. Thomas, who, in answering the question whether intention is an act of the intellect or of the will, says "the will moves all the other powers of the soul to the end . . . . Wherefore it is evident that intention, properly speaking, is an act of the will." *Id.* Q.12, art. 1, respondeo.

applies to that body of unwritten law known as the natural law;[136] consequently, its operation is not easily extended to positive law, which requires promulgation, without the aid of a legal fiction (i.e., constructive knowledge).[137] Nevertheless, the principle has transgressed its proper boundaries on account of widespread confusion concerning the nature of law itself, with the result that many who investigate the subject cannot reconcile the doctrine with notions of fairness and morality.[138] We will return to this doctrine shortly.[139]

A note of caution is needed before proceeding. This Comment does not propose to answer the question of whether American courts have authority to interpret and apply natural law, and to what extent they may do so (although the application of reason to concrete facts is in some circles considered to be natural-law jurisprudence). Nevertheless, a measure of sympathy is in order for those who have addressed the question with caution and a healthy dose of skepticism;[140] they know better than to play

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136. The content of the natural law, its interpretation, and other distinctions among theologians and natural-law scholars is not the subject of this paper. For the purpose of this Comment, however, the Thomistic definition has been adopted: "the natural law is nothing else than the rational creature's participation of the eternal law." *Id.* Q.91, art. 2, respondeo; *see also* Sean N. Cunningham, *In Defense of Law: The Common-Sense Jurisprudence of Aquinas*, 1 LIBERTY U. L. REV. 73 (2006); NEMETH, *supra* note 123. Despite the differences that divide, certainly most, if not all, proponents of natural-law jurisprudence would readily admit that traditional, common law crimes, such as homicide and larceny, are undoubtedly immoral acts naturally known by every man. *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J. dissenting) ("At the time of the framing, common-law crimes were considered unobjectionable, for a law founded on the law of nature may be retrospective, because it always existed . . . .") (internal quotation marks omitted).

137. *See* HALL, *supra* note 10, at 376. There is a half-truth in the fact that public condemnation and punishment of "certain highly immoral acts" provide a minimal certainty and knowledge of the criminal law. *Id.* at 381. But as Professor Hall maintains, the "deterrent theory . . . hardly comes into contact with the actual springs of moral conduct and conformity with penal law." *Id.*

138. *See, e.g.*, Dennis Jenkins, Comment, *Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution and Criminal Intent in an Environmental Context*, 24 B.C. ENVTL. AFF. L. REV. 595, 597 (1997) ("Although the criminal law . . . sought to punish only the morally blameworthy, the law, in a confusing and ill-defined paradox, also generally held that ignorance of the law was no excuse from criminal liability.").

139. *See infra* Part IV.B.

140. In *Griswold v. Connecticut*, for example, Justice Black said,

> If these formulas based on 'natural justice,' . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own

with fire, even when they have no faith in its existence. But there is a difference between admiring the architecture of a building and becoming an architect. This Comment merely advocates for renovation, not innovation.

A. Moral Good and Evil Are First in the Will.

The power of the state to punish its citizens turns on the fundamental nature of crime. As C. S. Lewis observed, it would indeed be a wicked thing to punish a man in order to make an example of him, unless, of course, he deserved it.[141] "[T]he concept of Desert is the only connecting link between punishment and Justice. It is only as deserved or undeserved that a sentence can be just or unjust."[142] As St. Thomas observes, "Punishment is due to sin. But every sin is voluntary according to Augustine. Therefore vengeance should be taken only on those who have deserved it voluntarily."[143] Herein lies the animating precept of all lawful retribution: that is, desert is reconciled to justice when it flows from conduct for which a man is subject to moral guilt.[144] Such is, as Holmes calls it, the "mystic bond between wrong and punishment."[145] Though hardly a novel ethic, it bears repeating in today's modern world.

This precept, however, is buttressed by yet another of capital importance—the arrival of evil in its first cause. Moral guilt stems from an interior principle, the movement of the will, within the human actor that is voluntary: *this principle the law calls mens rea.* And on this final point there is no shortage of authority to counteract the small, but potent train of abuses[146] against our dogma. "The saying that 'no one is voluntarily wicked nor involuntarily happy' seems to be partly false and partly true; for no one is involuntarily happy," writes Aristotle, "but wickedness *is* voluntary."[147] Indeed, as Jesus declares, "For from within, out of the heart of man, come evil thoughts . . . ."[148] St. Thomas thus affirms that "moral good and evil are

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> appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.

Griswold v. Connecticut, 381 U.S. 479, 511–12 (1965) (Black, J., dissenting).

141. Lewis, *supra* note 52, at 225.

142. *Id.*

143. 3 AQUINAS, *supra* note 4, bk. II pt. II. Q.108, art. 4, sed contra.

144. "[H]e shall reward every man according to his works." *Matthew* 16:27 (King James).

145. HOLMES, *supra* note 52, at 37; *see also supra* note 60.

146. *See, e.g.*, HALL, *supra* note 10, at 333.

147. ARISTOTLE, *supra* note 135, at 59.

148. *Mark* 7:21.

first in the will."[149] Likewise, Sir Matthew Hale states that "[t]he consent of the will is that, which renders human actions either commendable or culpable; . . . where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty."[150] Blackstone, too, teaches the same: "An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will . . . being the only thing that renders human action either praiseworthy or culpable."[151] Thus, the lesson to be learned from these learned men, indeed Christ himself, is that human actions—our works—have real moral consequences because of an invisible act of the will, in which it freely assents to the object of its choosing. To hold otherwise is error, and to persist therein is heresy.

It is necessary at this juncture to briefly expand on the concept of voluntariness, for the term "voluntary" is sometimes analyzed under the doctrine of actus reus, or the criminal act.[152] The usual reason for doing so is to distinguish generally volitional acts from reflexive or otherwise unconscious conduct.[153] But the concept of voluntariness cannot be rightly understood apart from mens rea.

The concept of actus reus may be defined in one of two ways. First, actus reus signifies the *external circumstances* that are proscribed by penal law, apart from proof of the mental element.[154] This first definition has nothing to do with the doctrine of voluntariness; it precedes it. Second, actus reus signifies the external manifestation of mens rea, and it is in this sense that one may correctly speak of voluntary acts. After all, mens rea—which is the essence of crime—*is itself a voluntary act*, albeit an internal act. Professor Hall thus rightly concludes that "*actus reus* implies *mens rea*."[155] Yet to analyze whether an act is voluntary under the rubric of actus reus is to cause unnecessary confusion. Therefore, this Comment conceives of actus reus in its true, orthodox sense, as *the external manifestation of mens rea*, which is

149. 2 AQUINAS, *supra* note 4, bk. I pt. II. Q.20, art. 1, sed contra.

150. 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 14–15 (1736).

151. BLACKSTONE, *supra* note 23, at *20–21.

152. *See, e.g.*, People v. Newton, 340 N.Y.S. 2d 77, 80 (1973) ("The doing of an act may by statute be made criminal without regard to the doer's intent or knowledge, but an involuntary action is not criminal."). And the casebooks, likewise, ordinarily discuss voluntariness under the heading of actus reus. *E.g.*, JOSEPH G. COOK ET AL., CRIMINAL LAW ix (6th ed. 2008); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW xxiii (5th ed. 2009); WAYNE R. LAFAVE, CRIMINAL LAW xvii (4th ed. 2003).

153. *See, e.g.*, MODEL PENAL CODE § 2.01 (1962).

154. *See* HALL, *supra* note 10, at 224 (discussing Dr. Glanville Williams's definition).

155. *Id.* at 230.

an interior act of the will, freely made.[156] This seems to be the position taken by Professor Hall: "What is required to incur penal liability is that the *mens rea* be thus manifested in criminal conduct."[157] "The internal *mens rea*," he says, "held in check, is by that extra effort externalized. . . . The additional effort may be viewed as the projection forward into conduct of the already existent action-thought of *mens rea*."[158] St. Thomas describes "the act of the will [as] the form . . . of the external action,"[159] and states further that "the interior act of the will, and the external action, considered morally, are one act."[160]

With these principles properly before us, it is now necessary to state precisely what mens rea is. As implied above, and so far as criminal law is concerned, mens rea is principally about freewill. Simply stated, mens rea means a willful transgression of law. Indeed, there was never a more perfect adjective to define a culpable mental state than the word "willful." Therefore, a crime is simply a willful transgression of a criminal law: that is, where the object of the will has been criminalized by the legislative power of the state. This definition is the constitutional minimum.

Note, however, that this definition presupposes the existence of other human powers besides that of the will, namely intellect, which implies knowledge and the use of reason.[161] Thus, the total doctrine of mens rea is a

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156. If one wishes to reconcile the ordinary usage of those terms (mens rea and actus reus as in the first definition), then a voluntary act is the concurrence of *both* mens rea and actus reus—the interior act of the will and the external *circumstances* that are proscribed by law. The critical point to be seized is that no act is voluntary unless all of the conditions of mens rea are satisfied.

157. HALL, *supra* note 10, at 180.

158. *Id.* at 179–80.

159. 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.20, art. 3, sed contra.

160. *Id.* respondeo. St. Thomas distinguishes the "goodness or malice" of the external action by either "its relation to the end" or "in regard to its matter and circumstances." *Id.* For the former, he holds that the internal act and the external action are morally one, "through the medium of the act of the will." *Id.* For the latter, however, he holds that the goodness or malice of the will and the external action are distinct in the physical order, *id.*, and yet "combine to form one thing in the moral order." *Id.* ad. 1.

161. *See* HALE, *supra* note 150, at 15 ("[T]he liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will . . . ."); *see also* 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.6, art. 1, sed contra. It is for this reason that criminal laws, indeed all human laws, require promulgation, *see id.* Q.90, art. 4, so that a person is given the opportunity to inform one's conscience of the requirements of law and, therefore, conform his conduct in accordance therewith. *Cf.* U.S. CONST. art. 1, § 9, cl. 3; § 10, cl. 1 (prohibiting ex post facto laws).

clustered concept. For this reason, a distortion as to one of its parts renders the whole unbalanced. A fair definition of mens rea is given by Professor Hall:

> *mens rea* includes relevant cognition, *i.e.* knowledge of the material facts, and an internal effort, 'movement of the will;' and the additionally required manifested effort ('act') must be established by relevant evidence, different from and beyond that which establishes the *mens rea*. This evidence consists of the occurrence of a legally proscribed harm under conditions which make it imputable to the offender.[162]

Accordingly, mens rea may be understood as the gateway to a host of other doctrines our criminal law has traditionally entertained in its inquiry into the culpability of the accused. Thus, for example, a mistake of fact as to circumstances deprives a person of knowledge, thereby rendering the person's act involuntary and therefore excused.[163] In like manner, a defect in reason (the traditional insanity defense) exculpates the commission of an unlawful act. Man is capable of crime because he is a rational being. Consequently, a man without the use of reason is something less than a man; he is more like an irrational animal, incapable of crime.[164] The celebrated rule in *M'Naghten's Case* is a good example.[165] Finally, there are those special doctrines which examine the will itself, to determine whether it was overcome by coercion or other kinds of violence,[166] such as the "heat

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162. HALL, *supra* note 10, at 183–84.

163. *See* 2 AQUINAS, *supra* note 4, bk. I pt. II. Q.6, art. 8, respondeo.

164. *See* HALL, *supra* note 10, at 475 (criticizing modern psychology for distorting the doctrines of early writers (e.g., Bracton) and noting "the ancient doctrine that man is distinguishable from other animals by his reason").

165. M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 719; 10 Cl. & F. 200, 210.

> [T]o establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.

Id.

166. The internal act of the will is immune from all kinds of violence and coercion. 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.6, art. 4, respondeo. Indeed, as God would have it, the human will is truly free. The one exception, however, is God himself, who "can move the will of man, according to Proverbs 21:1: 'The heart of the king is in the hand of the Lord; withersoever He will He shall turn it.'" *Id.* Q.6, art. 4, ad. 1.

of passion" defense in cases of homicide.[167] This gateway rationale seems to be the understanding of Blackstone, who states, "All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will."[168]

From the foregoing discussion a startling principle emerges: mens rea is the metaphysical key that grants mankind entry to the Almighty's judgment seat.[169] A truly culpable mind is a guilty mind, the assurance of which is declared by the doctrine of mens rea, without which freedom would be meaningless. Therefore, as both a moral and legal reality, it is high time the Supreme Court incorporated the requirement of mens rea with respect to traditional crime[170] into the Due Process Clause of the Fourteenth Amendment.

Substantive due process has become the guardian of fundamental rights, which, as Justice Scalia says, "prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest."[171] Those rights which are deemed fundamental and therefore worthy of constitutional protection are "'deeply rooted in this Nation's history and tradition.'"[172] This objective standard is eminently reasonable, for what else is substantive due process if not a defense of the continuity of tradition, and of that great mass of morals which comprise the

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167. *See, e.g.*, Hannah v. Commonwealth, 149 S.E. 419, 421 (Va. 1929) ("'Malice aforethought' implies a mind under the sway of reason, whereas 'passion' whilst it does not imply a dethronement of reason, yet it is the *furor brevis*, which renders a man deaf to the voice of reason . . . .").

168. BLACKSTONE, *supra* note 23, at *20. It seems in this regard, however, Blackstone could have been more precise in his explanation, as he fails to consider the powers of reason and the intellect as other potential sources of exculpation, unless if by the word "will" he means the clustered concept of mens rea. *Cf.* 2 AQUINAS, *supra* note 4, bk. I. pt. II, Q.20, art. 2, respondeo (stating that there is a "twofold goodness or malice" with respect to external actions involving both reason and will); *id.* Q.19, art. 5, respondeo ("[E]very will at variance with reason, whether right or erring, is always evil.").

169. *Leviticus* 19:15 ("You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor."); *see also John* 5:27 ("And he has given him [Christ] authority to execute judgment, because he is the Son of Man.").

170. That is, all crimes known to the common law, whether or not codified by statute. The state's power to call into existence new crimes unknown to the common law is discussed *infra* Part IV.B.

171. Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

172. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

heart and soul of Western civilization? Thus, *with respect to traditional crime*, the Court should incorporate the "ancient requirement of a culpable state of mind"[173] into the Due Process Clause of the Fourteenth Amendment. For it may *truly* be said that "neither liberty nor justice would exist if [it was] sacrificed."[174]

The Supreme Court's current law on presumptions in criminal cases lends strong support to this conclusion.[175] And the foregoing authorities provide ample evidence of a largely unbroken tradition of a conception of crime within the Western legal tradition that mandates moral guilt as a requisite to punishment. To break from that tradition would be a considerable step back to the ancient institutions our civilization outgrew when the West was Pagan. Therefore, the need for constitutional safeguards becomes obvious when mens rea is considered in its whole historical context: man (and thus the state) is powerless to alter or abolish the fundamental nature of crime.

This conclusion, however, does not provide any guidance with respect to the state's power to fashion statutory offenses, the subject of which are unknown to the common law, and dispense with mens rea altogether.[176] How does the Federal Constitution cabin the power of the public-welfare-offense doctrine? To this question we now turn our attention.

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173. Morissette v. United States, 342 U.S. 246, 250 (1952).

174. Palko v. Connecticut, 302 U.S. 319, 326 (1937) (Cardozo, J.) (alteration in original), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

175. *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that due process disallows either conclusive or burden-shifting presumptions on the element of felonious intent); *In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). While these decisions evidence the Court's assumption that mens rea is an element of crime worthy of constitutional protection, they do not address the ultimate question of whether a legislature may dispense with mens rea in a public welfare offense.

176. *See* United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943) ("The constitutional requirement of due process is not violated merely because mens rea is not a required element of a prescribed crime.").

B. *Alien Ethics*

1. Natural Law Crimes

The United States recognizes no binding moral authority beyond its own political makeup.[177] Hence, all is a matter of private judgment, and law is, practically speaking, the will of a governing majority in accordance with its constitution. Yet, as Justice Jackson once said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[178] While at first blush this seems a proper piece of American dogma, Justice Jackson's assertion presents an obstacle when it comes to crime, since proof of culpability, which is a requisite of just punishment, is essentially a *moral judgment.* But whose? Despite the extreme opinions held by many modern ethicists, most people agree that some moral values are naturally fixed,[179] which the law has long called *mala in se*; but what about offenses that are not inherently evil? Is conduct criminal simply because a majority of people say so, or is there another principle at work?

Returning to the doctrine *ignorantia juris neminem excusat*, it was explained above that a mistake of law will not excuse a common law crime because the conduct is inherently evil; thus, the object of the will, and therefore the will itself, is criminally culpable even if no positive law is in place which forbids the conduct. A presumption of actual knowledge that certain conduct is criminal arises from man's natural constitution. As St. Thomas explains, "The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."[180] Therefore, as Justice Scalia observes, "[A] law founded on the law of nature may be retrospective, because it always existed."[181] Consequently, natural law crimes, even if not proscribed by positive law, can, in a manner of speaking, be thought of as conduct for which a person is absolutely liable, because the prosecution need not prove whether the accused had *knowledge*

177. *See* U.S. CONST. amend. I.

178. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). "If there are any circumstances which permit an exception," Justice Jackson continues, "they do not now occur to us." *Id.* This Comment argues for an implicit exception in the case of criminal laws. *See infra* Part IV.B. Furthermore, mens rea is indeed an *act.*

179. 3 AQUINAS, *supra* note 4, bk. II. pt. II. Q.47, art. 6, respondeo (stating that "the ends of moral virtue must of necessity pre-exist in the reason").

180. 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.90, art. 4, ad. 1.

181. Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J. dissenting).

that his conduct was forbidden by positive law, but only whether the accused manifested the requisite mens rea: that is, whether the accused acted willfully in bringing about an intended result forbidden by natural law.[182]

Taken in this sense, however, the law's application is not technically that of absolute liability as that term is typically used, but rather serves to show the place of positive law in the equation of culpability. Merely writing down a description of what mankind has long considered evil adds nothing to the moral gravity of the offense, except, perhaps, to make the punishment known. Thus, with respect to natural law crimes, the state does not legislate in fact; it is merely called upon to act, in accordance with its power and authority, by exercising retributive justice on behalf of the victim. And recall, further, that it is the nature of crime—mens rea—which invokes the power (and duty) of the state to punish the criminal, in recognition of preexisting moral values. In sum, with respect to common law crimes, God, and not the state, is acting as the moral authority, and the power thus exercised by the state is simply punitive.

2. Mens Rea and Statutory Crimes

A difficulty arises, however, when the state calls into existence new crimes, not a few of which are foreign to the common law. Of such legislation there are two kinds: those that require proof of mens rea and those that do not. Typically, the former are considered to be crimes in the orthodox sense, especially where the object of the law's prohibition is derived from one common law crime or another.[183] The latter, on the other hand, are defined as public welfare offenses, prohibitions for which an offender is strictly liable. Yet the distinction between the two cannot turn simply on the presence or absence of mens rea within the definition of the offense; that would be a distinction without meaning. Surprisingly, the Supreme Court has offered little guidance on the subject, save its holding in *Lambert*[184] with respect to criminal omissions. Likewise, a rather malleable rule of due process has split the federal circuits.[185]

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182. This analysis would still allow for defenses of excuse and justification, as where the accused acted involuntarily on account of a mistake of fact.

183. In such cases there is fundamentally no difference between a common law and statutory crime, for the state is merely affecting the subject on which the prohibition operates (e.g., bankers).

184. *See supra* note 112 and accompanying text.

185. *Compare* United States v. Wulff, 758 F.2d 1121, 1124 (6th Cir. 1985) (holding that a felony provision in the Migratory Bird Treaty Act imposing two years in jail, $2,000 fine, or

When public welfare offenses were coming into prominence, courts usually called them police regulations, denominated as such under the theory that they derived their efficacy by reason of the police power—that is, the state's broad authority to enact laws for the benefit of the health, morals, and general welfare of its citizens. The state "has an undoubted right," says Blackstone, "for the well-being and peace of the community, to make some things unlawful, which are in themselves indifferent."[186] Consequently, police regulations punishable regardless of criminal intent were labeled *malum prohibitum* in order to distinguish them from crimes *malum in se*.[187] While this distinction has not found favor among some of the commentators,[188] it is nevertheless fundamentally correct, and thus quite useful, as it relates to the *object* sought to be proscribed. In light of the foregoing principles, however, a more holistic view of the distinction between policy and punishment is that of a twin effort by man and state, which, as will be shown by the principle below, depends on three elements: (1) the particular power being exercised by the state; (2) the natural moral gravity of the conduct proscribed by law; and (3) mens rea.

3. The Invalidating Principle

As discussed above, the state's authority to impose a lawful punishment is premised on culpability—that is, a finding that the accused committed the crime with the requisite mens rea. In such cases the state exercises a punitive power, essentially an act of public vengeance,[189] apart from the broad police powers it enjoys as sovereign. Once again, the reason for the rule is this: *mens rea is the causal link which invokes the state's authority to exercise retributive justice on behalf of the victim.* Inversely, where the state

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both, violated substantive due process, while validating the penalties under the misdemeanor provision imposing a fine of $500 and six months in jail), *with* United States v. Engler, 806 F.2d 425, 434 (3d Cir. 1986) (upholding the Act and stating that "[t]he differences between the objective penalties of the misdemeanor and felony provisions [are] for due process purposes, *de minimis*").

186. BLACKSTONE, *supra* note 23, at *42.

187. *See supra* notes 78–88 and accompanying text.

188. *See, e.g.*, HALL, *supra* note 10, at 341 (stating that "the judicial reliance upon *mala in se—mala prohibita* in support of strict penal liability is fallacious" and "the theory upon which it rests is highly questionable") (citations omitted); Sayre, *supra* note 67, at 70–71 (calling the distinction "an unsound criterion to follow"); Lévitt, *supra* note 34, at 587–88 ("There is no difference between them which is an inherent difference.").

189. *Romans* 13:3–4 (Douay-Rheims Version) ("For princes are not a terror to the good work, but to the evil. . . . For he is God's minister: an avenger to execute wrath upon him that doth evil.").

exercises a regulatory power for the common good of its citizens, enforcement by way of absolute liability is lawful under limited circumstances. Accordingly, the power of the state to enact public welfare offenses for which offenders are liable, irrespective of criminal intent, first depends on the mode of its agency, which in turn depends on the particular power it is exercising—either punitive or regulatory, the first being invoked by the individual, the second by the legislator pursuant to the police power.

Nevertheless, where the state prohibits certain conduct and imposes the sanction of absolute liability, it runs the risk of exceeding its authority by usurping a power that belongs exclusively to God. As explained above, for common law crimes, actual knowledge of the crime itself (whether codified or not) is presumed because the conduct is inherently evil, and the work of the prosecutor is thus concerned only with proving a willful transgression. But the presumption naturally fails where the state assigns a new moral value to conduct that was previously morally indifferent. And where the nature of the offense is "criminal," having crossed the threshold from police to punitive powers, the sanction of absolute liability under these conditions amounts to an attempt by the state to exercise a moral power over a man's conscience. This the state is powerless to accomplish, and the law is a nullity, for the state thereby acts under color of office, by placing itself in the position of God, who alone has power to promulgate the unwritten moral precepts of the natural law into the minds of men.[190]

Fundamentally, this invalidating principle finds its source in the First Amendment[191] to the United States Constitution, which denies to Congress and the several states the authority to establish an official orthodoxy.[192] "The very purpose of a Bill of Rights [is] to withdraw certain subjects from the vicissitudes of political controversy," said Justice Jackson in *Barnette*, "to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[193] Thus, when a political majority declares "certain subjects" that were previously amoral to

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190. *See Jeremiah* 31:33; *Romans* 2:12–16.

191. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). Certainly a man's opinion as to what is and is not moral is a religious belief; thus, a majority of men promulgating their religious beliefs as criminal laws are exercising a form of religious coercion on the people. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

192. *See supra* notes 177–78 and accompanying text.

193. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

be morally grave offenses, thus binding the conscience, the invocation of so great a power is justified only if actual knowledge of the illegality of the act (i.e., the actus reus) is proved. For only under these conditions is the state authorized to *punish* transgressors, the reason being that disobedience subjects the offender to authentic moral guilt.[194] Consequently, the offender in such cases must have acted with the requisite mens rea as defined by statute; and if the statute is silent, a willful transgression—the constitutional minimum[195]—must be proved beyond a reasonable doubt.

The awful, but necessary business of crafting criminal laws must include humanity in the equation, recognizing the dignity of each individual by allowing freedom to take its course. As Justice Jackson said, "Compulsory unification of opinion achieves only the unanimity of the graveyard."[196] The magic of mens rea is in bridging the gap between the individual and the state. Majorities may indeed outlaw what is deemed to be offensive to the common good of the state; but the predicate to punishment is in the hands of the smallest of minorities—the individual, who must initiate his own criminal trial by the misuse of his liberty. To punish an individual under any other conditions is to pretend the state has power to promulgate its moral views "into man's mind so as to be known by him naturally."[197]

4. Punitive vs. Police Powers

The next and difficult question that arises is, how can courts discern the often dim line between the state's punitive and regulatory powers? The principle is easily explained but not susceptible to any bright-line rule because the moral inquiry is fact sensitive, one which wavers between the extremes of good and evil; and the line connecting the two is bifurcated by a species of conduct that may be classified as morally indifferent. Thus, on the one extreme, any statutory prohibition that renders a person subject to moral guilt, and therefore punishment, is punitive in nature. Here, the law prohibits something inherently immoral, and the state's focus is therefore on the individual and only incidentally on the common good. Legislation of this type demands of citizens their moral allegiance; and the discipline of obedience therewith perfects the people in accordance with the virtues of the state.

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194. *Romans* 13:2 ("Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment.").

195. *See supra* Part IV.A.

196. *Barnette*, 319 U.S. at 641.

197. *See supra* note 180.

On the other extreme, the purpose of regulation effectively bypasses man as a moral being, demanding instead his political allegiance for the common good. As such, citizens are made the means through which the state achieves its regulatory ends. Although penal sanctions of one sort or another are still necessary to effectuate the state's regulatory objectives, the offense itself does not ordinarily carry with it the social stigma that attaches to criminal conduct. Critically, however, individuals do not incur moral guilt on account of violating a regulation:[198] the offense is venial.[199] It is for this reason that dispensing with mens rea is constitutional in the administration of the regulatory state.

Yet public welfare offenses defy easy categorization; many may be found at the murky midpoint between an obvious good and a definite evil. Nevertheless, one virtue above all the rest will help shed light on the judicial inquiry—the virtue of prudence.

Prudence is a cardinal virtue,[200] which may be loosely defined as practical reason. Accordingly, prudence helps a person to apply right reason to a specific action by "regulat[ing] the means"[201] by which the object is attained. As St. Thomas cogently explains, "it belongs to the ruling of prudence to decide in what manner and by what means man shall obtain the mean of reason in his deeds."[202] Thus, prudence has long informed the legal basis for an action in negligence.[203] And not only is prudence a private virtue, it is one which may be exercised by political authority for "the common good of

198. *See* 1 BLACKSTONE, *supra* note 23, at *57–58 (stating that offenses *mala prohibita* are "without any intermixture of moral guilt" and that "conscience is no farther concerned, than by directing a submission to the penalty").

199. Repeat offenders, however, incur a degree of culpability because these have actual knowledge of the statutory prohibition. The same goes for first-time willful offenders with actual knowledge.

200. *See* 3 AQUINAS, *supra* note 4, bk. II. pt. II. Q.47, art. 4.

201. *Id.* Q.47, art. 6, respondeo.

202. *Id.* Q.47, art. 7, respondeo.

203. *Id.* Q.54, art. 1, respondeo ("Negligence denotes lack of due solicitude."); *see also* Blyth v. Birmingham Waterworks Co., (1856) 156 Eng. Rep. 1047 (Exch.) 1049 (Alderson, B.); 11 Exch. 781, 784 ("Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."); Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (C.P.) 493 (Lord Tindal, C.J.); 3 Bing. (N.C.) 472, 475 ("The care taken by a prudent man has always been the rule laid down . . . ."). *But see* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928) (Cardozo, J.) ("Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.").

the multitude."[204] Indeed, a species of prudence must of necessity inform all legislative judgment.[205] Consequently, prudence may be employed by the individual as a check on the power of the state, since "every man, for as much as he is rational, has a share in ruling according to the judgment of reason . . . ."[206]

A rule of prudence, similar to that of traditional negligence, should thus be the chief instrument by which the object of a regulatory offense is found either punitive or regulatory. The essential rule boils down to whether it would be imprudent to consummate the object of the law's prohibition. And because all human law—but especially public welfare offenses, which are called into being by the police power—is aimed at effecting the common good,[207] it is said that "to forsake the greater good belongs to imprudence."[208] Therefore, where the command of prudence would substantially coincide with the commandment of positive law, the object's wrongfulness outweighs its indifference, and the state is justified in the use of punishment. On the other hand, where prudence commands an alternate (or nonexistent) course of action, the object's good or indifference outweighs its wrongfulness, and the prohibition is thus unconstitutional under the invalidating principle discussed above.[209]

The prudence rule is not a generic one, however. In applying the rule, the class of persons targeted by the statute is critical to a proper determination because prudence is not an innate human trait;[210] on the contrary, it is an intellectual habit "acquired by discovery through experience, or through teaching."[211] Consequently, the class of persons (e.g., butchers or licensed drivers) to which the statute applies must be incorporated into the equation.

Often times, however, the act itself which constitutes the offense is obviously morally indifferent. For instance, consider a traffic regulation commanding that drivers shall use turn signals whenever changing lanes.

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204. 3 AQUINAS, *supra* note 4, bk. II. pt. II, Q.47, art. 10, respondeo.

205. In discussing the doctrine of enumerated powers, Chief Justice Marshall said, "It must have been the intention of those who gave these powers, to insure, so far as *human prudence* could insure, their beneficial execution." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis added).

206. 3 AQUINAS, *supra* note 4, bk. II. pt. II. Q.47, art. 12, respondeo.

207. 2 AQUINAS, *supra* note 4, bk. I. pt. II. Q.90, art. 2.

208. *Id.* Q.90, art. 2, sed contra.

209. *See supra* Part IV.B.3.

210. 3 AQUINAS, *supra* note 4, bk. II. pt. II. Q.47, art. 15.

211. *Id.* Q.47, art. 15, respondeo.

Here, we must distinguish between the object of the will and the purpose of the regulation, which is highway safety. Thus, under these circumstances, the offense is one step removed from the ultimate evil to be avoided. From this basic example we derive a threshold question in the constitutional calculus: Whether the *purpose* of regulation, and the attendant evils to be thereby avoided, is one that would constitute a crime *malum in se* if any one of them was the result of a willful act.[212] If the answer is yes, then the regulatory offense is presumed valid under a rational basis review—that is, whether the means are rationally related to effectuate the legislative ends. The burden thus rests with the challenger, who must establish that the rule of prudence would *not* command substantial compliance with the regulatory prohibition in light of the probable evils to be avoided. Note that this is a test of exclusion, and not merely of alternate means, and thus a form of strict scrutiny. Therefore, as one might reasonably conclude, the traffic regulation above is a classic example of a constitutional public welfare offense.

If, on the other hand, the purpose and evils to be avoided by regulation would not constitute a crime *malum in se* if willfully committed, a presumption of invalidity arises, and the burden rests with the state to establish that the rule of prudence is in its favor. However, because under these conditions the object of legislation is morally indifferent, prudence must operate without knowledge of the regulatory purpose and the probable evils to which it speaks. In other words, prudence must command substantial compliance with positive law, unaided by the de facto knowledge of an alien ethic.

In addition, two bright-line rules concerning the statutory penalty should supplement the prudence rule, both of which create a presumption that the law is punitive in nature. The first is any penalty resulting in a felony conviction. The second is any penalty for which the offender is subject to a prison term exceeding one year. The rationale behind these twin presumptions turns on felt notions of proportionality,[213] the social stigma

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212. In the case of the traffic signal, one possible result of failing to signal is a fatal accident. A person would be guilty of homicide if he drove his vehicle willfully into another driver and killed him.

213. *See, e.g.*, United States v. Heller, 579 F.2d 990, 994 ("The concept of Malum prohibitum crime simply does not square with . . . such severe punishment [as up to 20 years in prison and $5,000 fine], which is reserved for the perpetuation of Malum in se crimes."); *see also* Sayre, *supra* note 67, at 72 ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure.").

that attaches to conviction,[214] and the substantial loss of rights incident therewith.

Though relevant in deciding whether a public welfare offense is more punitive than not, the sanction alone cannot logically dictate the difference. Unlike the evil of the crime itself, punishments are a necessary evil and therefore may be reduced or pardoned altogether as reason dictates.[215] Moreover, many traditional crimes do not carry heavy penalties, while some public welfare offenses carry heavy fines, sometimes even lengthy prison terms. Proportionality is nonetheless a legitimate concern, and excessively large penalties imposed under absolute liability are likely to be invalidated on due process grounds.[216]

On appeal, courts should consider the following factors in characterizing the object of the law's prohibition: (1) whether there is any connection between the prohibited conduct and known forms of vice; (2) whether the offense is one which is logically derived from a common law crime; (3) the consequences to the public welfare if the conduct was lawful; (4) the penalty for violation; and (5) the effect of conviction on a person's political and legal rights.

5. The Constitutional Formula

Distilling all of the above considerations results in the following four tests:

(1) With respect to common law crimes and their derivatives, substantive due process mandates a finding of culpability, which means the state must prove beyond a reasonable doubt that the accused acted with the requisite mens rea.[217] Actual knowledge by the accused that his conduct was prohibited is immaterial: the prosecution need only prove the constitutional

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214. The court in *Heller* suggested that prison terms no greater than one year "prevent[] the stigma and consequence of a felony conviction from attaching to the defendant." *Heller*, 579 F.2d at 994–95; *see also* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a *person's standing in the political community.*") (emphasis added).

215. *See* HALL, *supra* note 10, at 312 (discussing theories of punishment).

216. *See Heller*, 579 F.2d at 994 ("Certainly, if Congress attempted to define a Malum prohibitum offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended . . . ."). *Cf.* Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) (discussing factors as to when the omission of mens rea from "a federal criminal statute" is "not violative of the due process clause").

217. *But see* Sayre, *supra* note 67, at 70 ("Clearly it will not depend upon whether the crime happens to be a common law or statutory offense.").

minimum of willfulness,[218] even where the statute is silent as to mental elements.[219]

(2) Statutory offenses imposing absolute liability are presumed to violate the First Amendment's prohibition against an established orthodoxy. Constitutional review entails a two-part test: (A) the state must overcome the presumption by showing that the law is rationally related to the avoidance of evils that would constitute crimes *mala in se* if willfully caused. A sufficient showing will shift the burden to the challenger, who must establish that (B) the regulatory prohibition is an illegitimate exercise of punitive power. In this regard, the rule of prudence asks whether the virtue would *not* command substantial compliance with the regulatory prohibition (i.e., the actus reus) in light of the probable evils to be avoided. That is, whether the actions of a prudent person, enlightened by the regulatory purpose and within the class of persons targeted by the statute, would *not* have coincided with the commandment of positive law. Appellate courts should look to the factors discussed above.

(3) Where the state cannot overcome the presumption of invalidity, it must prove that prudence, unaided by the moral judgments of the state, still commands substantial compliance.

(4) Where a conviction carries the possibility of a prison term greater than one year, or in any event constitutes a felony, the burden of proof is initially placed on the government, regardless of whether the regulation passes rational-basis review. The offense is presumed to be punitive in nature, and the government must therefore overcome the presumption of invalidity under the alien ethics version of the prudence rule.

(5) Willful offenders are subject to constitutional conviction where it is proved that the offender had actual knowledge of the statutory prohibition: the actus reus. Under these conditions, punishment is always constitutional, so long as other constitutional requirements are satisfied.

V. CONCLUSION

While the state cannot take the place of God, it does have a role to play in the promotion of morals and the common good. To the extent the state may criminalize conduct, mens rea is the key to lawful punishment. Crime is a clash of wills, of which there are only two: one is man, the other is his

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218. *See supra* Part IV.A.

219. *E.g.*, Baender v. Barnett, 255 U.S. 224, 225 (1921) (interpreting a statute silent as to mental elements as requiring only a "conscious and willing" possession in prosecution for counterfeiting United States currency).

Creator. In the final analysis, it is the abuse of freedom that renders all of us amenable to punitive justice, of which even the penitent must offer satisfaction in this life. But such abuse must first be proved, and mens rea is the only tool we have, outside of confession, to judge the malice or goodness of the human will. Man is a creature worthy of at least this dignity.