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THE NUREMBERG TRIALS: A TEST CASE
FOR JURISPRUDENCE.

The Ohio State University, Ph.D., 1971
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1971
THE NUREMBERG TRIALS: 
A TEST CASE FOR JURISPRUDENCE

DISSERTATION

Presented in Partial Fulfillment of the Requirements for 
the Degree Doctor of Philosophy in the Graduate 
School of The Ohio State University

By

Samuel Israel Kanter, B.A., J.D., M.A.

* * * * * *

The Ohio State University 
1971

Approved by

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DEDICATION

Dedicated to my parents and to the memory of my Jewish brethren who died at the cruel hand of the Nazi oppressors.
ACKNOWLEDGMENTS

I would like to thank my aunt, Mrs. Eleanor Yenkin, who first suggested to me the idea of considering The Nuremberg Trials in relation to morality and international law.

Also, I would like to thank Professor Wade L. Robison for his helpful criticisms. His own paper, "The Form of Austin's Legal System," was extremely helpful in preparing the section on Austin.

Finally, I would like to thank Professor Bernard Rosen. His advice, cheerful attitude, and encouragement have made the time of my work seem "...but a few days,..." (Gen. 29:20). As a teacher and friend, he has enriched my life greatly.
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>iii</td>
</tr>
<tr>
<td>VITA</td>
<td>iv</td>
</tr>
<tr>
<td>Chapter</td>
<td></td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II. AN ANALYSIS OF THE LEGAL OPINIONS OF QUINCY WRIGHT AND GEORG SCHWARZENBERGER CONCERNING THE LEGAL STATUS OF THE NUREMBERG TRIALS AND THE NUREMBERG CHARTER</td>
<td>26</td>
</tr>
<tr>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td>Legal Opinion of Quincy Wright</td>
<td></td>
</tr>
<tr>
<td>Legal Opinion of Georg Schwarzenberger</td>
<td></td>
</tr>
<tr>
<td>Analysis and Comment on Wright and Schwarzenberger</td>
<td></td>
</tr>
<tr>
<td>III. THE NATURAL LAW THEORY OF THOMAS AQUINAS</td>
<td>53</td>
</tr>
<tr>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td>General Epistemological and Ethical Characteristics of the Natural Law</td>
<td></td>
</tr>
<tr>
<td>Function of the Natural Law in Man</td>
<td></td>
</tr>
<tr>
<td>Content of the Natural Law</td>
<td></td>
</tr>
<tr>
<td>The Relation of the Natural Law to Human Law</td>
<td></td>
</tr>
<tr>
<td>The Adequacy of Aquinas' Natural Law Theory to the Nuremberg Trials</td>
<td></td>
</tr>
<tr>
<td>IV. THE LEGAL THEORIES OF BLACKSTONE AND DEVLIN</td>
<td>85</td>
</tr>
<tr>
<td>V. THE LEGAL THEORIES OF AUSTIN AND HART</td>
<td>124</td>
</tr>
<tr>
<td>VI. CONCLUSION</td>
<td>155</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>168</td>
</tr>
</tbody>
</table>
CHAPTER I
INTRODUCTION

In this century we have witnessed acts of unspeakable horror--the Nazi atrocities. Of course, the fact of wars involving the destruction of innocent civilian lives, predates the Second World War. The militaristic value of such destruction can often be questioned and, sometimes, cannot be defended. The hell of war is one thing, but the fiendishness and cruelty of the Nazi atrocities is another. We have never before seen, and hope that we shall never again see such large-scale, organized and systematic torture and destruction of human lives.

The groan from the death camps is shattering, and bespeaks a bestiality unmatched in the history of man. The picture of the Nazi atrocities is complicated by the fact that in most cases they violated no German law and, in many cases, were committed pursuant to German law.

In 1933, the Decree of the Reich President for the Protection of the People and State, suspended civil liberties and provided for protective custody without judicial proceedings. Restrictions were placed on the expression of opinion, the press, and assembly and association. The requirement of warrants for house searches was suspended. In
The Reich Citizenship Law of 1935,\(^2\) citizenship was reserved for subjects of German blood. Jews were defined according to blood, and were thereby denied citizenship and the right to vote. Also in 1935, the Law for Protection of German Blood and German Honor,\(^3\) prohibited marriages and extra-marital relations between Jews and Aryans. In 1938, decrees were made denying the licensing of Jews as lawyers and physicians. An Order in 1938 required all German Jews to pay a collective fine of 1,000,000,000 Reichsmark. Also, in 1938, a Police regulation limited movement of Jews to certain localities and hours. A decree of the same year provided for the forcible congregation of Jews in the Reich Association of Jews in Germany. A secret law of 1940 provided for the murder of the aged and ill.\(^4\) In 1941, a Police order required all Jews over six years of age to wear the Star of David.

We are now faced with a moral problem. It is clear that persons who commit acts which are morally wrong to such a degree ought to be held accountable. We could, of course, proceed extra-legally. The occupying armies could, on the basis of lists in their possession, arrest the leading Nazis and execute them. But in a society containing a legal system, killing another person--without the usual process of law occurring--is morally justifiable if and only if it is a matter of self-defense or the defense of another innocent person. The stability of society requires that killing take place only within procedures
specified by the laws of the society. (Such laws include self-defense.)

The end of the war was a fact, and the cessation of hostilities negates any theory of self-defense on the part of the Allies. If one's enemy is lying helpless on the ground, one cannot kill him in self-defense.

Let us consider the legal means available. By executive action, the President of the United States could issue a directive to execute persons whose names appeared on authentic lists of leading Nazis. In such a manner we could avoid the legal problems presented by a trial (e.g., the problem of determining whether there existed an applicable law at the time the atrocities were committed). But it is morally obnoxious to determine the criminal guilt of a person without at least giving him the opportunity to prove his innocence. (This is, of course, a lesser claim than the presumption of innocence which is present in American criminal law.) This moral claim could be based on an epistemological kind of axiom, that the judgment as to the truth or falsity of an assertion should include all relevant evidence. The truth-claim involved in the notion of criminal guilt, is that a certain person committed a certain act or acts at approximately such-and-such time and approximately such-and-such place. We are assuming that the defendant's proof or attempted proof is relevant evidence.

Having eliminated the possibilities of killing in self-defense or by executive action, we are left with only one means or procedure for
holding accountable the Nazi leaders—that of trial. In determining the extent of legal responsibility, we shall follow the generally accepted statutory view that aiders, abettors, and principals are equally responsible with perpetrators. Thus, for example, the Ohio Revised Code (which is typical of state statutes in the United States) provides that "Any person who aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender."

The evidence at the Nuremberg Trials made clear the fact that the creators of the laws mentioned above (as well as similar orders and decrees) used these laws to implement their goals of harassment, slavery, and mass murders. The law makers who furnished these laws to the perpetrators stand in the same legal relation to the perpetrators as one who furnishes another with a gun for the express purpose of murdering a third party—the relation of accessory before the fact. As accessories before the fact, the lawmakers and signers of these decrees and orders share equal responsibility with the perpetrators. "An accessory before the fact is one who is guilty of felony by reason of having aided, counseled, commanded or encouraged the commission thereof, without having been present either actually or constructively at the moment of perpetration." The common law classification of accessories before the fact is included within the statutory specifications of aiders, abettors, or procurers.
The fundamental legal problem involved in a trial is that there seems to be no law applicable to the atrocities at the time of their commission. State law is applicable only within the borders of the state. Hence, the only law applicable seems to be German law. But the problem is generated by the fact that such acts as the killing of the aged and incurable were not illegal under the German law which existed at the time of their commission. That the German law conflicted with American law or any other state law, is not legally relevant. The doctrine of conflict of laws does not apply as between laws of different states. The problem of conflict between state law and international law is another issue, and will be considered in the discussion of the Nuremberg Trials.

In the dissertation I shall argue that acts which are morally wrong to a certain degree, n, are violations of international criminal law. Although, in ethics, there is no precise test for determining the degree of moral wrongness of acts, n is a degree of wrongness possessed by grave moral offenses. Acts which are morally wrong in themselves and wrong to degree n, I shall designate as acts (or crimes) mala in se. 'Mala in se' refers to particular acts, but not simply acts wrong in themselves. Rather, 'mala in se' refers to particular acts which are wrong in themselves and wrong to degree n. Of course, I am not asserting that all acts wrong in themselves are unlawful.
Indeed, a gratuitous insult may be wrong in itself, but it is not sufficiently wrong to be unlawful. I shall show that the crimes for which the Nazi leaders were tried were acts mala in se. Since the wrongness of acts mala in se is a characteristic of the individual act, that an act, A, is mala in se at time T, is universally true and is always true. In the dissertation I shall argue that there is a natural law which is part of international law, and that the natural law consists of summary rules which are prohibitions against acts mala in se and that these prohibitions take priority over any and all other conflicting laws. We may state as a summary rule that acts mala in se evoke in us the feeling or attitude of their being morally, shockingly obnoxious. Such a feeling or attitude does not in any way characterize the moral quality of the acts and serves only as a guideline for our moral judgments.

Since, as will be shown in the dissertation, the Nazi leaders are guilty of committing international crimes, we have a moral duty to punish them. However, since this dissertation is concerned only with the legal status of the Nazi atrocities, I shall not examine theories of punishment or determine a moral justification for punishing the Nazis. I would like to suggest, parenthetically, that the very institution of criminal laws requires punishment of criminals. Whether this view is correct or not is outside the scope of this paper.

The problem of applicable law could be avoided by making an
ex post facto law or laws, but ex post facto laws are abhorrent in criminal law. It seems at least presumptively, if not wholly, morally wrong for the law to hold legally accountable a person for committing an act which he could not have known was either morally or legally wrong at the time of committing it. (The issue of the legal or moral knowledge required by the defendant in order to hold him criminally responsible will be discussed in Chapter VI.) In general, legal responsibility for an act should involve the reasonable opportunity not to have committed the act. (Some crimes, e.g., statutory rape, contain an element of strict liability or responsibility. The existence of such laws does not affect the above-mentioned presumption as to the wrongness of ex post facto laws.) The use by the United States of ex post facto laws to try Nazis, is regarded by some persons as illegal—as falling within the United States Constitutional prohibition against ex post facto criminal laws. Such persons regard the Nuremberg Charter as an ex post facto law. (German law was suspended or superseded by the law of the occupying countries, so that the nature of German law is not a factor in deciding the issue of ex post facto law.) Others regard the employment of ex post facto laws as legally possible, but view the moral acceptability of such a device as dubious, if not wrong. In any case, a trial which does not involve ex post facto law is clearly more acceptable—legally and
morally—than one which does involve ex post facto law.

This apparent inapplicability of laws to such morally obnoxious acts forces us to reevaluate the various theories concerning the nature of law—especially with regard to their characterization of the relation between law and morality. Are all laws which are legally binding upon persons within a state solely creations of the state, or is there a non-created moral law which stands in some relation, R, (to be specified) to every legal system and has the full force of law—whether or not it is contained in the statutory law?

In the nineteenth century, natural law theories were, in general, no longer accepted. Many regarded them as dogmatic, and grounded in a teleological or essentialist metaphysic. Dogmatism and teleology had no place in the scientific age. Natural law theories were replaced by legal positivism and, later, by legal realism. Legal positivism was widely accepted in pre-war Germany. This theory provides legal justification for the most inhumane acts, so long as they are sanctioned by the legal authority of the state. For legal positivists, the concepts of illegality and legal justification are defined solely in terms of that which is specified or ratified by the legal authority of the state. Legal realism, espoused by Holmes, also provides for the legal justification of any act, so long as it is sanctioned by the legal authority of the state. In legal positivism,
the authority of the state is defined in terms of the lawmaker (either expressly by statute, or tacitly by acquiescence in judicially created law), whereas in legal realism the authority of the state is defined in terms of judicial decision. Thus, Holmes states, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."^8

Legal realism and legal positivism result in the unacceptable consequence that the individual Nazis can kill innocent persons, and take legal refuge in the state law. Thus, for example, the secret law of 1940 (see supra, p. 2) which provided for the killing of the aged and incurable is legally justifiable. Witness also the Enabling Act of 1933, which provided Hitler with the legal power for his later issuing of heinous decrees and laws, from which there was no legal appeal.^9 For legal positivists and legal realists the heinous decrees and laws enacted under authority of this Enabling Act, as well as the atrocities committed pursuant to such decrees and laws, are legally justifiable. These kinds of unacceptable consequences indicate a need for some universal moral law which is part of international law. The need of which I speak is the need for a legal remedy for the commission of acts mala in se--whether or not they are prohibited by statutory law and even if they are prescribed by state law. By what is universal in law, I mean the illegality of those acts which
are mala in se—whether or not such acts are prohibited by state law and even if they are sanctioned by state law. The concept of mala in se involves universality and can, therefore, provide the universally moral element in law. The connection of moral and legal issues involved in the concept of mala in se is best seen in natural law theory. We need, therefore, to reexamine natural law theory with especial attention to its element of universality. Part of the dissertation will be an attempt to formulate this universal element in law, without recourse to a particular metaphysic.

The above remarks concerning a morally justifiable means for holding accountable those responsible for the Nazi atrocities, can be summarized in the following argument:

1. What the Nazis did is so repugnant that it justifiably requires society's holding them accountable.
2. Holding one accountable in society is justifiable only in relation to laws.
3. Criminal laws of Type X are state law. (For the purpose of this argument, it will be sufficient to define 'State law' as that law whose applicability is limited to the geographical area of the state.)
4. Criminal laws of Type Y, which are the only other kind of criminal laws, are international law.
5. There were no criminal laws of Type X applicable to the Nazi atrocities at the time they were committed.
6. Therefore, there were criminal laws of Type Y applicable to the Nazi atrocities at the time they were committed.

The dissertation will be an attempt to substantiate the soundness of the above argument. I shall argue that a necessary and sufficient
condition for the existence of international law which was applicable at the time the Nazi atrocities were committed is a natural law which is part of international law—that the natural law overlaps with international law.

To clarify the legal issues involved in a trial judging the Nazi atrocities, we shall devote Chapter II to the legal theory involved in the Nuremberg Charter and Nuremberg Trials. The defendants at Nuremberg were tried under Article 6 of the Nuremberg Charter.

Article 6... ¹⁰

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.
Crimes against peace were limited by the Nuremberg Charter to acts of plans or conspiracies associated with a war of aggression or a war in breach of international treaties, agreements or assurances.

Our main concern will be with Article 6 (c)—crimes against humanity. Crimes against humanity were limited to acts which were "...committed in the execution of, or in connection with, war crimes in the strict sense and crimes against peace." Thus, Article 6 (c) was held to be not applicable to acts committed before September 1, 1939. We shall examine and compare the views of Georg Schwarzenberger and Quincy Wright concerning the legal status of the Nuremberg Trials. Schwarzenberger maintains that Article 6 (b) is, but that Article 6 (a) and (c) are not part of international law. Wright, however, states that "...there can be little doubt that international law had designated as crimes the acts so specified in the Charter long before the acts charged against the defendants were committed." In substantiation of my claim that the existence of a natural law is a necessary and sufficient condition for the existence of an international law which was applicable at the time the Nazi atrocities were committed, I shall show that their differing opinions as to the extent to which the Charter's applicability to the atrocities reflects international law, is explicable solely in terms of their differing views concerning natural law as a part of international law.
In order to show the existence of the natural law and of its overlap with international law, I shall consider the theories of Aquinas, Blackstone and Devlin. Chapter III will be devoted to Aquinas, Chapter IV will be devoted to Blackstone and Devlin. Aquinas is an important example of a philosophical attempt to formulate a natural law theory, and furnishes a good conceptual background for understanding the theories of Blackstone and Devlin. Blackstone will be considered because he presents a theory of law in which the natural law is expressed within a specific legal concept—the concept of crimes mala in se. Devlin's theory is important as an attempt to give a legal and moral justification of the concept mala in se. We shall also consider Devlin's theory of a shared morality and examine the relation of this theory to the concept of mala in se.

In Chapter V, we shall consider the theories of Austin and Hart, since they present the most serious challenges to the soundness of the above argument. I shall argue that since Austin accepts only premisses 2, 3, and 5 he is forced to the untenable conclusion of denying premiss 1. Hart accepts premisses 1, 3, 4, and 5 but denies the conclusion. In order to maintain premiss 1, Hart includes ex post facto laws within premiss 2. I shall show that Hart's solution, in terms of ex post facto laws, is legally and morally less desirable than that indicated in the above argument (see supra, p. 9).
In Chapter VI, the conclusion, I shall argue for the existence of a natural law which is also international law. This natural law, it will be argued, is free of any metaphysical commitment and is contained in the legal concept of mala in se. I shall relate this natural law formulation to certain elements in Aquinas, Blackstone and Devlin. Finally, I shall try to answer philosophical objections to this formulation within the area of moral philosophy.

In these preliminary remarks, I would like to outline briefly the theories which I shall discuss in the order which I shall discuss them, and indicate their respective places in the spectrum of the varying degrees of significant overlap between law and morality. To explain the concept of overlap, it will be helpful to think in terms of a spectrum whose elements are law and morality. At one end of the spectrum, the two elements are completely separated; at the other end, they are completely overlapped or identical. Besides the degree of overlap, we must also consider the nature of the overlap. Generally speaking, we can distinguish two kinds of overlap: non-contingent and contingent.

Contingent overlap between law and morality is mainly the concern of historians, sociologists, and psychologists. One kind of contingent overlap is identity of content between a particular law and a particular moral principle. As an example, we can cite the law against murder (the content being the wrongness of murder). Another
kind of contingent overlap is that of causation. Thus, we might ask whether Law A causes increased observance of Moral Principle A' or the moral improvement, in general, of the subjects of Law A. Causation may also be considered as flowing from a moral principle or principles to the making of laws. And, of course, the causal relation may be reciprocal. Such causal relations are important to the lawmaker and the judge. Thus, for example, in deciding whether or not to abolish capital punishment, the lawmaker may want to know what sentence within the limits of the statute will make the defendant a better person (not repeat the crime), vis-à-vis the possible danger to society of the defendant being released.

In jurisprudence, rather than factual or contingent relations, we are interested in reasons for connecting law and morality. (Such reasons should, of course, be in the light of the best factual information available.) Consider, for example, Law A which is identical in content with Moral Principle A'. Such an identity is a fact. In jurisprudence, some questions relevant to this fact are: Is the existence of Law A necessarily related to the existence of Moral Principle A'? Does the justification of Law A depend upon the justification of Moral Principle A'? Does Moral Principle A' vitiate the legality of laws which conflict with it? Does legally defensible obedience to Law A depend upon the justifiability of Moral Principle A'? These,
and similar questions, require answers involving reasons. These questions cannot be settled by the sciences.

Reasons for asserting or denying necessary relations between law and morality are varied. Natural law theories have traditionally argued upon metaphysical grounds. Thus, for Aquinas, the existence of a natural law which is legally binding, is an ontological claim. The denial of any necessary relation between law and morality is sometimes argued for on a conceptual basis. Legal positivists, for example, maintain that a critical examination of the moral value of laws, requires the complete separation of the concepts of law and those of morality. In other words, clarity of thought requires a certain conceptual scheme—one in which the existence of law is separate from the merit or demerit of law.

At one end of the spectrum, we find Austin's legal positivism, which maintains a complete separation between the existence of law, and morality. Law is the positive or statutory law, and it alone has legal force. The existence of laws is a fact, which is not affected by their goodness or badness. "The existence of law is one thing; its merit or demerit is another."13 Although Austin distinguishes the existence of law from morality, he does provide for the distinction between good and bad laws. Moral evaluation of the positive law is by reference to the Divine law. The content of the Divine law is based upon
the principle of utility. We evaluate the goodness or badness of laws in terms of their conducing to the general happiness. In case of conflict between Divine law and positive law, the former should be obeyed. The details of Austin's theory will be dealt with in the body of the dissertation.

At the other end of the spectrum we find the example of the Mosaic law, in which state law and moral law are held to be identical. In referring to the law which he presents, Moses says, "See, I have set before you today the life and the good, and the death and the evil." Moses here identifies the law with the good.

The question of the comparative degree of overlap between law and morality present in the following theories to be discussed, is a question to which there is no straightforward answer. Since the theories present different kinds of overlap, the amount of overlap cannot be decided on a purely quantitative basis. I shall now enumerate the theories in, what seems to me, an ascending order of degree of significant overlap.

For Hart, there is, conceptually, a "humble minimum" degree of overlap between law and morality. The humble minimum refer to the minimum content of natural law. The minimum content of natural law indicates a relation between law and morality which is weaker than necessity, but stronger than contingency--what Hart terms "natural necessity." The minimum content of natural law
does not contain, nor does it preclude any particular kind of substantive law. Hart states that the minimum content is consistent with a legal system containing slavery, since the rules of a legal system need be accepted by only some of the people. It would seem then, that the legalized murder of certain kinds of persons would fit into Hart's minimum content—provided that some of the subjects of the legal system (not necessarily the potential victims of the Law) voluntarily accepted the law. For Hart, the minimum content of natural law is based on certain truisms about the present nature of man and his environment, which result in the need for certain general categories of laws in order for men to live together. The truisms are: human vulnerability; approximate mental and physical equality among men; limited altruism of men; limited resources; and, limited understanding and strength of will of men. These truisms are reasons for the following kinds of laws: restricting violence against one another; mutual forbearances and compromise; the institution of property; and, laws providing for sanctions. The minimum content of natural law consists of these general categories of law.

The following three theories—Aquinas, Blackstone, and Devlin can be classified as natural law theories. I shall define a natural law theory, in general, as one which asserts that some immoral acts are unlawful and that their unlawfulness takes priority over any and
all other conflicting laws. (I have not included Hart's theory as a natural law theory because it does not meet this minimum definition.)

In Aquinas, the natural law is termed natural because it includes "...everything to which a man is inclined according to his nature." Following Aristotle, Aquinas defines man's essence or nature in terms of rationality. The natural law consists of universal propositions which are self-evident to and binding upon all men. These propositions are the first principles. In addition to the first principles, there are secondary principles which are "...certain detailed proximate conclusions drawn from the first principles,..." Absolute universality and unchangeability are attributed only to the first principles. Also, the quality of being universally self-evident, is attributed only to the first principles. Concerning the content of the natural law, Aquinas states "...this is the first precept of law, that good is to be done and promoted, and evil is to be avoided. All other precepts of the natural law are based upon this;..." Aquinas cites, approvingly, the following quote from Augustine: "...that which is not just seems to be no law at all." This quote by Aquinas is considered by some as clear proof that Aquinas denies the existence of unjust laws. 'Law,' then, is taken to be identical with 'natural law.' However, from an examination of the text, I shall show Aquinas' view to be: that there is a universal, unchangeable
natural law; that there are good human laws which are not identical with any natural law or laws; and, finally, that only those human laws which violate the first principles of the natural law, are not laws.

Blackstone accepts the existence of a natural law which consists of "...eternal, immutable laws of good and evil,..."19 Like Aquinas, he does not identify 'law' with 'natural law.' Blackstone states that all natural laws are legally binding, but not all statutes (or positive law) are natural laws. Crimes which are mala in se are violations of the natural law. Crimes mala in se are distinguished from crimes which are only mala prohibita. Examples of crimes mala in se are murder, theft, etc. Crimes which are only mala prohibita are acts which have been made crimes by statute, but which do not involve moral guilt. Blackstone states that crimes mala prohibita have been enacted for the welfare of the society, but that they are acts "...in themselves [morally] indifferent,..."20 The moral indifference of some acts is in contrast with other acts which are mala in se. Concerning the content of the natural law, Blackstone states "...'that man should pursue his own true and substantial happiness.' This is the foundation of what we call ethics, or natural law."21

I think that there is a greater degree of significant overlap between law and morality in Blackstone than in Aquinas. Only in
Aquinas do we find any preclusion of laws punishing evils. Aquinas states that in punishing all evils, human law "...would do away with many good things, and would hinder the advance of the common good, which is necessary for human living."\(^{22}\)

In classifying Devlin as a natural law theorist, I am aware of significant differences between Devlin and classical natural law theorists such as Aquinas and Blackstone. Devlin does not use terminology such as 'natural law' or 'eternal, immutable laws.' There are, however, in accordance with my above stipulated definition of 'natural law theory' (see supra, p. 18) strong reasons for including Devlin within such a classification. In one part of Devlin's theory he maintains a necessary connection between law and morality. This necessary connection results from his acceptance of crimes mala in se as expressing an objective morality. The objective morality of mala in se is in contrast with the shared morality. "If men and women try to create a society in which there is no fundamental agreement about good or evil [shared morality] they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate."\(^{23}\) Devlin defines shared morality as the collective judgment of the society concerning right and wrong. Since, for Devlin, there is an overlap between the shared morality and law, as well as between mala in se and the law, there is, I think, a greater
degree of significant overlap between law and morality in Devlin than in Blackstone.

Pursuant to the above moral argument (see supra, p. 9) we shall focus on a special criterion of success in relation to each of the metalegal theories which we examine. We shall inquire concerning each theory, whether or not it could provide an adequate remedy for the atrocities committed by the Nazis. I am not suggesting that the success or failure of a metalegal theory can be determined solely by its ability or inability to deal with this special problem. But I am convinced that the inability of a legal system to deal adequately with a great moral wrong counts heavily against such a system. Concerning the major German war criminals, the Right Honorable Viscount Kilmuir stated, in quoting Justice Jackson, chief prosecutor for the United States at Nuremberg, " 'To free them without a trial would mock the dead and make cynics of the living.' "24 An adequate solution to this special problem will constitute, then, a necessary condition for the success of any legal theory.

Certain possible objections to this special criterion should be mentioned at this point. Are we not merely crying for vengeance? Surely, a legal system should not serve as a tool for vengeance and, a fortiori, we cannot judge the success of a legal system in terms of its ability to wreak vengeance. This objection, based on the unaccept-
ableness of vengeance, can be answered without trying to determine where justice ends and vengeance begins. If the prosecution of persons for crimes against humanity is vengeance, then, a fortiori, the law against a single murder is vengeful in character. One might argue, however, that the objection should be amended so as to assert that it is unfair and vengeful to prosecute persons under an ex post facto law, and that no jurisdictionally applicable law existed at the time the atrocities were committed. But this objection begs the question in favor of the non-existence of applicable laws at the time of the atrocities. One of the main points of the dissertation, however, is to determine---in the case of each theory to be examined---whether there is a legal remedy or not and, if there is, the nature of the legal remedy (whether ex post facto or not).
NOTES

Chapter I

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CHAPTER II

AN ANALYSIS OF THE LEGAL OPINIONS OF QUINCY WRIGHT AND GEORG SCHWARZENBERGER CONCERNING THE LEGAL STATUS OF THE NUREMBERG TRIALS AND THE NUREMBERG CHARTER

Introduction

In the argument presented in Chapter I (see supra, p. 9), I concluded that there was international law applicable to the Nazi atrocities at the time they were committed. In this chapter, I shall argue that there is an overlap between natural law and international law; also, that the natural law is expressed in the concept of acts mala in se. I shall show that, since the Nazi atrocities were clearly mala in se, that part of the Nuremburg Charter which designated certain of those atrocities criminal, must--in order to reflect international law--involve recognition of the concept of acts mala in se as a necessary and sufficient condition for the existence of the relevant part of international law. To substantiate this opinion, I shall examine the opinions of two leading publicists in international law concerning the relationship of the Nuremburg Charter to international law--Quincy Wright and Georg Schwarzenberger. I shall argue that their differing opinions as to the extent to which the Charter's applicability to
atrocities reflects international laws is explicable solely in terms of their differing views concerning natural law as a part of international law.

The defendants at Nuremberg were tried under Article 6 of the Nuremberg Charter (see supra, p. 11).

Both Wright and Schwarzenberger cite the Statutes of the International Court of Justice (1922), Article 38, as defining the sources of international law.¹

The Court shall apply:
1. International conventions ... establishing rules expressly recognised by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognised by civilised nations;
4. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Let us call (1) general conventions; (2) customary law; (3) general principles of law; and (4) the writings of prominent publicists in law.

Examples of international conventions are the Hague Conventions of 1907 and 1922. Treaties are also included under (1). International custom must be not merely custom, but custom accepted as law by the state against whom the custom is sought to be applied as law. For Wright, the exercise of personal (universal) jurisdiction over brigands or pirates, is an example of a custom accepted as law. 'In personam'
jurisdiction and 'universality of jurisdiction' are phrases designating legal jurisdiction which extends to any place where the potential defendant may be found. (3) refers to general principles of law which are recognized in the legal systems of civilized (not necessarily all) countries. Wright, but not Schwarzenberger, thinks that the rule against ex post facto criminal laws, is an example of (3). Wright thinks that (4) is on a par with (1)-(3) as a source of international law. Schwarzenberger, however, considers the elements in (4) as being only a means for the determination of the alleged rules of international law.

Legal Opinion of Quincy Wright

Wright analogizes general international law with the common law and concludes, thereby, that there is no precise test for determining whether a certain rule of law or procedure is a part of international law. Also, since the existence of at least two of these elements--international custom and general principles of law--is not subject to a hard and fast test, the elements (1)-(4) considered as a whole, are not subject to a precise test. To make such a determination, we must look at the above-mentioned elements, to see if any or how many of them have been fulfilled, and to what extent.

For Wright, there are two independent bases of jurisdiction for the Nuremberg Trials--each of which is sufficient for jurisdiction.
"Under international law a state may acquire sovereignty of territory by declaration of annexation after subjugation of the territory if that declaration is generally recognized by the other states of the world."²

Germany surrendered unconditionally in May, 1945. The Declaration of Berlin, issued on June 5, 1945, declared the complete authority (including legislative authority) of the Allied Powers over Germany, and this Declaration was accepted by the other states of the world.

Wright argues that since the Allied Powers had the right under international law, either jointly or separately, to annex Germany, they had the right a fortiori to enact the Nuremberg Charter. In discussing the war crimes basis of jurisdiction, Wright refers to the Hague Convention of 1907 Respecting The Laws and Customs Of War On Land. This Convention was ratified by Germany, and includes the prohibition against maltreatment of enemy soldiers. To further substantiate the war crimes basis of jurisdiction, Wright cites the Lotus case³ as establishing the rule that there is a presumption of universality of jurisdiction over crimes. As evidence for the correct interpretation of Lotus, Wright refers to Cowles' article in the California Law Review entitled "Universality of Jurisdiction over War Crimes."⁴

In "Universality of Jurisdiction over War Crimes," Cowles cites Lotus as establishing, in international law, the scope of a state's exercise of jurisdiction. In the Lotus case a French steamship
named Lotus and a Turkish vessel collided on the high seas. Some passengers on the Turkish vessel were killed as a result of the collision. Demons, the officer of the watch of the Lotus, was arrested and convicted of involuntary manslaughter in a Turkish court. The French government protested that Turkey had no jurisdiction to try Demons and, upon agreement between Turkey and France, the case was submitted to the World Court for the sole purpose of deciding the issue of jurisdiction. The case was decided in favor of Turkey on the ground that the burden of proof is on the party contesting a particular exercise of jurisdiction by a state, to show that the particular exercise of jurisdiction in question is in violation of international law. In other words, the exercise of jurisdiction by a state is considered (or presumed) lawful unless shown to be a violation of international law. France failed to sustain this burden of proof. Based on Lotus, Cowles states:

In order to establish that, under international law, the principle of universality does not apply to the trial and punishment of such war crimes [e.g., those committed by the Nazis], it is necessary to show that States generally, as a matter of practice expressing a rule of law, have consented not to exercise jurisdiction in such cases.

War crimes are acts against the enemy in violation of the customary and conventional law of war. Cowles points out that it has been the custom of states to exercise personal (universal) jurisdiction over
acts of brigandage and that war crimes are legally the same as acts of brigandage. "...the essence of brigandage is the use of armed force without a genuine public cause,..." The law of brigandage has been applied in war time as well as peace time, and whether or not committed under the authority of a political community or a state.

Let us now consider Wright's view as to the legal status of the charges in the indictment. Wright maintains that crimes against peace (the crime of aggressive war) are crimes under international law. One basis of this contention is the Pact of Paris, ratified by Germany, in which:  

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Wright's other basis for maintaining that aggressive war is an international crime, is that "...if an individual act is of a criminal character, that is mala in se, and is in violation of the state's international obligation, it is a crime against the law of nations." Since the specific obligation under consideration by Wright is the Pact of Paris, it seems clear that 'obligation' refers to treaty obligation. That war crimes, the second charge in the indictment, are part of international law, is discussed above in connection with jurisdiction.

Crimes against humanity, the third and final charge in the
indictment, was restricted (by the Charter) to inhumane acts committed in execution of or in connection with the aggressive war. Thus, inhuman acts which did not constitute war crimes, were considered crimes against humanity—if and only if they were committed in execution of or in connection with the aggressive war. The Charter's use of 'in connection with' refers to the planning or preparation of an aggressive war; 'in execution of' refers to initiating or waging a war of aggression. Wright, then, maintains that crimes against humanity, as defined in the Nuremberg Charter, are an international crime due to their relation to aggressive war, which is an international crime. The relation is that of inclusion. Crimes against humanity are part of the planning, waging, etc. of a war of aggression.

Wright also states that crimes against humanity differ from war crimes only in that acts of the former kind were directed against German nationals, whereas acts of the latter kind were directed against an enemy. To support his contention that international law should not distinguish crimes against the enemy from crimes against nationals, Wright cites the preamble of the Hague Convention of 1907 Respecting The Laws And Customs of War On Land which "...refers to the 'laws of humanity' and the 'dictates of the public conscience' which would apply to atrocities against nationals as well as against aliens." To further substantiate the universality of status as
international law of crimes against humanity, Wright also cites Wharton: "As Wharton points out: 'The presumption of knowledge of the unlawfulness of crimes mala in se is not limited by state boundaries. The unlawfulness of such crimes is assumed wherever civilization exists.' 10

Individual responsibility has been applied in international law to pirates and brigands. Since war crimes have the same legal status as piracy and brigandage, they carry the same legal responsibility. Individual responsibility in relation to the crime of aggressive war is based "...upon the inherently criminal character of intentional initiation of aggressive war...." 11

Wright dismisses the purported commission of similar acts by the Allied Powers as a bar to prosecution, with the observation that the equitable principle of "clean hands" is not recognized as a defense in criminal trials. 12

He who comes into equity must come with clean hands. The clean hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. It is invoked to protect the integrity of the court.

Legal Opinion of Georg Schwarzenberger

Schwarzenberger maintains (in agreement with Wright) that jurisdiction can be based on debellatio (extinction of the international personality of a state by the destruction of the state machinery) and
the Allied co-imperium there established. ('Imperium' refers to the jurisdictional rights of a sovereign. The sovereignty here referred to is based upon the de facto authority of the Allied Powers, together with the acceptance of this authority by the independent states of the world.) In rejecting war crimes as a basis for jurisdiction in international law, Schwarzenberger cites Lotus as declarative of the correct view concerning the parties to international law. "International law governs relations between independent States." Since Germany was no longer an independent state, it could not be a party to a proceeding in international law. Furthermore, Schwarzenberger distinguishes the objects of international law from international persons. International persons are those persons who have traditionally been parties in an international court or signers of treaties--e.g., states and territories. The objects of international law are those things referred to in the content of international law--regarding the relations of independent states. Objects might include real property, personal property, or individuals. Schwarzenberger acknowledges the custom of universality (based on personal jurisdiction) of jurisdiction in cases of war crimes, but characterizes such jurisdiction as an exceptional extension of state jurisdiction. He states that the position of the individual as a bearer of rights and duties in international law is precarious, and goes on to argue that
we should not "...elevate the most disreputable objects [the Nazis] of international law to the rank of international persons." Schwarzenberger does, however, regard war crimes as violations of international law. Their status in international law is based upon the Hague Convention of 1907 and the Geneva Red Cross Conventions of 1929. Since war crimes are committed by individuals, and since Schwarzenberger maintains that individuals may be objects but not persons of international law, he maintains that the only legal justification of prosecuting war criminals is that such prosecution is an exceptional extension of state jurisdiction. The prosecution of war crimes cannot be justified as an exercise of jurisdiction under international law.

Schwarzenberger rejects the charge of crimes against peace as reflecting international law. He states that Germany's initiation of war constituted a violation of the Pact of Paris, but that such a violation is only tortious--not criminal. (Since there is no crime involved, there can be no going beyond the legal personality of the state, in order to impose individual responsibility.) The language of the Pact does not specify war as a crime and, therefore, the Pact cannot be so interpreted. Neither do prior international conventions, etc. justify an interpretation along lines of criminal responsibility. Schwarzenberger restricts the breach of an international obligation to civil law. "(1) The breach of any international obligation consti-
tutes an illegal act or international tort. (2) The commission of
an international tort involves the duty to make reparation."15

"Actually, terms such as international illegal act or international tort
are merely synonyms for the breach of international obligations."16

Schwarzenberger states that the class of crimes against humanity
overlaps with the class of war crimes, but insofar as it contains acts
not classifiable as war crimes, it does not reflect international law.
This opinion is based on the rejection of crimes against peace as
being international crimes. The Charter definition of crimes against
humanity includes persecutions "...in execution of or in connection
with any crime within the jurisdiction of the Tribunal,..."17 Any
such persecutions against the enemy would also fall within the defini-
tion of war crimes. But any such persecutions which did not also
constitute war crimes would have to fall within the category of crimes
against peace--in order to fulfill the Charter definition of crimes
against humanity as limited to inhumane acts "...in execution of or
in connection with any crime within the jurisdiction of the Tribunal,..."18

Parenthetically, both Wright and Schwarzenberger maintain that
the Charter definition of crimes against humanity allows for inclusion
of the commission of such crimes prior to the start of war--even
though the Judgment of the Tribunal restricted itself to acts committed
after September 1, 1939.
Schwarzenberger unhesitatingly accepts the consequence that the Charter contained \textit{ex post facto} law in specifying crimes against peace and crimes against humanity. "...the law the Tribunals of Nuremberg and Tokyo applied on aggressive war was the law laid down in their Charters, and as such \textit{ex post facto} law."\textsuperscript{19} However, he differs from Wright concerning the status of the rule against \textit{ex post facto} criminal laws. Schwarzenberger states that the Nuremberg Court could have come to either of two conclusions. First, it could have held that the rule against \textit{ex post facto} criminal laws has not been accepted sufficiently to constitute a general principle of law recognized by civilized nations--so as to be included within (3) of Article 38 of The Statutes of the International Court of Justice (see supra, p. 27). Second, the court could have held that the rule against \textit{ex post facto} laws is a general principle of law recognized by civilized nations, but that it admits of exceptions. The Nazi atrocities would constitute a ground for an exception to the rule.

Schwarzenberger also presents another argument concerning the justification of the Nuremberg Trials, which he elaborates in an earlier work--\textit{International Law and Totalitarian Lawlessness}.\textsuperscript{20} This argument, which I shall call his second argument, is clearly a moral argument. He begins by referring to the concept of the outlaw in the old English, French, and Canon law. Schwarzenberger does
not offer a precise definition of the concept of an outlaw, but the concept seems to refer to one who has committed acts "...so generally abhorred..."\(^{21}\) that he has indicated an utter break with the basic laws of society. He then argues that Germany committed acts which showed its utter rejection of international customary law, thus making itself an international outlaw.

...the function of outlawry is, in circumstances determined by the law, to deprive the outlaw by the withdrawal of his legal capacity of the rights and duties dependent on membership in a legal community, and, particularly, of the protection of the law accorded to the ordinary criminal.

Schwarzenberger acknowledges that the concept of the outlaw is not a general principle of law as contained in Article 38 of The Statutes of the International Court of Justice. In fact, he introduces the concept of the outlaw because he thinks that the normal procedures of international law are not sufficient as against Germany.

A third argument presented by Schwarzenberger (this argument, like the second argument, is contained in *International Law and Totalitarian Lawlessness*) is contained in the following:\(^{23}\) "Equally to the point seems a dispatch of Earl Russell:

"International Law makes progress in keeping with the advance of Christian civilization, and if it be found that a practice not hitherto treated as a violation of its principles be, nevertheless, a crime of the darkest character and an offence against our common humanity, it would surely become the great Christian States to include by their united verdict this atrocious crime in the list of
those which it is the duty of International Law to prevent and to punish."

Schwarzenberger is here clearly identifying a moral law with international law. But since the moral law does not change, Schwarzenberger is mistaken in stating that international law "makes progress" by including prohibitions against a crime of the darkest character.

**Analysis and Comment on Wright and Schwarzenberger**

Let us now consider the relation of natural law to Wright's views concerning the legal status of the Nuremberg Trials and the Nuremberg Charter. We shall adopt the previously stipulated general definition of a natural law theory (see supra, p. 18).

One basis for jurisdiction under international law, according to Wright, is the subjugation of the German territory by the Allied Powers, together with their declaration of sovereignty which was accepted by the states of the world. As a sovereign, the Allied Powers had the legislative authority to enact the Charter. I shall refer to this basis of jurisdiction and enactment of the Charter, as Wright's First Solution.

Wright's First Solution is inadequate. Although we may grant the sovereign's legislative authority to the Allied Powers, such authority does not solve the problem of *ex post facto* laws. The enactment of the Nuremberg Charter took place after the occurrence
of the crimes specified in the Charter. In fact, one might argue that since Wright specifies the Allies' legislative authority for enactment of the Charter, the legal status of the contents of the Charter is, for Wright, necessarily dependent upon enactment of the Charter. If such is the case, then the crimes specified in the Charter are clearly **ex post facto**. But Wright wants to argue that the crimes specified in the Charter are not **ex post facto**, since he maintains that the rule against **ex post facto** criminal laws is an absolute requirement in criminal law.

Wright's second basis for jurisdiction is that of war crimes. He states that the Hague Convention of 1907 Respecting The Laws and Customs Of War On Land is merely declarative of already existing international law. We should note that this Hague Convention specifies that prisoners of war "...must be humanely treated." 24 Although the above-quoted language is in the form of a positive command, its legal significance and enforcement is solely in relation to inhumane treatment. 'Humane' and 'inhumane' are clearly not stipulative terms. Inhumane acts are those which are wrong, and whose wrongness is not relative to any particular place or time. They are acts mala in se.

Another basis for the universality of jurisdiction (in personam jurisdiction) over war crimes, according to Wright, is **Lotus**.
However, contra to Cowles and Wright, I think that *Lotus* does not establish the universality of jurisdiction over war crimes.  

...the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based.

The Court goes on to say that the additional feature in the case at bar is that

...the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners.

I think that the Court is here explicitly avoiding basing its decision on the universality of jurisdiction over crimes. It may be, as the dissenting opinion of Lord Finlay declares, that "A ship is a movable chattel, it is not a place;..." Given the status of ships as chattels, Lord Finlay concludes: "The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all." However, even if we assume that the element of a ship adds no territorial feature to the case, we can--and should--maintain the incorrectness of Cowles' interpretation. I think that the majority opinion that

...the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim.
cannot be dismissed as obiter dictum. Rather, even given the correctness of Judge Finlay's dissent, the most that we can conclude is that the majority opinion mistakenly based its opinion, at least in part, on the territorial nature of a ship--not on the universality of jurisdiction over crimes.

Given my interpretation of **Lotus**, an important point arises concerning the temporal relation of **Lotus** to the Hague Convention of 1907. **Lotus** was decided in 1927--after the Hague Convention. We might conclude that since **Lotus** was decided after the Hague Convention, and because the Court in **Lotus** refrained from basing jurisdiction on the universality of jurisdiction over crimes, that **Lotus** is evidence for the absence or dubious existence of the universality of jurisdiction over war crimes. Such a conclusion would, I think, be mistaken. The Court in **Lotus** is correct in not dealing with the issue of war crimes. The crime in **Lotus** is that of involuntary manslaughter. Whatever legal significance may result from a multilateral treaty concerning war crimes (e.g., the Hague Convention) can have no bearing on the legal status of involuntary manslaughter or problems of international jurisdiction relating to involuntary manslaughter. The two crimes are radically different in nature. War crimes are clearly more serious or grave. If, as Cowles maintains, **Lotus** established the universality of jurisdiction over crimes, then
it would follow a fortiori that there is universality of jurisdiction over war crimes. However, although Lotus does not (on my interpretation) establish the universality of jurisdiction over crimes, nothing follows therefrom concerning the jurisdiction over war crimes.

Since the above examination of Wright's opinion concerning the jurisdictional problem of Nuremberg includes the issue of the legal status of war crimes, let us now turn to the first charge in the indictment—crimes against peace. The first basis offered by Wright for the criminality of aggressive war is the Pact of Paris. In the Pact of Paris, the contracting parties "...condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy...". It is a recognized rule in criminal law that criminal statutes are to be strictly construed.

As a general rule, crimes must be defined in a statute with appropriate certainty and definiteness, and the standards of certainty in statutes prescribing punishment for offenses are higher than in those depending primarily on civil sanction for their enforcement. There are no constructive criminal offenses, ...and purely statutory offenses cannot be established by implication.

I think that the strict construction rule is extendible to the existence of an enacted criminal law. Unless a statute or treaty employs such language as 'crime' or 'criminal,' or provides for punishment of a specific offense, such statute or treaty should not be construed as creating a criminal law. The Pact of Paris "condemns" and
"renounces" aggressive war, but does not label aggressive war a crime or criminal. Nor does the Pact provide for sanctions against a state or people which undertakes a war of aggression.

The second basis offered by Wright for the criminality of aggressive war contains two elements: the mala in se character of aggressive war, and aggressive war constituting a violation of the Pact of Paris. "...if an individual act is of a criminal character, that is mala in se, and is in violation of the state's international obligation, it is a crime against the law of nations." Wright is here emphasizing the nature of the acts committed, rather than the language of the Pact. He does not state that aggressive war is a criminal violation of the Pact, but rather that an act which is mala in se and is in violation of the state's international obligations, is a crime against the law of nations. Note also that he does not say that the crime is a crime as defined by the Pact, but rather a crime against the law of nations. Furthermore, the element of mala in se would not be required if the crime were defined by the Pact--since 'mala in se' is not used in the Pact.

Aside from the above examination of Wright's language, which indicates his acceptance of acts mala in se as international crimes, there is a conceptual consideration for maintaining that his second element--violation of the Pact--is a mere tag-on. Since the violation
of the Pact is only tortious (as opposed to criminal) it cannot affect the issue of the criminality of aggressive war. An otherwise non-criminal act cannot be made criminal by the fact of its being a civil wrong.

The status of aggressive war as an international crime (at the time of the Nuremberg Trials), can be based only on a natural law theory. I shall show that aggressive war involves relation of the natural law theory which I have formulated (see supra, p. 6). An aggressive war clearly involves acts which are mala in se. By definition, an aggressive war is not an act of self-defense. Since war involves killing, and since such killing (aggressive war) is not done in self-defense, such killing constitutes murder. And murder is clearly mala in se.

The last charge in the indictment is crimes against humanity. Wright offers three reasons for maintaining that crimes against humanity are international crimes. Wright's first reason is that crimes against humanity constitute a class within a class of crimes against peace. Since, as we have shown, crimes against peace are mala in se, it follows--under this theory of inclusion--that crimes against humanity are mala in se.

Another reason offered by Wright for the status of crimes against humanity as an international crime involves The Hague
Convention Respecting The Laws And Customs Of War On Land.

Wright states that crimes against humanity differ from war crimes only in that the former involve nationals as victims. He then argues that the Hague Conference's use of 'laws of humanity' and 'dictates of the public conscience' provides for the inclusion of nationals among the kinds of persons protected by international criminal law.  

Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

From the standpoint of what is mala in se it is clear that the nationality of the victim cannot make a difference in the wrongness of the act.

Finally, Wright bases the legal status of crimes against humanity on the concept of mala in se. His quoting Wharton (see supra, p. 33) is, of course, an explicit substantiation of my contention as to the universal illegality of acts mala in se.

Schwarzenberger concurs with Wright in maintaining that jurisdiction can be based on the sovereignty of the Allied Powers. But, as noted above, the solution of the jurisdictional problem does not affect the issue of the legal status of the substantive law applied at Nuremberg—whether it was ex post facto law or not.
Although Schwarzenberger accepts the existence of war crimes as part of customary international law, he declines to grant the Nuremberg Trial the status of an international legal proceeding. He states that international law exists only between independent states and argues, furthermore, that we should not "...elevate the most disreputable objects [the Nazis] of international law to the rank of international persons."\(^{34}\) I think that Schwarzenberger's view is untenable. It is clear that war crimes are committed by individuals. To designate the status of an individual as a criminal under international law, and thereafter to deny the status of such an individual as a defendant in an international legal proceeding, is clearly self-defeating. Furthermore, I do not understand Schwarzenberger's reason for using 'elevate' in relation to making war criminals parties defendant in an international court. If international law has "elevated" war crimes to international crimes, then international courts should "elevate" war criminals into international criminals.

For the reasons given above in the discussion of Wright, I think that Schwarzenberger is correct in rejecting the Pact of Paris as creating crimes against peace. The conclusion which gains support from this rejection, however, is that we must base crimes against peace on the natural law--acts which are mala in se.

Since Schwarzenberger maintains that crimes against humanity
are either war crimes or are inhumane acts done in execution of or in connection with crimes against peace, and because we have already discussed both war crimes and crimes against peace, we need not undertake a separate examination of Schwarzenberger's view concerning crimes against humanity.

Schwarzenberger's view concerning the ex post facto issue is that the rule against ex post facto criminal laws is not a rule of international law; or, if it is a rule of international law, it admits of exceptions--e.g., Nuremberg. Such a view is morally indefensible. A person should not be punished for an act which he could not reasonably have known was wrong or illegal at the time of his doing it. If one could not reasonably have known of the wrongness or illegality of action X, then one could not have been obligated to have refrained from doing X, and if he was not obligated to have refrained from doing X, it would be wrong to hold him punishable for doing X.

The most striking view held by Schwarzenberger concerning the substantive law at Nuremberg is the theory of Germany as an international outlaw and, hence, without any right to the application of law. The theory of the outlaw is unacceptable. We are being told to distinguish the ordinary murderer (who has a right to be tried by law) from the super-criminal. Aside from the problem of making such a distinction, the non-applicability of law to certain kinds of
persons would undercut the very purpose of democratic societies.
The rule of law must be guaranteed to all.

Finally, Schwarzenberger states that we should include as part of international law "...a crime of the darkest character and an offence against our common humanity..." (Schwarzenberger is here using 'crime' in a non-legal sense.) I agree with Schwarzenberger. I would argue, however, that a "crime" of the darkest character and an offense against our common humanity is an act mala in se. Since acts mala in se are violations of the natural law, and because the natural law is part of international law, such violations are violations of international law.
NOTES

Chapter II


2 Wright, The law of the Nuremberg Trial, 41 Am. J. Int'l L. 50 (1947).


4 Cowles, Universality of Jurisdiction over War Crimes, 33 Calif. L. Rev. 177, (1945).

5 Cowles, supra note 4, at 181.

6 Ibid. at 195.


8 Wright, supra note 3, at 63.

9 Ibid. at 60.

10 Ibid. at 61.

11 Ibid. at 66.

12 30 C.J.S. Equity sec. 93 (1965).

13 Case of the S.S. "Lotus," supra at 18.


15 Ibid. at 563.

50
16 Ibid. at 571.
17 Nuremberg Charter, art. 6, subpara. (c).
18 Ibid.
19 2 Schwarzenberger, International Law 494.
20 Schwarzenberger, International Law and Totalitarian Lawlessness (1943).
21 Ibid. at 86.
22 Ibid. at 88-89.
23 Ibid. at 99.
25 Case of the S.S. "Lotus," supra at 22-23.
26 Ibid. at 23.
27 Ibid. at 53.
28 Ibid.
29 Ibid. at 22-23.
30 Pact of Paris, art. I.
32 Wright, supra note 3, at 63.
33 Laws and Customs of War on Land (Hague, IV), Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.
34 1 Schwarzenberger, op. cit. supra note 14, at 155.

CHAPTER III

THE NATURAL LAW THEORY
OF THOMAS AQUINAS

Introduction

In this chapter we shall consider the natural law theory of Thomas Aquinas. The Questions referred to in the text are in the Summa Theologica, 1-2. We shall be concerned only with those parts of Aquinas' theory which are necessary for understanding the relation between the natural law and human laws. Due to the complexity of Aquinas' theory, it will be helpful to divide the chapter into the following parts: (a) general epistemological and ethical characteristics of the natural law; (b) function of the natural law in man; (c) content of the natural law; (d) the relation of the natural law to human law; and, (e) the adequacy of Aquinas' natural law theory in relation to the Nuremberg Trials.

General Epistemological and Ethical Characteristics of the Natural Law

Aquinas sometimes identifies the natural law with the first principles (common principles) of practical reason, and sometimes identifies the natural law with the conjunction of the primary precepts (first principles or common principles) and the secondary precepts.
I shall use 'first principle,' 'common principle,' and 'primary precept' interchangeably. Aquinas states that "...the precepts of the natural law are to the practical reason what the first principles of demonstrations are to the speculative reason, because both are self-evident principles."¹ Aquinas is here identifying the natural law with the first principles of practical reason. Grisez correctly points out that a self-evident principle does not require a knowledge of God as a necessary condition for knowing the self-evident principle. Thus we see that the natural law is epistemologically independent of knowledge of God and the divine law (God's commands). For Aquinas, there are two kinds of self-evident principles: Principles self-evident in themselves, and principles self-evident to us. A principle self-evident in itself is one in which the predicate is contained in the notion of the subject. A principle is self-evident to us when we know the meaning of the subject. The primary precepts are self-evident to all, and "...there is necessity in the common principles,..."² Examples of first principles are: "...good is to be done and promoted, and evil is to be avoided."³ "...one should do evil to no man,..."⁴ (elsewhere, Aquinas states that "...one should do harm to no man;..."⁵) and "...it is right and true for all to act according to reason,..."⁶

According to Aquinas, "...the natural law is altogether unchangeable in its first principles. But in its secondary principles,
which, as we have said, are certain detailed proximate conclusions
drawn from the first principles, the natural law is not changed so that
what it prescribes be not right in most cases. " Here, Aquinas
identifies the natural law with the conjunction of the primary precepts
and the secondary precepts. Unlike the primary precepts the second-
ary precepts are not self-evident. Also, since the secondary precepts
involve a descent to particulars, there is no necessity concerning
them. 'Necessity,' here, means 'applicable without exception.' The
secondary precepts are defined as proximate or proper conclusions
from the primary precepts. Although Aquinas uses 'demonstratio' in
characterizing the way in which the secondary precepts come from
the primary precepts, Copleston, Grisez, O'Connor, and Armstrong
all maintain that the secondary precepts are not deducible from the
primary precepts. As examples of secondary precepts derived
from primary precepts, Aquinas cites the following: (1) from the
principle that it is right and true for all to act according to reason,
"...it follows, as a proper conclusion, that goods entrusted to
another should be restored to their owner." 9 (2) "... that one must
not kill may be derived as a conclusion from the principle that one
should do harm to no man;..." 10 In these examples Aquinas seems
to indicate that the fundamental criminal laws are secondary precepts--
proximate conclusions from the common or first principles. In the
first example, not only is the conclusion not deducible from the common principle, but there does not seem to be any obvious conclusion suggested by the common principle. In the second example, we could supply the premise "killing is an instance of harm," thereby rendering the conclusion deducible from the common principle.

Let us now consider certain ethical characteristics of the natural law. The natural law is also the moral law. Since "...morals are called good which accord with reason," and since "...every judgment of human reason must needs be derived in some way from natural reason, --it follows, of necessity, that all the moral precepts belong to the law of nature, ..." For Aquinas, like Aristotle, duty is a derivative concept. "...Since a precept of law is binding, it is about something which must be done; and that a thing must be done arises from the necessity of some end." A precept "...has the nature of a duty." Since the natural law consists of precepts, it also consists of duties. Aquinas distinguishes two kinds of duties: (1) a duty prescribing something without which the order of virtue would be destroyed; and, (2) a duty prescribing something which is useful in maintaining the order of virtue. Grisez maintains that, for Aquinas, certain kinds of acts are bad in themselves, because they are intrinsically related to certain ends. It seems to me that Grisez is referring to this first kind of duty. Examples of the first kind of
duty are the prohibitions against killing and stealing. An example
of the second kind of duty is the Biblical requirement to return before
sunset a garment taken in pledge (Ex. 22:26).

We noted above that, for Aquinas, the fundamental criminal
laws were secondary precepts. But consider the following passage:
"...there are certain things which the natural reason of every man,
of its own accord and at once, judges to be done or not to be done:
e.g., ... Thou shalt not kill, Thou shalt not steal..." The use of
'at once' suggests that these precepts are self-evident, as opposed
to their being conclusions (as stated above). Also, neither in this
passage nor its context, is there any mention of these precepts
being derived or following from any other precepts. It will be recalled
that only the primary precepts are self-evident. By the criterion
of self-evidence, then, it seems that the fundamental criminal laws
are primary precepts. By 'the fundamental criminal laws' I mean
the major felonies--murder, stealing, rape, and perjury. Later,
we shall return to this problem of the status of the fundamental
criminal laws.

The problem raised by Hume--that one cannot derive an
obligation from purely factual statements--is a major criticism of
all natural law theories. The formulation of Hume's problem in
relation to Aquinas would be the following: From the fact that man
has a certain nature (e.g., rationality) or certain inclinations, we cannot conclude how man ought to act. Grisez's answer to this criticism is that, for Aquinas, the primary precepts of the natural law are self-evident and are, therefore, not derived. "Ought requires no special act legitimizing it;..." Since the primary precepts are not derived, and since the secondary precepts are derived from the primary precepts, Hume's problem is not applicable. Grisez's view requires an awareness of duty which is not dependent on any other knowledge. The self-evident character of the primary precepts supports Grisez's view. However, as pointed out above, Aquinas maintains that the requirement to do a certain act arises from the necessity of some end. The end itself cannot obligate because by the definition of duty, it would require an end, etc. But if the end cannot obligate, then a statement expressing the end must be in the form of an assertion—an "is" statement. We now have Hume's problem.

**Function of the Natural Law in Man**

Let us now turn to the way in which the natural law functions in man. The first principles of the natural law are known by synderesis. Synderesis, which Aquinas refers to as a habit, is the disposition to know these first principles. Thus, Aquinas states that the natural law is in a child habitually.
The second step in employing the natural law (after knowledge of the first principles), is recognizing the particular case as an instance of the appropriate first principle or secondary principle. Aquinas states that knowledge of the first principles cannot in any way be blotted out (from the hearts of men). Our infallibility in relation to first principles is contrasted with our fallibility concerning secondary principles, and the application of a first principle to a particular action. Such fallibility is due to individual moral defects—bad habits, evil persuasions, etc. The first two steps in employing the natural law are those of the major and minor premises of Aristotle's practical syllogism. And, since the natural law is a function of the practical reason, and because the practical reason, "...makes use of the syllogism in operable matters,..." the third and final step is that of the conclusion of the practical syllogism. The final step is action or choice. In Question 94, Aquinas compares the speculative reason with the practical reason. Both the practical reason and the speculative reason employ the syllogism, and begin with a major premiss containing a principle which is necessarily true. But, whereas the conclusion relating to the syllogism associated with the speculative reason is necessarily true, the conclusion (or secondary precept) of the practical reason is only true in most cases. Both the common principles of the practical reason and the
common notions of the speculative reason are known by all. And,
neither the conclusions of the practical reason nor those of the
speculative reason are known by all.

Although Aquinas states that the natural law is unchangeable,
he does stipulate certain qualifications. The natural law can be
added to by human law, "...for the benefit of human life...."18
Concerning subtracting from the natural law, Aquinas distinguishes
two parts of the natural law. The first part is the universal proposi-
tions (common principles or first principles). These cannot be
subtracted from. The second part is the secondary principles.
Aquinas refers to these as "...certain detailed proximate conclusions
drawn from the first principles,..."19 The secondary principles
cannot be subtracted from, in the sense of not being generally appli-
cable. However, they can be suspended or subtracted from in
certain rare, particular cases. For an explanation or example of
the rare case exception, Aquinas refers the reader to what "...was
stated above."20 I shall construe 'above' to refer to the preceding
article of the same Question. In that article, Aquinas states that
"...it is right and true for all to act according to reason, and from
this principle it follows, as a proper conclusion, that goods entrusted
to another should be restored to their owner."21 The first principle
in this case is a universal proposition concerning all men acting
according to reason. (Whether this principle is in the 'ought' form or not, is not relevant to the point presently being considered.) The proximate conclusion (termed "proper conclusion" in the above-quoted article)—that goods entrusted to another should be restored to their owner—also seems to be a universal proposition. The rare case exception cited by Aquinas is when the restored goods would be used to fight against one's country. The only rationale given by Aquinas, besides the case itself, is that restoring the goods in this particular case would be injurious.

Another issue which has, I think, close ties with the issues of addition to and subtraction from the natural law, is that of disobeying laws. One connection is that of disobedience involving suspension of a secondary principle. The other connection is a rationale common to all three issues. Non-observance of the law is justified only when observance would be "...injurious to the general welfare,..."\(^{22}\) Such dispensation, however, can be granted only by those in authority. Aquinas considers as a special case, a situation in which there is sudden peril. The suddenness refers to the fact that there is not sufficient time for the individual to refer the matter to the authorities, who normally provide for such dispensations. The special feature of the sudden peril case is that its rationale is that of necessity—not that of common welfare, as in the case of dispensation by authority.
Aquinas offers two explanations of disobedience based on the justification of necessity: (1) "...necessity itself carries with it a dispensation, since necessity knows no law." Also, (2) the individual in such a circumstance does not judge the law, but rather, "...a particular case in which he sees that the letter of the law is not to be observed." It seems that Aquinas does not consider necessity as a special case of dispensation. The ordinary case of dispensation is one in which the authorities realize that, in terms of the common good, disobedience greatly outweighs obedience to the law--in the particular case in question. "...precepts admit of dispensation when there occurs a particular case in which, if the letter of the law be observed, the intention of the lawgiver is frustrated. Now the intention of every lawgiver is directed first and chiefly to the common good;..." Necessity, however, is not weighed against the law or a particular application of the law. Necessity knows no law. Also, from the standpoint of the individual, Aquinas stresses the idea that the individual (in the situation of necessity) is not judging the law--rather, he is judging a particular case. Only the authorities can judge the law and, hence, dispense with it. In view of Aquinas' stating that "necessity itself carried with it a dispensation," "necessity knows no law," and, the individual "does not judge of the law," I think that 'he sees that the letter of the law is not to be
observed,' should be interpreted in the following way: 'The letter'
is not to be understood as being contrasted with or in opposition
to the intention of the lawgiver--as in the case of ordinary dispensa-
tion. 'The letter' should be construed as meaning this particular
case. Although such an interpretation involves a certain redundancy,
the alternative interpretation violates the greater weight of textual
evidence.

I think that the cases of addition to, subtraction from, and
dispensation of the natural law (excluding the sudden peril case),
have the same rationale--that of the common good or welfare. Aquinas
states that a justifiable reason for adding to the natural law, is the
benefit of human life. 'Human life' does not refer to the life of an
individual; it refers to the life of the people. Subtracting from the
secondary principles of the natural law is justified in terms of
injuriousness. The case cited by Aquinas as an explanation of the
rule for subtraction is that of restoring goods entrusted when they
would be used against one's country. It is clear that the injury
would be to the common welfare. Finally, the ordinary case of
dispensation is based explicitly on the consideration of injury to the
general welfare.

Aside from the above discussion, the issue of dispensation is,
I think, also significant as another factor in deciding how to classify
the fundamental criminal laws—whether as primary precepts or as
secondary precepts. Aquinas states that only the secondary precepts
can be subtracted from; dispensation cannot be granted in relation
to the primary precepts. Aquinas also asserts that "...the precepts
of the decalogue admit of no dispensation whatever." Since the
decalogue contains the fundamental criminal laws, we can conclude
from the inapplicability of dispensation in relation to the decalogue,
that the fundamental criminal laws are primary precepts. Although
I think that the inapplicability of dispensation is a basis for not
including the fundamental criminal laws within the secondary precepts,
there is an important distinction between the fundamental criminal
laws and the other primary precepts. The latter apply categorically.
However, I do not think that Aquinas would assert that "Thou shalt
not kill," or "Thou shalt not steal," apply categorically. Consider
the cases of killing in self-defense, and stealing to save a life. Since
the above two imperatives are in the form of a rule, we could, I
think, interpret Aquinas as offering a kind of prima facie rule theory
in relation to the fundamental criminal laws.

The importance of the common good or welfare in Aquinas’
theory of law extends beyond these considerations of adding to or
subtracting from the law. "...nothing stands firm with regard to
the practical reason, unless it be directed to the last end which is
the common good. Now whatever stands to reason in this sense has
the nature of a law. "27 'Stands firm' in this passage refers, I think,
to the moral justification of human action. Obviously, we sometimes
perform an action solely for the sake of our own private good.
However, an action within the moral sphere is justifiable if and only
if it benefits the common good. I think that Aquinas is asserting
that since the natural law is a function of practical reason, and
because the proper direction of the practical reason involves the
common good, the natural law involves the common good. Else­
where Aquinas states "Law is nothing else than an ordinance of rea­
son for the common good, promulgated by him who has the care of
the community."28 In this passage, Aquinas clearly indicates that
the common good is a necessary element of the nature of law.
Aquinas also bases his view concerning the significance of the
common good on his theory about the theory about the element of
final causality contained in the nature of the part-whole relation. He
views the relation between the individual and society as that of part­
whole. "...every part is ordained to the whole as the imperfect to
the perfect,..."29 To the same effect he states "The particular
good is directed to the common good as its end, for the being of the
part is for the sake of the being of the whole. "30

For Aquinas, human action is always directed toward some end.
Since the end includes the intelligibility of good, every action is
directed toward some good. Action toward an end presupposes an
inclination for that kind of end. Grisez points out that, for Aquinas,
"...man cannot act on account of that toward which he has no basis
for affinity in his inclinations."\(^{31}\)

Aquinas sets out the order of the precepts of the natural law as
being "...according to the order of natural inclinations."\(^{32}\) There is
a threefold order corresponding to three natural inclinations in man.
Firstly, man, in common with all other substances, seeks self-
preservation and, consequently, the removal of any obstacles to self-
preservation. Secondly, man, in common with all other animals, is
naturally inclined to "...sexual intercourse, the education of off-
spring and so forth."\(^{33}\) Thirdly, due to his reason, "...man has a
natural inclination to know the truth about God, and to live in society;
and in this respect, whatever pertains to this inclination belongs to
the natural law: e.g., to shun ignorance, to avoid offending those
among whom one has to live, and other such things regarding the
above inclination."\(^{34}\) Elsewhere, Aquinas says that human nature
can have either of two meanings. "By human nature we may mean
either that which is proper to man, [i.e., reason]...or we may mean
that nature which is common to man and other animals..."\(^{35}\) As an
example of that which is contrary to the animal nature, Aquinas
specifies the unnatural crime of uni-sexual lust. We see that the twofold meaning of human nature, does not include the nature of a substance, which was included in the account of man's natural inclinations.

Grisez states that, for Aquinas, "...tendency toward good and orientation toward end...[are] a dimension of all action." He concludes therefrom that Hume's problem (see supra, p. 57) does not arise. The error of Grisez's conclusion is due to his ambiguous use of 'good.' In this context 'good' can mean 'end' or 'morally justifiable' (or 'obligatory'). Grisez's conclusion is valid if and only if every good (in the sense of end) is morally justifiable or obligatory. But, of course, Aquinas does not maintain such a position. Furthermore, the nature of a tendency (referred to in the above quote) is not strong enough for the solution of Hume's problem. Since tendencies do not necessitate, it is always meaningful to ask, Ought one follow this particular tendency?

Content of the Natural Law

Let us now consider the content of the natural law. We have already discussed the content as determined by the self-evident primary precepts, and the proximate conclusions of the primary precepts--the secondary precepts. We have also discussed the content of the natural law as determined by the inclinations resulting
from the nature of man. In this section we shall consider the content
of the natural law in relation to the first precept.

...the first principle in the practical reason is one
founded on the nature of good, viz., that good is that
which all things seek after. Hence, this is the first
precept of law, that good is to be done and promoted,
and evil is to be avoided. All other precepts of the
natural law are based upon this; so that all the things
which the practical reason naturally apprehends as
man's good belong to the precepts of the natural law
under the form of things to be done or avoided.

Concerning the significance of the first precept and its relation
to all other precepts, Grisez states "All other precepts of the law of
nature are based on this one, in this way that under precepts of the
law of nature come all those things—to—be—done or things—to—be—
avoided which practical reason naturally grasps as human goods or
their opposites." To the same effect, Grisez states that the first
precept furnishes the practical reason with the general framework of
its operation—the intelligibility of good as an end. Consistent with
this point, Grisez points out that the first precept is not in the form of
an imperative. We have already discussed the way in which practical
reason operates by means of the practical syllogism. Since the
practical reason is directed toward ends, Grisez is correct in stating
the first precept furnishes the general direction or framework for the
operation of the practical reason.
The Relation of the Natural Law to Human Law

Let us now consider the relation of the natural law to human law. At one point, Aquinas states simply that human law consists of particular determinations "...from the precepts of the natural law, as from common and indemonstrable principles, [which determinations are]...devised by human reason,..." Elsewhere Aquinas provides a more detailed account of the relation between human law and natural law. "...something may be derived from the natural law in two ways: first, as a conclusion from principles; secondly, by way of a determination of certain common notions." As an example of something derived as a conclusion from the natural law, he states that "one must not kill," is derivable from, "one should do harm to no man." As an example of something derived by determination of the natural law, he states that a particular way of punishing an evil-doer is a determination of the natural law that the evil-doer should be punished. Later in the same Question, Aquinas describes the positive law (human law) as consisting of the law of nations and civil law. The law of nations, which contains those laws without which men cannot live together, is classified under the first kind of derivation (as a conclusion from principles of the natural law). The civil law, which may vary from state to state, is classified under the second kind of derivation (as determinations of the principles of the natural law).
Although those promulgated laws which are derived as conclusions from the natural law are called human laws, they emanate in part from the natural law and, consequently, have some force from the natural law also (in addition to their force as human laws). Those laws which are simply determinations of the natural law, "...have no other force than that of human law." (The first kind of derivation is that of deriving secondary precepts from primary precepts. The secondary principles, when they are promulgated, can also be considered as human laws.) When Aquinas speaks of such conclusions as not emanating from the natural law exclusively, the implication is, I think, of a partial emanation from a human lawmaker.

Human laws, in common with the secondary principles of the natural law, are subject to error. This error, or lack of necessity, is due to the fact that they are "...concerned with operable matters, which are singular and contingent, but not with necessary things,..." Aquinas draws another consequence of the singularity of human actions. Such singularity, together with the fact of the infinite number of human actions, result in laws not being able to cover certain individual facts.

We noted above that the common good is a necessary element of the nature of law. Let us now consider the common good in relation to unjust laws. "Law is nothing else than an ordinance of reason for
the common good, promulgated by him who has the care of the community.\(^{43}\) Earlier in the same Question (Question \(^{90},\) 1), and in Questions 93, 3 and 95, 2, Aquinas states that if what is commanded (by the appropriate lawmakers) is not in accordance with reason (and, hence, with the natural law), it does not have the nature of law. In Question 90, 1 he states that such a command "...would savor of lawlessness rather than of law."\(^{44}\) In Question 93, 3 he states that insofar as a human law "...deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence."\(^{45}\) In Question 95, 2 he states that if a human law "...in any point...departs from the law of nature, it is no longer a law but a perversion of law."\(^{46}\)

In Question 92, 1 Aquinas discusses the status of a tyrannical law. He states that since such a law is not in accordance with reason, it "...is not a law, absolutely speaking, but rather a perversion of law;..."\(^{47}\) He adds, however:\(^{48}\)

...in so far as it is something in the nature of a law, its aim is that the citizens be good. For it has the nature of law only in so far as it is an ordinance made by a superior to his subjects, and aims at being obeyed by them; and this is to make them good, not absolutely, but with respect to that particular government.

Earlier in the same Question, Aquinas indicates the two intentions possible in the lawgiver. The first intention is that of the true good, which is the common good. The effect of laws formulated in accordance with the first intention, is to make men (citizens) good absolutely.
The second intention possible is when,

...the intention of the lawgiver is fixed on that which is
not good absolutely, but useful or pleasurable to himself,
or in opposition to divine justice, then law does not make
men good absolutely, but in a relative way, namely, in
relation to that particular government. In this way good
is found even in things that are bad of themselves. Thus
a man is called a good robber, because he works in a way
that is adapted to his end.

This second sense of good, corresponding to the second intention, is
that of efficiency. In Question 92, 1 it seems clear that a tyrannical
law and, a fortiori, any less obnoxious law not in accordance with
reason (or the natural law) is not entirely devoid of the nature of law.

Question 92, 1 maintains only that a tyrannical law is not a law
absolutely speaking.

Another passage which seems to be harmonious with the passage
about tyrannical laws, is contained in Question 93, 3. In the sentence
immediately succeeding that quoted above in Question 93, 3 (see supra,
n. 45) Aquinas states, "Nevertheless, even an unjust law, in so far
as it retains some appearance of law, through being framed by one
who is in power, is derived from the eternal law;..."

In Question 96, 4 Aquinas discusses the two ways in which laws
can be unjust. Firstly, they can be unjust by going counter to the
common good, by exceeding the authority of the lawmaker, or by
imposing burdens unequally (although with a view to the common good).
Secondly, they can be unjust as being opposed to the divine good.
Concerning the first kind of unjust laws Aquinas states that "...such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right,..."\(^{51}\) Concerning the second kind of unjust laws, Aquinas states "Laws of this kind must in no way be observed,..."\(^{52}\)

**The Adequacy of Aquinas' Natural Law Theory in Relation to the Nuremberg Trials**

We shall now consider the adequacy of Aquinas' natural law theory in relation to our special criterion--the Nuremberg Trials. In order to answer the question, What would be the legal status of the Nuremberg Trials under Aquinas' natural law theory? we must first answer two other questions about Aquinas' natural law theory. These questions are: (1) What is the relation between human law and natural law, and (2) What laws fall within the category of primary precepts? I shall refer to these two questions as Question One and Question Two, respectively. It will be shown that the answer to Question Two is a necessary condition for answering Question One. Accordingly, we shall first consider Question Two.

What laws fall within the category of primary precepts? We noted in the General Epistemological section above that the two criteria of primary precepts are universal self-evidence and necessity. In contrast to the self-evidence of the primary precepts, the secondary precepts are in some sense derived from the primary precepts; also,
(as noted in Function of the Natural Law section above) the secondary precepts, unlike the primary precepts, admit of dispensation and, hence, lack necessity. Aquinas states explicitly that the prohibition against killing is derived from the primary precept, "One should do harm to no man." But let us consider the textual evidence in toto, as presented in the above sections--as that evidence relates to the criteria of self-evidence and necessity. Aquinas states that the precepts against killing and stealing are things which "...the natural reason of every man, of its own accord and at once, judges to be done or not to be done:...Thou shalt not kill, Thou shalt not steal...." We see here the element of universal self-evidence, which is one of the criteria of primary precepts. In other words, this passage is evidence that Aquinas regards the fundamental criminal laws as primary precepts. As further textual evidence that the fundamental criminal laws are primary precepts, there is Aquinas' statement that "...the precepts of the decalogue admit of no dispensation whatever." We see here the absence of dispensation, which is one of the criteria of secondary precepts. (The fundamental criminal laws are contained in the decalogue.) Aside from the above textual considerations, it seems clear to me that such precepts as those against killing and stealing--fundamental criminal laws--are at least as self-evident as such primary precepts as "one should do harm to no man" and
"it is right and true for all to act according to reason." On the basis of the above textual evidence and our independent knowledge concerning what is self-evident, we can conclude that the fundamental criminal laws are primary precepts.

If, as I have suggested, the fundamental criminal laws are primary precepts, what is their relation to the other precepts which Aquinas explicitly specifies as primary precepts? In the case of the first precept we have already answered this question. We accepted (in the Content of the Natural Law section above) Grisez's view concerning the first precept. He provides the general direction for the operation of the practical reason. The other precepts formulated explicitly as primary precepts—e.g., acting according to reason, and not harming anyone—serve as justifications for the fundamental criminal law precepts. In stating that they serve as a justification, we need not and do not deny their status as self-evident precepts. Furthermore, their justificatory function is not limited to the fundamental criminal laws. Moreover, although the precepts explicitly formulated as primary precepts are not bases for deriving the fundamental criminal laws, such primary precepts can and do serve as bases for deriving lesser criminal laws. Let us consider some examples. On this interpretation the fundamental criminal law against killing is self-evident—it is not derived. The justification of the law
might be in terms of the precept that one should do harm to no man. A lesser criminal law (one which is non-fundamental) such as the law against the malicious destruction of property, is not self-evident. It can in some sense be derived (though not immediately) from the precept against doing harm to anyone. We could add a premiss such as, "A person's property is to be regarded as an extension of the person."

I think that the above discussion also sheds light on the status of the natural inclinations. Armstrong argues that knowledge of the self-evident principles presupposes a prior understanding of the nature of man (his natural inclinations). The obvious criticism of Armstrong's position is that it destroys the self-evidence of the self-evident principles. If assertion (or obligation) A is self-evident, then knowledge of no other assertion or obligation is required for the knowledge of A. The natural inclinations (enumerated in Function of the Natural Law in Man section above) serve as a justification for fundamental, self-evident criminal laws. The natural inclinations also serve as a basis for deriving and justifying lesser criminal laws. We should note that there is a conceptual overlap between the explicitly formulated primary precepts and the natural inclinations. Thus, one of the natural inclinations is "...to avoid offending those among whom one has to live,..." This natural inclination is similar,
if not identical, in content to the primary precept to do harm to no man.

Let us now turn to Question One. What is the relation between human law and the natural law? Let us review briefly what we have said in the Relation of the Natural Law to Human Law section concerning the relation between the natural law and human law: (1) if a law is not in accordance with reason, then it is not a law; (2) the common good is a necessary condition for the existence of law; (3) a human law which departs from the law of nature is not a law; (4) a tyrannical law has the nature of law insofar as it is an ordinance made by a superior to his subjects, with the intention of making them good with respect to that particular government; and, (5) an unjust law, if it retains the appearance of law by being enacted by one who is in power, is derived from the eternal law. Unjust laws do not bind in conscience except, perhaps, to avoid scandal or disturbance "...for which cause a man should even yield his right,..." But unjust laws which conflict with the divine law are not laws. There seem to be obvious conflicts between the above five assertions. It would seem that a tyrannical law (4) is not in accordance with reason (1), does not serve the common good (2), and departs from the law of nature (3). There are, therefore, three independent bases for regarding a tyrannical law as not being a law. The same points and
conclusion obtain for unjust laws as for tyrannical laws. I think that Aquinas is torn between moral and practical considerations. From the moral or natural law point of view, an unjust or tyrannical law is clearly in conflict with the natural law. From the practical consideration of the stability of society, an unjust law is legally binding if obedience to such a law will avoid scandal or disturbance. To avoid scandal or disturbance a man should even yield his right. 'Right,' here, must mean 'moral right.' The qualification of 'avoid scandal or disturbance' suggests the a contrario argument that an unjust law is not legally binding if disobeying it would not result in scandal or disturbance or less scandal or disturbance than obeying it. I think that Aquinas' statement that an unjust law, if it is framed by one in power, is derived from the eternal law, is an ad hoc device to support the practical consideration of the stability of society. Practical considerations are clearly expressed in the following:

'Indeed, if there be not an excess of tyranny it is more expedient to tolerate for a while the milder tyranny than, by acting against the tyrant, to be involved in many perils which are more grievous than the tyranny itself.'

It will be recalled that the natural law itself is a participation in the eternal law. But the natural law and that which contradicts it (an unjust law) cannot both be part of the eternal law.

I would like to suggest the following resolution of the conflict, in Aquinas, between moral and practical considerations regarding the
legal status of unjust or tyrannical laws. The first kind of unjust laws—those which go counter to the common good—are legally binding if and only if disobedience would cause scandal or disturbance. The second kind of unjust laws—those which conflict with the divine law—"...must in no way be observed,..." 58 Of course, the decalogue, which embodies the fundamental criminal laws, is part of the divine law. Therefore, human laws which conflict with the fundamental criminal laws (since they are part of the divine law) are not laws. We can, I think, arrive at the same conclusion from a consideration of the fundamental criminal laws in relation to the first kind of unjust laws. A law which conflicts with the fundamental criminal laws clearly goes counter to the common good. Such a law is not legally binding since obedience to such a law would cause more "scandal" than disobeying such a law.

Independent of the above discussion, we may recall our prior conclusion that the fundamental criminal laws are primary precepts and do not admit of dispensation. Since they are universal, any law which conflicts with them is not legally binding.

We are now in a position to consider the issue of the adequacy of Aquinas' natural law theory in relation to our special criterion—the Nuremberg Trials. The crimes specified in the Nuremberg Charter are clearly fundamental crimes. Since, as we have argued, the fundamental criminal laws are primary precepts of the natural law,
they are universal. Since they are universal, they provide in personam (universal) jurisdiction. Also, since they do not admit of dispensation, any and all laws conflicting with them (e.g., German laws) are not laws. Finally, since the natural law dates from the creation of man, the law of the Nuremberg Charter is not ex post facto law.
NOTES

Chapter III

1S.T. 1-2, q. 94, a. 2, c.
2S.T. 1-2, q. 94, a. 4, c.
3S.T. 1-2, q. 94, a. 2, c.
4S.T. 1-2, q. 100, a. 3, c.
5S.T. 1-2, q. 95, a. 2, c.
6S.T. 1-2, q. 94, a. 4, c.
7S.T. 1-2, q. 94, a. 5, c.


9S.T. 1-2, q. 94, a. 4, c.
10S.T. 1-2, q. 95, a. 2, c.
11S.T. 1-2, q. 100, a. 1, c.
12Ibid.
13S.T. 1-2, q. 99, a. 1, c.
14S.T. 1-2, q. 100, a. 5, ad. 1
S. T. 1-2, q. 100, a. 1, c.

Grisez, supra note 8, at 380.

S. T. 1-2, q. 90, a. 1, ad. 2.

S. T. 1-2, q. 94, a. 5, c.

Ibid.

Ibid.

S. T. 1-2, q. 94, a. 4, c.

S. T. 1-2, q. 96, a. 6, c.

S. T. 1-2, q. 96, a. 6, c.

S. T. 1-2, q. 96, a. 6, ad. 1.

S. T. 1-2, q. 100, a. 8, c.

Ibid.

S. T. 1-2, q. 90, a. 2, ad. 3.

S. T. 1-2, q. 90, a. 4, c.

S. T. 1-2, q. 90, a. 2, c.


Grisez, supra note 8, at 358.

S. T. 1-2, q. 94, a. 2, c.

Ibid.

Ibid.

Ibid.
35 S.T. 1-2, q. 94, a. 3, ad. 2.

36 Grisez, supra note 8, at 379.

37 S.T. 1-2, q. 94, a. 2, c.

38 Grisez, supra note 8, at 345.

39 S.T. 1-2, q. 91, a. 3, c.

40 S.T. 1-2, q. 95, a. 2, c.

41 Ibid.

42 S.T. 1-2, q. 91, a. 3, ad. 3.

43 S.T. 1-2, q. 90, a. 4, c.

44 S.T. 1-2, q. 90, a. 1, ad. 3.

45 S.T. 1-2, q. 93, a. 3, ad. 2.

46 S.T. 1-2, q. 95, a. 2, c.

47 S.T. 1-2, q. 92, a. 1, ad. 4.

48 Ibid.

49 S.T. 1-2, q. 92, a. 1, c.

50 S.T. 1-2, q. 93, a. 3, ad. 2.

51 S.T. 1-2, q. 96, a. 4, c.

52 Ibid.

53 S.T. 1-2, q. 100, a. 1, c.

54 S.T. 1-2, q. 100, a. 8, c.
55 S. T. 1-2, q. 94, a. 2, c.

56 S. T. 1-2, q. 96, a. 4, c.


58 S. T. 1-2, q. 96, a. 4, c.
CHAPTER IV
BLACKSTONE AND DEVLIN

In the last chapter we noted that, for Aquinas, the moral quality of the natural law is in relation to man—what is good for man. The content of the natural law is also associated with the nature of man, "...everything to which a man is inclined according to his nature...."¹

In this chapter we shall consider the theories of Blackstone and Devlin. Blackstone's theory is important as offering a different basis (from Aquinas) for the moral quality of the natural law and for determining the content of the natural law. His theory is also important because he attempts to connect a significant concept of the criminal law—mala in se—with the natural law. Devlin attempts to maintain the concept of mala in se, while rejecting an objectivist morality as a legitimate basis for law.

For Blackstone, all laws are "...rule[s] of action dictated by some superior being:..."² Being a command is one of the elements of a rule. The law of nature is the will of man's Maker and consists of "...eternal, immutable laws of good and evil,..."³ Blackstone also maintains that the Creator Himself conforms to these eternal,
immutable laws of good and evil ". . . in all His dispensations. . . "⁴

Blackstone seems to waiver between a theistic voluntarism and a natural law which is intrinsically good. Viewed as the will of God, the laws of nature are voluntaristic. Blackstone's definition of all laws being the dictates of some superior being is consistent with the voluntaristic position. However, Blackstone's assertion that the Creator conforms to these laws, negates the idea of their being what He wills (His willings). It would be a mere tautology, if not incoherent, to state that He conforms to what He wills. On the other hand, if we view the laws of nature as something external to the Creator--to which He conforms--they lose their status as laws. Laws are defined as the dictates of a superior being, but there is no being superior to the Creator. We see here two conflicting elements in the concept of natural law. The element of nature (or natural) requires the moral quality to be intrinsic to or lie within the nature of the natural laws themselves. However, the element of law requires reference to the dictates of a superior being--thus placing the moral quality of the natural laws in something extrinsic to them.

Concerning the content of the natural law, Blackstone states "...that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law."⁵ The meaning of 'man' in this passage is clarified by another passage in
which Blackstone states that the principle of self-love is the basis for determining the content of the natural law. "...He has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action."  

Blackstone adds that there is a "...mutual connection of justice and human felicity,..."  

Blackstone seems to be asserting a parallelism between justice and actions based upon self-love. Self-love is defined in terms of one's own true and substantial happiness. The assertion of such a parallelism seems obviously false, or hopelessly vague. Acts of theft and fraud---e.g., the fraudulent representations of some used car salesmen---are often thought to contribute to the happiness of those performing them. However, such acts are clearly unjust. Notwithstanding the fact that we sometimes miscalculate concerning what will result in our own happiness, there seems to be no basis for asserting that all acts of self-love are just acts. If, however, we wish to reject counter-examples of unjust acts which contribute to one's own happiness, we shall probably try to distinguish happiness from true and substantial happiness. We might argue that such a distinction is implied by Blackstone's use of 'true and substantial.' If there is such a distinction, it is certainly not obvious or well-known.
Such a distinction would, presumably, involve a metaphysical view concerning the nature of man. In the absence of an explication of 'true and substantial happiness,' as contrasted with 'happiness,' together with the absence of a metaphysical theory concerning the nature of man, the concept of true and substantial happiness is hopelessly vague.

Blackstone states that all natural laws are legally binding, but not all statutes (positive law) are natural laws. Crimes mala in se are violations of the natural law. Such crimes are distinguished from crimes which are only mala prohibita. The latter involve acts "... in themselves [morally] indifferent,..." as opposed to acts which are mala in se. Blackstone states that in relation to crimes mala in se, we are bound by superior laws—laws which are superior to human laws. He also states that crimes mala in se are "... with regard to actions which are naturally and intrinsically right or wrong."  

In comparing crimes mala prohibita and mala in se, we may note that only the latter do not require enactment by a human lawmaker in order to be legally binding. Blackstone states "... upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong." For Blackstone, the only significance of the municipal law in relation to crimes mala in se is that the municipal law pro-
vides human remedies and/or punishments for the committing of such crimes. That the natural law does not require legal enactment in order to be legally binding is evident, also, in Blackstone's assertion that the natural law is part of the law of nations (the other parts being treaties and leagues). For Blackstone, crimes mala in se contain a moral and legal categorical imperative, whereas crimes mala prohibita contain only a hypothetical legal imperative. Blackstone's example of a crime mala prohibita is the killing of game out of season. If you do not want to be fined, do not kill game. Murder, theft, and perjury are examples of crimes mala in se. In such crimes, one does not have a moral or legal right to violate the law.

Having considered the relation of the natural law to positive law, let us now turn to the problem of the relation of the natural law to moral law or morality. Blackstone speaks of "...ethics, or natural law." Here, he seems to be asserting an identity relation between moral law and the natural law. Also, in characterizing the natural law as eternal, immutable laws of good and evil, he is again identifying moral law with the natural law. But the identity of morality with the natural law conflicts with the legally binding quality of the natural law. Of course, not every immoral action is to be regarded as illegal. To be sure, the fundamental criminal laws are prohibitions against immoral actions, but such laws concern only grave moral offenses (what I call acts mala in se). Aside, perhaps, from a
religious system of law (e.g., the Mosaic law), no legal system endeavors to make its citizens virtuous by making all immoral actions illegal. Aquinas states that making every sin illegal would go counter to the common good. Whether or not we agree with Aquinas, it is clear that the machinery of the law would be hopelessly inadequate to deal with all morally wrong actions. But even assuming that we could make all immoral actions illegal, such a system would be undesirable. Consider the following example. A man lies to his girl friend concerning the events which transpired while in the company of a third party. What the man did may be morally wrong, but clearly such a lie is not and should not be illegal. We would surely not want to imprison such a man or award damages to his girl friend.

One way of resolving the problem in Blackstone--of the natural law serving both as a moral and legal standard--is to accept his identification of the natural law with acts mala in se, and reject his identification of the natural law with ethics. By so restricting the natural law we exclude those morally wrong actions in which legal punishment (whether in the form of imprisonment or the requirement of monetary payment) is obviously undesirable.

In order to reconcile the universal and immutable nature of the natural law with Blackstone's method for determining the content of the natural law, we must assume man's own true and substantial
happiness is a universal and immutable characteristic of all men. But even this assumption does not seem adequate for maintaining the concept of mala in se as expressive of the natural law. Even if every act which is mala in se correlates with some detriment to one's own true and substantial happiness, the use of such a correlate to determine what is mala in se removes the basis of the immorality of the act from the act itself. The immorality of the act is no longer in itself, but rather in the nature of something else—the nature of man's true and substantial happiness.

With regard to our special criterion, the Nuremberg Trials, Blackstone's theory clearly provides a legal justification for the Trials and the crimes specified in the Charter—without recourse to ex post facto laws. Since the natural law applies to all persons, it provides in personam (or universal) jurisdiction. "...no human legislature has power to abridge or destroy them, [the natural laws]..."¹² Thus, any and all conflicting state laws are superseded. That the crimes specified in the Charter are mala in se and, hence, violations of the natural law, has already been shown.

Let us not turn to a consideration of Devlin's theory. It will be convenient to divide the discussion into two parts: Devlin's theory of shared morality and Devlin's explication and defense of crimes mala in se. In each part we shall begin with an explication of Devlin's
views, followed by criticisms of those views. With regard to Devlin's theory of shared morality, we shall consider the major criticisms of Hart, and suggest certain other criticisms. Finally, we shall consider Devlin's views in relation to our special criterion--the Nuremberg Trials.

Devlin asserts that a common or shared morality is essential to the existence of a society. "...Society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence."\(^{13}\) Since the general context of Devlin's essay is the issue of the justifiable enforcement of shared morality, it is clear that 'may,' in this passage, means 'has a right to.'

Devlin does not base preservation of the shared morality on a belief in the correctness or truth of the shared morality. Rather, such preservation is based on a shared morality being necessary for the cohesion of society. "Without it [the shared morality] there would be no cohesion.... What is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference."\(^{14}\) In this passage, the relation of law to the shared morality is that the former buttresses or preserves the latter. Since, for Devlin, the shared morality is necessary for the existence of society, the law should act to strengthen this cohesive element. I shall refer to Devlin's argument that society has a right to enforce a
shared morality, as the Argument From Necessity. The Argument From Necessity consists of two arguments. The above conclusion is the conclusion of the second argument.

1. A shared morality is necessary for the existence of society.
2. Legal enforcement of a shared morality is necessary to preserve the shared morality.
3. Therefore, legal enforcement of a shared morality is necessary for the existence of society.

This argument is required because its conclusion is a premise in the second argument.

1. Legal enforcement of a shared morality is necessary for the existence of society.
2. Society has the right to do that which is necessary for its existence.
3. Therefore, society has a right to enforce a shared morality.

The conclusion of the second argument above is problematic.

What kind of right is it that society has when it has the right to enforce a shared morality? Clearly, Devlin is not referring to a legal right. 

Showing that a shared morality is necessary for the existence of society is not relevant to or evidence for the claim that society has a right to make laws enforcing the shared morality. Furthermore, if society has the legal right to enforce the shared morality, then the Nazis can use as a legal defense the fact that they were merely acting pursuant to state law. Shall we say that the law can be used to prevent the punishment of persons guilty of murder and enslavement?

Is society's right to enforce a shared morality a moral right? This
question must also be answered in the negative. Since (as will be shown later in this chapter) Devlin admits that the individual can have the moral duty to rebel against a law enforcing the shared morality, society's right to enforce the shared morality cannot be a moral one. Consider a certain kind of action, Action X. Assume that it is part of the shared morality that Action X should not be done. If there is a moral right to enforce the shared morality, then there is a moral right to prohibit Action X (since it is part of the shared morality). If there is a moral right to prohibit Action X, then Action X is morally wrong. But, according to Devlin, one can have the moral duty to rebel against laws enforcing the shared morality. We can, therefore, have the moral duty to do Action X—since doing Action X is rebelling against the legal enforcement of the shared morality. But it cannot be both morally right to prohibit Action X and morally right to do Action X.

Devlin seems to be torn between the horns of a dilemma: wanting to give full moral support to the shared morality on the one hand (since it is necessary for the existence of society) and, on the other hand, wanting to maintain an independent (of society) source of morality which can conflict with a shared morality. If we choose the first horn of the dilemma—giving full moral support to the shared morality—we must accept not only the legal status of the Nazi laws,
but their moral justifiability as well. But if we choose the second horn of the dilemma—an independent source of morality which can require disobedience to the law enforcing the shared morality—then laws are legally binding if and only if they are morally justifiable.

What is required, I think, is a restricted definition of law so that certain kinds of morally bad laws are not laws. The natural law theory which I have proposed, defined in terms of prohibitions against acts mala in se, provides such a restricted definition.

Closely connected with the issue of the necessity of a shared morality for the existence of society, are Devlin's reasons for maintaining that it is the shared morality—as opposed to the law of God or the morality of a select group—which the law should take into account. The law of God (which Devlin identifies with the natural law), as discoverable by reason, is ruled out on the ground that "...men of undoubted reasoning power and honesty of purpose have shown themselves unable to agree on what the moral law should be,..."\(^\text{15}\) The morality of a select group is ruled out because "A free society is as much offended by the dictates of an intellectual oligarchy as by those of an autocrat."\(^\text{16}\) Devlin proposes as an answer to counter-examples to legal enforcement of the shared morality (such as witch-hunting and the burning of heretics) that counter-examples would not be raised "...if the point at issue had nothing in it of the spiritual."\(^\text{17}\)
(Devlin is here using 'spiritual' in the sense of 'moral.') He then points out that "... in our sort of society matters of great moment are settled in accordance with the opinion of the ordinary citizen...." Devlin then argues that by parity of reasoning matters of morals in society ought to be settled in the same way.

Devlin recognizes an objective morality as distinct from the shared morality. He states "... I am willing to assume that the moral judgements made by society always remain good for that society." The context of this passage suggests that 'good for the society' means 'effectively preserve the existence of that society.' There is further textual evidence to support the interpretation that Devlin is not here asserting a kind of ethical relativism. "There are, have been, and will be bad laws, bad morals and bad societies. Probably no lawmaker believes that the morality he is enacting is false, but that does not make it true." Here, Devlin is clearly implying that there are true and false moralities, whose truth and falsity is independent of the shared morality of a particular society.

There is further textual evidence indicating that Devlin recognizes a morality which is independent of the shared morality. The law knows nothing of the right, and it may be the duty, to rebel and cannot recognize it. And since I am talking only about the relationship between law and morals I cannot here concern myself with it. What I have said, I say to show that I am not under the delu-
sion that the law has the ultimate answer to every moral problem and I am not asserting that there is in all circumstances a moral obligation to obey the law. There may be times in the future, as there have been in the past, when a man has to set himself up against society. But if he does so, he must expect to find the law on the side of society.

Here we see not only a morality which is distinct from the shared morality, but also a morality which can require the individual to disobey laws enforcing the shared morality. This is the force of 'has to set himself up against society.'

Explication of certain sentences in the above passage will help clarify Devlin's theory as to the relation between a shared morality and an objective morality. "The law knows nothing of the right, and it may be the duty, to rebel and cannot recognize it." 22 'The right' refers to the true morality, as distinct from the shared morality. 'It may be the duty to rebel' means 'it may be the duty of the individual to rebel.' This interpretation of 'it may be the duty to rebel' is supported by the latter part of the passage in which it is asserted that there may be times when a man has to set himself up against society. 'And cannot recognize it' refers to the law--the law cannot recognize the duty or right to rebel against the law. Another sentence in the above passage requiring explication is, "What I have said, I say to show that I am not under the delusion that the law has the ultimate answer to every moral problem and I am not asserting that there is in all circumstances a moral obligation to obey the law." 23 In not
asserting that the law has the ultimate answer to every moral problem, Devlin is alluding once again to the possibility of disagreement between the shared morality and objective morality. This part of the sentence also seems to suggest, if not imply, that the law does have ultimate answers to some moral problems. I think that Devlin here has in mind the model of the criminal law part of English law in which, according to Devlin, real crimes are sins with legal definitions. (Later in this chapter, I shall argue that Devlin defines sins as violations of the true morality.) 'And I am not asserting that there is in all circumstances a moral obligation to obey the law,' is merely a weaker form of the assertion that there may be times when a man has to set himself up against society. In the last sentence of the above passage, 'he must expect to find the law on the side of society' indicates Devlin's view that one cannot embody in the law conditions under which it is legal to disobey the law. By 'disobey' I mean non-compliance with a law in a situation to which the law is applicable.

What does Devlin mean by 'shared morality'? One way Devlin defines 'shared morality' is in terms of the legal concept of the reasonable man. 24

How is the law-maker to ascertain the moral judgements of society?...It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man in the street--or to use an archaism familiar to all lawyers--
the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.

In this passage, Devlin seems to treat 'the reasonable man' and 'something about which any twelve men or women drawn at random might after discussion be expected to be unanimous' as equivalent expressions.

In order to understand Devlin's concept of the reasonable man, we shall refer to other passages in Devlin. Then, since the concept of the reasonable man is a legal concept, we shall examine the reasonable man in the law of torts. Finally, in order to understand the philosophical significance of the reasonable man, we shall consider the reasonable man in relation to the Ideal Observer Theory.

Devlin distinguishes the reasonable man from the emotional man. Concerning the element of feeling in Devlin's characterization of the reasonable man, he states "I put the word ['feeling'] in quotation marks because I am not sure that I use it in its correct philosophical sense."25 "What I want is a word that would clarify the distinction between 'rational' and 'reasonable.' The reasonable man is to be expected not to hold an irrational belief."26 For Devlin, the reasonable man is not the rational man, nor is he the emotional man. In the above quote (see supra, p. 98, n. 24) Devlin states that the reasonable
man is not expected to reason about anything. Devlin's use of 'reason' in this passage is an unfortunate choice of words. However, Devlin's exclusion of irrational beliefs from the reasonable man clearly indicates that the above verbal form of 'reason' does not mean 'think intelligently.' There is more textual evidence for distinguishing the reasonable man from the emotional man.

The other presumably equivalent or interchangeable way of determining shared morality is by reference to the man in the jury box. The shared morality is what any random sample of twelve persons (jurors) might be expected to agree upon "after discussion." Clearly no discussion is required if we are determining feelings, in the sense of emotional reactions. One does not have a discussion merely to agree upon emotional reactions. However, discussion may be required to determine attitudes. That one has an attitude about something, e.g., a kind of behavior, is not the result of discussion (although discussion may change one's attitude). However, discussion is often required to determine what one's attitude is toward something, especially when the object of the attitude is something complex--like a kind of behavior. For example, seemingly everyone has an attitude concerning the trial and conviction of Lieutenant Calley. But what their attitude is may require a discussion of the various aspects of the trial and the surrounding circumstances.
The defining characteristic of the reasonable man is common sense. "It is the power of a common sense and not the power of reason that is behind the judgements of society." The rational man, from whom the reasonable man is to be distinguished, is the moral philosopher.

Let us now consider the concept of the reasonable man in the law of torts. The concept of the reasonable man is used to decide the issue of negligence. If, in the mind of the jury, the defendant failed to do what the reasonable man would do under the same or similar circumstances, then the defendant is to be considered negligent. "Sometimes he is described as a reasonable man, or a prudent man, or a man of average prudence, or a man of ordinary sense using ordinary care and skill." An honest mistake of judgment does not negate conformity to the standard of the reasonable man. Concerning the reasonable man, Prosser refers to "...the abstract and hypothetical character of this mythical person." Although evidence of custom is admissible in determining the issue of negligence, Prosser states that the better view is that "...every custom is not conclusive merely because it is a custom, and that it must meet the challenge of 'learned reason,' and be given only the evidentiary weight which the situation deserves. It follows that where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone
does may be found to be negligent;..."  

It is clear from the above account of the reasonable man that
the reasonable man test of negligence does not involve, by definition,
the existence of a reasonable man. The reasonable man test is in
the form of a hypothetical statement: If the defendant failed to do what
the reasonable man would do under the same or similar circumstances,
then the defendant is negligent. The truth-value of the antecedent of
this hypothetical statement (which I shall call Statement One), depends
upon the truth-value of another hypothetical statement (which I shall
call Statement Two). Statement Two is: If a man were reasonable,
then under such and such conditions, he would do such and such.
Statement Two, likewise, does not involve, by definition, the existence
of a reasonable man. Although evidence of custom is admissible, it
is relevant only in determining what the reasonable man would do.
The fact of custom does not define reasonableness or the reasonable
man and, therefore, does not affect the hypothetical nature of the
reasonable man test.

Let us now consider the reasonable man in relation to the Ideal
Observer Theory. Firth offers the following linguistic definition of
the Ideal Observer Theory: ". . . 'X is P,' in which P is some particu-
lar ethical predicate, . . . [is] identical in meaning with statements of
the form: 'Any ideal observer would react to X in such and such a
way under such and such conditions.'"  

The Ideal Observer "...is
conceivable and...has certain characteristics to an extreme degree." For Firth, such characteristics include omniscience with respect to non-ethical facts, omnipercipient, etc. One crucial characteristic of the concept of the Ideal Observer is that it is definable without the use of egocentric expressions. Egocentric expressions:

...are ambiguous in abstraction from their relation to a speaker, but their ambiguity is conventional and systematic. They include the personal pronouns ("I," "you," etc.), the corresponding possessive adjectives ("my," "your," etc.), words which refer directly but relatively to spatial and temporal location ("this," "that," "here," "there," "now," "then," "past," "present," "future,"), reflexive expressions such as "the person who is speaking," and the various linguistic devices which are used to indicate the tense of verbs.

One of the consequences of using egocentric expressions to define moral predicates, a consequence the Ideal Observer Theory avoids, is that "X is P" and "X is not P" may involve no logical contradiction.

Let us now compare the Ideal Observer with the reasonable man. Both the Ideal Observer and the reasonable man are concepts used to determine the applicability of a certain kind of judgment--"X (some act) is right,"--in the case of the Ideal Observer, and "X (some act or lack of action) is negligent," in the case of the reasonable man. Neither the reasonable man nor the Ideal Observer need exist for the application of the reasonable man test or the Ideal Observer Theory, respectively. Both concepts are naturalistic: the Ideal Observer has
certain human characteristics to an extreme degree and the reasonable man has certain human characteristics to an average degree. The concepts of the Ideal Observer and the reasonable man both occur in contrary-to-fact conditionals. Also, both concepts are employed without the use of egocentric expressions. (Although the reasonable man test with respect to professional or expert activities does involve reference to a class of certain spatiotemporal persons and, therefore, involves the use of an egocentric expression, such expressions do not occur in the reasonable man test simpliciter). Both concepts are used to arrive at a judgment whose denial is a contradiction of the original judgment.

We noted above (see supra, p.99) that Devlin seemed to treat the reasonable man test as identical with something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. I shall refer to the test expressed by the latter expression as the Random Sample Test. We then proceeded to examine the nature of the reasonable man, and the reasonable man test. Let us now examine the Random Sample Test and compare it with the reasonable man test.

Certain passages in Devlin will help clarify the Random Sample Text. "...morality in England means what twelve men and women think it means...." This passage clearly indicates that the shared
morality is a society-bound concept, in which society refers to the nation-state. Also, Devlin states "...that morality is a question of fact." However, he explicitly rejects the idea of the shared morality being arrived at by a show of hands. "The law-maker's task, even in a democracy is not the drab one of counting heads or of synthesizing answers to moral questions given in a Gallup poll." Devlin's rejection of the head counting method would seem to negate the factual character of morality. However, the rejection of the head counting method must be read in conjunction with the Random Sample Test. The Random Sample Test is expressed in a contrary-to-fact conditional, but it is a test to determine what the common belief is. The hypothetical nature of the test for determining the common belief does not affect the factual character of the common belief. Although both the reasonable man test and the Random Sample Test are expressed in contrary-to-fact conditionals, there is a striking difference between the two tests. The reasonable man test is expressed in an absolutist statement—one not involving any egocentric expression. The Random Sample Test is expressed in a relativist statement—one involving an egocentric expression. To be sure, the reasonable man test is applied by certain people at a certain time in a certain place—the jury. However, the
test does not involve, by definition, any egocentric expressions. In other words, the jury decides, but does not define, negligence. Just as the Ideal Observer is the test of right or wrong, so the reasonable man is the test of negligence or the lack of negligence. To be sure, no person or group of persons employing the ideal observer test has a privileged status, whereas the jury's employment of the reasonable man test is, in general, a determination of negligence in that particular case. But we should, I think, distinguish the legal status of the jury's decision from the meaning of the legal concept used to arrive at that decision. Of course, the jury could arrive at its verdict in utter disregard of the court's instruction concerning the legal concept of the reasonable man. But in a similar manner, one could pretend to use the ideal observer test and, in fact, decide right and wrong on some other ground. But such pretending would not alter the definition of the ideal observer. Also, just as different persons employing the ideal observer test may reach different results (as to what is right or wrong in a certain circumstance), so different juries may differ in their determinations of negligence. On the other hand, the Random Sample Test, even though it does not involve head counting, does require for its definition, reference to a specific society at a specific time.

In comparing the reasonable man test, the Random Sample Test and the Ideal Observer Theory, we may note that all are expressed in
contrary-to-fact conditionals. The reasonable man test and the Ideal Observer Theory are both expressed in absolutist statements, whereas the Random Sample Test is expressed in a relativist statement—-one involving egocentric expressions. In other words, the reasonable man test and the Ideal Observer Theory do not involve reference to any particular space, time, or person (or group of persons), whereas the Random Sample Test involves reference to a certain group of persons—a particular society. The reasonable man test and the Ideal Observer Theory are tests of what a hypothetical person (the reasonable man) would do and the way in which a hypothetical person (the Ideal Observer) would react under certain conditions, respectively. The Random Sample Test is a test to determine the common belief in a given society at a given time.

There is textual evidence, aside from the Random Sample Test, indicating a relativist definition of shared morality in Devlin. In discussing the relation between the shared morality and the law-maker, Devlin states "What the law-maker has to ascertain is not the true belief but the common belief." 37 He also refers to the shared morality as "...some common agreement about what is right and what is wrong,..." 38

The Random Sample Test is, and the reasonable man test is not, consistent with the shared morality defined in terms of common
belief, and only the Random Sample Test is consistent with the assertion that "There are, have been, and will be bad laws, bad morals, and bad societies." The greater weight of textual evidence, therefore, favors accepting the Random Sample Test as Devlin's view concerning the nature of shared morality.

Thus far we have shown that, for Devlin, the shared morality is essential to the existence of a society. We have also tried to elucidate the meaning of 'shared morality.' Let us now turn to the manner in which the shared morality relates to lawmaking.

A necessary condition for making a law based on the shared morality is that there is public intolerance, indignation, and disgust. Devlin requires that the public intolerance, indignation and disgust be the product of "...calm and dispassionate consideration...." Devlin explicitly denies that public intolerance, etc., are used to determine what the shared morality is. He states that 'public intolerance, indignation, and disgust' is used in that part of his argument:

...which enumerates the factors which should restrict the use of the criminal law. It comes into the discussion of the first factor which is that there must be tolerance of the maximum individual freedom that is consistent with the integrity of society. It must be read in subjection to the statement that the judgement which the community passes on a practice which it dislikes must be calm and dispassionate and that mere disapproval is not enough to justify interference.

Here, Devlin distinguishes public intolerance, indignation, and disgust
from disapproval as well as from emotional reaction.

Given public intolerance, indignation, and disgust, we must strike a balance "...between the foreseeable danger to society and the foreseeable damage to the freedom and happiness of the individual."42

There is a problem in reconciling Devlin's considerations of foreseeable danger to society and the shared morality as a cohesive element which is necessary for the existence of society. Although foreseeable danger could conceivably be one of the reasons upon which the shared morality is based, 'foreseeable danger' does not mean 'shared morality.' Put another way, the common belief that X is wrong (where X is a certain kind of activity) is not necessarily based on the consideration that X is dangerous to society. Since 'foreseeable danger' does not mean 'shared morality,' foreseeable danger must be seen as a limitation on the applicability of the shared morality. If enforcement of the shared morality can justifiably be limited, then at least some of the shared morality is not necessary for the existence of society. But Devlin defines the shared morality as a cohesive element which is necessary for the existence of society, and does not distinguish kinds of shared morality.

Another factor in deciding whether to enact a law based on the shared morality, is what might be called the time-gap factor.43
... in any new matter of morals the law should be slow to act. By the next generation the swell of indignation may have abated and the law be left without the strong backing which it needs. But it is then difficult to alter the law without giving the impression that moral judgement is being weakened.

Once again Devlin is placing an external limitation on legal enforcement of the shared morality. The law-maker is to presume that the shared morality which expresses a new common belief is to be treated as unstable, a presumption which can be overcome by a temporal endurance of the new common belief. But in his definition of shared morality, Devlin places no temporal requirements on common beliefs in order for them to qualify as the shared morality. A point closely connected with the time-gap factor is found in Devlin's reason for the law being used to guard existing moral beliefs. "It is because an old morality cannot be changed for a new morality as an old coat for a new one. The old belief must be driven out by disbelief." This passage suggests temporal endurance as a requirement for the existence or applicability of the shared morality. But even if we assume temporal endurance as a requirement for the existence of shared morality, we are still left with the question, How long must the common belief be maintained in order for it to become part of the shared morality?

Let us now consider Hart's major criticisms of Devlin's theory of shared morality. Hart quotes, with approval, the Wolfenden
Report's statement "'There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.'" The ground for this statement is that some immoral actions are not harmful to others. Hart construes Devlin's statement that morality forms a seamless web, together with Devlin's assertion that shared morality is necessary for the existence of society, as implying that, for Devlin, any immoral act threatens the existence of society (and, hence, should be legislated against). Hart then points out, correctly, that "...there are actions immoral by accepted standards and yet not harmful to others." In order for the above-quoted passage to have the force of a criticism of Devlin, Hart must hold that, for Devlin, actions immoral by accepted standards should be legally enforced. Hart distinguishes actions immoral by accepted standards from public displays which cause shock or offense to feelings--e.g., prostitutes soliciting on public streets. The latter, only, he considers to be proper objects for legislation. Elsewhere, Hart states that Devlin identifies the shared morality with strong feelings of disapproval by the majority.

Let us now consider the merits of this one of Hart's criticisms. Hart is mistaken in stating that the shared morality is identical with actions considered immoral by accepted standards. Such accepted standards may reflect only disapproval and, as noted above, Devlin
distinguishes the shared morality from mere disapproval. Furthermore, even assuming that Devlin identifies the shared morality with disapproval or strong feelings of disapproval by the majority, Hart's conclusion as to the legal enforcement of morality is mistaken. As noted above (see supra p.108) a necessary condition for the legal enforcement of morality is the existence of public intolerance, indignation and disgust. Devlin distinguishes public intolerance, indignation and disgust from mere disapproval and from mere emotionality.

Hart is also mistaken in concluding that, for Devlin, any immoral act threatens the existence of society. In reply to Hart, Devlin states:

I do not assert that any deviation from a society's shared morality threatens its existence any more than I assert that any subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.

Here, Devlin explicitly rejects the idea that any departure from the shared morality is a threat to the existence of society (and, hence, should be legislated against). It is only when the departure from the shared morality results in public intolerance, indignation and disgust that the shared morality is to be legally enforced. The significance of the above quote is that "...it is no more possible to define a sphere of private morality than it is to define one of private subversive activity." I think that Devlin would argue that public displays
which cause shock or offense to feelings cannot be distinguished from private activities which cause shock or offense to feelings. The results are the same in both cases—public intolerance, indignation and disgust. And in neither case is there physical harm. Since Hart accepts the former case as a proper area for legislation, he must accept the latter.

Another criticism by Hart is that Devlin mistakenly identifies the shared morality with society, which identification leads to the unacceptable consequence that the law should preserve the status quo (in order to preserve the existence of society). But, as noted above (see supra, p. 110) Devlin allows for changes in the shared morality. Since the shared morality at any given time is necessary for the existence of society, the law should try to preserve that shared morality. Such a function of the law does not, however, preclude a change in the shared morality. Devlin requires only that the old shared morality be driven out by disbelief.

In one criticism Hart argues that, even if legal enforcement of the shared morality is necessary for preserving the society, the society may be such that it should not be preserved, or that the means for preserving it may be such that they cannot be justified. In this criticism, Hart interprets Devlin's view as being that society has the right to use whatever means necessary to preserve its own
existence. To assess this criticism, we must consider two points in Devlin. First, Devlin admits that the shared morality may conflict with objective morality, and that the individual may have a moral obligation to choose the latter. Second, Devlin argues that the nature of a free society is such that decisions affecting the welfare of society must be made by the majority. (See the parity of reasoning argument supra p. 96) To be sure, the majority may be mistaken, or even perverse, in its views as to what is necessary for the welfare or existence of society. However, I think that Devlin would maintain that the possibility of the majority going far astray is one of the risks inherent in a democratic society.

The last criticism of Hart's which we shall consider is in relation to Devlin's claim that the criminal law, in not allowing consent as a defense, exhibits its concern with something other than the harm of others. The disallowance of consent as a defense indicates, according to Devlin, the legal enforcement of morality. Hart argues that disallowing consent as a defense is explainable in terms of "...paternalism, designed to protect individuals against themselves."49 In answer to Hart, Devlin correctly points out that paternalism presupposes a kind of morality. In other words, paternalism itself is an example of the legal enforcement of morality. We might add, in support of Devlin, that the classification of rape as a felony and assault and battery as a misdemeanor is not explicable in terms of physical harm.
Classifying rape as a felony is based on the extreme moral obnoxiousness of the act, not on the physical harm involved.

Let us now turn to Devlin's discussion of mala in se. Devlin's discussion of shared morality in *The Enforcement of Morals* is mainly in Lecture One, entitled "Morals and the Criminal Law," whereas his discussion of mala in se is in Lecture Two, entitled "Morals and the Quasi-Criminal Law and the Law of Tort." Devlin identifies mala in se with the real criminal law. Mala prohibita is identified with the quasi-criminal law. 50

In the former the law adopts a particular moral idea, usually taken from a divine commandment. In the latter no more is required of the law than that it should maintain contact, more or less remote, with the general moral idea that a man, if he cannot reach the perfection of loving his neighbours, should at least take care not to injure them and should not unfairly snatch an advantage for himself at their expense.

It is clear that the moral property of a moral idea taken from a divine commandment is based on the fact that it is a divine commandment. The law adopting such an idea does not provide its moral quality. Furthermore, even if we read into the above passage an intermediate step (between the existence of a divine commandment, and the law adopting the moral idea of a divine commandment) in which there exists common belief in the particular moral idea, we still have not removed the moral quality of the idea from being based on its nature.
as a divine commandment.

In relation to the criminal law, Devlin states "Real crimes are sins with legal definitions. The criminal law is at its best when it sticks closely to the content of the sin." Elsewhere, however, (in Lecture One), Devlin states that "...the law does not distinguish between an act that is immoral and one that is contrary to public policy." He also states, in Lecture One, "I do not think that you can equate crime with sin."

I think that there is an irreconcilable conflict between Devlin's notions of law based on the shared morality and a law defining a crime as mala in se. The conflict is due to Devlin's asserting that the only morality which the law can take cognizance of is the shared morality (in his discussion of shared morality) and his asserting that real criminal laws are legal definitions of sins (in his discussion of mala in se). There is further textual evidence for not equating mala in se with the shared morality or a sub-class of shared morality.

Regarding what is a real crime, Devlin states:

I do not think that the test should be subjective. There is a large number of offences which no one, unless he is amoral, can commit without a sense of guilt, irrespective of whether he is likely to be detected and punished for it. Broadly speaking, these are offences against the moral law. There is also a large number of offences which a person with a highly developed moral sense can commit without any sense of guilt at all and where the only deterrent is the penalty that he would have to pay.
We have already noted that the shared morality is defined in terms of common belief. But the moral law and sin are, for Devlin, elements in an objective morality. In stating that the test for a real crime (crimes mala in se) should not be subjective, Devlin rules out, I think, the test of common belief, which is the defining characteristic of shared morality. Also, Devlin describes crimes mala in se as "...offences against the moral law." Here he is clearly referring to a morality other than shared morality. Furthermore, in his discussion of shared morality, Devlin never uses 'moral law.'

There is further textual evidence to substantiate this interpretation—that, for Devlin, mala in se describes an objective as opposed to shared morality. Devlin refers to a law which prohibits acts which are mala in se as "...good in itself..." He distinguishes such a law from "...a regulation designed to secure a good end." It is certainly clear from Devlin's theory of shared morality, that he does not hold the shared morality to be good in itself. Furthermore, Devlin does not use 'good in itself' in reference to preservation of the existence of society.

Let us now consider Devlin's theory in relation to our special criterion, the Nuremberg Trials. If we approach the problem from the standpoint of shared morality, then Nuremberg not only represents ex post facto law, but expresses law which is not "justifiable." The
shared morality determines what the criminal law should be. Devlin does not assert that the shared morality is the law. The law is what the lawmaker says it is. Nuremberg, then, is clearly *ex post facto* law. Since the shared morality is a society-bound concept (as indicated by Devlin's referring to shared morality as the common belief of a society), Devlin does not seem to allow for a criminal law which crosses societies—an international criminal law.

If, however, we approach the problem from the standpoint of crimes *mala in se*, then it is questionable whether we have a universal moral law which has the force of law. It is questionable because Devlin does not discuss the concept of *mala in se* in relation to immoral acts which have not been legislated against by the lawmaker. Devlin's discussion of *mala in se* and *mala prohibita* seems to be in the context of criminal laws which have been enacted. He might wish to hold that an act which is *mala in se* is not illegal until enactment by a human lawmaker. If Devlin's position is that *mala in se* does not attach until after enactment of a law by a human lawmaker, then the Nuremberg Charter is *ex post facto* law. The Nuremberg Charter was not drawn up until after the commission of the crimes specified in the Charter. On this interpretation of Devlin, we cannot come to any conclusion concerning the jurisdictional problem of Nuremberg since we do not know whether Devlin would regard *ex post facto* law
as capable of providing a basis for jurisdiction. If, however, acts
mala in se are criminal--whether enacted or not--then the Nuremberg
Charter is not *ex post facto* law. We have already shown that the
crimes specified in the Nuremberg Charter are in reference to acts
mala in se. Also, since the concept of mala in se involves universality--
the moral wrongness does not depend on any particular place--the
jurisdiction for crimes mala in se is universal (in personam).
NOTES
Chapter IV

1 S. T. 1-2, q. 94, a. 3, c.

2 Ehrlich, Ehrlich's Blackstone 7 (1945).

3 Ibid. at 8.

4 Ibid.

5 Ibid. at 9.

6 Ibid.

7 Ibid.

8 Ibid. at 17.

9 Ibid.

10 Ibid. at 16-17.

11 Ibid. at 9.

12 Ibid. at 16

13 Devlin, at 11.

14 Ibid. at 114.

15 Ibid. at 93.

16 Ibid.
17 Ibid. at 91.
18 Ibid.
19 Ibid. at 18.
20 Ibid. at 94.
21 Ibid. at 119.
22 Ibid.
23 Ibid.
24 Ibid. at 15.
25 Ibid. at viii.
26 Ibid.
27 Ibid. at 17.
29 Ibid. at 154.
30 Ibid. at 170.
32 Ibid.
33 Ibid. at 318
34 Devlin, at 100.
35 Ibid.
36 Ibid. at 94.
37 Ibid.

38 Ibid. at 114.

39 Ibid. at 94.

40 Ibid. at ix.

41 Ibid. at viii-ix.

42 Ibid. at 113.

43 Ibid. at 18.

44 Ibid. at 114.


46 Ibid. at 5.

47 Devlin, at 13, n. 1.

48 Ibid. at 14.

49 Hart, at 31.

50 Devlin, at 27.

51 Ibid.

52 Ibid. at 23.

53 Ibid.

54 Ibid. at 32, n. 2.

55 Ibid.
56 Ibid. at 31.

57 Ibid.
CHAPTER V
AUSTIN AND HART

In this chapter, I would like to explicate and present criticisms of Austin's and Hart's theories of law. We shall also consider the adequacy of each theory in relation to our special criterion--the Nuremberg Trials. Only those parts of their theories which are necessary and sufficient for an understanding of their views concerning the relation between law and morality will be considered.

The expressed purpose of Austin's classification of laws is to distinguish positive law, which is the appropriate matter of jurisprudence, from other kinds of law which it resembles either strongly or remotely. Austin divides all laws into laws proper and laws improper. Laws proper are distinguished from laws improper, in that the former are a species of command. "If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command."¹ "...the term 'command' implies:... 'sanction' or 'enforcement of obedience; 'duty; or 'obligation; 'superior and inferior."² A sanction is the evil which will probably be incurred for non-compliance with the
command. 'Command' and 'duty' are correlative terms: the evil which I will probably suffer if I do not conform to the signified wish of another, places me under a duty to obey the command. 'Bound' and 'obliged' are merely the verbal counterparts of 'duty.' As to laws which, apparently, only create rights (which, if they existed as laws proper, would conflict with Austin's definition of laws proper as a species of command and, therefore, necessarily creating duties), Austin states that they also impose, either expressly or tacitly, a relative duty or a duty correlating with the right. 'Superior' and 'inferior' are correlative terms referring to the power and suffering alluded to in the above definition of a command.

Another concept or property following from 'command,' is that of "...(flowing from a determinate source),..."³ Determinate, as a property, can apply to either individuals or groups. An individual or group is determinate, if and only if it is described particularly (a particular description of each member, in the case of a group) or generically. A particular description refers uniquely and may be thought of in terms of a Russelian definite description. A generic description specifies properties for inclusion within a particular class. In the case of groups, the description--whether particular or generic--must cover all members of the group. Determinateness in terms of generic description does not require permanent or unchanging
membership. Thus, the Senate of the United States would be a determinate body.

Austin distinguishes two kinds of commands: those which are general orders or rules, and those which are occasional commands. Now where it obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or forbearances which it determines specifically or individually, a command is occasional or particular.

Although rules or general orders are usually issued to kinds or classes of persons, they may be issued to a particular person or persons. Judicial commands are included within the category of occasional commands. Laws proper are a species of commands which are rules or general orders.

Having discussed those characteristics of laws proper which distinguish them from laws improper, let us now turn to the different kinds of laws proper. Although Austin sometimes states that positive law is the only kind of laws proper, he usually divides laws proper into three kinds: Divine Law, positive law, and the rules of positive morality. Since positive law is, for Austin, the appropriate matter of the science of jurisprudence, we shall consider it first.

Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.
Austin states that sovereignty implies an independent political society. There are two marks of sovereignty:

1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior.

'Sovereignty' and 'subjection' are correlative terms, referring to being obeyed habitually and obeying habitually, correspondingly.

Sovereignty is a kind of superiority, a political kind. Although, by definition, a sovereign does not habitually obey another determinate human superior, he may obey another determinate human superior occasionally, and may be continually affected by the opinions (as opposed to commands) of others. The sovereign and those in subjection to him constitute a political society. The independence of the political society is only in relation to the sovereign. A political society requires some minimum (not inconsiderable) number, which cannot be reckoned precisely. Due to the vagueness of 'habitual,' (with reference to habitual obedience to a determinate and common superior), the criteria for a political society cannot be applied to all cases.

Austin states that the stability of government requires that "...the persons who take the sovereignty in the way of succession,
must take or acquire by a given generic mode, or by given generic modes. In speaking of the absence of a generic mode for the succession of Roman Emperors, Austin states:

...there was no mode of acquiring the office, which could be styled legitimate, or which could be styled constitutional: which was susceptible of generic description, and which had been predetermined by positive law or morality. (Italics mine.)

The problem of the status of rules for sovereign succession will be considered below, in the criticism of Austin.

In discussing judicial decrees which legislate, Austin traces their legal status to authority given by the state to the judge. The authority conferred by the state (sovereign) may be express or "...in the way of acquiescence." The concept of a principal ratifying acts of an agent which lie outside the scope of his authority, is a familiar part of the law of agency. Since the definition of positive law includes circuitous as well as direct commands of the sovereign, such decrees seem to come within the definition. Let us now turn to a second kind of laws proper--positive morality.

Both positive law and positive morality are classified as laws set by men to men. The commands or rules of positive morality are distinguished from those of positive law, in that the former are set neither by men as political superiors nor by men as private persons in pursuance of legal rights. The sense of 'morality' in 'positive
morality, ' is that of an emotive-imperative theory, in which a particular society or the bulk of a particular society is the unit whose expressions of approval and disapproval form the content of 'good' and 'bad,' correspondingly. Both positive law and positive morality are commands and, therefore, create duties and have sanctions. The duties and sanctions of positive morality are moral rather than legal.

Austin cites only one kind of rules of positive morality which are established within a society. Such rules of positive morality can be established by subjects as private persons, but not by the subject authors in pursuance of legal rights. Austin gives as examples, rules set by parents for children, and rules for clubs. He distinguishes such rules of positive morality from rules of positive law which resemble them (e.g., rules set by a guardian for a ward) in that the former are set at the pleasure of the rule maker. Some rules can be classified under either category--positive law or positive morality. The other areas in which the rules of positive morality can be established (besides those within an independent political society) are: a state of nature (in the Lockean sense), or as between sovereigns. Let us now consider the last kind of laws proper--Divine Law.

The Divine Law consists of two parts: the revealed and the unrevealed. With regard to obedience, the Divine Law takes priority over positive law; in case of conflict, the latter should be disobeyed.
We shall omit consideration of the revealed law as being a purely theological issue. Austin states that there are only two kinds of theories concerning the content or description of the unrevealed Divine Commands: moral sense theories, and the principle of general utility. Austin rejects moral sense theories because we do, in fact, doubt whether we have a moral sense (which doubt is incompatible with our having such a sense); and, because there is lack of agreement as to what is right or wrong, good or bad.

The principle of utility obliges us only because it indicates the content of the Divine Commands—because the general happiness or good (defined in terms of aggregate pleasures) "...is the final cause or purpose of the good and wise lawgiver in all his laws and commandments."\(^\text{10}\) The Divine Law, both revealed and unrevealed, is the measure or test of positive law and morality.

Although Austin sometimes speaks of certain kinds of motives as affecting the degree of goodness or badness of an action, I shall accept the following statement as representing his view. "Now the theory of ethics which I style the theory of utility has no necessary connection with any theory of motives."\(^\text{11}\) Although Austin quotes, approvingly, Locke's statement that ethics is capable of demonstration, his usual position is that the principle of utility is an imperfect test due to the infinite diversity of effects of our actions.
Austin adopts a rule type of utilitarianism. Although the amount of utility is usually calculated with reference to rules, rather than individual actions, Austin does allow for the possibility of an eccentric or anomalous case. In such a case, the specific consequences of the act in question are "...so important...that the evil of observing the rule might surpass the evil of breaking it." In the eccentric or anomalous case, the principle of utility is applied directly to the specific act under consideration. Austin gives as an example of an eccentric case, the rule of obedience to established government. This rule is inferred from the principle of utility as being commanded by the Deity. The utility involved in this rule is that of government. But if the government in question "...vex us with needless restraints and load us with needless exactions, the principle which points at submission as our general duty may counsel and justify resistance." Another deviation from a strict rule utilitarianism position is found in the following:

The principle of general utility does not demand of us, that we shall always or habitually intend the general good: though the principle of general utility does demand of us, that we shall never pursue our own peculiar good by means which are inconsistent with that paramount object.

Having discussed Austin's utilitarianism, let us now turn to his treatment of the natural law. (The discussion of laws improper is postponed because Austin's views about natural law are, I think, best
understood in conjunction with his theory of ethics.) Austin accepts as true the following definition of natural law: "It consists of the human rules, legal and moral, which have obtained at all times and obtained at all places." Furthermore, Austin states that certain kinds of laws, e.g., those regarding the relation of parent and child "...are mainly caused by the instincts...." He also speaks of "...resemblances between different systems which are bottomed in the common nature of man...." Although, in these passages, Austin seems to assert the universality of certain kinds of laws as being required by certain universal human instincts or common nature, he elsewhere offers a different account of the existence of such laws.

For as some of the dictates of utility are always and everywhere the same,...there are legal and moral rules which are nearly or quite universal, and the expediency of which must be seen by merely natural reason, or by reason without the lights of extensive experience and observation.

Austin's objections to natural theories are based on his rejection of moral sense theories. For Austin, natural law theories involve the epistemological claim of knowledge by means of a moral sense. The objection can be viewed as an instance of Modus Tollens on the hypothetical statement, "If natural law theories are true, then there is a moral sense (which is aware of the natural law)." Austin's rejection of moral sense theories also results in his rejection of a certain natural law kind of classification of laws.
By modern writers on jurisprudence, positive law (or law, simply and strictly so called) is divided into law natural and law positive. By the classical Roman jurists, borrowing from the Greek philosophers, jus civile (or positive law) is divided into jus gentium and jus civile. Which two divisions of positive law are exactly equivalent.

Austin claims that the classification of crimes as mala in se and mala quia prohibita corresponds to the above classification of law natural and law positive. Austin's rejection of this classification and of the corresponding classification of crimes, is based on the rejection of what he terms the mixed hypothesis. The mixed hypothesis is the view that the principle of utility is applicable in determining the rightness or wrongness of some acts and that the moral sense is applicable in determining the rightness or wrongness of some acts. The mixed hypothesis is rejected because it involves a conjunction, one of whose conjuncts is false—the assertion that the rightness or wrongness of some acts is known by the moral sense. It is to be emphasized, as Austin expressly points out, that the above-quoted classification does not assert an identity relationship between natural law and positive law. Rather, the claim is that "...a portion of positive morality, as well as of positive law, is embraced by the law natural...."^20 Austin does, of course, take great pains to emphasize the incorrectness of a natural law interpretation which asserts an identity relation between natural law and positive law. He insists
upon distinguishing what law is from what law ought to be. We see, then, that Austin considers two types of natural law theories:

one in which the natural law is identical with positive law, and

one in which the natural law is identical with part of the positive law.

Let us consider Austin's criticisms of natural law theories in relation to Aquinas' natural law theory. Austin states that natural law theories involve the existence of a moral sense. He states that our doubt concerning the existence of a moral sense, and the lack of universal agreement concerning what is right and wrong, show that there is no moral sense. The basis of Aquinas' natural law theory, it will be recalled, is that certain obligations (primary precepts) are universally self-evident. In answer to Austin, we may point out that a moral sense is required to know self-evident moral obligations in the same ways that a mathematical sense is required to know self-evident truths of mathematics (e.g., \(1 + 1 = 2\)). As to the lack of agreement concerning what is right and wrong, I agree with Aquinas that everyone knows that certain actions—those prohibited by the primary precepts—are wrong. No sane and civilized person would deny that, in general, rape, killing, and stealing are morally wrong. (In the natural law theory which I have proposed, 'in general' refers to summary rules.) The problem of how people act is, as Aquinas
points out, a different problem.

We shall conclude this explication of Austin with a discussion of laws improper. There are two kinds of laws improper: positive moral rules which are set or imposed by general opinion, and laws metaphorical or figurative. Austin states that laws of opinion are distinguished from rules of positive morality (which are laws proper) solely on the basis of the former not having a determinate source. Hence, Austin states that laws of opinion have a strong or close analogy with laws proper. Included within this kind of laws improper are international law, declaratory laws, laws repealing laws, and laws of imperfect obligation. International law is based on sentiments or opinions and, therefore, lacks the command element of laws proper. Declaratory laws and laws of imperfect obligation lack sanctions. (Laws of imperfect obligation are defined as laws without sanctions.) Laws repealing laws are not laws proper because they "...are not commands, but revocations of commands." Laws metaphorical are descriptive, as opposed to prescriptive. The laws of falling bodies are an example of laws metaphorical. Since laws metaphorical do not have sanctions and do not command, they are said to bear only a slender or remote analogy with laws proper.

Let us now turn to a criticism of Austin. Consider aRb, where 'a' and 'b' represent two different theories, and 'R' represents the
relation between them. To prove that aRb is false, it is sufficient to show either that a is false, or that b is false. Let 'a' stand for Austin's theory of positive law, and 'b' stand for his theory of ethics. In this case, 'b' is, in fact, the principle of utility. There will be only a brief refutation of 'b'. There are two reasons for this. The standard criticisms of utilitarianism (including rule utilitarianism) are sufficient, and sufficiently known; and, more importantly, the jurisprudential significance of Austin's theory would not be diminished by replacing 'b' with 'b prime,' in which 'b prime' stands for morality in general, or some other ethical theory. The main purpose of this criticism, then, will be to refute 'a'--Austin's theory of positive law. The main criticisms of Austin's theory of positive law have been stated clearly and concisely by Professor Hart in his article in the Harvard Law Review, entitled "Positivism and the Separation of Law and Morals," and his book The Concept of Law. In considering Hart's criticisms, we should keep in mind that, for him "...the existence of a legal system is a social phenomenon...." Hart refers to Austin's theory as the imperative theory of law. We have seen that Austin maintains that a generic mode of succession is necessary for the stability of government. Hart offers the following general criticism, which covers the case of rules for the generic mode of succession. Legislators must conform with fundamentally
accepted rules specifying the essential lawmaking procedures. The Constitution of the United States would be a good example of fundamentally accepted rules. Since such rules are occasional commands, they cannot come within Austin's definition of positive law. But such rules are a fundamental part of a legal system. To relegate such rules to the periphery of either positive law or morality is a gross distortion of the actualities of a legal system. Thus, Austin's concept of "uncommanded commanders" (Hart's phrase for referring to Austin's concept of sovereignty) is untenable. Legislators themselves, qua legislators, must conform.

One of Hart's main criticisms is in relation to the command element of Austin's theory of positive law. It will be recalled that in an independent political society, the command element is fulfilled by the bulk of the given society being in a habit of obedience or submission to a determinate and common superior. But this, argues Hart, is just the gunman situation writ large. For Hart, the existence of a legal system with the necessary component part of authority, requires a sufficient number who accept the system of rules voluntarily. He does assert, however, that a significant segment of society need not accept the system of rules voluntarily in order for there to be a legal system. Thus, for Hart, Nazi Germany and the general practice of slavery are consistent with the existence of a legal system. Austin's
error, then, is that his definition of law in terms of a kind of command, allows for a case in which there are no rules. The relation of the gunman to his victims need not involve rules, but the existence of a legal system requires rules.

Another criticism by Hart concerns the relation between law and morality (in the ordinary, not Austinian sense of 'morality'). For Austin, morality (the principle of utility) is related to the positive law solely as a measure or test of that law. For Hart such a view is an oversimplification. Positive law is not only measured or tested by morality, but may contain moral elements. Thus, for example, the Constitution of the United States (which, for Hart, must fall within the concept of law) contains moral elements in its Fifth Amendment. Hart is, presumably, referring to the law against double jeopardy and the law against compelling a defendant to be a witness against himself. (These two laws refer to criminal cases only.)

Another defect in Austin's imperative theory, according to Hart, is that it does not distinguish different kinds of rules within the legal system. The imperative theory regards all legal rules as commands. But, says Hart, there are two kinds of rules. Some rules, let us call them Type A Rules, say, "Do this whether you wish it or not." An example of Type A Rules are the rules of criminal law. However, some rules, let us call them Type B Rules, say, "If you wish to do
this, here is the way to do it." An example of Type B Rules are the laws relating to contracts and wills. Type A Rules may correctly be viewed as commands, but not Type B Rules.

Hart cites, with approval, Salmond's criticism that the imperative theory does not provide a basis for the notion of rights. Hart does not elaborate the criticism, but such an elaboration might take the following form. It will be recalled that, for Austin, laws which apparently create only rights also impose, either expressly or tacitly, a relative duty or a duty correlating with the right. Licenses are, I think, a good counter-example to Austin's theory of rights. A license creates a certain power in the licensee - e.g., the license to sell beer. To characterize such a license as primarily the duty of others not to interfere with the licensee's selling of beer is an obvious distortion of the situation. It is also a distortion to characterize the licensee's powers as correlative with the duty of others not to interfere with the licensee's selling of beer. And, of course, the licensee has no duty to sell beer.

Another criticism of Austin's theory of positive law can be made in relation to his analysis of judicial decrees which "legislate" (Austin's terminology). It will be recalled that Austin considers judicial authority as created by the state, and the special case of judicial legislation as authority created by the acquiescence of the
state. It was noted above that Austin seemed to be using the concept of ratification, which is found in the law of agency. But the concept of agency is not applicable. In the United States, the relation between the legislative and judicial branches is certainly not that of principal and agent. If we proceed on a theory of agency, we shall (as noted above) regard judicial legislation as an act outside the scope of authority of the agent which, to be construed as an act of the principal, must be ratified by the principal. The analogy or parity of reasoning breaks down in several ways. Unlike an agent, a court can nullify an act of the legislature—e.g., by declaring it unconstitutional. Closely connected with this criticism is the issue of acquiescence. Austin might argue that the legislature not acting to nullify a particular bit of judicial legislation thereby indicates acquiescence to the judicial decree. But even if we assume this analysis of acquiescence, we are still left with a problem. A judicial decree may contain a rationale based on constitutional law such that the decree precludes any legislation which could overturn it. In such a case, the absence of legislation overturning the decree surely cannot be construed as acquiescence to the decree.

Let us now consider, briefly, some criticisms of Austin's utilitarianism. The criticisms of utilitarianism in general are, of course, applicable. There does not seem to be any method for calcu-
lating aggregate pleasures. Also, given no qualitative distinction of pleasures, certain unacceptable consequences follow from such a theory. Assume the existence of ten most diabolical men. For the sake of honesty, let us call them Nazis. Assume, further, that they murder an old Jew—quickly and by surprise. The Jew suffered only for a short time. The pleasure enjoyed by the Nazis is immense and, notwithstanding the Nuremberg Trials, they live to celebrate the anniversary of this murder each year. On what basis can we say that the suffering of the Jew outweighs the pleasure of the Nazis?

There are certain criticisms relating to the rule aspect of Austin's utilitarianism. There does not seem to be any method for deciding, within rule utilitarianism, a case involving a conflict of rules. That there are conflicts of rules in ethics is a fact. (Austin's notion of the anomalous or eccentric case does not deal with the issue of conflict of rules.) Another problem, peculiar to Austin's ethics, is raised by the above quotation concerning the principle of utility (see supra, p. 131, n. 14). For Austin, we need not always or habitually intend the general good. We can act for our own peculiar good so long as such acts do not conflict with the general good. We now have a restricted sphere of the applicability of the principle of utility, such that we have almost destroyed the principle. Rather than an ethical theory consisting of the principle of utility, we now have a
theory of self-interest with the principle of utility as a limiting factor.

Criticisms of the definition of good and bad in terms of Divine Commands can be found in Plato's "Euthyphro" in which Socrates asks "...whether the pious or holy is beloved by the gods because it is holy, or holy because it is beloved of the gods." Also, how can we know what God commands? And how can we verify such knowledge or resolve conflicts as to such knowledge?

Let us now consider Austin's theory in relation to our special criterion--the Nuremberg Trials. We may recall that, for Austin, international law is a kind of law improper. Since laws improper are not commands and since the element of commanding is a necessary condition for legal obligation, international law does not give rise to legal duties or obligations. To the same effect, Austin states that international law is based on sentiment or opinion. Under Austin's theory then, a strange twist results from classifying the Nuremberg Charter as international law. The general legal position is that if the Nuremberg Charter expresses international law, then it is not ex post facto law. But since, for Austin, to classify the Nuremberg Charter as international law would nullify its character as something legally binding, the issue of ex post facto law would not arise. If, however, we regard the Allied Powers as the sovereign over Germany, then the Nuremberg Charter is the command of a sovereign and,
therefore, legally binding. On this interpretation, however, the Nuremberg Charter is clearly ex post facto law.

Let us now turn to Hart's theory of law. As stated above, we shall consider only that part of Hart's theory which relates to the issue of the relation between law and morality. For Hart "...law may most illuminatingly be characterized as a union of primary rules of obligation with such secondary rules."27 The primary rules are like Type A Rules (see supra, p.138). They can be viewed as stating "Do this whether you wish it or not." The secondary rules "...are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined."28 Included within secondary rules would be: declaratory laws, laws for repealing laws, laws for making laws, and laws "...which confer on individuals power to vary their initial positions under the primary rules."29 [e.g., laws relating to private contracts, licenses, etc.].

I have merely indicated the bare outline of Hart's rule theory of law because the theory is, in a significant sense, neutral with respect to the issue of the relation between law and morality. In discussing the separation of law and morality, Hart makes the point that such a separation is neutral with respect to any particular kind of ethical
theory. There is, of course, the exception of an ethical theory which
denies such a separation. A similar point can be made in relation to
Hart's rule theory of law. The rule theory is concerned to describe
the existence of a legal system as a social phenomenon. The theory
characterizes those rules which we ordinarily call laws, as laws
(and, hence, does rule out any ethical theory which does not regard
all such rules as laws). The rule theory is, however, neutral in the
sense that it does not argue for the inclusion of such rules within the
concept of law, nor is such an argument derivable from the rule
theory. Hart does argue--on a conceptual basis--for the inclusion
of all such rules within the concept of law, but his arguments are
separate from and in no way dependent upon the rule theory characteri-
ization of a purported social phenomenon.

Most, if not all, of Hart's theory of the relation between law
and morality can be gained by examining his critique of natural law
theory. Hart's critique can be viewed as consisting of three parts:
first, his refutation of arguments which conclude the truth of natural
law theory from the falsity of the imperative theory; second, his
rejection of the conceptual framework of natural law theory in favor
of what he terms the broader view; and, third, his acceptance of a
minimum content type of natural law theory. Let us now consider
the first part of Hart's critique of natural law theory.
It has been argued, says Hart, that due to the open character of law, judges must decide what the law ought to be. Since what ought to be lies within the realm of morality, there is a necessary connection between law and morality. The area of judicial decree which operates in the open area of law is what Hart calls the penumbra, and what Austin might call the area of judicial legislation. The penumbra is to be distinguished from the area of hard-core cases. In the hard-core cases the meanings of the terms (or the applicability of the law) of the controlling law, and that it is the controlling law, are not problematic. In the penumbra, the meanings, etc., are uncertain. But, argues Hart, 'ought' merely reflects the presence of some standard of criticism. There is a moral standard of criticism, but not all standards are moral. As an example, Hart cites the sentencing of criminals by Nazi judges. The judge in such a case may have decided what sentence the defendant ought to receive, in the sense of efficiently serving the purposes of the government. But such an ought is not a moral ought. Moreover, and more importantly, the fact is that judges, when deciding cases in the penumbra, do not always feel or think that they are morally obligated to render a certain decree. We must keep in mind that Hart does not have to, nor does he in fact, assert that the penumbra never involves resorting to a moral standard. The necessary connection between law and
morality which Hart is here trying to disprove, is based on the penumbra necessarily involving a reference to moral standards. I think that Hart's refutation of the necessary connection between law and morality based on the nature of penumbral cases, stands.

Another argument which Hart criticizes, is the argument that the separation of law and morality caused the acceptance of laws in Nazi Germany. Hart argues correctly, I think, that we do not have evidence on which to base such an argument. Elsewhere, he claims that the sense that the last resort for obedience may lie outside the official system, is better kept alive "...among those who are accustomed to think that rules of law may be iniquitous,..." 30 I think that the argument which Hart criticizes, and his own claim, are equally unacceptable. At present it is, I think, impossible to determine the causal relation, if any, between the acceptance by people of a particular theory of law, and their acceptance of certain laws or a certain legal system. The causal question is too complex. But not only is the causal question too complex, it is, to a great extent, irrelevant. The ordinary citizen is unaware of theories about the relation between law and morality. His acceptance or non-acceptance of certain laws or a certain legal system cannot be based on a theory of which he has no knowledge. Unfortunately, the same can be said for many lawyers and judges.
Let us now turn to Hart's rejection of the conceptual framework of natural law theories. Hart characterizes natural law theories as theories which maintain ",... that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." In other words, Hart construes natural law theories as asserting that positive law--to be law--must either be identical with or entailed by natural law. In "Positivism and the Separation of Law and Morals," Hart discusses the separation of law and morality as opposed to natural law theories. In his book _The Concept of Law_, he discusses the same issues, but adds the terminology, "broader view," and "narrower view," to refer to the theories which separate law and morality, and natural law theories, respectively.

Hart does not discuss the narrower and broader views in terms of truth and falsity. He regards these two views as alternative ways of classifying rules, which have the status of proposals--rather than assertions (hence the inapplicability of 'true' and 'false'). Hart's main reason for opting for the broader view and rejecting the narrower view is that the former is intellectually honest and the latter is intellectually dishonest. As an example of intellectual dishonesty which obscures the moral issues involved, Hart cites the case of a woman in Nazi Germany in 1944 who reported her husband for his
committing the crime of speaking against Hitler. After the war, in 1949, the woman was tried under a German Statute which had been in force continuously since pre-war days. The Statute made it a crime to illegally deprive a person of his freedom. Since, at the time she reported her husband, he was committing a crime, she could not have been convicted, in 1944, of illegally depriving him of his freedom. The natural law element of the case is, presumably, that her defense could not make use of the Nazi Statute, because the Statute was immoral and, hence, not law. The intellectual dishonesty involved in this case, according to Hart, is that in not calling the Nazi Statute a law we have obscured a moral decision between two evils—whether to punish the woman by retroactive law, or not to punish the woman.

I would now like to argue that Hart's analysis of the moral aspect of the above case is no more intellectually honest than a natural law approach; and, more importantly, that even assuming the correctness of Hart's analysis of the case, his position does not prove enough as against a certain kind of natural law theory. A natural law theorist could argue that the moral issue is in relation to the Nazi Statute. The judicial process aims at justice and, therefore, a statute which is obviously immoral shall have no force in a court of law. Once we declare the statute not to be law, we
obviate the problem of whether or not to make a retroactive law to deal with a woman who is morally guilty.

The main criticism of Hart's example and analysis is, however, that they do not prove enough. Hart's basic error is that he thinks of natural law theories as asserting that 'morally good' is identical with 'law.' But, as we have seen in Chapter III, the natural law theory of Aquinas does not maintain such an extreme position. Also, in answer to Hart, we can refer to the kind of natural law theory which I have formulated, which asserts that acts (including statutes) mala in se are against the natural law and, therefore, illegal. In the above-mentioned case of the woman in Nazi Germany, we might view the statute making the speaking against Hitler a crime as merely immoral, but not mala in se. With such a characterization of the statute, it would be (according to my theory) a morally wrong statute but, nevertheless, a law.

Another problem with Hart's example and with criticisms of natural law in general, is that they emphasize the nullifying effect of natural law theory on legislative enactments which are procedurally correct, but ignore or minimize the role of natural law theory in relation to non-legislative acts. Consider the attempted genocide in Nazi Germany. There were no state laws against the atrocities. Hart formulates the decision as whether to punish or make a retroactive
criminal law. But I insist that the decision is whether to prosecute under a retroactive criminal law, or to prosecute under the natural law.

Let us now turn to the third part of Hart's critique of natural law—his acceptance of a minimum content of natural law. The minimum content of natural law is based on certain truisms about the present nature of man and his environment. The facts of man's nature and his environment are contingent, hence these truisms are not necessary truths. (Hart speaks of their "natural necessity.") The truisms are: human vulnerability; approximate mental and physical equality among men; limited altruism of men; limited resources; and, limited understanding and strength of will of men. These truisms are reasons for the following kinds of laws: restricting violence against one another; mutual forbearances and compromise; mutual forbearances; the institution of property; and, sanctions. These kinds of laws correspond with the above-mentioned truisms. Hart acknowledges that the minimum content of natural law allows for a highly immoral legal system—e.g., one including slavery. Although Hart sometimes speaks of the minimum content being conditional upon the goal of survival, he also states that "We are committed to it [survival] as something presupposed by the terms of the discussion; for our concern is with social arrangements for continued existence, not with those of a
s u icid e  club. " The point of the minimum content analysis, accord­
ing to Hart, is that it indicates a certain overlap between law and
morality. The problem with natural law theory, argues Hart, is
that it pushes the moral content beyond this "humble minimum." In
view of Hart's admission that his system is consistent with the exist­
ence of highly immoral laws, I think that it is neither a minimum
content nor a humble minimum content of natural law.

Let us summarize briefly our discussion of Hart. We have
accepted his criticisms of the truth of natural law theories being
deducible from the falsity of psoitivism. These criticisms do not,
of course, establish the falsity of natural law theories. We have re­
jected his factual claim that the sense that the last resort for obedience
may lie outside the official system, is best kept alive by the separa­
tion of law and morality. We have shown that the broader view (which
separates law and morality) is not more intellectually honest or help­
ful than the narrow (natural law) view, and have shown some practical
advantages in the narrower view. Hart's minimum content theory is
accepted as true, but almost vacuous. Throughout, we have tried
to emphasize that Hart's criticisms of natural law theory are mis­
directed. They are applicable only against a certain kind of natural
law theory---one which asserts an identity relation between law and
morality.
Let us now consider Hart's theory in relation to our special criterion--the Nuremberg Trials. For Hart, a theory (i.e., a natural law theory) which makes certain laws invalid obscures any moral issues which might relate to such laws. Also, since law is a social phenomenon, no immoral acts are necessarily illegal. (We may recall that Hart admitted the legal validity of laws providing for slavery.) For Hart, then, the Nuremberg Charter is clearly ex post facto law. Whether or not Hart would regard the Nuremberg Charter as a morally justifiable use of ex post facto law is not relevant to the purpose of this paper. What we want to point out is that the legal solution available to Hart--concerning our special criterion--is inferior to a natural law approach because Hart must resort to ex post facto law.
NOTES
Chapter V

1 Austin, at 13-14.

2 Ibid. at 4.

3 Ibid. at 134.

4 Ibid. at 19.

5 Ibid. at 132.

6 Ibid. at 193-194.

7 Ibid. at 152.

8 Ibid. at 153.

9 Ibid. at 31.

10 Ibid. 104.

11 Ibid. at 115.

12 Ibid. at 53.

13 Ibid.

14 Ibid. at 107.

15 Ibid. at 129.

16 Ibid at 177.
17 Ibid. at 373.

18 Ibid. at 178-179.

19 Ibid. at 101.

20 Ibid.

21 Ibid. at 27.


24 Ibid. at 197.

25 Hart, supra note 22.


27 Hart, op. cit. supra note 23, at 91.

28 Ibid. at 92.

29 Ibid. at 94.

30 Ibid. at 206.

31 Ibid. at 182.

32 Ibid. at 188.
CHAPTER VI

CONCLUSION

In this chapter, I would first like to consider the general significance of the theories which we have examined, in relation to our problem of providing a legal basis for the Nuremberg Trials. Secondly, I would like to consider certain philosophical and legal aspects of the natural law theory which I have formulated (see supra, p. 6).

We have shown that, for Aquinas, the fundamental criminal laws are primary precepts and, as such, are immutable, not subject to dispensation and self evident. Also, they date from the creation of man. The kind of self-evidence associated with the fundamental criminal laws is that of being immediately known by all men. I shall refer to this kind of self-evidence as the First Kind of Self-Evidence. I think that Aquinas has provided a good epistemological basis for the moral quality of the fundamental criminal laws. The acts to which fundamental criminal laws refer are known universally to be morally wrong, and are also legally wrong. The self-evidence of the moral obligatoriness of the fundamental criminal laws leads us to reject Aquinas' view that all moral duties are derivative--that

155
their obligatoriness is in relation to some end. The First Kind of Self-Evidence contained in Aquinas' natural theory is somewhat different from that contained in the natural law theory which I have suggested (see supra, p. 6). In Aquinas, the First Kind of Self-Evidence is in relation to kinds of acts, whereas in my theory the First Kind of Self-Evidence is in relation to particular acts.

I think that the fundamental criminal laws also possess another kind of self-evidence. The reason or evidence for their moral obligatoriness is contained within them--no extrinsic evidence is required. I shall refer to this kind of self-evidence as the Second Kind of Self-Evidence. Given this second kind of self-evidence, it follows that no justification of these laws, as moral precepts, is required in terms of the nature of man or his natural inclinations.

In Blackstone, we found in the criminal law concept of acts mala in se a specifically legal concept whose content is identical with part (a subclass) of the primary precepts in Aquinas. (It will be recalled that, in Aquinas, all fundamental criminal laws are primary precepts, but not all primary precepts are criminal laws.) By definition, acts mala in se possess the Second Kind of Self-Evidence. Also, Blackstone refers to their intrinsic wrongness. Although Blackstone does not discuss the First Kind of Self-Evidence, we can conclude from our discussion of Aquinas that acts mala in se
also possess the First Kind of Self-Evidence. For Blackstone, the natural law prohibition against acts mala in se is universal and is legally as well as morally binding without exception. We saw the same view in Aquinas in relation to the primary precepts of the natural law. In both Aquinas and Blackstone, we have a legally binding natural law which prohibits acts contained in the fundamental criminal laws.

In Devlin, we saw two conflicting elements: a shared morality as the only kind of morality which the law can justifiably embody, and the acceptance of crimes mala in se (which are part of objective morality). We have rejected that part of Devlin's theory which justifies the legal power of any shared morality so long as it is characterized by public intolerance, indignation and disgust. We reject Devlin's theory of shared morality because it can provide a legal justification for the Nazi laws. Furthermore, since shared morality is a society-bound concept, it cannot provide a moral justification for international law. But we have shown that the trial of the Nazi war criminals is morally justifiable and that such a trial requires international law. We accept Devlin's characterization of crimes mala in se as "...offences against the moral law."¹ We understand 'against the moral law' to mean 'objectively wrong.'

We have shown that Austin's "command theory" of law pro-
vides at best an *ex post facto* legal justification for the Nuremberg Trials. We may recall that, for Austin, in case of conflict between the Divine Law and positive law, the former should be obeyed. But even assuming that the acts referred to in the Nuremberg Charter are prohibited by Divine Law, the Divine imperative not to commit such acts does not provide a legal basis for the Nuremberg Trials. The issue of the legal adequacy of regarding Nuremberg as *ex post facto* law can best be examined in relation to Hart.

We may recall that, for Hart, we must first decide the moral question of whether or not to punish the Nazis. Given a positive answer to that question, Hart insists that we proceed on the basis of *ex post facto* law. I have asserted that there is no moral question of whether or not the Nazi leaders should be held accountable. Both Hart and I agree that punishment should be pursuant to a trial. But even given the moral imperative to hold accountable the Nazi leaders by means of a trial, we are still left with the questions: Why not proceed by the use of *ex post facto* law, and, Why is a natural law solution preferable to a solution in terms of *ex post facto* law?

Whether we proceed by *ex post facto* law or natural law, the effect in the particular case of the Nuremberg Trials will be the same. But in assessing the merits of a solution in terms of *ex post facto* law, we must not restrict our vision to the needs of this particu-
lar. Case. The rule against *ex post facto* laws in the Constitution of the United States is an absolute rule and reflects the historical abuse of *ex post facto* laws. (Of course, the American law provision against *ex post facto* laws does not preclude *ex post facto* law in international law.) The danger involved in the use of *ex post facto* laws, as shown by history, is so great that we dare not make any inroads into that area.

We might now ask, Does not a natural law solution (concerning the problem of how to try the Nazi leaders) provide an area for abuse in the same way as a solution in terms of *ex post facto* laws? Will not the lawmakers or prosecutors create their own "awarenesses" of acts *mala in se*? Within the area of law, these questions are clearly answered in the negative. Our natural law solution is in terms of acts *mala in se*. There is already abundant legal precedent defining acts *mala in se*. Although *mala in se* and *mala prohibita* were classifications within the category of misdemeanors at common law, the American view is as follows:

Crimes have been divided according to their nature into crimes *mala in se* and crimes *mala prohibita*; the former class comprises those acts which are immoral or wrong in themselves, or naturally evil, such as murder, rape, arson, burglary, and larceny, breach of the peace, forgery, and the like, ....

Also, unlike *ex post facto* laws, there is no historical abuse of crimes *mala in se*. There has been no extension of *mala in se* to acts other than those obviously involving extreme moral turpitude.

Aside from the objection to *ex post facto* laws based on the
abuse of such laws by the lawmaker, we have already noted above
(see supra, p. 7) an objection to ex post facto laws in terms of respon-
sibility for the commission of crimes. The two objections are
actually one, in the sense that they are two different aspects of the
same situation. From the aspect of responsibility for the commission
of a crime, we have noted that a person should not be punishable for
an act which he could not have known was seriously morally wrong
or legally wrong at the time of committing it. I use 'morally or
legally' because certain misdemeanors--e.g., certain traffic viola-
tions--contain no moral element. In other words, crimes mala
prohibita are a legitimate part of the criminal law. In asserting
that the agent's knowledge of the wrongness of an extremely immoral
act, while committing such act, is sufficient for holding the agent
legally punishable, I am not asserting that the act need not be prohibit-
ed by the criminal law at time T (the time the act was committed).
Part of the merit of a natural law theory is that an extremely morally
wrong act is also a legally wrong act. I am asserting that the
agent's knowledge of the wrongness of the act (at the time of committ-
ing the act) is a sufficient condition for holding him legally punishable.
In relation to state law, ignorance of the law is no defense. Since
state law is promulgated, the fairness of such a policy is not seriously
questioned. The natural law, however, may not be promulgated--
although it usually is. (Acts mala in se are usually prohibited by statutory law.) In fact, as we saw in the case of Nazi Germany, the promulgated law may be contrary to the natural law. But part of the legal significance of the Nazi atrocities, which I have argued for in this dissertation, is that we are morally justified in holding the Nazi leaders legally punishable for their great moral wrongs. We are justified in holding persons legally punishable for committing crimes mala in se because, whether promulgated by human law or not, such actions are universally known to be morally wrong. As a further justification (other than the Nazi atrocities) for holding persons legally punishable for crimes mala in se whether promulgated by human law or not, let us consider the following hypothetical case. Suppose the premeditated killing by one astronaut of another, on the moon. Shall we say that since there is at present no statutory law whose jurisdiction extends to the moon that such a killing is not legally punishable? As to the other parts of international law (other than acts mala in se), ignorance of the law is no defense because they are either promulgated in international agreements or known as customs. Of course, since acts mala in se are prohibited by international law, any and all state laws (e.g., German law) are superseded. "From the point of view of international law, municipal law and acts under municipal law are of a purely factual
character. As such, they either conform or are contrary to international law. 3 "...municipal law which is contrary to international law cannot be pleaded before an international court as an excuse for the non-fulfillment by a State of its obligations under international law." 4

At this point let us try to clarify the knowledge involved in knowing that an act is mala in se. Although Aquinas maintains that the primary precepts (which, as we have shown, include the fundamental criminal laws) cannot be blotted from the hearts of men, he does allow for the possibility of lack of knowledge in the application of such precepts to particular actions. For Aquinas, a lack of knowledge (concerning moral wrongness) in particular circumstances can be accounted for by evil habits, etc. But, contra to Aquinas, in the natural law theory which I have formulated, we shall allow for the lack of knowledge of moral wrongness in relation to acts mala in se (on the part of the agent) if and only if the agent is insane at the time of committing the act.

For the definition of insanity, we shall accept M'Naghten's Case. 5

'To establish a defense 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, if he did know it, that he did not know he was doing what was wrong.'

Perkins gives the following analysis of M'Naghten:

Four points stand out and should be understood whenever reference to M'Naghten is made other than in regard to procedure.

(1) It applies only in case of 'a defect of reason, from disease of the mind' and without this the following do not apply except that 'disease' as so used will be interpreted to include congenital defect or traumatic injury.

(2) If, because of this 'defect of reason,' the defendant did not know what he was doing he is not guilty of crime.

(3) Even if the defendant knew what he was doing he is not guilty of crime if, because of this 'defect of reason,' he did not know he was doing wrong.

(4) If the defendant acted under an insane delusion, and was not otherwise insane, his accountability to the criminal law is the same as if the facts were as they seemed to him to be.

Let us now relate M'Naghten's definition of insanity to crimes in general and to the Nazi atrocities in particular. We should note, initially, that insanity is an affirmative defense. The burden is upon the defendant to prove that he was insane at the time of committing the crime, with which he is charged; the burden is not upon the prosecution to prove that the defendant was sane. Given M'Naghten's definition of insanity, the burden is upon the defendant to prove that at the time of committing the crime he did not know that what he was doing was wrong. The legal aspect of our natural law theory presents no special problems in relation to knowing the wrongness of acts mala
in se. In our theory, the natural law prohibits acts mala in se, and is part of international criminal law. We have noted that acts mala in se do, in fact, have their correlates in the criminal law enumeration of crimes mala in se. Since the lack of knowledge of the wrongness of the act at the time of committing it is an affirmative defense, we do not need to prove—for legal purposes—that the Nazi leaders knew that what they were doing was mala in se. They must prove that they did not know what they were doing was wrong.

The distinction of statutory and non-statutory crimes is not relevant to the legal issue of insanity. Since ignorance of the law is no defense, in allowing for the defense of insanity in relation to statutory crimes, the sense of 'wrong' in M'Naghten clearly refers to a moral or non-legal kind of wrongness. Furthermore, neither the belief in the absolute moral obligatoriness of orders by a military superior, nor delusions concerning the nature of Jews is sufficient to establish insanity under M'Naghten.

From the epistemological point of view, there may be some lingering doubts. We have employed mala in se as a substitute for statutory criminal law. It may be argued that, to justify this substitution, we must show that sane persons are aware both of the wrongness of acts mala in se, and that acts mala in se are absolutely prohibited. We may give two answers to this criticism. First, as shown
above, the burden is upon the defendant to show that he did not know, at the time of committing the crime, that what he was doing was wrong. Second, we can give a positive account of knowledge of acts mala in se on the part of the Nazi leaders—an account which is sufficient for holding persons criminally responsible and, therefore, morally responsible (see supra, p. 6).

The Nazi leaders knew that killing, torturing and enslaving other persons—e.g., Jews—were acts wrong in themselves. They may have, however, believed that the moral wrongness of those acts was superseded by the duty to obey one's superiors. But such a false belief does not alter the fact of their knowing the wrongness of the acts in question. We must distinguish this case from one in which a person simply believes that what he is doing is right or permissible. If disobeying the commands of a military superior were mala in se, then we would have conflicting obligations—not to kill, enslave, etc., on the one hand, and not to disobey orders on the other. But it is clear that the act of disobeying military commands is not mala in se.

Military manuals, themselves, qualify the illegality of disobeying the command of a superior with the requirement that the command be a lawful command. Thus, for example, Taylor quotes the current (1956) Department of the Army Field Manual FM 27-10, The Law of Land Warfare, "...it must be borne in mind
that members of the armed forces are bound to obey only lawful
orders.7 Also, consider the following quote by Taylor, from the
same Manual, concerning the relation between international law and
military commands: "The fact that the law of war [international
law] has been violated pursuant to an order of a superior authority,
whether military or civil, does not deprive the act in question of its
character of a war crime,...."8 The British Army Act 1955 contains
the following: "Lawful command. The command must not be contrary
to English or international law...."9 The belief that military
commands are always legally binding is false, and the Calley case has
clearly shown that the criminal nature of action pursuant to such a
belief is not affected by such a belief.
NOTES

Chapter VI

1 Devlin, at 32, n. 2.


3 1 Schwarzenberger, International Law 614 (1957).

4 Ibid. at 69.

5 Perkins at 859.

6 Ibid.


8 Ibid.

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