

Brigham Young University Journal of Public Law

Volume 4 | Issue 1

Article 3

3-1-1990

Are Law and Morality Distinct?

William A. Edmundson

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

William A. Edmundson, *Are Law and Morality Distinct?*, 4 BYU J. Pub. L. 33 (1990).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol4/iss1/3>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Are Law and Morality Distinct?

William A. Edmundson*

I. INTRODUCTION

The relation of law and morality is difficult to define, but is of great importance. The relation is often treated as a conceptual one, and discussion of it raises troubling issues such as whether the law can ever require what is morally repugnant, or whether there is any moral requirement to obey the law simply because it is the law. These conceptual issues are important, but are separable from the one I want to explore here, which is whether there can be valid moral requirements that cannot validly be made requirements of law. The issue I want to examine is not so much one about what “law” and “morality” mean as it is about turf — is there (can there be) any department of conduct that morality claims as exclusively its own, and which the law has no business penetrating? The view that there are some moral wrongs that the law cannot properly right is tacitly and sometimes explicitly assumed by many participants in the ever-intensifying debate about privacy.¹

In what follows I will use the term “strongly delegalized moral requirements” to refer to the putative class of moral requirements that are forbidden by morality itself to become legal requirements. Some moral requirements may be only “weakly” delegalized because the moral requirements that “delegalize” them do so only contingently. For example, utilitarian moral concerns might delegalize a certain moral requirement if the social costs of legal enforcement outweighed the benefits. In such a case, the requirement in question would be delegalized but only weakly so, because a shift in the balance of costs and benefits

* Assistant Professor of Law, The University of Mississippi School of Law. Antioch College, B.A.; University of California, Berkeley, Ph.D.; Duke University, J.D. Thanks are due to James Peterman and Michael Hoffheimer, for their suggestions, and to Bonnie Steinbock and Ferdie Schoenman, for their provocations. Each is blameless for my errors.

1. The landmarks of the constitutional progress of this debate are *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973) and *Bowers v. Hardwick*, 478 U.S. 186 (1986). For recent discussion of the underlying issues, see Symposium, *Law, Community, and Moral Reasoning*, 77 CALIF. L. REV. 475 (1989). For a vivid characterization of competing viewpoints and the breadth of issues at stake, see P. Carrington, *A Senate of Five: An Essay on Sexuality and the Law*, 23 GA. L. REV. 859 (1989).

is always possible and would remove the barrier of delegalization. Strongly delegalized moral requirements, on the other hand, are those whose delegalization is a matter of principle, rather than of policy.²

Liberals and libertarians have a forensic if not a theoretical stake in defending the view that strongly delegalized moral requirements exist. Liberalism holds that individual liberty is a paramount value, and that legal curtailment of an individual's liberty to act is morally justified only if her conduct might cause harm to others, or produce undesirable consequences of other kinds. A liberal need not claim that delegalized moral requirements exist, or are possible, for a liberal might hold that nothing can be a *moral* requirement unless harm to others, or some other consequentialist concern, so warrants. A liberal might, in other words, hold what Joel Feinberg calls a "perfect coincidence" view, according to which something like a Millian harm principle defines the territory of both the moral and the permissibly legal.³ The perfect coincidence view entails that strongly delegalized moral requirements do not exist.

Many liberals (but, as I point out below, not Mill himself) reject the perfect coincidence view. They are reluctant to claim that their principles circumscribe morality as well as law because to do so extends the territory they must defend and thus tends to diminish the overall

2. For an elaboration of the distinction between "policy" and "principle" see R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 22-28, 90-100 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*]. In this discussion, I will mean by "law" the set of all legal requirements (existing in one place at a time) and by "morality" the set of all moral requirements (existing at that place at that time). Legal and moral requirements are distinguishable by the fact that there are state-maintained mechanisms for enforcing the former, but not necessarily the latter, type of requirement. As the discussion in section V., *infra*, makes evident, membership in the category of legal requirement is broader than what might at first appear. The term "moral requirement" is meant roughly to invoke what Lon Fuller has called "the morality of duty," as contrasted to "the morality of aspiration." See L. FULLER, *THE MORALITY OF LAW* 5-6 (rev. ed. 1969).

3. See J. FEINBERG, *HARMLESS WRONGDOING* at 124-25 (1988). Feinberg himself rejects the "perfect coincidence" view, *see id.* at 153-54, but many liberals do not. For example, Dworkin apparently does not, *see TAKING RIGHTS SERIOUSLY* at 253, and Anthony Woodzley certainly does not, *see "Law and the Legislation of Morality"* in *ETHICS IN HARD TIMES* (A. Caplan & D. Callahan, eds. 1981). Other authors have expressed skepticism about the general project of dividing morality into a part that may permissibly be legally enforced and a part that cannot. *See* Nagel, *The Enforcement of Morals*, *HUMANIST*, May/June 1968 at 18-27; M. GOLDING, *PHILOSOPHY OF LAW* at 67 (1975). A point made by both Dworkin and Woodzley is that counting something as a genuine moral requirement presupposes the existence of supporting reasons, and that these reasons in the absence of some bar might quite legitimately be weighed by a legislature. This point is not decisive, however, for the existence of such a bar remains a possibility—one which might be explained, e.g., in terms of Razian "exclusionary reasons." *See* J. RAZ, *THE AUTHORITY OF LAW* 16-17 (1979). My overall argument is designed to show that the existence of such a bar would be incompatible with the existence of the range of morally permissible forms of social enforcement which, I claim in section III, attach to any genuine moral requirement.

plausibility of their view. To convince a popular audience,⁴ it is more effective to say, for example, that consensual sado-masochism is morally wrong *but* beyond the law's proper reach, than to say that it is morally permissible and *therefore* beyond the law's proper reach.⁵ Consequently, some liberals (explicitly or otherwise) take the position that there exist strongly delegatized moral requirements, and what I would like to explore is the question: What account can be given of such requirements?

I will argue that no one can convincingly maintain that something is a moral requirement unless she is willing to recognize a range of morally permissible measures designed to correct individual failures to observe that requirement. One who believes that strongly delegatized moral requirements are possible has to give an account not only of how such requirements arise and find rational support, but also of the range of morally permissible, nonlegal corrective measures that must be associated with them. It is unclear how a liberal, for example, can give the first sort of account because such an account will have to be congenial to the priority of liberty and the harm principle, and yet not so congenial that the requirement in question is legalizable. But even if such an account can be given, the liberal will find it difficult to give a plausible account of the contours of morally permissible, necessarily non-legal correction.

In particular, I will argue that on Mill's account of social enforcement a less oppressive legal corrective is always conceivable, and that therefore the question whether the values of individual liberty and autonomy are better served by legal or by non-legal correction is always to be decided according to the particulars of the case. I conclude, then, that liberals (and everyone else) ought to accept the "perfect coincidence" view. But accepting this conclusion is not costless; for, when

4. Michael J. Sandel has recently distinguished "naive" and "sophisticated" types of argument for, or against, morals legislation. See Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521 (1989). According to Sandel, naive arguments "hold[] that the justice of laws depends on the moral worth of the conduct they prohibit or protect," while sophisticated arguments "bracket" substantive moral issues and invoke "a more general theory about the respective claims of majority rule and individual rights. . . ." *Id.* For sophisticated advocates of such legislation, bracketing means letting the majority decide; for sophisticated opponents, it means letting the individual decide. Each of these adversaries appeals to a "more general theory" to support its favored decisionmaker. One central point of the present article, expressed in Sandelian terms, is that the "more general theory" that sophisticated liberals invoke often involves an implicit or explicit denial of the perfect coincidence view.

5. According to a recent The New York Times/CBS News Poll, 68% of 978 adults polled "say that even in cases where they might think abortion is wrong, the government has no business preventing a woman from having an abortion." And 35% of "those who say abortion is murder and never the best course, even in a bad situation [20% of all respondents]" also say that preventing abortion is "no business" of the state. See The N.Y. Times, Aug. 3, 1989, at 10, col. 1.

specific issues of morals legislation arise, the "perfect coincidence" view requires those taking a liberal position to face the potentially awkward dilemma of having either to contradict popular moral notions or to admit that their opposition to legal enforcement is based only on grounds of policy, not of moral principle.

Because Mill is such a central figure in the liberal tradition, it will be illuminating first to explore his view.

II. MILL'S VIEW

The idea that there is an area of morality that is "not the law's business"⁶ is usually traced to Mill. Mill does, in the Introduction to *On Liberty*, speak of "rules of conduct . . . imposed . . . by opinion . . . which are not fit subjects for the operation of law,"⁷ and of "a legitimate sphere of legal control"⁸ and to "what things are fit to be done by a government."⁹ And, in the fourth chapter, Mill distinguishes a category of conduct which, though "hurtful to others or wanting in due consideration for their welfare" does not violate "any of their constituted rights," in which case "[t]he offender may then be justly punished by opinion, though not by law."¹⁰ These passages suggest that Mill's view was that delegalized—and perhaps strongly delegalized—moral requirements indeed exist. But Mill generally argues that the "harm" principle defines not only a limit beyond which law may not pass, but also a limit to morality, so the issue requires investigating.

Mill divides personal faults into two categories. Members of the first concern the actor's "own good" but do not affect the interests of others, and therefore never merit social punishment although they may occasion the "disagreeable consequence" that others in their liberty may shun the actor's company, hold him in disesteem, and pass him over in the distribution of "optional good offices" not tending to his self-improvement.¹¹ Into this category Mill places folly, "lowness or depravation of taste," rashness, obstinacy, self-conceit, immoderation, self-indulgence and cupidity.¹² Mill adds that these "are not properly immoralities and, to whatever pitch they may be carried, do not consti-

6. This indelible phrase appears in paragraph 257 of the REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (CMD 247) (1957), commonly known as the WOLFENDEN REPORT.

7. JOHN STUART MILL, *ON LIBERTY* at 8 (C. Shields, ed. 1956) [hereinafter *ON LIBERTY*].

8. *Id.* at 12.

9. *Id.*

10. *Id.* at 91-92.

11. *Id.* at 94.

12. *Id.*

tute wickedness."¹³ To fit Mill's claim into the terminology I am using, doing what is for one's own good is never *per se* morally required.

Faults of the second category affect others, and are "fit objects of moral reprobation and, in grave cases, of moral retribution and punishment."¹⁴ To this category belong rights violations, unjustified injury and "unfair or ungenerous use of advantages over [others]; even selfish abstinence from defending them from injury."¹⁵ Dispositions to such conduct—such as cruelty, malice, envy, insincerity, irascibility, greed and self-conceit—are also "properly immoral and fit subjects of disapprobation which may rise to abhorrence."¹⁶ But nothing is "socially obligatory unless circumstances render [it] at the same time [a] dut[y] to others."¹⁷ In other words, "moral disapprobation in the proper sense of the term" is appropriate only where conduct "violate[s] a distinct and assignable obligation to any other person."¹⁸ Mill's puzzling summary is this: "Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law."¹⁹

The disjunction, "morality *or* law," suggests that Mill felt these provinces to be distinct, but he gives no indication that different principles should operate in the two provinces, and every indication that in each province the decision, whether to sanction conduct and to what degree, is governed by the answer to the general question "whether the general welfare will or will not be promoted by interfering with it. . . ." ²⁰ Mill makes it nearly certain that his view does not recognize strongly delegatized moral requirements, when, in the concluding chapter of *On Liberty*, he states the maxim that: "for such actions as are prejudicial to the interests of others, the individual is accountable and may be subject either to social or to legal punishment *if society is of the opinion that the one or the other is requisite for its protection.*"²¹

In Mill's view the choice of remedies requires a calculation and comparison of the expected utilities of the available means and agencies. Once the harm principle justifies a sanction, Mill gives no hint

13. *Id.* at 96. Although Mill believed most strenuously in the virtue of self-improvement, he seems uncomfortable with the terms "duties to ourselves" and "duty to oneself." See *id.*

14. *Id.* at 95.

15. *Id.*

16. *Id.*

17. *Id.* at 96.

18. *Id.* at 99. The existence of "a distinct and assignable obligation" to another is not, for Mill, a *necessary* feature of the duties of morality in general, as distinct from the duties of justice. See J.S. MILL, *UTILITARIANISM* 304-05 (Warnock ed. 1962) [hereinafter *UTILITARIANISM*].

19. *ON LIBERTY* at 100.

20. *Id.* at 92.

21. *Id.* at 114 (emphasis added).

that any principle dictates an *a priori* preference for private as against state enforcement. Once the harm principle has been satisfied, the question of sanction is to be settled solely on grounds of utility, "the ultimate appeal on all ethical questions."²² As Mill put it in his "Introduction":

If anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law or, *where legal penalties are not safely applicable*, by general disapprobation. . . . In all things which regard the external relations of the individual, he is *de jure* amenable to those whose interests are concerned, and, if need be, to society as their protector. There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expedencies of the case: either because it is a kind of case in which he is on the whole likely to act better when left to his own discretion than when controlled by any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent.²³

What, in Mill's view, distinguishes legal and merely social means of enforcing rules of conduct? He wrote:

Society can and does execute its own mandates [as opposed to those issued "by the hands of its political functionaries"]; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, *though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.*²⁴

The contrast Mill draws is multidimensional, but nonetheless one of degree. "Civil penalties" are usually (but not always) more extreme than those of "prevailing opinion and feeling," but the latter are much harder to elude, much more minutely pervasive and are much more corrosive of individual personality.²⁵ No wonder that Mill repeatedly announces that he intends his "one very simple principle" to set a limit to both legal and social control of the individual.²⁶

Strongly delegalized moral requirements seem possible because the characteristics of being a legal requirement and of being a merely

22. *Id.* at 14.

23. *Id.* at 15 (emphasis added). Cf. UTILITARIANISM at 303.

24. ON LIBERTY at 7 (emphasis added).

25. *Id.*

26. *Id.* at 13.

moral requirement differ.²⁷ Legal requirements are coercively enforceable by some state-regulated mechanism; merely moral requirements are not necessarily coercively enforceable, although some probably are. It may be helpful to make two distinctions explicit. Any requirement of conduct may permissibly be enforced either through solely suasive (i.e., sub-coercive) means, or through coercive means such as physical compulsion and threats thereof.²⁸ This is a distinction between permissible *means* of enforcement, and it corresponds roughly to what Mill had in mind when he distinguished civil penalties and punishment "by opinion." Further, any requirement of conduct may be enforced privately only, or it may be enforced by the state. This is a distinction between permissible *agents* of enforcement, and it is one to which Mill gave less attention, for he felt that society had come in either case to be the ultimate agent of enforcement.

The two distinctions cut across each other and, for any requirement of conduct, create four possibilities: A requirement may be privately suavisely enforceable, suavisely enforceable by the state, privately coercively enforceable, or coercively enforceable by the state. A further division within the category of the state's coercive means must be noted, *viz.*, between regulatory and criminal coercive measures. A map of the resulting territory looks like this:

		AGENTS	
		Private	State
MEANS	Suasive		
	Coercive		Regulatory Criminal

27. According to Louis Schwartz, co-author, with Herbert Wechsler, of the MODEL PENAL CODE OF THE AMERICAN LAW INSTITUTE, "Moral demands on human behavior can be higher than those of the criminal law precisely because violations of those higher standards do not carry the grave consequences of penal offenses." Schwartz' observation pertained to the ALI's recommendation on abortion, and he went on to remark that, "Moreover, moral standards in this area are in a state of flux, with wide disagreement among honest and reasonable people." Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 685 (1963) (citing MODEL PENAL CODE § 207.11, comment 1 at 150-51 (Tent. Draft No. 9, 1959)). Schwartz' latter remark undermines the assumption implicit in the former that a genuine moral *demand* is at issue.

In section III, following, I will argue that nothing can be a moral requirement unless it can be located somewhere in this matrix. In section IV, I will try to show that it is implausible that the state should be barred by moral principle from employing the means of enforcement available to private actors. This is, I think, readily shown where coercive means are privately available. Where the only privately available means of enforcement are suasive, however, complications arise. These have to do with the fact that the state often cannot occupy the special roles whose occupants are in many instances the only morally allowable voices of suasion and complaint, and have also to do with the fact that in any event the state seldom confines itself to purely suasive means. Therefore, in section V, I try to show that from a Millian standpoint the moral grounds that justify private suasive enforcement also justify some form of state regulatory enforcement. In section VI, I will argue that regulatory and criminal enforcement cannot be distinguished in any way that would enable one to hold that there are moral requirements which the state may enforce by regulation but not by criminalization.

III. ARE UNENFORCEABLE MORAL REQUIREMENTS POSSIBLE?

It is typically true of moral requirements that transgressions will create in some other person a grievance; but this is not always true.²⁹ Invariably, however, a moral requirement incumbent on a given person carries with it a moral permission of some sort, on someone's part, to persuade that person to comply, and also carries with it a moral permission on someone's part to remonstrate if the requirement is not observed. If some such morally permissible persuasion and chastisement were not carried along, I think it would be false to suppose that the relevant moral requirement existed.³⁰

28. For the sake of simplicity of exposition I have assumed that "coercion" and "suasion" are distinguishable by reference to the presence or absence of a threat of some sort of physical compulsion. This assumption certainly requires more elaboration and defense than I am able to give here, but it will be sufficient for present purposes.

29. Mill noted the use of the terms "perfect" and "imperfect" to distinguish between duties that do and duties that do not entail a correlative individual right to compel performance. See *UTILITARIANISM* at 305. Derek Parfit, in his *REASONS AND PERSONS* 357-61 (1984) sets out a now-famous example of a wrong giving rise to no grievance. A couple know that if they have a child now there is a risk that it will have a defect, but that the risk will pass if they wait. The couple decide to have a child now rather than wait, or are careless then decide not to induce an abortion. The child is born with a handicap that a later-born child would not have had; but of course the child that is born would not exist at all had its parents followed advice. So long as the child's life is at least barely worth living, the child has no grievance against its parents for their conduct.

30. A baffling passage in Mill makes me hesitate to count him as in agreement. In *UTILITA-*

How could this not be true? The "disagreeable consequences" of being disesteemed, unrecommended, shunned and passed over might conceivably be all that morality permits to be visited upon those who omit moral requirements. But Mill thought that where morally permissible correction is so limited, what is at issue is not "social obligation" and that the correction itself does not express "moral disapprobation in the proper sense of the term." Unless a wholly self-concerning³¹ moral requirement is an intelligible possibility (which I doubt), it is difficult to understand how morality can both impose a genuine requirement of conduct and insulate the actor from the only independent means of knowing that and how her conduct varies from what is required. Working out such a hypothesis is not so very different from trying to imagine the world-view of a tribe, one of whose tabus is: Never correct what anyone says. Unless such a tribe were very lucky, its world-view would be hopelessly indeterminate even to itself.³²

I take it then that nothing can be a genuine moral requirement unless its omission is connected somehow with permissible suasion and remonstrance from sources other than the actor's conscience. Some other or others must therefore have a sufficient interest in what the

UTILITARIANISM, he wrote:

[T]he idea of a penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience.

Id. at 303-04 (emphasis added). The concluding clause involves "a step of some magnitude," as H.L.A. Hart has noted. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 106-07 (A.I. Melden ed. 1958). Here, Mill may simply be adverting to linguistic evidence rather than to his own view. Mill elsewhere opines that the "internal sanction" of conscience is "not innate, but acquired," UTILITARIANISM at 283, which suggests that he would have agreed that punishment by conscience is parasitic upon punishment by opinion. Mill may in fact have regarded the view I state here as too weak; for he seems to have believed that the performance of any genuine moral duty is compellable or, at least, that a person under a moral duty has no right to complain if she is compelled. See *id.* at 304. I would not go so far.

31. I use the term "self-concerning duty" rather than the more familiar term, "self-regarding duty" because the latter invites confusion. Clarity is served by replacing the latter with a pair of terms: a "self-concerning" duty is one whose omissions legitimately concerns no one other than the agent who is bound; a "self-directed" duty is one having as its aim the improvement of the actor or her lot, whether ultimately or as a means to an improved world, and whose omissions create no correlative grievance in any other person. The two concepts are distinct because others may have a legitimate concern even if none have a grievance. See note 29, *supra*, for an example. See generally Falk, *Morality, Self, and Others*, in *MORALITY AND THE LANGUAGE OF CONDUCT* 25 (H.-N. Castañeda & G. Nakhnikian, eds. 1965) [hereinafter Falk]. The terminology proposed here makes it obvious that the existence of self-directed duties in no way guarantees that self-concerning duties exist.

32. This point echoes others made by philosophers as diverse as L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 94e-100e (B. McGuinness, trans. 3d ed. 1958), and G.W.F. HEGEL, *PHENOMENOLOGY OF MIND* at 149-60 (J.B. Baillie, trans., rev. ed. 1931).

actor does to have a right to tell her what they think. Moreover, the suasion and remonstrance must be of a recognizably moral strain—they must be consistent with the assumption that they are licensed by the fact that a moral requirement of the actor is at issue. Therefore the “sufficient interest” on the others’ part has to be understood as restricted to a subset of their legitimate interests, i.e., to those interests that are implicated because the actor’s performance of some moral *requirement* is at stake. “Sufficient interest” does not encompass the larger set of legitimate interests containing what would suit the others’ preferences on some other ground, or what would comport with the others’ notions of what would merely be *commendable*.

An example: suppose I am walking down the street and pass a blind man. He has dropped his cane and is groping for it. Although it would cost me nothing to help him, I step around him and over his cane and proceed on my way. I was observed at a distance by a person whom I now pass. If I was morally required to give assistance (as I think I obviously was) and the facts of the situation are evident to the onlooker, I think the onlooker is entitled to say something like this: “I saw what you did. It was rotten of you not to help. How would you like it if you were in his shoes? (or “What if everybody were as callous as you?”).” Even if there is something amounting to a presumptive moral requirement not to offer unwelcome comment to strangers on the street, the onlooker acts properly if, but only if, the interest he takes is in my inexcusable omission of a moral requirement. He would, on the other hand, be a merely officious intermeddler if he were to say, “I saw what you did and I just didn’t like it. It didn’t please me at all. . .” or “Excuse me, but what you just did was hardly commendable. I don’t mean that sarcastically, because I don’t think you were morally required to do otherwise. You were, in fact, morally free to do what you did—but I don’t commend you for it.”

I conclude that no moral requirement can exist outside a space of social enforcement. Wrongdoers sometimes manage to evade detection (think of the ring of Gyges in *The Republic*), but even so they violate a moral requirement just in case their conduct is of a type that is subject to social correction when detected. Of course there are limits to permissible private suasion and chastisement, particularly where it is less than obvious what morality requires or whether a moral requirement is at issue. As David Falk put the point, “To say ‘you ought to’ to another is always a kind of interference; and the propriety of *saying so* (as distinct from having a judgment about it) varies with the case.”³³ For example,

33. Falk, *supra* note 31 at 56 (emphasis in original).

even those who think it obvious that a pregnant woman is morally required to take care to avoid doing harm to her unborn child would admit that they are constrained from offering unsolicited advice to her about her smoking or drinking.³⁴ In a case like this, comment can properly come only from those who are specially related to her —parent, sibling, child, doctor, spouse, lover or a close-enough friend. In the event that it is evident that no such person exists, or that such persons are unwilling to give counsel, then it seems less presumptuous of a stranger to comment.

The existence of moral limits to permissible means of enforcement raises the question whether, within those limits, there is an additional moral limit that debars the state from employing the very same means available to some private person. This question is the subject of the following section.

IV. ARE THERE MORAL REQUIREMENTS WHOSE PERMISSIBLE MEANS OF ENFORCEMENT ARE NOT AVAILABLE TO THE STATE?

Some moral requirements are coercively enforceable by suitably situated private persons. The law is shaped by a recognition that in some instances what would otherwise be a battery, or worse, is justifiable by the fact that the would-be defendant acted to enforce a moral requirement, e.g., the moral requirement that the would-be complainant refrain from violating the defendant's moral right to bodily integrity or property. This is sometimes explained by reference to what would be permissible in a state of nature. However we regard the matter, there are, I think, very few instances of privately coercively enforceable moral requirements that are not permissibly legally coercively enforceable. Here is a possible example: suppose that all children are morally required to obey their parents' reasonable bedtime rules, and suppose that this requirement is coercively enforceable by the parents. It could be argued that this requirement is strongly delegatized because legal intervention would violate moral principles that protect the integrity of the family.

This example would be worrisome if it presented a genuine example of a moral *requirement*, but I don't think it does. Children are relatively deficient in knowledge and judgment. This is why their parents are entitled to make special rules for them until they are of "suitable age and discretion." But this very same immaturity makes it odd to say that children are morally required to follow these rules; a child does not breach a duty or ignore a moral obligation when it ignores

34. I owe this example to Ferdie Schoenman.

them. Not everything that is permissibly coercively enforceable is a *moral* requirement incumbent upon the person who may permissibly be coerced.

I can think of no significantly different examples, and so I conclude that any moral requirement that is coercively enforceable by a private person is permissibly enforceable by legal coercive means. The law exists, after all, to eliminate the hazards of a regime of private coercion, and the law achieves this end by presuming largely to monopolize the permissible means of coercive enforcement, as Hobbes and Locke explain. There are in fact many moral requirements that the state and *only the state* may permissibly enforce by coercion, e.g., paying taxes, ceasing public nuisances.

Many moral requirements are not coercively enforceable by any private person. The blind man example above is a probable instance. The onlooker may permissibly chastise me, but he cannot lay hands on me, drag me back and force me to retrieve the blind man's cane. The question then becomes, are there suasive means of enforcement that the state may not permissibly pursue, even though some private person may? It seems to me that there are not, but the issue is obscured by the fact that the state rarely is in a position to offer personalized moral advice, and it seldom contents itself with doing so. Because the state cannot in principle occupy certain roles, such as spouse, parent or friend, its morally permissible suasive efforts seem to be seriously curtailed. Therefore it will be worth exploring the question: Are there moral requirements which, though subject to permissible private suasive enforcement, are not proper subjects of coercive legal enforcement?

V. MANY GRADES OF LEGAL INVOLVEMENT

Law affects conduct in multifarious ways. The paradigm instance of a legal requirement is a criminal statute that makes certain conduct punishable by imprisonment. But statutes impose fines as well as confinement, and taxes as well as fines. Paying these is a legal requirement. And the criminal law concerns not only what statutes prescribe, but also sentencing once a violation is proven. The defendant whose sentence may be enhanced for failure to show remorse after the fact is, in a perfectly natural sense, being legally required to show remorse.³⁵ And the criminal law is not the whole of the law. Civil courts order contracts to be performed, property to be handed over, money to be paid, and children to be given up by their parents. To the extent that

35. See Edmundson, *Liberalism, Legal Decisionmaking, and Morality 'As Such,'* forthcoming in 4 OXFORD J. LEGAL STUD. (1990).

helping out with the dishes and abstaining from profanity can properly affect the result in a child custody suit, there is an attenuated sense in which these things are legally required.

This messiness means that the *delegalization thesis*, that strongly delegialized moral requirements exist, can be held in various forms. A moderate form is the thesis that certain moral requirements cannot permissibly be enforced by the threat of imprisonment. An extreme form is the thesis that certain moral requirements are strongly delegialized "all the way down;" that is, certain moral requirements have no business affecting any legal outcome insofar as that outcome is coercively enforceable. I will explore the extreme and moderate views in turn.

The extreme form of the thesis is not very plausible. What facts about a moral requirement would show that its affecting any legal result would violate a moral principle, i.e., some other moral requirement? Facts about individual autonomy and integrity come to mind. Consider the man who fails to help the blind man recover his cane. He acts selfishly and in a way that merits censure, one might argue, but visiting legal consequences would impermissibly impinge upon his autonomy. This answer is unsatisfactory because it appeals to the very boundary that is at issue. Surely the man's conduct would be proper to consider in some legal contexts—such as a child custody proceeding or a parole hearing—and if considered it might very well determine the outcome.

Another example: the expectant mother who smokes and drinks despite the risks to her unborn child. A defender of the extreme view could argue that just as a stranger could not properly comment on her conduct, the state may not attach consequences to it. This position appeals to an analogy between the state and the officious intermeddler, while implicitly rejecting analogies between the state and those in special roles, such as the physician. Unless this selective use of analogy can be supported, it is question begging. Such support seems unlikely, and in any case it is implausible to suggest that the woman's conduct could not permissibly be taken into account in deciding, e.g., her fitness to be a custodial parent or her entitlement to recover damages against a tobacco company or distiller for injuries to her own health. Of course the weight such facts should be given in isolation may be slight, but it is hard to imagine a moral barrier to their being weighed at all that is not also a barrier to thinking them contrary to a moral requirement.

The extreme position is defensible only if at least one of the following two propositions is true: a) legal correction is *per se* oppressive of liberty in a way that private correction is not, or b) legal correction, though not different in kind from private correction, is in fact always more oppressive. But neither is true. Legal correction can be very mild.

The “lingering death” imposed for various offenses in imperial China stands at the opposite extreme from, for example, the \$5 parking ticket or the 5 mil sales tax. But each is an example of an exaction imposed by a legal system, a legal requirement. Moral suasion and remonstrance, on the other hand, can be very harsh. The sermon on hell in *A Portrait of the Artist as a Young Man* is a good example of the extremes to which moral suasion can be carried, and *The Scarlet Letter* of the extreme possibilities of remonstrance.³⁶ I find it difficult to believe that imposing a fine of \$5 for each failure to render aid to the blind man in circumstances like those described is *inherently* more offensive to one’s liberty, integrity or privacy than the suasion and remonstrance that is licensed in virtue of the fact that one has acted contrary to a moral requirement. A violator might well prefer to pay the \$5 and be spared the “moral reprobation . . . retribution and punishment” of which Mill spoke.

It could be argued that legal correction fails to respect the agent as an autonomous being, unlike private suasive correction, which essentially constitutes an appeal to the agent in her capacity as rational chooser. This argument proves too much if it means that the threat of legal correction precludes free choice. Anyone who has ever driven on a highway knows this to be false. Moreover, it is unclear why a criminal statute cannot be understood to be both an appeal to the citizen’s moral sense and a threat. As Mill points out, moral suasion may involve “moral reprobation . . . retribution and punishment,” without ceasing to be an appeal to us in our capacity as rational actors.

Perhaps it could be argued that although the fine may not be so oppressive as to preclude free choice, it is inherently more objectionable than suasion because the actor cannot exercise virtue—or act morally in a Kantian sense—by complying with the threat the fine represents. But this argument assumes that an actor’s conduct is morally worthy only to the extent that her choice is unaffected (consciously or otherwise) by its consequences for her. If that is so, why should it matter whether the constraining consequences are legal or merely social in nature?

Mill’s observation about social enforcement bears repeating here: although merely moral requirements are “not usually upheld by such extreme penalties” as legal requirements are, private suasive enforce-

36. Hester Prynne was of course *legally* required to wear the scarlet letter but, in itself, the letter was only marginally more burdensome than the garment to which it was sewn. The efficacy of legal punishment depended on its stimulating private means of enforcement that would in perhaps lesser degree have been used anyway. There are indications in the text that the legal punishment forestalled even more drastic private measures.

ment "leaves fewer means of escape, penetrat[es] much more deeply into the details of life, and enslav[es] the soul itself." These differences can be explained. If we consider the perceived extremity of a sanction to be equal to its actual extremity discounted by the probability the actor assigns to its occurrence, any given degree of perceived extremity can be attained either by combining a low probability of "conviction" with an extreme penalty, or by combining a higher probability of conviction with a lesser penalty. Social rather than legal enforcement may be attractive because it combines relatively low administrative costs (e.g., police, courts, etc.) with a relatively high probability of conviction. Thus, social enforcement may not only deliver a given level of perceived extremity of sanction at a lower administrative cost, it may do so by employing less extreme penalties.³⁷

Mill points out that private suasive correction is not only intrusive, it can erode the spontaneity of individual choice more surely and more extensively than any concern on the agent's part to avoid mild or remote legal consequences. There are of course moral and even legal limits to the extent and nature of suasive correction. Official intermeddling is morally impermissible, and suasion or remonstrance that lapses into harangue or harassment is also impermissible. But, at least as to the latter, these limits are diffuse and wide. No matter how much we may relish abstract discussion, only the sturdiest and most self-certain of us are likely to remain unmoved and unbothered by the more strenuous forms of permissible suasion and complaint where our actual, impending or completed practical decisions are at issue.

Mill held that private suasive correction, unlike legal repression, can "enslav[e] the soul itself." We can understand this as a reminder that the boundary between self and state is much harder to confound than the boundary between soul and soulmates. Heretics, for example, so typically form subcultures in which heresy is orthodoxy that it is reasonable to view such associations as practically necessary to the very maintenance of heresy. Moreover, it is hard to imagine how an individual could, without lapsing into pathology, persevere in any course of

37. For a discussion of the dynamics of the choice between public and private enforcement through the legal system, and of the factors that govern the choice between different combinations of severity and probability to achieve a given expected cost to the criminal, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* ch. 7, 22 (3d ed. 1986). Posner argues that the problem of the insolvent defendant largely accounts for the great degree to which criminal law relies on nonpecuniary penal sanctions rather than tort remedies to achieve its ends. See *id.* at 205, 209, and *cf.* Becker & Stigler, *Law Enforcement, Malfesance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1975) (proposing that criminal prosecution be wholly private). For an historical account of a regime combining extreme penalties and private prosecution, see D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975).

conduct that was universally thought wicked, whether or not it was illegal. Pace Kant and Rawls, we are not noumenal egos. We know ourselves through our associations and our understandings of how we are as others know us.³⁸ A barrier to legal correction alone would leave the individual's identity, as well as her liberty, exposed to potentially devastating social assaults.

Following Mill, we can conceptualize every instance of social control as an ordered quadruple whose values are a severity measure, an avoidability measure, a pervasiveness measure and a measure of the effect upon individuality. These measures are comparable and additive (let's pretend) and yield a measure of the total burden upon liberty of any given means of social control. Typically, civil penalties exceed private suasive methods in the severity measure, but not in the others. On Mill's view, then, for any private suasive means of enforcement there exists a conceivable, less burdensome state-imposed coercive means. Therefore, if Mill is generally correct, there will always be a possible, state-imposed coercive means of enforcement that is less offensive, on balance, than any given private, suasive means.

Legal correction is often less intrusive than the *least intrusive* morally permissible, available form of private suasive correction. Suppose I am driving on a public highway with my young children. I am driving carelessly but cause no actual harm, and suppose my driving this way violates a moral requirement. Suppose that another private person observes my driving and perceives that it created a sufficiently great risk of harm to him to give him a moral permission to complain, to me, about it. In these circumstances the least intrusive suasive correction available to him might be something like following me, catching up with me, waving me over and complaining —politely— about my driving; in others words, doing what the nicest police officer would do in the circumstances. My suspicion is that most of us would find this considerably more galling than being cautioned or even ticketed by the police. And more than galling —humiliating, infuriating, baffling and discombobulating. In a word —intrusive.³⁹

VI. IS CRIMINAL PUNISHMENT DIFFERENT? FEINBERG'S VIEW

The extreme view seems untenable, but the moderate view may not be. The extreme view is vulnerable because it forbids any legal

38. On this subject, see generally M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

39. A popular automobile bumper-sticker reads: "Don't like my driving? Dial 1-800-EAT-SHIT." The idea behind this might be translated: "If my driving isn't bad enough to call forth legal correction, then no one has a right to complain about it."

consequence to attach to certain forms of immoral conduct. The moderate view does not forbid all legal consequences to attach, but only those of a certain type, i.e., imprisonment or corporal or capital punishment. The moderate view thus seems more reasonable; after all, imprisonment seems importantly different from other burdens that the state may impose on us. But, looking behind this appearance, what separates regulation from punishment? Unless some principled distinction between regulation and criminalization can be drawn, every example of permissible regulatory enforcement of a moral requirement is a problem for the moderate version of the delegalization thesis.

Joel Feinberg offers a principled basis for such a distinction in his essay, "The Expressive Function of Punishment."⁴⁰ According to Feinberg, punishment needs to be understood as distinct from mere penalty. Penalties include such things as "parking tickets, offside penalties, sackings, flunkings and disqualifications" while "imprisonment at hard labor for committing a felony" is an example of a punishment.⁴¹ Feinberg rejects the idea that the distinction can rest on severity alone, even though penalties typically are the less severe; and he rejects the idea that penalties can be characterized as "retroactive licensing fees" in contrast to punishments, which are not.⁴² Rather, Feinberg differentiates the genus of "authoritative deprivations for failures" —to which both punishments and penalties belong— according to an "important additional characteristic" common and peculiar to punishments.⁴³ This

40. Collected in J. FEINBERG, *DOING AND DESERVING* at 95-118 (1970) [hereinafter "*The Expressive Function*"].

41. *Id.* at 96.

42. *Id.* at 97. Robert Cooter points out that the difference between prices and sanctions (roughly, between penalties and punishments, in Feinberg's terminology) can also be understood in terms of effect. See Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). Sanctions typically increase in abrupt fashion as the actor passes from a permitted to a forbidden level of activity, whereas prices do not. If in Mill's time governments were generally more given to sanctioning than to pricing, then his observation that legal requirements are typically upheld by "more extreme penalties" can be understood as referring not only to the relative severity of legal enforcement, but also to the fact that the *abruptness* with which the law responds to incremental increases in activity level stands in contrast to the more continuous nature of social enforcement. We are capable of expressing social disapprobation in nearly continuous fashion —think of the gradually raised eyebrow— whereas legal sanctions (as opposed to prices) tend to jump at one in a more extreme-seeming (because abrupt) way.

43. "*The Expressive Function*" at 97-98. Feinberg rightly dismisses the idea that the distinction between punishments and penalties can be based on degree of severity. See *id.* at 96. In a similar vein, David Luban dismisses the idea that the law can consistently grant an indigent a right to appointed counsel in a criminal case while denying her a right to appointed counsel in civil litigation. See D. LUBAN, *LAWYERS AND JUSTICE* at 261-62 (1988). Such a difference cannot be justified, Luban argues, by appeal to any presumed primacy of physical liberty over pecuniary interests. *Id.* at 262.

characteristic is what Feinberg calls "a certain expressive function."⁴⁴ Punishment, he argues, "is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself [sic] or of those 'in whose name' the punishment is inflicted."⁴⁵

If Feinberg can establish that a criminal legal requirement is backed by a threat (*viz.* of punishment, rather than mere penalty) that is different in kind from what backs a merely regulatory legal requirement, then there is a way to maintain the moderate version of the delegalization thesis. The advocate of the moderate view will admit that moral requirements may permissibly become regulatory legal requirements, but she will deny that all moral requirements may permissibly become criminal legal requirements. She will be able to do this by exploiting the discontinuity between penalties and punishments. She will admit that for each private suasive enforcement measure there exists a possible, less oppressive regulatory legal enforcement measure; but she will deny that there always exists a possible, less oppressive criminal legal enforcement measure. She can do this because every criminal legal enforcement measure will carry a special characteristic not shared by its otherwise equally severe regulatory counterparts —namely, the symbolic stigma.

Can this work? It is true that regulatory legal requirements do not generally *independently* constitute moral requirements, and it is true that to add a "symbolic stigma" to what would otherwise be a mere regulatory offense (a mere *malum prohibitum*) is to attach a consequence different in kind from mere penalty. But the delegalization thesis concerns types of conduct that are supposed already to be morally required, and whose omission is therefore already necessarily stigmatized. And so what criminalizing the omission of a moral requirement adds is not indignation or a judgment that a type of conduct is morally wrong, for those must already have existed.

Criminalizing the omission of a moral requirement changes two things. It creates a coercive remedy where, possibly, no morally permissible private coercive remedy had existed. And it expresses the state's remonstrance in addition to the necessarily permissible private remonstrance that otherwise exists. The first change is not necessarily different from the change that would be brought about by regulating the omission, and there is reason to doubt that any moral requirement can

44. "The Expressive Function" at 98.

45. *Id.* Mill argued that "the chief mischief of the legal penalties [imposed on unpopular belief] is that they strengthen the social stigma . . . which is [what is] really effective. . . ." ON LIBERTY at 39.

be morally immune from regulatory enforcement. The second change adds to—but does not originate—the category of those who may permissibly remonstrate with the offender for his omission. Therefore the necessary minimum net difference between regulating and criminalizing is the addition of the state to the category of those who may permissibly remonstrate. The moderate version of the delegalization thesis is tenable only if it is plausible to hold that there is a moral principle that makes it impermissible for the state to remonstrate about the omission of some (but of course not all) moral requirements.

The inquiry has come full circle. Above, at the end of section IV, I suggested that because particularized state suasive enforcement is often unavailable, it would be necessary to examine whether the state could permissibly enforce, by its typically coercive mechanisms, moral requirements that no private person was free to enforce coercively. In section V, I gave an affirmative answer to this question with respect to regulatory coercion, leaving only the question whether there are principled grounds to believe that criminal punishment cannot be employed to enforce at least some moral requirements. Now, it appears that the search for an answer to *this* question returns us to the earlier one: Is it ever morally improper for the state suasively to enforce a moral requirement?

Above, I noted that the class of those who may permissibly remonstrate with a person about her omission of a moral requirement is sometimes limited. I also suggested, though, that circumstances may operate to open this class; for example, when no one occupies the roles that ordinarily carry such a permission. Like it or not, we see that the state is often the only dependable inheritor of these roles when—as increasingly happens—they fall vacant. Their having responsible tenants is at best a contingent matter, and the circumstance that they often do have responsible tenants cannot be a basis for strongly delegalizing any moral requirement.

There is no denying that criminal punishments are typically more severe than regulatory penalties, and typically more burdensome upon liberty than private suasive enforcement measures. But it is likewise true that private coercive enforcement is more severe than suasion. A perhaps nebulous idea of proportionality governs both legal and private enforcement. The moderate version of the delegalization thesis is interesting only if it holds that some moral requirement enforceable by private means of overall burdensomeness b is not enforceable by criminal legal means having an overall burdensomeness of b or less; but holding this seems unreasonable. The moderate version cannot be defended by appealing to the fact that we would object to the state's locking up the petty malefactor and throwing away the key; we would likewise object

to any private person's doing this. What counts is what others do to the individual and, as Mill saw, whether what is done is done privately or by law makes no fundamental difference.

VII. CONCLUSION

In the pluralistic, complicated and increasingly fragmented world we inhabit, there are good reasons to refer to the state a greater-than-traditional share of the task of moral correction. For one thing, private correction is less reliable than it may have been when ties of family, religion and community were stronger. For another, private correction can be irregular, unfair, scary, risky and invasive. State responsibility for moral oversight may on balance be to the benefit of those overseen; whether it is or is not cannot be settled *a priori*.

Mill's fears of social tyranny have not, in the United States at least, been realized.⁴⁶ What Mill did not and perhaps could not foresee was the degree to which mobility and urbanization have eroded the bases both of social enforcement and of the reflective consensus that moral requirements presuppose. To the extent that social tyranny appears less of a threat than Mill envisaged, legal tyranny appears more of one. This fact has made it tempting to recast Mill's doctrine as one defining the limits of law alone, or of criminal law alone, rather than a limit to social control generally. I have tried to show that this is a mistake.

To grant that something is a moral requirement is to authorize some means of social enforcement. To those of us who find popular notions of morality too narrow, it may be tempting to ignore the "moral" point in order to concentrate our forces at the perimeter of the law. This gambit leaves the legitimacy of social enforcement unchallenged, but the thought may be that this can be readily evaded; and that the cost of contesting the moral territory is too high. However sound this might be as a forensic strategy, I think it is untenable in theory.

It is easy to picture morality divided into an outer sphere and an inner sphere. Morality is not offended if the state helps police the outer sphere, but the inner sphere is another matter. The law cannot enter here; morality itself forbids it, and forbids it absolutely, not as a mere matter of policy. This is a powerful, if inaccurate, picture. Because of its power, it is hard to resist using this image when the legislature threatens to penalize what is morally innocent. Appealing to this picture may help block bad legislation while finessing the politically very

46. As Sir Isaiah Berlin tersely puts it, "Mill had scarcely any prophetic gift." *FOUR ESSAYS ON LIBERTY* 183 (1970).

bloody debate about what is and is not morally blameworthy. The perfect coincidence view rejects this seductive and expedient picture. It may be that the perfect coincidence view should remain an esoteric doctrine—rather as Sidgwick thought utilitarianism should be—until the passions the privacy debate has stirred recede.