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Law versus Morality as Regulators of Conduct

Steven Shavell*

Abstract

It is evident that both law and morality serve to channel our behavior. Law accomplishes this primarily through the threat of sanctions if we disobey legal rules. Morality too involves incentives; bad acts may result in guilt and disapprobation, and goods act in virtuous feelings and praise. These two very different avenues of effect on our actions are examined in this article from an instrumental perspective. The analysis focuses on various social costs associated with law and morality, and on their effectiveness, as determined by the magnitude and likelihood of sanctions and by certain informational factors.

After the relative character of law and of morality as means of control of conduct is assessed, consideration is given to their theoretically optimal domains – to where morality alone would appear to be best to control behavior, to where morality and the law would likely be advantageous to employ jointly, and to where solely the law would seem to be desirable to utilize. The observed pattern of use of morality and of law is discussed, and it is tentatively suggested that the observed and the optimal patterns are in rough alignment with one another

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Law versus Morality as Regulators of Conduct

Steven Shavell

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1. Introduction

It is evident that both law and morality serve to channel our behavior. Law accomplishes this primarily through the threat of sanctions if we disobey legal rules. So too, on reflection, does morality involve incentives of sorts. When we do the wrong thing, we may suffer guilt and disapprobation, and when we do the right thing, we may experience virtue and enjoy praise; the push and pull of the moral forces constitute an important influence on our conduct.

The presence of these two very different avenues of effect on our actions naturally raises the question of how they compare.¹ In addressing this question below, the basic approach that I will adopt is instrumental: I will assess the various costs associated with the establishment and use of legal and of moral rules; and I will examine the effectiveness of the rules in regulating conduct -- as determined by the magnitude of legal and of moral incentives, by the probability of their application, and by certain informational factors. In so doing, I will be making conjectures about a number of issues, and it is quite possible that the reader's judgment about some of them may differ from mine. But this should not unduly disturb the reader nor cause him or her to discount the analysis, for its main purpose is to stimulate systematic inquiry about law versus morality as regulators of conduct; in writing an article of

¹Of course, law and morality work against the background of other important factors -- market forces, reputational concerns, and the cultural environment -- that influence our behavior.

such limited compass as this one, I could not realistically aspire to do more.

After investigating the relative character of law and of morality as means of control of conduct, I will be able to consider their theoretically optimal domains – where morality alone would appear to be best to use to control behavior, where morality and the law would likely be advantageous to employ jointly, and where solely the law would seem to be desirable to utilize.

It should be noted that the observed pattern of use of law and of morality displays all three possibilities, at least in an approximate sense. Morality, but not law to any real degree, applies as a means of control of much of our social discourse and daily interaction, for instance, regarding whether we keep lunch engagements or ensure that our children don't make a nuisance of themselves at the supermarket. However, law and morality work together to control a vast range of behavior; notably, most crimes and torts are not only legally sanctionable but are also thought immoral, and so often are breaches of contract and violations of regulation. And law but not morality, except in the particularistic form of the duty to obey the law, governs a non-trivial spectrum of behavior; consider especially many of our technical legal rules, such as minimum capital requirements that must be met for a company to be allowed to sell securities on a specified equity market. I will discuss this observed pattern of use morality and law to illustrate the theory of their optimal domains, and I will tentatively suggest that the observed and the optimal domains are in rough alignment with one another.²

²The subject of the rational domains of law and of morality has been mentioned by many writers over the years, for example, by Bentham (1864) at ch. 12 of *Principles of Legislation*, and Sidgwick (1887) at ch. 13, and recently by Cooter (1997) and Posner and Rasmusen (1999). One of the main points that has been made is that the expense of law is worth society's while to bear as a supplement to morality where moral forces are weak and/or the harmful acts in question surpass a threshold of seriousness; but sustained analysis of the optimal domains of law and of morality from an instrumental, economic perspective does not seem to have been undertaken.

In the concluding section of the article, I will make several comments on issues that are closely related to its subject.

2. Basic Description of and Assumptions about Law and Morality

Let me first briefly describe what I mean by law and morality and set out the basic assumptions that I will make about them in the analysis in Sections 3 and 4.

2.1 Law. By law I of course mean the body of rules that we term legal, that is, the rules that are determined and enforced by the state and that are intended to channel behavior and to resolve certain adverse events. Thus, a legal rule might forbid littering in the park and impose a \$50 fine for a violation, might impose expectation damages for breach of contract, or might declare murder a crime and punish it with a sentence of at least ten years of imprisonment.

The establishment of legal rules will refer to the process by which the rules are formulated and communicated to the relevant public. For example, an ordinance against littering in a park might be considered by city government, passed by its council, and then promulgated in written form and posted on signs in the park. In this example, and in general, social costs are incurred in the formulation of legal rules and in apprising the public of them.

The enforcement of law will refer to three stages. The first is the identification and reporting of violators to the state. This might be done by private parties who bring suits for violations or by public enforcement agents, for example, safety inspectors or police officers. Second, law enforcement requires adjudication. Third, law enforcement involves imposition of monetary sanctions or imprisonment (for simplicity I am not considering other forms of sanction). Law enforcement entails

social costs in these stages: the time and effort involved in suit or public enforcement, adjudication expenses, and the resources devoted to the actual imposition of sanctions.

The effectiveness of law enforcement depends, other things being equal, on the magnitude of sanctions and on the probability with which they are imposed for violations. The magnitude of sanctions is chosen by the state, and can be as high as the wealth of a violator if monetary, and as high as a life term if imprisonment. The probability of sanctions depends on the actions of private parties who might bring suit if the violation is civil in character, and on the effort of public enforcement agents otherwise.³

2.2 Morality. Consider next morality, by which I refer to rules of conduct that are associated with certain distinctive psychological and social attributes. In particular, a moral rule has the property that, when a person obeys the rule, he will tend to feel the sentiment known as virtue, and if he disobeys the rule, he will tend to feel the sentiment known as guilt. A moral rule also has the property that, when a person obeys the rule and is observed to have done so by another party, that party may bestow praise on the first party, who will enjoy the praise; and if the person disobeys the rule and is observed to have done that by another party, the second party will tend to disapprove the first party, who will dislike the disapproval.⁴ Behavior that comports with moral rules, so described, will be called good

³Whether law enforcement is accomplished by the bringing of suits by private parties or by public enforcement agents is subject to control by the state, but, for the most part, I need not take this point into account.

⁴More can be said about the foregoing definition of moral rules, including that the observers of moral or immoral conduct will generally *want* to praise moral conduct and to reprove immoral conduct (otherwise they would not do these things); and that failure to extend praise or to criticize when warranted may itself be behavior that violates a second-order moral rule. But I will not need to call upon these aspects of morality for most of my purposes.

and behavior that deviates from the rules will be called bad.⁵ (Moral rules may sometimes differ among subgroups of a population. For instance, for one segment of our population, abortion is regarded as immoral, while for most of the other, abortion is seen as a woman's right. I will not discuss such differences in moral rules because their existence, although important, is tangential to my chief object, of comparing the functioning of moral rules with that of legal rules, given some agreed-upon conception of social welfare.⁶)

The establishment of moral rules I presume comes about in part through a complex process of socialization, learning, and inculcation. When a child is raised by his or her parents, plays with peers, attends school, and the like, the child absorbs many lessons, and turns out to feel guilty about certain behaviors and virtuous about others. Along with these lessons, the child learns to reproach bad behavior and to compliment the good.

To some degree as well, moral rules are a feature of our inherited make-up, the product of evolutionary pressures. That is, some moral rules are programmed in us, or at least are triggered by a normal upbringing. The view that punishment should be in proportion to the gravity of the bad act

⁵The essentially descriptive, social scientific view of moral rules expressed in this paragraph is articulated, at least in part, by many early writers on ethics and morality, including Hume (1751), Sidgwick (1907), and Smith (1790); more recently, see, for example, Baron (1993), Brandt (1979), Pettit (1990), and Wilson (1993), and in the law and economics literature, Ellickson (1991), McAdams (1997), Posner (1997), and Posner and Rasmusen (1999). Especially in the law and economics literature, the term "social norms" tends to be employed rather than moral or ethical rules.

⁶To amplify, that individuals who believe abortion is immoral and those who do not wish to promote different measures of social welfare does not help us to understand how moral rules compare to law in regulating conduct. Rather, to advance our understanding, we need to ask questions such as this: *within* the population of individuals for whom abortion is considered to be socially undesirable, would moral rules forbidding abortion or laws against abortion be more effective in preventing it?

committed may be an example.⁷

By the enforcement of moral rules I refer to the factors that bear on whether the rules are obeyed by individuals. Enforcement comes about through the internal incentives of virtue for obeying the rules and of guilt for not doing so. Enforcement is also effected through external incentives. Namely, if a person believes that his conduct will be observed by others, who will reward him with praise for doing good and chastise him for not doing so, he will be led to do good.⁸

There are social costs associated with enforcement of moral rules through the moral incentives, these being mainly the actual experiencing of guilt and of disapprobation. But account must also be taken of the experiencing of virtue and of praise, which are positive elements, not costs, and of the fact that others make efforts to admonish and to praise, which have utility consequences for them as well.

The effectiveness of the enforcement of moral rules depends in part on the magnitude of the moral incentives, that is, on how much guilt and virtue, and admonition and praise, matter to individuals. The degree to which they matter is shaped by, and determined hand in hand with, the socialization and inculcation that governs the absorption of the rules themselves. In any case, I will assume that, for most individuals, the moral sanctions have quite definite limits (about which I will say more below).

The effectiveness of moral incentives also depends on their likelihood of application, in respect

⁷On the view that morality must be related to evolution and biology, see, for example, Alexander (1987), Darwin (1874) at ch. 5, Singer (1981), Wilson (1980), and Wilson (1993).

⁸Some readers may be skeptical of the very idea of enforcement of moral rules as just expressed. They may believe that individuals tend to obey a moral rule because of the felt importance of doing the right thing rather than because of a calculation involving the the promise of virtue and praise and/or the threat of guilt and chastisement. However, the sense of rightness that a person associates with an act is probably positively correlated with the virtue and praise that would follow from the doing of it and negatively correlated with the guilt and disapprobation that would attend the failure to carry it out. Thus, to a degree, we can say that individuals act *as if* they are engaging in calculation using the moral incentives, even when they are not doing this at a conscious level.

to which one must distinguish the internal and the external moral incentives. The internal incentives of guilt and virtue function automatically, for a person knows what he does and cannot hide from it (I set aside the factor of self-deception). By contrast, the external moral sanctions operate only if others observe conduct and also respond with disapproval or praise.

3. Law versus Morality as Regulators of Conduct

I will now attempt to compare law and morality in a general manner as regulators of our conduct. The comparison will be made on a number of bases, having to do with how well legal and moral rules reflect socially desirable conduct, with the effectiveness of legal and moral incentives in controlling behavior, and with various social costs associated with the legal and moral rules. One may view the comparison I undertake as referring to a standard criterion of social welfare reflecting the utilities of individuals.⁹

3.1 Establishment of rules. The establishment of legal rules ordinarily is not a very expensive process, requiring only that a law be passed by a legislative body or that a judge make a decision that helps to articulate a rule, and that the rule be properly communicated. The social resources devoted to passing a rule against littering and promulgating it are not great; and while the resources need for legislating and communicating more complex rules may be larger than for a rule against littering, they still seem much less than the type of costs that I am about to discuss.

⁹For example, in the comparison I undertake, I consider as a negative the public costs associated with imposing legal sanctions. These costs would also enter as a negative in an analysis based explicitly on social welfare: the public costs require tax revenues to finance, the payment of taxes reduces individuals' utilities, and thus it reduces social welfare.

The establishment of moral rules is evidently very expensive from a social perspective, assuming that this occurs through socialization and inculcation. To instill the moral rules that one should not litter, or lie, or cheat, and the like, requires constant effort over the years of childhood (and perhaps reinforcement thereafter). If we regard the duties of parents, schools, and religious institutions as comprised importantly of the teaching of children in the moral dimension, then we can appreciate that society's investment in imbuing moral rules is substantial.¹⁰ Of course, there are many purposes of parenting, schooling, and religious training apart from the teaching of morals. Hence, even if infusing moral lessons were not a goal, a great deal of energy would be devoted to children, so one must not exaggerate the cost of teaching morals; but even though teaching morals is a marginal cost, it is arguably a large one. In any case, one should also note that where moral notions are inborn, or virtually so, establishment of the notions is essentially free from a social perspective.

In sum, my conjecture is that legal rules enjoy an advantage over moral rules in respect to the lower cost of the establishment of the former, but subject to the qualifications just mentioned, and also to the general point that I am speaking only of central tendencies.

3.2 Specificity and flexibility of rules; degree to which rules reflect socially desirable conduct. Legal rules can be as specific as we please because they are consciously and deliberately fashioned by us. Hence, legal rules can in principle be tailored to promote socially desirable conduct

¹⁰It should be noted that the costs of establishing moral rules include the costs of instilling the tendency to experience virtue when the rules are obeyed and of guilt when they are disobeyed, and are thus greater than the costs of having children merely learn the rules in an intellectual sense. Therefore, by analogy, the costs of establishing legal rules should include some of the costs of erecting the superstructure for imposing legal sanctions (perhaps some of the expense of building courthouses). Nevertheless, taking this point into account would not alter the conclusion that the costs of establishing moral rules exceeds that of establishing legal rules in an average sense.

and to discourage undesirable conduct at a highly detailed level. To be sure, communicating very refined rules to the public may be problematic, and so may be enforcing the rules, owing especially to difficulties in obtaining the information needed to apply them; but these are different matters from our capacity to formulate them.

Legal rules are also flexible in the sense that they can be changed essentially at will, as circumstances require. Hence, if what is socially desirable or undesirable changes, so can legal rules change.

By contrast, it seems that moral rules cannot be too detailed and nuanced in character. One reason is that, to the extent that they need to be inculcated in individuals, especially during childhood, and to be capable of absorption by individuals of a wide spectrum of intelligence, moral rules must not be overly complex. A moral rule against lying that incorporated too many, and too complicated, categories of exception would be difficult for children to learn and might challenge the intellect of many.¹¹ Another reason for the limited complexity of moral rules concerns their use. Individuals often need to be able to employ moral rules with ease and rapidity for the rules to serve their purposes; if moral rules required real ratiocination to apply, they could not be used on the spot. If the rule against lying did include numerous exceptions depending on circumstance, a person might have to stop and ponder whether or not to tell the truth; he would not, as he often must, instantly know the answer to his moral obligation. Moreover, were moral rules too complex and to depend on too many factors, the rules might be rendered vulnerable to self-interested interpretation by individuals, defeating their

¹¹This is not to say that the moral rule against lying does not contain some exceptions. For instance, it may allow white lies, or lies when the truth would be more harmful to state to the listener.

purpose in curbing private advantage. Again, considering lying, a person might often be able, through a canvass of the set of possible excuses for lying, to identify one that could justify a selfish desire to lie. Also, to the degree that moral rules have an evolutionary basis, they will often tend to be simple in character, because very specific rules are generally not ones that have functional value over the long periods of time during which the forces of natural selection operate.¹²

Another difference between moral and legal rules is that moral rules cannot be changed with the ease that legal rules can be. Rules that are inculcated are not subject to alteration in the short run; it will often take at least a generation to accomplish that. However, a qualification to this point is that, to the extent that moral rules are of a general nature, it may be possible to change their specific interpretation fairly quickly. For instance, the broad moral principle that it is good to help the disadvantaged might be harnessed in a short time by a moral entrepreneur to make people think it right to help the homeless, as these individuals might be said to exemplify the disadvantaged. In any case, subject to the qualification just mentioned, moral rules appear to be much less malleable than legal rules, and when the moral rules have a biological basis, they obviously cannot be altered.

The implication of the lack of specificity and flexibility of moral rules relative to legal rules is that moral rules, if adhered to, will more often lead to errors in conduct than legal rules, assuming that they are adhered to. For instance, a person may decide to honor a contract due to the moral obligation to

¹²The various rationales offered in this paragraph for the limited complexity of moral rules have been stated by many writers over the years. See, for example, Austin (1832), Baron (1993), and Hare (1981). The claim that moral rules are of limited complexity should not be misinterpreted, however; it is not that moral rules are necessarily simple, that they always have a black and white character; rather, it is that when they are not simple, they are not overly complex. To the skeptic who believes that moral rules are highly sophisticated, one response (apart from the rationales mentioned in the text) is this: were the moral rules highly sophisticated, then we would not, as we do, often discover them to be in conflict with each other; and we would also not tend to feel guilty when we find that the social interest leads us to deviate from them (as when we break a promise for a good reason).

keep the promise it represents, even though breaching the contract would be socially preferable under the circumstances (perhaps the expense of performance greatly outweighs its value to the promisee) and the law would allow breach. Or a person might refrain from reporting the bad behavior of a friend out of a moral duty of fidelity, even though it would be socially desirable for the friend to be reported (perhaps his bad behavior would continue), and the law might allow or require reporting.

3.3 Magnitude of sanctions. As was stated, legal rules can be enforced by monetary sanctions and by imprisonment, with no limit in principle save for the wealth of an individual and his remaining lifetime. As such, the potential magnitude of legal sanctions is great.

What is the magnitude of the moral sanctions? I will assume here that the moral sanctions are, over most of their range and for most individuals, weaker, and perhaps much weaker, than high legal sanctions. This is based on the judgment that, at least for the great mass of individuals in modern industrialized nations, the disutility due to losing one's entire wealth or of going to jail for life outweighs, and probably by a significant amount, the sting of guilt and of disapproval, or rather, that plus the utility from virtue and praise.¹³ This is not to deny that for some individuals, the moral sanctions might have greater weight than the legal (a person might fear burning in Hell forever, or find the disapproval of the public to be almost intolerable), nor is it to deny the possibility that in some future world, moral socialization could be such that doing the right thing mattered much more than it now does. But in the type of society in which we find ourselves, where internal moral sanctions appear limited and external ones are weakened by, among other things, the ability of individuals to relocate, away from those who

¹³The true incentive to act in a moral way is the difference between one's position when one acts morally and when one does not; it is thus the *sum* of the utility of the reward for acting morally -- the utility from virtue and praise -- and the disutility from doing otherwise -- the disutility from guilt and disapprobation.

might reproach them, the assumption that I make seems the correct one. (It may also be conjectured that evolution has resulted in our favoring conventional self-interest over the interest of others, and thus over moral considerations, in some overall sense.¹⁴)

Another point that should be made is that moral sanctions are unable to prevent bad conduct through incapacitation of individuals, which is something that is accomplished by the legal sanction of imprisonment. Thus, an important tool for reducing bad conduct that is available under the law is absent from the moral arsenal.

My presumption, then, is that legal rules tend to be superior to moral rules in the potential potency of the sanctions that enforce them.¹⁵

3.4 Probability of sanctions. The probability of legal sanctions depends on circumstances; the imposition of sanctions for violations is not automatic. For a legal sanction to be imposed, the violation of law needs to be observed by someone, and then it has to be reported. Even where it is observed by the victim and he can bring suit, such as might be the case with a tortious harm and would usually be the case with a breach of contract, the victim might not find legal action worthwhile given its cost. Also, for many violations for which enforcement is public, the likelihood of sanctions is

¹⁴Individuals with the character trait that they care too much about the opinions or well-being of others will tend to lose out in competition to those who watch over their own welfare. Although some degree of other-regarding interest may help ones genes to survive under plausible assumptions, too much such interest leads to death before reproduction.

¹⁵Again, the reader is reminded that I am speaking only of general propensities. It is not hard to adduce situations where (a) moral sanctions are very important, such as where, as mentioned, an individual fears Hell, greatly dislikes external sanctions (suppose he is a member of a close knit group), believes in Heaven, or greatly desires external approval; and also situations where (b) legal sanctions are not so important, such as where an individual has only meager assets and does not much fear prison because he has been there before or has only a limited remaining lifetime.

notoriously low. Those who cheat on taxes, who steal or who rob, are often not caught and sanctioned.¹⁶

In contrast, the probability of imposition of the internal moral sanctions is one, as previously noted (self-deception aside). A person who believes it immoral to cheat on his taxes will definitely feel guilty for so doing, and will definitely feel virtuous for paying the proper amount, because he will know whether he honestly paid his taxes. The essential certainty of the internal moral sanctions constitutes an enforcement advantage of moral rules over legal rules.

The probability of imposition of the external moral sanctions, of disapprobation and praise, is a different matter, and may or may not be higher than that of imposition of legal sanctions, depending on context. For instance, the likelihood that a person would be seen cutting into a line, and suffer the external moral sanction for so doing of sour looks, negative remarks, and the like, is presumably one (for others in the line would notice), and thus higher than that of legal sanctions for most violations. But the likelihood of being found out and of experiencing disapproval for cheating on ones taxes might be lower than that of being caught in a tax audit, for tax cheaters would be unlikely to be caught by their fellow citizens.

Hence, in regard to the probability of imposition of sanctions, moral rules appear generally to enjoy an advantage in so far as the internal moral sanctions are concerned, whereas they may or may not enjoy an advantage in so far as the external moral sanctions are concerned.

¹⁶Of course, the probability of imposition of legal sanctions depends on the resources that the state devotes to enforcement; if suit is subsidized, or if more police are hired, the likelihood of sanctions rises. Thus, the statement that likelihood of sanctions is low reflects the expense of raising the likelihood and the state's decision not to undertake further expense.

3.5 Availability of information for the application of rules. In the application of legal rules, certain information is needed. But information can be difficult to acquire or verify, such as that concerning whether a person committed a crime and, if so, what exactly the circumstances were. The difficulty associated with substantiation of information has two disadvantageous implications. One is that errors may be made, such as when a person is found guilty of murder when he really acted in self-defense, or when he is found to have acted in self-defense when he in truth did not.¹⁷ The other is that legal rules are sometimes designed in a less refined manner than would be desirable if more information were available. For example, bartenders might be held strictly liable for serving liquor to minors because information about bartenders' true opportunities to determine the age of customers is generally hard to obtain.

These disadvantages due to difficulty in obtaining information do not apply in regard to the enforcement of moral rules with internal sanctions, because a person will naturally know what he did and why (again, excepting self-deception). If a person kills someone, he will know whether he acted in self-defense; if he serves liquor to a customer, he will know whether he suspected that the customer was underage. The virtually perfect quality of the information that a person has about himself means that the internal moral sanctions will not be erroneously applied and that the moral rules need not exclude any potentially relevant information.¹⁸

¹⁷The possibility of erroneously exonerating a guilty party is a factor that decreases the probability of sanctions, and thus bears on the issue discussed in the previous section.

¹⁸The point of this paragraph may be compared to a point stressed in section 3.2, namely, that moral rules may lead to socially worse outcomes than legal rules because of the limited complexity of moral rules. Here, the point is that moral rules may lead to socially superior outcomes to legal rules because of the greater information that may be available for the application of the moral rules.

The conclusion is somewhat different, however, with respect to enforcement of moral rules with external sanctions. Here there may be informational difficulties, for the observer of conduct may not have all the relevant information or may make errors. Nevertheless, these problems are often less serious than those faced by the legal system. When a person's conduct is observed by another person, such as when one person catches another in a lie, the observing party who chides or reprimands the wrongdoer (or praises the correctly-acting person) does not have to establish what he knows to the satisfaction of a tribunal -- it is enough that the observer knows the truth. Hence, there is a sense in which there is less scope for error and for failure to establish what the observer knows to be true than in enforcement of legal rules. Additionally, there is a peculiar self-correcting mechanism at work in respect to the imposition of external sanctions: if a person is mistaken in his criticism of another, the reproval may be dulled in its impact, for it seems a psychological fact that disapproval will not register as much if it is not deserved (and the same for praise).

A further point about external moral sanctions, but working in favor of legal sanctions, is that parties who observe the conduct of others may sometimes not possess certain relevant information that could be acquired in a legal setting. For instance, if one person observes that another breaks a promise to him and is given an excuse as the rationale, the victim of the broken promise might not be able to determine whether the excuse is the truth. However, in a legal setting, an excuse offered for breaking a contract could be investigated; witnesses could be forced to come forward and to testify under oath, and the like.

In summary, it seems that the informational burdens associated with the application of legal rules may constitute a significant disadvantage, leading to error and to use of simpler than otherwise desirable

rules. Application of moral rules with internal moral sanctions does not suffer from these problems, as individuals cannot hide from what they know about themselves. However, application of moral rules with external moral sanctions may or may not be associated with an informational advantage over application of legal rules, depending on several factors that were just discussed.

3.6 Costs of enforcement. The costs of enforcement of legal rules have to do with the expenses of identifying violators and of adjudication, which can be substantial, especially when public enforcement agents are involved. By contrast, the costs of enforcement of moral rules are non-existent in regard to internal sanctions; a person knows for free what he did and did not do. In regard to external sanctions, costs of enforcement are probably lower on average than those of legal rules, even though there might be some adjudication in the form of gossip and discussion of the propriety of acts. Accordingly, there appears to be an enforcement cost advantage of moral rules over legal rules.

3.7 Costs of imposition of sanctions. Legal rules involve sanctioning costs, and these depend on whether the sanctions are monetary or are terms of imprisonment.¹⁹ Monetary sanctions are sometimes said to be socially free, since a monetary sanction is a transfer of command over resources, not the use of resources per se. However, monetary sanctions involve administrative expense, which can be significant. The sanction of imprisonment clearly involves social cost, as it creates disutility for the violator that is not automatically offset by a gain to other parties (in contrast to the case with ideal monetary sanctions). Additionally, the operation of prisons involves substantial administrative and other public expense. Hence, it will be assumed that imprisonment is more expensive to impose than

¹⁹By sanctioning costs, I refer to costs of imposing sanctions, not to costs of adjudication, which are included under the head of the previous section.

monetary sanctions (even though, were the administrative expenses of imposing monetary sanctions sufficiently high, these sanctions would be more expensive to impose than imprisonment).

Regarding moral sanctions, consider first guilt. Like imprisonment, guilt is a sanction that is socially costly to have imposed because it is suffered by individuals and not automatically offset by gains to others. However, unlike imprisonment, guilt does not involve administrative expense to effect, so it is a socially cheaper form of sanction than imprisonment. Disapproval is much like guilt as a sanction, except that the consequences of its use for those who express it need to be incorporated into the social calculus, and what should be assumed about this matter is not entirely obvious. Disapproval should be treated as a socially more costly form of sanction than guilt if those who criticize are, on net, made worse off by their experience (if they would prefer never to have witnessed bad conduct than to have done so and disapproved it²⁰). Virtue and praise obviously differ from guilt and disapproval in that they are sanctions that create utility, rather than lower it.²¹

The conclusions about the costs of imposing sanctions may be expressed as follows: the legal sanction of imprisonment appears to be the most costly to impose; monetary sanctions may or may not be more costly to impose than guilt and disapprobation depending on administrative expense; whereas virtue and praise actually increase social welfare when employed as incentives.

²⁰To amplify, those who disapprove must prefer to do that than not -- otherwise they would not disapprove. But the question at hand is whether they are better off observing bad conduct (and then disapproving it) than not observing it.

²¹For an economically oriented analysis of the moral sanctions of guilt and virtue, taking into account that guilt is costly and that virtue creates utility, see Kaplow and Shavell (2001).

3.8 Amoral individuals. To this point, we have been considering fairly general factors bearing on legal versus moral rules, but a particular factor of potential significance bears mention. Namely, there may be individuals in the population for whom moral incentives are not very important. Indeed, this group may not be small in size, especially in societies, like that of the present-day United States, where families and other social institutions that provide stable environments for the socialization of children are often weak. The existence of a relatively amoral subgroup of the population implies that, for them, moral sanctions will fail to prevent much immoral behavior. Members of this subgroup will, by assumption, not be affected by the internal moral incentives of virtue and guilt, and will probably also not care as much as others about the external incentives of disapproval and praise. Moreover, these individuals will be unlikely themselves to impose the external moral sanctions called for by the conduct they observe of others, exacerbating the breakdown of the power of moral incentives. The presence of amoral individuals is thus a factor that favors legal rules over moral rules.²²

3.9 Firms (and other organizations). Another special factor worthy of note is that the power of moral incentives may be diluted within firms (and other organizations). Consider first the internal moral incentives, and let me note initially the familiar point that, because a firm is not in fact a person, but rather a collective comprised of different individuals, we cannot speak in a literal sense of internal moral incentives in respect to a firm. There is no being, the firm, that can feel guilty for acting wrongly and virtuous for acting correctly. However, individuals within a firm can feel guilt or virtue in regard to their own behavior, and the degree to which they will or will not experience these sentiments in relation

²²Because amoral individuals may tend to have low wealth (the factors that produce amorality tend to cause low education and low earnings), the only effective legal sanction available to curb them may be imprisonment.

to their actions as members of a firm is the question at hand. A reason for thinking that the internal moral incentives may be less effective in the setting of the firm than outside that setting is that decisions within firms are often made jointly by groups, or influenced by orders from above, or acted upon and influenced by subsequent decisions made below; this may serve to attenuate the sense of personal responsibility for one's acts and may reduce the sharpness of the moral incentives. Another factor is that firms often attempt to establish their own norms of loyalty (consider the corporate ethos at companies like IBM, or in organizations such as police departments), which may tend to offset the usual moral incentives when they come into conflict with the objectives of the firm.

Second, the external moral incentives have unclear force in relation to employees of firms. One reason is that, as just remarked, responsibility within a firm is often diffused, so that there often will not be specific individuals within firms who outsiders to firms will want to punish for wrongful behavior. Another reason is that a firm may have an incentive to conceal the identity of responsible individuals within it, just so they can escape external social sanctions. However, it may be remarked that outsiders may think of a firm as they do of a person, that is, they may anthropomorphize a firm; and if so, they may impose external sanctions on a firm even though they have not identified a responsible individual within it. For example, they might refuse to make purchases from a firm that acted in a grossly negligent manner.

3.10 Summary. The discussion of this section shows that law and morality each has advantages over the other in certain respects, which may be summarized (I omit qualifications) as follows. Law may enjoy advantages over morality due to the ease with which legal rules can be established, the flexible character of law, and the plausibly greater magnitude of legal sanctions over

moral sanctions. Also, the presence of amoral individuals can be a factor of significance favoring law, as can be the presence of firms, for whom moral forces are likely to be relatively weak. However, morality may possess advantages over law because moral sanctions are often applied with higher likelihood than legal ones (notably, internal moral sanctions apply with certainty), may reflect superior and more accurate information about conduct, and may involve lower costs of enforcement and of imposition.

4. The Optimal Domains of Law and Morality

As a general matter, one may conceive of the determination of the optimal domains of law and of morality as follows. For any given type of conduct that society seeks to control through morality or law three possibilities exist: the conduct is placed in the domain of control of morality alone; it is put in the domain of control of both morality and law; or it is entered into the domain of control of law alone. Each of these possible regimes is associated with a level of social welfare, which reflects the costs of the means of control, its effectiveness in altering conduct, and the social benefit from so doing. One of the possible regimes will be best for each type of conduct, and this determines the optimal domains of law and of morality.²³

Let me now elaborate on the optimal domains. In so doing, I will call on the comparison of morality and law of the previous section, and I will suggest that the theoretically optimal domains of morality and law align in a gross and approximate sense with what is observed.

²³For simplicity, I consider only types of conduct for which some means of control is socially worthwhile; that is, I exclude from consideration types of conduct that are not sufficiently important to control by either law or morality, given the costs of control.

4.1 Morality alone is optimal. It will be best to control behavior solely through use of morality when three conditions hold. First, morality functions reasonably well by itself. Second, morality is not worthwhile supplementing with law, given the social benefits that would flow from that and the added costs. Third, law alone is not as desirable to employ as morality alone.

These conditions will tend to apply when two things are true: the expected private gain from undesirable conduct is not too great, and the expected harm due to such conduct is also not too great. For if the expected private gain from bad conduct is not too great, then the moral sanctions, even though not as strong as legal sanctions, will very often be sufficient to discourage the conduct. And if the expected harm from bad conduct is not too great, then on those occasions when moral sanctions fail to prevent the conduct, the social effects will not be so serious, and thus not warrant the added expense of the legal system as a supplement to morality. However, the question remains whether it might be more desirable to employ law alone than morality alone. The points just made imply that the social value of law over morality will not be great, so that use of morality alone will be superior to use of law alone as long as the added expense of the law exceeds its modest marginal social value.

Let us now examine the domain in which behavior is in fact controlled primarily by morality. This area of behavior is comprised of a great multitude of the acts that we undertake in everyday life. Consider the keeping of promises about social engagements, acting so as to refrain from creating minor nuisances, lending a helping hand when that is not difficult to do. Here, morality applies, but the law is usually not relevant, either because a legal action cannot be brought for bad conduct or because the likelihood of an action is remote due to the high legal cost of bringing it relative to the benefits.

I suggest that this domain of behavior where mainly morality applies is broadly consistent with

the theory advanced above. In particular, the expected private gains from bad conduct do in fact appear typically to be small or modest. If a person breaks a lunch date, cuts into a line, or fails to keep quiet in a movie theatre, the benefits that he obtains are not usually of large magnitude. This being so, the assertion is that the moral sanctions will often be enough to deter bad conduct; the automatic functioning of the internal moral sanction of guilt, combined with the external sanctions, which sometimes will be applied with high probability (breaking a lunch date or cutting in line each would be observed essentially with certainty), will frequently be sufficient to dissuade individuals from acting incorrectly. Further, when that is not so and individuals do engage in bad conduct, the harms they cause appear on average to be minor. Again, if a person breaks a lunch date, cuts into a line, or talks in a movie theatre, the social detriment will usually not be significant. Hence, the claim is that it would not be socially worthwhile to append the legal system to the moral system in order to help to prevent this residuum of bad acts from occurring. That is, it would not be advantageous to subsidize civil suit to bring about legal actions for such harms as broken lunch dates, or to employ public enforcement authorities to hand out tickets for cutting in line or talking in movie theatres, because the cost of doing so would outweigh the benefit from the not-too-great additional harms that would be prevented.

Moreover, the disadvantage of appending the legal system to the moral one in the domain under discussion is not limited to the direct costs of use of the legal system; it is also likely that many mistakes would be made under the legal system relative to that under the moral one. When an individual breaks a lunch date or cuts into a line, he will know about this and, as noted above, will not make errors in judging the correctness of his own behavior. Also, the assessments of those around him will tend to be reasonably accurate, at least by comparison to those that would be made under the legal system. The

legal system could not hope to sort out, in the way we do ourselves, broken lunch dates due to valid excuses (suppose that a truly good friend appeared unannounced from out of town) from those that are not, breaking into line when that is not really socially undesirable given the totality of circumstances (suppose the line is not very long and it is clear that the person who broke into line joined a friend) from breaking into line when that is socially irresponsible, and so forth. The mistakes that would inevitably be made under the legal system, especially punishment that is not merited, constitute a separate cost that reinforces the argument against use of the law in the domain of conduct under discussion.

It remains to consider whether it might be desirable to employ the law alone instead of morality alone in the area of behavior in question. In order to assess how law alone would function, we have to perform a quite difficult mental exercise. We must imagine a world in which people are unlike people as we know them -- we must envision individuals who are devoid of compunctions about breaking promises, lying, and the like, who essentially do not care about each other, who are what we would describe as socially pathological. And we must ask in this notional world how well law would control the behavior and about the expense of control. A strong surmise is that it would be enormously expensive to control the behavior at issue, because of its variousness and extent, that society might be bankrupted by a serious attempt to do so; and, as mentioned in the previous paragraph, many mistakes would be made. Moreover, conduct would often fail to be controlled by law, for much undesirable conduct would escape the notice of parties other than those guilty of it, and where it is observed by others, they would often not choose to initiate an action. Further, where this broad swath of undesirable conduct would not be controlled by law, it would by hypothesis be essentially unrestrained. The conclusion is that use of law alone would be clearly inferior to use of morality alone in the domain

where mainly morality is observed to be employed.

4.2 Morality and law are optimal. It will be best to use law to supplement morality where the cost of so doing is justified by the extra social benefit. This will tend to be true when two conditions hold: the expected private gains from undesirable conduct are often large, and the expected harms due to such conduct are also often large. For if the expected gains from bad conduct are great, then the moral sanctions may not be enough to prevent it. And if the expected harms from bad conduct are substantial, then failure to prevent bad conduct will be socially serious, and thus make worthwhile the additional expense of the legal system as a supplement to morality.

Let us now consider the range of behavior that is regulated both by morality and by law. This area covers most acts that are criminal; murder, rape, robbery, fraud, and like acts are not only crimes but also generally are said to be immoral. Additionally, many torts, including most acts of negligence, many breaches of contract, and many violations of regulation (such as intentionally dumping a pollutant into a stream) are not only legally sanctionable but also are considered not to be moral.

It appears that this domain of behavior is characterized by the condition that the private gains from bad conduct are often large. The utility obtained by those who commit criminal acts tends to be significant; the murderer, the rapist, and the thief generally have strong motivations to act, however reprehensible we may find them. Also, the private benefits obtained by those who commit many torts or breaches of contract are substantial, especially because large amounts of money are frequently at stake. Hence, the suggestion is that the internal moral sanctions alone will often not be enough to prevent the bad conduct under consideration.

Another reason for failure of moral incentives to control conduct in the domain is that the

external moral incentives are often unlikely to apply, because the bad actor will not be noticed or, if noticed, will not be reprimanded. This is obviously so of many criminal acts; criminals escape punishment, even for murder, more often than not, and sometimes with great likelihood. Similarly, behavior that can give rise to torts often goes unspotted, or at least does not result in disapproval. For example, consider improper driving behavior, such as speeding, swerving out of lane, or going through a red light. If a driver does these things, he often won't be noticed, and if he is, how is it that other drivers are going to scold him? They usually won't have the opportunity. The external sanction of disapprobation is unlikely to be brought to bear in many other situations where accidents might occur, and where tort law and safety regulation are in fact brought to bear. This point should not be overstated, however. There are important situations – such as breaches of contract – in which problematic conduct will be noticed and there will be ample opportunity for observers to express their disapproval of it.

It also seems true that the condition mentioned above concerning the harm from bad conduct applies in the domain in question. The social consequences of failure to control crimes and torts, which often result in injury and death, as well as breaches of contract and many of the other acts to which our legal system applies, are manifestly great (especially in comparison to the consequences of broken lunch dates, cutting in line, and other quotidian misbehavior). Hence, the benefits from preventing these harms through use of the law, when they are not prevented by morality, are significant, and it is claimed outweigh the costs of the legal system.

Additionally, the problem of amoral individuals is of obvious relevance to the issue at hand. Because the magnitude of harm from the undesirable conduct that we are considering is, as just

observed, great, the existence of amoral subgroups is of special significance. Even if small, such subgroups, if unchecked, can wreak great social harm, especially through repeated crimes, but also through extremely negligent behavior, failure to obey contracts, and other bad acts.

The presence of firms further supports the thesis that law is needed as a supplement to morality in the realm of behavior under discussion. As suggested earlier, the force of moral sanctions, both internal and external, is diluted in respect to the behavior of firms. Firms, though, are often in a position to do large harm by virtue of their size and importance in modern economies; they mediate most production and exchange and can cause much physical and economic injury from misconduct. Hence, were society to attempt to control the behavior of firms only by resort to moral sanctions, substantial harm would result. Legal rules, however, do alter the behavior of firms for the good, either directly, by fiat, or by threat of monetary sanctions.

Thus, altogether, my conclusion is that for most of the acts that society has chosen to control through the law and through morality, the use of moral incentives alone would not function well due to some combination of the following factors: substantial private benefits from committing bad acts, inadequacy of internal and external moral sanctions to counter the private benefits, the presence of amoral subgroups, and the activity of firms. The imperfect performance of our moral system as a regulator of conduct, together with very high social costs of failure to control conduct, warrants use of our costly legal system.

A different reason why law may be socially useful in controlling conduct where morality also applies is, in a sense, the opposite of what has been discussed so far in this section. Namely, it may happen that a notion of morality is socially counterproductive, and legal rules are needed to channel

behavior in a different, and socially desirable, direction (rather than that legal rules are needed to steer behavior in the direction that morality already points).²⁴ For example, I mentioned the possibility that a person might refrain from reporting a friend's bad conduct because of a feeling of loyalty, even though reporting the conduct might be socially desirable, or that a person might not want to breach a contract, even though breaching might be socially desirable given the high cost of performance. If so, legal intervention, requiring the reporting of the friend or permitting breach, might be socially desirable. Although these situations where law may be needed to offset the effect of morality are not typical, neither are they rare, and this should not be considered surprising. As stressed above, moral notions cannot be too complex for various reasons, and thus we would predict that they would come into conflict with socially desirable behavior in some circumstances.²⁵

Having considered why it is beneficial to supplement morality with law to control the behavior under discussion, let me address the question why would it not make sense for society to rely solely on the law to control the behavior -- that is, why it is beneficial to supplement law with morality. For example, why should society not rely solely on criminal law to combat murder? A primary answer must be that law will only imperfectly deter murder, and given the seriousness of that act, society will find it advantageous to employ morality also as an instrument of control. There will be many occasions in which a person would be unlikely to be caught for a murder that would advantage him, but if he

²⁴This is a theme of Posner (1996).

²⁵A point related to that of this paragraph is that a law may be adopted to counter a moral rule because some group with political power disagrees with the moral rule. For example, those opposed to abortion may be able to pass a law making it difficult for women to obtain abortions, to counter the moral view that a woman has a right to obtain an abortion.

thinks murder is a moral evil, he might not even contemplate that act, much less commit it. As a general matter, legal rules do not always apply, and even when they do apply with high likelihood, the sanctions may not be strong enough to deter bad behavior. For this reason, and because the harm from the acts in question tends to be large, society will find it worthwhile to buttress legal rules with moral ones, presuming that the cost of so doing is not too large. (And as I will explain two paragraphs below, the cost of these supporting moral rules may be quite low, possibly zero.)

A second rationale for supplementing law with morality is that legal rules may not reflect certain information that is relevant to achieving socially desirable outcomes, whereas moral rules can reflect such information. For example, the law might award low damages for breach of a contract to photograph an important event, for proving its significance to a court might be difficult. However, the photographer might well realize from personal observation that the event is important, and thus if he feels it is his moral duty to keep promises, not breach the contract even though he can do so by law and it would be in his self-interest to do so. This is an example of what was discussed in part in section 3.5, that the information that is available to apply moral rules may be superior to that available to apply legal rules. On reflection, there are many cases in which, as in this one concerning contract breach, the law does not take into account factors of relevance, due to difficulty of proof, but where the involved parties know of these factors and, spurred by moral considerations, might act in a socially desirable way even though the law would not lead them to do this.

A third consideration is that moral rules may often be inexpensive supplements to legal ones. Let us consider the moral rule against murder as an example. The act of murder falls into a general category of conduct -- that of intentionally harming others -- that it is socially desirable to treat as

wrongful. It is desirable to treat this general category of conduct as immoral because the acts in it tend to be socially undesirable and because much of the category is not controlled by law: there are innumerable ways in which individuals may intentionally harm each other in everyday life (and certainly in the social intercourse of children) that we do not want to occur and that the broad moral rule at issue discourages, but which the law does not affect. Now it might be asked whether society could save resources by refining the broad moral rule against intentionally harming others, in such a way that it is not immoral to commit murder. One answer is that establishing such a refinement might add to social expenses rather than reduce them (it might be more difficult to inculcate the refined moral rule than the broad one). But this response aside, a refined moral rule under which murder would not be viewed as immoral would probably be unnatural and psychologically jarring, because of the evident underlying similarity between murder and many of the other acts that involve intentional harm and that are classified as immoral. Additionally, for the various reasons given earlier, in section 3.2, moral rules cannot be too nuanced. In sum, then, the argument concerning the moral rule against murder is this: given that society finds it advantageous to have a *general* moral rule against intentionally harming individuals -- because that rule is useful in the domain where law does not apply -- society has, as a byproduct, the use of the general moral rule to prevent murder, as a supplement to criminal law. Similar arguments can be given, I believe, for many other acts that are in the domain controlled by both law and morality; these acts fit under the head of some general moral rule that society has good reason to establish.

4.3 Law alone is optimal. It will be best to control behavior solely through use of law when, among other things, morality does not function well alone and law is needed to control behavior. These two conditions will tend to hold when the expected private gains from undesirable conduct are large

and the expected harms due to such conduct are also large. For, as has been discussed above, if the expected private gains from bad conduct are large, then the moral sanctions may not be enough to prevent it; and if the expected harms from bad conduct are substantial, then failure to prevent bad conduct will be socially serious, and thus justify use of the legal system. A third condition that must hold for law alone to be optimal is that law is not worth supplementing with moral rules in view of the cost of so doing.

Before considering the relevance of the foregoing to what is observed, let us ask whether there does exist a domain of behavior in which primarily the law applies, in which morality is only weakly or not at all relevant. It was suggested in the introduction that many of our technical, often fairly detailed, legal rules have this character, such as a rule requiring that a company have at least a stipulated amount of capital to be allowed to sell securities on an equity market. Other examples that might be borne in mind are a rule mandating the use of a particular accounting convention for valuation of inventories (such as last-in-first-out), or a rule proscribing the planting of an apparently innocuous species of tree in an area. What I am claiming is that it would not strike a person as intrinsically immoral -- as immoral in the absence of a law bearing on the matter -- for a company to sell securities when the company possesses less than the stipulated amount of capital, or for a company to use an accounting practice for valuing inventories (such as first-in-first-out) different from that named, or for a person to plant the species of tree that is mentioned as prohibited. Although I do not think that people would view such conduct as intrinsically immoral, that is, as immoral were the conduct legal, individuals would be likely to think this conduct immoral just because it is illegal; there is a general moral duty to do what the law

asks.²⁶ I am, however, excluding this particular moral rule from consideration, for otherwise the question that I think it natural to examine here would be mooted.²⁷

Now let us consider whether the two conditions about gains and harm that I mentioned above hold in the domain at issue. Regarding the first, it is fairly clear that the private gains from undesirable conduct are frequently large enough that legal sanctions, as opposed to merely moral sanctions, are needed to obtain a tolerably good level of compliance with rules. Consider the often substantial gains that can be obtained from improper sale of securities, or from a favorable choice of method for the valuation of inventories, or from planting a particular kind of tree if it provides unique benefits in terms, say, of its hardiness, price, or attractiveness. Moreover, the actors whose conduct needs to be controlled are often firms, which as noted, dilutes the force of moral sanctions. It seems doubtful on the whole that many of the regulations now enforced through use of the legal system, many times through public enforcement effort and the threat of criminal sanctions, could be reasonably well enforced by moral sanctions alone.

The second condition that we want to verify is that the harm that would follow from failure to comply with the rules in question would be substantial. This becomes evident from reflection on the purposes of the rules. Consider the minimum capital requirements for the registration of securities. If these are not met, there may ultimately be non-trivial consequences for the functioning of securities

²⁶It may be remarked that the moral duty to obey the law is evidently explainable as in the social interest: the rule aids in obtaining compliance with law, saving society law enforcement expenses. I am considering this subject in a paper in progress.

²⁷That is, I believe it interesting to ask why there should exist a category of acts governed by law even though the acts are not seen as intrinsically immoral.

markets (for instance, there may be erosion of investor confidence in the quality of securities). As the securities markets contribute greatly to the health and productivity of our economy, it is very valuable for the rules about the registration of securities to be satisfied. Likewise, if there are not uniform accounting rules for the valuation of inventories, investors and lenders will have to spend more time than they now do unraveling the meaning of financial statements, which would impede the functioning of our capital and credit markets. With regard to a rule preventing the planting of a certain species of tree, we can imagine that there are good reasons why its violation might be harmful; for instance, the tree might be known by entomologists to serve as the host for an insect pest that causes crop losses. The general claim, in other words, is that our somewhat detailed technical rules are often like these three examples of rules; when one reflects on them or investigates them, one finds that they have real and significant rationales, and therefore that, if they are violated, substantial social harm will result. Thus, I have suggested that, when one considers the two conditions in the domain in question, it does indeed seem that legal rules are needed as a mechanism of control.

The question remains, however, why morality is not desirable to employ as a supplement to the law in the domain we are discussing. For morality to function in this way, one approach that could be taken is simply to teach as individual moral rules the various legal rules at issue. Thus, we could teach children that it would be immoral for a firm to sell securities unless the firm's capital is higher than X, that it is immoral to plant species Y of tree, and so forth. But it is manifestly impractical to accomplish this task; it is arguably ridiculous to think that we could, or would, try to instill rules like this in our children; the sheer numerosity and changing nature of the rules would bar our teaching them to children, and in any case the specific nature of the rules would often render them difficult for children to absorb

(what does a child know of sale of securities, particular species of tree, and so forth?).

The second approach that society could employ to use morality to reinforce the law in the domain in question is to instill in children some overarching moral principle that, in its application by adults, would yield as subsidiary, implied moral rules the many particular rules under consideration. Arguably, the only overarching principle that could rationalize all these diverse rules is that of a general utilitarianism, of social welfare maximization. It does seem true that a form of this principle not only could be, but in fact is, imbued in us: the general obligation to do good, to do whatever it is that helps society. However, the force of this moral rule is attenuated when it is not clear how it applies. This, though, tends to be the case with regard to the legal rules under consideration; identifying them as in the social interest involves a fairly complicated train of thinking. Recall the argument given above for why a firm ought to have at least X in assets before it can sell securities; the logic behind the social desirability of this rule is not transparent (it is far more complex than that behind the typical moral rule, such as that one ought not hit someone, or one ought not lie). In other words, I am suggesting that the only overarching moral rule that could resolve itself into the body of technical legal rules in question is the general moral rule to maximize social welfare; and while I think we do have this general rule instilled in us as a moral rule, it is rendered weak in the domain in question because it is too difficult to apply, on account of our inability easily to recognize which of the technical rules are or are not in the social interest.²⁸ Thus, we must rely primarily on the law to induce compliance with the rules.

²⁸In fact, society is able to harness the general moral rule to do social good by making an act illegal. For then the rule is marked as likely to advance the social good. For example, an individual need not understand *why* selling securities without having capital of X is against the social interest; the fact that that is illegal means this to the individual.

5. Concluding Comments

Effect of law on morality. In the preceding discussion, I treated law and morality as if they are independent of each other. However, as is often noted, legal rules can affect our moral beliefs as well as the operation of the moral sanctions.²⁹ For instance, a law against discrimination based on race may change beliefs about proper conduct and lead also to a greater willingness of individuals to express disapproval when they witness discriminatory behavior. The principal effect that taking the influence of law on morality into account would have on the analysis is that it would add to the appeal of law as an instrument of control. For it means that not only does law have a direct effect on behavior through use of legal sanctions, it has as a byproduct the beneficial altering of moral beliefs and of strengthening moral sanctions.

Effect of morality on law. Another connection that I did not take into account is that the existence of moral beliefs should itself influence the design of the law, given that moral beliefs constitute tastes the satisfaction of which raises individuals' welfare. For example, legal sanctions should be determined in a way that reflects to some extent the retributivist moral principle that wrongdoers be punished in proportion to the gravity of their bad acts. Thus, even if on conventional instrumental grounds legal sanctions should be much higher than harm when the probability of sanctions is low (for instance, the sanction for littering should be much higher than harm when the probability of being caught is low) in order properly to deter, recognition of the importance to individuals' welfare of the retributivist principle would lead to some lowering of the otherwise quite high sanctions. Not only may

²⁹See, for example, McAdams (1997) and Sunstein (1996).

recognition of moral beliefs as tastes influence the best design of the law, as in the example just mentioned, it may also affect the optimal domain of the law, for it alters the social value of use of the law. (For instance, if the penalty for littering cannot be very high due to the retributivist principle, it may not be worthwhile using the law to control littering.)

Agreement, or lack thereof, between observed use of morality and law. I stressed in section 4 the general agreement that I saw between the theoretically optimal and the observed domain of morality and the law, but, of course, as with any fairly crude theory, its ability to predict and explain is limited.³⁰ It is likely that the reader can summon to mind types of conduct that the law sanctions that would be best left to our moral system to regulate (perhaps certain types of offensive statements that can give rise to tort actions) and other types of conduct that are only immoral but ought to be illegal (perhaps certain forms of abuse within the family). My purpose was to show a central tendency of agreement between the optimal and the observed, not more than that.

³⁰Indeed, one would predict no more than a gross relationship between optimality and observation. The primary reasons are that there is no single entity that governs both morality and the law, and that the various forces that determine morality (such as parents, religious figures, peers, teachers) and the law (such as politicians, judges) do not necessarily desire to maximize social welfare.

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