



Prohibiting Immoralities (2007)

by John Gardner
Professor of Jurisprudence
University of Oxford
<http://users.ox.ac.uk/~lawf0081>

This is an author eprint, which may not incorporate final edits.
The definitive version of the paper is published in

Cardozo Law Review 28 (2007), 2613 | © John Gardner

The typescript appears here with the consent of the publisher,
under the publisher's eprint policy, or by author's reserved rights.
Please do not quote from or cite to this eprint. Always use the
definitive version for quotation and citation.

Prohibiting Immoralities

JOHN GARDNER*

Is the fact that ϕ ing is immoral sufficient by itself to warrant the prohibition of ϕ ing by law? Almost everyone agrees, on reflection, that it is not. Further conditions need to be met. Here are three conditions that are often plausibly insisted upon. First, the prohibition must be effective, or at least not counterproductive; thanks to it there must be fewer, or at least no more, ϕ ings than there would otherwise be. Second, the prohibition must be consistent with the principles of the rule of law; if an effective prohibition on ϕ ing cannot be clear, open, and prospective, or more generally cannot give fair warning to those who might fall foul of it, then ϕ ing cannot properly be prohibited. Third, the prohibition must be consistent with the harm principle, or some similar principle of toleration; the law's invasions of personal autonomy in the suppression of ϕ ing (themselves morally costly) must not be disproportionate to the moral gains on offer. The details of these conditions – in both scope and force – are debatable. But their appeal is ecumenical. Only fundamentalists are inclined to resist them.

Here is one thing that makes these conditions odious to fundamentalists. Each condition, and *a fortiori* the combination of all three of them, has the implication that some people who deserve to be punished for their immoralities cannot properly be punished by law. Since criminal law, in a civilized society, dominates the infliction of punishment, this in turn has the

* University of Oxford. For valuable discussion I thank Timothy Macklem and audiences at Cardozo Law School and the Australian National University.

further pay-off that some people who deserve to be punished cannot properly be punished as they deserve to be, or possibly even at all. One need not be a fundamentalist to regard this as a matter of regret. Everyone sometimes feels disappointed or even indignant that a person deserving of punishment had to go unpunished or underpunished. It is hard to avoid feeling the corresponding *Schadenfreude* when fate intervenes to inflict so-called 'poetic justice' on someone who enjoys such unpoetic impunity. In itself this *Schadenfreude* is nothing to be ashamed of. Yet it is one mark of a civilized person that, even as she takes comfort in poetic justice, she controls the urge to see poetic justice preempted by punitive human activity, either inside or outside the law. The price for such retribution, she knows, is often too high. Retributive justice cannot always prevail consistently with other principles of justice, never mind with other sound moral and political principles.

Not surprisingly, George Fletcher shares this civilized view. 'The killer may deserve to die,' he writes, 'but it does not follow that the state is entitled to kill him.'¹ Fletcher's defence of this view, however, is much more dramatic than any of those suggested above. Not for him the moderate inhibitions on legal moralism imposed by the harm principle, the rule of law, the requirement of effectiveness, and so forth. He argues, rather, 'that the state cannot legislate morality,'² meaning that it is conceptually incapable of doing so. While moral considerations can bear on the justification of laws, he says, they can do so only indirectly by way of modification or qualification to prohibitions justified on other (non-moral) grounds. These other grounds he refers to as 'political' grounds. 'The political', he claims, 'precedes the moral. It is only when political theory makes reference to a moral question that the latter can become relevant

¹ *The Grammar of Criminal Law* (unpublished typescript), 227.

² *Ibid*, 229.

in the criminal law.³ The thesis is that morality by its very nature cannot get the justification of criminal law off the ground.

Fletcher formulates his argument for this thesis in various ways, not always mutually consistent. In what seems to be his canonical formulation, the argument rests on three premisses, supposedly owed to Kant, and by Kant himself to Locke:

- (1) Morality requires autonomy,
- (2) Right requires coercion,
- (3) Coercion compromises autonomy.⁴

Premiss (2) is strangely expressed. On any plausible view one could do the right thing without being coerced to do so. Fletcher is here using 'right' in a technical sense. He means *Recht*, or legal rectitude. There can, he means, be no legal intervention to secure that people do right by each other without a resort, on the part of the law, to coercive measures. Accepting this premiss together with the others, we are supposedly forced to the conclusion that law cannot possibly require moral actions on moral grounds (i.e. *qua* moral actions). For as soon as law becomes involved, autonomy is abdicated, and moral actions as such become impossible. 'The attempt to coerce human beings into moral action,' says Fletcher, 'is self-contradictory.'⁵ And so, by premiss (2), is the attempt to prohibit immorality by law.

In the following comments I will cast doubt on this argument, by challenging all three of its premisses in turn (§§1 to 3), and then by asking whether, even if they were sound, the advertised conclusion would follow from them (§4). As Fletcher points out, one could readily mount an attack on his argument

³ Ibid, 229.

⁴ Ibid, 228-9.

⁵ Ibid, 228.

simply by rejecting the narrow Kantian meaning he gives to the word ‘moral’ and its cognates. One could insist that what Fletcher calls ‘political’ considerations should be relabeled as moral. I will not be following this strategy. I agree with Fletcher that it would be a Pyrrhic victory to undermine his argument by quibbling over words. Instead I will end up suggesting that what Fletcher calls political considerations are moral considerations, even in his own narrow Kantian sense of the term.

1. Does morality require autonomy?

Philosophical discussion of autonomy is easily mired in confusion. Many things can be autonomous. There are autonomous regions and autonomous institutions and autonomous academic disciplines. When philosophers write about autonomy *simpliciter*, they are generally thinking about the autonomy that might be displayed by natural creatures like you and me. But even here there is room for confusion. For natural creatures can display various different autonomies; they can be autonomous in various different respects. Two autonomies, in particular, are often run together. One is personal autonomy, authorship of one’s own life. Another is moral autonomy, authorship of the principles on which one acts. There are others, but these two, each having a central role in modern moral philosophy, are particularly apt to be confused.⁶

⁶ For further discussion see Jeremy Waldron, ‘Moral Autonomy and Personal Autonomy’ in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (New York 2005). Although Waldron agrees that the two ideas are distinct, his discussion quickly takes a different turn from mine. Waldron emphasises the fact that one is none the less personally autonomous (although one’s personal autonomy may be less valuable) for the mere fact that one autonomously pursues immoral options; whereas action on an immoral principle cannot, it is often said, be morally autonomous. I ignore this contrast as it does not strike me as relevant to the present topic.

Personal autonomy is an ideal of human flourishing. To be personally autonomous is to shape one's life over time by making successive choices for oneself from among a range of valuable, appealing, and realistic options. There are various dimensions in which one's personal autonomy may be lacking. Because of shortage of money or lack of education or for various other causes one may have too few realistic options. Those options that one has may include too many of limited or transient value, or, even among those that have significant value, too few that one relishes. The element of iteration in choice may be lacking: one may have a decent range of valuable and tasty options today, too few of which contain possibilities for further choice tomorrow. Or one may not exactly choose for oneself: one may be in the thrall of others, too much hostage to their choices. On top of that there is always the possibility that, although one has the capacity and opportunity to choose autonomously, one fails to do so. One drifts idly, never confronting the options as options. In some situations, all of these problems co-exist. A prisoner confined for most of the time in his prison cell still has options: to pace clockwise or anti-clockwise, to sit down or stand up, to sleep now or later, to eat or refuse food, etc. But the range of options is small, the value of most is limited, their attractions to the prisoner typically pale after a few days, they do not lead to any significant new choices, there are guards whose orders disrupt (or might at any minute disrupt) their pursuit, and after a while the prisoner may naturally settle into aimlessness.

This prisoner suffers from a severe lack of personal autonomy. Yet he may still possess complete moral autonomy. Confronted with a fly and the idle inclination to pull its wings off, there is nothing in the story so far to suggest that the prisoner lacks the ability or the will to determine the moral principles on which he acts. Should one put transient amusement ahead of the miracle of flight? Is it wrong to take pleasure in suffering? Are all living things created equal or are some there for exploitation by others? These are exactly the kinds of moral questions which his

incarceration gives the prisoner an unusually lavish amount of time to explore and to discipline himself in respect of. He differs in this respect from the unluckier prisoner in a more savage regime who is maintained in a constant state of terror or pain, for whom even moral autonomy is an impossible luxury.

Of course depression or another mental illness may intervene to bring the lucky prisoner into the same state as the unlucky one. My only point is that this is a contingency. Even a radical loss of personal autonomy does not necessarily undermine one's moral autonomy. One can be a morally autonomous person with no significant personal autonomy. But can one, conversely, enjoy any significant measure of personal autonomy without moral autonomy? This is a more difficult question. It depends on the answer to two further questions. First, does one enjoy significant personal autonomy if one's range of valuable options includes no morally valuable options (i.e. no options constituted by morally valuable action)? Second, can one have any options constituted by morally valuable action if one lacks moral autonomy? I am inclined to answer the first question in the negative: a life that offers no possible encounters with moral value is by its nature a life with an insufficient range of options in it to qualify as autonomously lived. This is because most valuable options (any involving relationships with other people) have a moral aspect. But the second question is trickier. Indeed it is a version of the very question that we are currently investigating: Does morality require autonomy? An answer at this stage would be premature. So it is too early to say whether one can enjoy any significant personal autonomy without being morally autonomous. All we can say so far is this. Since one can certainly be morally autonomous without enjoying significant personal autonomy, not everything that destroys or compromises one's personal autonomy destroys or compromises one's moral autonomy. So, anticipating the discussion in section 3, we should be careful not to jump to the conclusion that coercion compromises one's

moral autonomy merely because it compromises one's personal autonomy (by placing one in the thrall of another).

It must be moral autonomy, not personal autonomy, that Fletcher is thinking of in his premiss (1). Personal autonomy, as I said, is an ideal of human flourishing. Although one may think that it is better to live an autonomous life than to live otherwise, nobody seriously contends that one cannot act morally without personal autonomy, still less that this 'cannot' is the cannot of conceptual impossibility. History and literature are littered with examples of morally admirable action by slaves and prisoners, by poor and oppressed people, and by others with scant personal autonomy. Can one deny the many moral virtues illustrated in, for example, the works of Hardy or Dickens or Steinbeck or Faulkner merely because the characters concerned enjoy few and narrow choices? One point of these novels is to remind us that personal autonomy (and more generally a good quality of life) is not a prerequisite for morally valuable action. What is more often and more plausibly claimed, however, is that *moral* autonomy – authorship of the principle on which one acts – is a prerequisite for morally valuable action. It is part of the nature of morality, some say, that only morally autonomous beings can participate in morality and hence exhibit moral value in their actions. This, it seems to me, is the view that Fletcher intends to borrow from Kant and through Kant from Locke. So I will interpret his premiss (1) as follows:

(1') It is conceptually impossible to perform a morally valuable action unless one is morally autonomous in its performance.

Is (1') true? I tend to think that it is false, unless the relevant idea of moral autonomy is so thin that (1') is reduced to a trivial truth. But I will not be able to mount a comprehensive attack on (1') here. Instead I will restrict myself to discussing a couple of red herrings, a couple of lines of thought that have conspired to lend (1') some of its false allure. With these sources of false allure

removed, it seems to me that advocates of (1') will struggle to find much by way of independent support for it.⁷

a. Ulterior motives

Here is the first red herring. Arguably (and let us concede for now) one's actions are morally valuable only if and to the extent that they exhibit one's moral virtue. Moral virtue, as Aristotle explained, is exhibited only in good actions performed 'for their own sakes'.⁸ One action that is characteristic of an honest person, for example, is truth-telling. The action of truth-telling is characteristic of an honest person because the honest person is disposed towards truth-telling, i.e. regards the fact that an action would be an action of truth-telling as being in itself a powerful reason in favour of performing it. She tells the truth, in this sense, for the sake of telling the truth, or (to put the point in a more Kantian way) on the principle of truth-telling. It follows that there are conceptual constraints on the contribution that others can make to the cultivation of honesty in me. Others, of course, can help to acquaint me with the joys of honesty, can set good examples of honesty, can remonstrate with me when I am dishonest, and so on. But on an occasion when truth-telling is called for I am exhibiting my honesty only⁹ if I tell the truth for the sake of telling the truth. I cannot be doing it instead for the

⁷ I say 'independent' because of course one may still wheel out other parts of Kant's moral theory to show how well (1') fits with them. These are not independent because most of them already presuppose the truth of (1').

⁸ *Nicomachean Ethics* II.4 1105^a32.

⁹ For simplicity's sake I ignore other aspects of the virtue of honesty and treat it as a virtue exhibited only in acts of telling. In reality, of course, there are many types of honest dealings other than honest tellings, and while the truth is what honest people *qua* honest tell, the truth is clearly not the only thing in which honest people *qua* honest deal. For insightful and balanced discussion of honesty and its relationship to trustworthiness (as well as other related virtues), see James D. Wallace, *Virtues and Vices* (Ithaca 1978), 107-10.

sake of pleasing my friends, for the sake of improving my moral reputation, for the sake of the pleasure I will take in having acted morally, for the sake of becoming an honest person, and so on. Nor – an important addition to the list – can I be doing it for the sake of keeping my promise that I will tell the truth. That is admittedly capable of being a morally virtuous motivation, but it is not the morally virtuous motivation that we are looking for. It shows me to be trustworthy rather than honest. I am acting on the principle of promise-keeping rather than on the principle of truth-telling (even though, on this occasion, the two converge in supporting the same action because I promised to tell the truth).

To exhibit honesty, then, I must tell the truth because it is the truth, irrespective of further reasons I might have to tell the truth. Generalized to other moral virtues, I will call this the ‘Aristotelian thesis’, or (A) for short:

(A) It is conceptually impossible to exhibit a moral virtue in acting for an ulterior motive, i.e. for a further reason that one has to perform an action characteristic of that virtue beyond the fact that it exhibits the features that make it characteristic of that virtue.

It is easy to see why (A) might be mixed up with (1’). By (A) your attempts to incentivize me to act honestly are self-defeating. You may thereby give me extra reasons to do the same things that an honest person does, but these are inevitably reasons other than those that make the action appealing *per se* to an honest person. So they cannot make an honest person of me. It may seem that the problem, the obstacle to my exhibiting moral virtue in such a case, is that these reasons are somehow coming from you rather than from me. You are the author of the principle on which I act, whereas, to qualify as a morally virtuous person, I have to be the author of my own principles. But a moment’s reflection reveals that, so far as (A) is concerned, this is not the real problem. It matters not, from the point of view of (A), where the ulterior reasons come from, who has authorship of them. They need not be incentives chosen by another for the

purpose of encouraging me to act in a certain way. They may indeed be other moral reasons, such as the moral reason I have to do as I promised you I would do. This too can count as an ulterior motive that interferes with my exhibiting honesty in my action, in just the same way that a prudential incentive supplied by you can count as an ulterior motive.

One can close this gap between (A) and (1') only by claiming (as Kant claimed) that there is only one moral virtue, such that every morally virtuous person is animated by the same feature of his or her projected action, from which it follows that there can be no such thing as an ulterior moral motive. But this consolidation of all moral virtue is a very high price to pay, in my view too high a price to pay, for an interpretation of (A) that makes the authorship of the moral principles on which one acts relevant to whether the action is morally virtuous.

There is also a converse asymmetry between (A) and (1'). (A) applies to the virtue of prudence, which counts (in the Aristotelian tradition) as one of the moral virtues. If the police threaten to punish me for parking beside a fire hydrant then, all else being equal, it would be prudent of me not to park beside the fire hydrant. But I exhibit prudence, in such a case, only if I avoid the punishment for the sake of avoiding the punishment. If I avoid the punishment instead for the sake of keeping my promise to you (e.g. my promise not to keep getting into trouble with the police) then the virtue I exhibit is trustworthiness, not prudence. According to (1'), on the other hand, I do not need to possess moral autonomy to exhibit prudence. On the contrary, if I prudently react to a threat of punishment then on most familiar interpretations of (1') (including Kant's as well as Fletcher's) I am not being morally autonomous. I am acting heteronomously, on principles authored by another. (1'), in other words, is supposed to capture a difference between the virtue of prudence and the moral virtues. Whereas (A) captures a feature that prudence shares with the (other) moral virtues. This is easily overlooked because the most common kind of ulterior motive is a prudential

one. This can lead one to think of prudence as the corrupter, and moral virtue as what is corrupted. But (another) moral virtue may equally be the corrupter of one's prudence.

b. Mixed motives

Once it has been distinguished from (A), and hence prevented from basking in (A)'s reflected glory, does (1') retain any attraction? Here is a second red herring. It is possible to act with mixed motives. I may tell the truth partly for the sake of truth-telling *per se* and partly for the sake of promise-keeping (having promised to tell the truth). In this way I may exhibit my honesty and my trustworthiness in one fell swoop. Likewise I may tell the truth partly for the sake of truth-telling *per se* and partly for the sake of punishment-avoidance (having been threatened with punishment for lying). In this way I may exhibit my honesty and my prudence at the same time. In the second case, it is plausible to think, my action is less admirable than it is in the first case. (A) does not explain this. (A) has nothing to say about mixed motives. (1'), on the other hand, offers us a way of explaining what is going on here. In the second case, but not the first, my moral autonomy is compromised. The incentives provided by the would-be punisher interfere with, even if they do not destroy altogether, my authorship of my own principles. In the process they detract from the moral value in my action.

It is contentious, among believers in (1'), whether an interference with moral autonomy can fall short of destroying it. Some regard moral autonomy as an all-or-nothing affair, and hence think that even the taint of prudential incentives is fatal to all moral value in the action so incentivized. Others think that autonomous and heteronomous motives can coexist, so that the only effect of a mixture of the two is dilution of the moral value in the action. But both can agree that the admirability of my truth-telling is set back by the fact that, in doing it, I am

interested in avoiding punishment for lying as well as interested in truth-telling per se. Isn't this part of (1')'s appeal?

It strikes me that (1') is a sledgehammer to crack a nut on this point, and can lead us wildly astray. The reason why it is less admirable to tell the truth partly for the sake of avoiding punishment is simply that, by and large, it is easier to live like this. It is easier to be the kind of person who allows the avoidance of punishment, and similar things, to figure to some extent in one's reasoning. For being such a person tends to mean that (barring systematic miscalculations) one is punished less than one otherwise would be. That it is less admirable to live more easily does not mean that there is less moral value in doing so. On the contrary, it is possible for us to admire the so-called 'man of principle' who goes to the gallows rather than lie, while at the same time holding that he lacks adequate moral justification for what he does. He was not merely too honest for his own good; he was too honest full stop.¹⁰ It is a central weakness of Kant's ethics that he systematically confuses this man's admirability with his moral virtue, and hence with the moral value of his actions. He offers us a theory of moral virtue according to which increasing feats of moral resilience, to the point at which one sticks to one's promises even as the world falls around one, are not only regarded as increasingly impressive but endorsed as exhibitions of increasingly good moral character. But we should prefer the Aristotelian view: moral virtue lies in a mean. Where moral virtue is concerned, more is not always better. There comes a point at which one's honesty or trustworthiness is morally excessive. Inasmuch as (1') gets its appeal by portraying such excess as morally superior, it is a spurious appeal.^s

You may think that I have given away in this remark the real crux of my quarrel with (1'). (1') makes authorship of the

¹⁰ The most insightful discussion of such cases of 'admirable immorality' is Michael Stocker's in his *Plural and Conflicting Values* (Oxford 1992), 37ff.

principles on which one acts a prerequisite for morally valuable action. Am I advocating a more particularistic ethics in which principles do less work? No I am not. The reference to 'principles' in my characterization of moral autonomy was not intended to lock supporters of (1') into the idea that moral action is always based on an unyielding maxim of the kind that Kant envisaged. A principle, for the purposes of (1'), is simply a reason. My objections to (1') centre not on its demand that moral action be action on principles (=for reasons) but merely on its demand that these principles be self-authored. Any attraction in this view, it seems to me, is reflected glory from various other more plausible views with which (1') is readily confused.

2. Does right require coercion?

There are two different features of regulation by law that give rise to worries about its compatibility with the autonomy of those who are regulated. One is that regulation by law is regulation by authority. The other is that law uses coercion to secure compliance by those who do not (otherwise) submit to its authority. What's the difference between authority and coercion? Someone exercises authority when he creates a reason that displaces (or 'pre-empts') some or all of the reasons that those subject to the authority would otherwise have had available to act on. Someone coerces, on the other hand, when he issues a conditional threat that adds a powerful (humanly irresistible) extra reason to the reasons that those subject to the coercion would otherwise have available to act on.

Several writers in the Kantian tradition have regarded the authoritativeness of law as the feature that compromises the moral autonomy of those who are subject to it. R.P. Wolff, in particular, made a famous argument for anarchism based on the incompatibility of the law's authority with the moral autonomy

of its subjects.¹¹ The feature that creates the incompatibility, for Wolff, is the pre-emption feature, the authority's displacement of what would otherwise be the subject's reasons. This, says Wolff, is the paradigm denial of moral autonomy, for it takes self-authored principles and replaces them with principles authored by another. This argument was successfully resisted by Joseph Raz, who pointed out that submission to authority can itself be a self-authored principle.¹² One acts on one's second-order judgment that it would be better to act on the judgment of another. There is no rational way to submit to authority other than by making the judgment for oneself that the authority is worth submitting to. If sound, this line of thought adds to our doubts about the whole idea of moral autonomy as presented in the Kantian tradition. If there is no other way to use other-authored principles than by self-authoring the principle under which one is to use them, then all action (for reasons) is autonomous in the relevant sense, and there is no special autonomy required by moral action. This is what I had in mind when I said above that (1') may be rendered trivially true if the relevant idea of moral autonomy is thin enough. It is thin enough if moral autonomy simply means the ability and propensity to respond to reasons, where this includes the ability and propensity to respond to second-order reasons that identify which first-order reasons we should respond to. For we exhibit this ability and propensity no less in actions that respond to reasons given to us by others than we do in other actions.¹³

Wolff's thesis, of course, is not Fletcher's thesis. Fletcher focuses not on law's authoritativeness, but on law's coerciveness. This focus presents two immediate additional problems beyond those faced by Wolff. The first problem is that there is no

¹¹ Wolff, *In Defence of Anarchism* (New York 1970), ch1.

¹² Raz, *The Authority of Law* (Oxford 1976), ch1.

¹³ For related doubts about moral autonomy, see Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge 1988), ch 3.

conceptual requirement for the law to resort to coercion. All extant legal systems do use coercion but this is not a prerequisite for them to qualify as legal systems. It is only a prerequisite for them to keep functioning well in the face of inevitable human weaknesses.¹⁴ The second and more important problem is that even where legal systems do have provision for coercion, they have no call to use such coercion against those who regard themselves as bound by the law. Coercion is the law's backstop device to deal with those who do not (otherwise) submit themselves to the authority of law. It follows that, if a general challenge is to be made to the law's ability to regulate immorality consistently with the moral autonomy of its subjects, that challenge must include a Wolff-style challenge focusing on law's authoritativeness, and not only a Fletcher-style challenge focusing on law's coerciveness. Otherwise the law can always answer that, if only people would follow the law as an authority (instead of waiting to be coerced) they could thereby make themselves more morally upstanding in the process. There would be no conceptual objection, then, to using the law as way of securing morally better actions by those subject to it.

Could one reply that even those who regard themselves as bound by law are still being coerced? After all, the law still threatens them that, in the event that they do not conform to the law, they will be met with a sanction. Assuming the sanction is awesome enough, isn't this still coercion? No. It is coercion only in those cases in which the threat is operative, i.e. in which it figures in the reasoning of those against whom it is issued.¹⁵ It is only because of this feature that those who object to moralistic coercion on Kantian grounds can get their objection off the ground. Their objection is that one cannot act with moral autonomy while one's behaviour is influenced by conditional

¹⁴ Joseph Raz, *Practical Reason and Norms* (London 1975), 157-61.

¹⁵ For further discussion see Harry Frankfurt, *The Importance of What We Care About* (Cambridge 1988), ch 1.

threats. But the other side of the coin is that one can act with moral autonomy, on the Kantian view, if there are conditional threats but one's behaviour is not influenced by them. So the mere fact that law issues the threats does not get Fletcher where he needs to be. Still less so in view of the fact that, conceptually, the threats need not even be made, for a legal prohibition remains a legal prohibition even without them.

3. Does coercion compromise autonomy?

Personal autonomy – authorship of one's own life – is compromised by coercion. You may think that this is because coercion reduces one's realistic options to a point at which one no longer has an adequate range of them. But this is not true. The coercer may coerce one not to pursue a particular option while leaving one with a fabulous range of others.¹⁶ Coercion has an independent significance in inhibiting personal autonomy. The autonomous person has a good range of realistic, valuable and palatable options and, a quite separate matter, enjoys substantial freedom from coercion and manipulation in respect of which of those options she pursues. So personal autonomy is compromised by coercion even where it leaves one with plenty of options left to choose from. Confusion between personal autonomy and moral autonomy leads many to talk as if moral autonomy, and hence the moral value in action, is likewise compromised by coercion. But is this really so?

The primary problem we now face is that, as our discussion has moved along, we have become increasingly uncertain what moral autonomy could be, such that its possession matters for morally valuable action in a way that it does not matter for other kinds of action. In light of this, I will short-circuit the question under discussion. Rather than asking whether coercion

¹⁶ Raz, *The Morality of Freedom* (Oxford 1986), 377.

compromises one's moral autonomy such that one cannot exhibit moral virtue in the coerced action, I will simply ask whether coercion prevents one from exhibiting moral virtue in the coerced action (still conceding, for the sake of argument, that one's actions are morally valuable only if and to the extent that they exhibit one's moral virtue).

For the purpose of evaluating it, in other words, I will interpret Fletcher's premiss (3) as:

(3') Coercion precludes morally valuable action by the person coerced.

Is (3') true? It certainly contains a grain of truth, which is the grain of truth entailed by (A). One could put it simply by saying that nobody can be coerced, or more generally given an effective incentive, to exhibit a particular moral virtue in what they do. You cannot give me an incentive to be honest without appealing to my prudence rather than my honesty, and so your attempt to make me honest is self-defeating. Nor is this point restricted to honesty. Equally, you cannot give me an incentive to be prudent. If I am not already prudent enough to care about the sanction you threaten for my imprudence, your threat, in itself, will not make me any more prudent. The best you can do with your threat is appeal to whatever prudence I already have. Of course one defining feature of *coercive* threats is that they are cranked up to overcome the resistance of even very imprudent people. So we do not notice that these threats fail to make anyone more prudent than they are. We make the mistake of thinking, as many Kantians think, that prudence can be compelled whereas moral virtue (not including prudence) cannot. But in fact the truth in (3'), such as it is, extends equally to prudence. One cannot coerce anyone to exhibit any moral virtue (where prudence equally counts as a moral virtue).

What does not follow, which (3') may seem to suggest, is that moral virtues are not exhibited in the performance of coerced actions. Coercion, as Thomas Schelling taught us, has

whatever effect it has on people only if and to the extent that they still answer to reasons, including moral reasons, even while they are being coerced.¹⁷ Consider the following example.¹⁸ Gangsters have broken into my house and are trying to get me to disclose the location and combination of my safe. They threaten to torture me and my family until I disclose the information. My will begins to crumble. Fortunately, I have in my pocket an irrationality pill, which I surreptitiously swallow. Now, when the gangsters threaten torture, I can sincerely respond: 'Go ahead, there's nothing I love more than pain. And there's nobody I more want to see in pain than my children.' Now I am impervious to their threats. It turns out that I was capable of being coerced by threats towards myself and my children only because I was still open to reason. Being open to reason, I was capable of exhibiting aspects of my moral character in my responses to the threats. I was capable of displaying more or less courage, more or less prudence, more or less dependability, and so on. When I claim that I was coerced, I can accordingly be faced with the objection that I showed insufficient courage or insufficient dependability in the face of the threats, such that the coercion defence is unavailable to me. Only if I became too irrational to be coerced did I become I too irrational to exhibit my moral character in my responses to the threats, and hence to be judged by the quality of my moral character so exhibited.

We can distinguish, in short, between attempts to coerce people to exhibit moral virtues (impossible) and attempts to judge them on the moral virtues they exhibit under coercion (possible). I do not think that Fletcher would dispute this contrast. Although he denies that people cannot be coerced to act morally, he is perfectly willing to see standards of moral character reflected in the definition of coercion (=duress) when

¹⁷ Schelling, *The Strategy of Conflict* (Cambridge, Mass. 1960), 16ff.

¹⁸ Based on the one that Derek Parfit calls 'Schelling's Answer to Armed Robbery': Parfit, *Reasons and Persons* (Oxford 1985), 12-13.

it is used as a defence to a criminal charge.¹⁹ This is consistent with his thesis that moral considerations can enter into the law indirectly. But if he accepts this much then his official explanation for his view that people cannot be coerced to exhibit moral virtue must be wrong. He says, in premiss (3), that people cannot be coerced to exhibit moral virtue because the coercion compromises their moral autonomy, which is a condition for exhibiting moral virtue in one's actions. If that were the true reason, it would also prevent people from exhibiting moral virtue while being coerced, and so would make it unintelligible for standards of moral character to appear in the definition of coercion (or duress) that is used for justificatory and/or excusatory purposes in the criminal law.

4. *What follows?*

I have challenged all three of Fletcher's premisses. But even if his premisses were true, his conclusion would be much too dramatic. He concludes that the attempt to prohibit immorality by law – meaning immorality *per se* – is self-contradictory. This would follow only if prohibiting immorality were the same as requiring actions of moral value, and only if (as I have been allowing so far) an action of moral value is the same as an action exhibiting moral virtue. But at least one of these undisclosed premisses in Fletcher's argument is false.

To see why, let's return to the Aristotelian thought that moral virtue is exhibited only in good actions performed 'for their own sake'. I unpacked this as follows. For each moral virtue there are actions characteristic of that virtue. The person who exhibits that virtue exhibits it by performing those characteristic actions because they are those actions – performing them, as modern philosophers sometimes put it, 'under that description'.

¹⁹ *The Grammar of Criminal Law*, above note 1, 316.

Now we may ask: What makes these actions characteristic? Are they the characteristic actions because they are performed for the characteristic reasons, or is it the other way round? It must be the other way round. The actions are the things that give the reasons; otherwise there would be nothing in the actions for the morally virtuous person, who is a rational person, to respond to rationally. We could nevertheless stipulate that the reasons given by the actions, although they are given by the actions in all cases, only qualify as moral reasons when they are actually acted on by a morally virtuous person. But this would be a bizarre stipulation. It would mean that the person who gave no weight to such reasons could never count as morally vicious, because relative to her the reasons would not be moral ones. If one is going to think of the reasons as moral reasons when they are acted on, they are also moral reasons when not acted on. This is also Kant's view. The reasons on which the morally virtuous person acts are moral reasons and they remain so even when not acted upon.

If this much is true then immorality does not lie, basically, in failing to act for moral reasons. Rather it lies in failing to do what moral reasons would have one do. A person who acts as a virtuous person would, but does not perform the relevant actions for their own sake, does not act immorally. She acts immorally only when she crosses the line into failing to act as a virtuous person would. What may nevertheless be said, in a Kantian vein, is that when she does not perform the relevant actions for their own sake, i.e. when no moral virtue is exhibited, her action lacks moral value or moral worth. This is a quirky way of talking, but I have allowed it throughout this paper and it is intelligible. Nevertheless it must be used carefully. In this narrow Kantian sense of 'moral value', immoral actions are not merely those that lack moral value. They are actions that go against morality, that lack moral value because they do not even *conform* with moral reasons, never mind being performed *for* moral reasons.

It follows that, even in Kantian terms, prohibiting immorality need not be a matter of regulating the reasons why people act as

they do. It need only be a matter of regulating the actions themselves. Such regulation is unaffected by Fletcher's argument, which, even if all of its premisses are sound, still shows at most that the law cannot intelligibly require people to exhibit moral virtues, i.e. to avoid acting immorally and to do so for moral reasons. It does not show that the law cannot intelligibly require them to avoid acting immorally. So it does not show that immorality as such cannot be prohibited by law.

A simpler way to convey this is to say that the prohibition of immorality need not equal the enforcement of morality. It may be conceptually impossible to enforce morality, where this is taken to entail coercing people to exhibit moral virtue in their actions. But it does not follow that it is conceptually impossible to prohibit immorality, where this is taken to entail coercing people to perform the very actions that the morally virtuous, *qua* morally virtuous, would insist on performing. Even if one cannot coerce people to act-for-a-moral-reason, that same moral reason can still clearly be one's reason for coercing them.

This being so, there is no sound basis that I can find anywhere in *The Grammar of Criminal Law* for Fletcher's claim that, where the justification of criminal law is concerned, the political precedes the moral. Indeed there is no sound basis for thinking that political considerations, in the sense that Fletcher has in mind, are anything other than moral considerations. States are moral agents too, and while the extent of state authority and the state's monopolization of coercion bring with them special moral constraints on what the state may do (e.g. the harm principle and the rule of law), these constraints apply to what is otherwise the ordinary moral position of an ordinary moral agent. The state must not murder or be complicit in murder. It must not rape or be complicit in rape. It must not rob or be complicit in robbery. It must not coerce or be complicit in coercion. Of course the last item on the list shows up a special problem. The state, as already conceded, must coerce if it is to maintain an effective legal system. It must commit what would

normally count as moral wrongs. In explaining how this can properly be so, however, the last thing we should do is claim that the state is somehow exempt from morality. No: the state too needs to justify its coercive activities in moral terms. Satisfying the harm principle and the rule of law are necessary but insufficient conditions of this. The state is also bound, even in its exercises of authority and its uses of coercion, by the general principles of morality that bind us all.