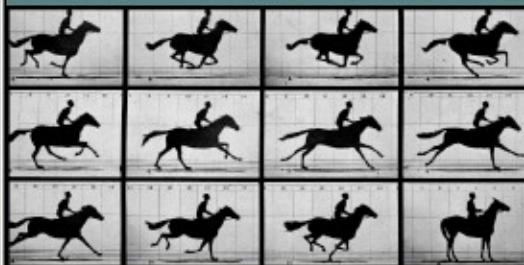# PUNISHMENT, COMPENSATION, AND LAW

A Theory of Enforceability

MARK R. REIFF

CAMBRIDGE STUDIES IN

PHILOSOPHY AND LAW

This page intentionally left blank

Punishment, Compensation, and Law

A Theory of Enforceability

This book is the first comprehensive study of the meaning and measure of enforceability. While we have long debated what restraints should govern the conduct of our social life, we have paid relatively little attention to the question of what it means to make a restraint enforceable. Focusing on the enforceability of legal rights but also addressing the enforceability of moral rights and social conventions, Mark Reiff explains how we use punishment and compensation to make restraints operative in the world. After describing the various means by which restraints may be enforced, Reiff explains how the sufficiency of enforcement can be measured, and he presents a new, unified theory of deterrence, retribution, and compensation that shows how these aspects of enforceability are interconnected. Reiff then applies his theory of enforceability to illuminate a variety of real-world problem situations.

Mark R. Reiff is Lecturer in Philosophy of Law at the University of Durham. He has written on various topics within legal, moral, and political philosophy, and he is a qualified lawyer in England, Wales, and the United States, where he also practiced for many years.

Cambridge Studies in Philosophy and Law

Some other books in the series:

Continued after the index

For Della

Punishment, Compensation, and Law

A Theory of Enforceability

Mark R. Reiff

University of Durham

Contents

Acknowledgments

The ideas that form the backbone of this work have a long history. They began as an effort to reconcile some received notions of the role law plays in maintaining social order with my experience of the law as I encountered it in practice. When I ultimately decided to leave practice and return to academia to do a Ph.D. at the University of Cambridge, I planned to develop these ideas into a dissertation that included a theory of enforceability, a theory of adjudication, and a theory of litigation. But I quickly realized that it would be impossible to deal adequately with all three topics in a single work, and so focused first on developing a theory of enforceability, which I viewed as more fundamental and in any event necessary before the further work I had envisioned could be undertaken. This book represents the culmination of that effort. It has gone through a great many revisions since its original incarnation, and it includes much new material, but I can still see the seeds of the ideas it contains in my experience of practice.

A great many people provided valuable assistance in bringing this project to fruition. Hillel Steiner and Nigel Simmonds, who acted as examiners of my dissertation, provided me with numerous criticisms, comments, and suggestions that led to substantial improvements in the manuscript. Antony Duff provided me with an extensive, insightful, and thought-provoking written critique of Chapter 4 that helped me clarify my argument in that chapter, and Gerald Dworkin provided a similar critique that helped me clarify my argument even further. I also benefited greatly from the many thoughtful and detailed comments and suggestions contained in the anonymous reader reports solicited by Cambridge University Press. I am grateful to these readers for helping make the book far better than it otherwise would have been. I am also grateful to Harriet Davidson, who provided me with valuable feedback on the introduction and much general advice and encouragement, and to Jerry Hirniak, who provided me with much advice and inspiration for important elements of the book's design.

Introduction

Mill said, "All that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people."[1] Two questions are suggested by this remark. First, "what restraints upon the actions of other people should there be?" Second, "how should these restraints be enforced?" Mill characterized the first as "the principal question of human affairs,"[2] and it has indeed been the focus of legal, moral, and political philosophy from long before Mill's remark to the present day. Answering this question requires the development of a method through which the set of appropriate restraints can be identified and derived – a way of deciding which restraints are morally required, which are morally prohibited, and for those restraints that are morally permitted but not required (and there are a great many of these), which should and should not be imposed. Utilitarianism offers one such method, contractarianism another, libertarianism yet another, and there are others still. While some of the restraints identified by the many variants of these theories are similar, many are controversial, and the development and refinement of these theories and the differing methodological approaches they represent continue to occupy a great deal of philosophical attention.

Far less attention, in contrast, has been paid to the second question suggested by Mill's remark, even though it should be obvious that answers to both questions are required if the restraints we impose on members of society are to have much effect on our quality of life, or, to put in more modern terms, if the project of social cooperation is not to founder but to flourish. Answering this question requires that we identify the various means by which restraints may be enforced, develop a way of measuring how much enforcement is available, and determine how much and what kind of enforcement must be available for a restraint to have the requisite operational effect. Despite providing what are often quite extensive answers to the first question suggested by Mill's remark,

---

[1] Mill (1989), ch. 1, p. 9.
[2] Mill (1989), ch. 1, p. 9.

however, most philosophers have simply assumed that whatever restraints they have under consideration will be enforceable without explaining what enforceability means or how it can be achieved. Those few philosophers who have addressed the question of enforceability have tended to do so only briefly, and those who have done so more than briefly have tended to focus primarily if not exclusively on just one aspect of enforceability. Some have focused on principles of punishment, while others have focused on principles of compensation. Some have focused on the enforceability of criminal law, while others have focused on the enforceability of private or public law or on restraints that are not embodied in the law at all. Some have focused on legal remedies, while others have focused on remedies that lie outside the traditional confines of the law. Some have focused on enforceability as a means of achieving retribution, while others have focused on enforceability as a means of achieving deterrence or corrective justice.

One consequence of this fragmentation of the question is that even when enforceability has been subject to analysis and discussion, these discussions have been seriously incomplete. Another and perhaps more unfortunate consequence is that this fragmentation of the question has created the impression that these various aspects of enforceability are separate and independent of each other and do not need to fit together to form a coherent conceptual whole. What remains conspicuously lacking is a conception of enforceability that is both comprehensive and unified – a conception that can be applied to all the various forms of restraint that govern our social life, that relies on theories of both deterrence and retribution and not exclusively one or the other, and that not only incorporates principles of punishment and principles of compensation but also explains the relationship between the two and identifies what conditions are necessary and sufficient for the requisite degree of enforceability to exist. The development of such a comprehensive unified conception of enforceability is the task I have undertaken in this book.

I will talk more about the relationship between these various aspects of enforceability in a moment, but before I do, I want to say a bit more about the relationship between the two questions suggested by Mill's remark. While each question intrudes to some extent on any attempt to answer the other, it is important to keep the distinction between the two questions firmly in mind. In large part, the project of deciding what restraints we should impose upon the actions of other people involves deciding what *rights* we do or should hold as members of society, for the assignment of rights is the principal method by which we create corresponding restraints on other people and on the government, at least for those restraints that we consider most important. In making this assignment, we often do consider issues of enforceability, for the choice of whether a right must be created or whether a restraint may remain part of the domain of morality alone or simply take the form of a social convention will to some extent depend on the differing means of enforcement that are available for these

different forms of restraint. Our answer to the question "what restraints upon the actions of other people should there be" may accordingly depend to some extent on our answer to the question "how should these restraints be enforced," for we may want to consider what methods of enforcement are available for a particular form of restraint when deciding which form to select given the content of the restraint we have in mind.[3]

Similarly, the answer to the question "how should these restraints be enforced" depends to some extent on our answer to the question "what restraints should there be," for enforcement action, like any other form of action, is subject to restraint. But the process of determining whether a restraint is or is not enforceable is independent of the process of determining whether the restraint at issue should or should not be imposed. Determining which restraints we should embrace and which we should reject is a controversial operation, and because the set of restraints that is ultimately selected will no doubt be the product of some compromise, it is quite likely that no single methodological approach can account for every choice that has been made. Any conception of enforceability will accordingly have to apply to restraints that are the product of many different underlying moral theories, and some of these underlying theories will conflict. If our conception of enforceability is to do its job, then it must tell us whether a restraint is enforceable regardless of which underlying moral theory happened to produce it. Indeed, for purposes of developing a conception of enforceability, "it is essential that the whole set of problems involving the assignment of rights among individuals and groups in society be separated from the problems involving the enforcement of the assignment that exists. Monumental but understandable confusion arises and persists from a failure to keep these two problem sets distinct."[4]

Another potential source of confusion is the relationship between a conception of enforceability and a conception of justice. A great deal of the work that has been done on enforceability has focused on the extent to which punishment or compensation is morally permitted or required, and thus is really more about what negative or positive restraints might apply to enforcement action under an appropriate conception of justice than about what we might call the "core issues" of enforceability. If we are to illuminate these core issues, however, we must recognize the possibility that a restraint may be enforceable even if the degree of enforcement available is more or less than what would be required to fulfill the demands of justice. Justice tells us how much enforcement is morally permitted or required, but enforceability tells us how much enforcement is required to make a restraint operative in the world, and these amounts may

---

[3] The American legal realists, of course, were forceful advocates of this view, but so were some of their most prominent critics. In Fuller and Perdue (1936–7), for example, the authors argue that rather than being determined by preexisting legal rights, remedies in fact determine rights. See Duxbury (1995), p. 224.

[4] Buchanan (1975), pp. 11–12.

differ. If we are to determine how much enforcement is required to make a restraint operative in the world, our conception of enforceability must at least begin its life unencumbered by any particular conception of justice. Whether it can be fully developed without reference to a conception of justice is a more complicated question, which I shall address at length in Chapters 3 and 4. For now, however, the only point I am trying to make is that the development of a conception of enforceability and the development of a conception of justice are fundamentally different projects with different objectives and potentially different methodological approaches, and while the trajectory of each project may sometimes intersect, it would be a mistake to confuse one project with the other.

Because this book is about enforceability alone, I make no attempt (except for purposes of illustration) to discuss what rights we have, what form these rights should take, or how the specific form and content of our rights should be derived. But this does not mean that my discussion has no bearing on issues related to the nature of rights. Because philosophers who engage in debates about the nature of rights invariably assume that rights are enforceable, it is often difficult to see the extent to which the value of the rights they discuss depends on their enforceability and the extent to which the value of these rights derives from some other source. Once we have isolated what matters about enforceability, however, we will be able to see what is left. If whatever is left has value, then the nature and extent of that value is what matters about rights apart from their function as triggers of enforceability. I will discuss this issue briefly in Chapter 8, but this discussion is meant to be tentative and suggestive given the principal focus of this book. I do hope, however, that my exploration of enforceability will help identify what matters about rights apart from their enforceability and thereby help to give some focus to future discussions of this issue. I will accordingly try to illuminate the path that such a discussion might follow, but I will not proceed very far down that path myself.

While what follows is framed as an analysis of the enforceability of legal rights, it is also important to note that the conception of enforceability I present does not depend on whether it is a legal right or something else that we are seeking to enforce. The various means of enforcement I identify and the method I develop of measuring the amount of enforcement available can also be applied to the enforcement of moral rights, social norms and conventions, and even the base personal desires of the enforcer. Indeed, one of the central points I hope to make is that the means of enforcement – even what we traditionally think of as "legal remedies" – will often be available when the legal right allegedly being enforced does not actually exist, and will sometimes be available even when there is no pretense that what is being enforced is anything other than the enforcer's will. What this means is that enforceability is not merely a property of (some) rights, it is a property that can be associated with various underlying norms, conventions, expectations, and desires, and these may range from the beneficent to the benign to the socially pernicious. My analysis can accordingly

be generalized and applied not only to the enforcement of legal rights, but also to any occasion where one person, group, or state seeks to exercise power over another and we want to know whether this is likely to be successful.

Which is why this book is a work of both legal and political philosophy. The distinction between the two is not often clear, but there is something to be gained by trying to make it more so. Political philosophy, in its broadest sense, is about how we should order society. Legal philosophy is about how we should order society through law or, more accurately, how we can use law to implement and regulate whatever political order we select. Not every work of political philosophy is a work of legal philosophy, but every work of legal philosophy is, in this sense, a work of political philosophy. But the law is far more technical than the broader political principles that are implemented and regulated by it. The law provides the details of the political order, and because these can be critical indeed, it is easy to focus solely on the details and forget the subsidiary relationship between the legal and the political. Often, this is not a problem, for in many debates about the legal details the larger political context may be harmlessly ignored. Indeed, in some debates about the legal details, the larger political context *must* be ignored – not because the issue involved is not in part political, but because there has been a prior overriding political decision to order society in such a way that certain decisions are thereafter insulated from contemporaneous political pressure. Because it is often harmless and sometimes necessary to ignore the political when focusing on the legal, ignoring the larger issues that are commonly the subject of political philosophy in debates about issues that are commonly the subject of legal philosophy may become a habit and leave us with the impression that legal philosophy takes place outside political philosophy rather than within it. Such an impression, however, can lead us analytically astray. When focusing on enforceability, for example, it is easy to see the issue simply in terms of what legal remedies are available. This is an important question without a doubt, for as we shall see, legal remedies are often essential and always helpful in enforcing legal rights. But we must not forget that the question of what legal remedies are available is merely part of the question of whether and to what extent the right at issue is enforceable. This is a question that is properly the subject of political philosophy, and while a great deal of the answer may relate to issues that are also the province of legal philosophy, the answer does not lie exclusively within its bounds. In Chapter 6, I shall argue that the availability of what we traditionally think of as legal remedies is neither a necessary nor a sufficient condition for enforceability. Indeed, I shall argue that for purposes of determining whether a right is or is not enforceable, the category *legal remedies* cannot even be meaningfully defined.

The word *enforceability* can itself be used in many different ways, and it may be helpful to mention some of these from the start in order to clarify the sense in which enforceability is the subject of this book. One common way

in which the word is used is to refer to the ability to impose *some* amount of punishment or extract *some* amount of compensation following the violation of a right, norm, convention, expectation, or desire, no matter how little this amount may be. In this most basic sense, the relevant object of our attention is enforceable if we can impose any punishment or extract any compensation, and it is not if we can do neither of these things. In the opening chapter of this book, I give this conception a little content by categorizing the various means of enforcement that could be employed in a given situation. If any of these means are available, we can impose some punishment or extract some compensation; if not, then regardless of the source of the restraint at issue, it is unenforceable.

While this conception of enforceability does reflect one common usage of the word, it has too little content to be of much use if what we are trying to do is decide how a restraint should be enforced. There are two reasons for this. First, as I shall argue in Chapter 2, at least one and usually more than one of the possible means of enforcement will almost always be available in some measure. The set of situations in which *no* means of enforcement are available whatsoever will be very small indeed, and it may be empty. Second, even if it is not empty, a conception of enforceability based on this use of the word does not tell us anything about what *measure* of enforcement is necessary for a restraint to have the requisite effect, whatever this might be, or what other conditions are necessary or sufficient. A conception of enforceability that does not offer a way of deriving such information does not tell us very much about how the restraints we desire to impose on other people should be enforced.

Another way in which the word *enforceability* is sometimes used is to refer to the ability to invoke the power of the state. This use reflects a conception of enforceability that has more content than the one previously set forth because it replaces the idea of invoking any kind of enforcement power with the idea of invoking a very particular kind of enforcement power. For obvious reasons, this conception is attractive to the political philosopher, for it focuses our attention on the power of the state, one of the central concerns of political philosophy. For equally obvious reasons, this conception is also attractive to the legal philosopher, for it connects the idea of legal rights with that of legal remedies and thereby provides a reason for creating legal remedies for the violation of every legal right and emphasizes the importance of the juridical domain. I discuss the viability of this conception in several places in this book, but it is not the conception of enforceability that this book is ultimately about. There are two reasons for this. First, as I shall argue briefly in Chapter 1 and at greater length in Chapter 6, while it is clear that the category of legal remedies must include certain forms of relief, it is impossible to define precisely what forms of relief are to be included in this category without relying on distinctions that are either arbitrary or incoherent. Any conception of enforceability that did rely on such distinctions would either have to be indeterminate or impossible to defend. Second, and more importantly, even if we were to ignore the problem

of adequate definition, this conception of enforceability still does not tell us how enforceable a right must be or how we go about measuring enforceability. It therefore does nothing more to answer the question of how to enforce the restraints we impose on other people than to suggest certain means of enforcement should be used in place of others.

But people also use the word *enforceability* in a much more meaningful way. This is when they use it to refer to the ability to employ means and measures of enforcement that are sufficient to satisfy a more exacting standard, a standard that reflects our desire to make the restraints we have elected to impose on other people operative in the world. This use of the word reflects a far more robust conception of enforceability, and it is this robust conception of enforceability that the bulk of this book is dedicated to illuminating. Such a robust conception of enforceability would not only describe what means of enforcement are available and explain whether (and if so why) some means may be preferable to others, it would also explain how enforceability is to be measured, what measure of enforcement is required, and whether any other conditions must be present in order for a restraint to have the requisite effect. It would also have a variety of practical applications. It would provide a method for evaluating the risk of violation that can be used by both the beneficiaries of a restraint and potential violators so that they can better determine whether these are risks they are willing to take. It would provide suggestions for managing these risks that can be employed in many situations regardless of what other means and measure of enforcement may or may not be available. It would provide a way of quantifying the degree of enforcement available and the degree of enforcement required so that legislators and other remedy designers can decide whether and to what extent supplemental means or measures of enforcement (such as new or additional legal remedies) are required. And it would provide a way of determining whether certain socially pernicious norms, conventions, expectations, or desires are likely to be enforceable, and thereby provide a way of evaluating whether enforceable rights against such pernicious enforcement action need to be created.

In Chapter 1, I begin my attempt to develop such a conception with a discussion of the means of enforcement. I identify six overlapping categories of means – the threat and use of physical force; the threat and use of strategic power; the sanction of moral condemnation and regret; the sanction of social criticism and the withdrawal of social cooperation; the threat or imposition of personal or financial injury that flows from what I call automatic sanctions; and the threat and use of legal remedies – and discuss the various circumstances in which these means of enforcement might be present and the various ways in which they might be used.

Chapters 2 through 5 contain the theoretical core of my argument. These four chapters all deal with the measurement of enforceability. Chapter 2 identifies the critical stages of enforcement – the previolation stage, the postviolation stage,

and the postenforcement stage – and explains how the goals of enforceability shift from one stage to another. Chapters 3 and 4 discuss how we measure the degree of enforcement available at each stage and what measure of enforcement is necessary and sufficient to satisfy the goals we have identified. This involves an examination of the role that punishment and compensation play at each stage of enforcement, and this, in turn, involves a reexamination and reconception of the ideas of deterrence and retribution and an explication of the relationship between these ideas and the goals of both previolation and postviolation enforceability. It is through this discussion that I develop a unified theory of punishment and compensation, and demonstrate how these two measures of enforcement interrelate. Chapter 5 completes my analysis of the measurement of enforceability with a discussion of the relationship between previolation expectations and postviolation practice.

Chapter 6 returns to the means of enforcement, and completes the development of my conception of enforceability by examining what limitations, if any, apply to the means we may consider in determining whether the requisite measure of enforcement exists. The chapter focuses on three potential candidates. First, the chapter discusses whether the means of enforcement must include what are commonly thought of as "legal" remedies – damages, injunctions, fines, and imprisonment – in order for a right to be enforceable in a meaningful sense, a topic that I touched on briefly back in Chapter 1. Next, the chapter discusses whether the means of enforcement must be lawful. Finally, the chapter discusses whether means of enforcement of sufficient measure must be not only lawfully available, but also practically exercisable for enforceability to exist.

Chapter 7 moves from the theoretical to the practical. In the preceding chapters, I have illustrated the application of the theoretical concepts I discuss with concrete examples wherever possible. Chapter 7, in which I discuss a series of special cases where enforceability seems problematic, is composed entirely of such examples. The special cases discussed in this chapter all arise out of circumstances in which the availability or effectiveness of traditional legal remedies is limited in some way. This could be because any damages awarded for the particular rights violation at issue would be uncollectable given the violator's lack of financial resources, or because some or all of the burden of paying damages would be covered by insurance or otherwise shifted from the violator to some third party, or because damages are the only legal remedy available yet the damages incurred are merely nominal, or because high transaction costs would make the available legal remedies too costly to pursue, or because the injured party lacks sufficient evidence to meet the applicable legal standard of proof, or because the relevant court has erroneously determined that the right at issue does not exist or the alleged violation has not occurred, or because the right involved arises under international rather than national law and there is no established enforcement mechanism for bringing a claim for the violation of

such rights. Aside from simply providing some extended illustrations of how the principles of enforceability developed in the first six chapters would apply to some complex real-world situations where questions regarding enforceability arise, the purpose of this chapter is twofold. First, it allows us to see whether the principles of enforceability developed in the preceding chapters both support and are supported by our considered pretheoretical judgments regarding the enforceability of particular restraints in these various problematic situations. If so – if these principles and our considered judgments are in reflective equilibrium – then this is some evidence that the principles we have developed are normatively correct.[5] Second, it allows us to see whether the recommendations for action generated by these principles of enforceability coincide with how people actually behave. If people do tend to behave in ways that these principles predict – in other words, if the risks of violation they take and avoid, and the form and extent of enforcement they impose and accept are what our principles of enforceability suggest, then this is evidence that these principles are descriptively correct.

Finally, Chapter 8 examines the value of nominal rights. Nominal rights are rights that are unenforceable under the robust conception of enforceability developed in the earlier chapters, but nevertheless may have some (currently insufficient) measure of enforceability associated with them. The chapter considers whether and to what extent even these unenforceable rights may influence the conduct of both beneficiaries and potential violators. The chapter also ponders whether such a thing as a "naked right" might exist – a right that is not merely insufficiently enforceable but not enforceable at all – and makes some tentative suggestions about what matters about rights apart from their enforceability.

Now a word about my method. I proceed by identifying the role enforceability plays in the social order – the goal of enforceability, if you will, and then give content to the concept by examining what means and measures of enforcement are most likely to maximize the chances of achievement of this goal. More precisely, I identify two goals – one for the previolation state of affairs and one for the postviolation state of affairs. I contend that the goal of previolation enforceability is to facilitate social cooperation, while the goal of postviolation enforceability is to facilitate social (as opposed to antisocial) conflict. I then derive the content of these two (what turns out to be) very different conceptions of enforceability by examining the various means and measures of enforcement available and determining which means and measures would best further the goals I have identified. My approach is thus relentlessly consequentialist. While I defend my selection of the relevant goals and my consequentialist conclusions at some length, one could attack my conclusions without challenging my method

---

[5] For a discussion of the normative force of reflective equilibrium, see Rawls (1999), pp. 18–19 and 42–5.

either by selecting a different goal or goals or by contending that the means and measures of enforcement I consider would have different consequences than I believe.

But could one also attack my conclusions by challenging my method? Could a rival conception of enforceability be developed using a method that was not so relentlessly consequentialist? I hesitate to say it could not, but it is difficult to imagine how such a method would proceed. When deciding which restraints we should impose, we are presented with what might be called a problem of moral architecture. The solutions to such problems require that we make substantive moral conclusions about different states of affairs, and these substantive moral conclusions can be generated by a method that is either consequentialist or nonconsequentialist. Indeed, in many instances, the most appealing method may be nonconsequentialist. When addressing the problem of enforceability, however, the availability of nonconsequentialist solutions is not so clear. This problem presents what might be called a problem of moral engineering, for it is not about the content of our underlying substantive moral conclusions but about how best to operationalize the substantive moral decisions we have already made in creating the moral architecture of society. By definition, then, the problem of enforceability seems to require a consequentialist solution – a solution that is embodied in the kind of principle that Nozick describes as "a device for having certain effects."[6] Asking whether a right (or anything else, for that matter) is enforceable is equivalent to asking what the (expected or actual) consequences of violation will be. It is difficult to see how we could evaluate those consequences if we did not have some ultimate goal in mind, or how we could choose one set of consequences when we know another set would better serve that goal. If we did either, it seems that our conception of enforceability would ultimately have to rest on distinctions that were either morally arbitrary or incoherent. If I am correct in this, then giving content to the idea of enforceability is by its very nature a consequentialist operation. Any attempt to derive a conception of enforceability by some other method would simply be missing the point of the enterprise in which we are engaged.

This does not mean that operationalizing the substantive conclusions of our moral theory is purely a consequentialist enterprise. Our underlying moral theory may impose limits on what we can do to operationalize its substantive conclusions, or it may require us to do *more* than merely operationalize its substantive conclusions, and probably it will do both. It might provide, for example, that the threat and use of torture is an impermissible way to make restraints operative in the world no matter how effective such a means of enforcement might be. It might provide that we must compensate the injured even though we could operationalize a restraint just as effectively by merely punishing the violator. And it might provide that even though a certain amount of punishment would

---

[6] Nozick (1993), p. 38.

be sufficient to make a restraint operative in the world, justice demands that we impose more. Nonconsequentialist concerns accordingly have an important role to play even when we are addressing questions of enforceability. But there is a plurality of moral theories at work in every society. Any theory of enforceability must accordingly take this into account. It must be neutral in the sense that it must be designed to work with a variety of different underlying moral theories that are derived in a variety of different ways and that produce a variety of different sets of substantive restraints. And it must not only allow us to operationalize any set of these restraints, it must also be structured in such a way that any set of restraints – both positive and negative – may be applied to it. While I will mention some of the moral restraints – both positive and negative – that may affect questions of enforceability, the idea of a unified comprehensive theory of enforceability is that it will provide a superstructure for generating answers to the question of enforceability without knowing in advance what restraints it may be asked to operationalize and what moral restraints may apply to matters of enforceability itself. If properly designed, our theory of enforceability may accordingly be used to operationalize restraints generated by both consequentialist and nonconsequentialist moral theories and restraints generated by either kind of theory may be applied to it. In any event, if it is to serve its purpose of explaining how to make a set of underlying substantive restraints effective in the world, our theory of enforceability must generate answers to the question of how these substantive restraints should be enforced even if the moral judgments that may apply to such enforcement action are themselves controversial and derived from various and sometimes inconsistent underlying moral theories.

In the course of assessing what consequences specific means and measures of enforcement are likely to have, I often rely on the language and insights of the theory of games and decisions. This is because assessing the consequences of specific means and measures of enforcement essentially means assessing how people are likely to react to the threat or use of various means and measures of enforcement. In the previolation state of affairs, the beneficiary of each restraint must decide whether to take the risk that this restraint will be violated or avoid this risk to the extent that he is able and take precautions against it to the extent that he is not. A potential violator, in turn, must decide whether to violate the restraint or try to abide by it, and, if the latter, what precautions to take against violating it unintentionally. In the postviolation state of affairs, the beneficiary must decide whether and to what extent to initiate or support enforcement action against the violator and, once that action is complete, whether to accept the resulting state of affairs or engage in some form of further retaliation. The violator, in turn, must decide whether to accept whatever enforcement action has been taken against him or engage in some form of counterretaliation. These decisions must often (if not always) be taken under conditions of risk and uncertainty; hence the insights of decision theory are often helpful. And they

will usually (but not always) be made in the context of strategic interaction – meaning that how one party behaves depends on how he expects others to behave, and how they behave depends on how they expect him to behave – in which case the insights of game theory (which is designed to allow us to model and thereby to help us to solve problems of strategic interaction) will be helpful as well.

Because I utilize some game theory in my analysis of enforceability, it may be helpful to define at the outset some of the terms we will encounter later on. A problem has a game-theoretic structure if it has *players* (at least two), who must each choose a *strategy* (make a decision on a plan of action), which will produce a *payoff* (a reward or punishment) for each player. The nature and extent of that payoff depends on what strategy is chosen by other players and also (in some cases) on chance. Games of *conflict* arise when an increase in the payoff for one player means a decrease in the payoff for another. Games of *coordination* arise when the payoffs for at least some players rise and fall in tandem. A game can be either a game of *pure* conflict or a game of *pure* coordination, or it can be a *mixed* game, which means that it is a combination of the two. A strategy may also be *pure* or *mixed* – pure if you decide to engage in a certain course of action with 100 percent probability, and mixed if you decide between two or more courses of action by utilizing some sort of lottery mechanism that assigns probabilities that sum to 100 percent but are less than 100 percent for each. There are other terms and concepts we will encounter as well, but these will be easier to explain at the time they arise if their meaning is not already abundantly clear from the context in which they are used.

But my analysis of enforceability not only draws on game theory, it also has something to contribute to it. Much of game theory is designed to model problems of strategic interaction that arise because players cannot make enforceable agreements or assert enforceable rights against one another. Enforceability accordingly plays a key role in game theory because its absence is a necessary background condition for many game-theoretic problems to arise. Take, for example, the much-studied Prisoner's Dilemma, a game designed to illustrate how individually rational behavior can lead to collectively suboptimal results. Two prisoners are brought in for questioning about a serious crime they are believed to have jointly committed. Unfortunately, the prosecutor does not have enough evidence to convict them of this crime unless he obtains a confession. So he tells each prisoner that if neither confesses, he will charge each with a less serious crime that he can easily prove and each will be sentenced to one year in jail. But if one prisoner confesses and implicates the other, that prisoner will be set free and the other will be given a lengthy sentence, say twenty years. And if they both confess, each will receive a moderate sentence of eight years. If each prisoner could prevent the other from talking, they could be sure they would spend no more than one year in jail. But when this is not an option, each prisoner reasons that he is better off confessing regardless of what the other

does. Each will accordingly serve eight years in prison when they could have served only one.[7]

In a strictly abstract game-theoretic setting, the players' inability to enter into enforceable agreements or assert enforceable rights against one another can be established by stipulation. But if we are going to apply game-theoretic modeling to real-world decision situations and we do not want to risk using a game-theoretic model to analyze a situation to which it does not actually apply, we cannot simply assume that the presence or absence of the requisite degree of enforceability will always be obvious and that no real analysis of the situation will ever need to be undertaken. Sometimes, at least, we are going to have to be able to determine whether this necessary background condition is actually absent or present. This means we are going to need to know exactly what enforceability means and how it can be measured. In any event, we are going to need a much richer conception of enforceability than the vague notion we currently employ.

But having a deeper understanding of the nature of enforceability does not simply allow us to recognize when the requisite background conditions for application of a particular game-theoretic model to a real-world decision situation are present. It also allows us to influence the game-theoretic structure of these situations. Understanding how enforceability works and how it can be measured gives us a mechanism for adjusting the payoffs of game-theoretic problems and for transforming one sort of problem into another. It tells us not only how to adjust the cardinal payoffs of various outcomes, but also how to tell when we have adjusted the cardinal payoffs *enough* to change the relative preferences of the players over outcomes. Armed with such a mechanism, we can change games of conflict into games of coordination and games of coordination into games of conflict and otherwise influence the strategies that players are likely to select in each type of game through the use of enforceable restraints. Rather than simply taking the payoff structure of such problems as given and trying to devise strategies to overcome the obstacles to socially optimal behavior that certain payoff structures provide, we can attack game-theoretic problems by changing the nature of the problem itself, producing new payoff structures that maximize the chances that whatever strategies are optimal from the relevant point of view will be individually pursued.

The ability to recognize when players may enter into enforceable agreements or assert enforceable rights against one another and the ability to adjust the payoffs of various strategies sufficiently to change a player's preferences

---

[7] The payoff structure of the Prisoner's Dilemma and the conflict it presents between individual and collective rationality has fascinated theorists from many fields for hundreds of years, but the formal game-theoretic statement of the problem is relatively recent. The amount of literature discussing the Prisoner's Dilemma is nevertheless enormous. For the classic game-theoretic statement of the problem, see Luce and Raiffa (1957), ch. 5, esp. pp. 94–102. For some history on the early recognition and analysis of the problem, see Hardin (1982), p. 24.

over outcomes are the contributions that an analysis of *pre*violation enforce-
ability makes to game theory. The contribution that an analysis of *post*violation
enforceability makes to game theory is to give content to the strategy of Tit for
Tat. This is a strategy for maximizing cooperative behavior when enforceable
agreements or rights are either not available or do not produce the desired result.
Although this strategy has been recommended by various sources for thousands
of years – an "eye for an eye" is an expression of it – it has been a favorite of
game theorists since it out-performed every other strategy submitted in a series
of computer tournaments designed to see what strategy would produce the best
overall results in an indefinitely iterated Prisoner's Dilemma.[8]

Recall that in a one-shot Prisoner's Dilemma, it is better to defect no matter
what the other player does. But when the players will repeat the game indefi-
nitely, this is no longer the case. The more games in which you and the other
player are able to cooperate, the greater the total payoff you will enjoy. What
you need, therefore, is a strategy that tells you when to cooperate and when to
defect. The strategy of Tit for Tat recommends that you cooperate in the first
game but cooperate in each subsequent game if and only if the other player
cooperated in the previous game. This strategy accordingly begins by being
"nice," rewards cooperation with cooperation, punishes defection with defec-
tion, and recommends that you not hold a grudge – once the other player makes
a cooperative move, you cooperate as well, no matter how many prior moves
were defections. There are a myriad of other possible strategies of course – one
could always defect; cooperate until the other player defects and then always
defect; forgive the first defection but not the second; cooperate at first but punish
every defection by defecting twice; or cooperate or defect on some randomized
basis or according to some very complicated mathematical formula, to name
just a few. But Tit for Tat proved to be the most successful in terms of maximiz-
ing the total payoff an individual player received when these various possible
strategies were pitted against one another in experimental settings.

The problem with these experimental settings is that they relieve the play-
ers of having to devise an appropriate Tit for the Tat to which they have been
subjected – they are simply told that the prior move was either cooperation or
defection and then given the option of either cooperating or defecting them-
selves. This is not a problem when each player's moves and particular strategy
are simply to be programmed into a computer, but in real life it is often impracti-
cal if not impossible to respond in kind. The idea of Tit for Tat must accordingly
be given some content if it is to be of any use as a strategy outside an abstract

---

[8] The tournaments were organized by Robert Axelrod, and entries were submitted by leading
game theorists from six different countries and a variety of disciplines, including mathematics,
economics, psychology, political science, and sociology. The winning strategy of Tit for Tat,
which was submitted by Anatol Rapoport of the University of Toronto, was also the simplest. A
description of the tournaments and a report and discussion of the results are contained in Axelrod
(1984).

game-theoretic context. Each Tit must be designed with the Tat that provoked it firmly in mind, and if it we cannot employ a Tit that is identical to the Tat that provoked it, we must be able to devise a Tit that is at least equivalent to it in some meaningful sense of the term. How we might do this, and whether Tit for Tat is indeed the most effective strategy for dealing with real-world problems that take the form of an iterated Prisoner's Dilemma, is what a large part of my discussion of postviolation enforceability describes.

Before I bring this introduction to a close, I want to make some brief final comments on the nature of my theory of enforceability. What I have tried to develop is a theory of law *in motion*. The descriptive term *in motion* is intended to evoke several different but complementary images and ideas. Some of these are obvious; some may be a bit obscure. Because it may help place the project in which I am engaged in its proper context, I will mention a few of them here. First, the phrase is intended to evoke that oft-cited distinction between what the law is in books and what the law is in practice. The cynical way of looking at this distinction is that it refers to the fact that the law is not always what it purports to be. But this renders the distinction a mere basis for complaint rather than an analytic tool. A more useful way of looking at this distinction is that it mirrors the distinction between the two questions suggested by the remark from Mill that I used to open this introduction. The former refers to what restraints should apply in our society, or at least to those restraints that are important enough to take the form of law; the latter to how those restraints should be enforced. As Mill's remark suggests, only if we find satisfactory answers to both questions are we likely to be able to create a society in which it is worth living.

The use of the phrase *in motion* is also intended to call to mind that well-known series of photographic studies of people and animals in motion made by Eadweard Muybridge in the late nineteenth century,[9] for which he is justly famous. While the enforcement of restraints is a social process rather than a physical process, it is just as dynamic as the physical events that Muybridge studied. Each is meaningful only if it is viewed as a continuous series of events rather than as isolated and unrelated phenomena. Nevertheless, what the Muybridge studies reveal is the somewhat ironic insight that in order to understand how a dynamic process works, one must be able to slow down time – to isolate key moments within the process without losing sight of the relationship between those moments and the whole. For example, until the Muybridge study *The Horse in Motion* in 1878, no one knew for sure whether all of a galloping horse's legs ever left the ground at the same time. Similarly, by identifying the critical stages of the enforcement process and examining each separately but in context, we can not only gain a better understanding of each stage, but also see how each stage relates to the others in ways that would not be revealed if

---

[9] Muybridge (1887).

each stage were studied in isolation, which is how enforceability has tended to be studied in the past.

Readers who have some experience as practicing lawyers will also notice that the phrase *law in motion* has a special meaning within the domain of legal practice. In the United States (and in many other countries as well), if one wants to obtain an order from a judge in a pending action, one does so by making what is called a *motion*. Sometimes a motion may be made orally, but usually it must be made in writing and set down for a hearing at a later date, at which time the court will listen to the arguments of the parties and may even make its ruling from the bench, although it may also take the motion under advisement and issue its ruling later. Typically, the court will hear motions from a number of different cases at regularly scheduled periodic sessions. Although the nomenclature varies somewhat depending on the particular court system involved, the court session at which these various motions are heard and considered is called *law in motion* in many jurisdictions. Used in this sense, then, the phrase *law in motion* refers to an actual event at which the various restraints established by the law may be judicially enforced.

Finally, the use of the phrase *in motion* is intended to evoke Hobbes's *Leviathan*,[10] another source of inspiration for this book. Hobbes was infatuated with motion, and his view of motion informed not only his naturalistic philosophy but also his political theory, or at least Hobbes thought it did.[11] Hobbes thought of human beings as constantly in motion, never at rest, and by this he meant that human beings are continuously pursuing the objects of desire. Because these are scarce, and human beings are roughly equal in physical strength, everyone in the state of nature would always be tempted to attack their neighbor and could never be sure their neighbor was not preparing to attack them. The only way to ensure that this situation would not devolve into an endless war of all against all is to subject everyone to restraints. Hobbes was accordingly in many ways a game theorist, long before there was such a thing as game theory. He was not only concerned with motion in the mechanistic sense, he was also concerned with motivation. And this is what enforceability is all about – about how we move others to act or refrain from acting in ways other than what they would choose for themselves if left to their own devices. While we need not accept Hobbes's view that life in the state of nature would be "solitary, poore, nasty, brutish, and short,"[12] it should be clear that if we are going to produce a stable, well-ordered, and just society, we must not only choose the right restraints to impose on people, we must also know how we should enforce them.

---

[10] Hobbes (1996).
[11] See Kavka (1986), pp. 8 and 10–18. Kavka argues persuasively that all the important substantive conclusions Hobbes derives from his principle of motion can be independently supported by more plausible considerations.
[12] Hobbes (1996), p. 89.