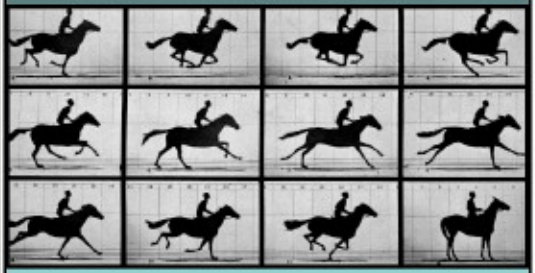
PUNISHMENT, COMPENSATION, AND LAW

A Theory of Enforceability



MARK R. REIFF

CAMBRIDGE STUDIES IN PHILOSOPHY AND LAW

CAMBRIDGE

more information - www.cambridge.org/9780521846691

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:

Larry Alexander (ed.): *Constitutionalism*
Larry Alexander: *Is There a Right of Freedom of Expression?*
Peter Benson (ed.): *The Theory of Contract Law: New Essays*
Steven J. Burton: *Judging in Good Faith*
Steven J. Burton (ed.): *"The Path of the Law" and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.*
Jules Coleman: *Risks and Wrongs*
Jules Coleman and Allan Buchanan (eds.): *In Harm's Way: Essays in Honor of Joel Feinberg*
R. A. Duff (ed.): *Philosophy and the Criminal Law*
William Edmundson: *Three Anarchial Fallacies: An Essay on Political Authority*
John Fischer and Mark Ravizza: *Responsibility and Control*
R. G. Frey and Christopher W. Morris (eds.): *Liability and Responsibility: Essays in Law and Morals*
Steven A. Hetcher: *Norms in a Wired World*
Heidi M. Hurd: *Moral Combat*
Jody S. Kraus and Steven D. Walt (eds.): *The Jurisprudential Foundations of Corporate and Commercial Law*
Christopher Kutz: *Complicity: Ethics and Law for a Collective Age*
Timothy Macklem: *Beyond Comparison: Sex and Discrimination*
Larry May: *Crimes Against Humanity: A Normative Account*
Stephen R. Munzer: *A Theory of Property*
Arthur Ripstein: *Equality, Responsibility and the Law*
R. Schopp: *Justification Defenses and Just Convictions*

Continued after the index

For Della

Punishment, Compensation, and Law

A Theory of Enforceability

Mark R. Reiff
University of Durham

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521846691

First published in print format 2005

ISBN-13 978-0-511-12896-7 eBook (EBL)
ISBN-10 0-511-12896-7 eBook (EBL)

ISBN-13 978-0-521-84669-1 hardback
ISBN-10 0-521-84669-2 hardback

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.

Over the years, I have discussed various issues that I tackle in the book with John Christman, Rowan Cruft, Ronan Deazley, Kaiyan Kaikobad, Christoph Kletzer, Ian Leigh, Thomas Nagel, Sarena Olsaretti, Gerald Postema, Sonia Harris-Short, Bob Sullivan, John Tasioulas, Colin Warbrick, Andrew Williams, and Richard Wright. These discussions did much to stimulate my thinking, and I am grateful to each of them for their comments and suggestions.

My greatest debt, however, is to Matthew Kramer, who supervised my dissertation and read and commented extensively in writing on numerous early drafts in their entirety. I could not imagine a better supervisor, nor a more conscientious, dedicated, and supportive mentor. Without his detailed comments, insightful criticism, and steady encouragement, this book would never have existed.

A few brief passages in Chapters 2 and 3 have appeared previously in somewhat different form. This material is reprinted from "The Politics of Masochism" by M. R. Reiff, *Inquiry* Vol. 46, 2003, pp. 29–61 (www.tandf.no/inquiry) by permission of Taylor & Francis AS. Thanks to Lisbeth Solberg and Taylor & Francis for their cooperation in allowing me to use this material. The image used on the cover of the book is a detail from *The Horse in Motion: "Sallie Gardner"* by Eadweard Muybridge; it is reprinted by permission of the Iris & B. Gerald Cantor Center for Visual Arts at Stanford University and the Stanford Family Collections. Thanks to Alicja Egbert and the Cantor Center for their cooperation in affording me access to their collection and for allowing me to use this material.

My final thanks go to my wife, Della Davidson, whose love and support have sustained me throughout this project and beyond.

Mark R. Reiff
Durham, England
March 2005

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 enforceability 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 indefinitely, 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 defection, 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 maximizing 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 players 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 themselves. 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 impractical 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.

1

The Means of Enforcement

When people talk about enforcing their legal rights, they are usually talking about doing so through the courts. Can they bring an action on their own behalf, they want to know, or must they rely on the state to do it for them? If they may take action on their own, what kind of remedies can the courts award them? Can they get damages? An injunction? Declaratory relief? Or can they obtain some combination of all three? What kind of damages can they get? How large an award should they expect? How much will it all cost? How long will it take? Because we have come to rely so heavily on litigation as a means of enforcement, these questions have naturally attracted a great deal of our attention. Indeed, it often seems difficult to imagine enforcing rights in any other way.

The fact that both civil and criminal litigation play such a prominent role in the enforcement scheme in our own society, however, does not mean that litigation is the only means by which legal rights can be enforced. For many violations of legal rights, punishment may be imposed and compensation extracted by other means as well, and these other means may take many forms. If we are to understand the meaning and measure of enforceability, our first task is to decide how to categorize all the means of enforcement available. We could, for example, focus on the nature of the process used when a particular means is employed. This might lead us to divide the means of enforcement into the judicial and the nonjudicial, or the official and the unofficial, or the private and the public, or perhaps the formal and the informal. Alternatively, we could focus on the aspect of well-being at which the particular means is primarily directed. This might lead us to divide the available means of enforcement into the physical, the financial, and the psychological.[1] Yet another possibility would be to focus on the degree to which a particular means of enforcement is subject to individual control. This might lead us to distinguish those means of enforcement that are

[1] This is arguably the approach that Hobbes took when he categorized the forms of punishment as being corporal, pecuniary, ignominy, imprisonment, exile, or some combination thereof. See Hobbes (1996), ch. 28, pp. 216–17.

subject to the exclusive control of the beneficiary from those that are subject to the control of the state or some community that counts both the beneficiary and violator among its members. Each method of categorization entails giving prominence to a different but no less distinctive and important feature. Deciding which method of categorization to use accordingly depends on which feature of the available means we want to emphasize.

In addition to choosing a method of categorization that emphasizes the particular features on which we want to focus, we also want our categories to be comprehensive. This means our categories must encompass all possible means of enforcement. But this does not mean our categories must be mutually exclusive. If we attempt to make them mutually exclusive, we will be forced to use either an overabundance of categories or too few. The way to avoid this is to allow overlapping categories, each of which emphasizes a different but equally important salient feature, while recognizing that many actual means of enforcement share various features and therefore fall into several categories rather than only one.

Using these considerations as a guide, I will divide the means by which restraints can be enforced into six categories: (1) physical force; (2) strategic power; (3) moral condemnation and regret; (4) social criticism and the withdrawal of the benefits of social cooperation; (5) automatic enforcement; and (6) legal sanctions. Note that each category shares certain features with at least one other. For example, physical, automatic, and legal sanctions may all have physical effects; strategic, legal, and social sanctions may all have financial effects; legal sanctions may also express moral condemnation and social criticism; and social and moral sanctions may both require a critical response by the community at large rather than by a particular individual. For reasons that I hope will become apparent, however, each of these categories also has a unique and important central defining characteristic.[2]

Of course, not every category of means of enforcement will be available in every situation. And those means of enforcement that are available will be available in various combinations and their relative effectiveness may vary dramatically from one situation to another. How we measure that effectiveness will be the subject of much discussion later, as will the question of whether and to what extent alternative means of enforcement may provide a measure of enforcement that is sufficient to render a legal right enforceable even when

[2] I do not mean to suggest that other divisions along the same lines are not possible. Bentham, for example, divided the means of enforcement into four categories: physical, political, moral, and religious. Bentham (1996), ch. 3. While Bentham's method of categorization may have accurately captured the most salient features of the various means of enforcement available in his day, I have not used his categories because by contemporary standards they overemphasize the importance of religious sanctions (sanctions imposed in the afterlife); pay insufficient attention to the distinction between strategic, social, and moral sanctions; and fail to account for the possibility of automatic enforcement.

legal remedies are unavailable. But first we need to focus on describing each of these potential means of enforcement in a little more detail.

1.1 Physical Force

The threat or use of physical force is probably the most direct means of enforcing any form of restraint, and it is clearly an important method for enforcing legal rights as well. Indeed, many theorists have assumed that in the state of nature, physical force would be the primary and perhaps even the only method of enforcement available. Locke, for example, argues that people have a natural right to use physical force to impose punishments on and extract compensation from rights violators in the state of nature, and are even entitled to enlist the physical assistance of others in doing so.[3] By using this proposition as a starting point, it is possible to explain how something very much like a minimal modern state could arise without violating anyone's rights and without anyone actually intending to create it.[4] And while there may be many other means of enforcement available to both the state and the private citizen in modern society, we still tend to think of physical force as the ultimate means of enforcement, as the one by which other means must be backed if they are to be at all effective.

Setting aside for the moment the question of who is entitled to use physical force as a means of enforcement, let us focus here on the ways in which physical force may be used. One way, of course, is to inflict pain or physical injury on the violator. This is still a common response to violations of international law, especially when the violation itself involves the use of physical force, and the degree of death and destruction that may be visited in retaliation for such a violation may often be extensive. The infliction of pain or physical injury is also sometimes used as a response to criminal violations of domestic law. For example, physical force may be used to inflict pain or injury in self-defense, although the degree of force that may be employed and the type of injury that may be inflicted is typically subject to stringent limits. Capital punishment is still employed in certain countries, including the United States, even when the infliction of lesser forms of corporal punishment is (somewhat inconsistently) prohibited. Other countries permit a variety of types of corporal punishment: caning is employed in Singapore, Malaysia, and Brunei, and even more severe forms of corporal punishment, including flogging, stoning, and amputation are

[3] See Locke (1988), secs. 7, 8, and 10. For further discussion of the Lockean right to punish, see Simmons (1992), pp. 121–66.

[4] This is what Robert Nozick attempted to do in *Anarchy, State, and Utopia*. Nozick argued that a market would develop in the state of nature for protective associations with special expertise in adjudicating claims and administering physical punishments. Gradually, one association would become dominant in each geographic area. Any remaining "independents" in the area would then be compelled to join the association and would also be protected by it, leaving something resembling a minimalist modern state. See Nozick (1974).

employed in other parts of the world.[5] The seizure of property used in the commission of a crime is another common means of enforcement, and is in fact becoming more frequent in many countries, including the United States. The destruction of contraband is also common, and while the destruction of other property owned or used by the violator is rare, it is still used (quite controversially) as a means of enforcement for public order offenses in parts of the Middle East. Of course, the most common use of physical force is to confine the violator against his will. This is usually accomplished through the imposition of a term of imprisonment, but less severe options such as "house arrest" and denial of the right to travel are sometimes available too. We can also use force to exclude the violator from certain areas, either by barring his entry or, if the violator is already present, by expelling or deporting him. Forced deportation (euphemistically referred to as "transport") was a common punishment at one time, and deportation is still the favored remedy for immigration violations today.

In addition to inflicting physical pain or injury on the violator or his property or by imprisoning or deporting him, physical force can also be used to extract compensation from him. The property of the violator can be seized and sold, and the proceeds used to compensate those who have been injured by his violation. This is a common function of the state in connection with the enforcement of rights under both civil and criminal law, and it is the invocation of such force that lies behind all legal actions for compensation. But it is also a remedy that may be sometimes utilized by private parties, although such remedies are often strictly regulated by law. A secured creditor, for example, may use force to repossess collateral currently in the hands of the debtor, and may sell that collateral and apply the proceeds to reduce the violator's outstanding debt.

There are several attributes of physical force that make it unique among available means of enforcement. Unlike other means of enforcement, the use of physical force often entails acts or omissions that would be rights violations themselves were they not taking place as a means of enforcement. Indeed, even when these acts or omissions *are* taking place as a means of enforcement, they may be violations if committed by private parties, for outside the narrow confines of self-defense and certain other self-help remedies, the right to use force is usually assigned exclusively to the state. And even the state's authority to use force will usually be heavily regulated. Rather than being entitled to use force as a means of enforcement in whatever way it sees fit, the state will often be able to use only certain kinds of force, and may use even these kinds of force only under certain predetermined conditions.

Physical force is also the only means of enforcement that can be used to extract compensation from a violator who is not susceptible to coercion. Other means of enforcement can be used to threaten the violator and coerce her into

[5] See Kuntz (1994).

providing compensation, but these other means of enforcement can only inflict punishment if the violator remains resistant to such threats. Physical force, in contrast, can be used to seize the violator's goods or property. These can then either be given to those injured by the rights violation as compensation in kind, or sold and the proceeds used to pay monetary compensation.

Physical force has yet another unique attribute. The threat of using any means of enforcement can deter a violation, but other means of enforcement cannot actually prevent a violation from occurring.[6] Physical force, in contrast, can be used to prevent some violations, or at least to make certain violations more difficult to commit and therefore less likely to occur or at least the injuries caused thereby less severe. Of course, physical force cannot prevent all violations. We can get you to the concert hall on time but no matter how much force we use we cannot make you sing if you are determined not to. But we can lock our doors at night, bar our windows, keep our valuables in a safe, fence our property, live in a gated community, and drive about in the steel-encased cocoon of an SUV rather than on the exposed saddle of a motorcycle. By placing fencing on either side of an overpass, we can prevent people from throwing things (and themselves) onto cars traveling on the motorway below. We can grease traffic poles, as the authorities do in New Orleans during Mardi Gras, and thereby prevent intoxicated people and pranksters from climbing up them. We can use force (sometimes even deadly force) to physically repel or restrain those who attempt to invade our homes or businesses, attack us, or steal our property. If I am a club owner and want to exclude you from the premises because you are not smartly dressed, for example, all I need do is employ several burly doormen to bar your way should you try and enter. Physical force may accordingly create a state of affairs in which the potential violator is no longer *free* to commit the violation, whereas other means of enforcement can deprive the potential violator of the desire but not the freedom to violate.[7]

For all these reasons, physical force is often far more effective as both a deterrent and a remedy than any other means of enforcement. Indeed, if the threatened use of physical force is credible enough, actual use will rarely be required, for the threat will usually be sufficient to enforce compliance or, if a violation has already occurred, to coerce the payment of compensation. If the violator is insufficiently concerned about her own personal safety or the maintenance of her property, such threats can be made against the violator's family or against those for whom she cares deeply. This is one way to collect

[6] Although legal remedies such as injunctions and declaratory relief can sometimes be obtained before a violation has occurred, these remedies merely clarify the rights and obligations of the parties and increase the penalty for (or at least clarify the consequences of) violation. While they may make the violation less likely to occur, they do not make it impossible, for a determined violator can still commit the violation despite being legally restrained, whereas a violator who has been successfully physically restrained cannot.

[7] See Steiner (1994), pp. 30–2 and Kramer (2003), pp. 38–9.

an outstanding debt, and setting aside the moral and legal implications of such a threat, no one can deny that such threats can be highly effective. Even the state sometimes relies on threats against the violator's family or loved ones as a means of enforcement. We allow persons other than the violator to post collateral for bail bonds, for example, because if someone is willing to do this for the violator, we assume that the personal connection between the two is such that the violator will not fail to appear, for she will not want the guarantor to forfeit that collateral.

1.2 Strategic Power

Strategic power is the power to grant or withhold the reward of future cooperation. Unlike physical force, strategic power is not available to enforce every right, for its existence depends on the nature of the relationship between the parties. That relationship must be such as to offer potential violators at least the possibility of obtaining future rewards from the continued cooperation of the beneficiary. If such rewards are available, the beneficiary can use the threat of their withdrawal to deter violations of his rights, and he can use their actual withdrawal as punishment for the violation of a right. Whether the threat or exercise of this power is alone sufficient to render a right enforceable will depend on many factors, including the extent of any benefit to be gained from the violation and the extent of any reward to be lost if future cooperation is not forthcoming. But even when strategic power is not *alone* sufficient to render a right enforceable, it contributes to the overall enforceability of the right, and could be decisive in determining whether the *combined* force of all available means of enforcement is sufficient. The availability of strategic power as a means of enforcement is accordingly always an important factor to consider in any enforceability calculation.

Note that strategic power is not merely something that happens to arise if the parties have an ongoing relationship. The parties may have entered into such a relationship precisely because of the strategic power an ongoing relationship affords them. Take, for example, the relations between nations, where the forging of trade and cultural links is often seen as a way of overcoming a history of rights violations and physical conflict. Such links not only help create a climate of mutual respect and trust, they also increase the opportunity costs of violation, and therefore make such violations less likely to occur. And if violations do occur, strategic sanctions provide a less drastic alternative to physical force as a means of enforcement. Because of these effects, the availability of strategic power can have a stabilizing effect on the parties' international relations.

Strategic power can also provide an effective alternative to the invocation of legal remedies. Suppose I want you to paint my house for $10,000 (it's a large house). You would like the $10,000, and are willing to paint my house to get it. Unfortunately, our local legislature has just passed a law depriving the courts

of jurisdiction to enforce contracts for house painting. You are accordingly unwilling to paint my house unless I pay you in advance, for you do not want to take the chance I will back out of our agreement once the job is done. But I am unwilling to pay you $10,000 in advance, for I am afraid you will back out or do a shoddy job once you have the money. We both want to cooperate, and there are benefits to be had for both of us if we can work out a way of doing so, but how can we cooperate if neither of us is willing to go first and bear the risk of the other's nonperformance?

We could do it by using what Thomas Schelling calls the "tactic of decomposition."[8] This tactic is available whenever it is possible to divide our respective rights and duties into smaller segments. In order to reduce our respective risks, we could agree to a series of progress payments. We could agree that you will paint the house one side at a time and I will pay you $2,500 as each side is completed. Now you only risk painting one side of the house for nothing. If that is still too much of a risk for you, we can divide the job into even smaller segments, so that you get paid $1,250 after each coat of paint is applied to each side (we contemplate each side taking two). If that is still too much of a risk, we can divide the job into smaller segments still. At some point, we should be able to reduce the risks of nonperformance down to an acceptable level. If necessary, I can stand there with dollar bills parceling them out every few minutes as you go about your business.[9] As long as our project is divisible into small enough risk packets, strategic power will be available as a method of enforcement.

Who bears this minimal incremental risk will depend on many factors, including the particular practices of the marketplace and our respective risk preferences. Who bears each incremental risk can even be the subject of negotiation. I can agree to pay you a little more in order that you are the one at risk, or you could agree to accept a little less in order that I take the incremental risk, or we could agree to trade off who bears the risk at each stage. The point is we can build sufficient safeguards into our agreement so that we both have incentives to respect the rights of the other party (I want my entire house painted and you want the entire $10,000) and are both reasonably comfortable the other party will perform. If you stop painting I stop paying, and if I stop paying you stop painting. Each right to a progress payment or completion of an additional segment of the job is enforced by the threat of withholding the reward of future performance.

Of course, there may be circumstances in which such a threat is insufficient to coerce continued performance. But the loss in such circumstances will be small

[8] Schelling (1960), pp. 21–52. See also Mnookin and Kornhauser (1979), p. 965, n. 55.

[9] Unlike the path of Xeno's arrow to its target, there is a limit to the number of segments into which we may divide our agreement, for at some point further division will be impractical and may be even impossible. Long before we reach that point, however, we should be able to reduce any risk of loss to acceptable levels. If not, then our agreement is simply not one that is subject to the tactic of decomposition.

and often no greater than it would have been had we enforced our agreement in the courts and had to absorb the transaction costs of doing so. Indeed, our risk of loss in that case is likely to be substantially higher, which is why many contracts, even though they *are* technically enforceable through the courts, are actually structured in this strategic manner. While the tactic of decomposition does not eliminate the risk of loss altogether, it does reduce that risk to a level that most parties will be prepared to take.

Even when an agreement is not subject to the tactic of decomposition, it nevertheless may be enforceable through the exercise of strategic power if the parties have or could benefit from a continuing relationship. In such cases, a series of agreements or potential agreements take the place of the incremental segments of a single agreement. Each party can enforce its rights under the current agreement by threatening to withdraw from the relationship (or by threatening to refuse to enter into a continuing relationship if such a relationship does not already exist), thereby depriving the other party of the rewards such a continuing relationship would offer. This remedy is especially important in the commercial arena. Borrowers and lenders, manufacturers and suppliers, retailers and customers, employers and employees, and even lawyers and their clients have ongoing relationships that are important to them, and the desire to realize future rewards from the continuation of such relationships often provides a far greater incentive for mutual respect than could ever be provided by the threat of legal action. Indeed, when such relationships are present, strategic sanctions are usually swifter to implement, more extensive, and cheaper than whatever legal remedies may be available. As a result, strategic sanctions can often be the enforcement mechanism of first resort, leaving legal remedies as a poor second, to be employed only if the exercise of strategic power turns out to be insufficient or unexpectedly ineffective.

Take, for example, the dilemma facing a computer manufacturer falling on hard times. The manufacturer may be more worried about losing its source of supply if it fails to pay for its last shipment of computer chips, given the devastating effect this would have on its ability to remain in business, than having to pay up months or even years from now if the chip maker sues on whatever invoice is currently outstanding. Similarly, a manufacturer presented with a warranty claim may have little to lose on that claim alone if it denies the claim and forces the customer to take the claim to court, something that the manufacturer knows the customer is unlikely to do in most circumstances. But it may honor such claims anyway in order to maintain the customer's goodwill and potential future business. On the other hand, if the same rewards that are available through future cooperation could be easily obtained from some other source, the strategic power arising from the relationship may be slight and may provide little assurance that the beneficiary's rights will be respected. In either case, however, before we can evaluate whether a right is more likely to be

honored or be violated, we will want to know whether its beneficiary holds strategic power.

1.3 Moral Condemnation and Regret

Moral condemnation and regret are also available as means of enforcement in a variety of situations. They are most clearly available for the violation of moral rights, but they are also available for the violation of legal rights as long as the legal right in question has some moral content, either in its own right or in light of the fact that it exists in the context of a larger set of background conditions that gives it at least contingent moral significance. And even when a legal right has neither necessary nor contingent moral content, there may still be moral weight associated with its observance, for violation of even an immoral law may undermine the stability of a system of legal rules whose existence has an overall positive moral value. So in any case where one or more of these conditions happen to apply, a violation of the relevant restraint can lead members of the violator's community to issue expressions of moral condemnation and the violator to experience feelings of moral regret. Because most people care how others feel about them, and want to feel good about themselves as well, the threat of moral condemnation and the fear of experiencing feelings of moral guilt and of regret provide many people with powerful reasons to respect the rights of others, and for those that do not, the actual imposition of such sanctions can constitute a powerful form of punishment. And while it is easy and perhaps even fashionable to underestimate the power of such moral sanctions, morality has undoubtedly played a significant role in shaping the behavior of vast numbers of people for thousands of years. Indeed, this is precisely why morality has sometimes been condemned as a tool invented by the powerful to manipulate the weak.[10]

There is a difference, of course, between moral condemnation and moral regret. Mill characterized the former as an external sanction whose power stems from our desire to be thought well of by others, and the latter as an internal sanction whose power stems from our own moral character and dispositions.[11] For Mill the internal sanction was "the ultimate sanction of the principle of utility,"[12] indicating that he viewed it as of preeminent importance, but in his haste to isolate the source and power of moral motivation, he might have overstated this. The external and the internal are not as unrelated as Mill makes them appear. The degree to which moral condemnation bites at our sense of well-being depends not only on the extent to which we want to hold the respect of others, but also on our moral character. Some people may have a telltale heart

[10] Such condemnations have ancient roots. See, e.g., Plato (2000), Book 1, 338c and 338e.
[11] Mill (1998), ch. 3, para. 3 and 4.
[12] Mill (1998), ch. 3.

and feel pangs of conscience even while their moral misdeeds remain undiscovered. Others may be susceptible to moral regret when condemned by others but in the absence of external condemnation have a tendency to suppress their moral reactions to certain kinds of conduct and convince themselves that their transgressions are more harmless than they appear. This does not necessarily mean that the person who experiences pangs of regret only in the presence of moral criticism by others has no moral conscience but merely a desire to be thought well of by others, although this might be true in some cases. In many cases, this might simply mean that our moral conscience is somewhat at the mercy of our nature, and that one aspect of human nature is that when we violate our own moral code we find it easier to make excuses for it if we are left to our own devices and not subjected to criticism by others. On the other hand, when our own moral regrets are reinforced by the criticism of others, they become too obvious to suppress or to ignore. So it is perhaps a mistake to think of moral criticism as a separate and independent sanction from moral regret. The two work together, one reinforcing the other. Mill's external/internal distinction is perhaps too hard and fast to capture the phenomenological subtleties of how our moral conscience operates.[13]

Nevertheless, moral sanctions are no doubt most forceful and effective when moral condemnation reinforces our own internal feelings of regret. The force of moral sanctions will therefore depend in part on the extent of moral condemnation a violation generates, and this, in turn, will depend on how widely knowledge of the violation gets distributed in the relevant community. Some violations will be more public than others by their very nature. If I fail to show up for my scheduled lecture, the violation is by definition public. But even violations that take place in private can be discovered, publicized, and subjected to widespread condemnation if the nature of the violation or the identity of the violator makes it newsworthy. The recent scandals regarding the use of steroids and other performance-enhancing drugs by some professional athletes are one example. In these cases, the moral condemnation such conduct receives is likely to be far more hurtful to the athletes involved than any legal penalties their conduct might provoke. What these athletes most want to avoid are the unanswerable cries of "say it ain't so" that undermine the significance of their considerable achievements.[14] Any legal penalties imposed are in comparison

[13] To be fair, Mill recognizes that the origins of our moral conscience are complex, and that the internal sanction of moral regret may in some cases be tied to our "desire of the esteem by others," at least in part. Mill (1998), p. 75. But Mill sees this question of the source of moral conscience as separate and distinct from its effect, and therefore does not seem concerned that this possibility might blur the distinction between internal and external sanctions that he wishes to maintain.

[14] For a vivid illustration of the emotional power of such cries, albeit arising out of allegations of a different kind of violation, see Malamud (1952), p. 237.

likely to be trivial. So while the degree to which a violation is amenable to discovery and publication affects the degree to which it may generate moral condemnation, a potential violator has reason to take the moral ramifications of his actions into consideration even when his transgressions would take place in private, for there is always a danger of discovery and with that the possibility of inciting the condemnation of his community.

Even when there is no threat of moral condemnation by others, however, the threat of moral regret alone can provide an effective deterrent to various kinds of behavior. Take, for example, the experience of a well-known Chicago restaurateur concerned about the number of persons who made dinner reservations at his establishment, never canceled, but failed to show.[15] The restaurateur estimated that this cost him about $900,000 a year, and he wondered whether he could reduce the number of no-shows by making a simple adjustment in the restaurant's reservations practice. He instructed his receptionist to stop saying, "Please call us if your plans change," and start saying, "Will you call us if your plans change?" His hope was that after making a promise to do so, people would feel a greater moral obligation to call and cancel and be less inclined to simply disregard their reservation and fail to appear. And he was right. His no-show rate dropped dramatically, from 30 percent to 10 percent. This represented a significant increase in the number of people calling in to cancel – a doubling, in fact, if 50 percent of the people making reservations ultimately chose not to take them up, and a tripling if that figure was a more realistic 40 percent.[16] Because any breach of a promise to call and cancel would be unlikely to become known beyond the immediate parties involved and unlikely to provoke significant moral criticism within the diner's community in any event, and because no one was under the illusion that legal remedies were likely to be sought or granted for the breach of such a promise, the most likely cause of this dramatic reduction in the number of no-shows was their fear of the internal sanction of moral regret. What this demonstrates is that the fear of moral regret, even where relatively trivial moral obligations such as dinner reservations are concerned, can be quite a powerful deterrent indeed. And if this can be a powerful deterrent for relatively trivial obligations, think how powerful the fear of moral regret can be where more important moral obligations are concerned.

The experience of moral regret can also be a powerful and important form of postviolation punishment. For some violators, at least, regret alone can inflict a substantial amount of suffering, and sometimes this suffering will even be sufficient to cause the violator to make amends. Literature is full of dramatic

[15] See Grimes (1997).

[16] My thanks to Thomas Nagel for bringing the Grimes article to my attention and for pointing out the mathematical significance of the results.

examples of such effects,[17] and while real life is perhaps more pedestrian, examples of such effects no doubt abound there as well. But even when the experience of regret alone is not sufficient punishment given the nature of the offense, the presence of moral sanctions reduces the need for the imposition of further sanctions such as fines or imprisonment, or at least reduces the extent to which such further sanctions must be imposed.[18] For example, the expression of remorse is a factor that is formally considered in many criminal justice systems when sentencing criminal offenders, and those offenders who express sincere remorse will receive shorter prison sentences (all other things being equal) than those who do not.[19] The absence of remorse, in contrast, indicates that the particular offender is not susceptible to moral sanctions. Punishment that would otherwise be imposed through moral regret must accordingly be imposed through some other, external means.

In most cases, it is relatively easy to adjust the amount of punishment to which the violator will be subjected in order to account for the violator's moral regret or any lack thereof, so the need for flexibility here is not a problem when it comes to sentencing. But this variation in the degree of susceptibility to moral sanctions does illustrate a problem with relying on the threat of moral condemnation and regret as a deterrent – the effectiveness of such threats depends on the moral character of the violator. The less the violator is concerned with the morality of his actions, the less the threat of moral sanctions will influence his behavior.[20] And while the threat of being subjected to the moral disapproval of his community and the fear of experiencing regret may be a significant deterrent to the typical law-abiding citizen, and perhaps (according to some) an even greater deterrent than the fear of fines or imprisonment,[21] the hardened criminal may be significantly deterred only by the latter. Indeed, the worst potential violators may be entirely unmoved by the prospect of moral condemnation

[17] See, e.g., Bolt (1986).

[18] See Benn and Peters (1959), p. 230: "[I]t must be admitted that for many people the fear of public reproach of loss of friends may count for more than the fear of prison, and if one penalty did not exist, it might mean stiffening the other, or the total deterrent effect would be reduced. As things are, the social penalty constitutes a part of the total that society imposes for offences against the law."

[19] Under § 3E1.1 of the United States Sentencing Guidelines, for example, the expression of "sincere remorse" is a prime consideration in determining whether a downward adjustment to the standard sentence is warranted. See Hutchison et al. (2004), p. 1368. Although the constitutionality of the guidelines has recently been called into question by *Blakely v. Washington*, 72 U.S.L.W. 4546 (June 24, 2004), this is with regard to sentence enhancements, not reductions. In any event, the point is not what the sentencing guidelines require, but that they illustrate that the violator's experience of moral regret plays a role in our common thinking about the level of penal sanction ultimately due.

[20] As Mill said, the effectiveness of any internal moral sanction depends on the extent to which the potential violator shares the "conscientious feelings of mankind. Undoubtedly, this sanction had no binding efficacy on those who do not posses the feelings it appeals to. . . . On them morality has no hold but through the external sanctions." Mill (1998), ch. 3, para. 5.

[21] See, e.g., Goldman (1979), esp. pp. 49–50.

and be incapable (or at least think of themselves as incapable) of experiencing moral regret.[22] One major problem in relying on the threat of moral sanctions as a deterrent is accordingly that the effectiveness of such a threat depends on the extent to which potential violators have already developed a moral conscience, which means that the worst violators may be entirely immune to any such effect.

The other major problem with using moral sanctions as a means of enforcement for a wide variety of forms of restraint is the lack of identity between legal and moral rights. Not all legal rights have moral content, and while some theorists contend that legal rights always have moral force,[23] others deny this.[24] Even those who do contend that legal rights always have moral force, however, do not deny that the moral and practical importance of a right may differ greatly. Indeed, the practical importance of a right may often overshadow its moral significance. This would be the case, for example, with regard to many so-called victimless crimes. It would also be the case for crimes that only become morally significant when committed by large numbers of people rather than scattered individuals, and whenever there are moral arguments in favor of the unlawful act. Because the moral importance of the rights involved in these and many other cases is less than their practical importance, the threat of moral sanctions alone is likely to be insufficient to deter the act and the imposition of moral sanctions is likely to be an insufficient form of punishment. In such cases – and these no doubt comprise the majority or at least a substantial minority of cases – moral sanctions must be supplemented by other means of enforcement. Nevertheless, it is still better to have moral sanctions available than not to have them. Moral sanctions can be important supplements to other means of enforcement, even if they are not fully effective on their own, and that makes them an important element in our arsenal of means of enforcement, despite their shortcomings. No evaluation of enforceability would be complete if it did not take the existence and the effect of such sanctions into account.

1.4 Social Criticism and the Withdrawal of Social Cooperation

Social sanctions can range from the threat or issuance of social criticism to the wholesale withdrawal of some or all of the benefits of social cooperation. Social sanctions may have either a prudential or a moral underpinning, but even when they are triggered by moral concerns they differ from moral sanctions in that they are addressed not to the violator's moral conscience but to his prudential

[22] Of course, the potential violator could be wrong about this, or even if he is not, he might develop a moral conscience if subjected to other forms of punishment. While this moral conscience may then become the source of some postviolation punishment, it comes too late to make the threat of moral sanctions a deterrent.

[23] See, e.g., Dworkin (1977), pp. 326–7.

[24] See, e.g., Kramer (1999), pp. 177–80 and Lyons (1984), pp. 110–36, esp. pp. 116–17.

interest in maintaining or acquiring future benefits from social cooperation. Like legal sanctions, social sanctions may ultimately trigger a moral response in the violator by teaching the violator a moral lesson, but they do not depend on such a lesson being learned for them to have a punitive effect. In this sense, they are similar to strategic sanctions, except that the cooperation that will be withdrawn (or simply not forthcoming) is not the cooperation of the beneficiary but the cooperation of some (usually similarly situated) group within society or even of society as a whole. Social sanctions accordingly threaten to affect the violator's relationship with a large number of potential future trading partners rather than just one. Even when the beneficiary lacks sufficient strategic or physical power to enforce a right, and even when a violation would provoke only minimal moral condemnation and no moral regret, the threat or imposition of the wider array of penalties that flow from social sanctions can make a right enforceable nonetheless.

Exactly how wide a threat social sanctions pose depends on the extent to which the violation will be publicized. In some cases, given the nature of the violation or the public profile of the beneficiary or violator, the violation may be so public or newsworthy that it will trigger social sanctions even if the beneficiary would prefer that the violation be kept confidential. But in most cases, it will be necessary for the beneficiary to publicize the violation in some way in order to trigger social sanctions. This can be done by reporting the violation to some organization, such as a credit reporting agency, that has a formal structure and identity and makes such information available to a small but specially targeted audience, or by attempting to disseminate it more widely through the press, or even by spreading it through informal means such as the "grapevine" of social gossip. Regardless of how the violation is publicized, however, as long as news of the violation ultimately reaches those with whom the violator would like to deal, it can have a significant impact on the number and nature of opportunities for social cooperation that the violator will thereafter encounter.

This requirement of publication can be an impediment to the imposition of social sanctions, but it is also a feature that gives social sanctions special coercive power. If strategic sanctions are imposed, the violator will often be able to recapture the strategic cooperation of the beneficiary by making amends. But social sanctions are usually not centrally administrated, and therefore once the process of publication has begun, both the nature and extent of the social sanctions ultimately imposed are largely out of the beneficiary's control. Even if the beneficiary is subsequently fully compensated by the violator, there may be little either the beneficiary or the violator can do to halt the imposition of further social sanctions, much less reverse this process or otherwise restore the level of social cooperation the violator enjoyed before the violation. In this respect, the decentralized process that produces social sanctions may prove even more inexorable than the process of imposing legal sanctions through criminal

prosecutions. Indeed, while criminal prosecutions can also begin without any action by the beneficiary or even against his express desires, and control of the process is ostensibly in the hands of the state, the beneficiary will often be in a position to derail the process by refusing to testify or changing his testimony or otherwise refusing to cooperate. No such power, however, remains with the beneficiary where the process that produces social criticism and the withdrawal of social cooperation is concerned. Once imposed, social sanctions tend to be irrevocable, and the resulting damage to the violator's social opportunities irreparable. Potential violators will accordingly know that if they commit a violation that triggers social sanctions, there may be nothing they can do to avoid the punishment that will result.

Sociologists have long been aware of the importance of social sanctions in the maintenance of social order.[25] But they are not only a means of enforcing social norms or conventions – they are an important means of enforcing legal rights as well. For example, legal action is rarely brought to enforce small debts, for the cost of prosecuting such an action would be prohibitively expensive. Instead, the violator is simply reported to a credit agency, where information regarding his nonpayment is accessible to a wide range of potential creditors. As a consequence of this, the violator is likely to find that credit is not available to him in the future or available only on unattractive terms. As long as the debtor has the ability to pay, the threat of such a withdrawal of social cooperation alone will usually be sufficient to ensure repayment.[26]

The same effect can be achieved for more valuable and complicated legal rights as well, and using more informal means. Both our ability to do business and our opportunities for social interaction within a particular community will in large part be determined by our reputation. Those who have reputations for being difficult are likely to have a tougher time of it than those with a reputation for fair dealing. This applies not only to the small debtor who bounces a check at his local market, but also to the major real-estate developer who misses an interest payment on a construction loan, the manufacturer who fails to honor his product warranties, the law firm who mishandles a case for one of its clients, and the physician who commits medical malpractice.[27] All will find their ability to

[25] See Ellickson (1991), p. 143 (citing studies).

[26] Where extensions of commercial as opposed to consumer credit are concerned, the same function is provided by Dun & Bradstreet. See Newman (1997), pp. 85–95. If a debt instrument will be publicly traded, financial strength is also rated by agencies such as Moody's and Standard & Poor's.

[27] For a formal economic presentation of when the fear of loss of future business alone is sufficient to assure contractual performance, see Klein and Leffler (1981). Klein and Leffler make clear that the loss of future sales is not a sufficient incentive to perform unless the discounted value of the future income stream to be lost exceeds the short-term gain from nonperformance. Firms may accordingly signal their commitment to perform by charging higher prices and investing in advertising, making their reputation a nonsalvageable asset and ensuring that their income stream is alone sufficient to guarantee performance.

pursue their own projects in the future compromised, and this is likely to be of far greater concern to them than the immediate consequences of the particular failure or default at issue. The threat of imposition of social sanctions can accordingly provide a powerful incentive to perform one's obligations and to respect the rights of others.[28]

Take, for example, the *hawala* system, an informal means of national and international currency transfer and exchange that has existed for thousands of years. Despite being virtually unknown to most people in the West, it continues to be widely used by people in or from the Arab world and South Asia. Among other things, the system allows people working in richer, more developed parts of the world to transfer funds to friends and families living in poorer, less developed parts. Some of these areas are so remote that no outlets of the formal banking system are located there, and even when banking outlets are available, the local banking system is often corrupt or unreliable and much more expensive to utilize. The *hawala* system accordingly provides a vital link between the richer and poorer parts of the world. Many people in these poorer areas simply could not exist without it.

The system works like this.[29] Suppose you are working in the United States and want to send some money to a relative in a remote region of Pakistan. There is probably no bank in your relative's community, and even if there were, the banking system is slow, expensive, prone to "losing" funds, and offers only the official exchange rate, which does not reflect the true value of your currency. So you go to a local *hawaladar*. The *hawaladar* has a large network of contacts in many parts of the world, and if he does not know someone in your relative's community, he will find someone who does. You then give him whatever amount of money you want to send, say, $1,000, and for a small fee (sometimes as little as 1 percent, but in any event much less than what a bank would charge) he will instruct his contact in the region to deliver an equivalent amount in local currency to your relative. The transaction is normally complete within twenty-four hours. No money actually leaves the country; all that happens as a result of the transfer is that your *hawaladar* is now indebted to the *hawaladar* in Pakistan. That debt remains "on the books" until someone comes to the *hawaladar* in Pakistan needing something from the United States. This request is then passed on to your *hawaladar*, who uses his own money to buy whatever the Pakistani client wants, and when he sends it on

[28] See Smith (2002), p. 74: "The success of . . . [most] people . . . almost always depends upon the favor and good opinion of their neighbors and equals; and without tolerably regular conduct these can very seldom be obtained." See also Smith (1978), pp. 538–9 (noting that when a person makes twenty contracts a day, even the appearance of cheating will put his future business opportunities in substantial jeopardy), and Mill (1989), pp. 77–8 (recognizing that given the range of benefits that social favor can bestow, "a person may suffer very severe penalties at the hand of others" through social criticism and the withdrawal of social cooperation).

[29] See U.S. Senate Committee on Banking, Housing, and Urban Affairs (2001), esp. pp. 46–7.

to Pakistan, his debt to the Pakistani *hawaladar* is canceled and the books are balanced.[30]

The *hawala* system is highly efficient, and while each individual transaction is usually small, the total amount of funds that pass through the system is enormous. In 1998 in India alone, for example, $680 billion moved through the *hawala* system, an amount equivalent to 40 percent of India's gross national product.[31] Yet the whole system depends on the threat and use of social sanctions, not the threat or use of legal remedies or physical force. Indeed, despite the fact that *hawala* agreements are nominally illegal in many countries and therefore not enforceable through the courts, *hawaladars* rarely default or defraud one another or their clients. A *hawaladar* knows that if he fails to fulfill his obligations and agreements he will be ostracized by his community, and without access to the local and foreign contacts his community can provide, he will be out of business. In most cases, this alone is enough to ensure that *hawaladars* are scrupulously honest in their business dealings. But the social sanctions do not stop there. If a *hawaladar* defaults, his family also faces the threat of social exclusion from the community. As a result, when a *hawaladar* does default, there is tremendous pressure on his family to ensure his *hawala* deals are honored. If the family does not come through, other *hawaladars* will do so, for if trust in the system is lost, the entire system will collapse, and this would be bad for all *hawaladars* everywhere. In the end, the threat and use of social sanctions alone is sufficient to keep the *hawala* system reliable and flourishing.

Indeed, the threat of a withdrawal of social cooperation is so powerful that it is often strictly regulated by law. Strikes, secondary boycotts, threats to work-to-rule, and a variety of other aspects of industrial action that can be used to enforce legal rights as well as to obtain or maintain discretionary benefits are all subject to extensive regulation under labor law.[32] Group boycotts and agreements in restraint of trade, which can be used either to enforce legal rights or to coerce others into engaging in illegal and anticompetitive conduct, are subject to similarly extensive regulation under antitrust law.[33] Libel and slander laws protect our personal and financial reputations.[34] Even the reporting and

[30] Another "advantage" of the *hawala* system is that few records are kept, and whatever records are initially created are usually destroyed once the books are balanced, making the *hawala* system attractive to terrorists and other criminals interested in transferring funds in ways that are difficult to detect or track. See U.S. Senate Committee on Banking, Housing, and Urban Affairs (2001).

[31] Farah (2004), p. 114.

[32] See, e.g., the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*.

[33] Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, bars contracts or conspiracies in restraint of trade and has been interpreted to apply to a wide range of collective conduct.

[34] For a general discussion of the American law of defamation, see Dobbs (2000), ch. 28. For a discussion of English law, see Gatley (1998), esp. ch. 2 (on what is defamatory) and ch. 8 (on who may sue or be sued).

use of negative credit information is recognized as so coercive and potentially damaging that it is subject to regulation under fair credit reporting and debt collection laws.[35] The existence of such regulation is yet another testament to the effectiveness of social sanctions. And given the effectiveness of social sanctions, they are undeniably an important means of enforcement for which any theory of enforceability must account.

1.5 Automatic Sanctions

Making an effective threat is an art as well as a science. The part that is an art has to do with making the threat appear credible, or at least credible enough to accomplish its purpose, which is to get the target of the threat to behave differently than he would otherwise be inclined. But making a threat appear credible is not always an easy matter. Indeed, as Thomas Schelling points out, "the distinctive character of a threat is that one asserts that he will do, in a contingency, what he would manifestly prefer not to do if the contingency occurred, the contingency being governed by the second party's behavior."[36] This is because carrying out a threat usually requires incurring certain costs, and if these costs are high enough, it may not be in the maker's interest to carry out the threat if the target fails or refuses to comply. And if the target knows this at the time the threat is made, or in some cases merely suspects it, the threat will lack the requisite credibility and is doomed to fail at the start.

To overcome this problem, the maker of the threat has various options open to him.[37] One is to make himself appear irrational, and thereby make it seem that the threat may be carried out even if it turns out not to be in the maker's interest to do so. It may be difficult to appear irrational, however, unless one *is* irrational, and while appearing irrational may make a threat more credible, it may also have undesirable collateral consequences, and is therefore often not the best response to the credibility problem. Another, and in most cases more sensible, solution to the problem is for the maker to take some action now that will change the payoff structure of the threat situation and thereby ensure that it would no longer be (or at least no longer appear to be) in his interest to back down should the target of the threat fail to comply. One way to do this would be for the maker to stake his reputation on carrying out the threat, thereby giving

[35] In the United States, the acquisition and exchange of consumer credit information is regulated by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. To prevent the harassment or embarrassment of debtors, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.,* regulates the extent to which debt collectors may disclose information about a consumer debt or otherwise communicate with parties other than the debtor. 15 U.S.C. § 1692c(b).

[36] Schelling (1960), p. 123. See also Davis (1983), pp. 101–2.

[37] For a more detailed discussion of some of techniques available for dealing with the credibility problem, see Schelling (1960), esp. pp. 123–31.

him an added incentive not to back down. Another would be to incur certain costs now (e.g., by expanding capacity) so that there would be no or at least only limited further costs if it became necessary to carry out the threat. Yet another would be to openly enter into a binding side agreement with some third party that exposed the maker to substantial penalties if he were to fail to follow through following the target's failure to comply. Paradoxically, by using one of these methods to restrict his future freedom not to carry out the threat if it fails to produce the desired results, the maker would effectively be increasing the chances that the target will comply and the threat will never have to be carried out.

But what we are interested in exploring here is yet another possible solution to the credibility problem. This is to make imposition of the threatened sanction automatic. A sanction is automatic if it can be imposed without the postviolation intervention of human agency – without the maker (or anyone else for that matter) actually having to decide to take action in response to the violation. Instead, the sanction is triggered through some physical, biological, emotional, or social mechanism that in no way depends on whether it is in anyone's best interest to impose the sanction. Because no further decision is required for the threatened sanction to be imposed in the event of noncompliance, the degree to which it will or will not be in the maker's interest to carry out the threat no longer matters. The elimination of the need for human intervention – the *automatic* nature of the sanction – solves the problem of credibility. Even if there are other reasons why the imposition of the sanction might remain uncertain, the elimination of the need for further human action removes an important obstacle to imposition and thereby gives the threatened sanction a special deterrent power.

One way to make the imposition of sanctions automatic is to create some sort of mechanistic device that will impose sanctions whenever certain preestablished triggering criteria are satisfied. Perhaps the most potent example of such a device is the Doomsday Machine described in the film *Dr. Strangelove*, a satiric examination of the cold war nuclear arms race. In the film, the Soviets have buried a large number of nuclear bombs deep underground and constructed a device that connects them all to a triggering computer. The computer has been programmed to set off the bombs if the Soviet Union is ever the target of a nuclear attack (or if any attempt is made to disarm the device), and the resulting nuclear explosion is designed to be large enough to destroy the world. The thinking behind the device is that as long as a nation has the option of withholding nuclear retaliation, an aggressor might be tempted to launch a limited nuclear attack because it might deter a nuclear response by threatening even more extensive destruction. If destruction of the world were automatic, however, no one would dare launch any sort of nuclear attack. The Soviets accordingly reason that building a Doomsday Machine is the only way to ensure the credibility of their nuclear deterrent.

There are, of course, several problems with any such device, and these are all illustrated with devastating precision in the film. First, the Soviets neglect to tell the world about the device, thereby eliminating any possible deterrent effect it might have had. This is the problem of notice – if potential violators do not have notice of what will trigger automatic sanctions, there is nothing to be gained and much to be lost by employing them. Second, the machine was programmed to explode even if the nuclear weapon detonated on Soviet territory was launched by a rogue officer acting without his government's knowledge or consent. This is the problem of defining appropriate triggering criteria. With mechanistic devices, it is often impossible to think of all contingencies in advance and to ensure that sanctions will be triggered only in appropriate circumstances and only against appropriate targets. Third, there is the problem of proportionality. Even if it is possible to accurately foresee each and every circumstance that would and would not justify the imposition of automatic sanctions, some of these triggering circumstances will undoubtedly justify less of a response than others, and it is even more difficult to design a mechanism that can adjust the severity of the sanction imposed to the particular circumstances that triggered it. And fourth, there is the problem of rationality. If automatic sanctions do not have the deterrent effect they are supposed to, it may not be rational to impose them. Indeed, if it were rational, there would have been no need to make them automatic in the first place, for the threat to impose them would not have lacked credibility.

Given these problems, the use of mechanistic devices to impose sanctions is often a morally dubious if not foolhardy venture. There are such devices in use nonetheless, although the Doomsday Machine remains fictional, at least for now. Land mines are still in regular use, despite their indiscriminate nature, although many countries have now signed a treaty to eliminate them.[38] Booby traps, spring guns, and similar mechanical devices are also sometimes employed by ordinary citizens determined to defend their property against burglars. Precisely because these devices raise problems of notice, criteria, proportionality, and rationality, however, they are generally prohibited, at least when they are designed to inflict potentially serious injury. As a result, a property owner who installs such a device is usually charged with a more serious offense than the burglar who ends up being injured by it,[39] and the property owner may also be required to pay the burglar compensatory and even punitive damages.[40] In

[38] As of May 2004, 143 countries were parties to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Antipersonnel Mines and on their Destruction. Nine more have signed but have not yet ratified the treaty, and 43 have not signed, including the United States.

[39] See, e.g., *People v. Ceballos,* 12 Cal.3d 470 (1974) (upholding conviction of homeowner for assault with a deadly weapon when teenage burglar was shot in the face by a spring gun homeowner had installed in his garage).

[40] See, e.g., *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971) (upholding award of compensatory and punitive damages to burglar shot by spring gun).

contrast, the use of physical or mechanical devices that are designed to inflict only property damage or less serious forms of physical injury is generally permitted, as long as the presence of the device is obvious or prominent notice is given.[41] Indeed, barbed wire, spiked walls, speed bumps, and those nasty looking devices that cause "severe tire damage" if one drives over them in the wrong direction are all designed to impose automatic sanctions on rights violators and are in common use today.

Automatic sanctions can also be imposed through biological as well as mechanical delivery devices. The American government permitted (and perhaps even promoted) the use of the herbicide paraquat on Mexican marijuana fields in the 1970s, even though (and some critics would say precisely because) this automatically exposed those who continued to smoke marijuana to what were possibly serious health risks. Contraception is not readily available to many young people, even though this automatically increases the risk of unwanted pregnancy among the sexually active, and addicts are generally denied access to clean hypodermic needles, even though this greatly increases their risk of exposure to AIDS. In each of these cases, conduct that we view as socially undesirable is subjected to a risk of undesirable and in some cases serious social and physical consequences. Even though the risk of these consequences could easily be reduced (e.g., by making condoms and needles widely available), many people oppose doing so precisely because they believe the automatic nature of these consequences makes them an effective deterrent of conduct they would like to suppress. And while the degree to which the threat of such automatic sanctions does deter sexual activity or drug use is debatable given the fact that the powerful desires that drive such conduct are often not subject to rational control, they do presumably have some deterrent effect and their retributive effect can be substantial. Such forms of automatic sanctions are accordingly another means of enforcement for which any theory of enforceability must account.

If automatic sanctions could arise only through the creation or use of such mechanical or biological devices, however, automatic sanctions would simply be a controversial and morally questionable fringe means of enforcement that in most cases remained largely the stuff of science fiction. But automatic sanctions can sometimes play a much more central and effective role as a means of enforcement. There are two situations in which this can occur. The first is when the potential violator has reason to coordinate his behavior with the behavior of others. In this case, the failure to coordinate automatically deprives the violator of the benefits that flow from cooperative behavior, and in certain circumstances

[41] See, e.g., Model Penal Code § 3.06(5). Compare Restatement of Torts 2d § 84 (permitting the use of mechanical devices to defend property and chattels as long as the device is not intended or likely to cause death or serious bodily injury and its use is otherwise "reasonable") with Restatement of Torts 2d § 85 (prohibiting the use of such devices to defend property or chattels when death or serious bodily injury is likely or intended).

these benefits may be substantial. The second is when the potential violator engages in activities that are inherently dangerous not only to others but also to his own person or property. In this case, the failure to exercise due care automatically exposes not only others but also the violator to the risk of serious injury. Even though other means of enforcement may also be available in either situation, especially when the conduct that triggers automatic sanctions also constitutes the violation of a right, the fear of automatic sanctions may be what keeps others from committing such violations. The potential availability of automatic sanctions effectively makes the right self-enforcing, either in whole or in part.

One often-cited example of the first type of situation is the decision to drive on the right or the left. If I were the only one confronted with such a choice, it would not matter which side I choose – one side would be as good as the other. But I am not the only one confronted with such a choice, and because we all must coordinate our behavior if we are to minimize the risk of colliding with one another, there are rules dictating which side we must choose. If I drive on the wrong side I will have violated these rules, and if caught I will at least have to pay a fine. If I end up causing an accident I will have to pay damages to anyone I injure and I may face serious criminal penalties as well. But the most powerful reason for me to abide by the rules is that it is in my interest to drive on the same side as everybody else, for if I do not do this I am highly likely to get into an accident and end up injuring myself. This sanction arises *automatically* – not because others might respond to my violation by taking action to punish me, but because others may not be able to swerve out of the way in time and *avoid* punishing me no matter how hard they try. These automatic sanctions present a risk of harm to my person and my property that in most cases will vastly exceed any possible benefit I could obtain by violating the rules of coordination, and therefore should be sufficient to deter any violation even in the absence of other possible penalties.[42] And if I do commit a violation and am seriously injured as a result, I will have already been subjected to substantial punishment regardless of what other sanctions may subsequently be imposed upon me.

Of course, this kind of automatic sanction is produced by the need for social coordination rather than by mechanistic devices, and the need for social coordination is not so easily artificially created. Nevertheless, there are various

[42] David Lewis puts the argument even more forcefully. At least when uncoordinated conduct threatens serious physical injury, as it would if we were to drive on the left when the convention was that everyone drive on the right, he considers any incentive to comply provided by the threat of other punishment to be superfluous. Indeed, even if we were legally required to drive on the left, we would not do so if we nevertheless expected everyone to drive on the right. "Punishments are superfluous if they agree with our convention, are outweighed if they go against it, are not decisive either way, and hence do not make it any less conventional to drive on the right." See Lewis (1969), pp. 44–5.

things we can do to take advantage of the persuasive power of such sanctions. Recent experiments with junction design, for example, suggest that by making road junctions *appear* more dangerous, we may actually be making them safer. When all road signs and traffic lights were removed from certain junctions in Denmark and the Netherlands, the accident rate at these junctions actually went down rather than up.[43] One explanation for these results is that by removing guidance as to who should yield to whom, we make the junction appear more dangerous, and thereby increase both the salience and the probability of automatic sanctions should a driver not exercise a sufficient degree of care to coordinate his actions with those of other drivers. Because these automatic sanctions are more severe than a traffic fine or even liability for damages (which is generally covered by insurance anyway), their deterrent effect is greater, and drivers are more likely to slow down, make eye contact with each other, and otherwise be more careful than if they were passing through a junction that seemed to pose less of a threat to their own person and property.

A similar effect has been found with regard to vehicle size and safety.[44] Ironically, the safest vehicles on the road (in terms of number of fatalities per million cars per year) are not necessarily the largest. A number of mid-size cars and even some subcompacts have better safety records than some popular SUVs. Not because the smaller vehicles provide greater protection for their occupants – adding size, height, weight, and steel to a vehicle does make its occupants more likely to survive certain kinds of collisions. But smaller cars are more maneuverable, and the drivers of such cars are therefore more able to take evasive action in potentially dangerous situations. More importantly, however, the feeling of safety engendered by the larger vehicles turns out to cause problems of its own. When not cocooned inside so much steel, drivers *feel* less secure, and because they feel less secure, they are more careful. More careful drivers are less likely to be involved in an accident, and therefore pose less of a danger to themselves and others, whatever kind of vehicle they drive. Once again, the more salient the threat of automatic sanctions, the less likely it is that actual violations will occur.

Automatic sanctions can also arise when rules of coordination are set forth in social conventions and do not constitute legal rights at all. For example, because people drive on the left in England there is a (largely unconscious) social convention of walking on the left as well. When encountering an oncoming pedestrian, you can move to the right, but you are likely to find that the oncoming walker will move to that side as well, necessitating an awkward little dance as you each try to go around the other. In America, the same dance is likely to occur if you move to the left. In either place, it is in your interest to abide by the prevailing social convention simply because it makes things easier. The same

[43] See Lyall (2005) and Walters (2002).
[44] See Gladwell (2004).

thing is likely to occur if you go into a shop in either country and try to conduct your business in something other than English. You violate no one's rights by trying to do so, but you may find it difficult to make yourself understood, even though the shopkeeper wants to make a sale and may accordingly do his best to understand you. In this case, the risk of not being understood is the automatic sanction for failing to abide by the convention. If you are able to avoid that risk, you will most likely try to do so. The convention will be self-enforcing.

It is precisely because certain conventions *are* self-enforcing that rights must sometimes be created to counteract this effect. To counteract the self-enforcing convention of conducting business in the dominant language, we now sometimes have the right to conduct our business in another language. Government offices in the United States, for example, are now required to print various materials in other languages and to employ at least some personnel who can converse in all languages spoken by significant portions of the population. This prevents people who do not speak the dominant language from being subject to the automatic sanction of being unable to do business with their government. Indeed, the fact that rights must sometimes be created to counteract the self-enforcing quality of certain social conventions in these and other circumstances is a testament to the persuasive power of automatic sanctions.

The other situation in which automatic sanctions are likely to arise and to have a similar effect is when someone is engaged in an activity she knows to be inherently dangerous to herself as well as others. Often the person engaged in such activity will bear a legal duty of care, and if she violates this duty she may be subject to fines or even imprisonment as well as legal liability for damages. But if she violates this duty she also will expose herself to a risk of serious injury. I am careful when handling explosives not only because I fear legal liability if I injure someone else, but also because if I am not careful I am most likely to end up injuring myself. I do not burn leaves in my backyard in a crowded subdivision, not only because I fear liability to my neighbors if the fire should get out of control and cause damage to their property, but also because I fear I might accidentally set fire to my own home. Indeed, whenever the violation of a right would place the violator's own interests in some kind of jeopardy, the right must be considered at least partially self-enforcing, for it is less likely to be violated than a right protected by legal remedies alone. Whenever we are trying to calculate whether a right is or is not enforceable, the potential availability of automatic sanctions is accordingly something that we must take into account.

1.6 Legal Remedies

The panoply of legal remedies available to protect most rights today undoubtedly presents the most complex and varied means of rights enforcement. Civil awards of damages, mandatory and negative injunctions, declarations of the

parties' respective legal rights and duties, and, in the criminal arena, fines and periods of imprisonment, comprise what we might call the "traditional" legal remedies. But other, more specialized legal remedies will often be available as well. These might include a variety of administrative remedies – remedies that are obtained through administrative agencies rather than through the courts, plus remedies such as the recording of liens and nonjudicial foreclosure that have been expressly created by statutory law but do not require the action of any arm of government to invoke. Within this category, we might even include ostensibly private remedies such as arbitration or mediation, remedies that are judicial in character but that in certain circumstances are expressly recognized as adjunct forms of legal action and supported through the enactment of various measures designed to give the results of such proceedings special legal standing. Later, we will discuss the exact scope of what we should or should not include within the category of legal remedies in great detail, but such a discussion is unnecessary now. At this point, we are not concerned with navigating the fringes of the category, but with the characteristics of the remedies that lie within its central core. It is accordingly to an examination of these characteristics that we now turn.

The central characteristic of most legal remedies is that they are ultimately backed by the physical power of the state, in both the civil and the criminal arena. If you violate an injunction, for example, you will be subject to a fine, and if you fail to pay the fine you may very well find yourself in jail. If you fail to pay an award of damages or comply with judgment for possession, bailiffs may come to your home and seize your property or forcibly evict you, and if you interfere with them you will again find yourself in jail. Even awards of declaratory relief, although not backed by the immediate threat of physical force, are ultimately backed by such a threat, at least in most circumstances. A declaratory judgment sets forth the legal rights and obligations of the parties, and clarifies what conduct would constitute a violation and what consequences would flow should a violation happen to occur. Often, it is accompanied by an injunction, but even when it is not, if you disregard the rights and obligations set forth in the declaration you are likely to be subjected to another legal action and the relief that will almost certainly be granted in *that* action *will* be backed by the physical power of the state. The fact that the relief granted in the original action was not immediately backed by the physical power of the state therefore seems a purely formal, technical matter rather than one of substance.

But it is important to recognize that this will not always be the case. There will sometimes be no further legal action to be taken following a declaratory judgment even if the rights recognized in the declaration are subsequently violated. For example, under the Human Rights Act, which has recently come into effect in England, persons who bring an action under the act may obtain a declaration stating whether a violation has occurred. This declaration, however, has no

specific legal consequences.[45] It is up to the government to decide whether they will continue to engage in such violations in the future and whether they will offer compensation to those who have had their rights violated in the past. Such a declaration may have a coercive effect, but if it does it will do so because of the moral and social force of the declaration and the moral and social consequences (such as a loss of votes) that will flow from a refusal to cease the offending conduct or make amends for past violations, not from the fear that the physical power of the state will ultimately be brought to bear in service of the rights set forth in the declaration. In the minds of some, there is a question as to whether these moral and social sanctions are sufficiently coercive, and this, in turn, raises a question as to whether the rights set forth in the act, despite the existence of a legal remedy, should be thought of as enforceable.[46]

This is because of the other central characteristic of most legal remedies. In most cases, legal remedies are specifically designed to have sufficient coercive force to make compliance with the underlying right highly likely and, when violations of the right nevertheless occur, to provide a degree of compensation that is designed (in theory, at least) to make the victim whole or to provide a degree of punishment that is designed to make the violator regret the violation, and sometimes both. For example, take the legal remedy of damages. These are usually calculated according to the harm caused by the violation. If I negligently damage property that you have entrusted to me for safekeeping I will have to pay you whatever it would cost to repair or replace that property. Because it is unlikely the violator will enjoy much benefit from the violation in this and a variety of similar cases, measuring damages by the harm caused by the violation should have sufficient coercive force to deter most violations, and when violations nevertheless occur, should provide the requisite degree of compensation.

But sometimes this will not be the case. Sometimes the harm caused by the violation will not even approach the benefit the violator may enjoy from the violation. For example, what if I do not damage property you have entrusted to me for safekeeping, but I use it as collateral for a loan and then I bet the proceeds on a horse. If the horse wins, I may be substantially better off, and I can redeem your property and return it to you at the time and place we originally agreed. Your property has not been damaged, and while your property was placed at risk in violation of your rights, the harm you suffer (assuming you become aware that your property was wrongfully pledged) is arguably minimal. Compensation for this harm is not likely to exceed or even approach the profit I have earned, for such compensation would clearly not exceed the replacement value of the property, and yet my gambling winnings could be many times this amount. In most systems, the measure of damages in this case would accordingly not be

[45] See Miles (2000), pp. 163–4.
[46] See, e.g., Leigh and Lustgarten (1999), pp. 536–42.

the degree of harm caused by the violation, which is minimal, but the amount by which I have been unjustly enriched by my violation of your rights. In such a case, the wrongdoer would be deemed a constructive trustee of the proceeds of his wrongdoing, and required to turn over those proceeds to the person whose rights he violated.[47] While the remedy of damages ensures that you can recover the value of your property if it is wrongfully lost, the remedy of constructive trust ensures that I cannot profit from my wrongdoing even if I am able to return your property undamaged. Because I would no longer be able to profit from my wrongdoing if I am caught, I would have much less incentive to try to behave in such a manner.

Even the prospect of this measure of damages, however, may not have sufficient coercive force to deter my violation, for I may believe I am unlikely to be caught. Indeed, as long as my horse wins, I *am* unlikely to be caught, for I should be able to return your property as and when agreed. And if my horse does not win, I will not have been unjustly enriched and therefore will have to pay nothing more than the value of the property I converted to my own use. If that value, discounted by the possibility the horse will win, is less than the potential value of my winnings, discounted by the possibility the horse will lose, then I will have little incentive to refrain from committing the violation based on my liability for damages alone. If I am to have such an incentive despite the fact that I am unlikely to be caught, I will have to be subject to far greater sanctions than simply the disgorgement of my profits – I will have to face additional penalties under the criminal law. Similarly, if I steal your property and am merely required to return it or its replacement cost to you should I be caught, I will have little incentive to refrain from committing a violation on that grounds alone if there is any possibility I will be able to avoid identification and detection. Once again, that incentive is going to have to come from the penalties I would face under the criminal law if the legal remedies for such a violation are to have the requisite degree of coercive force to deter most violations and to provide the requisite degree of punishment and compensation.

The same problems of deterrence, compensation, and punishment may arise for rights that are protected primarily by the availability of injunctive relief. For example, you have the right to exclude me from your property, and if I cut across your property on my way to work without permission I have committed a violation. You can enjoin such violations in the future, and if I violate this injunction I will be subject to severe penalties, but until the injunction is issued I have little to worry about. I have caused no injury to your property and therefore have no liability to you for compensatory damages, and I may be perfectly happy to pay you damages equivalent to the amount by which I was unjustly enriched through using your property as a shortcut. While even my first intrusion on your property would constitute a violation, the legal remedies available to you

[47] See generally Fischer (1999), ch. 6.

give me little reason to refrain from this or any subsequent intrusion that has not yet been enjoined. Once again, the availability of a legal remedy does not necessarily mean your right is likely to be respected, or that you will be able to make me regret my violation or obtain a satisfactory degree of compensation for your loss.

The purpose of these examples is to illustrate the point that we cannot know whether a right is enforceable simply by looking at whether there is a legal remedy available. The remedy available must at least arguably be of a certain type and a certain force. If we are to make a meaningful evaluation of the enforceability of any legal right, we must have a way to *measure* what amount of enforcement is available and a way to determine what measure of enforcement is sufficient. Sometimes the amount of enforcement available through a single legal remedy will be sufficient to render a right enforceable; sometimes the requisite amount of enforcement will be available only when a group of legal remedies are available and considered together; and sometimes the amount of enforcement available through even a group of legal remedies will be insufficient. In this case, we have to decide whether a sufficient measure of enforcement is available through other, nonlegal means, and whether these nonlegal means of enforcement can sometimes be a complete substitute for legal remedies as well as a supplement to them.

But how do we measure what level of enforcement is available? And what measure of enforcement is required in order for a right to be properly considered enforceable? Will any measure of enforcement do? After all, as long as some measure of enforcement is available, the right has some value – it is better to have it than not. Is this all that is required for a right to be considered enforceable? If some greater measure of enforcement is required, how is this requirement derived? Does the required measure of enforcement change over time? Does what measure of enforcement is required depend on whether the right has or has not been violated? In what way could this make a difference? It is to the discussion of these complex issues that we now turn.

2

The Goals of Enforcement

Before we embark on our examination of how to measure the degree of enforcement available and what measure of enforcement is sufficient to render a right or other restraint enforceable, we must get a clearer idea of what the concept of enforceability means. An enforceable restraint is one that is operative in the world, but operative in what way? There are many ways that a restraint might have an effect on the world, and before we can determine whether that effect is sufficient to render the restraint enforceable, we must know which of these many possible effects we are trying to achieve. What is it, exactly, that we are trying to accomplish when we seek to make a restraint enforceable? Only after we have identified the goals of enforcement can we begin to determine what means and measure of enforcement are necessary and sufficient to ensure those goals will be met.

2.1 The Three Critical Stages of Enforcement

Our first task in identifying the goals of enforcement is to consider whether these goals differ depending on whether the right or other restraint we are examining has or has not yet been violated or has or has not yet been enforced. Because we do not use separate words to distinguish between the enforceability of a right that has not yet been violated and one that has been violated but not yet enforced, it is natural to assume that enforceability means the same thing in both situations, and that whatever goals we are pursuing in one situation we are also pursuing in the other. But the ambiguity of our language and our lack of ability to easily distinguish between the enforceability of right that has not yet been violated and one that has been violated but not yet enforced may in fact conceal an important conceptual distinction.[1] Indeed, there are not

[1] Note that the language of enforcement is also ambiguous in another way. The words *enforceable*, *enforceability*, and *enforced* could each be interpreted as making a normative claim about whether the goals of enforcement have been or could be met, or they could each be interpreted as making

merely two but three potentially critical times at which enforceability could be measured – the *previolation* state of affairs, the *postviolation* state of affairs, and the *postenforcement* state of affairs, and very different considerations might come into play when determining what measure of enforcement is sufficient to make a restraint operative in the world depending on the particular state of affairs to which we are referring. Although people may use similar words when speaking of enforceability in each of these situations, the qualities or aspects of enforceability that concern them may differ dramatically as they move from one situation to the other. And if the goals of enforceability do differ at these various stages, then the measure of enforcement required at each stage might differ as well. But do the goals of enforceability differ from one stage to another? Does it matter that enforceability can be measured at different times? Is a different measure of enforcement required before a right has been violated than after, or is the timing of our inquiry irrelevant to the determination of enforceability? What does it mean to say a right has been enforced? What goals are we pursuing at each of these critical stages in the enforcement process?

Before turning our attention to a discussion of these questions, let me make a few preliminary points of clarification. While I have identified the previolation, the postviolation, and the postenforcement state of affairs as the relevant critical stages for purposes of determining the meaning and measure of enforceability, further subdivision of the lifetime of a right is of course possible. Nevertheless, we shall see that the fundamental shifts in the meaning and purpose of enforceability all occur when we move from one of these three stages to another. There may also be shifts in meaning and purpose within each stage, but these will typically be subtle and even so will usually occur only in special cases. I will accordingly ignore these complexities for the most part, fairly confident that the resulting simplification will be slight and more helpful than it is misleading.

There are two further complexities, however, I will not ignore. To understand the first we need to recognize that for any particular right, each of these three states of affairs is time dependent in the sense that each stage follows on (if it follows on at all) after the other. We live in one state of affairs and only one with regard to any particular right. But we also live in all three states of affairs for rights in general. The simultaneous (in this sense) coexistence of all three states of affairs for rights in general allows them to exert a strange and curiously complex but undeniable influence on each other. Before we can understand this important complexity, however, we must have a clear idea of how these states of affairs relate to the enforceability of a single right. I therefore propose to

a descriptive claim about whether some means or measure of enforcement could be or has been attempted or employed, without implying that this action would have or has had any particular effect. Unless otherwise indicated, when I use any of these words, I am using them in their normative sense.

address the relationship between the enforceability of a particular right and the enforceability of rights in general only after our model of enforceability for a single right has been set forth in full.

The second complexity is even more important. Even when focusing on a single right, it is not always (and perhaps not even often) clear which state of affairs actually obtains. The existence of the relevant state of affairs is subject to some and sometimes a great deal of uncertainty. This has important ramifications not only for enforceability, but also for any conception of rights in general. It is one of the things that both explains and affects how the various states of affairs relate to and influence each other. The existence of such uncertainty will accordingly play a major role in our ultimate model of enforceability, but in order to see the effects of uncertainty we must first see what enforceability would be like without it. We will therefore begin our discussion of the critical stages of enforceability by assuming a greater degree of certainty is present at each stage than might actually obtain. Why things could actually be less certain than this, where this uncertainty comes from, and what it all means to enforceability we will discuss in detail later.

2.2 Previolation Enforceability and the Facilitation of Social Cooperation

Let us begin with the previolation state of affairs. Why and in what way does the question of whether a right is enforceable matter to someone who finds himself in this state of affairs? What purpose, if any, does enforceability serve? What role does it play? Perhaps we can illuminate some of the possibilities if we imagine a society where everyone has the same rights we currently have, but all of these rights are unenforceable. How would this society differ from the one in which we actually live? How would people in such a society behave? If we were to return to the state of nature, there would be no government, and the only rights that people would possess would be natural rights, if they were to possess any rights at all. But we are not imagining our rights away in this thought experiment, only their enforceability, so we would not be returning to the state of nature. In the hypothetical society of our thought experiment, there is a government, and there is a very highly developed and complex system of rights in place. Unlike the state of nature, people in our hypothetical society would have specific and detailed expectations as to how everyone was supposed to behave in a wide variety of circumstances, just as they do in our society. The only attribute that would distinguish this hypothetical society from the one in which we actually live is that in our hypothetical society, everyone's rights would be unenforceable.

But imagining a society with an elaborate yet unenforceable system of rights is more difficult to do than it might at first appear. We can assume away legal remedies of course, but physical, strategic, social, moral, and automatic

sanctions all arise out of the circumstances of social interaction. This means that the potential availability of such sanctions cannot be eliminated. If it is impossible to imagine a society where all means of enforcement are *unavailable*, however, perhaps we can make do if we imagine a society where all means of enforcement are *unlawful*. But there is a catch. If all means of enforcement were unlawful, then enforcement of the right that makes enforcement unlawful would have to be unlawful as well. We cannot simply assume that people would refrain from taking enforcement action under these conditions, for why should they do so if enforcement of the right against enforcement were itself unlawful? And even if they were to refrain, this would not prevent the imposition of automatic sanctions or the experience of moral regret, for these sanctions can be activated without the intervention of any external human agent. These sanctions alone can impose severe punishment on any violator subject to them, and therefore provide powerful incentives to refrain from violating the rights of others in a wide variety of circumstances. People could also still use the tactic of decomposition to reduce the risk of violation in a great many transactions. Perhaps the best we can do if we are trying to construct a hypothetical society with an extensive set of detailed but unenforceable rights is to imagine a society where most rights are unenforceable most of the time, except through unlawful, uncertain, or inefficient means. Indeed, the only way to eliminate more elements of enforceability is to imagine ever more bizarre and elaborate scenarios that begin looking very little like a society at all and much more like a collection of extremely well-armed islands of individuality who neither want nor need to have much if anything to do with one another except reproduce. (Perhaps this society is composed of thousands of tiny islands, each inhabited by only one person; everyone is equivalently armed; and there are enough islands that it is possible to trade with another island without ever having to trade with the same island twice.)

The difficulty we encounter in constructing a hypothetical society whose members have extensive and detailed rights that are nevertheless unenforceable provides an important clue as to the role enforceability plays in the previolation state of affairs. What our thought experiment reveals is how enforceability and social cooperation are inextricably intertwined. Enforceability is not something we can simply add or remove from a system of rights at will, for the means of enforcement arise out of the very social structures that make rights possible. It is impossible for these social structures to be present and for all means of enforcement to be absent. The same physical and social relationships that make any group of persons (or animals for that matter) a society also afford members of that society the opportunity to impose physical, social, and strategic sanctions on one another. The very moral attitudes that naturally accompany the development of a system of rights inevitably lead to the possibility of both external and internal moral sanctions. And automatic sanctions will always be available for uncoordinated or inherently dangerous activity because these arise

from the laws of physics, not governments. It is impossible to imagine a society in which rights exist but are entirely unenforceable because trying to imagine these sanctions away requires that we imagine away the essential features of society itself.

If the only way to render rights less and less enforceable is to eliminate more and more opportunities for social interaction, then this tells of something important about the role enforceability plays in organized society. Opportunities for social interaction create opportunities for enforcement. We can accordingly increase the degree of enforcement available by increasing the breadth and depth of opportunities for social interaction. And if this is true, then the relationship may also hold in the other direction. If opportunities for social interaction create opportunities for enforcement, then opportunities for enforcement could create opportunities for social interaction. If we not only utilize whatever means of enforcement naturally arise, but also create artificial means of enforcement that can supplement or even supplant natural means when these are unavailable or insufficient or have undesirable effects, then perhaps we can create even more opportunities for social interaction and enhance the benefits that such social interaction can provide.

Indeed, previolation enforceability can facilitate social cooperation in a variety of important ways. It can provide a mechanism for nonsimultaneous exchange; it can encourage risk taking and reduce the overall societal burden of taking precautions against violation; it can solve collective action and coordination problems or prevent them from arising; it can impede various socially pernicious forms of cooperation that if left unchecked would be likely to undermine social cooperation more generally; and it can instantiate distributive justice in society and thereby preserve our sense of community and prevent social alienation and disaffection. Both the nature of these problems and the need to develop solutions to them if we are to take advantage of the benefits that social cooperation can deliver are well documented, but little attention has been paid to the fact that it is the *enforcement* of restraints and not merely the *existence* of restraints that allows us to attack these problems. The importance of enforceability and the mechanism by which it operates in these cases has often gone unnoticed, or at least under-appreciated. We will accordingly need to look a little deeper into some of these problems and the role enforceability plays in their solution if we are to understand exactly how enforceability facilitates social cooperation in the previolation state of affairs.

2.2.1 Enabling Nonsimultaneous Exchange

One of the benefits of social cooperation is the opportunity it offers for Pareto-superior exchanges – exchanges that result in at least one party to the exchange being made better off and neither party to the exchange being made worse off. Sometimes, the parties will be able to conduct a simultaneous exchange, but

when they cannot, problems may arise. The parties may be able to use the tactic of decomposition to conduct a staggered exchange and thereby limit the degree of risk to which each party is exposed at any one time, but the tactic of decomposition is not always available and even when it is available it is not always practical to employ it. In these cases, an exchange can be accomplished only if someone is willing to go first. But this requires that one party accept a promise to perform in exchange for actual performance, and people are going to be reluctant to accept a promise to perform and subject themselves to the risk of violation when there is anything substantial at stake unless that promise to perform is credible.[2] In this way, promises are like threats – they only have influence on the behavior of others to the extent others have reason to believe the promise is likely to be fulfilled. But in the absence of any means of enforcement, it will always be (or at least appear to be) in the promisor's self-interest not to perform his promise when the time for performance comes due. As a result, even when the promisor fully intends to fulfill her promise, it will be difficult for the promisor to convince potential promisees that she is sincere. And as long as they remain unconvinced, potential promisees will be reluctant to exchange anything of value for a mere promise of future performance. Even though each party desires to obtain the benefit of the other party's performance, they are unable to do so because they cannot make credible promises to perform. Despite the fact that both parties would benefit from the consummation of the transaction, this benefit will remain tantalizingly out of reach.

In order to overcome this problem, the parties need some way of making binding commitments. The means of enforcement provide just such a mechanism. As long as the degree of enforcement available is such that it no longer appears to be in the promisor's interest to withhold performance when the time for performance comes due, her promise to perform will be credible, and a credible promise is a valuable commodity, for it can be used to facilitate Pareto-superior exchanges of goods and services that could not be exchanged simultaneously. Enforceability is therefore not something that potential violators always want to avoid. On the contrary, it is often something that potential violators want to embrace, for it enables them to credibly commit to certain modes of behavior and thereby obtain whatever cooperative benefits may be on offer in exchange for such commitments.[3] Indeed, the interest in being able to bind oneself is so strong that at least one theorist categorizes it as a right.[4]

[2] See Kronman (1985).

[3] For further discussion of the importance of being able to make binding commitments, see Schelling (1960), pp. 21–52, esp. p. 43; Fried (1981), pp. 13–14; and Elster (1989), pp. 272–3 (arguing that the ability to make credible communications, including both promises and threats, makes for a more stable society).

[4] See Raz (1986), pp. 173–6.

2.2.2 Encouraging Risk Taking and Reducing Precautions

Enforceability also facilitates previolation social cooperation by encouraging rights beneficiaries to voluntarily incur risks of injury they would otherwise try to avoid. In a society where rights are not enforceable, more risk is involved in transacting without taking precautions against violation and more cost is involved (and therefore less gain is available) if precautions are taken, so voluntary transactions are necessarily less attractive than they would be if rights were enforceable. The less attractive a voluntary transaction is, the less likely that either party will choose to enter into it. In some cases, the cost of precautions would exceed even the maximum potential gain, or the risk of violation would be so great, regardless of what precautions were taken, that it would be foolish to incur the risk at all. People would accordingly be inclined to shun many of these transactions, thereby minimizing the number of occasions on which they exposed themselves to the risk of injury.

But a great many transactions (and the risks they entail) are avoidable only in the sense that a beneficiary may reject one voluntary trading partner in favor of another. I can trade with A rather than with B, but if I am to obtain the necessities of life or take advantage of any of the opportunities that social cooperation offers me, I cannot go through life without engaging in a great many voluntary transactions with a wide variety of trading partners. Although I can minimize my risk of injury by choosing my prospective trading partners carefully, I cannot avoid voluntary transactions or the risks that they entail altogether.[5] Moreover, there are many risks that I must bear even if I manage to avoid most voluntary transactions. I do not need to engage in voluntary transactions to be at risk in my person, and once I have acquired property I do not need to engage in any further transactions for that property to be at risk either. If I want to minimize my risk of injury in these situations, I must take precautions.[6]

The problem with this approach, however, is that taking precautions is often awkward, time consuming, and expensive. I can minimize my risk of injury from voluntary transactions by employing the tactic of decomposition, but this will often be inefficient if not impracticable. To protect my person and my property, I can carry weapons or employ bodyguards to protect me; I can fortify

[5] The view that a great many "voluntary" transactions actually take place because of an inherently coercive set of background conditions is forcefully set forth in Hale (1923).

[6] Of course, a beneficiary could simply choose to incur an unavoidable risk without taking precautions, but this seems unlikely, at least as long as the beneficiary has something worth protecting and the ability to protect it. A beneficiary facing an unavoidable risk is in the position of "a reluctant duelist" whose primary goal is likely to be to minimize his losses. Such a beneficiary would be most likely to act conservatively, employ a maximin strategy and choose whatever plan of action offered the best worst outcome. This means he would be most likely to choose to use some of his resources to take precautions as "the least ominous choice in a game he would rather not play." Ellsberg (1956). And if the beneficiary chose not to take precautions, or could not afford to do so, the greater risk to which he would be exposed would tend to cause him to regard his compatriots with suspicion, an attitude that undermines rather than fosters social cooperation.

my home and invest in expensive surveillance and security equipment; and I can purchase insurance against ransom demands in case I or any member of my family happen to be kidnapped. While these precautionary measures may sound extreme, there are many places in the world where people feel compelled to adopt them, and in the wake of current events, the list is growing. Not only are such precautions often expensive, however, they are also not always completely effective. Even people who can afford to adopt these precautions are accordingly unlikely to feel as secure as they would if they lived in a society where their rights were considered enforceable.

Such extreme precautionary measures are also likely to have side effects that are socially undesirable. The use of these measures cannot help but increase our sense of social isolation and decrease our sense of community. The more people view one another as potential attackers the less likely they are going to be able to form social bonds and cooperate on social projects even when they desire to do so, and society is likely to be much less productive as a result. It is also likely to be far more dangerous. Some means of enforcement are simply more amenable to accidental or improper use than others, and physical force is the most dangerous means of all. In a society where everyone is armed to the teeth, physical force can be used not only in response to rights violations, but also impulsively, in response to all kinds of social friction. The use of such precautions may accordingly cause as many rights violations as it prevents. Indeed, because many opportunities for violation would not be taken even in the absence of such precautions, the time, effort, and expense involved will often have been an unnecessary deadweight loss. At best, social cooperation would be awkward, expensive, and difficult. At worst, it would be simply impossible.[7]

When a sufficient measure of enforcement is available, however, the burden of taking precautions against rights violations shifts from the rights beneficiary to the potential violator. This reduces the overall level of precautions required in society in two ways. First, if rights beneficiaries must take precautions, they must take precautions against both intentional and unintentional violations. But if potential violators must take precautions, they must take precautions only against unintentional violations. Intentional violations they can simply choose not to commit. Second, it will almost always be more economically efficient for potential violators to take precautions against unintentional violations than beneficiaries. Indeed, it has long been argued that the rationale for creating

[7] The enormous cost of heightened security measures and the variety of restrictions on social interaction that have been adopted since the September 11, 2001 attack on the World Trade Center in New York vividly illustrate the drain that such precautions can place on both national economies and the national psyche. For example, at something over $1.2 billion, the cost of security for the 2004 Summer Olympics in Athens was four times the cost of security of 2000 Summer Olympics in Sydney, and security concerns still kept many people away. See Sachs (2004).

many rights in the first place, especially within the domain of tort law, is to place the burden of liability on the cheapest cost avoider or, to the extent some unintentional violations are unavoidable, on the party in the best position to insure.[8] It is the threatened enforcement of this burden, however, not its mere placement, that effectuates this cost savings. The degree of precautions that placement of this burden will produce is also directly related to the degree of enforcement available. As long as the expected savings from reduced exposure to liability exceeds the cost of a particular precaution, a potential violator has an incentive to adopt it. Thus enforceability not only shifts the burden of taking precautions from beneficiaries to potential violators, thereby lowering the burden of precautions that must be taken by society as a whole, it also offers us a mechanism to control the degree of the precautions that will be taken. This, in turn, allows us to ensure that the degree of precautions taken is neither more nor less than socially optimal. Both beneficiaries and potential violators accordingly benefit from the risk shifting that enforceability entails, for having a system of enforceable rights allows us to channel time, effort, and capital that would otherwise have to be devoted to protecting the status quo into more socially productive projects.[9]

2.2.3 Solving Collective Action Problems

The availability of enforceable restraints also allows us to solve collective action problems or prevent them from arising. Collective action problems arise whenever it is better for everyone if some people choose to cooperate than if everyone chooses otherwise, but given the payoff structure of the particular decision situation involved, individuals face motivational impediments to choosing cooperation over defection. This definition is rather broad, but it is impossible to be more specific without eliminating one or more possible variations of the problem, for motivational impediments to successful collective action can be produced by several different payoff structures and different motivational impediments and combinations of impediments can arise depending

[8] See, e.g., Calabresi (1970) and Posner (1973).

[9] Of course, claiming that *enforceability* is designed to facilitate social cooperation does not entail the claim that *rights* are all created with this goal in mind. In some cases, subgroup social cooperation may be socially pernicious at the societal level, and we may therefore choose to create rights against this form of cooperation. Sometimes we may even choose to create rights that impede rather than facilitate social cooperation more generally. Even if a particular right undermines rather than fosters social cooperation, however, the enforcement of that right still facilitates social cooperation in the ways I have discussed – enforcement reduces the risk of harm the beneficiaries of these rights face, and therefore enables the beneficiaries of such rights to incur risks they otherwise would avoid or incur only after taking precautions that would be harmful to social cooperation overall, and enforcement shifts the burden of taking precautions from the beneficiaries of these rights to potential violators, thereby reducing the overall level of precautions required in society as a whole.

on the particular payoff structure involved.[10] Different individuals also react to these motivational impediments in different ways, and the degree to which each individual is susceptible to each motivational impediment can vary, meaning that any single statement of the problem is likely to be misleading. The problem is not that given a particular collective action problem each person will necessarily reason in the same way and decide to defect rather than cooperate, but that even if they reason in different ways, they may each decide to defect rather than cooperate.

The paradigmatic example of a motivational impediment to successful collective action is the much-studied free-rider problem. This problem arises in connection with the production of public goods. A public good is a good that is to some degree *indivisible* and *nonexcludable*, but for our purposes all that matters is nonexcludability. A good may be nonexcludable with respect to all of society, as in the case of national defense, social order, or a pollution-free environment, or it may be nonexcludable only with respect to some particular group within society, as in the case of the higher wages that collective bargaining can bring to all employees regardless of whether they are members of the union, at least in states where union membership is not compulsory.[11] The problem arises because whenever the cooperation of any particular member of a group is not essential to the production of the public good, and the public good can be enjoyed equally by everyone in the group once it is produced regardless of whether they have contributed to its creation, each member has an incentive not to cooperate, for he enjoys the same benefit either way as long as the public good is produced and is better off saving the cost of cooperation. If enough members of the group succumb to this temptation and seek a free ride on the cooperation of others, however, there may be too few cooperators left to produce any amount of the public good, or the amount they are able to produce may be less than what is socially optimal.

But the incentive to free ride is not the only or even the most important motivational impediment to the production of public goods. Except in rare cases, a substantial if not collectively optimal amount of many public goods can be produced despite some free riding. We can still have a democracy, for example, even if some people choose not to vote, and we can still have a national defense and other government programs and benefits if some people refuse to pay their taxes. But no amount of the public good will be produced if free riding becomes too extensive or, more accurately, if too many people attempt

[10] For a useful summary of the various ways that the problem of collective action could be defined, see Elster (1989), ch. 1, esp. pp. 24–7. For a more extensive discussion of the number of variables that affect collective action problems and their possible solutions as well as a history of some of the early work done in the area, see Hardin (1982) and Taylor (1987).

[11] For a discussion of the collective action problems encountered in organizing and maintaining unions and for possible solutions to these problems other than compulsory membership, see Olson (1965), esp. ch. 3.

to free ride, for in this case no one shall obtain a ride at all, free or otherwise. This means that whenever there is the opportunity to free ride there is also the problem of assurance. If we are to save the whales, for example, or any other endangered species, almost everyone must participate or the species will become extinct in any event. Similarly, if compliance with pollution regulations were voluntary, even those who were inclined to comply would be afraid to do so for fear of being put at a competitive disadvantage and ultimately driven out of business. Unless assured that free riding will be kept within acceptable limits, no one may be willing to cooperate, for they will not want to incur the cost of cooperation when there is a significant chance that the public good will not be produced anyway and their cooperative contributions will be wasted. Indeed, it is the assurance problem and not the free-rider problem that is likely to be the more powerful motivational impediment to successful collective action. This is because the cost of wasted cooperation is likely to be coded as a loss while the benefit of free riding is likely to be coded as a gain. While the gain from free riding if the public good is produced is equivalent to the loss of wasted cooperation if it is not, people are more concerned about avoiding a potential loss than about realizing an equivalent gain. They are accordingly likely to be even more intent on avoiding the loss of wasted cooperation than they are on capturing the gain of a free ride.[12] As a result, even if no one is tempted to try to free ride, everyone may still defect because they cannot know each other's minds and cannot be sure the requisite degree of cooperation will be reached.

The assurance problem can also be present even when there is no incentive to free ride. This will be the case whenever the good at issue cannot be enjoyed by anyone who does not contribute to its creation, but the good will be produced only if a critical mass of cooperation can be reached. For example, consider two states that would each benefit from increased trade if there were a road linking their two capitals. Neither state alone can build the entire road itself, for each state has authority only within its own borders. Each wants the road to be built, but neither is willing to commit the time and the resources to do so unless it is convinced that the other is willing and able to complete its share of the project. Or consider a metropolitan area that wishes to join with local communities and construct a mass transit system for the region. Those suburban communities that do not wish to contribute to the cost of construction can be denied access to the system, for no station stops will be built in such communities and the rail lines

[12] If, for example, the avoidance of losses is given twice the decision weight as the acquisition of equivalent gains, as Tversky and Kahneman (1991) suggest, the aversion potential cooperators feel toward incurring what could be a deadweight loss of the cost of cooperation may be twice as strong as the attraction they feel toward the possibility of a free ride. Both these motivational impediments may be operating in some people, giving them two reasons not to cooperate, but even people who are able to resist the latter may find the former too strong to overcome and choose noncooperation for that reason alone.

may even pass them by entirely, but unless most suburban communities join the system it cannot be successful. Each community does best if it cooperates, but only if enough of the others cooperate as well, for people will not use the system unless it takes them where they want to go. And if the system fails, any community that has cooperated will have wasted the cost of its contribution.

Because the decision to cooperate or defect in these and similar situations must be taken under conditions of risk or uncertainty, whether people decide to cooperate or defect depends on what decision-making principle they use to evaluate the risk that their contribution will be wasted. This, in turn, depends on the payoffs of the various possible outcomes, on the degree of risk involved, and on the decision maker's risk preference. If the decision maker is extremely risk averse, or if the worst outcome of one choice is very bad indeed and is therefore to be avoided at all costs no matter how slight the risk, and the worst outcome of the other choice is at least acceptable, the principle most likely to be employed is maximin.[13] This principle recommends that a decision maker select among competing options according to which one offers the best worst outcome. Anyone who employed this strategy would simply assume that his contribution would be wasted and would never cooperate.

But the conditions that make maximin the most likely choice are not always present, which is why the assurance problem does not always present an insurmountable obstacle to collective action. When the risk that the cost of contribution will be wasted is not so extreme, and the gain to be had if the collective good is produced significantly exceeds the loss to be suffered if the cost of cooperation is wasted, there is no need to be so conservative. Under these conditions, people are much more likely to employ a principle with a more moderate attitude toward risk. One such principle would be expected utility, which recommends that a decision maker select among competing options simply by calculating which option has the highest expected value. Another possibility would be minimax regret, which allows for the consideration of opportunity costs as well as worst outcomes. The intuitive idea behind this principle is that people compare their actual situation with the situation they would have been in had they made other choices, and if some other choice would have produced a better outcome, they experience regret. Anticipating such feelings, people take them into account when making their decisions and try to minimize their maximum regret. Regret is thus formally defined as the difference between the best outcome in each possible state of affairs and every other outcome in that state of affairs. The regret associated with choosing the option that produces the best outcome in each state of affairs is accordingly zero, and the regret associated with choosing any other option is the difference between what that option pays and what the option with the best outcome would have paid had that been

[13] For an extensive discussion of why it is reasonable to use maximin under these conditions, see Rawls (1999, 2001) and Ellsberg (1956).

selected.[14] If the cost of cooperation is low and the potential gain from production of the public good is high, it may accordingly minimax regret to cooperate even when it might not maximize expected utility to do so. And while people usually will not have sufficient information regarding possible payoffs to make the kind of exact calculations that expected utility and minimax regret ideally require, they usually will have enough information to make rough calculations, and this is all that is required for either decision-making principle to generate recommendations for action.[15]

Lurking even further in the background, however, is a third motivational impediment that is also in operation whenever the opportunity to free ride is present, although this is often missed. This is an aversion to exploitation. The person who has such an aversion is not tempted to free ride herself, but she does not want to be exploited by the free riding of others. Unless she is assured that no one will receive a free ride, she is unwilling to cooperate and risk being made a chump. This differs from the assurance problem in that simply being assured that enough others will cooperate to produce the collective benefit is not enough. The person with an aversion to exploitation requires a greater degree of assurance than the person who merely wants to avoid seeing her contribution wasted. Because the solution to this problem requires a greater degree of assurance than the assurance problem itself, it is more likely that there will be some people for whom the assurance provided is not enough. Whether this aversion to exploitation precludes successful collective action then depends on how high a degree of cooperation is required for the collective benefit to be produced. Just as most collective benefits can be produced despite some degree of free riding, most collective projects can tolerate some defection from those motivated by exploitation aversion. But as the degree of cooperation required for successful

[14] To illustrate, assume that you are presented with the following decision situation. You have two options or choices of action, but the outcome of each option is uncertain. Things could turn out badly or well, and the payoff (the potential gain or loss) for each option depends on which state of affairs actually comes to pass. The payoff for option O_1 is 1 if things turn out well, but -1 if they turn out badly. The payoff for option O_2 is 10 if things turn out well, but -5 if things turn out badly. To determine which option would minimize your maximum possible regret, you construct a regret matrix by calculating the difference between the best payoff and every other payoff in each possible state of affairs. Option O_2 has the highest payoff if things turn out well, so the potential regret for choosing option O_2 if that state of affairs should come to pass is 0, while the potential regret for selecting option O_1 is 9, which is the difference between the best payoff in that state of affairs (10) and what option O_1 pays in that state of affairs (1). If things turn out badly, however, option O_1 has the highest payoff, so the potential regret associated with selecting option O_1 in that state of affairs is 0, while the potential regret associated with selecting option O_2 would be 4, which is the difference between the best payoff in that state of affairs (-1) and what option O_2 pays in that state of affairs (-5). In this situation, the maximum regret you could feel if you selected option O_1 is 9, while the maximum regret you could feel if you selected option O_2 is 4. The principle of minimax regret accordingly recommends you select option O_2. Reiff (2003). For more on the mechanics of minimax regret, see Guthrie (1999) and Savage (1951).

[15] See Ellsberg (1956).

collective action approaches unanimity, exploitation aversion is more likely to be a problem, for as long as doubts remain in the minds of those susceptible to this motivation it can preclude their cooperation even if no one would in fact succumb to the free-rider temptation.

To see how these motivational impediments to collective action work in tandem, consider Garrett Hardin's famous parable of the Tragedy of the Commons.[16] Imagine a pasture open to all. Each villager wants to graze as many cattle as he can on the commons, for the more cattle he can graze, the more milk or beef he can produce, and the more milk or beef he can produce, the greater his individual gain. But if too many cattle are brought on to the commons, it will become overgrazed and useless to all. It would therefore be best for everyone if each villager were to limit the number of cattle that he brings to the common to graze. Each villager, however, reasons as follows. If enough other villagers limit the number of cattle they graze, I can graze additional cattle without depleting the commons. And if enough others do not limit their herds, the commons will be ruined no matter what I do, so I might as well graze as many cattle as possible while I still can. Each villager does better if all the villagers limit their herds than if none do, but each does better still by not limiting his herd if enough others limit theirs because the defector enjoys the benefit of their restraint without having to contribute to the cost. Each villager may accordingly be tempted to try and free ride. And because no one wants to limit their herd if the commons will be ruined in any event, even those who are not inclined to try to free ride will not want to cooperate unless they are confident enough others will do so to ensure that the commons will be preserved, and a few may not want to cooperate unless they are convinced that everyone will do so, for some people are unwilling to tolerate the possibility of being exploited by even one free rider. Given these various motivational impediments to cooperation, it is highly likely that the requisite level of cooperation will not be reached and the commons will be ruined.[17]

What payoff structure best describes the preferences of the villagers in the Tragedy of the Commons? It is common to characterize that payoff structure

[16] Hardin (1968).

[17] Hardin actually analyzes the problem somewhat differently. He sees the problem arising because the marginal private benefit of defection exceeds the marginal private cost, while the marginal private cost is less than the marginal social cost, making it individually rational to defect even though when everyone follows this course of action the result is collective disaster. The problem with this analysis is that it focuses only on the free ride that defection seems to offer. But as we shall see when we examine the structure of the decision situation further, there is no reason to assume that all of the villagers will be blinded by the opportunity for a free ride. Some will see the overall advantage of cooperating despite the apparent wedge between marginal private cost and marginal social cost precisely because doing otherwise will inevitably lead to tragedy, yet still face motivational impediments to choosing cooperation over defection. I have accordingly modified Hardin's statement of the problem to make clear that it is not just the free-rider problem that is producing the collectively disastrous outcome, but the free-rider, assurance, and exploitation aversion problems combined.

as an *n*-person Prisoner's Dilemma.[18] But while the Prisoner's Dilemma does illustrate how individually rational behavior can produce collectively disastrous results, a Prisoner's Dilemma only arises when defection is the strictly dominant choice. For an individual to view his decision as a Prisoner's Dilemma, he must regard everyone else's decision to cooperate or defect as already fixed.[19] Viewed from this perspective, the individual sees his payoff as greatest if he defects no matter what anyone else does, for if enough others cooperate to produce the public good, he enjoys the benefit without bearing the cost of cooperation and thereby obtains a free ride, and if enough others do not cooperate, he saves the cost of cooperation that would have been wasted in any event.

For some individuals, without a doubt, the decision situation will take the form of a Prisoner's Dilemma. But there is no reason to believe that this will be true for everyone. Some individuals (perhaps even most) will view the decision situation strategically rather than parametrically. These individuals will not regard everyone else's decision to cooperate or defect as fixed, but will recognize that each individual's decision to cooperate or defect will depend on his or her expectation of what everyone else will do. Viewed from this perspective, defection is no longer the strictly dominant choice. Some of these individuals may still be tempted to try to free ride, but this is because they view defection as best *if* enough others cooperate. Even these individuals, however, would prefer to cooperate rather than defect if their cooperation was necessary for production of the public good, for they recognize that they do better if the public good is produced, even if they have to contribute to it, than they would if they failed to contribute and the public good were not produced. For these individuals, the payoff structure of the decision situation is best expressed as a game of Chicken.[20] Still other individuals will not be tempted by the possibility of a free ride, for they would rather cooperate than defect even if their individual cooperation were not strictly necessary. But they *are* concerned that the cost of their cooperation could be wasted. These individuals are accordingly prepared to defect rather than cooperate unless they are assured that enough others will cooperate for the public good to be produced. Viewed from this perspective, the decision situation takes the form of what Sen calls an Assurance Game.[21] And if an individual is so strongly averse to being exploited that he will cooperate

[18] This is the approach adopted by Russell Hardin. See, e.g., Hardin (1982). Hardin generalizes the two-person structure of the traditional example to capture the *n*-person problem of collective action by treating the problem as a game between the individual and the collective.

[19] See Rawls (1999), pp. 236–8.

[20] For a discussion of the *n*-person generalization of the game of Chicken, see Taylor and Ward (1982) and Taylor (1987).

[21] Sen (1967). Sen states that "assurance is sufficient and enforcement is unnecessary" in this type of game, but this statement is a bit misleading. It may be possible to provide the requisite assurance without enforcement, but the prospect of enforcement may also be how the requisite assurance is secured. See Williams (1988), pp. 3–4.

rather than defect only if convinced that *everyone* will do the same, we have an Assurance Game again, only now the nature and extent of the assurance required is even greater.

What this means is that no single game-theoretic payoff structure captures the decision situation of the Tragedy of the Commons from every potential point of view. What we have, in effect, is several different games going on at the same time. Collective action problems do not arise because everyone is necessarily playing the same game and reasoning in the same way, for they may be playing *different games* and reasoning in *different ways*, but because they all have reasons to defect rather than cooperate regardless of which game they see themselves as playing. Whether they will act upon these reasons to defect or find countervailing reasons to cooperate more persuasive depends on whether they view the decision situation as flexible or fixed, on their preferences, and on the preferences they attribute to everyone else. If they view the situation as fixed, then they will see themselves in a Prisoner's Dilemma and will defect. If they view the situation as flexible, however, they will see themselves in an Assurance Game or in a game of Chicken, depending on their preferences. Whether they cooperate or defect then depends on what they expect others to do, and this depends in part on which game each individual believes that others see themselves as playing. If you view the situation as a game of Chicken and believe everyone else sees it this way too, you may be tempted to defect in order to force others to cooperate, a strategic move game theorists call *precommitment*. If you view the situation as an Assurance Game but believe everyone else sees it as a Prisoner's Dilemma, you will defect because the requisite assurance will be lacking, even if no one actually does view it as a Prisoner's Dilemma. Indeed, regardless of what game or combination of games people actually see themselves as playing, they will always have reasons for defection. The fact that collective action is sometimes successful despite these reasons shows that these motivational impediments can be overcome even in the absence of enforceable restraints, but the variety of reasons for defection present in every possible combination shows why successful collective action is so often difficult and unlikely.

That is, *unless we are able to impose enforceable restraints on everyone that will produce the requisite degree of cooperation*. These restraints can take the form of enforceable agreements to cooperate or, if the number of parties involved is so large that it is unreasonable to expect them to be able to bargain among themselves and obtain the necessary agreements to cooperate, they can take the form of enforceable rights to compel the cooperation of others or to prohibit free riding or otherwise provide potential cooperators with assurance that their contributions will not be wasted. For example, if we require everyone to cooperate and threaten to punish those who do not, we can change the expected payoff of defection and thereby eliminate any incentive to free ride

and the assurance and aversion to exploitation problems that accompany it. We can also attack these problems less directly. Instead of requiring cooperation, we can change the expected payoff of defection by prohibiting consumption of the good by those who did not contribute to its creation and by threatening to punish those who defy this prohibition. For example, instead of using taxes to pay for the creation or maintenance of roads and bridges, monuments and museums, and parks and public transportation, we can charge tolls or other user fees and simply bar entry to those who refuse to pay. This also eliminates the incentive to free ride, for free riders can no longer enjoy the benefits generated by the cooperation of others, as well as the risk of exploitation. To the extent that an assurance problem remains, as it might if some minimum degree of participation is necessary to make the project a success, that problem can be addressed separately by allowing people to make their contributions conditional on a certain degree of participation or refundable if the requisite degree of cooperation is not reached. This changes the expected payoff of cooperation, for the downside is no longer a loss of contribution. Whether this indirect method is available as well as the direct method will depend on the precise nature of the public good at issue – some goods that are naturally nonexcludable can be made artificially excludable and some cannot,[22] and some forms of contribution can be made refundable and some cannot. But whichever method is selected, the expected payoff of both cooperation and defection will change, and as long as the expected payoff of cooperation and defection change enough, it will no longer be (or at least no longer appear to be) in anyone's interest to defect and the requisite degree of cooperation should be assured.[23]

[22] Note that it is not necessary to *privatize* a common resource in order to exclude people from using it, as some mistakenly contend. All that is required is that it be possible to grant enforceable property rights in the resource. These rights could be held by a single individual, or they could be held by a group, community, some sort of legal entity, or the state. See Trebilcock (1993), pp. 14–15. There are various advantages and disadvantages to each of these forms of ownership, and some of these solutions also create new collective action problems of their own, but the contention that private ownership of a common resource is *required* if we are to solve the Tragedy of the Commons mistakenly assumes that public or communal ownership entails open access to the resource when it does not. Besides, even private ownership does not ensure that the resource will not be depleted, as contemporary experience makes all too clear. For a discussion of the relationship between open access, private property rights, and communal property rights, see Taylor (1987), pp. 26–9.

[23] Enforceable restraints accordingly allow us to change what strategies are open to the players, their preferences, and their beliefs regarding the preferences of other players, and therefore change the nature of the game. These are what Michael Taylor calls *external solutions* to collective action problems. See Taylor (1987), pp. 21–30. But I am not so sure that the distinction between internal and external solutions is as easy to maintain as Taylor thinks it is. Some sanctions will naturally arise out of the same background circumstances that give rise to the decision situation, and therefore will already be built into the payoff structure. What makes a solution external or internal is not whether it takes the form of a sanction, but whether the sanction arises naturally out of the background conditions that create the decision situation or whether it is artificially created to influence the outcome of a decision situation that already exists.

2.2.4 Solving Problems of Coordination

The availability of enforceable restraints also allows us to solve collective action problems that take the form of coordination games with multiple coordination equilibria. In this type of game, the question is not "do we cooperate?" but "*how* do we cooperate?"[24] Each player enjoys the greatest benefit if all make the same choice, but there may be numerous choices available – numerous points of coordination – and there may be differing degrees of benefit associated with universal selection of each choice. In some cases, these differing degrees of benefit may vary from player to player depending on which coordination point is selected, meaning there is an element of conflict involved in making that selection, or the benefit may vary for all players depending on the coordination point selected but not vary between players once a selection has been made, meaning that some points of coordination are better for everyone than others and the trick is making sure that the Pareto-superior point is the one selected.

An example of a pure coordination game with multiple Pareto-equivalent equilibria is the choice between driving on the right side of the street and driving on the left. One side is as good as the other; the choice between them is not important. What is important is driving on the same side as everybody else. Once a selection has been made, it is in everyone's interest to abide by it. But this does not mean that enforceability is superfluous. It may be unnecessary to provide people with independent incentives to comply once a coordination equilibrium has been established, but that is because a coordination equilibrium is self-enforcing – any unilateral deviation from it will make the deviator worse off. Additional incentives, however, may be required in order to establish the equilibrium in the first place. If communication between all members of the group is not possible, people attempting to coordinate their behavior will often adopt the strategy of salience – they will look for some unique prominent feature that distinguishes one choice from its competitors. One clear indicator of salience is the degree of benefit a particular choice offers. But when two or more choices offer the same degree of benefit, this indicator of salience is not available. If there is no other feature of one choice or the other that makes it somehow unique, this strategy for coordinating behavior will be unavailable. Over time, and after a certain amount of trial and error, the selection can no doubt be made, but if we want it to be made without an interval of imperfectly coordinated behavior and the potentially serious consequences that can befall some members of a group while people fumble around until an equilibrium is established, we are going to have to change the payoff associated with these multiple equilibria so that one becomes clearly Pareto superior.

Sometimes, however, even this may be insufficient. Even when one coordination point is clearly Pareto superior, there may be problems associated with

[24] Hampton (1987), p. 254, n. 7.

establishing it. An example of a coordination problem with multiple equilibria in which one is Pareto superior to the others is the parable of the stag hunt from Rousseau's *Discourse on the Origins and Foundations of Inequality among Men*.[25] In this parable, each person faces a choice between hunting stag and hunting hare. For stag hunting to be successful, everyone must join in, but hare may be successfully hunted individually. Nevertheless, a share in the stag is regarded as better than a hare, so the coordination point of "everyone hunts stag" is Pareto superior to the coordination point of "everyone hunts hare." But this is no guarantee that the Pareto-superior equilibrium will be selected. The group could become stuck on the Pareto-inferior equilibrium for a variety of reasons. Perhaps the coordination point was initially selected by some third party with its own agenda; perhaps what is now regarded as an inferior equilibrium by everyone was once regarded as superior by some members of the group even though they now see the matter differently; perhaps it was superior when it was initially selected but this is no longer the case because of advances in technology; perhaps the Pareto-inferior coordination point was the more salient choice for some reason; or perhaps people were simply too risk averse to try the Pareto-superior strategy when they could not be sure that everybody else would do the same. Whatever the reason, however, once a coordination equilibrium has become established it is difficult to change, for no one can improve his position by unilaterally switching to another strategy. Complicating matters further, there may be transaction costs associated with switching that make the Pareto-superior equilibrium less attractive for everyone in the short term. What is needed once again is a way of convincing everyone that everyone else will switch at the same time, and that any short-term costs will be outweighed by the long-term benefit of the Pareto-superior equilibrium. This is the familiar assurance problem we have already discussed. The fact that everyone (or at least everyone who does not have a vested personal interest in maintaining the *status quo*) recognizes that another outcome would be socially optimal is not enough to ensure that this outcome will come about. If we are not content to linger at the Pareto-inferior coordination point, we are going to have to do something to prod everyone over the short-term obstacles and into the Pareto-superior equilibrium beyond.[26]

Coordination problems become even more severe when they also contain an element of conflict. An example of a mixed game of conflict and coordination is the Battle-of-the-Sexes.[27] This game has a payoff structure in which it is better for each player to do whatever the other player is doing than to act alone, but each player has different preferences as to which choice of coordinated action would be best, making this a game of mixed motive rather than a game of pure

[25] Rousseau (1984), pt. 2, p. 111.
[26] See Heap and Varoufakis (1995), pp. 217–18, for other examples.
[27] See Luce and Raiffa (1957), pp. 90–4.

coordination or pure conflict. The illustration commonly given of the simplified two-person version of the game is that of a husband and wife who each prefer different evening activities (he prefers boxing and she prefers ballet), but each would rather go to the other's favorite than spend the evening at his or her own favorite alone, hence the unfortunately sexist name. Given such a structure, each player may be tempted to get his or her way by precommitting to his or her own favored activity – taking some action that precludes him or her from going to the other's favorite activity even if the alternative is to go out alone – thereby forcing the other to either go along or go out alone. This strategy may indeed force one spouse to select the favored coordination point of the other, but if both spouses adopt this strategy, the result is a lack of coordination at either point and a Pareto-inferior outcome for everybody. Another possible strategy is to bluff. This is less dangerous than precommitting because it does not preclude a last minute capitulation, but it may have the same effect. Whenever bluffing is a possibility mistakes and miscalculations can occur and a player can unexpectedly feel compelled to carry through on a threat in order to establish or maintain a reputation even though the threat was originally intended only as a bluff. And even if either kind of strategic behavior is successful and one spouse is forced to go along to the favored activity of the other, there is another problem with the result. This is that the method of selection of the coordination point has not been procedurally just. Over time, the repeated unfairness of the selection process may erode social cooperation more generally and undermine the losing party's interest in coordination of any sort. Eventually, the unfairness of the situation may affect the preferences of the losing party so that he or she now prefers uncoordinated activity to coordinated activity on the other's terms, even though this outcome is not socially optimal. One can imagine what would happen to our husband and wife if one of them always got their way each time they faced a coordination problem like this. What is needed is a way to select between distributive solutions – a way to ensure that the parties are not only able to coordinate their behavior, but also able to do so in a way that treats their respective preferences over multiple coordination equilibria fairly over time.

Enforceability allows us to solve each of these problems in a variety of ways. If there are multiple coordination equilibria that all offer the same payoff for everyone, we can use enforceable restraints to change the payoffs so that a single equilibrium now offers the greatest payoff to everyone, and then rely on the salience that is usually associated with a Pareto-superior equilibrium to lead everyone to its selection. If this is insufficient to trigger its selection, or if there is already a single Pareto-superior selection but everyone is stuck on a Pareto-inferior one, we can use enforceable restraints to overcome any short-term transaction costs or other obstacles and provide the requisite assurance that everyone will switch. And if different individuals receive different payoffs at each point, enforceable restraints can be used to ensure that the selection of each coordination point is procedurally and distributively just or, if the same

group is presented with a series of similar coordination problems, that any unjustified inequality resulting from the solution of one problem in the series is offset by the solution of another, and that while the selection of each individual coordination point may generate unequal payoffs, the payoffs generated by the series of selections average out so that everyone enjoys either an equal payoff or one that is otherwise distributively just.

2.2.5 Prohibiting Socially Pernicious Cooperation

We can also use enforceable restraints to prohibit certain forms of subgroup social cooperation that could have the effect of undermining social cooperation more generally or that we otherwise come to regard as socially pernicious. The precise forms of social cooperation that fall into this category will be open to some debate, but there are two general areas within which concerns of this nature are likely to arise. The first is when social cooperation would result in the commodification of certain human attributes and resources. This would include transactions such as the sale of body parts, reproductive capacities, sexual favors, parental rights, and contracts for voluntary enslavement. Because these transactions are inconsistent with many people's conceptions of human dignity and self-respect, it is difficult to believe that such transactions could be truly voluntary in any meaningful sense of the term except in the most unusual of circumstances. If we allow some people to be coerced into such exchanges by the unfortunate circumstances in which they find themselves, this could breed resentment and ultimately undermine the bonds of mutual respect and concern that are essential for a successful and productive cooperative society to exist. While society could discourage such transactions simply by refusing to enforce them, this is unlikely to be enough given the desperation that is often driving one and sometimes both parties to agree to them. By prohibiting such conduct, however, and by threatening to punish those who violate such prohibitions, a society that is concerned about the effects of some or all of these forms of commodification can make these transactions dramatically less attractive and therefore much less likely to occur.

The second area in which concerns about the effects of subgroup social cooperation are likely to arise is in connection with coordination games that lend themselves to socially objectionable cooperative solutions. Price fixing, group boycotts, refusals to deal, and various other forms of anticompetitive social cooperation are often thought socially pernicious because they are economically inefficient. Racial, ethnic, gender, age, and other forms of discrimination are often regarded as socially pernicious not only because they are economically inefficient (practicing such forms of discrimination means that people who would make greater contributions to society are passed over in favor of those who will make lesser contributions but who happen to belong to the favored group), but also because they engender distrust and resentment within society

and therefore undermine social cooperation and cohesion more generally. The availability of enforceable restraints, however, allows us to transform these subgroup coordination games into more socially productive games of conflict by changing the payoffs for anticompetitive or discriminatory cooperation so that it is no longer in anyone's interest to engage in such behavior. What was a coordination game from which certain people were excluded can be transformed into a game of conflict in which everyone can participate on an equal footing.

2.2.6 Instantiating Distributive Justice

Social cooperation is greatest and most productive in a stable well-ordered society, and a stable well-ordered society is one that is perceived by its members as distributively just.[28] Given the unequal starting positions, unequal access to information, unequal bargaining power and ability, imperfect competition, and externalities that characterize most social interaction, however, the burdens and benefits of social cooperation will inevitably be distributed unequally, at least in a free-market economy. Accordingly, even when all the various problems of social cooperation have been solved, or perhaps especially when they have been solved, problems of distributive justice will remain. If left undisturbed, the presence of such inequalities can erode the bonds that hold society together and undermine social cooperation more generally. I will not say much about this problem, for there is already a wealth of material devoted to the consideration of it, but I will note the role that enforceability plays in any solution to it. To the extent that we find these inequalities disturbing and decide to redistribute certain benefits and burdens, we must use enforceable restraints to do so, for most of those among the better off will participate in such redistribution only if they are faced with the prospect of sanctions for resisting it. Even if we merely wish to correct for the market imperfections that produce these inequalities rather than address their results directly, we will need to employ enforceable restraints, for people will not give up their bargaining advantages unless they stand to lose more than they gain from utilizing them. While determining which of these approaches justice requires is a matter for moral theory, instantiating those requirements, whatever they turn out to be, is a matter for enforceability.

But what about corrective justice? Isn't that a matter of enforceability too? Indeed, it would seem that instantiating corrective justice would be a far more central concern of enforceability than instantiating whatever discretionary positions a society adopts with regard to distributive justice. But we are focusing on the goals of previolation enforceability here, and it is our focus on these goals that draws our attention to distributive concerns. Concerns regarding corrective justice arise only once there is a violation to correct. The nature of these very

[28] See generally Rawls (2001).

different concerns, and their relation to the goals of postviolation enforceability, are the issues we turn to next.

2.3 Postviolation Enforceability and the Facilitation of Social Conflict

Having identified how the use of enforceable restraints can facilitate social interaction and otherwise improve social cooperation in the previolation state of affairs, we have now arrived at *violation*, our first key dividing line. While the purpose of previolation enforceability was to facilitate social cooperation, when we move to the postviolation state of affairs, our previolation concerns no longer apply. We do not need to provide potential violators with a means of credibly committing themselves to behave in a certain way, for that behavior has already failed to occur. We do not need to encourage beneficiaries to incur risks they otherwise would seek to avoid, for those risks have already been incurred, and we do not need to encourage them to use certain techniques for risk management and not others, for regardless of the techniques used what was once a mere risk has now materialized into an event. Finally, we do not need to threaten to adjust the payoffs for uncooperative or uncoordinated or socially pernicious behavior, for those threats have already proved inefficacious; we need to deal with the effects of the uncooperative, uncoordinated, or socially pernicious behavior that has actually occurred. If enforceability is to have some purpose in the postviolation state of affairs, it is either going to have to be something other than the facilitation of social cooperation, or it is going to have to facilitate social cooperation in different ways.

To see if we can identify the role that enforceability plays in the postviolation state of affairs, let us return to our thought experiment. Imagine again we are in a society where everyone knows what their rights are but none of these rights can be lawfully enforced. People do what they can to minimize the risks of violation they face, but some violations inevitably occur. Now they need a strategy for determining how to respond. There are many possible strategies available, of course, ranging from doing nothing to stepping up their precautions against further violations to taking some sort of retaliatory action against the violator despite the fact that any such action would constitute a violation of the violator's rights against unlawful acts of enforcement. Presumably, people would try each strategy in turn and in various combinations unless and until one pure or mixed strategy proved to be superior to the others. A strategy would be superior in the relevant sense if the individual employing it considered himself to be better off than he would have been had he followed any other strategy. People might find that one particular strategy was best no matter what the circumstances of the violation, or they might find that determining which strategy was best depended on various factors, such as whether they expected to have occasion to interact with that particular violator again, how they expected that particular violator to respond to each strategy they could adopt, and whether their choice

of strategy was likely to become known by other future potential violators and, by contributing to their reputation, affect the likelihood they would be victimized again.

In order to determine what role enforceability plays on the postviolation state of affairs, however, we need not decide which strategy is best or even which strategy people are most likely to pursue. Our goal is not to determine whether our hypothetical society will degenerate into a Hobbesian war of all against all or whether some or even a high degree of social order is likely to obtain (this is a matter of previolation enforceability in any event), but to determine what problems people will encounter if they are unable to lawfully enforce their rights whatever degree of social order actually obtains. In order to make this determination, all we need do is examine the postviolation strategies they *could* pursue, and identify what it is about each strategy that is problematic. This, in turn, will allow us to define the void we need enforceability to fill.

2.3.1 Three Retaliatory Strategies

Aside from taking further precautions against future violations, which we will assume the beneficiary will do in any event to the extent these are feasible, there are three principal retaliatory strategies the beneficiary could adopt in response to a violation. First, the beneficiary could decide to do nothing, which in game-theoretic terms we might refer to as "playing Dove." A beneficiary who follows this strategy simply accepts that her rights have been violated and takes no action against the violator in response. Second, the beneficiary could decide to overretaliate. A beneficiary who follows this strategy will seek to inflict injury on the violator that greatly exceeds the injury done to her. I shall refer to this strategy as "the Chicago way" after a bit of dialogue from *The Untouchables,* the 1987 film depicting the efforts of a team of government agents led by Eliot Ness to bring down Al Capone, in which the strategy is neatly expressed. Frustrated by what he perceives as Ness's naiveté, Sean Connery, who is playing veteran Chicago police officer Jimmy Malone, tells Kevin Costner, who is playing Ness, "You want to get Capone, here's how you get him: He pulls a knife, you pull a gun; he sends one of yours to the hospital, you send one of his to the morgue. That's the Chicago way. That's how you get Capone."[29] Third, the beneficiary could decide to adopt the strategy of "Tit for Tat." A beneficiary who follows this strategy seeks to inflict injury on the violator that is equivalent in some meaningful sense to the injury the violator has caused. There are many possible strategies in between, of course, as well as innumerable possible mixed strategies, but we can fully explore the ways in which all these possible strategies are problematic by examining just these three.

[29] Mamet (1985, 1986), p. 28.

The strategy of playing Dove has the least to recommend it. It leaves the injury suffered by the beneficiary uncompensated, for the only way the beneficiary can obtain compensation for her injury in a society where rights are unenforceable is to seize something of value to which she would not otherwise be entitled. Playing Dove also leaves the violator unpunished, and the unfairness of this is likely to undermine any sense of justice that the system of rights existing in our hypothetical society is trying to engender. Even more importantly, allowing the violator to go unpunished does nothing to discourage future violations, either by the violator or by others who may learn of the free ride the violator has obtained. Indeed, even if the beneficiary and violator were unlikely to have occasion to interact again, the lack of punishment for the violation positively *invites* the violator to prey on the beneficiary again and turn what otherwise might have been a one-off encounter into a series of violations. And if repeated violation is the violator's best response to the strategy of playing Dove, then the only occasion on which playing Dove might be the best response to a violation is when the beneficiary believes the violator is the type of person who would respond to any sort of retaliation by committing violations that are even more serious than what she would commit were the beneficiary to respond by playing Dove. Because every violator would profit from such a reputation, however, the beneficiary would have no way of knowing which violators were likely to respond in this manner and which were merely bluffing, for some violators would not actually counterretaliate despite threatening to do so because they would fear becoming involved in an escalating series of violations and retaliations that would ultimately leave everyone worse off. But however these contingencies played out, the degree of social order obtaining in society would inevitably degenerate every time a victim of a rights violation adopted this strategy no matter what degree of social order obtained prior to the violation.

The Chicago way does not suffer these same disadvantages, but it has disadvantages if its own. Unlike the strategy of playing Dove, it does provide an opportunity to seize property from the violator and thereby obtain compensation, and even if no compensation can be obtained it does allow the beneficiary to inflict punishment on the violator. It therefore does discourage future violations by the violator and by any potential future violator who learns that the beneficiary is inclined to respond to any violation the Chicago way. Indeed, the intuitive idea behind the Chicago way is that an over-the-top response is so intimidating that neither the current violator nor other potential future violators will be inclined to violate any of the beneficiary's rights again. But there are problems here. The current violator may not be the type of person who responds to retaliatory acts of intimidation by doing nothing, and it may be difficult to tell what type of person the current violator is in advance. If the current violator does respond by doing nothing, then we have the problem of unfairness once again, except now the roles have been reversed – it is the violator qua victim of out-of-proportion retaliation who is now being treated

unfairly and left without a remedy. If someone has to suffer unfairness then better the violator than the victim, but even so, whenever *anyone* suffers an unfairness it undermines the sense of justice any system of rights is designed to engender and therefore ultimately contributes to making respect for these rights less likely and contributes to further degradation of the social order. On the other hand, if the violator is not the type of person who is easily intimidated, the degree of punishment the Chicago way recommends the beneficiary inflict upon the violator is so severe that it is likely to provoke an even more severe act of counterretaliation in response. If the violator does counterretaliate, the beneficiary is likely to counter the counter, and so on. A single violation may provoke an escalating series of violations that will echo back and forth between the violator and beneficiary until one of them is eliminated. Even then, however, a party may still have allies who are willing to step up and retaliate in her place. And as the scope of the parties involved continues to spread, so does the danger that an act of retaliation may cause some collateral damage, inflicting injury on people not involved in the original confrontation and broadening the scope of the parties involved in the cycle of violation and retaliation even further. The only way to stop these echo and spillover effects is for some party to accept a round of retaliation from wherever it may come and refrain from any counter. Some party will probably be willing to do this at some point, but if gangland wars are any guide, the damage to social order in the interim may be extreme.

This leaves Tit for Tat. Like the Chicago way, Tit for Tat also discourages future violations. While it is perhaps not quite so intimidating as the Chicago way, there is no real incentive to commit a violation if the potential violator knows she will be subject to the same suffering to which her victim is subjected, so any added deterrent value of the overretaliation of the Chicago way will be negligible to modest at best. There is also no lingering unfairness if the violator accepts her punishment and does nothing in response to Tit for Tat, whereas this is not the case if the violator does nothing in response to the overretaliation of the Chicago way. Finally, while Tit for Tat may provoke counterretaliation from some violators, it is less likely to do this than the Chicago way. This is because the principle of reciprocity built into Tit for Tat provides the violator with a reason to accept it, while the overretaliation of the Chicago way provides the violator with a reason to counterretaliate even when a lesser degree of retaliation would have been viewed as justified. When we factor in the advantage of avoiding the echo and spillover effects of counterretaliation, it appears that playing Dove is the best response for the violator to adopt if the beneficiary responds with Tit for Tat. Although it is by no means certain that this is how any particular violator will respond, at least the echo and spillover effects produced by Tit for Tat are likely to be less common and less severe than those produced by the Chicago way. And if the best response to Tit for Tat is playing Dove, then Tit for Tat must be the best response to violation, regardless of whether the

beneficiary expects to interact with the violator again or what type of person she believes the violator to be.[30]

Consider, for example, the series of computer tournaments conducted by Robert Axelrod in which different strategies were pitted against one another in an indefinitely iterated Prisoner's Dilemma. The best results were produced by Tit for Tat, and further computer simulations revealed that Tit for Tat would eventually become predominate with respect to any other strategy in a given population.[31] Although the postviolation decision situation is more akin to a game of Chicken than a Prisoner's Dilemma, the same principles should apply. Or consider the experience of British and German soldiers facing off against each other in the trenches during World War I. To the mounting annoyance of their superiors, the soldiers realized if they didn't shoot at the enemy, the enemy wouldn't shoot back. This de facto cease-fire was not inviolable – it was periodically broken either on purpose or by accident for varying periods by an exchange of fire – but it also turned out to be rather robust, in that both sides eventually saw the benefit of restoring it and the exchange of fire eventually ceased.[32]

2.3.2 Problems with Tit for Tat

Although Tit for Tat may be a better response to violation than any other strategy, it nevertheless has problems too. First, there is the problem of uncertainty. For a Tit for Tat retaliation to be acceptable to the violator, the violator must at least recognize that a violation has occurred. But given the open texture of language and the dynamic ever-evolving nature of the law, the scope of many rights is uncertain, and even the existence of some rights is controversial. Many rights will have settled cores but uncertain penumbras, regardless of whether they are grounded in public or private, international or domestic law.[33] It is accordingly possible and sometimes even easy for disputes over the scope of the beneficiary's rights to arise. Have I acted in self-defense, or did I react too quickly or use too much force or ignore an opportunity to retreat? Was the level of care I exhibited just above or just below that of a reasonable person? Have I materially breached our contract, or have I substantially performed my obligations? Is a policy that has a discriminatory impact on minorities unconstitutional, or only one that has a discriminatory intent? In these and countless other cases, I might correctly believe that you have violated my rights, but you might honestly but incorrectly disagree. If I nevertheless follow a strategy of Tit for Tat and retaliate, you are

[30] What this means in game-theoretic terms is that the Tit for Tat/playing Dove strategy pair is a Nash equilibrium for the postviolation state of affairs.

[31] See Axelrod (1984) (comparing various strategies for encouraging social cooperation when participants lack the ability to make enforceable agreements).

[32] See Axelrod (1984), p. 73ff.

[33] Hart (1994).

likely to treat my justified retaliation as an unjustified violation and retaliate in turn, leading to further (justified) retaliation, leading to further (unjustified) retaliation, and so on. Conversely, if I correctly believe I have violated none of your rights but you honestly but incorrectly disagree, we may once again find ourselves locked in a lengthy cycle of violation and retaliation. This potential for error is compounded further by our natural tendency to be biased in favor of our self-interest, which is likely to cause us to view our own rights as more expansive than we are prepared to view the rights of others. In the trenches, it is easy to tell if the other side has broken the cease-fire. But in a complex society where many rights have indeterminate borders, determining when a violation has occurred is not necessarily so easy. When there are many opportunities for error, mistakes will inevitably occur. In the wake of such mistakes, potentially lengthy cycles of violation and retaliation will periodically erupt and undermine the social order.[34]

Second, there is the problem of proportionality. Even when there is no dispute as to whether a violation has occurred, it may not be so easy to devise an appropriately equivalent response. If retaliation is excessive, it is likely to provoke counterretaliation even though a proportional retaliation would have been accepted as fully justified. While it may be relatively easy to devise an appropriate retaliation for the sporadic violation of a cease-fire (shot for shot and shell for shell), most situations are more complex. We enjoy a vast array of rights, and violations can arise in many different ways and cause a wide variety of both objective and subjective injuries. Given the range of violations and injuries that may occur, it will often be impossible to respond in kind, and whenever it is not, disputes may arise as to whether the form or extent of the retaliation chosen is appropriate. The heightened emotions that typically surround an act of violation no doubt will exacerbate the situation. Once again, the potential for error here means that social order will be interrupted periodically by lengthy cycles of violation and retaliation.[35]

Of course, the fact that social order would be periodically disrupted by mistake if everyone were following the strategy of Tit for Tat does not mean that social order would inevitably degenerate into a Hobbesian war of all against all. A cycle of violation, retaliation, and counterretaliation might eventually end

[34] Indeed, this is why following a strategy of Tit for Tat can have a potentially destabilizing effect on foreign relations. See Poundstone (1992), pp. 253–5.

[35] Locke also viewed bias and passion as making any attempt to use Tit for Tat to enforce rights in the state of nature problematic. In his Second Treatise of Government, Locke argued that "it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but Disorder and Confusion will follow" from "the irregular and uncertain exercise of the Power every Man has of punishing the transgressions of others" in the state of nature. Locke (1988), secs. 13 and 125–7, pp. 275–6 and 351–2.

from simple exhaustion, regardless of what provoked it.[36] But there are also various strategies that people could use to limit the damage from erroneous retaliation and excessiveness. For example, people might eventually learn to adopt a strategy of winding down, under which each act of retaliation would be slightly less severe than the violation that provoked it, thereby ensuring any cycle of violation and retaliation would eventually end even if it began erroneously.[37] Other possible strategies would be Tit for Two Tats, in which it takes two violations to provoke retaliation, or 90 percent Tit for Tat, in which there is a 90 precent chance of retaliation against each violation.[38] These would limit the number of erroneous retaliations and, like winding down, also ensure that any echo effects of an erroneous retaliation would eventually end. But they would be less suitable for use in our hypothetical society than winding down because they still leave open the possibility of erroneous retaliation yet have the additional undesirable effect of forgiving a certain number of actual violations, thereby encouraging actual violators to engage in further violations, including violations against other members of society. Winding down, in contrast, ensures that all actual violations are punished, and even though some innocent acts may be punished as well, the resulting cycle of violation and retaliation will end eventually. Winding down also provides the added benefit of making excessive retaliation less likely, an advantage that neither of the other two strategies can claim. Ultimately, some semblance of social order would probably survive under any of these strategies, even if it were regularly interrupted by lengthy paroxysms of violation, retaliation, and counterretaliation. But this shaky social order would hardly be an ideal medium for social cooperation to flourish and thrive. If we want social cooperation to be efficient and productive, we are going to have to do better than this. We are going to have to give some specific content to the concept of Tit for Tat.

2.3.3 The Objective of Containment

What this further development of our thought experiment tells us is that the purpose of having a system of enforceable rights in the postviolation state

[36] It is also possible that the long echo of an erroneous retaliation could be stopped by another error, this time mistaking what was intended as retaliation for cooperative behavior. See Axelrod (1984), pp. 182–3. But it is difficult to see how this could occur outside of an abstract game-theoretic situation. While we can program a certain number of random misperceptions into a computer and therefore create a game where misperceptions can go either way, this is not likely to be the case out in the real world. When we are dealing with the complex rights and interrelationships that govern human society, it is much more likely that an act or omission will be misperceived as a violation when it is not than as acceptable behavior when it is in fact a violation.

[37] This is the strategy that Axelrod recommends. See Axelrod (1984), p. 187 (noting that the stability of cooperation can be enhanced by ensuring that each retaliatory tit is slightly less intense than the tat that provoked it).

[38] See Poundstone (1992), pp. 245–6.

of affairs is not to facilitate social cooperation – once a rights violation has occurred, that particular aspect of social cooperation has already broken down – but to facilitate social conflict. This does not mean that we want to make conflict more likely, but that we want to make it less disruptive to the overall pattern of social cooperation surrounding it and therefore less likely to lead to any wider rending of the fabric of social cohesion. If we must have conflict between individual members of society – and if experience is any guide we must – we want this to be "social conflict" rather than "antisocial conflict." Antisocial conflict allows the energy released in the exchange of violation and retaliation to be dispersed in a variety of uncontrolled and therefore potentially destructive ways, but social conflict contains that energy within a narrow sphere and thereby increases the likelihood that social cooperation will ultimately be restored to its previolation levels. But how do we make our conflict more social and less antisocial? What principle do we need to put to work here?

Recall that the problem with utilizing a primitive concept of Tit for Tat as a surrogate for enforceability was that it would inevitably lead to periodic cycles of violation and retaliation that would be difficult and perhaps impossible to end. What prevents a primitive concept of Tit for Tat from being a successful strategy for enforcing most rights is its inability to reliably ensure containment of the conflict. Containment must accordingly be our principal objective in designing an alternative strategy for enforcement. From the idea of containment we can derive a number of characteristics that we would want our system of postviolation enforceability to include. We would want the conflict to have clearly delineated and relatively impermeable borders – a relatively clear and identifiable beginning and end and a way of reducing the likelihood that the conflict will spread beyond the original number of participants. We would want to minimize the likelihood of collateral damage – of the conflict causing injuries to members of society not initially involved, injuries that would inevitably result in the expansion of the conflict. We would want the means and measures of enforcement used to be relatively precise and controllable so that any retaliation may be proportional to the violation, for enforcement that is inappropriate in nature or extent is likely to inflame the conflict rather than abate it. We would also want to reduce the likelihood of erroneous imposition or denial of enforcement and increase the likelihood of acceptance of the results of enforcement whatever they may be. Finally, to deal with the problem of uncertainty, we would want to create some sort of market or other mechanism through which that uncertainty can be resolved and the parties' competing interests can be expressed, valued, determined, and exchanged. Taken together, all these techniques dramatically increase our chances of preventing a conflict from degenerating into an endless cycle of violation and retaliation.

2.4 Acceptance and the Restoration of Social Cooperation

Our focus on containment illuminates the other key dividing line between stages of enforcement. Unlike the dividing line of violation, where there is a shift of purpose in enforceability, there is no shift in purpose when we move from the postviolation to the postenforcement state of affairs – the key problem created by this line is figuring out when we have crossed it. When is it proper to characterize a right as having been *enforced* rather than as no longer being *enforceable*? When is enforcement really over? If the objective of enforcement is containment, then the postenforcement stage is characterized by the condition of *acceptance*. Acceptance occurs when regardless of the results of enforcement efforts made to date and the availability or lack thereof of further means or measures of enforcement, the parties view their conflict as complete, and are willing to resume their previolation level of social cooperation. Such acceptance could be based on a variety of reasons. It could simply be based on an awareness that no further lawful means of enforcement are available and a willingness, perhaps under the compulsion of threatened sanctions, to forgo further (unlawful) means of retaliation. This form of acceptance would be based on *extrinsic* reasons – reasons that are unrelated to the level of enforcement available for a particular right. Alternatively, acceptance could be based on the recognition that the state of affairs resulting from some act of enforcement is in some sense fair or just. This form of acceptance would be based on *intrinsic* reasons – reasons that are related to the level of enforcement available for a particular right. I will have much more to say on the nature of acceptance later, and on which form of acceptance postviolation enforceability requires. For now, however, we only need to recognize that *some* form of acceptance of the results of enforcement is necessary from both parties if we are to reestablish previolation levels of social cooperation after a violation has occurred.

This does not mean that acceptance of the results of enforcement, once given, is irrevocable. The move from the postviolation state of affairs to restoration of the previolation level of social cooperation is not irreversible. Acceptance that was based on the exhaustion of all currently available means of enforcement could be revoked if new and additional means of enforcement became available. Even in the absence of a change in circumstances, either party could simply decide to reevaluate their reasons for acceptance. Acceptance is therefore more a reflection of our current expectations than an insistence on a more robust requirement of certainty. Although it is possible to move from the postviolation state of affairs to a postenforcement restoration of previolation levels of social cooperation and back again, as long as the parties have no current expectation of such a move in the near future, we may properly characterize the state of affairs that obtains as postenforcement.

3

Measuring Enforceability in the Previolation State of Affairs

Having identified the three critical stages at which enforcement can be measured, and given some attention to what we are looking for at each stage, we can now turn to our detailed examination of how enforceability can be measured, and what measure of enforcement is sufficient. We begin by noting that there are two ways to measure the degree of enforcement available for the violation of any right or other restraint. One is to look at the rights violator, and compare the benefit received or to be received from the rights violation and the burdens imposed or to be imposed through enforcement. This is a measure of the punitive effect of enforcement, or *punishment*. The greater the ratio of burden to benefit the more likely a potential violator will prefer to remain in the previolation state of affairs and will regret it if he does not. The other measure of enforcement is to look at the party whose rights have been or would be violated, and compare the injury suffered or to be suffered from the rights violation and the benefit obtained or to be obtained through enforcement. This is a measure of the compensatory effect of enforcement, or *compensation*. The greater the ratio of benefit to injury the more likely the injured party will be indifferent to the violation of his right.

Determining whether the measure of enforcement available is sufficient to render a right enforceable presents a number of questions. Must the measure of punishment available be sufficient to produce a *preference* for the previolation state of affairs among actual and potential violators, or will some lesser measure of punishment do? Must the measure of compensation be sufficient to produce *indifference* to the violation among those who are or could be injured by a violation of the right, or will some lesser measure of compensation do? Must it be certain that the requisite level of preference or indifference has been created, or must it merely be likely? If the latter, how likely must it be? Does this depend on the nature of the right violated or is the same test applicable to every right?

The fact that there are two different scales for measuring the amount of available enforcement raises a number of subsidiary questions. Must the measure of enforcement available be sufficient to produce *both* a preference for the

previolation state of affairs in the actual or potential violator *and* indifference to the violation in the beneficiary, or is a right properly considered enforceable if the measure of enforcement available is sufficient to produce *either* one? Does this depend on the nature of the right or is the same test applicable to every right? What if there is some measure of punishment and some measure of compensation, but not enough of either to produce the requisite preference or indifference? Can a shortfall in punishment be made up by some measure of compensation? Can a shortfall in compensation be made up by some measure of punishment?

Because we now know what the critical stages of enforcement are and what we are using enforceability to accomplish at each stage, we now have a basis for developing answers to these questions. In this chapter we will examine what measure of punishment and compensation is required to render a restraint enforceable in the previolation state of affairs. In the next chapter we will examine what measure is required to render a restraint enforceable in the postviolation state of affairs. In each chapter we will focus initially on the measure of punishment required, and then on the amount of compensation. But keep in mind that while the two measures of enforcement are separate from one another, they are not independent. On the contrary, I will argue that they are integrally related in both the previolation and the postviolation state of affairs. Exactly how the two measures relate to one another, however, can best be seen if we focus first on one and then on the other. Later, when we have the requirements of both measures firmly in mind, we will examine some of the ramifications of having a unified theory of punishment and compensation in greater detail.

3.1 The Threat of Punishment and Previolation Enforceability

Punishment, in its most general sense, refers to an undesirable change in a person's well-being that is seen to result from or is deliberately imposed as a response to some act or omission committed by that person or by others for whom he is deemed responsible. It accordingly has two elements: an evaluative element, which determines whether the change in well-being is desirable or undesirable, and a relational element, which determines whether the connection between the change in well-being and the prior act or omission is sufficient or insufficient. Both elements are important, for the former tells us whether a particular change in well-being is a burden or a benefit and the latter tells us which burdens count as burdens of punishment and which do not. Only if both elements are satisfied can we properly include a particular change in well-being in our measure of the punitive effect of enforcement.

Before we can assess whether these evaluative and relational elements are satisfied in a particular case, however, we must identify the goal or function of the putative instance of punishment before us. This is because the way in which we determine whether these evaluative and relational elements are satisfied

will differ depending on which function of punishment we are examining. If punishment is to function as *retribution* for a past violation, for example, the evaluative and relational elements must be satisfied from the point of view of the beneficiary of the right that has been violated, or so I shall argue when we examine postviolation enforceability in Chapter 4. But a different point of view is required if punishment (or more precisely the threat of punishment) is to function as a *deterrent* to violations that have yet to occur. We cannot deter someone from committing a violation by threatening to change his well-being in a way he views as desirable, and we cannot deter him by threatening to change his well-being in a way he views as undesirable if he does not also understand what behavior will activate the threatened change. While postviolation punishment can perform both a retributive and a deterrent function, previolation punishment cannot be retributive because no violation has yet occurred. In the previolation state of affairs, the threat of punishment can function only as a deterrent. If a change in well-being is to qualify as punishment in the previolation sense, then its evaluative and relational elements must be satisfied from the potential violator's point of view.

Note that this is true regardless of whether we are seeking to deter a particular individual or an entire population of potential violators. In the former case, where the objective is specific deterrence, we must determine whether the relational and evaluative elements are satisfied from that particular individual's point of view. In the latter case, where the objective is general deterrence, we must determine whether the evaluative and relational elements are satisfied from *each* potential violator's point of view. Only those potential violators who view the threatened change in well-being as undesirable *and* understand what behavior will trigger the threatened change can possibly be deterred, although whether they will *actually* be deterred depends on a number of other factors that I shall get to in a moment. For now, however, we will focus on how we determine whether the evaluative and relational elements are met.

In determining whether the evaluative element is satisfied, the first thing to note is that the threatened change in well-being may take a variety of forms. It may be physical, emotional, or financial, and is often some combination of all three. Whether a potential violator views the threatened change as desirable or undesirable, however, depends on that potential violator's conception of the good. No doubt this will vary from potential violator to potential violator, but the presence of a variety of possible conceptions of the good does not mean that it is impossible to determine whether any particular threatened change in well-being will be viewed as punitive by potential violators. Most people will view injuries to their person or their property, reductions in their wealth, the experience of feelings of guilt or loss or regret, and the imposition of limitations to their freedom to come and go and do as they wish as undesirable. This is because such changes in well-being will impede the realization of a great many different conceptions of the good. By invoking something akin to Rawls's

"thin theory of the good,"[1] a beneficiary can accordingly safely assume that these changes in well-being will be viewed as undesirable by most potential violators most of the time. While some element of uncertainty necessarily remains, we will see that this is only the first of what will be many uncertainties with which the beneficiary must contend.

Indeed, a similar degree of subjectivity and resulting aura of uncertainty surrounds the relational aspect of our concept of punishment. The relational element requires that the potential violator understand there is a causal connection between his underlying act or omission and the particular change in well-being. The clearest example of this is when the potential violator understands that a particular act or failure to act will provide a *justification* for the imposition of an undesirable change in well-being, as would be the case when the change in well-being comes about because the rights violation is subject to a legal remedy. A rational potential violator who has such an understanding will then consider the risk of undergoing such a change when deciding whether to commit the violation.

But the scope of changes in well-being that will satisfy the relational requirement is broader than this. First, the act or failure to act need not be the justification for the imposition of a particular change in well-being, for a potential violator will also consider certain changes in well-being that are merely the *consequence* of the act or failure to act when deciding whether to commit a rights violation. This is why, for example, it is proper to treat automatic sanctions as punishment for a rights violation, even when these result from the circumstances of the violation rather than from a decision to punish the violator, and why social sanctions must be taken into account too, even when these result from a self-interested desire to avoid an unacceptable risk of loss rather than a desire to deprive the violator of the benefits of future cooperation. Second, the change in well-being need not be a *direct* consequence of the act or failure to act – certain *indirect* consequences may nevertheless be sufficiently connected to the underlying act or failure to act to figure in the potential violator's decision-making process as well. For most potential violators, this latter category will at least include those indirect but foreseeable secondary consequences that typically follow on from a particular change in well-being. Injuries to my person may cause me to suffer financial difficulties, which in turn may create difficulties in my personal life, and so on. But not every undesirable change in well-being that is part of the chain of events that began with a rights violation will be sufficiently connected to that violation to be seen as punishment for it, even if it is foreseeable. A potential violator may consider the possibility that he will crash into a tree in deciding whether to drive at an unsafe rate of speed, but will probably not consider the possibility that he will be exposed to a serious disease if he is injured in the crash and sent to the hospital for treatment or that

[1] See Rawls (1999), ch. 7, esp. secs. 60–1.

his home may be more easily burgled if he is required to stay in the hospital overnight. On the other hand, a potential violator will not only consider the direct consequences of being sent to prison in deciding whether to commit a violation, he will also consider various indirect or collateral consequences, such as how having a criminal record might alter his personal life and limit his future employment prospects. The trick is distinguishing between the consequences a potential violator is likely to consider in determining whether to commit a violation, even though they may be indirect, and those that are too exotic or remote to be taken into account.

Some potential violators will no doubt consider a wider range of consequences than others when they are calculating the pros and cons of committing a violation, but the resulting uncertainty is not fatal. A beneficiary can reliably predict which consequences will satisfy the relational test and which will not for most potential violators most of the time simply by applying what H. L. A. Hart and Tony Honoré call commonsense notions of causation.[2] Although Hart and Honoré use these notions to explain how we determine whether a particular harm suffered by a beneficiary is a harm for which a rights violator should be held legally responsible, rather than to decide whether a harm experienced by a violator should be viewed as punishment for that violation, the commonsense notions Hart and Honoré identify can be used for either purpose. Indeed, they would have to be, for whatever our commonsense notions of causation may be, they are the only commonsense notions that we have. And while it might be argued that social policy considerations also play an important role in determining the scope of harms for which we will hold violators responsible, common sense is a far better guide than social policy if what we are trying to determine is which possible consequences of a violation are likely to be viewed as punishment for it. With these commonsense notions of causation as a guide, a beneficiary can accordingly be relatively certain that direct consequences of a violation, such as the danger of suffering injury when engaging in careless behavior (what I have previously called "automatic enforcement"), as well as more indirect but predictable follow-on effects, will be taken into account by most potential violators, whereas more exotic consequences, although part of the chain of events put in motion by a violation, are likely to be too remote to be given serious consideration.[3]

[2] See Hart and Honoré (1985).

[3] Note that the relational requirement is likely to be far more expansive when evaluated from the point of view of the beneficiary whose rights have been violated, which (I will argue later) is the point of view we would adopt if retribution were at issue. There seems to be two reasons for this. First, we tend to discount the effect of future changes in well-being in deciding how to behave now, and thus the same negative change in well-being may not be sufficiently connected to the violation to be a deterrent but may be sufficiently connected to be retributive when it becomes an undiscounted present reality rather than a discounted future possibility. Second, while notions of proportionality do not affect our sense of causation when considering whether a change in well-being is a deterrent, notions of proportionality do seem to affect our notions of causation when

What this proves is that despite some lingering uncertainty, a beneficiary who employs a thin theory of the good and commonsense notions of causation can usually predict when the evaluative and relational tests are likely to be satisfied from a potential violator's point of view. But these evaluative and relational tests only tell him when potential violators are likely to view a particular change in well-being as punitive, they do not tell him when a measure of punishment is sufficient to deter a rights violation from occurring. That question is far more complicated, and adds even more elements of uncertainty into the equation. For the measure of punishment to be sufficient to deter a rights violation, the measure must be such that the potential violator will expect to prefer the previolation state of affairs. Only if a potential violator has such an expectation will he eschew intentional violations and take precautions to ensure that unintentional violations do not occur.

3.1.1 The Mathematics of Deterrence

What makes a potential rights violator expect to have such a preference? At the very least, a potential violator will have such a preference if whatever benefit he expects to obtain through the violation is less than the burden he expects to receive in punishment. This calculation, however, is far more complex than it initially appears. Both the amount of benefit and the amount of burden may be subject to a great deal of uncertainty. For example, assume that the only way I can arrive on time for a job interview is to drive at an unsafe rate of speed. I know that if I do not arrive on time, I will not get the job, but if I do arrive on time I may not get the job either. I also know that if I drive faster than is safe I may injure someone and be required to pay compensation, but I may not injure anyone and if I do these injuries may be either slight or serious. Or perhaps I am considering whether to use a currently undetectable performance-enhancing drug to prepare for an athletic event in which I am participating. If I do not take the drug, I will not win the event, but I may not win even if I do take it. Taking the drug will increase my risk of getting cancer later, but I may not get cancer even if I do take it and I may get cancer anyway even if I do not. In both cases, the potential benefit and the potential burden of the violation are uncertain, and I cannot know in advance which one will exceed the other.

There are other sources of uncertainty as well. I may be convinced the amount of burden I will suffer *if* I am punished will exceed the amount of benefit I will obtain, but I may not be certain I will be punished. Less serious violations may

considering whether a change in well-being is retributive. In the latter case, causation is to some extent a normative concept – the more serious the violation, the more indirect the consequence may be and still satisfy the relational requirement and qualify as retribution. Perhaps this explains our intuitive sense of what we sometimes call "divine" retribution. We may be unwilling to look very far along the chain of events for such retribution if we are dealing with a pickpocket; we may be willing to look very far indeed if we are dealing with a murderer.

go largely unreported, and few resources are likely to be devoted to identifying and punishing those who commit such violations even when they are reported. More serious violations are likely to draw more attention, but no matter how serious the violation, it is always possible the violator will escape punishment or even detection. For example, I may know that if I am caught embezzling funds from my employer the punishment I will suffer will vastly outweigh the benefit I might obtain through the embezzlement. Yet I may not be convinced I will be caught. I may believe there is a 50 percent chance I will be able to embezzle funds undetected. This means I am faced with a more complex choice. I must compare the previolation state of affairs with two possible postviolation states of affairs, each of which is equally likely to occur. In one possible postviolation state, the burden of punishment outweighs the benefit of the violation. In the other, there is no burden of punishment at all. In these circumstances, which choice I make depends on my risk preference. If I am risk neutral, I simply discount the potential burden of punishment by the probability of imposition, and then compare the discounted burden of punishment with the expected benefit. If the discounted burden exceeds the expected benefit, I do not commit the violation. If it does not, I do. If I am risk averse, however, even a small possibility I will receive a punishment that exceeds the benefit of the violation may be sufficient to dissuade me from committing it. And if I am risk inclined, I may commit the violation even if there is only a small possibility I will escape punishment altogether.

Of course, even if I am risk inclined I may not commit the violation. I may see the burden of fear of capture and moral regret, both of which I know I will suffer, as outweighing any possible benefit of the violation even if I am not caught. But what if I have no moral concerns about such a rights violation (my employer sells arms to repressive regimes) and I find the fear of capture an intoxicating feeling rather than an unpleasant one? Is there anything we can do to deter a rights violation regardless of my risk preference? Perhaps we could set the level of punishment so high that only truly insatiable risk seekers would chance subjecting themselves to it. For example, in the novel *Cat's Cradle*, Kurt Vonnegut describes a society where the punishment for any crime, no matter how trivial, is death by impalement on a giant fishhook. The prospect of such a horrifying and painful death makes everyone in this society extremely well-behaved. Indeed, "you can lay a billfold in the middle of the sidewalk and you come back a week later and it'll be right there, with everything still in it."[4]

Even in such a society, however, some uncertainty regarding the deterrence of potential violators would remain. There would always be the risk that a

[4] Vonnegut (1963), ch. 43. For a disturbing example of Vonnegut's fictional vision come to life, see Vollman (2000), pp. 58 and 61 (noting that when the Taliban ruled Afghanistan and amputated the right hand of thieves, "anyone could leave a bar of gold in the street and it would be there three days later").

potential violator would act irrationally; that he would unintentionally commit a violation despite taking extraordinary precautionary measures; that he would intentionally commit a violation as an act of martyrdom or perhaps as a political statement of opposition to such a harsh regime of punishment; that he might erroneously believe he could escape detection; and that he might simply see the potential benefit of committing the crime as outweighing the risk of even this severe form of punishment. Indeed, the more serious the offense, the more likely it can be seen by potential violators as offering a greater benefit, pecuniary or otherwise, given the right circumstances. While increasing the harshness of the potential punishment will increase the deterrence of trivial offenses, any increased deterrence of serious offenses may therefore be marginal at best, especially if the potential violator sees the potential benefits of the offense as both significant and immediate. Indeed, recent studies suggest that increasing the severity of punishment does little to increase the deterrent effect of punishment when significant uncertainty surrounding the likelihood of imposition remains, at least for more serious crimes that are already punishable by terms of imprisonment.[5] In any event, no matter how high we set our measure of punishment, there will always be some potential violators who are not deterred, and therefore some level of uncertainty will necessarily remain.

The amount of punishment we may impose in the name of deterrence is also subject to moral limits. These limits apply both to the form and to the extent of punishment.[6] Regardless of whether imposing harsher punishment will deter a greater degree of misconduct, we generally feel that the extent of punishment imposed must be proportional to the violation. The draconian levels of punishment described in *Cat's Cradle* would accordingly be morally impermissible, even if they did deter more violations than lesser levels of punishment, because the level of punishment would not be set according to the degree of harm caused by the violation or the seriousness of the offense, but simply designed to deter as many future potential violators as possible.[7]

Even for very serious crimes, where the extreme degree of punishment imposed might arguably be proportional to the offense, such a harsh method of punishment would not be morally justified in form. Punishments that are designed to be unnecessarily painful or humiliating are typically viewed as morally objectionable on those grounds alone. And capital punishment is viewed as morally objectionable by many people regardless of how supposedly humane

[5] See, e.g., Robinson and Darley (2004) and von Hirsch et al. (1999).

[6] Both limits, for example, are found in the prohibition against "cruel and unusual" punishment in the Eighth Amendment to the United States Constitution.

[7] By imposing a level of punishment that was not set according to the violator's own wrongdoing, we would be impermissibly using one person (the violator) as a mere means to an end (the deterrence of others), thereby violating one of the formulations of the Kantian categorical imperative. See Kant (1997) and Kant (1996), pp. 104–9, esp. p. 105. For discussion of the Kantian view, see Duff (1986), esp. ch. 7.

the form.[8] In a jurisdiction where these views prevail, it may simply be impossible to threaten to impose a degree of punishment severe enough to deter all violations. What this means for the calculation of enforceability is that while we can decrease the importance of risk preference by increasing the level of punishment, we can never increase the level of punishment sufficiently to eliminate the importance of risk preference altogether. And as long as risk preference remains an important factor, we cannot be certain that all violations will be deterred, regardless of whether the potential violator expects the burden of punishment he will suffer *if* he is caught to exceed any possible benefit he could obtain by committing the violation.

We have seen why deterrence must remain uncertain even when the expected burden of punishment exceeds the expected benefit of violation. But what if there is not even a chance that a potential violator will expect the burden of punishment to exceed the benefit of violation? Does this necessarily mean that a potential violator will *not* expect to prefer the previolation state of affairs? For example, what if the only punishment for a rights violation was 10 percent of the benefit received? Would a "rights violation tax" be a sufficient measure of punishment for a right to be properly considered enforceable? Such a tax would make the rights violation less profitable than it would otherwise be, and would therefore create a preference for other types of behavior that produced the same profit but were not subject to the tax. But would this be enough? What if the tax were 51 percent? What if it were 99 percent? Obviously, there is some point at which the tax would be high enough that taken together with the transaction costs of violation, would exceed the total benefit of the violation, and if combined with sufficient certainty of imposition, would be expected to produce a preference for the previolation state of affairs. It is equally obvious that there is some point at which the tax would be low enough that it would have no measurable effect on the potential violator's decision whether or not to commit the rights violation. These cases are relatively unproblematic. The more interesting question arises in the middle ground. Many theorists, including such prominent figures as Jeremy Bentham, have seemed to assume that there must at least be a possibility that the burden of punishment will exceed the benefit of violation, for only then could a potential violator possibly prefer the previolation state of affairs.[9] But is this as obvious as it may initially seem? Is there perhaps some point at which a rights violation tax would produce a preference for the previolation state of affairs even though it was clear to the potential violator that he would still profit from the violation after deducting transaction costs? If so, how can that point be identified?

[8] For a discussion of some of these objections and possible responses to them, see Pojman and Reiman (1998).

[9] See Bentham (1996), p. 166ff. In *Leviathan*, Hobbes claimed that if the burden inflicted by punishment did not exceed the benefit of the violation, then the burden could not properly be considered punishment at all. Hobbes (1996), ch. 28, p. 215.

One possible dividing line is the point at which the potential violator will expect to enjoy the majority of the profits generated by his violation. There are three reasons to believe this could be so. First, committing a violation is often indicative of a lack of concern for the interests of others. The people most likely to commit violations are therefore those who are especially selfishly oriented, and such people are likely to feel disinclined to engage in activities that benefit others more than themselves, even when they cannot obtain an equivalent benefit for themselves any other way. Indeed, such an attitude could be the product of natural selection, for those who placed their absolute position above their relative position after a minimum level of welfare was reached were placing themselves at a competitive disadvantage in the struggle for resources and were therefore less likely to survive and reproduce. When a tax on any particular activity exceeds 50 percent, a significant portion of potential violators may accordingly tend to lose much of their interest in that activity. Second, the 50 percent dividing line is a prominent border. If some rate of tax is going to deter someone from committing a violation, it is likely that the sheer prominence of this border will suggest itself as a dividing line in deciding whether to engage in such behavior. Third, and perhaps more importantly, a rights violation tax of 50 percent might have a significant deterrent impact through a combination of loss aversion and framing effects. Experimental evidence suggests that at least for small or moderate sums of money, losses tend to be given roughly twice the decision weight of equivalent gains.[10] For example, most people will turn down a risk that offers an equal probability of winning $200 and losing $100. Whether something is coded as a loss rather than as a reduced gain can therefore have great significance in the decision-making process. If a rights violation tax of 50 percent were coded as imposing a loss rather than as simply reducing the gain to be generated by the violation, the loss would have twice the decision weight of the gain that remained even though in absolute terms the two are equal.[11] In this case, the violator would tend to want to eschew such behavior rather than engage in it.

Taken together, these three factors suggest that the number of potential violators who would be deterred by a 50 percent rights violation tax might be significant, if not substantial, and that whatever that number, even a slightly lesser tax would have a greatly reduced effect. Of course, people vary in their degree of self-interest and their willingness to share the products of their labor, the importance they attach to points of prominence, the way they use such points in their decision making, their degree of loss aversion, and whether they experience a tax as a loss or as a reduced gain. Some people may accordingly

[10] See Tversky and Kahneman (1991).

[11] Oddly enough, the tax may be more likely to be coded as a loss if its imposition is uncertain, for then the potential rights violator is more likely to see the benefit to be gained from the violation and the burden of the tax as two separate, distinguishable events. See Kahneman and Tversky (1979), p. 40.

be willing to engage in profitable rights violations even if a large portion of that profit would be taxed, while others may be disinclined to engage in profitable rights violations even if only a small portion of that profit would be taxed. You cannot know which sort of person you may encounter in advance, and all you can reasonably assume is that the probability a potential violator will prefer the previolation state of affairs over a taxed but still profitable rights violation declines as the level of tax declines. As that probability declines, the risk of violation increases. But as long as some potential violators would be deterred from committing a violation by a rights violation tax, the effect of such a tax must be considered in our deterrence calculation. The fact that we cannot know precisely what percentage of violators would be deterred by a rights violation tax of any significant level merely adds one more element of uncertainty to our calculation.

There are further sources of uncertainty as well. Given all the factors that affect whether a measure of punishment will deter a particular rights violation, there are ample opportunities for errors in calculation. A potential violator may miscalculate the benefit of the violation, the burden of punishment, or the likelihood of its imposition. If he does, he may commit a violation even though the measure of punishment available would have been otherwise sufficient to deter the violation given his risk preference. Even if he makes no such errors, a potential violator may simply act irrationally, accidentally, or without considering the consequences, in which case once again, the threat of even a sufficient amount of punishment will not have the desired effect. The possibility that a potential violator will be driven by his emotions to commit a violation that he would never have considered in a cooler frame of mind must also be taken into account, especially in situations that may be particularly emotionally charged, for "men are likely to forget in the heat of action where their best interest lies and let their emotions carry them away."[12] Each of these possibilities accordingly adds further elements of uncertainty to our efforts to determine whether the measure of punishment available will be sufficient to produce a preference for the previolation state of affairs among potential violators and, even if it is, whether it will actually deter any particular rights violation.

Finally, if there is going to be any delay between obtaining the benefits of violation and suffering the burdens of punishment, and in most cases there will, the deterrent effect of that burden may be reduced by our well-documented tendency to discount the decision weight of future events excessively.[13] Future discounting is excessive when it reflects something more than mere uncertainty regarding whether the future event will indeed occur, and instead reflects a kind

[12] Hammett (1930), p. 169.

[13] While future discounting is a widely observed phenomenon, the way in which such discounting occurs is still the subject of some debate. Some argue that future discounting is *exponential*, others that it is *hyperbolic*. For a discussion of the difference between the two, see Elster (2000), pp. 25–6.

of shortsightedness that gives greater weight to benefits or burdens that will be enjoyed (or suffered) now and lesser weight to those that will be enjoyed (or suffered) later simply because that experience will take place in the future. The reasons why we so frequently engage in this form of discounting are unclear,[14] but whatever these may be, this tendency is sufficiently common that it must be overcome if a threat of punishment is to have the requisite deterrent effect. The possibility that the amount of threatened punishment may not be sufficient to overcome such future discounting adds yet another basis for uncertainty that must be taken into account.

3.1.2 Deterrence and Previolation Enforceability Compared

What all this means is that after considering the factors that determine whether a particular change in well-being is punitive, and the additional factors that determine whether the threatened change is of sufficient measure to successfully deter violations, the best we can do is calculate the probability that a violation will occur. In order to determine what we do with this probability calculation, however, we must return to our discussion of the purpose of previolation enforceability. It should be clear from this discussion that the deterrence of violations and previolation enforceability are not simply two sides of the same coin. Deterrence may be the end at which previolation threats of punishment are aimed, but it is a mere means of assuring previolation enforceability. The goal of previolation enforceability is not simply the deterrence of violations, but the facilitation of social cooperation. Saying that a right is enforceable does not mean the available measure of punishment is actually sufficient to deter most or even any violations. It means the probability it is sufficient is high enough (and the corresponding risk of violation low enough) that a potential violator is able to make credible promises to perform and a rights beneficiary is willing to incur risks of violation he would otherwise avoid and to refrain from taking socially burdensome precautions. While the focus of deterrence is on the preferences of the potential violator, the focus of enforceability is on the rational beliefs of the rights beneficiary. The question is accordingly not whether the measure of punishment available is sufficient to make potential violators prefer to remain in the previolation state of affairs, but whether it is sufficient to make the rights beneficiary *rationally believe* that potential violators will prefer to remain in the previolation state of affairs. Only if the beneficiary has such a belief will he view the risk of violation as sufficiently manageable, and only then will he

[14] Nozick argues that excessive discounting results from the uncertainty of future outcomes being counted twice – once because evolution has led us to make anticipatory probabilistic calculations instinctively, for we were at one time incapable of making such calculations consciously, and again because now that we *are* capable of making such calculations consciously, we consciously discount what we have in effect already discounted instinctively. See Nozick (1993), pp. 14–15.

be willing to expose himself to the risk of violation that engaging in social cooperation necessarily entails.

This is a subtle difference but an important one. It means that the existence of previolation enforceability depends on whether the beneficiary believes something to be true rather than on whether it is true. It is the presence of the belief, not the actual preference of potential violators, which produces the requisite previolation behavior in the beneficiary, for regardless of whether a potential violator has an *actual* preference for the previolation state of affairs, he will only be able to make credible promises to perform, and the beneficiary will only be willing to incur risks of violation he could otherwise avoid, if the beneficiary *believes* that the potential violator has such a preference. If the beneficiary has the requisite belief, the belief will often turn out to be true, for it is more likely that a potential violator will be able to produce the requisite belief in the beneficiary if the potential violator actually *does* prefer to remain in the previolation state of affairs, but some potential violators will be very adept at concealing their actual preference for violation. Given the degree of uncertainty that often accompanies any evaluation of the relevant factors, even rational beneficiaries may misjudge the strength of the incentives and disincentives that potential violators face, and it will often be difficult to determine whether a potential violator may act irrationally or make mistakes in calculation of his own. Inevitably, the beneficiary's belief will sometimes turn out to be false, and some violations that the beneficiary could have avoided will occur. But by the time this happens, the behavior that previolation enforceability is designed to encourage will already have occurred. The presence of an actual preference for the previolation state of affairs among potential violators is accordingly neither a necessary nor a sufficient condition for the previolation enforceability of any particular right.

This does not mean that belief can be divorced from reality over a great many rights and a long period of time. There is a relationship between the actual behavior of potential violators and the future beliefs of beneficiaries. If potential violators do not have the preferences that beneficiaries believe they do, violations are likely. Beneficiaries who find that their beliefs are consistently wrong will have reason to revise their beliefs in the future. But this reason for revision is not conclusive. There may be changes in circumstances that suggest previous experience is not a good guide to future behavior, even when similar rights are involved. In defining what previolation enforceability requires, we must accordingly acknowledge the importance of both prior experience and changes in current conditions in the process of the beneficiary's belief formation. We do this by recognizing that while the beneficiary's beliefs need not be true in any particular instance, they must be *rational*. This means they must be supported by an assessment of both prior experience and current conditions. If prior experience supports the belief that potential violators will have the requisite preference for the previolation state of affairs, then there must be no reason

to believe that there has been a change in conditions that renders this prior experience inapposite. Conversely, if prior experience suggests that potential violators will *not* have the requisite preference, then there must be good reason to believe there *has* been a change in conditions that renders this prior experience inapposite. Changes in condition that are sufficiently extreme to render prior experience inapposite, however, are likely to be rare. It will therefore usually be the case that prior experience must support the beneficiary's current beliefs for those beliefs to be rational. While this does not mean that the beneficiary's beliefs must always have proved true in the past, it does mean that most opportunities for violation of the beneficiary's rights in the past must not have been taken, and the beneficiary must have a sense that other beneficiaries who exposed themselves to similar opportunities for violation in similar circumstances had similar experiences. As long as this is the case, the beneficiary's current beliefs about the preferences of potential violators will be rational and the right at issue may be properly considered enforceable regardless of whether the beneficiary's beliefs are true in that particular instance.

Recognizing that enforceability in the previolation sense is dependent on the rational beliefs of the beneficiary rather than on the actual preferences of potential violators allows us to solve the mechanical questions of how we are to evaluate the probability of violation and what we are to do with that probability calculation once it has been made. The deterrent effect of whatever punishment is expected to be available must be evaluated from the viewpoint of the potential violator, but we must evaluate *that* viewpoint from the viewpoint of the rights beneficiary. The question is not whether the measure of punishment available is sufficient to deter potential violators but whether it is sufficient to enable rights beneficiaries to behave *as if* the risk of violation has been shifted. Accordingly, it is the rights beneficiary who must make judgments regarding a potential violator's conception of the good, notions of causation, assessment of the benefits of violation, the burdens of punishment, and the likelihood of imposition, as well as the potential violator's risk preference, rationality, and the possibility of errors in calculation. Some of these judgments will be harder to make than others, and they all will have to be made under conditions of uncertainty. How much uncertainty will be present will depend on how well the beneficiary is acquainted with the universe of potential violators. If the universe of potential violators is small and identifiable in advance, as would be the case when the right in question related to the performance of a contractual obligation, the beneficiary may have a very high degree of confidence in his probability determination, especially if there is substantial symmetry between the beneficiary and the potential violator. A businessman contemplating entering into a contract with another businessman, for example, is likely to have a high degree of confidence in his evaluation of what the other party will do in a wide variety of situations. He will be much less confident in his evaluation, however, if the other party is a wholly different kind of person, say a rock star, who

is unfamiliar to him.[15] Similarly, if the universe of potential violators is larger or harder to identify, as it would be if the potential violators included all other drivers on the road from London to Manchester or all potential bank robbers, the beneficiary's degree of confidence will by necessity be lower. In either case, however, the first step in determining whether a right is enforceable is for the beneficiary to calculate the probability of violation.

3.1.3 The Concept of Critical Risk

What then do we do with this probability? If the beneficiary believes the probability of violation is sufficiently low, he will incur risks of violation he would otherwise avoid or incur only in conjunction with taking substantial precautions, although he may still engage in some additional risk management through some other source, such as insurance. If the beneficiary believes the probability of violation is too high, and therefore the risk of injury from violation is too great, he will avoid the risk to the extent he is able and, to the extent he is not, he will be forced to take substantial and possibly burdensome precautions against injury. But how do we know whether the beneficiary will consider the probability of violation too high for him to behave as if the right will not be violated? How high is too high? What factors influence this decision?

The first step in determining whether the probability of violation is acceptable or unacceptable is identifying and then comparing the potential benefits and burdens of taking the risk. Together, the potential benefits and burdens of taking the risk determine what is at stake for the beneficiary in making this decision. The benefits would include any potential positive change in well-being from taking the risk, while the burdens would include any potential negative change. The greater the potential benefit or positive change, the more likely the beneficiary will be willing to risk violation, and the greater the potential burden or negative change, the less likely he will be willing to risk it. To distinguish between a positive and a negative change, each beneficiary will need to reference not only their conception of the good, which tells them whether a change in well-being is a burden or a benefit, but also their normative baseline, which tells them from what point changes in well-being should be measured.[16] A beneficiary's normative baseline is accordingly set by his understanding of the scope of his rights. A positive change is any change the beneficiary finds desirable but believes he has no right to expect unless he takes the risk of violation. A negative change is any change the beneficiary finds undesirable and believes he has a right not to suffer if he takes the risk of violation. If I take a risk of violation and deliver goods in exchange for a promise of payment,

[15] For a discussion of the importance in game theory of there being symmetry between players, see Schelling (1960), p. 117.

[16] See Fried (1981), pp. 95–9 and Nozick (1969).

the potential benefit is the net profit I will earn on the transaction if I am paid; the potential burden is my net unrecoverable cost of performance if I am not. If I manage to walk down the street without being assaulted, however, this is not a positive change, but merely the absence of a negative change, for I have a right not to suffer this kind of loss and thus would not be likely to consider the absence of this kind of loss a positive change in well-being and a benefit of taking the risk of violation.[17]

The reason to distinguish a positive change in well-being from the mere absence of negative change is that this will affect the second factor that goes into determining whether the risk of violation is acceptable or unacceptable, which is the beneficiary's attitude toward risk. Positive changes will be coded as gains, toward which the beneficiary will be attracted, while negative changes will be coded as losses, toward which the beneficiary will be averse. The greater the potential benefit or positive change, the more likely the beneficiary will be inclined to take the risk of violation, and the greater the potential burden or negative change, the more likely he will be risk averse. A risk-averse beneficiary may avoid a risk even if the potential benefit substantially exceeds the potential burden, a risk-inclined beneficiary may incur the risk even if the potential burden substantially exceeds the potential benefit, and a risk-neutral beneficiary will simply discount the potential benefits and burdens to reflect the probability of violation and then do whatever has the greater expected value. But potential benefits and potential burdens will not necessarily be accorded equal decision weight in the beneficiary's decision. Most people are loss averse. Indeed, as we have already seen, losses tend to have twice the decision weight as equivalent gains. The beneficiary is accordingly only likely to move from the status quo if the potential gains are more than twice as large or twice as likely as the potential losses.[18] Although sometimes a change in well-being may be framed as either a potential gain or a potential loss, and risk preference is therefore subject to some manipulation,[19] how the beneficiary mentally accounts for potential gains and losses is an important factor in determining whether the particular risk of violation facing a beneficiary is a risk that the beneficiary will be prepared to take.

Note also that in determining the potential burden of violation, the potential availability of compensation for any injuries that might occur becomes

[17] This does not mean the beneficiary will necessarily use the same baseline to evaluate changes in well-being after a violation has occurred. Both losses and gains are quickly internalized, and after a violation has occurred, a beneficiary may view an offer of compensation as a potential gain even if he now believes he has a right to expect it. This adjustment from a normative to a factual baseline is important because it means that an offer of partial compensation is more likely to be viewed as securing a partial gain, which a beneficiary is more likely to be inclined to accept, than as imposing a partial loss, which he is more likely to be inclined to reject. See Guthrie (1999), p. 59 and n. 69, and Rachlinski (1996), p. 129, n. 65.

[18] See Tversky and Kahneman (1991) and Kahneman, Knetsch, and Thaler (1991).

[19] See Kahneman and Tversky (1979) and Tversky and Kahneman (1981).

important. To the extent the beneficiary believes he can obtain compensation for his injuries, this reduces the expected burden of violation. The beneficiary will often expect some compensation for his injuries to be available, but for reasons we will examine at length when we look at the role of compensation in the previolation state of affairs, the beneficiary will expect to obtain *full* compensation for his injuries only rarely. The primary role played by compensation in the previolation state of affairs is accordingly one of reducing rather than eliminating the expected burden of violation. This does not affect the amount of punishment required in order to render a right enforceable in the previolation sense, for that amount is calculated in reference to the benefit not the burden of violation. But it does affect what is at stake for the beneficiary in deciding whether to incur the risk of violation, and the less he has at stake, the more risk of violation he will be able to tolerate.

The third factor that determines whether the risk will be acceptable or unacceptable is the probabilities of the various outcomes. The potential benefits and burdens from each possible decision will often be highly uncertain, as will the beneficiary's evaluation of the probability of violation, and the beneficiary will have varying degrees of confidence in his probability determinations. Low confidence levels undermine the persuasive force of the beneficiary's probability determinations, and high confidence levels enhance their persuasive force. The greater the probability of violation, and the more certain the beneficiary is in this probability calculation, the less likely the beneficiary will take the risk. The lower the probability of violation, and the more certain the beneficiary is in this probability calculation, the more likely the beneficiary will take the risk.

Together these factors enable the beneficiary to calculate what Daniel Ellsberg would call the beneficiary's *critical risk*.[20] Critical risk is simply the amount of risk someone is willing to take in a particular decision situation given the stakes, the probabilities of the various outcomes, her risk preference, and the degree of confidence the decision maker has in her probability calculations. Sometimes these factors all point in the same direction, making the determination of critical risk relatively easy, but often they will point in opposite directions, making the determination more difficult. For example, the beneficiary will often be required to balance a high probability of modest gain, which she is inclined to pursue, against a low probability of serious loss, which she is inclined to avoid. In such cases, the beneficiary must carefully balance each of these factors against one another and the conflicting impulses they produce before she can determine whether the probability of violation is above or below her critical threshold. What the beneficiary must decide is whether the probability of violation is low enough that she is willing to behave *as if* she believes the right will not be violated given what is at stake should that decision turn

[20] Ellsberg (1975), pp. 343–63 and 349.

out to be wrong.[21] If after balancing the relevant factors against one another, the beneficiary decides that the probability of violation falls below her critical threshold, she will incur the risk and act as if her right will not be violated, but if the probability of violation rises above that level, she will take precautions against violation until the risk drops back below her critical threshold or she will avoid the risk altogether to the extent that she is able.

What this means is that enforceability is *not* a strictly linear property, but is more akin to a step good. While the measure of enforcement available in any particular situation is infinitely gradable, there is a minimum that must be met if the right is to be considered enforceable in the larger previolation sense. Either the measure of enforcement available is sufficient to bring the risk of violation below the beneficiary's critical threshold or it is not. Although a beneficiary may be able to reduce a risk to critical levels (the point at which the beneficiary would rather incur the risk than avoid it if it were avoidable) by utilizing the tactic of decomposition, erecting physical barriers against violation, obtaining insurance against injury, or taking other precautions, this will usually be possible and practicable only when these are secondary or supplemental methods of managing the risk. When the beneficiary has to rely primarily on her own precautions to manage the risk of violation rather than the presence of means of enforcement of sufficient measure, it is less likely that she will be able to reduce her risk below the critical level. This may mean that the beneficiary will avoid the risk altogether, or it may mean that despite a substantial investment in defensive precautions, the beneficiary will incur the risk only grudgingly, with a degree of anxiety and suspicion that renders the experience both more psychologically taxing and less socially productive than it would otherwise be even if the feared violation never actually occurs.

To illustrate how risk preference, the stakes, and the probabilities of various outcomes interrelate in setting the level of critical risk, let us take an example from the play *Le Grande Magia* by Eduardo de Filippo.[22] The play begins at a hotel resort where a professional magician has been engaged to entertain the guests. A man's wife has surreptitiously paid the magician to select her "randomly" from the audience and then make her disappear in a specially rigged chamber so that she can have a few minutes alone to rendezvous with her lover. The magician makes the wife disappear as arranged, but instead of spending a few minutes with her lover and then returning just in time to miraculously reappear in the chamber at the end of the show, she runs off with him. When

[21] This variation in the level of certainty required to support a belief is a form of what Nozick calls "radical contextualism." Under this view, the degree of certainty necessary to form the belief varies according to the context within which the belief will be employed as a reason for action. The question is what degree of certainty that the belief is true is necessary for the holder of that belief to behave *as if* the belief were true given the stakes at risk should that belief turn out to be false. See Nozick (1993), pp. 93–100.

[22] de Filippo (1992).

the magician is unable to make the wife reappear, the husband demands some explanation. Anxious to conceal his complicity in the whole affair, the magician gives the husband a "magic box" and tells him that his wife is inside. But the magician warns the husband that for the magic to work, the husband must believe that his wife is inside. If he tries to open the box in bad faith, his wife will be gone forever. If he truly believes she is inside the box, however, then she will reappear as soon as he opens it. The husband is of course incredulous. He does not believe what the magician is telling him and is very sure his wife is not inside the box. But he does not open it. He loves his wife very much, and while he is very sure she is not inside the box, he cannot be completely sure. The stakes are so great that his critical risk is quite low. He cannot take the chance, no matter how small a chance it is, that by opening the box without the requisite belief he may lose his wife forever. Because he cannot eliminate all doubts from his mind, he cannot open the box.

Of course it will often be impossible for a beneficiary to calculate his level of critical risk precisely. But precise calculations will rarely be necessary. We are all capable of making rough calculations intuitively, and rough calculations are all that are required as a basis for action in most decision situations.[23] Nuclear deterrence works because even though the chances of nuclear retaliation are small, a full-scale nuclear exchange could destroy the world, and even a small chance that this could occur will exceed our level of critical risk. For the same reason, when confronted by a gunman who demands your money or your life, even a small chance that he is serious is enough to lead most people to comply. Critical risk levels will therefore often be predictable, and even though these levels may vary from beneficiary to beneficiary to some extent, some general patterns are likely to emerge. When the consequences of violation are very serious, such as the loss of a loved one, as in *Le Grande Magia*, or death, serious bodily injury, or financial ruin, or when the consequences are less serious but still dramatically outweigh the benefit to be had from taking the risk of violation, the beneficiary's level of critical risk is likely to be very low. In contrast, when the potential benefits of incurring the risk of violation are very high, and the potential consequences of violation are not so severe, the beneficiary's critical risk is likely to be much higher. And when both the potential gains and losses to be had from incurring the risk of violation are relatively modest, the risk is likely to rise above the beneficiary's critical threshold only if the potential gain is more than double the potential loss or twice as likely. Indeed, it is precisely our intuitive sense of critical risk that leads us to adopt various rules of contract and tort damages and various terms of imprisonment for criminal rights violations. Although these penalties may not be sufficient to produce the requisite probability of preference for the previolation state of affairs in every case, we can feel fairly confident that

[23] See Ellsberg (1975), pp. 350–1.

we will meet the requirements of critical risk for most beneficiaries most of the time.

There is one further element of uncertainty that we must consider before we leave our discussion of critical risk. There will often be some and sometimes a great deal of uncertainty regarding the existence of the right or the precise circumstances that will constitute a violation. If we view the question of previolation enforceability as simply a question of whether the probability of the requisite preference is above or below the beneficiary's level of critical risk, we can see that uncertainty as to the existence of the right or the existence of a violation is just one more element of uncertainty to be factored into the mix. Doubts about the existence of a right or the precise circumstances that will constitute a violation simply serve to further reduce the probability that potential violators will prefer the (in this case putative) previolation state of affairs. The lower the probability of preference, the greater the probability of violation, and the greater the risk the beneficiary takes if he acts as if the putative right will not be violated. If the risk falls above a particular beneficiary's critical level, the beneficiary will avoid the risk or undertake it only after taking substantial precautions. If it falls below that level, the beneficiary will incur the risk with no or only minimal further precautions. Regardless of the source of the uncertainty affecting the probability calculation, the ultimate question remains the same: Is the probability of violation above or below the beneficiary's level of critical risk? As long as the probability of violation remains below that level, a putative right is enforceable in the previolation sense even though it may not actually exist.

3.1.4 Rational Beliefs and Beneficiaries

Let us return for a moment to the idea that the beneficiary's belief in the presence of the requisite preference for the previolation state of affairs among potential violators must be rational. Why must this be so? We expect the beneficiary to consider the possibility that potential violators may behave irrationally in determining whether they will be deterred by the measure of enforcement that is available – indeed, it would be *irrational* for beneficiaries not to consider this possibility – so why don't we have to consider the possibility that beneficiaries may behave irrationally as well? The answer is that for our purposes we are giving the term *rational* a limited and technical meaning. A rational belief is simply one that is formed by the beneficiary's expectations regarding potential violators' behavior, his estimation of the consequences of such behavior, and by his preferences, no matter how unreasonable or crazy or erroneous those expectations, estimations, and preferences may be.[24] If the beneficiary's belief is not formed by his expectations, estimations, and preferences, then it

[24] See Ellsberg (1975), which uses a similar definition of rationality at p. 346.

will not be subject to manipulation by adjustments to the available measure of enforcement. Regardless of whether the source of the restraint at issue is a legal right, a moral right, a social convention, or merely the expression of a particular individual's will, the objective of making adjustments to the measure of enforcement available is to influence the behavior of the beneficiaries of that restraint, and therefore only rational beneficiaries need be considered in determining whether the restraint is enforceable because only rational beneficiaries are subject to such influence. Irrational beneficiaries are by definition unaffected by such endeavors and their actions accordingly have no relevance to the question of whether the restraint is to be properly considered enforceable.

But we also need to clarify what we mean by *beneficiary* here. Whereas the violator is a distinct individual, many people may be beneficiaries of a single restraint. Whose rational beliefs are we trying to influence, anyway? Surely not everyone who could conceivably benefit from the restraint, no matter how indirectly? In answering this question, it may be helpful to divide the beneficiaries of each restraint into three categories or classes. Someone is a primary beneficiary if proof of interference with that individual or entity's beneficial interest is sufficient to establish a violation of the restraint.[25] This category includes those most directly affected by a violation of the restraint – the victim, for example, in the case of murder, or the promisee in the case of a breach of contract. Someone is a secondary beneficiary if they have a significant and differentiated interest in the observance of the restraint, even though proof of interference with that interest is neither necessary nor sufficient to make out a violation of that restraint. In the case of murder, this category would include the family of the murder victim, close friends, and others with a special interest in his survival, whereas in the case of breach of contract, there may be no secondary beneficiaries, although this category could include employees or shareholders of a corporate promisee or even subcontractors or creditors depending on the facts and circumstances of the particular violation. Someone is a tertiary beneficiary if they have a significant although undifferentiated interest in the observance of the restraint. This category would include the general public in the case of murder and most other violations of the criminal law (and most violations of public law as well, as in the case of environmental regulation), and in any event would include anyone who has a nontrivial interest in the observance of the restraint. There is not necessarily a bright line dividing categories two and three, and each category will not necessarily be filled for every restraint, but this will not affect our analysis. These categories are designed to provide general guidance only, not to rule out the consideration of any particular individual's beneficial interest.

[25] For a detailed explanation of the nature and mechanics of this test, which originated with Bentham, see Hart (1982) and Kramer (1998), p. 81ff.

In most cases, the person whose rational beliefs are the focus of concern is the primary beneficiary, for it is the primary beneficiary who we are usually trying to encourage to take risks and to engage in social cooperation without feeling compelled to adopt extensive and socially wasteful precautions. At least if the enforceability concerns of the primary beneficiary are satisfied, it is likely that the concerns of any secondary and tertiary beneficiaries will be satisfied as well, because their interests are by definition less substantial than hers. If the primary beneficiary is an infant, animal, dead person, trust, corporation, government body, or other individual or entity that is not capable of holding rational beliefs, then it is the secondary beneficiaries, especially those who are charged with responsibility for protecting the interests of the primary beneficiary or, if no one is so charged, those who have the strongest differentiated interest or who are otherwise most likely to take action to reduce the risks of violation to which the primary beneficiary is exposed (the parents of the child, the owner of the animal, the relatives of the deceased, or environmental activists in the case of potential environmental violations), who we are trying to encourage to take risks rather than precautions and whose rational beliefs are therefore the focus of our concern. Admittedly, there will be some indeterminacy in identifying which secondary beneficiaries are most likely to take action in certain cases, especially when no one is specifically charged with protecting the primary beneficiary's interest, but these people will often be self-identifying, for if it is not otherwise obvious they are likely to make their level of interest and their commitment to protecting it known to potential violators in advance in order to discourage violations. Those who do not make themselves known in advance are likely to have a more remote interest in preventing violations, an interest more closely associated with the interest of a tertiary beneficiary, and the more remote their interest, the more likely the available measure of enforcement will be sufficient to make them willing to put that interest at risk. But in the end, *everyone* whose interest is in any way protected by the restraint – whether he is a primary, secondary, or tertiary beneficiary – must determine for himself whether the available measure of enforcement is sufficient to relieve him of the need to take other precautions given the level of his interest and his commitment to protecting it.

I do not mean to suggest that people should or actually do make these rather complex calculations every time they think about their rights or other sources of restraint on the actions of other people and consider whether others will abide by these restraints or violate them. People have limited time, information, and computational abilities,[26] and therefore may rationally use "rules of thumb" they have worked out in advance for determining whether a right or

[26] As a result, people are not capable of perfect rationality but only of what Herbert Simon calls "bounded" or "limited" rationality. See Simon (1955, 1956).

other restraint is enforceable.[27] Indeed, an important reason to make legal remedies available for rights violations is to relieve people of the burden of making these calculations on a continual basis in their everyday affairs. If legal remedies are available, people can properly assume that the required calculations have already been done, at least in the general abstract sense, and that the available measure of enforcement will be *prima facie* sufficient to produce the required preference. Rather than revisit these calculations to see if they apply to the particular circumstances with which we are confronted, most of us will be content most of the time to act as if others will have the required preference unless we are presented with some reason to consider the question more deeply.[28] Only when we expect that legal remedies are not likely to be available will we need to consider the question of enforceability more seriously from the outset.

3.2 The Promise of Compensation and Previolation Enforceability

While we measure the sufficiency of a threat of punishment in the previolation state of affairs by comparing the benefits the violator expects to realize from violation with the burdens he expects to suffer as a result of enforcement, we measure the sufficiency of a promise of compensation by comparing the burdens the beneficiary expects to suffer as a result of a violation to the benefits the beneficiary expects to obtain through the means of enforcement. It is nevertheless possible to express the objectives of a threat of punishment and the objectives of a promise of compensation in a similar fashion. While the objective of a threat of punishment is to create a "preference" for the previolation state of affairs among potential violators, the objective of a promise of compensation is to create "indifference" to the possibility of violation among beneficiaries. Just as a right is enforceable in the previolation state of affairs if the threat of punishment is sufficient to make the beneficiary rationally believe that potential violators will prefer to remain in the previolation state of affairs, a right is enforceable in the previolation sense if the promise of compensation is sufficient to make the beneficiary rationally indifferent to the possibility that a violation might occur. While both tests could be satisfied in a particular case, this is not required. As long as one test is satisfied, the right is enforceable.

To see why the production of rational indifference should be sufficient to establish previolation enforceability, remember that the purpose of previolation enforceability is to encourage the beneficiary to act *as if* the particular right at issue will not be violated. We do this by creating certain expectations in

[27] See Ellickson (1991), p. 157.

[28] In this sense, the rights beneficiary acts much like the utilitarian, who does not engage in complex utilitarian calculations every time he must decide on a course of action but instead employs previously devised utilitarian rules of thumb unless there is some obvious reason not to do so. See Smart and Williams (1973), pp. 42–3.

the beneficiary – specifically, that a certain state of affairs will obtain in the future. One way to convince the beneficiary that this desired state of affairs will obtain is make him believe that potential violators will prefer to remain in the previolation state of affairs, for this belief would lead him to conclude that his right is not likely to be violated. But even if he has no reason to believe that potential violators will prefer the previolation state of affairs, there is another way to encourage the beneficiary to act *as if* the right will not be violated. This is to create a rational expectation that in light of the promise of compensation, an equally desirable state of affairs will obtain *regardless* of whether the right is violated. If a beneficiary has such an expectation, then even though potential rights violators might have no disincentive to commit a violation, they would also have no power to bring about a state of affairs that was materially different from the state of affairs the beneficiary desires. The incentives or disincentives facing potential violators would therefore be irrelevant to the beneficiary, for he would be indifferent to the violation even if it did occur. And the beneficiary who rationally believed he would be indifferent to any violation should be no less prepared to incur risks of violation than the beneficiary who rationally believed a violation would not occur. Indeed, the beneficiary should not feel at risk at all, for he would believe he has sufficient power to maintain all that is significant to him in the existing state of affairs and obtain all the future benefits he has been promised or their equally desirable compensatory substitutes.[29]

This explains, for example, why the usual remedy for breach of contract is the recovery of expectation damages – an amount necessary to put the plaintiff in the position he would have been in if the contract had been performed, while the usual measure for tortuous conduct is out-of-pocket loss – an amount necessary to restore the plaintiff to the position he would have been in had the violation not occurred. In each case, the usual measure is designed to make the beneficiary indifferent to the possibility of violation.[30] If the usual measure of damages for each type of violation were out-of-pocket loss, in contrast, the beneficiary in a breach of contract case would not be indifferent to the possibility that a violation might occur because he would do better if the contract were performed than if it were violated and he simply was returned to the position he was in before he entered the contract. He might therefore take further and potentially

[29] Note that the mere fact that a beneficiary does not believe that potential violators will prefer the previolation state of affairs does not mean that the beneficiary believes a violation *will* occur. The beneficiary may simply believe that if his right is *not* violated, this will be for reasons unrelated to the burdens that could be imposed through enforcement – reasons such as the absence of any benefit from the violation or the absence of any opportunity to commit it.

[30] While this amount will often exceed any benefit the violator might derive from the violation, and therefore also be sufficient to produce a preference among potential violators for the previolation state of affairs, this will not always be the case. For example, the threat of an award of expectation damages would not deter the possibility of an "efficient breach" of contract if the gains that one party can capture through violation exceed the profit the other expected to earn on the contract.

unnecessary precautions against violation in order to ensure the realization of this gain, or without the guarantee of gain he might simply refuse to enter into the contract and thereby avoid the risk of violation altogether.[31]

3.2.1 Calculating Compensatory Effect

In order to determine whether a promise of compensation is sufficient to render the beneficiary indifferent to the possibility of violation, we must have a way of calculating its compensatory effect. In other words, we must have a method for determining which changes in well-being constitute a burden to the beneficiary and which constitute a benefit, and which burdens are attributable to the violation and which benefits are attributable to enforcement. We had to address similar evaluative and relational questions from the potential violator's point of view in order to measure the deterrent effect of the expected burden of punishment, but now that we are trying to measure the compensatory effect of the expected benefit of compensation, we must address these questions from the point of view of the beneficiary, for only if the beneficiary views the available measure of compensation as sufficient is he likely to be indifferent to the violation and therefore view his right as enforceable.

Because the beneficiary's conception of the good or notions of causation could be idiosyncratic, these determinations are somewhat unpredictable, but in most cases we will be able to arrive at adequate solutions to these evaluative and relational problems when attempting to measure the adequacy of compensation simply by applying our thin theory of the good and commonsense notions of causation. Using our thin theory of the good, we can be relatively certain that most beneficiaries will consider reductions in their income or wealth, lost economic and social opportunities, damage to their property, physical injury, pain, and emotional suffering, to be negative changes in well-being, for these injuries impair a wide variety of conceptions of the good. For the same reason, most beneficiaries will consider money to be a compensatory benefit for many types of injury, for this facilitates the pursuit of a wide variety of conceptions of the good, even if they do not recognize that money has a compensatory effect for every type of injury. Using our commonsense notions of causation, we can be similarly certain that most beneficiaries will recognize that not every injury, no matter how far down the causal chain, is attributable to the violation. They will generally only insist on compensation for the more immediate links in the causal chain before becoming indifferent to the violation, although how far down they actually go may depend on the particular beneficiary's perception of the severity

[31] The reason why we typically award expectation damages rather than mere reliance or restitution damages for breach of contract has long been a topic of debate. See, e.g., Fuller and Perdue (1936–7). The production of indifference may not be the *only* explanation for this practice, but it is one explanation nonetheless.

of the violation.[32] This, however, should be relatively predictable as well, for our sense of the relative severity of different violations is generally widely shared. Finally, using our commonsense notions of causation once again, it should be relatively straightforward to determine which benefits are attributable to enforcement action and which are simply the product of fortuitous or unrelated events.

Not all benefits that a beneficiary may attribute to enforcement, however, are properly considered compensatory. In order to be compensatory, the benefit must not only have the effect of offsetting an injury the beneficiary attributes to the violation, thereby moving the beneficiary closer to but not beyond the point of indifference between the previolation and postviolation state of affairs, it must also have this beneficial effect regardless of whether it is obtained from the violator or some third party. Punitive or exemplary damages, although sometimes benefits of enforcement, are accordingly not compensatory benefits unless the amount of compensatory damages awarded, perhaps because of limitations on the type of damages that may be recovered or limitations on the recovery of costs or attorney's fees, is not sufficient to offset the entire injury caused by the violation. Similarly, certain indirect benefits of enforcement, such as the deterrence of future violations by others, are not compensatory either, because even if the injury caused by the violation is not otherwise entirely offset, this beneficial effect would not be present if whatever produced it (perhaps an award of damages or the imposition of costs) were obtained from or imposed on someone other than the rights violator.

For example, a large consumer lender might incur substantial transaction costs to enforce a small debt even though the amount of any recovery will be less than the cost of enforcement. It would do this in order to discourage other small debtors from failing to pay their debts in the future. The lender would obtain a benefit in this case – the deterrence of future violations by others – and it might view this benefit as exceeding the cost of enforcement even though the amount collected would not exceed the amount of the debt. But this would not be a compensatory benefit, for if it were obtained from someone other than the rights violator (e.g., the state), its beneficial effect (the deterrence of future violations) would no longer exist. It would therefore not be considered in determining whether the amount of compensation available for the violation would be sufficient to render the beneficiary indifferent to the violation. Of course, this does not mean it would have no bearing on the enforceability of the lender's right to repayment at all. Even if legal action were

[32] Note that while social policy considerations may influence our determination of legal causation and therefore affect whether a particular item of damage is recoverable through judicial proceedings, such considerations are irrelevant when determining whether the beneficiary will be indifferent to the violation. For the beneficiary to be indifferent, he must be compensated for *all* of the injury he attributes to the violation, and not merely that portion of the injury for which he may obtain damages at law.

to produce no net compensatory benefit for the lender, such action would still deprive the violator of any benefit from the violation, and because it would produce a noncompensatory benefit for the lender, the lender's threat to take legal action would be credible. Faced with a credible threat of a sufficient measure of punishment, it is likely that most potential violators would prefer to remain in the previolation state of affairs. The lender's right to repayment might therefore be enforceable, but this would be because of the amount of punishment available, not the amount of compensation.

3.2.2 Problems with the Indifference Test

While a promise of compensation can render a right enforceable in theory, there are numerous obstacles to producing the requisite indifference in practice, and these problems may render the indifference test a far less practical measure of enforceability than it perhaps appears. For one thing, indifference is by its very nature harder to achieve. Creating a preference for the previolation state of affairs means ensuring that the threat of punishment meets or exceeds the minimum required. Creating indifference to the possibility of violation, on the other hand, requires far greater precision, for it means ensuring that the amount of compensation promised is neither more nor less than the requisite amount. For example, a threat of two months in prison for murder might be sufficient to make me prefer to remain in the previolation state of affairs, but most people would consider such a short sentence for such a serious crime unjust. I may therefore be threatened with a much more severe punishment, perhaps even death. Although the lesser threat would have been sufficient to create the requisite preference, the harsher threat doesn't make my preference any weaker – on the contrary, the threat of a more severe sentence makes my preference for the previolation state of affairs even stronger. Increasing the level of compensation, in contrast, does not make indifference, once achieved, more intense. If a certain level of compensation would make me indifferent between the previolation and the postviolation state of affairs, increasing the level of compensation would transform my indifference into a preference for the postviolation state of affairs, and would mean I would want a violation to occur. Indeed, the payment that produced this transformation would not properly be characterized as compensation at all, for what it really represents is a windfall. Perhaps such a payment might be justified on noncompensatory grounds, but even if it were, the availability of such a windfall would not only give beneficiaries an incentive to expose themselves to the kinds of violations that could produce it, it would also give them an incentive to encourage others to commit such violations. This, in turn, would make these and perhaps many other kinds of violations more likely to occur, for it would be hard to encourage some violations but not encourage others. Obviously, this is exactly the opposite of what previolation enforceability is trying to achieve. Using the

production of indifference as a test for previolation enforceability is accordingly highly problematic, for it would be counterproductive and therefore dangerous to overshoot.

Not only is a much more exact calculation required if we are to use indifference as an alternative test for previolation enforceability, such a calculation is also far more difficult to make. Difficult questions of valuation are likely to arise when dealing with injuries not so easily translatable into money. How much is that leg really worth to you? That oil painting of your great-grandfather? The family pet? What do we do if there is not some established market to which we can refer for guidance in our valuations? Regardless of the method used to translate such injuries into money, we may easily undershoot or overshoot the target of indifference. If I receive even a relatively modest amount of compensation for the loss of my leg, I may very much prefer the life chances that are available to me now that I have funds I can use to pursue a wide variety of projects to the life chances I had when I was poorer but physically intact. Of course, it is far more likely the opposite will be true – no matter how much compensation I receive I will probably prefer the previolation state of affairs, in which I had two legs, to the postenforcement state of affairs, in which I have only one, regardless of the increase in my wealth. The point is simply that when an injury is not repairable and the injured item cannot be replaced – whenever it is not possible to actually *restore* the previolation state of affairs but only to create a state of affairs in which the injured party is wealthier – indifference is going to be difficult if not impossible to achieve.

If we are nevertheless serious about making the beneficiary indifferent to the possibility of violation, it seems clear that we must promise him an amount of compensation that is equivalent to his subjective valuation of his loss. But there may be limits on both our willingness and our ability to make such a promise. I discuss these limits in some depth later in connection with my examination of compensation and postviolation enforceability, so I will mention them only briefly here. First, there is the concern that subjective valuations may be unreliable, especially when the alleged injury takes the form of pain and suffering, mental anguish, or emotional distress. Because these injuries are often not accompanied by physical or otherwise objectively verifiable symptoms, they are typically regarded as too easily subject to undetectable postviolation invention and inflation. Second, there is the concern that it is too difficult to translate sentimental value, loss of quality of life, loss of consortium, and other losses for which there are no readily ascertainable objective market values into awards of damages, and given these difficulties, our valuations of such injuries are at best going to be arbitrary and at worst driven largely by emotion, creating a danger that the amount of compensation ultimately awarded will tend to be excessive. Third, there is the concern that such large amounts of compensation would be required to fully offset pain and suffering and certain other forms of subjective injury in many cases that we simply cannot afford to monetize these

injuries, and therefore must restrict the amount of compensation available for them in some way.

In light of these concerns, the law favors objective over subjective valuations whenever objective valuations are available, and sometimes limits or even prohibits compensation for injuries that have a high component of subjective value or otherwise rely too heavily on subjective evidence to establish.[33] If my negligence damages your car beyond repair, for example, the measure of your compensation will be the price for which you could have sold the car in the current market before it had been damaged, even though you did not attempt to do so and even if you would not have been willing to sell it at this price. You are generally not entitled to recover damages for the pain and suffering caused by the negligent destruction of your property, nor are you entitled to any compensation for its sentimental value. And while you generally are entitled to recover for pain and suffering and emotional distress and other injuries that do not have objective values when they flow from intentional torts or from negligent injuries to the person and, in some jurisdictions, from intentional (but not unintentional) breaches of contract, the amount of damages you may recover for these injuries is often limited in some way. Many states impose a cap on the amount of noneconomic damages that may be awarded in medical malpractice actions, for example, and some states cap the amount of noneconomic damages that may be awarded in *all* tort actions.[34] What this means is that for many violations, a beneficiary may not receive full compensation if his injuries contain a significant component of subjective value. While not every violation threatens to cause such injuries, many do. Any rational beneficiary facing such a threat is therefore unlikely to be indifferent to the possibility that such a violation could occur.

Even if there were no limits on the amount of compensation available for noneconomic losses, however, indifference might not be possible to achieve. Being indifferent to the possibility of violation means viewing the previolation and the postviolation state of affairs as equally good and desirable. If we are to produce such indifference by awarding monetary compensation for any injury caused by a violation, we are essentially committed to the belief that these different states of affairs (and the different conceptions of the good they represent) can be expressed in terms of a single unit of value, namely wealth. But values, like people, are distinct. There are many different kinds of value that might be represented in the previolation state of affairs, and it is not at all clear that these different kinds of value can be reduced to a single supervalue, and especially not to amounts of wealth, assuming wealth even is a value.[35] Whenever a violation threatens to cause an injury that contains a significant component of

[33] See generally Fischer (1999) and McCormick (1935), esp. secs. 44, 88–9, and 145.
[34] For a comprehensive list of the caps currently in force, see Nates et al. (2004), sec. 3.06.
[35] But see Dworkin (1985).

subjective value, many beneficiaries will accordingly have incommensurability concerns.

There are a variety of forms these concerns can take, and I will mention only two.[36] One that we have already alluded to briefly is that the level of precision required for such comparisons is simply beyond our ability when it comes to injuries for which there are no established market values. It is one thing to say that a poke in the eye is better or worse than $1 million; it is quite another to say exactly what a poke in the eye is worth. The former is an ordinal ranking, and rough head-to-head ordinal rankings may indeed be possible even when the monetary value of a particular injury cannot be precisely calculated. But the latter requires a precise cardinal measurement, for if we are to produce indifference, we can neither underestimate nor overestimate the monetary value of the loss. Even if a beneficiary need not be concerned that there might be some artificial limit placed on his recovery, and even if he believes that some amount of money *could* make him indifferent to any injury, the difficulty of establishing the monetary value of the subjective component of his injury means he cannot be confident that the amount of compensation he *will* receive will be sufficient. Unless a beneficiary feels confident that it is not only possible to cardinally rank the monetary value of his injury, but also that his personal cardinal ranking is likely to be shared by those setting the level of his compensation, he is unlikely to be indifferent to the possibility of violation.

But there is another form of incommensurability that may be of even greater concern. In addition to the difficulty of devising an intelligible method of converting noneconomic losses into amounts of monetary compensation, many beneficiaries will find that certain kinds of losses and monetary compensation are simply incomparable. The problem here is that our very concept of certain kinds of value may preclude comparing states of affairs that we value in different ways. This is what Joseph Raz calls "constitutive incommensurability."[37] It is part of the fundamental nature of the way we value our children, for example, that we cannot contemplate exchanging them for cash.[38] To contemplate such an exchange would be inconsistent with a proper appreciation of the value of parenthood, and it would therefore be impossible to be indifferent between a world in which our children thrive and a world in which they die but we receive some amount of compensatory cash unless we were willing to fundamentally change the nature of the value we assign to avoiding such a loss. Some people might be willing to do this, no doubt, and those that were would still value their children, of course, but the *nature* of the value they assign to

[36] For a more comprehensive survey of the various forms incommensurability concerns can take, see Chang (1997).

[37] See Raz (1986), pp. 345–53.

[38] Raz (1986), pp. 346–8. A similar argument can be found in Warner (1992, 1995, and 1998) (arguing that it is in part constitutive of the attitude we designate as parental love that we will not measure our children's value in money).

their children would be fundamentally different than the nature of the value assigned by someone who was not willing to compare their children's lives to an amount of cash. Anyone who fell into the latter category, and no doubt many people would, could not be made indifferent to such a loss by the promise of monetary compensation.[39]

The same would hold true for a variety of other potential losses. A woman who is raped, for example, could be compensated, but it is unlikely that she could be *fully* compensated, for she would have to change the way she valued her right not to have sexual intercourse without her consent in order to be indifferent between that right and some amount of cash. Indeed, many beneficiaries would find at least some aspect of the nature of the value they assign to friendship, companionship, loyalty, respect, sexual and political autonomy, physical and mental well-being, bodily integrity, and perhaps even to works of art and the environment, incomparable to monetary value.[40] These beneficiaries could not continue to value the previolation state of affairs in the same way if they were willing to contemplate exchanging any of these incomparable aspects of its value for cash. The very suggestion that they should consider such an exchange, much less be indifferent between the preservation of these aspects of previolation value and some amount of cash, is likely to be offensive to them, for it would indicate a lack of appreciation of the nature of the value they place on these aspects of the previolation state of affairs.

Of course, value comes in complex packages, and there may be many different aspects to the value a beneficiary assigns to a particular previolation state of affairs. Even when some of these aspects are incomparable with cash, there may be many other aspects that are not. In these cases, part of the injury suffered will be compensable and part not. If you have negligently destroyed a Rembrandt, for example, the owner would no doubt insist on being compensated for the market value of her loss. But the destruction of that Rembrandt would also create another kind of loss. Many people would feel that there is value in the mere existence of such a work of art, and that this kind of value would not be comparable to cash. Indeed, many of us would argue that while you could buy or sell a Rembrandt, you could not (or at least should not be able to) buy or sell the right to *destroy* a Rembrandt. If the owner holds

[39] An alternative way of viewing people who refuse to consider exchanging their children for cash is that such people are indeed able to make the relevant comparisons of value, but simply find that they value children more than any amount of cash. No doubt some people do feel this way, but as Raz points out, others do seem to believe in incomparability, for if you merely saw children as worth more than any amount of cash you would object to selling them but not to buying them, and many people object to both. See Raz (1986), p. 345. In any event, even if the alternative view were a better account of the phenomenology of what is actually occurring in these cases, it would make no difference, because the production of indifference in these cases would still be impossible to achieve.

[40] See Sunstein (1994) and (1997), esp. pp. 235–43 and 250–2 (noting various ways in which people may feel that monetary value and other kinds of value are incomparable).

such views, or finds any other aspect of the painting's value and monetary value incomparable, then she cannot be fully compensated for her loss. And any beneficiary who believes she cannot be fully compensated for her loss cannot be indifferent to the possibility that a violation that threatens such a loss could occur.

But even when the injury is to a marketable good that has no significant subjective value and it is therefore possible for monetary compensation to fully restore the previolation state of affairs, indifference may not always be so easy to achieve. This is because there usually will be a difference between what the injured party could have realized if he were to have sold the good in the marketplace before it had been damaged and what he would have to pay if he were to go into the marketplace and purchase a replacement. Unless a seller is a merchant dealing in goods of that kind, he will typically not have ready access to willing buyers or otherwise have the resources and facilities necessary to market the good at issue in a way that ensures he will be able to sell it for its full retail price. He will either have to sell it through an established dealer, who will take a heavy percentage of the retail price, or sell the good at a large discount. In contrast, if he wishes to purchase a replacement good, a nonmerchant will typically have to pay full retail. Depending on the circumstances, then, compensating the beneficiary for the replacement cost of damaged goods could represent a sort of windfall.

To see how this could occur, assume you have negligently caused the destruction of my rare and valuable (but not irreplaceable) antique vase. In order to fully compensate me for this loss, you would have to pay me what it would cost me to purchase a replacement. But assume I am not a dealer in antiques, had no particular fondness for the vase, I never used it or took pleasure in looking at it or in displaying it to others, and I am short of cash. If I had tried to sell the vase as a private party, I would have realized a far smaller sum than I have now obtained from you as compensation. Even though all that I have received is what is necessary to allow me to restore the previolation state of affairs, I am not indifferent to the violation. On the contrary, upon receiving compensation, I very much prefer the postviolation state of affairs, for I can use the cash I have received as compensation in any way I see fit and I have far more of it than I could have realized if I had sold the vase myself. I have profited by the spread between the price at which I could have sold the vase before it was destroyed and the price at which I would be able to purchase a replacement, which is the measure of my compensation.

We could eliminate the potential for profiting from such a spread simply by requiring the injured party to actually replace the damaged item and not allowing him to use whatever compensation is awarded for other projects. This would ensure that we do not overshoot indifference. Why we do not do this is not entirely clear, for the spread could be significant in many cases. Perhaps it would simply be too impractical, intrusive, and expensive to police a rule

that restricted how compensatory funds could be used. Perhaps we view any profit from this spread as more than offset by the transaction costs of enforcement, at least in those systems that do not award such costs to the prevailing party. Or perhaps we are just not as concerned with the potential existence of this spread and with the possibility of overshooting indifference as we should be. Whatever the reason, however, the potential for such a spread between the sales price for a good in the hands of a nonmerchant beneficiary and its replacement cost raises further doubts as to whether the payment of full compensation can be relied on to produce indifference toward the violation, even when the previolation state of affairs rather than some surrogate can actually be restored.

Of course, it is far more likely that we will undershoot rather than overshoot even though the payment of compensation could fully restore the previolation state of affairs. This is because we are simply unlikely to take our professed goal of fully compensating the beneficiary for all injuries he reasonably attributes to the violation seriously enough to actually produce indifference except in a small minority of cases. For one thing, the transaction costs of engaging in enforcement and the delay and resulting lost time-value of money are unlikely to be fully recoverable in most systems. Even in systems that follow the so-called English rule, which awards attorney's fees and other costs to the prevailing party, the amount awarded is likely to be less than the amount incurred in many cases. It is also unlikely that compensation would be available for the stress and emotional cost of enforcement or for the time spent pursuing enforcement that the beneficiary could have profitably devoted to other projects, even though these are injuries that most beneficiaries would naturally attribute to the violation. Yet it is difficult to see how a beneficiary could rationally expect to feel indifferent to a violation if he knows that any of these costs will remain uncompensated. Unless we are willing to take the idea of full compensation seriously enough to compensate for all these injuries, we cannot rely on producing a rational expectation of indifference as an alternative test for establishing previolation enforceability.

What all this means is that there are significant limits on our ability to use the promise of compensation to make a right enforceable. While the promise of compensation will work in some cases, even when the previolation state of affairs cannot be restored, it will not work in all cases, even when the previolation state of affairs can be restored. And because it will not work for all beneficiaries and all violations, the promise of compensation can never be a reliable alternative for making rights enforceable in the previolation sense. Indeed, given the numerous obstacles to the production of indifference, it is likely that the promise of compensation will serve to make a right enforceable only rarely. In the vast majority of cases, if we are going to make a right or other restraint enforceable in the previolation sense, only the threat of punishment will do.

3.2.3 Indifference and Critical Risk

How concerned should we be that there seems to be so many obstacles to the production of indifference? To what degree does our inability to always use the production of indifference as an alternative method for establishing previolation enforceability present a problem for us? On first glance, it seems like this could be a serious problem indeed. In many cases, potential violators will have relieved themselves in advance of much if not all of the expected burden of punishment by obtaining insurance, apparently leaving only the beneficiary's previolation expectation of compensation to determine whether a right is enforceable or not. But on closer inspection, we can see that the situation is not as troubling as it seems. An important portion of the expected burden of punishment is not so easily avoided. Typically, the violator will only be able to shift the burden of having to pay damages, a form of punishment available through the invocation of legal remedies. But in many cases, this still leaves the violator subject to punishment through other means. When these means are considered it will often be the case that the violator can still be expected to prefer the previolation state of affairs. Indeed, a potential violator would not be able to obtain insurance unless the insurer believed the insured would continue to prefer to remain in the previolation state of affairs. Only where the expected benefit of committing the violation would be particularly great and the remaining expected burden of punishment, even undiscounted for the possibility of nonimposition, would be less, is the availability of compensation likely to be the critical factor in determining whether a right is or is not enforceable. It is in this atypical situation that the question of whether we can produce a rational expectation of indifference assumes particular importance.

Of course, the beneficiary could never be certain that the amount of compensation available will be sufficient to make her indifferent to every possible violation. For one thing, she may not be certain whether the injuries that would result from the violation would be legally cognizable or not. Even if we were committed to fully compensating all aspects of the beneficiary's injury, mistakes in the assessments of those injuries can easily occur, especially given the subjective and speculative nature of many of the consequential losses that flow from many forms of injury. The beneficiary could accordingly never be sure that we could accurately measure the extent of these injuries even if we tried to do so, and so could never be sure that she would be fully compensated for her injuries if a violation did occur, even if the injury was to a marketable good with an easily verifiable objective value. She might also not be sure that the right in question even exists or what circumstances would constitute a violation. Given all these uncertainties, the best she could do is calculate the probability that she would feel indifferent should a violation actually occur. As with the probability

of violation, whether this probability of indifference is sufficient to establish enforceability would depend on the particular beneficiary's level of critical risk. If the risk that the beneficiary would not be indifferent was below the beneficiary's critical level, the right would be properly considered enforceable. If the level of risk was too great, our test of previolation enforceability would not be met.

4

Measuring Enforceability in the Postviolation State of Affairs

Having articulated a test for determining whether the available measure of punishment is sufficient to render a right enforceable *before* it has been violated, and an alternative test for determining whether the available measure of compensation is sufficient to render a right enforceable *before* it has been violated, we must now look at whether these same or some different tests should apply when determining whether a right is enforceable *after* it has been violated. Recall that in the previolation state of affairs, we wanted to know whether the measure of enforcement available was such that the beneficiary would be willing to incur the risk of violation or, if incurring that risk were unavoidable, whether the beneficiary would be able to experience the risk without feeling unduly threatened and without feeling compelled to adopt elaborate precautionary measures. The amount of punishment available would be sufficient to satisfy this requirement, we decided, if the beneficiary rationally believed that it was enough to make potential violators prefer to remain in the previolation state of affairs. Alternatively, the amount of compensation would be sufficient if the beneficiary rationally believed that it was enough to make her indifferent to any violation that might occur. Our rationale for the sufficiency of punishment test, which we saw was the one most likely to be satisfied in the vast majority of cases, was that a potential violator who preferred to remain in the previolation state of affairs would be unlikely to violate the beneficiary's rights intentionally, and while she might commit an unintentional violation, she would at least have an incentive to take precautions against such violations to the extent this was rational and within her ability to do so. Our rationale for the sufficiency of compensation test, which we saw was likely to be satisfied in only a limited number of cases, was that a beneficiary who was indifferent to the possibility of violation would not consider the possibility of violation a risk because she would be able to obtain all that was important to her regardless of whether a violation did or did not occur. While we noted that a shortfall in either punishment or compensation could not be made up by an abundance of the other, and thus at least one of these tests had to be satisfied fully in order for a right to be considered enforceable, we

also noted that in most cases, the calculations required by these tests are subject to some uncertainty. Even if the beneficiary believes that potential violators will prefer to remain in the previolation state of affairs, she will likely believe that some risk of violation remains. And even if the beneficiary believes she will be indifferent to any violation, she will likely believe that some risk of falling short of indifference remains. Whether the beneficiary is nevertheless prepared to act *as if* her right will not be violated will therefore depend on whether the level of risk falls above or below the beneficiary's critical level, considering what is at stake in the particular decision situation, the probabilities of the various outcomes, and the beneficiary's risk preference. Only if the probability of violation or a lack of indifference is below the beneficiary's level of critical risk will she knowingly expose herself to the risk of violation.

Once we have moved to the postviolation state of affairs, however, the concerns that drove our tests for previolation enforceability no longer seem to apply. We no longer need a test designed to tell us whether a beneficiary will incur the risk of violation or experience that risk without feeling unduly threatened or compelled to adopt elaborate precautionary measures, for regardless of the risk and the precautions taken or not taken, a violation has already occurred. In developing our test for postviolation enforceability, we shall accordingly have to rethink the role that enforceability plays in making restraints operative in the world. To what extent is the deterrence of future violations an objective of postviolation punishment? To what extent is retribution? What exactly is retribution, and how do we measure retributive effect? Does the payment of compensation change the amount of retribution that would otherwise be due? What is the difference between the demands of retribution and the demands of postviolation enforceability? Can we derive a test for postviolation enforceability from our conception of retribution, and if so, how? What is the role of compensation in the postviolation state of affairs, and are there limits on our ability to compensate certain kinds of injuries? It is to these questions that we now turn.

4.1 The Role of Deterrence

Let us begin by looking more closely at the role deterrence plays in the postviolation state of affairs. In the previolation state of affairs, the threat of punishment was intended to deter violations. Once a violation has occurred, however, it is no longer possible to deter *that* violation. If punishment is to function as a deterrent in the postviolation state of affairs, it must be with regard to *other* violations – violations that have not yet occurred. The degree to which any particular instance of postviolation punishment can help deter *those* violations, however, depends on the degree of similarity between the circumstances of the current and potential future violation. This, in turn, depends on whether the rights involved are the same or similar or different, whether the violator is

the same or different, and whether the right is held by the same or a different beneficiary. There are several reasons why this is so. First, the more the rights involved are similar, the more likely it is that information regarding the measure of enforcement meted out for past violations will be considered relevant by future potential violators when they are forming their previolation expectations. Second, no matter how relevant the information, it can have an impact on a future potential violator's previolation expectations only if the potential violator has access to it. Although potential violators will often have such access, this will not always be the case, and access is obviously greatest when the current potential violator and the prior actual violator are one and the same. Third, a beneficiary with an established reputation for the vigorous enforcement of her rights is likely to act in conformance with that reputation if her rights are violated again. When forming their previolation expectations, potential violators will accordingly consider whether the beneficiary has such a reputation. A beneficiary whose rights are susceptible to future violation is therefore likely to be more concerned about her reputation for enforcement than one who is not in a position to have her rights violated in the same way or by the same violator again. Depending on how these three factors converge and interrelate, both the future deterrent effect of any instance of postviolation enforceability and the importance of this effect to the beneficiary will vary greatly in both nature and extent.

Given this interplay of factors, the role for deterrence to play in any calculation of postviolation enforceability is likely to be largest when the right involved is ongoing and capable of being violated by the same violator in exactly the same way. An example would include my right to quiet enjoyment of my real property free from physical invasion by you or persons or objects or even unreasonably obnoxious sounds or smells under your control. If you were in the habit of cutting across my property on your way to the train station every morning, practicing the tuba loudly late at night, or, more seriously, discharging pollutants onto my property, my primary concern in the postviolation state of affairs might be to prevent further violations, just as it was in the previolation state of affairs. In this case, our test for previolation enforceability would also be an appropriate test for postviolation enforceability. If I rationally believed that whatever measure of enforcement I actually could obtain, whether it was an injunction, an award of damages, some form of criminal sanction, or a combination of all three, was such that you would thereafter prefer to remain in the previolation state of affairs rather than violate my right again, I could consider my right against your trespass, tuba playing, or discharge of pollutants enforceable.[1] If I believed that the measure of enforcement available to me in the

[1] Whether the deterrence of future violations was indeed my primary concern would depend on whether the initial violation had caused any significant damage. In the trespass case, for example, it is likely that I will have suffered only nominal damage, and therefore the deterrence of future

postviolation state of affairs were not sufficient to produce such a preference, on the other hand, I would have no reason to believe you would refrain from repeating your violation and I would have to consider my right unenforceable.

Once we move beyond what are commonly thought of as property rights, however, rights that are amenable to repeated violation are relatively rare. Contract rights, for example, generally require a specified performance at a specified time, and therefore once violated are not capable of being violated again. If I refuse to pay for the meal I have just eaten in your restaurant, I have committed a violation and my continued refusal does not constitute a separate violation but merely a continuation of the first. The same would be true if I fail to timely deliver goods for which you have already paid. Because the time for my performance has come and gone, I could not commit the same violation again even if I wanted to. Of course there are exceptions. Sometimes a contract may call for repeated performance over a period of time. I may have agreed to appear in a play for some number of performances, to repay a loan by making a specified payment every month, or to provide various other goods or services on a regular basis. In these cases, a breach of a single periodic obligation can be repeated and it may be the case that the primary concern of the beneficiary following such a breach is to deter further breaches and obtain the promised performance. But even in these cases, the beneficiary will often have the option to treat the first violation as a material breach of the entire agreement, allowing him to look elsewhere to obtain whatever goods or services had been promised on a continuing basis, and he will be primarily concerned with obtaining compensation and perhaps retribution for any losses he suffers as a result rather than with deterring similar breaches in the future.

The same will generally be true of tort violations. Even when a repeated violation of the same right is technically possible, the circumstances will often be such that the probability of a repeat violation is so low that it will be of little concern to the beneficiary. After all, what are the chances the same beneficiary would be involved in a *second* road traffic accident with a car driven by the same negligent driver? And if you intentionally defraud me, I am not likely to rely on you again even if we subsequently do have occasion to interact. To the extent a beneficiary has any concern about deterring future violations in

violations might be my only concern. But in the pollution case, I may have already suffered substantial damage, and while deterring the further discharge of pollutants will no doubt be important to me, I may also have a substantial interest in obtaining compensation and even retribution for the injury I have already suffered. In this and other "mixed" cases, determining whether my right was enforceable in the postviolation state of affairs would depend not only on the satisfaction of the same test we applied to determine previolation enforceability, but also on the satisfaction of an additional postviolation test especially designed to address my desires for compensation and retribution. Exactly what this additional postviolation test might be is the issue we will take up in the next section of this chapter. For now, however, the only point I am trying to make is that there are some circumstances in which our test for postviolation and previolation enforceability could be the same.

connection with any particular act of enforcement, those concerns will usually relate not to violations of the same right by the same violator, but to violations of some other right by some other violator.

With regard to rights that are not capable of being violated by the same violator again, or at least not likely to be violated by the same violator again, the role of deterrence in the calculation of postviolation enforceability is far more limited. Take, for example, future potential violations of the beneficiary's other rights. For this category of violation, deterrence would appear to have some role because of what we might call the "reputation effect." Beneficiaries who allow violations of their rights to go unpunished may acquire a reputation for not enforcing their rights vigorously, and this can make future violations of their rights more likely. This is especially true where the current violator is also a potential future violator, for in this case he will have firsthand knowledge of such behavior, whereas other potential future violators may have none. But the beneficiary's concern for his reputation relates to his willingness to use the full measure of punishment available to him, rather than the sufficiency or insufficiency of the available measure. The deterrence arising from the "reputation effect" is therefore not really a matter of enforceability at all, at least as long as it does not suggest that beneficiaries as a class are unwilling or unable to utilize the full measure of enforcement available to them, in which case it suggests that the measure of enforcement actually available may be less than it happens to appear.

What is a matter of enforceability is whether the amount of punishment imposed for the current violation signals something about the measure of punishment that will be available should future violations of other rights by the same or other potential violators occur. This is most likely when the current and potential future violations are similar to some extent. But even when this is the case, the amount of punishment imposed for the current violation would contribute to the deterrence of future violations only if potential future violators come to know of it, and this may not always or even often happen. Sometimes the amount of punishment imposed will be widely known, but sometimes it will be known only by the parties directly involved, and sometimes it will be known only to a relatively small group of experts (presumably lawyers), who may or may not be consulted by potential future violators in advance, depending on the nature of the right and the stakes involved. And when the potential future violation and the current violation are *not* similar, which would be the case for most of the possible future violations, there is no reason to believe that potential future violators will draw any conclusions about the amount of punishment available for such future violations from the amount imposed for the current violation. For example, the fact that you were unable to punish me sufficiently for repeatedly cutting across your property is unlikely to change my expectation as to how much punishment I will receive if I breach some contractual agreement I have made with you or if I steal your car. The degree of punishment I expect

to receive for these very different types of violations depends primarily on the circumstances of these violations, and not on anything that I might learn from my experience of the enforcement of some prior but completely different type of rights violation. That experience is in most respects too general to have much influence on my future expectations.

Sometimes, however, the general conclusions that can be drawn from one particular instance of postviolation experience can have important effects on our future previolation expectations. This would be the case whenever the punishment available for a previous violation turns out to be limited not by facts specific to that violation but by some general broad-based principle that may have application to the future violation of many other rights. Under these circumstances, postviolation practice may have important ramifications for the deterrence of future violations. But even so, these ramifications relate to the enforceability of *other* rights, not to the enforceability of the right that has actually been violated. We will discuss the relationship between this kind of deterrence and enforceability later. For now, however, we need simply recognize that except in those special cases where the right at issue is subject to the likelihood of repeated violation, the goal of deterring future violations does not provide us with much guidance as to what measure of punishment, if any, must be available in the postviolation state of affairs for a right to be properly considered enforceable.

But this does not mean there are not other considerations from which a test for postviolation enforceability may be derived. Indeed, if we are unable to derive a test for postviolation enforceability from the goal of deterrence except in special cases, perhaps we can derive one from the goal of retribution. After all, deterrence operates only on future violations; the whole point of retribution is to justify punishment by reference to the violation that has already occurred. If we are trying to determine what amount of punishment, if any, is required for a right to be properly considered enforceable in the postviolation state of affairs, retribution might accordingly be a good place to start. But what exactly is retribution? How do its requirements differ from the requirements of deterrence? How much punishment does it permit? How much does it require? Is there a difference between the amount of punishment that retribution requires and the amount of retribution that is morally justified? It is to these questions that we turn our attention next.

4.2 Retribution Reconceived

There are two important differences between deterrence and retribution. The first is that we must adopt different points of view when making the comparative calculations these different functions of punishment require. The second is that we must include different factors in our comparative calculations depending on whether it is the deterrent or the retributive effect of punishment that we are

trying to measure. We touched on the first difference briefly at the beginning of Chapter 3 when we examined the role of punishment in the previolation state of affairs, but we will explore it now in greater depth. The second difference we will be encountering for the first time.

4.2.1 The Retributive Point of View

Selecting a point of view from which to measure the deterrent effect of an act or threat of punishment is unproblematic. A change in well-being cannot be a deterrent to future violations if the potential violator views that change as desirable, and even an undesirable change in well-being cannot be a deterrent if the potential violator does not understand what behavior will trigger the change. Because the wrongful behavior of potential violators is by definition what we are trying to deter, the only possible conclusion is that the evaluative and relational elements of punishment must be satisfied from the potential violator's point of view if an act or threat of punishment is to function as a deterrent.

When it comes to measuring the retributive effect of an act of punishment, however, selecting the appropriate point of view is more problematic. Indeed, there are four possibilities. We could conclude that the evaluative and relational elements must be satisfied from the violator's point of view in order for punishment to be retributive, just as they would for punishment to function as a deterrent. Alternatively, we could conclude that when it comes to deciding what acts will and will not be punitive, deterrence and retribution are different, and in order for punishment to have a retributive effect, the evaluative and relational elements must be satisfied from the beneficiary's not the violator's point of view. Or we could conclude that in the case of retribution, each element must be satisfied from *both* points of view – in other words, any change in well-being would have to be viewed as negative and as sufficiently related to the violation by both the violator and the beneficiary in order to be retributive. Finally, we could conclude that we should adopt an "objective" point of view, using some sort of "reasonable person" standard to determine whether the evaluative and relational elements are satisfied and ignoring the actual views of both the beneficiary and the violator should they differ from those of our reasonable person in any particular case.

The latter two possibilities can be disposed of rather quickly. Any conception of retribution under which a change in well-being had to be punitive from both the violator's and the beneficiary's point of view would be highly problematic, for there would inevitably be some occasions when the parties' respective points of view would be irreconcilable. While it is conceivable that there might be situations in which it would be impossible to impose retributive punishment that was *morally justified*, it is hard to envision circumstances in which it would be impossible to impose punishment that was *retributive*, even if unjustified. It may be morally wrong to punish the insane, for example, but it nevertheless

seems possible to punish them. The objective point of view, in turn, might be fine for the legislator who was trying to devise general guidelines for retributive punishments – indeed, it is difficult to see how such general guidelines could be developed in any other way. But a conception of enforceability must not only help us develop general guidelines for punishment, it must also tell us whether a particular right is enforceable in a particular case. This requires that we acknowledge the actual views of at least one of the affected parties, for the alternative is to settle for a conception of enforceability that merely generates idealized answers to idealized situations and tells us nothing about the extent to which it is possible to respond to an actual violation in a way that makes the particular restraint at issue operative in the world.

In order to determine which of the two possible points of view remaining is the correct one for determining whether a particular change in the violator's well-being is punitive, we first need to decide on the purpose of retribution, for only if we know what purpose retribution is supposed to serve can we determine whose point of view must be used to determine whether that purpose has been fulfilled. But specifying the purpose of retribution is bound to be controversial. A wide variety of purposes for retribution have been put forward over the years, some of which are inconsistent with one another, and a few theorists even deny that retribution serves any purpose at all. There is widespread agreement, however, that those who perceive themselves as having been injured by a rights violation have a desire to retaliate against those who have committed these violations, although the exact source of this desire is the subject of some debate. Some claim that the desire to retaliate is a primitive instinctual or emotional reflex that has become a fixed aspect of human nature through natural selection, for those who possessed it were more likely to survive in the state of nature and more likely to be successful in early organized society. Others claim that retaliation remains the most effective strategy that individuals intent on maximizing their own self-interest and perhaps even the good of their community could adopt, and that the desire to retaliate is accordingly not simply a primitive reflex reaction that we no longer need but cannot overcome, it is instead the continuing common deliberative outcome of a conscious process of strategic calculation and rational choice. Regardless of its source, however, the presence of such a desire for retaliation is a "fact on the ground" for which any theory of retribution must account.[2]

[2] Adam Smith takes the view that this desire for retaliation is given to us by nature, but he does not deny that it is also the most profitable strategy we could consciously adopt: "Resentment seems to have been given us by nature for defence, and for defence only. It is the safeguard of justice and the security of innocence. It prompts us to beat off the mischief which is attempted to be done to us, and to retaliate to that which is already done; that the offender be made to repent his injustice, and that others, through fear of the like punishment, may be terrified from being guilty of the like offence." Smith (2002), pt. II, sec. ii, ch. 1, para. 4, p. 92. Modern scientific studies not only confirm the continued existence of this desire for retaliation, they also establish that the desire to punish violators is not limited to the primary beneficiary of the right in question;

Given that this desire for retaliation is endemic within society, one purpose that retribution serves is to ensure that the desire is expressed in a way that will not simply fuel further conflict and deterioration of the social order but will cauterize the wound created by the violation and maximize the chances that previolation levels of social cooperation will be restored. In this sense, retribution is the flip side of deterrence. While deterrence uses acts and threats of punishment to influence the behavior of potential violators, retribution uses acts of punishment to influence the behavior of injured beneficiaries. It does this not by threatening to punish the beneficiary who retaliates in an excessive or unlawful manner (this is the function of deterrence), but by punishing the violator in such a manner and to such an extent that the beneficiary no longer feels a desire to retaliate in an excessive or unlawful manner. Both deterrence and retribution are accordingly aspects of social control. Through the former, we are trying to prevent rights violations from occurring. Through the latter, we are trying to influence the form and extent of the inevitable expression of the beneficiary's desire for retaliation, the objective being not to squelch that desire for retaliation, but to see that it is satisfied in the most socially productive manner possible. And if we are to do this, then we will have to assess the evaluative and relational elements from the beneficiary's not the violator's point of view, for only if the beneficiary views the change in well-being to which the violator is subjected as punitive and sees that change as sufficiently related to the violation will it act as an outlet for the beneficiary's desire for retaliation.

But even if the satisfaction of the beneficiary's desire for retaliation is *a* purpose of retribution, it may not be the *only* purpose, and it is possible that some other retributive purpose can be satisfied only if the evaluative and relational elements are assessed either exclusively or additionally from the violator's point of view. For example, numerous theorists assign a communicative, educative, or rehabilitative function to retributive punishment.[3] Postviolation punishment is communicative when it communicates society's disapproval of certain modes of behavior to the offender, it is educative when it educates the offender as to the standard of behavior required, and it is rehabilitative when it helps the offender change his "disposition to offend" and thereby makes it less likely that he will reoffend in the future. Theorists who assign one or more of these purposes to retribution *do* contend that the violator must view his change in well-being as undesirable and understand the connection between that change and his violation before any punishment imposed upon him may be deemed retributive, for only in such circumstances can these purposes can be fulfilled.[4]

secondary beneficiaries and other members of the primary beneficiary's social group seem to have the desire to punish violators too. See, e.g., Fehr and Gächter (2002).

[3] See generally Duff (2001), esp. ch. 1 and Simmons et al. (1995), esp. pt. 1.

[4] See, e.g., Hampton (1984) and Nozick (1981), pp. 363–97.

The mistake such theorists make, however, is they fail to keep the questions "what is retribution?" and "when is retribution morally justified?" separate and distinct. To answer the second question, we need to develop a conception of retribution that plays a justificatory role in our punishment practices. To answer the first, we need to develop a conception of retribution that plays an explanatory role in our punishment practices. While an explanatory conception may (but need not) be justificatory in whole or in part, and a justificatory conception may (but need not) be explanatory in whole or in part, the focus of each conception is different. A justificatory conception may explain little or none of our actual practice yet still have moral force, whereas an explanatory conception must explain a great deal of our actual practice if it is to have explanatory power. And while the presence of communicative, educative, or rehabilitative effects may provide a moral justification for retributive punishment, insisting that punishment must have one or more of these effects in order to be retributive leaves us with a rather poor explanation of our actual practice, for as we shall see, there are important instances where none of these effects are present. If we are going to define retribution rather than morally evaluate it, we must focus on what makes punishment retributive, and not what makes retributive punishment morally justified.

This does not mean that the question of moral justification is unimportant, that any of various justifications offered for our retributive practices are incorrect, or that whatever explanation we offer for our retributive practices may not also play a justificatory role and therefore also provide an answer to the question of moral justification either in whole or in part. It merely means that for purposes of finding a role for retribution in our conception of enforceability, it is analytically helpful – indeed, analytically necessary – to separate the question of definition from the question of justification. What we are looking for is a way of distinguishing punishment that is designed to have deterrent force from punishment that is designed to have retributive effect, and of explaining how the latter as well as the former helps us make restraints operative in the world. Only after we do that does the question of moral justification arise.

This, of course, is the same approach we took when examining the properties of deterrence. In that context, no one was tempted to conflate the questions "what is deterrence?" and "when is deterrence morally justified?" Why so many theorists seem inclined to conflate these questions when it comes to examining retribution is accordingly not easy to understand. Indeed, no theorist would contend that punishment must be morally justified in order to have deterrent force – it is precisely because punishment *can* have deterrent force regardless of whether the application of such force would be morally justified that the question of moral justification even arises. The same is true for retribution. Even when punishment does not produce communicative, educative, or rehabilitative effects, it can still give expression to the beneficiary's desire for retaliation as long it represents an undesirable change to the violator's well-being and

is attributable to the violation from the beneficiary's point of view.[5] Thus, even if the presence of communicative, educative, or rehabilitative effects were necessary for retributive punishment to be morally justified, their presence would be neither a necessary nor a sufficient condition for punishment to be retributive.

Indeed, there is reason to doubt that these communicative, educative, and rehabilitative effects of postviolation punishment are properly characterized as aspects of retribution even when they are present. Each of these effects relate to the behavior of potential future violators, especially but not exclusively the future behavior of the current violator, although the behavior of other potential violators is an important target of the communicative and educative effects of postviolation punishment as well. If we include these communicative, educative, and rehabilitative effects within the ambit of retribution, we risk being unable to explain how retribution and deterrence differ. But if we categorize these and any other effects that focus on the behavior of potential violators as aspects of deterrence, and categorize acts of punishment that focus on giving expression to the beneficiary's desire for retaliation as aspects of retribution, we have a way of distinguishing between these two functions of punishment that is actually workable and therefore potentially useful. If we want to make the distinction between retribution and deterrence meaningful, we need to avoid conflating elements of retribution with elements of deterrence and keep the appropriate point of view firmly in mind.

Distinguishing between deterrence and retribution on the basis of the different point of view each of these functions of punishment requires is not only useful, it is also necessary if we are to explain various aspects of our retributive practice, for we often do impose what we consider to be retributive

[5] I should note that while my explanatory conception of retribution bears some resemblance to the "expressive" theory of punishment, an early precursor of contemporary communicative theories, there are important differences as well. The essence of the expressive theory is that retributive punishment is a conventional device for the expression of moral attitudes of resentment and indignation, and moral judgments of disapproval and reprobation. See, e.g., Feinberg (1970), p. 98. The expressive theory differs from the communicative theory in that its focus is on the nature of the message being expressed, rather than on the message being received, and therefore unlike the communicative theory, the expressive theory does not suggest that a change in well-being is punitive only if it is punitive from the violator's point of view. But this is where the resemblance between the expressive theory and my explanatory conception stops. Moral condemnation is merely one of many possible forms of sanction, and while there might be some reason to focus on this particular means of enforcement when constructing a justificatory conception of retribution, adopting such a restrictive view when constructing an explanatory conception is problematic. Indeed, those who adopt such a restrictive view often find themselves forced to make untenable distinctions between "penalties" and "punishments" in order to account for administrative fines, awards of damages for strict liability offenses, and various other acts of "hard treatment" that seem to lack the requisite condemnatory feature. See, e.g., Feinberg (1970). Under my explanatory conception, in contrast, punishment need not take any particular form in order to be retributive. Retributive punishment simply gives expression to the beneficiary's desire for retaliation, and while this desire may (and no doubt often is) generated by moral considerations, at least in part, it need not be.

punishments even when the evaluative and relational elements that determine whether a change in well-being will be punitive are not satisfied from the violator's point of view. We would still sentence the murderer who finds the prospect of life in prison positively delightful but is absolutely horrified at the thought of having to sit in a comfy chair for five minutes to the former rather than the latter. We would not consider the fact that a serial killer genuinely prefers to die rather than spend his life in prison a reason to spare his life if he would otherwise be subject to the death penalty. And we would still think of the violator who comes to believe that imprisonment "was the best thing that could have happened to me" as having been retributively punished despite the fact that all things considered he regards that punishment as a positive experience.[6]

It is possible, of course, that a beneficiary's retaliatory desires may not be fully satisfied if she realizes that a particular violator is positively looking forward to his "punishment." But these desires do not have to be *fully* satisfied for the goals of postviolation enforceability to be fulfilled. All that postviolation enforceability requires is that the beneficiary's desire for retaliation be satisfied *enough* that she is unlikely to take further unlawful retaliatory action and cause potentially further disruption of the social order. No doubt most violators will find reductions in their wealth, restrictions on their freedom, or the ending of their life undesirable, so there will be much coincidence between the beneficiary's and the violator's point of view when it comes to evaluating the character of changes in well-being. But even though the beneficiary's desire for retaliation may be satisfied to a greater extent if the violator's change in well-being is undesirable according to his own conception of the good as well as the beneficiary's, the fact that we do consider a change in well-being punitive even when a violator has an idiosyncratic conception of the good shows that this is not essential. In determining whether the evaluative element is satisfied, it is ultimately the beneficiary's point of view and not the violator's that matters.

Of course, it could be the beneficiary, not the violator, who has the idiosyncratic conception of the good, but this is less likely. After all it is the violator, not the beneficiary, who has committed the violation and thereby called his conception of the good into question. The beneficiary's conception of the good is more likely to be widely shared, and even if the violator does not share it, he will almost certainly understand it. It is therefore more likely that both parties will accept the results of enforcement and the social equilibrium will be restored if these results are evaluated according to the beneficiary's point of view than if they are evaluated according to the violator's. Indeed, the violator is hardly likely to complain if he finds the change in well-being to which he is subjected desirable. Using the beneficiary's point of view to determine whether a change in well-being is undesirable and therefore punitive for purposes of retribution accordingly furthers what we have identified as the basic purpose of

[6] See Walker (1991), pp. 1–3.

postviolation enforceability by maximizing the likelihood of acceptance by all parties of the means and measure of enforcement employed.

It is also the beneficiary's and not the violator's point of view that determines whether the relational element of punishment is satisfied when the objective of that punishment is retribution. Indeed, if we were to insist that the relational element be satisfied either exclusively or additionally from the violator's point of view, this would mean there could be no such thing as covert retribution, because when retribution is covert the violator will not know what aspect of his behavior has led to the undesirable change in his well-being. Yet this is often the only retaliatory option open to beneficiaries susceptible to countermeasures,[7] and covert retribution is something that both our practice and moral intuitions would seem to allow.[8] Even if we were to decide that covert retaliation was for some reason morally objectionable, this would not make such retaliation non-retributive, for retaliation does not need to be overt to satisfy the beneficiary's desire for retaliation, even though this may be desirable for other reasons, and therefore does not need to be overt to lead to a restoration of the social order. So regardless of whether it may be morally desirable for the violator to understand why he is being punished, punishment is retributive as long as the requisite relational element is established from the beneficiary's point of view.

Having defended my explanatory conception of retribution, and explained how retributive punishment helps make restraints operative in the world, I want to touch briefly on the question of moral justification. While I do not propose to say much about this question, a few comments are necessary to ensure that it is clear how an explanatory conception of retribution and a justificatory conception would relate. The question of moral justification has two parts. The first part relates to whether the general practice of imposing retributive punishments can be morally justified, while the second relates to whether there are moral limits on the particular form and extent that retributive punishment may take. In answering the first part we are looking for a *prima facie* moral justification; in answering the second we are making an ultimate moral judgment. While a *prima facie* moral justification provides general moral support for the practice, an ultimate moral judgment tells us whether the form and extent of a particular instance of this practice conforms to our wider moral goals all things considered. Just as discouraging future violations provides a *prima facie* moral justification for deterrence, discouraging acts of unlawful retaliation provides a *prima facie* moral justification for retribution. And just as deterrence is subject to moral limits despite its *prima facie* moral justification, retribution is subject to moral limits too despite its *prima facie* moral justification.

There are, of course, many other *prima facie* moral justifications for retribution on offer. Some of these are more consequentialist in nature, such as

[7] See Baumgartner (1984), pp. 303–45.
[8] See Cottingham (1979), p. 245.

the communicative, educative, and rehabilitative effects we have already examined, and some are deontological, ranging from the rather vague assertion that violators simply deserve to be punished to the claim that punishing violators is intrinsically good to more developed justifications such as those provided by Kant or Hegel.[9] Kant derived a right to punish from the violator's rationality, reasoning that by engaging in the violation, the violator had consented to being punished in the form and to the extent provided by law.[10] Hegel derived a right to punish from the nature of the violator's act, reasoning that a wrong constituted a negation of the victim's freedom and rights, and a challenge to the existence and value of freedom and rights in general. Only through the equivalent punishment of the violator – the negation of a negation – could the wrong be annulled and the existence and value of freedom and rights be affirmed and restored.[11] While accepting any of these moral justifications is not *necessary* given the justification that discouraging unlawful retaliation already provides, there is nothing *inconsistent* about doing so.

There is also nothing inconsistent about accepting any of these moral justifications and adopting what I have identified as the retributive point of view. To operationalize the Kantian view, for example, one still needs a method for determining the form and extent of punishment to which the violator has given his consent. To operationalize the Hegelian view, one still needs a method for determining the form and extent of punishment that will be equivalent to and therefore a negation of the wrongful act. In each case, we still need to know which changes in well-being will count as punishment and which will not. Neither Kant nor Hegel expressly discussed which point of view should be used to resolve this question, but it seems unlikely that either would have opted for the violator's point of view given the overall tone and structure of their theories. Even if changes in well-being had to be evaluated from the violator's point of view under Kant or Hegel's theory, however, this would merely mean that both the violator's and the beneficiary's point of view would have to be satisfied if retributive punishment was to be within the additional *prima facie* moral justification provided by that theory. It would not mean that punishment would not be morally justified, for our consequentialist moral justification would remain, and more importantly, it would not mean that an act of punishment would have to be evaluated from the violator's point of view in order to be retributive.

There is one final point I want to emphasize before we move from our examination of the retributive point of view to some further issues of retributive mathematics. Traditionally, the distinction between deterrence and retribution has been seen as part of the debate between consequentialists and deontologists. The view that the purpose of retribution is to shape and limit the form and

[9] For a summary of the many theories on offer, see Cottingham (1979) and Walker (1999).
[10] See Kant (1996).
[11] See Hegel (1962), secs. 90–104, 214, and 218.

extent of the expression of the beneficiary's desire for retaliation might be a novel form of the consequentialist view, but it is a consequentialist view nonetheless. In adopting it, are we not simply begging the question in the debate between the different methods of moral reasoning on offer by assuming that a consequentialist account of postviolation punishment and not a deontological one is correct? To see why this is not the case, we must remember that the questions "what is retribution" and "when is retribution morally justified?" are separate and distinct. The debate between consequentialists and deontologists relates to the latter question, not the former. It is simply not possible to define what retribution *is* without referring to the potential or actual effect of the acts that are constitutive of that concept, just as it is not possible to define what deterrence is without referring to the potential or actual effect of the acts that are constitutive of that concept. While we can morally evaluate an act of punishment without regard to its potential or actual effects, we cannot identify an act as an act of punishment if it has no potential or actual effects, regardless of whether that act of punishment is intended as an act of retribution or a deterrent. By referring to these effects in the course of constructing our definition of retribution, we have accordingly done nothing to commit ourselves to any particular position in the debate between consequentialists and deontologists over the question of moral justification.

Of course, we have not left the matter there, for we have said something about the moral question too. Because both retribution and deterrence have effects, the threat or imposition of punishment can always be evaluated by using consequentialist moral reasoning, and we have indeed applied consequentialist reasoning to develop a basic *prima facie* justification for both deterrence and retribution. But while the *prima facie* moral justification for each form of punishment is a consequentialist one, the form and extent of punishment that may be threatened or imposed is still subject to moral restraints, both positive and negative, and these may be either consequentially or deontologically based, for there is nothing about adopting the retributive point of view that entails a commitment to one form of moral reasoning over the other. On the contrary, in order to apply either type of moral reasoning we must first have a way of measuring whether and to what extent postviolation punishment has a retributive effect, for only then can we determine whether this amount of punishment is also morally required or whether some moral limit has been breached, regardless of its source. And the only way to account for all our intuitions about when an act of punishment will have a retributive effect is to adopt the retributive point of view.

4.2.2 The Components of the Retributive Equation

The second important difference between deterrence and retribution is that different comparative calculations are required if we are to determine whether and to what degree these different functions of punishments are being served.

To calculate the deterrent force of an act or threat of punishment, we compare the benefit of the violation and the burden of punishment, assessing each from the violator's point of view and from an *ex ante* perspective. To calculate the retributive effect of an act of punishment, a comparison of different factors is required. The burden of punishment is again on one side of the comparative calculation, although in this case the burden is assessed from the beneficiary's rather than the violator's point of view and from an *ex post* rather than an *ex ante* perspective.[12] What should be on the other side of the comparative calculation, however, is open to debate. Under the biblical *lex talionis* (law of retaliation), the other side of the comparative equation would be the suffering caused by the violation, and the suffering imposed through punishment would be required to match the suffering caused by the violation in both nature and extent – "an eye for an eye, a tooth for a tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."[13] But the biblical approach has been the target of much criticism. Among other things, critics argue that trying to make the punishment fit the crime in both nature and extent is sometimes impossible and often impractical, and even when it is both possible and practical it can nevertheless be unjust. As Blackstone noted long ago in his *Commentaries on the Laws of England*,[14] theft cannot be punished by theft, defamation by defamation, forgery by forgery, or adultery by adultery. And what do you do when a one-eyed man maliciously puts out the eye of a man with two eyes, or vice versa? In the former case an eye for an eye seems too severe a penalty; in the latter it seems too slight.

In light of such difficulties, modern retributivists reject the apparent biblical insistence on strict identity between crime and punishment, but they do not reject the idea that the punishment should fit the crime in some meaningful sense. Some base their view on an alternative theory after rejecting *lex talionis*

[12] The switch in perspective is potentially important. From the *ex ante* perspective, the burden of punishment is often subject to some and sometimes to a great deal of uncertainty, which must be factored into our deterrence calculation. From the *ex post* perspective, we are trying to decide whether a specified amount of punishment will have the requisite retributive effect. Because there is no uncertainty as to the amount of punishment under consideration, this is not a factor in our retributive calculation.

[13] Exodus 21:24–5. See also Leviticus 24:17–20: "And he that killeth any man shall surely be put to death . . . And if a man cause a blemish in his neighbor; as he hath done, so shall it be done to him. Breach for breach, eye for eye, tooth for tooth. . . ." Interestingly, while strict equivalence is the general rule set forth in the Bible, the Bible also advocates various departures from this. The biblical punishment for adultery is death, and even when the prescribed biblical punishment fits the crime in form it is not always equivalent in amount. For example, "If a man steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep." Exodus 22:1. This may be an indication that some biblical punishments were set with deterrence more firmly in mind than retribution, for these latter crimes may have been particularly difficult to detect and if undetected were likely to be repeated, or it may be an indication that some crimes were believed to cause a degree of injury that went well beyond what could be replicated by performance of a similar act on the offender.

[14] Blackstone (1979), bk. 4, ch. 1, p. 13.

outright; others argue that it is not necessary to take the biblical formulation so literally, and that a plausible interpretation of *lex talionis* is that it merely requires rough equivalence in any event.[15] Both groups agree that instead of trying to match the punishment and the crime and replicate the injury caused by the violation precisely, punishment should be largely uniform, chosen from among a relatively small set of physical, financial, social, and moral penalties. This avoids the problems that arise from aiming for strict identity, but it raises problems of a different sort, for it requires that we "translate" one type of injury into another in many cases, and this type of translation can be difficult. The greater the difference between the injury caused by the violation and the injury to be inflicted as punishment, the more "incomparable" or "incommensurable" the two forms of injury may be,[16] and the more difficult this translation process becomes. For example, translating certain injuries into monetary penalties may be relatively unproblematic, for monetary penalties may often be set by reference to market prices, but there is no market for imprisonment, so translating injuries into terms of imprisonment may be far more difficult. These translation problems are by no means insurmountable, however, and in any event they also arise when we are trying to make the comparative calculation required when our objective is deterrence, so they are nothing new.

But modern retributivists also tend to deny that the suffering created by the violation is the proper object for comparison. The generally accepted view today is that the relevant object of comparison is not the degree of suffering caused by the violation, but the "moral gravity" of the violation. This includes consideration of the harm caused by the violation but is not necessarily dominated by it.[17] Intention is another factor – intentionally causing harm is morally more serious than causing the same harm negligently or accidentally. Motive also seems to be a factor. An intentional harm motivated by racial hatred is more serious than one motivated by jealousy. The identity of the victim is also relevant. The murder of a child is morally more serious than the murder of an old man even if the motives behind the crime are identical. Exactly how all these elements interrelate, however, is not entirely clear.[18] The calculation of moral gravity accordingly has a somewhat mysterious, intuitive quality to it.

However it may be formulated, using moral gravity as one side of our comparative equation creates numerous difficulties when we try to use it to

[15] See, e.g., Waldron (1992).

[16] Some writers use these terms interchangeably; others reserve *incommensurability* to refer to items that cannot be cardinally measured according to a common scale and *incomparability* to refer to items that cannot be ordinally ranked. See Chang (1997), pp. 1–4.

[17] See Hart (1968), pp. 233–4.

[18] See Nozick (1974), pp. 59–63, noting the various elements that can contribute to moral gravity and the difficulties encountered in deciding how these various components interrelate. Nozick's own approach is to define the amount of punishment that retribution demands as $r \times H$, where r is the degree of responsibility (meaning *scienter* or *mens rea*) of the violator and H is the harm caused by the violation. Nozick (1981), pp. 363–4.

determine how much retribution may be due. First, whatever incommensurability or incomparability problems we would encounter by translating many types of injuries into a small number of retributive punishments is multiplied many times over, for it is even more difficult to translate moral gravity (itself a compilation of difficult to compare considerations) into some amount of punishment than it is to translate one form of suffering into another. Indeed, while the consideration of moral gravity may work reasonably well for adjusting the *comparative* severity of punishments for a wide range of violations (robbery should be punished less severely than murder, attempts less severely than completed crimes), it is of little use when trying to decide where to start. No matter how morally serious the violation, no absolute minimum amount of punishment can be derived from that fact alone; some additional criteria must be supplied. Otherwise we could set the punishment for murder at five years in prison or fifty as long as once we picked a starting point we punished all less serious crimes less severely. Although it may be possible to derive anchoring points for this ordinal scale using formal rather than substantive methods, linking the most serious crime to the most serious punishment we are prepared to impose and working down from there,[19] the lack of any substantive connection between punishment and crime makes this method less than satisfying, and in any event it is useless for setting civil penalties. Using moral gravity as the other side of the comparative equation therefore remains highly problematic, even if we do not abandon consideration of the suffering caused by the violation entirely.

Moreover, it is not clear that using "moral gravity" as the other side of the comparative equation ultimately leads to anything different than a comparison of suffering in the vast majority of cases. All of the factors that contribute to moral gravity are factors precisely because they influence the overall suffering caused by the violation. Take two violations that are basically identical except for the level of intent involved. Even though the physical harm caused by each violation is similar, our normal responses to these violations will differ. The intentional violation is more emotionally disturbing than the negligent one, both to the beneficiary and to other members of society who learn of it.[20] A murder, for example, may create fear and anxiety throughout a local community, causing many people to revise what they perceive as the risk of social interaction and to adjust their behavior accordingly, whereas a negligent death may have none of these effects, and if it does, they are likely to be far less severe. Because of the greater range and depth of the suffering caused by the level of intent with which the violation was performed, the murder is potentially socially volatile in a way

[19] See von Hirsch (1993), esp. chs. 2 and 5.

[20] This seems to be the approach that Bentham followed. He argued that the degree of suffering caused by a violation was greater if the violation was intentional rather than negligent, or negligent rather than accidental, and that intentional violations were accordingly more pernicious. See Bentham (1996), ch. 12.

the negligent death is not.[21] If the motive behind the murder is especially pernicious (say it was motivated by racial hatred rather than greed or jealousy), it will be even more disturbing still, and its potential social volatility will be even greater. And if the victim is particularly defenseless, say a child, the ripples of emotional disturbance that travel though society will once again be even more profound and potentially more disruptive. In contrast, if the victim is particularly evil and unsympathetic, say a drug dealer or a pedophile, the emotional disturbance the murder causes in society at large may be rather limited indeed. In each case, whether we use some conception of moral gravity to determine the seriousness of a violation or use the extent of physical, psychological, and financial suffering the violation will inflict on society as a whole, the ordinal rankings we come up with are likely to be similar.

Of course, this requires that we reject a narrow definition of suffering, one that limits cognizable suffering to the legally compensable suffering of the beneficiary, in favor of a much broader definition of suffering, one that includes not only all the actual physical, financial, and psychological suffering of the primary beneficiary, whether legally compensable or not, but also all the physical, financial, and psychological suffering of any other members of the beneficiary's community who are affected by the violation and who for these purposes are properly treated as beneficiaries of the restraint at issue too. But there is good reason to opt for the broader definition, especially when it comes to violations of the criminal law. All members of the beneficiary's community benefit greatly from the sense of social stability that the criminal law provides, and suffer greatly from the fear and sense of social unease that criminal violations create. Preventing harm to these "secondary" beneficiaries is therefore an important objective of the criminal law. Indeed, the more that a particular violation threatens to harm these secondary beneficiaries, the more that criminal penalties for the particular violation are likely to be deemed appropriate, because compensating these beneficiaries will rarely be possible or practical given the subjective and widely dispersed nature of their injury. We could account for this kind of noncompensable injury by making it a factor in calculating moral gravity, but if we use a suitably broad definition of suffering, we can capture these injuries more directly and produce a more workable comparison for calculating retribution.

If a broad definition of suffering can capture the same wide range of injuries that can be captured by moral gravity but more directly, and the ordinal rankings generated by suffering and by moral gravity are likely to be similar, why is moral gravity and not suffering so often picked as the relevant basis for comparison? Perhaps our focus on moral gravity is simply a form of self-deception, arising because we are uncomfortable with the idea that punishment is a way of imposing suffering on the violator. If we think of punishment as reflecting the

[21] For a further discussion of how criminal acts are more socially volatile than mere negligent ones, see Becker (1974), esp. pp. 273–5.

moral gravity of the violation rather than the suffering it has produced, we avoid directly confronting the reality of what punishment entails. But if we are to develop a more useful conception of retribution, we must not be so squeamish. We must embrace what we are really doing, and if there are moral objections that can be raised to this, we should address them in the open and head-on instead of burying them within a complex calculation of moral gravity. Indeed, if the degree of suffering caused by a violation exceeds its moral gravity, this would simply give us a moral reason for limiting the amount of punishment that would otherwise be due. In this case, our nonmoralized definition of retribution tells how much punishment would be retributive, but our underlying moral theory imposes limits on the amount of retributive punishment that is justly due. By dealing with these issues separately, we are able to see more clearly what considerations are at work and how we balance them against one another, while if we collapse them into a calculation of moral gravity and use that to directly generate our ordinal scale, we obfuscate rather than illuminate what is really going on.

But is it really possible to separately evaluate the suffering caused by a violation and its moral gravity? Isn't it also possible that the degree of suffering caused by a particular violation will depend to some extent upon judgments about its moral character, just as judgments about its moral character will depend to some extent on the degree of suffering it has caused? If this is true, then judgments about the degree of suffering caused by a violation and judgments about its moral gravity are inextricably intertwined – not only is a violation that causes greater suffering often viewed as morally more serious, but a violation that is perceived as morally more serious causes greater suffering precisely because this is how it is perceived. In this case, focusing on the suffering caused by a violation does not produce a nonmoralized retributive calculation; it simply reports the consequences of our moral judgments, at least in part. To the extent these moral judgments are unreasonable, the suffering that is produced by them is not suffering that should be included in our retributive calculation, and we have no way to correct for this if we use suffering rather than moral gravity to determine the appropriate severity of punishment.

My response to this potential objection is twofold. First, there is reason to doubt that the objection correctly captures the phenomenology of what is occurring in these cases. The moral epiphenomenalist would say that if I find a violation particularly morally serious, it must be because of certain nonmoral facts about the nature of the violation. It is therefore not the judgment that the violation is particularly morally serious that causes me to suffer, but the nonmoral facts that underlie my moral judgment. The same nonmoral facts that cause my moral judgment cause me to suffer more; my moral judgment causes nothing on its own.[22] Even if one were to reject moral epiphenomenalism,

[22] For more on moral epiphenomenalism, see Harman (1986), p. 63 and Sturgeon (1986), p. 74–6.

however, and assume that moral judgments do have causal powers, this would not suggest that basing our retributive calculation on the degree of suffering a violation has caused is problematic. Remember, the amount of punishment actually imposed is subject to moral limits, and if some of the suffering caused by a violation is indeed the product of unreasonable moral judgments, then the place to correct for this is when we apply such limits, not when we define what amount of punishment would be retributive. Once again, only by separating the questions "what is retribution?" and "when is retribution morally justified?" can we be sure that we have given the relevant considerations the focus they are due.

One other possible objection to using a broad definition of suffering rather than moral gravity as the relevant basis of comparison is that this seems to suggest the murder of a popular footballer should be punished more severely than the murder of a friendless vagrant, when each victim has equal moral worth and the punishment for these crimes should be the same. In each case, however, the suffering of the victim would be the same, and while there might be greater suffering in society at large following the murder of the footballer, this is not necessarily true, for any murder has the potential to raise the level of fear and anxiety within the victim's community if it receives sufficient publicity. Granted, the murder of the popular footballer is likely to receive more publicity, and therefore be socially volatile in a way the murder of the vagrant is not, but considering this harm in determining the appropriate sentence does not imply that we are assigning the victims different moral worth. We are merely recognizing that one violation has caused more harm than the other. Indeed, if instead of the murder of a footballer, we were dealing with the assassination of a president or prime minister, we would surely want to adjust the penalty to reflect the social ramifications of such an act and would not treat this as implying we were assigning the victim special moral worth. In any event, if moral gravity is indeed $r \times H$, then we will rank the murder of the president, the murder of the footballer, and the murder of the vagrant differently regardless of whether we are using suffering or moral gravity to do so. Whatever one suggests about equal moral worth the other does as well, so this hardly seems a basis for preferring moral gravity over suffering as a basis for compiling ordinal rankings.

The inappropriateness of using moral gravity as our comparative is perhaps even clearer if we focus on civil rather than criminal violations. Moral gravity is naturally present where criminal violations are concerned because a certain minimum degree of moral seriousness is usually required before a violation will be considered criminal. While a significant degree of moral seriousness is also present when conduct constitutes an intentional tort, when it comes to other civil violations, moral blameworthiness is typically present only in lesser degrees and sometimes not at all. It is therefore a far less important factor when it comes to calculating the amount of retribution due in most civil

cases than the degree of suffering caused by the violation. For example, the same amount of damages is recoverable for breach of contract regardless of whether the breach is intentional or negligent or even accidental – the moral character of the violation is simply irrelevant. No moral blameworthiness is required for vicarious or strict liability in tort, or for trespass or conversion, and while a certain amount of moral blameworthiness is required for the tort of negligence, the harm caused by the violation and not its moral seriousness is the only directly relevant factor when it comes to calculating damages. And while punitive or exemplary damages are theoretically recoverable in the United States for intentional torts and sometimes even for recklessness or gross negligence, this is not the case in most other countries, even those whose systems are based on common law, and even in the United States such damages are rarely actually awarded, popular misconceptions to the contrary notwithstanding.[23] So when it comes to civil rather than criminal violations, and especially to violations of private law, the harm caused by the violation and not its moral seriousness is the most important factor in determining the extent of damages recoverable in the vast majority of cases.

This may be why talk of retribution has all but dropped out of any discussion of enforceability that arises in the context of civil rather than criminal law. Our insistence on treating moral gravity as the relevant comparative for purposes of retribution has led us to conclude that retribution has no place in the enforcement of civil violations. Instead, where civil violations are concerned, we have replaced the concept of retribution with the seemingly more palatable concept of *corrective justice*, which does focus on the harm suffered by the beneficiary but does so in the context of determining the amount of compensation due rather than the amount of punishment to be imposed. This, in turn, has encouraged the view that criminal and civil law are two separate and independent realms, one focused on the punishment of wrongs and the other focused on the compensation of harms. But this "great divide" between the civil and the criminal law is wholly artificial. If we reject the use of moral gravity as the proper basis for calculating retribution and replace it with a suitably broad definition of suffering, we can produce a nonmoralized retributive calculation from which both civil and criminal remedies can be derived. By reinventing retribution as a nonmoralized concept with application to both civil and criminal law, we can see that instead of voicing different concerns and pursuing different objectives, both bodies of law represent a joint effort to render rights enforceable, and the different remedies that each body of law provides are complimentary tools to help ensure that this single objective of enforceability is met.

The way our nonmoralized conception of retribution does this is by showing how the functions of compensation and punishment are related. If we begin with

[23] See Rustad (1998).

the idea that retribution requires a comparison of the burden of suffering caused by the violation and the burden of suffering to be imposed through punishment, we can see how the payment of compensation affects the amount of retribution due. When full compensation is not only available for the beneficiary's injuries but also actually paid, the beneficiary will by definition be made indifferent to the violation, and no retributive punishment would be due. But as we shall see later when we examine the role of compensation in the postviolation state of affairs, there are limits on the type of injuries for which compensation will be available, and even when full compensation is available, it will not necessarily be paid. When the beneficiary is not (or due to the nature of the violation cannot be) fully compensated for her injury, some punishment would be due under our retributive calculation, but the amount would be reduced to reflect the amount of compensation actually paid. Only the beneficiary's *post*compensation suffering, not her *pre*compensation suffering, is to be translated into an equivalent amount of retributive punishment, even if the source of the compensation were not the violator but an insurer or even the state, for regardless of its source, the effect of compensation (the reduction of the beneficiary's suffering) is always the same. Retribution accordingly entails no absolute minimum amount of punishment. We cannot assume that *any* retributive punishment is due until we know the nature of the suffering caused by the violation and the extent to which it can be and actually is reduced through the payment of compensation. The amount of punishment required by retribution is simply whatever amount ultimately proves necessary to make the violator's suffering equivalent to the uncompensated suffering of the beneficiary.

Remember, however, that the amount of punishment required by our retributive calculation is not necessarily the amount of retributive punishment that would be morally justified. These questions, let me emphasize once again, are separate and independent. Just as moral considerations place certain limits on what we may do in the name of deterrence (we may not punish the innocent, we may not impose an amount of punishment that is out of proportion with the offense), moral considerations place limits on what we may do in the name of retribution. Some methods of producing suffering in the violator will be regarded as morally impermissible, although which methods these are will vary from society to society and perhaps even from individual to individual within a particular society. The method most universally regarded as morally impermissible would presumably be torture,[24] but other methods of producing suffering in the violator could be regarded as morally impermissible as well. Collective punishment – producing suffering in the violator by punishing friends or family

[24] While some people have recently offered moral justifications for the limited use of torture as an interrogation technique in the wake of recent events, this view remains highly controversial, and even those who advocate the limited use of torture as an interrogation technique do not contend that torture could be morally justified as a form of retribution. See generally Levinson (2003).

or other members of the violator's community for whom the violator feels a sense of responsibility or attachment – would be another method of producing suffering in the violator that would be widely although perhaps not universally condemned as morally impermissible. And many people would view capital punishment as not only morally repugnant in form, but also as morally excessive in amount, even when the measure of suffering to which the beneficiary has been subjected by reason of the violation can be equaled only if the violator is put to death.

Our project, however, is to determine the amount of postviolation punishment that must be imposed for a right to be considered enforceable in the postviolation state of affairs, *not* to determine the amount of retribution that would be morally justified in any particular situation. These projects are separate and distinct, and much confusion results from their inappropriate conflation. Only after we have decided how much punishment *enforceability* requires need we concern ourselves much with moral limits, for it may be that the amount of punishment required by enforceability is within these limits even though the amount required by retribution may not be. Because the exact moral limits on retribution are likely to be controversial, it is better to avoid such questions until it is absolutely necessary that we address them.

4.2.3 Calculating Retributive Equivalence

Having determined that retributive punishment is the imposition of an amount of suffering equal to the uncompensated suffering of the beneficiary, we arrive at the question of how we are to calculate retributive equivalence. There are two parts to this calculation. First, we need to determine the amount of uncompensated suffering that is attributable to the violation. This tells us what we need to equalize. Second, we need to determine the amount of suffering that is attributable to punishment. This tells us whether the relevant suffering has been equalized. While we have already decided that the punitive *character* of a change in well-being is to be determined from the beneficiary's point of view, the questions we are addressing now are slightly different. The first question relates to the amount of suffering caused by the violation, not the amount of suffering caused by punishment, and the second relates to the *extent* of the suffering produced by punishment, not its character. We will address each of these questions separately in turn.

Calculating the amount of suffering caused by the violation is relatively straightforward. Because it is the beneficiary's instinct for retaliation we are trying to satisfy, we must determine what suffering the beneficiary attributes to the violation from the beneficiary's point of view, using the beneficiary's conception of the good and commonsense notions of causation. This is how, for example, we might hold violators responsible for suffering caused by acts they neither knew about nor would have approved of if they had, such as acts

committed in furtherance of a conspiracy or a felony murder,[25] even though these acts might have been separate and independent from the criminal enterprise and even counterproductive to it if we were to look at the matter from the violator's point of view. It is also how we might hold a violator vicariously or strictly liable for certain civil violations even when there was nothing the violator could have done to prevent the violation from occurring. Of course, the range of consequences for which the beneficiary may seek retribution is subject to moral limits, and if the beneficiary's causal determinations transgress these limits, there may be moral reasons for excluding a particular element of suffering from our retributive calculation. But the application of those limits would take place *after* the initial calculation of the suffering to be equalized from the beneficiary's point of view. Indeed, if we had to establish the requisite causal connection either exclusively from or also from the violator's point of view, it is likely that the scope of criminal and even civil responsibility for many violations would be so narrow that there would be many instances where the beneficiary's desire to retaliate would remain unsatisfied, for there would be many circumstances in which the beneficiary would blame the violator for injuries that the violator would view as caused by someone else. This in turn, would encourage beneficiaries to retaliate outside the law, and rather than increasing the chances of a restoration of the social order, we would be decreasing them, because many beneficiaries would be unwilling to accept the fact that no lawful retaliation was available to them.

But moral considerations also come into play in other, more subtle ways in the course of calculating the degree of suffering for which the beneficiary may legitimately hold the violator responsible. For reasons that we will discuss in greater depth when we examine the limits that may apply to our ability to compensate for certain injuries, the greater the moral gravity of the violation, the more likely we are to be willing to allow the beneficiary to recover damages for pain and suffering and other similarly subjective injuries that are caused by the violation, despite the risk that these injuries may be fraudulently inflated. The greater the moral gravity of the violation, the more likely it is that these injuries have indeed occurred, and this makes the beneficiary's claim to recompense much stronger, while the violator's concern about the possibility of fraudulent inflation seems correspondingly weaker and less reasonable. Allowing the beneficiary to legitimately include such subjective injuries in his side of the retributive equation in such cases therefore maximizes the chances of acceptance by both parties. Moral considerations also influence our commonsense notions

[25] A violator is generally guilty of felony murder if any death occurs during the commission of a dangerous felony, no matter who was the immediate cause of that death or how it came about, as long as the death was in some sense foreseeable. For example, if one of several bank robbers shoots and kills a bystander, the other robbers would each be guilty of felony murder, even if they did not know that their compatriot was armed and would not have participated in the robbery if they had. See generally LaFave (2003), sec. 14.5, pp. 744–65.

of causation, making us willing to treat a more remote range of consequences as part of the suffering to be included in our retributive calculation when the moral seriousness of the violation is particularly high.[26] For example, consequential damages are recoverable for breach of contract, which does not require proof of fault, only when they are foreseeable both in nature and extent,[27] whereas even unforeseeable damages may sometimes be recoverable for torts.[28] And if the tort is particularly morally pernicious, causing a deeper degree of suffering to a wider degree of beneficiaries, we may even allow the recovery of punitive or exemplary damages to ensure that all the suffering caused by the violation is equalized through retribution. While the degree of suffering for which the violator may legitimately be held responsible is therefore somewhat flexible, this flexibility is again designed to maximize the chances of acceptance by both parties.

Once we have determined the amount of suffering that the beneficiary may legitimately attribute to the violator, we come to the second part of our retributive calculation. Now we must determine what extent of punishment to impose to produce the requisite retributive equivalence. For reasons that we have already discussed, the retributive *character* of punishment must be evaluated from the beneficiary's rather than the violator's point of view. This means that we determine whether a change in well-being is positive or negative (and therefore punitive) by reference to the beneficiary's conception of the good, and determine whether the negative change in well-being and the underlying violation are sufficiently connected to satisfy the beneficiary's instinct for retaliation by reference to the beneficiary's commonsense notions of causation. But should the *extent* of retributive punishment be determined from the beneficiary's point of view as well?

If what we are trying to do is produce the same degree of suffering in both the beneficiary and the violator, why not determine the amount of suffering each experiences from their own respective point of view? Indeed, using such a dual point of view would seem to be the only way to ensure that both beneficiary and violator suffer equally, although we would have to overcome all the

[26] Indeed, it is precisely because our commonsense notions of causation have moral considerations embedded within them that many theorists argue that we often conflate the factual question of causation with the social policy question of the proper scope of legal liability. See, e.g., Wright (1985, 1988, and 2001). While some believe this makes our commonsense notions problematic, others disagree. See, e.g., Hart and Honoré (1985). Regardless of whether it is both possible and proper to treat these questions as separate and distinct for purposes of determining the proper scope of legal liability, however, our commonsense notions are what trigger our instinct for retaliation, and it is therefore our commonsense notions that drive our retributive calculations.

[27] For a discussion and some criticism of this rule, see Epstein (1989).

[28] While the plaintiff must be foreseeable for recovery in tort, as well as the type of injury, the extent of the plaintiff's injuries and the manner they came about need not be. See generally Jones (2002), pp. 266–79 and Dobbs (2000), pp. 463–70.

familiar problems of making interpersonal comparisons of utility.[29] But aside from having to overcome these problems if we adopted this approach, we would also find ourselves once again at the mercy of violators who had idiosyncratic conceptions of the good. We cannot equalize degrees of suffering if the violator views the form of punishment imposed as entailing no suffering at all. If we are going to determine the retributive character of punishment by reference to the beneficiary's point of view, we are going to have to determine retributive equivalence by reference to the beneficiary's point of view as well.

Another reason why we would not want to determine the amount of retribution due by reference to the violator's point of view, either instead of or in addition to the beneficiary's point of view, is that this would encourage us to seek out and impose retributive punishments that were individually tailored to match the violator's own personal vision of hell. There are several reasons why we should find this objectionable. First, to effectuate such a punishment, we would need a degree of access to the violator's psyche that is unlikely to be provided voluntarily and, absent the invention of some sort of mind-reading device, could be obtained involuntarily only by first imposing a more universalized form of punishment, leaving little work to be done by a more personalized form even if we were ultimately able to discover enough about the violator to identify what this should be. Second, even if we could use some sort of mind-reading device, it is not clear that we would have any right to do so. Apart from revealing the direct motivation for the violation, we tend to accept that the violator retains the right to keep his thoughts and fears private, and does not forfeit this right by reason of his violation. Third, even if there were ample external evidence of the violator's individual fears and sensitivities, diverting our creative energies to designing personalized punishments might have an undesirable effect on our own character. We would be turning our natural ability to empathize, an ability that otherwise encourages social cooperation and understanding, into a weapon, and we would naturally begin to take pride or pleasure in the punishments we had devised, and perhaps even begin to revel in the suffering of others rather than be disturbed by it. Once such changes to our character began to occur, there would also be an increased danger of vindictiveness, for the temptation to overenforce would be greater when the suffering of others is a source of pleasure and not merely a necessary method of social control. This, in turn, would undermine rather than further the purposes of enforceability, for vindictive punishments are more likely to inflame social conflict than resolve it.[30]

[29] The literature discussing these problems is enormous. See, e.g., Elster and Roemer (1991) and the sources cited therein.

[30] It is important to keep this distinction between vindictiveness and retribution firmly in mind. Vindictiveness is the desire to inflict suffering on the violator *simply to see him suffer*. Retribution is the desire to inflict suffering on the violator that is equal to the uncompensated suffering caused by the violation *from the beneficiary's point of view*. While both desires include a willingness

What this means is that no adjustments can be made to the amount of retribution due to account for the differing dispositions of different violators, even though these may result in hypersensitivity or insensitivity to certain forms of punishment. If we are to determine retributive equivalence from the beneficiary's point of view, we cannot adjust the character or extent of the punishment imposed either up or down according to the violator's subjective conception of the good. Thus, the claustrophobic violator would not get less time in prison than the violator who prefers confined spaces, nor would the miser receive a smaller fine than the profligate spender. Both the retributive character and the amount of punishment necessary to establish retributive equivalence would have to be determined from the beneficiary's point of view.

Nevertheless, using the beneficiary's point of view to determine both the retributive character and the amount of punishment due does not mean that the violator's actual circumstances and moral character are irrelevant to the equivalence calculation. Indeed, these factors can come into the beneficiary's equivalence calculation in a variety of ways. First, the beneficiary may consider the violator's individual circumstances in determining the amount of punishment the violator should receive, for unlike dispositions, circumstances are objective and may be considered without adopting the violator's point of view. Once the violator's individual circumstances are taken into account, different amounts of punishment may be necessary in order to produce the requisite degree of suffering in different violators according to the beneficiary's point of view. For example, it is not only relevant that a poor man suffers more than a rich one from whom the same amount is stolen when determining retributive equivalence, it is also relevant that regardless of his idiosyncratic dispositions, a rich violator is in a position to suffer less than a poor one when the same fine is imposed. The beneficiary may accordingly properly demand that we levy greater fines on a rich violator than we levy on a poor one, and impose longer prison sentences on the hardened criminal than we impose on a first offender, to meet the demands of retributive equivalence.

Second, both the violator's circumstances and his moral character may affect the *distribution* of the requisite amount of punishment over the various forms of punishment available. Violators who have suffered or will suffer moral or social

to impose punishments even at some cost, and both are triggered by violation, vindictiveness is potentially unbounded, for it has no objective other than making the violator suffer. Retribution, in contrast, has both a different and a more precise objective. Instead of focusing on making the violator suffer, retribution focuses on making the violator experience a certain kind of change in well-being, and not on how the violator reacts to this experience. Both the form and the extent of this change in well-being are bounded by the change in well-being the beneficiary has experienced, for the objective of retribution is to subject the violator to an equivalent experience. It is the expression of this bounded desire for retaliation that we wish to encourage, not the unbounded desire, for retributive punishments are more likely to allow a return to previolation levels of social cooperation after enforcement is complete, whereas vindictive ones are more likely to preclude this.

or automatic sanctions will need to be subjected to lesser amounts of additional punishment in order to ensure that the demands of retributive equivalence will be met. This is why we typically impose lesser fines or terms of imprisonment on violators who make sincere expressions of moral regret,[31] or who will lose their license to practice law or medicine as a result of their conviction or suffer other collateral professional, social, or economic consequences.[32] It is also why we might feel that the reckless driver who loses his legs when his car smashes into another needs less additional punishment than the reckless driver who walks away from the crash unscathed. In each of these cases, the legal sanctions imposed on the violator would be adjusted to reflect the fact that whatever amount of punishment our formula for retribution requires, some of it has already been meted out through other methods. The *amount* of punishment due under our formula for retribution would not change in any of these cases, only how that amount is to be distributed over the various forms of punishment available. The extent to which such adjustments are appropriate would be determined from the beneficiary's point of view, but that view would be informed by a consideration of the violator's actual circumstances and moral character.[33]

Of course, not all theorists would agree that punishment that is self-inflicted or automatic or – even more restrictively – not inflicted by officials should count toward determining whether the violator has received the amount of retribution due, despite our practice to the contrary. Some theorists, for example, exclude any punishment that is not intentionally administered by human agents in response to a violation from their very definition of retribution.[34] Others argue that unless it is administered by public officials, an act of "punishment" does not constitute punishment at all.[35] But even though both human agency and official agency are usually attributes of retribution, H. L. A. Hart argues that retribution may sometimes or secondarily include punishment that is administered in other

[31] See Hutchison et al. (2004), p. 1368.

[32] Such a reduction in other penalties would not be appropriate, of course, when the violator's professional, social, or economic position was an enabling factor in the violation. In these cases, any professional, social, or economic consequences would be the direct result of the abuse of his position, rather than the collateral effects of a criminal conviction, and they would be independently justified by the nature of harm such violations necessarily entail. Cf. *Koon v. United States*, 116 S. Ct. 2035, 2051–3 (1996) (police officers convicted of beating Rodney King not entitled to sentence reduction despite fact that their conviction also entailed the loss of their careers, for their offense was committed "under color of law").

[33] One consequence of this is that the beneficiary is necessarily under some obligation to consider the circumstances and moral character of the violator before calculating what amount of retributive punishment is due. The scope of this obligation, however, is fairly minimal. It entails an obligation to consider mitigating or aggravating factors brought to his attention, and perhaps (under certain circumstances) an obligation to conduct a reasonable investigation into the existence of such factors, although how much investigation (if any) is reasonable will vary greatly depending on the circumstances of the violation and the form and extent of the enforcement action to be taken.

[34] See, e.g., Nozick (1981), p. 369.

[35] See, e.g., Hobbes (1996), ch. 28, pp. 214–15.

ways, and he warns against using the central or typical case as a "definitional stop" in arguments about what counts as retribution.[36] Given the effectiveness of self-inflicted, automatic, and unofficial sanctions, we would do well to heed Hart's warning. Because moral, social, and automatic sanctions can provide a powerful deterrent to wrongful behavior, it seems irrational to ignore their existence in determining what form and degree of other sanctions are necessary to create the requisite deterrent. And if we are going to consider these sanctions in our calculation of deterrence, it is inconsistent to exclude them when we come to retribution.

If the exclusion of self-inflicted, automatic, and unofficial sanctions from our calculation of retributive equivalence would be irrational, however, why do so many theorists insist on this? The answer seems to be that they refuse to count such sanctions because they find these sanctions do not further the purpose they assign to retribution as its moral justification. But the fact that self-inflicted, automatic, or unofficial sanctions do not fulfill some specific moral goal should be regarded as a sign that retribution has some other purpose in addition to the one specified, and not as evidence that such sanctions are not retributive. If one purpose of retribution is to satisfy the beneficiary's instinct for retaliation and thereby allow a restoration of the previolation level of social order, then there is no reason to exclude any form of sanction that might contribute to such satisfaction when calculating the extent of additional punishment required to establish retributive equivalence. Indeed, it may be morally required that we include such sanctions, for they undeniably form part of the moral landscape on which our moral intuitions regarding the appropriate degree of retribution must be formed.

What this means is that both the form and the amount of retribution due are situation-specific in the sense that they depend on (1) the actual suffering experienced by the beneficiary as a result of the violation, determined from his subjective point of view using his conception of the good and commonsense notions of causation, and (2) the suffering that someone in the violator's circumstances and with the violator's moral character would undergo as a result of the imposition of the available forms of punishment, if the violator had the beneficiary's conception of the good, once again applying the beneficiary's commonsense notions of causation. Of course, when setting penalties for a particular violation in advance, the legislature must use a more objective approach. The legislature must estimate how much suffering a typical beneficiary could be reasonably expected to endure as a result of the particular violation, and then devise a punishment that would impose an equivalent amount of suffering on a typical violator. Because it will usually have insufficient information to determine the precise amount of retribution due, however, all the legislature can really do for many violations is make a range of penalties available. If the

[36] Hart (1968), pp. 5–6.

legislature has done its job well, the amount of punishment actually required under our formula for retribution will fall within this range, but outside a few special cases, we cannot calculate the precise amount of retribution due without regard to the actual circumstances of the violation, the actual suffering of the beneficiary, and the actual circumstances and moral character of the violator.[37] This does not mean that objective considerations of reasonableness have no role to play in setting the amount of punishment ultimately imposed upon the violator. For reasons that we shall discuss in greater depth in just a moment, the subjective calculation of the amount of punishment due under our formula for retribution may have to be adjusted to meet certain objective requirements in order to be a suitable test for enforceability. But if we are to see these objective considerations at work and understand the role they play in the calculation of postviolation enforceability, we must recognize that their application is part of a separate operation, and not collapse them into our calculation of retribution.

4.3 Retribution and Postviolation Enforceability

Now that we have a better understanding of the differences between retribution and deterrence and the reasons why retribution plays a central role in the postviolation state of affairs, we need to consider the relationship between retribution and postviolation enforceability more deeply, for the two are not necessarily synonymous. We have defined retribution with the goals of postviolation enforceability in mind, but several questions remain. First, is the amount of punishment required by retribution *sufficient* to establish postviolation enforceability? Second, is this amount of punishment *necessary* to establish postviolation enforceability? And finally, if the amount of punishment required by retribution is not a necessary condition for postviolation enforceability, what amount of punishment is required, and from what can this requirement be derived?

4.3.1 Retribution as a Sufficient Condition

In order to determine whether the amount of punishment required by retribution is sufficient to establish postviolation enforceability, we need to return to our examination of the goals of postviolation enforceability. Recall that we identified the goal of postviolation enforceability as the facilitation of social conflict. In order to accomplish that goal, a system of enforcement would have to exhibit certain characteristics. First, it would have to offer some means of

[37] The exceptions would include those violations that are so severe there is little doubt the amount of punishment actually required under our formula for retribution will be extremely severe as well, no matter who the beneficiary or the violator turns out to be and regardless of the actual circumstances of the violation.

satisfying the beneficiary's instinct for retaliation. This means it would have to either provide the beneficiary with a means of obtaining some measure of compensation, thereby reducing the pressure created by the desire for retaliation, or provide a means of imposing some measure of punishment on the violator, thereby satisfying the desire for retaliation, or some combination of the two. Second, whatever combination of means and measures of enforcement are offered, these must be designed to promote containment rather than expansion of the conflict – they must minimize the risk the conflict will spread beyond the parties initially involved or degenerate into a lengthy cycle of retaliatory Tit for Tat or otherwise undermine the overall pattern of social cooperation that was in place prior to the violation. The key ingredient of containment, in turn, is acceptance. Unless all parties are prepared to accept the results of enforcement, whatever they may be, we will we have no reason to be optimistic about the prospects for containment.

But what exactly does this idea of acceptance entail? There are different forms of acceptance, and the extent to which acceptance furthers the goals of postviolation enforceability may vary according to the reasons on which it is based. For example, acceptance could be based purely on *extrinsic* reasons. Extrinsic reasons are reasons that are unrelated to the form or amount of enforcement actually employed in response to a particular violation. For example, the beneficiary may be deterred from engaging in unlawful acts of retribution by the fear of punishment, even though she views the level of enforcement that is lawfully available as unsatisfactory in the extreme. Similarly, the fear of punishment may deter the violator from engaging in unlawful acts of retaliation for acts of enforcement, even though she views the means or measure of enforcement employed against her as inappropriate or excessive in the extreme. Given the goals we have identified for postviolation enforceability, however, acceptance that is based purely on a fear of punishment or some other extrinsic reason would be acceptance for the wrong reasons. This is because acceptance for extrinsic reasons does not *resolve* conflict; it *suppresses* it. Rather than allowing the beneficiary's natural feelings of violation and concomitant desire for retaliation to be appropriately expressed and discharged, acceptance for extrinsic reasons allows such feelings to fester. Rather than ensuring that such feelings of resentment and a desire for retaliation do not arise in the violator after enforcement, acceptance for extrinsic reasons allows such feelings to grow and to gnaw away at the violator like a cancer. Because these feelings are unresolved and suppressed, the conflict that produced them is prone to reerupt if the extrinsic reasons that generated acceptance ever cease to have the same force. And even if neither party ever feels free to act on these feelings overtly, there would be many opportunities over time for them to be acted on covertly. Indeed, if acceptance were based on the wrong reasons, there would be an ever-increasing number of frustrated beneficiaries and violators with one eye out for opportunistic revenge, and this would inevitably infect all those engaged in the

project of social cooperation with a debilitating attitude of suspicion and resentment. Not only would social cooperation be disrupted between the original parties to each dispute, existing patterns of social cooperation would begin to degrade generally.

What all this means is that if postviolation enforceability is to maximize the chances that individual instances of social conflict will neither result in lengthy cycles of Tit for Tat nor otherwise undermine social cooperation generally, a much deeper form of acceptance will be required, a form of acceptance that signals a discharge of the negative attitudes of violation and resentment rather than simply a suppression of them. The level of enforcement actually employed must be enough to satisfy the beneficiary's desire for retribution, but not so much as to generate a desire for retaliation in the violator. What is required by postviolation enforceability is not merely acceptance from both parties to the dispute, but *acceptance for the right reasons*. Rather than being based solely on reasons that are *extrinsic* to the level of enforcement available for a particular violation, acceptance must be based on reasons that are related to and therefore *intrinsic* to the level of enforcement available for that violation, at least in substantial part. This means the beneficiary must have a good reason to refrain from unlawful acts of further retaliation *and* the violator must have a good reason not to engage in unlawful acts of counterretaliation *even if those unlawful acts of further retaliation or counterretaliation could be performed with impunity*. When acceptance is based on the right reasons, it is more likely to reflect a genuine willingness on behalf of all parties to put past conflicts aside, and lead to a more complete, long-lasting, and robust restoration of the previolation level of social cooperation than we could expect if the reasons for acceptance were purely extrinsic. This is accordingly the sort of acceptance that our test for postviolation enforceability must be designed to achieve.

Now let us return to the question of whether the level of enforcement contemplated by our formula for retribution would be sufficient to meet the requirements of postviolation enforceability. For reasons that I hope are now abundantly clear, the answer to this question depends on whether it is likely that both the beneficiary and the violator would find this level of enforcement acceptable for the right reasons. Let us consider the beneficiary first. If the beneficiary receives full compensation – that is, compensation sufficient to make him indifferent to the violation, then he should find the level of enforcement he has received acceptable, for otherwise it is hard to see how he could be indifferent. To achieve such indifference, however, the beneficiary would not only have to be compensated for his direct loss, but also for his fear of being subject to repeat violations and any other subjective suffering the violation has caused. In most cases, this in unlikely to occur, so something less than full compensation is all he will receive. But even if he does receive less than full compensation, the beneficiary nevertheless has a good and sufficient intrinsic reason to accept the postenforcement state of affairs as long as no discrepancy remains between

the beneficiary's uncompensated suffering and the violator's suffering after the violator has been punished. Indeed, no reasonable basis for demanding more punishment of the violator could be sustained.

But why should the violator find this measure of retribution acceptable? While the reasons for the beneficiary's acceptance of the amount of enforcement allowed under our formula for retribution derive from the principle of equality, the reasons for the violator's acceptance of this amount of enforcement derive from the principle of reciprocity. The violator is not only a violator of this particular right, he is also the beneficiary of a great many other rights. A rational violator will accordingly recognize that at some time in his life, he may very well (and in all probability will) be the victim of a rights violation himself. Should he find himself in such a position in the future, the measure of enforcement now aimed against him is what he would demand be employed against a violator of *his* rights. He therefore has reason to view this amount of enforcement as just and accept his punishment for the right reasons rather than engage in unlawful counterretaliation. Of course, even when a violator recognizes the principle of reciprocity, he may not find the reason it gives him to accept the amount of enforcement levied against him immediately convincing. Initially, at least, the primary motivation for the violator's acceptance may have to be based on extrinsic reasons. But over time, after punishment has been imposed and the violator is no longer preoccupied with trying to avoid it, he may come to see the reason for acceptance provided by the principle of reciprocity as more persuasive. While all that can be done to prevent retaliation by violators who do not come to see the force of the principle of reciprocity is to continue to provide them with sufficiently persuasive extrinsic reasons for acceptance, the point of postviolation enforceability is simply to ensure that intrinsic reasons for acceptance are available to both parties, for it is the presence of such reasons that maximizes the chances of a long-term and robust restoration of the previolation social order. Because both parties do have good intrinsic reasons to accept the level of enforcement provided for by our formula for retribution, that amount of enforcement is sufficient to meet the requirements of postviolation enforceability.

Sometimes, however, the amount of punishment due under our formula for retribution will be subject to certain limits. For example, before we can determine what amount of retribution is due under our formula for retribution, the beneficiary's uncompensated suffering must first be adjusted to reflect any subjective uncertainty regarding the existence of the right or the existence of the violation. This is because the measure of enforcement that must be available in order to achieve acceptance by the beneficiary will necessarily be less when the beneficiary is uncertain as to whether the right actually exists or a rights violation has occurred. Indeed, these adjustments may have to be made repeatedly over time, for the beneficiary's level of uncertainty is subject to revision and even wild fluctuation as events unfold and new information regarding the

existence of the violation is discovered. But as long as the amount of enforcement actually applied matches the beneficiary's expectation at that particular time, the beneficiary should find that level of enforcement acceptable.

But what happens to the violator under conditions of uncertainty? Why should the violator accept an amount of punishment discounted for the *beneficiary's* subjective evaluation of uncertainty? After all, the violator may and very often will have a different subjective evaluation of the probability that a violation has occurred. It is possible, of course, that these different subjective evaluations will *increase* the likelihood of acceptance. This would be the case whenever the violator assigns a greater probability to a violation having occurred than the beneficiary does. The putative violator might believe that there is a 60 percent chance he has violated the beneficiary's rights, for example, while the beneficiary might believe there is only a 40 percent chance. In this case, there is a great deal of room to arrive at a settlement that is acceptable to both parties, assuming that both parties hold roughly equivalent views of the amount of damages the beneficiary has suffered *if* a violation has occurred, for the violator should be willing to offer more than enough compensation to cover the beneficiary's discounted evaluation of the strength of his case. (Assuming damages of $10,000, the violator should be willing to pay 60 percent or $6,000 while the beneficiary should be willing to take 40 percent or $4,000.) But if these subjective evaluations fall the other way around – if the putative violator sees only a 40 percent chance of there having been a violation but the beneficiary thinks there is a 60 percent chance – then the violator is unlikely to offer to pay more than 40 percent of the beneficiary's damages, or $4,000, while the beneficiary is likely to demand 60 percent, or $6,000, and a settlement that is acceptable to both parties will be more difficult to achieve.

One way to solve this problem is to provide some means by which the parties' subjective evaluations of uncertainty can be brought closer together, such as through arbitration, adjudication, or mediation. This is perhaps why we commonly think of the availability of such procedures as necessary attributes of any system of enforceability, for such procedures are undeniably useful in ensuring the acceptance by all parties of the actual amount of enforcement obtained. Indeed, even when such procedures do not lead the parties to actually revise their subjective evaluations of uncertainty, they still can produce good and sufficient reasons for each party to accept the amount of enforcement generated by these procedures as long as the parties recognize that the procedures utilized have been fair. Parties who have had the opportunity to present their position to an impartial decision maker and have had their arguments seriously considered albeit ultimately rejected are likely to be willing to accept the decision entered even if they remain subjectively unconvinced.

But the availability of such formalized procedures is *not* a necessary component of postviolation enforceability. This is because even without such formalized procedures, people can recognize what Rawls describes as "the burdens

of judgment."[38] The burdens of judgment are the reasons why people can reasonably disagree. These include the following: evidence is often complex, conflicting, and hard to assess; the weight to be given to relevant considerations is often open to disagreement; normative concepts are often vague and require interpretation before they may be applied to practical situations; our judgments are influenced by our respective experiences and our respective experiences are diverse; and we may reasonably assign different priorities to competing considerations. The burdens of judgment accordingly put a limit on what we can reasonably expect in the behavior and judgments of others. Recognition of these burdens means we can accept a range of resolutions to questions of uncertainty regardless of how we would resolve those questions ourselves. How big a range depends on what is in turn another subjective judgment – our evaluation of the degree to which the particular circumstances lend themselves to reasonable disagreement. This judgment is likely to be affected by the presence of fair procedures for resolving uncertainty, for in the presence of fair procedures we are likely to be willing to view any resolution of uncertainty that is the product of those procedures as reasonable. But even in their absence we are likely to be willing to accept some subjective evaluations of uncertainty that differ from our own. The burdens of judgment accordingly provide good and sufficient reasons for both the beneficiary and the violator to accept the degree of enforcement even when it differs from the discounted amount of retributive punishment that they subjectively believe would otherwise be due.

Uncertainty is not the only factor, however, that may limit the amount of retributive punishment due. Aside from adjustments for uncertainty, the amount of punishment due under our formula for retribution is also subject to moral limits. These limits may prevent us from making the violator's suffering equal to the uncompensated suffering of the beneficiary even when neither the existence of the right nor the existence of the violation is subject to uncertainty. But when the amount of retributive punishment due is adjusted to account for these moral limits, can it still be sufficient to meet the demands of postviolation enforceability? Imagine a particularly heinous multiple murder. Regardless of our moral attitude toward capital punishment, we might readily acknowledge that imposing a death sentence on the violator would be the only way to make his suffering roughly equivalent to the uncompensated suffering caused by his violation. Yet suppose we live in a society where capital punishment is officially considered morally impermissible and therefore legally prohibited. Is the right that the murderer has violated still properly considered enforceable in the postviolation sense despite the fact that the amount of retributive punishment that we can legally impose is limited by moral considerations to something less than would otherwise be required under our formula for retribution? Certainly

[38] Note, however, that Rawls applies this concept to disputes regarding the design of the basic institutions of society rather than disputes regarding ordinary rights. See Rawls (1996), p. 54ff.

this lesser amount of punishment should be acceptable to the violator, for she is being subjected to less suffering than would otherwise be due and less than what she would likely want to impose if the same sort of violation were committed against her. The more difficult question is whether the surviving beneficiaries of the rights that the murderer has so grotesquely violated have reason to accept this reduced level of retribution too. For some of these beneficiaries, at least, the same moral belief that supports the limit on retributive punishment also provides good and sufficient reason to accept even this reduced level of retribution. But what about beneficiaries who do not share this moral belief? Is there a good and sufficient reason why this reduced amount of retribution should be acceptable to them?

Once again, the requisite reasons for acceptance can be found in the burdens of judgment. Even though a beneficiary may not share the moral beliefs that impose a limit on the form or amount of punishment that may be exacted under our formula for retribution, most beneficiaries will recognize that a range of moral beliefs other than their own are reasonable, at least within certain limits. While we may disagree about the morality of imposing capital punishment, for example, few people would deny that the moral belief prohibiting capital punishment is reasonable. Even fewer would deny that the moral belief prohibiting torture is reasonable, even when this would be the only way to make the uncompensated suffering of the beneficiary and the suffering of the violator equivalent. The burdens of judgment accordingly provide the reasonable beneficiary with a good and sufficient reason to accept a morally limited amount of retributive punishment, even when he does not share the moral beliefs that impose such limits.

This acceptance, of course, may take some time to develop. Just as it may take some time before the violator has the perspective necessary to recognize the persuasive power of the principle of reciprocity and come to accept the amount of enforcement levied against him, it may take some time before the beneficiary has the perspective necessary to recognize that the moral limitation preventing him from seeking full retribution is reasonable. In the immediate wake of a violation, especially if the violation is particularly serious, emotions are likely to run high, interfering with the beneficiary's ability to accept the burdens of judgment. But once enough time has passed for the beneficiary to internalize the reality of the limitation, the reasonable beneficiary should be able to evaluate that limitation without undue interference from his emotions. Indeed, in most cases the beneficiary will already have formed an opinion about the reasonableness of the limitation. The only new factor is that instead of holding that opinion in the abstract, he now has to embrace it even though this has real consequences for him. Remember also that a return to total objectivity is not required, for the whole idea of the burdens of judgment is that people can recognize the reasonableness of views that differ from their own. The reasonable beneficiary should accordingly be able to accept limitations on

enforcement that stem from reasonable moral limitations with which he continues to disagree.

Of course, not all beneficiaries will be reasonable in this manner, even after the passage of time. Some beneficiaries will never find the reasons for acceptance provided by the burdens of judgment persuasive. But just as the target of *pre*violation enforceability was the behavior of the *rational* beneficiary, the target of *post*violation enforceability is the behavior of the *reasonable* beneficiary. The unreasonable beneficiary will not recognize the burdens of judgment, and therefore cannot be expected to accept any moral limits on retribution if they stem from moral beliefs with which he does not agree. Indeed, the *unreasonable* beneficiary is not concerned, even in part, with preventing escalation of the parties' conflict, and therefore may be inclined to take vengeance beyond that provided for in our formula for retribution even if no limits thereon are introduced. All that can be done to prevent excessive or otherwise unlawful retaliation by the unreasonable beneficiary is to provide him with a sufficiently persuasive extrinsic reason for acceptance. For this kind of reason to be persuasive, the beneficiary need only be rational. Nevertheless, as long as most beneficiaries are reasonable as well as rational, the deeper form of acceptance that is based on intrinsic reasons should be sufficiently widespread to accomplish the goals of postviolation enforceability, even if there are some beneficiaries for whom only the thinner form of acceptance produced by extrinsic reasons is all that can be maintained.

The burdens of judgment have one other important function. In addition to providing the beneficiary with good and sufficient reasons to accept moral limits with which she disagrees, they also provide the violator with reasons to accept enforcement that she believes is morally unjustified in form or extent, including *any* enforcement of rights she considers morally unjustified. For example, the violator may believe it is morally wrong to prohibit her from assisting in the suicide of a terminally ill patient or relative, yet still recognize that the moral view permitting such a bar (and therefore its enforcement) is reasonable. As long as the amount of enforcement to which she is subjected is otherwise within the amount provided by our formula for retribution, she should eventually be able to accept the enforcement imposed in such a case. On the other hand, if the violator finds the moral view embodied in a particular right outside the bounds of the burdens of judgment, then she will never accept its enforcement except to the extent she is faced with sufficiently powerful extrinsic reasons for doing so. Indeed, this is why rights that are particularly morally pernicious (such as the rights whites enjoyed under the apartheid system in South Africa) are inherently unstable. Sufficiently powerful extrinsic reasons for acceptance are notoriously difficult to maintain in such circumstances, and the continued enforcement of such rights will eventually provoke at least Tit for Tat retaliation against those in society sponsoring these rights, if not outright revolt.

4.3.2 Retribution as a Necessary Condition

This brings us to the second question we posed when we began our examination of the relationship between retribution and postviolation enforceability. We have established that the amount of punishment called for in our formula for retribution is *sufficient* to meet the requirements of postviolation enforceability, even after that amount is adjusted to account for uncertainty and for moral considerations. Now we must consider whether the availability of enough punishment to satisfy our adjusted formula for retribution is a *necessary* condition for postviolation enforceability. If the amount of punishment required by retribution were a necessary condition, then the amount of punishment required by postviolation enforceability would be the same as the amount required by justice. But we have good reason to doubt that this is the case. While the amount of punishment required by justice would be sufficient to generate acceptance for the right reasons, both our intuitions and our common practice suggest that it should be possible to generate that kind of acceptance with less enforcement than this. There will certainly be numerous occasions on which less enforcement than what is required by justice is all that can be obtained. The beneficiary may feel somewhat dissatisfied on these occasions, but he will nevertheless often consider his right to have been enforced. Equating the amount of enforcement required by enforceability with the amount of enforcement required by justice therefore seems too robust. Given their different aims and objectives and the different way the two concepts are constructed, enforceability should present a lower hurdle than justice. But if some lower level of enforcement could still be acceptable to the beneficiary for the right reasons, and therefore be both necessary and sufficient to meet the requirements of postviolation enforceability, what level of enforcement could this be?

Perhaps instead of the amount of enforcement required by retribution, all that is required to establish postviolation enforceability is some minimal amount of redistribution of the benefits and burdens of the violation. After all, as long as some amount of compensation or punishment is available for the violation of a right, that right has value – having it is better than not having it. Such minimal redistribution even satisfies one of the key requirements of postviolation enforceability – it gives the beneficiary some opportunity to express his dissatisfaction with the existing state of affairs and some outlet for his instinct for retaliation. The benefits and burdens of the violation of an unenforceable right, in contrast, are left wherever they may happen to fall.

But while this conception of enforceability would conform to the way people sometimes use the word *enforceable*, minimal redistribution would do almost nothing to make a right operative in the world, and therefore would not be sufficient to make a right "enforceable" in the more meaningful sense of the word. It would not ensure that the beneficiary's desire for retaliation was satisfied to such an extent that he would be unlikely to take additional, unlawful

enforcement action, and it would not ensure a robust restoration of the social order, for the paltry amount of enforcement required by minimal redistribution could not satisfy the requirement of acceptance for the right reasons. If it were to generate any kind of acceptance, this could only be for *extrinsic* reasons – reasons unrelated to the amount of enforcement available. Indeed, if minimal redistribution were the test of postviolation enforceability, the only violation that would need to generate any substantial amount of enforcement would be a violation of the right against unlawful retaliation. As long as a sufficient level of enforcement were available for a violation of *that* right, the level of enforcement available for all other rights could be merely nominal. This would make for a very odd test for postviolation enforceability indeed, for except as applied to the right against unlawful retaliation, it would be almost entirely without content. Full-blown retribution may be too robust a requirement for postviolation enforceability, but minimal redistribution is too weak. Something in between these two extremes is accordingly required. But how do we determine what amount of punishment is minimally required? And how can such a minimum be derived?

4.3.3 Moral Significance and the Ultimatum Game

We have now arrived at a critical juncture in the development of our theory of postviolation enforceability, so let us take a moment and review where we are. We have considered two candidates for our test of postviolation enforceability. Unfortunately, we have found both unsuitable, although for opposite reasons. On the one hand, the level of enforcement required by retribution is too robust, for while this level of enforcement is acceptable for the right reasons, it equates the amount of enforcement required by enforceability with the amount required by justice. On the other hand, the level of enforcement required by minimal redistribution is too weak, for this would allow a mere trivial amount of enforcement to suffice for all rights except the right against unlawful retaliation, and such a trivial amount of enforcement, if it were acceptable at all, could only be acceptable for the wrong reasons. The task then is to find a level of enforcement that is nontrivial and therefore capable of producing acceptance for the right reasons, yet still requires a level of enforcement that is less than that required by our full-blown moral theory of retributive justice.

Let us return for a moment to this requirement of acceptance for the right reasons. As a practical matter, acceptance will often be based on both intrinsic and extrinsic reasons. For the goals of postviolation enforceability to be fulfilled, it is not necessary that acceptance be based *exclusively* on intrinsic reasons. It is merely necessary that acceptance be based on intrinsic reasons in significant part. The more that acceptance is based on intrinsic rather than extrinsic reasons, the more likely it is to represent a real resolution of the parties' dispute and produce a long-term and robust restoration of the social order. The trick is in getting the relative strength of the two kinds of reasons right, and ensuring that

intrinsic reasons for acceptance are strong enough that the goals of postviolation enforceability are likely to be met.

With this objective in mind, perhaps what we are looking for is moral significance rather than moral sufficiency – tolerable unfairness rather than justice. While the amount of enforcement available in the postviolation state of affairs need not be morally *sufficient*, that is, sufficient to satisfy the demands of justice under our full-blown moral theory of retribution, it must at least represent a redistribution of the benefits and burdens of violation that is morally *significant*, that is, an amount of redistribution that is in itself sufficient to generate the right form of acceptance. The ultimate amount of redistribution of the benefits and burdens of violation may still be unfair, but it must be tolerably unfair. A beneficiary will make moral compromises often and for a variety of reasons, but only up to a point. At this point, moral concerns are of sufficient intensity that they override other concerns and any further compromise takes on moral significance. Below this point, the beneficiary sees the benefit of moral compromise as exceeding the cost, but above this point, he is unwilling to compromise his moral beliefs any further. Moral significance is accordingly the point at which a beneficiary's desire to obtain the requisite degree of retributive justice and his desire not to expose himself to further injury, effort, and expense are in what might be called a state of uneasy equilibrium. It is the minimum level of enforcement that is still acceptable for the right reasons.

But how do we determine whether the level of enforcement is sufficient to achieve a morally significant redistribution of the benefits and burdens of a rights violation? Is this notion of moral significance of sufficient substance to derive a test for postviolation enforceability, or will we ultimately be forced to select some arbitrary level of enforcement between full retribution and minimal redistribution if we are to satisfy our intuitions regarding the level of enforcement required? Is there really a way to test the beneficiary's tolerance for unfairness? By what test can this moral minimum be identified?

One way to test for moral significance is to use a form of ultimatum game, a game developed by experimental economists to investigate whether and to what extent fairness concerns will override self-interest in human decision making.[39] In this game, two players are provisionally given a sum of money to divide, say ten dollars. The first player is told to propose a division to the second player, who is permitted to either accept or reject the first player's offer, but is not permitted to make a counterproposal. If the proposal is accepted, each player receives the specified share. If the proposal is rejected, each player receives nothing. To ensure that the players are not influenced by their past relationship

[39] The ultimatum game has probably been the subject of more experimental study than any other game except the Prisoner's Dilemma. Many of these studies are summarized in Roth (1995), pp. 253–348. Two of the most important and accessible are Guth and Teitz (1990) and Kahneman, Knetsch, and Thaler (1986).

or by a desire to establish or maintain a reputation for toughness or fairness, the game is played under conditions of anonymity and with no opportunity for retaliation. The game accordingly consists of only a single round, neither player knows the other before the game begins, and the players' identities are concealed from one another both during the game and after.

Obviously, the fairest proposal the first player can make is offer to divide the ten dollars equally. But the first player may realize he has an advantage over the second player. His proposal is, after all, an ultimatum. If he proposes an unequal division – perhaps that he will keep six dollars and give the second player only four – the second player has only two choices: accept the smaller share or reject it and receive nothing. The first player accordingly has reason to believe that the second player would accept a proposed division even if it was unequal. Indeed, if the second player is rational, he should accept any proposed division no matter how one-sided as long as he gets something out of it, for the alternative is he will get nothing.

This is not, however, what happens in practice. In practice, only a certain amount of unfairness will be tolerated – at a certain point the second player would rather reject an offer and deprive himself of some gain than allow the first player to obtain an intolerably unfair share. What the game shows is that considerations of fairness do override self-interest when an offer is significantly one-sided, for the second player will reject an offer below a certain level even though this will leave him worse off. How one-sided an offer must be before a second player rejects it will vary – some players will be more or less sensitive to unfairness. A particular player's tolerance for unfairness will also depend on the stakes to be divided. For example, when the amount to be divided is ten dollars, as in our hypothetical, the experimental evidence suggests that most second players would put their minimum demand at around three dollars, or a 30 percent share.[40] But a player's tolerance for unfairness expressed as a percentage of the amount to be divided is not a constant. Because the absolute cost of insisting on a fair division goes up as the amount to be divided increases, the percentage the second player will demand gradually moves toward (but never reaches) zero as the stakes grow larger.[41] Whatever a particular player's tolerance for unfairness when a particular amount is at stake, however, the ultimatum game enables us to identify it.

Note that both the ultimatum game and the problem of devising a test for postviolation enforceability present the same sort of distributive problem. In the ultimatum game, we are solving this distributive problem by balancing our concern for fairness against our economic self-interest. In trying to arrive at a test for postviolation enforceability, we are solving this distributive problem

[40] Elster (2000), p. 50; Guth and Teitz (1990), p. 430; Kahneman, Knetsch, and Thaler (1986), p. 736.
[41] Roth (1995), pp. 329–30; Guth and Teitz (1990), p. 426.

by balancing our desire for a just amount of retribution against our fear of punishment should we refuse to accept the amount of enforcement that we can lawfully obtain and retaliate unlawfully. In both cases, we are balancing intrinsic reasons for acceptance against extrinsic reasons for acceptance, and trying to identify when the first are strong enough to ensure that the goals of justice and fairness will be sufficiently met. If the ultimatum game is a way of identifying the point of moral significance (the hinge point between tolerable unfairness and intolerable unfairness) in an abstract setting, perhaps we can use it as a test for postviolation enforceability as well.

Suppose we have identified what level of enforcement would be required under our formula for retribution. This tells us the amount of suffering that must be compensated or, if not compensated, imposed on the violator as punishment. This is the amount of enforcement required by justice, but not the amount required for enforceability. To determine the amount required for enforceability – the minimum amount of enforcement that would be morally significant although not morally sufficient – we need to determine the minimum amount of enforcement that would be acceptable to the beneficiary for the right reasons. We do this by conducting a thought experiment in the form of a hypothetical ultimatum game to tell us the minimum amount of enforcement the beneficiary could obtain before she would rather suffer more than see the violator suffer any less.

Let us begin with a simple example. Suppose the amount of compensation necessary to make the beneficiary indifferent to the violation is $1,000. If this amount of compensation were paid, no punishment would be due under our formula for retribution as a matter of justice. But while indifference is a sufficient condition for postviolation enforceability, it is not a necessary one. What is required is acceptance for the right reasons, and this merely requires that the beneficiary consider the amount of compensation received morally significant. To determine what amount of compensation the beneficiary would consider morally significant, we assume that the beneficiary is the second player in an ultimatum game in which the first player is to divide $2,000. The beneficiary can either accept the first player's proposed division, in which case each player receives their respective share, or reject it, in which case both players receive nothing. A fair division in the ultimatum game would give the beneficiary $1,000, and the beneficiary would have no moral right to demand more, just as the beneficiary has no moral right in our violation example to more than $1,000 in compensation. What we want to determine, however, is the extent to which the beneficiary would tolerate an unfair division that offered her something less than $1,000 (the amount of compensation justly due) but not so much less that she would rather forgo any share than allow an intolerably unfair division to take place. Although each beneficiary's sense of where to draw this line will vary to some degree, assume that the beneficiary in our example would draw the line at a 70/30 split. This means that our beneficiary's tolerance for unfairness is

reached if the share offered to her in the ultimatum game is less than 30 percent of $2,000, or $600. This is the amount that is morally significant to her. It is the minimum amount she would accept *for the right reasons* even though it is not morally sufficient. In other words, it is the minimum she would accept because of the amount offered. She is willing to forfeit any lesser amount in order to avoid validating an injustice and would presumably accept such a lesser amount only if she had a sufficiently powerful extrinsic reason for doing so, which means only if rejection exposed her to some additional penalty or punishment.

Having used this hypothetical ultimatum game to determine the beneficiary's tolerance for unfairness, we now have some basis to determine the minimum amount of compensation the beneficiary would consider morally significant, and therefore some basis to determine when intrinsic reasons for acceptance are strong enough to make the level of enforcement available acceptable for the right reasons. In our given example, the minimum amount of compensation that would be morally significant would be $600, or 60 percent of the compensation required by the demands of justice. Although the beneficiary might be willing to accept less compensation without engaging in some form of additional retaliation, our ultimatum game suggests her acceptance of any lesser amount and willingness to forgo retaliation would be based purely on extrinsic reasons arising out of a fear of punishment, and that the amount of compensation actually received would no longer present a sufficiently strong intrinsic reason for acceptance. The ultimatum game accordingly not only gives us a way of determining how much compensation must be available in the postviolation state of affairs for a right to be considered enforceable, it gives us a way of making this determination *beneficiary-specific*. This makes it even more attractive as a test for postviolation enforceability, for it allows us to account for why some beneficiaries may consider a right enforceable when others do not despite the presence of the same means and measure of enforcement.

There are, of course, differences between determining what degree of unfairness is tolerable in a hypothetical ultimatum game and determining what degree of unfairness is tolerable in the case of an actual rights violation. But the ultimatum game is *not* meant to be a direct test for postviolation enforceability. I do not contend that people do or should perform ultimatum game experiments in their heads in order to determine if their rights are enforceable. The ultimatum game is simply a useful tool for exploring and refining what the experimental evidence reveals are commonly held and deep-seated attitudes toward tolerable and intolerable unfairness. What it provides is a way of confirming when intrinsic reasons for acceptance are sufficiently powerful that the goals of postviolation enforceability are likely to be met, and a way of giving shape to our intuitive sense that some level of enforcement less than that required by justice but more than that required by nominal redistribution is necessary if a right is to be properly considered enforceable in the postviolation state of affairs.

Indeed, while there are some important differences between the hypothetical game construct and an actual rights violation, these differences may be more apparent than real. For example, one possible objection to the postviolation enforceability/ultimatum game analogy is that the beneficiary's tolerance for unfairness will be much lower when he is offered an unjust amount of compensation for a rights violation than when he is offered an unequal share of a windfall, which is the stipulated situation in the ultimatum game. The ultimatum game accordingly appears to abstract out from a key element that influences the beneficiary's attitude toward unfairness. But this appearance may be deceiving. Immediately after the violation, the beneficiary's loss will be most salient, and his sense of entitlement to recompense will be strongest (and therefore his tolerance of unjust recompense will be lowest) because it is inflamed by his emotional sense of violation. In many cases, however, this attitude will be only temporary. The beneficiary's loss will eventually if not quickly be internalized. Once it is, there should be little difference in his attitude toward the amount of compensation he receives and his attitude to an unjust division of the stakes in an ultimatum game. Because this greater tolerance of unfairness is the attitude that prevails over the long run, this is the more appropriate benchmark for determining enforceability than the more short-lived attitude prevailing while the beneficiary is still inflamed by the heat of violation. The most obvious difference between a real-world rights violation and the ultimatum game setting turns out to be largely superficial and short-lived.

There is also good reason to believe the ultimatum game *is* an appropriate way of exploring the limits of moral significance despite the differences between the hypothetical ultimatum game situation and a real-world rights violation. This is because the results of the ultimatum game are consistent with a number of our intuitions regarding enforceability. The first is that the level of moral significance is not a constant. It may be 60 percent of the compensation justly due for modest amounts, but it is likely to be much lower when larger amounts are at stake, just as it would be as the stakes in an ultimatum game are raised. Money has decreasing marginal utility but increasing absolute utility, and therefore the absolute cost of rejecting even a dramatically unfair offer goes up as the amount involved gets larger and larger. If ten dollars is to be distributed in an ultimatum game, I may insist that I receive at least three, but I will probably be much more flexible if $1 million is to be distributed. In the latter case, I will not want to reject a proposed division and thereby forfeit my proposed share if the absolute amount on offer is large, say $50,000, even though it represents a relatively small percentage, in this case only 5 percent, of the amount to be divided, and therefore constitutes a relatively large deviation from what would be my fair share. This is also likely to be my attitude toward offers of compensation. The larger the amount of compensation on offer, the more this can deviate from the amount that I am justly due and still be morally significant to me. Moral significance is affected not only by my relative share, but by my absolute share as

well, and the importance of my relative share goes down as my absolute share goes up. The results of our ultimatum game are therefore likely to track our intuitions regarding the moral significance of compensation rather well.

There is also a second way in which the results of a hypothetical ultimatum game are likely to be consistent with our intuitions regarding enforceability. Both the results of such a game and our sense of moral significance are likely to be subject to wealth effects. The percentage of the amount of compensation morally due that a beneficiary finds morally significant is likely to be higher if the beneficiary is rich than if he is poor, for the rich beneficiary is simply in a better position to insist on fairness. While both will insist on a smaller percentage as the absolute amount of compensation increases, we would expect the percentage demanded by the rich beneficiary at any particular level of compensation to be greater than that demanded by the beneficiary who is poor. Similar wealth effects should also be reflected in the results of our hypothetical ultimatum game, for the beneficiary *qua* player knows his own wealth in deciding whether to accept or reject the hypothetical offer. Just as a greater percentage of the compensation due must be paid to the rich beneficiary than to the poor beneficiary before he will consider his right enforceable, a greater share of the stakes in the ultimatum game will be demanded by a second player who is rich than by a second player who is poor.

Note that payment of a morally significant amount of compensation has the same effect on our determination of enforceability as payment of the full amount of compensation under our formula for retribution. If payment of full compensation would leave no punishment due as a matter of justice under our formula for retribution, payment of a morally significant percentage will leave no punishment due as a matter of enforceability. But in most cases, compensation cannot relieve all of the suffering caused by the violation, and thus some amount of punishment will also be due. In this case, or in any case where for whatever reason the requisite morally significant amount of compensation has not been paid, some amount of punishment must be imposed before the right can be properly considered enforceable. To determine what portion of the punishment due under our formula for retribution would be morally significant and therefore satisfy the requirements of postviolation enforceability in these cases, we would use the ultimatum game test again, albeit in a slightly revised form.

In this case, we would apply the ultimatum game analogy as follows. Using our formula for retribution, we can calculate the amount of punishment that would have to be imposed on the violator in order to satisfy the demands of justice. By definition, this amount is equal to the uncompensated suffering of the beneficiary. Assume that in the particular case before us this translates into 20 years in prison. If this term of imprisonment were imposed on the violator, then the uncompensated suffering of the beneficiary and the actual suffering of the violator would be equal (their total suffering would be divided equally in half). In order to determine what portion of this sentence the violator must

actually serve in order to satisfy the (lesser) demands of enforceability, we need to determine the minimum term of imprisonment the beneficiary would consider morally significant. In other words, we need to identify the hinge point between tolerable and intolerable unfairness – the minimum amount of time the violator could be imprisoned before the beneficiary would rather suffer more than see the violator suffer any less. If the minimum were eight years, for example, this would mean that even though the beneficiary would bear an unjustly disproportionate share of the parties' total suffering (remember the beneficiary's share of the parties' total suffering in this example would still be the equivalent of twenty years in prison), the beneficiary would still find the amount of suffering to which the violator would be subjected morally significant and therefore tolerably rather than intolerably unfair. If the violator were to serve something less than this, however, the division of suffering between the parties would now be intolerably unfair, and the beneficiary would rather suffer more than see the violator get away with suffering only this limited amount – in effect, the beneficiary would be prepared to reject the ultimatum, even though this would result in the imposition of further costs or other forms of suffering on himself. The intrinsic reasons for acceptance of the amount of enforcement obtained would no longer be sufficient to keep the beneficiary from taking additional unlawful retaliatory action, and the only way to prevent this would be to subject the beneficiary to an extrinsic threat of punishment.

Once again, the results produced by the ultimatum game seem to track our intuitions regarding what amount of punishment is necessary to establish enforceability rather well. As was the case with compensation, our tolerance for unfairness in the division of suffering is not a constant, but changes as a percentage according to the amount of punishment morally due. But while our tolerance for unfairness increases with the amount of compensation morally due, meaning we will tolerate a smaller and smaller percentage share, our tolerance for unfairness when punishment is morally due follows the shape of an inverted bell. In other words, we have very little tolerance for unfairness at either end of the punishment scale, but greater tolerance for unfairness in the middle. If the amount of punishment morally due is one month in prison or life, we will likely accept little deviation from the required amount. Yet if the amount is something in the middle, say seven years, the difference between what we are willing to consider morally significant and what we are willing to consider morally sufficient will be far greater. The fact that our hypothetical ultimatum game also produces a fluctuating minimum, and that this minimum fluctuates differently for compensation and punishment as we intuitively feel it should, is therefore some indication that the ultimatum game is an appropriate guide to determining moral significance.

Of course, using the ultimatum game to determine a particular beneficiary's tolerance for unfairness in the division of suffering in any given situation is somewhat imperfect. The solution to the ultimatum game depends not only on

the beneficiary's tolerance for unfairness, but also on the intensity of the beneficiary's desire to avoid further suffering himself. A beneficiary with a higher aversion to suffering will tolerate a greater imbalance in the parties' respective distributive shares of total suffering than a beneficiary with a lesser aversion. But this is not necessarily a disadvantage, for it may accurately reflect people's real-world attitudes to enforceability. A beneficiary with a higher aversion to suffering will be more likely to consider a right enforceable at any given level of punishment than a beneficiary with a lesser aversion. Although precise accuracy may be impossible to achieve when making these evaluations, precise accuracy is not required. Given all the various uncertainties and approximations already involved in calculating the beneficiary's suffering and translating that into the relevant language of punishment, all we really need is a basis for making some very rough calculations. For that purpose, our hypothetical ultimatum game should prove more than satisfactory.

We now have a way of identifying the amount of punishment and compensation that postviolation enforceability requires. A right is enforceable in the postviolation sense if the amount of punishment and compensation available is equivalent to the amount due under our formula for retribution, discounted to moral significance. The amount of punishment and compensation available is morally significant, in turn, as long as it would pass a hypothetical ultimatum test – as long as the beneficiary would not rather suffer more than see the violator suffer only that percentage of the amount otherwise due. The amount of punishment and compensation that is morally significant is accordingly determined *in reference* to the amount required by justice but is not equivalent to it. It is neither as robust as the amount due under a full-blown moral theory of retribution, nor as inconsequential as the amount necessary to establish minimal redistribution, yet it is still likely to be acceptable for the right reasons and therefore is designed to maximize the chances that the parties will ultimately be able to resume previolation levels of social cooperation. If the amount of punishment and compensation available for a particular violation passes our hypothetical ultimatum test, it is morally significant, and if it is morally significant, the right is enforceable. If the amount of punishment and compensation available is less than this, any restraint from further retaliation could only be for the wrong reasons, and the right should accordingly be considered unenforceable.[42]

Note that one very important ramification of the process of discounting to moral significance is that it allows us to avoid most of the problems that

[42] Note that there are two categories of unenforceable rights. The first includes what I shall call *naked* rights. These are rights for which no measure of enforcement is available whatsoever. The second includes what I shall call *nominal* rights. These are rights that can be enforced to some extent, although the measure of enforcement available is insufficient to meet the requisite tests of previolation and postviolation enforceability. Both kinds of rights may have value, despite being unenforceable. We shall explore what kind of value this might be when we look at the value of unenforceable rights in Chapter 8.

would otherwise be created by disagreements over the extent to which the amount of punishment due under our formula for retribution must be adjusted for uncertainty and for moral considerations. We need not rely on the burdens of judgment to provide the beneficiary with a reason to accept less enforcement than would be required under our formula for retribution, for even outside the bounds of the burdens of judgment the beneficiary should be willing to accept a merely morally significant amount of retribution. Any disagreement between the beneficiary's and violator's view of the appropriate extent of these adjustments is likely to be moot after the process of discounting to moral significance is complete. Whereas the beneficiary and violator may never agree on the extent of enforcement justice requires, they should both be able to accept the amount of enforcement necessary to establish moral significance.

Discounting to moral significance also allows us to explain how a right could be enforceable when the amount of punishment due under our formula for retribution is so extensive that it is beyond our capacity to inflict. This would be the case with mass murderers, serial killers, torturers, and terrorists, no doubt, and could be the case with a variety of other violations as well, depending on the nature of the violation, the number of victims, and the type of injury the violation inflicts. While it may not be possible to impose sufficient punishment to satisfy the demands of justice in these cases, it should still be possible to satisfy the demands of enforceability, and thereby offer at least the possibility of a meaningful restoration of previolation levels of social order.

4.4 Compensation and Postviolation Enforceability

While there are only limited circumstances in the previolation state of affairs when the availability of compensation has a significant impact on whether a right can be properly considered enforceable, this is not the case when we come to the postviolation state of affairs. In the postviolation state of affairs, the presence of compensation will often be critical in determining whether a right can be properly considered enforceable. Indeed, this is why some measure of punishment and some measure of compensation are both usually available for the enforcement of rights. Even though no expectation of compensation need be available in most circumstances at the previolation stage, it must often be available at the postviolation stage if the right is to be properly considered enforceable.

There are several reasons why this is so. First, while it is likely that there will be some punishment available in the postviolation state of affairs as long as the right was considered enforceable in the previolation state of affairs, it is possible that the amount of punishment actually available will be far less than the beneficiary's previolation expectations. This could be because a large component of the beneficiary's previolation expectations consisted of punishment that would result from automatic enforcement, and despite the fact that the violation has

now occurred, automatic enforcement may have been avoided. (Perhaps your careless driving forced me off the road but left you and your car undamaged.) Or it could be because the beneficiary's previolation expectations were based on certain assumptions about the circumstances and dispositions of potential violators, and these assumptions may have turned out to be inaccurate, and the actual violator far less susceptible to moral regret or social or strategic sanctions than the beneficiary expected. Or it could be because the beneficiary's previolation expectations of the availability of legal or other sanctions were simply overinflated. Second, it may be that the amount of postviolation punishment available *is* equivalent to the beneficiary's previolation expectations, but this amount is simply far less than would be necessary to satisfy the requirements of retribution. This is because the sufficiency of previolation expectations and the sufficiency of actual postviolation enforcement are measured by different benchmarks. Whereas the sufficiency of previolation punishment is measured by comparing it to the expected benefit of the violation, the sufficiency of actual postviolation punishment is measured by comparing it to the burden of the violation, and the burden may turn out to be much greater than the benefit. This would be the case, for example, with most tort violations, and for many criminal violations as well. Third, while the availability of punishment and compensation must be considered separately in the previolation state of affairs, in the postviolation state of affairs they must be considered together, or rather compensation must be considered first. This flows from the fact that the amount of punishment required to make a right enforceable in the postviolation state of affairs is an amount equivalent to the uncompensated suffering of the beneficiary, discounted to moral significance. Therefore, in order to determine how much punishment is required, we must first determine how much of the beneficiary's suffering can be and has been compensated.

The first step toward making this determination is to identify what counts as "suffering" for purposes of this calculation. Just as in the previolation state of affairs, compensation has both an evaluative and a relational element. The evaluative element determines what changes in well-being constitute suffering and the relational element determines what suffering is properly attributable to the violation. As in the previolation state of affairs, these elements are determined from the beneficiary's point of view, because it is the beneficiary's point of view on these matters that will shape her instinct for retaliation. Although the beneficiary's point of view could be idiosyncratic, in most instances it will accord with our thin theory of the good and with commonsense notions of causation. As long as it does, it should also accord with the violator's view of these matters, thus creating no potential bar to the move from enforcement to acceptance by both parties. But even if it does not, even if the beneficiary idiosyncratically believes a greater amount of compensation is morally required or the violator idiosyncratically believes some lesser amount of compensation is morally required, the process of discounting from moral sufficiency to moral

significance should enable us to overcome these disagreements and obtain the acceptance of both parties.

4.4.1 The Limits of Compensation

Assuming rough agreement on what constitutes suffering and on what suffering is caused by the violation, we must then determine what portion of this suffering is compensable, for there are limits on what kinds of suffering can be compensated. The first is what might be called a measurement limit – we cannot compensate suffering we cannot reliably measure. This is a technical limit that is encountered most often when all or part of the beneficiary's suffering is subjective and therefore experienced internally, accompanied by little if any outward or objective sign of its existence. In such cases, claims of subjective injury are unreliable because they are too easily subject to undetectable postviolation inflation. Whenever the measurement of suffering is unreliable, forcing the violator to provide compensation for it would actually undermine the purpose of postviolation enforceability by making enforcement more difficult for the violator to accept.

Of course, denying compensation might make enforcement more difficult for the beneficiary to accept, but there are several reasons to think that on balance, the acceptance of both parties is more likely if compensation is denied. First, the beneficiary can recognize the reasonableness of the violator's concern regarding the possibility of fraudulent inflation, for she would have the same concerns if she were in the violator's shoes. Second, the beneficiary is still being compensated for any injury that can be reliably measured. Third, for reasons we will discuss further in a moment, the reliability concerns associated with measuring subjective suffering when calculating the amount of compensation due are less acute when calculating the amount of punishment due, so denying compensation for subjective suffering does not leave it out of the enforceability calculation altogether, it merely moves it to the punishment side of the equation. Because subjective suffering remains a factor in determining the amount of punishment the violator must suffer, the beneficiary has less reason to object when compensation for this kind of suffering is denied.

Note, however, that moral considerations have a role to play in determining how much subjective suffering can be a basis for compensation and how much can be a basis only for punishment. The greater the moral gravity of the violation, the more likely it is that some degree of subjective suffering exists. The beneficiary in this situation has a correspondingly stronger claim to compensation. The violator, in turn, has a weaker objection, for by engaging in more morally objectionable behavior, she can reasonably be held to have assumed the risk that the beneficiary might engage in the morally objectionable behavior of fraudulently inflating her subjective injuries in response. When a violation reaches a certain degree of moral severity, we accordingly maximize the chances

of acceptance by both parties by allowing compensation for subjective injuries rather than denying it.

This is indeed how we approach the compensation of such injuries. Compensation for subjective injuries is generally not allowed for breach of contract, which does not require proof of fault, while it is allowed for torts, although it is often capped at a specified amount, unless the tort is intentional.[43] Our actual practice in compensating subjective injury accordingly tracks the measurement limits on the award of compensation that our theory of enforceability recommends rather well.[44]

The second limit on the degree of compensation that can be made available is what we might call a translation limit. To see how this limit applies, we need to distinguish between *restorative* compensation and *compensatory* compensation. Restorative compensation is compensation that allows us to restore the *status quo* – either directly, through compensation in kind, or indirectly, through payment of whatever it would cost to enter the marketplace and repair or replace whatever has been injured or destroyed. Compensatory compensation, in contrast, does not enable the beneficiary to restore the *status quo*. Instead, it enables the beneficiary to establish a new state of affairs that is different from but of equal value to that which existed before his right was violated, usually through the payment of money. Translation limits are encountered only with regard to compensatory compensation, when there is no established market to refer to in setting the amount of compensation due, there is no way to restore the previolation state of affairs, and all that can be done (if anything) is to create a state of affairs that is in some sense of equivalent value.[45]

Although certain types of injuries may be subject to both measurement and translation limits, the two limits are distinct and one may be present without the other. Unlike measurement limits, which arise from technical concerns, translation limits arise from incommensurability concerns. We may be able to reliably measure the degree of subjective suffering in certain circumstances, for example, yet still be faced with an impossible task of converting that particular form of suffering into a precise amount of money. Of course, the beneficiary and the violator may be able to agree on the translation, but such an agreement may be

[43] See generally Fischer (1999), Ingber (1985), and McCormick (1935), esp. secs. 44, 88–9, and 145. For a current list of statutory caps applicable to recovery of noneconomic damages, see Nates, et al. (2004), sec. 3.06.

[44] Claims for future losses may also encounter measurement limits. But proof of future losses is not so dependent on the beneficiary's own testimony, so here the concern is not over the possibility of fraudulent inflation, but simply over the inherently speculative nature of projecting the future. Also, the fact that there will be *some* future injury is also not usually in dispute, only the extent. In such cases, it will usually maximize the chances of acceptance by both parties if recovery of compensation for future losses is allowed as long as these are proved to a reasonable certainty, and this is indeed what the law provides. See generally Murray (2001), pp. 790–6.

[45] For further discussion of the distinction between restorative and compensatory compensation, albeit using slightly different terms, see Goodin (1995), ch. 13 and Wolff (2002).

difficult to come by, even if the violator is convinced that the claimed injury is genuine. Pain, even when it can be reliably measured, would be one example; any kind of injury for which there are no established market values would be another. Without an established reference point to determine the appropriate amount of monetary damages, any award of compensation is in danger of being arbitrary or excessive and driven by emotion, and the greater the likelihood of such a problem, the less likely the award will be acceptable to both parties. We may accordingly deny a right to compensation altogether or, as we have already noted, we may place limits on the amount of compensation that is available. These limits may be fixed or, like the limits imposed by measurement difficulties, they may be adjustable according to the moral gravity of the violation. In either case, however, the recognition of the inherent difficulty of translation should make these limits acceptable to the beneficiary, while the imposition of these limits should increase the likelihood of acceptance by the violator.

A third potential limit arises from a different kind of incommensurability concern, what we have previously identified as *constitutive incommensurability* or *incomparability*. For our purposes, this kind of incommensurability presents a special form of translation problem. It arises not because a lack of established market substitutes makes it difficult to translate a particular type of suffering into money, but because translating that particular form of suffering into monetary compensation would be fundamentally inconsistent with the way we value whatever has been injured. We have already seen how this concern can prevent a previolation promise of compensation from making the beneficiary indifferent to the possibility of violation, and the concern here is similar. If I negligently run over your dog with my car, for example, there may well be an established market to which we can refer to determine how much it would cost to purchase another dog of that particular breed, age, health, appearance, training, and even temperament, but surely compensation in this amount would address only a small and rather inconsequential part of the loss you would feel. The overwhelming source of your suffering stems from your subjective attachment to this *particular* dog, just as it would if the injured party were a member of your family. The very qualities that made this relationship valuable – love, affection, loyalty, and a readiness to engage in mutual self-sacrifice – are valuable precisely because they cannot be purchased with money. Indeed, the very act of seeking compensation for this aspect of your loss would suggest that these qualities were not actually present in your relationship, for seeking compensation is inconsistent with them. And if I were to offer to compensate you for this aspect of your loss without being asked, you would probably feel I was heaping insult upon injury, or even inflicting new injury rather than repairing old, for my offer would simply indicate I had failed to understand and respect what made this particular relationship valuable to you. Because accepting such an offer would actually undermine the value of the relationship rather than compensate for any injury to it, compensation for this aspect of your injury is not an option.

Even if measurement and translation limits could be overcome, the availability of compensation is limited in this case by the very nature of the loss involved.[46]

To further illustrate the nature of this limitation, imagine it were possible to construct a machine – call it a universal suffering translator – that accurately measured and translated all forms of suffering into a single means of exchange (e.g., money). How would the experience of human life be different in a world where such a machine exists? Would not the whole idea of forming certain subjective attachments be less coherent in such a world? What would love, or regret, or embarrassment, *mean* if we could accurately translate the experience of such feelings into amounts of money? Some people, perhaps, already experience the world in this way, and they would have no problem viewing every aspect of their experience as interchangeable with an amount of money. For those people, the payment of monetary compensation *could* make them indifferent to any kind of injury. But for many of us, the very way we think about the value of certain experiences would have to change before we could translate these experiences into money. The fact that certain aspects of our experience of the world might be very different or even impossible to comprehend if these experiences could be translated into amounts of money indicates that money cannot compensate for every kind of injury to every beneficiary. Our ability to compensate may be limited by the very nature of the value we assign to certain aspects of our experience. And because both beneficiaries and violators alike should be able to appreciate the reasons for such limits, both should be willing to accept that compensation will not be available for certain kinds of injuries.

This does not mean that if some aspects of an injury are incomparable to money, we cannot seek compensation for other aspects that are. If the negligent death of a family member deprives the family of financial support the now-deceased family member would have provided, then certainly this aspect of their loss can be compensated. Compensation for this aspect of their loss is not inconsistent with the nature of the value of that aspect of the family relationship. It may also be appropriate for the family to demand and for the violator to pay *symbolic compensation* for aspects of their loss that are incomparable with money. Rather than constituting an attempt to repair the injury, the purpose of symbolic compensation is to acknowledge its moral significance. Symbolic compensation can accordingly be determined in reference to the injury without undermining it, for it makes no attempt to assign that injury an absolute value, nor does it suggest that the beneficiary is or will be made indifferent between the amount of compensation paid and the particular injury he has suffered. On the contrary, symbolic compensation is merely a sign of respect for the beneficiary

[46] The same thinking would apply to the loss of a child, but I have used a dog in my example to show that it is not simply the lack of a market through which it would be possible to purchase a replacement that makes it impossible to fully compensate the beneficiary for all aspects of his injury. It is the nature of the loss that makes full compensation impossible.

and an acknowledgement of the fact that a cherished and important carrier of value has been injured. The precise level of compensation that is required in order to make such an acknowledgement will vary according to the specific context in which the injury arose, the respective economic circumstances of the parties, and a variety of other factors, but it will always be much lower than what would be required if we were attempting to provide full compensation. Nevertheless, it will serve to reduce the beneficiary's uncompensated suffering somewhat, and therefore will reduce the amount of punishment to which the violator would otherwise be exposed. The violator accordingly has every reason to accept it as part of the measure of enforcement to which he will be subjected. The beneficiary has good reason to accept it too, for it does not debase the interest that has been injured, and because it leaves most of the beneficiary's suffering uncompensated, it still leaves the violator subject to some and perhaps a great deal of retributive punishment. The payment of symbolic compensation for injuries otherwise subject to incommensurability limits is accordingly fully consistent with what we have identified as the purpose of postviolation enforceability.

Remember also that the fact that certain kinds of injury are incomparable and therefore not compensable with *money* does not mean they are not compensable in other ways. If a child is deprived of his father by the negligence of another, money cannot make up for the love, guidance, and emotional support his father would have provided, but those things could be provided by someone else. It is unlikely that the child could be *fully* compensated for the loss of his father in this way (i.e., be made indifferent to his loss), but he could be compensated in part, and this form of compensation would *not* be inconsistent with what gives these aspects of the child's relationship with his father value. I take as my example a scene from the 1982 film *Gandhi*. Toward the end of the film, a Hindu man whose child has been killed during the spreading Hindu-Muslim riots and who has killed a Muslim boy in return approaches Gandhi and tells him of this unforgivable crime. The man expects to be condemned to hell for what he has done, but Gandhi tells him there is a way to avoid this: find a boy whose parents were killed in the riots and raise him as his own, loving and nurturing him as he would his own child, "only be sure that he is a Muslim, and that you raise him as one."[47] The issues raised in this example are complex, but it does seem to capture something important about our attitude toward what can be done to compensate for certain kinds of injuries. By adopting and raising the orphaned Muslim boy, the man would be providing a form of compensation to the boy that could not be provided simply by giving the boy money. What the example illustrates is that in some cases, incommensurability and incomparability concerns may not eliminate the possibility of compensation, but merely limit the form that compensation may take. We can love all our children equally, but we cannot

[47] Briley (1982), pp. 188–90.

love money and our children equally unless we adopt a very different attitude toward parental love.

The fourth potential limit on what suffering is compensable is a public policy limit. There are some kinds of injuries for which the parties might very well be willing to agree to acceptable levels of compensation, but we block such exchanges as a matter of public policy, for there is a limit to the degree of commodification we are prepared to allow. We do not want people to be able to sell their right not to be murdered or maimed or to sell their parental rights or their reproductive capacities even if they are willing to do so. But how is this consistent with the purpose of postviolation enforceability? If people are willing to agree to acceptable levels of compensation for these injuries, why shouldn't they be allowed to do so? Indeed, if both parties find some level of compensation acceptable wouldn't they both reject any level of enforcement that consisted only of punishment? Why should they accept turning suffering into punishment when they were willing to turn it into compensation instead? Isn't *this* inconsistent with what we have identified as the purpose of postviolation enforceability?

Remember that the level of enforcement available in the postviolation state of affairs must not merely be acceptable to both parties – it must be acceptable to both parties *for the right reasons*. The *right* reasons are *intrinsic* reasons, reasons that relate to whether the measure of enforcement available is appropriate given the suffering caused by the violation, as opposed to *extrinsic* reasons, which are reasons that relate to matters of external reward or punishment. Because the parties to any rights conflict will often have unequal bargaining power, there is every reason to suspect that an offer of compensation would be unduly coercive in certain circumstances, and that any acceptance by the beneficiary would be tainted. Exactly what circumstances are sufficient to trigger public policy limits on the availability of compensation is a matter for the relevant political institutions of each society to decide according to whatever standards such institutions deem appropriate. Each society will no doubt set somewhat different limits on the degree of inequality of bargaining power it is prepared to tolerate and the degree of commodification it is prepared to allow. Typically, however, the kinds of transactions that would be subject to such limits would include the sale of body parts, parental rights, reproductive capacities, and similar transactions that seem extremely unlikely to occur unless the beneficiary is being unduly influenced by some externally created need for cash. Rather than restore previolation levels of social cooperation, the resentment that would ultimately arise following such coerced acceptance would often lead to further conflict.[48] And because a beneficiary whose acceptance is based on extrinsic reasons would have reason to conceal the external circumstances that made the offer of compensation unduly coercive, even a beneficiary who has not been unduly coerced has reason to accept that such offers must be universally

[48] See, e.g., *Matter of Baby M*, 527 A.2d 1227 (N.J. 1988).

prohibited. Because a universal prohibition is reasonable under such circumstances, the violator has good reason to accept it too. The prohibition of the payment of compensation in these cases is accordingly fully consistent with the objectives of postviolation enforceability.

The final limit of what suffering may be compensated arises out of what might be called the spillover effects of many rights violations. Often a violation will not only cause suffering to the primary beneficiary, it will also cause small amounts of suffering to a wide range of secondary or tertiary or even more indirect beneficiaries. Sometimes these beneficiaries will be difficult to identify, sometimes they will be possible to identify only at great cost, and sometimes their individual injuries may be slight although their collective suffering may be substantial. In such cases, it is simply not practical to provide compensation for each of their injuries, even assuming these were of a kind that would otherwise be amenable to compensation. Spillover effects can arise out of any kind of violation, but they will be particularly pronounced when it comes to criminal violations, because the potential for such effects is usually one of the reasons that a violation was made criminal in the first place. For example, if I rob a bank, among the other injuries I inflict I also create fear among the general public that such conduct is more likely to occur than they previously had reason to suspect. The prevention of such fear is one of the reasons for the creation of the right I have violated, and retribution for such suffering is accordingly an appropriate element of its postviolation enforceability. But the identification of all those who have suffered such increased fear as a result of my violation would be difficult if not impossible. If it were possible, it would often be extremely expensive and therefore impractical. Even if these persons could all be easily and cheaply identified, the marginal increase in their level of fear may only be significant if it is measured collectively rather than individually. It is accordingly not surprising that such suffering is often not eligible for compensation. Indeed, it would be unlikely that any attempt at requiring such compensation would be acceptable to the violator, whereas the denial of compensation in these circumstances should be acceptable to all parties. The denial of compensation for spillover suffering is accordingly entirely consistent with the purposes of postviolation enforceability.

Of course, not every violation will produce an injury that will be subject to one of these limits on compensation. Sometimes, the beneficiary's injuries will be fully compensable. When this is the case, the beneficiary can be made indifferent to the violation. But remember, the production of indifference in the beneficiary is a *sufficient* but not a *necessary* condition for postviolation enforceability. All that is required is acceptance, and this can be achieved as long as the amount of compensation received is morally significant. Nevertheless, given all the limitations on the degree to which a beneficiary may obtain compensation for his injury, it is likely that at least some component of the beneficiary's injury will be noncompensable. In this case, a morally significant amount of

compensation alone will not be sufficient to render the right enforceable in the postviolation sense; a morally significant amount of punishment will have to be available as well. But this will usually not present a problem. If it comes from the violator, the same payment can constitute both compensation and punishment, so if the violator pays a morally significant amount of compensation, it will often be the case that the violator has been subjected to a morally significant amount of punishment as well. Even if compensation is paid by someone other than the violator, it is still likely that a sufficient measure of punishment will be available as long as the right was properly thought enforceable in the previolation sense. This is because the amount of punishment required by previolation enforceability is typically much greater than the amount required by postviolation enforceability. As a result, even if the amount of punishment actually available in the postviolation state of affairs turns out to be far less than was expected, *some* punishment will usually be available, and this should be sufficient to satisfy most postviolation shortfalls in compensation.[49]

4.4.2 Uncompensable Suffering and Punishment

If our ability to convert suffering into compensation is limited, won't we encounter the same limitations when we attempt to determine the amount of suffering that must be imposed through punishment? Not necessarily. Punishment is much less finely tuned than compensation. Uncertainties flowing from measurement or translation difficulties will have a much smaller impact when measurement and translation need not be so precise. The beneficiary is also less likely to inflate her claims of subjective suffering if she knows they will be the basis of punishment rather than compensation, and less likely to get away with it if she does. Admittedly, the former claim assumes that vindictiveness is less common than greed, and the latter that vindictiveness is easier to detect than greed. Neither assumption can be easily empirically tested, but there is nevertheless good reason to believe that both are true. First, vindictiveness should be less common than greed because every beneficiary stands to benefit financially if she successfully misrepresents the extent of her subjective injury for purposes of compensation, but only a beneficiary who would obtain some satisfaction from seeing a violator punished *beyond the demands of retribution* would benefit if she inflates the degree of her subjective injury for purposes of punishment, and most beneficiaries would not fall into this category as long as the society in which they lived was functioning on anything other than a minimal level. Second, vindictiveness should be easier to detect because it is a more emotional state than greed, and the more emotional the state, the less likely

[49] Accident cases in which the requisite previolation expectation of punishment came from a threat of automatic enforcement that never materialized and the postviolation burden of paying damages has been shifted to an insurer would be the biggest exception.

it can be subjected to the degree of control necessary for it to be successfully concealed.[50]

Support for both these claims can be found in several recent studies regarding the use of victim impact statements. One important purpose of such statements is to make sure that the sentencing authority is aware of the physical, financial, and emotional harm suffered by the victim as a result of the offense, and these statements are now widely used in sentencing proceedings in many countries and throughout the United States. Although some early critics of this practice were concerned that victims might be inclined to exaggerate their suffering in order to increase the sentence to which the offender would be subjected and that such exaggeration would be difficult to detect,[51] these fears have proved unfounded. Vindictiveness, overstatement, and exaggeration have been rare, and most professionals involved in the sentencing process, including judges, prosecutors, and defense attorneys, are relatively confident that they have been able to identify such behavior when it does occur.[52] Even continuing critics of the practice now concede that undetectable exaggeration in sentencing proceedings does not appear to be a major problem.[53] In any event, it seems reasonable to begin by crediting claims of subjective suffering in this context rather then rejecting them, for in the absence of evidence of vindictiveness, it seems more reasonable to require the violator to risk undetected vindictiveness than to require the beneficiary to forgo retribution for subjective injury. On balance, a rebuttable presumption that such claims are genuine seems most likely to maximize the chances for acceptance.

Nor do incommensurability limits apply with the same force to punishment as they do to compensation. Setting the amount of compensation due requires us to assign a monetary value to the beneficiary's suffering. This necessarily entails a commitment to the idea that the value the beneficiary assigns to his particular injured interest and the value the beneficiary assigns to a certain amount of money are commensurable and can be made equivalent from the beneficiary's point of view. Setting the amount of punishment due, in contrast, merely requires us to produce an amount of suffering in the violator that is equivalent to the uncompensated suffering of the beneficiary. Even when punishment is being administered in the form of a fine, this does not entail a commitment to the idea that the *value* of a particular injured interest and the *value* of a particular sum of money can be equivalent. It merely entails a commitment to the idea

[50] For a discussion of this view and some possible exceptions to it, see Elster (1999), pp. 391–3.
[51] See, e.g., *Booth v. Maryland*, 482 U.S. 496, 506 (1987) (expressing the concern that in capital cases, defendants would rarely be able to show that family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered), overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991) (rejecting that concern and permitting use of victim impact statements even in capital cases).
[52] See Erez (1999), esp. pp. 548–9 and Hoyle et al. (1998), esp. p. 28.
[53] See Ashworth (2002), p. 586.

that the *suffering* produced in the beneficiary by a particular injury and the *suffering* produced in the violator by the imposition of a monetary penalty can be equivalent, at least from the beneficiary's point of view. The reasons why the incommensurability of values imposes limits on our ability to compensate accordingly never come into play.[54]

As for problems created by spillover effects or public policy concerns, these simply do not arise when we are in the realm of punishment rather than compensation. Providing compensation may require that we identify and measure the marginal increase in the *individual* suffering of a myriad of indirect beneficiaries, but imposing punishment merely requires that we identify and measure the *collective* suffering of these beneficiaries. And when public policy prohibits the provision of compensation it is precisely because we feel punishment is the only appropriate means of enforcement for certain violations. Neither of these limits accordingly has any application when it comes to punishment.

4.4.3 The Incentive but Not the Duty to Compensate

Having established why there are sometimes limits on the beneficiary's ability to obtain compensation and why these limits do not apply to the beneficiary's ability to impose punishment, we need to consider whether compensation that is *not* subject to these limits must be paid, and if so, by whom. Most corrective justice theorists, for example, contend that a person who wrongfully injures another has a moral obligation to compensate the injured party for his loss.[55] But while this may be a requirement of morality, it is not a requirement of enforceability. Under our test for postviolation enforceability, the violator has an *incentive* to compensate the beneficiary, but not a *duty*. A violator has an incentive to compensate the beneficiary because any compensation paid reduces the burden of punishment the violator must bear. While the violator has an incentive to see compensation paid, however, he does not necessarily have to

[54] Nor do the problems associated with making interpersonal comparisons of utility. Because equivalence is determined from the beneficiary's point of view, even though the violator's individual objective circumstances and apparent moral character are to be taken into account, the comparison required is strictly intrapersonal.

[55] There is, of course, a wide divergence of opinion, even among corrective justice theorists, as to what exactly corrective justice requires. See, e.g., Weinrib (1995), Epstein (1974), and Fletcher (1972). There is nevertheless a growing consensus that corrective justice at least requires a person who wrongfully causes injury to another to compensate the injured party for his loss. See Weinrib (2001). This view, however, was not always so widespread. Jules Coleman, for example, initially argued that while corrective justice required both the annulment of wrongful losses and the annulment of wrongful gains, it did not require any specific mode of rectification, and therefore did not require that violators compensate their victims, only that the victims be compensated and the violators be deprived of their wrongful gains. See Coleman (1982). Coleman's view of corrective justice still differs from the view of other corrective justice theorists in important respects, but he now agrees that corrective justice imposes a duty on wrongdoers to compensate their victims, although he leaves open the possibility that corrective justice may allow this duty to be discharged by others. See Coleman (1992).

pay compensation himself, for any payment of compensation will have the same effect regardless of its source. Compensation can come from anywhere – the violator, his insurer, a registered charity, or anonymous benefactor, or even the state.[56] Of course, a violator may have an obligation to compensate the beneficiary arising out of a separate legal or moral right, and this right may even provide that the violator's obligation is personal and cannot be discharged by others, but the existence of this obligation is not a requirement of enforceability. Indeed, even if a beneficiary did have a specific right to compensation from the violator, *that* right would be enforceable as long as compensation was available *from any source* or, if sufficient compensation was not received or any aspect of the beneficiary's injury was noncompensable (and this would include any injury that resulted from the fact that compensation was paid by someone other than the violator), the requisite amount of punishment was imposed.

Just as the violator has an incentive but not a duty to see that the beneficiary receives as much compensation for his suffering as possible, the beneficiary has an incentive but not a duty to accept whatever compensation may be offered, at least to the extent his injury is properly compensable. The beneficiary has an incentive to accept whatever compensation may be offered for his compensable injuries because the amount of punishment the violator must bear is reduced by that amount regardless of whether the beneficiary refuses or accepts it. If this were not the case, the beneficiary would be able to increase the punishment a violator would have to bear merely by refusing whatever compensation might be offered. Because the beneficiary has no moral claim to retribution in excess of his uncompensated suffering, any such refusal would be unreasonable and unjustified, and the violator would be extremely unlikely to accept the increased punishment such refusal would entail. Allowing the beneficiary to manipulate the amount of punishment the violator will have to bear in this fashion would accordingly frustrate rather than further the purposes of postviolation enforceability.

4.5 Previolation and Postviolation Enforceability Compared

Note that our test for postviolation enforceability differs from our test for previolation enforceability in significant ways. One important difference is the way punishment and compensation relate to each other under the two tests. For previolation enforceability, the two measures of enforcement are separate and independent and cannot be combined. If the amount of punishment available is not sufficient to produce the requisite preference for the previolation state of affairs,

[56] In New Zealand, for example, a government-financed compensation scheme for accident victims has replaced the traditional tort action for damages in personal injury cases. Although this scheme eliminates some of the problems associated with privately prosecuting personal injury tort claims, it is not without problems of its own. See generally Todd (2000).

and the amount of compensation is not sufficient to produce the requisite indifference to the violation, the right is not enforceable. Either measure of enforcement at a sufficient level can substitute entirely for the other, but the availability of one measure at an *insufficient* level does not reduce the amount of the other that would otherwise be required. In the postviolation state of affairs, in contrast, punishment and compensation must be considered together, for it is their *combined* effect that is relevant. No punishment is required if the compensation available is sufficient to make the beneficiary indifferent to the violation,[57] and no compensation is required if the punishment available is equivalent to the suffering caused by the violation, but any deficiencies in one *can* be made up for by the presence of the other. The amounts of postviolation punishment and compensation that are together sufficient to make a right enforceable in the postviolation state of affairs may accordingly be far less than the amounts that are separately required to produce the requisite preference or indifference and thereby make a right enforceable in the previolation state of affairs.

One important consequence of this is that it matters from whom the compensation comes, for on many occasions, fewer social resources will be required to stabilize social cooperation after a violation if compensation comes from the violator than if it comes from the state or some third party. If compensation does come from the state but is less than the suffering caused by the violation, then our principle of retribution requires that some punishment be imposed on the violator. But when the same amount of compensation comes from the violator, it is possible that no further punishment of the violator will be due because the payment of damages by the violator can be simultaneously compensatory and retributive. Whether further punishment *is* due depends on whether there was a benefit from the violation. Retribution must be measured from a previolation baseline, for only then can the suffering of the beneficiary and the violator be made equivalent. Payment of compensation is only retributive to the extent it comes from the violator's previolation pocket rather than out of the benefit of the violation. But when it does, the payment of compensation can satisfy the requirements of retribution even when it would have not have done so had the same amount of compensation been paid by the state or some other third party.[58]

Note, however, that the fact that the same payment can count as both punishment and compensation if it comes from the violator is a limiting principle on retribution, not compensation. Principles of retribution do not limit the amount

[57] At least no punishment is required by retribution. Some punishment may be required despite the fact that full compensation has been paid, but if so this is required by the need to deter violations of other rights, and is thus a matter of enforceability of those rights, rather than a matter of the enforceability of the right at issue.

[58] This is also Nozick's view. In *Philosophical Explanations*, Nozick notes that the same payment can constitute both compensation and punishment if it reduces the violator's previolation well-being baseline. As a result, the payment of compensation can in some cases eliminate the need for further punishment altogether. See Nozick (1981), p. 364.

of compensation the beneficiary may obtain. They merely describe how much punishment the violator must bear if the beneficiary's efforts to obtain compensation are (or would reasonably be expected to be) unsuccessful. These efforts may be unsuccessful because some or all of the beneficiary's injury is noncompensable, or they may be unsuccessful because the violator is simply unable or unwilling to pay compensation. But in either case, retribution only becomes an appropriate form of enforcement *once all reasonable means of obtaining compensation have been exhausted*. The beneficiary is accordingly not only entitled to seek full compensation for his injuries, or rather full compensation for all his compensable injuries, he is required to *prefer* compensation to retribution when compensation is available, and therefore to make a reasonable effort to obtain compensation before seeking retribution. This is because the more compensation the beneficiary obtains for his compensable injury, the closer the beneficiary will come to being indifferent to the violation, and the closer the beneficiary is to being indifferent to the violation, the more robust the restoration of the previolation level of social cooperation will be, especially as between the beneficiary and violator. Requiring the beneficiary to make reasonable efforts to exhaust available means of compensation before seeking retribution accordingly furthers the goals we have identified for postviolation enforceability.[59]

There is one more point that is worth considering before we leave our comparison of previolation and postviolation enforceability. Although the tests we have developed for these two states of affairs are different, perhaps our conclusions regarding postviolation enforceability suggest that we should reconsider our conclusions about previolation enforceability. If retribution – the imposition of punishment equivalent to the uncompensated suffering of the beneficiary – is sufficient to make a right enforceable in the postviolation state of affairs, perhaps the threatened imposition of this amount of punishment would be sufficient to make a right enforceable in the previolation state of affairs as well. The problem with using this as a test for previolation enforceability, however, is that while it might work on some number of occasions, the amount of punishment it requires is pegged to the harm caused by the violation rather than the benefit to

[59] Like the beneficiary's obligation to make a reasonable investigation of the violator's circumstances and moral character when determining retributive equivalence, the beneficiary's obligation to make a reasonable effort to recover compensation is rather minimal. The beneficiary may not refuse compensation if it is offered to him, and must avail himself of means of enforcement that would be expected to produce at least a morally significant amount of compensation without creating an unreasonable risk of further injury or requiring an unreasonable expenditure of time or money. The general basis for this obligation is that it furthers the overall goals of postviolation enforceability, but when the ultimate source of compensation is someone other than the violator, such reasonable efforts are also based on the requirement of acceptance for the right reasons. If the violator is to find the amount of enforcement ultimately employed acceptable for the right reasons, he must believe the beneficiary has made a reasonable effort to obtain compensation, for the more compensation the beneficiary receives, the less punishment must be imposed on the violator.

be gained from the violation. Because the benefit to be gained from the violation may exceed the harm caused by the violation, the threatened imposition of the amount of punishment required by retribution (even before discounting to moral significance) is not designed to ensure that potential violators will prefer to remain in the previolation state of affairs. Such a threat accordingly provides the beneficiary with little basis for evaluating whether and to what extent to incur the risks of violation. As a result, our test for postviolation enforceability would be of little use as a test for previolation enforceability, for when applied to the previolation state of affairs, it would not help us determine how either beneficiaries or potential violators are likely to behave. If we are trying to determine whether the goals of previolation enforceability are met, it seems that we must indeed apply a different test. Whether this raises some complications for our overall conception of enforceability is the question that we will turn to next.

5

The Relationship between Previolation Expectations and Postviolation Practice

Before we leave our examination of the measurement of previolation and postviolation enforceability, there is one further issue we must address. Recall that when we began our examination of postviolation enforceability, we saw that (subject to a few limited exceptions) deterrence was not (indeed, could not be) a factor in determining the enforceability of a right that had already been violated. The beneficiary was already in the postviolation state of affairs with regard to *that* right, so determining whether *that* right should be considered enforceable meant deciding whether the punishment actually imposed sufficiently satisfied the requirements of retribution, not deterrence. But while the amount of punishment actually imposed in the postviolation state of affairs could not have any deterrent effect on a violation that had already occurred, we also noted that it could have a deterrent effect on violations yet to come, for what is past for one right is prologue for many others. Every instance of postviolation punishment becomes part of the background pattern of postviolation practice of the society in which we live, and potential violators are likely to consider past postviolation practice as some evidence of the amount of punishment to which they are likely to be exposed should they commit a violation in the future. And if past postviolation practice is likely to influence the behavior of future potential violators, it will also influence the future previolation expectations of beneficiaries. Having acknowledged that a society's past postviolation practice could accordingly be an important factor in determining the future previolation enforceability of a wide range of rights, I nevertheless postponed consideration of this effect until after we had a more fully developed theory of postviolation enforceability. Now that we have such a theory, it is time to return to this issue and examine the relationship between postviolation practice and previolation enforceability in more detail.

5.1 Previolation Expectations and Postviolation Practice

The first important aspect of this relationship of which we should take note is that the effect of any particular instance of postviolation practice on previolation

expectations is likely to be negligible. This may not be the case for a few especially high-profile violations, and any instance of postviolation practice is likely to have a greater effect on the future expectations of those who are directly involved, but in general it is only the cumulative effect of many instances of postviolation practice that can be substantial. What this means is that when we are examining the relationship between postviolation practice and previolation expectations, we need not overly concern ourselves with the outcome of any particular instance of enforcement. What we need to focus on is overall patterns of enforcement, for it is past postviolation practice as a whole that can be indicative of systemic problems in the apparently available methods of enforcement, and it is these systemic problems that can undermine the previolation expectations on which our test for previolation enforceability is based.

For example, if a particular violator receives probation rather than prison for his violation, this is likely to have little effect on the future previolation expectations of anyone other than the particular violator and beneficiary involved, and even here the effect may be marginal at best because the outcome may have been heavily influenced by facts and circumstances peculiar to that violation. But if nonviolent first offenders as a group rarely serve time in prison despite the fact that substantial prison terms are possible for such offenses, the threat of imprisonment for such offenses will lack credibility, and this *will* have an effect on the previolation expectations of many future potential violators and beneficiaries. If probation is not a sufficient amount of punishment to make beneficiaries rationally believe that potential violators will prefer the previolation state of affairs, then our test for previolation enforceability tells us that beneficiaries will not consider these particular rights enforceable.

We can express this relationship between previolation expectations and postviolation practice as an additional necessary background condition for previolation enforceability. Either (1) the amount of punishment actually imposed for past rights violations in general (but not necessarily for any past violation in particular) must be sufficient to support the requisite current previolation expectations, or (2) there must be good reason to believe past postviolation experience is no longer a reliable guide to future practice, and good reason to believe that a greater amount of punishment will be available in the future. This latter alternative could be satisfied by a change of government, the adoption of a different legal system, the elimination of or at least a dramatic reduction in corruption in a system where corruption was previously widespread, the restoration of social order following a period of social chaos, and perhaps in other ways as well, but such dramatic changes in background conditions are likely to be relatively rare. As a result, satisfaction of the first alternative will ordinarily be required.

This may be more problematic than it might at first appear. Recall that under our test for previolation enforceability, the available measure of punishment

must be sufficient to make the rights beneficiary rationally believe potential violators will prefer to remain in the previolation state of affairs. Under our test for postviolation enforceability, however, the available measure of punishment merely must be morally significant – that is, a tolerable percentage of the punishment due under our formula for retribution, which requires an amount of punishment sufficient to inflict suffering on the violator equivalent to the uncompensated suffering of the beneficiary. Even though the amount of punishment required under our test for previolation enforceability is set according to the benefit of the violation, and the amount of punishment required under our test for postviolation enforceability is set according to the burden of the violation, which will usually (but not always) be much greater, the process of moral discounting is likely to put the amount of punishment required by our test for postviolation enforceability somewhere below that required by our test for previolation enforceability. The fact that the amount of punishment required under our test for postviolation enforceability can and usually will be reduced further by the payment of compensation, whereas the expectation of such a payment has no effect on the amount of punishment required for previolation enforceability, may exacerbate this effect.[1] Given the differences in the way the two tests are formulated, the amount of punishment actually required to make a right enforceable in the postviolation state of affairs often will be less than the amount required to make it enforceable in the previolation state of affairs.

But why should this be any cause for concern? Given the different goals of previolation and postviolation enforceability, there is nothing inconsistent about a beneficiary insisting that punishment P be available before he will consider a right enforceable in the previolation sense and at the same time recognizing that $\frac{1}{4}P$ or even some smaller fractional amount will be sufficient to render the same right enforceable in the postviolation sense. All this means is the beneficiary has a previolation expectation that more punishment will be available in the postviolation state of affairs than is strictly necessary for the particular right at issue to be considered enforceable in the postviolation sense if it is actually violated. The fact that less punishment is required to establish postviolation enforceability than previolation enforceability does not mean that only this lesser amount of punishment will be available in the postviolation state of affairs or that only this lesser amount of punishment will be imposed. And as long as the amount actually imposed meets or exceeds our previolation expectations, our future previolation expectations will be fully supported by our past postviolation practice.

[1] It *may* rather than *will* exacerbate this effect because when compensation comes from the violator, it can count as punishment too (if it comes from the violator's previolation pocket), and thus the total amount of punishment imposed on the violator will include the compensation paid as well as any separate punishment imposed.

The problem is that even though there is nothing prohibiting the imposition of more punishment than would strictly be required to establish postviolation enforceability, the amount of punishment actually imposed will tend to gravitate toward the minimum. There are three reasons for this. The first is that imposing punishment requires a diversion of social resources that could be put to more socially productive use elsewhere. This creates a strong utilitarian incentive for a social system to make available only the minimum amount of punishment necessary to ensure restoration of the social order and the corresponding continuation of social cooperation at previolation levels. Of course, there is also a strong utilitarian incentive to ensure that expectations of punishment remain high, thereby ensuring that the law maintains its deterrent effect, but the simultaneous pursuit of both goals is not as impossible as it might seem. By selectively publicizing what the law provides, or using different methods of transmission for different kinds of information, or directing certain information at the general public and other information only at officials, we can create the impression among the population of potential violators that a wider range of conduct is subject to a greater amount of punishment than is actually the case.[2] We may make every effort to announce what constitutes a criminal offense, for example, yet hardly mention the availability of defenses such as necessity and duress out of fear that an informed public would be likely to interpret these defenses too expansively and invoke them in situations to which they do not in fact apply. We may use ordinary language to define many offenses, but give these words highly technical and restrictive legal meanings that are less widely disseminated and are in any event difficult for the general public to understand. We may publicly assert that ignorance of the law is no excuse, even though the law may be more complex than this and ignorance of the law may affect liability in a variety of subtle yet important ways. We may allow juries to nullify the law, but not tell them or the public that they have such a power. We may enact criminal prohibitions that are deliberately somewhat vague in order to deter a largely risk-averse population from engaging in a wide range of conduct, yet instruct officials not to convict those who did not receive fair warning that their conduct was prohibited. In these and a myriad of other ways, we can seek to keep expectations of punishment high, thereby ensuring that the law has the maximum deterrent effect, while the amount of punishment actually imposed remains low, thereby minimizing the social resources that must be diverted to nonproductive enforcement activity.[3]

A second reason to impose the minimum amount of punishment rather than the maximum is that this is a form of winding down. By tending toward the

[2] This selective transmission of information creates what Meir Dan-Cohen calls "acoustic separation" between what officials understand the law to be and what the general public believes the law to be. See Dan-Cohen (1984).

[3] For a detailed discussion of these and various other examples of acoustic separation, see Dan-Cohen (1984), pp. 634–64.

minimum, a social system builds into its enforcement practices a mechanism for correcting the occasional errors in determination that will inevitably occur when either the existence of a violation or the appropriate amount of punishment due is disputed, thereby reducing the echo of retaliation and counterretaliation that can result from differing views as to the proper scope of the burdens of judgment. While either party may assign a greater or lesser scope to the burdens of judgment, it is the violator who is more likely to have the narrower view, because by committing the violation he has already proved himself less sensitive to the concerns of others. Tending toward the minimum is therefore not only likely to maximize the chances of acceptance by both parties, it is also likely to reduce the length and intensity of further disruptions to social cooperation when acceptance does not occur, and, in the long term, produce a more stable and productive social order.

Finally, even if enforcement does not gravitate toward the minimum as a matter of intentional design, we must remember that there are many practical difficulties to be encountered in administering any system of enforcement. It is quite possible that not all of these difficulties will be fully overcome. Any remaining administrative friction will provide a drag on the wheels of enforcement and keep the actual level of enforcement within society closer to the minimum than the maximum. There are also limits on the amount of enforcement a society can afford. As a practical matter, in many cases the minimum may be all that we can achieve. In any event, whether as a matter of institutional design or as a product of the invisible hand of administrative or economic friction, the actual level of enforcement within our society is more likely to be closer to the minimum than the maximum. Indeed, one of the reasons why we find our minimum test for postviolation enforceability intuitively appealing is that it accords with our sense of the amount of punishment that many rights violations actually receive.

But how can this be so? If the amount of punishment actually imposed in postviolation practice were consistently less than the amount required by our test for previolation enforceability, wouldn't people eventually realize this was the case and revise their previolation expectations downward? Because these revised previolation expectations would be for less punishment than our test for previolation enforceability requires, wouldn't we be forced to conclude that most rights were not enforceable in the previolation sense? But we also said that the purpose of previolation enforceability was to encourage people to behave as if their rights would not be violated, and people generally do behave like this. Because they generally do consider their rights to be enforceable in the previolation sense, we must be getting something wrong here. Either we must rethink our test for previolation enforceability and explain why the lesser amount of punishment required by our test for postviolation enforceability is enough to produce the requisite previolation expectations, or we must rethink our test for postviolation enforceability and explain why more punishment than

it requires will typically be produced, or both, for as they are currently constructed, the postviolation practice that our test for postviolation enforceability is likely to produce does not support the previolation expectations that our test for previolation enforceability seems to require.[4]

Or does it? Could the amount of punishment actually imposed in practice consistently be less than our previolation expectations without undermining them? Is there an explanation for how we can continue to expect that a greater amount of punishment will be imposed than is actually imposed in practice? Certainly the amount of punishment imposed in practice must meet or exceed our previolation expectations on *some* number of occasions, but what number of occasions is sufficient? Must postviolation practice meet or exceed previolation expectations on a substantial majority of occasions, or will a bare majority of occasions do? Could something even less than this be sufficient? And does it matter what means or methods of enforcement have been used? Do some means or methods of enforcement have a greater influence on the formation of future previolation expectations than others, or will all postviolation enforcement activity contribute equally to the formation of future previolation expectations? What does it actually mean to require that postviolation practice be sufficient to support previolation expectations *in general*?

Note that there are two different expectations that postviolation practice could affect. One is that a certain amount of punishment will be available in the postviolation state of affairs; the other is that this amount will be sufficient to produce a preference for the previolation state of affairs among potential violators. If the punishment actually imposed were insufficient in amount, this would mean we should revise our expectation as to the amount of punishment that is likely to be imposed in the future, but it need not mean we should revise our expectation that the amount available, whatever it may be, is sufficient to produce the requisite preference for the previolation state of affairs. Indeed, the mere fact that some violations continue to occur despite the imposition of the expected amount of punishment does not mean that our expectations as to *preference* are unjustified. This could simply reflect the fact that no matter how much punishment is available in practice, some potential violators will not be deterred by it, either because they have an idiosyncratic conception of the good or because they stand to gain an unexpectedly large benefit from the violation due to an unusual confluence of circumstances. Maintenance of our previolation

[4] While there is much anecdotal evidence that our postviolation practice consistently delivers less punishment than our previolation expectations, this does not seem to have ever been the subject of empirical study. Of course, if punishment does *not* tend to gravitate toward the minimum, then there is no need to explain why people persist in maintaining expectations that are consistently disappointed by experience because in this case their expectations would not be disappointed. An explanation is only required if punishment *does* tend to gravitate toward the minimum. I therefore do not have to prove that punishment gravitates toward the minimum in order to defend my theory of enforceability, I merely have to explain why it is not a problem if it does, which is what I have attempted to do in the text.

expectation as to preference does not depend solely on the amount of punishment imposed – it also depends on the number of opportunities for violation that are taken. As long as few opportunities for violation are taken, we have no reason to revise our expectation as to preference even if less punishment than we originally expected turns out to be available. We merely need to revise our expectation as to the amount of punishment required to produce this preference. But if we do this, we need to explain the mechanism by which this expected lesser amount of punishment produces the requisite preference. If no defensible explanation can be supplied given our understanding of human nature and human decision-making procedures, then we must conclude that our original analysis of the amount of expected punishment required to produce the requisite preference was correct, and we must supply an explanation of how this preference can be maintained in the face of a reality that would seem to undermine it.

The degree to which our postviolation practice will have an influence on our future previolation expectations will be determined by two factors. The first is the relative degree of publicity that various instances of our postviolation practice receive. To the extent that instances of harsher punishment receive more publicity than instances of lighter punishment, the public's previolation expectations may be erroneously inflated. The second is the degree of uncertainty that surrounds the existence of the right in question or the existence of the violation. To the extent that instances of lighter punishment can be ascribed to the existence of such uncertainties, the public's previolation expectations may be unaffected, for these instances of punishment may not be taken as indicative of the amount of punishment a more certain violation would receive. The two factors are accordingly somewhat interrelated. Uncertainty may undermine the deflationary effect of publicity about light punishments and, as we shall see, publicity may undermine the deflationary effect of some kinds of uncertainty.

5.2 Publicity and Previolation Expectations

The amount of publicity any particular instance of postviolation enforcement receives will vary widely from case to case. Indeed, some instances of enforcement will not be visible at all to anyone other than the beneficiary and the violator, either because enforcement is taken informally and privately or because it is taken through some formal means (such as settlement or arbitration) that preserves the confidentiality of the proceedings. The nonpublic nature of these latter methods of enforcement is even seen by some as a reason to discourage them.[5] Whether nonpublic methods of dispute resolution and enforcement

[5] See, e.g., Coleman and Silver (1986), pp. 114–19. Others argue that the cure for this "public bad" is not to discourage settlements but to make their terms public whenever possible. See, e.g., Luban (1995), esp. p. 2625 and pp. 2648–58.

should be encouraged or discouraged, however, it is true that actual enforcement can have only a limited influence on the future expectations of anyone not directly involved in the dispute if the details of the enforcement obtained are not open to public inspection. This is not to say that enforcement obtained through such methods will have no influence – even when an instance of enforcement is nonpublic, rumors and suspicions can abound, information can "leak out," especially in cases where the degree of punishment imposed is particularly noteworthy, and eventually a wide range of people can become at least vaguely aware of it.[6] The point is simply that the degree of penetration into the public consciousness is likely to be far slower and shallower in these cases than in those that are resolved through more public proceedings.

Even when the amount of punishment imposed on a particular violator *is* public information, however, the degree to which it penetrates the public consciousness may still be rather limited. Although all public instances of postviolation enforceability are *available* as precedents for the formation of future expectations, their influence is directly related to how widely known they become, and they are unlikely to become widely known beyond lawyers and other dispute-resolution professionals unless there is something particularly noteworthy about them. The more noteworthy they are, the more publicity they will receive, and the more publicity they receive, the greater their impact on the formation of future expectations among the general public. Those that remain *public* but not *publicized,* on the other hand, are again unlikely to have much effect on the future expectations of anyone but the parties most directly involved.

Which cases, then, are likely to be most noteworthy? Although some cases may become noteworthy precisely because they are representative of some larger overall pattern, the criterion of noteworthiness is likely to produce a very unrepresentative overall sample. In what way the sample will be unrepresentative, however, may depend on whether the particular case involves an award of civil damages or the imposition of criminal penalties, for noteworthy civil and noteworthy criminal cases are likely to be unrepresentative in opposite ways. Whether driven by some hidden political agenda or simply by people's apparent fascination with extremes, large awards of damages are likely to receive considerable publicity whenever they are obtained, whereas few if any examples

[6] This leak of information is likely to come primarily from lawyers. While litigants are likely to have only limited experience with the judicial process, lawyers are "repeat players" and accordingly have access to a great deal of ostensibly private information on the outcome of prior similar disputes. Indeed, this is a primary reason people consult lawyers in the first place. See generally Galanter (1974). Lawyers will also often share their experiences with each other as well as their clients. Eventually, the more noteworthy aspects of this experience may become widely known, even to people who have not yet experienced a violation or personally had reason to consult a lawyer. Of course, this information may and often will become garbled in the process of dissemination. Nevertheless, given the possibility of information leaks, even private enforcement actions can have some effect on future previolation expectations.

of more typical awards are likely to receive much publicity at all.[7] It is news when someone recovers almost $3 million after spilling a cup of hot coffee on herself; it is not when someone in similar circumstances recovers nothing.[8] The result is that examples of these more extreme damage awards will tend to be overrepresented in the public consciousness. This is important because when forming our previolation expectations as to the amount of damages that are recoverable for civil violations, we are likely to employ what is called the availability heuristic, which means we will tend to evaluate the likelihood of various possible postviolation outcomes by the ease with which examples of such outcomes can be called to mind.[9] If the set of examples of postviolation practice that we have to draw upon is skewed in favor of more extreme awards of damages, this will tend to exaggerate our perception of their frequency, and we are likely to believe that a greater amount of both compensatory and punitive damages are typically recoverable in the postviolation world than would be the case if we relied on a more representative sampling of actual postviolation practice. And as long as this is the way in which our previolation expectations commonly are formed, actual postviolation practice will be sufficient to support our future previolation expectations in civil cases, even though the number of postviolation cases that actually meet or exceed our previolation expectations is relatively small and our previolation expectations are therefore unrealistically inflated.

But why aren't surprisingly small awards of damages given an unrepresentative amount of publicity too? After all, these are also examples of extremes, and if this was all that determined the degree of publicity a particular case received, we should expect anomalously low awards to receive as much publicity as anomalously high ones, and the two would cancel each other out. The reason

[7] For example, the average jury award reported by the *New York Times* was 16.5 times as large as the average award actually entered in New York State during the same period and 15.4 times the average award entered in New York City. And while only 4.6 percent of actual jury verdicts include punitive damage awards, these account for 21.3 percent of verdicts reported in the media. See Galanter (1998), pp. 744–7.

[8] The reference is of course to *Liebeck v. McDonald's Restaurants, Inc*., No CV-93-02419, 1995 WL 360309 (N.M. Dist. August 18, 1994), in which the jury awarded the plaintiff punitive damages of $2.7 million on top of compensatory damages of $160,000. This award received substantial publicity, but very little of this mentioned how seriously the plaintiff had been injured (she actually suffered second and third degree burns, spent seven days in the hospital, and had to undergo painful skin grafts), or the reasons why the jury might have found McDonald's conduct particularly reprehensible (there was evidence that McDonald's had persisted in serving its coffee at a much higher temperature than other fast-food restaurants despite receiving hundreds of complaints from other customers, some of whom had also suffered serious burns), or the fact that the punitive award was subsequently reduced by the court to $480,000. See, e.g., Rusted (1998), at p. 68, n. 282; Galanter (1998), pp. 731–2; Hoole (1996), 470–2. The fact that most plaintiffs recover nothing for similar claims, (see *McMahon v. Bunn-O-Matic Corporation*, 150 F.3d 651 [7th Cir. 1998] [noting that the overwhelming majority of courts to have considered similar suits have granted summary judgment for the defendant]), received hardly any publicity at all.

[9] See Tversky and Kahneman (1973).

this does not occur, I think, is threefold. First, because our natural sympathies tend to lead us to err on the side of awarding too great an amount of damages rather than too little when a party is clearly genuinely injured, *extreme* examples of undercompensation and surprising refusals to award punitive damages are relatively rare. Second, when such awards do occur, none of the media-savvy participants in the case (the defendant, the defendant's lawyer, and the plaintiff's lawyer) is likely to have a self-interested reason to publicize the award. In contrast, all three have a vested interest in seeking publicity for unusually large awards – the plaintiff's lawyer in order to attract more clients, and the defendant and the defendant's lawyer in order to make a case for tort reform. Third, even when a case involving a surprisingly small award of damages is brought to the attention of the media, it is only news if the award is unjust, and explaining why it is unjust usually requires greater effort and space than would be required to make it clear why an extremely large award was newsworthy. The latter are therefore likely to make more attractive stories purely for instrumental reasons and therefore receive more publicity than the former.

When it comes to the imposition of criminal penalties, however, the most noteworthy cases may be those that go to the other extreme. While it would be news if a minor crime were to generate a severe punishment, there are safeguards in place in most societies to prevent this, so unless a society does not employ such safeguards, it is unlikely that there will be many instances of this kind of extreme to report. But there are likely to be many examples of the other extreme – serious crimes that receive only light fines or short terms of imprisonment or perhaps even no punishment at all. Even if these are not representative of the typical amount of punishment such offenses receive, they are newsworthy because they are examples of the extreme, while it is less newsworthy when a serious crime generates a severe punishment, at least as long as the punishment is not death, the effect of which we shall come to in a moment. If people apply the same availability heuristic when evaluating the likelihood that various criminal penalties will be imposed, and the most noteworthy and therefore the most publicized cases are ones in which the punishment imposed is unrepresentatively light, then people are likely to have an overly pessimistic view of the amount of enforcement available for criminal violations.[10]

There are several factors, however, that mitigate this effect. First, some of the cases in which light punishments are meted out are newsworthy because the defendants involved are politicians, celebrities, or other public figures. We

[10] There is recent research that suggests this is indeed the case. Hough and Roberts (1998), for example, report that a large percentage of respondents to the British Crime Survey greatly underestimated the severity of the penalty typically imposed for various criminal offenses. Ironically, when asked what penalties they thought should be imposed for these offenses, these same respondents opted for what they thought was an increased level of severity but was in fact the level of severity actually imposed.

tend to believe that different rules apply when the conduct of such people is at issue. Unless you are a celebrity or expect to be attacked by one, these cases are too easily distinguished to have much influence on the formation of your future previolation expectations. Second, even when the defendants involved are more ordinary people, and the crime involved is particularly notorious, publication of an unduly lenient amount of punishment will also often be accompanied by calls for reform. Indeed, what makes such light punishments newsworthy is the public outrage they engender, and contemporaneous promises by public officials to increase criminal penalties or take other steps to prevent the repetition of such conduct are common. In light of such contemporaneous public promises, there may be good reason to believe that circumstances will be different in the future, and the weight actually assigned to these prior instances of lenient punishment may be minimal when it comes time for future previolation expectations to be formed. Third, in the United States and other jurisdictions where capital punishment is permitted, both the imposition and the execution of such a sentence will also receive considerable publicity. While there is a great deal of controversy surrounding the claim that capital punishment is an effective deterrent, many people believe that it is, and because instances of capital punishment do receive a substantial amount of publicity, people are likely to think that the probability of receiving such a punishment is much greater than it is. Just as unrepresentative examples of light punishment will tend to deflate their future previolation expectations, unrepresentative examples of harsh punishment will tend to inflate them. The net effect in these jurisdictions is that unrepresentative examples of leniency and unrepresentative examples of stringency may cancel each other out.

Nevertheless, previolation expectations of the degree of criminal punishment typically available might indeed be biased toward the negative if they were based on unrepresentative samples of actual practice alone. To correct for this, stated punishments may have to be raised beyond what would be strictly necessary to produce the requisite previolation expectations if actual punishments and stated punishments were seen to be in closer correspondence, and this increase in stated punishments may have to be heavily publicized to ensure it penetrates the public consciousness. Indeed, correcting for the bias created by the availability heuristic may explain why stated punishments often seem unduly harsh for some offenses, and why more and more offenses are carrying mandatory minimums or otherwise depriving judges of sentencing discretion.[11] In any event, some corrective publicity or other measures may have to be undertaken to ensure that postviolation practice is sufficient to support the requisite future previolation expectations where criminal penalties are concerned.

[11] The availability heuristic also leads people to overestimate the amount of crime that actually occurs and their own chances of falling victim to it, putting further pressure on public officials to increase the severity of stated punishments.

Are there limits, however, to the amount of work publicity can do? Could publicity alone ever be sufficient to support our previolation expectations? After all, "it is the threat of punishment and not punishment itself that deters," and if effective deterrence "really depends on publication," it "may be achieved if men believe that punishment has occurred even if in fact it has not."[12] Suppose the government finds it too difficult and expensive to actually catch, prosecute, and punish violators of the criminal law. It nevertheless wants beneficiaries to behave as if their rights were enforceable, for the economy would otherwise suffer a loss of productivity that would vastly outweigh the benefit of the cost savings the government hopes to enjoy. The government therefore embarks on a secret program of disinformation, creating false news reports and documentaries showing the frequent capture of rights violators and the imposition of severe punishments, and suppressing all news of violations that go unpunished. At the same time, actual enforcement activity ceases. The government no longer makes any effort to catch rights violators, and if they surrender themselves it lets them go because it does not want to incur the cost of their prosecution and incarceration. Not only does actual postviolation practice fail to meet previolation expectations, it fails even to meet postviolation requirements. What happens to previolation expectations in this kind of society?

At first, probably nothing. Freed from the constraints of reality, the government can create the impression that rights violators are almost always caught and punishment is always swift and severe. Beneficiaries will accordingly continue to believe that the amount of postviolation punishment available meets or exceeds their previolation expectations, and that most potential violators will prefer to remain in the previolation state of affairs. This latter belief may even be true, for the government's disinformation campaign affects not only the beliefs of rights beneficiaries, it affects the beliefs of potential violators too. Most potential violators accordingly continue to be deterred by their fear of capture and punishment, just as if society were actually enforcing the rights of its constituents, and never discover that their fear of capture and punishment is not well-grounded in actual practice. Those few who actually do commit violations, either intentionally or unintentionally, and then escape punishment, are likely to simply ascribe their escape to luck. They certainly have no incentive to publicize their escape, for they would fear drawing attention to themselves and being caught and punished after all. Only when they escape a second and a third time, perhaps after committing a series of unintentional violations, are they likely to begin to question the veracity of government enforcement reports. Once this occurs, however, the government's plan begins to break down.

[12] Mabbot (1939). For Bentham, this meant that it was morally preferable from a utilitarian perspective to increase the *apparent* punishment inflicted on an offender rather than the *real* whenever possible, for it was the apparent punishment not the real that produced deterrence and the real not the apparent that was the greater evil. See Bentham (1996), ch. 15, sec. 9, pp. 178–9.

After enough time, so many violators will have escaped punishment on so many occasions that it will become impossible for the government to control the spread of such information. Although the previously false beliefs of the rest of the population might be initially resistant to change even in the face of revelation of the government's fraud,[13] the truth would eventually overwhelm such resistance and cause these artificially inflated previolation expectations to collapse.

Of course, this hypothetical assumes essentially total government control over the dissemination of information. Even extremely repressive government regimes are rarely able to achieve this level of control. In the real world, such a disinformation campaign would quickly collapse from the government's inevitable inability to suppress the spread of anecdotal truth and to conceal its true intentions completely. Even if such an extreme degree of control were possible, however, this hypothetical illustrates that previolation expectations must receive at least some support from actual postviolation practice. Unrepresentative publicity can inflate previolation expectations beyond that justified by actual practice,[14] but publicity alone cannot be a complete substitute for very long.[15]

[13] There are several reasons why beliefs can be initially resistant to change even when the holder of such beliefs is presented with irrefutable evidence that the assumptions or empirical data on which they were based are demonstrably false. First, the false evidence that originated the belief may have since become associated with other apparently confirmatory data, and this evidence may continue to be viewed as supporting the belief even after the originating evidence is discredited. Second, the originating evidence may have led the holder of the belief to form a causal explanation that the holder is reluctant to abandon even when the originating evidence is discredited, preferring instead to search out new evidence that would support it. Third, the false belief may have led to the construction of a self-fulfilling hypothesis, which has in turn generated further "objective" confirmation because that is what the holder of the belief expected to find. See Ross and Anderson (1982), esp. 146–52.

[14] For a discussion of how false, unrepresentative, and deliberately misleading examples of enforcement can and have been used by those with a specific political agenda to inflate people's perceptions of the amount of enforcement available, see Daniels and Martin (1995).

[15] There are perhaps even more radical ways of manipulating people's previolation expectations besides generating false and misleading publicity. Hypnotism might be one, or some other form of mind control that left people with the false belief that more punishment was being meted out in practice than was actually the case. Thankfully, these methods are currently the stuff of science fiction, but if they were available, they could influence the formation of previolation expectations, so should they nevertheless be considered methods of enforcement too, at least in theory? While these methods would be a way of making restraints operative in the world, they would not fit our intuitive understanding of what it means to enforce them. The purpose of enforcement is to influence the behavior of the beneficiary, but not everything that influences the behavior of a beneficiary is a means of enforcement. Only those means that use the threat or imposition of punishment or the offer or payment of compensation are means of enforcement. Just as we would not say that someone who had crossed the finish line first had "won" the race if the other participants had been killed by a runaway truck, we would not say that the use of these ever more radical techniques of influencing the beliefs of the beneficiary would constitute acts of enforcement. Our conception of enforceability requires at least some resort to the tools of enforcement, and not simply an end run around them.

5.3 Uncertainty and Previolation Expectations

The second factor that influences the formation of our previolation expectations is the degree to which either the existence of the right or the existence of the violation is subject to uncertainty. In a substantial majority of cases, one or even both of these will be disputed. Sometimes this dispute will be resolved prior to the enforcement of the right, but often the right will be enforced even though much of this uncertainty remains. In the United States, for example, over 70 percent of filed civil cases are resolved through settlement rather than adjudication.[16] A similar high rate of settlement is present in England[17] and in many continental legal systems too. The details of these settlements are not usually made public, but people are generally aware that the rate of settlement is quite high. While these settlements could and sometimes do impose sufficient punishment to meet the relevant previolation expectations, the widespread assumption is that some lesser amount of punishment is usually all that can be achieved when a valid claim is settled rather than prosecuted to its conclusion.[18] Why, then, do people continue to believe that a greater amount of punishment will be available if they invoke their legal remedies when this has so rarely been the case in the past? Are we so easily impressed when the amount of enforcement actually obtained does meet or exceed our expectations that we simply do not notice that most people usually obtain far less? Is this just some kind of a quirk in our psychological makeup that encourages us to focus on the positive and ignore the negative despite the relative weight of the evidence, or is there in fact a good reason why this experience should not have a greater influence on our future previolation expectations?

Part of the explanation clearly does arise out of the natural biases that influence our evaluations of the likelihood of uncertain events. One such bias is the egoistic bias, which simply means that most people think they are above average, and that good things are more likely and bad things less likely on average to happen to them than to other people.[19] Such overconfidence causes people to expect that they will be able to enjoy the full panoply of legal remedies should they ever need to invoke them even though most people cannot, and that the considerations that force other people to compromise their claims will not apply to them. But there is another part to the explanation as well. In forming their future previolation expectations, people recognize the limited relevance of examples of enforcement that are not preceded by definitive determinations of liability.

[16] The figures vary somewhat depending on type of case and court. For certain kinds of cases, the settlement figure may be slightly below 70 percent, but for many it is well over. See Eisenberg et al. (1996), Table 5 and Galanter and Cahill (1994), p. 1340.

[17] Genn (1988), p. 146.

[18] Conversely, people generally assume that invalid claims often can be settled for far more than they deserve.

[19] See generally Weinstein (1980). Indeed, there are over 200 studies that support this phenomenon, with people estimating their chances of experiencing an undesirable event at 20 to 80 percent below average. See Jolls (1998), p. 1659 and n. 22.

Our previolation expectations are general expectations – they encompass all potential violators and all potential forms of violation. Once a violation has occurred, however, the general has been reduced to the specific. We now have a great deal more information available – in most cases we know the identity of the violator and we should at least know the precise nature of the violation. Our expectations are no longer framed by the vast array of violations that *could* occur, but by the specific violation that *did* occur. It should be no surprise that the amount of enforcement available for *this* violation is uncertain, for when the amount of enforcement available *is* uncertain, the deterrent effect of the fear of punishment is at its weakest and this is when a violation is most likely to occur, *ceteris paribus*. If enforcement is then obtained without this uncertainty having been definitively resolved, the amount of enforcement that would have otherwise been available will have to be discounted to reflect this remaining uncertainty. People accordingly expect that the amount of enforcement actually obtained through settlement will be this discounted amount, and not the amount that would be available if any uncertainty had been definitively resolved in the beneficiary's favor. The mere fact that most disputed claims are settled for less than their full value does not give people a reason to believe their prior but more generally framed previolation expectations about the amount of enforcement available for undisputed violations were in error.

This is not to say that whenever rights are enforced by means of compromise, the amount of enforcement obtained is irrelevant to the formation of our future previolation expectations. To some extent at least, the amount of enforcement obtained through compromise will reflect not only a discount for uncertainty, but also a discount motivated by more instrumental concerns. For example, some beneficiaries will be unable to bear the delay or the publicity or the cost of continued litigation, or will be otherwise amenable to outside pressures, and may accordingly be forced to settle their claim for a greater discount than is justified by uncertainty alone. It is therefore necessary to distinguish between *true* or *substantive* uncertainty, or uncertainty reflecting legitimate and defensible disagreements in position, and *manufactured* or *procedural* uncertainty, or uncertainty reflecting the existence of arguments that have value purely because of the vagaries of the decision-making process. Obviously, while they are not privy to the details, the public is generally aware that settlements are often influenced by instrumental concerns and procedural uncertainties. While discounting for true uncertainty does not give people a reason to revise their future previolation expectations, discounting for manufactured uncertainty does, because the discounting occurring here is being driven by instrumental considerations that would apply even to a claim that was substantively certain. This kind of discounting accordingly will apply downward pressure on the future previolation expectations of both violators and beneficiaries.

But there is inflationary pressure on these future previolation expectations as well. This is exerted by those claims that proceed to judgment and produce enforcement in excess of previolation expectations. These latter cases may be

few and far between, but they are often noteworthy and are therefore likely to receive more publicity and penetrate more deeply into the public consciousness than the more mundane or dissatisfying examples of enforcement produced by the less visible settlement process.[20] They are accordingly likely to be given far greater weight in evaluations of enforcement outcomes than they statistically deserve and may easily overwhelm the more statistically significant number of outcomes that produce only disappointing amounts of enforcement. As long as the inflationary pressure of these excessive adjudicated outcomes is sufficient to counterbalance the depressive effect of excessive discounting in settlement, postviolation practice should still be sufficient, all things considered, to support the maintenance of our future previolation expectations.

[20] This may not be true in criminal cases, for unduly lenient plea bargains in criminal cases are also likely to attract publicity. In these cases, the downward pressure on future previolation expectations is likely to be offset only by calls for reform, which may explain why the stated penalties for what would otherwise be less serious offenses have increased so dramatically in recent years. The most prominent example of this phenomenon is the "three-strikes-and-you're-out" laws now in force in many parts of the United States, under which even a minor third offense can lead to a sentence of life in prison.

6

Limitations on the Means of Enforcement

We have now examined the means by which legal rights may be enforced, the ways in which we can measure the amount of enforcement available through those means, and what measure of enforcement is necessary for a right to be properly considered enforceable at both the previolation and the postviolation stage. Before we can be certain we have identified all the necessary and sufficient conditions for enforceability, however, there is one further issue we must examine. We must consider whether any restrictions apply to the means of enforcement that we may consider in determining whether the requisite measure of enforcement is available. Three possibilities arise. First, we must decide whether a legal right must have a legal remedy in order to be properly considered enforceable, or whether any means of enforcement will do as long as these means, taken together, will produce enforcement of sufficient measure. Second, we must decide whether the available means of enforcement must be lawful, or whether it is possible that even an unlawful means of enforcement, if available, can contribute to the enforceability of a right. And finally, we must consider the extent to which a lawful means of enforcement must also be available as a practical matter for that means of enforcement to be properly included in our enforceability calculation. It is to these issues that we turn our attention next.

6.1 Legal Rights and Legal Remedies

Most legal rights have legal remedies. Indeed, it is difficult to think of a legal right that does not offer some legal remedy (at least in theory) as a means of enforcement. There is little doubt that legal remedies are often the most effective and certainly the most commonly invoked means of enforcing legal rights. There is also little doubt that the need for a legal remedy often provides the justification for the creation of a legal right. In deciding whether any particular legal right is enforceable, determining whether and to what extent legal remedies are available will accordingly be of primary importance. But does this mean a legal remedy *must* be available for a right to be properly considered enforceable?

The first thing we must do if we are to meaningfully address this question is to specify what exactly counts as a legal remedy. This is more problematic than it might at first appear. One possibility would be to equate *legal* remedies and *lawful* remedies. If we did this, all means of enforcement would be considered legal remedies as long as they were not prohibited by law. But there is an obvious problem with such a broad definition. If we equate legal remedies and lawful remedies, we transform the question of whether a legal right can be properly considered enforceable even though it is enforceable only through nonlegal means into the question of whether a legal right can be properly considered enforceable even though it is enforceable only through unlawful means. The latter question is not unimportant (in fact we will turn to it in the very next section), but it is the former question on which we are focusing now. In order to do this, we must use a definition that distinguishes between different methods of enforcement rather than merely between lawful and unlawful means.[1]

Once we attempt to devise a narrower definition, however, the lines become difficult to draw. If we try to limit our definition to traditional legal remedies such as civil awards of damages and injunctions and criminal fines and imprisonment – remedies that are created by statutory or common law and awarded only after being found appropriate by neutral judicial officers and backed by the coercive power of the state – we have captured the central case but ignored the richness and complexity of the legal regulatory scheme. Many other forms of remedy, while lacking one or more features of the central case, may nevertheless have sufficient features in common to qualify as legal remedies under any meaningful definition of the term. Sometimes the remedies available may be administrative rather than judicial, but these may also be backed by the coercive power of the state and be awarded only if deemed appropriate by some nonjudicial but otherwise no less neutral public official. Or perhaps the administrative remedy may be issued on the agency's own initiative without the prior approval of some neutral official, but is nevertheless subject to subsequent judicial review. Or perhaps the remedy is judicial, but is not backed by the coercive power of state, as is the case with declaratory relief. Or perhaps the remedy is neither administrative nor judicial but private, as is the case when self-help is expressly intended or at least acknowledged to be part of the remedial scheme by some statute or judicial decision. In deciding which among these various remedies should be considered "legal," we could adopt a broad, a narrow, or a middle view, depending on which features of our central case we select as essential to our definition. To avoid any controversy over which view

[1] Not only is asking whether a legal right must have a legal remedy in order to be enforceable different than asking whether a legal right must have a lawful remedy in order to be enforceable, it is also different than asking whether a legal right must be enforceable (lawfully or otherwise) in order to exist. Regardless of your position on the latter question, the question of whether a legal right can be enforceable without a legal remedy remains an open one.

is appropriate, we will have to consider whether a legal right must have a legal remedy under each of these possible views in turn.

The broad view is that legal remedies, like legal rights, are creatures of law, and therefore include all remedies that owe their existence to law rather than simply to happenstance or some set of physical, social, or strategic facts and circumstances or the content of a particular conception of morality. Under the broad view, legal remedies would include not only traditional judicial remedies, but also all modern administrative variants, plus declaratory relief, plus any private legal remedies that have been expressly incorporated into the remedial scheme by statutory or common law. This latter category would include specially created statutory remedies such as nonjudicial foreclosure, a less cumbersome and less expensive privately executed alternative to the more traditional option of judicial foreclosure, and the filing of mechanic's liens, a passive form of remedy used by workmen to secure payment for improvements made to real property. It would also include forms of self-help that have not been specially created, but which would constitute statutory or common law violations absent some express exemption. Such exemptions, for example, are what allow a secured creditor to repossess goods from a defaulting debtor, a bailee to sell property of a defaulting bailor, and a landlord to seize and sell the possessions of a defaulting tenant, without being liable for conversion.

The problem with the broad view is that to avoid falling back into equating legal and lawful remedies, it must distinguish between remedies that are expressly authorized by law and those that are merely not prohibited. Moral, strategic, automatic, and most social means of enforcement would therefore be excluded. So would the use of physical force in self-defense. But why should anything turn on the fact that a particular means of private enforcement would be a violation of law if it were not being employed as a legal remedy? All lawful means of enforcement are equally well-grounded in the law in the sense that any claim pursued against someone for exercising such means is bound to fail. Why not include other means of private enforcement that are generally permitted even when not being employed as legal remedies? What do we do with borderline cases where the means of private enforcement are neither generally permitted nor generally prohibited? And why should this distinction have any impact on our evaluation of whether a right is or is not enforceable? None of the information contained in this distinction is relevant to any of the concerns that underlie either previolation or postviolation enforceability. If we were to distinguish between an enforceable and an unenforceable right according to whether the available remedy was expressly authorized by law or merely not prohibited, such a distinction would be entirely arbitrary. If we were to adopt the broad view of what constitutes a legal remedy, the notion that a legal right must have a legal remedy to be enforceable would accordingly have to be rejected.

We next consider whether we would come to a different conclusion if we were to adopt the middle view. The middle view focuses on the neutrality of the

official issuing or approving of the remedy, and uses the participation of neutral public officials in the remedial process as a way of distinguishing legal from other remedies. Under the middle view, judicial or administrative remedies, including declaratory relief, would be included in our definition because they are all subject to prior or at least subsequent review by a neutral public official, whereas all private remedies would be excluded even if they were expressly incorporated into the remedial scheme by some statute or judicial decision. But does the neutrality of their pedigree warrant giving judicial and administrative remedies a special status above other forms of remedy that are equally well-grounded in statutory or common law? This is no doubt an important feature, for having a neutral party decide what level of enforcement is appropriate would seem to increase the chances that the remedies awarded will be acceptable to all parties. Because acceptance is one of the key objectives of the postviolation enforcement process, it might make sense to assign a special status to judicial or administrative remedies if they were uniquely positioned to produce such acceptance. But we have reason to question whether this is indeed the case. The overwhelming majority of civil matters are settled, rather than litigated to judgment, and a similarly high percentage of criminal matters are resolved through plea-bargaining. Civil settlements rarely require court approval, so the degree of enforcement ultimately obtained through most civil actions is determined by the parties, not by some neutral government official. The role of the court in plea-bargaining is more complicated. The court must approve most plea agreements, but the court cannot tell the prosecutor what charges to bring or not to drop, and this has a tremendous impact on the sentence that the court has authority to impose, especially now that the traditional sentencing discretion once granted to the courts has been severely limited. Most plea agreements contain a sentence recommendation to control the court's discretion in any event, and while the court is not bound by this recommendation, it is rare for a court not to follow it. The degree of enforcement ultimately obtained though most criminal actions is therefore decided primarily by the prosecutor, hardly a neutral government official, and secondarily by the violator, who can almost always obtain more lenient treatment by agreeing to a plea, with the court and the victim playing only subsidiary roles. Given the fact that a neutral government official has no impact on the remedies obtained in most civil matters and only limited impact on the remedies obtained in most criminal matters, it seems hypocritical to assign a special status to such remedies when in most instances they do not exhibit the feature that supposedly makes them special.

Moreover, even when judicial or administrative proceedings *do* result in the issuance of a remedy by a neutral government official, it is not so clear that this feature makes acceptance of the degree of enforcement awarded more likely. Full-blown litigation, regardless of the forum in which it happens to occur, also increases the acrimony between the parties, and there is some evidence that the resentments and antagonisms created by the process of presenting evidence

and arguments to a neutral decision maker may actually decrease the chances of a postenforcement resumption of previolation levels of cooperation rather than increase them.[2] The critical factor may be whether the dispute relates to matters of private conduct alone, in which case the parties may be resistant to the judgment of an outsider, or also raises important questions of public policy, in which case the participation of a neutral third party may be essential to the ultimate acceptance of whatever enforcement is awarded. In any case, the relationship between the participation of a neutral third party in the remedial process and the ultimate acceptance of the relief awarded is a more complex question than it might at first appear,[3] and is therefore not a reliable basis on which to elevate legal remedies above all other others.

Even if we were to assume a strong connection between the neutrality of the remedial source and remedial acceptance, however, neutrality is not the exclusive province of the judicial and administrative process. Private remedies such as arbitration or mediation or other forms of alternative dispute resolution also provide this feature. Indeed, some parties may view the private arbitration panel as more neutral than the public court.[4] Even self-help and other forms of private sanctions are ultimately subject to some review by a neutral public official, for an aggrieved party may always sue to enjoin such action or bring an action for damages after the fact. Any exclusion of other forms of relief from the category of legal remedies on these grounds alone would accordingly have to rely on some arbitrary distinction between private and public neutral decision makers or between prior and subsequent judicial review. If we were to adopt the middle view of what constitutes a legal remedy, the notion that a legal right must have a legal remedy to be enforceable would therefore once again have to be rejected.

[2] See, e.g., Farnsworth (1999) (noting that acrimony between the parties presented a substantial obstacle to postjudgment bargaining following the issuance or denial of injunctions in nuisance cases).

[3] Another benefit of the participation of a neutral decision maker is that erroneous denials or applications of enforcement are less likely to occur, and this should make the degree of enforcement issued more likely to be acceptable to both parties. But the relief granted is also likely to be more intrusive than the relief available through private means, for legal remedies would normally constitute rights violations in themselves if they were not justified as responses to prior violations. Most private remedies, in contrast, would not constitute rights violations in themselves and therefore are less likely to trigger retaliation even if erroneously imposed. Once again, it is difficult to predict how these two factors will balance out, and it is therefore difficult to say whether acceptance is any more likely to be generated by legal remedies than by any other means of lawful enforcement.

[4] The American securities industry, for example, began inserting arbitration clauses into all their customer agreements in the 1980s after a spate of jury verdicts awarding large amounts of punitive damages to customers whose brokers had mishandled their accounts. Many doctors in the United Sates also now routinely insist on the execution of an arbitration agreement before they will take on new patients. While arbitration is also quicker and less expensive than litigation, the fear that a jury might be ruled by sympathy for the plaintiff and antipathy for the defendant rather than a dispassionate view of the law and the facts is clearly an important motivating factor in both cases.

Finally, we must consider whether adopting the narrow view would lead to a different conclusion. The narrow view focuses on whether the remedy is backed by the coercive power of the state, another feature that is present in our central case. Under this view, traditional legal and administrative remedies would be included in our definition but private remedies and the judicial remedy of declaratory relief, which relies on moral, social, or strategic considerations for its effect, would be excluded. The justification for focusing on whether a remedy is backed by the coercive power of the state is that such remedies are more likely to be effective. But declaratory relief is often a highly effective remedy too, even though it is not directly coercive. Even private remedies can be highly effective in certain circumstances. They are also usually quicker and cheaper than their more formal judicial and administrative counterparts and likely to produce far less adverse or otherwise undesirable publicity. They are accordingly often the most attractive means of enforcement in a wide variety of circumstances, relegating traditional judicial and administrative remedies to the category of remedies of last resort. Indeed, they are so effective that their use is often heavily regulated and sometimes even prohibited to prevent abuse.[5] Whether a private means of enforcement is subject to detailed regulation or not, however, the effectiveness of such means is often sufficiently obvious to all concerned that such means will figure prominently in everyone's previolation and postviolation enforceability calculations. Even though they typically supplement rather than supplant judicial or administrative remedies and are not backed by the coercive power of the state, it is clear that private remedies often do the bulk of the work. Because there is no offsetting reason to exclude such obviously effective remedies from our enforceability calculations, it would be arbitrary to fail to consider them. Once again, even if we were to adopt the narrow view of what constitutes a legal remedy, the notion that a legal right must have a legal remedy to be enforceable would have to be rejected.

The difficulty in developing a definition of legal remedies that avoids equating legal remedies with lawful ones without resort to arbitrary distinctions is not the only reason to reject the idea that a right must have a legal remedy in order to be enforceable. There is also something inconsistent with elevating legal remedies, however broadly or narrowly that term may be defined, above nonlegal ones. Whatever coercive force a legal remedy may have, it owes this force to the physical, social, moral, and strategic sanctions that back it up. Damages are collectible and injunctions effective only because they are ultimately backed by the physical power of the state, and because there are also moral, social, and strategic sanctions that typically accompany such relief. Repossession

[5] See, e.g., the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. (regulating the circumstances under which a debtor can be reported as delinquent to a private credit bureau), the Sherman Antitrust Act, 15 U.S.C. § 1 (barring group boycotts and refusals to deal and other contracts and conspiracies in restraint of trade), and the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*. (regulating various forms of industrial action).

and other self-help remedies also rely on physical force to back them up, and declaratory relief is only effective to the extent that moral, social, or strategic force can be brought to bear to compel observance of the rights set forth in the declaration. As a theoretical as well as an empirical matter, legal remedies simply cannot be anything other than a subset of remedies based on the use of physical, moral, social, or strategic force. And if these means of enforcement are acceptable as secondary sources of coercive power, then consistency demands that we treat them as acceptable means of enforcement when they become primary.

Indeed, various studies have shown that we often underappreciate the role these primary means of enforcement play in achieving social order. In relatively stable communities where people expect to have repeated interactions with one another, legal remedies are rarely needed for most people to consider their rights enforceable. One now famous study, conducted among cattle ranchers in Shasta County California, showed that through a combination of social criticism, ostracism, the withdrawal of social cooperation, and (when necessary) physical force, members of the community were able to successfully maintain an acceptable degree of social order without resort to legal remedies. Ranchers would simply keep track of those among their number who violated the rights of other group members and would settle accounts periodically through these various nonlegal means of enforcement. Indeed, not only did members of this community view the use of legal remedies as unnecessary given the availability of cheaper, quicker, yet equally effective alternative means of enforcement, they also viewed the use of legal remedies as positively disruptive, for they found that enforcing their rights through the courts was far more likely to generate acrimony between the parties than other means of enforcement, and therefore less likely to produce the acceptance necessary to restore the requisite level of social order. Only when dealing with outsiders were members of the community likely to think that reliance on legal remedies was both necessary and appropriate.[6]

This does not mean a legal right will always or even often be enforceable when nonlegal means of enforcement are the only means available. The measure of enforcement available through such means must still be sufficient to meet the requisite tests for enforceability. This, in turn, will depend largely on the surrounding circumstances. In larger and more heterogeneous communities, where repeated interaction is the exception rather than the rule, some kind of legal remedy probably will be necessary if the requirements of these tests are to be fulfilled, for outside relatively close-knit and stable communities the availability and effectiveness of nonlegal remedies will be too uncertain in most cases to create the requisite previolation expectations among potential violators and beneficiaries or to provide the requisite morally significant level

[6] See Ellickson (1991).

of postviolation punishment and compensation. But to determine whether some sort of legal remedy *is* necessary for a restraint to be enforceable, and if so, what form that legal remedy should take, we simply apply our tests for enforceability. In some cases, we may have to embody a particular restraint in a legal right in order to ensure that a legal remedy will be available, for the available nonlegal means of enforcement may be inadequate. In others, we may have to make a variety of legal remedies available in order to ensure the enforceability of a right. Even though a statute or regulation may provide that it is to be enforced by a public body, for example, the likelihood of that body taking action may be too low to make the statute or regulation enforceable, and the courts may need to imply a private right of action in order to ensure adequate enforcement of the statutory or regulatory scheme.[7] And even when they are not strictly necessary, legal remedies are generally desirable, for they ensure enforceability in a wider array of circumstances than nonlegal remedies and at least sometimes are easier to employ. Nevertheless, a right may be enforceable without them, and if it is not, it is because the measure of enforcement otherwise available for that right is insufficient, not because a legal right must have a legal remedy if it is to be enforceable.

Our conclusion that a legal right need not have a legal remedy to be enforceable also has one other benefit. If the presence of some form of legal remedy were a necessary condition of enforceability, we would have a problem whenever legal remedies are formally available but not available in practice, such as when the transaction costs of invoking these remedies are prohibitive or when the relief obtained is uncollectable. Whether a legal right is unenforceable under these conditions should depend on an analysis of how these conditions affect our expectations that the right will not be violated and, if it is violated, that the violator will be subject to sufficient punishment and the beneficiary offered sufficient compensation. If we had already decided that nonlegal means of enforcement cannot be legitimately relied on to create such expectations, however, we would simply be forced to conclude the right is unenforceable and would never be able to reach these deeper issues. Having avoided this problem, we will turn to these deeper issues in a moment. Before we do, however, we

[7] For many years, a private right of action was presumptively available in the United States for federal statutory or regulatory violations if the plaintiff was otherwise without an adequate remedy and the statute was silent on the matter. See, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a private right of action for damages under section 14(a) of the Securities and Exchange Act of 1934). But the proliferation of complex statutory and regulatory schemes that do not expressly set forth private remedies, combined with a marked increase in judicial conservatism, has made the courts more reluctant to imply private rights of action. A private right will usually be implied now only if there is a clear indication of legislative intent to make such a remedy part of the statutory or regulatory scheme, regardless of the adequacy of other remedies. For a further discussion of the history of the implied right of action doctrine in the United States, see Stabile (1996), pp. 864–73. For a discussion of the corresponding English doctrine, which seems to have a somewhat similar history, see Jones (2002), pp. 447–62.

need to consider whether an enforceable right must have a lawful remedy and, if so, whether that lawful remedy must be available in practice as well as in theory in order to be considered in our enforceability calculation.

6.2 Legal Rights and Lawful Remedies

While it is relatively difficult to define what constitutes a legal remedy, it is relatively easy to define what constitutes a lawful remedy. A lawful remedy is any remedy that can be exercised without violating a legal right, regardless of whether that legal right is or is not enforceable. We have already seen that as long as a lawful remedy provides the requisite degree of punishment or compensation, the right protected by that remedy is enforceable. But what is the status of a right protected only by an unlawful remedy? Is that right enforceable too? If so, then few rights would be unenforceable, for almost every right can be enforced through the threat or use of physical force, even though in most circumstances this means of enforcement can only be lawfully employed by the state. I can threaten to break your legs if you breach your contract with me, or shoot you if you fail to return money you have stolen from me, or burn down your factory if it is polluting my groundwater, or cut the power lines that run to your home if you continue to play loud music late at night after I have asked you to stop. If my threats are credible they are likely to be effective in preventing a violation, and if a violation nevertheless occurs, the amount of punishment such acts would impose if actually carried out would no doubt be morally significant. But there is clearly a difference between rights that can be enforced only by unlawful means and rights that can be enforced by lawful ones. Is it consistent with our conception of enforceability to include both lawful and unlawful means of enforcement in our enforceability calculation? If not, why not? Can a right be enforceable if the only means of enforcement available are unlawful? If these means of enforcement are unlawful, there must be a legal right against their use. But what if the right that renders these means unlawful is itself enforceable only through unlawful means? Is the first right now enforceable? Is the second right enforceable? Can one be enforceable and not the other? Can they both be enforceable at the same time? Could neither be enforceable? On what does this depend? There is much potential for confusion here, but before we attempt to sort this out, we will need to examine a straightforward case.

Assume that the only means of enforcement available for a certain right R_1 are unlawful. What makes these means unlawful is another right R_2. R_2, however, is enforceable by lawful means. If these lawful means are of sufficient measure, then R_2 will be enforceable. This means that the beneficiary of R_2, who is also the potential violator of R_1, expects that the beneficiary of R_1, who is also the potential violator of R_2, will not use unlawful means to enforce R_1. The beneficiary of R_2, who is also the potential violator of R_1, will accordingly not

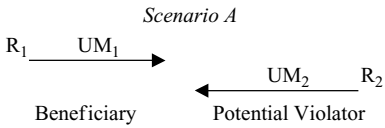
be deterred by these unlawful means of enforcement, and he will not consider them when deciding whether it would be in his interest to violate R_1 or try to avoid such a violation. Because these unlawful means of enforcement will have no deterrent effect on potential violators of R_1, the beneficiary of R_1 will not consider them when he calculates whether R_1 is enforceable under the relevant test for previolation enforceability. He also will not consider these unlawful means when he calculates whether R_1 is enforceable under the relevant test for postviolation enforceability, for if R_1 is actually violated, he will be deterred from using these unlawful means by the lawful means of enforcement available for R_2. If no other means of enforcement of sufficient measure are available for R_1, the only conclusion he can reach under either test is that R_1 is unenforceable.

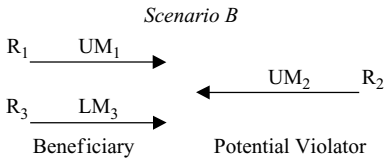
What all this means is that when we have a right that is enforceable only through unlawful means, and the right that renders those means unlawful is enforceable through lawful means of sufficient measure, the first right is unenforceable. If I cannot prove that you borrowed money from me (perhaps all records of the loan were destroyed in a fire), and therefore cannot bring an action against you for repayment, and no other lawful means of enforcement are available to me, there is always the possibility that I might shoot you. Actually doing so would be a violation of your rights, however, for which lawful means of enforcement *would* be available, and as long as you rationally believed that your legal and other lawful remedies were of sufficient measure to deter me from shooting you and could impose a morally significant amount of punishment on me if I did, you are not likely to take this possibility seriously or otherwise take it into account in deciding whether to return my money as you originally promised. Given the presence of sufficient lawful means of enforcing your legal right against my use of unlawful means of enforcement, my legal right to repayment would be unenforceable.

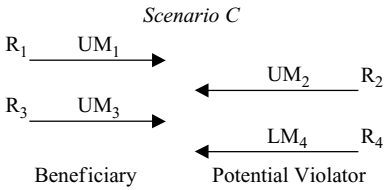
But this is the most straightforward case. We have not yet determined whether the presence of a lawful means of enforcement is a necessary condition of enforceability, for we have not yet considered what happens when the right barring the use of unlawful means is itself enforceable only through unlawful means. What will be the effect of the availability of unlawful means of enforcement on the previolation conduct of potential violators in these circumstances? What will be the effect on the previolation conduct of beneficiaries? What will be the effect on the postviolation conduct of either party? If the right against the use of unlawful means of enforcement were itself unenforceable, then it seems that potential violators would have no reason to expect the beneficiary to refrain from using such means. If these unlawful means of enforcement were of sufficient measure, then they might deter many potential violators from committing actual violations. If the availability of unlawful means of enforcement *would* deter a significant number of violations, and if unlawful means of enforcement could be used to impose punishment and extract compensation from those potential

violators who were not deterred, then the beneficiary should consider these effects in making the relevant pre- and postviolation enforceability calculations. Even though the only means of enforcement available might be unlawful, a right protected by such means might nevertheless be properly considered enforceable.

To illustrate the problems with this conclusion, we will need to refer to several diagrams in order to avoid confusion. Scenario A shows the basic situation. Right R_1 is enforceable only though unlawful means UM_1, but the right R_2 that renders these means unlawful is also enforceable only through unlawful means UM_2. Scenarios B and C show two possible alternative states of affairs that are both compatible with our basic situation. In scenario B, the right R_3 that makes UM_2 unlawful is enforceable through lawful means LM_3. In scenario C, the right R_3 that makes UM_2 unlawful is enforceable only through unlawful means UM_3, but the right R_4 that makes UM_3 unlawful is enforceable through lawful means LM_4. In each scenario, the available means of enforcement would be of sufficient measure to deter a violation of the relevant right, but only if the potential violator expected that the means, whether lawful or unlawful, would be used. The question presented in each scenario is whether R_1 is enforceable. We also need to determine whether the answer to this question differs depending on whether we assume scenario B or C is in place, and if not, why not. It is to these tasks that we now turn.







Note that there are only two possible answers to the question of whether R_1 is enforceable. Either it is enforceable or it is not. If it is enforceable, it

must be because the unlawful means through which it could be enforced make it so. This means that in the previolation state of affairs, the beneficiary of R_1 expects the potential violator of R_1 to be deterred by the threat of UM_1. But if the potential violator of R_1 were deterred by the threat of UM_1, this would mean that the potential violator of R_1, who is also the beneficiary of R_2, expects that the beneficiary of R_1, who is also the potential violator of R_2, will not be deterred from using UM_1 by the threat of UM_2. The beneficiary of R_2 must accordingly consider R_2 (the right that renders the means of enforcing R_1 unlawful) unenforceable. But how can R_1 be considered enforceable and R_2 be considered unenforceable by their respective beneficiaries when both are enforceable only by unlawful means? It seems that we are granting enforceability to one right while denying it to another even though they both have exactly the same characteristics. Conversely, if R_1 is unenforceable, it must be because the unlawful means through which it may be enforced do not make it enforceable. This means that the beneficiary of R_1 does *not* expect the potential violator of R_1 to be deterred from committing a violation by the threat of UM_1. But if the potential violator of R_1 will not be deterred by the threat of UM_1, this means that the potential violator of R_1, who is also the beneficiary of R_2, expects that the beneficiary of R_1, who is also the potential violator of R_2, *will* be deterred from using UM_1 by the threat of UM_2. The beneficiary of R_2 must accordingly consider R_2 to be enforceable. Now R_2 is considered enforceable and R_1 considered unenforceable by their respective beneficiaries even though both are enforceable only by unlawful means. Once again, we seem to be granting enforceability to one right while denying it to another even though they both suffer from the same defect. In either case, whichever conclusion we reach, it seems we will be forced to adopt inconsistent positions, and we still have to explain why we would pick one over the other.

One way to explain this inconsistency is to ascribe the parties' differing conclusions as to the enforceability of their respective rights to the presence of either scenario B or C. If scenario B accurately describes the state of affairs, then the beneficiary of R_2 will not be willing to use UM_2 to enforce R_2 because of fear of the lawful means available to enforce R_3. Because the beneficiary of R_2 will not use UM_2, the beneficiary of R_1 will have nothing to fear from the use of UM_1. The beneficiary of R_2, who is also the potential violator of R_1, will accordingly be deterred from violating R_1 by the availability of UM_1. This means that the beneficiary of R_1 would properly consider R_1 to be enforceable under the applicable test for previolation enforceability, while the beneficiary of R_2 would properly consider R_2 to be unenforceable. On the other hand, if scenario C rather than scenario B accurately described the state of affairs, then the beneficiary of R_1, who is also the beneficiary of R_3 and the potential violator of R_4, would not violate R_4 for fear of LM_4, which means he would not use UM_3, which means the beneficiary of R_2, who is also the potential violator of

R_1, would have nothing to fear from using UM_2, which means the beneficiary of R_1 would be deterred from using UM_1 to enforce R_1. In this case, R_2 would be enforceable and R_1 would be unenforceable under the applicable test for previolation enforceability.

Of course, we might find that neither scenario B nor scenario C is present. In this case, we would have to go further back along the chain of rights until we found one that is enforceable through lawful means. If the first right that is enforceable through lawful means belongs to the beneficiary of R_1, then R_1 is enforceable despite the fact that it is enforceable only though unlawful means. But if the first right that is enforceable through lawful means belongs to the beneficiary of R_2, then R_1 is unenforceable. In any case, as long as we find a lawfully enforceable right somewhere down the chain we can explain how a right protected by unlawful means could sometimes be enforceable and sometimes not.

But this is a highly unsatisfactory basis on which to determine enforceability. Not only does it make the enforceability of one right depend on the enforceability of another right from which it may be many steps removed, if there is no right in the chain that is enforceable by lawful means, we are still left without a basis for deciding whether R_1 is or is not enforceable or any way to avoid adopting what appear to be inconsistent positions. What we need is a reason to treat R_1 as either enforceable or unenforceable that is independent of whether R_2 is enforceable or unenforceable. But what could this reason be? Why would a rational beneficiary not use unlawful means to enforce his rights if he could do so without fear of reprisal?

For the explanation, we have to return to our discussion of the purpose of enforceability. Recall that the purpose of enforceability was not simply to deter and punish violations, but to make the beneficiary willing to incur the risk of violation, and to maximize the chances that previolation levels of social cooperation would be restored if a violation should actually occur. We have already seen that to maximize the chances of such a restoration, the measure of enforcement obtained must not only be acceptable to both parties, it must also be acceptable *for the right reasons*. But the measure of enforcement obtained is not all that must be acceptable to both parties for the right reasons. The *means* of enforcement used must be acceptable for the right reasons too if previolation levels of social cooperation are to be restored. If a violator were to accept an unlawful means of enforcement, this could only be because her right against use of those means of enforcement was itself unenforceable, an extrinsic reason, and not because those means were acceptable in and of themselves. Her acceptance would accordingly be for the wrong reasons, and any restoration of previolation levels of social cooperation would be likely to be fragile, if it were to occur at all. Even when the violator's right against the use of these unlawful means of enforcement is itself protected only by unlawful means that

are opposed by a right protected by lawful means, the availability of unlawful means of enforcement cannot render either party's right enforceable. Although the availability of a legal remedy is not a necessary condition of enforceability, the availability of a lawful remedy is.

6.3 The Threat or Imposition of Countersanctions

There is one further issue we must address before we can be confident we have identified all the necessary and sufficient conditions for enforceability. Assume that some legal or other lawful remedy is available as a means of enforcement for a particular legal right. Further assume that the beneficiary rationally believes that the measure of enforcement available through this remedy is sufficient to produce a preference among potential violators for the previolation state of affairs, and to provide a morally significant amount of compensation and punishment should the right actually be violated. Does the availability of such a means and measure of enforcement necessarily mean the right is enforceable? Or is there some other condition that must be satisfied before we can come to this conclusion?

Let us begin our exploration of this question by looking at a concrete example. Suppose you are a journeyman actor who enters into a contract with a major Hollywood producer to perform a small part in one of her upcoming films. The contract provides you will be paid a salary plus a small percentage (a very small percentage) of the takings at the box office. You make the film and are paid your salary but receive no part of your percentage of the box office. You consult a lawyer and are informed you have an ironclad legal right to payment; there are no defenses. But your friends tell you if you sue the producer you will acquire a reputation as a troublemaker and "you will never eat lunch in this town again." Is your legal right to a share of the box office receipts enforceable?

The question presented is one of postviolation enforceability. There is a sufficient measure of enforcement available to produce morally significant amounts of punishment and compensation, but the use of these means of enforcement would have serious consequences. You would bear a heavy cost if you pursued your legal remedy even though it is completely lawful for you to do so, not only because the violator would not cast you in any of her future pictures, a form of strategic sanction, but also because other producers and the community at large would withhold further work from you, a form of social sanction. Moreover, there is nothing unlawful about the use of such sanctions against you, for you have no right to appear in any future pictures by this producer or to work for any other member of the community. Indeed, the imposition of these social sanctions might even be moral – after all, no one is saying you cannot collect what is rightfully owed you. All they are doing is exercising their right not to deal with someone who resorts to the courts, and as strangers to the original transaction, they have no way of knowing whether you are righting a wrong or

merely being a nuisance. They may therefore quite sensibly wish to err on the side of caution.

The threat of these strategic and social sanctions, taken together, imposes what is in effect a special kind of transaction cost on the pursuit of your legal remedies. This transaction cost is no different than the filing and attorney's fees and other costs that ordinarily accompany the prosecution of a legal action, except that ordinary transaction costs typically reduce rather than eliminate the amount of gain to be had from a successful action.[8] In this case, however, the countermeasures to which you would be subjected would impose a transaction cost that would vastly exceed even the most optimistic estimate of the benefit you could obtain from the successful prosecution of your action. It would therefore be irrational for you to embark on such a course of conduct. In these circumstances, it would be meaningless to describe your right as enforceable, for such costs do not merely make your legal remedies too costly to pursue, they make them illusory. And if you did pursue them nonetheless, the benefit you would obtain would not be morally significant, for once you deducted the additional suffering the exercise of these remedies would cause you to experience, the net benefits of enforcement would no longer meet the requisite criteria under our test for postviolation enforceability.

Now assume you are aware of all these factors at the time you sign the contract, and believe the producer is fully aware of them, and that she is aware that you are aware of them, and so on. In this case, you would have to believe that the producer would not find any threat of legal action credible, for she would think you would have to be irrational to pursue such a remedy, and if she thought this she would be unlikely to hire you in the first place. You would therefore not expect the producer to take your potential legal remedies into account when considering whether she should violate the contract. You could accordingly not rely on the availability of these legal remedies in deciding whether to appear in the film and take the risk that your right to a share of the box office receipts would be violated. Under our test for previolation enforceability, you would have to consider your right to a share of these receipts to be unenforceable. You would simply have to decide whether you were willing to enter into the contract to do the part on the basis of the salary offered alone.

Of course, if you were a big celebrity rather than a journeyman actor, the situation would be completely different. Now there would be very little strategic or social power that could be leveled against you. Instead of needing the cooperation of others to obtain future benefits you desire, *your* cooperation would now be essential to others if they are to obtain certain future benefits *they* desire. You would almost certainly receive your promised share of the box office, not because the producer would be afraid you would invoke your legal remedies,

[8] For a discussion of the effect on enforceability of these more traditional transaction costs, see ch. 7, sec. 7.3.

but because she would be afraid you would exercise your strategic power and refuse to appear in any of her future films. You would know this at the time you entered into the contract, and the producer would know it and know you knew it, and so on. Your right would therefore properly be considered enforceable in the previolation sense. And if your right to a share of the box office receipts were violated notwithstanding everyone's previolation expectations, there would be nothing preventing you from invoking your legal remedies or any other available means of enforcement. Your right would therefore properly be considered enforceable in the postviolation sense as well.

What the different versions of this example illustrate is that the formal existence of a means of enforcement of sufficient measure is not enough to render a right enforceable, even when that means of enforcement is a legal remedy. The means of enforcement must also be *exercisable*. To be exercisable in the previolation sense, the beneficiary must rationally believe that potential violators will expect the beneficiary to use that particular means of enforcement should a violation actually occur. Only then can the availability of that means of enforcement affect the previolation behavior of potential violators, and only then can it shape the rational previolation expectations of the beneficiary. To be exercisable in the postviolation sense, in turn, the use of the particular means of enforcement must not entail incurring transaction costs or bearing responsive sanctions of such an amount that the net punishment and compensation obtained no longer meet the requisite test of moral significance. If the exercise of an available means of enforcement is blocked or offset by such a countervailing sanction, it cannot satisfy the requirements of postviolation enforceability. The expected absence of such a countervailing sanction in the previolation state of affairs, and the actual absence of such a countervailing sanction in the postviolation state of affairs, is accordingly our final necessary condition for the enforcement of a legal right.

Note that the imposition of this countervailing sanction may be both lawful and moral, as in our example, but it need not be either. Even if such sanctions are unlawful and immoral, as long as the beneficiary expects them and believes the potential violator believes the beneficiary would not exercise a remedy that would trigger such sanctions, the beneficiary must believe that the potential violator will not be deterred by the availability of such a remedy. This means the beneficiary cannot rationally consider the availability of this remedy when he makes his previolation enforceability calculation of whether he is willing to incur the risks of violation. Simply put, a rational beneficiary does not sue a reputed mobster for nonpayment of a dry-cleaning bill, and does not consider the availability of such a remedy in deciding whether to take in the mobster's dry cleaning. And if he does sue the mobster but his store gets firebombed in response, he could not properly consider his right to payment to have been enforced even if he does collect on his bill because the suffering he bears as a result of his attempt at enforcement makes any compensation he obtained

morally insignificant. In this case, despite the ability to collect on his bill his right to payment was effectively unenforceable.

6.4 Coda on the Advantages of a Unified Theory

We now have completed our development of a theory of enforceability, but before I bring this portion of the book to a close and move on to some practical problems that both illustrate applications of the theory and offer us an opportunity to test its conclusions, I want to briefly emphasize some features of the theory we have developed. What I have tried to present in the preceding chapters is a theory of enforceability that is both unified and comprehensive. It is comprehensive in the sense that it covers both the previolation and the postviolation state of affairs; it applies to all forms of restraint, not merely legal rights, and all means of enforcement, not merely legal remedies; it incorporates the objectives of both deterrence and retribution not as ends in themselves but as means for accomplishing the overarching objectives of facilitating social cooperation and promoting social as opposed to antisocial conflict; and it explains the roles of both punishment and compensation in the attainment of these objectives. It is unified in the sense that it not only covers all these various elements of enforceability, it also shows how they interrelate and influence one another.

One of the advantages of such a unified theory of enforceability is that it explains aspects of our current practice that other theories cannot. Take, for example, the relationship between punishment and compensation. In the previolation state of affairs, the availability of compensation alone will be sufficient to render a right enforceable only rarely. But compensation does have a role to play in the previolation state of affairs. By reducing the ultimate burden that a violation threatens to inflict, the availability of compensation limits what the beneficiary has at stake, and thereby increases the beneficiary's threshold level of critical risk. This does not reduce the amount of punishment the beneficiary must expect to be available in order to render a right enforceable, but it does affect what probability of violation the beneficiary will find acceptable and how confident he must be in his probability calculation. This, in turn affects the extent to which he is willing to incur the risk of violation and the degree of precautions against violation he is likely to be inclined to take.

In the postviolation state of affairs, the relationship between punishment and compensation is more direct, for shortfalls in one measure can be made up by provision of the other. Yet existing theories of punishment and theories of compensation tend to be constructed as if these two measures of enforcement were unrelated. Retributivists focus solely on the amount of punishment due for an offense and ignore the role of compensation, while corrective justice theorists focus solely on the amount of compensation due and ignore the role of punishment. By employing a unified theory, however, we can avoid many of the troubling implications of any theory that addresses only one measure of

enforcement. We can explain not only whether but also why and how the availability of compensation reduces the amount of punishment due. And while the fact that there are inherent limits on our ability to compensate may mean that some injuries must remain uncompensated, this does not mean that the uncompensated suffering of the beneficiary is simply ignored. Our unified theory makes clear that the provision of anything less than full compensation leaves the violator subject to retributive punishment, and this explains how a right can be enforceable even when the beneficiary's injuries are not compensable or, if they are compensable, even when compensation remains unpaid.

More importantly, perhaps, our unified theory explains how justice can be done when the injuries caused by a particular violation are not fully compensable. Because punishment provides no alternative to compensation under their theory, corrective justice theorists are committed to the view that all injuries are compensable, or else they must acknowledge that whenever an injury is not fully compensable, justice cannot be done. The unified theory, in contrast, faces no such dilemma. The unified theory has no problem acknowledging that some injuries are not compensable – indeed, it explains why sometimes this must be the case. The unified theory also explains how justice can be done even when the beneficiary cannot be or for whatever reason will not be fully compensated. The unified theory accordingly embodies a sense of justice that is both more holistic and easier to fulfill, for there will be fewer occasions under the unified theory where a lack of compensation will cause the amount of enforcement available to be deemed unjust. The sense of justice embodied by corrective justice, on the other hand, will tend to breed anger and resentment, for the standard of justice it embodies will often be unfulfilled. Corrective justice theorists accordingly cannot explain how a society regulated by such a principle could be stable over time, while the unified theory neatly explains how we can and do maintain a workable social order despite the fact that something less than full compensation is often all that is available or paid for many violations.

Corrective justice theorists also have difficulty explaining why we sometimes impose an obligation to pay compensation on someone other than the violator. Although most corrective justice theorists would allow the violator's duty to pay compensation to be voluntarily discharged by another and therefore have no difficulty justifying liability insurance schemes, they do have a problem justifying instances in which the duty to pay compensation is imposed directly on someone else.[9] Examples would include joint and several liability, which allows the beneficiary to recover the whole of his loss from any joint tortfeasor, and compulsory no-fault insurance schemes, which place the burden of liability for injuries on the injured party himself regardless of whether he is at fault. While these schemes would violate corrective justice, they do not violate the unified

[9] See Wright (1992), pp. 703–4 and n. 360.

theory, for that theory does not impose a duty to pay compensation on the violator, and therefore does not have to justify circumstances in which a duty to compensate may be involuntarily imposed on someone else. Indeed, the unified theory supports whatever measures are most likely to produce compensation for the beneficiary, for the more compensation the beneficiary receives, the less uncompensated suffering remains, and the less uncompensated suffering remains, the less incentive there is for the beneficiary to take matters into his own hands and engage in unlawful retaliation and the less damage is likely to result if he does.

While corrective justice theorists have trouble explaining why we sometimes do not require the violator to pay compensation, law and economics theorists have trouble explaining why we ever do. Law and economics theorists focus on the wealth-maximizing efficiency gains to be had from correcting externalities that distort the market's allocation of resources. In order to achieve such gains, they contend that liability should be imposed so as to encourage the cheapest cost-avoider to take cost-effective precautions. As these theorists readily acknowledge, however, this objective can be achieved by making the wrongdoer liable for an amount equal to the harm he has caused. Nothing additional is achieved by making the wrongdoer pay this amount to the injured party as compensation as opposed to, say, having the wrongdoer pay it as a penalty to the state. "That the damages are paid *to the plaintiff* is, from an economic standpoint, a detail. It is the payment *by the defendant* that creates incentives for more efficient resource use."[10] Of course, requiring that the defendant compensate the injured party rather than make an equivalent payment to the state gives the injured party an incentive to enforce efficient resource use, but this incentive is only necessary once we have opted for a system under which efficiency gains are privately enforced, so we cannot rely on this incentive effect to explain why we might prefer such a system to one in which efficiency gains are enforced by the state. Nor is it necessarily the case that the injured party will be a more diligent enforcer than functionaries of the state. This may be true when individual losses are high relative to the costs of enforcement, but not when individual losses are small to modest, even though the collective losses suffered by all those injured by the violation may be huge. Although this problem can sometimes be overcome through the use of procedural devices such as class actions, these devices can cause as well as cure distortions in the market, and in any event the presence of such modern procedural devices hardly explains why a system of private enforcement was in place before these procedural devices were invented, or why it is in place in systems that do not avail themselves of such devices.

[10] Posner (1973), p. 78 (footnotes omitted). To be fair, this statement does not appear in later editions of the same work, but Posner does not disavow it either, and there is nothing in these later editions that is inconsistent with it.

The unified theory, in contrast, does explain why private enforcement might be preferable to enforcement by the state. Because the same payment can constitute both punishment and compensation if it comes from the violator rather than the state, there are strong efficiency-based reasons to opt for a system of private enforcement rather than for a system in which both punishment and compensation are doled out by the state. These efficiency gains, however, do not result from the imposition of liability on the cheapest cost-avoider. These efficiency gains result from the fact that less of society's resources will need to be diverted from more productive activities into the imposition of punishment when a system of private enforcement is in place. If compensation were only available from the state, then some additional amount of punishment would be due whenever any portion of the injury caused by the violation was subjective or otherwise noncompensable. But if compensation can be obtained from the violator, and the same payment can constitute both punishment and compensation, then there will be many cases in which no further punishment will be due. Tort claims for which liability is covered by insurance would be the most obvious exception, but perhaps this explains why more progress has been made in shifting to a state-run compensation scheme for these kinds of claims while no suggestion has been made that we should do this for claims that are not typically covered by insurance. In any event, the unified theory explains an aspect of our current practice that law and economics cannot.

Another advantage of the unified theory is that it allows us to consider all lawful means of enforcement when determining whether a restraint is enforceable and not merely traditional legal remedies. This, in turn, clarifies why legal remedies sometimes take the form of a liability rule and sometimes take the form of a property rule, a distinction first noted in an influential article by Calabresi and Melamed.[11] Calabresi and Melamed argued that the choice between these two types of remedies was determined by the difficulty in bargaining for exchange of the relevant entitlement. When bargaining was possible, they noted, the entitlement was typically protected by a property rule, which ensured that an exchange could take place only if the prospective purchaser was willing to pay the entitlement holder's subjective price. When bargaining was impractical or impossible, however, use of a property rule would have effectively precluded transfer of the entitlement. In these circumstances, the entitlement was typically protected by a liability rule, which effectively allowed the entitlement to be transferred through a forced sale at an objective price, thereby ensuring that exchanges could still occur when there were efficiency gains to be had thereby. Thus, Calabresi and Melamed argued, the choice of remedy was and should be designed to ensure the transferability of entitlements.

[11] Calabresi and Melamed (1972).

But Calabresi and Melamed failed to consider the effect of nonlegal remedies on such transferability. When these remedies are taken into account, as they are in our unified theory, we can see that the property rule/liability rule distinction does not have the significance Calabresi and Melamed attribute to it. While it is true that violation of a property rule can be enjoined and violation of a liability rule cannot, this does not mean that when the legal remedy for a violation takes the form of a liability rule the entitlement at issue is subject to a forced sale at an objective price, nor does the availability of an injunction guarantee that the entitlement can be transferred only with the beneficiary's consent and therefore for a subjective price. As long as the right is enforceable, a potential violator should have plenty of incentive to pay subjective value if he wants to purchase the entitlement that right represents even if the right is protected by a mere liability rule, for additional punishment will be available though nonlegal means if liability alone is not likely to produce a preference for the previolation state of affairs. And if the right is not enforceable, the entitlement it represents can be forcibly transferred even if it is protected by a property rule, as the trespassing example we have already discussed makes clear. Indeed, the whole suggestion that we might want to allow the forced sale of entitlements when bargaining is impractical or impossible is misguided. If a forced sale will cause subjective injury, then we do not want the forced sale at objective value to occur, for this will only cause disharmony and resentment. Rather than facilitate social cooperation and productivity by ensuring that entitlements end up in the hands of the most efficient user, a forced sale is more likely to provoke some form of retaliation and undermine social cooperation and productivity, not increase it.

So what does the unified theory tell us about the choice between property rules and liability rules? What the unified theory makes clear is that the choice between the two types of remedy should be driven by the need to make the requisite measure of enforcement available and not by the existence of prohibitive transaction costs or other limits on the ability to bargain for the transfer of entitlements. Remedy designers should use a property rule when the benefit of violation is likely to exceed the burden on the beneficiary, for in these circumstances a mere liability rule would not be enough to create the requisite preference for the previolation state of affairs and render the right enforceable in the previolation sense. For example, the benefit of trespassing enjoyed by the violator will often be greater than the burden of injury trespassing inflicts on the beneficiary, and therefore an injunction and not merely liability must be available if we are to ensure that the requisite preference for the previolation state of affairs is present. When the burden of violation is likely to exceed the benefit, on the other hand, a liability rule will suffice to create the requisite previolation expectations even if no injunction against violation can be issued, especially when means of enforcement other than legal remedies are added into the mix. Even an otherwise "efficient" breach of contract, for example, will

often be deterred by a liability rule when this is combined with the threat of additional strategic or social sanctions. The entitlement will only be subject to a forced sale for an objective price when the combined force of the available means of enforcement is not sufficient to make the right enforceable in the previolation sense. As long as the requisite previolation expectations are present, the entitlement at issue will only be transferable with the beneficiary's consent, and therefore only if the party interested in purchasing the entitlement is willing to pay the subjective price demanded by the holder of the entitlement.

7

Special Problems with Legal Remedies

We turn now to some special problems that beneficiaries may encounter when they seek to enforce their rights using legal remedies. These include uncollectability, insurance, transaction costs, nominal damages, failures of proof, errors in determination, and the problems associated with the enforcement of rights in international law. Each of these special problems challenges our notions of enforceability in different ways. Our purpose is to see if the understanding of enforceability we have developed in the previous sections supports and is supported by our pretheoretical intuitions about enforceability in these problem cases, and to see if our analysis of enforceability helps explain how people actually behave when confronted with such problems. Do the conditions present in these special cases make the rights involved unenforceable under our analysis? What intuitions do we have in this regard? Do people actually behave as if their rights were unenforceable in these situations? Does the analysis of enforceability we have developed in the preceding sections allow us to account for these special problem cases as well as the more central ones, or must we treat these special cases as exceptions to the rule? If we can account for these special cases as well as the more central ones, this is some evidence that the analytical framework we have developed is a valid one. If we cannot, our framework may need revisions. With these possibilities in mind, we will examine each of these problem areas in turn.

7.1 Uncollectability

Uncollectability is a common problem with the legal remedy of damages. Because legal remedies are both highly effective and readily available for most rights violations, we tend to rely on them as a sort of guarantee of enforceability. We attach especially great importance to the legal remedy of damages because it is designed to produce compensation, while all other legal remedies are designed to produce only punishment. But even when the remedy of damages is technically available, it may be pointless to pursue if the violator has relatively

limited financial resources. If any award of damages would be uncollectable, we accordingly have serious reason to question whether the right protected by such a remedy is still enforceable.

To determine whether the right at issue is enforceable, we simply apply the tests and principles we have already developed in our discussion of the meaning and measure of enforceability. Given our rejection of the notion that a legal right must have a legal remedy to be enforceable, we know that the mere fact a legal remedy is unavailable does not mean the underlying right is unenforceable. Before we can determine if the underlying right is enforceable, we must consider what other means of enforcement may be available and the degree of punishment and compensation those other means of enforcement may be able to supply. We can then determine whether the degree of punishment and compensation available through these other means of enforcement is sufficient to make our right enforceable by using the tests we have developed for pre- and postviolation enforceability.

Using these tests, it should be clear that a right will often be enforceable in both the pre- and postviolation sense despite the fact that any expected or actual award of damages would be or is uncollectable. This is because the legal remedy of damages will rarely be the only means of enforcement available. In most cases, moral and social sanctions will be available as well, and strategic or automatic sanctions will be available in many cases too. Even criminal sanctions will be available in some cases. These sanctions can all be expected to produce some, and sometimes a great deal, of punishment. Under our test for previolation enforceability, it will usually be an expectation of punishment, not compensation, which makes a right enforceable in any event. And while some punishment will usually be required under our test for postviolation enforceability, no minimum amount of compensation is ever due. Even when these various means of enforcement are not individually sufficient to produce the requisite amount of punishment, these alternative means of enforcement will usually be exercisable in tandem, and when their punitive effects are considered together we may often find that the requisite tests for pre- and postviolation enforceability are fully satisfied. A legal right may accordingly be enforceable in a wide variety of circumstances even though any award of damages would be uncollectable.

For example, an uninsured and insolvent motorist has substantial reason to drive with care even if she considers herself effectively immune to liability for damages, for she still wants to avoid injury to her person and her property. And if she does not drive with care, the measure of enforcement levied against her can still be morally significant if she is injured in her person or her property, even if the suffering of others goes uncompensated. Similarly, people otherwise inclined toward criminal activity do not refrain because they fear liability for damages to their victims, but because they fear criminal conviction and imprisonment. In most cases, the suffering imposed by such forms of punishment should be sufficiently severe to satisfy the requirements

of postviolation enforceability even when no compensation is ever paid. Even ordinary people will find their lives far more difficult if they are unable to pay their debts, and are likely to fear the social and strategic sanctions that follow from nonpayment as much as liability for damages. Indeed, the moral and social consequences of not being able to respond to a claim for damages will alone often be sufficient to make a right enforceable, for few potential violators want to be declared bankrupt, and therefore will take great care to avoid violations they cannot afford to repair.[1]

Finally, we should note that the fact that the violator is unable to respond to an award of damages does not mean that the beneficiary will be unable to obtain any compensation. Remember that compensation can come from any source, not just from the violator, and often there will be other sources of compensation available. Sometimes compensation may come from the state, and sometimes it may come from the beneficiary's own private insurer. Under the right conditions, the beneficiary may even be able to obtain at least partial compensation for his injuries from his customer or client base by simply raising the price he charges for his goods or services. This compensation may be insufficient to make the beneficiary indifferent to any violation, but even when damages *are* collectable, they will usually be insufficient to produce indifference. In most cases, the primary role of compensation is to reduce rather than eliminate the need for punishment. Other sources of compensation can perform this role just as well as damages. In any case, we can see that the unavailability of damages is not necessarily fatal to enforceability. Our analysis of enforceability has accordingly met its first challenge, for it both supports and is supported by our intuitions regarding enforceability in this special case and tracks the way people actually behave as well.

7.2 Insurance and Other Forms of Burden Shifting

Insurance allows a person subject to certain contingent liabilities, such as the liability to compensate persons whose rights have been violated by the insured, to shift the burden of those liabilities to another party should they actually

[1] Indeed, the stigma associated with filing for bankruptcy was once so severe that some people, including prominent figures such as Sir Walter Scott and Mark Twain, worked for years to repay their debts even though they were discharged in bankruptcy. In the United States, Congress eventually recognized that it would need to take steps to reduce this stigma if the bankruptcy laws were to accomplish their purpose of allowing the honest but unfortunate debtor the option of a fresh start. In 1970, when Congress enacted the Fair Credit Reporting Act, it placed limits on the length of time a prior bankruptcy may be included on a consumer's credit report. See 15 U.S.C. § 1681c(a)(1). In 1978, when Congress enacted the Bankruptcy Code, it changed the term used to identify the person who filed for bankruptcy from the word *bankrupt*, which carried a strong negative connotation, to the more neutral *debtor.* Bankruptcy filings rose sharply in the following years, and some critics have called for measures that reenforce the social and moral stigma of filing for bankruptcy to be reintroduced. Others contend that the increase in filings is the result of other factors, and that most people still find the stigma attached to filing for bankruptcy a substantial deterrent. See generally Dickerson (2001).

arise. Insurance therefore affects the measure of enforceability of a legal right by eliminating or at least dramatically reducing both the expected and actual burden of one of the most common forms of punishment – liability for damages. Relieved of all or most of the financial burden of any injury he may cause, the potential violator may be more inclined to engage in risky behavior if he derives some benefit from it, and if he does commit a violation, the punishment he will bear is far less than he would bear if he were not protected by insurance. Despite these effects, however, we do not think of a right as unenforceable merely because the damages that may be recovered for its violation are covered by insurance. The availability of liability insurance accordingly challenges our analysis of enforceability in several ways. First, it challenges our conclusion that it is the expected availability of punishment, not compensation, which usually makes a right enforceable in the previolation sense. This is because when liability is covered by insurance, compensation would seem to be the only form of enforcement that remains. Second, it challenges our conclusion that some degree of punishment is usually required for a right to be enforceable in the postviolation sense, for it removes perhaps the most significant burden that a violator must bear.[2] Either we need to rethink these conclusions, or we must explain how our notions of pre- and postviolation enforceability are compatible with the availability of insurance.

The first step toward such an explanation is to remember that liability insurance is available only for unintentional violations, and the benefits of committing this kind of violation are often relatively insubstantial. Take, for example, driving while not exercising due care and attention. Sometimes, perhaps, there may be some concrete benefits to such behavior (talking on the cell phone while you drive may indeed increase the amount of business you can get done during the day), but most activities that would constitute such a violation offer benefits that are largely ephemeral in form and minimal to relatively modest in amount. You gain very little from not bothering to signal your turns before you make them, or from failing to look behind you when you reverse, and while you may derive some pleasure from driving at a high rate of speed and will presumably arrive at your destination slightly earlier, these benefits are not so extensive that only liability for damages would be sufficient to outweigh them. Similarly, there is often little to be gained by a doctor, lawyer, architect, engineer, or other professional who fails to exercise due care in the performance of his duties, especially if he is getting paid by the hour and will accordingly be

[2] Note that the challenge to our notions of previolation enforceability is the more severe, for insurance guarantees that some measure of compensation will be available in the postviolation state of affairs, and thereby dramatically reduces the amount of punishment that would otherwise be required to impose a morally significant amount of retribution on the violator. If we can explain why there is enough punishment to meet our test for previolation enforceability despite the burden shifting generated by insurance, we will accordingly have shown that sufficient punishment is available to satisfy our test for postviolation enforceability as well.

compensated by his client for any additional expenditure of time that exercising the requisite degree of care requires. If the professional is getting paid by the task, the potential benefits of saving time and cutting corners may be greater, but we cannot assume this benefit will outweigh the burden of enforcement merely because the burden of financial liability has been shifted. In these and other cases where the benefit from violation is more substantial, we will first need to examine the residual burdens of enforcement that remain after the burden of financial liability has been shifted.

This is where understanding the various means through which a right may be enforced becomes important. What insurance does is relieve potential violators of the threat of financial liability, a burden of enforcement that is available through the imposition of one form of legal sanction. But this does not insulate potential violators from *all* previolation threats of enforcement. Acts and omissions for which one may obtain liability insurance also are often subject to automatic sanctions. This would be the case, for example, with careless driving. Regardless of the fact that any financial liability I incur may be covered by insurance, I still risk suffering physical injury or damage to my property if I engage in such behavior. This possibility alone gives me a powerful incentive to avoid a violation. But even if I expect to avoid the burden of automatic sanctions, I will still expect to feel moral regret if I cause injury to others, and I will expect to receive both moral and social criticism for my actions. I will also expect to be subject to various social sanctions – I may no longer be eligible for certain kinds of employment because of my poor driving record, I may be unable to rent a car, I may lose my insurance and therefore be subject to greater financial risk in the future, or such insurance may be available only at substantially greater cost. I may face criminal sanctions and my right to drive may be forfeited for a time or even permanently, putting me to great cost and inconvenience in many aspects of my life. While I may have shifted the burden of financial liability to my insurer, many other sanctions still could be imposed upon me. Taken together, these will usually greatly exceed whatever benefit I could obtain from failing to drive with care, and therefore should provide a formidable deterrent.

The same is true of acts or omissions that may constitute professional malpractice. While automatic sanctions will not usually be available here, social sanctions will and these will often be severe. Professionals have both a personal and a financial interest in their reputations. Even one successful negligence claim against a lawyer, doctor, architect, or engineer may cause them to lose clients, and at the very least will cause their insurance premiums to rise dramatically. Several successful claims may cause them to go out of business altogether. Claims of professional negligence also expose the professional to moral and social criticism and threaten to undermine the professional's self-respect, and may even lead to restrictions on their right to practice or withdrawal of their professional licenses. This is why professionals often fight so hard against allegations

of malpractice even though their liability for damages is covered by insurance. Once again, despite shifting the burden of financial liability, they remain subject to other sanctions that together provide a powerful incentive to exercise due care. Because the benefits of violation in these cases are often comparatively slight, even a fully insured potential violator will continue to prefer to remain in the previolation state of affairs, and our test for previolation enforceability will remain satisfied.

Indeed, the whole concept of insurance depends on the existence of substantial incentives not to commit the insured act. Any potential violator who would not be expected to prefer the previolation state of affairs despite the removal of the burden of financial liability would simply never be able to obtain insurance, for no insurer would sell liability insurance unless they believed the insured had a sufficient incentive to act in ways that would not trigger liability. The fact that insurance is available in these circumstances proves that notwithstanding the absence of any exposure to the threat of financial liability, the measure of punishment available through other means is sufficient to make a potential violator continue to prefer the previolation state of affairs. Rather than undermining the suitability of our test for previolation enforceability, the availability of insurance actually supports it.

Obtaining insurance, however, is not the only way a potential violator can relieve himself of the burden of legal liability for damages. If the violator is engaged in a trade or business, legal liability is a cost of doing business, and he may be able to shift some of this cost forward by charging higher prices for his goods or services, or backward by demanding wage or price concessions from his workers or suppliers. Whether and to what extent a violator *can* shift the burden of his legal liability forward or backward is a very complicated matter, depending on a variety of factors. These include the competitive situation in which the violator finds himself; the elasticity of demand for the violator's goods and services; the extent to which the violator must compete for the goods and services of his workers and suppliers; whether the cost of legal liability is marginal (varying with production) or fixed (the same regardless of the amount of goods and services produced) or some combination of the two (increasing by stages according to production but unaffected by incremental changes within each stage); the degree to which the violator's loss experience and other costs are similar to that of his competitors; whether there are substantial barriers to entry in the industry and the ease of exit; whether the economy is contracting or expanding; and whether we are focusing on the violator's ability to shift losses over the short or long term, to name just some of the relevant factors.[3] A violator who enjoys a complete monopoly in an unregulated industry, for example, will

[3] For a discussion of how these various factors interrelate and affect the ability of a violator to shift the burden of his legal liability onto others, see Calabresi (1961), pp. 519–27 and Kennedy (1982), pp. 605–7.

most likely already be reaping maximal monopoly profits and therefore be unable to raise his prices further without suffering a substantial decline in sales. In this case, the violator would be able to shift only a small portion of his burden of legal liability forward. And while the monopolist violator could raise his prices without suffering a decline in sales if he were not already charging the maximal monopoly price, it is not meaningful to think of him as shifting the burden of his liability forward in these circumstances because he could have been charging this price (and therefore previously have been reaping greater profits) all along. In a competitive environment, however, a greater degree of meaningful burden shifting is at least possible. Under the right conditions,[4] a violator in a competitive environment could shift almost its entire burden of legal liability forward over time.[5] Indeed, any firm that could shift its burden to the consumer but nevertheless chose to absorb it in the form of lower profits would shrink, and could eventually go out of business.[6]

Not only is it possible for certain violators to shift the burden of their legal liability to their customers, this ability is sometimes a reason (and perhaps *the* reason) for imposing liability on these violators in the first place.[7] When the true social cost of using certain goods or services is not reflected in their price, misallocations of resources can occur, and imposing liability on the provider of these goods or services may be one way to correct for this if the violator is able to pass these costs on to the consumer. Imposing liability on a violator who is able to redistribute this cost among all his customers may also minimize the social and economic disruption that would occur if these losses were allowed to fall entirely on a few individual customers alone. But regardless of whether such burden shifting is simply an unavoidable possibility or an intended outcome, the fact that some potential violators can engage in it challenges our conception of enforceability in two ways. First, if a potential violator can shift the burden of his legal liability for damages, the threat of legal liability no longer seems to provide an incentive for him to take precautions against violations. To show that the underlying right against such violations is nevertheless enforceable in the *pre*violation sense, we have to show that the beneficiary still has reason to believe that the violator will prefer to remain in the previolation state of affairs – that is, will face a threat of punishment from some other source and accordingly still have an incentive to take precautions – despite his ability to shift the burden of any legal liability that could be imposed upon him. Second, in order to show that the underlying right is enforceable in the *post*violation sense, we have to

[4] For example, the shift would have to be made on a sectorwide basis, and therefore any individual violator would only be able to shift as much of his burden as his most efficient competitor, and the price increase entailed by the shift could not be such as to trigger competition from other sectors of the market.

[5] Calabresi (1961), pp. 519–24.

[6] Posner (1998), p. 462.

[7] See generally Calabresi (1970), ch. 4 and Calabresi (1961).

show that a morally significant amount of punishment can still be imposed when violations do occur despite the fact that the violator will ultimately be able to recover any damages he is forced to pay from his customers.

To see why a violator's ability to shift the burden of legal liability to his customers does not render a right unenforceable in the previolation sense, we have to focus on what gives the potential violator an incentive to take precautions against violations in the first place. Potential violators who are engaged in a trade or business want to maximize the profits generated by this activity. The lower their costs, the greater their potential profits. Faced with the threat of legal liability for damages, a potential violator will accordingly have an incentive to take all cost-effective precautions against violation. Precautions are cost effective whenever the cost of undertaking the precaution is less than the cost of legal liability a violation would produce.[8] Potential violators must be careful in making this calculation, for it is easy to assign too low a value to lives saved or injuries prevented, as a number of high-profile cases have recently made clear.[9] But the same incentives operate regardless of whether the potential violator has the ability to shift the cost of legal liability or not. A violator will be able to shift the burden of legal liability (if at all) only to the extent that the total cost of liability plus the cost of precautions is no greater than the total cost of liability plus precautions for his most efficient competitor. Burden shifting can accordingly occur in a competitive environment when mistakes in the calculation of cost effectiveness occur or precautions fail, but competitive

[8] Determining the expected "cost of undertaking the precaution" would include consideration of whether implementing the precaution would increase or decrease sales of the goods or services given the potential violator's competitive situation. The precaution could decrease sales if it made the goods or services more expensive or otherwise less attractive to consumers, perhaps because the goods or services would no longer be as exciting or stylish. On the other hand, it could increase sales if safety was the paramount purchasing criterion for large numbers of consumers, in which case the provider could make greater profits even if he had to sell at a higher price. In the latter case, implementing the precaution would offer benefits beyond a simple reduction in legal liability, and might mean that the precaution had no net cost at all, even if it had no effect on the amount of legal liability. Determining the expected "cost of legal liability," in turn, could require consideration of a variety of factors, depending on the jurisdiction in which the violator was doing business. In some jurisdictions, for example, liability might only be imposed if the requirements of the Hand formula were met (if the cost of precautions were less than the degree of harm a violation would produce multiplied by the probability that this degree of harm would actually occur). Other jurisdictions put a greater emphasis on safety and impose liability even when the Hand formula would not be met, or at least allow a jury to do so. See Geistfeld (2001) and Gilles (2001, 1994).

[9] Examples of such miscalculations would include *Grimshaw v. Ford Motor Company*, in which Ford's failure to take sufficient precautions to prevent postcollision fires in the Ford Pinto resulted in a 1978 jury verdict of $2.5 million in compensatory damages and $125 million in punitive damages (later reduced to $3.5 million by the trial judge) and eventually a "voluntary" recall, and a similar case brought against General Motors, which resulted in a 1999 jury verdict of $4.9 billion (subsequently reduced to $1.2 billion). See *Grimshaw v. Ford Motor*, 174 Cal. Rptr. 348 (Ct. App. 1981) and Geistfeld (2001). Both companies apparently made their cost-effectiveness decision after assigning a value of $200,000 to human life, a figure the jury in these cases obviously found unreasonably low. See Schwartz (2001) and Geistfeld (2001).

pressures (a social sanction) ensure that each potential violator would reap higher profits if his liability were lower, and therefore each potential violator always has an incentive to keep these mistakes and failures to a minimum. Beneficiaries accordingly still have reason to believe that potential violators will prefer the previolation state of affairs even when such burden shifting can occur.[10]

The same effect also serves to render a right enforceable in the postviolation sense. Even though a violator in a competitive environment may be able to shift the burden of his legal liability to his customers, he would have a competitive advantage if he had not incurred this liability in the first place. In this case, he would have had lower costs, and would have been able to increase his profits by selling more goods and services at a lower price, or by selling the same amount of goods and services at higher margins, if he charged the higher price his competitors must charge to cover the cost of *their* legal liability. Accordingly, while the imposition of legal liability on the violator who can shift the cost of this liability to his customers does not alone make him any worse off, he does suffer punishment in the form of a lost opportunity to reap greater profits from social cooperation, a form of social sanction and a burden the violator cannot shift. Of course, the degree of potential profits lost from any one individual violation is likely to be small, but under our test for postviolation enforceability, a small amount of punishment may be all that is required. To render a right enforceable in the postviolation sense, the amount of punishment that is imposed need only be equivalent to the uncompensated suffering of the beneficiary, discounted to moral significance. When a violator can shift the burden of his legal liability to his customers, the beneficiary is likely to receive a great deal of compensation – not enough to produce indifference, perhaps, but as close to this as possible given the limits on our ability to compensate. This leaves only a modest amount of work for punishment to do, and the punishment resulting from the social sanction of lost profit opportunities may often be sufficient to fit the bill.

7.3 Transaction Costs

All means of enforcement entail some transaction costs. For legal remedies, however, these transaction costs can be substantial. Sometimes these costs can be recovered from the losing party. Sometimes they must be borne by the enforcing party regardless of the outcome of the enforcement. This raises several

[10] Only when significant precautions would not be cost effective, perhaps because consumers did not have access to sufficient information to evaluate the relative safety of competing products, or because they underestimated the risk of injury and were therefore willing to forgo certain safety features for a lower price, would the right be unenforceable in the previolation sense, and government regulation imposing administrative or even criminal penalties be required in order to ensure an acceptable degree of product safety. But this would be true regardless of whether the violator had the ability to shift the burden of legal liability to his customers.

possibilities. First, the enforcing party may expect its own transaction costs to exceed any possible benefit (including indirect and noncompensatory benefits) it could obtain if it were to invoke its legal remedies. In this case, the use of such remedies would be irrational, for it would leave the enforcing party worse off regardless of the outcome of the action. Second, the enforcing party may be uncertain of the outcome of any litigation but know if it prevails the benefits will exceed the costs. In this case, the resort to litigation presents an element of risk, as it may leave the enforcing party either better or worse off depending on the outcome of the action. Third, the enforcing party may know that the benefits of legal action will exceed the costs but nevertheless be without sufficient resources to fund the action. In this case, legal action is simply not feasible absent some external method of financing the litigation. Various other permutations and combinations are possible, of course, but these three should enable us to explore all the interesting issues that may arise.

Let us take the first case first. Is it meaningful to describe a right as enforceable when the transaction costs are such that the resort to legal action would be irrational? The answer depends on several factors. First, even when it would be irrational for the beneficiary to resort to legal action, the burden such an action could impose upon the violator may be such that the violator will still prefer to remain in the previolation state of affairs rather than take the risk the beneficiary may be irrational. Whether the potential violator will have such a preference depends on the benefit to be gained by the violation, the relationship between that benefit and the expected burden of punishment, the degree to which the beneficiary's threat to act irrationally is credible, and the potential violator's risk preference. This is why it is often an advantage to appear irrational in strategic situations, and sometimes it is essential.[11] Indeed, creating a fear of irrational behavior is a key ingredient behind the success (so far) of nuclear deterrence. Although there is also much to criticize about this approach,[12] the strategy of fostering a fear of irrationality works in the nuclear arena because even a slight possibility of such behavior is too much to risk. It is obviously more difficult to make the threat of irrational enforcement action sufficiently credible in other contexts, but in family law and other matters where emotions run high, this possibility cannot be so easily dismissed. If the beneficiary's threat to act irrationally is sufficiently credible, his right may be enforceable in the previolation sense even if the transaction costs of any legal action would exceed the benefits.

Second, even when there is no credible threat that the enforcing party will act irrationally and bring a legal action despite its costs, the right may still be enforceable through other means. Transaction costs are likely to exceed the benefits of legal action only when those benefits are relatively modest, for more substantial claims must be economically viable to pursue if the remedy

[11] See Schelling (1960), p. 36, n. 7 and p. 143 and Ellsberg (1975), p. 360.
[12] See, e.g., Kavka (1987).

of legal action is to be seen as real rather than illusory. When the benefits of legal action are relatively modest, however, the benefits of violation should be relatively modest as well, at least in civil cases where transaction costs pose the greatest impediment to enforceability, for civil legal remedies (excluding transaction costs) will typically offer a degree of compensation that aims to make the beneficiary indifferent to the violation and this will usually (although not necessarily) exceed the benefit of the violation. The more modest the benefits of violation, in turn, the more likely it is that other means of enforcement will be sufficient to produce the requisite previolation preference. For example, you may be confident that no effort will be made to collect a debt of $100 through the courts because the cost of doing so would be prohibitive. (To be confident of this, you would have to be in a jurisdiction where each party bears its own costs of enforcement and be dealing with a creditor who is not a "repeat player," and therefore not likely to want to make an example of you despite the cost and thereby deter future violations by others.) Yet you might still feel compelled to pay this debt for moral reasons, or because you may want to do business with your creditor in the future (a strategic reason), or because failing to pay would affect your ability to obtain credit elsewhere (a reason arising out of the fear of social sanctions). If any of these means of enforcement are available, your debt for $100 could be enforceable despite the fact that pursuing the available legal remedy would be prohibitively expensive. Only if the combined force of these other means of enforcement were not sufficient to make your creditor rationally believe that you would prefer the previolation state of affairs, or to impose the requisite morally significant amount of punishment if a violation did occur, would it be proper to consider the right at issue unenforceable.

Finally, depending on the circumstances, it may be possible for a beneficiary to enforce its rights by shifting the burden of its injury to others. Take, for example, a large consumer lender. A certain percentage of its customers default, and a certain percentage of these defaults are prohibitively expensive to pursue. The losses that result are a cost of doing business. If each beneficiary in the relevant market sector has a similar loss experience, prices can be raised on a sectorwide basis, assuming at least unitary elasticity of demand, thereby allowing each beneficiary to recover most of its losses from these defaults over time from its future customers. The beneficiary may even be able to do this in advance if it is sufficiently experienced to accurately predict its losses.[13] In

[13] This is what Richard Posner refers to as *ex ante* compensation. This kind of compensation, unlike traditional *ex post* compensation, is obtained prior to a rights violation rather than after it. But the reversal of the usual order of events does not render its effect any less compensatory. Of course, it also shifts the burden of the violation from the primary beneficiary to secondary or tertiary beneficiaries, for the customers who have to pay higher prices as a result may be unable to pass these increased costs any further down the line, and *this* injury is a harm caused by the violation that may go uncompensated. But this does not change the fact that the beneficiaries who *are* able to pass this cost on to others may have been fully or at least largely compensated for any injury they have suffered by reason of the violation. See generally Posner (1981), pp. 198–9.

either case, it will have effectively enforced its rights through the use of strategic power.

Under the right conditions, it may also be possible for the beneficiary to use strategic power to shift the burden of its injury to its customers if it is a monopolist or a member of an oligopoly. Of course, a monopolist may already be charging the maximal monopoly price, in which case any increase in prices would result in a decline in sales and an accompanying drop in total profits. But this will not always be the case. The beneficiary could be a monopolist in a regulated industry, where prices had been held below maximal levels until the monopolist could offer an adequate public justification for an increase. Or the beneficiary could be an oligopolist in an unregulated industry, where fear of cheating may have kept prices below maximal levels until an incident occurred that would be sufficient to trigger equivalent price increases by everybody. Or the monopolist or oligopolist may have been charging less than the maximal price for some other reason.[14] And even a monopolist or an oligopolist who *was* already charging the maximal price might be able to avoid a decline in sales if it offered a sufficient public justification for a further increase in its prices. Covering the losses resulting from the unjustified defaults of other customers that were too costly to pursue might indeed be such a justification, for in these circumstances, customers might tolerate an increase they would otherwise resist by turning away from the product in disgust and doing without. In any event, if the beneficiary were able to use its strategic power to shift the full burden of its losses, it would expect to be indifferent to any violation, and its rights would accordingly be enforceable in the previolation sense of the term. And as long as the beneficiary were actually able to shift a sufficient part of the burden, it would at least be able to receive a morally significant if not morally sufficient amount of compensation, and its rights would be enforceable in the postviolation sense as well.

Having addressed the issues raised when transaction costs render the resort to legal remedies irrational, let us turn to the issues raised when the benefits of legal action clearly exceed the costs, but the costs nevertheless exceed the enforcing party's resources. Once again, the first issue to be addressed is whether the threat to resort to litigation in such circumstances remains credible. If potential violators do not know the enforcing party's resources are insufficient, their previolation expectations should not be affected, and the enforcing party's lack of resources would not affect the previolation enforceability of the right.

[14] Although it is not meaningful to think of the monopolist *violator* as shifting the burden of his *punishment* by raising his prices when he was charging less than the maximal price but could have been charging the maximal price all along, it *is* meaningful to think of the monopolist *beneficiary* as shifting the burden of his *injury* by raising his prices even when he could have been charging the maximal price all along. This is because in the former case, the violator's point of view is not relevant in determining whether such a shift has occurred, whereas in the latter case, the beneficiary's point of view is.

Initially, even the violator's postviolation expectations should not be affected, although at some point the enforcing party's failure to initiate legal proceedings would signal its inability to do so. Before this point is reached, however, the threat of legal action alone might well be sufficient to settle the matter, in which case the right never need be recharacterized as unenforceable.

But let us assume that potential violators know the enforcing party has insufficient resources to fund enforcement, the beneficiary knows they know this, and so on. Now potential violators do have reason to adjust their expectations as to what will happen if they violate the right, and they may no longer prefer to remain in the previolation state of affairs. As long as the benefits of legal action are likely to be relatively substantial, however, such action could be financed through the use of contingency or conditional fee arrangements. If either of these financing arrangements were available, the enforcing party's lack of personal resources would not be an impediment to legal action. And as long as potential violators were aware of this potential source of funding too, they would have no reason to revise their previolation expectations despite the beneficiary's apparent lack of resources, and their preference for the previolation state of affairs would be unaffected.

Now let us turn to the final set of issues raised by the problem of transaction costs – the extent to which the risk that transaction costs may exceed the benefits of legal action affects the enforceability of a right. Once again, the determinative factor is the extent to which the beneficiary believes that potential violators will have the requisite previolation preference despite the existence of this risk. Relying again on existing empirical evidence of loss aversion,[15] we might presume that a typical beneficiary will incur the risk of taking legal action only if the potential gain is at least twice as great as the potential loss. But even if the beneficiary were this risk averse and would only take legal action in these circumstances, potential violators will not necessarily be in a position to know this. Potential violators would also have to recognize that even a risk-averse beneficiary might initiate legal action without intending to go through with it – in other words, try to bluff. With bluffing a possible strategy, potential violators would have to account for the possibility that strategic errors might occur, and the beneficiary might feel compelled to carry out a threat he initially made only as a bluff. The risk that the costs of legal action will exceed the benefits is accordingly likely to give potential violators a reason to adjust their expectations of enforcement only when it is particularly severe, or when they are otherwise likely to be particularly risk inclined and see the beneficiary as transparently risk averse, for only in these cases will the threat of legal action no longer be credible. The beneficiary, in turn, will have reason to revise his previolation expectations only when he believes this to be the case, and even then, only if the right at issue is not enforceable through other means.

[15] See Tversky and Kahneman (1991).

7.4 Nominal Damages

In many cases, the only legal remedy available for a rights violation is damages, and the measure of damages is the harm caused by the violation. What happens if that harm is merely nominal? Does it still make sense to consider the right enforceable? Suppose my field lies between your house and the train station. You like to walk to the station, and cutting across my field saves you substantial time, so you decide to do it. I happen to be watching from a distance when you do this and I see you. To prevent you from cutting across my field again, I can obtain an injunction. If I do so and you violate the injunction, we both expect you will be subject to a significant measure of punishment – at least enough to make it unlikely you will chance cutting across my field again. But what about your original violation? That cannot be enjoined because it has already occurred. The only remedy for this violation is damages, but any damages would be nominal. You know this before you cut across my property for the first time, I know you know this, and so on. Does this mean my right against your cutting across my property that first time is unenforceable? Does it mean I only have a right against your cutting across my property twice? Although we could redefine my right in this manner, this seems highly unsatisfactory, because I clearly believe that my right to exclude people from my property includes the right to exclude them from crossing it even once. So what is the basis for my belief?

The answer lies, once again, in the existence of other means of enforcement. Although the available legal remedies may not do much to deter the first violation in this situation, a sufficient degree of deterrence may be provided by other means of enforcement. For example, you may feel it is morally wrong to cut across my property without asking permission, and if you do so anyway you may experience moral regret, even if I am unaware of your violation. As we are neighbors, you may need my cooperation in the future and thus may be concerned that if you cut across my property even once and I learn of your violation, I may retaliate by refusing that cooperation. You may also be wary of gaining a reputation as a bad neighbor, in which case others besides me may refuse to cooperate with you in the future. If I find the availability of these moral, strategic, and social sanctions still leaves me feeling insecure, I am perfectly free to erect physical barriers that prevent you from violating my right even once, or at least make it more difficult or inconvenient for you to do so even when I am not around to stop you. Because I am also free to remove you physically if I catch you committing even your first violation, you may prefer to eschew any violation in order to avoid the risk of an embarrassing or injurious physical encounter. Taken together, these various burdens of nonlegal enforcement may indeed make it rational for me to believe that you would prefer to remain in the previolation state of affairs. And if they do, I may properly consider my right to exclude even your first journey across my field to be enforceable.

A similar example could involve a breach of contract. Assume that I have entered into a contract to supply you with certain goods that are readily available at the same price from other suppliers. If I fail to supply the promised goods, I know you will be able to find replacement goods in the market at no additional cost. My breach will accordingly cause you no damage. You know this too, and I know you know this, and so on. Is your right under our contract nevertheless enforceable?

Once again, the answer depends on the nonlegal means of enforcement available. I may feel a moral obligation to perform, or I may be concerned that you will refuse to do business with me in the future if I fail to perform, or that others will refuse to do business with me if I develop a reputation for nonperformance. Taken together, these concerns may give me a powerful incentive to perform. Once again, even though you know I know the violation of your contract rights will cause you no damage, you may nevertheless rationally believe I would prefer to remain in the previolation state of affairs. It is therefore proper for you to consider your contract rights enforceable despite the fact that you will suffer only nominal damage if I violate them.

7.5 Failures of Proof

Unlike other means of enforcement, the resort to legal action generally imposes a burden of proof on the party seeking enforcement of a right. Discharging this burden means the party seeking enforcement must satisfy the applicable *standard* of proof before enforcement will be granted. The usual standard is a "preponderance of the evidence," but sometimes (e.g., in fraud cases in some jurisdictions) "clear and convincing evidence" is required, and in criminal cases the standard is "beyond a reasonable doubt." Because the applicable standard applies to all of the elements of the enforcing party's case-in-chief, it creates a series of hurdles for the enforcing party to overcome. In civil cases, the enforcing party must prove not only the existence of the right, but also the existence of a violation, the identity of the violator, and the existence and amount of damage suffered by the beneficiary. Depending on the nature of the claim, proving any one of these elements can be a relatively simple project or an extremely complicated one. Take, for example, the difficulty in proving lost profits to a reasonable degree of certainty, or of proving the existence of a nontraditional fiduciary relationship, or of identifying which manufacturer supplied a product that the beneficiary was exposed to long ago but that is only now causing an injury to become manifest.[16] If the enforcing party is unable to prove any of the

[16] See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980) (apportioning liability among manufacturers of DES according to their market share at the time without requiring plaintiff to identify from which manufacturer the DES that caused her injury had come).

elements of his claim under the applicable standard, he will be unable to obtain a legal remedy, but this does not necessarily mean a rights violation has not occurred. Indeed there may be a significant amount of evidence to support the party's claim, just not enough to satisfy the applicable standard. Assuming a violation has occurred, is it still meaningful to describe that right as enforceable if the applicable standard of proof cannot be met? Or is it no longer meaningful to describe that right as a right at all?

Before we begin to examine these questions, three points of clarification are in order. First, my focus here is on cases in which problems of proof preclude the resort to legal action or the issuance of legal remedies, not on cases in which problems of proof merely make the availability of a legal remedy uncertain, a problem that is present in almost every case. If the problem is simply uncertainty, this merely gets factored into the previolation enforceability calculation along with the uncertainty stemming from any other source. Second, my focus here is on cases in which legal remedies are either (1) not sought because the requisite degree of proof is not available or (2) sought but *correctly* denied because sufficient proof is not available or supplied. Cases in which legal remedies are sought but *incorrectly* denied despite the availability and submission of sufficient proof – what I call errors in determination – I will address later. Third, for purposes of this section I am assuming (at least for now) that a legal right exists even though problems of proof preclude resort to legal action or the issuance of legal remedies. If I were to assume otherwise, I would necessarily foreclose any inquiry into the extent to which a right that cannot be enforced through legal action is nevertheless enforceable, which is the very question I wish to examine here. With these clarifications in mind, we can now begin our examination of that question.

As was the case when collectability problems or transaction costs precluded resort to legal action, when problems of proof preclude resort to legal action, the enforceability of a right depends on the measure of enforcement available through other means. Sometimes the same problems of proof may limit the availability of nonlegal remedies, but often this will not be the case. Potential violators may still prefer to remain in the previolation state of affairs if they would be subject to strategic or social sanctions, for example, even if they know any legal claim against them would be unprovable. Some evidence of violation and identity must be present for such sanctions to be employed, but the standard of proof is informal. The amount of proof required to trigger social sanctions will accordingly be much lower than what is required to trigger legal sanctions, and it will be lower still where strategic sanctions are concerned. And even if these minimal standards of proof cannot be met, the potential violator may still expect to prefer the previolation state of affairs because of fears of automatic enforcement (I may be reluctant to drive recklessly on a deserted mountain road even though no one is there to see me) or of moral sanctions (I may experience moral regret if I litter in the desert even though no one is there to see me). When

such means of enforcement are available, a beneficiary may properly consider his right enforceable even though he and potential violators know that problems of proof will preclude him from successfully invoking his legal remedies.

But what if the failure of proof only becomes apparent after the violation has occurred? Is the right enforceable then? Again, this depends on what other means of enforcement are available. Because the measure of enforcement that must be available at this stage is much lower than that required at the previolation stage, it is even more likely that a right will be enforceable at the postviolation stage than at the previolation stage despite the existence of problems of proof. For example, the schoolteacher who escapes conviction for possession of illegal drugs when the illegally obtained evidence against him is suppressed will still expect to suffer highly undesirable social sanctions, including the loss of his job and perhaps even his career. Similar social sanctions may be available in civil cases too. And as we have already seen, even if the identity of the violator is unknown the beneficiary of the right may possess sufficient strategic power under certain circumstances to recover most of his losses simply by increasing the prices he charges for his goods or services. Indeed, if the amount of loss was capable of prediction, he may have already included these losses in his prices and recovered them before the violation actually occurred. In either case, the right would be properly considered enforceable despite the absence of any possibility of resort to legal action.

7.6 Errors in Determination

One unique aspect of legal remedies is that their availability is contingent on a determination of the right. Because enforcement is contingent on a determination of the right, there is the possibility that errors can occur. Enforcement may be erroneously refused if it is incorrectly determined that the right does not exist or has not been violated, or enforcement may be erroneously granted if it is incorrectly determined the right does exist when it does not or has been violated when it has not. Although the possibility of erroneous enforcement also has implications for enforceability,[17] what I will focus on here are the implications of erroneous refusal. What effect do these errors have on the enforceability of the right? Does it make a difference whether the error is related to the existence of the right or the existence of the violation? Is it even meaningful to ask whether a right is or is not enforceable once it has been determined that the right does not exist, even if this determination is erroneous?

Note first that the possibility of erroneous refusal is primarily a problem of postviolation enforceability. Although the possibility of such an error must

[17] Under conditions of uncertainty, the possibility of erroneous enforcement increases the chances for settlement of valid as well as invalid claims, and accordingly makes valid but uncertain rights easier to enforce than they would be in the absence of any possibility of error.

be factored into the beneficiary's previolation calculations of enforceability as well, such a possibility will rarely be sufficient on its own to render a right unenforceable in the previolation sense. In most cases, despite the possibility of an erroneous refusal, the availability of a legal remedy will still be sufficient to make the beneficiary believe that potential violators will prefer to remain in the previolation state of affairs. But once we have moved into the postviolation state of affairs and that error has actually occurred, the impact of such an error on enforceability can be severe. At this point, the right can only be enforceable if the requisite morally significant amount of punishment can be obtained through other means. Whether and to what extent an alternative source of punishment is available will vary from case to case, but remember that the amount of punishment required to establish enforceability in the postviolation sense will generally be far less than that required to establish enforceability in the previolation sense. Even though the threat of legal action was essential to make a right enforceable in the previolation sense, there is accordingly no reason to assume that the denial of a legal remedy *necessarily* means that the right cannot be enforceable in the postviolation sense. If other postviolation means of enforcement are available in sufficient measure, the right will be enforceable.

But if other means of enforcement were available would they not have been employed *before* seeking a legal remedy because of their lesser cost? Not necessarily. Legal action might have been preferable because other means of enforcement would impose only punishment rather than both punish and extract compensation, or the expected measure of punishment available through other means may have been smaller or more uncertain. While the erroneous denial of a legal remedy, if not patently erroneous, can make the imposition of social or moral sanctions more difficult or the measure of punishment available through those means of enforcement less severe, it will not necessarily eliminate their availability altogether. And the erroneous denial of a legal remedy should have no effect on the availability or strength of strategic sanctions. The possibility of enforcement accordingly remains as long as other means of enforcement are still available to be tried.

Even if no other means of enforcement are currently available after an erroneous refusal of legal remedies, or if the other available means of enforcement are currently ineffective, this will not necessarily remain the case forever. The injured party may subsequently acquire sufficient strategic, social, or even legal power to enforce a right for which previous enforcement has been refused. For example, if I am a struggling actor under contract to a major studio I may not currently be able to enforce my rights, but when I become a star I may have sufficient strategic power to demand rectification of past wrongs. Similarly, social power may arise after a time to force the rectification of past wrongs, as it has quite recently forced numerous companies to make reparations for rights violations during World War II. Finally, the law may change or the courts may come to see the error of their ways and rectify past errors by granting

legal remedies that they had previously refused. One high-profile example of this would be *Korematsu v. United States*, in which an American citizen of Japanese ancestry finally obtained a remedy for his unlawful internment during World War II, despite the judicial refusal of such relief many years previously.[18]

7.7 The Enforcement of Rights in International Law

There are two problems that are commonly raised when discussing the enforcement of rights granted by international law. The first is that there is a general absence of any formal means of invoking international legal remedies. The second is that even when some form of international legal action is available, the relief obtainable through that action is typically declaratory only, and not backed by the coercive force of some overriding authority. Because of these problems, many people conclude that rights in international law are not enforceable in the sense that this term is used when applied to rights that arise under national law. Without the availability of some meaningful legal remedy, the argument goes, rights in international law are hollow and empty vessels that merely serve to disguise rather than justify the exercise of raw power. When combined with the problem of definitively determining when a right even exists under international law given the usual absence of any institutionalized means of adjudication, many people, at least among the general public if not among legal practitioners and scholars, have lingering doubts as to whether international law should properly be characterized as law at all.

Full engagement in the debate over the legitimacy of describing international law as "law" is beyond the scope of our discussion here.[19] But the analysis of enforceability I have presented does have something to contribute to it. Like rights in national law, rights in international law are enforceable in the previolation sense as long as the means and measure of enforcement available are sufficient to produce the requisite preference for the previolation state of affairs among potential violators. Such rights are enforceable in the postviolation sense as long as the means of enforcement available are sufficient to impose morally significant amounts of punishment and extract morally significant amounts of

[18] Korematsu was convicted of violating the civilian exclusion order requiring all persons of Japanese ancestry to leave the Western United States and proceed to special "assembly centers" in which such persons were to be interned for the duration of the war. He appealed, arguing that the exclusion order violated his civil rights, but his conviction was affirmed by the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944). Finally, after almost forty years, this erroneous refusal to enforce his civil rights was remedied when his petition for a writ of *coram nobis* was granted and his conviction vacated in *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). See also *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (granting writ of c*oram nobis* and vacating convictions for violation of exclusion and curfew order that had been affirmed by the Supreme Court forty-four years earlier in *Hirabayashi v. United States*, 320 U.S. 81 [1943]).

[19] For an important contribution to that debate, see Hart (1994), ch. 10.

compensation when violations do occur. As we have seen with regard to various problems that may preclude resort to legal remedies for violations committed under national law, the requisite preferences may often be established by the threat or use of a variety of other means of enforcement. Indeed, the effectiveness of these other means of enforcement is perhaps nowhere more apparent than in the international arena, where there has been a long-standing reliance on physical force as a means of enforcement. Even though this means of enforcement may only be available to the physically powerful (just as legal remedies are often available in the national arena only to the economically powerful), that does not make the use of such means any less legitimate, at least as long as such use would be lawful. Historically, strategic enforcement has also been a very important means of international enforcement, with the granting or denial of international trade an important means of deterring potential violators, and of punishing violations that nevertheless occur. And as international relations become more extensive and national economies become more global and interdependent, social enforcement – the threatened or actual withdrawal of the benefits of international cooperation and membership in international associations – is also becoming a highly sophisticated and effective means of ensuring respect for rights in international law. Even physically powerful states benefit from access to international loans and markets. They accordingly take the possible denial of such access into account when considering how to conduct themselves in the international arena, and suffer morally significant amounts of punishment when such access is withdrawn. Moral sanctions also play an often-underestimated role in the enforcement of rights under international law, just as they do in connection with the enforcement of rights under national law. All nations invariably attempt to justify their international actions by reference to generally accepted moral principles of behavior, no matter how strained these justifications may be. This shows that they have some sensitivity to moral criticism of their international behavior even though they would totally ignore such criticism were it directed at behavior occurring within their own borders. Whether this is because they fear the social, strategic, and sometimes physical sanctions that often follow moral condemnation by the international community, or because they have internalized and will actually apply more stringent moral standards to their international behavior, the moral force behind many international legal standards undeniably has a regulatory effect on much international behavior.[20]

If we see legal action as only one means of enforcement, and accept moral, strategic, social, and even physical power as legitimate means of enforcing legal rights, we can perhaps be more comfortable with the idea that rights in international law can be and often are enforceable. Of course, enforcing legal rights through moral, strategic, and social power in the national arena, where such

[20] See generally Koh (1997).

means are merely supplemental to legal remedies, is not the same as relying on moral, strategic, and social power (and of course physical power as well) as the primary means of enforcement, as one must do in the international arena. The fact that legal remedies are not generally available in the international arena means that the enforceability of international rights will usually be more uncertain than the enforceability of their national counterparts. Threats of unlawful or unjust retaliation for the use of legitimate means of enforcement will also be more common in the international arena, and these countervailing sanctions or negative powers of enforcement can effectively undermine what would otherwise be available means of enforcement. Perhaps it is the frequent presence of such countervailing sanctions, rather than the absence of more traditional legal remedies, that leads people to see rights in international law as primarily unenforceable. Certainly no one denies that, as a practical matter, international rights will more often be enforceable by the strong than by the weak, given the fact that the weak cannot rely on the coercive power of some overriding authority to back them up. But such asymmetric enforceability raises a question of justice, not enforceability. It may be unjust that the international rights of some beneficiaries are more likely to be enforceable than the right of others, but the rights that are enforceable are enforceable nonetheless.

8

The Value of Nominal Rights

Having constructed tests for both previolation and postviolation enforceability, we now have a way of determining whether a right is enforceable in each relevant state of affairs. In the previolation state of affairs, a right is enforceable if the beneficiary rationally believes the requisite probability of preference or indifference is present. In the postviolation state of affairs, a right is enforceable if the amount of compensation and punishment available is morally significant. A right that is enforceable under the appropriate test is a *genuine* right; a right that is unenforceable is a *nominal* right. It would be a mistake, however, to think of nominal rights as merely formal and empty, for this will be true only rarely. In most cases, nominal rights, although unenforceable, nevertheless have a certain basic value. This is why it is not an empty gesture to seek the creation of what appear to be unenforceable rights, be they in the form of national declarations of individual rights or international declarations of human rights. Indeed, if people did not intuitively recognize that even nominal rights have value, there would not be such vociferous opposition to their creation on so many occasions. The nature and sources of this value are the issues to which we now turn.

8.1 Sources of Previolation Value

One source of basic previolation value for a nominal right is its inherent potential for becoming a genuine right. The mere fact that a right may be currently unenforceable does not mean it must always remain so. Enforceability is a fluid state of affairs, and a change in circumstances can transform a nominal right into a genuine one and back again any number of times. Sometimes these transformations can be influenced or controlled by the beneficiary, sometimes they can be influenced or controlled by the actual or potential violator, but often they will be largely if not wholly within the control of third parties, who may have their own independent and unrelated reasons for action. And in some cases, a transformation may occur without being deliberately initiated by anyone, but

simply be the unpredictable and unintentional effect of impersonal market transactions or other complex patterns of human interaction.

Here are some examples of how a transformation from nominal right to genuine right might occur. In the light of newly discovered evidence, or simply after further reflection, a beneficiary may come to realize that her initial calculation of the probability of the requisite previolation preference or indifference was erroneous, and she should have considered her right enforceable all along. Or perhaps the beneficiary rationally and correctly believed her right was unenforceable because of the existence of a countervailing power of enforcement, and circumstances change in such a way that this countervailing power is removed. Or perhaps new legal remedies are enacted, or the penalties available through existing remedies are increased, or perhaps existing remedies become more likely to be imposed or less costly to pursue because attorneys are suddenly allowed to charge conditional or contingent fees. Perhaps circumstances change in such a way that the beneficiary has something that is suddenly in great demand, giving her strategic power over potential violators that she did not possess before, making them more likely to prefer the previolation state of affairs and to offer to make amends for any unremedied violations that may have already occurred. Or perhaps technological change makes the imposition of social sanctions more effective. The advent of computers, for example, has made it far easier to identify those who fail to pay their debts, commit malpractice, or engage in a wide variety of other violations. Those who would commit such violations now face the withdrawal of social cooperation by a far wider group of potential partners than would have been aware of these violations in the past. Social sanctions may also become more effective because of increases in the profile of the violator. A right that may have been unenforceable against a private citizen may suddenly become enforceable if that citizen decides to run for office or otherwise becomes a public figure, thereby making her personal financial dealings more likely to attract public scrutiny, and creating the possibility that social sanctions may now be available when these may not have been available before. Even the lack of moral sanctions is not a constant. Indeed, the mere existence of what was initially a nominal right may, over time, contribute to a moral transformation, after which the moral sanction for the violation of that right may become sufficiently strong that it can now be regarded as enforceable.

Of course, to the extent any of these changes are foreseeable, the possibility they might occur must be factored into the beneficiary's previolation probability calculation. But even if they are foreseeable, the possibility they might occur may not be sufficient to make an otherwise unenforceable right enforceable. In this case, the right would become enforceable only if and when the transforming event actually occurred. The probability that such a transforming event will actually occur will vary according to the content of the right and the circumstances, but all nominal rights will enjoy *some* probability of transformation.

And whatever the probability of transformation, the hurdle of transformation is likely to be lower than the hurdle of creation, for several reasons. First, while the creation of a right is typically subject to political opposition, the transformation of a nominal right into a genuine right is less likely to be, for such a transformation may occur without anyone having to specifically intend it. Second, even if transformation *is* subject to political opposition, it is always easier to make an existing right enforceable by degrees than to create an enforceable right out of whole cloth. An interest that is protected by a nominal right is therefore more likely to end up being protected by an enforceable right than an interest that is not yet protected by any sort of right at all. Accordingly, even if a nominal right is merely a genuine right-in-waiting, its probability of transformation gives it some degree of basic value.

Another source of a nominal right's basic value is the influence a nominal right may have on the previolation conduct of potential violators irrespective of the consequences that flow from its violation. Not all potential violators are consequentialists, and few potential violators are consequentialists all the time. Most people will choose to eschew a rights violation on certain occasions simply out of concern for the beneficiary, regardless of the consequences (including the consequence of moral regret) that might flow from the violation. The possibility of such behavior is akin to the possibility of altruism. Sometimes ostensibly altruistic behavior may really be the product of some higher-order self-interested concern. This would be the case, for example, when my gift to charity is really motivated by my desire for the gratitude my gift is likely to produce rather than by a genuine concern for the interests of those the charity aims to help. But sometimes such behavior is truly based on a concern for others. We can isolate a true altruistic motive from an ostensible one by asking whether the putative altruist would rather falsely believe that the object of his concern (say, his children) has been adequately provided for or falsely believe it has not. If the putative altruist would rather hold the latter false belief than the former, we can surmise that it really is a concern for others, and not simply his concern for his own peace of mind, that is motivating his behavior.[1] Applying a similar test to our attitudes as potential violators, we can ask whether we would rather falsely believe we had committed a rights violation, or falsely believe we had not, even though the violation, had it indeed occurred, would have caused no injury and therefore would have imposed no moral or legal or even social obligation to compensate the beneficiary or suffer punishment. At least some of us would prefer the former, illustrating that we have some desire to respect the rights of others that is independent of our desire to avoid the consequences that would ensue should we commit a rights violation. Of course, this independent desire to respect the rights of others can often be outweighed by other concerns, but the

[1] This test for isolating and identifying a true altruistic motive for behavior comes from Gregory Kavka and Bernard Williams. See Kavka (1986), pp. 36–8 and Williams (1973), p. 262.

presence of such a desire can also sometimes influence the conduct of potential violators. Even when the extent of such influence is not sufficient to allow the beneficiary to risk violation without taking precautionary measures, it will nevertheless provide the beneficiary with some protection, and that protection gives the nominal right further basic previolation value.

Indeed, under the right conditions, there is some reason to believe that a nominal right may be more likely to be observed than a genuine one. A restraint could be operative in the world if made enforceable, yet be more effective if it remained unenforceable because the absence of a means of enforcement could foster a sense of altruism that would otherwise be missing. In some cases, cooperation may be greater if it is voluntary rather than coerced. Take, for example, the right to recall a book in the hands of another reader at a university library. In University A, the book must be returned within five days of notice of the recall, but there is no explicit penalty for noncompliance. In University B, the book must also be returned within five days, but a failure to comply generates a fine of one dollar per day, and any outstanding fines must be paid in full before further borrowing will be allowed. It is possible that recalled books will be returned sooner in University A than in University B, for the policy of not imposing a specific fine encourages readers to think of each other's interests. In University B, in contrast, the fine effectively monetizes the issue of compliance, encouraging readers simply to compare the cost and benefits of noncompliance without further regard to the interests of others. Rather than *supplementing* altruism as a reason for voluntary compliance, the fine may tend to *supplant* any altruistic concerns by diminishing their salience. And with their attention diverted to more prudential concerns, readers who might have otherwise voluntarily complied may find the price of noncompliance a price they are willing to pay.

Some empirical support for this effect can be found in *The Gift Relationship*, Richard Titmuss's famous comparative study of patterns of blood donation in the United States, England and Wales, and Japan.[2] In England and Wales, where no payment is offered, donation levels have kept pace with increasing demand. In the United States and Japan, where payment is offered, voluntary donations have decreased dramatically and severe shortages have occurred despite the availability of commercially purchased blood. This suggests not only that a purely voluntary system encourages altruistic behavior while a mixed commercial–voluntary system discourages it, but also that the gains from commercial donations do not offset the losses from voluntary ones when the desired behavior is made a marketable commodity.[3] If we then substitute the threat of monetary punishment for the promise of monetary reward, we may find that under the right circumstances, compliance will indeed be greater where monetary

[2] Titmuss (1970).
[3] See Singer (1973).

sanctions for misbehavior are eschewed in favor of a system of enforcement that relies exclusively on altruistic motives for compliance and a sense of reciprocity.

This effect is likely to be strongest when altruistic reasons for compliance are very salient and the potential monetary penalties under consideration are relatively slight. In the university library example, the reader who has the book knows someone else wants it, whereas if the book were merely due rather than recalled, it is not so clear that someone needs it immediately and the reader has a less salient altruistic reason to comply. In the latter case, even a slight monetary penalty may be more effective at generating compliance than altruism alone. But in the former case, the introduction of a monetary penalty may actually reduce compliance.[4] Generalizing this effect, it may be true that voluntary compliance is more likely in a society where many rights are unenforceable, and less likely in a society where almost all rights are enforceable, for our capacity for altruism may tend to atrophy if largely unused. If altruistic reasons for action do fall into disuse, people may tend to "forget" these exist and view unenforceable rights as opportunities for obtaining wrongful gains rather than as occasions to consider the interests of others. Conversely, in societies where voluntarism is more necessary and therefore more common, a nominal right may generate a large degree of compliance indeed.[5]

Some people may also eschew rights violations simply out of habit, without bothering to make the consequential calculations that would allow them to recognize that it might be in their self-interest to violate a nominal right if there is a benefit to be gained. Indeed, most people will fall into this category most of the time, for constant consequential calculation and recalculation is simply too burdensome to undertake. In a society where most rights are genuine most of the time, this habit of obedience may become quite entrenched, and potential violators may tend to treat all rights as genuine unless they have some reason to consider the matter more carefully. The fact that a particular right may be nominal only in a particular set of circumstances, rather than in a wide variety of circumstances, increases the likelihood that it may be respected out of habit. This potential for habitual obedience is accordingly another source of basic previolation value.

Even more previolation value is provided by the deterrent effect of whatever amount of punishment is expected to be available for a violation of the right.

[4] Note that this decrease in compliance may be a long-term rather than a short-term effect. It is possible that the addition of a means of enforcement may initially increase the level of compliance, for there may be some delay until people get out of the habit of thinking altruistically. Conversely, there may initially be a large drop in compliance if a means of enforcement is suddenly eliminated, although the level of voluntary compliance may recover somewhat as altruism begins to reemerge over time.

[5] For further discussion of the theory that altruism flourishes in the absence of coercion and atrophies in its presence, see Taylor (1987), pp. 168–75.

Remember that our test for previolation enforceability expressly contemplates that some amount of punishment may be available for a violation, even though this amount, discounted for its probability of imposition, is not enough to render the right enforceable. Indeed, it is difficult to imagine a violation that would generate no expectation of punishment whatsoever. Some sort of punishment – even if this is only social or moral criticism or regret – will almost always be available. This will have several effects. First, as long as the amount of punishment that *could* be imposed would be sufficient to produce the requisite preference for the previolation state of affairs if it *were* imposed, some potential violators will be risk averse enough to be deterred by this, no matter how small the risk actually is. Second, even if the amount of punishment that could be imposed would not be sufficient to produce the requisite preference for the previolation state of affairs, some (and possibly a great many) potential violators will still have incentives to eschew a violation if the same benefit that the violation would provide can be obtained in other ways that are not subject to even this minimal amount of punishment. In this case, the amount of punishment functions like a tax – it does not deter by rendering what would be a profitable activity unprofitable, it deters by making other opportunities that can be pursued without additional effort or expense more profitable than the opportunity subject to the tax. And just as taxation has proved to be an effective tool for various forms of social engineering, the threat of punishment that a nominal right provides can be an effective deterrent to the misbehavior of potential violators. The greater the potential for this form of deterrence under the particular circumstances present, the greater the nominal right's basic previolation value.

The final source of a nominal right's previolation basic value is the amount of compensation that the beneficiary believes will be available should the right be violated, even though this amount may not be sufficient to produce indifference to the violation and therefore render it enforceable. If neither the preference nor the indifference test is satisfied, the beneficiary will avoid risks of violation where he can and otherwise take precautions where he cannot. But if some compensation is available, this will reduce the stakes he has at risk. Because the stakes are lower than they otherwise would be, the level of precautions he must take if he cannot avoid the risk altogether are reduced. The amount by which the required level of precautions is reduced is accordingly the final measure of the nominal right's basic previolation value.

8.2 Sources of Postviolation Value

Having discussed the factors that give a nominal right basic *previolation* value, we can turn to the factors that give a nominal right basic *postviolation* value. Here the situation becomes somewhat more complex. The nominal right's potential for becoming genuine is also a source of postviolation value, as are the

amounts of punishment and compensation available. And some amount of both will often be available – few situations will leave no opportunity for any form of punishment, and the availability of some postviolation punishment usually entails the availability of at least some postviolation compensation. This is because even if compensation is not otherwise available, the violator may want to provide compensation in order to avoid the imposition of this punishment. But the presence of some opportunity for punishment and some opportunity for compensation does not *necessarily* contribute to a nominal right's postviolation basic value. This is because the amounts available are by definition not morally significant (otherwise the nominal right would be genuine), and there may be situations in which the beneficiary would rather forgo punishment and compensation entirely than allow these remedies to be levied in morally insignificant amounts. This would be the case whenever the beneficiary believed that the imposition of punishment or the issuance of compensation in morally *in*significant amounts could be misunderstood by others as an acknowledgement that these amounts *were* morally significant. The more formal the process that produces the punishment and compensation, the more likely outsiders will view the amounts of punishment and compensation available as morally significant. The withdrawal of social cooperation and the imposition of informal sanctions such as social and moral criticism are not likely to have this effect, but the use of legal remedies and more formal social sanctions such as official apologies and government offers of compensation could be more easily misconstrued. For example, had the U.S. government offered compensation of twenty-five dollars to each citizen of Japanese ancestry whom it wrongly detained in wartime internment camps instead of $25,000, it is unlikely that anyone would have been willing to accept such a paltry amount for fear that such acceptance would send the wrong message to the rest of American society. Some amount of compensation and punishment is not always better than nothing, and morally insignificant amounts do not necessarily add to a nominal right's basic postviolation value.

Indeed, the availability of morally insignificant amounts of punishment or compensation will contribute to a nominal right's basic postviolation value only when the imposition of such punishment or the payment of such compensation could not be misconstrued. In these cases, an insufficient amount of enforcement *is* better than nothing, for while it will not produce acceptance and reconciliation, it will reduce the burden of violation and the likelihood of retaliation and reprisal, or at least limit the severity of such events if they do occur. This, in turn, will reduce the possibility of an escalation of the conflict and limit the damage that social cooperation suffers overall. While it may be difficult to predict the number of cases that will fall into this category in advance, for those that do, having the right to impose some measure of enforcement is still better than not having it, even if, for the time being at least, that right remains merely nominal.

8.3 Naked Rights and the Provision of Public Reasons for Action

But what would happen if we stripped a nominal right of even its basic value? What, if anything, would remain? This would be a very different kind of unenforceable right, for such a right would not be merely *insufficiently* enforceable according to the relevant tests for previolation and postviolation enforceability, it would not be enforceable *at all*. Stripped of all vestiges of enforceability, and therefore even less enforceable than a nominal right, we might call this kind of unenforceable right a "naked" right. Of course, as we have already noted, it is difficult to imagine a right for which no means or measure of enforcement whatsoever would be available, so it is not clear that such a thing as a naked right could exist. But there is nevertheless something to be gained from considering what significance a naked right would have if it did exist. Such a thought experiment will help us separate the essential features of our conception of a right from the essential features of our conception of enforceability, enable us to distinguish between the different roles these conceptions play in our moral thinking, and provide us with a richer understanding of both the nature of rights and the nature of enforceability.

Because the focus of this book is the nature of enforceability, not the nature of rights, I will offer only some brief, tentative thoughts about what the conception of enforceability we have developed may tell us about the nature of rights. One feature of this conception is that enforceability is a property that can exist independently from the existence of a right. All means of enforcement, including the invocation of the legal process, can be used to enforce a beneficiary's will as well as his rights, and the tests we have developed for determining whether the beneficiary's rights are enforceable can also be applied to determine the enforceability of the beneficiary's will. If we can identify what it is about a naked right that distinguishes it from the mere will of the beneficiary, however, we would be able to isolate the quality that makes rights valuable apart from the powers of enforcement with which they are typically associated. This would be an important achievement, for it would establish how rights are different than other sources of restraint and why their significance and value does not lie solely in their ability to be enforced. It would tell us what *matters* about rights aside from the effect of making them operative in the world.

Perhaps the best way to distinguish a naked right from the mere will of the beneficiary is that the former establishes a communal rather than an individual standard by which we can judge the acceptability of the behavior of members of our society. The violation of a naked right and the violation of a mere will may each trigger a desire for retaliation, but the violation of a right by definition affords the beneficiary a public reason he can use to justify his desire for retaliation to others, whereas no such public reason would necessarily arise from the violation of a mere will. While the violation of a naked right gives rise to public reasons for action, the violation of a mere will gives rise only to individual

reasons for action, and in many cases these reasons may not be acceptable to other members of the community. A right is accordingly the communal validation of a particular individual interest. It is the first step in the transformation of a mere will, which is solely an expression of individual interest, into a just will, which is an expression of the coincidence of the interests of the individual and the interests of the community in a just society. It is then the role of enforceability to activate this communal interest and give it effect in the world, and put whatever plans we have for our society and have embodied in our law in motion.

References

Acton, H. B. 1969. *The Philosophy of Punishment*. London: Macmillan.

Ashworth, Andrew. 2002. "Responsibilities, Rights, and Restorative Justice." *British Journal of Criminology* 42: 578–95.

Axelrod, Robert. 1984. *The Evolution of Co-operation*. New York: Basic Books.

Baumgartner, M. P. 1984. "Social Control from Below." In *Toward a General Theory of Social Control*, Donald Black, ed. Orlando, FL: Academic Press.

Becker, Lawrence C. 1974. "Criminal Attempt and the Theory of the Law of Crimes." *Philosophy and Public Affairs* 3: 262–94.

Benn, S. I. and R. S. Peters. 1959. *Social Principles and the Democratic State*. London: George Allen & Unwin.

Bentham, Jeremy. 1996. *An Introduction to the Principles of Morals and Legislation*, J. H. Burns and H. L. A. Hart, eds. Oxford: Oxford University Press, 1798.

Blackstone, William. 1979. *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*. Chicago: University of Chicago Press.

Bolt, Robert. 1986. *The Mission*. New York: Viking Penguin.

Briley, John. 1982. *Gandhi: The Screenplay*. London: Duckworth.

Buchanan, James. 1975. *The Limits of Liberty: Between Anarchy and Leviathan*. Chicago: University of Chicago Press.

Calabresi, Guido. 1961. "Some Thoughts on Risk Distribution and the Law of Torts." *Yale Law Journal* 70: 499–553.

———. 1970. *The Cost of Accidents*. New Haven: Yale University Press.

Calabresi, Guido and A. Douglass Melamed. 1972. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral." *Harvard Law Review* 85: 1089–128.

Chang, Ruth, ed. 1997. *Incommensurability, Incompatibility, and Practical Reason*. Cambridge: Cambridge University Press.

Coleman, Jules. 1982. "Corrective Justice and Wrongful Gain." *Journal of Legal Studies* 11: 421–40. Reprinted in Jules Coleman, *Markets, Morals, and the Law*. Cambridge: Cambridge University Press, 1988, pp. 184–201.

———. 1988. *Markets, Morals, and the Law*. Cambridge: Cambridge University Press.

———. 1992. "The Mixed Conception of Corrective Justice." *Iowa Law Review* 77: 427–44.

Coleman, Jules and Charles Silver. 1986. "Justice in Settlements." *Social Philosophy and Policy* 4: 102–44. Reprinted in Jules Coleman, *Markets, Morals, and the Law*. Cambridge: Cambridge University Press, 1988, pp. 202–39.

Cottingham, John. 1979. "Varieties of Retribution." *Philosophy Quarterly* 29: 238–46.

Dan-Cohen, Meir. 1984. "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law." *Harvard Law Review* 97: 625–77. Reprinted in Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality*. Princeton: Princeton University Press, 2002, pp. 37–93.

Daniels, Stephen and Joanne Martin. 1995. *Civil Juries and the Politics of Reform*. Evanston, IL: Northwestern University Press.

Davis, Morton D. 1983. *Game Theory: A Nontechnical Introduction*, rev. ed. New York: Basic Books.

Dickerson, A. Mechele. 2001. "Bankruptcy Reform: Does the End Justify the Means?" *American Bankruptcy Law Journal* 75: 243–77.

Dobbs, Dan B. 2000. *The Law of Torts*. St. Paul, MN: West Publishing.

Duff, R. A. 1986. *Trials and Punishments*. Cambridge: Cambridge University Press.

———. 2001. *Punishment, Communication, and Community*. Oxford: Oxford University Press.

Duxbury, Neil. 1995. *Patterns of American Jurisprudence*. Oxford: Oxford University Press.

Dworkin, Ronald. 1977. *Taking Rights Seriously*. Cambridge: Harvard University Press.

———. 1980. "Is Wealth a Value?" *Journal of Legal Studies* 9: 191–26. Reprinted in Ronald Dworkin, *A Matter of Principle*, Cambridge: Harvard University Press, 1985, pp. 237–66.

Eisenberg, Theodore, et al. 1996. "Litigation Outcomes in State and Federal Courts: A Statistical Portrait." *Seattle University Law Review* 19: 433–53.

Ellickson, Robert C. 1991. *Order Without Law: How Neighbors Settle Disputes*. Cambridge: Harvard University Press.

Ellsberg, Daniel. 1956. "Theory of the Reluctant Duelist." *American Economic Review* 46: 909–23. Reprinted in *Bargaining: Formal Theories of Negotiation*, Oran R. Young, ed. Urbana: University of Illinois Press, 1975, pp. 38–52.

———. 1975. "The Theory and Practice of Blackmail." In *Bargaining: Formal Theories of Negotiation*, Oran R. Young, ed. Urbana: University of Illinois Press, pp. 343–63.

Elster, Jon. (1989). *The Cement of Society*. Cambridge: Cambridge University Press.

———. 1999. *Alchemies of the Mind: Rationality and the Emotions*. Cambridge: Cambridge University Press.

———. 2000. *Ulysses Unbound*. Cambridge: Cambridge University Press.

Elster, Jon and John E. Roemer, eds. 1991. *Interpersonal Comparisons of Well-Being*. Cambridge: Cambridge University Press.

Epstein, Richard. 1974. "Defenses and Subsequent Pleas in a System of Strict Liability." *Journal of Legal Studies* 3: 165–215.

———. 1989. "Beyond Foreseeability: Consequential Damages in the Law of Contract." *Journal of Legal Studies* 18: 105–38.

Erez, Edna. 1999. "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment *and* Enhancement of Justice." *Criminal Law Review* 1999: 545–56.

Farah, Douglass. 2004. *Blood from Stones: The Secret Financial Network of Terror*. New York: Broadway Books.

Farnsworth, Ward. 1999. "Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral." *University of Chicago Law Review* 66: 373–436. Reprinted in *Behavioral Law and Economics*, Cass R. Sunstein, ed. Cambridge: Cambridge University Press, 2000, pp. 302–21.

Fehr, Ernst and Simon Gächter. 2002. "Altruistic Punishment in Humans." *Nature* 415: 137–40.

Feinberg, Joel. 1970. *Doing and Deserving*. Princeton: Princeton University Press.

Filippo, Eduardo de. 1992. "Le Grande Magia." In Eduardo de Filippo, *Four Plays*, Carlo Ardito, trans. London: Methuen.

Fischer, James. 1999. *Understanding Remedies*. New York: Matthew Bender.

Fletcher, George. 1972. "Fairness and Utility in Tort Theory." *Harvard Law Review* 85: 537–73.

Fried, Charles. 1981. *Contract as Promise*. Cambridge: Harvard University Press.

Fuller, L. L. and William R. Perdue. 1936–7. "The Reliance Interest in Contract Damages." *Yale Law Journal* 46: 52–96, 373–420.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society* 1974: 95–160.

———. 1998. "An Oil Strike in Hell: Contemporary Legends About the Civil Justice System." *Arizona Law Review* 40: 717–52.

Galanter, Marc and Mia Cahill. 1994. "'Most Cases Settle': Judicial Promotion and Regulation of Settlements." *Stanford Law Review* 46: 1339–92.

Gatley, John Carpenter. 1998. *Gatley on Libel and Slander*, 9th ed., Patrick Milmo and W. V. H. Rogers, eds. London: Sweet and Maxwell.

Geistfeld, Mark. 2001. "Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More Than Money." *New York University Law Review* 76: 114–89.

Genn, Hazel. 1988. *Hard Bargaining: Out of Court Settlement in Personal Injury Actions*. Oxford: Oxford University Press.

Gilles, Stephen G. 1994. "The Invisible Hand Formula." *Virginia Law Review* 80: 1015–54.

———. 2001. "On Determining Negligence: Hand Formula Balancing, The Reasonable Person Standard, and the Jury." *Vanderbilt Law Review* 54: 813–61.

Gladwell, Malcolm. 2004. "Big and Bad: How the S.U.V. Ran Over Automotive Safety." *The New Yorker,* Jan. 12.

Goldman, Alan H. 1979. "The Paradox of Punishment." *Philosophy and Public Affairs* 9: 42–58. Reprinted in *Punishment*, A. John Simmons et al., eds. Princeton: Princeton University Press, 1995, pp. 30–46.

Goodin, Robert E. 1995. "Theories of Compensation." In Robert E. Goodin, *Utilitarianism as a Public Philosophy*. Cambridge: Cambridge University Press.

Grimes, William. 1997. "In War Against No-shows, Restaurants Get Tougher." *New York Times*, Oct. 15, p. F1.

Guth, Werner and Reinhard Teitz. 1990. "Ultimatum Bargaining Behavior." *Journal of Economic Psychology* 11: 417–49.

Guthrie, Chris. 1999. "The Regret Aversion Theory of Litigation Behavior." *Illinois Law Review* 1999: 43–90.

Hale, Robert. 1923. "Coercion and Distribution in a Supposedly Non-Coercive State." *Political Science Quarterly* 38: 470–94.

Hammett, Dashiell. 1930. *The Maltese Falcon*. New York, London: Knopf.
Hampton, Jean. 1984. "The Moral Education Theory of Punishment." *Philosophy and Public Affairs* 13: 208–38.
———. 1987. "Free-Rider Problems in the Production of Public Goods." *Economics and Philosophy* 3: 245–73.
Hardin, Garrett. 1968. "The Tragedy of the Commons." *Science* 162: 1243–8.
Hardin, Russell. 1982. *Collective Action*. Baltimore: Johns Hopkins University Press.
Harman, Gilbert. 1986. "Moral Explanations of Natural Facts – Can Moral Claims be Tested Against Reality?" *Southern Journal of Philosophy* supp. 24: 57–68.
Hart, H. L. A. 1968. *Punishment and Responsibility*. Oxford: Oxford University Press.
———. 1982. "Legal Rights." In H. L. A. Hart, *Essays on Bentham: Studies on Jurisprudence and Political Theory*. Oxford: Oxford University Press, pp. 162–93.
———. 1994. *The Concept of Law*, 2nd ed. Oxford: Oxford University Press, 1961.
Hart, H. L. A. and Tony Honoré. 1985. *Causation in the Law*, 2nd ed. Oxford: Oxford University Press, 1968.
Heap, Shaun P. Hargreaves and Yanis Varoufakis. 1995. *Game Theory: A Critical Introduction*. London: Routledge.
Hegel, G. W. F. 1962. *The Philosophy of Right*, T. M. Knox, trans. Oxford: Oxford University Press.
Hirsch, Andrew von. 1993. *Censure and Sanctions*. Oxford: Oxford University Press.
Hirsch, Andrew von, et al. 1999. *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*. Oxford: Hart Publishing.
Hobbes, Thomas. 1996. *Leviathan*, rev. student ed., Richard Tuck, ed. Cambridge: Cambridge University Press, 1651.
Hoole, Gregory Nathan. 1996. "In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages – Are We Barking Up the Wrong Tree?" *Journal of Contemporary Law* 22: 459–84.
Hough, Michael and Julian Roberts. 1998. *Attitudes to Punishment: Findings from the British Crime Survey*. Home Office Research Study 179. London: HMSO.
Hoyle, Carolyn, et al. 1998. *Evaluation of the "One-Stop Shop" and Victim Statement Pilot Projects*. London: Home Office Research Development and Statistics Directorate.
Hutchinson, Thomas, et al. 2004. *Federal Sentencing Law and Practice*. St. Paul, MN: Thomson West.
Ingber, Stanley. 1985. "Rethinking Intangible Injuries: A Focus on Remedy." *California Law Review* 73: 772.
Jolls, Christine. 1998. "Behavioral Economics Analysis of Redistributive Legal Rules." *Vanderbilt Law Review* 51: 1653.
Jones, Michael A. 2002. *Torts*, 8th ed. Oxford: Oxford University Press.
Kahneman, Daniel and Amos Tversky. 1979. "Prospect Theory: An Analysis of Decision under Risk." *Econometrica* 47: 2, 263–91. Reprinted in *Choices, Values, and Frames*, Daniel Kahneman and Amos Tversky, eds. Cambridge: Cambridge University Press, 2000, pp. 17–43.
———, eds. 2000. *Choices, Values, and Frames*. Cambridge: Cambridge University Press.
Kahneman, Daniel, Jack L. Knetsch, and Richard Thaler. 1986. "Fairness as a Constraint on Profit Seeking Entitlements in the Market." *American Economic Review* 76: 728–41. Reprinted in *Choices, Values, and Frames*, Daniel Kahneman and Amos Tversky, eds. Cambridge: Cambridge University Press, 2000, pp. 317–34.

———. 1991. "The Endowment Effect, Loss Aversion, and the Status Quo Bias." *Journal of Economic Perspectives* 5: 193–206. Reprinted in *Choices, Values, and Frames*, Daniel Kahneman and Amos Tversky, eds. Cambridge: Cambridge University Press, 2000, pp. 159–70.

Kahneman, Daniel, Paul Slovic, and Amos Tversky, eds. 1982. *Judgment under Uncertainty: Heuristics and Biases*. Cambridge: Cambridge University Press.

Kant, Immanuel. 1996. *The Metaphysics of Morals*, Mary Gregor, ed. Cambridge: Cambridge University Press, 1797.

———. 1997. *Groundwork of the Metaphysics of Morals*, Mary Gregor, ed. Cambridge: Cambridge University Press, 1785.

Kavka, Gregory S. 1986. *Hobbesian Moral and Political Theory*. Princeton: Princeton University Press.

———. 1987. *Moral Paradoxes of Nuclear Deterrence*. Cambridge: Cambridge University Press.

Kennedy, Duncan. 1982. "Distributive and Paternalist Moves in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power." *Maryland Law Review* 41: 563–659.

Klein, Benjamin and Keith B. Leffler. 1981. "The Role of Market Forces in Assuring Contractual Performance." *Journal of Political Economy* 89: 615–41.

Koh, Harold Hongju. 1997. "Why Do Nations Obey International Law?" *Yale Law Journal* 106: 2599–659.

Kramer, Matthew H. 1998. "Rights Without Trimmings." In Matthew Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate Over Rights*. Oxford: Oxford University Press, pp. 7–111.

———. 1999. *In Defense of Legal Positivism*. Oxford: Oxford University Press.

———. 2003. *The Quality of Freedom*. Oxford: Oxford University Press.

Kronman, Anthony T. 1985. "Contract Law and the State Of Nature." *Journal of Law, Economics, & Organization* 1: 5–32.

Kuntz, Tom. 1994. "Beyond Singapore: Corporal Punishment, A to Z." *New York Times*, June 26, p. E5.

LaFave, Wayne R. 2003. *Criminal Law*, 4th ed. St. Paul, MN: West Publishing.

Leigh, Ian and Laurence Lustgarten. 1999. "Making Rights Real: The Courts, Remedies, and the Human Rights Act." *Cambridge Law Journal* 58: 509–45.

Levinson, Sanford. 2003. "The Debate on Torture: War Against Virtual States." *Dissent* 50(3): 79–90.

Lewis, David. 1969. *Convention: A Philosophical Study*. Cambridge: Harvard University Press.

Locke, John. 1988. "Second Treatise of Government." In *Two Treatises of Government*, Peter Laslett, ed. Cambridge: Cambridge University Press, 1698.

Luban, David. 1995. "Settlements and the Public Realm." *Georgetown Law Journal* 83: 2619–62.

Luce, R. Duncan and Howard Raiffa. 1957. *Game Theory and Decisions*. New York: John Wiley & Sons.

Lyall, Sarah. 2005. "A Path to Road Safety with No Signposts." *New York Times*, Jan. 22, p. A4.

Lyons, David. 1984. "Utility and Rights." In *Theories of Rights*, Jeremy Waldron, ed. Oxford: Oxford University Press.

Mabbot, J. D. 1939. "Punishment," *Mind* 48: 152–67. Reprinted in *The Philosophy of Punishment*, H. B. Acton, ed. London: Macmillan, 1969, pp. 39–54.

Malamud, Bernard. 1952. *The Natural*. New York: Farrar, Straus and Giroux

Mamet, David. 1985, 1986. *The Untouchables: Screenplay*. Hollywood, CA: Script City.

McCormick, Charles T. 1935. *Damages*. St. Paul, MN: West Publishing.

Miles, Joanna. 2000. "Standing Under the Human Rights Act." *Cambridge Law Journal* 59: 133–67.

Mill, J. S. 1989. *On Liberty*, Stefan Collini, ed. Cambridge: Cambridge University Press, 1859.

———. 1998. *Utilitarianism*, Roger Crisp, ed. Oxford: Oxford University Press, 1861.

Mnookin, Robert H. and Lewis Kornhauser. 1979. "Bargaining in the Shadow of the Law: The Case of Divorce." *Yale Law Journal* 88: 950–97.

Murray, John Edward, Jr. 2001. *Murray on Contracts*, 4th ed. Newark, NJ: Matthew Bender.

Muybridge, Eadweard. 1887. *Animal Locomotion: An Electro-Photographic Investigation of Consecutive Phases of Animal Movements*. Philadelphia: University of Pennsylvania Press. Republished as *Muybridge's Complete Human and Animal Locomotion*. New York: Dover Publications, 1979.

Nates, Jerome H., et al. 2004. *Damages in Tort Actions*. Newark, NJ: Matthew Bender.

Newman, J. Wilson. 1997. "Dun & Bradstreet: For the Promotion and Protection of Trade." In *Reputation: Studies in the Voluntary Elicitation of Good Conduct*, Daniel Klein, ed. Ann Arbor: University of Michigan Press.

Nozick, Robert. 1969. "Coercion." In *Philosophy, Science, and Method*, S. Morgenbesser, Patrick Suppes, and Morton White, eds. New York: St. Martin's Press, pp. 440–72. Reprinted in Robert Nozick, *Socratic Puzzles*. Cambridge, Harvard University Press, 1997, pp. 15–44.

———. 1974. *Anarchy, State, and Utopia*. Oxford: Blackwell.

———. 1981. *Philosophical Explanations*. Cambridge: Harvard University Press.

———. 1993. *The Nature of Rationality*. Princeton: Princeton University Press.

———. 1997. *Socratic Puzzles*. Cambridge, Harvard University Press.

Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge: Harvard University Press.

Plato. 2000. *The Republic*, G. R. F. Ferrari, ed. Cambridge: Cambridge University Press.

Pojman, Louis P. and Jeffrey Reiman. 1998. *The Death Penalty: For and Against*. Lanham, MD: Rowan and Littlefield.

Posner, Richard A. 1973. *Economic Analysis of Law*. Boston: Little Brown & Co.

———. 1981. "The Concept of Corrective Justice in Recent Theories of Tort Law." *Journal of Legal Studies* 10: 187–206.

———. 1998. *Economic Analysis of Law*, 5th ed. New York: Aspen Publishers.

Poundstone, William. 1992. *Prisoner's Dilemma*. New York: Doubleday.

Rachlinski, Jeffrey J. 1996. "Gains, Losses, and the Psychology of Litigation." *Southern California Law Review* 70: 113.

Rawls, John. 1996. *Political Liberalism*. New York: Columbia University Press, 1993.

———. 1999. *A Theory of Justice*, rev. ed. Cambridge: Harvard University Press, 1971.

———. 2001. *Justice as Fairness: A Restatement*. Cambridge: Harvard University Press.

Raz, Joseph. 1986. *The Morality of Freedom*. Oxford: Oxford University Press.

Reiff, Mark R. 2003. "The Politics of Masochism." *Inquiry* 46: 29–63.

Robinson, Paul H. and John M. Darley. 2004. "Does Criminal Law Deter? A Behavioral Science Investigation." *Oxford Journal of Legal Studies* 24: 173–205.

Ross, Lee and Craig A. Anderson. 1982. "Shortcomings in the Arbitration Process: On the Origins and Maintenance of Erroneous Social Assessments." In *Judgment under Uncertainty: Heuristics and Biases*, Daniel Kahneman, Paul Slovic, and Amos Tversky, eds. Cambridge: Cambridge University Press.

Roth, Alvin E. 1995. "Bargaining Experiments." In *The Handbook of Experimental Economics*, John H. Kagel and Alvin E. Roth, eds. Princeton: Princeton University Press, pp. 253–348.

Rousseau, Jean-Jacques. 1984. *A Discourse on Inequality*. London: Penguin.

Rustad, Michael L. 1998. "The Incidence, Scope, and Purpose of Punitive Damages: Current Data and Further Inquiry." *Wisconsin Law Review* 1998: 15–68.

Sachs, Susan. 2004. "For Greece, the Games Leave Pride, Relief and a Huge Bill: Now Athens Deals with the Cost of a Safe Games." *New York Times*, Aug. 30, p. A1.

Savage, Leonard. 1951. "The Theory of Statistical Decision." *American Statistical Association Journal* 46: 55–67.

Schelling, Thomas C. 1960. *The Strategy of Conflict*. Cambridge: Harvard University Press, 1980 ed.

Schwartz, Gary T. 2001. "The Myth of the Ford Pinto Case." *Rutgers University Law Review*, 43: 1013–68.

Sen, Amartya K. 1967. "Isolation, Assurance and the Social Rate of Discount." *Quarterly Journal of Economics* 89: 112–24.

Simmons, A. John. 1992. *The Lockean Theory of Rights*. Princeton: Princeton University Press.

Simmons, A. John, et al., eds. 1995. *Punishment: A Philosophy and Public Affairs Reader*. Princeton: Princeton University Press.

Simon, Herbert. 1955. "A Behavioral Theory of Rational Choice." *Quarterly Journal of Economics* 69: 99–118.

———. 1956. "Rational Choice and the Structure of the Environment." *Psychological Review* 63: 129–38.

Singer, Peter. 1973. "Altruism and Commerce: A Defense of Titmuss Against Arrow." *Philosophy and Public Affairs* 2: 312–20.

Smart, J. J. C. and Bernard Williams. 1973. *Utilitarianism for and against*. Cambridge: Cambridge University Press.

Smith, Adam. 1978. *Lectures on Jurisprudence*, R. L. Meek, D. D. Rapheal, and P. G. Stein, eds. New York: Oxford University Press.

———. 2002. *The Theory of Moral Sentiments*, Knut Haakonssen, ed. Cambridge: Cambridge University Press.

Stabile, Susan J. 1996. "The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action." *Notre Dame Law Review* 71: 861.

Steiner, Hillel. 1994. *An Essay on Rights*. Oxford: Blackwell.

Sturgeon, Nicholas. 1986. "Harman on Moral Explanations of Natural Facts." *Southern Journal of Philosophy* supp. 24: 69–78.

Sunstein, Cass R. 1994. "Incommensurability and Valuation in Law." *Michigan Law Review* 92: 779–861.

———. 1997. "Incommensurability and Kinds of Valuation: Some Applications in Law." In *Incommensurability, Incompatibility, and Practical Reason*, Ruth Chang, ed. Cambridge: Cambridge University Press.

Sunstein, Cass R., ed. 2000. *Behavioral Law and Economics*. Cambridge: Cambridge University Press.

Taylor, Michael. 1987. *The Possibility of Cooperation*. Cambridge: Cambridge University Press.

Taylor, Michael and Hugh Ward. 1982. "Chickens, Whales, and Lumpy Goods: Alternative Models of Public Goods Provision." *Political Studies* 30: 350–70.

Titmuss, Richard M. 1970. *The Gift Relationship: From Human Blood to Social Policy*. London: George Allen and Unwin; New York: Random House.

Todd, Stephen J. 2000. "Privatization of Accident Compensation: Policy and Politics in New Zealand." *Washburn Law Journal* 39: 404–95.

Trebilcock, Michael J. 1993. *The Limits of Freedom of Contract*. Cambridge: Harvard University Press.

Tversky, Amos and Daniel Kahneman. 1973. "Availability: A Heuristic for Judging Frequency and Probability." *Cognitive Psychology* 4: 207–32. Reprinted in *Judgment under Uncertainty: Heuristics and Biases*, Daniel Kahneman, Paul Slovic, and Amos Tversky, eds. Cambridge: Cambridge University Press, 1982, pp. 163–78.

———. 1981. "The Framing of Decisions and the Psychology of Choice." *Science* 211: 453–8. Reprinted in *Rational Choice*, Jon Elster, ed. Oxford: Basil Blackwell, 1986, pp. 123–41.

———. 1991. "Loss Aversion in Riskless Choice." *The Quarterly Journal of Economics*, 106: 1039–61. Reprinted in *Choices, Values, and Frames*, Daniel Kahneman and Amos Tversky, eds. Cambridge: Cambridge University Press, 2000, pp. 143–58.

U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on International Trade and Finance. 2001. *Hawala and Underground Terrorist Financing Mechanisms*. 107th Cong., 1st sess., Nov. 17.

Vollman, William T. 2000. "Letters from Afghanistan: Across the Great Divide." *The New Yorker*, May 15.

Vonnegut, Kurt Jr. 1963. *Cat's Cradle*. New York: Holt, Reinhart, and Winston.

Waldron, Jeremy. 1992. "Lex Talionis." *Arizona Law Review* 34: 25–51.

Walker, Nigel. 1991. *Why Punish?* Oxford: Oxford University Press.

———. 1999. "Even More Varieties of Retribution." *Philosophy* 74: 595–605.

Walters, Joanna. 2002. "Why No Road Rules Rule." *The Guardian*, June 30.

Warner, Richard. 1992. "Incommensurability as a Jurisprudential Puzzle." *Chicago-Kent Law Review* 68: 147–70.

———. 1995. "Impossible Comparisons and Rational Choice Theory." *Southern California Law Review* 68: 1705–40.

———. 1998. "Does Incommensurability Matter? Incommensurability and Public Policy." *University of Pennsylvania Law Review* 146: 1287–325.

Weinrib, Ernest J. 1995. *The Ideal of Private Law*. Cambridge: Harvard University Press.

———. 2001. "Correlativity, Personality, and the Emerging Consensus on Corrective Justice." *Theoretical Inquiries in Law* 2001: 107–59.

Weinstein, Neil D. 1980. "Unrealistic Optimism About Future Life Events." *Journal of Personality & Social Psychology* 39: 806.

Williams, Bernard. 1973. "Egoism and Altruism." In Bernard Williams, *Problems of the Self*, Cambridge: Cambridge University Press.

———. 1988. "Formal Structures and Social Reality." In *Trust: Making and Breaking Cooperative Relations*, Diego Gambetta, ed. Oxford: Basil Blackwell.

Wolff, Jonathan. 2002. "Addressing Disadvantage and the Human Good." *Journal of Applied Philosophy* 19: 207–18.

Wright, Richard W. 1985. "Causation in Tort Law." *California Law Review* 73: 1735–828.

———. 1988. "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts." *Iowa Law Review* 73: 1001–77

———. 1992. "Substantive Corrective Justice." *Iowa Law Review* 77: 625–711.

———. 2001. "Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility." *Vanderbilt Law Review* 54: 1071–132.

Young, Oran R., ed. 1975. *Bargaining: Formal Theories of Negotiation*. Urbana: University of Illinois Press.

Index

Some other books in the series (continued from p. iii)

Robert F. Schopp: *Automatism, Insanity, and the Psychology of Criminal Responsibility*
Warren F. Schwartz (ed.): *Justice in Immigration*
Anthony Sebok: *Legal Positivism in American Jurisprudence*
Philip Soper: *The Ethics of Deference*
Suzanne Uniacke: *Permissible Killing: The Self-Defense Justification of Homicide*