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.