

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

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 University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

Cambridge Studies in Philosophy and Law

GENERAL EDITOR: GERALD POSTEMA
(UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL)

ADVISORY BOARD

Jules Coleman (Yale Law School)
 Antony Duff (University of Stirling)
 David Lyons (Boston University)
 Neil MacCormick (University of Edinburgh)
 Stephen R. Munzer (U.C.L.A. Law School)
 Phillip Pettit (Princeton University)
 Joseph Raz (University of Oxford)
 Jeremy Waldron (Columbia Law School)

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

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

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*

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

For Della

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

Punishment, Compensation, and Law

A Theory of Enforceability

Mark R. Reiff

University of Durham



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

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

Cambridge University Press
40 West 20th Street, New York, NY 10011-4211, USA

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

© Mark R. Reiff 2005

This book is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2005

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Reiff, Mark R., 1957–
Punishment, compensation, and law : a theory of enforceability / Mark R. Reiff.
p. cm. – (Cambridge studies in philosophy and law)
Includes bibliographical references and index.
ISBN 0-521-84669-2 (hardback)
1. Obedience (Law) 2. Law enforcement. 3. Punishment – Philosophy.
4. Compensation (Law) I. Title. II. Series.
K250.R45 2005
340'.11–dc22 2004024991

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

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this book and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

Contents

<i>Acknowledgments</i>	<i>page ix</i>
Introduction	1
1. The Means of Enforcement	17
1.1 Physical Force	19
1.2 Strategic Power	22
1.3 Moral Condemnation and Regret	25
1.4 Social Criticism and the Withdrawal of Social Cooperation	29
1.5 Automatic Sanctions	34
1.6 Legal Remedies	40
2. The Goals of Enforcement	45
2.1 The Three Critical Stages of Enforcement	45
2.2 Previolation Enforceability and the Facilitation of Social Cooperation	47
2.3 Postviolation Enforceability and the Facilitation of Social Conflict	67
2.4 Acceptance and the Restoration of Social Cooperation	75
3. Measuring Enforceability in the Previolation State of Affairs	76
3.1 The Threat of Punishment and Previolation Enforceability	77
3.2 The Promise of Compensation and Previolation Enforceability	98
4. Measuring Enforceability in the Postviolation State of Affairs	111
4.1 The Role of Deterrence	112
4.2 Retribution Reconceived	116
4.3 Retribution and Postviolation Enforceability	141
4.4 Compensation and Postviolation Enforceability	159
4.5 Previolation and Postviolation Enforceability Compared	171

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

viii

CONTENTS

5. The Relationship between Previolation Expectations and Postviolation Practice	175
5.1 Previolation Expectations and Postviolation Practice	175
5.2 Publicity and Previolation Expectations	181
5.3 Uncertainty and Previolation Expectations	188
6. Limitations on the Means of Enforcement	191
6.1 Legal Rights and Legal Remedies	191
6.2 Legal Rights and Lawful Remedies	199
6.3 The Threat or Imposition of Countersanctions	204
6.4 Coda on the Advantages of a Unified Theory	207
7. Special Problems with Legal Remedies	213
7.1 Uncollectability	213
7.2 Insurance and Other Forms of Burden Shifting	215
7.3 Transaction Costs	221
7.4 Nominal Damages	226
7.5 Failures of Proof	227
7.6 Errors in Determination	229
7.7 The Enforcement of Rights in International Law	231
8. The Value of Nominal Rights	234
8.1 Sources of Previolation Value	234
8.2 Sources of Postviolation Value	239
8.3 Naked Rights and the Provision of Public Reasons for Action	241
<i>References</i>	243
<i>Index</i>	253

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

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.

Cambridge University Press

0521846692 - Punishment, Compensation, and Law: A Theory of Enforceability

Mark R. Reiff

Frontmatter

[More information](#)

X

ACKNOWLEDGMENTS

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