

## **A Puzzle of Enforceability: Why do moral duties differ in their enforceability?**

### **Abstract**

When someone is poised to fail to fulfil a moral duty, we can respond in a variety of ways. We might remind them of their duty, or seek to persuade them through argument. Or we might intervene forcibly to ensure that they act in accordance with their duty. Some duties appear to be such that the duty-bearer can be liable to forcible interference when this is necessary to ensure that they comply with them. We'll call duties that carry such liabilities *enforcement-apt*. Not all duties seem to be enforcement-apt. Some, for example, accept that a person in a monogamous marriage has a moral duty to refrain from infidelity, but deny that a spouse can be compelled to comply with their duty to be faithful without transgressing her rights. More controversially, some think that our duties to assist others in severe need are not enforcement-apt. What could explain the contrast between duties that are enforcement-apt while and those that are not? We'll call this the puzzle of enforceability and our paper considers three broad strategies for responding to it. The first strategy takes the form of identifying some substantive feature or features that are necessary and/or sufficient for a duty to possess some enforcement status. We consider a range of candidate explanations of this sort but find that none are plausible. The second strategy rejects the idea that there are genuinely enforcement-inapt duties and instead seeks to explain why there can nonetheless be marked differences amongst duties concerning how they can be enforced and who can enforce them. We find that this strategy too is largely unsuccessful. The third strategy, offered seeks an explanation of differences in enforcement status by appeal to the broader social costs of enforcing certain kinds of duties. We find that this approach holds some promise, but note that it requires adopting a controversial set of moral commitments. We conclude by considering what our options would be in the absence of a solution to our puzzle.

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When someone is poised to fail to fulfill a moral duty, we might respond in a variety of ways. We might remind them of their duty, or seek to persuade them to comply through argument, offering financial incentives, or giving them disapproving looks. Or we might intervene forcibly to ensure that they act in accordance with their duty. Some duties seem to be such that the duty-bearer can be forcibly interfered with when that is required to ensure that they not act against them, without violating or even infringing their rights, so long as the costs that are thereby imposed on them are

proportionate.<sup>1</sup> We will call such duties *enforcement-apt*. The duty to refrain from causing bodily injury is, paradigmatically, enforcement-apt. If someone is about to break the limbs of an innocent, non-threatening person, then we can prevent her from doing so without violating or infringing her rights through the proportionate use of force. But other duties – we will call them *enforcement-inapt* – do not appear to be like this. We may accept that a person in a monogamous marriage has a moral duty to refrain from infidelity but deny that a spouse can be compelled forcibly to comply with their duty to be faithful without transgressing their rights. And, given how they behave, many who are vegetarians on ethical grounds appear to hold that while we have moral duties not to eat animals, others cannot be forcibly prevented from deviating from a vegetarian diet without transgressing their rights. More controversially, some think that while we have duties to assist strangers in severe need or to refrain from making derogatory remarks about racial groups, they are enforcement-inapt.<sup>2</sup>

At the very least, those who maintain that some duties are enforcement-inapt do not seem to make a conceptual mistake – and they may be right. This presents a puzzle: what explains differences between duties when it comes to their enforcement?<sup>3</sup> We will call this the puzzle of enforceability, and our paper considers three broad strategies for responding to it.<sup>4</sup> In (§1) we outline what we mean by enforcing a duty. In (§2) we turn to the first strategy for responding to the puzzle, which takes the form of identifying some substantive feature or features that are necessary and/or sufficient for a duty to possess some enforcement status. We consider a range of candidate explanations of this sort but find that none are plausible. The second strategy, explored in (§3), rejects the idea that there are genuinely enforcement-inapt duties and instead seeks to explain why there can nonetheless be marked differences amongst duties concerning how

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<sup>1</sup> A person's rights are violated when they are impermissibly transgressed (as when you cause another serious bodily injury to avoid a minor inconvenience). They are infringed when their rights are permissibly transgressed (as when you step on another's foot to avoid being hit by a bus). Here we follow Judith Jarvis Thomson's account of the infringement/violation distinction in "Some Ruminations on Rights," in William Parent (ed.), *Rights, Restitution, and Risk* (Cambridge, MA: Harvard University Press, 1986). We will use the term 'transgression' to refer to all cases that involve either violation or infringement of rights.

<sup>2</sup> On the former see Jessica Flanigan, 'Duty and Enforcement,' *Journal of Political Philosophy* (2018) doi:10.1111/jopp.12173. Or, for a note that some hold that we should be protected from interference if we fail in our duties of easy rescue/charity, see Ori Herstein, 'Defending the Right to Do Wrong,' *Law and Philosophy* 31(3) (2011): 343–65, p. 344.

<sup>3</sup> We will refer to all such differences as differences in enforcement status.

<sup>4</sup> This issue has received relatively little direct philosophical discussion. A notable exception is Flanigan's, 'Duty and Enforcement' which we discuss in (§2.d). Another exception is a very closely related debate over moral rights to do wrong, including Renée Bolinger, 'Revisiting the Right to Do Wrong,' *Australasian Journal of Philosophy* 19(2) (2017): 43–57; Andrew I. Cohen, 'Virtues, Opportunities, and the Right to Do Wrong,' *Journal of Social Philosophy* 28(2)(1987): 43–55 ; Ori Herstein, 'Defending the Right to Do Wrong'; Gerhard Øverland, 'The Right to Do Wrong,' *Law and Philosophy* 26 (2007): 377–404; Jeremy Waldron, 'A Right to Do Wrong,' *Ethics* 92(1) (1981): 21–39. We draw from this literature some possible grounds for this right that might also explain why some duties are enforcement-inapt.

they can be enforced and who can enforce them. We find that this strategy too is largely unsuccessful. The third strategy, offered in (§4), seeks an explanation of differences in enforcement status by appeal to the broader social costs of enforcing certain kinds of duties. We find that this approach holds some promise, but note that it requires the adoption of a controversial set of moral commitments. We conclude in (§5) by considering what our options would be in the absence of a solution to our puzzle.

### (§1) **Enforcing duties: some assumptions**

What does it mean to enforce a duty? For this paper, we adopt a relatively narrow definition of enforcement, intended to describe paradigm cases of enforcement, rather than constituting a complete account. On this definition, agent A counts as enforcing agent B's duty to  $\varphi$  when her actions meet two conditions:

- 1) A intends to prevent B from acting against a moral duty to  $\varphi$  (in the case of negative duties, to prevent B from performing some action, such as harming; in the case of positive duties, to ensure that B does perform some action, such as rescue); and
- 2) so intending, A intervenes by either directly forcing B to  $\varphi$  or inducing B to  $\varphi$  by imposing (or threatening to impose) a cost on them that, in the absence of a duty to  $\varphi$ , would transgress B's rights. These costs can be financial, such as when a fine is imposed, or non-financial, as when a person is incarcerated, harmed, or loses their freedom of movement.

We will interpret condition (2) such that it does not treat as enforcement cases those where A's actions raise the costs of B's not  $\varphi$ -ing simply by offering B positive incentives to  $\varphi$ . So, offering someone \$10 not to cheat in an exam does not count as enforcing the duty not to cheat, even though it may promote its observance. Encouragement, even in a very strong form, is not the same as enforcement.

We interpret condition (2) so that a duty to  $\varphi$  is only enforced by A where the costs of not  $\varphi$ -ing would be raised specifically through A's intervention. When you merely remind someone of the costs already involved in failing to  $\varphi$  – say the imposition of a hefty fine – that does not count as *your* enforcing the duty. More precisely, in this case the duty may be enforced not by the person who does the reminding but by the agency that would impose the fine. However, we do interpret (2) as it counting as enforcing a duty where A makes it the case through her intervention that such costs will be imposed on B if he does not  $\varphi$ . When you alert a public authority of a crime that is

about to occur, that counts as joining in the enforcement of a duty: you actively enable the coercive intervention of another. But if you merely advise someone that crimes which they are about to commit might be prevented by the police or attract criminal sanctions, you do not.

Further, we take condition (2) to distinguish cases where you deny an agent the option of failing to comply with her duty to  $\varphi$  from those where you refrain from enabling an agent's failure to  $\varphi$ . Suppose that Bob intends to drink-drive. Someone who refuses to enable drink-driving, but does not enforce that duty, might decline to help Bob find his car keys or refrain from joining in with jokes normalizing drink-driving. Someone who enforces the duty might seize Bob's keys, or make him take a cab through threats or force. What makes the difference? One set of actions takes the form of not enabling someone's failure to do their duty, the other of preventing someone from failing to do their duty (enforcing). Interventions of the latter sort – but not the former – are ordinarily taken to transgress a person's rights, when that person is not failing to comply with a duty.

Finally, we take condition (2) to distinguish between types of costs that can be imposed. Employing relatively mild social sanctions, such as refusing to talk to someone if they fail to comply with their duties, will not count as enforcement on our working definition, because such measures are not ordinarily regarded as transgressing the rights of the person upon whom they are imposed.<sup>5</sup>

We close this section with a few further clarifications. First, it is important to recognize that attempts at enforcement can transgress rights even when the duties they aim to enforce are enforcement-apt. This happens, for example, when the costs imposed on the duty bearer are disproportionate. We violate someone's right to life, for example, if we kill them to prevent them from bruising our arm, even though their duty not to bruise our arm is paradigmatically enforcement-apt.<sup>6</sup>

Second, we have defined a duty as enforcement-apt when it *can* be enforced without transgressing the rights of the duty-bearer. This leaves open which agents can permissibly enforce such duties and under what circumstances: a duty can be enforcement-apt without being enforceable by just anyone. So, the question of whether different duties are enforcement-apt is distinct from that of which duties ought to be enforced by a particular agent, such as the state.

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<sup>5</sup> Clause (2) makes reference to rights violations and because there may disagreement about which sanctions constitute rights transgressions, there can be disagreement too about whether imposing them counts as enforcement. For instance, refusing to speak to a friend may not constitute a rights violation or infringement. But things may be less clear if you spread rumors about them aiming to ensure that they are widely shunned, or if you shunned your own child. Thanks to an anonymous referee for the latter example.

<sup>6</sup> See Flanigan, 'Duty and Enforcement' and Øverland, 'The Right to Do Wrong' for discussion.

Some duties seem to be enforceable by nearly anyone. For example, while societies are ordinarily arranged so that only certain agents have legal authority to enforce the duty not to break the limbs of innocent, non-threatening people, few would maintain that, in cases where such authorities are unable to prevent an agent from acting against it, others must necessarily refrain from interfering while people are being killed or injured, or that they would transgress the rights of those threatening such harms were they to forcibly intervene. But it could be that not all duties look like this, as we discuss below in (§3).

Third, a pair of duties might be enforcement-apt, yet differ in terms of the relationship between the costs that an agent should be willing to take on to avoid acting against her duty (we will call this the *required cost*) and the cost that others could impose on her to ensure she does not act against her duty (we will call this the *enforcement cost*). With respect to duties not to kill or inflict bodily harm, for example, there seems to be symmetry between these required and enforcement costs. For example, the required cost of the duty not to inflict a broken limb on an innocent non-threatening person appears to be suffering a substantial loss yourself (say a broken limb). If Cindy is under threat of having her limb broken by a falling rock, she cannot, to avoid injury, kick it towards Bob, so that he suffers a broken limb instead. And the enforcement cost also seems this high – you could impose a broken limb on Cindy to prevent her from kicking the falling rock towards Bob in order to avoid harm to herself.<sup>7</sup> However, other duties may lack that symmetry between required and enforcement costs, such that we might be permitted to enforce them only if the enforcement cost were substantially lower than the required cost. Perhaps, for instance, someone in a monogamous relationship about to violate her duty of fidelity should be willing to take on quite significant cost to avoid doing so, but third parties could not forcibly impose as much cost as this on her for this purpose.<sup>8</sup> While the next section focuses on the distinction between enforcement-apt and enforcement-inapt duties, in (§3) we address whether the distinction might be one of degree, not kind, captured by these other dimensions in which a duty's enforcement status may vary.

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<sup>7</sup> Victor Tadros invokes these considerations when discussing the criminal law. He argues that what makes it permissible for the state to impose costs on a person through criminal punishment is that the person had a duty to take on at least these costs in order to protect the victims of the crimes they have committed, in his, *Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2013), p. 21. Tadros links his theory of punishment to self-defense cases, where symmetry in our sense holds. See *Ends of Harm*, pp. 16, 53, 188, 266.

<sup>8</sup> For a discussion of a different asymmetry, where the costs which an enforcer may impose on the duty-bearer to ensure their compliance may be greater than the costs which the duty-bearer has to bear to fulfill it, see Susanne Burri and Lars Christie, "On the enforceability of poverty-related responsibilities," *Ethics and Global Politics* 12 (1):68-75 (2019).

## (§2) Explaining the contrast

What would a successful explanation of contrasts in enforcement status look like? First, an explanation ought to accommodate paradigmatic cases of duties that are enforcement-apt and enforcement-inapt, or, at least, give a plausible rationale for revising our judgements about the enforcement status of such duties. Second, it would be desirable for an explanation to shed some light on why the enforcement status of certain duties is controversial. Third, we take it that addressing this puzzle matters not only for ethical theory, in clarifying the nature of duties, but also for the choices that we make when confronted with others' failure to do their duty. So, it would be desirable that our explanation clearly marks off those duties that are enforcement-apt from those that are not, in order to successfully guide our actions. A successful explanation might *vindicate* our judgements about enforcement status, showing that there is a plausible rationale for treating particular duties in different ways. But it may also *undercut* them: once we identify the distinction underlying our intuitive judgements regarding the enforcement status of different duties, it might turn out that we would conclude that this distinction is morally irrelevant and does not support our current practices.

These desiderata of a good explanation provide a good motivation for the first strategy that we assess. This strategy seeks to identify some feature or set of features that is necessary and/or sufficient for a duty to have a given enforcement status.<sup>9</sup> If found, such an account would clearly specify the conditions under which any given duty is enforcement-apt or inapt. And if the distinction such an account track appears to be morally plausible, it would successfully guide our actions with respect to duty enforcement.

### A. Stringency

One natural thought would be that differences in stringency determine enforcement status. Perhaps only and/or all relatively stringent duties are enforcement-apt. Let us say that a person's moral duty to  $\varphi$  is stringent to the extent that it (1) constrains her and (2) can demand much of her.<sup>10</sup> Her duty to  $\varphi$  constrains her to the extent that she cannot justify refusing to  $\varphi$  by appealing to the costs to herself of  $\varphi$ -ing or to other valuable ends that her conduct could instead bring about

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<sup>9</sup> Since we source some candidate features from existing literature, it appears that others too might take this approach.

<sup>10</sup> These are two different dimensions of stringency: in theory, a duty could be very constraining but not very demanding, although these dimensions typically appear to travel together.

if she does not  $\varphi$ .<sup>11</sup> A duty to  $\varphi$  is demanding to the extent that a person who has failed to  $\varphi$  is required to take on cost to remedy the situation of the person to whom the responsibility was owed. This explanation has the advantage that it would distinguish duties according to a distinction – between stringent and non-stringent duties – which clearly has moral relevance.

Now, duties vary across a spectrum when it comes to stringency. So, we would need to know *where* the relevant threshold in regard to stringency lies such that duties of that or greater stringency are enforcement-apt while others are not. But is it really plausible that any particular threshold could mark such a significant contrast? Of course this familiar question about the use of thresholds in moral theory need not raise a decisive objection to such an explanation. So long as very stringent duties are intuitively enforcement-apt while very non-stringent ones are not, we might tolerate the idea that the enforcement status of some duties is ambiguous. Indeed, if it turned out that those duties whose enforcement status remains in dispute are those of intermediate stringency, this might offer additional support to this proposal.

Consider, however, the duty to refrain from causing slight damage to another person's non-essential property. This is not particularly stringent, but seems enforcement-apt. Conversely, other duties, for example of infidelity to one's partner in a monogamous relationship (and perhaps also not to write racist and sexist screeds), are commonly taken to be very stringent, yet may not be enforcement-apt. Thus, possessing some level of stringency, taken on its own, seems neither necessary nor sufficient for determining a duty's enforcement status.

Thus, taking stringency to be the critical marker of enforcement-aptness would be quite revisionary of widely shared beliefs. But there are additional reasons to worry about it. To propose a threshold, we need to know why looking for a threshold is the right kind of approach, regardless of where we place it. The less stringent a moral duty to refrain from  $\varphi$ -ing, the less cost an agent is required to bear for that purpose (the lower the required cost). But why should this mean that non-stringent duties fail to be enforcement-apt, rather than that the costs that can be imposed on the duty bearer to enforce them are correspondingly lower (the lower the enforcement cost)? Would it not be more plausible to hold that a duty's stringency affects what counts as *proportionate* enforcement than that it determines whether a duty is enforcement-apt or inapt?

## B. Discretion

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<sup>11</sup> On the appeal to cost, see Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1991) and Bashshar Haydar, 'Special Responsibility and the Appeal to Cost,' *Journal of Political Philosophy* 17(2) (2009): 129–45.

Another proposal is that the differing degrees of discretion that agents have in discharging their various duties is what explains differences in enforcement status. Perhaps all and/or only those duties that lack discretion regarding when and how they are fulfilled are enforcement-apt. For example, no discretion is permitted in observing the duty not to cause severe bodily harm: you cannot decide not to fulfill it now because you will fulfill it another time. In contrast, you can observe your filial duties while choosing when exactly to visit your parents in a care home. One reason why permissible discretion might make a difference to the enforcement-aptness of a duty is that we, the bystanders or those who would be affected by the agent's failure to do her duty, might get it wrong about whether the agent must perform a particular act in order to comply with her duty. The possibility of error gives us reason not to enforce it.<sup>12</sup>

However, discretion cannot explain why only some duties are enforcement-apt. Some paradigmatically enforcement-apt duties are not characterized by the absence of a degree of discretion when fulfilling that duty. Take the duty to care adequately for one's children. There is a range of ways one might fulfill that duty and sometimes, permissibly, one might act to fulfill it later rather than immediately. But still there are limits on how a parent can behave with respect to their children, and duties to observe such limits are enforcement-apt. So being non-discretionary is not necessary for a duty to be enforcement-apt. Second, lack of discretion does not appear to be sufficient to make a duty enforcement-apt either. Take the case of spousal fidelity, for example. Insofar as a spouse has a duty to be faithful, there is no meaningful discretion regarding how or when to fulfill that duty—so too for many duties to keep many non-contractual promises, for example to meet a friend for lunch.

Moreover, discretion seems dubious as an explanation of enforcement status. As Allen Buchanan notes, some duties that seem to permit discretion can be made determinate by 'appropriate institutional arrangement.'<sup>13</sup> Then the distinction between duties that permit discretion and those that do not (and on this explanation of the contrast, between duties that are enforcement-apt and those that are not) is rendered trivial since, rather than a 'fundamental distinction,' it turns out to depend on our institutions. Such happenstance features of the world cannot account for the fact that some *types* of duty – such as the duties of spousal fidelity or many non-contractual promises – seem to be enforcement-inapt.

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<sup>12</sup> Renée Bolinger considers a proposal of this sort. She points out that worries about the risk that we might make mistakes in attempting to enforce duties may lead us to think that such duties are enforcement-inapt, in our sense, when they are in fact enforcement-apt but enforcing them is morally risky. See Bolinger, 'Revisiting the Right to Do Wrong,' at pp. 52–3.

<sup>13</sup> Allen Buchanan, 'Justice and Charity,' *Ethics* 97(3) (1987): 558–75, at p. 570. See also Jaako Kuosmanen, 'Institutionalisation of a Universal Right to Asylum,' *Journal of Political Philosophy* 21 (2013): 24–43.

Some might nevertheless find an institutional approach palatable. In particular, perhaps inspired by Kantian political theory, one might claim that duties should only be enforceable if legally recognized by some legitimate authority, while all other duties ought to be unenforceable.<sup>14</sup> However, we take it that an explanation for which duties we take to be enforcement-apt must permit us sometimes to claim that a legitimate state has incorrectly determined that some duty ought to be enforced, as, for instance, where spousal fidelity is legally enforced. And some duties seem enforceable even in the absence of legal recognition: a state's failure to legally require that same-sex couples be protected from harassment would not render duties to refrain from such conduct enforcement-inapt.

### C. Relationships, right reasons, and preserving value

Perhaps all and/or only general duties are enforcement-apt, while relationship-specific or special duties are not. Two paradigm examples of enforcement-inapt duties, after all, are spousal fidelity and filial loyalty. However, some duties that are generally considered enforcement-inapt are general duties, not relationship-specific, for example, the duty to keep one's non-contractual promises. Further, some relationship-specific duties are enforcement-apt. Parents' duty to provide adequate care for their children arises from the existence of a relationship – of parenthood. So, our paradigm cases suggest that the difference between kinds of relationships is neither a necessary nor sufficient condition for a duty to be enforcement-apt.

More importantly, this apparent difference does not seem to be a promising explanation of enforcement status. Why should duties grounded in relationships be enforcement-inapt? One possible answer might be that third parties have no stake in special duties being enforced, whereas we all have a stake in general duties being fulfilled. However, that leaves unanswered why at least the agents to whom they are owed cannot enforce the relationship-specific duties without transgressing the duty-bearer's rights; surely, they have a stake in the duty being fulfilled.

Instead, then, one might appeal to the nature of the good conferred when people conform to relationship-specific duties as compared to general duties. Perhaps duties like these must be fulfilled for the right reasons to have value, and enforcement might be thought to impede the deployment of these reasons.<sup>15</sup> On this approach, the duties that are enforcement-inapt are those that lose their value when they are not performed for the right reasons.

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<sup>14</sup> See Arthur Ripstein, *Force and Freedom* (Cambridge: Harvard University Press, 2009).

<sup>15</sup> We thank an anonymous reviewer for encouraging us to explore this possibility.

However, it looks like duties which are enforcement-inapt need not be complied with for the right reasons. For example, you still fulfill your filial duties by visiting your elderly parents, even if you do so because you want others to think well of you rather than out of loving commitment, even if doing it for the latter reason would make you a better person. Alternatively, suppose that for a single decade out of a very long and faithful monogamous marriage, you happen to be faithful only because no promising opportunity presented itself. Still, the value in a monogamous long-term marriage is in some measure preserved, despite that decade in which you might just as easily have acted non-monogamously.

Finally, one might claim that while duties that are enforcement-inapt need not be done for the right reasons, their value depends on their being performed without being enforced.<sup>16</sup> It seems plausible that enforcement destroys or at least radically reduces the value in fulfilling these duties. For one possible justification, Andrew I. Cohen has suggested that taking some duties to be unenforceable is necessary for both the development and the expression of virtue.<sup>17</sup> He writes, ‘Having the right not to be virtuous is important for genuinely virtuous conduct. If an agent cannot perform virtuous conduct, she is unable to define herself as a virtuous person.’<sup>18</sup> Without being secure from the interference of others with their performance of actions that run contrary to duty, people are in effect forced to act in accordance with virtue.

But it is unclear that considering duties arising from special relationships to be enforcement-apt would deprive such relationships of all, or even most, of their value. There is, after all, something good in complying with your duties of fidelity to your spouse, even if you are forced to do so. Your partner would not be (as) hurt, nor would your promise to be faithful have been broken.<sup>19</sup> Indeed, enforcing compliance with the duty might better protect the value in the relationship than the alternative of refraining from intervening.<sup>20</sup> And so too for the case of visiting your elderly parents. In neither case is it as good or as valuable as if you had acted willingly without such intervention. But some value remains.<sup>21</sup> In the case of the about-to-lapse ethical vegetarian, being forced not to eat meat might seem to capture (nearly) *all* the value of fulfilling the duty

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<sup>16</sup> We thank an anonymous reviewer for suggesting this possibility.

<sup>17</sup> Cohen, ‘Virtues, Opportunities, and the Right to Do Wrong.’ For similar suggestions, see Waldron, ‘A Right to Do Wrong’ and Herstein, ‘Defending the Right to Do Wrong.’

<sup>18</sup> Cohen, ‘Virtues, Opportunities, and the Right to Do Wrong,’ p. 46.

<sup>19</sup> Assuming that the promise concerns behavior (no sexual relations outside of the marriage), rather than desires. With thanks to an anonymous referee for encouraging this clarification.

<sup>20</sup> As Øverland observes in ‘The Right to do Wrong,’ p. 386.

<sup>21</sup> As an anonymous reviewer has pointed out to us, the fact that the value is not fully preserved by enforcement in the case of these duties may make it more likely that interventions to enforce them will be disproportionate. We discuss this important observation further below.

without its being enforced, namely avoiding contributing to an industry that they believe to involve torture and needless killing.<sup>22</sup>

Admittedly, when some duties are enforced, the value in not acting contrary to duty may be diminished, perhaps substantially, and one may not display virtue. The person to whom the duty is owed may feel that the relationship is diminished should they learn you did not contravene your duty only because of forcible intervention.<sup>23</sup> And the agent who requires enforcement not to contravene her duty when she intentionally neglects it is morally worse than one who does not. However, these diminutions of value and shortfalls from virtuous behavior apply also to paradigmatic cases of enforcement-apt duties, albeit perhaps to lesser extents, and thus seem ill-suited to serve as a feature that explains a categorical difference. For example, enforcing duties not to physically harm others may force people to act in accordance with virtue, but that is not typically regarded as a compelling reason to refrain from enforcing them, nor does it make it the case that enforcing them will necessarily involve the transgression of rights. And surely someone who can be compelled to do something without transgressing their rights can nevertheless display virtue in  $\varphi$ -ing. It may be, for example, that duties to  $\varphi$ , while enforcement-apt, are seldom enforced in practice. Moreover, even if an agent knows that they can be compelled to  $\varphi$  without transgressing their rights, they may be virtuous because they are stably disposed to  $\varphi$  and to do so willingly, even in the absence of compulsion.

#### D. Types of Right

Jessica Flanigan has developed an interesting new proposal for explaining differences in enforcement status. On her view, ‘duties of non-interference or duties to respect people’s entitlement to control their own lives merit enforcement, and other kinds of duties do not.’<sup>24</sup> Only in failing to act on the former, she argues, does someone forfeit her right to control her life, such that we could enforce her duties to respect others’ rights to control their own lives, proportionately and where necessary. This is grounded, Flanigan argues, in moral equality and reciprocity: we cannot lay claim to the right to control our lives while violating others’ rights to control theirs, but nor can others justify interfering in our lives if we are not interfering in theirs.<sup>25</sup> This proposal has

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<sup>22</sup> There might be some extra good done by doing so willingly. There may of course be counter-veiling costs to such enforcement—we discuss this in §4.

<sup>23</sup> Again, these considerations could contribute to making the enforcement of some duties disproportionate, a point we return to again below.

<sup>24</sup> Flanigan, ‘Duty and Enforcement,’ p. 21.

<sup>25</sup> *Ibid.*, pp. 1–2.

the clear virtue of providing a general explanation for why enforcement is justified for some duties, but not others.

But, as Flanigan seems to acknowledge, her proposal carries counterintuitive implications. For instance, it implies that the duty to rescue a child that is drowning in front of you, even at next to no cost, is not enforcement-apt, while the duty to keep even quite trivial promises is enforcement-apt because, according to her, not keeping promises at least infringes on and frequently violates others' rights to control their lives.<sup>26</sup> Many would struggle to accept that we can really compel someone, albeit with proportionate use of force, to meet us for coffee because they promised to, but cannot compel someone to save a child drowning in front of them at negligible cost. Flanigan is aware of this worry about her proposal. She notes that while the duty to rescue is not enforcement-apt, we may nevertheless have good reason to enforce it, all things considered. That is, compelling you to save the drowning child would be a case of permissible rights-infringement. To provide intuitive support for her claim that even when we do justifiably enforce duties to rescue, we thereby infringe the duty-bearer's rights, she proposes a drowning child case in which, to rescue the child, an agent has to push an innocent tourist – who is unaware of the child and unable to be warned – out the way and into the mud. Flanigan concludes that this is 'good but not justified' since the tourist was not liable to being pushed. Indeed, the rescuer may even owe the tourist compensation, perhaps paying for his dry-cleaning.<sup>27</sup>

However, this case fails to support the view that duties to assist are not enforcement-apt. Indeed, we think that it possesses an idiosyncratic feature that distinguishes it from typical cases where such duties will not be discharged without enforcement, namely that the tourist is non-culpably unaware of the situation: he does not know about the drowning child. The tourist is therefore likely to be understandably distressed at being pushed into the mud. This fact may make an apology warranted, even while it seems reasonable that the tourist would recognize that the intervention was justified (and indeed required) once he realizes that the child was drowning. But in standard cases, duties need to be enforced when people are aware of them – or at least *should* be aware of them – and yet without enforcement will not comply.

So, let us consider a modified case without that idiosyncratic feature. This time the tourist is fully aware of the child's plight, knows that they can rescue her at very little cost, and is obliged to do so, but decides not to. He prefers to continue strolling undisturbed, enjoying gelato. The situation is transparent to the rescuer, and she can save the child only in such a way that the tourist's suit is muddied. Here the rescuer owes the tourist no apology or compensation. Indeed,

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<sup>26</sup> Ibid., pp. 6–8.

<sup>27</sup> Ibid., pp. 13, 14.

if the rescuer incurs more cost than a muddied suit when saving the child – if, for instance, she sustains an injury by having to push past the tourist – then she would seem to have a claim to compensation from him, not the other way round. After all, the tourist was required to help the child at very little cost, was aware that he could, and simply failed to act on his duty. This failure meant that others had to take on more cost than anyone needed to have done to save the child.<sup>28</sup>

Flanigan’s proposal has other worrying implications. In particular, it commits us to regarding enforcement as permissible in areas where we would not usually think it appropriate, including spousal fidelity as a form of promise, or visiting one’s parents in their old people’s home if one promised to do so. The range of potential interference in people’s private lives and personal relationships that this position permits looks unattractive, even taking account of Flanigan’s observation that the enforcement of promises would be limited by the requirement of proportionality.

#### E. Preserving Autonomy

We can draw another proposal from the literature on the right to do wrong, where some assume that agents would have a right to do wrong in a case where they have a duty not to  $\varphi$ , coupled with a claim against others that they not interfere with their  $\varphi$ -ing. Those who claim that there are rights to do wrong do not claim that such rights are unrestricted; rather, they claim that people have rights to do only *some* wrongs. Advocates of rights to do wrong often seek to ground such rights by appealing to the value of autonomy.<sup>29</sup> That is, they argue that we have rights to do wrong where possessing such rights is essential for protecting individual autonomy. Ori Herstein, for example, writes, “The most appealing answer is that without a right to do wrong individuals would not have sufficient “breathing room” to autonomously determine “who they are”.”<sup>30</sup> Accordingly, were we to regard certain duties as enforcement-apt, we would unduly undermine the autonomy of the duty-bearers. One might think that such considerations underlie why many take duties to refrain from various forms of offensive speech to be enforcement-inapt.

What links together duties that are enforcement-inapt, on this view, is that they pertain to conduct that must be protected if the autonomy of the agent is to be adequately preserved. But that raises two questions. First, is it plausible that those duties that seem, intuitively, to be

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<sup>28</sup> For an extended discussion of enforcing duties to assist, see chapter 2 of Christian Barry and Gerhard Øverland, *Responding to Global Poverty: Harm, Responsibility, and Agency* (Cambridge: Cambridge University Press, 2016).

<sup>29</sup> Herstein, ‘Defending the Right to Do Wrong,’ p. 349; David Enoch, ‘A Right to Violate One’s Duty,’ *Law and Philosophy* 21 (2002): 355-384, p. 380.

<sup>30</sup> Herstein, ‘Defending the Right to do Wrong,’ p. 349. See also Waldron, ‘A Right to Do Wrong,’ pp. 34–5.

enforcement-inapt are those pertaining to areas of life where preserving autonomy has particular importance, while those that are enforcement-apt do not? Second, is it true that taking such duties to be enforcement-inapt is indeed critical to protecting autonomy? Others have cast doubt on whether the second can be answered in the affirmative, and here we limit ourselves to considering the first.<sup>31</sup>

Take the cut between different types of relationship: parents, say, compared to children. Why are our duties to our children enforcement-apt, and not those to our parents? The reason cannot lie in protecting spaces for autonomy, given that both types of relationship fall within the same space of ‘intimate relations’ or being ‘life projects.’<sup>32</sup> And why would food choice fall into that protected realm, while stealing minor items of property where we have a duty not to steal, would not? Perhaps the response would come that the about-to-lapse vegetarian, being free to lapse, will determine who they are: someone weak of will, or less committed to their moral principles than they had supposed. But this version of the proposal over-generalizes. Why would choosing whether to eat animals, engage in sexist diatribes, or keep one’s non-contractual promises be essential for people to have the breathing space to constitute themselves, but not whether to engage in petty theft? Petty theft too would permit a person to learn about her moral commitments or weakness of will.

#### F. Reasonable Disagreement

Perhaps duties become enforcement-apt in a community only if they are widely recognized as duties within that community. The *only if*, here, is used advisedly: this proposal is most plausibly interpreted as establishing a necessary condition for enforcement-aptness. After all, duties of fidelity in monogamous relationships and to keep some non-contractual promises are widely recognized within many communities that do not regard them as enforcement-apt. Still, one might think that insofar as others may reasonably disagree that some purported duty is a bona fide duty, it is not enforcement-apt. That might explain the reluctance of a committed vegetarian to regard the duty not to kill animals as enforcement-apt. To evaluate this proposal, we first need to clarify how the notion of reasonable disagreement is being employed. Is there reasonable disagreement whenever there is a course of conduct that we know would violate

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<sup>31</sup> Against the idea that protecting autonomy requires rights to do wrong, see Bolinger, ‘Revisiting the Right to Do Wrong,’ esp. pp. 47–50.

<sup>32</sup> These are commonly included in what autonomy requires: for instance, see Herstein, ‘Defending the Right to Do Wrong,’ p. 350.

a duty, but where we can understand how it might be reasonable for others to have failed to recognize this? Alternatively, does reasonable disagreement obtain only when we cannot determine whether some course of conduct would indeed violate a duty?

These ways of understanding reasonable disagreement differ in important respects. The first implies that we can make sense of the fact that other people may reasonably have come to conclusions about the moral status of some conduct that we regard as flawed. Perhaps they were unaware of some important fact concerning the risk that the conduct imposed on others and could not reasonably have been expected to be aware of it.

On the second understanding, we deny the possibility that one can be fully justified in claiming that other people have failed to see that their conduct violates some duty, since no one can be certain that there is such a duty. In this second sense, reasonable disagreement is understood as reasonable doubt about the moral status of some type of conduct. However, appealing to reasonable disagreement, understood in this second sense, offers little insight into the matter of enforcement status. Since enforcement typically carries a cost and involves coercive intervention in another person's life, it is unsurprising that we should be very reluctant to undertake such measures when we have serious reason to doubt that the other is failing to meet a bona fide moral duty. On the second sense, this candidate explanation shows only that we should be reluctant to enforce  $\varphi$ -ing when we are unsure that there is a duty to  $\varphi$ , not that there is something about  $\varphi$ -ing, as such, that makes it not enforcement-apt.

Tying the status of enforcement-inapt duties to reasonable disagreement in the first sense, on the other hand, is implausible. Would it really be impermissible to forcibly prevent someone from physically disciplining their children without transgressing their rights simply because we can understand how they could reasonably have come to regard such behavior as permissible? In addition, it would be odd if the fact of reasonable disagreement would make it impermissible to enforce a person's duty when that person herself affirms the existence of the duty. Hence, this explanation would not cover a range of cases, including the lapsing vegetarian who affirms that they have a stringent duty not to eat meat.

Some might argue that, in fact, we *should* enforce a person's duty if she herself affirms it, as in the case of a lapsing vegetarian or spouse. Perhaps, despite appearances, that is not so counterintuitive—although there is something strange about the idea that the womanizing spouse that does not recognize their duty of fidelity ought to be spared the enforcement and not the spouse that affirms such a duty.<sup>33</sup> However, even if so, a further problem arises for a proposal

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<sup>33</sup> With thanks to two anonymous referees for suggesting this possibility.

based on reasonable disagreement in the first sense. Rather than making a difference in enforcement status, a more plausible way to respond to reasonable disagreement in the first sense is to regard it as affecting our assessment of the agent who fails to do their duty: say, excusing their actions since they could not have known that it was their duty. This in turn could affect the costs that it would be proportionate to impose on them to prevent them from contravening their duties. But it would not determine whether duties are enforcement-apt, or inapt.

### G. Multiple Factors

The last version of the first strategy that we consider abandons the search for a single feature that is necessary and/or sufficient to settle whether a duty is enforcement-apt or not. It proposes that some combination or combinations of features settles enforcement status. While we cannot rule out that an account of this sort can be provided, we have been unable to identify any particular combinations of characteristics which can plausibly play this role. To illustrate, spousal fidelity, a relationship-specific duty, is both enforcement-inapt and lacks discretion, while duties to care for one's children have an element of discretion, are relationship-specific, and yet are (to some extent) enforcement-apt.

One might respond that the characteristic, or set of characteristics combined, that determines the enforceability status of duties, could vary across different duties. So, spousal fidelity might be enforcement-inapt because it is relationship-specific (perhaps, plus some other factor), but vegetarianism is enforcement-inapt because it lacks widespread acceptance and visiting one's elderly parents is enforcement-inapt because it both has an element of discretion and is relationship-specific.<sup>34</sup> But in the absence of an explanation for why some factors make a difference sometimes but not always, such a proposal is incomplete and lacks explanatory power. Further, it would provide no guidance when we confront critical practical questions: are we getting it wrong when we enforce some duties and not others? How could we tell when no features (or combinations thereof) consistently make the difference in enforcement status?

Note that we are not here arguing that pluralistic accounts of phenomena are never plausible. Suppose, for example, that we had a pluralist account according to which there can be three good reasons not to keep promises. We could then consider for each promise whether any one of these reasons applies. The issue is that no pluralist account with this structure regarding

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<sup>34</sup> With thanks to two anonymous referees for encouraging us to consider this idea.

enforcement status seems plausible. Rather, we end up with combinations of features that sometimes are present in enforcement-inapt duties and other times in enforcement-apt duties. A pluralistic proposal cannot say, without further explanation, that factors x, y, and z are jointly sufficient to make duty A enforcement-inapt, but those same features are not sufficient to make duty B enforcement-inapt. That flickering in and out of salience does not make for a satisfactory explanation.

### (§3) Relocating the contrast

Given that, thus far, we find no satisfactory explanation of difference between enforcement-apt and inapt duties, perhaps we should give up on the idea that there are duties that are genuinely enforcement-inapt. This is J.S. Mill's position, who wrote: "Duty is a thing that may be exacted from a person, as one exacts a debt. Unless we think that it may be exacted from him, we do not call it his duty."<sup>35</sup> We might make this idea more palatable by maintaining that enforcement-apt duties might nevertheless differ markedly when it comes to enforcement, for example, in terms of who can permissibly enforce them or at what cost. In this section, we explore this possibility.

#### A. Generality

First, one might consider who has the standing to enforce a duty. Duties like spousal fidelity might be different because only particular individuals – the spouse, say, or a close friend – can enforce the duty without transgressing the rights of duty-bearers.

Of course, one needs some explanation of *why* the standing to enforce a duty varies, and what justifies that difference. To find it, one would likely return to the proposed explanations explored above, and we suspect that these will still be unconvincing. Consider relationship-specific duties. Perhaps only those affected by the failure to do one's duty can enforce the performance of the duty without transgressing the duty-bearer's rights. This cannot, of course, serve as an explanation for all the duties that appear enforcement-inapt, given that some duties that intuitively seem to belong to this category are general rather than relationship-specific, and vice versa, but it may go some way towards explaining why relationship specific-duties in particular, if they are enforcement-apt, are less generally so. However, this explanation would license far greater

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<sup>35</sup> *Utilitarianism*, Roger Crisp (ed) (New York: Oxford University Press, 1998 [1861]), Chapter V, paragraph 14. We do not address the parallel proposal, that no duties are enforcement-apt, since it is obviously implausible

involvement in each other's personal relationships, enforcing the duties that others bear to us as spouses and friends, than we would ordinarily endorse.

Or take discretion. An element of discretion might seem to plausibly affect the generality of a duty's enforceability: some will be better placed than others to determine whether a duty ought to be enforced on some occasion. The elderly parent may know better than the stranger when their child's visit is overdue. But, still, not all duties that lack discretion are ones that all could enforce. Duties of spousal fidelity lack discretion, yet it appears unacceptable to let just anyone enforce such duties (if they are enforcement-apt at all).

### B. The relationship between required and enforcement costs

As noted above, when it comes to some enforcement-apt duties, such as not to physically harm others, what we have called the required cost and enforcement cost seem to be symmetrical. But perhaps this symmetry does not hold for other duties, even if they too are enforcement-apt. There could be permissible forms of enforcement, where the enforcement costs are lower than the required cost. Consider the case of spousal fidelity. We might think that enforcing a duty by raising the costs is permissible and would not transgress anyone's rights where the costs of acting contrary to duty are increased only marginally, for example, threatening to pinch someone.

But this position faces two difficulties. First, we will have only mitigated, not eliminated, the worries that turning all apparently non-enforcement-apt duties into enforcement-apt ones involves significant and counterintuitive changes to our ordinary ways of relating to each other. It would suggest that we are permitted to forcibly intervene to prevent others acting against their duties to friends or spouses, however little we know them, or that vegetarians can forcibly intervene in the dietary choices of fellow diners. Admittedly, some may be willing to accept these conclusions. However, there is a second objection. We still need a reason *why* the enforceability of different duties varies in these ways. Presumably, one would again return to the very features we considered above as candidates for explaining why only some duties are enforcement-inapt. And the same problems with these explanations would arise, yet again.

### C. Practical Constraints

Perhaps we are misled into taking some duties to be enforcement-inapt, when all we really face are practical constraints in enforcing them. Perhaps it could be argued that there is no *proportionate* way to enforce duties commonly regarded as enforcement-inapt. That is, all the measures we might

reasonably hope to employ would transgress the rights of the duty-bearer. Crucially, to count as an explanation of differences in enforcement status rather than a restatement of it, this claim of disproportionality cannot rest on claims about the kind of duty in question. It must rather rest on the fact that all the methods of enforcement for such duties seem problematic. However, one could imagine enforcing duties which seem not to be enforcement-apt in much the same way as we enforce enforcement-apt ones. So, one could use force or threat of force, in a way that would be proportionate to the harm done by failing to fulfill the duty, to enforce a visit to one's parents in an old people's home or to ensure that a spouse is faithful. Such measures are precisely what are employed when it comes to enforcement-apt duties. It is just that in the case of certain types of duties they appear to involve a transgression of the rights of the duty-bearer.

One might instead argue that duties that appear enforcement-inapt are those whose enforcement will (nearly always) be disproportionate because, when enforced, so little of the value of doing one's duty is preserved.<sup>36</sup> To illustrate, perhaps spousal fidelity appears to be enforcement-inapt only because of the practical constraint that enforcing it would almost always preserve too little of the value of fidelity to justify the costs of its enforcement. This explanation clearly will not cover all duties: as we argued in §2C, ethical vegetarianism appears to be enforcement-inapt and yet nearly all of the value of doing one's duty would be preserved where the duty is enforced.<sup>37</sup> More importantly, it seems plausible that enough of the value of something like fidelity is preserved to justify *some* enforcement costs: one's spouse would be less hurt by a frustrated affair than an actual affair, and one has kept one's promise in deed if not thought by not following through with adulterous urges. At the least, it is hard to see why one would not preserve *enough* value in cases like spousal fidelity or visiting one's elderly parents to justify some form of enforcement, even if only the less costly forms given proportionality concerns. So, this account fails to explain why we do not enforce duties like spousal fidelity. What it might explain is why the costs of enforcing these duties are very often disproportionate.

#### **(§4) Social costs and benefits**

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<sup>36</sup> We thank an anonymous referee for encouraging us to explore this possibility.

<sup>37</sup> If one adopts vegetarianism for environmental reasons, little value might be preserved in being forced to comply with one's duty as a one-off: one meat-eater makes little difference. But if one adopts vegetarianism for ethical reasons, refraining from contributing to a moral wrong of killing an animal, even if because one is made to, clearly remains morally valuable. In the environmental case too, enforcing the duty may have some value, signaling to others we ought not eat meat. We thank an anonymous referee for encouraging us to consider these points.

There is one last strategy to explore. Rather than trying to identify features of duties that settle their enforcement status, one might claim that enforceability is instead settled by considering the overall benefits and burdens of norms that regard types of duties as enforcement-apt.<sup>38</sup> On this proposal, there is no special relationship between some duty and its enforcement status. That is, we can ask for each duty whether a system of norms regarding it as enforcement-apt is more beneficial, overall, than those regarding it as enforcement-inapt. Similarly, we can ask, for each duty, whether a system of norms regarded as enforceable by all is generally more beneficial than one that narrowly restricts the class of agents that can enforce it, and so on. However, this sort of explanation depends on empirical claims about the effects of treating different classes of duties as enforcement-apt. It is beyond the scope of this paper to fully substantiate claims of this sort; hence, we offer only a sketch of this alternative explanation.

To begin, the enforcement of duties carries costs for the person whose duty is enforced, but also for those undertaking the enforcement and, sometimes, to third parties. Moreover, in considering the cost of enforcement norms, we should include both costs of interventions necessary for ensuring compliance and cases where people mistakenly undertake enforcement. If enforcement is likely to misfire for some type of duty, that might be a reason to prefer norms that treat the duty as enforcement-inapt. Of course, norms permitting enforcement can have benefits too. They can help prevent people from acting against moral duties and so help protect things of value. With respect to each moral duty, then, we can ask whether a norm permitting its enforcement is likely to be more socially beneficial than one forbidding its enforcement.

This account of enforceability thus has one significant advantage of helping to explain why the enforcement status of some duties is controversial. Consider debates over duties to assist. What is at stake in such disagreements is whether the social costs of permitting enforcement exceed the benefits of increased compliance. Libertarians and egalitarians disagree about the magnitude and moral significance of these different kinds of cost. Or consider disagreements over regulating hate speech. Civil libertarians are concerned about the potentially adverse consequences of norms that permit the state or private agents to forcibly intervene in such speech, but others argue that refraining from interfering with such expression would harm vulnerable groups.

Perhaps we could (further) establish the plausibility of this account through examining duties that are intuitively, enforcement-inapt and finding features that seem likely to make norms allowing their enforcement socially costly. Finding such features would also suggest that this

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<sup>38</sup> There might be an act utilitarian variant, considering the consequences of enforcement for each individual case. However, this cannot accommodate the more general intuitions that we have about the examples, which are not specified as one-off duties but rather as a type (e.g., spousal fidelity).

account would have practical use, guiding us in how to act when others would fail to comply with their duty. We need to be able to *tell* whether some duty is enforcement-inapt, or enforcement-apt only to some degree.

Some of the features that were dismissed above as explanations for why some duties are enforcement-apt can do some work, if reframed as ways that some classes of duty are more costly, and less beneficial, to enforce. Consider the cheating spouse. One might observe that the fact that spousal fidelity is a relationship-specific duty, and a duty whose enforcement undermines some of the value of doing one's duty, helps explain why it is too socially costly to enforce. Or take duties of friendship. We would not regard as a friend someone who continued to bestow favors on us simply because they feared that they would be compelled to do so. The presence of a norm permitting enforcement might make us second guess why we do things for one another. The presence of norms of enforcement might also undermine goods such as friendship and fidelity in another way. We like to be known to be good friends and loyal partners. Part of being known as such depends not only on our doing things for our friends and partners, but on doing them for the right reasons, and being disposed to do them under a broad range of circumstances. But in a social system in which duties of friendship and fidelity are regarded as enforceable, it will be more difficult to reliably display that we are indeed behaving towards our friends and partners in appropriate ways for the right reasons. This may, perversely, undermine the conditions whereby people form valuable bonds of these kinds.

How about vegetarianism? Here, we focus on reasonable disagreement. Norms permitting enforcement for duties that are regarded as the subject of reasonable disagreement could be counterproductive. Efforts to enforce duties where the agent disagrees that she bears that duty can impose additional costs on her. People are likely to resent deeply efforts to enforce behaviors that they regard themselves morally free to refrain from. Norms permitting their enforcement, therefore, may also elicit violent and costly responses, and seem likely to undermine support for the moral norms that one seeks to protect. Of course, as in our previous discussion, these costs will not directly tell against enforcing the duty of the lapsing vegetarian who agrees that she ought not eat meat. But an advocate of the third strategy has a good answer to this challenge: the relevant duty *in general* ought not to be enforced, so we see why we should not enforce vegetarianism even for the lapsing vegetarian, even though this one subset of cases may not carry significant social costs.

Despite the appeal of this strategy, it faces three principal objections. First, insofar as it vindicates common judgements about enforceability, it may seem to be doing so for the wrong reasons. When people object to coercive intervention to prevent infidelity, for example, they

appear to do so on the grounds that there is something deeply inappropriate, as such, about attempts to enforce such duties—so too with some dietary norms. An approach that focuses only on the social costs of norms permitting the enforcement of these duties fails to capture the special opprobrium that would attach to efforts to enforce such duties.

Second, the approach just sketched cannot explain why we ought not to enforce a duty in some particular case. The fact that it is socially beneficial to regard some duty as enforcement-inapt does not settle the question of whether enforcing that duty on some occasions is unjustified or would transgress the duty-bearer's rights. This worry may be particularly sharp when a duty could be enforced in some cases in ways that better protect the value that the duty protects. How serious the reader takes these first two objections to be likely depends on their broader ethical commitments. Both have been lodged against rule-consequentialist accounts of other aspects of morality, and rule-consequentialists, in turn, have offered responses.<sup>39</sup>

Third, because it relies on complex empirical claims, this approach may not provide a very satisfactory answer as to when we ought to enforce a type of duty, and so may fail to be action guiding. Above, we suggested that spousal fidelity and duties of friendship may not be socially beneficial to enforce because enforcement diminishes the value of doing one's duty or of these goods. But one could equally return to our earlier thoughts on virtue and enforcement and argue that a social system that assists us in complying with our duty might support, rather than undermine, our capacity to act as good partners and friends. Since we are all vulnerable to weakness of will, it could be beneficial overall to have other reasons to do as we should, and sustain our good friendships and marriages. Of course, an advocate of this approach will not be concerned with the fact that there would be *some* disagreement over the cost and benefits of according some duty an enforcement status. How troubling this objection should be found depends on the extent and resolvability of the disagreement: one might doubt that we could reach settled, well-justified judgements concerning which duties are such that it is socially beneficial (or too costly) to adopt norms which permit their enforcement.

## (§5) Life without an explanation

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<sup>39</sup> For a clear presentation see Dale E Miller, 'Mill, rule utilitarianism, and the incoherence objection.' In Ben Eggleston (ed) *John Stuart Mill and the art of life* (Oxford: Oxford University Press, 2010). For responses, see Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford University Press, 2000). Recently, consequentialists have offered explanations of so-called deontological intuitions that provide reason not to give them moral weight, e.g. Isaac Wiegman, 'The Evolution of Retribution: Intuitions Undermined,' *Pacific Philosophical Quarterly* 98 (2) (2017):490-510.

Much depends then, we submit, on one's broader moral theory regarding the justification of moral requirements. On some (rule consequentialist) moral outlooks, there may be no interesting question about whether some duty is enforcement-apt, other than answering the difficult question of whether regarding it as such is more socially beneficial than not. But for those who think that there is a separate moral issue here – such that it appears *wrong* in principle to enforce certain duties like spousal fidelity or the duties of lapsing vegetarians, and not merely generally socially costly to have norms that permit such enforcement, and *right* in principle to enforce the duty not to harm and not merely generally socially beneficial to have norms that permit such enforcement – our puzzle remains unsolved.

We conclude, then, by outlining three ways to respond to the puzzle of enforceability, if you do not find our third strategy compelling.

The first two options would require substantial revision to our ordinary practices yet neither of them accommodates or explains that apparent fact with which we started, namely that only some duties are enforcement-apt. The first bites the bullet and accepts that all duties are enforcement-apt or that none are, since there is no successful justification for why some duties are not enforcement-apt and others inapt. That would require substantial changes in our ordinary moral practices of the kind mentioned earlier, for example, leading us to be far more involved in the intimate relationships of others, or willing to allow the violation of rights against bodily harm.

The second is to deny that duties that appear enforcement-inapt are, in fact, bona fide duties. If you think that spousal fidelity or vegetarianism are enforcement-inapt, then you should accept that these are not truly duties at all. Perhaps the moral reasons for them are insufficiently stringent for them to count as duties. Yet much of the time our reactive attitudes towards those who fail to act on such commitments, including ourselves, strongly suggest otherwise. Alternatively, then, perhaps there are stringent moral reasons that are not duties. But accepting this would create a new puzzle: why are some reasonably stringent reasons for action enforcement-apt while others are not? If the answer is that some stringent reasons for action are duties and others are not, we can still ask what confers the status of a duty on some of these reasons, but not others.

The third option is to stick to our conventional practices. But, of course, our conventions might stem from flawed or unjust social practices. Perhaps, for instance, we have historically left unenforced our duties to animals because we have regarded animals as having little value, or we have overvalued the protection of minor property rights. Nor have our conventional practices remained static over time: consider the historical enforcement of marital fidelity. More importantly, questions of enforcement are too morally significant to leave to convention: the ills

we might be committing by enforcing the wrong duties, or not enforcing duties when we should, are too grave.

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