

Revisiting the Right to do Wrong*

Renee Jorgensen Bolinger

Rights to do wrong are not necessary even within the framework of interest-based rights aimed at preserving autonomy (contra Waldron, Enoch, and Herstein). Agents can make morally significant choices and develop their moral character without a right to do wrong, so long as we allow that there can be moral variation within the set of actions an agent is permitted to perform. Agents can also engage in non-trivial self-constitution in choosing between morally indifferent options so long as there is adequate non-moral variation among the alternatives. The stubborn intuition that individuals have a right to do wrong in some cases can be explained as stemming from a cautionary principle motivated by the asymmetry between the risk of wrongly interfering and that of refraining from interfering.

KEYWORDS: *Rights, moral theory, right to do wrong*

Jeremy Waldron [1981], David Enoch [2002], and Ori Herstein [2012] each contend that there is a moral right to do moral wrong. We should distinguish two versions of this thesis:

- *Conceptual*: The notion of a moral right to do wrong is coherent; it does not involve logical contradiction.
- *Substantive*: There are actual moral rights to do moral wrong.

This paper will focus on the latter, but it's worth taking a moment before plunging into the argument to get clear on what 'a moral right to do moral wrong' means. The rights in question are claims against interference in performance of an option (out of some set of alternatives) that is morally impermissible or that the agent is morally obligated not to do, not merely that is strictly less preferable than some alternative.¹ For a person P to have a moral right in the relevant sense to do some action *a*, it is essential that the reasons for non-interference stem from P's claims, rather than from external considerations such as social costs of interference. Fully spelled-out, the substantive thesis maintains that at least sometimes, everyone has a directed duty of non-interference in P's performance of morally impermissible actions, that is owed to P and stems from the strength of P's claim in doing so.² Advocates of the right to do wrong offer the following as paradigmatic instances:

- Someone uses all the money that he has won in a fair lottery to buy racehorses and champagne and refuses to donate any of it to a desperately deserving charity or contribute to famine relief.
- An individual joins or supports an organization which he knows has racist leanings, such as the National Front in the United Kingdom; he canvasses support for it among a credulous electorate, and he exercises his own vote in its favor.³

I will later argue that neither of these is actually best understood as a right to do wrong, but for now I want to focus narrowly on the arguments in favor of such rights.

*The definitive version of this article is to appear in the *Australasian Journal of Philosophy*, and will be available at <http://www.tandfonline.com/loi/rajp>. Please refer to the published version.

¹Enoch acknowledges this explicitly. It's less clear whether Waldron distinguishes between morally impermissible and merely less preferable actions, since his argument for the right to do wrong only establishes a right to do non-optimal actions, but he describes it as showing that 'the function of rights in moral theory precludes the imposition of any general requirement on rights to the effect that actions that one has a right to perform must be actions that it is morally permissible for one to perform.' [Waldron 1981: 31]. I will follow Enoch and Waldron in using 'morally impermissible' and 'morally prohibited' interchangeably.

²I aim to stay neutral between theories of rights; choice theorists can take the claims at face value, while interest theorists can read them as restricted to the subset of rights protecting an individual's interest in decision-making.

³Variants of both examples appear in Waldron [1981: 21], Enoch [2002: 355], and Herstein [2012: 344].

Because it assigns positive weight to an individual's ability to have and make significant choices, independently of the value of the option chosen, the strongest case for the substantive thesis appeals to the value of autonomy. Both Enoch and Waldron invoke a broadly Razian conception according to which 'the ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives' [Raz 1986: 269].⁴ Valuable exercise of autonomy requires sufficient variation of choices in a few key areas, primarily in

individuals' political activities, their intimate relations with others, their public expressions of opinion, their choice of associates, their participation in self-governing groups and organizations, particularly political organizations and trade unions, their choice of an occupation—all these have been regarded as particularly important in people's definitions of themselves. [Waldron 1981: 34-5].

Waldron contends that without rights to do wrong agents' choices collapse into mere trivialities; Herstein claims that moral self-constitution is impossible without them. Enoch focuses on arguing for the conceptual claim, saying little about the substantive thesis beyond that 'A right to violate one's duty is not merely, then, a conceptual possibility. A moral theory that fails to justify such rights fails to take autonomy seriously.' Still, it is doubtful that the value of autonomy is sufficient to justify non-interference in egregious wrong-doing, so rights to do wrong are most plausible where the wrong is minor and does not involve a rights-violation.

I aim to undermine the substantive claim by showing that autonomy considerations do *not* commit us to the existence of rights to do wrong. This does not show anything directly about the nature of rights, but it sets the stage. We're still in the business of constructing a satisfying theory of rights; if Waldron and Enoch are correct, then one constraint on such a theory is that it ratify rights to do wrong if it values autonomy.⁵ On the other hand if it is possible to take autonomy seriously without acknowledging rights to do wrong, then we must leave open the possibility that the correct theory of rights will render rights to do wrong conceptually impossible.

Part I pursues the negative project of showing that the arguments in favor of a right to do wrong are unpersuasive. Section 1 rehearses Waldron and Herstein's arguments that valuable rights to self-determination require a right to do wrong. Sections 2-3 demonstrate that restricted choices can still provide agents with adequate alternatives for non-trivial choices. In section 4 I argue that we lack reason to think that morally wrong alternatives contribute to autonomy in a unique and important way. Part II takes up the task of giving an alternative explanation for the intuition that we ought not interfere with certain wrong actions. Section 5 develops a general debunking argument, and section 6 explains particular hard cases. I conclude that one can place a high value on autonomy without countenancing a right to do wrong.

Part I

1 Arguments in Favor of the Right to do Wrong

The justification for rights protecting an agent's choice in some domain α is that there is some compelling value in the agent exercising free choice with respect to α . The right imposes a duty on others to refrain from interfering

⁴Waldron only explicitly appeals to the importance of *personal integrity*, but Herstein shows that while integrity could ground non-interference with particular actions, it is ill-suited to justify the general non-interference constitutive of a choice right, and hence Waldron's claims are more at home in a broadly Razian appeal to the value of autonomy.

⁵It's not obvious that we should ultimately construe rights as being such that a right to do wrong is conceptually possible. Joel Feinberg [1973: 58], Alan White [1984: 59], and Christopher Wellman [1995: 285] are among the philosophers who deny that a right to do wrong is conceptually possible.

with the agent's ability to freely choose an action in α , but it does not give the agent any reason to select one option over another. Following Waldron [1981: 34], I will call this a 'general choice right.' The key question is whether such general rights must extend to cover any morally impermissible actions, thus giving the agent a right to do wrong.

Suppose agents have a compelling interest in freely determining their political affiliation. Some options are morally permissible: she can choose to remain unaffiliated, to be democrat, republican, green, etc. Some are not: she can affiliate with a radical racist party. If an agent has a general choice-right to political affiliation, that entails that everyone else has a directed duty (owed to her) not to interfere with her ability to freely choose her affiliation. To secure a meaningful choice, this general right must ground particular non-interference duties for at least two options. Granting that it protects each morally permissible alternative, must it also ground a right to affiliate with the racist party?

The contours of general choice rights are already partially shaped by other moral considerations. P's rights to freely decide how to move her body generate duties of non-interference for many alternatives that P could select, but if one of these alternatives—swinging a fist in a particular direction—involves violating S's rights against bodily harm, P's general right does not give S a duty of non-interference with respect to the fist-swinging. To say that the domain of alternatives protected by general choice rights excludes morally prohibited alternatives is simply to suggest that the connection between P's duties and rights exhibited in the fist-swinging case holds more generally, such that P's having a moral obligation to refrain from *a*-ing excludes *a* from the domain protected by her general choice right.

1.1 The Collapse Argument

Waldron seeks to demonstrate that this *cannot* be the structure of a general choice right by showing that if morally impermissible alternatives are excluded from the protected domain of a choice right, the choice must collapse into triviality. He starts from the assumption that all of the actions covered by a choice right must have one of just three moral valences:

Presumably, the actions in each of the clusters covered by a general right will each be either morally required, morally prohibited, or morally indifferent. Or, to phrase it a little less rigidly, each action protected by a right will, in its particular circumstances, be an action that is called for from the moral point of view, or an action that is subject to moral criticism, or an action on which morality has nothing of importance to say. (For simplicity, I am ignoring supererogatory acts; their inclusion would not affect the argument except to make it a bit more complicated.) [Waldron 1981: 35]

With this setup, the collapse proceeds as follows: Assume for reductio that MORALLY PROHIBITED actions cannot be protected. Then only the subset of actions that are REQUIRED OR INDIFFERENT are protected by the right. But then the set will constrict to the REQUIRED actions, since if some action is morally required, then omitting it is impermissible. In Waldron's words:

wrong actions or actions subject to moral criticism would be excluded. But once this restriction had been imposed it would be bound to escalate further. For, if an action is called for from the moral point of view, then any alternative to it that is not called for (i.e., any merely indifferent alternative) immediately becomes impermissible and so would be excluded.

Let's pause briefly to clarify the background framework. First, Waldron's argument (and thus my discussion) assumes that the alternatives in the field of choice are mutually exclusive: for any options in a set $\{a, b, \dots\}$, doing *a* precludes doing *b*, and so on. Second, though an agent's alternatives may sort roughly into Waldron's three categories, the options within a given category are not necessarily morally on par. Some impermissible options (breaking a promise) are plausibly not as bad as others (killing the promisee); and some permissible options are

more choiceworthy than others. Without committing to any particular theory of moral value, we can be confident that any plausible theory will yield a comparative ranking of alternatives that is more fine-grained than simply REQUIRED/INDIFFERENT/PROHIBITED.⁶

Waldron moves freely between ‘subject to moral criticism’ and ‘morally prohibited’, but the two are not naturally coextensive. One can certainly be criticized for a morally impermissible action, but on non-maximizing moral theories agents may also be open to moral criticism for choosing to act in ways that, though morally permissible, are far less morally preferable than some salient alternative.⁷ On the assumption that helping to alleviate poverty through Oxfam is morally preferable to an action that marginally improves my quality of life, spending an extra \$200/month to have east-facing windows in my office may be morally criticizable, since I could have pledged that money to Oxfam instead. Nevertheless it isn’t obvious that it is morally impermissible for me to spend the money on my office. To get the equivalence between moral criticizability and moral impermissibility, Waldron needs to assume something like:

Dominance: If an alternative y is morally preferable to x , then performing x is morally prohibited.

Successive applications of *dominance* to a set of alternatives will cause the collapse Waldron predicts, prohibiting all but the best option (or the non-dominated, if some alternatives are tied or incommensurable).⁸ A choice right that protects only the agent’s choice of the morally best alternative fails to provide the variation in alternatives necessary for her exercise of meaningful autonomy.

Waldron argues that even if the collapse could be blocked in some cases—perhaps by the absence of any morally required alternatives—excluding morally prohibited alternatives trivializes the agent’s choice by restricting her decision to indifferent options. He objects that such restriction will leave agents free to make choices only with respect to

the banalities and trivia of human life. The decision to begin shaving on chin rather than cheek, the choice between strawberry and banana ice cream, the actions of dressing for dinner and avoiding the cracks on the sidewalk—these would be the sorts of actions left over for the morality of rights to concern itself with. [Waldron 1981: 36]

Such decisions are too trivial to be plausible candidates for justification by appeal to importance for autonomy. If every way of restricting choice-rights from protecting morally prohibited options robs the choice of significance, then we can only deny the right to do wrong at the cost of trivializing choice rights.

⁶Oddie and Milne’s [1991] representation result shows that the comparative value of an agent’s alternatives on any given moral theory can be ‘consequentialized’, represented on an expected value calculus ranking the choiceworthiness of alternatives. To accommodate standard deontological agent-centered options and constraints, outcome values may incorporate total states and histories of the world, and we may invoke Portmore’s [2008] dual-ranking structure where the rank of an alternative is determined by a function of the value it brings about and how well it respects the various constraints we take the agent to be under.

⁷Whether someone is subject to moral criticism seems to depend not just on the absolute value of the act chosen, but on its comparative value to her other alternatives. One natural way of representing this would be as a distance function between S ’s alternatives: the greater the distance between the value:cost ratio she actually achieves and that of her available alternatives, the more criticizable. But being open to criticism doesn’t imply that her act is impermissible. In any case, as Waldron rightly notes, simply having had a right to ϕ does not insulate the agent from moral criticism for doing so.

⁸That Waldron assumes something like dominance is evidenced by his criticism of William Galston [1983]’s suggestion that individuals are free to choose any alternative when morality is equivocal on the topic: ‘On Galston’s account, is it possible for the man who has chosen A to recognize a right in his opponent to choose not- A ? It is difficult to see how he can. His own view evinces a belief in “a single morally preferred alternative”; that is incompatible, from his point of view, with the moral permissibility of the other alternatives, and hence with the right to choose them’ [Waldron 1983].

1.2 The Argument from Moral Constitution

Herstein adopts a different strategy centered around the claim that without a right to do wrong, agents lack adequate scope for moral development. To meaningfully and freely choose to be moral, individuals must be free to do otherwise: to choose to do something morally prohibited instead. Mere unenforceable duties do not suffice, says Herstein, because agents cannot feel sufficiently free to choose to do evil unless they have a claim to enforce non-interference in their pursuit of a wrong action. Herstein grants that this argument has limited scope: moral character is developed over time, through multiple decisions, so one can develop morally without the right to choose a wrong option in all, or even most, cases. Still, if such development requires that at least sometimes agents know they have a claim against interference in wrong-doing, the argument shows that there must be some rights to do wrong.

Of these, Waldron's collapse argument is the more powerful, since if he's right then it is impossible to accommodate meaningful exercise of autonomy while denying the right to do wrong. Answering this charge will involve showing that rights to do wrong are not necessary for agents to have moral guidance in their choices, which goes some distance toward answering Herstein's moral development argument. In the next section I'll start by replying to the collapse argument. Then, having established that agents can engage in meaningful self-constitution without the right to do wrong, we can evaluate the claim that moral variation in alternatives is inadequate without the right to select morally prohibited options.

2 Undermining the Triviality Claim

2.1 Non-Trivial Variation Within Morally Required Alternatives

Even assuming that the range of protected choice must collapse to just the required alternatives, it does not follow that P's choices must lack room for moral guidance or fail to provide space for moral development. Where a choice concerns an imperfect duty, P may have several alternatives that are 'called for from the moral point of view.' A narrow-scope reading of this requirement is implausible, so we should read the requirement as taking wide-scope, entailing that P is required to perform the disjunction of these options, but not any one in particular.⁹

This structure permits significant variation among the required options, both in moral praiseworthiness and practical content. For example, one faces a wide variety of options in determining how to spend a large sum of money. Even restricting our attention to the morally praiseworthy alternatives below, we can rank options in terms of moral preferability as follows: *a* satisfies the most serious humanitarian needs, and is for that reason better than *b*, which is less self-serving than *c*.

- a) Donate to hurricane relief
- b) Donate to local a Boy Scouts group
- c) Fund an academic prize in your name

On this ranking, if P chooses *b* rather than *a* she may be morally criticizable, though perhaps less than she would have been had she chosen *c*. So long as we allow that there can be moral orderings like this within the set of REQUIRED options, restricting the range of protected choice to only required options does not undermine the choice's value for autonomous moral development. The remaining options provide enough moral variation to enable character development through seeking moral guidance and being subject to moral criticism.

⁹A narrow-scope reading ($\Box a \wedge \Box b \wedge \Box c$) requires P to do each of *a*, *b*, and *c*, while the wide-scope reading requires only the disjunction of all the required options: $\Box(a \vee b \vee c)$. Since P can perform only one option, narrow-scope implies the moral impermissibility of all options: since *a* is required, any action that omits *a* is wrong, so *b* and *c* are prohibited, but since *b* is required, and *b* entails omitting *a*, *a* is also wrong.

2.2 Non-trivial Non-moral Variation

Suppose that P's options are either only the REQUIRED subset or the INDIFFERENT subset (if there are no required options) and exhibit no moral variation; it still does not follow that the remaining range must be trivial, failing to provide the agent with opportunities to engage in autonomous self-definition. Recall the political affiliation case with which we began our discussion: if P's protected options are all morally indifferent—P is morally permitted to ϕ or not, for every ϕ in the protected range—does it follow that P's determination to be a democrat rather than a republican is trivial or banal? It doesn't seem so.

In many choices, there are some prohibited options but none that are REQUIRED. In a trivial sense, whenever P's options have this structure, it is then true that P is 'required' to perform the disjunction of all the non-prohibited options. Far from being the hallmark of merely trivial choices, this is the structure of most of the domains Waldron identifies as key to autonomous self-constitution: choices of political activities, friendships, group memberships, and occupation. So long as there is adequate non-moral variation in P's options, it is possible for P to make significant, identity-shaping choices without having a right to do wrong. There may be no one whom one is morally required to marry; there may even be no moral difference between marrying Alex or Bertrand—but presumably such a decision nevertheless is of tremendous personal and practical significance to the agent doing the marrying. The moral indifference of options does not indicate that a decision is trivial, or as peripheral to self-constitution as deciding where to begin shaving, or what flavor of ice cream to have.

3 Blocking the Collapse Argument

The arguments so far have been consistent with denying the possibility of supererogation,¹⁰ but if we can invoke supererogation and minimal moral permissibility, it is possible to resist the collapse argument simply by insisting on more fine-grained moral categories.

3.1 Supererogation

Since Waldron asserts that supererogation would merely complicate his argument, it's worth taking a moment to try to see how to extend his account. Standardly, a supererogatory act is praiseworthy but not required: an action that is morally preferable to P's other alternatives, but which P is not morally required to perform.¹¹ There is no obvious way to consistently extend Waldron's model to accommodate this sort of structure, but there seem to be just three possibilities: (i) extend straightforwardly, preserving *dominance*, (ii) treat supererogatory actions as strictly incomparable to all other alternatives, or (iii) replace *dominance* with

Threshold: if a morally required alternative y is preferable to x then performing x is morally prohibited.

The first option is unable to allow that agents are not morally required to perform supererogatory acts. Since a supererogatory act a is morally preferable to all alternatives, *dominance* dictates that the others are morally prohibited. It follows that a is morally required.¹² The second possibility is little better. Denying that supererogatory actions

¹⁰Theorists attracted to a maximizing utilitarianism like Bentham's or a classical Kantian picture of moral obligation will find the notion of morally optimal but non-obligatory action incoherent, and so find the earlier arguments more useful than what follows.

¹¹The argument I present here is compatible with any view of the supererogatory that incorporates moral preferability and non-requirement as necessary conditions, whatever additional constraints it builds into the full characterization.

¹²Some authors deny that moral permissibility is transitive (see, e.g., Kamm [1985: 118-38]), but the only assumption needed here is that moral *preferability* is transitive; the rest is assured by *dominance*, which Waldron's argument commits to. Kamm argues that moral permissibility is not transitive because though one may perform a self-interested act rather than a supererogatory one, and a supererogatory act rather than fulfilling a duty, one may not perform the self-interested act rather than the duty. This does not threaten the claim that moral preferability

are comparable with P's other alternatives does prevent the set of permissible actions from reducing to just *a*, but it also invalidates all talk of supererogatory actions being *better than* or *preferable to* merely permissible or wrong actions. The claim that such actions are strictly incomparable to alternatives thus also cuts against the concept of supererogation.

The final option is promising, but allowing that there could be an upper threshold to moral requirement undermines the structure of the collapse argument. Once a threshold dividing good actions into REQUIRED and PREFERABLE BUT NOT REQUIRED is on the table, the question arises: must the threshold serve only to separate supererogation from morally required actions, or could it be lower, defining the lower bound of moral permissibility?

3.2 Minimal Acceptability

Suppose we think that there are some cases where you can perform actions that are morally better than a minimally acceptable action *b*, but performing *b* isn't morally prohibited. In this case, *b* is not required, since if you perform a morally preferable action *c*, you fail to perform *b*, but you have not thereby done something wrong, failing to do something you were required to do. If we explain the permissibility of *b* by appeal to the fact that it is at least as good as some threshold of minimal acceptability, then we have all we need to resist the Collapse argument. Depending where we place the threshold, we can either allow that choice rights protect all alternatives that are not prohibited, illustrated in the blood donor case, or that it protects all alternatives with a minimally positive moral valence:

BLOOD DONOR — You have the rarest bloodtype (O-), meaning that you are a universal donor, and more importantly, one of a very small number of people able to donate to other O-s in need. You're also moderately healthy, with no background features that make you ineligible to donate blood. In deciding what to do about whether to donate blood, your options include:

- a) Never donate any blood.
- b) Donate at most once every four years, despite more frequent opportunities to do so at no inconvenience.
- c) Donate whenever doing so is low-cost to you: when a blood drive comes to campus and you don't have a schedule conflict.
- d) Organize your nutrition and exercise regimen to make yourself optimally healthy for blood donations, and donate as often as you can.

Since donating is highly likely to save some lives, plausibly you are morally required to donate at least once, so *a* is morally prohibited. If the threshold for minimal acceptability is *b*, we exclude everything below it from the range protected by your choice right, leaving you to choose between the remaining three acceptable options. In terms of moral preferability, your choice has the structure $b \prec c \prec d$. *c* is clearly better than *b* and barely more costly; in *b*ing instead you are open to serious moral criticism, but have not violated a moral obligation.

An important upshot of the blood donor case is that even when some of your options have a positive moral valence, we are not necessarily forced to sacrifice all merely permissible options when we exclude the morally prohibited actions.¹³ Of course most significant self-defining choices will be more complex, featuring a wider array of options and exhibiting a more complex ordering, with ties, isolated incommensurabilities, and the like. Conveniently for

is transitive: the supererogatory act is preferable to the duty, which is preferable to the self-interested act; the agent's permission to perform the supererogatory act stems from a permission to act on reasons other than just moral preferability. Nor does it question the idea that supererogation is morally comparable to other options, since the argument relies on some sort of ranking to in fact hold between supererogatory acts, duties, and self-interested actions.

¹³In saying one lacks the right to never donate blood, it does not follow that others may permissibly compel a donation unless it can be done in a way that does not violate rights you *do* have, such as a right to bodily integrity.

us, the results from the simple cases generalize, and with added complexity it is more rather than less likely that a threshold would be desirable and sufficient to block the collapse.

4 Are Restricted Rights Sufficient for Moral Autonomy?

Once we've blocked the collapse argument, excluding morally prohibited actions from the protected range of a decision problem still leaves a spectrum of moral options. There is room for moral guidance in a choice like BLOOD DONOR; one can do better or worse, morally speaking. One can exercise important moral choice just in deciding whether to perform the minimally satisficing *b*, *c*, or the optimizing *d*, and in most realistic choices the alternatives are much more numerous and varied.

That this is not enough scope for the agent to make a morally significant decision—that a right to do moral *wrong* is uniquely necessary—is a strong claim in need of support. If choices don't become morally trivial once we exclude the wrong actions, then we need a direct argument for the value of being able to choose morally prohibited actions in order to establish that they must be in the protected range. Waldron and Herstein appeal to the value of freely chosen virtue to play this role, since 'none of the special value which attaches to a life organized in conformity to a worthy conception of virtue attaches to a life where that organization is the result of external coercion.' [Waldron 1983: 326]. They contend that without assurances (in the form of a right to do wrong) that others will not interfere with their performance of morally prohibited actions, agents are forced to act virtuously. Such liability to coercion leaves little scope for an agent to freely choose to be virtuous, and so crowds out an important source of the value of autonomy.

This line of argument is insufficient: one can fail to craft a virtuous character simply by repeatedly choosing the minimally satisficing option, even when a morally preferable option would come at little cost to, or even benefit oneself (consider Ebenezer Scrooge). So long as the field of protected choice has this level of moral variation, one has protected alternatives to being virtuous, and so the possibility of freely choosing to be virtuous is preserved. To justify a right to do wrong, a proponent needs an argument to the effect that freely chosen virtue is valuable only if others were obligated not to interfere with an individual's choice to be downright "wicked."¹⁴ Alternatively, he could contend that a choice to perform a morally praiseworthy action is not truly free unless P had a protected alternative that was not merely morally inferior, but prohibited. Perhaps such arguments can be made; my point at present is simply that the indirect arguments given so far do not suffice.

Part II

Waldron and Herstein's arguments are insufficient to establish the substantive thesis; we lack reason to think that a right to do wrong is necessary for valuable exercise of autonomy. Nevertheless, Waldron's examples have some intuitive pull. Part II shifts to the project of explaining why we would be tempted to think there are such rights in the first place. There are two main ways the illusion of a right to do wrong might arise: we may take ourselves to be obligated not to interfere with P's *acting* when in fact we have no such duty, or we may in fact be obligated, but without this non-interference being *owed to P*.

¹⁴Herstein's term (at p. 358). Andrew Cohen [1997: 43-55] presses a similar objection.

5 A Debunking Argument

Mistakes of the first sort can be explained as arising from regulating our interference by a cautionary principle; the grounds for our non-interference is epistemic limitation, not a moral right. Timothy Williamson [1994]’s argument against the possibility of knowledge in borderline cases of vagueness may be of help here. When the truth of some proposition (e.g. whether a particular shade counts as ‘red’, or precisely how tall a tree is) depends on facts imperceptible to us, our justification for belief in the proposition is too unstable to yield knowledge. This is not to say there is no truth of the matter, just that our contact with it is too tenuous to permit us to know it. Nor does this destroy the possibility of knowledge on these topics generally: when the proposition concerns a clear case, its truth is unaffected by small changes in facts at the borders.¹⁵

Our judgments concerning the moral valances of actions display a similar instability. While some are very clear, and hence stable—actions that violate others’ rights are wrong, and certain altruistic actions are pretty clearly good and right—there’s a whole range in the middle where our judgments are far less obvious, and that we’re aware are determined by information to which we might not have access. The clear-cut cases tend to involve threat of significant harm or violations of someone’s rights, but non-interference rights to do wrong are most plausible where they do not involve such dangers or violations, so putative cases of a right to do wrong occur almost exclusively in the ambiguous middle range.

Interfering with someone’s autonomous action is a high-stakes game. Suppose P has a general choice right where *a* is one of the options, it is unclear whether *a* is wrong, and P has no right to do wrong. Then we have a duty to refrain from interfering with P’s *a*ing iff *a* is not wrong. We do not, however, in general have an obligation to interfere whenever *a* is wrong (particularly when *a* does not threaten to harm or violate the rights of any victim). Failing to prevent P’s *a*ing does not violate our duties, while if we interfere and *a* was not wrong, we have ourselves done wrong.

Given all this, we have moral reason to interfere conservatively, exercising quite a bit of caution in the borderline cases. If, for instance, your eccentric neighbor begins performing a series of experiments in his basement on unclaimed human corpses, it is unclear whether his new hobby is morally prohibited. It may well be wrong, but you may not be confident enough in this judgment to risk interfering. This hesitance disappears completely when we change the case to make his experiments clearly prohibited by stipulating that his experiments are performed on live, non-consenting subjects.

Knowing what we do about the error possibilities, to safely interfere with P’s *a*ing requires not only that we feel sure that *a*ing is wrong, but also that we are confident that we are in a position to know that we are right in this judgment. Since the moral valence of actions that do not violate others’ rights is sensitive to a number of factors, not all of which are epistemically available to us, we are often not in a position to be justified in this background belief. If this is our condition, then we may find ourselves often without a stable judgment concerning which of P’s alternatives are morally prohibited. The safest policy to adopt is to simply not interfere with any of the actions in a domain covered by a general choice-right. Conservative interference of this kind will be practically indistinguishable in all except the clearest cases of wrong action from granting a right to do wrong.

¹⁵The truth of ‘the tree is over 5ft tall’ is unaffected by facts about whether the tree is 89 inches or 90 inches. So while our justification for believing that the tree is 89 inches is too unstable to yield knowledge, stability is no obstacle to knowing that the tree is over 5 feet tall. See Williamson [1994: 225-29].

6 Explaining the Hard Cases

Not every putative case of a right to do wrong trades on moral uncertainty. Waldron's original examples involve actions that we can be reasonably confident are morally wrong, and are equally confident that we may not (as private citizens, at least) interfere with:

- *Lottery*: Someone uses all the money that he has won in a fair lottery to buy racehorses and champagne and refuses to donate any of it to a desperately deserving charity.
- *Voting*: An individual joins or supports an organization which he knows has racist leanings, such as the National Front in the United Kingdom; he canvasses support for it among a credulous electorate, and he exercises his own vote in its favor.
- *Pundit*: Somebody offers deliberately confusing, though not untrue, information about the policies of a political party to a confused and simpleminded voter in an attempt to influence his vote.

There are a number of ways to accommodate these intuitions without acknowledging a right to do wrong. The fact that a given agent—or even most agents—cannot permissibly interfere with P's *acting* does not show that P has a right to *a*. Instead, it is simply (contingently) impossible to interfere with P's *acting* without either (i) risking worse harm than what is threatened by allowing P to *a*, (ii) violating an obligation owed to someone else, or (iii) violating some of P's other rights.

6.1 Rights to Civic Actions

The *Pundit* case is a good example of the first type. Imagine for a moment that it were possible to ensure perfect enforcement of a law requiring that the electorate be provided only with fair, balanced, and accurate information. Would such a law violate a pundit's *right* to mislead the public? It doesn't seem plausible to claim that the pundit has such a right. Why the conviction that we cannot interfere with someone's deliberately misleading presentation? As soon as we drop the idealization of perfect enforcement, we have overwhelming practical reason to resist laws, gag orders, etc., that would prevent individuals from presenting information that the party in power considers misleading. There are simply too many deep-seated disagreements for us to reasonably hope that such a law could be enforced without exercising a distorting effect on public discourse worse than that of misinformation. So we have a simple consequentialist justification for permitting individuals to spin stories that does not indicate the presence of a right to do so.

The *Voting* case is more complex. It's intuitively impermissible for me to prevent others from voting for or promoting political parties on the grounds that I think it's morally wrong to vote for such a party. When the morality of the party's platform is a matter of significant debate, this accords with the cautionary principle: the fact that my judgment has been considered and rejected by a significant number of other citizens should weaken my conviction in the background belief that my judgment is right, just as widespread disagreement over whether a given shade counts as red should weaken my conviction that I am right in counting it as red.¹⁶ If instead there is a general consensus that the platform is morally wrong, as is the case in Waldron's example, it still seems inappropriate to prevent a single individual from voting for the party (given that they are on the ballot), but we do not intuitively seem to violate the individual's right by forbidding a group from running on e.g., genocidal platforms, or preventing the individual from forming such a party.

¹⁶There's a great deal of work on how much I should weaken my conviction, and why, in the literature on peer disagreement. For our purposes it is enough that I am no longer sure that my judgment is correct; stronger forms of this claim, advocating adopting neutrality between the conflicting judgments, have been made by Elga [2007] and Feldman [2006], among others.

Why is it that interference seems impermissible when performed directly by a private party, but not when indirectly by political reform? There seem to be two sorts of justification at work here: given the serious potential for abuse, there are sufficient practical reasons to forbid direct interference with the electoral process. In addition, it is plausible that this case involves the second type of justification: we actually do have duties against direct interference, but they aren't *owed to P*. Members of a cooperative endeavor incur duties to act in ways that support—or minimally do not undermine—the goals of cooperation. These duties are owed not to the other members individually, but instead to the collective. As a cooperative scheme, a political body generates these sorts of collective obligations, chief among them (a) not to act in ways that undermine legitimate governance, and (b) to act in ways that uphold just laws.

While no citizen has a moral right to politically support parties with immoral platforms, each citizen owes it to the collective not to interfere with a legitimate electoral process. So though P has no moral right to vote for a morally wrong political position, there is no permissible way for a private citizen S to directly prevent P from doing so, since there is no way to directly interfere without violating S's duties to the collective. However, that does not imply that S has no morally permissible way of interfering with P's ability to vote for x: if S succeeds in legally forbidding political parties from running on immoral platforms, she has interfered with P's ability to exercise his vote in a morally impermissible way, but does not seem to have violated P's moral right to do so, or deprived P of anything to which he had a claim.¹⁷

Waldron's lottery case also fits this profile: while it may be impermissible for any one of us to steal 1% of the winnings to transfer the money to charity, it does seem permissible to institute a 1% tax on lottery earnings, to be given to charity. What these cases may demonstrate is that for some of values of ϕ , direct interference with P's performance of ϕ would violate duties owed to the body politic, and so is impermissible. Nevertheless there is a permissible way to interfere indirectly; the duties owed to the collective do not simply transform into duties of non-interference owed to P.

6.2 Rights to Speech and Thought

The most difficult question for this approach may be whether we should say that individuals have a claim to non-interference in thinking morally wrong thoughts.¹⁸ Suppose there was some device that could block P from thinking any morally prohibited thoughts, and would do nothing else (to abstract away from the possibility that in using the device we'd violate some of P's other rights.) Assume that P is about to entertain (and perhaps internally endorse) a morally prohibited thought, but would not act on it in any way: he would not express or advocate it; it would play no motivational role in future actions of his, etc. There's no harm to others threatened, yet we seem to have a strong intuition that there is something impermissible about using that device. What else could that be but a strong intuition that P has a moral right to do wrong (that is, to think this impermissible thought) that we would violate by interfering in this way?

There are a lot of ways to treat this case. The one that I favor is to deny that there is a class of thoughts that are morally wrong to entertain. There are plenty of thoughts about morally wrong actions, but is there a thought that

¹⁷Possibly there are seeds here for a distinctively political liberal argument for a right to do wrong. The rough sketch of the argument would be that for some subset of actions (acts strictly condemned by some comprehensive doctrines, but about which there is reasonable disagreement), citizens have a moral duty based in respect for others as equal authors and subjects of the laws to not attempt to close off the legal right to engage in those actions. Insofar as there may then be no morally permissible means of interfering with P's acting, and this because of a duty I owe to P—to respect P as equally an author of law, and a moral agent entitled to form her own judgments concerning the abstruse moral questions about which we reasonably disagree—we seem to have a right to do wrong. (My thanks to Jonathan Quong for suggesting this line of thought).

¹⁸My thanks to Seana Shiffrin for raising this objection.

is not merely criticizable, but *morally prohibited* to entertain, token, believe, etc.? I don't think it's at all clear that there are such thoughts. If there are none, then it follows trivially that comprehensive rights to non-interference in thought won't ground a right to do wrong.

Even supposing that the class of beliefs that are morally wrong—*prohibited to token*—is not empty, it is at least substantially smaller than the class of beliefs that are bad but merely criticizable to token. We can allow that individuals have a right to non-interference in entertaining merely criticizable beliefs without acknowledging a right to do wrong; consequently, we can invoke my earlier arguments to deny that P's autonomy interests require a special right to non-interference in tokening a morally prohibited belief *b*.

Beyond these two considerations, there is reason to be skeptical about the strength and veracity of our non-interference intuition in this case. I doubt that we can clearly imagine what targeted interference with only morally prohibited beliefs would involve. One retains rights to criticizable thought, so to be of value as a counterexample we must be sure we've imagined a scenario where the only thought affected is the prohibited one. If it is sometimes unclear whether a given action is morally prohibited, it is far murkier whether tokening a given thought is prohibited, so here as elsewhere a cautionary principle is in effect. Additionally, we have even stronger practical reasons to prohibit interference in thought than we do in public discourse: the potential for abuse is great, and the risks associated with non-interference are more tolerable. Finally, our intuitions about the moral inviolability of an individual's private thoughts may be significantly shaped by consideration of what legal rights we have reason to recognize, rather than responding to a particular moral right to tokening morally impermissible thoughts. I am skeptical that our judgments about the permissibility of interference are sensitive enough to get past all these co-occurring complications. So, though it may sound counterintuitive, it is at least plausible that we lack moral rights to token morally impermissible thoughts.

7 Conclusion

This paper has two primary aims: to show that the arguments given for the existence of a right to do wrong are insufficient, and to gesture at an alternative explanation for the intuitions that seem to support such a right. I have not shown (nor even attempted to show) that the notion of a right to do wrong is conceptually incoherent. My arguments only militate in favor of treating the existence of such rights as an open question: allowing that it may well be that the final correct theory of rights entails the impossibility of a right to do wrong.

At the very least I have established that the substantive claim is in need of better support: the arguments surveyed here won't do. We can place a high value on autonomy without thereby committing to the substantive thesis and acknowledging a right to do wrong. Nevertheless, it is true that in many cases we have compelling reason (given our epistemic limitations, other obligations, and practical concerns) not to interfere with an agent's performance of a morally prohibited act. It is thus true that we ought not to interfere, but this is not a duty we owe to the wrongdoer.¹⁹

8 References

- Cohen, Andrew 1997. Virtues, Opportunities, and the Right to do Wrong, *Journal of Social Philosophy* 28/2: 43-55.
Elga, Adam 2007. Reflection and Disagreement, *Nous* 41/3: 478-502.
Enoch, David 2002. A Right to Violate One's Duty, *Law and Philosophy* 21/4: 355-84.

¹⁹My particular thanks to Andrei Marmor and Jonathan Quong, who encouraged me to develop these ideas and gave me comments on several early drafts. Thanks as well as to Hillel Steiner and two referees at this journal for helpful feedback on this paper, and to audience members at the 2014 UCLA and University of Antwerp Joint Conference in Law and Philosophy for discussion of an earlier version of these ideas.

- Feinberg, Joel 1973. *Social Philosophy*. New Jersey: Prentice Hall.
- Feldman, Richard 2006. Epistemological Puzzles about Disagreement, in *Epistemology Futures*, ed. Stephen Hetherington, Oxford: Clarendon Press: 216-36.
- Galston, William 1983. On the Alleged Right to do Wrong: A Response to Waldron, *Ethics*, 93/2: 320-24.
- Herstein, Orr 2012. Defending the Right to do Wrong, *Law and Philosophy* 31/3:343-65.
- Kamm, Frances 1985. Supererogation and Obligation, *Journal of Philosophy* 82/3:118-38.
- Oddie, Graham and Peter Milne 1991. Act and value: Expectation and the Representability of Moral Theories, *Theoria* 57/1: 42-76.
- Portmore, Douglas 2008. Dual-ranking Act-consequentialism, *Philosophical Studies* 138/3:409-27.
- Raz, Joseph 1986. *The Morality of Freedom*. Oxford: Clarendon Press.
- Waldron, Jeremy 1981. A Right to do Wrong, *Ethics* 92/1: 21-39.
- Waldron, Jeremy 1983. Galston on Rights, *Ethics* 93/2: 325-27.
- Wellman, Christopher 1995. On Conflicts between Rights, *Law and Philosophy* 14/3: 271-95.
- White, Alan 1984. *Rights*. Oxford: Clarendon Press.
- Williamson, Timothy 1994. *Vagueness*. Abingdon: Routledge.