

Taking Rights Seriously

Waldron on 'The Right To Do Wrong'

I. Rights and Wrongs

In his celebrated debates with Abraham Lincoln, Stephen Douglas distinguished the question of whether slave-holding is right or wrong from the question of whether communities have a right to decide for themselves whether to permit or forbid slave-holding. As to the morality of slave-holding, Douglas persistently refused to state an opinion whether it was right or wrong. Slavery's moral rightness or wrongness, he insisted, was simply irrelevant to the question of whether majorities in the states and federal territories had a right to permit slave-holding within their jurisdictions. That right, he argued, derives from a basic principle of political morality that he called 'popular sovereignty'. According to this principle, people in different communities have a right to control their common destinies by deciding, through democratic political processes, the terms of their social relations. Douglas insisted that even where fundamental matters of morality and justice are at stake, local majorities have the moral right to decide upon these terms. Douglas concluded therefore that, the alleged immorality of slave-holding notwithstanding, states and territories have a right to permit it.

In the end, Douglas professed 'not to care' whether local communities decided to permit slave-holding or forbid it. It was in response to this profession that Lincoln launched his famous counterattack:

Judge Douglas says he 'don't care whether slavery is voted up or down' . . . [but] he cannot thus argue logically if he sees anything wrong

in it . . . He cannot say that he would as soon see a wrong voted up as voted down. When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong.¹

Lincoln's claim against the proposition that someone could have a right to do wrong was that it is illogical. He alleged that Douglas implicitly contradicted himself in holding that (1) slavery is wrong, and (2) communities have a right to establish or maintain the institution of slavery. Lincoln maintained that the proposition that slavery is wrong entails the negative of the proposition that communities have a right to opt for slavery.

It is plain that the dispute between Lincoln and Douglas had to do with moral rights and wrongs. Lincoln did not suppose that there is anything illogical in claiming that someone could have a *legal* right to do something that is morally wrong. Earlier in the same debate, he acknowledged that white people in various places in the United States possessed a *legal* right to hold certain black people as slaves, despite the fact that he and many Americans judged slave-holding to be morally wrong. Indeed—*notoriously*, from Lincoln's point of view—the supreme law of the land granted those who exercised their legal right to own slaves certain additional legal rights in regard to their human property.²

Of course, Lincoln was neither the first nor the last English-speaking moralist to suppose that there is something illogical about the proposition that someone could have a moral right to do something that is morally wrong. The late eighteenth-century utilitarian William Godwin, for example, declared flatly that 'there

¹ *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, (New Brunswick, NJ: Rutgers University Press, 1953), iii. 256–7; quoted in Hadley Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (Princeton, NJ: Princeton University Press, 1986), 24.

² Article IV, Section II of the Constitution of the United States stated: 'No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on any Claim of the Party to whom such Service or Labour may be due.' This provision remained in effect until 6 Dec. 1865, when the Thirteenth Amendment (abolishing slavery and involuntary servitude except as punishment for a crime) was ratified.

cannot be a more absurd proposition than that which affirms the right of doing wrong'.³ In our own time, thinkers as divergent in viewpoint, from each other and from Godwin, as the Kantian political theorist Hadley Arkes and the Humean analytic philosopher John Mackie have defended accounts of moral rights that clearly leave no logical room for a right to do wrong.⁴

Nevertheless, many people today believe that there are certain immoral actions that people have a moral right to perform. Of course, virtually no one today defends the notion of a moral right to do wrong in the case of slavery. Consider, however, the case of abortion. Apparently, a great many Americans who profess to be pro-choice nevertheless believe that most abortions are morally wrong. Indeed, it appears that a significant percentage of people who believe that women have a right to abortion at any point in pregnancy and for any reason *also* believe that most abortions are morally indistinguishable from murder.⁵ Surely there can be no more exquisite example of a belief in a moral right to do moral wrong, than the belief in a right to commit murder.

In 1984, Governor Mario Cuomo of New York offered a formal defense of the putative moral right to do moral wrong in the case of abortion. In a widely publicized speech delivered at the University of Notre Dame, Cuomo stated his belief that abortion is, in most circumstances, gravely immoral. He argued, however, that this belief is perfectly consistent with his belief that, in a religiously diverse, pluralistic society, individual pregnant women are morally entitled to decide for themselves whether to have abortions.⁶

Cuomo did not provide a detailed defense of his belief in a right to abortion; and what little he did say was woven into

³ William Godwin, *Enquiry Concerning Political Justice*, ed. K. Codell Carter (Oxford: Clarendon Press, 1971), 88; quoted in Jeremy Waldron, 'A Right to Do Wrong', *Ethics*, 92 (1981), 21-39, at 23.

⁴ Arkes, *First Things*, esp. ch. 2; John Mackie, 'Can There Be a Right-based Moral Theory?', *Midwest Studies in Philosophy*, 3 (1987), 350-9.

⁵ In a recent national poll by the Wirthlin Group, for example, 45% of the respondents agreed with the proposition that 'abortion is murder' and 46% agreed with the proposition that 'abortion is not murder'. Of those who agreed with the former proposition, 9% also indicated their belief that there should be no legal restrictions on abortion at any point in pregnancy up to the live birth of a child.

⁶ The Governor's speech has been published under the title 'Religious Belief and Public Morality: A Catholic Governor's Perspective', in *Notre Dame Journal of Law, Ethics and Public Policy*, 1 (1984), 13-31.

an elaborate fabric of argument that included various practical difficulties with abortion regulation, such as the problem of enforcing laws restricting abortion in the absence of a social consensus regarding the wrongness of abortion. According to one plausible interpretation of his remarks, however, Cuomo would derive a right to do wrong in the case of abortion from something closely resembling the principle of political morality that Joel Feinberg has labeled 'personal sovereignty'.⁷ In Cuomo's judgment, the right to abortion is a specific instance of a more general right of persons to govern their lives according to their own consciences and, in particular, to decide what happens in and to their bodies.

Many contemporary philosophers, whether or not they agree with Cuomo on the particular question of abortion, share the Governor's belief that someone can have a moral right to do something that is morally wrong. As we have seen, Ronald Dworkin, for example, has defended a putative moral right to pornography, a right that holds good, he maintains, even if the manufacture, distribution, and use of pornography are morally wrong.⁸ Joseph Raz, while he has not, to my knowledge, cited a specific instance of such a right, has stated that 'to show that someone has a right to perform [a certain] act is to show that even if it is wrong he is entitled to perform it'.⁹ And Jeremy Waldron, in an exceptionally elegant essay published in 1981, formally defended the notion of a moral right to do moral wrong against the charge of illogicality or incoherence. He vigorously argued that anyone who correctly understands the function of moral rights as protecting individual choice in humanly important areas of decision must acknowledge that 'wrong actions as well

⁷ In *Harm to Self* (New York: Oxford University Press, 1986), the third of his magisterial 4-volume series on the 'Moral Limits of the Criminal Law', Joel Feinberg defends 'the liberal position' in part on the basis of the proposition that 'personal sovereignty' almost always outweighs considerations that support criminalizing immoral behavior that does not directly harm or unduly offend parties who do not consent to it.

⁸ See Ronald Dworkin, 'Do We Have a Right to Pornography?', in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985). Recall that according to Dworkin, a right to pornography can be derived from a more general right to moral independence, which can in turn be derived from a still more general right of citizens to be treated by their government with equal concern and respect.

⁹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 274.

as right actions and indifferent actions can be the subject of moral rights'.¹⁰

It is worth observing that contemporary defenders of putative moral rights to commit moral wrongs typically do not restrict the wrongs to which they believe people may have moral rights to the class of 'self-regarding' or 'victimless' wrongs. Cuomo, for example, presumably considers abortions to be morally wrong because they are fetical. And Dworkin explicitly acknowledges that the legal recognition of a person's moral right to pornography is likely to damage the legitimate and significant interests of others.¹¹ Furthermore, they do not suppose that arguments in support of the notion of a right to do wrong will persuade only those who are willing to commit themselves to some version of J. S. Mill's harm principle. So, for example, Waldron begins his article with seven examples of specific instances of the right to do wrong, at least six of which manifestly involve 'other-regarding' moral wrongs.¹²

What is to be said for and against the notion of a moral right to do moral wrong? Is belief in such a right illogical, as Lincoln supposed? Or, as Waldron contends, is the proposition that morally wrong actions can be the subject of moral rights actually entailed by a correct understanding of the function of rights as protecting individual choice in certain important areas of decision?

¹⁰ Waldron, 'A Right to Do Wrong', 37. *Ethics* also published a short reply to Waldron by William Galston: 'On the Alleged Right to Do Wrong: A Response to Waldron', *Ethics*, 93 (1983), 320-4. While I am generally sympathetic to Galston's position, I believe that he moved too quickly to dismiss Waldron's claim on logical grounds and failed to recognize the weak, but meaningful, sense in which someone's moral right to do something morally wrong may exist as a shadow of someone else's (e.g. the government's) independently grounded duty not to interfere with the wrongdoing in question. I do not think that Galston attended adequately to Waldron's explication of a right to do wrong as a right that *somebody else* not interfere with one's wrongdoing.

¹¹ See Dworkin, *A Matter of Principle*, 349.

¹² Waldron, 'A Right to Do Wrong', 21. The six: (1) having won a fortune in a lottery, a person living in luxury callously refuses to help those in need; (2) someone joins or supports a racist political organization; (3) someone deliberately confuses a simple-minded voter in an attempt to influence his vote; (4) an athlete takes part in a sporting competition that includes participants from a racist state, thus knowingly contributing to the demoralization of those struggling for the liberalization of that state; (5) anti-war activists organize a rowdy demonstration near a Remembrance Day service; (6) someone rudely rebuffs a stranger's invitation to casual conversation or coldly refuses his request to be told the time of day.

Against the strict Lincolnian position, I wish to show that there is a sense in which one can, without logical inconsistency, speak of an individual's moral right not to be forbidden to perform, or interfered with in performing, acts that one has a moral duty not to perform. Against the Waldronian position, however, I wish to show that the sense in which such rights exist, as a matter of political morality, is weak. Such rights, I shall argue, are not grounds for governmental non-interference with certain immoral choices; they exist, rather, only as 'shadows' of governmental duties not to intervene, which duties are not themselves grounded in the rights of individuals to perform immoral actions. Further, I wish to show that someone who 'takes rights seriously' need not believe in moral rights to do moral wrongs in any stronger sense. I shall argue that someone who denies that morally wrongful actions can be the subject of strong moral rights may nevertheless hold a robust conception of moral rights as protecting the liberty of individuals to deliberate and decide for themselves what to do in areas of significant personal choice. Finally, I wish to show that one can deny that there are strong moral rights to do moral wrongs and yet acknowledge that there may be compelling reasons for the law to tolerate certain immoral acts, or to protect individuals from coercive private (i.e. non-governmental) efforts to prevent them from committing certain unjust or otherwise immoral acts. In other words, I shall argue that one can affirm, with Aquinas,¹³ that the law ought not to forbid every moral wrong, without supposing that there are moral wrongs that people have a moral right to commit.

II. 'Rights' and the Grounds of Duties not to Interfere with Moral Wrongdoing

As Waldron freely concedes, the claim that someone could have a moral right to do something morally wrong sounds paradoxical or like an equivocation. He argues, however, that the paradox or equivocation is merely apparent, and that the conjunction of the following two propositions:

¹³ Recall that in *Summa Theologiae*, I-II, q. 96, a. 2, Aquinas concludes that human law should not prohibit every vice, 'but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are injurious to others, without the prohibition of which society could not be maintained'.

- (1) *P* has a moral right to do *A*
and
(2) *P*'s doing *A* is morally wrong

is not illogical but 'actually represent[s] a single coherent position that is open to a logically scrupulous person making judgments from the moral point of view'.¹⁴ Waldron observes that (1) entails

- (3) it is morally wrong for someone to interfere with *P*'s doing *A*.

So, the Lincolnians among us may be tempted wrongly to conclude that (2) entails

- (4) it is morally permissible for someone to interfere with *P*'s doing *A*.

The truth of the matter, however, is that (2) does not entail (4); thus there is no logical incompatibility between (2) and (3).

Waldron concludes from this analysis that we can, with logical consistency, speak of a moral right to perform an act that is morally wrong in circumstances in which it is morally wrong for someone to interfere with someone else's performing that act. If, for example, it is morally impermissible for the law to forbid abortions, then we can speak meaningfully of someone's moral right that the law not forbid her from having an abortion, even if having an abortion is morally wrong. Or, again, if it is morally impermissible for the federal government to abolish slavery in those states and territories that choose to permit it, then we can speak of a moral right of those communities to permit slaveholding, even if the institution of slavery is morally wrong.

Of course, the proponent of any particular putative moral right to do moral wrong will need to adduce some ground for the claim that it is morally impermissible for the law to forbid the immoral act or abolish the immoral institution in question. And in so far as the ground of the right is the moral impermissibility of forbidding the immoral act or abolishing the institution, it will not do to cite baldly the moral right to perform the act or have the institution as the ground of this moral impermissibility. That

¹⁴ Waldron, 'A Right to Do Wrong', 22.

kind of justification for a strong moral right to do wrong would be viciously circular. The fact that it may be morally impermissible for a government to forbid a certain immoral act or abolish a certain immoral institution gives us no reason to suppose that there is, in the case of that act or institution, a strong right to do wrong, that is, a right that is itself a premiss for the conclusion that it is wrong to forbid the act or abolish the institution.

It may be instructive to pause here to consider why (2) does not entail (4). The answer, I think, is that while the wrongness of an act (e.g. its injustice) may provide a reason (i.e. a possible rational motive) for interfering with someone's performing that act, one may have competing reasons not to interfere. One or more of these reasons may, in a particular case, be morally conclusive; such reason(s) would then defeat one's reason(s) for interfering. Where one has a morally conclusive reason not to interfere with someone's performing a certain act (whether or not the act is unjust or otherwise immoral), interfering with that act is morally impermissible.

What sorts of reasons might one have for not interfering with someone's performing an immoral act? The attempt to interfere might prevent one from fulfilling some more compelling obligation. Or the attempt may be the sort that is likely to be self-defeating or even counter-productive. It might unreasonably put the interferer, or unfairly put some third party, at risk of serious harm. Where the government is the interferer, the effort may encourage corruption of police officers or prosecutors or judges. Or it may damage the common good in some other way: for example, by dangerously enhancing the power of the government, thus placing honorable liberties in jeopardy; or, in the circumstances, by encouraging undue conformism, servility, and mindless obedience to authority.

I think that it is fair to say, therefore, that Waldron is on solid ground in contending that the proposition that '*P*'s doing *A* is morally wrong' is logically compatible with the proposition that 'it is morally impermissible to interfere with *P*'s doing *A*'. Has he, however, established the logical coherence of the notion of a moral right to do moral wrong?

William Galston insists that he has not. According to Galston, Waldron's argument, as I have set it out thus far, 'is wholly inconclusive because it is far too general'. Galston observes that:

For every case of wrongdoing—not just those allegedly protected by rights—the question of the permissibility of interference will necessarily arise. For example, even if an outbreak of looting can only be quelled by a draconian shoot-to-kill policy, it is by no means clear that it is proper to employ such a policy. But our qualms about permissibility obviously do not stem from any suspicion that the looters had a right to do what they did.¹⁵

Galston's point is sound. The question of whether an act is right or wrong and the question of whether it is right or wrong for the government (or, for that matter, some private party) to interfere with someone's performing that act are *always* distinct questions. To demonstrate that the government (for example) sometimes has compelling reasons not to interfere with someone's performing an immoral act is not to establish that the wrongdoer has a moral right, in any strong and interesting sense, to perform the morally wrongful act. To establish the right to do wrong, in a strong and interesting sense, it would be necessary to show that the compelling reason for non-interference is precisely the right of the wrongdoer to do the wrong.

As Galston seems to suggest, Waldron's point cuts both ways: Just as the proposition that 'It is wrong for *P* to do *A*' is logically compatible with the proposition that 'It is wrong to interfere with *P*'s doing *A*', so the latter proposition is logically compatible with the proposition that '*P* has no right to do *A*', and, *a fortiori*, no right that could make it wrong to interfere with *P*'s doing *A*.

It is important to notice that Waldron conceives of the right to do wrong as a right *against being interfered with* in doing something that is wrong. Although he frames it as a right 'to do' wrong, he consistently defends the putative right as a right that someone else (e.g. the government) not interfere with one's doing something wrong. In Waldron's conception, then, the right to do wrong is certainly not the sort of right that Hohfeld called a 'privilege' and Hohfeldians call a 'liberty' or 'liberty right'.¹⁶ The most we can say, and it seems decidedly odd to say it about Galston's imaginary looters, is that people sometimes have a

¹⁵ Galston, 'On the Alleged Right to Do Wrong', 321.

¹⁶ See generally W. N. Hohfeld, *Fundamental Legal Conceptions* (New Haven, Conn.: Yale University Press, 1919).

Hohfeldian 'claim right' that others (e.g. the government) not interfere with their performing acts that are morally wrong.

We are accustomed to thinking of rights claims as two-term relations between a person and a subject-matter or act-description. So, for example, we speak of rights to 'free speech', 'religious liberty', 'privacy', and 'property'. Under Hohfeld's scheme, however, we can translate all such rights claims into three-term relations between a person, an act-description, and another person. In Hohfeldian terms, rights claims can be reduced, without remainder, to one (or some combination) of four types of rights, namely, 'claim rights', 'liberties', 'powers', and 'immunities'. We need not concern ourselves here with the latter two types of rights, which have their primary significance in analyzing rights claims in the context of juridical relationships. The Hohfeldian concepts of 'claim right' and 'liberty', however, while useful in the juridical context, are equally serviceable in analyzing claims of moral rights.

P has a **claim right** that *X* perform (or refrain from performing) act *A*, if and only if *X* has a **duty** to *P* to perform (or refrain from performing) *A*.

X has a **liberty** (relative to *P*) to perform (or not perform) *A*, if and only if *P* has **no-[claim]-right** that *X* not perform (or perform) *A*.

Claim rights correlate with duties; liberties with no-[claim]-rights. And we can distinguish *moral* claim rights, duties, and liberties, from *legal* claim rights, duties, and liberties.

Strictly speaking, a claim right (whether moral or legal) cannot be a right to do (or not do) something. Claim rights are rights that somebody else do (or not do) something. They correlate with someone else's duty to do (or not do) something. *P* can, for example, have a claim right (moral or legal) that *X* not interfere with his doing *A*. The claim right is entailed by *X*'s duty (moral or legal) not to interfere. Hohfeldian liberties, by contrast, *are* rights to do (or not do) something. One has a liberty (moral or legal) to do (or not do) something where one has no duty (moral or legal) not to do it (or no duty to do it). For example, *X* has a liberty to interfere with *P*'s doing *A* where *X* has no duty not to interfere; where *X* has such a liberty, *P* has no-[claim]-right that he refrain from interfering.

It is plain, in Hohfeldian terms, that one cannot have a liberty right to do something that one has a duty not to do. At most, one can have a claim right that somebody else (or, indeed, everybody else) refrain from interfering with one's doing something that one has a duty not to do. There is logical room for such a claim right because 'one's doing *A*' and 'someone's interfering with one's doing *A*' are separate act-descriptions, each of which picks out a distinct set of Hohfeldian relations.

It is also worth noting that particular Hohfeldian liberties and claim rights might or might not be joined to, or buttressed by, additional claim rights. For example, if one has a liberty to do *A*, that liberty might or might not be conjoined to a claim right that someone refrain from interfering with one's doing *A*. If one has a claim right that the government refrain from interfering with one's doing *A*, whether or not one has a liberty to do *A*, one's claim right might or might not be buttressed by a further claim right that the government prevent private parties from interfering with one's doing *A*. Even where one has a claim right that private parties refrain from interfering with one's doing *A*, one's claim right might or might not be buttressed by a further claim right that the government prevent private parties from interfering.

The utility of Hohfeldian analysis in moral enquiry and argumentation is limited in one significant respect: Hohfeldian duties are always to someone who has a corresponding claim right; and that there is such a person does not follow from an act's being morally wrong. Hohfeldian analysts aspire to analyze all rights claims; they do not, however, purport to analyze all claims of moral duties. One may have (or be said to have) a duty not to perform a certain act because it would be morally wrong for one to perform it; yet one's (putative) duty not to perform the act may not be (or be said to be) to someone who has a corresponding claim right that one not perform it. Duties of this sort are simply not analyzable in Hohfeldian terms.¹⁷

Because I wish to analyze claims of a putative right to do wrong in Hohfeldian terms, I shall, for the remainder of this chapter, focus on examples of the putative right that involve

¹⁷ Which is most definitely not to say that by analyzing rights in Hohfeldian terms one implicitly commits oneself to the idea that all moral duties are 'other-regarding', or that only 'other-regarding' acts can be contrary to moral duties, or that immorality consists only in violations of the rights of others.

'other-regarding' immoralities, that is, acts that are immoral inasmuch as they involve breaches of duties to others and violations of their corresponding rights.

In Hohfeldian terms, one could never legitimately say that someone has a moral liberty right to do something that he has a moral duty not to do. '*P* has a moral liberty right to do *A*' entails that '*P* has no moral duty (to someone or anyone) not to do *A*'. '*P* has a moral duty (to someone or anyone) not to do *A*' entails that '*P* has no moral liberty right to do *A*'.

At the same time that '*P* has no moral liberty right to do *A*', however, the following proposition about the moral duty of *X* might be true: '*X* has a moral duty to *P* not to interfere with *P*'s doing *A*'. This latter proposition entails that '*P* has a moral claim right that *X* not interfere with his doing *A*'.

So, for example, if '*P* has a moral duty to *F* not to have an abortion', then '*P* has no moral liberty right to have an abortion'. Nevertheless, it might be the case that 'the government has a moral duty to *P* not to interfere with her having an abortion'. If so, '*P* has a claim right that the government not interfere with her having an abortion'. The same is true, however, in the case of the looters. If '*L* has a duty to *M* not to loot his shop', then '*P* has no liberty right to loot *M*'s shop'. *P*'s having such a duty, however, is logically compatible with the government's having a moral duty to *P* not to interfere with his looting (e.g. because any effort to do so might unjustly put lives—including *P*'s own life—at risk). So, oddly, we can speak of *P*'s moral claim right that the government not interfere with his looting. Such a claim right is a sort of shadow of the government's duty not to stop him from looting.

Where someone does not have a moral liberty to perform a certain act (because he is under a moral duty not to perform that act), it is nevertheless possible that the government is under a moral duty to create or respect a legal liberty for that person to perform that (immoral) act, and even to buttress this legal liberty with a legal claim right that the government prevent others from interfering with that person's decision to perform the act. Furthermore, a constitution maker might have morally compelling reasons to create a judicially enforceable legal claim right that the government not interfere with that person's performing the act. But the moral reasons for recognizing the legal liberty to perform the immoral act (and for creating legal claim rights to buttress

that legal liberty) need have nothing to do with any putative moral right of the individual concerned to perform the act.

Waldron's framing of the putative right he wishes to defend as a right 'to do' wrong implies, I think, that what he has in mind is something more like a Hohfeldian liberty than a claim right. If, however, he were proposing the right as a moral liberty, he would be trapped in a logical dilemma: if *A* is morally wrong, then *P* has a moral duty not to do *A*; but if *P* has a moral duty not to do *A*, then logically *P* can have no moral liberty right to do *A*. We must recall, though, that Waldron conceives of the putative moral right as a right against *interference* with one's doing something that is morally wrong. He does not mean to propose, then, that someone could have a right in the sense of a Hohfeldian liberty to do something wrong. His claim is likely the more modest one that someone could have a Hohfeldian claim right that the government (and everyone else) not interfere with his choice to perform a certain immoral act. There is logical room for such a claim; and while it is more modest than the apparently illogical claim that one could have a moral liberty right to do moral wrong, it is not without bite in Waldron's case. He means to establish that such a right is not a weak right—a mere shadow of a governmental duty which grounds the right—but is rather a strong right, that is, a reason for the duty.

III. Taking Rights Seriously: Moral Rights and Humanly Important Choices

Waldron argues that the alleged moral right to do moral wrong, where it exists, 'provides a special reason for not interfering' with an individual's decision to perform certain immoral acts. In other words, he wishes to argue that in certain cases the governmental duty not to interfere with an immoral act derives from, or is imposed by, the wrongdoer's right not to be interfered with. In these cases, the government may not interfere even if there is no *other* reason not to interfere. The right is itself a reason—ordinarily, at least, a morally conclusive reason—for non-interference. A right that is itself a reason for non-interference, and not merely the shadow of an independent (governmental or non-governmental) duty not to interfere, is what I call a strong right.

Waldron, as I understand him, wants to be able to say that

people have moral rights to, for example, join the Nazi party or spread false and damaging (albeit non-defamatory) reports about others, without having to say that looters have a moral right to loot in cases where the government has conclusive moral reasons (hence a moral duty) not to attempt to stop them from looting. He wants to be able to say, for example, that the government has a moral duty not to forbid people to join the Nazi party or spread the lies *because* people have moral rights to do *these* things, the immorality of doing them notwithstanding.

He seeks to establish that the putative right to do wrong is what I have called a strong right by defending a particular understanding of the function of rights in moral theory, and attending particularly to the generality of rights thus understood. He observes that rights such as the right to join the Nazi party or the right to spread non-defamatory lies about people are specific instances of more general rights, namely, rights to free political association or free speech. He says that 'particular rights-statements [e.g. the right to join the Nazis or spread the lies] can be conceived as clustered together into groups represented by general rights-statements [e.g. the cluster of particular rights generally referred to as 'freedom of political association' or 'freedom of speech']'.¹⁸ He then develops the idea of rights as protecting the choices of individuals in key areas of their lives:

Now it is important for understanding the notion of a right to do wrong to see in general terms how justification here usually proceeds. As we have seen, the cutting edge of a rights-claim is the claim it entails about the wrongness of interfering with the action that the rights-bearer has chosen. So what is defended or contested when a general right is in dispute is the claim that choice within a certain range is not to be interfered with. This claim in turn is usually defended on the basis of the importance of the choices in the range in question for the lives of the individuals who are making them. In the ranges of action to which a theory of rights draws attention, individual choices are seen as crucial to personal integrity. To make a decision in these areas is, in some sense, to decide what person one is to be. . . . There are certain types of choice, certain key areas of decision making, which have a special importance for individual integrity and self-constitution. . . . In the light of all this, it is easy to see why we cannot exclude the possibility that a person has a right to perform some action that is wrong.¹⁹

¹⁸ Waldron, 'A Right to Do Wrong', 34.

¹⁹ *Ibid.*

I would submit, however, that these considerations do not make it 'easy to see' that people could have, in a strong sense, a moral right to do moral wrong. While it seems sound enough to claim that the human goods of personal integrity and self-constitution depend upon the availability of significant opportunities for practical deliberation, judgment, and choice, it is not at all clear that these goods depend upon the availability of particular immoral choices that are insulated from interference by the government or others because they concern matters that are important to people.

Surely no one has a moral right to kill people because of their race, ancestry, or religion. Is that because the choice to kill people on this basis is not important to personal integrity and self-constitution? If so, it is hard to see how this choice is less important for the self-constitution of a convinced Nazi than his choice to join the Nazi party.

The truth, I would suggest, is that the sort of personal integrity and self-constitution that are humanly valuable and therefore worth worrying about are not at stake in either case.²⁰ A person's essential integrity is not denied, nor is his status as a self-constituting person sacrificed, when he is forbidden by law (or, for that matter, by his parents or employer) to join the Nazis. There may, of course, be other reasons (i.e. reasons of prudence) for not forbidding him to join (or not granting government the power to forbid him to join); but one can acknowledge these reasons (and, thus, that he has a sort of weak moral claim right that shadows the government's duty not to prevent him from joining) without supposing that he should not be forbidden to

²⁰ Although I prefer to speak of the good of 'personal integrity', rather than the good of 'autonomy' (autonomy, I think, is not itself a basic good, but is rather a condition of integrity and thus of the complex basic good of integrity and personal authenticity in choosing that some philosophers refer to as 'practical reasonableness', see e.g. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 88-9), Joseph Raz seems to me fundamentally correct in his judgments that 'autonomy is valuable only if exercised in pursuit of the good', (*The Morality of Freedom* (Oxford: Clarendon Press, 1986), 381), and that autonomy itself therefore 'supplies no reason to provide, nor any reason to protect, worthless let alone bad options', (411). Indeed, Raz goes so far as to say that 'autonomously choosing the bad makes one's life worse than a comparable non-autonomous life', (412). As Raz recognizes, we may, of course, have other reasons to tolerate immoral choices.

join *because* he has a moral right to join.²¹ There may be morally compelling reasons not to forbid him to join the Nazis, despite the fact that he has no more right to be a Nazi than looters have to loot in a situation in which there are reasons not to stop the looting.

The same can be said with respect to a putative moral right to spread non-defamatory lies about people. Assume that there is a general moral right to free speech. Are there grounds for concluding that defamatory speech is not a specific instance of this general right, but non-defamatory speech, even if false and damaging, *is* a specific instance? Can we say that the choice to defame someone is not essential to the goods of integrity and self-constitution, but the choice to spread non-defamatory but damaging lies about them, while morally wrong, *is* somehow essential to these goods? I doubt it. Most jurisdictions quite reasonably draw a distinction between defamatory and non-defamatory lies and do not permit public prosecution or private actions for non-defamatory lying. I do not suppose that any jurisdiction draws this distinction, however, on the basis of the proposition that non-defamatory lying, unlike defamatory lying, is critical to people's integrity and self-constitution. I do not mean to suggest that these jurisdictions lack good reasons for drawing the line at defamatory speech and not permitting public prosecutions or private actions for non-defamatory lies.²² A prudent concern to place more or less strict limits on the (highly abusible)

²¹ Where an attempt to enforce a moral duty would be self-defeating, one has a *conclusive* reason not to make the attempt. Consider the duty to repent of one's wrongdoing or the duty of someone who has been wronged to forgive the sincerely repentant wrongdoer. Given the nature of such duties, one cannot be coerced to fulfill them. If one is 'repenting' or 'forgiving' under the threat of coercion (or, for that matter, in the hope of reward) one is simply not repenting or forgiving. Moreover, any attempt to require repentance or forgiveness (by law or otherwise) is likely to do moral harm by, for example, encouraging the evils of hypocrisy and personal inauthenticity.

²² I am assuming here, of course, that no one has a moral claim right that the government forbid others from spreading non-defamatory lies about them, i.e. that the government has (only) a liberty not to forbid non-defamatory lying. This Hohfeldian relation is compatible with the separate Hohfeldian relation (which we can agree, I think, exists) in which everyone has moral claim right that others not spread even non-defamatory lies about them; that is, everyone has a moral duty not to spread such lies and no one has a liberty to spread them. This latter claim right, I am assuming, is not buttressed by the former claim right.

power of government to regulate speech, and, relatedly, a reasonable desire to ensure fairly robust public discussion of political, philosophical, aesthetic, and other cultural issues, might lead a wise legislator or constitution maker to conclude that the overall common good of the community is best served by tolerating non-defamatory lying. But someone can recognize compelling reasons for tolerating non-defamatory lying without supposing that people have any sort of strong moral right to spread non-defamatory lies.

Waldron's fear is that 'by limiting rights to actions that are morally permissible, we would impoverish the content of our theory of rights'.²³ He supposes that, in such circumstances, all that would be left for individual choice and action would be '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 side walk—these would be the sorts of actions left over for the morality of rights to concern ourselves with. But these are the actions which . . . would be the ones *least likely to be regarded as an appropriate subject matter for rights*. The areas of decision that we *normally* associate with rights would, on this account, be miles out of range. Because of the very importance that leads us to regard them as subject matter for rights, those areas of decision are bound to be of concern to the other deontological requirements of morality and thus are bound to be excluded from the area of moral indifference where rights are permitted their limited sway. In other words, if rights were confined to actions that were morally indifferent, actions on which the rest of morality had nothing to say, then rights would lose the link with the *importance* of certain individual decisions which, as we have seen, is crucial in their defense.²⁴

This argument, however, rests on a misconception. Moral considerations rule out certain options as eligible for choice; but—in virtually any area of human endeavor—they leave a wide range of possible options intact. Choice among these morally permissible options can be of tremendous human importance. Frequently we have reasons to perform two or more mutually exclusive actions but no conclusive moral reason to prefer one of these rationally grounded possibilities for choice to the others. In such

²³ Waldron, 'A Right to Do Wrong', 36.

²⁴ *Ibid.*

situations of choice, one may exercise the capacity for practical deliberation and judgment and make the sort of self-constituting choices that Waldron fears would be impossible were it not for a moral right to choose possibilities that are morally wrong.

Even under fairly rigorous understandings of the requirements of personal morality, the exclusion of many choices as immoral leaves open, in most circumstances, a more-than-sufficient range of choices among morally permissible options to fill up whole lifetimes with important self-constituting choice-making. People who adhere strictly to traditional Christian or Jewish moral precepts, for example, deliberate about and make choices among various morally permissible large-scale commitments through which they may realize and participate in a range of distinct and irreducible human goods. Having deliberated and chosen among these possibilities, they deliberate further, make additional prudential and other sorts of judgments, and choose among the diverse particular projects by which they could carry out their various large-scale commitments. Often, they will prefer a particular possibility for choice to other morally permissible possibilities precisely because a certain option best harmonizes with their past choices and with the distinctive personalities and characters that they have formed in part by their basic commitments and past choices. In choosing for the sake of this sort of coherence or integrity, they fashion their lives as integrated wholes and secure for themselves identities that are stable as well as distinctive.

In sum: in view of (1) the plurality of irreducible goods that provide basic reasons for action; (2) the multiplicity of possible large-scale commitments through which people realize and participate in these basic goods; and (3) the diversity of specific projects in which people concretely fulfill their commitments and instantiate these goods, it is plain that practical deliberation and judgment are required with respect to a host of humanly important, self-constituting, *morally permissible*, choices.

Galston has correctly identified the 'root' of Waldron's misconception:

Waldron tacitly equates the 'morally permissible' with the 'morally indifferent,' and moral indifference with the sphere in which morality 'has nothing to say.' But this interpretation is mistaken. To say that A and B are morally permissible is to assert that:

- (a) neither A nor B contravenes any duty
and
(b) the moral considerations that bear on our evaluation of A
and B are insufficient to render an unequivocal judgment
between them.

Thus, morality may well have a great deal to say about morally permissible alternatives, and they may well occupy spheres of considerable human importance. Moral permissibility rules out only a clear choice of a single most preferred alternative.²⁵

We can, I think, concede that certain important opportunities for integrity and self-constitution would be lost in a situation in which, despite the availability of a range of significant choices among morally permissible options, one had no opportunity ever to make an immoral choice. This concession does not, however, entail that there must be strong moral rights to perform immoral actions. Opportunities for immoral choice inhere in the human condition. They are, in a certain sense, ineradicable. They could be eliminated only by destroying the human capacity for free choice that is a condition for practical deliberation, judgment, and choice with respect to morally permissible possibilities. Moreover, as we have seen, there are often compelling reasons for tolerating certain injustices and other forms of immorality, despite the fact that no one has a strong moral right to commit these injustices or indulge in these other immoralities. We need not embrace the idea of a moral right to do moral wrong in any strong sense to ensure that people will have available to them valuable opportunities to test their moral mettle and (further) develop their moral character.

²⁵ Galston, 'On the Alleged Right to Do Wrong', 322.

Anti-Perfectionism and Autonomy

Rawls and Richards on Neutrality and the Harm Principle

I. Two Types of Liberalism

Many contemporary non-consequentialist liberal theorists argue that the legal enforcement of morality is inconsistent with a morally due regard for individual autonomy. Arguments from autonomy can be divided into two broad categories: *anti-perfectionist* arguments treat respect for autonomy as a non-axial ('deontological') principle of political morality which forbids governments from restricting people's liberties for the sake of making them morally better. *Perfectionist* arguments from autonomy, by contrast, treat autonomy as itself an intrinsic human good which governments should protect and promote, and for whose sake governments should refrain from employing coercion in encouraging people to lead morally worthy lives.

Anti-perfectionists maintain that governments are required in justice to remain neutral on controversial questions of what makes for, or detracts from, a morally good life, and that political authorities must, as a matter of political morality, refrain from acting on the basis of controversial beliefs about human well-being and flourishing.¹ They typically defend strict versions of the harm

¹ Joseph Raz distinguishes two forms of anti-perfectionism, both of which he subjects to searing criticism: one committed to neutrality and the other committed to the exclusion of ideals. Advocates of neutrality hold that governments must be even-handed in respect of actions which may encourage or discourage rival conceptions of the morally good life. Proponents of the exclusion of ideals maintain that political authorities must not treat the truth or falsity of a conception of the morally good life as a reason for action. As Raz observes, however, 'the distinction between neutrality and the exclusion of ideals is rarely drawn by the supporters of either' (*The Morality of Freedom* (Oxford: Clarendon Press, 1986), 108).

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