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DEFENDING THE RIGHT TO DO WRONG

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Are there moral rights to do moral wrong? A right to do wrong is a right that others not interfere with the right-holder's wrongdoing. It is a right against enforcement of duty, that is a right that others not interfere with one's violation of one's own obligations. The strongest reason for moral rights to do moral wrong is grounded in the value of personal autonomy. Having a measure of protected choice (that is a right) to do wrong is a condition for an autonomous life and for autonomous *moral* self-constitution. This view has its critics. Responding to these objections reveals that none refute the coherence of the concept of a 'moral right to do moral wrong.' At most, some objections successfully challenge the weight and frequency of the personal autonomy reasons for such rights. Autonomy-based moral rights to do moral wrong are therefore conceptually possible as well as, at least on occasion, actual.

I. INTRODUCTION

My concern here is with the concept of a '*moral* right to do *moral* wrong.' The dialectical stance of the article is defensive, trying to make a case for the normative grounds as well as for the coherence of the concept of a 'right to do wrong' in response to various objections raised against it. The article opens with an introduction of the concept of a 'right to do wrong,' exploring its meaning and arguing for its coherence. The article then turns to its primary concern, which is reflecting on the normative grounds of the right to do wrong. The primary question the article attempts to answer is that given that the idea of a right to do wrong is conceptually coherent, do such rights ever arise in morality. After introducing the best liberal justification for such rights – a justification grounded in the value of personal autonomy – and exploring and tentatively rejecting a competing

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justification – grounded in personal integrity – the article develops the idea of a liberal autonomy-based moral right to do moral wrong and assesses how this idea fares against objections raised in the literature.

II. A RIGHT TO DO WRONG

Having a right to do wrong entails that the right-holder has a claim on others against their interference with the right-holder's ϕ -ing regardless of whether or not the right-holder is permitted to ϕ (where ' ϕ ' stands for an active verb).¹ The idea of a right to do wrong assumes a view of rights as protected choice;² in the case of a right to do wrong the choice is between right and wrong. A right to do wrong protects the right-holder's wrongdoing from external interference,³ such that if a holder of a right to ϕ (who is also under a duty not to ϕ) chooses to ϕ , others are under a correlated duty not to interfere with the right-holder's ϕ -ing.

Examples of moral rights to do moral wrong that are common in the literature are one's moral rights not to offer easy rescue to those in danger, not to give money to charity, not to help a friend in need, to exercise one's moral right to free speech in order to insult others, and one's moral right to support a racist political party. All these examples assume a moral duty one nevertheless enjoys a moral right to violate. Late-term abortion is another example: some are of the opinion that late-term abortion – that is aborting after the fetus has become sentient – is morally wrong, but nevertheless are also of the opinion that women have the (moral) right to decide to undergo such an abortion without external interference.

Notice that while a right to do wrong must correspond to some duty in others, it need not necessarily correspond to the 'negative' duty of non-interference. Conceptually, a right may also correlate to 'positive' duties to facilitate, enable, and realize what one has a right to.⁴ The scope and nature ('positive' or 'negative') of actual rights

¹ William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), pp. 133-35.

² Edmundson, *id.* at 135.

³ Jeremy Waldron, "A Right to Do Wrong", *Ethics* 92(1) (1981): pp. 21-39, 29.

⁴ See Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), pp. 59-60; Alon Harel, "Theories of Rights", in Martin P. Golding and William A. Edmundson (eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Malden and Oxford: Blackwell Publishing, 2005), pp. 191-206, 192.

depend not on the concept of ‘right’ but on the norms giving rise to those rights. For example, the (moral) right to vote for a racist party is a right to do wrong which has corresponding ‘negative’ duties on others not to interfere with one’s voting – such as the duty not to block the right-holder’s access to the voting booth – as well as affirmative duties to facilitate the right-holder’s voting – such as the duty to provide the racist voter with a voting ballot. For reasons of economy, I will mainly use the ‘negative’ language of ‘non-interference.’

Conceptually, the idea of a right to do wrong is most interesting and puzzling in cases of a right of one kind to do a wrong of the *same* kind. How can there be a right (e.g., a moral right) to do what one is under a (moral) duty not to do? And moreover, if one is under a duty of one kind (e.g., moral) not to ϕ how can others owe one a duty (of the same kind, i.e., moral) not to interfere with one’s ϕ -ing? William Godwin aptly expressed the sense of perplexity surrounding the idea of a right to do wrong, writing that “[t]here cannot be a more absurd proposition than that which affirms the right of doing wrong.”⁵

This sense of perplexity is, nevertheless, easily dispelled. First, conceptually there is an analytical space for a right to do wrong. In Hohfeldian terms the presumed moral right to do moral wrong is best conceived of as a claim-right.⁶ A claim-right to ϕ entails a claim against interference by others with one’s ϕ -ing that corresponds to a duty in others not to interfere with one’s ϕ -ing. A privilege (or liberty) to ϕ entails a freedom to ϕ or, more accurately, having no duty not to ϕ . Normally claim-rights are accompanied by a privilege, so that if one has a claim-right to ϕ one is also privileged (or at liberty) to ϕ (or not to ϕ). For example, my right that others not censor my ideas is normally coupled with a privilege (or liberty) to express those ideas. Conceptually, however, it is possible to have a

⁵ William Godwin, “Enquiry Concerning Political Justice”, in K. Codell Carter (ed.) (Oxford: Clarendon Press, 1971), p. 88.

⁶ In Hohfeldian terms, as characterized here, the *moral* right to do wrong is best conceived of as a claim-right and not a liberty/privilege. This is so even though the right to do wrong is presented as a right to do something (ϕ), which appears to have the structure of a Hohfeldian privilege. The essence of the right to *do* wrong is that the right-holder is *not* privileged to ϕ yet has a claim on others (who have a corresponding duty) that they not interfere with the right-holder’s ϕ -ing. On this see Robert P. George, *Making Men Moral* (Oxford and New York: Oxford University Press, 1993), pp. 118-22.

claim-right to ϕ , such that others are under a correlative duty not to interfere with one's ϕ -ing, and still lack the liberty to ϕ (i.e., have a duty not to ϕ).⁷ The category of a claim-right without privilege opens the door for the possibility of a right to do wrong.⁸ In the example of late-term abortion these categories play out as follows: late-term abortion is presumably morally wrong so that women are not privileged to have them performed, although women do have a claim-right that others not interfere with their decision to undergo such a procedure.

Second, normatively the mere fact that someone is engaged in wrongdoing does not necessarily mandate or even permit others to interfere with one's wrongdoing.⁹ While the wrongness of one's actions is perhaps a reason for others to interfere, often other (weightier) reasons arise against such interference. Therefore, the fact that one's actions are wrongful does not necessarily entail that normatively one cannot have a right – the function of which is to forbid the interference of others – to perform them. And while not all reasons against interference need also be reasons for a *right* against such interference, some such reasons certainly may (reasons for a right are not merely reasons for a duty of non-interference with A 's ϕ -ing but also for A to hold a correlative claim against such interference).

Third, and perhaps most importantly, a right to do wrong does not bear on the rightness or wrongness of the actions the right-holder is free to perform; it only bars others from interfering with such actions. Thus, while rights to do wrong give others reason not to interfere with

⁷ See Matthew H. Kramer, "Rights Without Trimmings", in Matthew H. Kramer, N.E. Simmonds & Hillel Steiner, *A Debate Over Rights* (Oxford and New York: Clarendon Press, 1998), p. 15; Edmundson, *supra* note 1, at 94, 135. For a strongly related position see Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), pp. 222-25.

⁸ Notice that this Hohfeldian account of the logic and normative structure of rights to do wrong is an explication of the Hohfeldian categories. It is not an account of Hohfeld's views on the coherence of the category of a 'right to do wrong.' The argument here is that the Hohfeldian building blocks allow for the category of a 'right to do wrong.' This position is indifferent as to whether or not the category of a 'right to do wrong' ever occurred to Hohfeld himself or whether or not he considered the category coherent.

⁹ Waldron, *supra* note 3, at 28-31.

the right-holder's wrongdoing, they do not give reason for the right-holder herself to do (or not to do) wrong. It is the essence of the right to do wrong that what the right-holder is protected to do is not necessarily the right thing to do. One should avoid the impulse to associate a right to do ϕ with the rightness of ϕ -ing as well as to equate the reasons for a right to ϕ with the reasons for ϕ -ing.¹⁰ What one should keep in mind is that rights matter most in protecting the interests and choices of right-holders from external interference, and not in validating or justifying those interests and choices. The main function of rights (certainly liberal rights) is, in other words, to protect the interests of right-holders and to assure individuals a realm of protected choice and a measure of freedom.¹¹

Finally, notice that although I often refer to 'a right to do wrong' I do not mean to refer to a pervasive right to do any and all wrong. Such a moral right is *prima facie* implausible. It is likely that morality does not afford a right to do, for example, particularly egregious wrongs.

¹⁰ If I follow his reasoning correctly, Gerhard Øverland's recent critique of the concept of a 'right to do wrong' does just that: conflates reasons for a right with reasons for how to exercise the right. Gerhard Øverland, "The Right to Do Wrong", *Law and Philosophy* 26(4) (2007): pp. 377-404, 385-89. Øverland concludes that there *can be no* right to do wrong. Because where the reasons in favor of a right protecting A's ϕ -ing are sufficiently strong to overcome the competing reasons against the right, Øverland believes that it is also the case that due to the same weighing of reasons there is no longer any wrong for there to be a right to do. In other words, if there are weighty enough moral reasons to allow A to ϕ without interference then it follows that A's ϕ -ing is not wrongful, because there are overriding moral reasons for allowing A to ϕ . Yet, as just explained, a reason for a right protecting one's ϕ -ing is not necessarily also a reason for exercising that right in any specific way. That is, such a reason is not a reason to ϕ , but merely a reason that one have the protected *choice* to ϕ .

¹¹ David Enoch has offered a compelling proof of the conceptual coherence of the right to do wrong, or as he calls it, "a right to violate one's duty." In broad terms, what Enoch demonstrates is that the assumption that there is never a right to do wrong yields substantive results to rights theory under all three leading theories of rights: Hohfeldian, Will Theory, and Interest Theory. That this assumption has substantive results for rights entails that the assumption – that there is no right to do wrong – is not a conceptual truth, but a matter of substantive morality. If it were conceptually true that there is never a right to do wrong, then assuming it would yield purely conceptual results to a theory of rights and not any substantive normative results. If a substantive result follows from a certain proposition, it follows that that proposition is not a conceptual truth. Therefore, a right to do wrong is conceptually possible. David Enoch, "A Right to Violate One's Duty", *Law and Philosophy* 21(4/5) (2002): pp. 367-78, 361.

There is, however, more to morality than the great wrongs of the world. In fact, the chief habitat of morality is in the contours of everyday life, in which rights to do wrong are probably the most pervasive. The question then is whether, and if so when, do people hold a moral right to do *some* moral wrong.

III. THE LIBERAL GROUNDS OF A MORAL RIGHT TO DO MORAL WRONG

Given that a right to do wrong is conceptually coherent, what sort of reasons are there for the actuality of such rights? First, as explained above, such reasons are reasons for barring others from interfering with wrongdoing, or, in other words, reasons against the enforcement of duty. Second, where a set of reasons gives rise to a right to do wrong *some* such reasons must somehow be *for* the right-holder. A right to do wrong may *also* arise from reasons external to the interests or liberty of the right-holder. Yet, no right can arise from purely external reasons. The claim that “[t]here might be rights to do wrong, which are not for the sake of the wrongdoer”¹² contradicts, I think, an essential feature of rights: that they are *for* the right-holder. This, I believe, is the case under both leading theories on what rights are for.

Under the Interest (or Benefit) Theory of rights, rights are for the well-being of the right-holder.¹³ While the justification of a right need not *solely* rely on the significance the protected interests of the right-holder have for him or her, *some* of the reasons for the right must be situated in the well-being of the right-holder.¹⁴ Where the reasons against interference are not in any way for or supportive of the wrongdoer’s well-being, the wrongdoer may be free to do wrong

¹² Øverland, *supra* note 10, at 379.

¹³ The Interest Theory of rights views rights as protectors of right-holders’ interests or well-being. See Harel, *supra* note 4, at p. 195; Edmundson, *supra* note 1, at pp. 120-22.

¹⁴ Joseph Raz, *Ethics in the Public Domain* (Oxford and New York: Oxford University Press, 1994), pp. 149-51. Obviously often the importance of one’s right is much greater than the importance, for the right-holder, of the particular interest of the right-holder that is protected by the right. Consider the following example: imagine two people with an equal interest in having a particular shirt. It is clear that the one who legally owns the shirt should have a right to it. But as their interest gives them equal claim to the shirt, this can only be because the right-holder’s ownership of the shirt is a reason for giving it to him that is greater than his interest in the shirt. His (moral) right to the shirt does not, therefore, merely reflect his interest in the shirt, but adds to it an additional independent reason based on the importance of protecting *legal* property rights.

in the sense that there is a duty on others not to interfere, yet under such circumstances the wrongdoer's freedom to do wrong would not derive from *her right* to such freedom.

According to the Choice (or Will) Theory of rights, rights are for the right-holder in that they are protective of her freedom or autonomy.¹⁵ In a sense, the Choice Theory is a sub-category of the Interest Theory.¹⁶ Under a Choice Theory of rights reasons against interference with wrongdoing only establish a right of the wrongdoer against such interference if those reasons justify giving the wrongdoer the power or discretion to decide whether to enforce the right or to relinquish it and consent to the interference.¹⁷ Under the Choice Theory a normative constellation not exhibiting such an empowering and protection of the would-be right-holder's freedom and autonomy simply does not comprise a right. Where the reasons for non-interference are purely external to the wrongdoer – not for giving the wrongdoer any control over others' duty of non-interference – they may provide for the side-effect of freedom to wrong with impunity, but such reasons do not grant the wrongdoer *the right* to do wrong with impunity.

A. Personal Autonomy

The most promising ideal taken as a reason for a right to do wrong – in the sense of how such rights are *for* the right-holder – is grounded in the value of personal autonomy.¹⁸ And it is the view I develop and defend here. The liberal ideal of personal autonomy is that

¹⁵ According to the Will (or Choice) Theory of rights, rights protect the right-holder's exercise of choice, inherently concerned with the right-holder's freedom and autonomy. See Harel, *supra* note 4, at pp. 194-95; Edmundson, *supra* note 1, at 119-20, 122-32.

¹⁶ See Raz, *supra* note 14, at 149-50 n. 10; Edmundson, *supra* note 1, at 127.

¹⁷ Edmundson, *supra* note 1, at 144; Leif Wenar, "The Nature of Rights", *Philosophy and Public Affairs* 33(3) (2005): pp. 223-52, 238.

¹⁸ In his 1981 essay on the right to do wrong Waldron refers to "personal integrity" and not to 'autonomy' as the source of the significance of the right to do wrong. Yet, much in Waldron's argument seems nevertheless better aligned with the idea of autonomy. *Supra* note 3, at 34-5. Moreover, in a short piece from 1983 Waldron explicitly refers to "autonomy" as the grounding value of his conception of a right to do wrong. Jeremy Waldron, "Galston on Rights", *Ethics* (93)(2) (1983): pp. 325-37, 326. David Enoch also endorses the autonomy-based account of a right to do wrong. Enoch, *supra* note 11, at 379-80.

individuals possess a measure of self-governance and self-determination over their lives and identity. As Joseph Raz puts it,

[t]he ruling idea behind the idea of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. 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.¹⁹

And,

[a]utonomy means that a good life is a life of free creation.²⁰

Gerald Dworkin's formulation is also illuminating:

autonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.²¹

In short, autonomy is self-sovereignty, self-constitution, self-formation, self-definition, and self-determination of one's life and identity.²²

Certain actions and decisions individuals make are self-defining or self-constituting in this sense. Self-defining choices may maintain or steer a person's life in a certain direction or put it on a particular trajectory. Moreover, such choices are formative of 'who one is' in that through them one defines or determines aspects and attributes of him- or herself, which are central to one's identity. The liberal tradition has identified a number of typical realms of choice that are often particularly important for personal autonomy and self-constitution. These include choices of political affiliation and activity, intimate relations, public expression of opinion, association,

¹⁹ Joseph Raz, *The Morality of Freedom* (Oxford and New York: Clarendon Press, 1986), p. 369.

²⁰ *Id.*, at 412.

²¹ Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 20.

²² In what follows I use these terms interchangeably with 'autonomy.'

commitments, values, occupation, and life-projects.²³ Now of course no single choice is determinate of one's autonomy, but these are the type of choices and realm of choices in which freedom of choice is typically considered crucial for an autonomous life. There are certainly others.

According to liberal morality those aspects of people's lives, which are often partially determinative of 'who one is,' are uniquely valuable (or of disvalue) when freely chosen, because as such they contribute to an autonomous life. Thus, all other things being equal, even if valuable in and of themselves, where values, virtues, commitments, affiliations, life-projects, etc. are externally imposed, lesser value is generated than when freely chosen. Moreover, many such values are, by their own lights, only valuable if engaged in autonomously. In instances involving self-constituting *moral* choices there is a significant difference in value between doing right out of choice and doing right out of coercion, compulsion, or the deterring effect of expected sanction. Accordingly, liberal rights arise to assure that these various identity-forming attributes, be they attachments, associations, personal relations, values, political actions, public expressions, moral character and so on are freely chosen and formed, at least to a degree. As such, the moral ground for liberal rights is instrumental: they are rights in the service of personal autonomy, requiring that individuals have sufficient freedom of choice, both in kind and in number, between self-constituting options.

Still, how does the value of autonomy ground a right to make morally *wrongful* choices? This question appears to persist even having accepted that autonomy mandates a sufficient measure of freedom to choose from various options that are significantly related to individuals' steering of the course of their own lives and to the formation of their own identity. The most appealing answer is that without a right to do wrong individuals would not have sufficient 'breathing room' to autonomously determine 'who they are.' Self-forming choices are often value-laden, and values often evoke moral issues. A person's freedom to make *morally* sensitive choices, which are often among the choices that matter most for self-constitution, is essential to any rich and meaningful autonomous self-formation. And, the argument goes, having a right to choose wrongfully is a condition for having the autonomy over such morally saturated issues

²³ See e.g., Waldron, *supra* note 3, at 34-35.

and aspects of life or, more generally, it is a condition for an autonomous life. As such, the right to do wrong is a liberal right.

This conception of the liberal right to do wrong has been subjected to forceful criticism. Explaining and developing these critiques and attempting to assess how the liberal right to do wrong fares in relation to them is the focus of Section IV. But before turning to assessing and defending the autonomy argument for rights to do wrong, we must assess the viability of a competing value for the normative grounds of such rights.

B. Personal Integrity

Some view personal integrity as the primary value giving reason for rights to do wrong. One proponent of this position is Robert George.²⁴ Jeremy Waldron too refers to “personal integrity” as the value furthered by a right to do wrong.²⁵ Following John Finnis, George appears to view the value of personal integrity as the ideal of having a coherent and harmonious identity and sense of self.²⁶ According to this position it is people’s interest in integrity that requires affording individuals the protected choice to act in furtherance of their integrity, even if doing so may require wrongdoing.

I however doubt whether, as a conceptual matter, personal integrity – as just described – can function as a reason for a right that has the structure of a protected choice, such as the right to do wrong. As explained above, a reason for a right to do wrong is not a reason to do wrong but rather a reason for having a protected choice to do wrong. An integrity reason for a right to do wrong therefore must have the form of a reason for having *the protected choice* (i.e., a right) to do evil as one’s integrity mandates. I do not believe that personal integrity functions as such a reason.

²⁴ George, *supra* note 6, at 124-25.

²⁵ Yet, as explained above, although his position is not entirely clear much in Waldron’s discussion of personal integrity is actually in line with the ideal of autonomy. See *supra* note 18. Andrew Cohen also appears to count integrity among the grounds of the right to do wrong. Andrew I. Cohen, “Virtues, Opportunities, and the Right to Do Wrong”, *Journal of Social Philosophy* 28(2) (1997): pp. 43-55.

²⁶ George, *supra* note 6, at p. 24. For Finnis, integrity is an aspect of the more general basic value of what he calls “practical-reasonableness.” John Finnis, *Natural Rights and Natural Law* (Oxford: Clarendon Press, 1980), pp. 88-9.

Consider the following example. A person is said to hold a right to (wrongfully) side with a bigoted cause because the values the cause stands for are imbedded in that person's beliefs, values, religion, personal history, core communal attachments, and social commitments, and because failing to side with the bigoted cause would greatly erode and clash with those core aspects of that person's identity. The presumed reason for this person holding a right to side with bigotry without interference is that were the person prevented from taking this stance, perverse as it may be, it would result in a substantial detriment to his or her identity and sense of self. That is, it would erode this person's integrity. In the cases in which the reasons for acting in furtherance of one's integrity prevail over competing reasons for action, what I suspect we will find is that the wrongness of one's presumed wrongdoing in siding with a bigoted cause is *outweighed* by the severity of the damage to one's integrity (for example, some deep crisis in one's deeply held religious beliefs were one prevented from acting as one's integrity mandates). The point being that the reason not to interfere with the bigot's conduct is that under the circumstances he is, all things considered, doing as value requires. Where the presumed disvalue found in the loss of integrity is greater than the disvalue of acting in furtherance of other values, one should act in furtherance of integrity. And, following the same value calculus and assuming away external reasons for interference, others should not interfere with the agent's actions in furtherance of his or her integrity.

If true, this points to a deep conceptual problem with grounding rights to do wrong in the value of personal integrity. Namely, integrity seems unable to justify a right to do *wrong*. Integrity appears to function as a reason for an action and not as a reason for a *right to choose* that action. Because if the integrity reasons for ϕ -ing outweigh the reasons against ϕ -ing there are conclusive reasons to ϕ as well as (excluding, in favor of simplification, any external reasons) not to interfere with one's *justified* ϕ -ing. ϕ -ing under these circumstances is *not* wrongful but justified. So while integrity gives reason to ϕ and for non-interference with one's ϕ -ing it does not give reason for a right to do *wrong*, because when such reasons prevail ϕ -ing appears justified.

Moreover, following this line of reasoning it is not clear to me whether personal integrity is indeed at all a reason for a *right* to do ϕ (regardless of the question of whether or not ϕ -ing is a wrong). As already explained, a reason for a *right* to ϕ is not a reason to ϕ but

rather a reason for affording the right-holder, through non-interference, the freedom to ϕ or not to ϕ as she chooses. Preserving and furthering one's integrity through one's own actions does not necessarily require that one *freely choose* those actions. Rather, it simply requires that one act in furtherance of one's own integrity. Where ϕ -ing is crucial for one's integrity, integrity is a reason for ϕ -ing that suggests some goodness in ϕ -ing as well as a reason for others not to interfere with one's ϕ -ing, but it is not necessarily a reason for giving one the *right* to ϕ . The right to ϕ is the right to choose without interference whether to ϕ or not to ϕ . And, it is not clear to me why one's integrity-interests in ϕ -ing would function as a reason for allowing one to *choose* not only to ϕ but also not to ϕ , especially where not ϕ -ing is detrimental to one's integrity. Integrity, as defined above, does not mandate choice and autonomy,²⁷ and therefore where one's integrity is a reason for one to ϕ and that others not interfere with one's ϕ -ing it is not a reason that one have the choice to ϕ (and by extension not to ϕ) and that others not interfere with one's not ϕ -ing. In other words, integrity may be a reason to ϕ but it is not a reason for a *right* to ϕ .²⁸

Notice that this refutation of the integrity account (as defined above) of moral rights to do moral wrong is not applicable against the autonomy account for such rights. Autonomy reasons are reasons for affording the agent (of whom it is the autonomy of) a right to *choose* how to act. In contrast, as just explained, integrity reasons give the agent (of whom it is the integrity of) reasons for how to act. Autonomy reasons are reasons for others not to infringe on the freedom of the person it is the autonomy of. Such reasons do not bear on how one should exercise the protected freedom of choice one has, but only that one should hold a right to make such choices freely. In contrast, as we just saw, integrity reasons give reason for action not only to others (not to setback and/or further one's integrity) but also to the person it is the integrity of. Integrity reasons are reasons for one to act as one's integrity mandates.

²⁷ Autonomy, in contrast, may require a measure of integrity. See Raz, *supra* note 19, at 381-85.

²⁸ I see one exception to my position. Where ϕ -ing is a condition for preserving personal integrity, reasons of integrity may support a right to ϕ where such a right is *practically* the best path to assure that one actually ϕ s. In such cases integrity gives instrumental reasons for a right to ϕ . This is unlike the autonomy-justification for a right to ϕ where the interest in having a choice directly grounds the right.

Relatedly, unlike integrity reasons, autonomy reasons for a protected choice to ϕ are not reasons that bear on the rightness or wrongness of ϕ -ing. Thus, where autonomy reasons prevail in giving rise to a right to ϕ it does not necessarily follow that ϕ -ing is morally right. Which is why autonomy reasons can give rise to a right to do *wrong*. In contrast, as we saw above, where integrity reasons for allowing one to ϕ prevail over competing reasons it follows that ϕ -ing is justified, which is why such reasons cannot give rise to a right to do *wrong*.

IV. ASSESSING THE RIGHT TO DO WRONG: HOW MUCH CHOICE IS REQUIRED?

A. *The Demands of Autonomy*

Having laid out the conceptual and normative foundations of a liberal autonomy-based right to do wrong, I now turn to assessing whether this right survives the objections raised against it in the literature. My focus here is on defending and assessing the viability of the normative liberal grounds for rights to do wrong.

Must individuals have rights to violate their moral duties in order to have a *sufficient* array of morally permissible self-constituting choices to satisfy the demands of autonomy? Another way of putting the issue is to ask whether the range and scope of the self-constitutive choices individuals presumably have – even in the absence of rights to do wrong – satisfy the demands of personal autonomy?

Waldron's position suggests that they do not.²⁹ Waldron explains that characteristically the spectrum of choice open to individuals comprises options that are (a) morally called for, (b) subject to moral criticism, and (c) options to which morality is indifferent.³⁰ According to Waldron, in the absence of a right to do wrong rights would only protect choice between morally permissible options, which would result in rights protecting only morally permissible choices. This would result in individuals having no morally protected freedom of choice in matters touching on morality. Because, according to Waldron, in a universe without rights to do wrong, whenever faced with a set of morally permissible choices, one choice – the one morally called for – would dominate all other choices, in effect making all other options morally impermissible and leaving

²⁹ Waldron, *supra* note 3, at 31-7.

³⁰ For purposes of simplification Waldron brackets supererogatory options.

individuals with no course of action but for the morally dominating option, effectively affording individuals no choice at all. In such a universe freedom of choice would only persist where the possible options do not involve morality (so that no one choice can come to morally dominate all others). The worry is that considering the unique significance and centrality moral issues play in people's lives, personal autonomy cannot flourish where people lack any freedom of choice in such matters.

William Galston and George are critical of Waldron's argument.³¹ According to them having a set of options that are undominated (i.e., none are morally inferior) yet still all morally permissible is a common feature of morality. Accordingly, Waldron is naïve to think that there is typically a morally called for option that therefore dominates *all* other options. Galston and George seem to believe that the realm of what is morally permissible normally contains an array of options that are in some sense incommensurate, incomparable, or are equally good (the latter would be cases of 'ties at the top'). For example, individuals may choose between different and even contradicting morally permissible yet mutually incomparable, undominated, and unranked (in order of moral priority) religious paths, political forms of activism, commitments, attachments, personal relationships, social affiliations, professions, forms of life etc. Rights that are protective of such vast arrays of options assure individuals a wide range of self-constituting sets of choices, providing for conditions that easily satisfy the demands of personal autonomy.

Much here turns on whether one recognizes the pervasiveness of incommensurability and incomparability in people's potential options. My sentiments are with those who view incommensurability or incomparability as a significant aspect of life and of the nature of value.³² Yet this is a contested position.³³ Accordingly, assuming such pervasive incommensurability or incomparability, there is reason

³¹ William A. Galston, "On the Alleged Right to Do Wrong: A Response to Waldron", *Ethics* 93(2) (1983): pp. 320-24, at 321-23; George, *supra* note 6, at 126-28.

³² See e.g., Raz, *supra* note 19, at 321-68; Joseph Raz, "Incommensurability and Agency," in R. Chang (ed.), *Incommensurability, Incomparability, and Practical Reason* (Cambridge M.A. and London: Harvard University Press, 1997), pp. 110-28.

³³ For a compelling argument and a critical survey of different views favoring the position that incomparability is a common feature of value, see Ruth Chang, "Introduction," in *Incommensurability, Incomparability, and Practical Reason*, *Id.*, at 1-34.

to think that morality provides individuals with a sufficiently rich plethora of choices to satisfy the demands of autonomy without allowing right-holders to choose to do wrong.

Are these self-constituting choices, which individuals presumably may have even in the absence of rights to do wrong, indeed enough? Clearly, all other things being equal, a world with a right to do wrong offers individuals more options than a world without such a right, the rich array of choices Galston and George argue for notwithstanding. But this observation does not entail that the autonomy argument for a right to do wrong necessarily survives its critics.

It seems sensible to postulate that there is a threshold beyond which having more choice adds little to nothing to individual autonomy. More choice does not, in other words, always entail more autonomy. In fact, at times more choice is too much choice, adversely affecting individuals' freedom³⁴ and ability to deliberate and choose rationally in ways that foster autonomy.³⁵ It seems reasonable to argue that even prior to reaching this threshold of saturation in terms of a number or complexity of choices, the weight of the demands of personal autonomy decreases with the growth in the number and variety of self-constituting choices people have. The autonomy reasons for a right to do wrong are weightier in relation to assuring individuals few self-constituting choices than they are in relation to assuring that individuals have more such choices. And the crux of Galston and George's position is that individuals have a wide range of important choices even without a right to do wrong. For example, George points out that even within highly restrictive worldviews on personal morality, such as traditional forms of Christianity or Judaism, people are still left with a range of morally permitted options that are enough to fill a whole lifetime with self-constituting choices.³⁶

Whether or not autonomy calls for a right to do wrong depends on various contingent circumstances determinative of both the type (different aspects of self-constitution may require different types of choices) and range (how much choice one has of each type) of self-

³⁴ See Dworkin, *supra* note 21, at 62-84.

³⁵ For a well-known empirical account of the debilitating effects of too many choices in the context of consumerism, see Barry Schwartz, *The Paradox of Choice, Why More is Less* (Harper-Collins, 2004).

³⁶ George, *supra* note 6, at 127.

constituting choices individuals happen to have. And, factual circumstances may vary with time and place and between individuals. Under some circumstances the autonomy argument may ground certain rights to do wrong and in other circumstances, in which circumstances allow for a range of morally permissible options sufficient for meaningful self-constitution, autonomy reasons lack sufficient weight to ground such rights.

While powerful, Galston and George's counter to the autonomy argument is therefore not a knockdown argument. Whether or not a certain person has a right to perform a certain wrong largely depends on the contingent circumstances. It is hard to demonstrate that a sufficient range or choice – both in number and type – always exists. Yet, if what the value of autonomy calls for is a wide range of paths and forms of life to choose from, it seems that at least in some social circumstances (although not in all) people can do without rights to do wrong, at least in relation to some aspects of their lives.

B. Autonomy as Moral Self-Constitution

But there are autonomy reasons for a right to do wrong that the various morally permissible choices Galston and George point to cannot satisfy, *categorically*. Having a right to *choose to do wrong* contributes uniquely to personal autonomy through its contribution to *moral* self-constitution. A central aspect of self-constitution turns on autonomously determining the nature of one's *moral* self: whether – in relation to the various aspects of morality – one is virtuous or wicked, good or evil, moral or immoral. Such moral self-constitution is only possible if one is afforded the freedom to make morally *wrong* choices. Simplistically put, being good is only a meaningful or autonomous choice – in terms of the *self*-constitution of one's moral self – if one has some freedom to choose to be bad. The autonomous self-development of an integral moral (or immoral) identity mandates therefore allowing a measure of choice between good and evil, right and wrong, virtue and vice.³⁷ It calls, in other words, for a right to do (at least some) wrong. Rights that only protect choices spanning between the paths of the saint (the supererogatory), the righteous (the moral person), and the mere 'good egg' (the non-evil person) fall short of securing the range of choice required for *moral* self-constitution. To put the idea crudely and running the risk of sounding like a televangelist, in order to truly constitute oneself as morally

³⁷ For a similar line of reasoning see Cohen, *supra* note 25, at 46-7.

good, individuals must be allowed some opportunity to choose to become bad, which requires having a choice to do (at least some) wrong. For example, accepting that charity is morally right and that there is a moral duty to show a measure of charity, had one lacked the right to violate this duty one could become a charitable person, but could one truly *self-constitute* oneself as a charitable person?

Note that moral self-constitution requires a range of moral choices that are, to a degree, recurring. No single choice or even type of choice between a wrongful option and a moral option is determinative in forming one into a moral or a wicked person. Also, one may be moral in some respects in relation to certain issues and not to others. And, different choices may contribute to forming such different aspects of one's moral nature. Moreover, there is a cumulative aspect to choices that form one's moral makeup. How one faces a single moral dilemma does not determine one's moral self. In addition, an individual's moral character may change and fluctuate throughout life, requiring one to reaffirm or restore one's moral character. Thus, a measure of various wrongful choices is needed throughout one's life to assure the opportunity for moral self-constitution.

Still, one should avoid overstating the point. Although having more than a single choice between good and evil is required for moral autonomy, there is a threshold of moral choice beyond which having a greater number of choices makes little difference to moral self-constitution. In addition, clearly one need not have a choice to do all types of wrongs in order to have sufficient range of moral choices for moral self-constitution. Finally, one's autonomy interests in a right to do wrong are most likely never weighty enough to justify a right to highly egregious wrongdoing.

George argues that even assuming individuals indeed have a genuinely unique autonomy-driven interest in a freedom to choose to do wrong, such an interest does not give rise to a *right* to do wrong. According to him even without a right to do wrong individuals normally enjoy sufficient opportunities to choose evil over virtue *without interference*.³⁸ George does not offer an example, yet one possible scenario is that occasionally others are under a duty not to interfere with one's wrongdoing, where the duty is sufficiently supported by reasons wholly unrelated to one's interests in having the freedom to do wrong. Morality here may prescribe sufficient freedom

³⁸ George, *supra* note 6, at 128.

to choose wrong even without providing for a right to do so. For example, even assuming that lying is morally wrong, the moral and administrative costs of enforcing a ban on lying would be morally prohibitive. The moral reasons prohibiting such a ban may have nothing to do with people's interests in lying, yet will of course have the effect of offering a measure of freedom, even if not a right, to lie.

A related argument against the right to do wrong is that even without a duty of non-interference with other people's wrongdoing many choices to do wrong would go unchecked and even unnoticed. And, again, where individuals enjoy a sufficient degree of freedom to do wrong, the reasons from moral autonomy for a right to do wrong are satisfied or are at least diminished, becoming too weak to support a right to do wrong. A position George advocates and that Joseph Raz may be interpreted to hold.³⁹

It is, however, worth noticing that such a *de facto* freedom to do wrong may offer less in terms of furthering personal autonomy than a right to do wrong. One has *de facto* freedom to do wrong where others are under a duty not to so interfere with one's wrongdoing or even when others, who may be permitted and even obligated to interfere, just happen not to. Yet such duty or factual lack of interference do not provide for the same measure of freedom to do wrong as does a *right* against such interference. The cutting edge of the right to do wrong is that it gives the right-holder a moral claim to enforce the duty of non-interference on others. Autonomy has a subjective component to it, by which I mean to point out that in order to be autonomous people must believe and, in some sense, feel that they are autonomous. Lacking a right to violate their duty, it is not unlikely that some individuals will be nevertheless reticent to consider violating the duty or will not *feel* free to do so even if enjoying a *de facto* freedom to violate their duty. As is demonstrated in the numerous instances of people invoking their rights to ϕ against allegations of their wrongdoing through ϕ -ing, rights often have a strong liberating and insulating (even if not justifying) effect. Having a right tends to assure individuals some measure of empowerment to ignore the judgment of others and to feel that the choice of whether or not to do wrong really is subject to their own judgment. The feeling of freedom is partially determinate of freedom, and what people feel is not purely determined by reason. Rights of course do not always have such empowering psychological effects, but when they do I

³⁹ George, *id.*; Raz, *supra* note 19, at 380-81.

believe that they offer a sense of freedom that is hospitable for personal autonomy to a degree that is less found in circumstances of a mere *de facto* freedom. Moreover, there are also epistemological factors at play here. Individuals enjoying a *de facto* freedom to do wrong are not necessarily aware of it or of its extent and reliability, and may therefore still fear reprisal. Thus, if the freedom to choose wrong uniquely fosters moral self-constitution, then mere opportunity to do wrong, as opposed to a *right* to do wrong, may not always suffice to realize the autonomy-based value of moral self-constitution.

Once again, therefore, whether or not the demands of personal autonomy are weighty enough to give rise to a right to do wrong depends on factual circumstances and not on analysis. Perhaps ironically it seems that the more efficient one's environment is in terms of imposing morality and moral character, the fewer opportunities to *choose* to do wrong one has and the more weighty the autonomy reasons for a right to do wrong become. Moreover, as claimed above, different types of choices to do wrong may contribute differently to one's moral self, which, depending on variations in the social enforcement of such duties, may suggest having a right to do certain wrongs and not others.

C. *The Value of Autonomous Wrongdoing*

The argument I just endorsed based on the importance rights to do wrong have for moral self-constitution faces another objection, based on the presumed disvalue of autonomous wrongdoing. Yet, although formidable, I believe this objection is surmountable.

George claims that autonomy does not ground a right to do wrong because, and here he relies on Raz, "autonomy is valuable only if exercised in pursuit of the good."⁴⁰ For Raz, it seems that there is actually more disvalue in choosing or acting badly where the choice or action involves higher degrees of autonomy.⁴¹ Wrongdoing that is not autonomous is somehow less bad. I concur. Raz does not directly discuss the issue of a *right* to do wrong, but the presumed Razian objection to the right to do wrong is that if what grounds the right is the value of autonomy and accepting that autonomous pursuit of the bad is, at best, valueless, it appears that the right to do wrong has no

⁴⁰ George, *supra* note 6, at 124 n. 20, quoting Raz, *id.*, at 381.

⁴¹ Raz, *id.*, at 380, 412.

normative legs to stand on.⁴² If autonomy embodied in or achieved through exercising the right to do wrong is indeed valueless – or even of a disvalue – what then is the point of such a right? Autonomy does not, according to Raz, justify wrongdoing and therefore, it seems to follow, autonomy cannot justify a right to do wrong. Thus, the objection appears to lead to concluding that the value of personal autonomy may only ground a right to do what is morally permitted.

One partial response to this objection is to point out that autonomous wrongdoing may further good in the long run. Doing wrong and later coming to regret it and learning from one's errors is not an unfamiliar path towards moral self-constitution.⁴³ Thus, there is a benefit in terms of moral self-constitution to giving individuals the freedom to do wrong as a way of setting the conditions for subsequent contrition and as a step in self-directed moral development. Naturally even where such benefits to moral self-constitution justify rights to do certain wrongs, they obviously do not justify a right to do all wrongs. For example, the benefits that murder had for Raskolnikov's moral development hardly afforded him the right to kill the pawnbroker.

Second, and more importantly, the objection does not rule out the value a right to do wrong holds as a *condition* for moral self-constitution. As Raz points out, the fact that one *autonomously* engages in wrongdoing adds no value to one's valueless conduct or choice. In fact, Raz believes that "autonomously choosing the bad makes one's life worse than a comparable non-autonomous life."⁴⁴ In contrast, autonomously pursuing good *is* of value. In allowing for a choice to pursue the bad, the right to do wrong allows for the *conditions* of exercising autonomy in the pursuit of the good. It is of course often possible to pursue good autonomously even without the freedom to do wrong, because one may autonomously choose between all morally valuable options. Yet, what the right to do wrong assures is that in choosing an option that is good one is also, more broadly, choosing good over bad. And a choice to do good deriving from a deliberation between good and evil potentially contributes to one's moral self-constitution *as a moral person*. It is that exercise of autonomy – manifested in choosing good over evil – that the right to do wrong enables. The liberal right to do wrong does not, therefore, derive from the self-constituting value of autonomous *wrongdoing*,

⁴² *Id.*, at 411-12.

⁴³ For a similar position see Cohen *supra* note 25, at 53.

⁴⁴ *Id.*, at 412.

but from the fact that the self-constituting value found in freely pursuing The Good (as opposed to *a* good) is only morally permissible if one is free to pursue The Bad. Put slightly differently, the value of the right to do wrong is in enabling or in setting the conditions for the self-constituting value of freely choosing the good, which requires a right to freely choose the bad. If one had no option to choose evil one's choosing of the moral would not involve autonomous moral self-constitution *as a moral person* because one would have no alternative but to choose options that are morally permitted.

There is, nevertheless, a second Razian hurdle to contend with. Raz's position is that choosing an option that is morally good over one that is morally bad does not involve an exercise of autonomy at all,⁴⁵ even if one is in a sense free to choose the evil option. According to Raz an exercise of autonomy mandates a choice between at least two options that are *both* good (or, presumably at least, morally permissible).⁴⁶ Accordingly, a choice that does not admit several *moral* options but only a choice between a moral and an immoral option is not autonomous.⁴⁷ Raz's reasoning is that when faced with a choice between a good and an evil a person's choice of the good is in a sense coerced and, therefore, is not autonomous. As Raz puts it, a person faced with a choice between good and evil is coerced because "[i]f he is to be moral then he has no choice, just as the person struggling for physical survival has no choice if he is to stay alive."⁴⁸ When an agent is faced with a choice that in effect challenges what Raz calls the agent's "moral survival," the choosing of the good is not autonomous because what other choice can one really make?

I believe that Raz's reasoning undoubtedly captures cases of coercion. An agent really is faced with only one viable or acceptable option if all other options challenge one or more of the agent's basic tenets, deep beliefs, values, commitments, attachments, physical survival, morality, or religious convictions. What I have in mind are cases in which a person's integrity or mere existence is so severely

⁴⁵ *Id.*, at 378-80.

⁴⁶ *Id.*

⁴⁷ It appears that for Raz if a choice is between valueless options that are not evil – i.e., morally permitted but with no value – choosing would involve genuine exercise of autonomy that is, nevertheless, valueless.

⁴⁸ Raz, *supra* note 19, at 380.

endangered by a certain course of action that the person is compelled to choose any other available alternative. Thus, while the person under such circumstances is seemingly given a choice in the sense that he is not subject to any external force blocking him from choosing, the person's liberty is in a sense 'internally' blocked. For example, was Thomas More autonomous in choosing between the gallows and his religious beliefs? I think not. More's martyrdom is that he was coerced to choose death and not that he autonomously chose it, because for More the only alternative path to death – defying the Catholic Church – was, in a sense, impossible for him to take. Had More acquiesced, he would no longer have been More.

Yet, it is not at all clear to me that such coercion is duplicated in circumstances where one's choice between an evil and a moral option does not pose a significant threat to one's basic values, attachments, or moral tenets. In fact, where moral choice seems most significant to determining one's moral self is where one's moral makeup is not fully formed in relation to the issue at hand or where an immoral person is given the choice of moral self-transformation. Following Raz's logic seems to suggest that under such circumstances the agent *does* have autonomy in choosing between good and evil, and if the agent were to choose well that exercise of autonomy would be of value. In such cases choosing evil does not endanger the agent's integrity and is therefore potentially autonomous, and choosing the good would be a valuable exercise of that autonomy. In cases not involving coercion, therefore, there is conditional value in the right to do wrong that derives from the value of choosing good as an instrument of *moral* self-constitution. This conditional autonomy-based value of the freedom to choose between good and evil gives reason for a right to such a choice, i.e., for a right to do (some) wrong.

V. CONCLUSION

Are there moral rights to do moral wrong? I began with an explanation of the concept of a 'right to do wrong' and with a defense (mostly rooted in the literature) of its coherence. I then assessed and rejected an integrity-based justification for rights to do wrong and argued for grounding such rights in the value of personal autonomy. I thereupon set out to defend the idea of such rights from several objections. These objections fail as categorical challenges to grounding rights to do wrong in autonomy. Conceptually at least, liberal (that is autonomy) rights to do wrong are coherent and possible. However, my efforts at fending off some of the objections to the idea that personal autonomy is a consistently robust reason for

rights to do wrong were only partially successful. Although I managed to weaken, narrow, and in the case of some refute the objections to the viability of the autonomy-based grounds of a right to do wrong, some doubts persist, doubts that primarily turn on empirical hypothesis touching on human psychology and the contingent scope and type of choices people may or may not possess in varying circumstances. Proponents of the idea that there is not only a conceptual space for a moral right to do moral wrong but also that such a right plays a meaningful role in morality may still, therefore, have a few hurdles to overcome. Although not as many as some have postulated.