The Right to do Wrong and Practical Reasoning

It has been argued that an action being morally wrong is at least sometimes compatible with having a right to take it. I will call this view "the compatibility thesis." Those who hold this view argue that the compatibility thesis must be true, because otherwise we cannot explain the important role rights have in our moral discourse. They argue that if the compatibility thesis were false rights would only relate to the trivialities of life, such as whether to have cereal before the morning coffee or after it, or which shoe to put on first. But since we know that rights are an important aspect of our moral life, then they must be concerned with matters of much greater importance, and in particular with autonomy, which would not be so highly prized if it were concerned only with trifles. In addition to this *reductio* supporters of the compatibility thesis provide some intuitively compelling examples to support their claim: a person who has vast amounts of money is (let us assume) behaving immorally if she spends it on racehorses instead of giving it to the poor. Yet it is exactly the fact that she has a right to her property which explains why she can behave in this way.

The first to articulate this intuition was Jeremy Waldron in his essay "A Right to Do Wrong." More recently, an even stronger version of the compatibility thesis was defended with sophistication by David Enoch, who argued that it is conceptually possible for an agent to have a right to violate a moral duty she has.[1] One of the aims of this essay is to show that these conclusions are mistaken, and that the compatibility thesis is false. I will argue that given some plausible assumptions about rights the compatibility thesis is either logically impossible or morally unjustified. My argument will often focus on Enoch's paper, because his account is the most detailed, but it is general, and if successful, it is successful against Waldron's argument as well. In order to reach this conclusion we will need a better

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[1] Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (1981): 21-39; David Enoch, "A Right to Violate One's Duty," *Law and Philosophy* 21 (2002): 355-84. Further references to these articles will be in parentheses in the text.

understanding of the role rights play in practical reasoning. I will offer an account of this role, one which is largely independent of the question of the truth of the compatibility thesis, and which I hope assists in understanding the nature of rights in general.

Before I begin several notes of clarification: first, as I said, my argument against the compatibility thesis is general, and therefore whenever I use the term "right to do wrong," I mean "right to do wrong or right to violate one's duty." Second, I will not address the question of the relationship between valid all-things-considered ought statements and statements of duty. I will assume that if statements of duty are not identical with all-things-considered ought statements, then all cases falling under the former necessarily fall under the latter, but not vice versa. Hence, an argument that is successful against all all-things-considered ought statements, is also successful against all statements of duty. Third, it is well known since Hohfeld (although this insight can be traced back at least to Bentham), that the word "right" is ambiguous and specifies different kinds of relations between right-holders and other people. Thus having a right in the strict sense (a "claim right") entails that another person has a duty against the right-holder, whereas having a liberty (or "privilege") to take a certain action means that no other person can stop the right-holder from taking that action. Upon inspection it turns out that many of the "famous" rights (freedom of expression, privacy, private property etc.) are bundles of different kinds of relations between the right-holder and other people. My argument applies to rights in the sense of liberties, such as the property-owner's liberty to dispense with her property as she pleases. It does not aim to cover such rights as a buyer's contractual right to receive a good upon paying for it, or the wrongfully injured person's right to compensation from the injurer. Finally, my discussion is limited to individual rights and not to group rights (rights to self-determination, rights of association etc.). It might be that the conclusion I reach can be extended to those rights as well, but since they raise various complications, I disregard them here. I should stress that none of these qualifications to the scope of the argument biases the discussion in my favor, since Waldron and Enoch's accounts are limited in the same way.

I. Is The Right to Do Wrong a Conceptual Possibility?

Before I offer my general argument against the compatibility thesis I want to examine in some detail one particular argument offered by Enoch in support of his conclusion that an agent may have a right to violate her duty. Enoch labels his argument "conceptual" in the sense that he is not offering a normative argument that shows that recognizing a right to violate one's duty would make the world a better place, only that contrary to appearances and "on any reasonable theory of rights" there is no logical contradiction in the notion of a right to do wrong. It is best to quote here him at some length:

> Anything that logically follows from a conceptual truth is itself a conceptual truth. If a substantive result follows from a given proposition, then, it follows that that proposition cannot be a conceptual truth. But then its negation is conceptually possible. This, then, is a possible way of arguing that a proposition is conceptually possible: Showing that its negation entails substantive results. My argument will thus have the following form: Let's assume that there is never a right to violate a duty; let us then show that—on any reasonable theory of rights—substantive results follow from this assumption; but then, if substantive results follow from the denial of a right to violate one's duty, this denial cannot be conceptually necessary; *so* it is conceptually possible for there to be a right to violate one's duty. (Enoch, 367.)

It is the contrast between conceptual and substantive truths (or propositions) that is supposed to do the work. Enoch never fully explains what he means by this contrast, and I think he actually has two distinctions in mind. Sometimes he contrasts conceptual claims with normative claims made at the level of substantive moral theory: thus, for example he says of a certain proposition that "it may be a reasonable moral position .... But ... it is clearly a *moral*, not a *conceptual* position." (Enoch, 375; also, 369.) On this account Enoch's claim is that his argument is not based on what rights should be (based on a certain substantive theory of rights), only on what their "nature" is. But which claims about rights are "conceptual" in this sense? It would seem from the contrast that conceptual propositions are those that do not depend on any possibly controversial theory of rights, but are rather part of the notion of right "on any reasonable theory of rights." But can there

be any *such* conceptual truths about rights?[2] I suspect there are none. After all, even the existence of rights is a substantive moral claim, and it may turn out that a substantive argument would convince us that all rights are unjustified. So how can we say anything about rights that does not rest on substantive (moral) premises?

Let us consider the argument more closely: if I understand him, Enoch argues that conceptual claims about the nature of rights entail only conceptual claims about the nature of rights, presumably because a substantive claim is or entails an ought-statement, and an ought-statement can never be derived from an is-statement. If this is the case, and we have a premise that entails an unquestionably substantive (normative, moral) conclusion, it follows that the premise is normative as well. But then the negation of the premise must be a conceptual possibility, because any normative proposition is open for debate, which implies that its negation is logically possible.

If this is Enoch's logical argument then it is mistaken, because the dichotomy between conceptual and substantive truths in this sense is false: it is conceptually possible that there are truths which are both substantive and their negation is not conceptually possible. If a substantive proposition is necessarily true, then its negation is not conceptually possible. If such necessary normative propositions exist, this argument is faulty. Note also, that if this is Enoch's argument, then by his own lights his argument must be considered substantive, because later in his article he argues that the right to violate one's duty has important implications for autonomy and for the number of rights that exist (Enoch, 379-81).[3] These are surely substantive claims by Enoch's standards, and if they follow from the compatibility

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[2] The "such" is italicized on purpose, for I believe there is an important distinction between modest and immodest conceptual analysis. See Frank Jackson, *From Metaphysics to Ethics* (Oxford: Clarendon Press, 1998) 42-44. I suspect Enoch's brand of conceptual analysis is immodest, because he draws non-conceptual conclusions by means of conceptual analysis.

[3] Enoch discusses the possibility that if his claim is conceptual it cannot entail any substantive conclusions (Enoch, 377-78), but his answer does not address the problem of the entailment of substantive propositions from supposedly conceptual ones mentioned in the text.

thesis, then the compatibility thesis itself must be a substantive thesis, not merely a conceptual possibility. So the argument interpreted this way won't do.

At other times it seems that Enoch has a different contrast in mind, namely a contrast between necessary, a priori, or analytic propositions on the one hand, and contingent, a posteriori, or synthetic propositions on the other. Enoch discusses at some length the relationship between his conceptual-substantive distinction and the analytic-synthetic distinction, and at one point says, that "we have rather firm intuitions regarding a distinction ... between matters of *conceptual necessity* and other matters." (Enoch, 377, emphasis added; also 376, where the focus seems to be on the analytic-synthetic distinction.) Now, the relationships between these three dichotomies (necessary-contingent, a priori-a posteriori, analytic-synthetic) are complex and controversial, but it is usually agreed that the first in each of these dichotomies does not entail the first in the other two. So it is difficult to tell which of the three distinctions is exactly the one to which Enoch refers. However, because of the logical nature of his argument and the words used in the passage just quoted, I believe that Enoch thinks of the distinction between necessary and contingent propositions. In particular he seems to think of the logical relation

$\sim\Box p \leftrightarrow \Diamond(\sim p)$,

which is true for any p. This seems to fit perfectly with Enoch's claim that if we find out that a certain proposition is substantive (viz. under this interpretation, not necessary), it follows that its negation is (conceptually) possible. Thus if a given premise (which we don't know whether it is necessarily true or not) entails a contingent proposition, it follows that the premise is contingent as well. And from this it follows that the negation of the premise is logically possible.

Enoch's argument then is only aimed at showing that it is not logically impossible to have a right to violate one's duty. In defending his thesis Enoch draws an analogy between the conceptual possibility of rights to do wrong and the claim that despite the fact that there are no animals with heart but no kidneys in our world, their existence is conceptually

possible. Enoch argues analogically that rights to violate one's duties are conceptually possible in a similar fashion.

I leave aside some doubts about the validity of the analogy (for instance, the ontological status of species, or whether rights have a "nature" of the sort that this argument presupposes). Even if we assume with Enoch that the analogy is valid, I think it actually tells against his argument. Think of the biological example: to say that it is conceptually possible that an animal with a heart and no kidneys exists in some different environment is not really interesting or important if actually there are no such animals: we learn nothing about existing animals in our world by noting this conceptual possibility. It is important to see here the difference between claims about logical *im*possibility and claims about logical possibility. What is logically impossible does not exist, so to find out what is logically impossible is of some importance: it entails, among other things, that anyone who claims otherwise is mistaken. On the other hand, leaving modal realism aside, what is logically possible does not necessarily exist. Thus, the fact that animals with heart but no kidneys are logically possible tells us nothing about animal biology of our world if such an animal (given the path of evolution on Earth) is biologically impossible. By analogy, in the case of rights we learn nothing about the moral rights *we* recognize by pointing out conceptual possibilities. From the fact that such a right logically exists it does not follow that this is what explains why rich people can buy racehorses instead of supporting the poor. A substantive argument showing this must follow. But if we conduct such an inquiry and conclude that no rights to violate one's duties on substantive moral grounds are ever justified, then the fact that a conceptual possibility exists is not helpful for understanding the concept of rights and the relation of rights to other moral concepts. So substantive argument is always required; but once substantive argument settles the question whether a right to do wrong is ever justified, the conceptual argument is either redundant (because we already know that there are actual cases of a right to do wrong, which entail the existence of the conceptual possibility) or uninteresting (because we will know that there are no cases

of such rights, and then the existence of the conceptual possibility is not a very important discovery).

I suspect, however, that in the case of rights even drawing the distinction between a conceptual possibility and existence is problematic, since it is not clear in what sense a right that has no moral justification can be said to "exist," even as a conceptual possibility. We don't say "agents have an unjustified right to murder"; in fact, this sentence is close to being meaningless. We simply say "agents have no right to murder." This is not merely a point about language use: a thing that is conceptually possible but cannot have instantiations in any possible world is not a conceptual possibility, so unless we are shown at least one instance of a *justified* right to do wrong, the conceptual argument on its own cannot succeed. This of course does not imply that there cannot be successful conceptual arguments about rights: these are arguments which presuppose the truth of certain moral premises about rights. The argument then proceeds to explain the (deontic) logical relations of rights with duties, reasons, permissions etc. But in the case of the alleged right to do wrong the question is whether it exists, and whether the alleged examples of right to do wrong are indeed cases of such a right and not of something else. When this is what's at stake a conceptual argument will never suffice.

This perhaps is just another way of making the point made earlier, namely that Enoch's argument is substantive and not conceptual: if indeed the notion of an unjustified right is a contradiction in terms, then Enoch must believe that there exists a justification for the right to do wrong, which entails that his claim is substantive, not conceptual.

The question we must address now, therefore, is whether there is a substantive argument in favor of the compatibility thesis. In particular, we haven't answered yet the claim that only the compatibility thesis can explain the importance of autonomy to our moral discourse. But to assess this argument, we must first make a detour to understand better the role of rights in practical reasoning.

II. RIGHTS AND REASONS

Some things in the world (events, states of affairs, objects, agents) make claims for our action. Some of those claims give rise to reasons for our action. I will call these claims that "generate" reasons (though not necessarily conclusive reasons), reason-generating claims. Thus, for instance, when a poor person makes claims against rich people for their assistance, it does not immediately follow that those claims give the rich reasons for assisting the poor. If for example we discover that the cause of the claimant's poverty is his expensive lifestyle, we might not think that his claim for assistance generates a reason for action. Of course, answering which claims generate reasons for actions and which do not, or for that matter, who can make such claims (humans, agents, animals) are among the questions that any moral theory will have to grapple with. Here, all that we need to do is recognize the distinction between claims and reason-generating claims.

How do rights (in the sense of liberties) fit into this picture? Are rights simply reasons for action? Plainly not. The fact that I have a right to speak does not, by itself, give me a reason to speak. The fact that I have a right to marry, does not entail or even suggest that I have reason to marry (Waldron, 27-28).[4] But this does not mean that rights and reasons are unrelated. In fact, since both figure in moral discourse, quite often simultaneously, we should hope to find some connection between them. Finding this connection is particularly important because it is not always the case that an agent's having a certain right forecloses all moral deliberation: it is commonly assumed that at least some rights can be overridden by other interests.

To get closer to understanding the relationship between rights and reasons, we must distinguish between reasons *for having* rights and the role that reasons have in practical reasoning. It has often been argued that the reason for having rights is that they are important for protecting the autonomy of the right-holder. As we have seen this is also the opinion of Waldron and Enoch, and I will not challenge it myself. Note that there may

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[4] Also Jeremy Waldron, "Galston on Rights," *Ethics* 93 (1983): 325-27, p. 325.

also be other values whose promotion may be a reason for having rights, for instance the promotion or protection of the autonomy of agents other than the right-holder. One of the most commonly cited justifications for freedom of speech, for example, is that it increases the dispersion of information, which contributes to the autonomy of people other than the speaker. I also take it to be uncontroversial that one person's rights entail reasons for action to other people: thus *A*'s right to privacy, entails that *B* (and *C* etc.) have reason not to take certain actions that will interfere with *A*'s privacy. But we are interested here in the question, how does having a right affect the *right-holder's* reasons for action?

The first thing to note is that if rights affect the right-holder's ability to do certain things, they do not (at least not directly—more on this in the next section) affect the right-holder's physical capability of taking certain action, only the moral permissibility of certain actions. I may have a right to speak, even when I am stopped from speaking: indeed my right will be exactly what I will assert when demanding that the impediment be removed. On the other hand, one needs no right to say certain things that will affect no-one when walking alone in the middle of the desert, all that one needs is the physical ability to say these things. Hence, to have a right to say certain things is to be morally permitted to say them even if this would harm others (or, more controversially, the speaker herself) in some sense.

What I am trying to get at is that "right" is the name we give to the fact that agents are (arguably) morally permitted to count their personal considerations (which include the considerations of those attached to them) before those of others. In terms of reasons, this means that rights are not reasons for action or reasons against action, but that they are *permissions to disregard reasons generated by others' otherwise reason-generating claims*. I gave earlier the example of the claims of poor people against us, which (let us assume) can sometimes generate reasons for action against us. To have certain rights (if we have them) means that we have permission to disregard those claims, or more accurately, to disregard the reasons generated by those claims.

Thus, rights do not function as countervailing considerations against certain reasons. Rather, they function by annulling reasons. Metaphorically speaking, rights are not put on the scale of reasons on the side of the considerations against a certain action. Rather, they function by removing certain reasons from the scale. They do not function by giving the agent permission to take a particular action, but by giving a more-or-less general permission to disregard certain reasons generated by claims others have against us.

Rights can have different weight or stringency. We can now explain how this affects practical reasoning: the stringency of a right is the degree to which it permits its holder to disregard reasons generated by others' claims. The stringency has at least two aspects: one is the type or scope of reasons which the right-holder has permission to disregard; thus, having freedom of speech may give me permission to disregard reasons generated by others' claims to reputation, but not permissions to disregard others' claims to bodily integrity. The second aspect is the strength of the permissions the rights provides its holder: absolute rights (rights as "side-constraints"), if such exist, are very strong permissions to disregard other reasons. The weaker is the right, the weaker can others' claims be, and still be strong enough to override the right and generate reasons that the right-holder is not permitted to disregard.

I said rights should be understood only as *permissions* to disregard certain reasons, and not as *reasons* against considering certain reasons. Why not think about rights as reasons for disregarding certain reasons? The suggestion that rights are reasons against considering others' justified claims faces the following challenge: if we think that justified private property gives the agent a *reason* against considering others' reason-generating claims then it would follow that if an agent decides to actually go and give some of her property to others she is behaving against reason, and this at first sounds implausible.

Before we dismiss this idea, it should be noted that in some circumstances it might not be all that implausible. It is true that in the Western world some people have accumulated such amounts of private property that it seems insane to suggest that the immensely wealthy will be behaving against reason if they decided to give some of their

wealth to others. But consider a situation in which people have only small amounts of private property. In such a situation it *might* be that an agent will act against reason if she gives some of her property to others, because at this stage giving up some of her property will impair her autonomy (or even her chances of staying alive) so significantly that by doing this she will be acting against reason.[5] More controversially perhaps, if some people's having a significant amount of private property makes those in the worst position better off (as in Rawls's maxi-min principle), then perhaps even a person with quite substantial amounts of property will behave wrongly by giving some of it to others.

If the preceding argument is true, then maintaining a certain degree of private property is a duty an agent has against oneself, which has to be examined against other duties the agent has. But this does not undermine my claim that beyond that, rights (in the sense of liberties) are permissions to disregard others' reason-generating claims, and which explains the role rights as they are currently understood have in practical reasoning. If, for instance, we think people are morally permitted to have as much private property as they can amass, it is still the case that the right-holder may act on certain reasons generated by others' claims, even if she has permission to behave otherwise, and in that case she is not behaving immorally. However, because the reasons she is permitted to disregard are valid moral reasons, the decision to disregard them is not entirely neutral: deciding to act on those reasons (that is to say, not relying on the permission to disregard them) is morally praiseworthy and superior to disregarding them. When an agent disregards the permission she has in virtue of having a right, she acts supererogatorily. In other words, a supererogatory act is one that involves disregarding one's right.

We can now understand how rights may be relevant to autonomy. Once an agent is permitted to disregard others' reason-generating claims, reasons that originate in the agent's own personal claims, i.e. reasons that are generated by her interests or inclinations,

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[5] Compare this to the unease we feel towards "moral saints" as described in Susan Wolf, "Moral Saints," *Journal of Philosophy* 79 (1982): 419-39.

are more likely to prevail. It follows that rights are inherently egoistic. Since many consider egoism antithetical to ethical life this may lead to thinking that rights are never justified. But such a conclusion is too hasty. In fact, this is exactly where the link between rights and autonomy should be drawn. Rights are egoistic only in the sense, and only to the extent, that autonomy is egoistic: if autonomy is a necessary requirement for personhood, then some degree of egoism is justified.[6] It follows that if some degree of autonomy is required for personhood (which seems plausible, but which I have not argued here), and rights are the only means of achieving this degree of autonomy, then some recognition of rights is justified even if rights are egoistic.

I want to consider now two possible objections to my account of rights as permissions to disregard others' reason-generating claims. The first is that my argument may be successful with regard to the right to private property, but it is not equally successful in the case of other rights. For instance, as I said earlier, freedom of speech is often justified not only for being beneficial to the speaker's autonomy, but because it is important for others' autonomy as well: the speaker (at least sometimes) provides information which assists others in making informed decisions, without which agents do not have significant choice. Does this fact undermine my argument? I think not. There are two errors in this objection: first, it mistakes the reasons for having rights with what having a right implies for the right-holder's practical reasoning. Second, the objection misses the role rights play in practical reasoning, and conflates the various implications hidden under the expression "having a right." While the term "freedom of expression" is broadly used for all sorts of purposes, the concept of a right is not needed to explain the physical ability to talk, nor is it

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[6] The relationship between rights and autonomy is of course well known. See for example T.M. Scanlon, "Rights, Goals, and Fairness," in *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003) pp. 26-41; Loren Lomasky, "Personal Projects as the Foundation for Basic Rights," *Social Philosophy & Policy* 1 (1983): 35-55; and Tara Smith, "Rights, Friends, and Egoism," *Journal of Philosophy* 90 (1993): 144-48, pp. 146-47. So Viewed, rights perhaps conflict with certain versions of utilitarianism, but their justification is nonetheless consequentialist.

needed to explain the moral (or practical) capacity to say certain things when those are not contested. As far as the dissemination of information is concerned, it is actually duties and not rights that may be imposed upon certain agents to guarantee the free flow of information. An agent needs to invoke her right to freedom of expression when she wishes to say something when it is contrary to others' desires or interests that she say it. It is these situations that my account sought to explain.

A second objection is this: rights entitle me to act against my interests. For instance, I may have a right to smoke even though it is against my interests that I do so. Therefore, it cannot be said that rights can be justified by egoistic considerations. But the objection mistakes my explanation of the role of rights with how they can be abused. I presented an argument that explains the way rights figure in practical reasoning, and explained in what way having a right may be important for one's autonomy. This does not imply that an agent cannot abuse her autonomy to harm herself or others. It may even turn out that such instances will convince us that rights are morally indefensible, because autonomy is not an important value, or because rights are detrimental to the right-holder's autonomy, or because rights let some people excessively harm other people's autonomy. But my argument presupposes that all these claims are false, and seeks to explain what role of rights have in practical reasoning under those circumstances.

III. Can There Be a Right to Do Wrong?

The long detour was, I hope, worthwhile in its own right. But in this section I will connect it to the question of the existence of rights to do wrong.

We must first understand the scope of Waldron's and Enoch's arguments. Enoch says that his thesis does not entail that "a right to violate one's duty gets one off the (moral) hook .... The wrongness or contrariness-to-duty of an action is perfectly compatible with a right to perform it; *so* perfectly compatible, that having the right in no way makes the action less wrong." (Enoch, 363). Waldron agrees: "if someone has a right to do an action

that is wrong, it follows that it is wrong *tout court* for him to exercise his right in this respect. He cannot appeal to his right as a warrant or excuse for his wrongdoing."[7]

Even with these qualifications, the argument that there can be a right to do wrong is unsuccessful. Consider what such an argument forces us to accept: suppose that at time *t A* ought to ϕ all-things-considered. I take this statement to mean that—on the balance of reasons pertaining to *A* at *t*—ϕ-ing is the action *A* should take if she is to behave in the morally optimal way. Based on the conclusions of the previous section, if one ought to ϕ *all*-things-considered then all practical considerations, *including those pertaining to one's rights*, must already be incorporated in the balance of reasons upon which action should be taken. And if one's rights affect what one is permitted to do, it follows that if one has a duty to not-ϕ, or one ought to not-ϕ because ϕ-ing is wrong, then this is the case *given* the rights one has. Therefore, if we take one's rights into account now, we would be counting them twice. In fact, understood in this way, having a right to do wrong involves a contradiction: you are at once required not to take a certain action (because you have a duty not to do it, or because it is all things considered wrong), and are permitted to take it at the same time (because you have a right to take it).

Both Waldron and Enoch perhaps recognize this problem, and this is why despite arguing for a right to *do* wrong and a right to *violate* one's duty, they do not defend a right to taking an action that is morally wrong. What they seem to defend instead is a different and weaker claim, namely that it does not follow from *A*'s having a duty to not-ϕ that others have a right to interfere with *A*'s actions if *A* tries to ϕ despite his duty. Thus Waldron says that the "right to do what is wrong ... is about reasons for not *enforcing* standards of rightness or wrongness."[8] And similarly Enoch says that "the right to violate one's duty [should be] understood as a claim for noninterference...." (Enoch, 370).[9] It may

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[7] Waldron, "Galston on Rights," 325.

[8] *Ibid.*

[9] See also the quote from Enoch in the beginning of this section (page 13).

seem a bit odd to call this a moral right to *do* wrong, but if that is all that the right to do wrong amounts to, what was the paradox that needed explanation? To say that a right of one person does not entail reasons for others is trivial; and to say that one person's liberty right means that others are barred from taking certain actions is (if we accept the Hohfeldian analysis of rights) simply a matter of definition. But the unease that we feel about the supposed examples of right to do wrong is real, and a moment's reflection shows that the explanations we were offered leave us as perplexed as before. What troubles us about such cases is whether such behavior can be justified, not how it can be logically explained, and the explanation in the form of claim to non-interference does nothing to appease us about such cases.

Even as far as conceptual possibilities go, the solution to the apparent paradox in having a right to do wrong is achieved at the cost of giving rise to a different paradox: we are asked to believe that people have rights that by definition they should *never* exercise. A right to do wrong covers *only* situations in which the action in question is all-things-considered and not just prima facie wrong (Enoch, 361; cf. Waldron 26), so by definition the right to do wrong is no longer capable of being exercised the moment the action in question ceases to be all-things-considered wrong. Since I cannot think of circumstances under which one should act *in order* to do wrong, then the right to do wrong is a right one can never exercise.[10]

In any case, the important question is not about conceptual possibilities, but moral justification. As we have seen Waldron and Enoch believe that a right to do wrong is not only a conceptual possibility, but is essential for an agent's autonomy. Is this really the case?

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[10] It might be argued in response that there are circumstances in which all possible actions available to a person are all-things-considered wrong. But these cases have nothing to do with the kind of situations supposedly explained by the existence of a right to do wrong (and are not cases in which an agent can be said to exercise her autonomy—more on this in a moment), but rather cases in which the agent is excused for being forced to take a wrong action through no fault of her own.

What are the conditions for becoming autonomous?[11] A first and very rough approximation is being given a substantial number of options, because other things being equal having more options increases the likelihood that one of them will enable the agent to advance her interests/desires (I leave open here whether autonomy is about interests or desires), and thus lead a better life.[12]

It follows that not any physically possible action enhances an agent's autonomy. This is the case only if the availability of the action increases the likelihood of fulfilling an agent's interests/desires. This was exactly Waldron's point about the irrelevance of trivial options for an agent's autonomy: a person whose available choices are limited to which shoe to put on first is not more autonomous than the one who does not have such choice, at least not in any morally interesting sense. But the availability of "good" options is not enough. One also needs to be free from other limitations that may inhibit choice: a person who has many available options, but because of some physical impediment does not know that she has them or is inhibited by some compulsion from pursuing them, is not more autonomous than the agent who does not have those options at all.

Given this sketch, would rights be confined to the trivialities of life if we do not recognize a right to do wrong (Waldron, 36)? Is the right to violate one's duty required if we wish to "take[] autonomy seriously" and "accord [it] adequate weight" (Enoch, 379-80)? Hardly so. To begin with, even without a right to do wrong there are still numerous other available options, and we value the availability of numerous options because we know that different people have different interests/desires, and even the same person has different interests/desires at different times. These interests (let us hope) are much broader than "the choice between strawberry and banana ice cream" (Waldron, 36). We value autonomy

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[11] Though not directly following it, I have been assisted here by the discussion in Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) pp. 369-80.

[12] There is a well-known downside to having more options, namely the need to examine and evaluate them, which beyond a certain point undercuts the value of having many options (or options whose value it is hard to assess), but I disregard this point, as it does not affect the discussion.

without having to recognize or justify a right to do wrong, because of the value we attach to letting people choose among different yet similarly valuable ways of leading their life.

Let us now see how the existence of a right to do wrong is supposed to be relevant for autonomy. The first question is whether in order to become autonomous we need to exercise the right to do wrong or whether we just have to have it? If we need to exercise it, it follows that at least some people, and from what Waldron says perhaps all people, necessarily have to act immorally in order to become autonomous.

The alternative is that having more options, even options one should never exercise, can make one more autonomous. But for something to be an option, it has to be something that has potential for fulfillment. And at least as far as moral permission goes, what one should not do is not an available option. And as we have seen, a right to do wrong is a right one should never exercise. (Contrast this with a person compelled by a situation to act in a morally wrong way; such a person will usually be excused exactly because she was not autonomous.)

Still, it might be contended that there is a *physical* sense in which the agent might be thought to become more autonomous by having a right to do wrong. For if we construe autonomy as concerned with the satisfaction of desires, and since we know that people sometimes want to behave immorally, then it follows that by removing obstacles from taking immoral-yet-desired actions, we increase the likelihood that an agent will succeed in satisfying her desires, and thus become more autonomous.

Even granting all the assumptions of this argument (including the highly contentious one that autonomy is concerned with desire satisfaction), does it give some moral justification for the right to do wrong? No, because *ex hypothesi* it is a right to do an all-things-considered wrong action, that is, the moral "gain" in autonomy is outweighed by the wrongness of the action. In order to see this we must add to our analysis the element that has hitherto been missing, namely the reasons for action and autonomy of other agents.

When one person acts wrongly, we normally think that at the very least other agents are permitted to take action to prevent or stop the wrong; in some situations we even think

that others have a duty to take some preventive action. What the compatibility thesis entails (or even what it means) is that there are some situations in which agents are not permitted to prevent or stop wrongs. In considering whether such a situation can ever be justified, we must be careful not to confuse it with the fact that in some circumstances preventing a wrong action might cause (or is thought to have potential to cause) greater independent wrong.[13] In particular, this might explain why within the context of a state there are considerable limits to the liberty of people to take independent action to prevent the occurrence of wrongs. (I suspect that some of the examples of a right to do wrong, and in particular private property, gain their apparent plausibility from this fact.) But even in such contexts we believe that people sometimes have a moral (and not merely legal) duty to report wrongs they know of to the authorities,[14] and when immediate action is required, even to act on their own.

However, our discussion must assume that the case in question is one in which an agent who is in a position to prevent or stop a wrong is not going to cause greater independent wrong by her actions. In such situations, the compatibility thesis forces a puzzle upon us: if the action is all-things-considered wrong, then it follows that it should not occur. But suppose that we see that the wrong is occurring or about to occur, are there circumstances in which agents are not even *permitted* to try and prevent it? If this is the case, then people have reason not to prevent a wrong. Presumably, this reason might be outweighed in some circumstances, but not always: all the examples of a supposed right to do wrong are cases in which it is not outweighed. But then suppose an agent does to prevent the wrong from occurring. What we are now forced to accept is that *the very act of* making the world a better place (by preventing or stopping something that should not

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[13] By independent wrong I mean a wrong that is distinct from the (alleged) wrong an agent will cause *by the act of preventing*: of course, this is a wrong only on the assumption that the agent in question is not morally permitted to prevent the wrong.

[14] Does doing this constitute a violation of another's right to do wrong? Does the authorities' intervention in such a case constitute a violation of another's right to do wrong?

occur) was wrong. While not strictly speaking a logical contradiction, this conclusion solves the mystery of the moral permissibility of actions such as buying racehorses by means of a much greater one.

In contrast the account of the role of rights in practical reasoning explains such phenomena without mystery. I argued above that to have a right is to have a permission to disregard certain otherwise reason-generating claims. It follows that whenever a person exercises a right she has, she is not in the wrong (although of course she may be mistaken in thinking that she has a right, or a right stringent enough to disregard certain claims, when in fact she does not); the justification for having the right—and for the action taken pursuant of that right—is autonomy.

It might be objected now that if in a certain situation taking an action that satisfies a personal interest and in this way makes one more autonomous is the all-things-considered optimal option, then we do not need the notion of permission to disregard others' claims to justify the action. The agent is simply doing what is in the circumstances all-things-considered best. And if on the other hand it is not all-things-considered best, then why should we be given such permission? And why shouldn't we call an agent's refrain from doing what is all-things-considered optimal in these circumstances "wrong"?

There are two stages to the answer. The first is that as I explained them above rights are exactly the "mechanism" by which people are permitted to exercise their personal interests. (Does this explain why Bentham had such disdain for rights?) In other words, the philosophical argument that people should be autonomous is "translated" at the level of practical reasoning to the language of rights. But this answer is not enough; at a second stage, the challenge here is not to my account of rights, but to our moral discourse that distinguishes between duties and acts that while morally desirable, are not required. The assumption of this paper is that this distinction, which is prevalent in moral discourse, is defensible. It may not be. In that case the conceptual argument developed earlier is indefensible as well. However, Waldron and Enoch accepted the very same moral

assumptions, and it is within this set of assumptions that I have tried to show why their explanation is unsuccessful.

IV. A LEGAL RIGHT TO DO WRONG

If I am right in all this, then there is no moral right to do moral wrong. Is the same true with regard to legal rights and legal wrongs? Given my previous answer, it might seem surprising that I think the answer is in the negative; that is to say, my view is that there may be a legal right to do what is legally wrong. I will first explain what I mean by a legal right to do wrong, and will then explain why what is so strange in the case of morality is a real possibility in the law. (I should note that Enoch considers the case of legal rights to do wrong and says he could not find any example of such rights (Enoch, 382-84). My view is thus exactly opposite to his.)

Guido Calabresi and Douglas Melamed distinguished between three kinds of protection of legal entitlements: either by a "property rule," a "liability rule" or by making the entitlement "inalienable."[15] The distinction between protecting an entitlement by a property rule or a liability rule is the basis of the idea of a legal right to do wrong. (I will disregard inalienability.) If I plan to publish a libelous book and the person whose reputation will be harmed by the book knows about this, there are two ways in which the law can protect that person's reputation: one way is to enjoin the publication in advance; this is a property rule, since the person's reputation is, so to speak, his property, which can be infringed only by getting his (presumably bought) consent. Alternatively the law can let me publish the book, and then give the harmed person a right to sue for damages; this is a liability rule, since the victim of the libel is paid damages after the publication, and the amount of damages is determined by a neutral body (usually, a court) according to its assessment of the damage caused.

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[15] Guido Calabresi & A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972): 1089-128. For a close analysis see Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974) pp. 59-73.

Calabresi and Melamed show that there are various considerations that affect the decision regarding the choice of rule for protecting people's legal entitlements. It is worthwhile to consider two of them: it may be that protecting certain entitlements by a property rule is practically impossible. We cannot have all people who use vehicles on the road contract with each other in advance about possible infringements of their respective rights. This is why accident law is almost always in the form of liability rules. However, there are times in which we can protect a rule with a property rule, and yet we still prefer to protect it only with a liability rule. Consider the case of several jurisdictions (United States is an example) in which protection against libelous publication is in the shape of a liability rule. In such cases it is quite often possible to protect against such publications by using a property rule. However, because of the "chilling effect" of censorship, injunctions prohibiting speech in advance are hardly ever granted. In such cases the law gives agents a right to do legal wrong, and this right changes the options available to agents. It allows them to take actions that, if the entitlement had been protected by a property rule, they would not have been able to take. The difference here is not merely theoretical: there is an actual difference in the way agents are legally permitted to act, and the difference is not limited to the physical options available to agents, i.e. whether they will be stopped or not if they tried to publish the libelous material. To be sure, even when reputation is protected by a property rule it is still often possible to break the law, publish the libelous publication and face the legal consequences. But there is a significant difference between the message sent by the legal system in the case of a property rule, which is "you are not allowed to publish the book, unless you get the harmed person's consent," and the altogether different message of a liability rule, which is "you may publish whatever you want, so long as you are willing to pay for violating others' rights."

It is a different attitude of the legal system towards the publication. The difference in attitude is likely to affect agents' behavior, as well as the legal system's response in the case of publication: for example, punitive damages are more likely to be granted in a case of a violation of a property rule, than in the case of a violation of a liability rule.

The different "message" given by the legal system is important also for understanding whether the agent is given a right to do wrong or not, for it is not always the case that protecting an entitlement with a liability rule is akin to a right to do wrong. It is not the case when the liability rule is chosen because of our inability to know about potential violations of entitlements, and contract about them in advance. But in cases like libel it is sometimes not contested that certain publications are libelous and their publication could have been enjoined in advance. The choice of a liability rule in such cases is a decision to let people do wrong.

But then, wouldn't we say that in such a case all-things-considered the publication is not wrong, that is, that even if the act of publishing itself is morally wrong, the balance of reasons favors publication? I don't think so. If the publication is not wrong, the person who published the libel would not be liable to pay compensation;[16] and as a matter of fact, in some jurisdictions such an action (despite its initial permissibility) may even be a criminal offense.

How come what is logically impossible in morality is possible and actually a frequent occurrence in the law? The main reason for this difference is that law is system of norms backed by sanctions, whereas morality is not. To be sure, some acts considered immoral will effect social or legal censure, but this *social* censure is not part of morality, if the latter is taken to be the considerations according to which one ought to behave regardless of social disapproval or praise of the act. (This statement is true even under most versions of moral anti-realism.) Law, on the other hand, is a system of norms backed by the threat of sanctions. Even if, as some have argued, sanctions are not necessary for the existence of a

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[16] There may be cases in which despite the fact the agent has done the right thing she will still be required to remunerate another for a certain loss she caused. Joel Feinberg provides an example in the case of the person who breaks into another's cabin in order to survive a snowstorm is such a case. Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7 (1978): 93-123, p. 102. However, the case of libelous publication bears no resemblance to it.

legal system,[17] sanctions are essential role for understanding the nature of legal duty in real human societies. Consequently the nature of legal and moral obligation is different. Legal obligation is bound to the notion of sanction. What is all-things-considered (morally) wrong should not be done. In the law, on the other hand, because sanctions are part of the concept of legal obligation, and because different legal responses are attached to legally wrong actions, we can distinguish between legally wrong actions that should not be taken at all, and legally wrong actions that may be taken, despite an adverse legal response. We have seen that in the case of morality *at best* the notion of right to do wrong can explain the physical possibility of taking a certain action, but not its moral permissibility, and this is true only given a highly implausible account of morality. On the other hand, in law the existence and *specific nature* of legal sanction (an injunction, damages, criminal punishment etc.) affect not only what one can physically do but which action one is legally permitted to do.

V. Conclusion

The relationship between having certain rights and autonomy has been noted often, and has some potential implications which are much broader than my discussion here might suggest. Thus, there are well known arguments from autonomy to certain claim-rights (to education, to some degree of sustenance etc.) and the imposition of their correlative duties on others (often the state). My argument is of course not in conflict with these arguments. What my argument sought to show is how rights figure in practical reasoning, and if true, several interesting conclusions follow from it. First, I believe it explains better the way rights function in moral discourse without any need for misleading metaphors like "trumps" or "side constraints." As such, we are provided with a better *analytical* tool for

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[17] Joseph Raz argued that sanctions are not a necessary element of the law, because a legal system would be needed even in an imaginary society of angels. See *Practical Reason and Norms*, 2nd ed. (Oxford: Clarendon Press, 1999) 159-60. Even if this is true, this does not alter the fact that law without sanctions in a society of mere mortals is not possible (a point that Raz, of course, does not deny).

understanding the relationships among different rights and the relationship between right-protected and non-right-protected interests. Rights do not have any unique or mysterious "trumping" power (which is even more difficult to explain when it is conceded that rights may be overridden by other considerations). Rights figure in practical reasoning by permitting their holders to disregard other people's claims that but for the right would have given the right-holder reasons for action. One implication of this analysis is that there cannot be a right to do wrong or a right to violate one's duty. However, this conclusion does not entail that without recognizing a right to do wrong rights are left to deal only with trivial choices of life. On the contrary, the explanation of rights offered here links rights with the permission to act on certain personal reasons that are about, or affect, the most substantial aspects of one's life. If such actions are justified, it is because of the value of autonomy.

The analysis of the nature of rights offered here may also indirectly affect *normative* discussions about rights. Rights are commonly defended by the loftiest of terms: liberty, security, equality, or autonomy. There is undoubtedly much truth in many of these accounts; in fact I endorsed such an explanation here myself. But the analysis offered here brings out the cost of rights: rights are permissions to disregard others. And this may lead to questioning the scope of rights that modern societies allow. At some point the importance of the right-holder's autonomy does not seem to be strong enough to warrant the *degree* of protection some rights are given in our society.