

Legal Toleration and Rights to Do Wrong

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This Essay explores the possibility that morally ambivalent practices (practices that are neither morally abhorrent nor morally indifferent) can be protected as rights to do wrong. The first section of the paper establishes the conceptual coherence of the notion of legal rights to do legal wrong. Legal Toleration, it is argued, has a bifurcated structure. Different sanctions fall on different agents, such that some agents are exempted from general legal prohibitions, yet subjected to expressive official sanctions. The second section of the Essay explores the normative justifiability of deploying Legal Toleration to exempt morally ambivalent practices from general legal prohibitions. It considers three possible justifications for Legal Toleration: Integrity, Uncertainty and Disagreement. Each relies on a distinctive account of what it means for a practice to be morally ambivalent. After showing the limits of the Integrity and the Uncertainty accounts, the Essay discusses in greater depth the potential and pitfalls of a defence of Legal Toleration grounded in Disagreement. On that view, morally ambivalent actions are liable to be exempted from general laws because they express liberal disagreement about justice. The logic of political liberalism is that, because democratic proceduralism dissolves moral ambivalence about the contested practices, there is no scenario in which citizens retain a right to do wrong. The defensibility of Legal Toleration ultimately hinges on the plausibility of compromises about justice within political liberal theories of public justification.

Assume a law of general application is justified. Why should anyone be exempt from compliance? Liberal philosophers have disagreed about the permissibility of exemptions from general laws. Some have dismissed the coherence of any rule-and-exemption approach. On this view, either laws are fully justified, and they apply to all; or they are

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not, and they should be repealed. Others have granted that structural inequalities and non-ideal circumstances may warrant the selective non-enforcement of justified laws, but such exemptions only apply to categories of social disadvantage such as disability, gender or race. Yet others have suggested that the liberal commitment to equal liberty of conscience itself demands the alleviation of some legal burdens on practices that are central to people's ethical or religious integrity.²

These liberal theorists, however, have placed strict limits on the permissibility of legal exemptions. A common liberal test involves balancing the severity and directness of the legal burden against the contribution of the law to the aims of liberal justice and the cost-shifting consequences for others of an exemption.³ Such a test delivers plausible conclusions. It accommodates practices that do not unjustly harm anyone, though they might generate costs for others. For example, workplace regulations should make room for the wearing of religious signs and symbols, as well as for dietary accommodations. By contrast, religious demands that violate the rights of others, and thus directly conflict with the demands of liberal justice, should not be acceded to. For example, a law forcing parents to provide their children with appropriate medical care, including life-saving blood transfusions if necessary, directly and severely burdens Jehovah Witness families. Yet it should be enforced on them, because of the compelling healthcare interest at stake. Or consider public accommodation law in the USA, which requires businesses such as restaurants and pharmacies to serve all-comers with no discrimination on grounds of race, gender or sexuality. Those who are religiously motivated to deny service to LGBTQ citizens have no grounds for exemptions.

From the perspective of liberal justice, wearing a religious dress or symbol is a *morally indifferent* or *morally permissible* practice; whereas denying children a life-saving procedure, or denying some citizens access to public accommodation, are *morally abhorrent* practices, because they violate rights. In this Essay, I focus on a class of

² For an overview of the first-generation debate about religious exemptions in Anglophone liberalism, see Paul Kelly (ed.), *Multiculturalism Reconsidered*. Cambridge: Polity, 2002. For a recent clarification of the Rawlsian political liberal position on religious exemptions, see Lori Watson & Christie Hartley, *Equal Citizenship and Public Reason. A Feminist Political Liberalism*. Oxford: Oxford University Press 2019, Chapter 5.

³ Cécile Laborde, *Liberalism's Religion*. Cambridge Mass., Harvard University Press, 2017. See also Alan Patten, 'Religious Exemptions and Disproportionate Burden', *Criminal Law and Philosophy* First Online, 4 January 2020.

intermediate cases, those we might call *morally ambivalent* practices. Consider the following practices, which are exempted or tolerated in liberal democracies, even though they contradict legal norms protecting gender equality, non-discrimination on grounds of sexuality, or the protection of vulnerable persons. The practice of male-only priesthood is common in many churches, in line with what US law calls a ‘ministerial exception’, which immunizes religious groups from any anti-discrimination scrutiny in the selection of their ministers. Evangelical businesses have declined to provide artistic services – cakes or photographs – at same-sex weddings. The circumcision of young boys is prevalent in Muslim and Jewish communities. Not all morally ambivalent practices are religious, of course: witness men-only private clubs in the UK, or the demand by the Boy Scouts of America to be allowed to dismiss openly gay leaders.

Morally ambivalent practices are practices that cannot easily be classified either as indifferent or abhorrent. Perhaps this is because they express conflicting moral intuitions; or we are uncertain as to whether they violate rights, or they are the subject of disagreement between reasonable people. In what follows, I do not intend to discuss the details of any specific exemption controversy. I shall occasionally illustrate the argument by reference to the ministerial exception, but readers should feel free to substitute examples they find more plausible. The minimal assumption I start from is that there is a non-empty set of practices that are morally ambivalent in the intuitive sense referred to above (later in the paper, I shall disambiguate different interpretations of moral ambivalence).

The question I ask is this: what is the appropriate response of the liberal democratic state to morally ambivalent practices? It is clear that the state *must* prohibit abhorrent practices (which are wrongful because they violate rights) and *may* accommodate indifferent or permissible practices (which are not wrongful, even if their accommodation can be costly). What is less clear, however, is what it should do about morally ambivalent practices. In this Essay, I explore the possibility that such practices may be legally permitted, yet categorised as legal wrongs. It is this space – which I call Legal Toleration – that I seek to locate and explore. Legal Toleration models what some theorists (in other contexts) have called a ‘right to do wrong’, which has a similar, paradoxical protection-*cum*-disapprobation structure. According to Legal Toleration, exemptions for morally ambivalent practices protect rights to do wrong.

The Essay is structured as follows. In the first section, I set out the *conceptual* structure of Legal Toleration and the legal rights to do wrong that it secures. In the second section, I explore the *normative* justifiability of deploying Legal Toleration to exempt morally ambivalent practices from general laws.

1. The Structure of Legal Toleration

Legal Toleration recognises a legal right to do legal wrong. This notion is controversial. In this section, I briefly elucidate the notion of moral rights to do moral wrong, before explaining why the notion of legal rights to do legal wrong is commonly judged to be incoherent. I then argue that the only cogent conceptual framing for legal rights to do legal wrong is what I call Legal Toleration. Legal Toleration construes legal rights to do legal wrong as exemptions from general prohibitions, on a protection-*cum*-disapprobation model.

1.1 From Moral to Legal Rights to do Wrong

Let me start by clarifying the notion of moral right to do moral wrong. If ϕ -ing is wrongful, can there be a right to ϕ ? The expression sounds paradoxical because, in English at least, there is a troubling semantic closeness between the noun ‘right’ and the adjective ‘right’. Yet they connote distinct notions. The noun (‘having a right’) protects sets of options, whereas the adjective (‘doing, or being, right’) serves to guide choices between these options. Plainly, having a right to ϕ does not entail that ϕ -ing is the right thing to do (I have a right to get married, but this does not entail that it is right for me to get married). Rights typically protect sets of permissible options – options that we are permitted to choose or not to choose. The difficult task is to explain how they can also protect options that are wrongful and therefore impermissible.

To identify the conceptual space of rights to do wrong, let us draw on Wesley Hohfeld's formal analysis of rights.⁴ Hohfeld distinguished between claim rights and liberty rights. Liberty rights to ϕ entail that we have no duty not to ϕ . Claim rights are claims against others interfering with our ϕ -ing. Ordinarily, claim rights are accompanied by liberty rights. If I have a claim right to get married, I am also at liberty to get married, or not to get married. Yet because the two categories capture different types of entitlement, the category of claim right without liberty right opens the possibility of a right to do wrong. A right to do wrong is a right against being interfered with one's doing something that is wrong. Strictly speaking, it is not a right 'to do' wrong: one cannot have a liberty to do something that one has a duty not to do. It is a claim right, without a liberty right. This is not incoherent, because 'one ϕ -ing' and 'someone interfering with one's ϕ -ing' are separate acts-descriptions: different sets of Hohfeldian relations.⁵

The upshot is that rights to do wrong correlate with duties of others: duties not to coercively obstruct one's wrongdoing. Thus conceived, rights to do wrong are a familiar feature of our normative landscape. We have rights against the obstructing interference of others when we act in myriad impermissible ways: use freedom of speech to convey hate, join a racist party, refuse to donate to charity, lie to our friends, cheat on our spouse. To be sure, some of these rights are explained by the fact that law and morality pertain to different normative orders. When we say that we have a right to commit a wrong such as hate speech, we usually mean that we have a *legal* right to do *moral* wrong. This sentence is not paradoxical because the adjectival qualifiers signal a mid-sentence shift in the domain of reasons: not all moral wrongs should be legally prohibited.⁶

In the rest of this Essay, I focus on the more difficult – and more paradoxical – case of rights to do wrong within the *same* domain of reasons. Plainly, the fact that I have a legal right to join a racist party does not exhaust the question of whether I have a moral right to do so. Can I hold a moral right to do something morally wrongful? It seems that

⁴ Wesley Hohfeld, in W. Cook (ed), *Fundamental Legal Conceptions*. New Haven: Yale University Press 1919.

⁵ Ori J. Herstein, 'Defending the Right To Do Wrong', *Law And Philosophy* 31, No. 3 (2012): 343-65.

⁶ Leif Wenar, 'Rights', *The Stanford Encyclopedia of Philosophy* (Spring 2020 Edition), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/spr2020/entries/rights>.

I can. As suggested above, my moral right is only a claim right against certain types of interference from others: it does not bear on the rightness, validity or permissibility of what I opt to do. The fact that an action is wrong does not *ipso facto* give a reason to others permissibly to obstruct it. It may be, for example, that respect for my autonomy entails that I be left free to make moral mistakes. Moral rights to do moral wrongs are, then, at least intuitively plausible.⁷

More doubtful is whether it is possible, as a mere matter of conceptual possibility, to hold a legal right to do legal wrong.⁸ The difficulty is this. If I lack legal liberty to ϕ , I have a legally enforceable duty not to ϕ . How could I also hold a legally enforceable claim right to ϕ ? Patently, I cannot hold both a legal right to ϕ and a legal duty not to ϕ , assuming legal duties are uniformly enforceable. By contrast to the case of moral duties, there is no such thing as 'legal autonomy', no discretion as to whether one's legal duties are discharged: all are subjected to the blunt edge of legal sanction.⁹ This thesis – the enforceability of law thesis – is endorsed by a broad spectrum of scholars with otherwise contrasting theories of law: it is held both by positivist defenders of versions of the 'command theory' of law and by Dworkinian advocates of the judicial enforceability of law.

The enforceability of law thesis, however, is too narrow. The fact that law must generally be enforceable if a legal system is to subsist does not entail that legal enforceability is the marker of every single law. More generally, the force of law cannot be reduced to its coercive effect. State action and law interfere with actions in myriad ways that fall short of legal enforcement. H.L.A Hart famously argued that enforceability is not the chief guarantor of compliance with the law: socialisation, acceptance of authority, social pressure, as well as what he called the internal point of view, ensure compliance as effectively.¹⁰ Lawrence Sager, *contra* Dworkin, demonstrated that even

⁷ For an autonomy-based argument, see Jeremy Waldron, 'A Right to Do Wrong', *Ethics*, Vol. 92, No. 1, Oct., 1981, pp. 21-39, p. 30. I discuss Waldron's argument below.

⁸ Note that I shall only focus on legal wrongs that are also moral wrongs – that are *mala per se*, not simply made wrong by the law itself.

⁹ David Enoch, 'A Right to Violate One's Duty', *Law and Philosophy* 21, no. 4 (2002): 355-84, at p. 382-3

¹⁰ Hart is now interpreted as a 'legal expressivist' on these grounds. See, eg., Kevin Toh, 'Legal Judgements as Plural Acceptances of Norms', in Leslie Green & Brian Leiter (eds.), *Oxford Studies in the Philosophy of Law*, Vol. 1 (Oxford: Oxford University Press, 2011).

though some rights (eg. social rights) are under-enforced, they still count as proper rights.¹¹ Not all legal duties are paired with mechanisms of legal enforcement: consider, for example, the obligations of senior officials to carry out the duties of their office.¹² The possibility of the non-enforceability of law opens a logical space for legal rights to do legal wrong. This, at least, is what Ori Herstein hypothesises in the only academic paper, to date, on the subject.¹³ Is he right?

It is important to be clear about what non-enforceability refers to. Some legal duties are in practice not enforced, yet they are enforceable. Consider cases where a law is generally not enforced because it would be too costly or intrusive for state officials to do so. Good examples here are laws against dropping litter, or smoking inside cars. These are not rights to do wrong. The legal duty correlates with the absence of a claim right against both state officials and private actors, who can permissibly interfere with the legally prohibited action. More likely candidates are cases where a law is consistently not enforced because it is archaic – discrepant from the progressive evolution of public standards. Some states in the USA, for example, uphold prohibitions on practices such as sodomy or fornication in their statute books, yet do not enforce them. Many states around the world decline to prosecute doctors who perform illegal procedures such as physician-assisted suicide. These, however, are not rights to do wrong, either. Unless and until there is a formal process of legislative amendment or repeal, or of *désuétude* – whereby the judiciary unilaterally abrogates the contested provision –, these rights are not secure.¹⁴ They are held at the discretion of relevant authorities, and can at any point be denied. The correlative duties, in a word, are enforceable.

More likely candidates for legal rights to do legal wrong are various statutes of immunity, upon which Herstein focuses his own analysis. These are cases where the official status, or the special circumstances, of a person grant her immunity from prosecution. Consider, for example, non-prosecution agreements for criminal informers; or diplomatic immunity. According to the latter, diplomats who commit a crime in their

¹¹ Lawrence Sager, 'Material Rights, Underenforcement, and the Adjudication Thesis', 90 *Boston University Law Review* 579 (2010), 579-593.

¹² Joseph Raz, *The Concept of a Legal System*. Oxford: Oxford University Press, 1970 (second ed 1980), p. 153.

¹³ Ori J. Herstein, 'A Legal Right to Do Legal Wrong', *Oxford Journal of Legal Studies* 34, no. 1 (2014): 21-45.

¹⁴ N.A., 'Desuetude', 119 *Harvard Law Review*, 2009, 2005-2006.

host country have a claim against state officials that they not be prosecuted. Yet they have no claim against others interfering with the legally prohibited action, and their actions can generate secondary legal effects (eg. payment of civil damages). Herstein suggests that the structure of this right – non-enforceable duty, residual legal wrong, alternative sanctions – makes immunity case paradigms of legal rights to do legal wrong.¹⁵

Herstein has, I think, correctly identified the structure of legal rights to do legal wrong. However, he errs in thinking that the immunities he describes are such rights. Let me explain. Herstein is correct to point out that rights to do wrongs correlate with what we could call bifurcated state rights and duties. Bifurcation implies that the wrong is not annulled: it correlates with specific rights – perhaps duties – of intervention by official authorities. In the specific case of diplomatic immunity, the host state has no right to prosecute on criminal grounds, but it can pursue the wrongdoer for civil damage. Herstein is also correct to intimate that rights to do wrong accrue to certain people in virtue of their special position or status. These rights – I shall argue – are indeed best interpreted as tailored *exceptions* from general rules.

All that said, Herstein is mistaken to construe cases such as diplomatic immunity as rights to do wrong. As other agents – private or public – can lawfully interfere with the diplomat’s wrongdoing, the diplomat is in effect under a legal duty not to do wrong. What she holds is merely a narrow right against prosecution of wrongdoing by her host state. The right is too narrow to count as a right to do wrong, especially given how easy it is for her home state to waive the immunity. Similar sceptical considerations apply, *mutatis mutandis*, to the other immunity cases that Herstein chronicles. For example, police informers only acquire immunity *post facto*: at the time of commission of the illegal action, the legal duty can be enforced on them. It is not unenforceable.

In the next section, I set out an alternative account of non-enforceable legal duties, which mirrors the structure of Herstein’s explication of rights to do wrong, yet proposes a different account of the bifurcated duties they correlate with.

1.2 A Proposal: Legal Toleration

¹⁵ Herstein, ‘Legal Right to Do Legal Wrong’.

Here is my proposal. A legal right to do legal wrong entails (i) a claim right against the legal sanctions that normally attach to the wrongdoing (not simply prosecution) and (ii) no claim right against other state-imposed sanctions (such as expressive sanctions). To grasp the initial plausibility of this suggestion, let us return for a moment to moral rights to do moral wrong. Looking at them closely, it is apparent that they, too, display a bifurcated structure. Consider how such rights differ from moral rights to do *what is permissible*. While moral rights to do what is permissible merely correlate with duties of non-obstruction, moral rights to do what is impermissible warrant additional reactive attitudes, such as the expression of disapprobation.

To illustrate, if I have a right to join a racist party, others are under a duty not to stop me from doing so. Yet if joining such a party is wrong – if I am not at liberty to do it – then others have a right – perhaps a duty – to criticise, reprimand, or ostracise me. They would wrong me if they coercively obstructed my ϕ -ing, but they do not wrong me if they attempt to talk me out of ϕ -ing. Rights to do wrong, therefore, generate bifurcated rights and duties for others. Of course, in interpersonal cases of morality, the line at which mere disapprobation and admonition stop, and obstruction begins, is a fine one. Between close friends, a raised eyebrow might be felt as a positive show of force.¹⁶ If my friends and family threaten to ostracise me, were I to join a racist party, both the intended message and the effect of their threat might well be equivalent to coercive obstruction. Still, moral rights to do moral wrong supervene on the crucial distinction between obstructing interference, on the one hand, and other forms of interference with actions, such as disapprobation, on the other.

Legal rights to do legal wrongs, I suggest, rely on a structurally similar bifurcation. The legal right blocks a special kind of interference: legal prohibition. Yet the residual presence of the legal wrong justifies other forms of interference: disapprobation by state and official authorities. If I have a right to ϕ , then the state may not prohibit my ϕ -ing, but it may sanction it via official disapprobation. In the domain of law and state action, the distinction that I am drawing, between prohibition and disapprobation, has a recognizable presence. Some state policies and laws *prohibit* actions, while others *discourage* actions. To take a familiar example, the use of class A drugs such as heroin is

¹⁶ Waldron, 'A Right to Do Wrong', 30.

legally prohibited; whereas smoking tobacco is merely discouraged, say through campaigns of information about its harmfulness.

Plainly, legal rights to do wrong diverge from the heroin/tobacco example in two ways: first, the wrong in question must be a public moral wrong (not merely, say, a public health risk) and, second, the same action must be subjected to differentiated state treatment depending on who engages in it. Legal rights to do wrongs entail concomitant deployment of the bifurcated - prohibitive and expressive - powers of the state on different agents. The proposed *Legal Toleration* takes the form of a rule-and-exception, as follows:

Rule: the state generally disapproves of, and prohibits, ϕ -ing.

Exception: the state disapproves of, but does not prohibit, ϕ -ing by agent X.

There are many elements to unpack here. The Rule makes it clear that the state generally considers ϕ -ing to be legally (as well as morally) wrongful: it is the subject of a general prohibition. Yet the Exception allows that a class of agents - call them X - have a right to ϕ , because of their special status or position (for example, they are churches or other expressive associations). In contrast to the immunity cases canvassed by Herstein, X's right against state legal prosecution is secure. X have a claim right to ϕ : state officials would act unlawfully if they prosecuted X for ϕ -ing, and X can enlist state officials to prevent third parties from obstructing their ϕ -ing. Yet X are still under a legal duty not to ϕ , because their ϕ -ing is subjected to other state-backed sanctions: expressive sanctions. These include speech (by officials and representatives) as well as funding and subsidy (or their withdrawal). For example, the state may withdraw charitable status from organizations whose practices conflict with egalitarian norms and principles, thereby expressing official disapprobation of them.

A natural objection to my account of Legal Toleration is that it is unclear in what sense X are committing a *legal* wrong. Can ϕ -ing a legal duty for X, if there are no legal sanctions for its breach? It can, because the legal wrong has a residual presence, in two ways. First, ϕ -ing is a public wrong and, as such, liable to official (though not legal) sanctions. Second, ϕ -ing is generally prohibited in society at large, and thus bears the marks of legal wrongdoing. Let me explicate these two conditions in turn. The first condition is that ϕ -ing is a public wrong, subjected to 'expressive' sanctions. On

expressive theories of state action, the state constitutes legal wrongs in a variety of ways, which include legal regulation as well as non-legal sanctions.¹⁷ Consider the following examples of expressive state sanctions. Public authorities sometimes introduce ‘shaming penalties’ as alternative sanctions to legal imprisonment.¹⁸ Or they might engage in ‘counter-speech’ against hate speech: the state might use its powers as speaker, spender and educator to sanction those organizations that use rights of freedom of speech to communicate views that are incompatible with free and equal citizenship.¹⁹

On an expressive theory of state action, such alternative sanctions are functionally equivalent to legal penalties. They fulfil the same functions as prohibition: they are designed to blame wrongdoers, or to deter wrongful actions. Official disapprobation, admonition and censure can be felt to be as freedom-limiting as legal prohibition.²⁰ It is not inconceivable, for example, that a religious group might prefer to pay a legal fine as penalty for gender discrimination, rather than being subjected to public condemnation. On an expressive theory of law and the state, prohibition and disapprobation are two available, equally apt, responses by the state to a legal wrong. The legal wrong is still there: what makes it legal is that it is liable to collective public regulation. It is not merely a moral wrong (such as cheating on your spouse) falling under the domain of personal or interpersonal morality: it is a public wrong falling under the legitimate domain of collective, state-sanctioned regulation. Such wrongs can be effectively sanctioned through state expressive action.

To illustrate the possibility of the expressive sanction of public wrongs, consider the response of many governments to the coronavirus pandemic in 2020. To contain the spread of the virus, governments instructed their citizens to avoid unnecessary journeys, to wear face coverings in public places, to respect social distancing rules, etc. Some of these instructions were enforced by the police and backed by legal sanctions such as fines; others were not (they were merely communicated and reiterated by public officials such

¹⁷ See, eg, Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits*. Cambridge MA: Harvard University Press, 2015.

¹⁸ Dan Kahan, ‘What Do Alternative Sanctions Mean?’, *University of Chicago Law Review* 63 (1996): pp. 591-653, at p. 593.

¹⁹ Corey Brettschneider, *When the State Speaks, What Should it Say?* Princeton, NJ: Princeton University Press, 2012.

²⁰ See, eg., Paul Billingham, ‘State Speech as a Response to Hate Speech: Assessing “Transformative Liberalism”’, *Ethical Theory and Moral Practice*, 22(3) (2019): 639-655.

as transportation and public parks officers, as well as governmental authorities and the police). The latter instructions, however, were not gentle recommendations or paternalist nudges (comparable to official anti-smoking campaigns): their intended normative force was *equivalent* to that of legal sanctions. The choice between enforceable or non-enforceable sanctions was not a measure of the relative normative force of the injunction. It expressed, rather, a contingent judgement about the predicted effectiveness of different forms of sanctions. Crucially, the force of the official 'ought' was the same in both cases. This is not to say, however, that non-compliance with governmental instructions, such as coronavirus restrictions, qualifies as a legal right to do legal wrong. If it did, the concept would be over-inclusive, as it would generalise to all cases of pragmatic non-enforcement of legal duties.

The second condition to be met, on the account I put forward, is that the legal duty must be generally enforced on the majority of the population. There must be a presumption of legal prohibition of the contested action. Rights to do wrong take the form of exemptions from general obligations: selected individuals or groups have the right to violate an otherwise enforced legal duty. On my account, they (and only they) have legal rights to do legal wrongs. As I suggested above, one crucial feature of legal rights to do wrong – brought to light by Herstein – is that they selectively accrue (i) in relation to wrongs that are generally sanctioned by the law (ii) to certain people in virtue of their special position or status. These people still commit a residual legal wrong, *both* because the wrong is generally subjected to legal prohibition and because, in their case, it is subjected to official state disapprobation.

Assuming this bifurcation between prohibition and disapprobation is plausible, it raises a further question. If prohibition and disapprobation are functionally equivalent, as I suggested they are, it is no longer clear in what sense X have a right to do what others may not do. X are differentially sanctioned, but in what sense is the sanction they are subjected to, an attenuated sanction? More specifically, in what sense are they *exempted* from the normal duties set out by the Rule? We can answer this objection in two ways.

First, we can note that while prohibition and disapprobation are functionally equivalent in the sense that they fulfil similar aims (retribution, deterrence, etc.), it remains the case that state legal prohibition, with its assorted mechanisms of fines and (*in extremis*) imprisonment, is uniquely coercive. State coercion decisively removes the

option of ϕ -ing from the set of available options, while disapprobation merely raises the cost of ϕ -ing. X are not prohibited from ϕ -ing, but if they ϕ , they become liable to non-legal sanctions. At this point, critics may object that legal coercion in itself does not, strictly speaking, remove the option of ϕ -ing: it simply attaches a distinct cost – the threat of legal sanction – to it. So, we may have exaggerated the difference between legal and expressive sanctions.

Fortunately, we do not need to settle the knotty question of the relationship between law and coercion: we can answer the objection in a second, more direct way. The problem with the objection, as stated, is that it misses the distinctive structure of Legal Toleration. X who ϕ , are subjected to state disapprobation. Non-X who ϕ , are subjected *both* to disapprobation and prohibition. To illustrate, a private firm found guilty of gender discrimination suffers both the injury of the legal penalty and the insult of state-backed official disapprobation. By contrast, religious organizations that commit the same wrong are only subjected to disapprobation. Whatever one's views about whether expressive sanctions can be as coercive as legal sanctions, it is plainly the case that, on a simple additive view, the *combined* effect of expressive and legal sanctions is more coercive than the effect of either of them taken singly. X are exempted from a prohibition that falls on non-X. They have, in this sense, a legal right to do legal wrong.

This right is clearly delimited. As I have argued, it does not correlate with merely moral wrongs, nor with public wrongs that – for contingent reasons of effectiveness – governments do not enforce on anyone. It only attaches to wrongs that (i) fall under the scope of state authority *qua* justice-based wrongs and (ii) are legally enforced via a general prohibition. What the right secures is the non-enforceability of the prohibition on a specific set of people.

This completes my explication of the conceptual structure of Legal Toleration. I now move to the separate question of whether Legal Toleration is a normatively defensible legal response to morally ambivalent practices.

2. The Justification of Legal Toleration.

Legal Toleration has a bifurcated structure: it entails both the absence of legal prohibition and the presence of expressive sanctions. Of these two clauses, it is the former that is in need of justification. We assume that ϕ -ing is wrongful, morally and legally, at the bar of liberal justice, and that legal prohibition as well as expressive sanctions are generally apt responses to ϕ -ing. What needs to be explained, therefore, is what justifies that a set of people X be exempted from legal prohibition. Why should X have a legally protected right to ϕ , given that ϕ is legally wrongful? I consider three possible responses, which I call Integrity, Uncertainty and Disagreement. Each relies on a distinct account of what it means for an action to be morally ambivalent. After showing the limits of both the Integrity and the Uncertainty accounts, I explore in greater depth the potential and pitfalls of a defence of Legal Toleration grounded in Disagreement. On that view, morally ambivalent actions are liable to be exempted from general laws because they express liberal disagreement about justice.

2.1 Integrity

On the integrity conception of moral ambivalence, ϕ is morally ambivalent just in case it simultaneously expresses two conflicting values. We have *pro tanto* moral reasons *both* to object to ϕ (because it infringes the rights of others) and to let X ϕ (out of respect for X's autonomy or integrity²¹). When our moral intuitions pull in different directions in this way, perhaps a right to do wrong is an attractive way to give justice to both. In what follows, I examine a version of this argument, put forward by Jeremy Waldron. I develop two objections: one to Waldron's own defense of moral rights to moral wrongs; the other to the application of the Waldronian logic to the legal sphere.

If I have a *moral* right to ϕ , then others have a special reason to refrain from obstructing my ϕ -ing, even though their moral objection to ϕ is warranted. What could that special reason to refrain be? A thoughtful suggestion was provided by Waldron in his 1981 paper, 'Is There a Right To Do Wrong?'. Waldron appealed to what he called the generality of moral rights. Rights protect certain choices in areas of decision-making that have a special importance for individual autonomy – political activities, intimate relations,

²¹ I further disambiguate the two values of autonomy and integrity below.

religious commitments, and so forth. For autonomy to be meaningful, it must not simply protect morally required or morally indifferent actions. Individuals must have a sufficient range of options – including morally impermissible ones – for their choice meaningfully to express their autonomy. Rights would only protect sets of banal or trivial options, if we excluded a right to make wrongful choices.²²

The chief flaw of Waldron's approach that the commission of a class of wrongs – specifically, those that deny the justice rights of others – cannot be justified by appeal to the value of individual autonomy. Regrettably, Waldron does not discuss such wrongs. He focuses either on moral wrongs that are protected by legal rights (such as the right to freedom of speech) or on moral rights to do what other people, because of reasonable ethical disagreement, consider to be wrong.²³ Neither relates to our key case: that of wrongs that are collectively, from an impersonal point of view, recognised as serious enough to constitute public wrongs *qua* injustices. Appeals to individual autonomy can only justify the pursuit of conceptions of the good that are compatible with the just rights of others. Insofar as far right activists exercise freedom of speech and association in ways that deny the rights of others as free and equal, they do not exercise any properly understood right. *Contra* Waldron, individuals have no moral right to join racist parties.²⁴

To be sure, we may have good reasons not to interfere with their so joining (obstructing interference may be costly or self-defeating; or it may damage our interpersonal relation, etc.) and such reasons can ground what we could call a weak claim right.²⁵ However, it is crucial not to mistake such a *weak* right for the *strong* right that Waldron seeks to vindicate. While a strong right is directly justified by appeal to the moral status or interests of the right-holder, a weak right is justified by appeal to reasons external to her. Both types of rights, to be sure, correlate with directed duties – duties

²² Waldron, 'A Right to Do Wrong'. Waldron's formulation explicitly relies on a will theory of rights. Interest theory of rights, however, can also accommodate a right to do wrong if autonomy is a sufficiently strong interest to justify holding others under a duty.

²³ Jeremy Waldron, 'Galston on Rights', *Ethics* 93, no. 2 (1983): 325-27.

²⁴ Jonathan Quong, 'The Rights of Unreasonable Citizens', *Journal of Political Philosophy*, Vol. 12, Issue 3, Sept 2004, 314-335, p. 331.

²⁵ I borrow the expression from Robert George, 'Taking Rights Seriously: Waldron on "The Right To Do Wrong"', In R. George, *Making Men Moral*, Chapter 4. Oxford: Oxford University Press, 1995, 110-128.

whose breach constitutes a *wronging* of the person to whom the duty is owed. Yet in the case of strong rights, this wronging fails to show appropriate consideration to salient moral features of the right-holder.²⁶

To illustrate, consider possible justifications from the best-known legal right to do moral wrong (at least in US law): the right to hate speech. A weak right would be grounded in considerations such as the epistemic value of the free exchange of ideas, its contribution to democratic deliberation, the importance of listeners' autonomy, etc. Speakers would be wronged if they were prevented from speaking, but they would not be disrespected, because their moral status or salient interest is not what grounds the right. A strong right, by contrast, would be grounded in the interests of the speaker herself (say, her interests in sincere agency): she would be disrespected if she were prevented from engaging in hate speech. Waldron attempts to justify a *strong* moral right to do moral wrong: a right grounded in the interests (specifically, in autonomy) of the rights-holder herself. But it is doubtful that autonomy can ground a right to violate the justice rights of others (or indeed, to engage in hate speech). At best, such a right can only be a weak right: a shadow of the duty of others not to intervene, itself grounded in other reasons.²⁷ Strong rights to do wrong in the case of injustices are a non-starter: the two conflicting intuitions cannot be reconciled.

Now assume, *arguendo*, that Waldron's account survives this criticism. There is a further difficulty with the application of a Waldronian account in support of Legal Toleration.²⁸ The structure of Legal Toleration differs from that of standard liberal rights

²⁶ This move potentially dissolves a puzzle highlighted by Rowan Cruft: why we should think that it is disrespectful to a person X to violate a duty towards X that is not grounded in anything morally significant about X? See Rowan Cruft, 'Why is it Disrespectful to Violate Rights?', *Proceedings of the Aristotelian Society*, Volume 113, Issue 2, July 2013, pp. 201-224. On my account, violating weak rights is not disrespectful. Consider Raz's example of parents' right to child benefit. Parents who are denied this right are wronged, but they are not disrespected, because the right is not grounded in their own interests.

²⁷ For the view that hate speech should be best defended as a weak (in my sense) and defeasible right of non-enforcement of the duty to refrain from hate speech, rather than as a strong moral right to hate speech, see Jeff Howard, 'Dangerous Speech', *Philosophy and Public Affairs*, Volume 47, Issue 2, Spring 2019, pp. 208-254.

²⁸ Waldron himself rejects the possibility of legal rights to do legal wrongs, because he thinks that legal duties strictly correlate with enforceable legal rights. As I have a different (bifurcated) account of the correlativity of legal rights and duties, I do not follow Waldron on this point, and present different objections to an autonomy-based legal right to do legal wrong.

which, on Waldron's account, protect the exercise of one's *autonomy*. Legal Toleration does not protect the open-ended value of autonomy and choice, but a more determinate value, that of *integrity* – the value of living in accordance with one's specific beliefs and pursuits. A legal right to do legal wrong would not protect the freedom to choose to do right (or not): rather, it would single out and protect the performance of wrongful actions. It would grant legal protection, not to the freedom to ϕ , but to ϕ -ing itself. Waldron's emphasis on autonomy and choice would get lost in legal translation, so to say.

Perhaps we are over-estimating this difficulty, however. If autonomy consists in subjecting oneself to rules, and living in accordance with those rules – ie, living with integrity – is connected to subjecting oneself to them, then integrity and autonomy are not that far apart. Religious freedom, after all, protects both freedom of choice in relation to religion and the status of being bound by religious commitments. Furthermore, there is nothing paradoxical *per se* about the legal protection of integrity-protecting commitments. Liberal theorists have argued that respect for integrity (not simply autonomy) is what justifies tailored legal exemptions from burdensome laws – ceremonial drug use, sartorial commitments, dietary requirements, and so forth. Yet – *qua* liberal – these theorists share a further conviction, that integrity-protecting commitments do not deserve legal accommodation when they violate the justice rights of others.²⁹ Why not?

Advocates of such accommodation would argue that we must balance the special and disproportionate setback suffered by X if they cannot live with integrity, against the harms they cause when they violate the rights of others. It is hard to see, however, how the value of integrity could ever be high enough for the liberal state to tolerate injustice. Integrity cannot be balanced against the commission of injustice. For integrity to take precedence, it must be the case that the harms in question are not in fact unjust: it must be the case that they do not reach the threshold of severity of actual violations of rights. I

²⁹ Cécile Laborde, 'Religion and the Law: the Disaggregation Approach', *Law and Philosophy*, November 2015, Volume 34, Issue 6, pp. 581-600; *Liberalism's Religion*; Watson and Harley, *Equal Citizenship and Public Reason*. There is a further debate, between these theorists, about whether a commitment that entails violating the rights of others can be said to express the value of integrity in the first place. See my exchanges with Paul Bou-Habib, Jonathan Seglow, and Lori Watson in the Special Issues on *Liberalism's Religion in Review of Politics* (2019) and *Critical Review of International Social and Political Philosophy* (2020).

explore this possibility below. Suffice to say here that this reconciliation only succeeds because it dissolves the initial value conflict: there is no residual wrong, properly speaking.

2.2 Uncertainty

On the uncertainty conception of moral ambivalence, ϕ is morally ambivalent just in case we are not entirely certain that it is wrongful. Because we are not sure how strongly we should object to ϕ (we are not sure whether it infringes the rights of others) we should let $X \phi$ (out of respect for their autonomy, or integrity).

A version of this argument has recently been proposed by Renée Bolinger. In some cases, Bolinger suggests, we are not certain as whether some actions are actually, or only apparently, wrong. Just as we are not always in a position to know certain facts (whether a particular shade is red, or a person's head bald), likewise, we cannot always justify our judgement of the moral quality of actions (for example, because we do not have access to all the pertinent information). We know that actions that violate others' rights are unambiguously wrong, but it is sometimes difficult to be certain about which actions belong to that set. There is a grey zone of ambivalent cases where our judgments are not stable. In cases of epistemic doubt of that sort, Bolinger argues, we should adopt a precautionary principle. Because infringing on autonomy is a high-risk game, it is best to err on the side of protecting rather than limiting its exercise.³⁰

This is a thoughtful suggestion, yet two considerations impel us to reject its applicability to Legal Toleration. The first is that it is not clear why the relevant baseline should be the protection of autonomy. Recall that we are focusing on cases where we are uncertain as to whether one person's exercise of her autonomy affects other people in a way that infringes their justice-based rights. Plainly, rights-infringement is as high-risk a game as autonomy-violation. The value of autonomy in itself cannot justify that it be given priority over other justice-based considerations: what must be justified is not

³⁰ Renee Jorgensen Bolinger, 'Revisiting the Right to Do Wrong', *Australasian Journal Of Philosophy* 95, no. 1 (2017): 43-57.

infringement of autonomy *simpliciter*, but the all-things-considered distribution of justice-related rights (including autonomy). Infringing autonomy is *pro tanto* wrong, but all-things-considered permissible if it protects an important value such as the protection of rights. In sum, it is unclear why respect for autonomy should be the relevant baseline if the question we are uncertain about is whether the exercise of autonomy by one agent infringes the rights of another. The burden of proof might as plausibly shift the other way.

The second consideration is that Bolinger does not distinguish between individual and collective uncertainty. Her focus on individual epistemic uncertainty³¹ fails to capture what is at stake in collective ethical puzzles such as Legal Toleration. To be sure, Bolinger recognises that we may be *collectively* unsure about whether or not some action is wrongful. But she does not consider the possibility that such collective uncertainty may be compatible with high levels of *individual* epistemic certainty. On a broadly Rawlsian political epistemology, collective uncertainty is the natural consequence of deep disagreement about rights and justice, and need not imply individual uncertainty. Consider what Rawls says about reasonable ethical disagreement (disagreement about the good life). Someone who accepts that everyone, including herself, is subject to the burdens of judgment, is not logically impelled to doubt the truth of her own conception of the good just because others reject it. The burdens - the fact that moral reasoning is subjected to epistemic obstacles, as well as framed by our personal experience - simply explain why others' disagreement is reasonable, even if mistaken. As Rawls insists, the mere existence of reasonable disagreement does not entail that 'we should be hesitant and uncertain, much less sceptical, about our own beliefs'.³²

I suggest that we think of liberal disagreements about justice in roughly the same way. We should assume that our views about justice, much like our broader conception of the good, have been formed against a distinct personal experience, and partly reflect

³¹ Cf. Bolinger's example of uncertainty about the moral valence of actions: 'If, for instance, your eccentric neighbour begins performing a series of experiments in his basement on unclaimed human corpses, it is unclear whether his new hobby is morally prohibited. It may well be wrong, but you may not be confident enough in this judgment to risk interfering.' Bolinger, 'Revisiting the Right to Do Wrong', p. 53.

³² John Rawls, *Political Liberalism*, 1996, 2nd ed., first ed: 1993. *Political Liberalism*. New York: Columbia University Press, p. 63.

our first-person interpretation of the demands of justice. Assuming that we are justified in holding the beliefs we have, then, by analogy with disagreement about the good, the mere fact of liberal disagreement about justice does not, in and by itself, give us reasons to revise or doubt our own view.³³ The problem, here, is that this type of collective uncertainty cannot justify (to individually certain individuals) the uneasy compromise of rights of do wrong. Bolinger's account can only justify rights to do wrong as morally apt responses to individual uncertainty, or to collective uncertainty stemming from individual uncertainty. Yet collective uncertainty in politics most likely arises, not from individual uncertainty, but from reasonable disagreement between not-uncertain individuals. I turn to these cases in the next, final section.

2.3 Disagreement

On the disagreement conception of moral ambivalence, ϕ is morally ambivalent just in case there is liberal disagreement about the wrongfulness of ϕ . *Legal Toleration* is an apt response to this disagreement because it shows appropriate political respect to dissenters: those who hold an alternative, still distinctively liberal, conception of justice. This, I shall argue, is the most promising justification for legal rights to do legal wrong. The suggestion is not new. Those political liberal philosophers who take seriously Rawls's suggestion that reasonable citizens disagree about justice as well as about the good, have suggested that legal exemptions could be an apt response to this disagreement.³⁴ Yet no

³³ This all-too-brief suggestion raises complicated questions about the epistemology of disagreement, which I do not have the space to address here. Epistemologists have reflected on when it is rational to believe that p in case one's epistemic peers believe that not- p . The Rawlsian epistemology I gesture at here is aligned with theories that place a premium on epistemic self-trust as justifying an attitude of steadfastness in the face of disagreement. For different accounts of why at least some epistemic self-trust is warranted, see, eg., Ralph Wedgwood, 2010, 'The Moral Evil Demons,' in R. Feldman and T. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press; David Enoch, 2010, 'Not Just a Truthometer: Taking Oneself Seriously (but not Too Seriously) in Cases of Peer Disagreement,' *Mind*, 119: 953–997; Fabienne Peter, 'Epistemic Self-Trust and Doxastic Disagreements,' *Erkenntnis* 84 (2019): 1189–1205; Amia Srinivasan, 'Genealogy, Epistemology and Worldmaking,' *Proceedings of the Aristotelian Society* (2019).

³⁴ Jonathan Quong, *Liberalism without Perfection*. Oxford: Oxford University Press, 2011, pp. 205–6; Jeffrey W. Howard, 'The Labors of Justice: Democracy, Respect, and Judicial Review,' *Critical Review of International Social and Political Philosophy*, 22:2 (2019), 176–199, p. 195.

one, to my knowledge, has yet explored the theoretical implications of this claim. In this final section, I first lay out the argument, clarifying the grounds of liberal disagreement about morally ambivalent practices. I then argue that democratic decision-making settles liberal disagreement and dissolves moral ambivalence, such that there is no space left for legal rights to do legal wrong. When X have a right to ϕ , it is not by virtue of holding a legal right to do legal wrong. The justifiability of Legal Toleration, I will argue, hinges on the morality of compromises about justice under political liberalism.

2.3.1 *Moral ambivalence and liberal disagreement*

Liberals disagree³⁵ about morally ambivalent practices, such as male priesthood. This is often presented as a disagreement about whether *religious* commitments ground selective rights to be exempted from general obligations of justice. Yet this is unsatisfactory, in my view, both because the question of morally ambivalent practices arises exactly in the same way for non-religious integrity-protecting practices, and because – as we saw earlier – the fact that X has religious (or, more broadly) integrity-related commitments does not settle the question of the scope of the rights that they ground. It seems to me that disagreement over a range of morally ambivalent practices is better framed in more general theoretical terms.

It should be seen as an argument about how far a liberal state should require ‘congruence’, in Nancy Rosenblum’s terms, between its political principles (eg. equality and non-discrimination) and the norms that structure other associations such as families, churches, and other groups.³⁶ This question tracks a long-standing debate at the heart of the liberal tradition, between congruence thinkers such as Rousseau or Mill, and incongruence thinkers such as Tocqueville or the English pluralists.³⁷ A similar divide is also operative within Rawlsian political liberalism. Rawls’s assumption of reasonable pluralism supported a division of labour between the principles that govern the state and

³⁵ What Rawls calls reasonable disagreement I prefer to call, simply, liberal disagreement. I further assume that liberal justice is inconclusive, such that commitment to basic liberal principles is compatible with a range of different, acceptably liberal, conceptions of justice.

³⁶ Rosenblum, Nancy L.. *Membership and Morals: The Personal Uses of Pluralism in America*. Princeton, NJ: Princeton University Press, 1998; Laborde, *Liberalism’s Religion*; Billingham, ‘Shaping Religion’.

³⁷ Cécile Laborde, *Pluralist Thought and the State in Britain and France*. Basingstoke, Macmillan, 2000.

the basic structure, on the one hand, and those that prevail in associations in the private and civil sphere, on the other.³⁸ Political liberalism, however, is inconclusive about how strict the division of labour should be: in particular, about the scope and reach of state-enforced egalitarian norms.

At one end of the political liberal spectrum, we find Pluralists. They argue that egalitarian norms primarily apply to the basic structure – the central institutions and laws that distribute basic rights and opportunities. Other associations and groups, and the individuals that compose them, have extensive rights of personal, parental, religious and associational freedom, and can structure their lives around principles that are incongruent from state norms, as long as all members are treated as free and equal citizens. At the opposite end of the political liberal spectrum, we find Egalitarians, who retort that inequalitarian social relationships, while not necessarily objectionable in and of themselves, should be curtailed if their effect is likely to spill over and affect the equal status of citizenship.³⁹ Morally ambivalent claims, on this view, are claims whose rightfulness depends on adjudicating the contested question of the scope of egalitarian norms. The disagreement over male priesthood, for example, turns on whether the exclusion of women from the priesthood is detrimental to their status as full citizens, and whether state egalitarian norms should be imposed within associations such as churches. This disagreement is internal to political liberalism: it is a liberal disagreement.⁴⁰

³⁸ On the moral division of labour as a strategy for accommodating pluralism, see Samuel Scheffler, 'Egalitarian Liberalism as Moral Pluralism', *Proceedings of the Aristotelian Society*, Suppl., 79 (2005), 229–53 at p. 238.

³⁹ Such egalitarians, it should be stressed, are still political liberals, not comprehensive or perfectionist liberals. They do not pursue a comprehensively egalitarian agenda of democratization and liberalization of society, but rather worry that the political status of citizens as free and equal cannot be secured if some citizens are systematically discriminated against in private and associational settings

⁴⁰ Pluralists (in my sense) include Nancy Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America*. Princeton: Princeton University Press, 1998; Saladin Meckled-Garcia, 'On the Very Idea of Cosmopolitan Justice. Constructivism and International Agency', *Journal of Political Philosophy*. Volume 16, Number 3, 2008, pp. 245–271, 249–259; Paul Billingham, 'State Speech as a Response to Hate Speech'; 'Shaping Religion. The Limits of Transformative Liberalism', in Jonathan Seglow & Andrew Shorten (eds.) *Religion and Political Theory. Secularism, Accommodation and the New Challenges of Religious Diversity*. London: Rowman & Littlefield, 2019, 57–77; Jeff Spinner-Halev (2011) 'A Restrained View of Transformation', *Political Theory* 39: 777–784. Early egalitarian critiques of Pluralists were not all political liberals: See Susan Okin, *Justice, Gender and the Family*. New York: Basic Books, 1989, G. A. Cohen, 'Where the Action is: On the Site of Distributive Justice', *Philosophy and Public Affairs*, 26(1), 1997, 3–30; Clare Chambers, 'All Must Have Prizes: the Liberal Case for Interference in Cultural Practices',

On the political liberal view, such disagreement must be adjudicated politically. The two views are mutually incompatible: the state must affirm either that rights of non-discrimination apply to ministerial offices, or that they do not. By contrast to disagreement about the good, the state cannot adopt a stance of epistemic stand-off, official uncertainty, or principled neutrality towards disagreement about justice. Political liberals typically argue that the only procedurally fair way to address liberal disagreements about justice is via democratic decision-making.⁴¹ As both the Egalitarian and the Pluralist conceptions are recognizably liberal conceptions of justice, either can be selected by citizens through democratic procedures. The point of democratic resolution, on this account, is to resolve liberal disagreement by dissolving moral ambivalence – by settling, in a final and determinate way, the question of the wrongfulness of the contested practice. One important implication, as I now suggest, is that democratic resolution precludes the recognition of legal rights to do legal wrong.

2.3.2 Democratic conclusiveness and rights to do wrong.

Let us first consider a state in which the Pluralist conception is democratically victorious – call it a Pluralist state. In a Pluralist state, where the public conception of justice rejects full congruence, the practice of male priesthood is disambiguated in such a way that churches do no wrong. Not all the norms of egalitarian justice are meant to apply to private associations, and male-only priesthood is not an act of unfair discrimination. The right to be a priest is not a basic right of citizenship; the harms suffered by women who are denied ministerial office do not amount to a violation of their justice-based rights. As a result, churches hold both a liberty right to select their ministers discretionarily, and a

Multiculturalism Reconsidered, ed. in Paul Kelly (Cambridge Polity, 2002), pp. 151–73 at pp. 164–5. The logical space of Egalitarian political liberalism is well-delimited by Chiara Cordelli, ‘The Institutional Division of Labor and the Egalitarian Obligations of Non-profits’, *Journal of Political Philosophy*, 20(2), February 2011, 131–155. Egalitarian political liberal accounts that accommodate some morally ambivalent practices such as male-only clergy include Watson & Hartley, *Equal Citizenship*, 120–127, Laborde, *Liberalism’s Religion*, Quong, *Liberalism Without Perfection*, Brettschneider, *When the State Speaks*. Princeton: Princeton University Press, p. 135. My aim in this paper is to explore rights to do wrong as a possible justification for this move.

⁴¹ Jeremy Waldron, *Law and Disagreement*. Oxford: Oxford University Press, 1999; Thomas Christiano, ‘The Authority of Democracy’, *Journal of Political Philosophy*, 12/3 (August): 266–290, at p. 285, Laura Valentini, ‘Assessing the Global Order: Justice, Legitimacy, or Political Justice?’, *Critical Review of International Social and Political Philosophy*, 15, 5 (2012) 593–612; ‘Justice, Disagreement and Democracy’, *British Journal of Political Science*, Vol 43, Issue 1, January 2013, pp. 177–199; Jeffrey W. Howard, ‘The Labors of Justice: Democracy, Respect, and Judicial Review’, *Critical Review of International Social and Political Philosophy*, 22:2 (2019), 176–199.

claim against the state that they be protected from interference (by state officials as well as private citizens). The ministerial exception is not a ‘license to discriminate’: it is not an exception from duty, as it defines the proper scope of the right to freedom of association. Once the public conception of justice is made determinate, it fully specifies rights in such a way that no conflict of rights arises. The term ‘ministerial exception’ is a misnomer: it is not an ‘exception’ but the normal mode of church autonomy in the Pluralist state.⁴² In a Pluralist state, the ministerial exception is a Hohfeldian liberty, one that annuls the (legal and moral) wrong by declaring the contested action a permissible way to exercise a set of rights. There is no residual public wrong: Legal Toleration does not apply.

Consider now an Egalitarian state – one in which the Egalitarian conception of justice has democratically been selected as the victorious public conception. Such a state, in its effort to protect and promote equality, is concerned to stamp down on a range of discriminatory practices, including within seemingly private and/or voluntary associations. Women have a right to be protected against discrimination in access to key opportunities, particularly those that attach to positions of authority and influence. Sexist practices within non-state associations contribute to the perpetuation of patriarchal norms of domination throughout society, which themselves affect the standing of women as free and equal citizens. Women have an equal right of opportunity to access all positions, and churches have a correlative duty not to discriminate against them. Churches, in sum, have no *right* to do wrong.

Now, could either a Pluralist or an Egalitarian state recognise the ministerial exception as a *legal* right to do *moral* wrong? This possibility is ruled out by the demands of democratic legitimacy. Recall that the disagreement between Egalitarians and Pluralists centres on the question of whether a practice ϕ is wrongful at the bar of both morality and law. A fair democratic process is the only way decisively to settle that question for political purposes. If a *prima facie* morally ambivalent practice is found to be

⁴² Variants of this Pluralist defense can be found in Christopher Lund, ‘In Defense of the Ministerial Exception’, *North Carolina Law Review*, 90, 1, 2011; Julian Rivers, *The Law of Organized Religions*, Oxford, Oxford University Press, 2010, p. 136; Paul Billingham, in John Adenitire (ed.), *Religious Beliefs and Conscientious Exemptions in a Liberal State*. London: Bloomsbury, 2019, 51-70; Robin Fretwell Wilson, ‘Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After Hobby Lobby’, in Micah Schwartzman, Chad Flanders, Zoë Robinson, (ed). *The Rise of Corporate Religious Liberty*. Oxford: Oxford University Press, 2016.

wrongful, all things considered, this is because it violates the rights of others, according to the political conception of justice, and this is normally sufficient ground for legal prohibition. Conversely, if a morally ambivalent practice is found to be acceptable at the bar of justice, all things considered, then it is both legally and morally permissible. Morally ambivalent practices, by construction, cannot fall under the category of ‘moral wrong but legal right’.⁴³ Of course, they can do so *from the perspective of individual citizens*, who can hold on to their view that some practice is unjust, and yet recognise that the state has a legal right to permit it. Yet *from the perspective of the state* itself, it would be incoherent to recognise a legal right to engage in morally ambivalent practices. As long as the state enjoys democratic legitimacy and adjudicates liberal disagreement about the justice of such practices, its decisions are both legitimate and just: there is no such thing as legitimate injustice.⁴⁴

Democratic legitimacy, then, annuls the right in the Egalitarian state and annuls the wrong in the Pluralist state: neither recognises to their citizens a legal right to do legal wrong. To be sure, the contested practices are expressly permitted in the Pluralist state, but only because they are not publicly wrongful in the first place. In neither case do we need to appeal to the baroque, bifurcated structure of Legal Toleration.

2.3.3 *A Tolerant Egalitarian State?*

There is, however, a complication. Perhaps the aforementioned argument is too quick. Recall that the bifurcated structure of Legal Toleration expressly recognizes that ϕ -ing is wrong, even though there is a right to ϕ . This raises the possibility that this bifurcated right could be a fitting way to recognise the depth and intractability of liberal disagreement about the permissibility of ϕ . Let us consider a possible argument from Pluralist dissenters in an Egalitarian state. They could argue as follows:

⁴³ Admittedly, the decision not to prohibit a wrongful practice could be made on other, say, prudential or epistemic grounds (eg. because the state’s interference in ministerial appointments would entangle secular authorities in matters over which they are epistemically incompetent). Yet in this case, we have a weak, not a strong, right to do wrong (as explicated above).

⁴⁴ For different perspectives on democratic legitimacy and justice, see Zofia Stemplowska & Adam Swift, ‘Dethroning Democratic Legitimacy’, in David Sobel, Peter Vallentyne, and Steven Wall (eds.) *Oxford Studies in Political Philosophy*, Volume 4. Oxford: Oxford University Press, 2018, and Jonathan Quong, ‘Legitimate Injustice’, paper presented to the Nuffield Workshop of Political Theory, December 2019.

‘Look, we are not claiming that you (Egalitarians) should accommodate our view that ϕ -ing is not (morally and legally) wrong: we accept the result of the democratic process. We are simply asking you to consider not deploying legal sanctions to prohibit it. The reason why we think you should accept this compromise is that our disagreement about the permissibility of X ϕ -ing is a liberal disagreement. Granting exemptions – by imposing less severe penalties for ϕ -ing on X – would be a fitting way to show respect to us (Pluralists) as liberal dissenters’.

This argument is *prima facie* plausible. By contrast to the Integrity argument, it concedes that ϕ -ing cannot be justified simply by appeal to a competing value such as integrity: the dissenters defer to the victorious democratic view that establishes that ϕ -ing is (publicly) wrongful. By contrast to the Uncertainty argument, this argument accepts that Egalitarians are not uncertain about their own view, and therefore that the exemption compromise cannot be justified to them as expressing the right kind of collective uncertainty. Instead, this version of the Disagreement argument is rooted in an appeal to political respect: the compromise is justified by appeal to the political standing of Pluralists as liberal dissenters, and to the fact that liberal justice is inconclusive in morally ambivalent cases. Liberal dissenters are those who dissent from the publicly endorsed conception of justice, from the perspective of an alternative liberal conception. Direct appeals to integrity, as we saw, generated a first-order incoherence: they would justify granting some agents a claim right to perform an action ϕ that is normally liable to lawful prohibition. The disagreement-based argument, by contrast, shifts to a second-order mode of justification. On this view, the exempted is respected not as a wrongdoer, but as a liberal agent who correctly holds that ϕ -ing would be protected under an alternative interpretation of liberal justice.⁴⁵

Legal Toleration could be an ingenious response to the intractability and persistence of disagreement between Egalitarians and Pluralists. Because official disapprobation still attaches to morally ambivalent actions, Legal Toleration mitigates the Egalitarian worry that letting groups engage in certain practices undermines equal status in society at large. Yet because there is no legal prohibition on those actions, it mitigates

⁴⁵ An objection here is that the exempted and the dissident might not be the same person. The exemptee might herself not hold a liberal conception of justice. I ignore this complication here, only to note that, on principle, rights to do wrong should only accrue to dissenters.

the Pluralist worry that not letting groups engage in them unduly erodes associational, religious and other liberal freedoms. Legal Toleration, in a word, could be an attractive compromise solution in cases of democratic stand-offs between Egalitarians and Pluralists. When faced with a high-stake controversy, where the adoption of one conception of justice is optimal for one group but unacceptable for another, the solution might to adopt a second best: one that is acceptable, albeit not optimal, for both groups.

I do not have the space here to evaluate whether the compromise of Legal Toleration can be made compatible with the normative structure of political liberalism. It is not clear, for example, that Legal Toleration can be justified *from within* the Egalitarian conception of justice (it raises questions of procedural double counting, as well as justice deficit for the victims of discrimination). Nor it is clear that Legal Toleration meets the Rawlsian requirement that society be regulated according to one determinate conception of justice, as several conceptions still remain in play after democratic resolution. Yet what Legal Toleration offers is a way of thinking about how to mitigate the significant moral losses that obtain when liberal dissenters from the public conception of justice are outvoted. Whether they adopt Legal Toleration or not, political liberals must think harder about the justifiability of ‘winner-takes-all’ democratic resolutions to disagreements about liberal justice.

Conclusion

This Essay has explored both the conceptual possibility and the normative justifiability of exempting morally ambivalent practices from general laws by construing them as rights to do wrong. I defended Legal Toleration as the only plausible construal of legal rights to do legal wrongs. I explicated the bifurcated conceptual structure of Legal Toleration, whereby different sanctions (legal prohibition / expressive sanctions) fall on different agents, such that only some are exempted from prohibitions that everyone else is subjected to. I then considered three possible justifications for Legal Toleration. The most promising, I argued, is appeal to liberal disagreement about the wrongfulness of contested practices. The logic of political liberalism is that, because democratic resolution dissolves moral ambivalence about the contested practices, there is no scenario in which citizens retain a right to do wrong. Either they do no wrong, and the practice should be

permitted; or they have no right, and the practice should be prohibited. The defensibility of Legal Toleration ultimately hinges on the plausibility of compromises about justice within political liberal theories of public justification.