

# Do Legitimate States Have a Right to Do Wrong?

*Christopher Heath Wellman*

In his landmark article “A Right to Do Wrong,” Jeremy Waldron famously argues that a proper appreciation for how rights function reveals that agents sometimes have a right to do wrong.<sup>1</sup> Can the same thing be said of legitimate states? Do legitimate states have a moral claim against external interference even when they act unjustly?<sup>2</sup> I do not think so, and in this essay I explain my skepticism. I begin by arguing that while Waldron’s article is rightly applauded for identifying an important insight, individuals do not have a claim against others forcibly interfering when they act unjustly. After showing how this creates a presumption against a state’s right to act unjustly, I turn to Anna Stilz’s recent defense of a legitimate state’s right to do wrong in her excellent book *Territorial Sovereignty: A Philosophical Exploration*.<sup>3</sup> Without denying that legitimate states are entitled to political self-determination, I ultimately question Stilz’s view that legitimate states enjoy a right against external interference when they act unjustly.

At first blush, a right to do wrong would appear to be a logical contradiction. After all, everyone familiar with Hohfeldian analysis knows that an agent’s liberty right to do *A* implies that she has no duty not to do *A*, and an agent’s duty not to do *A* implies that she is not at liberty to do *A*. Of course, Waldron is not making this elementary mistake. When he posits a right to do wrong, Waldron is exploring the possibility that one might have a right against “external interference” even when one acts wrongly. As he puts it, “The cutting edge of the claim that *P* has a right to do *A* is the correlative claim that other people are morally required to refrain from interfering with *P*’s performance of *A*. If *P* has a right to do *A*,

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**Christopher Heath Wellman**, Washington University in St. Louis, Missouri, United States ([kwellman@wustl.edu](mailto:kwellman@wustl.edu))

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then it follows that it is wrong for anyone to try to stop P from doing A.”<sup>4</sup> Waldron may be wrong about this possibility, but his view cannot be summarily brushed aside as a basic Hohfeldian confusion. So, is Waldron correct about this type of right to do wrong?

Waldron begins his essay by offering several cases with which he hopes the reader will agree that (1) the agent acts wrongly, and yet (2) others lack the standing to interfere. Here are two examples:

Someone uses all the money that he won fairly in a lottery to buy racehorses and champagne and refuses to donate any of it to a desperately deserving charity . . . .

A man refuses to give a stranger in the street the time of day when he asks for it or coldly rebuffs attempts at conversation in a railway compartment.<sup>5</sup>

In my estimation, Waldron is correct about these examples: while the lottery winner morally ought to be more charitable and the man merits moral condemnation for being so rude in the street and railway compartment, I do not think it would be permissible for anyone to force them to be more charitable or polite.

Consider a dramatically different example, though. Imagine that a woman wants to shoot a random person on the street. Does this prospective shooter have a right to do wrong? Do others have principled reasons to refrain from interfering with this woman’s attack upon an innocent stranger? Presumably not. I do not present this example as an objection to Waldron. This case would be a potential counterexample only if Waldron were insisting that agents *always* have a right to do wrong, but there is no reason to understand Waldron as advancing such a broad and unrefined thesis. The more natural (and plausible) interpretation of Waldron is merely that agents *sometimes* have a right to do wrong.

This raises the question of when an agent does and when she does not have a right against external interference. Waldron does not say, but I would suggest that agents enjoy a claim against intervention as long as they are not violating the rights of others.<sup>6</sup> It seems natural to suppose that Waldron’s uncharitable lottery winner and rude man have claims against external interference because no second party has a moral right to receive a charitable donation, to be told the time of day by a stranger, or to be engaged in cheerful conversation by fellow commuters. My prospective shooter clearly lacks a right against interference, however, because the innocent victim on the street emphatically does have a right not to be shot.

In my view, while all moral rights may be (proportionately) enforced, agents need not act perfectly virtuously in order to enjoy a claim against external interference. Third parties generally lack the standing to forcibly interfere when agents either act in a suberogatory fashion or fail to act in a supererogatory manner.<sup>7</sup> And if it makes sense to say that one acts wrongly when one performs a suberogatory act (as I believe it does), then this squares with Waldron's important observation that we can have a right against others interfering with our wrongdoing. To emphasize: as long as we understand the "right" as a claim against interference, and we understand the "wrong" as a suberogatory act rather than a rights violation, I am happy to endorse Waldron's thesis that agents can have a right to do wrong.

I cannot be sure that Waldron would embrace the details of my interpretation; but nothing in his essay conflicts with it, and several passages confirm it. Notice, for instance, that when setting the stage for his thesis, he emphasizes that Hohfeld's analysis omits important components of the normative landscape. As Waldron puts it, "The trouble with applying this neat analysis to the language of morals is that, in the moral sphere, notions like *duty*, *wrongness*, and *permissibility* are—though relevant to rights—not confined to the area of rights."<sup>8</sup> And later, when summarizing elements of his position, he explains that "the clusters of actions that we find subsumed under our general rights are likely to include . . . actions that would be stupid, cowardly, tasteless, inconsiderate, destructive, wasteful, deceitful, and just plain wrong, as well as actions that are wise, courageous, cultured, compassionate, creative, honest, and good."<sup>9</sup> It is noteworthy, I believe, that Waldron does not list "unjust" among the negative adjectives of the actions we have a right to perform. I am, of course, not in a position to insist that he deliberately omitted the word "unjust," but its omission lends at least some credence to the possibility that he conceives of his thesis in line with what I have suggested as its most defensible interpretation.

Whether or not Waldron would embrace the details of my account, if the right to do wrong is limited to a right against interference when acting in a suberogatory manner, then one must do more than merely compare states to individuals if she hopes to show that legitimate states have a claim right against interference when they act unjustly. Admittedly, my analysis up until this point has not addressed whether states necessarily lack this type of moral protection, but I think it does reveal that we should presume that states lack this standing in the absence of a compelling explanation as to why they should enjoy such a distinctive right.

With that in mind, let us consider Anna Stilz's particularly sophisticated defense of this view.

In *Territorial Sovereignty*, Stilz emphasizes that justice and legitimacy are distinct values, and that we must be careful to distinguish between two separate questions: (1) What does justice require? and (2) Who has the standing to enforce their conception of justice? Importantly, Stilz believes that a state's legitimacy can give it the right to enforce a mistaken conception of justice. To motivate this view, she asks the reader to imagine the vigilante enforcement of distributive justice:

Suppose, for example, that Rawls's theory of justice is correct. By any reasonable estimation, current property laws in the United States are far from satisfying his difference principle. Yet were my fellow Rawlsians and I to arm ourselves and—taking to the streets—strip the rich of their goods and give them to the poor to satisfy Rawlsian requirements, others would have an important objection to our actions. As private individuals, we lack the proper standing to make and enforce property law. Normally, only our legitimate government may do that. (p. 89)

Presumably Stilz offers this example as a clear case with which readers are unlikely to disagree, but I doubt that it can accomplish what she hopes. To begin, is it really outlandish to think that individual citizens might be entitled to forcibly resist when their state perpetrates an injustice? Most people celebrate those who worked on the underground railroad, for instance, and if it was laudable for citizens to actively resist unjust slavery laws in the antebellum South, how can we be sure that it is any less permissible for citizens to fight against current injustices in the United States?

To be fair, Stilz has an obvious response to this challenge. On her view, any state that sanctions slavery could not qualify as legitimate (p. 90), and since Stilz never defends an illegitimate state's right to do wrong, her position cannot be accused of entailing a duty to obey laws upholding slavery. And even if a state that enforced slavery could somehow remain legitimate, the duty to obey its laws would be merely presumptive and thus would be vulnerable to being outweighed by the egregious injustice of slavery. Thus, Stilz clearly has the means to distinguish sharply between a state that enforces slavery and one that fails to realize Rawls's difference principle. Fair enough, but now a critic might counter that a non-Rawlsian property regime is importantly distinct from slavery only because the former is not unjust. It is commonly understood that the pre-institutional demands of justice vastly underdetermine the specific form any given political

society must take, and as Stilz herself emphasizes in her first book, *Liberal Loyalty*, this is especially true of property rights.<sup>10</sup> Thus, without denying the relative merits of Rawls's vision, most agree that a state need not commit any injustice when it institutes a property regime that does not feature the difference principle. And if so, those vigilantes who take it upon themselves to impose the difference principle in the United States would not necessarily be resisting injustice. To emphasize: even if Rawls is correct that his two principles of justice are the *most* reasonable conception of justice, he concedes in his later work that they are not the *only* reasonable option, so it would be wrong to accuse a state that eschewed the difference principle of perpetrating an injustice.<sup>11</sup>

Here, Stilz might respond that, even if the United States' current property regime is not unjust merely because it has not fully realized Rawls's difference principle, it nevertheless remains unjust because it falls so woefully short. This, too, is hard to deny. But now one might wonder why Stilz thinks that her readers should take it as obvious that resisting the profound injustices of the current regime is necessarily impermissible. Moreover, it does not seem unreasonable to think that current economic injustices are so grave as to render the United States an illegitimate regime. (Consider, for instance, Tommie Shelby's scathing critique of the basic structure of the United States in *Dark Ghettos*.)<sup>12</sup> Stilz thus faces a dilemma. On the one hand, if a society merely failed to fully instantiate Rawls's favored principles, most would agree that vigilante resistance would be inappropriate, but many would suggest that this is because the society is not necessarily perpetrating injustice. On the other hand, if a society's basic structure deviates as dramatically from Rawls's ideal as the United States currently does, many would grant the existence of injustice, but they might also plausibly insist not only that active resistance is warranted but also that the current regime is illegitimate. We thus need a clearer example of a legitimate regime that commits injustices if we hope to properly assess Stilz's thesis.

Stilz provides a potential example in the course of her discussion of cultural neutrality: the requirement that citizens not use their state "as a vehicle for preserving or promoting their unique cultural or religious heritage" (p. 148). In this context, Stilz imagines a state that officially favors Catholicism. As she explains,

This Catholic society's right to collective self-determination is grounded in its members' interests in *political autonomy*, i.e., their interests in being ruled by a state that reflects

their shared political will, not in their interest in promoting their preferred culture or religion. But there is no guarantee that groups possessing this right—on political autonomy grounds—will not use it for other purposes, including protecting their cultural or religious heritage. Respect for their political autonomy requires respecting their “right to do wrong” in this case. (p. 149)

While theorists who are less convinced of the imperative of cultural neutrality might contest Stilz’s characterization of the injustice of a state’s favoring Catholicism, let us simply stipulate for the purposes of this discussion that (1) this privileging of Catholicism is unjust; (2) the state is otherwise perfectly just; and (3) the privileging of Catholicism is not so grave an injustice as to render the state illegitimate.<sup>13</sup> Granting all of this *arguendo* will put us in a better position to assess Stilz’s view that legitimate states have a right to do wrong.

According to Stilz, the distinct values of justice and legitimacy are crucial to understanding why this state would have a right against external interference even though it acts unjustly. As someone with deep sympathies for W. D. Ross’s ethics, I am receptive to the idea of multiple, potentially competing values. Even so, I have concerns with Stilz’s particular brand of ethical pluralism.<sup>14</sup> To recount a stock Rossian example, imagine that while on my way to meet a friend whom I have promised to join for lunch, I come across an injured pedestrian on the side of the road who desperately needs medical attention. My duty of fidelity provides moral reasons for me to ignore the plight of this imperiled stranger so that I can make it to the restaurant on time, but my duty of beneficence gives me moral reasons to take the pedestrian to the hospital. Ross provides little guidance as to how we should weigh these competing moral reasons, but most of us likely believe that if the pedestrian’s condition is sufficiently dire, I should take the time to get her to the hospital, even though this means breaking my promise to my friend. I have no qualms with this characterization of the morality of this situation. But even though I believe both that fidelity and beneficence are two distinct values and that the latter can sometimes prevail over the former, I am far less sanguine about Stilz’s contention that justice and legitimacy are separate values and that the latter can sometimes prevail over the former.<sup>15</sup>

To begin, I am not entirely clear what Stilz means when she says that legitimacy is a value. I suspect (though I confess to not being sure about this) that Stilz means that collective political self-determination is a value, and thus legitimacy is valuable insofar as respecting a state’s legitimacy involves deferring to the self-determination of the state’s constituents. If so, Stilz may be suggesting that, just

as fidelity and beneficence are distinct values that independently generate moral reasons that potentially compete, justice and collective self-determination are separate values that each generate independent (and potentially competing) reasons. Alternatively, Stilz may believe that justice and self-determination are distinct values, and the moral reasons generated by the latter sometimes undercut/undermine/silence/nullify the moral reasons that would ordinarily be generated by the former. Either way, as her discussion of a legitimate state that wrongly privileges Catholicism suggests, Stilz believes that there are some contexts in which the value of collective self-determination prevails over justice. Even as an ethical pluralist, I am for several reasons uncomfortable with this characterization of the relationship between justice and self-determination.

First, there is a significant difference between the Rossian suggestion that there are a variety of values that need to be considered (and weighed, when they conflict) to determine what justice, all-things-considered, demands, and Stilz's contention that, even after we determine what justice requires, some competing value somehow gives an agent the right to act unjustly. There is nothing logically inconsistent about insisting that just as multiple values are relevant to intramural debates about what justice requires, there are additional values external to justice that are relevant to determining how third parties may permissibly respond when agents act unjustly. However, given that the dictates of justice are commonly regarded as side constraints, there is something jarring about suggesting that any other value might compete with, let alone prevail over, justice. Indeed, it was just this type of sentiment that led me to my duly limited interpretation of Waldron's thesis above.

Second, even if justice is only one among multiple values, I have particular doubts about invoking self-determination as a cover to protect an agent engaged in rights violations. I am very sympathetic to the value of both individual and collective self-determination, but we need only reconsider the examples we reviewed when discussing Waldron's position to see why self-determination appears unable to prevail over injustice. In particular, while the lottery winner can plausibly appeal to his right to self-determination in defense of his claim that others may not permissibly force him to be more charitable with his winnings, the prospective shooter clearly cannot object that others would impermissibly interfere with her self-determination were they forcibly to prevent her from shooting an innocent stranger. A person's right to self-determination is a morally privileged position over her self-regarding affairs, but since shooting a bystander is a patently other-

regarding action, it does not fall under the protection of self-determination. And since no rights violation is self-regarding, this explains why Waldron's thesis about a right to do wrong does not extend to rights violations. So, if Stilz is correct that citizens have a right entailing that their state should not privilege Catholicism, it is problematic to invoke the value of self-determination to explain why a state has the right to treat its constituents unjustly.

Stilz has at least two potential responses. First and most obviously, she can simply reject my analysis of Waldron's argument. While many may regard it as counterintuitive, there is nothing logically inconsistent about objecting that I interpret an individual's right to do wrong far too narrowly. She could argue that third parties may not forcibly intervene even when an individual is violating the rights of others, and thus the prospective shooter does in fact enjoy a right to do wrong. Second (and more plausibly, I think), Stilz might concede that while an individual's right to do wrong does not extend to rights violations, a legitimate state's political self-determination does protect it against interference during the commission of injustice. This move is made possible by the fact that groups are comprised of multiple individuals, and thus it makes sense to speak of group self-determination despite the fact that some members of the collective are treated unjustly.

There is nothing unintelligible about this second potential response, but I worry about it on normative grounds. While one might be tempted to suppose that outsiders lack the standing to interfere with a group's so-called internal matters, I believe that it is important to bear in mind that—at least when injustices are occurring—collectives are comprised of multiple individuals, some of whom are violating the rights of others. To appreciate the importance of this perspective, recall how our thinking has evolved regarding the moral protections of families. While it was once common to think that outsiders lacked the standing to interfere with a family's private affairs, it is increasingly accepted that familial relations do not provide wrongdoers with moral cover. For instance, when a husband or father physically or sexually abuses his wife or children, the fact that these injustices occur within the confines of a distinct family unit is of no moral—or increasingly legal—consequence. To emphasize, although it would not be *unintelligible* to describe the rights violations that are perpetrated within a family as private matters over which outsiders have no moral standing, one cannot conclude that these injustices are somehow morally protected without getting the values wrong. The value of family privacy does not override the moral rights to be free from violence



and sexual abuse possessed by the rest of the family; instead, injustices within the household override the right to family privacy. I believe that we should reason similarly about injustices that occur within states.

For the purposes of argument, let us suppose that I am wrong. Assume, that is, either that injustices within the context of a family are morally protected or that even if families enjoy no moral right to do wrong, the value of self-determination for legitimate states prevails over (some) injustices. On either assumption, this would still not be enough to vindicate Stilz's account because she believes not only that a legitimate state enjoys a right to commit injustices against its own constituents but also that it has a right to wrong outsiders. This becomes evident in the course of her discussion of the ethics of immigration.

Given her account of political autonomy, Stilz appears to have the resources to explain why legitimate states may appeal to self-determination to justify their interest in excluding outsiders. After all, if Denmark is entitled to reject a potential merger with Sweden simply because the Danes would prefer not to associate with the Swedes in that way (as Stilz affirms), Denmark would appear equally entitled to decline to accept prospective Swedish immigrants into its political community.<sup>16</sup> Rather than embrace this conclusion, Stilz suggests that outsiders have a right to enter unless their immigration would be harmful. As she puts it, "The argument from collective self-determination to a discretionary right to exclude seems dubious. In pluralistic societies, self-determination can only justify conditional limits on migration in cases where support for a country's political institutions or valued programs or policies is seriously threatened" (p. 198).<sup>17</sup> In other words, in the absence of a credible threat to a sufficiently valuable feature of society, justice requires pluralistic states to allow immigration.

Because of her distinction between justice and legitimacy, however, Stilz denies that outsiders may permissibly force countries like Denmark to have a just immigration policy. As she emphasizes, "A legitimate state's right to decide its immigration policy may give it the 'right to do wrong,' refusing entry to migrants who ought morally to be admitted. But still, that would be an unjust decision for it to make, outside the scope of their justified exclusionary prerogative" (p. 195).<sup>18</sup> But this seems problematic because even if the value of self-determination explains why Denmark may violate the rights of its own citizens, it could not justify the country perpetrating injustices against outsiders, such as foreigners who have a moral right to immigrate. Thus, even if we assume *arguendo* (1) that Stilz's account of the value of self-determination succeeds; (2)

that rather than being a component of justice, self-determination is a distinct value that competes with (and sometimes prevails over) justice; and (3) that self-determination entitles legitimate states to violate (at least some of) the rights of their constituents, this would not be enough to vindicate Stilz's expansive understanding of a legitimate state's right to do wrong. In sum, while I doubt that collective self-determination could successfully justify a legitimate state's right to unjustly order its internal affairs, it clearly seems unable to ground a state's claim against forcible interference while violating the rights of outsiders.

Before closing, I should stress that I am no cheerleader for foreign intervention. Given the grave risks involved, it is seldom possible to do enough good to justify the harms of a foreign invasion into even patently illegitimate states, so it stands to reason that more harm than good would almost inevitably come from forcibly interfering with the actions of a legitimate state. But acknowledging that, in practice, foreign interference seldom satisfies the proportionality requirement is very different from supposing that there are principled reasons to refrain from interfering when legitimate states commit injustices. And while my discussion here does not show that states necessarily lack this moral protection, I have provided several reasons to doubt the existence of such a right to do wrong. If I am correct that individuals enjoy no moral protection when they attempt to violate the rights of others, for instance, then it will not do to merely compare states to individuals. Of course, there may be distinctive features of legitimate states that explain why they enjoy moral protections that individuals lack, but I have given reason to doubt that the value of collective self-determination is up to this task. And even if I am wrong, self-determination would at most explain why legitimate states enjoy a right to commit injustices against their own citizens; it would provide them no moral protection when they violate the rights of outsiders.

#### NOTES

<sup>1</sup> Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92, no. 1 (October 1981), pp. 21–39.

<sup>2</sup> One might ask the same question of democratic states. On that related (and perhaps connected) issue, see Gerhard Øverland and Christian Barry, "Do Democratic Societies Have a Right to Do Wrong?," *Journal of Social Philosophy* 42, no. 2 (Summer 2011), pp. 111–31.

<sup>3</sup> Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019). All parenthetical page references to Stilz in this essay refer to this book.

<sup>4</sup> Waldron, "A Right to Do Wrong," p. 29.

<sup>5</sup> *Ibid.*, p. 21.

<sup>6</sup> As William Galston states, "Only moral wrongs that do not involve the violation of others' rights can possibly fall within the purview of Waldron's thesis." William A. Galston, "On the Alleged Right to Do Wrong: A Response to Waldron," *Ethics* 93, no. 2 (January 1983), pp. 320–24, at p. 320.

- <sup>7</sup> Following Julia Driver (“The Suberogatory,” *Australasian Journal of Philosophy* 70, no. 3 [1992], pp. 286–95), I understand a suberogatory act to be a permissible action that nonetheless reflects poorly on the agent’s character.
- <sup>8</sup> Waldron, “A Right to Do Wrong,” p. 24.
- <sup>9</sup> *Ibid.*, p. 37.
- <sup>10</sup> Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton, N.J.: Princeton University Press, 2009).
- <sup>11</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001).
- <sup>12</sup> Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, Mass.: Harvard University Press, 2016).
- <sup>13</sup> A competing vision is offered by Robert P. George, for instance, in *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Oxford University Press, 1995).
- <sup>14</sup> W. D. Ross defends an ethical pluralism that features multiple, potentially competing prima facie obligations in *The Right and the Good* (Oxford: Oxford University Press, 1930). While Stilz does not specifically invoke Ross, her view is similarly pluralistic insofar as it involves the competing values of justice and legitimacy.
- <sup>15</sup> As Stilz emphasizes on page 89 of *Territorial Sovereignty*, “Because legitimacy and justice are importantly distinct values, someone may have the correct view about justice, yet lack the right legitimately to enforce that view.”
- <sup>16</sup> On page 132 of *Territorial Sovereignty*, Stilz confirms Denmark’s right to remain independent of Sweden even if Danish and Swedish legal institutions and values are indistinguishable, by explaining: “As I have stressed throughout, normally a shared political will involves not only a commitment to support certain institutions, but also a commitment to associate politically with a group of fellow citizens.” Incidentally, in addition to its apparent implications for immigration, this reasoning, along with Stilz’s clear statement that “the innate Kantian right to independence (i.e., the right to determine our lives in accordance with our own judgments) gives people standing to reject alien state coercion whenever that coercion is not *necessary* to securing basic justice for others” (p. 117), seems to pave the way for a more permissive right to secede grounded in self-determination than Stilz is willing to endorse.
- <sup>17</sup> Again, it is striking that Stilz does not attach similar conditions to Denmark’s right to reject a potential merger with Sweden.
- <sup>18</sup> Insofar as Stilz insists that legitimate states act unjustly, as opposed to merely uncharitably, when they deny nonharmful immigration, her view is importantly distinct from that which Michael Blake defends in *Justice, Migration, & Mercy* (New York: Oxford University Press, 2020).

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Abstract: This essay critically assesses Anna Stilz’s argument in *Territorial Sovereignty: A Philosophical Exploration* that legitimate states have a right to do wrong. I concede that individuals enjoy a claim against external interference when they commit suberogatory acts, but I deny that the right to do wrong extends to acts that would violate the rights of others. If this is correct, then one must do more than merely invoke an individual’s right to do wrong if one hopes to vindicate a legitimate state’s right to commit injustices. Of course, there may be distinctive features of legitimate states that explain why they enjoy moral protections that individuals lack, but I argue that the value of collective self-determination is not up to this task. And even if these arguments fail, self-determination would at most explain why legitimate states enjoy a right to commit injustices against their own citizens; it would provide them no moral protection when they violate the rights of outsiders.

Keywords: rights, justice, injustice, political legitimacy, self-determination, territory