A Legal Right to Do Legal Wrong

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ABSTRACT: The literature, as are the intuitions of many, is skeptical as to the coherence of 'legal rights to do legal wrong'. A right to do wrong is a right against interference with wrongdoing. A legal right to do legal wrong is, therefore, a right against legal enforcement of legal duty. It is, in other words, a right that shields the right holder's legal wrongdoing. The sceptics notwithstanding, the category of 'legal right to do legal wrong' coheres with the concepts of 'right' and 'legality'. In fact, once the parameters and features of the category of 'legal right to do legal wrong' are clarified, it becomes apparent that positive law contains actual doctrines that have the structure of a right to do wrong. One example is the doctrine of diplomatic immunity. This, and other examples of normatively sound legal doctrines that constitute legal rights to do legal wrong, demonstrate that such rights are not only conceptually coherent, but at times are normatively valuable. Moreover, looking to the law helps detect a category of rights to do wrong that has thus far gone wholly undetected in the literature, which is immunity from liability for violation of duty.

KEYWORDS: Rights, Hohfeld, immunity, jurisprudence.

TÍTULO EM PORTUGUÊS: Um direito a violar a lei

RESUMO: A literatura, assim como as intuições de muitos, é cética quanto à coerência de um "direito juridicamente reconhecido de violar a lei". Um direito a violar é um direito contra a interferência sobre as violações. Um direito juridicamente reconhecido a violar a lei é, assim, um direito contra o caráter cogente de um dever jurídico. É, em outras palavras, um direito que protege a violação cometida por seu titular. A despeito dos céticos, a categoria de um direito a violar a lei é coerente com os conceitos de direito e de legalidade. De fato, uma vez que os parâmetros e as características da categoria de um direito juridicamente reconhecido a violar a lei tenham sido esclarecidos, torna-se aparente que o direito positivo contém verdadeiras

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doutrinas que têm a estrutura de um direito a violar a lei. Um exemplo é a doutrina da imunidade diplomática. Este e outros exemplos de doutrinas jurídicas normativamente legítimas, demonstram que tais exemplos não são apenas conceitualmente coerentes, mas por vezes normativamente válidos. Além disso, observar a lei permite identificar uma categoria de direitos a violá-la que tem permanecido totalmente ignorada pela doutrina, que é a imunidade de responsabilidade por violação de dever legal.

PALAVRAS-CHAVE: Direitos, Hohfeld, imunidade, jurisprudência.

1. A Right to Do Wrong

Can the law provide a right to do what the law forbids? I explain that it can. Legal rights to do legal wrong, that is legal rights to violate legal duty, are conceptually coherent as manifestations both of the concept of 'right' and the concept of 'law'. Moreover, such rights are found in various doctrines of positive law, suggesting that legal rights to do legal wrong are not only conceptually coherent but at times also beneficial.

A holder of a right to do wrong (not necessarily a legal right) enjoys a right against certain interferences by others with the right-holder's wrongdoing.[1] A right to do wrong is, in other words, a right against the enforcement of duty. Such that if a holder of a right to Ø—who is also under a duty not to Ø—chooses to Ø, others are under a correlative duty not to interfere with the right-holder's Ø-ing or, in the alternative, are normatively disabled from interfering with the right-holder's Ø-ing. As such, a legal right to do legal wrong provides a measure of legal protection or liberty to do what one is legally forbidden from doing.

Accordingly, the label 'legal right to do legal wrong' is potentially confusing, because it suggests a right to do something; that is a right that permits certain conduct. While in fact, a right to do wrong is a right that protects or shields conduct that the right holder is forbidden from performing. The shield comes in the form of normative limitations on others from interfering with the right holder's wrongdoing. It is, in other words, not a 'right to do Ø', but a right that others not interfere with one's Ø-ing. I will, nevertheless, use the term 'legal right to do legal wrong', considering that it is the term used in the literature.

[1] William A Edmundson, An Introduction to Rights (CUP 2004) 133–5; Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 Ethics 21, 29.

There are various types of rights to do various types of wrongs. Examples are 'moral right to do legal wrong' (eg the moral right to civil disobedience),[2] 'legal right to do moral wrong' (eg the legal right not to perform an easy rescue of a stranger in peril)[3] and 'moral right to do moral wrong' (eg some believe that voluntarily undergoing a late-term abortion is morally wrong, yet also think that women have a moral right to choose to do so without interference).[4]

Here my concern is with 'legal rights to do legal wrong'. A legal right to do legal wrong is a legal right against enforcement or interference by others with one's violations of one's own legal duties and obligations. As such, it is a right of one normative kind (legal) to perform a wrong of the same normative kind. Moreover, I am only interested in the idea of a legal right in one legal system to violate a duty of the same legal system.

On its face, the notion of a right of one normative kind (eg a legal right) to violate a duty or obligation of the same normative kind appears oxymoronic. A perplexity William Godwin aptly expressed when he said (discussing moral rights): '[t]here cannot be a more absurd proposition than that which affirms the right of doing wrong'.[5] The view that one can hold a legal right to do what one is under a legal duty not to do evokes a similar sense of contradiction.

Some of the air of contradiction is cleared when realizing that a right to do wrong does not bear on the normative status, that is, on the rightness or the wrongness or on the legality or the illegality, of the actions the right-holder is at liberty to perform under the right. It is generally true of rights that a right to Ø does not necessarily entail that Ø-ing is valid or the right thing to do.

The right to do wrong only functions to limit enforcement or interference with those wrongful actions; it does not give reason or permission to so act.[6] So that a legal right to Ø provides for certain legal protections to Ø, but it does not necessarily entail that Ø-ing is legally permitted. The legal right to do legal wrong, therefore, secures the option to choose to do legal wrong without entailing the contradiction that such legal wrongdoing is in any way legally right, valid or permissible. The function of the right to do wrong is, in other words, to afford the right-holder a relative freedom under the law to violate her legal duty or obligation.[7] Moreover, as I demonstrate below, working through the relevant Hohfeldian categories clarifies that the concept of 'right' allows for the right of one kind to violate a duty of the same kind.

The idea of a right to do wrong reflects, therefore, a conception of rights as protected choice,[8] where the choice is between what is right, valid or permissible and what is wrong,

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[2] Joseph Raz, The Authority of Law (OUP 1979) 262–75.
[3] The rule in most common-law jurisdictions is that there is no general duty, be it criminal or civil, to rescue others—even at no personal risk—from grave risk. See Liam Murphy, 'Beneficence, Law, and Liberty: The Case of Required Rescue' (2001) 89 Geo LJ 605.
[4] For a discussion and a defence of the idea of a moral right to do moral wrong see Ori J Herstein, 'Defending the Right To Do Wrong' (2012) 31 L Phil 343.
[5] William Godwin, Enquiry Concerning Political Justice (abridged and edited with an introduction by K Codell
Carter, Clarendon Press 1971) 88.
[6] See Waldron (n 1); Andrei Marmor, 'On the Limits of Rights' (1997) 16 L Phil 1, 5.
[7] I use 'duty' and 'obligation' interchangeably.
[8] Edmundson (n 1) 135.

invalid or impermissible. Rights may, therefore, protect one's choice to Ø without bearing on the rightness, validity or permissibility of Ø-ing. For example, expressing racist views is, at least at times, morally wrong, even though, under certain circumstances, one has a moral right that others not silence such speech.

For some, the notion that a right to Ø does not necessarily denote the rightness (or legality) of Ø-ing may still seem both unintuitive and a degradation of the concept of 'right'. This attitude derives most likely from the association of the word 'right' with rightness. What we must accept is that the term 'right' in fact stands for a rich set of normative categories found in most normative systems. For example, while some rights shield conduct, other rights permit conduct.

What is also important to understand is that the main function of rights is to protect the interests of right-holders and to assure individuals a realm of protected choice and a measure of liberty. This is certainly true for liberal rights. More often than not, rights matter the most in the protections that they afford the interests and choices of right-holders from external interference and not in validating or justifying those interests and choices. This is not to say that rights never have a validating, empowering or justifying role. For example, supporters and objectors of a legal right to gay marriage alike have found reason for their position in the fact that such a right lends legal (as well as social) legitimacy or validity to gay relationships. That is, the validation of gay marriage may prove a legal basis, via judicial interpretation, for the validation of other related rights currently unrecognized. Yet here, I am not concerned with these validating or legitimizing roles that rights sometimes fill.

Later on in the article, I offer several concrete examples of legal doctrines that have the form of a legal right to do legal wrong, yet I think it helpful to give one such brief example now. As I explain in more detail below, the doctrine of diplomatic immunity bestows a right to do wrong. Diplomats covered under the immunity enjoy a right against prosecution and often also against civil liability for violations of the laws of their hosting state. Yet, such diplomats are still subject to the laws of their hosting state. In other words, diplomats have duties and obligations under the law of the host state, yet are immune from most forms of legal sanction and liability for violating those laws. They have, therefore, a legal right to violate what are their legal duties and obligation, which is, in other words, a legal right to do legal wrong.

The motivations for this article are several. The literature on rights to do wrong has focused almost exclusively on moral rights to do moral wrong.[9] In contrast, the manifestation of rights to do wrong in the law has gone largely unexplored. I aim to demonstrate that the structure of a right to do wrong is found in various legal doctrines. In addition to demonstrating whether and how the concept of a right to do wrong is manifested in a normative realm other than morality, looking to the law also has the theoretical benefit of exposing a new and thus far undetected form of legal right to do

[9] Arguing for the moral right to do moral wrong are: David Enoch, 'A Right to Violate One's Duty' (2002) 21 L Phil 355; Herstein (n 4); Waldron (n 1). Raz endorses such a right in Raz (n 2) 266–7, 281–2. Arguing against such a right are: Robert P George, Making Men Moral (OUP 1995) 110–28; Gerhard Øverland 'The Right to Do Wrong' (2007) 26 L Phil 377; William A Galston 'On the Alleged Right to Do Wrong: A Response to Waldron' (1983) 93 Ethics 320.

legal wrong, which is immunity. Perhaps because it exclusively looked at moral and not institutionalized rights, the literature has thus far only conceptualized rights to do wrong in terms of Hohfeldian claim-rights (a term explained below in some detail).

In addition to furthering conceptual clarity, there is also a normative motivation driving this article. On the face of things at least, it seems pointless to impose a legal duty that—as a matter of law—people have a legal right to violate.[10] After all, much of the practical significance of legal duties and rights (with corresponding duties) derives directly from their enforceability. My hope is that through pointing out how concrete and normatively well-grounded legal doctrines exhibit the logic and structure of a right to do wrong—for instance diplomatic immunity—I also implicitly demonstrate that a legal right to do legal wrong is a legal form that actually plays a positive role in the law. For example, considering the benefits diplomatic immunity brings to diplomacy, it would be unfortunate if it turned out that this legal doctrine is conceptually incoherent or impossible.

2. A Legal Right to Do Legal Wrong

A. Preliminary Clarifications

If a right to do wrong is a right against interference with wrongdoing, then a legal right to do legal wrong is a legal right against enforcement of a legal duty. But what exactly are the conceptual parameters of the category of 'legal right to do legal wrong'? How does it relate and how does it differ from regular rights in the law? Below are a few crucial characteristics of legal rights to do legal wrong, explaining how such rights relate to other types of legal norms, and helping define not only what legal rights to do legal wrong are, but also what they are not. Without appreciating these nuances, the category of 'legal rights to do legal wrong' will remain hidden, seeming either hopelessly over-inclusive or practically empty; losing, in both cases, any explanatory traction.

Notice first that a legal right to do legal wrong entails a legal norm of noninterference with the right-holder's wrongdoing and not a mere de facto freedom to do wrong with impunity. That person A holds a legal right to do what she is under a legal duty not to do entails that there is a legal norm protecting her freedom to violate her legal duty. A legal right to do legal wrong must involve a legal duty that is unenforceable as a matter of law. Mere de facto non-enforcement of one's legal duty entails that one's wrongdoing will not, as a matter of fact, be interfered with, but it does not entail that one has a legal right to such non-interference. Thus, the fact that enforcing a duty is impractical due to, for example, litigation costs, evidentiary impediments or procedural hurdles, does not amount to establishing a legal right to do legal wrong.

Notice also that a right that has the effect of blocking interference with a wrongdoing, but is not designed or intended for protecting such wrongdoing, is not a right to do that wrong. For example, one may hold a right to freely enter a gardening supply shop without

[10] Enoch very tentatively suggests that perhaps there are normative reasons for legal systems not to ever take advantage of the category of a 'legal right to do wrong' Enoch (n 9) 382–3. Shelly Kagan, also somewhat noncommittally, expresses similar doubts in relation to moral rights. Shelly Kagan, The Limits of Morality (OUP 1989) 224–6.

interference by others. Yet, the fact that one has a right that others not hinder one's access to the local gardening store does not entail that one has a right to illegally construct, without interference, a bomb from the fertilizer one is free to purchase there. It is true that one's right to free access to establishments open to the general public may have the effect of furthering and protecting one's unlawful bomb-making activities from interference. Yet, this protection is merely collateral to what the right is for, which is not to protect one's freedom to build bombs but rather to ensure one's freedom of movement and the right to equal protection of the law. The right to free access, as an instance of the right to free movement and to equal protection, is not, therefore, a right to violate the prohibition on bomb-making; even if the right of free access may occasionally have the incidental and collateral effect of removing hurdles in the way of the right-holder's attempts to violate that prohibition. Failing to appreciate this distinction will result in the category of 'legal rights to do legal wrong' seeming grossly over-inclusive, incorporating numerous instances of what we simply view as regular legal rights.

In addition, a right that blocks interference with wrongdoing is only a right to do wrong if the interference blocked is of a type that is normally permitted and lawful against such wrongdoing. A right that colours certain means of enforcement as illegitimate or unlawful per se, that is under the right it is never lawful to enforce 'that duty' using 'those means', is not a right to do wrong.

It is, rather, simply a right against those means of enforcement. Such a right is not designed to allow for the choice to violate legal duty; it simply blocks a form of enforcement that the law generally deems illegitimate, which may have the by-product of providing the freedom to do wrong. For example, in the United States, using deadly force to apprehend a non-dangerous fleeing suspect is a violation of the suspect's Fourth Amendment right against unreasonable seizure,[11] even when it is the only available means of preventing the suspect's escape.[12] On its surface, this appears as a constitutional right to do legal wrong, because it protects unlawful disobedience. But this is not a right to do wrong in the sense I mean to explore here. Unlawful actions may interfere with one's wrongdoing and may have the effect of enforcing duty, but what blocks them is not an individual's legal right to violate her legal duty but simply the fact that such means of enforcement are generally unlawful. The category of a legal right to do legal wrong is only interesting when the right functions to block what are otherwise—in the normal case—lawful means of enforcement.

Failing to appreciate this nuance results in seeing rights to do wrong everywhere in the law. We could begin talking about the enforcement and sanctioning features of law not in terms of how they limit freedom to violate the law, but rather in terms of the level of freedom they leave for violating the law. Adopting this reversal would result in erasing the concept 'right' from our discourse in favour of the concept 'right to do wrong'. Such a switch in accent and terminology is perhaps interesting; yet, it still keeps one category of rights essentially hidden. I am interested in fleshing out how legal rights to do legal wrong are a distinct category of legal rights; not in conceptual juggling, demonstrating that we can exchange the description of the normative structure of law, which is normally

[11] Tennesee v Garner 471 US 1 (1985).
[12] ibid 18 (O'Connor J dissenting).

given in terms of 'legal rights', with an alternative description in terms of 'legal rights to do legal wrong'.

Finally, a right to do a wrong does not necessarily block all types of otherwise lawful enforcement or interferences with the wrongdoing. A legal right may function as a right to do legal wrong if it blocks some forms of what are otherwise lawful forms of enforcement and interference, even if it does not block all such forms of enforcement and interference. The essence of a right to do wrong is to provide liberty to violate the law. Such a right must, therefore, provide for a measure of liberty—not otherwise provided in that legal system—from what is otherwise lawful intervention with legal wrongdoing. The right need not (yet may) provide for complete liberty to violate the law. Take the example of immunity from criminal prosecution. As is explained below, certain immunities may function as rights to do wrong; such rights block what is otherwise a lawful prosecution of a crime, and thereby provide the immune party with a right to violate a criminal prohibition, without also providing for immunity from other forms of legal sanction, such as civil liability, for violating the same law. It is because such immunities provide a measure of liberty—relative to the specific legal system—to violate legal duty, that they constitute a right to do wrong; even though such immunities do not immunize one from all forms of enforcement or sanctioning. Thus, legal rights to do legal wrong are aberrations: affording for more liberty than a legal system normally provides.

Failing to take in this feature will invariably result in obscuring the category of a 'legal right to do legal wrong', causing it to appear empty. Notice that there is nothing unusual in a right to Ø that provides for some—yet not complete—liberty to Ø. Even where the right to Ø does not only protect one's Ø-ing from interference but also permits Ø-ing, there are normally still certain legal limitations on Ø-ing. That is, even in cases in which the law protects and permits Ø-ing, the law seldom provides for a complete liberty to Ø.

For example, I may hold a right to use and enjoy my land, as well as a right that others not interfere with my use and enjoyment; yet, it does not follow that I have a right against all forms of interference with my use of the land. For instance, the government may lawfully prevent me from constructing a nuclear plant on my land. This of course does not entail I do not have a right to use and enjoy but it does demonstrate that my right is not comprehensive.

B. The Legality of Legal Rights to Do Legal Wrong

Before exploring the two types of legal rights to do legal wrong—claim-right and immunity—and prior to giving some examples of such rights in positive law, one must overcome an important objection to the very coherence of legal rights to do legal wrong. A legal right to do legal wrong is a right against the enforcement of legal obligation, which may seem an incoherent category to those who believe that a necessary connection obtains between legal obligation and legal enforcement. David Enoch suggests that if legal rights and duties are categorically (ie as a matter of their nature as legal) enforceable, then there can be no legal rights to violate a legal duty (ie legal rights to do legal wrong).[13] This is because logically there is no enforceable right to violate an enforceable duty. And, because enforceability of a duty logically rules out any rights to

[13] Enoch (n 9) 383–84.

violate that duty, if legal duties are—necessarily—enforceable, then as an analytical matter there can be no legal rights to do legal wrong.

I see three paths for meeting Enoch's challenge. First, Enoch's objection assumes an all-or-nothing view of rights to do wrong. That is, for a right to do wrong to exist it must block all forms of enforcement of the duty one has a right to violate. In other words, if a duty is in any way (lawfully) enforceable, then there can be no right to violate that duty. But as explained above, such a view is overly restrictive. A right is a right to do wrong if, in addition to a few further features, it blocks otherwise legitimate interference with wrongdoing or otherwise lawful enforcement of duty. A right to do wrong need not block all forms of interference or enforcement, only some of those that would otherwise be permissible. The many examples offered throughout the article bear out this point. Therefore, even if it were true that all legal duties, obligations and directives were in some way enforceable as a matter of their nature as legal, rights to do wrong could still exist in the law so long as such rights blocked some, although not all, forms of otherwise lawful enforcement of legal duties, obligations and directives.

Second, refuting examples give reason to doubt the claim that legal duties and obligations are necessarily enforceable: for instance, legal rights to do legal wrong that function to block all forms of otherwise lawful enforcement, such as sovereign immunity. Further examples of legal duties not paired with norms of legal enforcement are certain obligations of senior officials in carrying out the duties of their office,[14] or jurors, who may, through jury nullification, violate with impunity their duty to apply the law applicable to the case. In both examples, we find a legal duty that is not backed up by any legal sanction or other form of legal enforcement, yet one is still hard-pressed to say that no obligations obtain.

Relatedly, a third response to Enoch's challenge is of course to offer reasons to doubt the view that legal duties and obligations are enforceable, be it as a function of the nature of law or of the practical realities of law. But before addressing whether all legal duties are indeed necessarily enforceable, some clarification of the notion of 'enforceability' is in order.

Here 'enforceability' only suggests that the law allows or provides for the enforcement of legal duties in principle, and not that all legal duties are necessarily practically enforceable. Many legal duties for which the law does provide for some form of enforcement go unenforced due to practical constraints such as litigation costs, procedural and evidentiary hurdles, corruption, discretion in pursuing litigation or prosecution, or practical inability to pursue lawful self-help. Accordingly, a suggestion that all legal duties are necessarily practically enforceable is tenuous. The idea that legal rights and duties are as a matter of law enforceable in principle is much more plausible. For my purposes it is therefore immaterial that the law may contain norms of enforcement—negating, according to Enoch, rights to do wrong—that are practically inefficient in achieving compliance with the law. The efficacy of an enforcement norm makes no difference to the fact that normatively a norm enforcing a duty to Ø rules out a right to Ø.

[14] See Joseph Raz, The Concept of a Legal System (2nd edn, OUP 1980) 153–4.

What exactly does 'enforceability in principle' entail? The idea is that the law provides for the enforcement of legal duties. The proposition under consideration and which I must refute or at least weaken is, therefore, that for a duty to Ø to qualify as a legal duty, the law must not only direct people to Ø but must also provide for some form of enforcement in the event that people fail to comply. Thus, for our purposes here, not every adverse reaction to noncompliance counts as 'enforcement'. To rule out the category of a 'legal right to violate a legal duty' (ie a legal right to do legal wrong) one must demonstrate that legal duties are (categorically or practically) necessarily legally enforceable. It is enforceability through law or under the protection of the law that logically rules out the possibility of a legal right to violate legal duty. 'Enforceability', in other words, entails that the law provides for or allows (where it otherwise forbids) for some form of reaction to or pre-emption of violations of legal duties. Criminal culpability, tort liability, court orders and self-help[15] are primary forms of such enforcement.

Notice also that I use the term 'enforcement' broadly, also covering concepts such as 'sanction' and 'prior restraint'. Whether or not enforceability is a necessary feature of legal duties and obligations is a question about the legality of legal duties and obligations and not about duties and obligations per se. Enforceability does not appear an essential feature of the concepts of 'duty' and 'obligation'.[16] An instantiation of duty or obligation simply does not require the accompaniment of a sanction or of some other form of enforcement. Moral duties, for instance, do not conceptually rely on their enforceability. The same is true for the duties of certain religions that do not recognize a necessary correlation between compliance with religious duty and divine reward and retribution (eg Calvinist versions of Protestantism or strong rule-following versions of Judaism). The question is, therefore, whether legal duties and obligations are necessarily enforceable, as Jeremy Bentham, John Austin, and even Hans Kelsen famously believed?[17]

This question is the subject of a voluminous literature. I will limit myself here to a brief discussion and rejection of what seems to me the primary motivation, at least for most people, for believing that enforceability is a necessary condition of legal duties: explaining the strong practical tie between the enforceability of legal mandatory norms and compliance with law. Bentham claimed, for instance, that without the threat of sanction 'legal obligation is a cobweb' and 'legal duty a feather'.[18] Accepting that non-coincidental and wide compliance are necessary conditions for an active valid legal system,[19] and considering that compliance is often a function of enforcement mechanisms, there is reason to think that law assumes its enforceability. Because, if substantial widespread compliance with the law is a necessary condition for an active

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[15] In many jurisdictions shop owners are allowed to detain suspected shoplifters in a manner that would otherwise generate liability for false imprisonment. See MA Franklin, RL Rabin, and MD Green, Tort Law and Alternatives (9th edn, Foundation Press 2011) 976.

[16] There are, of course, different views on this. For an account of some such views see, for example, PMS Hacker, 'Sanction Theories of Duty' in ADB Simpson (ed), Oxford Essays in Jurisprudence (OUP 1973) 131.

[17] John Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence (first published 1832, HLA Hart (ed), Weidenfeld & Nicolson 1954) lecture 1; Jeremy Bentham, Of Laws in General (HLA Hart (ed), Athlone Press 1970) 54; Hans Kelsen, Introduction to the Problems of Legal Theory (BL Paulson and SL Paulson trans, Clarendon Press 1934) 26; Hans Kelsen, Pure Theory of Law (Max Knight trans, University of California Press 1970) 33–4. For further examples see Hans Oberdiek, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' (1976) 21 Am J Juris 71, 71–2.

[18] Bentham, ibid 136 ff.

[19] See on this Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 Legal Theory 35, 45; HLA Hart, The Concept of Law (2nd edn, Clarendon Law Series, OUP 1994) 103–5.

valid legal system, then by extension the existence of any legal duty or obligation is predicated not only on its being part of a legal system—there are no free-floating legal norms; but also on substantial compliance with the law of the legal system of which the legal duty is a part. If substantial compliance with law indeed necessarily relies on the enforceability of all legal duties, then it must follow that enforceability is a necessary practical condition of legal duties (because the existence of a valid legal duty is conditioned on the viability of the legal system it is a legal duty of).

But from the fact that a measure of compliance with the law is a necessary condition for law, it does not follow that all legal duties and obligations are necessarily enforceable, because the conditions for the required measure of compliance may arise from sources other than legal enforcement. Other causes or motivations for compliance are plentiful, such as socialization, acceptance of authority and social pressures and benefits.[20]

HLA Hart's concept of the 'internal point of view' gives further reason to doubt the notion that the compliance-obtaining feature of enforceability makes enforceability into a necessary feature of legal duties. Hart believes that often the best explanation of people's compliance with law is found not in the threat of legal sanction, but rather in the social fact that people often accept the law's authority. According to Hart, people often view the law not from the point of view of Oliver Wendell Holmes' 'bad man', who is only concerned with the law's coercive aspects,[21] but rather from an 'internal point of view' through which they accept the law as an authoritative system of rules of conduct that guides activity and gives reasons for action.[22] From the perspective of the internal point of view, a legal norm directing one to Ø gives one reason to Ø because it is the law; and not because of some external prudential consideration, such as fear of reprisal or a desire to gain benefit. Thus, even in cases where a sanction is expected to follow noncompliance with the law, the reason why many people actually comply with the law is not the fear of the sanction, but rather their acceptance of the authority of the law.

If Hart's conception of the internal point of view and Lamond's suggestions of non-legal mechanisms of compliance with law are correct, they demonstrate that a legal system may successfully govern (and thereby exist as a valid system of law) without requiring the enforceability of all its duties and obligations. In other words, if our worry is compliance with law (as the primary reason for having a legal system and a necessary condition of an active and valid legal system) there is reason to doubt whether legality (or more accurately compliance as a necessary condition of legality) really does require or depends on the enforceability of all legal duties. It is not an unlikely feature of actual legal systems that the critical mass of compliance with the law required to bolster an active, valid and viable legal system is partially, even if not completely, achieved through compliance from the internal point of view or for other non-legal, non-coercive or non-sanction-related reasons; suggesting that an active, valid and viable legal system may exist even if some of its duties, obligations and directives are unenforceable.

To refute Enoch's 'enforceability challenge' one must demonstrate that legal duties are not necessarily enforceable and that the concept or the phenomenon of 'legality' does not

[20] ibid 47–8.
[21] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 459, 460–1.
[22] Hart (n 19) 55–7, 85–91.

necessarily preclude unenforceable legal duties. A challenge just met, certainly if the reason to view enforceability as a necessary feature of legal duty arises out of concern for compliance with law.

To conclude, there are strong reasons to think that although enforcement of legal duties is a common feature of most legal systems, it is not a necessary feature of legal duties: neither the concepts of 'duty' and 'obligation', nor the concepts or the realities of 'law' and 'legality' appear to categorically or practically require enforceability. Enforceability is a common and most likely often a practically important feature of legal duties, but it is not a necessary feature. As far as the concept and the phenomenon of 'legality' are concerned, legal rights to violate legal duty, that is legal rights to do legal wrong, are conceptually coherent as well as practically possible.

C. Legal Rights to Do Legal Wrong Claim-Rights and Immunities

Understanding the structure and logic of rights to do wrong requires working through the relevant Hohfeldian categories.[23] As I explain in the following two sections, legal rights to do legal wrong take the form of Hohfeldian claim-rights or immunities. An indication of what type of right a certain legal right to do legal wrong happens to be—whether claim-right or immunity—is the remedy that the law provides for violations of the right. Where the remedy is injunctive, that is blocking action interfering with the right-holder's wrongdoing or mandating action in furtherance of said wrongdoing, a right that has the structure of a right to do wrong is most likely a claim-right to do wrong. In contrast, as will become apparent below, a remedy blocking or disabling legal power, the imposition of liability, or the altering of legal entitlement, is indicative of immunity-rights to do wrong. Put differently and to paraphrase Guido Calabresi and Douglas Melamed, claim-rights to do wrong are in a sense 'property rights' while immunity-rights to do wrong function as 'anti-liability rights'.[24]

(i) Claim-rights to do (legal) wrong

A holder of what Hohfeld calls a 'claim-right' has a claim against others for non-interference. Correlating to claim-rights are duties on others for that noninterference. Formally, that A has a claim-right to Ø against B means that B is under a duty to A not to interfere with A's Ø–ing and A has a correlative claim against B for such non-interference. 'Privilege' (also known as 'liberty') is a second Hohfeldian category, standing for the absence of a duty. Formally, that A is privileged (or at liberty) to Ø means that A is not under a duty to Ø and/or not under a duty not to Ø.[25]

Philosophers objecting (explicitly or implicitly) to the category of a right to do wrong have argued that claim-rights only arise when coupled with a privilege. So that if A has a

[23] Wesley Hohfeld, in W Cook (ed), Fundamental Legal Conceptions (Yale University Press 1919). See also Joel Feinberg, Social Philosophy (Prentice Hall Press 1973) 56–9; Alon Harel, 'Theories of Rights' in MP Golding and WA Edmundson (eds), The Blackwell Guide to Philosophy of Law and Legal Theory (Blackwell Publishing 2005) 191, 192–3.
[24] Guido Calabresi and Douglas Melamed, 'Property Rules, Liability Rules, and Alienability: One View of the Cathedral' (1972) 85 Harv L R 1089.
[25] Here my concern is mostly with what Leif Wenar calls 'paired privilege', which prescribes both a liberty to Ø and a liberty not to Ø. For reasons of economy I do not always make this explicit. See LWenar, 'The Nature of Rights' 33 (2005) P&PA 223, 226–7.

right to Ø, A is also privileged to Ø (ie A is not under a duty not to Ø). For example, Joel Feinberg maintains that claim-rights contain liberties (or privileges) as components, which according to Feinberg is why one cannot have a claim-right that is not also a privilege.[26] In other words, if one has a right that others not interfere with one's Ø-ing it follows that one is at liberty (or privileged) to Ø, which entails that a right to Ø is never a right to violate a duty not to Ø (ie to do wrong). Similarly, Alan White argues that '[t]he presence of a duty (or obligation) not to V implies the absence of a right to V'.[27] Similarly, according to David Lyons 'a right to do (or refrain from doing) something has as its core the absence of an obligation to do otherwise'.[28]

At first blush, this position enjoys a measure of plausibility. Typically privileges do seem to accompany claim-rights. For example, one's property right in one's land normally comprises both a claim against others for noninterference with one's use and enjoyment of one's land (eg the tort of nuisance), as well as a broad liberty to use and enjoy one's land as one pleases.

Still, it is certainly conceptually coherent to have a claim-right to Ø and still lack the liberty to Ø (ie have a duty not to Ø).[29] There is nothing in the concept of 'claim-right to Ø' that mandates an accompaniment in the form of a privilege to Ø. As explained above, having a right (under a certain normative framework) against the interference of others with one's conduct does not entail that what one is doing is right, permitted or valid (under the same normative framework). One may, for example, have a moral duty to give a small portion of one's fortune to the poor (a duty of charity/lack of a privilege to be uncharitable) and still hold a moral right (a claim-right) that others not force one to make such a donation. Recognizing the coherence of the category of a 'claim-right without privilege' entails the conceptual coherence of the category of a 'right to do wrong', because a claim-right to Ø without privilege to Ø is a right to do what one has a duty not to do.

Conceptual matters aside, one wonders what, if any, are the normative virtues or benefits of legal rights to do legal wrong. After all, what point is there in a claim-right to Ø without a privilege to Ø? For example, what use is the right against interference with one's use and enjoyment of one's land, if one is not also privileged to use and enjoy one's land? My hope is that the potential virtue of legal rights to do legal wrong will become apparent once we see how positive law contains certain normatively sound doctrines that take on the form of rights to do wrong, Because accepting that such doctrines are in fact valuable, it follows that the form of a 'legal right to do legal wrong' can play a positive role in the law.

As I pointed out at the outset, notwithstanding the moniker of 'rights to do wrong', strictly speaking the rights I am concerned with here are not rights to do or not to do something (ie a right to do Ø). Rather, they are rights that others do or not do something.

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[26] Feinberg, Social Philosophy (n 23) 58; Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 J Value Inq 243, 249.
[27] AR White, Rights (Clarendon Press 1984) 59.
[28] David Lyons, 'Rights, Claimants, and Beneficiaries' (1969) 6 Am Phil Q 173, 173.
[29] Mathew H Kramer, 'Rights Without the Trimmings' in MH Kramer, NE Simmonds, & H Steiner (eds), A Debate Over Rights (OUP 1998) 7, 15; Edmondson (n 1) 94, 135. For a strongly related position see Kagan (n 10) 222–5.

Applying the terminology just explained, rights to do something are privilege-rights (or liberty-rights). The accepted title or formulation in the literature of a 'right to do wrong' is, therefore, a little confusing; because it suggests that the right has the form of a privilege, although its structure is actually that of a claim-right.[30]

Considering that rights to do wrong are rights against interference with wrongdoing, it is worth clarifying what exactly counts here as 'interference'. In the context of claim-rights, a right to Ø entails a claim and a correlative duty for forbearance or for actual action in furtherance of the right-holder's Ø-ing.[31] The extent of such duties of non-interference and whether or not they are 'positive' or 'negative' duties depends on the normative grounds and the scope of the right. As used here, therefore, the concept 'interference' potentially spans a wide range of possible actions that are somehow inhospitable (or not sufficiently hospitable) to what the right-holder has a right to. At its most extreme, 'interference' stands for failing to actively assure the right-holder's Ø-ing, in the case of a 'positive' right, or actual physical or violent coercion (which in the law is manifested in mechanisms such as the enforcing of an injunction) in the case of a 'negative' right. Yet, interference may also manifest itself in less totalistic measures. A minimal form of interference is, for example, verbal criticism, which in most circumstances does not really count as interference at all. In between these two poles lie various disruptive actions.

Interference is legal if the law provides for or sanctions it. Accepting that legal (claim-) rights to do legal wrong are conceptually coherent as instances of the general concept of 'right', the question becomes whether or not there are any such rights in positive law. Some are doubtful. It is, for instance, possible to interpret Feinberg's implicit objection to the right to do wrong as specific to legal rights.[32] Jeremy Waldron is sceptical because of the prevalent correlation between legal duties and legal rights.[33] He claims that the typical structure of legal norms involving duties—specifically in private law—does not leave room for rights to do wrong. Because, according to Waldron, private law duties and obligations are mostly and even perfectly correlative with claim-rights. Violating a legal duty typically entails, therefore, a right's violation that gives rise to a claim (for legal remedy or a cause of action).

Such a structure allows no space for a right to do wrong, because all duties are also subject to enforcement via correlative claim-rights, ruling out the possibility of having a duty one has a right to violate without interference. So are there or can there be any actual legal claim-rights to do legal wrong in positive law? The only attempt in the literature that I am aware of to give an example of a legal claim-right to do legal wrong is,[34] I think, unsuccessful.

In the example, a factory owner is under a duty not to pollute a nearby lake. Moreover, the owner is liable for damages for breaching this duty and for causing such pollution, as

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[30] George (n 9) 118–22.
[31] See Feinberg, Social Philosophy (n 23) 59–60; Harel (n 23) 192.
[32] From his discussion in his classic 'Social Philosophy', Feinberg appears to think that it is a general feature of rights that claim-rights imply privilege. Yet his discussion of the issue appears in a chapter on 'Legal Rights,' which could suggest that his observations are directed towards the peculiarities of legal rights as opposed to the general concept of 'right.' See Feinberg, Social Philosophy (n 23) 55–67.
[33] Waldron (n 1) 24–5.
[34] Kramer (n 29) 15–6.

well as for resulting economic damages consequently caused to the lake's fishermen. Yet, were the fishermen to disrupt the operation of the factory—unilaterally plugging its waste pipes—as a means of stopping the pollution, the owner would hold strong injunctive and damages claims against the fishermen. According to Mathew Kramer this constellation of rights and obligations constitutes a right to do wrong: although the factory owner is under a duty not to pollute the lake, he also enjoys a (claim-)right 'to be unhindered in his pollution'.[35]

I do not, however, think that this is a successful example of a legal right to do legal wrong. The factory owner's right that is at stake here is not a right to pollute (ie do wrong/violate his duty not to pollute), but rather his property right against others sabotaging the mechanical operation of his factory. Were the fishermen to introduce some cleansing chemical or organism to the lake's waters, they would certainly disrupt the factory owner's polluting of the lake; but such action by the fishermen would hardly violate any of the owner's rights.

Therefore, although the factory owner is under a duty not to pollute, I see no reason to think that he enjoys a right to violate that duty. Still, although likely comprising a comparatively small set, certain actual legal doctrines may, on occasion, exhibit the form of a legal claim-right to do legal wrong. Below are a couple of such instances. While tempting, one should avoid conflating rights to do wrong with privileges. Key to a successful demonstration that a legal right to Ø is indeed a legal right to do wrong is showing that Ø-ing is legally wrongful and that one's right to Ø is not merely an exception to the rule against Ø-ing (ie is a privilege).

For example, normally intentionally entering the property of another, without the consent of the party holding the right of possession, constitutes trespass.[36] Yet, the law provides for a variety of privileges allowing certain types of actors to enter another's land under conditions that normally would constitute a trespass. For instance, a police officer is privileged to enter another's land without consent in order to perform a lawful arrest.[37] These privileges function as exceptions to the tort of trespass and not as rights to commit the civil wrong of trespass. Since, even if normally entering the land under such conditions is wrongful, if a party enjoys a privilege to enter the land without consent, doing so is permitted, rather than constituting a wrong that one has a right to perform free from enforcement, sanction or interference.

One method for distinguishing rights to do wrong from privileges is pointing out the residual legal significance of the wrong and its underlying duty, beyond the specific enforcement the presumed right to do wrong functions to block. Such normative residue validates the presumption that the duty not to Ø persists even if one enjoys a right to Ø. For example, a legal right to perform a criminal act may block criminal prosecution and still leave room for civil liability. It is hopefully clear that the following examples are of genuine rights to do wrong and not mere exceptions to duty, that is privileges.

1. Non-Prosecution Agreements.

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[35] ibid 16.
[36] Dan B Dobbs, The Law of Torts (Handbook Series, West Group 2000) 95.
[37] ibid 206.

In non-prosecution agreements the government promises not to prosecute a suspected or would-be criminal in exchange for the latter's cooperation with law enforcement officials. In principle, these agreements may cover not only past but also future crimes.[38] In such a scenario, the government gives a contractual claim-right to potential criminals to block attempts to prosecute their future crimes; were the government to prosecute the criminal for crimes covered under the agreement, the criminal might petition the court to enforce the agreement and enjoin the prosecution.[39] It is easy to see how such non-prosecuting agreements have the form of a legal claim-right to do legal wrong: they grant contractual rights to legally enjoin interference with criminal activity, that is to petition the court to command the end of a criminal prosecution.[40]

One would be hard-pressed to argue that such non-prosecution agreements nullify the underlying criminal prohibition. For one, the existence of a criminal prohibition is inherent to the logic of such an agreement, which is an agreement against prosecution for criminal activity. Second, a non-prosecution agreement need not nullify the collateral legal significance of the criminal activity. For example, an exclusion clause for criminal activity in an insurance policy would apply even if the insured enjoyed the benefits of a nonprosecution agreement for the criminal activity. Third, the non-prosecution agreement does not annul the privileges of the police and of private actors to act—in ways that are considered wrongful when directed against lawful activity—to stop or prevent the illegal conduct. There are most likely other such indications.

2. Government Estoppel.

The doctrine of government estoppel holds the government to the representations of its agents. Four elements establish estoppel: (i) the party to be estopped must know the facts; (ii) must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (iii) the latter must be ignorant of the true facts; and (iv) he must rely on the former's conduct to his injury.[41] In principle, when a court rules to estop a government agency from enforcing a duty on a private actor, that litigant in effect enjoys a legal right to do legal wrong through a right to enjoin the government from interfering with one's wrongdoing. Because in making the erroneous representation (that fulfils the conditions for estoppel) that one is under no duty or is exempt from duty, the party to whom that representation is made is given a legal right against the enforcement of his or her legal duty. This is a claim-right that gives the wrongdoer a legal claim to block the enforcement of his or her valid legal duty.[42] It is, in other words, a legal right to violate legal duty.

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[38] For an instructive analysis on how 'transaction immunity' may include immunity from prosecution for future crimes see United States v Harvey 869 F2d 1439, 1449–55 (11th Cir 1989) (Hatchett J dissenting).
[39] See United States v Fitch 964 F2d 571, 575–6 (6th Cir Mich 1992).
[40] One scenario in which prospective non-prosecution agreements are beneficial is where law enforcement uses informants. Effective use of informants may require their continued involvement in a criminal organization, which often includes engaging and participating in criminal activities. Courts should understandably worry about such agreements. But there are circumstances in which ex post promises not to prosecute certain future crimes may have significant benefits for law enforcement. See, for example, United States v Irwin 612 F2d 1182, 1192 n22 (9th Cir 1980); Graham Hughes, 'Agreements for Cooperation in Criminal Cases' (1995) 45 Vand L Rev 1, 69 n 72.
[41] United States v Georgia-Pacific Co 421 F2d 92, 96 (9th Cir Or 1970).
[42] The United States Supreme Court has construed the doctrine of government estoppel extremely narrowly. See Charles H Koch, Administrative Law and Practice (3rd edn, West 2010) vol 4, 290–8; AC Aman and WT

Notice that here estoppel only entails that the government may not enforce a duty, not that the underlying duty is no longer in force. Again, this becomes clear when considering possible residual legal implications that the failure to comply with the rule may have, regardless of the enforcement question. For example, the failure to comply with licensing laws may violate a contractual obligation or trigger an insurance exclusion clause, the estoppel notwithstanding.

(ii) (Legal) Immunities as (legal) rights to do legal wrong

Claim-rights are not the only type of right that may function as a right to do wrong. The literature on the concept of a 'right to do wrong' is concerned almost exclusively with the idea of a moral right to do moral wrong, which perhaps explains why the literature has consistently characterized the right to do wrong as a claim-right. What Hohfeld calls 'power' and 'immunity' are normative categories that are, at least often, more prominent in discussions on institutionalized normative systems (eg law) than other normative systems (eg morality). Turning one's attention to the concept of a 'legal right' serves, therefore, to discover a second and wholly undetected type of right to do wrong, which is immunity. In fact, immunities probably count for most manifestations of rights to do wrong in the law.

The Hohfeldian concept of 'immunity' is best understood in relation to 'power', which is its Hohfeldian counterpart. A power is the normative capacity or authority to alter, annul or create normative (eg legal) conditions or states of affairs.[43] More specifically, a power is the capacity or authority to alter one's own and/or others' status and entitlements—such as claim-rights and privileges. For example, a property owner has a power-right in her property that is embodied in her normative capacity to transfer her property rights to others, thereby altering her own entitlements and creating new entitlements for others.

Immunity is liberty from power, such that others lack the normative (namely legal) capacity (or in other words are normatively 'disabled') to change the immune party's legal status or circumstances.[44] For example, unless I consent, I normally enjoy immunity from other people (who are therefore disabled) entering into contractual obligations on my behalf, a power typically only I possess. Notice that immunity is rarely absolute. Typically immunities apply to or against certain (and not all) entities or certain types of power.[45]

Mayton, Administrative Law (West Publishing 1993) 323–34. But other jurisdictions are more generous with the doctrine. For example in Israel, a sister common-law jurisdiction, government estoppel is subject to a balancing test between, on the one hand, the hardship to the individual (as well as to third parties) who relied on the government's conduct and, on the other hand, public and rule-of-law interests. See CA 6996/97 Avada Inc v The Development Agency [1997] IsrSC 53(4) 117. And although Israeli courts tend to favour ruling for the government in estoppel cases, the doctrine can allow for private litigants to avoid enforcement of their legal duties based on their reliance on government representations.

[43] See Edmundson (n 1) 87–94; Harel (n 23) 193; Wenar (n 25) 231.

[44] See Edmundson, ibid; Harel, ibid; Wenar, ibid 232.

[45] An example of complete immunity is, perhaps, the old doctrine of unqualified sovereign immunity. On sovereign immunity see Dobbs (n 36) 693. Here the assumption is that the sovereign is subject to its own laws, but immune from legal sanction.

'Liability' is the correlative of 'power' in that liability is the exposure to the exercise of power. When one is held legally liable for Ø-ing the state of one's legal affairs is exposed to alteration—at times for the worse—because liability makes it possible to hold one legally responsible and accountable for one's Ø-ing (and often also for the foreseeable harmful effects of one's Ø-ing). Immunity from liability secures one's legal statuses, state of affairs or privileges from alteration. In a sense, therefore, liability is to immunity what interference is to claim-right.

Because they disable liability, immunities protect freedom. This is important because, as explained above, rights to do wrong allow for a relative measure of liberty to violate one's obligations. Liability can result in curtailing one's freedom to act (ie freedom to do Ø): where one's freedom to do certain things is dependent somehow on a legal status, right, entitlement or state of affairs that is exposed to liability. First, legal entitlements and legal states of affairs may practically allow or facilitate one's Ø-ing, or may function as normative conditions for one's Ø-ing. Immunities that function to protect such statuses, entitlements and legal states of affairs also have the very real effect of protecting the immune party's freedom to Ø. One example is one's right in one's vehicle that facilitates one's freedom of movement and travel. Immunity from appropriation of one's property functions to vicariously protect the freedoms practically depending on one's property. Legal status, to give another example, is often a condition to perform certain actions, such as the legal status of parenthood or guardianship, which is a legal condition for having control over the upbringing of one's children. Another example is marriage, a legal status that many rights, benefits and privileges are predicated on. Immunity from alteration therefore protects not only the status or entitlement itself, but also the freedom to engage in various activities normatively conditioned or practically depending on such a status or entitlement.

Second, curtailing or threatening to curtail one's legal entitlements in retaliation to one's Ø-ing may function to deter right-holders from Ø-ing. Here the worry is not that the alteration of the right allows for curtailing one's practical (positive or negative) freedoms. Rather, it is the threat of losing one's rights that deters individuals so as to pressure them to choose (or avoid) some of the options open to them. Such deterrence is possible even if there is no practical or normative dependency between the threatened rights or entitlements and the adversely affected freedoms. Immunity functions to protect one's freedom from such deterrence. For example, tort and criminal law deter activity in numerous facets of life through exposing individuals' rights to property and freedom of movement to liability. Immunity from such forms of liability has the effect of affording greater freedom of conduct, because it removes the threat to what often are some of one's most prized rights and entitlements.

Finally, liability may curtail one's freedom to a certain type of action by curtailing the right to that same type of action. Here too immunities protect freedom. For example, in order to stifle speech critical of the regime, many legislators in history have limited the right to free speech, allowing for censorship and prior restraint of seditious expression. As a constitutional right, however, the freedom of speech, where available, contains an immunity component that disables legislators, judges, and law enforcement agencies from limiting or altering the freedom of speech, thereby protecting the actual freedom to speak.

Immunities may take the form of a right to do wrong in cases where the holder of the immunity is immune from liability for Ø-ing even though Ø-ing is a legal wrong. That is, even though the right-holder is under a duty (ie lacks a privilege) not to Ø, others still lack the power to alter the wrongdoer's legal rights in order to practically curtail, normatively disable, deter or directly enjoin the wrongdoer's freedom to Ø. The holder of an immunity-right may invoke it against attempts to enforce—through law—his or her legal obligations not to Ø. In such circumstances, legal immunities protect one's freedom to Ø—even where Ø-ing is in violation of one's legal duties—from external interference through law. This interference may, as just demonstrated, take the form of indirect curtailment (removing or enabling practical or normative conditions), deterrence or permitting direct enjoinment.

It is important to clarify that not all immunities function as rights to violate legal duties. This is because not all legal liability (in the Hohfeldian sense of exposure to power) is predicated on a violation of duty. Such predication is of course foundational to arguably all criminal and too much of civil law liability; where it is the violation of a legal duty or an obligation that exposes one to the legal power of others to hold one liable, and thereby adversely alter one's legal statuses, rights and entitlements. In criminal law, for example, punishment for violating a criminal prohibition may entail curtailing the defendant's property rights (in the case of a fine) or right to freedom of movement (in the case of incarceration). In much of tort law liability for damages is conditioned on a violation of a duty of care. Breach of contractual duties grounds contractual liability. There are of course other examples. Immunity from liability for violating such duties seems to give rise to a right to do wrong. Yet, immunities may also protect one's rights from an exercise of power that has nothing to do with whether or not one violates a duty. For example, the constitutional right to free speech contains an immunity disabling the legislature or executive from narrowing one's realm of protected speech. The liberty of the legislative branch to exercise its legislative power against its subjects is of course not predicated or conditioned in any way on any violation of duty by those subjects. Thus, the immunity found in rights such as freedom of speech does not necessarily serve to protect the freedom to violate legal duties. It is an immunity that assures that speech is not made unlawful, and not that people have a right against interference with their unlawful speech.

To better understand how immunities can protect one's freedom to do wrong it is worth noting how immunity-rights differ from claim-rights. Claim-rights regulate actions, affording right-holders normative tools to counter actions (or inactions) that threaten their interests and freedom. Immunities defend the right-holder's legal rights, status, and entitlement from alteration. As such, immunities function to protect one from interference with one's legal rights and obligations through law, that is through the exercise of legal power. Immunity from civil liability, for example, assures that one will not incur legal liability due to one's Ø-ing, even if one is under a legal duty not to Ø and if one's Ø-ing is a civil wrong.

Yet because immunities, unlike claim-rights, are second-order rights—that is, rights that regulate first-order privileges and obligations—even the most robust immunity does not protect wrongdoers from interference that does not involve an alteration of one's legal

rights and obligations. For example, that one is under a duty not to trespass, yet simultaneously enjoys immunity from equitable remedies, civil liability and criminal prosecution, does not of course entail that one has a claim against a landowner for physically foiling one's attempt at trespassing. Although trespassing is a civil wrong, the immune trespasser is insulated from injunction or damages liability. But an owner who physically removes a trespasser (which, within limits, is within the rights of the holder of the right of possession)[46] does not violate the trespasser's immunity from liability for trespassing. To legally avoid or defend against the brunt of such self-help (assuming it does not violate one's other rights, such as against assault and battery) the trespasser must enjoy a claim-right to violate her duty not to trespass.

But are immunities 'real' rights? I think the answer is clearly 'yes'. Semantically at least, immunities are of course referred to as 'rights' in both natural language and legal parlance. More importantly, as just demonstrated, immunities fulfil the most important function of rights, which is to protect the interests and freedoms of rights holders.

A possible counter to characterizing immunities as rights to do wrong is to view immunity to always entail a privilege or lack of duty. Such a position fits nicely with the fact that in law immunities seem to often arise when coupled with a privilege. For example, as already explained the constitutional right to free speech contains a privilege to speak, as well as immunity from others—such as legislators or courts—from altering that privilege, so that one's speech may not be enjoined or sanctioned and one may not be held civilly liable for exercising one's privilege to express one's views. Another example is property.

Property rights normally include the privilege (as well as power) to transfer the rights in the property in addition to an immunity disabling others from transferring the rights in the property without the right-holder's consent. All this notwithstanding, there are reasons for thinking that immunities do not necessitate an accompanying privilege. First, the view that all immunities correlate to a privilege is overly deflationary to the concept of 'immunity'. If immunity always entails a lack of duty—that is, a privilege—then it follows that the category of 'immunity' is in fact void of much of its apparent normative role. Immunities allow individuals to act without the shadow of liability, that is, free of retaliation, coercion, sanction or interference through the exercise of legal power. But if all immunities had correlative privileges, so that any immunity from liability for Ø-ing would have a correlating privilege to Ø, immunities would become superfluous in all cases in which liability is predicated on a violation of duty. Considering that most retaliation, coercion, sanction and interference through law are in fact triggered and predicated on a violation of legal duty (in both civil and criminal law), if all immunities assumed a lack of a duty (ie a privilege) then immunities would mostly have no normative role to play. If immunities indeed assumed a lack of duty then, for all liability that is dependent on a violation of duty, immunities would never immunize one from liability. Because one is never liable for violating a duty one does not have. In other words, where liability is predicated on a violation of duty, a party who does not have a duty—the suggested condition for immunity—is not subject to liability, regardless of whether or not she is immune from liability. This is an implausible result. It largely deflates the very category of immunity, which is a pervasive category in law and in practical reasoning.

[46] See Dobbs (n 36) 182.

Second, a view that categorically couples immunity with privilege is blind to certain normative scenarios. For instance, immunity from a form of sanction that normally follows a violation of duty does not necessarily entail immunity from a second form of sanction normally following violations of the same duty.

For example, immunity from damages for violating one's duty not to Ø need not also protect one from an injunction not to (continue) Ø-ing. One instance of this type of scenario is found in the doctrine of 'qualified immunity'. Qualified immunity is a defence potentially available under US law to public officials from liability in 'constitutional torts' brought under Section 1983[47] or as a Bivens Action[48] for violation of civil rights. Public officials are shielded from liability for civil damages, so long as their conduct did not violate clearly established statutory or constitutional rights that a reasonable person would have known about.[49] Qualified immunity does not, however, obviate all civil remedies. A party who establishes a civil rights violation may request the court to issue injunctive relief against the defendant's ongoing or prospective wrongful conduct, even if the defendant enjoys a qualified immunity from damages liability for that same conduct.[50] It is also not beyond the realm of possibility that under certain circumstances the court would rule in favour of certain restitutive or restorative remedies for such civil rights violations.

The view that immunities are necessarily coupled with privileges cannot account for a legal doctrine such as qualified immunity. If the immunity from one form of remedy, such as damages, entails that there was no duty in the first place, it necessarily also entails that there is no wrongdoing on which to predicate claims for other types of remedies, such as injunctive, restitutive or restorative relief. Accepting that conceptually immunities can take the form of a right to do wrong, the question then becomes whether there are any such immunities in positive law. The doctrine of qualified immunity just mentioned is one such example. Here are three more:

1. Presidential Immunity.

The US President, during and after leaving office, enjoys absolute immunity from money damages liability for acts performed within the 'outer responsibility' of the president's official duties.[51] This absolute immunity does not suggest, however, that the president is not subject to the norms of private law. For example, it is I think a mischaracterization to suggest that President Nixon was not under a duty not to dismiss federal employees in retaliation for 'blowing the whistle' when testifying in congressional proceedings, as was alleged in Nixon v Fitzgerald. This is reflected not only in the fact that it appears an odd interpretation of the law—claiming that the law does not apply to the president—but also in the fact that the legal issue of the president's liability is formulated in terms of immunity and not in terms of a lack of duty, as well as in the fact that the court specifically stipulated that the absolute immunity from liability for money damages does not give the president immunity from other civil remedies, such as injunctions, for the same

[47] 47 42 USC s 1983.
[48] Bivens v Six Unknown Named Agents 403 US 388 (1971).
[49] Harlow v Fitzgerald 457 US 800, 818 (1982).
[50] Franklin (n 15) 917.
[51] Nixon v Fitzgerald 457 US 731 (1982).

actions.[52] Presidential immunity functions, therefore, as a presidential right to violate some of the president's private law duties.[53]

2. Immunity for Charities.

In the past, the immunity of charitable organizations from civil liability was fairly widely recognized in the United States.[54] At a minimum, this immunity protected charitable organizations from civil liability for negligently caused harms. With time, most US jurisdictions either narrowed or rejected this immunity.[55] Yet, the doctrine still persists in one form or another in several jurisdictions.[56] This immunity appears to have the form of an immunity-right to violate the duty of care, protecting charities from liability for harms resulting from their negligent conduct.

3. Diplomatic Immunity.

The law of diplomatic immunity is codified in the 1961 Vienna Convention on Diplomatic Relations (VCDR). Among its various provisions the VCDR addresses the immunity of diplomatic agents (the highest ranking members of diplomatic missions) and their families, all of whom enjoy personal legal inviolability in the host jurisdiction, including absolute immunity from criminal jurisdiction[57] as well as a wide immunity from civil liability.[58]

As in the other examples, diplomatic immunity assures the liberty from legal liability without entailing that the criminal and civil laws of host states do not apply to diplomatic agents. Such immunities are, therefore, legal rights to do legal wrong. Diplomatic agents are, in other words, bound by the laws of the receiving states, but are immune from liability in the eventuality that they violate those laws. For one, the VCDR itself recognizes the duty of diplomats to respect the laws of the receiving state.[59] Moreover, the sending state may waive the immunity of its diplomatic agents and in effect allow the receiving state to prosecute its diplomats,[60] suggesting that diplomats who acted in contradiction to the laws of the receiving state in fact violated those laws: otherwise there would be nothing to prosecute or hold such diplomats liable for, once immunity is waived.

The immunity right of diplomatic agents is a particularly pervasive and broad legal right to violate legal duties. Practically all states have ratified the VCDR.[61] Thus, although it is in a sense a right derived from international law, due to widespread incorporation and

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[52] JE Nowak and RD Rotunda, Constitutional Law (6th edn, West Group 2000) 266–8.
[53] Note that considering the high threshold for impeachment, impeachment does not function as an enforcement substitute for damages in most cases of presidential criminal wrongdoing and in all cases of presidential civil wrongdoing.
[54] Dobbs (n 36) 761.
[55] ibid 763; Restatement (Second) of Torts § 895E (1979).
[56] Picher v Roman Catholic Bishop of Portland 974 A2d 286, 292–4 (Me 2009); Dobbs (n 36) 764.
[57] 1961 Vienna Convention on Diplomatic Relations (VCDR) art 31.
[58] Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in MD Evans (ed), International Law (3rd edn, OUP 2010) 380, 387.
[59] VCDR (n 57) art 41.
[60] ibid art 32.
[61] Wickremasinghe (n 58) 384.

ratification, this immunity-right to do legal wrong is a right in practically all national legal systems to violate most of the right-holder's duties under the same legal system.

4. Defences: Excuses and Justifications.

Before closing, a few words on defences are in order. For those combing the law for instances of legal rights to do legal wrong, defences are what the song of the sirens was to Odysseus: highly seductive, but alas not what they seem to be. A defence functions to block legal liability for apparent legal wrongdoing and, therefore, appears to bear the mark of a right to do wrong. But this is mostly misleading.

Defences that look to the conduct of the defendant[62] are often divided into two categories: justification and excuse. Neither category exhibits the structure of a right to do wrong. A right to do wrong involves a duty one nevertheless has the (claim-)right to violate. A justification, however, deems a defendant's conduct right or lawful, hence the term 'justification', which implies a lack of duty in the first place.[63] For example, in tort law the doctrine of 'private necessity' provides those faced with an emergency with a privilege to do what would otherwise be considered a tort (such as trespass or conversion),[64] and where the 'lesser-evil' defence applies in criminal law, the defendant's conduct is deemed justified.[65]

Excuse does assume wrongdoing, yet as the term 'excuse' suggests it does not recognize a right to such wrongdoing. An excuse undermines culpability or liability for wrongdoing (that is, a violation of a duty) and for resulting harms, but does not suggest that the perpetrator had a right to perform the wrong or to cause the subsequent harm[66] or that the perpetrator holds a right against interference with her wrongdoing. Excuses turn on such issues as duress and reduced or lack of mental capacity, suggesting lack of or reduced moral responsibility. Excused defendants are deemed not culpable or less culpable for their wrongdoing and resultantly deserving of reduced liability, yet they are certainly not deemed to have held a right to violate their duty.

3. Conclusion

My aim here was to introduce and defend the idea that the law may and in fact does contain rights to do wrong. The literature on rights to do wrong has focused almost exclusively on moral rights, and even when rarely touching on legal rights, this literature has been largely sceptical about the existence of legal rights to do legal wrong. Yet legal rights to do legal wrong are conceptually possible as a matter of the logic of rights and of

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[62] As opposed to defences that are exclusively focused on the plaintiff or on the circumstances of the litigation, such as laches, statutes of limitation, comparative negligence, unclean hands.
[63] See Lawrence Alexander, 'The Philosophy of Criminal Law' in J Coleman and S Shapiro (eds), The Oxford Handbook of Jurisprudence & Philosophy of Law (OUP 2002) 815, 842–3. ('When one commits what is otherwise a crime in circumstances in which a justification is present, one has committed no wrong and caused no prohibited result').
[64] Dobbs (n 36) 248. Notice that the duty to compensate for losses caused by a privileged use of another's property does not negate the privilege deriving from the doctrine of private necessity. Under this doctrine one is privileged to temporarily appropriate another's property, but not to damage it.
[65] Model Penal Code s 3.02 (1).
[66] See Alexander (n 63) 843, 847.

the logic and practicality of legality. Moreover, actual instances of legal rights to do legal wrong are found in positive law.

I also aspired to introduce a new type of right to do wrong. The literature on rights to do wrong has exclusively conceptualized such rights as claim-rights. Yet, rights to do wrong also manifest as immunities, a type of right to do wrong that has thus far gone undetected. In fact, it appears that in the law the primary manifestation of the concept of a right to do wrong takes the form of immunity, though there are also legal claim-rights to do legal wrong.

Analytically, recognizing the phenomenon of legal rights to do legal wrong has significance for the larger debate on the normative nature of law; cutting in favour of those arguing that legal duties and obligations are not necessarily or essentially enforceable, coercive, or backed by sanction. Normatively, although I did not set out to prove the matter, the implication of my analysis is that legal rights to do legal wrong are, on occasion, desirable. On the face of things the idea of a legal right to do what the law forbids one from doing may appear oxymoronic and counterproductive to the ends and functions of law. Yet, as the examples given in the article suggest, there are actual legal doctrines that take the form of a claim-right or an immunity to do legal wrong that yield normative benefits. Benefits that serve not only to justify the doctrines themselves, but also to suggest that the form of a 'right to do wrong' itself is, at least on occasion, normatively fruitful when manifested in law.

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