

***The Right to Do Wrong: Morality and the Limits of Law*, by Mark Osiel (Cambridge: Harvard University Press), 2019**

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Can our rights protect us even as we do terrible things, like wasting cash and voting for bad candidates? Jeremy Waldron says yes, on the grounds that rights would not truly protect our autonomy if they applied only to anodyne choices from permissible options, such as the choice between chocolate and vanilla ice cream.¹ Waldron's critics push back, contending that "rights to do wrong" are incoherent or inessential to autonomy.

Given the title of Osiel's book, I expected another salvo in this familiar debate, distinguished only by its extensive case studies. I was wrong. An understated, unexpected masterpiece, *The Right to Do Wrong* transcends the concept from which it takes its name to revitalize a classic conception of morality and law. It's not Waldron with footnotes; it's Montesquieu with social science.

For Montesquieu, laws depend upon "the spirit of a nation." For Osiel, that "spirit" is common morality—a community's shared moral beliefs. Common morality forbids many things that American law does not: disinherit children arbitrarily (56), shirking debts by filing for bankruptcy (49), collecting looted works of art (65), uttering hateful slurs (44), declining life-saving medical attention (91–8)—the list goes on and on.

How should a society deal with such abuses of rights? We might roll back our rights; we could also accede to the abuses. ("They're just exercising their rights," after all.) Osiel shines a light on a third option. *The abuse of rights can be limited by the threat*

¹ Waldron, Jeremy, "A Right to Do Wrong," *Ethics* 92 (1): 21–39.

of informal stigma. Common morality can pick up where the law leaves off—which enables the law to give us more expansive rights that it otherwise could.

The Right to Do Wrong explores this phenomenon across a dazzling array of examples, drawing on cutting-edge scholarship across the humanities and the social sciences.² Osiel then asks *why* laws and morality should ever diverge. Here, he does not just point the finger at the usual suspects: short-sighted legislators and rent-seeking lobbyists. Instead, Osiel argues that the deepest, starkest gaps arise when we (i) don't trust public officials to be moral enforcers (158–59), (ii) don't know about someone's right to do wrong (160–61), or (iii) can't enforce morality, either because of the costs of overpolicing (161–63), or the futility of using force to make people act from noble motives (164–67).

Any rights theorist would benefit immensely from reading Osiel's main argument.³ Any ethicist, especially a virtue ethicist, will be glad they grappled with Osiel's profound challenges to *a priori* methods in moral philosophy.

Here I will try to give the reader a sense of three key themes from the book:

1. The role of rights in public discussion;
2. The need for stigma in a liberal society; and
3. The empirical emptiness of academic ethics.

² Osiel's standards of evidence are high, and the breadth of his research beggars belief. One memorable endnote: "Though I have read some of the relevant literature on shamanism in cultural anthropology, I here rely chiefly on a long conversation with a local shaman in highlands Guatemala, Quetzaltenando, in 2014" (419).

³ In my view, the essential line of argument runs through about half of the book: the Introduction followed by Chapters 3–7 and 12. The other chapters are interesting but not essential to the core argument. Chapter 1 argues for the existence of a common morality, which I expect many readers will be happy to grant; the other chapters delve into methodology and more examples.

Public Discussion

Modern moral philosophers write papers and give talks about the nature of rightness and wrongness; they don't usually go around telling people how to live. For practical advice, one must turn to such forums as Reddit's Am I the Asshole? ([AITA](#)), in which users share stories from their own lives and ask who, if anyone, was in the wrong.

In the [most popular post of all time](#), a father asks about his choice to put locks on his daughter's door to keep out her thieving cousins. (Verdict: Not the Asshole.)

In the [second most popular post of all time](#), we find something more "meta." The post begins:

I've enjoyed reading and posting on this sub for many months now, and I feel like I've noticed a disconcerting trend, lately. Over time, more and more of the posts seem to have...a shift towards judgments that seem (to me at least) to be out of step with how people in the real world judge situations.

And the top comment reads:

[P]eople here are too hung up on things that they're technically or legally allowed to do, often at the expense of socially acceptable behavior[.]

Followed by:

I so agree, people are so obsessed on this sub with what they "owe" other people or what they're obligated to do, it seems like they're often missing the bigger picture[.]

The distinction is subtle but essential, whether we are trying to understand everyday moral gossip or academic moral theories. You may be "technically" allowed to do things that are morally verboten.

To illustrate: if I tell you that you should get a flu shot, you do not win the argument by replying that you have the right to do what you want with your own body.

Even if you truly have that right, you are confusing one argument for another. It is one thing to establish that you are acting within your rights by refusing the shot; it is another to establish that you are acting wisely, or even decently.

Osiel shows, time and again, that we routinely garble this elementary distinction. As a result, when we debate tricky moral issues, we often bifurcate into tribes that do not respond to, or even grasp, what the other side is trying to say.

The Right to Do Wrong's most developed example of a botched debate is that of the so-called "Ground-Zero Mosque," a "Muslim cultural center, with a prayer center, near the site of the former World Trade Center" (17, with discussion continued up to p. 21, and resumed in pp. 277–80). On Osiel's recounting, the center struck many observers as insensitive to the families of those killed in the 9/11 attacks. But those defending the center's construction often seemed to miss this point, framing the debate as one about the existence of a right to build, rather than about whether building was a good idea. Osiel thinks the defenders should have *given reasons* in favor of building the center, as Michael Bloomberg did when he cast it as a beacon of openness (20). This move has the virtue of responding to the other side's grievance, resulting in an actual conversation rather than the mutual skewering of strawmen.

Once one gets a feel for this discursive mismatch, one finds it everywhere. Consider the predictable back-and-forth about free speech that occurs when a controversial figure is disinvited from a talk at an American university's campus. Critics decry the decision as closed-minded. Defenders cheer on the cancellation. But often the debate is muddled by invocations of the First Amendment's right to freedom of speech.⁴

⁴ See, for example, Rep. Jim Jordan's (R-OH) [letter to Jerrold Nadler](#), the House Judiciary Committee Chair, which seamlessly moves from praise of the First Amendment to lamentations about the "erosion" of a "shared commitment to free speech principles."

What are we debating, here? The university's legal rights, or its moral values? If the question is a moral one, we are just going to confuse things by insisting that the university is, or is not, running afoul of the First Amendment.

To some extent, I am sure that the confusion is the result of bad faith point-scoring, as each side tries to paint the other's position in the least flattering light. But to the extent that the confusion is genuine, there is no better antidote than Osiel's book, deeper and clearer than any other treatment of the topic.

Stigma

"In public," writes Osiel, "we invariably describe stigma as reprehensible. To acknowledge its indispensability and seek its rehabilitation runs powerfully against the grain of modern moral sensibility" (199). He's right, you know. Experts and advocates urge us to "end the stigma" around mental illness, homelessness, and drug addiction; around AIDS, cancer, and obesity. And with good reason! Shaming someone in need is no substitute for helping them, and stigmas can ostracize people who need and deserve to be included.

But that just means that stigmatizing is *often* bad. Is it *always* bad, as many scholars seem to think?⁵ Should we be trying to tamp down stigmas in general?

Osiel gives us reason to pause. Consider his example of bankruptcy. When people declare bankruptcy, they typically experience "considerable stigma" (49), and they may be blamed for their hardship even if the true source is some tectonic social or economic

⁵ See [Joseph Heath](#) on "stigma" as a "cyroptonormative" term in critical studies: "Stigmatization is, apparently, always bad. Anything that stigmatizes anyone else is bad. In some cases, entire bodies of empirical research, which might introduce a bit of moral complexity to the analysis of a particular situation, were swept aside on the grounds that they are "potentially stigmatizing" to oppressed groups."

trend. Bankrupts may be “shunned” at church and degraded in the courts (50). This seems regrettable—unfair, even.

But before you reach for that END THE STIGMA protest sign, consider a different example. What about the person who doesn't *need* to declare bankruptcy, but who would simply *like* to do so? This is the bankruptcy of fiscal convenience rather than of last resort. It is not what bankruptcy is meant for. We need a mechanism if we want to separate out those who should get to declare bankruptcy from those who should not. One option, pursued in some other countries, is to have the courts peer into the choices and assets of the would-be bankrupt. Effective—but intrusive. To those of us who would rather not subject the bankrupt to such scrutiny, the bankruptcy stigma offers itself as another means to the same end: it discourages the bankruptcy of convenience, without deterring those who truly need a second chance.

We might still wonder if such a stigma is really such a good idea, morally speaking. Consider again the person who needs to declare bankruptcy for reasons beyond their control. To saddle them with stigma seems unfair, as I said before. But it is hard to redesign the stigma so that it only attaches to those who are responsible for their misfortunes, those who deserve it in the eyes of common morality. Stigma is sticky. Attach it to something, and it clings to anybody who gets close, however undeserving.

Osiel is refreshingly open to such moral nuances. He does not insist that stigma is in general a better option than government oversight, or that government oversight is in general a better option than informal stigma. His position is less ideological. He denies, more broadly, that:

“private ordering” is necessarily or even presumptively superior to public, as both libertarians and religious conservatives often believe. Nor should there be a presumption *against* such ordering, a view common among progressives, who

today often deny the very existence of any private realm demanding unqualified legal protection. My point is simply that when creating and interpreting our law, we must become more reflective and self-aware in assessing the strengths and weaknesses of the kinds of nonlegal ordering here examined. (196)

In other words, we need a more systematic understanding of stigma. How else are we going to decide how to go about restricting a certain too-broad legal right? We could formally curtail it; we could also leave it broad and informally police its abuses. We need to understand these options before we can choose between them, and we have to recognize that their relative merits in a given case may depend on what kind of right is at issue. What holds for bankruptcy need not hold across the board.

Osiel makes another point worth emphasizing. In a liberal democracy, where citizens have the freedom to make decisions without constant state interference, *stigma may be more, not less, important*. When people are fed up by the flouting of social mores, they often feel compelled to cut back personal freedoms by curtailing legal rights. To ward off such a rollback, liberals need to think hard about how the state can bring behavior in line with common morality *without* having to resort to state intervention. This is not to say that the law will inevitably or automatically converge upon common morality (145). But when the gap is big and salient—and especially when it concerns core moral issues—people probably won't tolerate it for very long (187–94). Liberal democracies may well find stigma a less costly way to close the gap.

Critique of Academic Ethics

Osiel's argument has profound implications for how we should deal with, and discuss, the moral abuses of legal rights. But his argument is not itself a moral one. Osiel is not advocating for any particular policy, much less any big-picture ethical theory. Indeed,

Osiel shows little love for “critical morality,” the reflective study of what is truly right and truly wrong, as opposed to “common morality,” which consists in the mores that prevail in a given society, however heinous they may be. Osiel recognizes a role for critical morality in the development of common morality, which people do revise over time as they reflect on their own views (37). But as an academic discipline, critical morality—or as we call it in philosophy departments, *ethics*—has serious shortcomings, by Osiel’s reckoning.

For one thing, “analytic” ethicists have a clipped vocabulary. We talk about “what justice requires,” and “what we owe to each other,” but not generosity, nobility, dignity, integrity, and other terms from ordinary life (142). This strikes me as mostly true, but not entirely. Philosophers do write a fair bit about dignity⁶ and integrity.⁷ There was even a book a while back about what it means to be an asshole.⁸

Osiel’s second critique, in my view, cuts deeper: philosophers ignore empirical details—as if we could lay out the rules for living well without thinking through the social facts of how we live.

For the first instance of this, let’s go back to Waldron, who coined “a right to do wrong” in his 1982 paper of the same title (cited in fn. 1). Waldron foreshadows *The Right to Do Wrong* in a later paper, in which he argues that rights come bundled with *responsibilities*.⁹ For example, parents have the right to raise their children as they see fit, parents also have a responsibility to do this job well, by (at minimum) instilling moral standards in their kids. Waldron does not see such responsibilities as something

⁶ See e.g. Killmister, Suzanne, *Contours of Dignity* (Oxford: Oxford University Press), 2020.

⁷ The classic example is Bernard Williams’ “A Critique of Utilitarianism,” in his and J. J. C. Smart’s *Utilitarianism: For and Against* (Cambridge: Cambridge University Press), 1973.

⁸ James, Aaron, *Assholes: A Theory* (New York: Anchor Books), 2012.

⁹ Waldron, Jeremy, “Dignity, Rights, and Responsibilities,” NYU School of Law, Public Law Research Paper No. 10-83, 2010.

alien to rights. They are intertwined—he calls the nexus a “responsibility-right”—and they share a source. Responsibility-rights attach to important social roles, like those of a parent, voter, doctor, or soldier, who each has an important job for which he or she needs some discretion. And each role’s particular package of rights and responsibilities is united by the “dignity” attached to that role.

A “tantalizing” suggestion, says Osiel (264). But isn’t this a bit too simple? Are we supposed to take the role of a doctor, or of a parent, as a sociological given? The character of any given social role surely “varies by time and place” (264); consider the efforts of lobbyists trying to expand the role of this or that profession in a society (265). But there is no role in Waldron’s framework for this sort of mutable nuance, nor does he emphasize that the “dignity” of any particular role would be, at least to some extent, a matter to be discovered a posteriori through sociology, not deduced a priori by philosophers. (See especially Osiel’s discussion of “roles” in sociology at p. 271, and his discussion at pp. 280–87 of how the “virtues” attached to a role may change.)

But Osiel’s sharpest critique is not of Waldron—to whom Osiel clearly owes a debt—but the political philosopher Thomas Scanlon. In *The Difficulty of Tolerance*, Scanlon expresses that he shares “some of the *concerns*” of those who seek the “legal enforcement of morals.”¹⁰ As a liberal, Scanlon does not think the law is a suitable mechanism for the job; an atheist shouldn’t seek to outlaw religion even if he or she has a legitimate interest in living in a society where religion does not socially predominate. Instead, the role of religion in society is to be settled by “informal politics,” a vague concept defined in opposition to the “formal politics” of ballot-casting and law-making.

¹⁰ Scanlon, Thomas, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press), 2003, at p. 192.

(Toleration, for Scanlon, means that everyone is equally entitled to define a society by taking part in informal as well as formal politics.)

So far so good. But what is informal politics, exactly? And how are we to regulate it? Here, Osiel would hope to find some considered view about the workings of stigma and common morality. Instead:

Scanlon...confesses that he lacks even any firm idea of "what I mean by informal politics." This confessed and startling inarticulateness, from one of liberalism's most distinguished and able philosophical defenders, could scarcely be more glaring and unsatisfying. (318)

To Osiel, this is a sign that academic ethicists and political philosophers have not even begun to breach the crucial questions with which he is interested. How are we supposed to decide between responsibility-rights and tightly circumscribed rights if we don't have any clue about responsibilities? About the stigmas that stick to those who neglect their responsibilities?

Without revealing my own thoughts about this critique, I would like to convey it as a challenge to academic moral and political philosophy—where we so often think about virtues and vices as abstracted from their contingent contexts, where we seek the sources of dignity not in the ever-changing social world but in the unchanging depths of our own navels. *The Right to Do Wrong* warns us not to get too comfortable in our armchairs—or in our disciplines, for that matter, ever more narrowly circumscribed. I recommend Osiel's book enthusiastically.

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