

Diskussion/Discussion

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Steiner's Trilemma

*A Critical Comment on Hillel Steiner: "Rational Rights"
(Analyse & Kritik 17, 3-11)*

Abstract: I try to show that Steiner's theory has very implausible normative consequences since it does not accept the prima facie character of rights. This theory is unable to solve the conflicts of interests in which the only intuitively plausible solution consists in overriding someone's rights.

The article "Rational Rights" by Hillel Steiner (1995) summarizes very succinctly some central points of the theory developed by him in *An Essay on Rights* (1994). I would like to begin this note by summarizing that summary, but introducing an important element from Steiner's book that does not appear in his article:

1. Persons have moral codes, including one or more moral rules (called "primary rules"). Such rules prescribe what to do or to omit.
2. When a person subscribes to more than one rule (let's say, two), there is a possibility of conflict between them. Such potential conflict must be solved through a "secondary rule" which ranks the different primary rules.
3. When more than one person (let's say, two) have moral codes with different primary rules or with the same primary rules but different secondary rules, again there is a possibility of conflict.
4. This kind of conflict we can only solve by appealing to rights.
5. For a set of rights to resolve this kind of conflict, it must be a "compossible" one, i. e. a set in which it cannot happen that it is permissible for me to do x and, at the same time, it is permissible for you to force me not to do x .
6. The only type of rights capable of forming a compossible set of rights are property rights titles over one's body and external objects. (This thesis is not in the paper but can be found in Steiner 1994, 91.)

I shall not analyse the different steps of this argumentation. My purpose is only to look at some of its main features and the consequences they may imply.

I think we can say without risk that Steiner's theory is a 'radical deontological' one. I call 'radical deontological' those moral theories that establish the permission or prohibition of acts without ever appealing to a neutral calculation of foreseeable consequences. In contrast, a moral theory that acknowledges rights but

also accepts that an act may in some cases be said to be right or wrong based on consequentialist calculations would be 'moderately deontological'.

We thus have three possible strategies to confront a conflict between incompatible moral codes:

1. Consequentialism (for instance, in the utilitarian version): Conflicts are to be solved by calculating which of the two codes, when applied, has the best consequences in terms of some predefined value.

2. Moderate deontologism: This position provides rights, but in some circumstances accepts the possibility that these rights be overridden by other rights (for instance, positive rights) or on the basis of direct consequentialist argumentation.

3. Radical deontologism: Rights define a set of differentiated moral domains which in no case may be overridden. These sets of rights provide the holder of a moral domain with absolute power (and all other persons with the corresponding duties).

Steiner rejects alternative 1, saying that it makes rights "entirely otiose" or reducible to the more comprehensive language of duties (1995, 8). If we can determine through a calculus of consequences which code is the optimal one, then nobody can ever have "a right to do wrong" (1995, 7). Regarding alternative 2, Steiner's position is even stronger. While consequentialism is not an inconsistent position for Steiner, moderate deontologism is. In *An Essay on Rights* and other papers, Steiner tries to prove that any set of rights that is not title-based is impossible (1977a, 42; 1977b; 1994, 92). Indeed, moderate deontologists try to construe a set of rights that, in some cases, is not based on property rights but on interests, ends, intentions, consequences, positive rights, etc.

Now, what can we say regarding alternative 3 (Steiner's position)? While it certainly is perfectly coherent, I think it does lead to the same problem all extreme deontological theories face: it is extremely implausible from an intuitive standpoint. To see why this is so, let us take Sartre's example (commented by Steiner in his paper). In this situation, as presented by Steiner, you and I adhere to a code that includes the 'Patriotism Rule' and the 'Family Care Rule' (both primary rules), but we defend different secondary rules: you give priority to the Patriotism Rule over the Family Care Rule, and I subscribe to the contrary. If the set of rights that regulates this conflict is compossible, then, according to Steiner, it will give me the right to stay at home, and at the same time prescribe to you the duty not to force me to go to England, or vice versa. Let us suppose that the first is the case, i. e., I have the right to stay, although that is wrong in your opinion. As it often occurs in this sort of cases, we can slightly modify some of the variables of the example, so that it ceases to be intuitively acceptable. Suppose I am the only expert in the entire country who could deactivate a nuclear bomb the Nazis have deployed in a subway station in Paris. Or suppose I have many brothers and sisters who could care for my mother while I deactivate the bomb. Or suppose it is not my mother I have to take care of, but my little dog (who, we may agree, belongs to my family). These variations could go on, but it should be clear by now that, even if we are ready to accept 'the right to do wrong', it would be extremely unreasonable to accept the right to do *very* wrong, especially if the consequences of the

wrong decision include such disvaluable events as the loss of human lives. The move of moderate deontology as well as of consequentialism to avoid such unpleasant theoretical effects consists in considering rights as *prima facie*: I may have the property right over this lifeboat, but you may override it (e. g., by using the boat without my consent) if that is necessary to save somebody from drowning. Even property rights over one's own body are *prima facie*: If the only way to save many persons is to (morally or even legally) force others to donate some amount of blood (without a risk to themselves) or some amount of time (say, ten hours of work rescuing victims of an earthquake), we would surely accept this obligation as morally justified. There is, of course, a matter of degree which divides opinions between moderate deontologists and consequentialists (the deontologist would not accept killing one person to save many others, while the consequentialist *apparently* would).

Steiner's theory cannot endorse this strategy, because any restriction to the property rights of a person is based either on a calculus of consequences along some commensurating value, or on rights that are not property titles (for instance, positive rights), which, in Steiner's opinion, can only constitute an impossible set of rights.

It is worth to note that it is not necessary to be confronted with a 'catastrophe' for considering rights as *prima facie* (it depends, of course, on what we understand by 'catastrophe') (see Steiner 1994, 198 ff.). It is only necessary to point out that there will always be some point in the continuum of possible negative consequences of respecting a right at which we would certainly be willing to claim that beyond this point we are no longer morally obliged to respect that right. The moral domain defined by a person's property rights normally includes (not only, but also) the power to perform acts that are totally trivial or unimportant. To reject *any* possibility of a trade-off between different domains of rights implies rejecting that the slightest and most indifferent restriction on one domain (say, that I enter your property for five minutes) may be justified by preventing a most serious and irreversible harm (say, to save my small child from drowning in the river that flows through your property). Also, it would not work to argue that, in some cases, I do have the moral permission to *violate* your rights (for instance, to violate your property right over a piece of land in order to save my child). This move would only translate the impossibility alleged by Steiner from rights to moral permissions.

Steiner's theory has some traits that make it much more attractive than other libertarian positions, because it introduces a very surprising egalitarian element into the rigorous scheme of libertarian rights. But this egalitarian element (based on the equal right to natural resources) is not sufficient to avoid a fatal flaw of libertarian thought: namely, what we could call 'deontological absolutism'. If every restriction of a property right implies either a normative inconsistency or renouncing the very notion of a right, then Steiner is caught in a serious 'trilemma': He must either abandon the theoretical basis of his theory (the notion of right), or be inconsistent, or accept theoretical consequences that are clearly implausible.

The trilemma is not, of course, inescapable. But in order to escape it, we must give up at least one of the following theses: that consequentialism cannot provide genuine rights, or that any set of rights other than property rights is impossible. I think there is much to say in favour of abandoning both theses, but I will not follow this line in the present note. For my present purpose it suffices to have shown the problems Steiner has created for himself.

Bibliography

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