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Diversity and the Lexical Priority of the Right to Equal Freedom

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It is uncontroversial to observe that in contemporary liberal democracies there is much dissensus about the nature of the good life. Catholics, Protestants, Muslims, atheists and many others hold profoundly different and conflicting views about which personal ideals are fulfilling. Given this we need to know how the State should respond to such a lack of consensus. Various positions have been proposed and one can discern (at least) three possible responses. Some defend what might be termed the *democratic solution*: this affirms that when people are divided over an issue they should resolve the matter politically and decide the issue by voting on the matter. A second position sometimes affirmed is what might be termed the *perfectionist solution*: this states that when citizens disagree about which personal ideals are valuable the State should promote the most worthwhile ideals. In cases of conflict between conceptions of the good the State should decide in favour of the most valuable and fulfilling conceptions of the good. A third position might be termed the *liberal solution*: this maintains that the appropriate way for the State to respond to disagreement is for it to allow people equal freedom to make up their own minds. Now one can, of course, combine these three positions. One could, for example, embrace (b) and (c) and claim that the State should encourage worthwhile conceptions of the good but do so in a way that respects people's most important freedoms.¹ In this paper I shall consider and appraise Hillel Steiner's defence of what I have termed the liberal solution. In his important work *An Essay on Rights* he argues that given the existence of unresolvable disagreement there should be a right to equal freedom.² Furthermore, he argues, this right is lexically prior to all other values.³ This claim that people have a right to equal freedom plays an important role in his theory. From it he derives an account of distributive justice that stipulates that people are entitled to (i) ownership of their bodies (231–2), and

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¹ See, for example, Joseph Raz *The Morality of Freedom* (Oxford: Clarendon, 1986).

² See *An Essay on Rights* (Oxford: Blackwell, 1994). Hereafter all references to this work will be inserted in the text. The right to equal freedom is also affirmed by Kant who refers to it as the 'universal principle of justice'. See his *The Metaphysical Elements of Justice* (London: Collier Macmillan, 1965) translated with an introduction by John Ladd, 35.

³ For the concept of lexical priority see John Rawls *A Theory of Justice* (Oxford: Oxford University Press, 1972) 42ff.

(ii) an equal amount of the world's natural resources (235–6). A great deal depends, then, on whether he can successfully defend the right to equal freedom. In this paper I shall argue that he is unsuccessful. Steiner's contention that the State should deal with conflict by granting to everyone an inviolable right to equal freedom incorporates three distinct claims: first that the appropriate way to deal with conflict is to allocate the conflicting parties individual rights (the *rights thesis*), secondly that rights are lexically prior to all other values (the *priority thesis*); and finally, that these rights distribute equal amounts of freedom (the *equal freedom thesis*). The first makes a claim about the *nature* of the proposed solution (a rights-centered solution); the second makes a claim about the *status* of these rights (they are lexically prime); and the third makes a claim about the *content* of these rights (they distribute equal amounts of freedom). To assess Steiner's defence of the liberal solution I have taken each of these claims separately. Section I thus presents and assesses Steiner's defence of the *rights thesis*. The following section discusses and evaluates his defence of the contention that rights are lexically prime (the *priority thesis*). The final section considers his claim that the content of these lexically prime rights is a right to equal freedom, arguing that his reasoning is unconvincing. As we shall see each claim relies on an undefended and implausible account of impartiality.

1.

Let us begin then with Steiner's claim that the fair way to deal with conflict is for the State to institute a set of individual rights. Why should we accept this? Steiner's answer to this question relies upon a conceptual analysis of the ideal of impartiality. He takes it as axiomatic that the right way to deal with moral conflict is to treat the conflicting parties impartially. He therefore defends his rights-centered approach to dealing with moral disagreement by analysing the concept of impartiality and then showing how the only impartial solution is one that protects individual rights. He thus begins with a characterization of impartiality, stipulating that

(P1) An impartial solution (a) involves no 'priority-reversals' and (b) does not contradict any of our conceptions of the good (194–8, 207).

Both (a) and (b) need to be explained. The stipulation that there should be no 'priority-reversals' means that the state may never enact legislation on the belief that P-ing is more important than Q-ing, if one of its citizens thinks that Q-ing is more important than P-ing. One should be able to affirm the State's decision without reversing one's ranking of P-ing and Q-ing. Let us now consider the second property of an impartial decision, namely the stipulation that the State should not contradict any of our conceptions of the good. This forbids the State from making legislation on the assumption that P-ing is worthless if one (or more) of its citizens believes that P-ing is worthwhile. One should be able to affirm the State's decision without rejecting one's conception of the good. An

impartial solution, thus, leaves 'all primary rules intact and [requires] no priority-reversals' (197).

Steiner then argues that rights do not require priority-reversals; nor do they violate our primary rules (201). He thus affirms the following premise:

(P2) A system of rights satisfies the conditions of impartiality specified in (P1).

Initially, this claim might seem implausible. A critic might argue against Steiner that one can conceive of some conceptions of the good which do require the violation of rights. A set of rights would then contradict this conception of the good and could not meet condition (P1b). Consider, for example, a religion which requires the sacrifice of innocent and unwilling human beings. In this situation a scheme of rights would not be impartial because it would contradict this religious moral code. Steiner, however, has anticipated this sort of objection and replies that it is self-defeating. A conception of the good that contains the injunction 'violate other people's rights' already concedes that other people do have rights (197-8). The objection thus presupposes that people do in fact have rights. It has failed to show that some codes reject a commitment to rights.

Steiner's argument, here, does not of course show that all moral codes accept rights. (Nor does he think it does). It has force against someone who asserts 'God requires me to violate other people's rights', but it has no force against someone who asserts 'God requires me to burn other people as heretics'. Someone making the latter statement is not committed to the proposition that people have rights. A more sophisticated objection against Steiner can therefore maintain that some codes do not include a commitment to rights and Steiner concedes this.

He maintains, nonetheless, that rights represent an impartial solution to conflict. His reasoning is as follows: justice and morality (his term for people's conceptions of the good) represent two different categories of normative thought.⁴ Rights do not pass comment on the ethical worth of someone's conception of the good (210-14). Consequently, one can maintain that X-ing is immoral but also believe that people have a right to do it. Of course, recognizing other people's rights may prevent one from committing acts that one's conception of the good enjoins. This is unavoidable but the crucial point for Steiner is that the reason for not acting on one's conception of the good is not that one's conception of the good is worthless. Rather, it is that others have a right and this commitment to rights neither endorses nor repudiates the worth of one's conception of the good. It thus does not demand a priority-reversal and it does not dispute one's moral code. The impartial solution to disagreement thus requires a set of rights.

Now if (P1) and (P2) are correct it follows that the State should handle disagreement between individuals over matters of the good life by abstaining from making judgements about competing conceptions of the good and by

⁴ Steiner here follows Kant. See Kant's *The Metaphysical Elements of Justice*, 34-5 and 45.

allocating to each person the same individual rights. (The content of these rights will be discussed in section 3).

How convincing is this defence of a rights-centered approach to moral conflict? It suffers from three serious problems. First, Steiner's claim—in (P2)—that rights represent an impartial solution is questionable. Steiner believes that rights are impartial since, even if the rights in question prohibit one from pursuing one's chosen conception of the good, they do not assess the worth of one's conceptions of the good. Since rights do not rest on a judgement of the quality of one's conception of the good they neither contradict one's conception of the good nor rank it differently to the way that one does. In some cases, however this is not true and a commitment to a right does imply an assessment of the worth of people's conceptions of the good. This can best be illustrated by examining a specific example. Consider someone who, since she is a Catholic, thinks that abortion is murder. Now let us suppose that, according to the rights-centered approach favoured by Steiner, women have a right to an abortion. (Given Steiner's commitment to the choice theory of rights, he would endorse this claim on the grounds that fetuses cannot exercise choice and hence lack a right to life). Steiner's claim that a commitment to this right does not make any judgement about the truth or falsity of the conception of the good under question (Catholicism) is implausible here. The implausibility arises because it is difficult to see how one could hold that Catholicism is correct and also endorse what one would see as a woman's right to kill innocent human beings. In cases like this, where so much is at stake, endorsing the right only makes sense if the conception of the good it conflicts with is false.⁵ This point, it should be stressed, is not a psychological point about whether it is psychologically possible for Catholics to accept the right to abortion. Rather it is a conceptual point about the moral implications of taking Catholicism seriously. My claim is that the moral implications of accepting the Catholic point of view are such that someone who accepts this point of view could not sanction the right to an abortion. Such is the importance of the issue (of abortion) and so great are the consequences of allowing or prohibiting it, that no-one who is persuaded of Catholicism's truth could endorse a political principle that, in this case, licenses what the Catholic would see as widescale murder. To endorse the right to an abortion, therefore, is to accept implicitly that Catholic doctrine about abortion is wrong. *Contra* Steiner then, endorsing rights does, in some cases, imply a judgement about the quality of the conception of the good that is being prohibited or allowed by the right. In situations such as the one described above rights then are predicated on judgements about the good.

This point is obscured in Steiner's text because the conflicts he discusses are so abstract and far removed from the conflicts that actually take place in contemporary liberal democracies. Steiner's discussion of conflict centres on a dispute between two characters, Red and Blue, over whether keeping one's

⁵ A similar point is made by Michael Sandel in criticism of Rawls's *Political Liberalism*: see Sandel 'Review of *Political Liberalism*', *Harvard Law Review*, vol 107, no 7 (1994) especially 1777–8.

promises is more important than patriotism. Once we examine real-life examples, however, (like abortion or euthanasia) it becomes clear that one can accept certain rights only if one repudiates certain conceptions of the good. Unlike in Steiner's abstract example, in these real-life issues it is apparent that—since so much is at stake—one can endorse liberal rights only if certain conceptions of the good are false. (P2) is therefore implausible: rights do sometimes implicitly entail an assessment of the worth of certain conceptions of the good. They thus do not satisfy Steiner's own concept of impartiality.

Steiner's defence of a rights-centered approach to dealing with conflict is also open to a second objection. A rights-centered approach can resolve moral conflict only if there are no conflicts of rights. Rights will be of no help in resolving a disagreement if there are conflicting rights: they simply redescribe or reproduce the original conflict and offer no way of overcoming the disagreement. Moreover, if there are conflicting rights, we need to appeal to some criterion other than individual rights to solve the problem. Steiner's approach therefore rests on the assumption that rights do not conflict and Steiner is indeed happy to make this assumption. He refers to this as the compossibility of rights.

Why, however, should we believe in the compossibility of rights? Steiner makes several suggestions but his central argument is that to claim that rights can conflict issues in a logical contradiction (81 & 94). His reasoning is very simple: to say that a person, John, has a right to do P (right 1) implies that he should be allowed to do P. If we claim, however, that there is a right (right 2) whose exercise is incompatible with the exercise of right 1, what we are claiming is that John is both allowed and not allowed to do P. And this constitutes a logical contradiction: thus it is impossible for rights to conflict.⁶ This argument, however, overlooks the simple but important distinction between *pro tanto* rights (hereafter rights_{pt}) and *all-things-considered* rights (hereafter rights_{ac}). As I define these terms, one has a right_{pt} to do P if one has a right to do P which may be overridden by another right and one has a right_{ac} if this right to do P cannot be overridden by another right.⁷ Now using this terminology it is clear that one can make sense of rights conflicts. Whilst it is logically impossible for two rights_{ac} to conflict, it is quite possible for rights_{pt} to conflict.

Furthermore not only does Steiner's defence of the compossibility of rights not succeed but this contention runs counter to our common usage of the concept of rights which is after all Steiner's touchstone. It is truer to our normal usage to think that sometimes one right (for instance, the right to free speech)

⁶ This argument is stated very clearly in Steiner, 'The Structure of a Set of Compossible Rights', *Journal of Philosophy*, vol LXXIV, no 12 (1977) 767–8. See also Steiner, 'Slavery, Socialism, and Private Property' in J. Roland Pennock and John Chapman (eds), *Property: NOMOS XXII* (New York: New York University Press, 1980) 247. I hope to consider this and other arguments that Steiner invokes, notably his appeal to what (following H. L. A. Hart) he calls the 'Nightmare', in another paper. For an excellent discussion and evaluation of Steiner's arguments for compossibility see Nigel Simmonds, 'The Analytical Foundations of Justice', *Cambridge Law Journal*, vol 54, no 2 (1995) especially 321–40.

⁷ For an instructive discussion of the moral weight and status of rights and an account of their relationship to other rights and other moral values see Peter Jones, *Rights* (London: Macmillan, 1994) 195–204.

may be incompatible with another right (for instance, the right to privacy).⁸ Steiner might reply that no concept fits in with all the ways in which it is commonly used and that sometimes linguistic usage should be reformed. This is true but, in this case, there is a strong case for keeping normal usage because it expresses an important moral point. By describing situations like this as two rights clashing we recognize the values of each of the activities protected by the clashing rights. We acknowledge the importance of free speech and the value of privacy. Allowing rights to conflict thus is not only consonant with linguistic usage but also accurately captures the moral situation. To claim that there is only one right would be to misrepresent the state of affairs.

Moreover, Steiner's conclusion is *prima facie* odd. We recognize that other *pro tanto* values conflict and are willing to acknowledge, for instance, that two duties may conflict. If my mother needs medical care but my child does as well it is accurate to describe this as a conflict of duties. Furthermore, we recognize that goals may frequently conflict. Given this, Steiner needs to explain why rights cannot conflict with other rights but goals and duties can conflict with other goals and duties respectively. Why do rights have this unique property?

The claim that rights are compossible is thus unsupported by Steiner's argument and is itself implausible. And if we accept this conclusion we must accordingly find unpersuasive the claim that a rights-centered approach can enable us to provide a solution to cases of moral conflict.

One final point should be made. Neither of the two objections that have been made against Steiner's rights-centered approach has called into question (P1). This premise (which is crucial to Steiner's defence of the *rights thesis*) is, I shall argue below, also inadequate. A critical discussion of his conception of impartiality will, however, be postponed until section 3 because, as we shall see, his justifications of both the *priority thesis* and the *equal freedom thesis* also depend on it. For the meantime it is worth recording the importance of this assumption for the defence of the *rights thesis* and observing that Steiner gives no argument in defence of this account of impartiality but simply asserts (P1).

2.

Let us suppose, however, that Steiner's defence of the *rights thesis* is persuasive. Steiner makes a further claim, arguing that rights should take priority over all other moral and political values (the *priority thesis*). Rights have lexical priority. Again he presents a conceptual argument and, again, this argument draws on the concept of impartiality. Impartiality requires that a system of rights be lexically prior to all other values. This is, of course, a remarkably ambitious conclusion. Some would reject the idea that any value is lexically prime, and of those who believe that one value is lexically prime many would reject the claim

⁸ Here I am in agreement with Michael Freeman, 'Theories of Individual and Collective Rights' in N. J. Rengger and M. Rady (eds) *Individual and Collective Rights in National Context* (forthcoming) especially at 10 and 15.

that rights are lexically prime. So how does Steiner defend this claim? He reasons as follows: unless people rank rights as their most important value there cannot be an impartial solution to disagreement. If people place their commitment to rights, for instance, lower than their commitment to their religion there could not be a solution which demanded no priority reversals and which did not contradict anyone's moral code (198). He imagines a conflict between two people, Blue and White. And when White asks why rights are to be ranked above all other values, Steiner replies

if it were not so ranked, it might not get a grip on your current deadlock. And if it didn't, then, given your and Blue's respective commitments, there's no way that your deadlock could be resolved impartially. There is no way that it could be resolved without relying on one, and dismissing the other, of your respective opposed prioritizations. The lexically prime priority of the rights rule is indeed a conceptual truth: it's a conceptual truth about the implications of resolving deadlocks impartially (202-3).

The impartial resolution of conflict thus requires a principle of rights which takes precedence over all other values.

The *priority thesis* is, however, highly implausible. To see this consider the following example:

I. A nuclear plant starts to leak radioactivity and a scientist discovers how to stop this but refuses to tell anyone. Suppose we know that she has written down the correct decision procedure and left it in her office. Should we break into her office to discover the solution, thereby preventing a nuclear disaster?⁹

We might think that the scientist is the bearer of a right, and yet nonetheless think that it ought to be overridden. The right is therefore not lexically prime. The same conclusion is suggested by a second example:

II. Suppose that someone is being chased by a savage dog and that the only way that she can avoid being mauled to death is by climbing into someone else's garden (and thereby walking on their flower beds). Suppose, however, that the owner of the garden, although he is aware of the plight of the person being chased does not want someone to walk over his flower beds to safety and therefore forbids the person being chased from entering.

Now it is clear that the owner of the garden possesses a right (in this case the right to private property): it also seems plausible, however, to claim that the value of this right is outweighed by the value of saving the life of the endangered woman. Steiner could argue that the owner of the garden is acting uncharitably but he would have to maintain that he had an inviolable right to do so even though it leads to one woman losing her life. And any political theory that protects one person's right to look after their flower beds whilst another dies is

⁹ This example was inspired by one devised by Amartya Sen to make a slightly different point. See 'Rights and Agency' in Samuel Scheffler (ed) *Consequentialism and its Critics* (Oxford: Oxford University Press, 1988) s2, 191-2.

morally untenable.¹⁰ Moreover, Steiner's commitment to the lexical priority of rights is even more implausible if we adopt his account of rights. In *An Essay on Rights* he defends the choice theory of rights and accordingly cannot attribute rights to the mentally handicapped, children, fetuses, future generations and non-human animals.¹¹ So in a Steinerian political system present generations would be permitted to consume *all* the world's resources leaving nothing but a wasteland for future generations. Similarly, individuals could legitimately leave the mentally handicapped alone in the world without any protection.

The assertion that rights take lexical priority is thus untenable. Let us call this the Intolerable Outcomes Objection. Steiner might make three responses to this objection. He might:

- (a) deny that in such cases the individuals in question do possess a right and therefore deny that any of their rights ought to be violated
- (b) accept that in such cases people do have a right (which is therefore lexically prime) but call into question the alleged moral unacceptability of their exercise
- (c) accept that in such cases individuals do have rights and accept that their use issues in morally counter-intuitive outcomes but deny the importance of moral intuitions.

Let us examine each in more detail.

(a) Steiner might argue that the counter-examples mustered by the Intolerable Outcomes Objection do not demonstrate that an individual's right ought to be overridden to prevent some morally atrocious result because in none of the cases do the individuals in question have the rights attributed to them by the Objection. Thus the claim that people possess rights which can be violated is inaccurate. In the situations in question, the argument runs, the person alleged to possess an overridable right does not in fact possess the right ascribed to him by the objection. Therefore compelling him to prevent the intolerable outcome is compatible with the lexical priority of rights. This strategy thus seeks to discredit the counterexamples. One might do this in several ways:-

(i) One might, for example, try to argue that the scientist in example I does not have a right to withhold information. Suppose, for example, that the scientist who discovers how to prevent the leak is employed by the plant. In such a case, Steiner could reply that the scientist does not have a right of privacy since it is arguably part of her contract to use her expertise to assist the functioning of the nuclear plant. Consequently one could argue that the scientist could be made

¹⁰ Someone might reply here that the woman being chased possesses a right to be saved and hence affirming the lexical priority of rights need not lead to this horrendous outcome. This option is, however, not available to Steiner for two reasons. First, on his system people possess only a negative right to life: that is, others are morally prohibited from killing them but they are not required to give aid. Secondly, allowing persons the right to be saved would generate a conflict of rights (the right of private ownership versus the right to be saved) and Steiner denies that rights can conflict.

¹¹ Steiner defines the choice theory as follows: 'According to Choice Theory, a right exists when the necessary and sufficient condition, of imposing or relaxing the constraint on some person's conduct, is another person's choice to that effect' (57-8).

to provide the correct decision-procedure whilst also affirming the lexical priority of rights. This counter-argument can, however, easily be resisted. One could just describe example I in greater detail and specify that the scientist is not employed by the plant (or company) in question and therefore is under no contractual obligation to provide the requisite technical knowledge.

(ii) Steiner adopts a similar type of argument in *An Essay on Rights* where he claims that many objections to the lexical priority of rights rely on cases where a psychopath uses one of his rights to do something awful. Steiner rightly replies that this sort of argument is unconvincing: someone who adheres to the lexical priority of rights can plausibly deny that psychopaths are entitled to the rights in question (200 fn 7). Again, therefore, the denial of the claim that someone's rights ought to be overridden takes the form of denying that the person whose behaviour leads to the morally atrocious outcome actually has the right to do so. But this version of the argument is no more successful than that discussed in the last paragraph. The problem is that there are cases where someone who is not a psychopath exercises a right in a way that has such morally repugnant outcomes that we are willing to say that the right ought to be overridden. Neither the scientist in example I nor the owner of the garden in example II, for example, would normally be described as psychopaths. This point is also borne out by an additional example:

III. Suppose that someone discovers a cure for AIDS and writes a paper setting out the proper course of treatment. He is, however, subsequently converted to a religion which prohibits the use of medicine. According to this religion it is arrogant of humans to interfere with natural processes and therefore one should just let nature take its course. Now it seems accurate to claim that the discoverer of the cure is not a psychopath. Furthermore, he has a right to withhold from others his scientific discoveries. We might, nevertheless, think that because so much is at stake respecting this right should take second place to saving the lives of those who would otherwise die from AIDS.¹²

The first response to the Intolerable Outcomes Objection is thus unconvincing.

(b) Steiner's second response to the Intolerable Outcomes Objection is to question whether the outcomes produced by the exercise of rights will ever really be morally intolerable. In his discussion of whether rights will produce morally unacceptable outcomes in *An Essay on Rights*, Steiner argues that in situations

¹² The same point could be made using an example inspired by Umberto Eco's *In the Name of the Rose*. In the latter, Jorge, the librarian, destroys the sole remaining copy of Aristotle's treatise on comedy (described in the book as the second book of Aristotle's *Poetics*) because he thinks it is blasphemous and sinful. Consider, therefore, a case in which someone legitimately acquires some great works of art and literature (say some undiscovered plays by Shakespeare or sculptures by Michelangelo or paintings by Rembrandt). And suppose that (because of his religious convictions) he believes these to be works of the devil which must be destroyed. Now we might say that he is misguided and deluded but it would be inaccurate to claim that he is a psychopath. And it would similarly be inaccurate to deny that he has a right to these works: after all, he acquired them legitimately. Nonetheless, we might still think that the immense value of these works justifies overriding his right. In this context, see also Jonathan Wolff's discussion of Nozick's account of rights: *Robert Nozick: Property, Justice and the Minimal State* (Cambridge: Polity, 1991) 22.

where people choose to exercise their rights in ways which bring about appalling results it must be the case that

there are some persons *whose moral codes do not include* that other rule or, at least, the way it's prioritized. . . . For them, whatever would occur as a result of their rights not being violated simply does not amount to a moral catastrophe. Because if it did, *they would thereby have sufficient reason to stand down* and waive the correlative duties owed to them (200).

People in Steiner's political system choose how to exercise their rights and if their exercise results in what some find morally intolerable consequences, Steiner's reply is that these people clearly did not think that it was morally intolerable. Otherwise they would not have exercised their rights in the way they did (200–1).

But this is little consolation. That a phenomenon is not recognized to be morally unacceptable by some people does not mean that it is any the less morally unacceptable. That some individuals do not agree that what they have brought about is morally intolerable is beside the point. All that we need to establish that the lexical priority of rights can have unacceptable consequences is to assume that people may, on occasion, be selfish, ignorant, insensitive or have utterly misconceived notions of their moral obligations. Steiner's second reply to the objection that the lexical priority of rights has morally unacceptable implications is thus unpersuasive.

(c) A third response Steiner might make to the Intolerable Outcomes Objection can be inferred from his view of the significance of moral intuitions. Like R. M. Hare, Steiner distinguishes between 'moral intuitions' and 'linguistic intuitions' and he is critical of those who appeal to 'moral intuitions' to ground their political philosophy. In addition, like Hare, he believes that the appropriate way to do political philosophy is to draw on 'linguistic intuitions' and to elaborate the meaning of moral concepts (in Steiner's case, the meaning of 'justice' and 'rights') (3–4).¹³ Thus his account of justice is an analysis of the way that the concept is normally used and he bases his account of political philosophy on a conceptual analysis of the way in which we use terms like rights. Given this Steiner might reply to the objection that the lexical priority of rights has morally counter-intuitive implications that the latter have no relevance when assessing the correctness of a political theory.

But this response is also unsuccessful. Moral intuitions cannot and should not be ignored for four reasons. First, the case against including them is unsuccessful. Steiner himself does not give any argument for his rejection of the role of moral intuitions. The normal argument against any invocation of moral intuitions, however, is that they reflect people's self-interest and are corrupted by self-deception, social pressure and dogma. But this does not imply that no reference

¹³ I am grateful to Steiner for several discussions about his attitude toward moral and linguistic intuitions. For Hare's treatment of moral and linguistic intuitions see *Moral Thinking: Its Levels, Method and Point* (Oxford: Clarendon Press, 1981) 5–20. For Hare's critique of moral intuitions see 'The Argument from Received Opinion', *Essays on Philosophical Method* (London: Macmillan, 1971).

at all should be made to intuitions. What it implies is that one should not be uncritical of one's intuitions and should seek to filter out these sorts of distortions.¹⁴ Secondly, without moral intuitions one cannot reach moral conclusions. Suppose that someone provides an account of the way that a certain word—like 'justice'—is used, we are unable to know what ought to be done until we have been given good reason to further this ideal. Suppose Steiner persuades someone that the term 'justice' does have the meaning he contends (ie it implies the lexical priority of rights), it is always open to the critic to argue that now we know what the term means we still need an argument to show why it is valuable. This critic might propose an alternative ideal to Steiner's—let us call it justice—and then point out that before she accepts Steiner's preferred ideal the virtues of the two competing ideals must be appraised. And this can only be done by, amongst other things, comparing their moral plausibility. As Rawls rightly points out 'it is obviously impossible to develop a substantive theory of justice founded solely on truths of logic and definition. The analysis of moral concepts and the a priori, however traditionally understood, is too slender a basis'.¹⁵ A third point should also be made about Steiner's methodology. One problem with relying solely on a conceptual analysis of the meaning of moral terms is that frequently the latter can deliver no single correct definition of a term. Most concepts are open to various different interpretations. It is thus misguided to claim to provide a determinate account of what the term 'justice' means by appealing to linguistic intuitions alone. What are therefore needed are moral intuitions to arbitrate between the various different interpretations of the same ideal. Conceptual analysis is thus indeterminate and when appraising the plausibility of various competing conceptions of justice we must surely take into account whether they have morally unacceptable implications.¹⁶ One final point should be made against Steiner's dismissal of moral intuitions, namely, that Steiner himself appeals to them. As we shall see later, he criticizes majoritarianism on the grounds that it violates individual rights (218–19). To do this he is however appealing to an intuition. But if he appeals to the alleged intuitive implausibility of majoritarianism he cannot then reply to the accusation that the prioritizing of rights has counter-intuitive implications that one can ignore moral intuitions.

¹⁴ For an excellent discussion of these issues see James Griffin, 'How we do Ethics now' in A. Phillipps Griffiths (ed), *Ethics: Royal Institute of Philosophy Supplement 35* (Cambridge: Cambridge University Press, 1993) edited by A. Phillipps Griffiths. Griffin argues that the 'purist' view espoused by Hare fails to show that no use of moral intuitions should be made when assessing the plausibility of a moral theory but he is also critical of those who simply blindly follow people's intuitions. See also John Rawls's important contribution in *A Theory of Justice*, 46–52.

¹⁵ *A Theory of Justice*, 51. I should make it clear here, lest my argument is misunderstood, that my claim is not that conceptual analysis is not important. My claim is only that it needs to be supplemented by moral argument and that the latter should pay some attention to our moral judgements.

¹⁶ Cf Rawls, *A Theory of Justice*, 5–6; John Gray 'On Liberty, Liberalism and Essential Contestability', *British Journal of Political Science* vol 8, part 4 (1978), especially 387; Peter Jones, 'Two Conceptions of Liberalism, Two Conceptions of Justice', *British Journal of Political Science*, vol 25 (1995) 544–5; and Nigel Simmonds, 'The Analytical Foundations of Justice', especially 308–11. See also Gerald Dworkin's instructive discussion of the appropriate way to elucidate the ideal of autonomy: *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1989) ch 1, especially 6–10.

Thus the Intolerable Outcomes Objection to the lexical priority of rights still stands. Steiner cannot, (a), argue that the examples used by the Intolerable Outcomes Objection rely on attributing rights to people which they do not have. Nor, (b), is he right to question the moral unacceptability of the 'intolerable outcomes' by arguing that if a state of affairs were morally appalling people would employ their rights to ensure that this state of affairs did not come about. Furthermore, (c), he would be wrong to disregard the moral counter-intuitiveness of his proposal that rights be given priority over all other political values. Steiner's suggestion that rights may never be overridden is therefore morally implausible.

Before moving on to consider the rest of Steiner's theory of rights, it is worth noting that Steiner's entire argument for the *priority thesis*, like his defence of the *rights thesis* and the *equal freedom thesis*, rests on his ideal of impartiality. It therefore bears mentioning that before he can claim to show that rights are lexically prime he must show that his ideal of impartiality is lexically prime. Without this further argument all that Steiner can show us is that *if* one accepts his conception of impartiality *then* one should accept his conclusion that rights are lexically prime. But this is evidently insufficient to demonstrate that rights are lexically prime. Without an argument establishing the lexical priority of impartiality, therefore, his justification of the lexical priority of rights fails.

3.

Let us suppose, however, that Steiner's arguments are convincing, and that the correct way to respond to ethical disagreement is to allocate to each individual a set of inviolable rights. It remains to be seen what the *content* of these rights are: *what* rights do people have? Steiner argues that what is at stake when two people disagree is who should have freedom. Should X be allowed to pursue her goal (P-ing) or should X's freedom to do P be curtailed in order that Y can be free to pursue his goal (to do Q). The appropriate question here, then, is 'how should the State distribute freedom between the disputants?'. Steiner's argument again draws on his principle of impartiality. Suppose that the State proposes to decide the issue in X's favour—giving X the freedom to perform P—this conflicts with Y's moral code. Similarly, if the State affirms the value of Q-ing, thereby giving Y the freedom to do Q, its decision conflicts with X's moral code. Given disagreement, no substantive proposal is acceptable (214–15 & 216). A substantive criterion would be acceptable only if all the disputants agreed on it, but if this were the case, rights would be 'otiose' (215). Consequently, a solution based on one of the moral codes is unacceptable. Steiner then argues that

if ... no criterion for relevantly differentiating cases can be eligible to serve as a standard of distributive justice, the inference must be that no cases can be regarded as relevantly different: that is, all cases are relevantly alike. In this context that means

that the freedom-distribution mandated by justice is an *equal* one, that everyone is justly entitled to equal freedom (216: see also 220 & 221).¹⁷

An equal distribution, because it is uninformed by either of the disputants' moral values, is therefore the only impartial solution. Justice requires the lexical priority of a system of rights allocating each person equal freedom.

How persuasive is this defence of equal freedom? I believe that it faces four problems. The first focuses on his account of impartiality. As has been stressed in the two preceding sections, Steiner's commitment to (P1) plays a crucial part in his theory, underpinning his defence of the *rights thesis*, the *priority thesis* and the *equal freedom thesis*. It is therefore important to observe that nowhere does Steiner give us any reason at all to accept it. The problem is not that he takes impartiality to be valuable (an assumption that many are willing to accept); rather it is that he has given a very specific interpretation of this ideal but has given no reason to endorse this specific interpretation. He simply assumes that an impartial solution should not contradict anyone's moral codes and should not rank some ideals higher than others if its citizens have an alternative ranking (207, 215 & 216).¹⁸ The problem caused by this absence of argument is exacerbated because there are other accounts which have as much claim to be the impartial way to resolve conflict. Consider, for example, three alternative interpretations of the ideal of impartiality.

(a) Utilitarians (like R. M. Hare) maintain that to treat persons impartially the State should implement those policies which maximize happiness.¹⁹ In such a way, the State can resolve conflicts impartially treating each person evenhandedly. Nothing Steiner has said shows why his account of impartiality is superior to the utilitarian interpretation.

(b) A perfectionist can argue that the impartial way to treat people is to respect each person's interest in well-being. As Martha Nussbaum writes, according to a perfectionist theory, the State respects its citizens 'as equals only if the whole life of each one of them has been considered with rich imagination and, as a result, each one of them has been given whatever he or she needs in order to be in a position of capability to live a rich and fully human life, up to the limit permitted by natural possibilities'.²⁰ According to perfectionism, citizens are treated impartially if they are each helped to flourish.

¹⁷ For an earlier account of the argument see Steiner, 'The Concept of Justice', *Ratio*, vol XVI no 2 (1974) 215 & 216-22.

¹⁸ See also 'The Concept of Justice' 215.

¹⁹ R. M. Hare, *Moral Thinking: Its Levels, Method and Point*, especially 154.

²⁰ 'Aristotelian Social Democracy' in R. Bruce Douglass *et al* (eds) *Liberalism and the Good* (New York and London: Routledge, 1990) 216-17. I have omitted a footnote in Nussbaum's text appearing after the word 'imagination'.

(c) Consider what might be called the *liberal democrat* position.²¹ This stipulates that (i) certain core freedoms should be protected (including, for example, freedom of speech, belief and association) and that each person is entitled to a certain level of economic resources. It also states, however, that (ii) people can decide other matters democratically as long as they do not violate the freedoms or economic principles listed in (i). A liberal democrat can argue that the State treats people fairly by protecting their essential rights and allowing them—through democratic decision making—to decide other matters not covered by the liberal rights.²²

In short then, Steiner has given us no reason to endorse his fundamental starting assumption—his conception of impartiality. His defence of the *equal freedom thesis* is therefore incomplete. Furthermore, not only does Steiner provide no argument for his conception of impartiality, we can also see that his account of impartiality is, in some respects, counter-intuitive. Suppose that two people disagree about an issue: Steiner's response is to argue that the impartial solution would be not to affirm either of the side's values. But in some instances (like for instance disagreements concerning the right) this is implausible. If two people disagree about the legitimacy of the death penalty we do not think that the State acts impartially by not affirming either of the sides' moral principles. Surely what we think here is that the State should enforce the correct position even if doing so involves relying on a claim that one of the disputants rejects. But if the impartial solution to controversies concerning justice should be handled in this way, Steiner needs to tell us why the impartial solution to controversies concerning well-being does not also involve the promotion of the more plausible position. Why should the impartial way to deal with disagreements concerning personal ideals be to refrain from taking sides if the impartial way to deal with disagreements concerning the right is to implement the correct policies (even if they are controversial)? Why this asymmetric response to controversies about what makes life meaningful, on the one hand, and controversies about the nature of justice, on the other? Now, of course, neutralist liberals might provide various explanations of this asymmetry, but Steiner does not give *any* and without this his account of impartiality is highly problematic.²³ His conception of impartiality is thus not only undefended: it is also *prima facie* implausible.

It is worth pausing here to observe the implications of this point for the previous two theses that Steiner has sought to establish. As was noted above, both the *rights thesis* and the *priority thesis* rely on the assumption that an impartial solution involves no priority reversals and does not contradict anyone's

²¹ Peter de Marneffe affirms this type of position in his article 'Liberalism, Liberty, and Neutrality', *Philosophy and Public Affairs*, vol 19 no 3 (1990). See also John Rawls who argues in *Political Liberalism* (New York: Columbia University Press, 1993) that whilst 'constitutional essentials and matters of basic justice' (xvi) should be neutral between conceptions of the good, democratic authorities may appeal to conceptions of the good when deciding other political matters. See too Brian Barry's *Justice as Impartiality* (Oxford: Clarendon, 1995).

²² The diversity of conceptions of impartiality also illustrates and supports the point made earlier (15–16) that linguistic analysis in itself is incapable of showing one interpretation of an ideal to be the most accurate account of what that term means in normal usage.

²³ I have addressed and criticised several responses to this argument elsewhere.

conceptions of the good. The *rights thesis*, for example, defends rights on the grounds that they provide the only political solution to conflict that satisfies Steiner's conception of impartiality. Similarly Steiner's defence of the *priority thesis* is also predicated on his ideal of impartiality since it argues that unless rights are prioritised there can be no solution which neither makes any priority reversals nor contradicts people's conceptions of the good. By undermining Steiner's assertion of (P1) we therefore undermine his defence of all three theses.

Let us return to Steiner's argument for equal freedom. A second problem with Steiner's defence of equal freedom is that he has failed to show why his proposed solution is superior to other ways of resolving conflict. Some democrats, for example, maintain that people should decide disputed issues by engaging in political deliberation and voting on the matter. Now Steiner considers this and some other options (217–20). He argues against a majoritarian solution that this is unfair on minorities. This problem, it is suggested, can be overcome only by requiring political decisions to be unanimous. But to say that each has a veto on what is decided relies on the assumption that each person has rights over him or herself. What is presupposed is therefore a system in which each has equal freedom to decide how to lead his or her life. The democratic solution thus collapses into Steiner's position.

This argument, however, moves too swiftly. Steiner assumes that the only way to avoid an unattractive majoritarianism is to adopt his system of liberal rights. This assumption is unfounded. Steiner's account is too Manichean: he assumes that either one adopts an unrestrained majoritarianism or one adopts his principle of rights. One might, however, adopt an intermediary position, like the doctrine I termed the liberal democrat position. This would allow the majority to decide some issues but—given its protection of central freedoms—it is unclear why it is inferior to Steiner's system of equal freedoms. Steiner has failed to demonstrate the superiority of his principle of rights.

A further problem with Steiner's defence of the right to equal freedom is its indifference to citizen's ability to flourish, to their interest in well-being. Many rightly argue that citizens have an interest in pursuing and adhering to valuable conceptions of the good.²⁴ We would like to live valuable lives and wish to avoid boring and worthless conceptions of the good. When two people disagree over the value of a conception of the good they both wish to pursue valuable conceptions of the good. It matters greatly to people that they lead rewarding and fulfilling lives. Given this is it not odd to construct a political theory which takes no account of this interest? Compare two States: whereas under one people flourish and live fulfilling lives, under the other they lead impoverished and meaningless lives. Surely the first is *pro tanto* better than the second. If, however, we accept this it follows that a political theory—such as Steiner's—which is not

²⁴ See Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993) 201–8; Ronald Dworkin, 'Foundations of Liberal Equality', in Grethe Peterson (ed) *The Tanner Lectures on Human Values: Volume XI* (Salt Lake City: University of Utah Press, 1990); Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon, 1989) 10–12; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon, 1990) ch 2, (especially 14–16) and ch 6 (especially 202–3).

designed to protect or promote this interest is for that reason flawed and inadequate.

Now acknowledging citizens' interest in well-being would require a deviation from Steiner's system of rights. It is plausible to suggest, for example, that the State can increase its citizens' ability to flourish by subsidizing fulfilling conceptions of the good. Since, however, subsidies (normally) rely upon taxation which restricts some people's freedom they would not be permitted by Steiner's set of inviolable rights. Steiner's proposed political system is thus insensitive to one of people's most important interests. This perfectionist argument, it should be stressed, does not deny the tremendous importance of liberty. It can recognize the value of freedom: it simply adds that citizens have other interests (including an interest in well-being) which should also be respected.²⁵ Steiner's solution, therefore, unlike the perfectionist position, fails to take seriously an interest that we all value—the interest in well-being.

A final problem with Steiner's proposed solution to moral conflict is that the idea of equal freedom is indeterminate.²⁶ The problem can be seen most clearly by considering an example. Suppose that one person, P1, wants X to occur but another, P2, wants Y to occur and that either X occurs or Y occurs. According to Steiner the fair way to resolve this disagreement is to give each disputant equal freedom. But what does this mean in this context? Who should get their way? Suppose that the State allows X-ing and thus prevents Y-ing. This is compatible with a system of equal freedom. P1 can of course engage in X-ing but so can P2. The important point is that, on Steiner's definition of freedom, whether one is free depends on what one can do unhindered by others and P2 is consequently as free as P1. He may not want to X but it is crucial to observe that—as Steiner himself argues very lucidly—this is beside the point when assessing his freedom (ch 2, especially 8–11). The permission of X-ing is thus compatible with equal freedom. But, by the same reasoning so is the State's permission of Y-ing. P2 is free now to do Y, but so too is P1. The ideal of equal freedom thus cannot help us to choose which course of action to adopt because it is compatible with more than one course of action. Steiner's right to equal freedom is therefore unable to provide a determinate answer as to how disagreements should be resolved. But this is exactly what it is supposed to do.²⁷

²⁵ See Amartya Sen, 'Well-Being, Agency and Freedom: The Dewey Lectures 1984', *Journal of Philosophy*, vol LXXXII, no 4 (1985).

²⁶ On the problems of working out what 'equal freedom' requires see Tim Gray, *Freedom* (London: Macmillan, 1991) especially 167–9; and Tim Gray, 'Spencer, Steiner and Hart on the Equal Liberty Principle', *Journal of Applied Philosophy*, vol 10, no 1 (1993) 91–104. See also John Gray's discussion in 'On Liberty, Liberalism and Essential Contestability', especially 388.

²⁷ There are additional problems with the *equal freedom thesis*. For example, Steiner assumes that only an *equal* distribution of freedom meets the conditions specified by (P1). This assumption is, however, incorrect. One might, for example, prefer to distribute freedoms according to the difference principle. On this conception, freedom would be distributed so as to maximize the amount possessed by those with the least amount of freedom. (This, of course, is not Rawls's position since his first principle of justice requires that citizen's basic freedoms be equally protected, and the difference principle distributes wealth and income not freedom). See, however, Philippe van Parijs, *Real Freedom for All: What (if anything) Can Justify Capitalism?* (Oxford: Clarendon Press, 1995). The important point is that there are distributive principles other than egalitarian ones which do not rest on a certain conception of the good and which therefore meet the conditions of Steiner's account of impartiality.

4.

Steiner's defence of the liberal solution to moral conflict is an ingenious and sophisticated one. It is, nonetheless, I have argued, unsuccessful. His justification of the *rights thesis* fails because:

(1) rights may on occasion fail to meet Steiner's own standards of impartiality, and,

(2) the assumption on which the argument rests (namely, the compossibility of rights) is implausible and should be rejected.

In addition, his defence of the claim that rights are lexically prime (the *priority thesis*) is unsuccessful because it is

(3) open to the Intolerable Outcomes Objection and none of the three counter-arguments canvassed are successful.

Finally, his defence of the claim that rights should distribute equal amounts of freedom (the *equal freedom thesis*) is unconvincing because:

(4) its objection to alternative accounts of rights, like the democratic view that we have a right to settle disputed matters politically, relies upon a misconception,

(5) his proposal is insensitive to one of citizens' most important interests, and

(6) his proposal is incapable of providing a determinate answer as to what should be done.

Furthermore, his arguments for all three *theses* are flawed because they are each dependent on an undefended and *prima facie* implausible conception of impartiality.²⁸

²⁸ Earlier versions of this paper were presented at the Department of Government at Essex and the Political Studies Association Conference in York. I am grateful to audiences at both for their comments and would particularly like to thank Derek Bell, Michael Freeman, Noel O'Sullivan, Bhikhu Parekh and Albert Weale. I am also indebted to Peter Jones for conversations about Steiner's work. Finally, I am especially grateful to Hillel Steiner for his written comments and suggestions and for conversations about the issues discussed in this paper. Responsibility for the interpretation of *An Essay on Rights* rests, however, with me.