

Rights-Defeasibility and Social Justice

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August 31st, 2013

Word count: 2,000

Negative rights considered in the abstract aren't very controversial. It seems prima facie plausible that we have rights. I'm not going to defend a sophisticated account of the ontological basis for these rights. Like Nozick in his seminal work *Anarchy, State, and Utopia*, I'm just going to assume—for this purposes of this paper—that individuals do have certain rights. What I'm going to argue, then, is that it's in principle possible for certain positive rights associated with 'social justice' to be morally permissible—on a deontological, rather than utilitarian basis. I develop an account of rights-abrogation based on defeasibility conditions, while simultaneously avoiding traditional criticisms of forced labor and slavery. Since this is an original work of pure theory, citations are kept to a bare minimum. For the purposes of this paper, I take social justice to mean a particular subset of positive rights geared towards liberalism (welfare rights, discrimination, equality, healthcare, labor laws, etc.)

Suppose X walks into Y's store and—without consent—knowingly takes some of X's goods and attempts to leave without paying. X chases after Y, pins him down, and returns the goods to his store. The operating principle is similar to the dictum: 'my right to move my fist ends where your nose begins'. Y's negative right not to be interfered with isn't at all absolute, despite commonplace language to the contrary. By absolute, I mean inviolable. That is, there exists no such thing as giving up the rights to one's own property by engaging in aggression against others. But this point about defeasibility is important, in order to avoid conflicts between negative rights. Y's negative right to not be interfered with is defeasible if he engages in an act Z (say, engaging in a violent and unprovoked attack against X). This defeasibility can be quite significant. Y loses his rights of non-interference to a proportional extent based on how vicious and dangerous the assault on X is. It might warrant X simply shoving Y back, a shove which had Y not abrogated his own rights to non-interference, could be counted as assault. Rights are defeasible, and not absolute. Conditions of defeasibility/abrogation are established through a variety of tools—proportionality, to give one example. Rothbard agrees: the familiar rhetoric of absolute rights isn't very sophisticated, but that isn't cause for panic.

Take Rothbard's infamous rebuttal to the pacifist conception of rights. As Rothbard puts it, how is it that we can call it 'rights/property rights' if we don't even have the right to defend our own property? The ability to defend one's property, Rothbard maintains, is an essential feature of the notion of property rights, such that in its absence, property rights are no longer said

to exist.¹ But both Rothbard and the pacifists are wrong. There is no essential, non-neutral definition of property rights that's devoid of normativity. What the term 'property rights' means is entirely contingent on one's background ethical framework. Rothbard here is simply begging the question against pacifists by assuming a definition of property rights that sneakily assumes a looser deontological ethics than would be accepted by hard-line pacifists. His more implicitly sophisticated understanding of deontological ethics incorporates the concept of defeasibility.

Naïve deontology is what I call the refusal to incorporate defeasibility into reasoning about rights. Sophisticated deontology, the sort Rothbard employs, is when defeasibility is used to illustrate Y's loss of rights, such that X similarly loses negative duties that he previously had to Y. Without these negative duties, he can morally act in certain ways that would have before been categorically forbidden. Pacifists, on the other hand, take the rhetoric of absolute rights seriously. That is, they deny defeasibility, and so they deny X's ability to use violence or coercion against Y, despite the fact that Y wrongfully violated X's rights. Even so, they maintain, Y still maintains his absolute rights, and so X cannot morally retaliate in defense. But with defeasibility, X's retaliation against Y is not actually assault. The reason why it isn't assault is, again, because Y lost rights to non-interference when he assaulted X. Had Y not assaulted X, X's attack on Y would have been counted as assault. Defeasibility, as I mentioned previously, is established through particular conditions. Let's take the analysis a step further by looking at lying, instead of assault:

1: X is lying, and hence never justifiable (naïve deontology)

2: X is lying, but lying is justified in this case because of factors X1, X2, X3, etc.

(where X1 is utility-naïve utilitarianism)

3: X is not lying (sophisticated deontology)

For a defense of (3), a definition of lying would have to be stipulated, such that X in circumstances Y does not fit neatly in the semantic box of what it is to lie. Let's stipulate that lie =df purposefully withholding the truth from an agent that has a right to the truth. With that in mind, a nauseatingly common thought experiment comes to the forefront, namely the case of the Nazi at your door asking whether or not you're hiding any Jews. Strategy (1) seems to me to be why deontology has a noxious reputation when hit with thought experiments such as these. Strategy (3) works based on my stipulated definition of what it means to lie. Assuming that

¹ Murray Rothbard, *The Ethics of Liberty* (New York and London: New York University Press, 1998), 77.

rights are correlative with duties, does A, the owner of the house, *owe* the Nazi the truth? Does the Nazi, intending death to innocent human beings, have a *right* to the truth? On an intuitive level, the Nazi has no such right, and the owner has no such duty. Therefore, A can fully mislead the Nazi, without being accused of lying. It's analogous, again, to the distinction between self-defence and assault.

Rights-language isn't conducive to utilitarianism, particularly when referencing the inviolability of rights. But I've already been chipping away at inviolability, and so the goal of the approach of sophisticated deontology is to get some of the consequentialist benefits of utilitarianism without the consequences. In this case, then, probably strategy (3) is best adopted, since it may be difficult to claim that lying is reserved for anything other than an action that's intrinsically immoral. It's better to argue that it's not lying, rather than muddling up the term and saying that *sometimes* theft is justified (just like we wouldn't say assault is sometimes justified; we'd just say that—because of defeasibility—it wasn't assault, it was self-defence). Besides, saying that theft is sometimes justified is entirely utilitarian. The same analysis goes for murder: Pacifists, citing inescapable logic, don't seem to comprehend that self-defence can be defined in such a way as to render even the purposeful 'ending' of another human as morally innocuous. And fighting over the definition of murder is where the real argument is.

The more important question is: are there further conditions of defeasibility, such that when invoked, achieve the function of positive rights, but that can be comfortably integrated into a deontologically based account of negative rights, instead of opting for utilitarianism? Defeasibility is just a way of considering special circumstances in which property rights—formerly thought to be absolute—can be limited/abrogated. Rights/property rights are sacrosanct insofar as they fulfill their intended function. From the normative side, private property (1) fosters a just social order, (2) is necessary for social peace, (3) is appropriate in conditions of scarcity, (4) provides incentives for a better administration of material goods, (5) facilitates trade and social cooperation, and (6) fulfills the common good.

However, there are certain (hypothetical and non-hypothetical) circumstances where property rights fail to fulfill their function. At that time, they dissolve either completely or to a limited extent. Those are further conditions of defeasibility that move beyond aggression. Aggression, like the other conditions of defeasibility, is a sub-category, a deduction from the understanding of the purpose of property rights. And while it may seem utilitarian, it is entirely

deontological. Deontologists don't reject consequences altogether in the formulation of moral positions. Consequences are important. Rather, they just reject consequences as the sole foundation. Could it be that the slightest amount of taxation, in order to support a very narrow social safety net is not intrinsically immoral? What about *any* taking from another person?

Suppose we take strategy (3) (action X isn't theft) in response to the traditional taxation-as-theft/slavery objection. There don't seem to be any good reasons to populate the set of defeasibility conditions solely with 'aggression'. To argue that taxation isn't theft is to talk about property rights. Take the example where X seizes thing Z from Y. It's impossible to say whether that 'taking' is theft or justified seizure without talking about the underlying property rights at play. Libertarians are perfectly fine with opting for 'justified seizure,' and not theft, in the case that Z really does rightfully belong to X because of the defeasibility condition of *aggression*.

Here's a thought experiment based on a potential positive 'right to life' claim: suppose an isolated community that subsists based on agriculture has a famine for multiple years. Aid is on the way but will not reach the community for another month. The only grain stores left belong to a single property owner, and are enough to sustain the community until aid arrives. The property owner refuses to voluntarily relinquish the grain; the community uses force in turn, and hence survives. This second thought experiment is linked more closely to social justice: suppose a government is attempting to build a highway through a mountain pass to connect two cities. The resulting highway would connect a town full of wealthy doctors to a town full of deathly-ill folk with the necessary medication that they could not otherwise obtain. A single property owner owns some property on the mountain. It is impossible to build the highway around it and impossible for the residents to use any other method of transportation. Maximization of human flourishing ought to prevail by an exercise in eminent domain through overriding the individual owner's property rights. Note that the alternative is not between deontology and utilitarianism. The alternative is between naïve deontology and sophisticated deontology.

To say that X has a right to life is just to say that Y's property is defeasible using the 'survivability of the community' (or some other similar) condition, such that a tax on Y or a seizure of Y's property (e.g., grain/highway examples) isn't at all theft or slavery, but just a transfer of resources. Whether action X procures forced labor or 'is theft' is contingent on one's conception of property rights. I've so far dispelled the notion that rights—to property or otherwise—are absolute. If rights are defeasible, then it seems arbitrary to limit the conditions of

defeasibility to the initiation of aggression. As my thought experiments show, there are sometimes very good reasons to consider conditions of defeasibility other than aggression: the good and preservation of a well-functioning community, for example. Maintaining a well-functioning community may—in some cases—require extremely minimal welfare/seizure rights, i.e. ‘social justice’. This is, of course, assuming a state in the first place, for otherwise social justice questions (as I’ve defined them) would be moot.

In summary, my account of negative rights as supported by sophisticated deontology and a fleshed out theory of the function of property rights allows for *some semblance* of positive rights being integrated into a more robust account of negative rights. This doesn’t mean the flood gates are opened for any positive right to be reduced down to a legitimate negative right. Just because the town’s people can seize grain to prevent the destruction of the town doesn’t mean that the welfare state in its current form is legitimate. Clearly, each case has to be carefully and soberly assessed. It doesn’t entail socialism, but it could function as an entirely satisfactory defense of minimal welfare rights, without reference to utilitarianism and the noxious thought experiments attached to it.

Bibliography

Rothbard, Murray. *The Ethics of Liberty*. New York and London: New York University Press, 1998.