

*Hillel Steiner*

## **Rational Rights**

*Abstract:* A rational moral code must satisfy the condition of completeness. This same condition applies to a set of moral rights, where it takes the form of requiring that all the rights in that set be compossible: that their respective correlatively entailed duties be jointly fulfillable. Such joint fulfillability is guaranteed only by a set of fully differentiated individual domains. And if moral rights are to play any independent role in moral reasoning – any role logically independent of the values that bring persons into conflict – those domains must be determined by rules which are not derived from those values.

### **1. Introduction**

One thing (at least) seems certain. However much we may disagree about the desirable characteristics of a set of legal or moral norms – henceforth called a *code* – what we do all agree on is that we don't want such a code to demand the impossible.<sup>1</sup> Ought implies can. The duties implied by a valid code cannot be such that it is literally impossible to comply with them. Fulfilling duties can, of course, be costly in innumerable ways. But the costliness of its fulfillment is neither a necessary nor a sufficient reason for regarding a duty as invalid.<sup>2</sup> Its impossibility, however, is.

Such impossibilities come in many shapes and sizes. It's impossible for me to eat the whole of Mount Everest for breakfast. I'm also incapable of drawing a square circle. And there is no way I can arrange to be in both Frankfurt and Manchester at exactly the same moment. Any code implying that I have duties to do these things is an impossible code. That is, its implying impossible duties is a sufficient reason for regarding a code as impossible.<sup>3</sup> Of course, we can always reinterpret or modify the provisions of such a code so as to make it a possible one. Perhaps I needn't eat the *whole* of Mount Everest for breakfast; maybe it's okay if I

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<sup>1</sup> Thus I take it that the once familiar slogan, 'Demand the impossible!', is to be understood as a tactical injunction: a prescription motivated by the sometimes plausible view that demands for what cannot be achieved are instrumentally efficacious in inducing their recipients to do *more* of what can be achieved than they would otherwise be inclined to do.

<sup>2</sup> Unless, of course, that cost amounts to the breach of a more important duty; see part 2, below.

<sup>3</sup> More formally, we might say that a code is a possible code if there is at least one set of possible actions that satisfies all its requirements.

draw a square and *then* draw a circle; etc. But these reinterpretations or modifications make that a different code. Its set of provisions is non-identical with that of its impossible predecessor.

## 2. Conflicts of Rules

Another way in which a code can be impossible is by prescribing mutually inconsistent actions. One of its provisions may require that I do action A in circumstance C, while another may impose a duty that I do not-A in C. The doing of A and of not-A in C may each be eminently possible actions: that is, neither of them may amount to eating Mount Everest. But, obviously, they are not actions which are jointly performable. And they are thus what Leibniz termed *impossible*.<sup>4</sup> A code containing such provisions implies that my doing A in C is both permissible and impermissible.<sup>5</sup> Since this is a contradiction, I shall call such a code 'irrational'. It is an impossible code and its impossibility is due to its irrationality.

Perhaps the classic case in modern moral philosophy, of an irrational code, is that reported by Sartre (1948, 35f.). In this instance, Sartre's student is confronted with a moral dilemma: he must choose between (i) going to England to join the Free French Forces in their efforts to liberate France from Nazi rule, and (ii) remaining at home in France to care for his severely ill mother. Evidently his moral code supplies him with weighty reasons for each of these actions. And since this is a moral dilemma – and not merely a conflict between personal preferences – these reasons must be construed as moral rules or values, i.e. as universalised prescriptions. We can usefully label them, respectively, as (i) the Patriotism Rule and (ii) the Family Care Rule

The student's code is irrational because, as it stands, it implies that his remaining in France is both impermissible and permissible. (The same is true of his going to England.) It is a code which contains a plurality of what we may call 'primary' rules or values.<sup>6</sup> What it lacks, however, are any rules for weighting or ranking those primary rules – rules which we might therefore label as 'secondary' ones. Since it is always possible for any two primary rules to conflict in this way – to generate impossible duties – any code which contains more than one

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<sup>4</sup> For Leibniz, some things (objects, events, concepts) which are each independently possible may not be jointly possible, that is, elements of one and the same possible world. Mates 1986, 43f., explains: "Now some things that in themselves are possible are not compossible. There could be a world in which there was no sin, and there can be (indeed, is) a world in which there is forgiveness of sin, but there cannot be a world with both of these features; likewise, there could be a world in which there was no poverty, but such a world would exclude the exercise of charity, which in itself is possible (and also desirable)."

<sup>5</sup> In deontic logic, obligatory acts are a subset of permissible acts.

<sup>6</sup> A primary rule or value is one which is not logically derived from any other rule or value.

primary rule, and which lacks any secondary rules, is an impossible code.<sup>7</sup> Such codes can be described as failing to satisfy the rational choice condition of *completeness*. In the history of moral philosophy, incomplete codes have often been called 'intuitionist' ones.<sup>8</sup>

To make the student's code a rational and, hence, a possible one, it needs to be modified through the addition of a secondary rule. Such a rule can take either of two broad forms. It can be one which simply ranks the Patriotism Rule relative to the Family Care rule. Alternatively, it can be one which assigns numerical value-weightings to each of these rules and, through them, to the particular acts they prescribe.<sup>9</sup> A radically different approach to code-completeness is the non-pluralistic one typified by utilitarianism, which simply denies the primary status of the Patriotism and Family Care Rules and reduces them to (at most) purely instrumental guidelines, 'rules of thumb', for compliance with an underlying *single* primary rule prescribing the maximisation of happiness or preference-satisfaction or some other, less empirical variable.

### 3. Conflicts of Codes

Suppose that I am Sartre's student and you are Charles de Gaulle. Having reflected on the argument of the preceding passages, I realise that my code is irrational and consequently amend it to include a secondary rule which prioritises the Family Care Rule over the Patriotism Rule.<sup>10</sup> You, however, are justifiably convinced that my skills as a radio electronics expert are vital to the success of the Free French effort. (I don't disagree with this.) And you consequently despatch agents to bring me to England. It's not, we should note, that you are indifferent to family care nor, therefore, that you find no moral value in my staying with my mother. For you also subscribe to the Family Care Rule. It's rather that your priorities are different from mine and you assign greater importance to the Patriot-

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<sup>7</sup> Does this mean that moral dilemmas are themselves impossible, in the sense of 'cannot occur'? No. All that this argument suggests is that the reality of occurrent moral dilemmas is to be explained as the product of incomplete codes. See Steiner 1994, ch. 4, for an account of the nature of moral dilemmas and the variety of code-structuring rules capable of resolving or precluding them.

<sup>8</sup> Cf. Rawls 1972, 34, and Urmson 1975, for mutually opposing views on intuitionist moral theories. 'Intuitionism' also covers the view, not disputed here, that the epistemic source of our primary moral rules (and at least some of our secondary ones) is neither empirical nor metaphysical data.

<sup>9</sup> The latter presupposes that we can identify variations in the magnitudes of different acts compliant with one and the same primary rule. Thus, for example, rescuing two of one's sisters would *ceteris paribus* be a greater act of family care than would rescuing only one of them.

<sup>10</sup> Or this prioritising rule can be introduced into my code indirectly, by my decision that what I (morally) ought to do is stay with my mother. For this is a decision which, following the formal universalizability requirement of, for example, Kant's first formulation of the Categorical Imperative – "Act only according to that maxim which you can at the same time will that it should become a universal law" – entails that rule.

ism Rule. Faced with a choice exactly similar to mine, you would judge going to England to be the morally right thing to do. In short, our codes are in mutual conflict. What can we do?

One thing that's not going to help is any further reconsideration of the pertinent *facts*. We can suppose that we've already explored all the possibilities of, say, finding a substitute for me in England or at my mother's bedside. And we've both come, perhaps even reluctantly, to the conclusions both that *my* potential patriotic contribution is indispensable and that it's *my* care that my mother needs. Our disagreement is, then, entirely about moral priorities, not facts. How can it be resolved?

One way, I suppose, is the Hobbesian state of nature method. Here are your agents on my mother's doorstep, preparing to take me away. I, perhaps with the aid of some like-minded friends, might see myself as having no option but to resist them, by force if necessary. Indeed, as described thus far, our respective moral codes would commit each of us to doing our utmost to ensure that our own priorities prevail. And one possible outcome of this is, as in the lethal Hobbesian state of nature, that neither set of priorities prevails: that neither of us gets to do the right thing.

The only other path of resolution lies in an appeal to a reason for one of us to back down and comply with the other's demand. But there is a quite stringent restriction on the possible content of any such reason. For *ex hypothesi*, it cannot be one which implies one's endorsement of the other's code. That is, this resolution consists neither in my embracing your stated priorities nor in your embracing mine. It has to involve a reason which is neutral with regard to – which does not address – the relative merits of the Patriotism Rule and the Family Care Rule, since those merits are precisely the issue on which we fundamentally disagree.

Such circumstances are the natural homeland of rights discourse. Rights provide persons in such adversarial positions with reasons to back down, in situations where they lack any other reasons to do so. Adversarial positions of this kind have two principal features: (i) there is fundamental disagreement among the parties occupying them as to whose proposed action is the more desirable, and (ii) their respective proposed actions are not compossible, that is, they are not jointly performable. The function of a set of rights is *not* to resolve (i). For that is, indeed, impossible. It is, rather, to determine which one of the adversarial parties is authorised – has the Hohfeldian 'power' (cf. Hohfeld 1919) – to decide which one of the impossible actions shall occur.

Thus *if* a set of rights gives me the power to decide whether to remain in France or go to England, it imposes a correlative liability on you to be subjected to a duty not to force me to go to England.<sup>11</sup> Suppose I exercise that power and create that duty. The critical question here is whether your code's posited priorities can allow you, *consistently*, to accept that set of rights and, with it, this duty.

And the short answer is 'yes'. For your acceptance of that set of rights does not logically commit you (i.e. *via* universalizability) to endorsing my remaining in

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<sup>11</sup> As far as these rights are concerned, it is still permissible for me to go to England.

France as the better of the two actions. That is, it does not entail any reversal of your priorities. You can still consistently affirm that (i) 'my going to England' is morally superior to (ii) 'my remaining in France'. What your acceptance of that set of rights *does* entail is that your moral ordering of the three actions – (i) 'my going to England', (ii) 'my remaining in France', and (iii) 'your forcing me to go to England' – places the last of these in the lowest rank.<sup>12</sup> It is precisely this construction of rights and their relation to other aspects of morality that lies behind, and makes intelligible, the common notion of 'having a right to do wrong' (cf. Dworkin 1977, 188f.; Raz 1979, 266 ff.; Waldron 1981). In these circumstances, you might well describe my remaining in France as exercising a right to do wrong.

#### 4. Conflicts of Rights

What if a set of rights is such as to imply that powers to decide this matter are vested in *both* of us, that we are each liable to the duties we each create for one another? It's not hard to see that this is an impossible set of rights. For suppose that, in addition to my creating the duty that you not force me to go to England, you exercise your power to create a duty that I go to England. Now consider the normative status of your action of forcing me to go. On the one hand, that action is *impermissible* as a violation of the duty you owe me. On the other hand, it's *permissible* as an exercise of your power to enforce the duty I owe you.<sup>13</sup>

This kind of impossibility in a set of rights is not entirely unfamiliar. We encounter it most notably, and pervasively, in the rights which Hobbes ascribes to all persons in the state of nature. There, he famously says, every man has a right to every thing; even to one another's body (Hobbes 1946, 85).

Most commentators have not failed to remark that, far from vesting persons with extensive rights, this passage vests them with no rights at all. For there is no conceivable action that anyone can perform in this situation that would not count as both an exercise of one right and a violation of others. Hobbes is here guilty of the same sort of imprecise use of terms that he was so fond of ascribing to scholastic philosophers: in this case, a failure to distinguish between rights, which entail correlative duties, and mere liberties which do not.

The Hobbesian state of nature is entirely devoid of rights precisely because it reflects, comprehensively, what our aforementioned set of rights reflects at least partially: namely, the failure to differentiate the domains of respective persons' rights. For Hobbes, everyone's domain is entirely *identical* to that of everyone else. For you and me, our respective domains at least *intersect*: that is, at least some elements of your domain are identical with at least some elements of mine. For

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<sup>12</sup> These features, of accepting a set of rights, are analysed in considerable detail in Steiner 1994, chs. 6 and 7.

<sup>13</sup> The view that rights include powers to enforce (or, alternatively, waive) the duties correlative to them is the central thesis of the Will or Choice Theory of rights; cf. Hart 1955 and 1982, ch. VII. For an extended defence of this theory, see Steiner 1994, ch. 3.

contradictions to be absent from our set of rights, for it to be a possible set, it must be such that all the domains it implies are entirely mutually differentiated and, hence, mutually compatible. How can this be done?

### 5. Differentiated Domains

There are a number of ostensible solutions to this problem, few of which are successful. But since the reasons why they are unsuccessful are illuminating, it seems worthwhile to conclude by reviewing them here.

The first of these is that proposed by utilitarianism and other non-pluralistic moral codes. Any such code correctly suggests that the intersection between my domain and yours is eliminable by sustaining one, and denying the other, of the two powers in question. But it determines which one of these two powers is valid by reference to a comparison of the respective amounts of moral value that are likely to be produced by the exercise of each of them. If my going to England promises greater moral value than my remaining in France, then my rights cannot – and your rights do – include the power to decide whether I have a duty to go to England. In effect, it denies that I have a right against your forcing me to go to England.

Perhaps it hardly needs saying that this cannot be a solution to the problem, at least in the terms in which it's posed. For if, as Bentham believed, all moral conflicts are rationally resolvable only by adopting that course of action which maximises the realised magnitude of a single valued variable – be it happiness or whatever – then, as Bentham himself insisted, rights are entirely otiose and can play no independent role in moral reasoning. Rights are simply reflexes of duties and nothing that is stated in the language of rights cannot be reduced to the more comprehensive language of duties. However, Bentham's argument can evidently have no purchase on conflicts (such as the present one) between persons whose moral codes contain a genuine plurality of primary rules or values and, moreover, ones which they prioritise or weight differently. *Ex hypothesi* you and I have already sought, to no avail, a reconciliation of our conflicting commitments along the commensurating lines proposed by Bentham and others.

Nor does recourse to the *Interest Theory* of rights offer an alternative means of escape. This theory, it's true, does not regard rights as necessarily including powers to enforce or waive the duties correlatively entailed by them.<sup>14</sup> Instead, it offers the view that an individual, X, has a right

"if and only if X can have rights, and other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty". (Raz, 1986, 166)

So on the face of it, an Interest Theory understanding of rights might seem capable of eluding the difficulty posed above, which was diagnosed as being due to our having opposed powers.

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<sup>14</sup> Jones 1994, 26-32, provides a helpful summary of the Interest Theory of rights.

Unfortunately, it's not. For, as some of its proponents themselves concede, "if rights are understood along the lines of the Interest Theory ... then conflicts of rights must be regarded as more or less inevitable." (Waldron 1989, 503)

Plainly, and however carefully we might wish to contour the concept of "interest", the conflict between you and me is a conflict of interests. And there is obviously no aspect of our well-being the servicing of which by others cannot require actions which are jointly unperformable. The important interests persons have both in privacy and in free expression are, as we know, ones which cannot invariably be jointly serviced. Nor, tragically, can the vital interests several persons may each have in gaining access to some scarce medical resource.

So although the Interest Theory of rights can eliminate the problem of opposed powers, it cannot avoid – indeed, it must proliferate – the conflicts of duty underlying them. Neither *inter-right* nor *intra-right* impossibilities – conflicts between correlative duties of different or the same types of action – can be resolved under this rubric. That is, they cannot be resolved without trading-off persons' similar or different conflicting interests against one another, and thereby invoking the sort of comprehensive commensurability sponsored by Bentham.

A third approach to domain differentiation is what we might call the 'institutional' one. This is best represented in the idea and practices of legal systems though, as I'll suggest, it may be seen to have some moral counterparts as well. Suppose our conflict is referred to a third party, *Richter*, for adjudication. And suppose Richter decides in your favour, determining that I have an enforceable duty to go to England. Our domains are thereby differentiated, inasmuch as the implications of this decision are (i) a denial of my right to determine whether I remain in France, and (ii) an affirmation of your right to determine this. How could Richter arrive at this decision?

H.L.A. Hart's remarks about 'the Nightmare' are apposite here:

"The Nightmare is this. Litigants in law cases consider themselves entitled to have from judges an application of the existing law to their disputes, not to have the law made for them ... The Nightmare is that this image of the judge, distinguishing him from the legislator, is an illusion ... that judges make the law which they apply to litigants and are not impartial, objective declarers of existing law ... [but rather exercise] what Holmes called the 'sovereign prerogative of choice'." (Hart 1985, 126f., 134)<sup>15</sup>

The role played by Richter in relation to *legal* codes is familiar enough. What we want to know is whether there can be a Richter-analogue in a *moral* code. Perhaps there can. Perhaps certain moral codes, such as ones associated with institutionally organised religions, come equipped with Richters. Do they derive their judgements from the rules of the codes they serve or do they exercise a 'sovereign prerogative of choice'?

Consider your code first. Evidently Richter's decision *could* be derived from your code, since it prioritises patriotic duties over family care ones. But mine

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<sup>15</sup> Hart associates the nightmare with some of the doctrines of Legal Realism.

doesn't. So we need to know the basis on which that decision could carry any more general moral authority and not simply confront me with an exercise of prerogative choice. One answer that fails to supply that basis is that Richter is charged with upholding the priorities of a moral code associated with an organised religion to which I adhere. For, obviously, if that were true and I were an adherent of that religion, I could not consistently affirm the moral priorities which I do affirm and which have brought me into conflict with you. We would not *be* in conflict and further reflection on my basic religious beliefs would have sufficed to reveal that I was in error. In other words, the fact that some moral codes come equipped with Richters offers no help in finding a solution to our problem. For Richter's decision to be authoritative in this context, it must derive from rules which (as noted previously) are not addressed to the relative merits of our respective priorities.

More generally, the institutional approach to the differentiation of moral domains presupposes the existence of such rules. That being so, however, those rules must themselves be (at least implicitly) sufficient to determine a complete set of domain differentiations.<sup>16</sup> To the extent that they're not, Richter's domain-differentiating judgements are unavoidably prerogative choices and not merely declarations of the demands of those rules. In such circumstances, we are driven to embrace the unwelcome paradox that the rights ostensibly prescribed by at least some of those rules fail to entitle and their duties fail to obligate. The set of rights in question is an impossible set.

In short, the institutional approach to differentiating *moral* domains offers no substitute for a complete set of substantive differentiating rules. And insofar as we think it desirable that *legal* systems protect such moral domains and minimise occasions for the exercise of sovereign prerogative choice, the presence of such rules in their constitutional frameworks seems equally indispensable.<sup>17</sup>

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<sup>16</sup> Steiner 1994, chs. 3 and 6, develops an account of the conditions under which domains can be fully differentiated.

<sup>17</sup> Steiner 1994, chs. 6-8, advances an argument as to what the content of those rules must be. The following paper, "Liberalism and Nationalism", explores the global implications of those rules.



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