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Steiner's Justice

Abstract: Hillel Steiner is a libertarian who takes the equal right to natural resources seriously. Though there are objections to some of the conclusions he draws from this right, his approach might avoid the vices of liberalism and socialism and combine their virtues.

1. An Egalitarian Libertarian

Hillel Steiner is a political philosopher too little known in Germany. He defends the principles of libertarianism no less vehemently than Robert Nozick did, but the society he constructs from these principles looks socialist rather than capitalist and has even been called by himself "a form of socialism" (Steiner 1981, 569). Libertarians want to minimise uncontracted enforceable restrictions upon conduct. This is an end most people will consent to. But according to libertarianism, it is obstructed by all those philosophers who, like Rawls and Dworkin, allow the state to be, for the sake of equality, more than a minimal state. Steiner's state is to be minimal, too. Its only end is the protection of people's rights, and these rights can all be derived from original or natural rights that are the basis and criterion of legitimacy of all positive rights. Excluded from the competence of the state are ends like people's welfare, equality of opportunity, equality of resources, satisfaction of needs, the maximisation of happiness or utility or any other positive furthering of whatever good. Moreover, for Steiner as for Locke and the contemporary libertarians, the great and chief and only end "of Mens uniting into Commonwealths, and putting themselves under Governments, *is the Preservation of their Property*" (Locke 1960, §124). For basic or natural rights are property rights. But these rights are of two kinds: the rights to one's own person or self-ownership and the rights to an equal share in the natural resources and, more generally, in unowned goods. It is the recognition of the second kind of rights which puts libertarianism on its legs. In fact, Locke (1960, §§ 25f.) and Nozick (1974, 178-82) affirm the second kind of rights, too. But it's only Steiner who has taken pains in spelling out the consequences.

In Germany, libertarianism has often been identified with an apology or even apotheosis of Manchester capitalism. I think Steiner is completely right in maintaining that there is incompatibility between libertarianism and the kind of inequality prevailing everywhere. But I am afraid that his *Essay on Rights* (1994) is less effective in showing the power of his ideas than it might have been. A reader who does not know some of his many papers whose publication accompa-

nied the writing of his book will sometimes not understand the point of the many dialogues, examples and parables that make the book a welcome change in a philosopher's reading but produce their own interpretation problems. Moreover, Steiner gives his essay a frame taken from an orthodox analytical philosophy which is too narrow for his ambitions. Let me start my discussion of some of Steiner's theses by commenting on this point.

2. Too Ascetic a Frame

"Two questions" is the very first sentence of Steiner's *Essay on Rights*. "What is justice? And what is it for? A principal theme of this book is that, insofar as the first question has an answer, the second does not." (1) In how far does Steiner answer the first question? He is definite on what justice is about:

"We unavoidably restrict one another's freedom. And justice is about how those restrictions ought to be arranged. What it's *not* about are the ends which might be achieved by that arrangement. Questions of justice arise precisely where the moral permissibility of one person's restricting another's freedom is not determined by the comparative merits of the ends to which they are respectively committed." (1f.)

These statements state what might be called Steiner's message. And they give a key to an understanding of what he says about those two questions. At first sight we might hold him to commit a blunt contradiction. Isn't he just saying not only what justice is *about* but also what it is *for*? Namely, for the maximising or at least securing of everyone's freedom?

Well, yes and no. Yes, because Steiner does want to secure freedom for everyone. No, because he rejects the idea that we say what justice is for, when we say that justice secures freedom for everyone. That idea has been upheld by the British and French enlightenment since Locke, by Kant and the German idealists, by John Stuart Mill and many other theorists and politicians. To all of them freedom has a positive moral value obligating everyone to secure it for everyone and worth the trouble it entails by being inseparable from the freedom of doing evil. To them, stating freedom as the end of justice appeared to be giving the reason and motive for a specific conception of justice, that of a free and liberal society, whereas Steiner thinks we better refrain from judging about freedom's value. It's no use doing so since it's no use looking for reasons to be just and to secure freedom for everyone. It's enough to analyse the concept of justice and to show the reasons why we can be called just only if we do not violate a certain set of rights. Therefore, Steiner ends his book in the very same spirit in which he opens it:

"What I've tried to do in this book is to give reasons why that set of rights is just. I've offered no reasons as to why we should be just. Nor do I think that any can be found." (282)

Steiner's theoretical asceticism presupposes that by conceptual analysis, by "exploring the meanings of words" (3), alone can we show what justice is. No doubt he succeeds in assembling important necessary conditions of justice. But if

he is right, no one can, without conceptual or semantical contradiction, defend a theory of justice different from Steiner's, and that, as Steiner's "own chastening experience suggests", captures at best "a fair proportion of your intuitions" of what justice is (5). Now, even if we were forced, by the strength of Steiner's arguments, to admit that today Rawls and Nozick and Raz, and in the past Locke and Kant and Hegel, did commit semantical contradictions in holding their different conceptions of justice, what should we have won? Whoever differs from Steiner might well concede to him that only Steiner succeeds in explicating the conception of justice contained in the ordinary language concept of justice. But he may add that that conception is not worth following or that he does not see any reasons to follow it. Would Steiner then still repeat the sentence he concludes his book with: "Nor do I think that any can be found"? Anyway, it is not enough to defend a conception of justice by showing it is implied by the given use of the concept of justice. We are free to change it, so it is a deficiency in a theory if it gives us no reason why we shouldn't change it.

But I think we should not take too seriously what Steiner says at the beginning and the end of his book. It is an ascetic frame that might be substituted by a Lockean, Kantian or an overtly metaphysical frame which commits him to a teleological reason for being just: we should be just because we should prefer freedom for ourselves and everyone else to coercion, manipulation or paternalistic regulation. I see no reason why Steiner might object to saying what he denies, namely, that justice is for freedom. On the contrary, he has good reasons for asserting this. When he defines how the unavoidable restrictions we unavoidably set for one another ought to be arranged, his measure and rule is the same idea that guides Kant's definition of justice: that all and only those actions are just that are compatible with everyone's freedom under a universal law (cf. Kant 1954, §C). For, as he summarises "the upshot of (his) argument", "justice is a ... rule which distributes freedom equally through a set of ... rights" (5).

Of course, there are differences from Kant's conception of justice, though they are, I think, reformulations and modifications rather than contradictions. Anyway, his conception is close enough to Kant's to stand a review from a more or less Kantian perspective. I shall concentrate on four points, unduly neglecting many others worth mentioning and commenting on: on what may be called Steiner's reformulation of the Kantian and liberal idea that actions are just if and only if they are compatible with everyone's freedom (a), on his 'pure' concept of negative liberty (b), on his attributing everyone an equal share in the goods of nature and, more generally, unowned things (c), and on his argument of how self-ownership is non-paradoxically possible (d).

3. Freedom as Possessions of Things

(a) The model for Kant's idea of justice is a society where (1) everyone may do all and only those actions which everyone else may do as well, and (2) no action is forbidden unless it impedes someone in using his own body and its capacities. The first condition is the condition of the universality of the laws and of the equality of

their application, the second condition is the condition of liberty, self-determination or autonomy. I suppose it is the same model that Locke, Mill and most other liberal theorists followed. It is inspiring enough but not without problems in its application to the limited world we live in. It is not always easy to decide whether some action of mine hinders someone else in employing his own body and capacities. There are no problems when the action in question is open force or obvious fraud. Then we know that the sphere of a person's autonomy or of his rights is violated.

But it is not always clear where the boundaries between these spheres lie. When one of two neighbours (to give a well-known example) enjoys playing the trumpet and the other wants silence for thinking about justice, does the musician impede the philosopher in using his capacities? Does the philosopher invade the musician's sphere of autonomy when he hides the trumpet? Such cases indicate that the liberal conception of justice cannot be explicated without spelling out when actions are compatible or, as Steiner prefers to say, compossible. That's what Steiner does, with the result that to see whether actions are compossible we must know not their intensional descriptions (which are given by describing their intentions or their maxims) but their extensional descriptions (which can only be given by their spatio-temporal descriptions) (cf. 37).

Kant, like many other philosophers of law before and after him, referred to the same condition when he defined the object of law as 'external' ('äußere') actions in contrast to 'internal' ('innere') actions as the object of morality (Kant 1954, 15-23). Therefore, Steiner does not say something new when he defines compossibility by the extensionality of action-descriptions. But it is a merit to translate into contemporary terminology the doctrines of past masters. Moreover, Steiner draws two important conclusions from his formulation. First, the freedom that the liberal idea of justice is to secure for everyone must be understood as the possession or control of those things or spatio-temporal entities whose control is a presupposition for doing an action in its extensional sense. The musician is only free to play his trumpet as he likes when he is the happy owner of the house the philosopher lives in. "Freedom is the possession of things." (39) Second, "Freedom is a social relation, not a technological one. It's a relation between persons and persons, not between persons and nature." (44)

True, the musician's ownership of the house relates him to a piece of nature or technology. But his freedom is not constituted by his relation to the house, but to other persons that are excluded from controlling that spatio-temporal object. I think here we have a case where Steiner's 'exploration' of the concept of freedom does not fit the facts of ordinary language. If, for instance, someone is prevented by some natural accident from using his car, the rules of ordinary language permit us to say that he is unfree to use his car, and when some other accident removes that hindrance, we may say that it makes him free to use his car. Nevertheless, the rules of ordinary language should not prevent the philosopher from formulating rules that alone are relevant to understanding a problematic concept.

Kant's definition of law, too, implies that freedom is the possession of things and that it is a social relation. For Kant, too, concludes from his definition that

"the division of jurisprudence may be merely referred to the external mine and thine" (Kant 1954, 45). But again, it is a merit when a contemporary philosopher explicates a traditional view, in particular when the view has been branded "possessive individualism" (cf. Macpherson 1962).¹

4. Pure Negative Liberty

(b) Steiner insists on a 'pure' negative conception of justice, calling concessions to a positive concept of liberty 'impure' or, with the champion of a positive concept, Charles Taylor, "hybrid or middle positions" (14). Many philosophers prefer an impure conception. According to the pure negative concept, someone is free to v if and only if no one hinders him from v -ing. According to the impure concept, someone may be unfree even if no one hinders him from v -ing. Rather, to be ('truly' or 'really' or 'properly') free he must be guided by the right reasons, i.e. by reasons well considered according to some criterion. Kant even tends to argue that no one is free when doing wrong, since then he cannot but act heteronomously, hence from natural necessity and the wrong reasons (see Kant 1959, 39). But thus binding liberty to right reasons seems to commit to moralising justice and to slur the sharp boundary between justice or the right and morality and the good that the libertarians, justly and meritoriously, I think, and true to the Kantian spirit, pride themselves in drawing.

Nevertheless, Steiner does not convince me. According to the pure negative conception we are unfree when we are prevented by law from driving cars without using seat belts or prevented by security fences from jumping from towers and bridges. According to the impure conception, although of course ordinary language allows us to call ourselves unfree in such cases, the law and the security fence do not render us unfree in a sense relevant for justice. For the law and the fence prevent us only from choosing reasons chosen normally only by people who are unfree to choose well-considered reasons.

Steiner might concede that there are good reasons for enforcing the use of seat belts and security fences, but might insist that doing so, though it is not unjust, does not realise justice. But it may be argued against this that the law and the fence may well be elements in what Steiner himself considers 'justice', namely, a "rule which distributes freedom equally through a set of ... rights" (5). For when

¹ Steiner draws a third conclusion from his formulation. Since "being free to do an action is ... being in ... possession of its physical components" and "everything is in someone's such possession", it follows that "what I am free to do is a function of the things possessed by others, and what I am unfree to do is a function of the things possessed by others. My total liberty, the extent of my freedom, is inversely related to theirs. If I lose possession of something, someone else gains it." Steiner calls this dependence the "law of conservation of liberty" (52). It excludes the occurring of absolute losses or gains of freedom in a society. True, "a law abolishing slavery may confer a great deal of liberty on the emancipated slaves. ... But such a measure also considerably reduces some persons' freedom: namely, that of slave-owners." (53) I cannot see that this law is important. What is important is that freedom implies control of things.

people are careless or suffer from suicidal tendencies, preventing them from yielding to their weakness may be a means to an equal distribution of freedom. It is true that this argument needs a definition of the weakness that people may be coerced not to give in to. But this task is no insoluble problem, since there are some paradigmatic cases of self-destruction, e.g. drug addiction, where it seems obvious that not preventing the addicts from yielding to their weakness is excluding them from any distribution of freedom. And where to draw the line between drug addiction and self-chosen high risk sports that cannot be classified as weakness is a difficult problem only because it is impossible to classify all risks of self-destruction as chosen for right or well considered reasons.

If the freedom that guides the rules of justice is no pure negative liberty, many of Steiner's libertarian conclusions lose their foundation. So does his preference of the Will or Choice theory over the Interest or Benefit theory of rights, to which he devotes his third (and longest) chapter.²

It is true that allowing the negative liberty to be impure means running risks. People's rights may become incompatible or impossible. But they do not necessarily do so. It should not be by defining the abstract concepts of right, liberty or justice that we prevent rights from becoming incompatible but by defining the concrete rights. It is true that insisting on a pure and sharply defined concept looks more elegant and scientific. But human institutions rarely do conform to sharp definitions. And it is true that legitimising seat belts and security fences is paternalistic, and that paternalism is incompatible with libertarianism and perhaps with liberalism. But paternalism can be a bugbear that should not deter us. The rules of justice are to guide our behaviour not only towards other adult men and women, but also towards children and even the possible individuals of possible future generations. It would be strange if they were free from paternalistic elements. It is true that Steiner asserts not only that the dead have no rights against the living but also that, "symmetrically, the as yet unborn are equally devoid of rights against the living" (1992, 90n. 8). But there is no symmetry in the living's *responsibility* to the dead and to the unborn; therefore, why should we expect a symmetry between the dead and the unborn as to their *rights* against the living? The living are responsible to the unborn in a way they cannot be to the dead, because the unborn will have the same original right to having an equal share in the natural resources as the living have. Therefore, the living must have a regard to the unborn they cannot have to the dead. There is a necessary asymmetry in the position of a generation towards their predecessors and their successors that gives all important human institutions, justice included, a necessary paternalistic bias.

² "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. Whereas according to Benefit Theory, such imposition or relaxation must be in conformity with what would generally better serve that other's important interests, i.e. regardless of his or her own choices in the matter." (57f.) Original rights are here to be excluded.

5. Equality of Access to the Goods of Nature

(c) The most interesting conclusion Steiner draws from his idea of justice as a rule which distributes freedom equally through a set of rights is independent of his pure negative concept of liberty. Rights "come in the form of property rights". There are "two original rights which are ones to self-ownership and to an equal share of initially unowned things" (236), and rights derivated from them. The original rights define our initial spheres of autonomy that may be transformed by exercising derivative rights. Self-ownership, the owning of one's body and its capacities, is "a sufficient basis for creating unencumbered titles both to things produced solely from self-owned things" – one's bodily parts – "and to things produced from (an) equal portion of unowned things" – the products of our labour as far as the natural materials necessary for any product belong to our equal share of initially unowned things (236). Initially unowned things are the goods of nature that are unmixed with human labour; they include the genetic information that determine individuals' genetic asset (239ff.). Unowned things that have been initially owned, are the things and values people leave behind when they die.³

Neglecting this second class of unowned things, Steiner's classification of rights is nearly the same as Locke's. Locke, too, gives rights the form of property rights, and he, too, maintains two original rights, that to the property "every Man has ... in his own *Person*" (Locke 1960, §27), and that which is "common to all Men" (§27), "given ... to Mankind in common" (§25), namely, to "the Earth, and all inferior Creatures" (§27). True, this second right has no practical importance because of Locke's assertion that we appropriate natural goods by mixing our labour with them (§27). But the theoretical significance of this assertion is as little as its practical significance is great. For it is only the conclusion from premisses that declare natural goods (1) to be "given ... to Mankind in common" (§25) and (2) to constitute only $\frac{1}{100}$ or even less than $\frac{1}{1000}$ of the *value* of the goods "useful to the life of Man", the overwhelming mass of their value springing from labour (§§ 40, 43). Hence, according to Locke, it is only because the goods of nature constitute such a petty part of the value of commodities' that we can declare the people who mix their labour with them to be the owner not only of the value of their labour spent on the natural good, but also of the whole product. As soon as we replace Locke's premiss (2) for a more realistic one that takes account of the scarcity of many natural goods, a Lockean philosopher must exclude natural goods and their value from the right of appropriation by labour and attribute everyone an equal share in them – given Locke's assertion of equality of men's rights (§4f.).

³ People cannot bequeath them, Steiner argues, because transfers of property can only be made by living persons but bequests are not executed while the testator lives (252-8). I shall not discuss this question. But I think Steiner loses the basis for his position if an impure concept of negative liberty proves preferable to a pure one. For then the Benefit Theory of rights is superior to the Will Theory and there is no objection to giving people the opportunity to determine the use of their property beyond their death if such opportunity is thought useful to the society.

The right to an equal share in the goods of nature that Steiner attributes to everyone gives his "historical entitlement conception of justice" (5), better known by Nozick's inegalitarian version, a strong egalitarian trait or, as Steiner says, "some reasonably strong redistributive implications" (5). As I said, Steiner is perfectly justified in maintaining that his redistributive demands are implications of an entitlement conception of justice. I have never understood why Nozick – and before him, Kant – did not draw similar conclusions.⁴

But I have some doubts as to the particular form Steiner gives his redistributive implications. His idea is that "over-appropriators" – persons who have appropriated more goods of nature than is their share – compensate for their injustice by paying compensations to a worldwide compensation fund to exactly the same extent as they have over-appropriated goods of nature, and that "under-appropriators" receive their compensations from the global compensation fund to the exact extent in which they have under-appropriated goods of nature (268ff.). But how to apply this beautiful idea in a world where there are no longer goods of nature untainted by human labour; where the part constituted by raw nature and the part constituted by labour can only be distinguished by economic value measures; and where there is, it seems, no common value measure of the form Steiner needs. That common measure must indicate without distortion how much labour has been expended on which goods of nature of what value (or utility times scarcity) by which individuals all over the world.

Steiner sees the problems (cf. 272), but thinks that the mechanisms of the given markets or of fictive markets and auctions are sufficient for determining the value of the goods of nature and of the different sorts of labour added to them. He refers to a "very considerable literature ... on the variety of property rights in sites, the methods for asserting their values and the forms which such payments can take" (273), though he adds himself in a footnote "that very little literature on this subject ... construes the fund created by these payments as a global one" (273 n.14).

By whatever methods the compensations the over-appropriators owe to the underappropriators are determined, they will not be without arbitrariness. The given markets can determine prices only by mechanisms biased by prevailing inequalities, and fictive markets can simulate real markets only on the basis of more or less uncertain information. Therefore, if there are other ways to realise the right to an equal share in the goods of nature, they should be preferred.

Now there may be over-appropriators of the goods of nature and under-appropriators disadvantaged by them not only among the living, but also between generations. Though Steiner says the unborn have no rights against the living as little as the dead do, it is the point of the four beautiful parables in his paper of 1981 that we have duties to those who will be born, and that these duties obligate us to leave them resources as valuable as those we have found when we entered

⁴ I have argued that the goods of nature must be recognised as the common property of mankind on Lockean and Nozickean premisses in Steinworth 1990, 188-91, and in several papers since then (1995a; 1995b; 1996).

society. If we leave them with resources less valuable, we are over-appropriators and they under-appropriators.

True, it is resources and not only natural resources that we are obligated to leave to the new-born in a state as valuable as the one we have found. Only the very first generation of men could have found after their birth resources that were purely natural. But they had to substitute or leave to regeneration what they had consumed so that what were to them natural resources only, would be both natural and non-natural resources of equal value to the following generation. Otherwise they would have been over-appropriators of the natural resources.

For the living who want to leave the resources they have found to the newborn in a state of equal value, it is neither necessary nor sufficient to determine the value of the resources consumed and pay the following generation that value. Rather, the living must determine what kinds of resources will become scarce or scarcer for the individuals to follow. They must decide what steps are necessary today in the search for substitutes and to achieve regeneration or protection from pollution. In the relation between generations, for realising the right to an equal share in what have once been purely natural resources it would be impossible to determine the equal value of the resources that the living have to leave to the newborn by some quantitative and purely economic method. Rather, what is necessary is a qualitative and political determination of which resources have to be saved, substituted, regenerated or in other ways conserved so as to secure for the newborn a world of equal wealth or riches.

Let us ask whether there isn't a similar way of determining the equal value of the share in the natural resources to which everyone among the living has a right. One way could be when we presuppose that everyone does have an equal share. What would be the consequences of this? One answer is that everyone would have an equal say in the allocation of the natural resources. This would entail to establishing institutions that allow everyone to exert equal influence upon the allocation of natural resources. Since there can be no production without using natural resources, the answer implies a plea for more, or more effective, democratic controls of the economic system. Since there can be no effective democratic control without informed controllers, the answer implies as well a plea for a public system of schools and education. Perhaps we may draw some more conclusions. Anyway, Steiner does not show that his way of compensating under-appropriators by over-appropriators is the only possible one for realising equality of natural resources.

On the other hand, it is plausible that to realise that equality completely, it is necessary (though probably not sufficient) for over-appropriators to pay compensations to under-appropriators, and that to determine the amount of such compensations the value of what has been over-appropriated must be determined by methods suggested by Steiner, that is, by more or less fictive markets and auctions. But the necessary arbitrariness of such calculations might be limited by the other and more political ways of determining what is necessary to realise equality of natural resources.

Now this criticism of Steiner might have been put forward by Steiner, as the author of an article published in 1981, against Steiner the author of the 1994 book. In the article, revoked in 1994 (271 n.11), Steiner calls the valuation of natural resources by market prices "ultimately flawed" because it depends upon the "prevailing set of rights" (1981, 563). Instead of transforming the right to an equal share in the goods of nature into a right of compensation for under-appropriators which is determined by the market prices of the natural resources, he transforms it into a veto of everyone "against any assignment of our assets of which we do not approve" (1981, 564) – into a veto, that is, "on the initial allocation of property" which alone, Steiner says, "eliminates the possibility of his being exploited". And he adds: "Such an arrangement is, recognizably, a form of socialism." (1981, 569)

Since then, it seems, Steiner has won more trust in the market. He does not explicate the reasons, but it is not because he has become less radical or has made his peace with the prevailing conditions. Rather, he thinks he has found efficient means to create a society, both libertarian and egalitarian, in three just taxes: taxes on the ownership of natural resources, on bequests and on more valuable genetic information. And indeed, if these three taxes were levied in the way he proposes, the world would become perhaps not very libertarian but very egalitarian. It wouldn't look very different from the socialist world he recommended in 1981. Nevertheless, the reasons justifying each of them and the ways leading to them would be quite different.

As far as the first tax is concerned, I have already referred to the difficulties in determining the value of natural resources and, hence, the sums of the taxes levied on the over-appropriators. Relying only on that lever (beside the two other taxes) to create a more egalitarian society would involve the political agents in a lot of arbitrariness which would be pernicious to their claims to justice. The full taxation of bequests (coming to the second tax) can only be justified on the basis of the Choice Theory of rights, and since its claims are dubious, so would this tax be.

Steiner's third tax is perhaps the most interesting one. I think we again owe Steiner a lot for his treatment of the role of genetic information in distributive justice, though its implications seem to me to point to Steiner's 1981 egalitarianism rather than to Steiner's 1994 libertarianism. Let us have a look at it and go back to the paradox of self-ownership which leads Steiner to his third tax. Steiner's treatment of this paradox is hardly convincing and threatens to block the insights that may justify his third tax.

6. Self-Ownership

(d) There is a paradox in self-ownership, Steiner says, because, on the one hand, our right to our own body or person "generates our rights to the products of our labour, since those products embody our labour and that labour, as the product of our bodies, embodies part of our selves"; and, on the other hand, "each of us, as a non-primordial moral agent, is the product of other moral agents' labour" (Steiner

1992, 86f.). Therefore, the same principle that makes us owners of our products (excluding the raw materials of nature which we might have over-appropriated) seems to make us the slaves of our parents and whoever has expended labour in shaping us. According to Steiner, "credit for what amounts to (the) discovery (of the paradox)" must go to "Locke's great seventeenth-century opponent, Sir Robert Filmer" (242, cf. Steiner 1992, 87).

How does Steiner solve it? By pointing to the fact that our parents, too, spent their labour, in making us moral agents, on a good of nature which is not their exclusive property. This good is the germ-line genetic information which determines both the genetic asset of the parents and their children. "And thus Adam and Eve partly own (Cain). But not fully ... their ownership of Cain is an encumbered title and not an instance of full liberal ownership. In their case, that encumbrance – the thing that rids us of the paradox – consists in their ownership being temporary and expiring upon Cain's attainment of majority." (275)

Let us leave aside the question whether this means that we all become slaves of Adam and Eve and their chosen heirs if the theory of genetic information proves false. Suppose Steiner succeeds in solving his, or Filmer's, paradox. This would not imply that he answers the question why we should treat people at all as self-owners. Nor does he claim to answer this question. He just presupposes that we do and should do so, quite in accord with his position that it is impossible to find reasons for being just. Nevertheless, his solution provokes questions which it seems difficult for a philosopher to reject. I will try to articulate them before I return to the question of whether Steiner's third tax is justified.

According to Steiner's solution, every organism endowed with the genetic asset of normal human people has an original right to decide for itself about the use of its capacities and life, and the fact that parents and perhaps educators have contributed to producing its capacities gives them only a partial right in determining its life, which happily expires the moment it attains majority. In exercising its right of self-ownership, this organism makes use of its due share in the goods of nature.

Now suppose the parents decide not to spend their labour on their offspring to produce an organism that can itself dispose of itself, but for whatever reasons prefer to keep it in an undeveloped state. Why is that unjust? Is the bare fact of the organism's having the possibility to determine its life, if treated the right way, an obligation to the parents to give it that treatment? If so, would the parents still have what Steiner calls full liberal ownership of themselves?

So let us suppose that, regarding the special good of genetic information that forms potentially autonomous organisms, individuals are not free to dispose of it according to their whim and will, but are, when it has been embodied, obligated to choose treatments that lead to educated creatures. The question now arises why this good should obligate people. In Lockean terms, why do we distinguish between men and "inferior creatures"?

If we do not try to answer this question, we seem a little dull. But if, in spite of Steiner's reservations, we do, we obviously cannot avoid metaphysical assump-

tions on the special worth of men or their freedom or autonomy or rationality.⁵ But if we engage in such assumptions, Steiner's solution to the paradox of self-ownership seems somewhat superfluous. If our being or even the possibility of our being free, autonomous or rational, is reason enough for meriting a special esteem, why should we resort to the fact that our parents have no "full liberal ownership" of the genetic information that informs our genetic asset? On the other hand, once Steiner has taken resort to that empirical and refutable fact, if only to solve a paradox and not to give reasons why we should be just, why does he still refuse to resort to assumptions which might explain rights and rules of justice in a less tortuous way?

All these questions do not yet directly concern the question of whether a tax on more valuable genetic information is justified. They indicate a lack of theory in the analysis of self-ownership and freedom. They suggest that our self-ownership cannot be justified by referring to the fact that our parents have spent their efforts on some natural substrate, but only in the same way as the self-ownership of the very first man and his privileges against his non-human ancestors must be justified: by referring to some special faculties animals do not have. The fact that these special human faculties are transmitted from parents to children by genes and genetic information is totally irrelevant to the questions of whether people have an original right to self-ownership and whether they have an original right to an equal share in the goods of nature.

But the genetic-independent foundation of people's original rights does not exclude that the assignment of everyone's due share in the goods of nature is dependent on the constitution of one's genes. In fact, it seems rather obvious that someone endowed with a genetic disposition contributing to socially attractive abilities such as those of a tennis champion or a movie star has a privileged access to the goods society can offer, the goods of nature included. Steiner's third tax is not meant to correct over-appropriation resulting from genetic endowment privileging their owners in their access to the goods of nature. Rather, it is meant to correct differences in the expenditures of parents in promoting in their children abilities they need for taking part in the labour market. The benefits of the third tax are to go only to those parents or educators who invest their educating work in less abled or disabled children. The tax is a lever for abolishing the unearned differences in income, prestige and power people acquire because of their different endowments which are not the result of their own labour, effort and choice. But it only refers to the formation of these talents, not to their use. It has the same function as Dworkin's insurance against underemployment (Dworkin 1981, 314ff.), but it would, if realised, perform its function more directly than Dworkin's underemployment insurance.

So the fact that Steiner has encumbered his description of the third tax with his curious refutation of Robert Filmer should not prejudice it. It might be nevertheless an adequate instrument for establishing equality. But there are difficulties in its justification. It can only be justified if we can show that having a genome

⁵ I have dealt with (and I hope argued in favour of) such assumptions in Steinvorth 1994.

that contributes to more than average valuable abilities is a privileged access to nature and unjust unless those endowed with a less valuable genome are compensated. But why and in what sense is it a privileged access? It can only be so if someone's use of some particular genetic information makes someone else's position worse off. But, as Alan Carling has argued against Steiner, genetic information "is a pure public good" that is "undiminished by use" and can, if used, make no one worse off (Carling 1992, 95). Steiner has replied that "this argument overlooks the gestation period necessarily involved in any instance of genetic promulgation, during which time that code is unavailable to other users" (Steiner 1992, 90 n.13). But today the genome of any embryo can be cloned up to three or even seven times before gestation without much cost. It is true that the gestation period makes some particular genome less available but only to an extent that seems too small to justify a taxation on parents of genetically well-endowed children.

It seems, therefore, that Steiner has not given his third tax a sufficient justification. But that does not mean that it cannot be justified. The idea of taxing valuable genetic information is certainly no freak. It's a way to take account of the progress in genetics and reproductive and medical knowledge that has revolutionised not only technology, but also social relations and responsibilities. That progress implies a new stage in the socialisation of individuals which has accompanied human history and makes its way without people's will and consent.

In a way, people have been the products not only of their parents but of their societies since the times societies have become civilised and have drawn all of their individuals into their nets of mutual dependency. But people have been such products only in their educable, acquired properties. Now they are becoming the products of their societies also in non-educable, congenital properties. For it has become possible to interfere with their genomes, to destroy unwanted genes, multiply wanted genomes and practice eugenics which surpass all Platonic dreams. It's true, we can go on treating our genetic constitution as a pure fact of nature, and to a considerable degree we must even do so, since our technological skill in manipulating the human genome is still modest. But our genetic knowledge is already sufficient to prevent some hereditary diseases, and it is a matter of time until we can manipulate the genome of an embryo to a much larger extent. Even if we decide never to interfere with the lottery of nature which no former eugenics could eliminate, the decision would be one for which we are responsible. Human society cannot avoid becoming, to an uncertain extent, responsible for the genetic constitution of its members. It is this responsibility, still to be analysed and defined, that forbids saying that someone's genetic luck or misery is his or his parents' private affair. It makes it a public affair in both ways: as the genetical disadvantaged can claim the solidarity of society, so can society put a claim on the genetically lucky. Someone's genetic constitution, once a paradigm of pure nature untainted by and preceding all social facts, has come under the influence of social facts and institutions. Formerly, no one could complain to someone of his genetic constitution; now, some can even sue others for it.

Therefore, it becomes difficult not to justify societies' claims on the benefit of congenital properties. Their ownership can never be the result of their owners' effort or choice. That excludes any justification of the private appropriation of the benefits of these properties by appealing to their owners' effort or choice. But traditionally, there has been another justification. Ownership of congenital properties has been a fact of nature, and such facts, as Hegel once remarked, cannot be an injustice to anybody – except, as Hegel added, "in society" (Hegel 1970, § 244z). Whether that is true or not, now the ownership of congenital properties is no longer a fact of nature. Therefore, there is no longer the traditional foundation for justifying the private appropriation of the benefits of one's talents.

By his third tax, Steiner has taken account of this development. It is an adequate response to it. But I doubt whether it is compatible with his libertarianism. His third tax and the development it responds to provoke many questions unanswered by Steiner. We may regret that, but must praise him for provoking them.

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