

# WHAT ARE BASIC LIBERTIES? AN ESSAY ON ANALYTICAL SPECIFICATION

## ABSTRACT

Our initial aim is to characterize, in a manner more precise than before, what Rawls calls the “analytical” method of arrival at a list of basic liberties. As we understand it, this method employs one or more general conditions that, under *any* just social order whatever, putative entitlements must meet in order for them to be among the basic liberties encompassed, within *some* just social order, by Rawls’s first principle of justice (i.e., the liberty principle). We then argue that the general conditions that feature in Rawls’s own version of the analytical method, which employ the notion of necessity, are too stringent. They ultimately fail to deliver as basic certain particular liberties that, we argue, should be encompassed within *any* fully adequate scheme of liberties. In order to address this shortcoming, we provide a significantly amended, disjunctive, general condition. This replaces Rawls’s necessity condition with a probabilistic condition and it also appeals to the principle of legitimacy. We defend our new approach both as apt to feature in applications of the analytical method and as adequately grounded in justice as fairness as Rawls articulates the theory’s fundamental ideas.

**KEYWORDS** basic liberties; basic rights; economic liberties; enabling; freedom of expression; freedom of speech; moral powers; political legitimacy; political satire; Rawls

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### 1. *Introduction*

It is widely held that some liberties are more important than others. How are we to decide, though, as to which liberties are the most important or basic? Focusing on the account of basic liberties that is central to Rawls's theory of justice will enable us to recognize and address some intricacies that arise when attempting to answer this question.

Rawls (2005: 290) writes that there are two phases involved in providing a defensible specification of the basic liberties. The first involves specifying a list of basic liberties under general headings. The second involves further specification of this list by determining the significance of different particular liberties that come under the same general heading and adjudicating over conflicts between them. For example, after Nickel (1994: 780), while in the first phase we can include freedom of movement as a basic liberty, in the second phase we can recognize that certain particular liberties of movement (e.g., going on vacation) are much less important than others (e.g., attending a political rally).

Rawls (2001: 44, citing 1971: 61; cf. 2005: 450) remarks that "the basic liberties are specified by a list". Rawls (2001: 45; cf. 2005: 292–293) distinguishes between "historical" and "analytical" ways in which such a list "can be drawn up". Proceeding historically, "we survey various democratic regimes and assemble a list of rights and liberties that seem basic and are securely protected in what seem to be [...] the more successful regimes" (Rawls 2001: 45).<sup>1</sup> Presumably, in doing this, we are guided by the *functional role* that the basic liberties play within the theory of justice as fairness, rather than by a pre-existent *list*, however incomplete, of putatively basic liberties. We are to examine democratic regimes and identify which liberties commonly play, or approximate to playing, that functional role within them. Proceeding analytically, writes Rawls (2001: 45), "we consider what liberties provide the

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<sup>1</sup> On the historical method's disadvantages, see Arnold (2018: §2).

political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons”. We can also mix the two methods.<sup>2</sup>

Rawls’s conception of justice as fairness regards citizens as persons engaged in social co-operation who have “two moral powers”, namely the capacity to have a sense of justice and the capacity to have a conception of the good (Rawls 2001: 18–19). The principles of justice concern the design of the *basic structure* of society, that is, “the way in which the main political and social institutions of a society fit together into one system of social co-operation, and the way they assign basic rights and duties and regulate the division of advantages that arise from social co-operation over time” (Rawls 2001: 10). The fundamental case in which the capacity for a sense of justice is exercised is in “the application of the principles of justice to the basic structure and its social policies” (Rawls 2001: 112). The fundamental case in which the capacity for a conception of the good is exercised is in “forming, revising, and rationally pursuing such a conception over a complete life” (Rawls 2001: 113).

The two moral powers and their exercise in the two fundamental cases feature importantly, as we shall shortly explain, in the conditions that Rawls thinks a liberty must meet if it is to be a “basic” particular liberty. Such a liberty is one that emerges, in turn, from each of the two phases of specification as (what we call) a “core” basic liberty. It is a particular case of the basic liberties identified (under general headings) in the first phase and it is one that is identified, in the second phase, as being of substantial political significance.

We consider it useful to distinguish between specification *as process* and specification as the *result* of that process. Specification as *process* is what Rawls (2001: 45) calls “drawing up a list”. An actual list of the basic liberties itself is, or is part of, a specification *qua* result. The historical and the analytical methods are ways of carrying out the process of specification. In our terminology, the process of specification of the basic liberties consists in the *application*,

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<sup>2</sup> See footnote 5 below.

within an epistemic situation, of a *method* (i.e., in Rawls's terms, a way of drawing up a list), in order to arrive at a list of the basic liberties. Rawls (2001: 7) writes that the "role of the principles of justice [...] is to specify the fair terms of social co-operation" and that these "principles specify the basic rights and duties to be assigned by the main social and political institutions". This is not to be understood to imply that his first principle of justice, namely the liberty principle, itself *lists* the basic liberties. Rather, and as Rawls (2001: 42) states the principle, it mentions these liberties as a class without itself listing or specifying them. Within a society, *application* of the first principle, *in combination* with a list of basic liberties that has been drawn up via one of the three available methods (analytical, historical, and mixed) is part of what specifies "the fair terms of social co-operation".

We think it useful to distinguish between the method, itself, of analytical specification of the basic liberties and the setting out of the *general conditions* apt for deployment as part of any application of that method. The method of analytical specification employs one or more general conditions that, under *any* just social order whatever, putative entitlements must meet in order for them to among the basic liberties encompassed, within *some* just social order, by Rawls's first principle of justice (i.e., the liberty principle).

That is to say, they are to pertain to all particular applications, which tend towards variation in their outcomes across different democratic regimes, of the analytical method of specifying the basic liberties. These general conditions determine what it is to be a basic liberty in the sense that they concern the intension of the concept *basic liberty*, not its extension. By contrast the ultimate aim of the process of specification is to identify the concept's extension. As we have previously observed, we can also use the word "specification" to refer to the *result* of that process, namely a list of basic liberties (in the first phase, specified at a high level of abstraction and, in the second, more particularly specified and within "a fully adequate scheme of equal basic liberties", to quote part of Rawls's liberty principle, from Rawls 2005: 42). Our

main concern is with the general conditions that Rawls thinks pertinent to each phase of any process of analytical specification of the basic liberties. Arrival at general conditions appropriate for application in analytical specification of the basic liberties is, we take it, a theoretical task that takes place as part of the setting up of justice as fairness as a theory. It is to be distinguished from the task of drawing up a list of the basic liberties in that the latter, and not the former, takes place, with increasing particularity, over the four stages of the four-stage sequence (Rawls 2005: 289–371; Freeman 2007: 73; Wenar 2017: §4.9). We reserve the term “specification” for the process of carrying out this task, done using one of the three available methods, and for its result.

Our main task, then, is to render more precise the concept of *basic liberty*, rather than to settle questions about its extension. Fully settling the concept’s extension is not a matter for philosophers only: rather, it is the same task as the provision of a full specification of the basic liberties. A full specification, as we will understand it, of the basic liberties includes a full list of particular basic liberties that feature within an overall scheme of liberty. Accordingly, the settling of the concept’s extension must take place across both phases of specification, and the stages of the four-stage sequence. The task in which we are engaged and that of actually specifying the basic liberties are, therefore, importantly distinct.

We aim also to contribute towards the filling of a significant gap in the literature, in which answers to the question of what it *is* for a liberty to be basic (as against mere lists of putatively basic liberties) do not abound (cf. Pettit 2008: 201, 203). Rawls’s account of the basic liberties is primarily a “functionalist” approach: it concentrates mainly on the role that the basic liberties play, rather than dwelling, in detail, upon defining what they are. Moreover, his account of the analytical method itself, and of the general conditions pertinent to it, is relatively sparse. We aim to expand upon it, criticize it and improve upon it.

In Section 2, we argue that Rawls's account of the analytical method requires some important additional clarifications. After providing these, we discuss the general condition that Rawls lays down upon a liberty's being properly identifiable, in the first phase, and at a high level of abstraction, as basic. The condition defines as basic those liberties that are *necessary* for the full and informed exercise of the moral powers. We call this the "necessity reading" of how Rawls defines the basic liberties. After having clarified it, we distinguish between it and a reading that uses a different modal notion that also features in Rawls's discussion, namely *enabling*. We then argue that the notion of enabling is too weak to replace that of necessity.

In Section 3, we turn to Rawls's general condition for use in the second phase of specification. We take this to have at its core the appeal to the aforementioned fundamental cases. We argue that, coupled with the necessity reading, invoking the two fundamental cases is too strong. This is because it under-generates: that is, it excludes certain specific particular basic liberties that it should not, such as certain forms of freedom of movement. While Rawls's necessity-based account might be apt for application in the first phase of analytical specification, it is unsuitable for application in the second phase. We then discuss a new approach that seeks to improve on Rawls's and to expunge the problems identified earlier. On the new approach, probability takes over the role that was occupied, on the previous approaches, by modality.

In Section 4, however, we show that the probabilistic approach introduced in Section 3 is also, like the modal approaches previously discussed, extensionally inadequate. We argue, by appeal to the case of the freedom to produce and to consume political satire, that the approach under-generates in that it fails to secure as basic some particular liberties that seem, and rightly so, to have been considered basic by Rawls (namely, in this case, some forms of freedom of political expression).

In Section 5, we propose a remedy for this under-generation problem. Our proposal adds as a sufficient (but non-necessary) condition upon a particular liberty's being basic that any restrictions upon it that did not promote, or which were not designed to promote, the weighting of liberties in a scheme of liberty would be restrictions that breached the liberal principle of legitimacy.<sup>3</sup> We argue that since the legitimacy principle is, like the moral powers, and on Rawls's own account, rooted in the fundamental ideas, including those of the person and of society, that are integral to Rawls's theory of justice, this is no *ad hoc* solution.

In Section 6, we summarize our argument and make some concluding remarks.

## 2. *The Analytical Method of Specification*

Rawls lists as basic the following rights and liberties:

freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law. (Rawls 2001: 44; cf. 1971: 61; 2005: 291)<sup>4</sup>

Elsewhere, he remarks that in pursuit of the

ideal of perfect procedural justice [...] the liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of

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<sup>3</sup> Though we arrived at this idea independently, we note that Glod (2010) and (perhaps less directly) Tomasi (2012a; 2012b) also suggest that the principle of legitimacy be deployed in specifying the basic liberties.

<sup>4</sup> Henceforth, like Rawls, we will use "basic liberties" as short for "basic rights and liberties".

liberty of conscience and freedom of thought, liberty of the person, and equal political rights. The political system [...] would not be a just procedure if it did not embody these liberties. (Rawls 1971: 197–198)

Rawls's characterization of the analytical method of arrival at a list of basic liberties is brief and imprecise. When Rawls (2001: 45) remarks that, when proceeding analytically, "we consider what liberties provide the political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons" he is, we think, stating what we called, in Section 1, a "general condition" (in this case, pertinent to the first phase of specification of the basic liberties). The analytical method itself is not to be identified with any determinate attempt to state such conditions. If we are right about that, then an adequate general explanation of the nature of the analytical method is missing from Rawls's remarks. The purpose of employing the analytical method is partly to distinguish between those social primary goods that are basic liberties and those that are not. To deploy the analytical method is, we take it, to identify general conditions that are, taken together, necessary and sufficient for any social primary good to qualify as a basic liberty. By our lights, Rawls seems to have confused the method itself with a determinate specification of these conditions.

The analytical method, as we conceive of it, is not itself a *specification* of the basic liberties, in the "list" sense: rather, it is a method of *arrival*, by philosophical rather than historical means, at a such a specification. The analytical method does not consist of a putative list of basic liberties: rather, the method is that of providing general conditions that partially determine what is fit for inclusion in such a list. As we use the term, a *version* of the analytical method is a statement of the conditions that a liberty must meet for inclusion in the full list of particular basic liberties, across societies. Societal facts about which the parties to the constitutional convention become aware in the constitutional stage of the four-stage sequence



are not all common across those societies in which the circumstances of justice obtain. These facts do bear on which particular liberties will emerge as basic. Thus, the content of a full list of the basic liberties within a full and appropriate specification will vary across different societies in which the circumstance of justice obtain, in accordance with relevant differing contingencies across those societies. The conception of the analytical method with which we are working, according to which a version of the analytical method provides a *definition* of the basic liberties, might be one that Rawls would have considered alien, but we do not see how the analytical method, *as a general method* (i.e., rather than by reference to a specific version of it) could otherwise viably be characterized.<sup>5</sup>

Of course, it is a constraint on the definition of a concept that the definition should be extensionally adequate. If an attempt to define the basic liberties fails to secure as basic a core liberal freedom that merits inclusion in *any* specification of the basic liberties whatever, then it under-generates, failing to meet the aforementioned constraint. We will argue that Rawls's own version of the analytical method does under-generate in this way, and we will seek to remedy this.

The analytical method is distinct from the justification of the principles of justice. To see this, consider the contrast with Hart's challenge. According to Hart (1973: 550–555), Rawls must provide grounds both for the choice, in the original position, of basic liberties and for their priority within the theory of justice. Hart (1973: 542–547) thinks that Rawls must also provide criteria for adjudicating between the basic liberties, when they conflict in the constitutional, legislative, and judicial stages. While there is significant overlap between the Hartian challenges and the two phases of specification outlined in the previous section, these

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<sup>5</sup> Some might deny that Rawls intended to provide a definition of the basic liberties. We agree with Hsieh (2005: 118) that he did. Even if he did not, we do not see how that task can properly be regarded as dispensable. We note that the historical and analytical methods can be combined. Rawls (2005: 340–356) does this when discussing freedom of political speech.

are not the same. The analytical method is not, as such, a response to the first Hartian challenge. This is simply because the Hartian challenge demands *justification* of the choice of basic liberties and, of their priority, in the original position. The analytical method of specifying the basic liberties, on the other hand, is concerned not with justification but with *definition*. The content of the justificatory material in the original position can differ from the material that features in the analytical method's general conditions.<sup>6</sup> Drawing up these conditions is not a task that is given to the parties in the original position.<sup>7</sup>

What is the exact role, within the analytical method, of Rawls's appeal to the fundamental cases? While Rawls does not mention the two fundamental cases in the sentence that introduces the analytical method, he proceeds to claim that the exercise of these powers in the two fundamental cases "is essential to us as free and equal citizens" (Rawls 2001: 45).<sup>8</sup> When he refers back to his introduction of the analytical method, he does explicitly mention the two fundamental cases (Rawls 2001: 112). Either the two fundamental cases are to be invoked in the first phase of specification or they become relevant only in the second phase. We believe that the latter is the correct interpretation.<sup>9</sup> The appeal to the two fundamental cases serves to help us to specify which particular liberties under an already selected (first-phase) basic liberty, specified at a higher level of abstraction, are of particular political importance (i.e., which are the core areas of that basic liberty).

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<sup>6</sup> According to Rawls, three forms of justification are apposite to the basic liberties. The first two concern the moral powers: basic liberties are justified because they are necessary in the pursuit of a good life and/or to develop and apply a sense of justice. The third, however, is instrumental: some liberties are basic because they are needed to protect other basic liberties. In order for one to use this third form of justification, it is necessary that one should already know what at least some of the basic liberties are. The first two forms are used in the original position; the third outside the original position. See Rawls (2005: Lecture VIII, §§5–6, 10–12); for critical discussion see Nickel (1994: esp. 777–779).

<sup>7</sup> See also Nickel (1994: 766).

<sup>8</sup> Cf. Rawls (2005: 293, which does not refer to the two fundamental cases, and 308, which does). Freeman (2007: 55) defines the basic liberties following Rawls (2005: 293) and omits mention of the two fundamental cases.

<sup>9</sup> Cf. Nickel (1994: 780–781). Rawls (2005: 332–335) serves as clear evidence for this interpretation.

Our discussion so far paints the following picture. Although Rawls does not pursue it in detail, he seems to intend that the analytical method should be apt to be invoked during both phases of specification. For Rawls a liberty is basic if and only if it is necessary to the provision of “the social conditions essential for the adequate development and the full and informed exercise of [people’s] two moral powers [...] in [at least one of] the two fundamental cases” (Rawls 2001: 112).<sup>10</sup> This breaks down into the first and second phases of specification as follows. Necessity to the “adequate development and the full and informed exercise” of the moral powers is Rawls’s general condition for use in the first phrase of specification. The supplementation of this with the appeal to the two fundamental cases provides his general condition for use in the second phase. Evidently, it is not only the *possession* of the two moral powers that is essential to a person’s being a free and equal citizen; it is also the *exercise* of them, in the two fundamental cases (Rawls 2001: 43, 112; Nickel 1994: 773). The basic liberties pertain to Rawls’s first principle of justice, that: “Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all [...]” (Rawls 2001: 42). This is why the exercise of our moral powers in respect of the two fundamental cases is “essential to us as free and equal citizens” (Rawls 2001: 45) and no trade-offs are to be made of basic liberties for other social primary goods (Rawls 2001: 46–47).

Before we criticize this account, we would like to distinguish between it and an alternative reading with which some authors seem to confuse it.<sup>11</sup> This alternative reading

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<sup>10</sup> Cf. O’Neill (2008: 35–36); Wells (2018: §1). Following von Platz (2014: 41, note 9), the first “and” in the definition should read “and/or”. Presumably, so should the second “and”. Henceforth in our discussion, we make these amendments. Rawls (2005: 308) refers to “the social conditions necessary for the development and the full and informed exercise of the two moral powers (particularly in [...] ‘the two fundamental cases’)”. Thus, for Rawls, “essential” and “necessary” are presumably interchangeable terms when defining the basic liberties. We assume so in what follows.

<sup>11</sup> For example, Nickel (1994: 772–773) claims that what we have to show in order to recognize a liberty as basic is that it is a primary good. Relatedly, von Platz (2014: 28) observes (without endorsing the view) that one way of rejecting Rawls’s argument that not all economic liberties are basic is “to reject

might also be thought to save Rawls's account from criticisms that we will offer in the next section. After he gives the above general conditions, Rawls remarks that "equal political liberties and freedom of thought enable citizens" to judge "the justice of the basic structure of society and its social policies" and that "liberty of conscience and freedom of association enable citizens" to form, to revise, and rationally to pursue "their conceptions of the good" (Rawls 2001: 45). This is an interesting modal shift. Rawls's general condition (for the first phase of specification) appeals to the *essentiality/necessity* of the basic liberties to the full and informed exercise of the moral powers.<sup>12</sup> The explanatory remarks just quoted appeal to the weaker claim that the basic liberties *enable* this.

Even if, unlike the claim that the basic liberties are necessary to the full and informed exercise of the moral powers, the enabling claim is true, the notion of enabling cannot be the right notion to feature in an extensionally adequate definition of the basic liberties.<sup>13</sup> The argument for this conclusion is simple. All social primary goods enable the full and informed exercise of the moral powers.<sup>14</sup> Not all social primary goods are basic liberties, however. Therefore, if enabling were to supplant necessity in the definition of the basic liberties, the resultant definition would be too permissive to be consistent with Rawlsian liberalism. No doubt, basic liberties, being social primary goods, have an enabling function, but that is true of all social primary goods (among them income, wealth and the social bases of self-respect) and not only of the basic liberties.<sup>15</sup> While enabling is a necessary condition for a social primary

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the modality of necessity" in the definition of the basic liberties and to appeal, instead, to the claim that "the basic liberties are protections that are conducive to or promote the development and exercise of the two moral powers".

<sup>12</sup> "Essential" is the 2001 term; "necessary" the 2005 (1993) term.

<sup>13</sup> Cf. von Platz (2014: 29) who makes this point in relation to "conduciveness", though he does so, we think, without arguing for the point.

<sup>14</sup> Rawls (2005: 307, our italics; cf. 2001: 57) characterizes social primary goods exactly along these lines: "The main idea is that primary goods are singled out by asking which things are generally necessary as social conditions and all-purpose means to *enable* persons to pursue their determinate conceptions of the good and to develop and exercise their two moral powers."

<sup>15</sup> Cf. Melenovsky (2018: 434), though we disagree with him over some matters of detail.

good to qualify as a basic liberty (since the basic liberties are among the social primary goods), it is not a necessary and sufficient condition.

One might attempt to defend the enabling approach by pointing out that we have overlooked an important complication in Rawls's account of primary goods. After *A Theory of Justice*, Rawls argued that primary goods come in a hierarchy depending on that for which they are necessary. In particular, he identified three higher-order interests: the first two are interests in the exercise of the two moral powers while the third is an interest in the advancement of one's determinate conception of the good. The basic liberties, Rawls can be interpreted to claim, serve both of the first two sorts of interests, but other social primary goods, such as income and wealth, only serve the third (Rawls 2005: 74–75, 106; 2001: 112–115). It might be claimed that the basic liberties, in their enabling role, help satisfy all three higher-order interests, whereas other social primary goods do this only in relation to the third higher-order interest (i.e., in the pursuit of one's determinate conception of the good).<sup>16</sup>

There are some interpretative issues here that also connect to non-exegetical philosophical questions. Among these, the relationship between a social primary good's status as an enabler and the question of how to define the basic liberties is particularly salient. We think that there is a lack of substantive and detailed argument in support of the enabling approach to defining the basic liberties: such argumentation is provided neither by Rawls nor by others. It sounds rather strong to claim that certain social primary goods do not function even as enablers for the exercise of the two moral powers (and hence that they do not promote persons' corresponding highest-order interests in this particular way).<sup>17</sup> It is telling that Rawls

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<sup>16</sup> Davenport (ms: section II) interprets Rawls in this way but Pogge (2007: 86–88) disagrees. Pogge holds that the basic liberties are not related to the pursuit of the third fundamental interest. See also footnote 20 below.

<sup>17</sup> Take income and wealth as our test cases. It is hard to see why these primary goods would not enable, in our weak sense, the development and exercise of one's sense of justice and conception of the good. Surely, through funding education and, more generally, facilitating socialization, income and wealth can have such effects.

introduces the distinction between highest-order and higher-order interests while presupposing the necessity reading: nowhere, as far as we can tell, does he make the move from necessity to enabling in this context. We think that making such a move would be mistaken. At least, the burden of proof is on the side of anyone who wishes to make it.

### 3. *The Analytical Method: From Modality to Probability*

Let us return, then, to the necessity reading of Rawls's version of the analytical method. We have no immediate quarrel with this as apt for application in the first phase of specification, fit to provide a means of identifying the basic liberties at a high level of abstraction.<sup>18</sup> Nevertheless, we argue in this Section that it is not apt for application in the second phase of specification.

It is pertinent to ask whether the presence of the basic liberties is a necessary condition for the full and informed exercise of the moral powers in the two fundamental cases. A positive answer to that question is not, if we are to be charitable to Rawls, to be construed as suggesting that, for each individual citizen in a given society, the full and informed exercise of the moral powers in the two fundamental cases is possible only if all citizens possess the basic liberties.<sup>19</sup> Highly-developed moral and political sensibilities, including the capacity for a sense of justice and the capacity to have a conception of the good, may be present and exercised, even to a relatively high degree, in populations living under regimes in which the basic liberties recognized by Rawls are not afforded equally to all citizens: e.g., in the United Kingdom before universal suffrage, or in contemporary Cuba. Living under such a regime lessens the likelihood that people will be able, in a full and informed way, to exercise their moral powers in the two fundamental cases but it would not necessarily make it impossible for them to do so. Indeed,

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<sup>18</sup> Contrast Nickel (1994: 783–786).

<sup>19</sup> After Melenovsky & Bernstein (2015: 50); cf. Melenovsky (2018: 442–443).

the possibility of progress from such a regime to a society that more closely approximates to being, in Rawls's sense, a well-ordered society, rests upon the ability of a body of citizens having and exercising these powers. While governmental refusal to afford equal basic liberties may place limits upon these two moral powers and their exercise in the two fundamental cases, it need not make these powers and their exercise in the two fundamental cases impossible for each and every citizen (cf. Arnold 2018: §3).

Recall that for Rawls (2001: 112) a liberty is basic if and only if it is necessary to the provision of “the social conditions essential for the adequate development” and/or “the full” and/or “informed exercise of [people's] two moral powers [...] in [at least one of] the two fundamental cases”. Our interpretation of this remark is that a liberty is basic if and only if it is necessary to the provision of the social conditions that must be in place in order for it to be the case that *every citizen* naturally capable of doing so is not hindered, by arrangements relating to the basic structure of society and its laws, from exercising the moral powers in a full and informed way in the two fundamental cases. Nevertheless, the appeal to necessity remains too strong. While the connection between the basic liberties and Rawls's conception of citizenship in a well-ordered society is indeed a necessary one, some liberties that ought, at least by Rawlsian lights, to qualify as particular basic liberties within any just social order are, as Arnold (2018) has argued, only contingently connected with the full and informed exercise of the moral powers in the two fundamental cases. Arnold (2018: §4.2) illustrates this point using various counter-examples to the necessity claim that are intended to establish that universal full and informed exercise of the moral powers in the two fundamental cases can be compatible with laws that deprive citizens of core liberal freedoms. Here, we summarize just one of these counter-examples. For Rawls (2005: 335), “the liberty and integrity of the person” is “violated [...] by denial of freedom of movement”; thus, freedom of movement is a basic liberty. Arnold's discussion suggests, however, that if a law were enacted that restricted people's

freedom of movement to within their metropolitan areas, this would not make it impossible for every citizen to possess, and exercise in a full and informed way, the moral powers in the two fundamental cases (cf. Pogge 2007: 87). While we think it is very *unlikely* that, under such conditions, every citizen could be so fortunate as to be able to do this, we agree with Arnold that it does not seem to be *impossible*.

As far as we know, Rawls does not explain what he means by “full and informed” in this context. We suggest the following as a reasonable interpretation, with respect to the first moral power. An agent’s exercise of the *sense of justice* is *full* provided that: (i) the agent has a permanent capacity to make evaluations that employ the notion of justice; (ii) while possessed, this capacity is regularly exercised during the agent’s life; (iii) there is no realm that is a proper subject (i.e., intentional object) of the sense of justice with respect to which the agent’s exercise of the sense of justice is, partly due to social factors, debarred or impeded. An agent’s exercise of the sense of justice is *informed* provided that the agent has access to those facts, including facts about common and theoretically-informed evaluations, that are both relevant to making the particular evaluations that the agent makes and known, by mainstream scientists and social scientists, within the agent’s epistemic community. With respect to the second moral power, we suggest that exercise of an agent’s *capacity for a conception of the good* is *full* provided that, while the capacity is possessed, the agent: (i) has “a conception of the good”; (ii) is able “to revise, and rationally to pursue” that conception; (iii) does, over the course of the agent’s life, revise and rationally pursue that conception (Rawls 2001: 19). We suggest that exercise of an agent’s capacity for a conception of the good is *informed* provided that the agent: (i) has access to those facts, including facts about common and theoretically-informed conceptions of the good, that are both relevant to the formulation of conceptions of the good and known within the agent’s epistemic community; (ii) knows at least a minimally adequate stock of those facts sufficient to raise the agent significantly above ignorance. In both



cases, we note that full knowledge of the facts is not required. It seems to us that to demand full knowledge of these facts would be to set the bar unrealistically high, and mean that no-one's exercise of either of their moral powers would ever count as informed. Our ignorance, or relative ignorance, about the beliefs, value-commitments and practices of a particular religious, political or cultural sect would not, it seems to us (cf. Rawls 2001: 90), be sufficient to render the exercise of our moral powers less than full or informed (except when the sect itself, or its worldview, is what is at issue).

These suggestions about how "full and informed" should be interpreted are tentative. For our present purposes, it is more important to be clear about what this phrase *does not* mean than what it does. Arnold's argument about restricted freedom of movement assumes that "full and informed" exercise of the moral powers in respect of the two fundamental cases does not already mean that, for any liberty, defined at high level of abstraction, that is relevant to this, that liberty is unrestricted. We take this to be correct, both in itself and as a reading of Rawls.

Recall that Arnold's conclusion was that universal full and informed exercise of the moral powers in the two fundamental cases can be compatible with laws that deprive citizens of core liberal freedoms. A possible move in response, so as to secure the status of such particular core liberal freedoms as basic, might be to give up the appeal to the two fundamental cases (second phase) but to retain the necessity reading (first phase). An obvious problem with this suggestion is that it is not clear as to what might, for the purposes of adjudication between conflicting basic liberties, replace the appeal to the two fundamental cases.<sup>20</sup> Also, even if we

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<sup>20</sup> Nickel (1994: 782–783) proposes a possible replacement of the second fundamental case (and the second moral power) with what he calls "all-permeating choices". It is unclear whether this proposal would be able to accommodate the soon-to-be-presented case of freedom of political satire. Pogge (2007: 87–88) considers invoking the third higher-order interest as a means of determining the significance of basic liberties but argues, against this suggestion, that Rawls does not and should not hold that this fundamental interest is served by the basic liberties. The main reason for this is that since the third fundamental interest concerns citizens' concrete conceptions of the good, our assessment of significance would be held hostage to particularities and would differ from citizen to citizen. This would make it all but impossible to provide clear guidelines for adjudication.

find an answer to this question, another problem presents itself. In the second phase of specification, we are not only looking further to specify the basic liberties identified, a higher level of abstraction, in the first phase; we must also employ a method of adjudication. Adjudication requires an account of the relative significance of different liberties. Here, Rawls proposes that:

a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed exercise of the moral powers in one (or both) of the two fundamental cases. (Rawls 2001: 113; cf. 2005: 335)<sup>21</sup>

Before we discuss this quotation further, let us consider an ambiguity in it. A sentence of the form “A is essentially involved in B” may be taken to mean *either* that A is essential to B (i.e., in this context, that B cannot happen without A) *or* (non-equivalently) that A cannot be A without being involved in B (i.e., if A exists or occurs then, thereby, B does, at least partly, too). We take the first reading to be the one that is apposite to interpreting Rawls: it accords with Rawls’s own talk of the basic liberties being (either essentially or instrumentally) *necessary for* the full and informed exercise of the moral powers in the fundamental cases

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<sup>21</sup> O’Neill (2008: 33–35) seems to interpret the quoted remark as having been intended to provide a criterion for deciding upon whether a given liberty is basic in the first phase. It is clear from the quoted text and its context, though, that this is not the case and we are in the second phase here. See also Rawls (2005: 290, 331–340, 359). In the quotation in the main text, Rawls is alluding to a distinction between liberties that are *essentially* or (if you prefer the term) *intrinsically* (and therefore necessarily) related to the attainment of full and informed exercise of the moral powers in the two fundamental cases and liberties that (as he makes clearer elsewhere, e.g., Rawls 2005: 299), are merely necessary institutional *means* towards this (via their securing of the liberties in the first group). See further Nickel (1994: 775, 777–778); Melenovsky (2018: 436–438, 449–451). Arnold (2018) does not explicitly take this distinction into account. We think, however, that some of his counter-examples, such as the one to which we have ourselves appealed, extend also to the case of being a necessary institutional means towards the protection of a liberty that is intrinsically related to the full and informed exercise of the moral powers.

(Rawls 2005: 208; cf. 2001: 58). The second reading, whilst unsuitable as exegesis, is independently interesting: we return to it, in effect, in Section 4, when discussing freedom of political satire. There, we suggest that this freedom *is* “essentially involved” in evaluation of the justice of the basic structure and its social policies, but only in this *second*, we think uncommonly deployed, sense of that expression.

For simplicity, let us set aside the reference to the two fundamental cases. Adding them to the present discussion would make no philosophical difference to our points. The idea is now that the weightings of particular basic liberties, within “a fully adequate scheme” of basic liberties, once a list of basic liberties (specified at a high level of abstraction) is already in place, can be guided by measuring how necessary or essential they are to, or as institutional means to protect, the full and informed exercise of the two moral powers. This idea, however, is bizarre. Rawls, when providing his modal definition of the basic liberties, does not appeal to degrees of essentiality or necessity. In the remark about degrees of significance, he does so. A liberty, however, cannot (for example) both be essential (or necessary) for the adequate development and/or the full and/or informed exercise of the moral powers and not so essential (or necessary) to this. Degrees of significance cannot, consistently with Rawls’s attempt to define the basic liberties, be spelled out in terms of degrees of essentiality (or necessity). Distinguishing between the two phases of specification does not help resolve this problem.

While significance admits of degrees, this is not true of necessity (or essentiality). There might well be various notions of necessity that differ in strength (Hale 1997). Nevertheless, when we are working with a single notion of necessity there are no degrees within it. While the significance of a liberty is a scalar property of the liberty, its necessity (or otherwise) for the full and informed exercise of, or as a necessary institutional means towards the protection of, the moral powers is a binary property of the liberty. That is to say, either a liberty is so

necessary or it is not. If it is not, then it is only contingently connected with the full and informed exercise of the moral powers.

Thus, supposing that it is a given that some particular liberties are more significant than others, but that the division is not simply between those that are significant and those that are not, the proper way to cash this out cannot be in terms of degrees of necessity of the liberties in question to the full and informed exercise, or institutional protection, of the moral powers. Rather, if differences in degrees of significance of particular liberties are to be correlated with other gradated differences, then the appropriate appeal should be to the extent to which it is *probable* that, in the absence of a given particular liberty's taking on the functional role of a basic liberty, the full or informed exercise of (at least one of) the moral powers will, partly due to due to social conditions, be significantly impeded, stunted or atrophy.

Now this observation relates, as we have already noted, not to how an appropriate list of basic liberties is to be drawn-up in the first phase but, rather, to the question of how, in the second phase, particular basic liberties are to be ranked in a fully adequate scheme of liberties. In defining what it is for a liberty to be basic, instead of appealing, as Rawls does, to a purported modal relationship between the basic liberties and the full and informed exercise of the moral powers in the two fundamental cases (or the institutional protection of liberties intrinsically related to this), we introduce the idea of mitigating against risk, above a certain threshold, to the full and informed exercise of the two moral powers. Accordingly, let us consider the suggestion that *a liberty is basic if and only if the likelihood is above a certain threshold that, in its absence, and partly due to social conditions, the possession and/or the full and informed exercise of one or both of the moral powers will be prevented, stunted or atrophied.*

Let us spell out how this suggestion contrasts, in ways that we think amount to improvements, with Rawls's own account. On Rawls's account, the first phase of specification appeals to the supposed necessity of the basic liberties to the full and informed exercise of (or,

in some cases, institutional protection of liberties intrinsically related to) the moral powers. In the second phase, and so as to identify the core areas of the basic liberties, he introduces the appeal to the two fundamental cases. Finally, his account of how adjudication between the resultant particular liberties works, within an overall scheme of liberties, uses the notion of degrees of necessity (essentiality). Our proposal differs in the following respects. We replace the modal notion in Rawls's account, necessity, with the non-modal notion of probability. Thus, a basic liberty is a liberty in the absence of which the risk to the possession, and/or the full and informed exercise, of the moral powers rises above a certain threshold.<sup>22</sup> Again by contrast with Rawls's account, this new general condition is apt for deployment in both phases of specification of the basic liberties: nothing needs to be added to it to cope with the second phase. A remaining task for the second phase, on both Rawls's account and according to our new suggestion, concerns the weighting of, and the adjudication between, the particular basic liberties within an overall scheme of liberties. Here our idea is simple. Adjudication proceeds using probability assessment above the specified threshold of risk. That is, we compare (ordinally or cardinally) the different risk levels to each other so as to measure the relative significance of different particular basic liberties.<sup>23</sup> If the absence of a certain liberty would pose a higher risk to the possession of, and/or the full and informed exercise of, the moral powers than another, then the first of these liberties is more significant than the second.

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<sup>22</sup> See Pogge (2007: 84), for an appeal to the notion of a threshold in a closely related context. Note that any liberty that meets Rawls's modal condition of being necessary for the possession, and/or the full and informed exercise, of the moral powers will thereby also be a liberty without which the possession and/or the full and informed exercise of the moral powers would be objectively improbable. Also, the absence of a liberty that is necessary for the institutional protection of another, independently identifiable, basic liberty will presumably raise the risk to the latter liberty above the threshold.

<sup>23</sup> The appeal to the two fundamental cases could easily be reintroduced here. We could say this: a particular liberty is more or less significant depending on how likely it is that, in its absence, the full and informed exercise of one or both of the moral powers, *in one or both fundamental cases*, will be stunted or atrophy. However, given the difficulties raised by by Nickel (1994: 781–782), we proceed without doing this.

We take it that our appeal to probability, in place of necessity, is no *ad hoc* move to save a Rawlsian (or at least, Rawls-inspired) account of the basic liberties. If, in an account of the basic liberties, one wishes to retain Rawls's appeal to the moral powers then this appears to be the only way to proceed: at least, it seems to be the only real and plausible proposal on the table. Arnold's imaginary example provides a good illustration. His objection to Rawls's account withers away when necessity is supplanted, along the lines we suggest, with the appeal to a probability threshold.

Of course, a lot depends on how and where the threshold is set. Let us explain why it is neither crucial nor desirable that this question should be settled here and now. Our concern has been to arrive at general conditions apt for deployment in any process of analytical specification of the basic liberties. The identification of these conditions is a philosophical task that takes place outside of the four-stage sequence. Application of the analytical method, via which a list of particular basic liberties is drawn up, is a process that happens across the stages of the four-stage sequence. This is also true of threshold-setting. Now, according to some theorists (Miklósi 2008; Miklós 2011), the stages of the four-stage sequence see institutions, such as those constitutive of the basic structure of society, as determining moral content by doing, among other things, just the kind of specification job we need to make the above probabilistic approach work. Rawls's own discussion of the four-stage sequence further underlines this idea. It shows that specification and adjudication take place in an institutional setting (he uses mainly US Supreme Court examples) and that the constitutional, legislative and executive stages interact: they feed material into each other with theorists going back and forth between them, as would be expected in a process of reflective equilibrium (Rawls 1971: §31; 2005: 334–356). To apply this framework to our case, what would happen, we surmise, is not so much that participants in these stages would literally discuss a threshold (although that too can happen, e.g., in the work of the courts) but that they would come up with guidelines

designed to reflect the abstract account given by the theorists (us), hand over their “results” to the theorists (who could then apply them in the theory), and then repeat this process, going back and forth between the theorists and the other participants.<sup>24</sup> The emerging picture, then, is that of a process for setting the threshold that harmonizes with Rawls’s ideas about the role of institutions with respect to justice.

#### *4. The Probabilistic Approach: An Outstanding Problem*

When discussing Rawls’s modal definition of the basic liberties, in terms of their supposed necessity to the full and adequate possession and exercise of the moral powers in the two fundamental cases, we agreed with Arnold that some of the core areas of basic liberties that instantiate liberties, more abstractly specified, in Rawls’s list of the basic liberties are not necessary in this way. Thus, the modal definition is extensionally inadequate; it under-generates when applied in the second phase of specification. Unfortunately, the probabilistic approach we have discussed as an alternative to modal definitions is vulnerable to counter-examples that show it to be extensionally inadequate in the same way. One such counter-example is the freedom to produce or to consume political satire, which we will henceforth call “freedom of political satire”.

The case of freedom of political satire results in a dilemma for the probabilistic approach. Suppose, for the first horn of the dilemma, that any satirical content can be conveyed non-satirically. (In doing this, suppose that the content of political satire can exhaustively be expressed, as, for example, some philosophers hold that the content of a metaphorical sentence can exhaustively be expressed, in literal language.<sup>25</sup>) Suppose, further, that the probability is high that the content of any given piece of putative political satire that agents would otherwise

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<sup>24</sup> This is what Rawls (2005: 340–356) does when he “translates” his own proposal into an account of the thinking of the Supreme Court about free political speech.

<sup>25</sup> For an introductory discussion of metaphor, see Lycan (2000: Chapter 14).

be inclined to create will instead be expressed non-satirically should political satire be legally debarred. Other things being equal, it follows that freedom of political satire is not, on the probabilistic approach, a core area of the related basic liberty (namely freedom of speech) because (under these suppositions) the equivalence of expressions of satire (whatsoever their format, so including mere images) to literal language means that a ban on political satire would not, of itself, make it likely that the full and informed exercise of the moral powers (in the two fundamental cases) would be stunted or atrophy.<sup>26</sup> Under our suppositions for his horn of the dilemma, even if political satire were legally debarred (supposing, contrary, we assume, to fact, that sufficiently precise legislation could be drafted, passed and implemented), the content of its message would, other things being equal, readily be effectively communicable, as no merely theoretical possibility, by non-satirical means. Accordingly, citizens' exercise of the capacity for a sense of justice would not be precluded from being aptly being describable as "full and informed": for neither full nor informed exercise of a moral power requires that for every manner of conveying facts and judgements about the justice of the basic structure and its laws citizens can legally have those facts and judgements conveyed to them in that manner. It is each citizens' possession of an adequate stock of relevant information, alongside access to that stock of relevant information that is possessed by the citizens' epistemic community, that matters here. It is not *how* the information is conveyed that matters. A restriction on the latter does not amount, of itself, in compromise to the full and informed exercise of the relevant

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<sup>26</sup> Our point here is a conceptual one that is deduced from the suppositions for this horn of the dilemma. It is not an empirical point about probability. Also, we by no means suggest that the failure of freedom of political satire's qualification, on application of a given version of the analytical method, would result, on that application, in its being *permissible* to ban political satire. Rather, our appeal is to the following underlying principle (and its contrapositive) in so far as it is incorporated into versions of the analytical method that we think deficient: for any liberty that is a particular basic liberty, a more or less effective legal ban on its exercise would hinder the full and informed exercise of a moral power, in a fundamental case. Evidently, we do not ourselves take this principle to be correct. Rather we deploy it, from within versions of the analytical method that do endorse it, against their credentials as duly protective, at a constitutional level, of the full range of particular basic liberties apt for protection under *any* just constitution whatsoever. (As noted in Section 1, there will, in particular societies, be further particular basic liberties that depend on social contingencies that pertain in those societies.)



moral power in the relevant fundamental case. This point stands, we take it, even if one is not committed to the positive, but tentative, suggestions that we made in the previous section, when discussing Arnold's argument, about how "full and informed" is to be understood. We repeat our point that, for the purposes of our argument, it is more important to note what this phrase (quite clearly, we think) *does not* mean, than to be totally clear about what it does.

Now suppose, on the other hand, and for the second horn of the dilemma, that political satire can include satirical content that is *not* literally expressible. The case of a law banning political satire can then be contrasted with Rawls's discussion of the repression of "subversive advocacy". He writes:

As Kalven observes, revolutionaries don't simply shout: 'Revolt! Revolt!' They give reasons. To suppress subversive advocacy is to suppress the discussion of these reasons, and to do this is to restrict the free and informed public use of reason in judging the justice of the basic structure and its social policies. And thus the basic liberty of freedom of thought is violated. (Rawls 2005: 346)

On this horn of the dilemma, political satire can include rhetorical elements that outstrip reasons (since, for example, it can consist of an image alone). We presume that it is an essential feature of reasons that they can feature as premises in inferences (whether within theoretical or within practical reasoning).<sup>27</sup> We take it, therefore, that reasons can be stated in literal language. If reasons can be stated in literal language, while (on this horn of the dilemma) not all satirical content can so be stated, a law against political satire cannot be criticized (on this

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<sup>27</sup> This view of reasons bears clear affinity to the so-called *reasoning view* of reasons (Setiya 2014; Silverstein 2016; Way 2017). Note that there is no denial here that, for example, an image can *stimulate* reasoning. Rather, our point is that things, such as images, that cannot be premises cannot *be* reasons. The use of an entity, as a rhetorical device, to stimulate reasoning does not bestow upon that entity itself the status of being a reason *within* the stimulated chain of reasoning.

horn of the dilemma) for being a restriction on the free and informed public use of *reason*; for (on this horn of the dilemma) it is not that: it is, at best, a restriction on the free and informed use of *rhetoric* (i.e., in this case, the manner in which reasons are expressed). Given that the probabilistic approach to defining the basic liberties preserves, from Rawls's modal definition, the end relative to which the basic liberties are to be defined, namely, the full and informed exercise of the moral powers, the probabilistic approach is unable to secure freedom of political satire as a basic liberty.

The outcome of this dilemma is that, regardless of whether the content of political satire can be exhaustively stated using literal language, the end relative to which Rawls defines the basic liberties is too narrow to encompass freedom of political satire.<sup>28</sup>

It might be objected that the proper response to this dilemma is to bite the bullet and to accept that freedom of political satire simply does not count as a particular liberty that qualifies as basic. Freedom of political satire might still be apt for political protection, but whatever political protection it enjoyed would not be the special protection that is afforded to the basic liberties.<sup>29</sup> We decline the invitation to bite the bullet. First, we hold that there are good reasons to take freedom of political satire to be a core area of freedom of (political) speech (and, more widely, of expression and, hence, of thought), which in turn is a core area of the group of basic liberties that Rawls calls "political liberties".<sup>30</sup> We think that the status of freedom of political

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<sup>28</sup> If there be citizens among whose conceptions of the good producing or consuming political satire is included, this is a purely contingent matter. In any case, appealing to the case of such citizens would be an example of what Melenovsky & Bernstein (2015: 53) call an "argument from particular interests", to which they rightly object that the "fact that a way of life is important to an individual is not sufficient to show that we should [on Rawlsian grounds] protect the liberties that are useful—or even necessary—to pursuing that way of life". This also connects with why the basic liberties are not to be tied to the pursuit of the third fundamental interest (see footnote 20).

<sup>29</sup> This objection was put to us by a referee.

<sup>30</sup> Rawls seems to agree (Rawls 2001: 92, 113; 2005: 341–344; cf. Nickel 1994: 771–772; Freeman 2007: 47).

satire as a core basic liberty is clear.<sup>31</sup> In many repressive regimes, and even in particularly sensitive cases in non-repressive regimes, the most effective method of social critique is sometimes through highly abstract satirical pieces: indeed, sometimes this is the only legally or politically available method. We take it, then, that we are justified in regarding freedom of political satire as encompassed by the explicitly listed political liberties (of expression, thought, and the political liberties) that are common to all arrived at during the constitutional or later stages in the second phase of specification. Second, we believe that there are good reasons to think that freedom of political satire should be afforded the kind of protection that is afforded only to the basic liberties. The approach to political liberty that is embedded within Rawlsian liberalism already has readily available resources to accept this claim: it is just that it is not accommodated by Rawls's version of the analytical method or by its probabilistic counterpart.

To see this, consider the circumstances in which, under Rawlsian liberalism, a liberty may permissibly be legally restricted. According to Rawls (2005: 292; cf. 2001: 112), any liberty is covered by a "general presumption against imposing legal or other restrictions on conduct without sufficient reason". That which is to count as sufficient reason will differ depending upon two factors: whether the liberty in question is an instance of a basic liberty (specified at a higher level of abstraction), and the realm with respect to which the liberty is putatively exercised.<sup>32</sup> If a liberty is basic then, within its "central range of application", only

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<sup>31</sup> This is implied by Freeman (2007: 74). Also, Nussbaum (2002: 509) remarks, citing Rawls (2005: 354), that for Rawls "no political [...] speech can be censored absent [...] a grave constitutional crisis". There, Rawls also states that "free political speech" is a basic liberty and that "to restrict or suppress" it "always implies at least partial suspension of democracy". No exception is made for political satire. Given that political satire is a form of political expression, the conclusion that freedom of political satire is a matter of basic liberty appears to be a straightforward consequence of Rawls's view. Rawls (2001: 92) writes that "public reason is the form of reasoning appropriate to equal citizens who as a corporate body impose rules on one another backed by sanctions of state power". He continues: "shared guidelines for inquiry and methods of reasoning make that reason public, while freedom of speech and thought in a constitutional regime make that reason free". A ban on political satire would mean that public reason was *not* free.

<sup>32</sup> For more detail, see Freeman (2007: 81–85). (Freeman 2007: 82 uses the word "manner" where we use "realm". In the main text, we reserve "manner" for a different use.)

restrictions upon it that promote the overall balance of basic liberties within a scheme of liberty can be justified (Rawls 1971: 244; 2001: 111; 2005: 295; Freeman 2007: 65–72, 81–82). In the second phase of specification we are dealing with particular liberties that instantiate more abstract, only generally specified, basic liberties. There is no assurance that every such particular liberty will be afforded the same protection. For Rawls (2005: 340), “freedom of political speech [...] falls under the basic liberty of freedom of thought and [relates to] the first fundamental case”.<sup>33</sup> Our task now is to show, as this remark suggests, that freedom of political satire indeed falls within the central range of application of freedom of thought. As a result, freedom of political satire is, speaking in functional terms, a particular basic liberty. We have already argued that that the status of this freedom as basic is secured via application neither of a purely modal, nor of a purely probabilistic, version of the analytical method of specifying the basic liberties. There is a mismatch between what counts functionally as a basic liberty and what applications of the versions of the analytic method so far discussed can deliver. We proceed to address this by offering a supplementation of the probabilistic approach that does encompass freedom of political satire (among other liberties apt for recognition, in view of their functional roles in a just political order, as basic).

In order to show that freedom of political satire falls within the central range of application of freedom of thought, we begin by contrasting political satire with non-political satire. Clearly, the freedom to produce or consume *non-political* satire, for example about the consensual sexual antics of stars of “reality” television, while also an instance of the more abstract liberty of freedom of expression, does *not* have the special protection afforded to the basic liberties. This is because, in the case of this type of satire, the *realm* (i.e., in this case, the subject matter) of the exercise of the more abstract liberty is largely *irrelevant* to the full and

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<sup>33</sup> Cf. Cohen (1994: 592): he regards freedom of political speech as integral to “the ideal of democratic process” and as “constitutionally fundamental”. In this, we take him to be agreeing with Rawls.

informed exercise of one or both of the moral powers. Notably, and by contrast with the more important forms of political satire, this sort of non-political satire does not concern “the justice of the basic structure and its social policies” (Rawls 2001: 112). To paraphrase the above quotation from Rawls about subversive advocacy, and appealing this time to expression in general, rather than to the more restricted category of dealing in reasons:

The more important forms of political satire do not just ridicule or draw attention to unjust aspects of the basic structure and its social policies; they encourage their audience to do so too (at least attitudinally, if not out loud). To suppress such political satire is to suppress the critical evaluation of the justice of the basic structure and its social policies. And thus the basic liberty of freedom of expression is violated.

We would like to emphasize that, in accordance with its liberal nature, a Rawlsian account of freedom of expression must reckon, when assessing whether particular liberties that instantiate this freedom are to be afforded special protection, not only with the *content* of the expression but also with the multiplicity of *ways in which that content may be expressed*. Restrictions upon freedom of expression come in three broad forms: of the *message* (e.g., one is not allowed to criticize the head of state), of the *medium* (e.g., one is not allowed to criticize the head of state in print), and of the *manner* in which the message is expressed (e.g., one is not allowed to publish satire that lampoons the head of state).<sup>34</sup> Crucially, freedom of expression is not only freedom to express the content of the message: it is freedom of medium, and of manner, too. So far as freedom of political expression is concerned, we consider

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<sup>34</sup> Rawls (2001: 111; 2005: 295–296, 348, 364–365) distinguishes between the *regulation* of speech, which does not affect the content of what may be said (e.g., the convention that only one person speaks at a time in a formal debate), and the *restriction* of speech, which does (e.g., the banning of job advertisements that express racism or sexism).

restrictions on the medium, or on the manner, that do not serve to promote the balance of particular liberties in an overall scheme of liberties to be, in the spirit of Rawls's high liberalism (though not to the letter of Rawls's version of the analytical specification, or its probabilistic counterpart, of the basic liberties), just like restrictions on the expression of the content of the message, unjustifiable.<sup>35</sup>

More broadly, if there are many ways in which a particular basic liberty, such as freedom of political expression, may be exercised then the state cannot be within its rights arbitrarily to rule that only some of them, specified at an even lower level of abstraction, are allowed. Suppose that of the many broad ways in which a given particular liberty may be exercised the state permits only one, and the availability of this one to citizens *does not pose an above-threshold probabilistic threat to the possession and/or the full and informed exercise of one or both of the moral powers*. This latter fact is not, we suggest, genuinely exculpatory. That the definitions of the basic liberties so far discussed do not of themselves (as opposed to by appeal to the general presumption in favour of liberty) debar such selection by the state is, we contend, a shortcoming, against the spirit of Rawls's high liberalism, and, when duly reflected upon, a clear case of under-generation regarding which particular liberties are to count as basic.

If a particular liberty is non-basic, then, in principle, there can be restrictions upon it that do not promote the overall balance of basic liberties within a scheme of liberty: this is so because of the particular liberty's realm. When a particular liberty is an instance of a basic liberty, then, while this does not of itself confer basic status upon that particular liberty, we suggest that the mere availability of an alternative *manner* of exercising that particular liberty is not enough to render it permissible for the state, for a reason other than the promotion of the

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<sup>35</sup> For discussion, with further references, of the differences between high liberalism and other forms of liberalism, see Freeman (2011) and Arnold (2018).

overall balance of basic liberties within a scheme of liberty, to restrict that particular liberty. Given that it is plain to see that freedom of political satire *is* a particular instance of freedom of political thought (and expression), restrictions upon it could only be permissible for reasons of realm. There can be no such reasons, because the realm of freedom of political satire is exactly that of freedom of political, but non-satirical, expression. The body of discourse called “political satire”, even if it is not necessary *for* evaluation of the justice of the basic structure and its social policies, is essentially involved in such evaluation in the sense that this is part of its characteristic subject matter. We conclude that freedom of political satire is on a par, in terms of its significance, with freedom of political but non-satirical expression.

##### *5. The Appeal to the Principle of Legitimacy*

Given that every version of the analytical method that we have so far discussed is extensionally inadequate, how are we to provide appropriate general conditions for the analytic method? We believe that progress can be made by employing an underlying principle of Rawls’s political liberalism, namely “the liberal principle of legitimacy” which states that “political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason” (Rawls 2001: 41; cf. 2005: 137).<sup>36</sup> The principle can be reformulated, as a conditional of “if...then...” grammatical form, as follows:

If an exercise of political power is legitimate then it accords with a constitution that can, in its essentials, be endorsed by all citizens, as reasonable and rational, in the light of their common human reason.

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<sup>36</sup> For a brief discussion, see Wenar (2017: §3.1). There is a lot more to say about exactly how Rawls’s account of legitimacy is to be understood (Song 2012; Rossi 2014; Patton 2015; Langvatn 2016).

Put conversely:

If an exercise of political power does *not* accord with a constitution that can, in its essentials, be endorsed by all citizens, as reasonable and rational, in the light of their common human reason, then that exercise of power is *illegitimate*.

Recall Rawls's remark that

the liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty of conscience and freedom of thought, liberty of the person, and equal political rights. The political system [...] would not be a just procedure if it did not embody these liberties. (Rawls 1971: 197–198)

Our suggestion is that, even if the absence of freedom of political satire would pose no above-threshold threat to the full and informed exercise of the moral powers, a legal ban on political satire would, by Rawlsian lights, be procedurally unjust. While there is a genuine distinction between affording legal protection to a liberty and agreeing to a procedure that would result in its legal or constitutional protection, this should not obscure the point that, for Rawls, certain freedoms are clearly *aspects* of the procedural conditions that justify protecting and restricting other freedoms. These include freedom of political expression. Freedom of political expression, including freedom of political satire, is as a matter of what, in Joshua Cohen's words, "must be in place for a political process to be open and so for outcomes to be legitimate" (Cohen 1994: 601; cf. 2002: 93). In so far as a distinction between procedural and substantive justice is in good standing, freedom of political satire is at least a procedural freedom, and a legal ban on it could not, we take it, accord with any just constitution.



We admit that it might reasonably be debated as to whether freedom of political satire, specific, is a purely procedural freedom. Even if it is not, we suggest, again after Joshua Cohen, that it would then fall under the rubric of the substantive “rights of expressive liberty” that form a part of Rawls’s ambition to reconcile liberty and equality (Cohen 1994: 597). We do not see this concession as posing, of itself, a threat to the status of freedom of political satire as basic, because we agree with Cohen (1994: 595–596) that Rawls’s first principle of justice “guarantees” some basic liberties “that are not matters of fair procedure”.<sup>37</sup>

The suppression of political satire is inconsistent with the principle of legitimacy given that political satire contributes, among other things, and through its rhetorical content, towards citizens’ evaluations of the justice of the basic structure and its social policies.<sup>38</sup> Freedom of political satire has the essential function of enabling citizens to undertake such evaluation. This is not to suggest that such enabling cannot happen without the political satire, but that a body of discourse, or other communicative content, cannot be political satire unless it enables in this way. That is, in saying that this is an “essential function” of freedom of political satire, we do not intend to suggest that this freedom is necessarily indispensable to the assessment of the justice of the basic structure and its social policies. Indeed, we have already granted, in Section 4, that it might not be. Take political satire itself, rather freedom of political satire. Political satire itself is an atypical enabler (as against, for example, most of the social primary goods) in that it has intentional content: that is to say, there is material that it is *about*. While political satire often takes as its target the foibles of particular leaders, the justice of the basic structure and its social policies is core subject matter for political satire, especially in regimes that are far distant from counting, in Rawls’s sense, as well-ordered societies.

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<sup>37</sup> As an example, Cohen provides freedom of conscience, including religious freedom. Rawls (1997: 774) specifically agrees with Cohen that justice as fairness is among those liberalism that “contain substantive principles of justice, and hence cover more than procedural justice” (cf. Rawls 2001: 153, note 47; 2005: 191–192).

<sup>38</sup> Think, for example, of how political satire was employed, by brave comedians, even in the darkest days of communist reign in Eastern Europe.

We propose that a general condition that is genuinely apt for deployment when specifying the basic liberties analytically will be along the following, disjunctive, lines. An entitlement is a basic right or liberty if and only if at least one of the following conditions holds:

- (i) the likelihood is above a certain threshold that, in its absence, and partly due to social conditions, the possession and/or the full and informed exercise of one or both of the moral powers will be prevented, stunted or atrophied;
- (ii) any legal restriction upon it that did not promote the weighting of liberties in a scheme of liberty would breach the principle of legitimacy.

The adoption of this version of the analytical method, rather than the abandonment of the project of providing general conditions fit for use in any analytical specification, is vindicated by the fact that the principle of legitimacy underlies Rawls's theory of justice. (We say more about this shortly.)

Freedom of political satire is, we have argued, a freedom that ought to be encompassed under *any* full specification of the basic liberties. In order for it to be encompassed by any analytically-derived specification of the basic liberties, we have proposed that direct appeal be made to the principle of legitimacy. Is invoking legitimacy here merely an *ad hoc* move? We do not think so: the move is well-motivated on independent grounds. Our new general condition, although disjunctive, is united in that the concepts in each disjunct that are most salient to the theory of justice have the very same foundations. Rawls's writings clearly show that the principle of legitimacy is rooted in the fundamental ideas of the person (citizen) and of society, the exact two foundational reference points for the moral powers as well.<sup>39</sup> Our

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<sup>39</sup> See Rawls (2005: xliv, 19, 52, 137, 217); Freeman (2007: 374–375). Tomasi (2012a: 66–67; 2012b: 75) makes a similar move to ours (although he seems to apply the principle, with insufficient justification, in the first phase of specification and, in so doing, to overburden it).

contention that the principle of legitimacy partially determines the specification of the basic liberties has a precedent in Rawls's own work. Rawls (1997: 771) writes that the principle of legitimacy is "based on the criterion of reciprocity". The criterion of reciprocity "requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position" (Rawls 1997: 770). According to Rawls himself, the principle of reciprocity embodies his conception of citizens as free and equal persons within a constitutional democracy (Rawls 1997: §§1-2). When explaining "the political values expressed by justice as fairness as a political conception", Rawls (2001: 91) remarks that they

reflect an ideal of citizenship: our willingness to settle the fundamental political matters in ways that others as free and equal can acknowledge as reasonable and rational. This idea gives rise to a duty of public civility [...], one aspect of which directs us, when constitutional essentials and questions of basic justice are involved, to reason within the limits set by the principle of legitimacy. (Rawls 2001: 92)

Given that the constitutional essentials are "covered by the first principle" of justice (Rawls 2001: 49), but that (as we mentioned at the outset) the attainment of fully adequate scheme of basic liberties is the outcome of progression through the stages of the four-stage sequence, Rawls seems here to be suggesting that the principle of legitimacy is a constraint on reasoning about (and therefore, upon the determination of any fully adequate scheme of) the basic liberties.<sup>40</sup> Moreover, Rawls (2005: 41) depicts the principle of legitimacy as an outgrowth of

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<sup>40</sup> Cf. Rawls (2005: 48). Rawls (2005: 14) includes among the "fundamental ideas" of justice as fairness the idea of the basic structure, that of citizens as free and equal, and that of public justification. The

political liberalism's "political conception of justice" the "shared principles and values [of which] make reason public, while freedom of speech and thought in a constitutional regime make it free".<sup>41</sup>

A second objection to our proposal is that condition (ii) renders condition (i) redundant because every liberty that meets (ii) also meets (i) but, as the case of freedom of political satire shows, not vice versa. We do not consider condition (i) redundant, for the following reason. The right to vote in general elections is an entitlement that citizens can exercise. Legislation that stipulates fixed-term parliaments puts a restriction on the exercise of that right, and not to promote the overall weighting of liberties in a scheme of liberty. However, such legislation does not breach the principle of legitimacy. Thus, while condition (i) and not condition (ii) secures the right of universal suffrage, (ii) and not (i) secures freedom of political satire.

A third objection to our proposal is that, in dampening down the bump in the carpet concerning freedom of political expression, more specifically, concerning freedom of political satire, we have caused another bump to appear. Rawls (2005: 364–365) writes that the right to advertise, while a form of freedom of speech (and, we would add, expression), is not a basic liberty because, in the case of "market-strategic advertising", the right to advertise "can be restricted by contract, and therefore [...] is not inalienable". Does our lowering of the bar on what it is to be a basic liberty not, in admitting freedom of political satire, also have the undesirable result, for Rawls, that the right to engage in market-strategic advertising also turns out to be a basic liberty? We answer that it does not. Restrictions on market-strategic

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principle of legitimacy is closely related to all three. Rawls (2005: 24–27) explains the relationship between the theory's fundamental ideas and notes (2005: 26) that the last is related to "free public reason", which he goes on to discuss further (2005: 89–94).

<sup>41</sup> There is also the perhaps more contentious matter that Rawls connects legitimacy and justice in the following way: for the state, for example, to be legitimate, it cannot be too unjust. A sufficient level of justice is required (Rawls 2005: 393, 427–428). Freeman (2007: 376–377) interprets this as claiming that nothing can be legitimate if it violates the basic liberties. Thus, again, there is no *ad hoc* move involved in our proposal: if Freeman is right, we are just incorporating notions into our disjunction that already belonged together. Cf. Tomasi (2012a: 66; 2012b: 75).

advertising, even if these are legally imposed (as opposed to just being contractually agreed), can be consistent with the principle of legitimacy. This is because reasonable and rational people may agree with Rawls (2005: 365) that market-strategic advertising can be socially wasteful. Also, market-strategic advertising, unlike freedom of political satire, is *unrelated* to the exercise of the moral powers. It is necessary to the satisfaction of condition (ii) that the liberty in question should be related (either intrinsically or instrumentally) to the full and informed exercise of the moral powers. The reason why freedom of political satire is basic is because, as we have already said, while it does not meet condition (i), legal restrictions, whether of message, medium, or manner, on political satire would breach the inalienable right of citizens to engage in judgements about the justice of the basic structure and its social policies.

#### *6. A Summary of Our Proposal and Its Significance*

Both the question as to which liberties are basic and the nature of the analytical method of specifying the basic liberties are significantly under-theorized in the literature. This is despite the clear importance of the notion of basic liberties for liberal political theories.

We have emphasized that any theory of the basic liberties must distinguish between two phases of specification: in the first, a highly abstract list of liberties is drawn up under general headings; in the second, this list is further specified into core areas of these liberties and adjudication (involving judgements about the significance of particular liberties within an overall scheme of liberties) takes place. It seems to us that much of the existing literature tends to entangle these two phases, insufficiently distinguishing between them. Although the first phase gives us a defensible list, this list is at too high a level of abstraction; it is really only the particular liberties identified in the second phase that matter in “real life”.

In the framework provided by this distinction, we gave an account of Rawls’s version of the analytical method of specifying the basic liberties as centring on a necessary connection

between the basic liberties and the full and informed exercise of the two moral powers (first phase) in the two fundamental cases (second phase). We then argued that Rawls's appeal, in his definition of the basic liberties, to a modal relationship should be replaced instead by the appeal to a probability threshold. Using the case of freedom of political satire, we argued that even a probabilistic general condition under-generates. We remedied this by disjoining probabilistic considerations with a clause that makes direct appeal to the liberal principle of legitimacy.

While the modification to Rawls's approach to defining the basic liberties that we propose is motivated by purely analytical considerations, the weakening of the concept of basic liberty that it involves renders Rawls's theory of justice more inclusive, in terms of the rights and liberties that fall under the concept, than does the letter of Rawls's own definition. The case of the freedom of political satire, to which our argument has appealed, is but one among many. For example, even if, as Martin O'Neill suggests, an element of workplace democracy is not *necessary* to the full and informed exercise of the moral powers in the two fundamental cases (O'Neill 2008: 41–42) this does not (on our approach), settle the question of whether a right to an element of democracy is basic. Rather, a pertinent question is whether, without such a right, the risk falls above a certain threshold that some individuals will, due to its absence, lack the full and informed exercise of one or both of the moral powers.<sup>42</sup> The same applies to *laissez-faire* economic freedoms, such as freedom of contract.<sup>43</sup> The question to ask about each freedom, provided that the lack thereof would not necessarily breach the principle of legitimacy, is whether its lack would raise above the threshold risk to the full and informed exercise of the moral powers. Each freedom must be approached on an individual basis

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<sup>42</sup> O'Neill (2008: 36) notes this risk but does not question the adequacy of Rawls's version of the analytical method. See further REDACTED.

<sup>43</sup> Tomasi (2012a; 2012b) argues, by appeal to the principle of legitimacy, that *laissez-faire* economic liberties qualify as basic. For critical discussion, see Arnold (2018); Melenovsky & Bernstein (2015); Patten (2014); von Platz (2014); Wells (2018).

regarding the question of whether it is, by the lights of a probabilistic but disjunctive definition, a basic liberty.

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