

# WHAT ARE BASIC LIBERTIES?

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# FULL VERSION

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# I. INTRODUCTION

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# WHICH LIBERTIES ARE BASIC? SOME CONTROVERSIES

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- It is widely held that some liberties are more important than others.
- Nevertheless, there has been considerable controversy about which liberties count as basic.
- Gourevitch (2018); Raekstad and Rossi (2021): moral rights like the right to engage in sit-ins and mass picketing during strikes, or to participate in other forms of direct action, do not count as, and can take priority over, freedoms that liberals tend to regard as basic.
- Question of whether a right to an element of workplace democracy, or economic democracy, is basic by liberal lights (Gourevitch 2014; McLeod 2018; O'Neill 2008).
- Growing literature about whether certain *laissez-faire* economic freedoms qualify, as the neoclassical liberal John Tomasi (2012a, 2012b) argues, as basic liberties.

# THE UNDERLYING QUESTION: HOW SHOULD *BASIC LIBERTY* BE DEFINED?

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- How are liberals and their critics to decide as to which liberties are, according to liberalism, the most important or basic?
- Focusing on Rawls's account of the basic liberties will enable us to recognize and address some intricacies that arise when attempting to answer this question.

# HOW SHOULD *BASIC LIBERTY* BE DEFINED? THE QUESTION'S IMPORTANCE

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- Rawls's version of high liberalism can be seen as driving a wedge between classical liberalism and left liberalism via its favoured list of basic liberties.
- As Brennan (2020: 493) explains, Rawls's list excludes both economic liberties that classical liberalism includes, and social liberties that left liberalism includes.
- This shows that deciding what makes its way onto the list of basic liberties is not merely an exercise in 'list-drawing'.
- It is really a debate about the fate of liberalism and particularly about which version of liberalism, if any, it is fitting to accept.

# TWO STAGES OF SPECIFICATION

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- How are we to decide as to which liberties are the most important or basic?
- Rawls: two phases are involved in providing a defensible specification of the basic liberties.
- **First phase:** specification of a list of basic liberties under general headings.
- **Second phase:** determination of the significance of different particular liberties that come under the same general heading; adjudication over conflicts between particular liberties.
- For example, after Nickel (1994: 780), while in the first phase freedom of movement is recognized as a basic liberty, in the second phase it is recognized that certain particular liberties of movement (e.g., going on holiday) are much less important than others (e.g., attending a political rally).



# SOME BASIC INGREDIENTS IN RAWLS'S DISCUSSION

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- Citizens are persons engaged in social co-operation who have 'the 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.
- 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).

## 2. RAWLS'S PROPOSAL: A RECONSTRUCTION

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# METHODS OF SPECIFICATION

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- 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).
- 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’ (ibid.).
- This latter method is our concern.
- We regard Rawls’s quoted remarks about it as providing an actual definition of the basic liberties, rather than an adequate general explanation of the analytical method.

# OUR TASK

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- To render more precise the concept of *basic liberty* (rather than to settle questions about its extension).
- *The task in which we are engaged is the determination of the general conditions apt to feature in any application of the analytical method.*
- This task is prior to, and importantly distinct from, that of analytically specifying the basic liberties (in the first and second phases of specification).
- 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 understand it, 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.



# RAWLS'S ANALYTICAL DEFINITION OF THE BASIC LIBERTIES

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- 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).
- Necessity to the 'adequate development and the full and informed exercise' of the moral powers is Rawls's first phrase of specification.
- The supplementation of this with the appeal to the two fundamental cases is his 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.

# 3. FROM MODALITY TO PROBABILITY

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# THE PROBLEM WITH NECESSITY

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- For Rawls, a liberty is basic if and only if 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 being able to exercise the moral powers in a full and informed way in the two fundamental cases.
- Following Arnold (2018), the appeal to necessity here is too strong.
- Arnold shows, we think, that the 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.
- This means that Rawls's definition of the basic liberties *under-generates*.

# FREEDOM OF MOVEMENT

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- 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 (2018) 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 very *unlikely* that, under such conditions, every citizen would be able to do this, we agree with Arnold that it does not seem to be *impossible*.



# POSSIBLE SOLUTIONS (THAT WE DON'T FAVOUR) TO THE UNDER-GENERATION PROBLEM

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- Revise the list of liberties to fit the definition.
- We think that this would concede too much, making the list potentially very sparse.
- Give up the appeal to the two fundamental cases (second phase) but retain necessity to the full and informed exercise of the two moral powers (first phase).
- But how then do we account for the significance of liberties in the second phase of specification?

# A PROBABILISTIC PROPOSAL

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*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.*

- This replaces the modal notion in Rawls's account, *necessity*, with the non-modal notion of *probability*.
- This new general condition is apt for deployment in both phases of specification: nothing needs to be added to it to cope with the second phase.
- Adjudication proceeds using probability assessment above the specified threshold of risk.
- That is, we compare the different risk levels to each other so as to measure the relative significance of different particular basic liberties.
- If the absence of a certain liberty would pose a higher risk to the full and informed exercise of the moral powers than another, then the first of these liberties is more significant than the second.

# 4. THE PROBABILISTIC APPROACH: AN OUTSTANDING PROBLEM

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# THE PROBABILISTIC APPROACH UNDER-GENERATES

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- The modal definition is extensionally inadequate because it under-generates when applied in the second phase of specification.
- Unfortunately, the probabilistic approach is also vulnerable to counter-examples that show it to be extensionally inadequate in the same way: it also under-generates in the second phase of specification.
- One such counter-example is the freedom to produce or to consume political satire,.
- We call this 'freedom of political satire'.



# DILEMMA FROM FREEDOM OF POLITICAL SATIRE: FIRST HORN

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- Suppose that any satirical content can be conveyed non-satirically.
- 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.
- (The same content could readily be conveyed non-satirically.)

# DILEMMA FROM FREEDOM OF POLITICAL SATIRE: SECOND HORN

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- Suppose that political satire can include content that is not literally expressible.
- We take it that a piece of political satire, since, for example, it can consist of an image alone, can include rhetorical elements that outstrip reasons.
- Reasons can be stated in literal language,.
- On this horn of the dilemma, not all satirical content can so be stated.
- Thus, a law against political satire cannot be criticized (on this horn of the dilemma) for being a restriction on the free and informed public use of reason.
- On this horn of the dilemma, it is not such a restriction.
- Rather, it is merely a restriction on the use of a specific form of rhetoric.

# DILEMMA'S CONCLUSION & IMPLICATION

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- We argue (in the article) that freedom of political satire is a core area of freedom of (political) speech (and, more widely, of expression), which in turn is a core area of the group of basic liberties that Rawls calls 'political liberties'.
- While any liberalism worthy of the name should count freedom of political satire as a core area of freedom of speech and expression, neither Rawls's modal approach to analytical specification nor the probabilistic approach succeeds in securing it among the list of basic liberties.
- Rather, they both under-generate with respect to it.

# 5. ARBITRARY COERCION & THE PRINCIPLE OF LEGITIMACY

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# WHERE NEXT?

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- 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?
- Progress can be made via appeal to the standard liberal injunction against arbitrary coercion.
- In Rawls's case, this injunction is embodied in a more specific principle that underlies Rawls's political liberalism, namely 'the liberal principle of legitimacy'.
- This 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).

# A NEW, DISJUNCTIVE, GENERAL CONDITION

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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 be arbitrarily coercive: i.e., an arbitrary exercise of political power.

# INTRODUCING (II) IS NOT *AD HOC*

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- Rawls's conception of persons as 'free and equal beings with a liberty to choose' (Rawls 1971: 256), although prior historically to Rawls's version of the principle of legitimacy and to the integration into his theorizing of considerations about the moral powers, underlies (i).
- It also underlies (ii)'s injunction, manifested in Rawls's case by the principle of legitimacy, against arbitrary coercion.
- Rawls's writings clearly show that the principle of legitimacy, which justifies (ii) from a specifically Rawlsian perspective, is rooted in the fundamental ideas of the person (citizen) and of society, the exact two foundational reference points for the moral powers that are mentioned in (i) as well.
- Moreover, there is good reason to read Rawls as 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.

## 6. SOME CONCLUDING REMARKS

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# TO THE CONTROVERSIES ONCE MORE

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- While our proposed approach is motivated by purely analytical considerations, the concept of basic liberty that it involves is more inclusive, in terms of the rights and liberties that fall under it, than is the letter of Rawls's own discussion.
- The case of the freedom of political satire is but one example among many.
- For example, while O'Neill (2008: 41–42) may be right that an element of workplace democracy is not *necessary* to the full and informed exercise of the moral powers this does not settle the question of whether a right to an element of workplace democracy is basic (cf. McLeod 2018).
- The same applies to the *laissez-faire* economic freedoms, such as freedom of contract, that Tomasi (2012a, 2012b) regards as basic liberties.
- The question to ask about each freedom, provided that it is not the case that any legal restriction upon it that did not promote the weighting of liberties in a scheme of liberty would be arbitrarily coercive, is whether its lack would raise above the threshold risk to the full and informed exercise of the moral powers.
- Empirical psychology and social science therefore have even greater roles to play than Rawls thought.

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