

H.L.A. Hart, Scott Soames, and the priority of liberty rights over economic gains

Author: Terence Rajivan Edward

Abstract. This paper responds to material from Scott Soames's wide ranging book *The World Philosophy Made*, material which I am actually tempted to overlook. Soames adds a detail to a criticism H.L.A. Hart makes of John Rawls, but I argue that Soames cannot consistently endorse this criticism, given his acceptance of trickle-down economics and his aspiration to cohere with a dominant strand of right-wing American philosophy.

Draft version: Version 1 (1st July 2022).

Longer introduction: background information. There are books which are written by respected academics but which it is tempting to pretend do not exist. This paper responds to a section of a book which I am tempted to overlook, but on second thought I wonder whether it is better to respond to it. First some background information. John Rawls, in his 1971 canonical text *A Theory of Justice*, recommends that institutions implement two principles, with priority accorded to one. The prioritized principle, namely the liberty principle, gives all adults an equal amount of what Rawls calls "basic liberties" – or all sane adults, or all sane adults who are not imprisoned for crime; beyond ideal circumstances some qualification is needed here. The second principle recommends that major institutions implement fair equality of opportunity and that the economy is organized so that the wealth level of the worst-off group is as high as possible. Prioritization means that there can be no sacrifice of basic liberties for the ends specified by the second principle, for example no reduction of such liberty for improving the economic position of the worst off. The leading Anglophone legal philosopher of the time, H.L.A. Hart, in his 1973 response, argues that

Rawls offers no acceptable grounds for prioritization – that is amongst his many points and fleshed out memorably towards the article’s end. Hart identifies two alternative worst-off positions, one of which involves deprivation of liberty with economic gains a person is indifferent to whereas the other involves liberties but ones which a person would gladly surrender for economic gain, such is their economic deprivation (1973: 554). He thinks Rawls has no grounds for concluding that the rational choice, given his method, is to prefer the latter situation and agree to a system of principles which protects against the former by prioritizing liberty.

The book I wish to discuss – Scott Soames’s *The World Philosophy Made: From Plato to the Digital Age* – seems very much influenced by Hart’s objection at a crucial point. When Soames objects to Rawls at this point, the differences are very subtle. But the book does not refer to Hart here or any earlier contributor who makes broadly the same objection. The book feels easy to read in many places and may be offered to novices in philosophy. Soames acknowledges that some of his points are taken from elsewhere (e.g. 2019: 275). He also lionizes Hart in a later chapter (2019: 303).¹ But he does not let young readers, or readers new to philosophy, know that what he says is a development of earlier material. I would not say that the objection is sufficiently obvious that he can get away with that. This example and others like it incline me to just ignore the text – “His referencing is below minimal standards” – but Soames adds to Hart’s objection and I wonder whether it is a bad idea to just ignore Soames on this matter.

¹ “Thanks to H.L.A. Hart, who is widely recognized as the leading philosopher of law in the last century...” (2019: 303). Compare: “H.L.A. Hart was, without question, one of the two greatest twentieth-century exponents of the position known as “legal positivism” (the other great legal positivist was Hans Kelsen).” (Simmonds 2013: 145) Great, but widely ranked second or below? I doubt that. Also: “I want to show that Hart’s theory of law takes Kelsen’s foundation to its reasonable conclusions, relying on some of Kelsen’s best insights but amending them in some crucial respects.” (Marmor 2011: 35)

As I understand him, Soames thinks that, within Rawls's model for selecting principles, a person who prioritizes liberty is not making a mistake, but nor is a person who prioritizes economy:

But it's also not unreasonable to sacrifice principle (i), ensuring maximum individual liberty for all, if doing so would mitigate the misery one would suffer if one were badly enough off. Thus, it's hard to make the case that those in the original position would choose both (i) and (ii). Perhaps they would choose (ii) while swapping (i) for a principle that merely outlawed slavery.

(2019: 270)

Compare this with the specification of alternative worst off positions A and B at the top of Hart's page 554 followed by commentary. What Soames adds is this detail: individuals who are contemplating a principle which delivers them economic gains over prioritizing liberties can "accommodate" the case for prioritizing basic liberties. The case in brief rhetorical terms is "aren't these liberties just very important for every individual, whatever their plan in life?" The response is to absorb or partly absorb the consideration in favour of prioritizing basic liberties by means of a less liberal principle, which merely outlaws slavery (or non-consensual slavery, I presume). "What is irrational about that combination?" is the question Soames poses, or a question. I shall raise two problems of consistency for him.

Not slavery? Soames's proposal depends on an assumption:

(Distinctness assumption) There is a principle which is distinct from Rawls's liberty principle which merely outlaws non-consensual slavery.

Here is the rough list of basic liberties, which Hart repeats: the right to vote and be eligible for public office, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person, along with the right to hold personal property, and freedom

from arbitrary arrest and seizure (1973: 539). So the assumption is that we can avoid a principle giving equal liberties of these kinds and yet implement a principle outlawing slavery. Soames aims to be in line with the dominant strands of right-wing American political philosophy, but at least one strand expands our sense of when one is a slave.² Extending its spirit: if I have no right to vote and have to abide by the policies voted for by others and a policy is introduced that I cannot enter parks, and police will arrest me if I do, then how am I different from a slave ordered by a master not to enter a park and physically punished if I do? I presume this strand would regard me as a slave in this situation as well. The space Soames is trying to occupy does not exist, from this dominant perspective.

Nevertheless, there is a point in Soames's favour. Soames is writing a few years after the strange American election campaigns featuring Donald Trump, Hillary Clinton, and Bernie Sanders. I think it makes sense for some philosopher of extreme right or left-wing sympathies, faced with such campaigns, to look into the system Soames briefly envisages, because of the number of people who think, "The system of rights in place protects all these liberties, but I have got no work and not much money, and I want to work and economic gains would mean a lot to me." If the mainstream specialist political philosopher does not respond to such people, others will: "You need work, you need money. I am the philosopher who is going to start formulating that position for you, in a way that connects it with mainstream currents of American thought, and helps you out with accessible books like this."

² Robert Nozick's claim that taxation is on a par with forced labour is a notable example within the analytic tradition (1974: 169). Well, he does not say that such forced labour is slavery, but I presume he would have agreed. Also "Some tax protestors argue that the 16th Amendment to the Constitution, which authorized the personal income tax in 1913, was improperly ratified or otherwise invalid. You can find many of these people in jail." (Burman and Slemrod 2020: 28-29)

(It sounds like no great moment of inspiration, but working out the liberty-reducing details is difficult.³)

Trickle-down economics. Using Rawls’s method, people who are deciding on principles institutions should abide by are supposed to be responsive to knowledge from the social sciences (1999: 119). But what knowledge? Here is Soames later introducing some knowledge, or what he regards as knowledge:

Finally, Rawls cannot escape Hayek’s dilemma: any attempt to improve the material standard of living of the least well off by limiting the liberty of the most productive members of society is likely, in the long run, to lower everyone’s standard of living. (2019: 275)

Now presumably the holder of this economic theory does not want to single out some individuals and say, “You are more productive, so you get more liberty,” and others and say, “You are less productive, so you get less.” So if this is one’s economic theory, then it is rational to prefer that all adult individuals have a set of basic liberties because the eventual result will be more productivity and innovation and the benefits will trickle down to the worst-off. Some individual has a thought of the form, “There is a demand for X. I shall supply X and get rich,” and soon others benefit. It would be irrational, within this economic outlook, to choose a system of less liberty that explicitly aims to ensure that the wealth of the worst-off level is as high as possible, because it is a system of basic liberties which allows a country to achieve that economic end. If anything, a basic liberty would be explicitly added to Rawls’s rough list, should it not be already entailed: the right to trade. How can Soames assert that it is rational in the circumstances of principle choice Rawls envisages to reduce

³ Soames does not greatly emphasize the material I have discussed, nor does a helpful reviewer (Purdy 2020), but I would, for providing an apparent glimpse at the details: this... from the original position.

liberty for economic gains? Don't the role of social science knowledge and what Soames takes as knowledge block this?

Conclusion. When proposing an alternative rational option given Rawls's method, Soames makes significant oversights, in light of the larger bodies of thought he aims for compatibility with. On the economic side, he either overlooks how Rawls's aspiration of improving the economic condition of the worst off is responded to with, "We already achieve that as best we can within a system that prioritizes individual liberty and nothing else" (see Reiff 2012), or overlooks how this response should figure in Rawls's method for deciding on institutional principles, assuming it is correct. The proposal Soames presents, of replacing the liberty principle with merely outlawing slavery and improving the wealth of the worst off, is inconsistent with a dominant strand of American right-wing philosophy as well, which expands our conception of when one is a slave, though it fits with the circumstances of the time. A tantalizing detail has been added beyond what Hart says, but what is the economics required so that this makes sense and what philosophy of slavery? (Components from aristocracy? "Where've you been? Forget about your liberty. You're poor. You come in and we'll take care of you." "Why is there no one else here?")

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