

Part III

A Theory of Justice

The Priority of Liberty

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1. Introduction

The first priority rule (the priority of liberty) of justice as fairness reads as follows: “the principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty” (*TJ*, 266). The basic liberties are those commonly protected by liberal constitutional regimes, including “freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person . . . ; the right to hold personal property and freedom from arbitrary arrest and seizure . . .” (*TJ*, 53). The priority of liberty regards these basic liberties as paramount and forbids their sacrifice for the sake of efficiency, utilitarian and perfectionist ideals, or even the other principles within justice as fairness (*viz.* fair equality of opportunity (FEO) and the difference principle (DP)), regardless of the size of the benefits that might obtain as a consequence of such sacrifice.

Two examples will illustrate the force of this priority *vis-à-vis* the two subordinate principles of justice. Suppose that a law is proposed to punish (maybe only with fines) advocacy of racially and sexually bigoted doctrines on the grounds that their spread would hinder the implementation of FEO: the dissemination of such doctrines in a population – especially among employers – may hamper the matching of people and their talents with appropriate jobs in the basic structure. Such a law would clearly violate the priority of liberty, as liberty can be sacrificed only for the sake of liberty, and would therefore be ruled out.¹ Now suppose that a law is offered to punish advocacy of ascetic or antimaterialist doctrines (e.g., the teachings of Jesus in the Gospels) on the grounds that their widespread adoption would effectively undermine the DP’s mandate: were such ideas to gain in popularity, economic trade and production would likely diminish and fewer resources would therefore be available to redistribute to the least advantaged members of society. Again, if the equal-liberty principle is lexically prior to the DP, such a law must be rejected.

The priority of liberty has always played a central role in Rawls’s political theory. Rawls notes that “the force of justice as fairness would appear to arise from two things: the

requirement that all inequalities be justified to the least advantaged [the DP], and the priority of liberty. This pair of constraints distinguishes it from intuitionism and teleological theories” (TJ, 220). As we shall see, its importance in his work has if anything increased over time. Part of the reason for this greater prominence is Rawls’s growing ambivalence about the other distinctive elements of his political theory, especially the lexical priority of FEO and the DP.² In the absence of the former element, the priority of liberty would be the chief thing preventing the special conception of justice from collapsing into the general conception, in which all social primary goods (and presumably the interests they support) are lumped together. Rawls is deeply opposed, however, to the notion that “all human interests are commensurable, and that between any two there always exists some rate of exchange in terms of which it is rational to balance the protection of one against the protection of the other,” and anything short of lexical priority for the basic liberties would countenance such trade-offs under certain circumstances (PL, 312).

This central component of justice as fairness has been criticized in a long line of articles, including works by Kenneth Arrow, Brian Barry, Norman Daniels, H.L.A. Hart, Russell Keat and David Miller, and Henry Shue.³ All of these authors have found Rawls’s defense of the priority of liberty deficient in some respects, and many of them have been sharply critical of the very idea of lexical priority for basic liberties. Barry considers it “outlandishly extreme” (1973, 276), while Hart deems it “dogmatic” (1989, 252; see also Arneson 2000, 240–241). In section 2 of this chapter, I will review Rawls’s three arguments for the priority of liberty in *Theory* and argue that two of them do indeed fail (either in whole or in part) because of two types of error. One is Rawls’s conviction that once he has shown the instrumental value of the basic liberties for some essential purpose (e.g., securing self-respect), he has automatically shown the reason for their lexical priority. I will refer to this conviction – specifically, that the *lexical* priority of the basic liberties can be inferred from the *high* priority of the interests that they serve – as the “inference fallacy.” The other kind of error arises because although the interest in question may have the necessary priority, the basic liberties are not *requisite* for its protection but merely *strongly contributory* toward it. Lexical priority is such a stringent condition that a special form of justification will be necessary for its defense.

As I will also demonstrate, though, Rawls’s third argument for the priority of liberty does not commit either of these two errors. This defense, which I will call the “hierarchy argument,” suggests that the priority of liberty flows immediately from a certain conception of free persons. Unfortunately, the argument as presented in Rawls’s work is radically incomplete, leaving a number of important questions unanswered. In section 3, therefore, I present a partial reconstruction of the hierarchy argument, showing that it can offer a compelling and attractive defense of the priority of liberty. This reconstruction explains our highest-order interest in rationality, justifies the lexical priority of all basic liberties, and reinterprets the threshold condition for the application of the priority of liberty. What had perhaps previously seemed a peculiarly disproportionate concern for the basic liberties is shown to follow quite naturally from a Kantian conception of the person.

Having demonstrated this, I turn in section 4 to an apparent problem with the scope of the hierarchy argument: it does not offer a particularly compelling defense of the priority of the basic *political* liberties, including the rights to vote and hold public office. I suggest there a solution to this problem relying upon Rawls’s scattered comments on the (hierarchical)

relationship between our highest-order interests in reasonableness and rationality respectively, though this solution calls into question Rawls's claim that the political and civil liberties are "of equal weight . . . with neither externally imposed on the other" and is consequentially revisionist in nature (*PL*, 412). I conclude the chapter by considering the implications of the priority of liberty for the American practice of civil libertarianism.

2. Three Arguments for the Priority of Liberty in *Theory*

In this section, I will examine Rawls's three arguments for the lexical priority of liberty found in the revised edition of *Theory*.⁴ In the first of these three, which I will label the "self-respect argument," Rawls maintains that the priority of the (equal) basic liberties is needed to secure equal citizenship, which is itself a prerequisite for self-respect. In the second, which I will call the "equal liberty of conscience argument," Rawls argues that the integrity of our religious beliefs (and, by extension, of our moral and philosophical ones) is of such importance that liberty of conscience (and, by extension, other basic liberties) must be given lexical priority. Finally, in what I will refer to as the "hierarchy argument," Rawls maintains that the lexical priority of the basic liberties is justified by the lexical priority of a particular interest that they protect – namely, our interest in choosing our final ends under conditions of freedom. I will argue that the first and second arguments suffer from the two errors discussed above (although the second can be given a narrow construction that rescues it from the charge) but that the third argument avoids them and can therefore serve as the basis for a reconstructed defense of the priority of liberty.

2.1 *The Self-Respect Argument*

In §67 of *Theory*, Rawls says that self-respect is "perhaps the most important primary good": without it, we will doubt our own value, the value of our plan of life, and our ability to carry it out, and we will therefore be susceptible to the siren call of "apathy and cynicism" (*TJ*, 386; cf. *PL*, 318–320). In §82 of *Theory*, as a prelude to the self-respect argument, Rawls goes on to note how self-respect is tightly linked to status, that is, to our positions in social hierarchies. Because even a just society will be characterized by various kinds of inequalities (e.g., income differentials) that might erode the self-respect of the poorly ranked, any society concerned with securing self-respect for all of its citizens must affirm equality of status along a key dimension. Rawls believes political equality, or "equal citizenship," can serve this purpose, especially when socioeconomic inequalities are kept within reasonable bounds by "just background institutions" reflecting FEO and the DP (*TJ*, 478).⁵

What is required for "equal citizenship," however? Rawls contends that equality in the provision of basic liberties is a necessary condition for equal citizenship and that such equality therefore provides a secure ground for self-respect: "the basis for self-respect in a just society is the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society" (*TJ*, 477). Rawls persuasively argues that citizens in a just society could never consent to less than equal basic liberties, as "this subordinate ranking in public life would be humiliating and destructive of self-esteem" (*TJ*, 477). A status

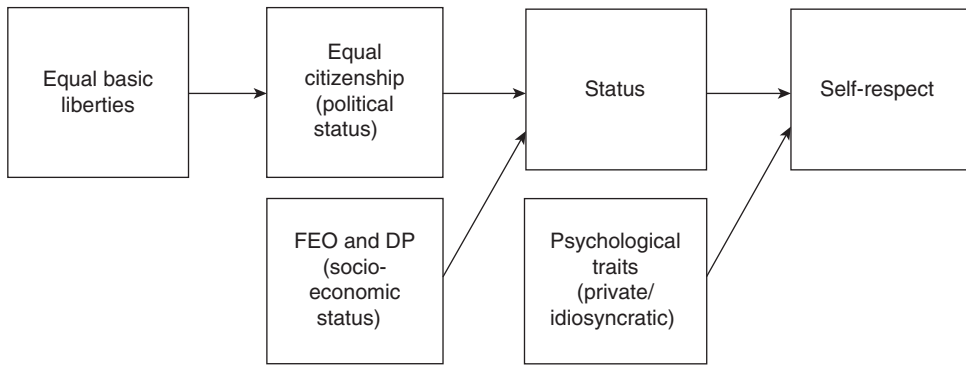


Figure 8.1 The self-respect argument

inequality explicitly defined and enforced by the state would likely have a more devastating effect on self-respect than a socioeconomic inequality that emerges via a process merely superintended by the state. A self-respecting citizenry thus requires equal basic liberties. I summarize this multistage argument in Figure 8.1.

Up to this point, Rawls has said nothing about the priority of the basic liberties; rather, he has focused exclusively on their equal provision. Only at the end of his main presentation of the self-respect argument does he mention the priority of liberty:

when it is the position of equal citizenship that answers to the need for status, the precedence of the equal liberties becomes all the more necessary. Having chosen a conception of justice that tries to eliminate the significance of relative economic and social advantages as supports for men's self-confidence, it is essential that the priority of liberty be firmly maintained. (*TJ*, 478)

This passage provides a good illustration of what I earlier called the “inference fallacy”: Rawls tries to derive the lexical priority of the basic liberties from the central importance of an interest that they support – in this case, an interest in securing self-respect for all citizens. Without question, the self-respect argument makes a very strong case for assigning the basic liberties a *high* priority; otherwise, socioeconomic inequalities might reemerge as the primary determinants of status and therefore self-respect. What it does not explain, however, is why *lexical* priority is needed. Why, for instance, would minor restraints on the basic liberties threaten the social basis of self-respect, so long as they were equally applied to all citizens? One example might be punishing Holocaust denial for the sake of political stability. Such a restriction would involve no subordination and, being very small, would be unlikely to jeopardize the central importance of equal citizenship as a determinant of status.

Even if such minor restrictions were ruled out as too risky, we would still need to ask why self-respect is of such overwhelming importance that its social basis, an equal distribution of the basic liberties, must be given lexical priority. As noted above, Rawls maintains in §67 of *Theory* that self-respect is “perhaps the most important primary good,” but he does not explain why this particular primary good should trump all others. As we shall see in the third subsection, the only way to justify something as strong as lexical priority for the basic liberties is to justify lexical priority for the interest they support, that is, assigning of such weight to

an interest that it cannot be traded off for any other interest, no matter how high the rate of exchange. Securing self-respect for all citizens might be such an interest, but Rawls's arguments do not show why.

2.2 *The Equal Liberty of Conscience Argument*

In §26 of *Theory*, Rawls contends that free persons have certain “fundamental interests” that they must secure through the priority of liberty:

I assume that the parties [in the original position, or OP] view themselves as free persons who have *fundamental aims and interests* in the name of which they think it legitimate for them to make claims on one another concerning the design of the basic structure of society. The *religious interest* is a familiar historical example; the interest in the integrity of the person is another. In the original position the parties do not know what particular forms these interests take; but they do assume that they have such interests and that the basic liberties necessary for their protection are guaranteed by the first principle. *Since they must secure these interests, they rank the first principle prior to the second.* (*TJ*, 131, emphasis added; cf. *PL*, 310–312)

Later, in *Theory* §33, Rawls further develops this argument with respect to the religious interest, among others. He explains the importance of this interest and the equal liberty of conscience that protects it as follows:

The parties [in the OP] must assume that they may have moral, religious, or philosophical interests which they cannot put in jeopardy unless there is no alternative. One might say that they regard themselves as having moral or religious obligations which they must keep themselves free to honor . . . They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes . . . To gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs. (*TJ*, 180–181)

We might view this argument as simply another illustration of the inference fallacy: Rawls tries to derive the lexical priority of equal liberty of conscience from the fundamental importance of the interest it supports – *viz.* an interest in examining and subscribing to certain philosophical, moral, and religious beliefs. The central importance of this interest is insufficient, however, to establish the lexical priority of the liberty that supports it: one might “highly value” this interest yet still endorse small sacrifices of equal liberty of conscience and the interest it protects if such sacrifices were necessary to advance other highly valued interests. Only if the interest had lexical priority over all other interests could such trade-offs be categorically ruled out.

We can, however, interpret Rawls's argument in another way. The passages just quoted are larded with the language of compulsion: “must secure,” “cannot put in jeopardy,” “cannot take chances,” etc. Also, when discussing the same issue in §82 of *Theory*, Rawls says that “in order to secure their unknown but particular interests from the original position, they [the parties in the OP] are led, *in view of the strains of commitment* (§29), to give precedence to basic liberties” (*TJ*, 475, emphasis added). Perhaps Rawls's argument here is best understood as follows: the parties in the original position, given their general knowledge of human psychology, must avoid committing to political principles whose outcomes they might not be

able to accept; political principles that place fundamental interests (such as the religious interest) at even the slightest risk, by refusing lexical priority to the liberties that protect them, make the strains of commitment intolerable.

This argument seems especially powerful with regard to the religious interest. Religious persons have faith that their religious duties (e.g., acceptance of a creed, participation in certain ceremonies, etc.) are divinely mandated and that a failure to abide by these commitments may lead to divine retribution, even eternal damnation. If the parties in the original position agree to anything less exacting than the lexical priority of equal liberty of conscience, they may emerge from behind the veil of ignorance to discover that their own religious beliefs and practices have been put in jeopardy by discriminatory legislation and that they are psychologically incapable of abiding by such legislation due to an overriding fear of supernatural punishment.

This strains-of-commitment argument provides strong support for the lexical priority of equal liberty of conscience as applied to religion. Does it, however, extend to philosophical and moral commitments as well, as Rawls claims in §33 of *Theory*? Although one can point to a few important historical examples of people who were either incapable or unwilling to abide by laws that discriminated against their philosophical and moral beliefs (e.g., Galileo and Socrates), these cases are celebrated precisely because of their rarity: religious martyrs are far more common than philosophical or moral ones, as we have become uncomfortably aware in the wake of September 11 and with the spread of suicide bombing as a tactic of Islamic terrorists. Therefore, the strains-of-commitment argument, if it applies to moral and philosophical beliefs at all, is less compelling than in the case of religious belief.⁶

What of Rawls's additional claim in §33 of *Theory* that "the reasoning in this case [i.e., equal liberty of conscience] can be generalized to apply to other freedoms, *although not always with the same force*" (*TJ*, 181, emphasis added)? In some cases, this claim seems justified. Consider, for instance, Rawls's own example of "the rights defining the integrity of the person" (mentioned along with liberty of conscience in §39) (*TJ*, 217; cf. *TJ*, 53, 131). If something less than lexical priority for these rights were agreed to by the parties in the OP, they might again come out from behind the veil of ignorance to discover that their fundamental interest in bodily integrity had been jeopardized by legislation implementing, for example, compulsory live-donor organ harvesting or some radically egalitarian "slavery of the talented" for the benefit of the poor (e.g., heavy head taxes) – legislation that they might be hard pressed to obey. In other cases, though, this strains-of-commitment argument appears less compelling, as Rawls himself admits in the above quotation. Consider, for example, freedom of speech. Were freedom of speech given less than lexical priority, would the speech-curbing laws that might result lead to intolerable strains of commitment? Perhaps, though the not insubstantial variation in such legislation across stable liberal democracies (e.g., laws that check pornography, obscenity, Holocaust or Armenian-genocide denial, advocacy of race and religious hatreds, etc.) suggests otherwise. Even laws that would violate *core* protections of *political* speech on virtually anyone's understanding – for instance, restrictions on advocacy of the peaceful nationalization of industry – might not cause unbearably severe commitment strains. Parties in the original position, aware of the possible benefits of allowing such restrictions (for, say, political stability or solidarity), would be unlikely to tie the hands of agents in later stages of the four-stage sequence by assigning infinite weight to these liberties vis-à-vis other social primary goods – at least not for the reasons given here.

In summary, the strains-of-commitment interpretation of the equal liberty of conscience argument provides strong support for the lexical priority of certain basic liberties (e.g., religious liberty and the rights protecting integrity of the person) but weaker support for others (e.g., moral or philosophical liberty of conscience and freedom of speech). This result may not be especially surprising: there is no reason why the psychological strains of obeying laws that encroach upon fundamental interests should be same for each of these interests – some interests, after all, might be more fundamental than others. Hence, this interpretation of the equal liberty of conscience argument cannot by itself provide the desired support for the priority of liberty. What is needed is a defense of the priority of liberty that can justify the lexical priority of *all* basic liberties, not merely the subset whose violation creates intolerable commitment strains. Fortunately, Rawls's third argument for the priority of liberty points the way toward such a defense.

2.3 *The Hierarchy Argument*

Rawls initially presents the hierarchy argument in §§26 and 82 of *Theory*. He begins in §26 by distinguishing what he calls a “highest-order interest” from the fundamental interests that I discussed in the last subsection and by linking the former to the priority of liberty:

Very roughly the parties [in the OP] regard themselves as having a *highest-order interest* in how all their other interests, *including even their fundamental ones*, are shaped and regulated by social institutions. They do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests that they may have at any given time, although they want the right to advance such interests . . . *Rather, free persons conceive themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in these matters.* (*TJ*, 131–132, emphasis added)

Rawls identifies here what he later calls a “hierarchy of interests” for free persons. Our highest-order interest (or that of our OP representatives) is in shaping our other interests, including our fundamental ones, under conditions of freedom, which we therefore assign “first priority”; this interest is identical to the highest-order interest in the development and exercise of our second moral power of rationality (*CP*, 312). Our fundamental interests, including both our religious interest and our interest in integrity of the person, come second; they are best regarded as components of the higher-order interest in “protecting and advancing [our] conception of the good,” as fundamental interests are likely to be preconditions or even constituents of these conceptions (*CP*, 313). Rawls spells out the implications of the above passage more clearly in §82:

Thus the persons in the original position are moved by a certain *hierarchy of interests*. They must first secure their highest-order interest and fundamental aims (only the general form of which is known to them), and this fact is reflected in the precedence they give to liberty; the acquisition of means that enable them to advance their other desires and ends has a subordinate place. (*TJ*, 476, emphasis added)

Thus, the lexical priority of basic liberties over other social primary goods (“means that enable them to advance their other desires and ends”) can be justified by a hierarchy of interests: the highest-order interest in choosing our ends in freedom takes lexical priority

(“they must first secure . . .”) over an interest in advancing those ends – an interest that is secured by FEO and the DP, which provide various kinds of resources (jobs, income, etc.) for this very purpose.

In short, the hierarchy argument tries to justify a hierarchy of goods (basic liberties over other social primary goods) with a hierarchy of interests (a highest-order interest in free choice of ends over an interest in advancing those ends). Notice how this argument deftly avoids the inference-fallacy objection: by asserting the *lexical* priority of our highest-order interest in the free choice of ends, Rawls is able to defend the lexical priority of the basic liberties that are its indispensable support. The hierarchy argument seems to be a promising approach to justifying the priority of liberty.

This argument also serves as one of the key defenses of the priority of liberty in *Political Liberalism* (PL, 312–314, 335).⁷ Rawls argues there that our highest-order interest in the development and exercise of rationality – both as a means to our conception of the good and as a constituent of it – must be supported by a set of basic liberties, including liberty of conscience and freedom of association. Apart from noting that liberty of conscience allows us to “fall into error and make mistakes” and thereby learn and grow as rational actors, Rawls spends little time connecting the basic liberties to this highest-order interest, nor does he really explain the underlying hierarchy of interests.

Several important questions therefore arise at this point. First, what is the exact nature of this highest-order interest, and why are some basic liberties crucial for its support? Second, what justifies the asserted hierarchy of interests? To put the question more sharply: does the hierarchy argument simply kick the problem of defending the priority of liberty up one level of abstraction (from goods to interests) without actually solving it? Third, are there goods other than the basic liberties that are indispensable buttresses for our highest-order interest (e.g., literature comparing religious faiths, which is surely necessary for intelligent “free exercise”) and, if so, does this fact undermine the hierarchy argument? Rawls does not adequately address any of these questions, yet they must be answered for the hierarchy argument to be considered a full success.

In the next section, I show that all of these questions can be answered within the context of Rawls’s political theory. To do so, however, I must demonstrate that our highest-order interest in the development and exercise of rationality follows naturally from the Kantian commitment to autonomy that Rawls expresses in *Theory* §40, that the basic liberties are essential institutional supports for this interest, and that the priority of liberty becomes effective only if sufficient material means are available to sustain our exercise of rationality.

3. A Kantian Reconstruction of the Hierarchy Argument

3.1 *Rationality as a Form of Autonomy*

Rawls defines the second moral power of rationality as the “capacity to form, to revise, and rationally to pursue a conception of the good” (CP, 312). He associates the successful execution of a plan of life, which implements our conception of the good, with happiness, and he argues that the rational pursuit of it must be consistent with principles of deliberative rationality, including “the adoption of effective means to ends; the balancing of final ends by

their significance for our plan of life as a whole and by the extent to which these ends cohere and support each other; and finally, the assigning of a greater weight to the more likely consequences" (*TJ*, 359–360; *CP*, 316; cf. *TJ*, §64). The formation and revision of a plan of life, on the other hand, is the creative side of the moral power of rationality. Though it involves working with our current set of aims, interests, and desires, Rawls stresses that these elements of our conception of the good are subject to rational adherence, alteration, and even rejection; in other words, the moral power of rationality makes us the ultimate authors of our identity:

The aim of deliberation is to find that plan which best organizes our activities and influences the formation of our subsequent wants so that our aims and interests can be fruitfully combined into one scheme of conduct. Desires that tend to interfere with other ends, or which undermine the capacity for other activities, are weeded out; whereas those that are enjoyable in themselves and support other aims as well are encouraged (*TJ*, 360–361).

Far from taking the elements of our plan of life as givens, Rawls's understanding of rationality requires us to harmonize them by trimming some and nurturing others. Exercising rationality is like tending our garden: we must work with the vegetation at hand according to certain rules, but over time we can change its composition and redirect its growth to achieve particular aesthetic or utilitarian objectives. Thus, Rawls's second moral power of rationality, which unites deliberative rationality with creative self-authorship, is simply a variation on the contemporary concept of *personal* autonomy.

This self-authorship links rationality (so understood) to Kantian *moral* autonomy, which Rawls endorses in *Theory* §40. He says there that agents in the original position "must decide . . . which principles when consciously followed and acted upon in everyday life will . . . most fully reveal their independence from natural contingencies and social accident" (*TJ*, 225). Just as one aspect of our autonomy (the first moral power of reasonableness) is the distancing from our immediate desires that is involved in acting on such principles, so another aspect (the second moral power of rationality) is the less radical distancing involved in scheduling, prioritizing, tempering, and pruning these desires in accordance with a plan of life. Both moral powers are facets of our autonomy, of our ability to detach ourselves from and reflect critically upon our desires as a prelude to self-legislation, be it moral or prudential. Failing to achieve such detachment and critical reflection is acting "as though we belonged to a lower order [of animals], as though we were a creature whose first principles are decided by natural contingencies" rather than by moral law or a plan of life; such failure is a source of shame for rational beings, which shows why our interest in maintaining such rationality must never be sacrificed for the sake of other interests (*TJ*, 225).⁸

3.2 *Basic Liberties as Indispensable Supports for Rationality*

Why does this highest-order interest in rationality and its preconditions justify something as extreme as the lexical priority of the basic liberties over other social primary goods? In short, these basic liberties are the indispensable conditions for the development and exercise of rationality, which is why agents in the OP "give first priority to preserving [our] liberty in these matters" (*TJ*, 131–132). If the parties in the OP sacrificed basic liberties for the sake of lower social primary goods (i.e., the "means that enable them to advance their other desires

and ends”), they would be sacrificing their highest-order interest in rationality and thereby failing to express their trustors’ nature as autonomous beings (*TJ*, 476, 493).

A concise examination of the basic liberties enumerated by Rawls will indicate why they are necessary conditions for the exercise of rationality. The freedoms of speech and assembly, liberty of conscience, and freedom of thought are *directly* supportive of the creation and revision of plans of life: without secure rights to explore ideas and beliefs with others (be it in person or through various media) and consider these at our leisure, we would be unable to make informed decisions about our conception of the good. Freedom of the person (including psychological and bodily integrity), as well as the right to personal property and immunity from arbitrary arrest and seizure, are *indirectly* supportive of rationality, as they create stable and safe personal spaces for purposes of reflection and communication, without which the free design and revision of plans of life would be compromised if not crippled. Even minor restrictions on these basic liberties would threaten the highest-order interest in rationality, however slightly, and such a threat is disallowed given the absolute priority of this interest over lower concerns. Note also that lexical priority can be justified here for all basic liberties, not just a subset of them (as was the case with the strains-of-commitment interpretation of the equal liberty of conscience argument) (*TJ*, 53).⁹

In order for these basic liberties to be truly indispensable, though, it must be the case that no compensating measures can be taken to sustain our exercise of rationality if we trade off basic liberties for lower goods; otherwise, the basic liberties lack the requisite priority. The possibility and desirability of such trade-offs vary across the two categories of basic liberties. The directly supportive basic liberties are indeed indispensable, at least along some dimensions. For example, free speech is usually consistent with so-called “time, place, and manner restrictions” because compensating measures, like additional funding for relevant media or other forums, are possible. However, it is inconsistent with content controls because, by hindering the discussion of certain topics, they reduce our ability to make informed judgments regarding them and thereby illicitly restrict our exercise of rationality. Any compensating measures that are proposed would have to either subvert the original controls or aid discussion of other, uncontrolled topics, but the latter approach would be beside the point, as a broad conception of rationality requires that all topics be open for discussion. Each and every parameter of a discussion, including especially its scope, must be revisable *from within* for a discussion to be deemed autonomous; no amount of aid can remove the stain of the original intervention, which taints all subsequent discussion and forever colors any revisions to life plans that result.

The indirectly supportive basic liberties, on the other hand, are more difficult to defend as indispensable, as compensated trade-offs would surely be possible under some circumstances. For example, a modest increase in the probability of arbitrary arrest (the result of, say, a money-saving reduction in criminal-procedural protections) might be made “rationality neutral” with an across-the-board boost to media subsidies – assuming, of course, that this increased probability of arrest were uncorrelated with one’s selection of discussion topics. Still, a *minimal* provision of psychological and physical security is surely required for personally autonomous creation and revision of plans of life: for example, the continual, looming threat of violent death due to civil unrest or unchecked criminality would make the full exercise of rationality difficult, even if various compensating measures were taken. Beyond mandating a basic minimum, though, the parties in the original position are not able to say much more (due to the possibility of compensated trade-offs) and must consequently defer

to the judgment of those later in the four-stage sequence, who will know more about their particular societies and therefore be in a better position to judge such trade-offs.

One problem with both the reconstructed hierarchy argument and its original version, as I implied at the end of the last section, is that goods other than the basic liberties are necessary to support our highest-order interest in rationality. For example, while freedom of speech is indeed essential for the creation and revision of plans of life, so are those material goods that make this freedom effective, including assembly halls, street corners, megaphones, soapboxes, etc.; much the same could be said of other basic liberties. One potential solution to this problem would be to redefine the priority of liberty so that it supported the lexical priority of basic liberties over other goods *only when those goods were not needed to uphold the highest-order interest in rationality*. I offer a more elegant solution in the following subsection. This solution has the added advantage of elucidating the meaning of Rawls's threshold condition for the application of the priority of liberty.

3.3 *An Interpretation of the Threshold Condition for Applying the Priority of Liberty*

Rawls notes on several occasions in *Theory* that the priority of liberty comes into effect only when certain conditions are realized. For example, he begins *Theory* §82 with the following observation:

I have supposed that if the persons in the original position know that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for greater economic advantages (§26). It is only when social conditions do not allow the full establishment of these rights that one can acknowledge their restriction. The equal liberties can be denied only when it is necessary to change the quality of civilization so that in due course everyone can enjoy these freedoms. The effective realization of all these liberties in a well-ordered society is the long-run tendency of the two principles and rules of priority when they are consistently followed under reasonably favorable conditions. (*TJ*, 474–475)

His other discussions of the threshold condition in *Theory* provide little additional information, though later in §82 he adds a “degree of fulfillment of needs and material wants” to the social conditions that must be met before the priority of liberty can come into effect (*TJ*, 476; cf. *TJ*, 54–55, 132; and *PL*, 7).¹⁰

Rawls's description of the threshold condition can be interpreted in at least three different ways, each of which is inclusive of (and therefore more stringent than) the ones preceding it:

- 1 *Formal threshold* Before the priority of liberty can apply, a society must have achieved a level of wealth sufficient for it to maintain a legal system with courts, police, etc., that can define and protect the basic liberties of citizens within the bounds of the rule of law.
- 2 *Weak substantive threshold* Before the priority of liberty can apply, a society must have achieved a level of wealth sufficient for it to allow its citizens to engage in the meaningful *formation* of life plans. For example, citizens must have access to media, public forums, and schools and must have sufficient leisure time to make use of these resources and reflect on their plans.

- 3 *Strong substantive threshold* Before the priority of liberty can apply, a society must have achieved a level of wealth sufficient for it to allow its citizens to engage in the meaningful *advancement* of life plans. For example, citizens must have access to professional training, start-up funds for businesses, grants for artistic, literary, and scientific projects, etc.

Two implications of the reconstructed hierarchy argument are clear. First, at least the formal threshold must be met before the priority of liberty can apply: the priority of liberty would be meaningless in a society that could not even establish the basic liberties themselves due to social and economic conditions. All arguments for the priority of liberty, including the reconstructed one on offer here, must take feasibility into account. Second, the strong substantive threshold must be ruled out. Once the weak substantive threshold is met, our highest-order interest in rationality can be fully satisfied, as all of its necessary conditions (including the basic liberties and any other social primary goods essential for its exercise) are then in place. Any threshold more stringent than this one, including the strong substantive threshold, in effect sacrifices the basic liberties and the highest-order interest they protect for the sake of advancing, not forming, our plans of life, but such sacrifice is forbidden by the reconstructed hierarchy argument. In sum, no threshold less stringent than the formal one or more stringent than the weak substantive one can be justified by this argument for the priority of liberty.

Now consider the choice between the formal and weak substantive thresholds: can the reconstructed hierarchy argument justify violations of the priority of liberty if needed to move society to a level of wealth where the formation of life plans is meaningful? Once we recognize that the only function of the basic liberties is to advance our highest-order interest in rationality, the answer becomes clear: if the violation of the basic liberties is the best means to advance the interest that they serve, then the priority of liberty must be temporarily set aside. To insist upon the imposition of the priority of liberty under such circumstances would be to fetishize the basic liberties. I thus conclude that the reconstructed hierarchy argument requires a weak substantive threshold for the application of the priority of liberty.

Note how this interpretation of the threshold condition solves the problem discussed at the end of the last subsection. Rather than modifying the definition of the priority of liberty, we can simply stipulate that its implementation be delayed until all social primary goods necessary for the advancement of the highest-order interest in rationality can be made available. Once this threshold is reached, however, basic liberties can no longer be sacrificed for lower social primary goods. Thus, the reconstructed hierarchy argument, in addition to offering a strong defense of the priority of liberty, clarifies the meaning of the threshold condition for its application.

We have now completed the reconstruction of the hierarchy argument. At the end of the last section we asked a number of questions about the original argument, all of which have now been answered. We have explicated our highest-order interest in preserving both rationality and the conditions of its exercise, which include basic liberties first and foremost. We have seen that the exalted position that this interest holds in our hierarchy of interests is justified by rationality's intimate connection to Kantian moral autonomy. Finally, we have learned that the contribution of social primary goods other than basic liberties to this highest-order interest does not weaken the argument for the priority of liberty but rather strengthens our understanding of the threshold condition for its application.

4. The Special Status of the Political Liberties

Careful readers will notice that I have avoided discussing the basic *political* liberties, including the rights to vote and hold public office. I have done so because the hierarchy argument does not provide a compelling defense of their lexical priority, as they are not necessary conditions for the development and exercise of our rationality but rather means for pursuing one kind of rationally chosen end, *viz.* political engagement. If the political liberties are instrumentally valuable in the defense of the other basic liberties, however, we can build a second-order defense of their lexical priority as an extension of the hierarchy argument: if the rights to vote and hold public office are essential protections for the other basic liberties, because they empower citizens to replace rulers who abuse those liberties, then they must also receive lexical priority as the necessary conditions of the necessary conditions (the *civil* liberties) of the development and exercise of our rationality. Rawls constructs such an argument himself in *Theory* §37 and associates it with a certain strand of liberal theory, exemplified by John Locke, Benjamin Constant, and Isaiah Berlin (*TJ*, 176–177, 200–205; *PL*, 4–5, 206, 299).

Such a tight connection between political and civil liberties seems implausible, however. For example, what if in each democratic election 10 percent of the population were randomly selected and given the right to vote, whereas the other 90 percent were disenfranchised. If the selection process were truly random, then this reform would be unlikely to threaten civil liberties: expectationally, at least, the same interests would be represented, so there is little reason to think that politicians would be unleashed to violate the liberties of disenfranchised. The cost savings (in terms of the saved opportunity cost of time involved in voting, etc.) might be large. Would such an exchange of political liberty for socioeconomic benefits be ruled out by the above instrumental argument for the priority of political liberties? So long as civil liberties were protected just as well under the new scheme, it is difficult to see why it would fail to pass muster. Even if reforms of this sort diminished protection for civil liberties, so long as compensating expenditures were made to return us to the prior level of protection (e.g., diverting some of the savings into legal advocacy for the disenfranchised) the instrumental argument would have to permit diminution of political liberties.

I will sketch here an alternative, more promising approach to defending the priority of the political liberties, one with revisionist implications for Rawls's theory.¹¹ If the civil liberties are necessary for the pursuit of our highest-order interest in rationality (the second moral power), as the hierarchy argument maintains, perhaps the political liberties are necessary for the pursuit of our other highest-order interest, reasonableness (first moral power). In order to develop and exercise our sense of justice and our moral autonomy more broadly, we will need to provide them with an institutional medium for growth and expression. Just as moral autonomy can be understood on Kantian grounds as the legislation of morality for a kingdom of ends, so in the context of right it can be understood as participation in republican self-government, be it directly (as a legislator or bureaucrat crafting laws or regulations, respectively) or indirectly (as a voter choosing between the legislative programs of parties and candidates). Through such participation, as Rawls rightly says, we can "enlarge [our] intellectual and moral sensibilities" and exercise them in the creation of fair and impartial law for our society; political liberty, however, is not simply a means to the development and utilization of our capacity for moral autonomy, but also in some sense *is* that capacity expressed in political-institutional form (*TJ*, 206).

If such a defense of the priority of political liberty could be sustained, however, it would arguably have the revisionist implication of prioritizing political over civil liberties, contrary to Rawls's claim that they are "of equal weight . . . with neither externally imposed on the other" (*PL*, 412). Rawls himself maintains that reasonableness frames and absolutely limits rationality and that the political liberties are grounded on the first whereas several civil ones (e.g., liberty of conscience, freedom of association generally) are grounded on the second (*CP*, 317, 319; *PL*, 52, 334–335). If so, then the first moral power and its allied political liberties take priority over the second moral power and its associated civil liberties. Rawls already assigns a special weight to the political liberties (e.g., by protecting their "fair value" and emphasizing their "distinctive place" among the basic liberties); such a defense of their priority *within* Rawls's first principle of justice would make his theory more democratic than some scholars (e.g., Jürgen Habermas) have taken it to be (*PL*, 327; Habermas 1995).

5. Conclusion: Implications for the American Practice of Civil Libertarianism

This reconstructed hierarchy defense of the priority of liberty has significant implications for American-style civil libertarianism, especially as reflected in First Amendment jurisprudence. Consider, for example, two strands of such jurisprudence: the line of Establishment Clause cases starting in the 1960s and the string of "incitement" cases ending in *Brandenburg v. Ohio* (1969). The US Supreme Court initiated stricter enforcement of the Establishment Clause of the First Amendment ("Congress shall pass no law respecting an establishment of religion") in the early 1960s under the leadership of Chief Justice Earl Warren. A long line of decisions – including *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), *Stone v. Graham* (1980), and *Wallace v. Jaffree* (1985) – gradually eliminated most religious content from public-school instruction. Mandatory school prayers, Bible readings, postings of the Ten Commandments, and voluntary school prayers were successively found unconstitutional. State laws either banning the teaching of evolution or mandating the teaching of "creation science" or "intelligent design" in public schools were also overturned. Finally, in *Lemon v. Kurtzman* (1971), the Supreme Court promulgated a strict three-prong test for determining the constitutionality of policies challenged under the Establishment Clause. This test has been used *inter alia* to overturn laws offering supplementary salaries to parochial-school teachers and other forms of direct economic aid to religious schools (as opposed to *indirect* aid via parentally targeted vouchers, for example, which was found constitutional in *Zelman v. Simmons-Harris*, 2002).

The string of "incitement" cases, dealing with the punishment of persons who advocate illegal conduct, begins with *Schenck v. United States* (1919). In this case, Justice Oliver Wendell Holmes articulated his famous "clear and present danger" test for incitement, which established a low threshold for the punishment of people advocating illegal conduct (in this case, resistance to the draft during wartime). A succeeding series of cases that modified this threshold (both up and down) culminated in the 1969 decision of *Brandenburg v. Ohio*, which established an extremely high threshold for punishment of incitement: "the constitutional guarantees of free speech and press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." In practice, this

decision has effectively ended punishment for incitement, thoroughly insulating those who advocate violence – even revolutionary violence.

What characterizes both of these lines of cases is the evolution of an uncompromising devotion to liberal neutrality: in the Establishment Clause cases, the Court sought to bar states from using their authority over minors to promote religious belief, whereas in the “incitement” cases, it in effect legalized the advocacy of sedition and other forms of lawless violence. What could justify such extremism in defense of (basic) liberty? The Supreme Court itself has offered many justifications, but the kind most likely to succeed is one grounded upon the inviolability of individual autonomy in matters of belief – like the justification provided by the reconstructed hierarchy argument. Only this kind of justification can provide a secure and permanent defense of the basic liberties against all political contingencies. All other justifications are ultimately held hostage to what Rawls has called “the calculus of social interests”: because they are not based on the lexical priority of liberty (at the level of political principle (original position) rather than constitutional practice (constitutional/legislative stages)), their defense of basic liberties is always contingent on particular historical conditions, such as the likelihood of legislative overreach or abuse, the nature of the political culture, and the attractiveness of trading off certain basic liberties for some highly valued social good (e.g., solidarity or stability) (*TJ*, 4; *TJ*, §31). The reconstructed hierarchy argument does not hinge on such empirical circumstances: it offers a robust defense of the basic liberties that (at least when “reasonably favorable conditions” obtain) secure both them and the highest-order interest that they protect – viz. the development and exercise of autonomy, both personal and moral – from the depredations of eudaimonism and political expediency.

Notes

Figure 8.1 is reproduced from my *Reconstructing Rawls: The Kantian Foundations of Justice as Fairness* (University Park: Pennsylvania State University Press, 2011), by permission.

- 1 The allowable sacrifices of liberty for liberty can take several forms. First, some basic liberties might be sacrificed for the sake of others: for example, free political speech (in the form of campaign expenditures) might be curtailed in order to protect the fair value of core political liberties. Second, a basic liberty might be limited for its own sake: for example, so-called “time, place, and manner” regulations on speech may help to preserve the value of speech itself by making its exercise across persons mutually consistent (by means of, say, *Robert’s Rules of Order*) – see *PL*, 341. Third, a basic liberty might be *temporarily* sacrificed if doing so is a condition for its own eventual effective exercise: for example, core political liberties might be sacrificed if this were strictly necessary to increase GDP and thereby make adequate economic resources available for their effective exercise. This last variety of sacrifice falls under the rubric of nonideal theory, discussed in *TJ*, §39.
- 2 On his ambivalence toward the priority of FEO, see *JF*, 163 n44; on his ambivalence toward the DP, see *TJ*, xiv.
- 3 See Arrow 1973; Barry 1973; Daniels 1989; Hart 1989; Keat and Miller 1974; Shue 1975.
- 4 Rawls provides an additional argument in the original edition of *A Theory of Justice* (*TJ* 1971, 542–543) but retracts it in *Political Liberalism* (*PL*, 371 n84) because of its inconsistency with the hierarchy argument.
- 5 There are other determinants of self-respect, of course, some of which are private and idiosyncratic (e.g., indelible psychological traits resulting from early childhood socialization).

- 6 Rawls might reply here that reactions to strains of commitment can take both strong and weak forms and that the power of my examples derives from only considering the strong form. The strong form is for us to become “sullen and resentful,” leading perhaps to “violent action in protest against our condition,” while the weak form is for us to become “withdrawn and cynical,” unable to “affirm the principles of justice in our thought and conduct . . . Though we are not hostile or rebellious, those principles are not ours and fail to engage our moral sensibility” (*JF*, 128). So Rawls might admit that violent resentment is indeed more probable in the religious case but still argue that cynical withdrawal is a real possibility in all of them. One can admit the force of this reply, though, and still point out that the *overall* strains in the religious case (strong plus weak) are more severe than in either the philosophical or moral cases (weak only), and this is all that I need for the above critique to do its work. All principles of justice will create *some* strains, however minor, so the strains-of-commitment argument must be understood only to rule out candidate principles that would generate especially severe, even intolerable strains – and principles that deny lexical priority to liberty of religious conscience qualify, as the long and bloody history of European Christianity amply demonstrates.
- 7 Though Rawls does not try to assess the “relative weights” of the various grounds he offers for the priority of liberty, he does suggest that those “connected with the capacity for a conception of the good are more familiar, perhaps because they seem more straightforward and, offhand, of greater weight”; the hierarchy argument is one such ground (*PL*, 324).
- 8 For a fuller discussion of how these two facets of autonomy are related, see Taylor 2011, ch. 2.
- 9 This conceptual distinction between directly and indirectly supportive basic liberties is implied by *PL*, 335.
- 10 Rawls later adds that “these conditions are determined by a society’s culture, its traditions and acquired skill in running institutions, and its level of economic advance (which need not be especially high), and no doubt by other things as well” (*PL*, 297). Finally, he discusses these conditions a bit more in *The Law of Peoples*, §15, especially with respect to the three guidelines for assistance to “burdened societies” (*LP*, 106–112).
- 11 For a fuller discussion, see Taylor 2011, ch. 3.

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