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RETHINKING RAWLS'S THEORY OF LIBERTY AND RIGHTS

JAMES W. NICKEL*

INTRODUCTION

Rawls's theory of justice gives a central place to the protection of basic liberties, and the essays in *Political Liberalism* substantially strengthen and enrich Rawls's account of how basic liberties and rights are justified and delimited.¹ Rawls's account of the justification of liberties and rights is important not only to his own theory but also to broader efforts to provide a philosophical framework for defending human rights. My goals in this Article are to present an up-to-date and accessible account of Rawls's theory of liberty, subject key parts of that theory to evaluation and criticism, and to suggest alterations and additions. My criticisms and suggestions for alterations will usually be "internal" in the sense that I try to defend them within the Rawlsian framework.

There are four sections. The first examines and reconstructs Rawls's list of basic liberties and rights. The second section evaluates the adequacy of the scheme Rawls provides for justifying this list. The third section deals with Rawls's account of how the basic liberties should be interpreted and applied. And the final section suggests that his conception of the person should contain more than just two "moral powers."

I. A THEORY OF BASIC LIBERTIES

Let's begin with a short summary of Rawls's revised theory of basic liberties.² Rawls holds that a central part of social justice is a

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1. JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter *POLITICAL LIBERALISM*]. The "lectures" or chapters of most relevance to liberties and rights are: Lecture VIII, *The Basic Liberties and Their Priority*, *id.* at 289; Lecture V, *Priority of Right and Ideas of the Good*, *id.* at 173; and Lecture II, *The Powers of Citizens and Their Representation*, *id.* at 47. Also helpful in understanding Rawls's recent views on liberty and rights is his recent essay, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36 (1993) [hereinafter *The Law of Peoples*].

2. Important discussions of Rawls's theory of liberty and rights include H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 *U. CHI. L. REV.* 534 (1973), reprinted in *READING RAWLS* 230 (Norman Daniels ed., 1975); Norman Bowie, *Equal Basic Liberty for All*, in *JOHN RAWLS' THEORY OF SOCIAL JUSTICE* 110 (H. Gene Blocker & Elizabeth H. Smith eds., 1980); and REX MARTIN, *RAWLS AND RIGHTS* 45-61 (1985).

requirement that a "fully adequate" system of basic liberties be protected and given priority over (that is, never sacrificed to) social goods such as prosperity, efficiency, and a high level of culture.³ This requirement, which Rawls refers to as his "first principle of justice," does not prescribe liberty in the abstract, but rather requires respect for a select list of basic liberties derived from the bill of rights tradition.⁴ This list includes freedom of conscience, association, to engage in political activity, and from arbitrary arrest.⁵

Rawls defends his proposed principles of justice by arguing that they are central parts of fair terms of social cooperation for mutual advantage between free and equal persons. In the "original position" rational representatives of the members of society are asked to choose principles of justice.⁶ The veil of ignorance deprives these representatives of information about themselves and their temporal and social positions, thus assuring that they will choose principles that are impartial or fair in spite of the fact that they choose from self-interested reasons. Since the veil of ignorance deprives them of much knowledge relevant to the choice and specification of liberties and rights, the basic liberties that they choose must be rather abstract. They will not be very clear about the exact scope of these liberties and rights until they reach the constitutional stage—where they will create a

3. POLITICAL LIBERALISM, *supra* note 1, at 291; see also JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter A THEORY OF JUSTICE].

4. A Theory of Justice gives the following formulation of the principles of justice:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

A THEORY OF JUSTICE, *supra* note 3, at 60. The first part of the second principle is often referred to as the "difference principle," and the second part as the "equal opportunity principle."

Although Rawls continues to refer to the first of these as his "first principle of justice," in *Political Liberalism* it is preceded by another principle concerned with basic needs:

the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties.

POLITICAL LIBERALISM, *supra* note 1, at 7; see also *id.* at 228. With the introduction of a basic needs principle, Rawls has four normative principles, with each item having lexical priority over the items beneath it:

- A. The basic needs principle;
- B. The basic liberties and rights principle;
- C. The equal opportunity principle;
- D. The difference principle.

For purposes of this paper, I will continue to refer to the liberties and rights principle as the "first principle."

5. See *infra* Section II for Rawls's complete list.

6. A THEORY OF JUSTICE, *supra* note 3, at 17-22.

constitution that enumerates and protects the basic liberties and rights and creates a democratic system of government.

Rawls claims that it is rational for people in the original position to give the basic liberties a privileged place because these basic liberties are extremely valuable to anyone. In this respect, Rawls follows the method of John Stuart Mill in *Utilitarianism*, where Mill demonstrates the great value of security to everyone and goes on to suggest that security rights are at the center of justice.⁷ Rawls differs from Mill, however, in that a concern for fairness is built into the structure of the choice situation.

To support claims about the great value of the basic liberties, Rawls offers a theory of "primary goods."⁸ The theory of primary goods has undergone substantial modification since the publication of *A Theory of Justice*⁹ through the addition of a "political conception of the person."¹⁰ This conception, which is derived from Rawls's root idea of social cooperation between free and equal beings, suggests that all persons need to develop and exercise two moral capacities.¹¹ The first of these (which Rawls calls the "first moral power") is the capacity for a sense of justice, the capacity to accept and live by fair terms of social cooperation. The "second moral power" is the ability to form, revise, and pursue a conception of the good—a personal view of what values are worthy of one's commitment and pursuit.¹²

Primary goods are social conditions and all-purpose means that people generally must have in order successfully to form, revise, and pursue their conceptions of the good and to develop and exercise a sense of justice. Without freedom of association, for example, one would be greatly handicapped in forming, revising, and pursuing a personal conception of what is valuable, and in developing and exercising a sense of justice. Further, being denied freedom of association would be a severe blow to one's self-respect—which is itself a primary good.

Once society is able to provide for basic material needs, the basic liberties are so valuable to persons concerned with developing and

7. JOHN STUART MILL, *UTILITARIANISM* 41-63 (George Sher ed., Hackett Publishing 1979) (1859).

8. POLITICAL LIBERALISM, *supra* note 1, at 75.

9. A THEORY OF JUSTICE, *supra* note 3.

10. POLITICAL LIBERALISM, *supra* note 1, at 29.

11. *Id.* at 19, 81.

12. Rawls is also prepared to presuppose a third power, which is intellectual rather than moral, comprised of human capacities for judgment, thought, and inference. This third power is necessary for the exercise of the other two powers. *Id.*

exercising the two moral powers, and so important to self-respect, that the parties in the original position will decide that they must be equal for all citizens (with a few qualifications) and that they must never be sacrificed to secondary values such as greater prosperity or the advancement of scientific knowledge.¹³

II. THE LIST OF BASIC LIBERTIES AND RIGHTS

Rawls deals with the difficult question of which liberties are basic by simply offering us a list—and a very imprecise one at that. Rawls is not confident that the parties in the original position could generate an adequate list, given the restraints on their knowledge. Instead, Rawls suggests that in setting up the original position we, as political theorists here and now, can construct such a list on the basis of our historical knowledge of the liberties usually protected by the constitutions of democratic states and offer it to the parties as part of one of the conceptions of justice they may choose.¹⁴ When Rawls proceeds to construct a list of basic liberties by drawing on the successful constitutions of democratic states, he does so in a very schematic way. He requires that the system of liberties be a “fully adequate scheme of equal basic liberties,” and identifies four categories of liberties or protections.¹⁵ Although the content of these categories is illustrated, much is left indeterminate.

We can begin by looking Table 1, which lists the basic liberties given in Rawls's two books:

TABLE 1—THE BASIC LIBERTIES

<i>A Theory of Justice</i> ¹⁶	<i>Political Liberalism</i> ¹⁷
1. liberty of conscience and freedom of thought	freedom of thought and liberty of conscience
2. political liberty (the right to vote and to be eligible for public office together with freedom of speech and assembly)	the political liberties and freedom of association

13. See *supra* text accompanying note 3.

14. *POLITICAL LIBERALISM*, *supra* note 1, at 292-93.

15. *Id.* at 291.

16. *A THEORY OF JUSTICE*, *supra* note 3, at 61.

17. *POLITICAL LIBERALISM*, *supra* note 1, at 291.

- | | |
|---|---|
| 3. freedom of the person along with the right to hold (personal) property | freedoms specified by the liberty and integrity of the person ¹⁸ |
| 4. freedom from arbitrary arrest and seizure as defined by the concept of the rule of law | the rights and liberties covered by the rule of law |

Each of the numbered categories contains a family of liberties and rights. The first category—freedom of thought and conscience—concerns intellectual freedom or freedom of mind. It includes rights protecting thought, belief, inquiry, expression, and association. The second and fourth categories are familiar and widely used, and might respectively be called “rights of political participation” and “due process rights.” The third category is the most vague, and Rawls never offers a comprehensive listing of its contents.

If one compares these four categories with historic and contemporary bills of rights, there are clearly important omissions.¹⁹ I think the most important of these are:

- (1) rights to security (protections against wrongful killing, torture, rape, harm, and deprivation of property); and
- (2) liberties in the area of family, lifestyle, and reproduction, including rights of privacy and (limited) control by parents of the rearing and education of children.²⁰

These omitted liberties and rights are found in almost all contemporary national and international bills of rights and are no more controversial than the ones Rawls included. Thus, if the test is what we find in successful constitutional bills of rights, these omitted liberties and rights should be included. Ultimately, of course, one should attempt to provide justifications for each specific liberty or right and to assess its importance or significance. I offer illustrative justifications for many of the liberties and rights that I think should be added.

A. *The Omission of Security Rights*

Security rights protect people against murder and unjustifiable killing, torture, rape and other forms of sexual assault, violence, unjust

18. Although Rawls fails to mention here the right to hold personal property, it has not been dropped from the list of basic liberties. “[A]mong the basic liberties of the person is the right to hold and have exclusive use of personal property.” *Id.* at 298.

19. For an excellent collection of contemporary constitutions and bills of rights, see *BASIC DOCUMENTS ON HUMAN RIGHTS* (Ian Brownlie ed., 2d ed. 1981).

20. I leave aside here the issue of welfare rights and the right to education. Rawls deals with these under the basic needs principle, the equal opportunity principle, and the difference principle. Also left aside is whether equality rights, such as rights to equal protection of the law and freedom from discrimination should be included in the list.

tifiable harm, and theft or unauthorized use of one's body, time, and justifiably held assets. Although Rawls seems not to include security rights in the first principle in *A Theory of Justice*, he does give related duties explicit treatment elsewhere in that book. Duties "not to injure," "not to harm the innocent,"²¹ and "not to cause unnecessary suffering"²² are listed among the "natural" duties. Natural duties are ones that do not arise from promises, contracts, roles, or the principle of fair play; they apply to us "without regard to our voluntary acts."²³

Including matters of security among the natural duties is unobjectionable, but it does not provide an adequate account of a government's responsibility to *protect* security, which is an important dimension of fair terms of social cooperation. Hart suggested that natural duties (such as the duty not to harm) are standards of conduct for individuals, while principles of justice are standards for institutions.²⁴ But since government officials and agencies often kill, torture, and harm, we require security rights against them as well as against individuals. Further, creating an effective system of protections of security rights through the criminal law is one of the most important things that can be done to make possible the enjoyment of other liberty below). If those who would invade people's liberties and rights are unrestrained in their ability to threaten death, harm, violence, and loss of property, few if any liberties can be enjoyed.²⁵ Security rights, like due process rights, are essential building blocks for a system of liberty.

In works subsequent to *A Theory of Justice*, Rawls includes security rights under the "liberty" and "integrity" of the person. As we saw earlier, in *Political Liberalism*, Rawls changed the description of the third set of liberties from "freedom of the person" to "freedom and integrity of the person."²⁶ And Rawls takes the "integrity of the person" to include "freedom from psychological oppression and physical

21. A THEORY OF JUSTICE, *supra* note 3, at 109.

22. *Id.* at 114.

23. *Id.*

24. Hart, *supra* note 2, at 245-46.

25. As Henry Shue put it:

No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right. Such threats to physical security are among the most serious and—in much of the world—the most widespread hindrances to the enjoyment of any right.

HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 21 (1980); see also JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 212 (1990).

26. POLITICAL LIBERALISM, *supra* note 1, at 291.

assault.”²⁷ But bundling security rights together with basic liberties makes for an oddly mixed category. Security rights are not directly matters of liberty.²⁸ For example, having effective legal prohibitions of and protections against murder is not directly a matter of being free to engage in some particular kind of action.

It is hard to understand why Rawls does not give security rights an explicit and separate place in the list of basic liberties.²⁹ The reason cannot be that security rights are not exactly liberties, because due process rights—which *are* included—are not exactly liberties in precisely the same way. Nor can the reason be that Rawls does not want to authorize limiting liberty for reasons of security, since he does explicitly authorize this. For example, Rawls says that “Liberty of conscience is limited . . . by the common interest in public order and security.”³⁰

I believe that the best way for Rawls to treat security rights would be to recognize them explicitly as a separate category of rights. This would add further weight to Martin’s contention that not all of the basic liberties are really liberties.³¹ Rawls seems to have recognized this in *Political Liberation* by redescribing the basic liberties as “basic liberties and rights.”³² To provide for the justification and definition of these rights, I believe there will need to be corresponding changes in the primary goods. We should at least add to the list of social primary goods (1) the avoidance of premature death, (2) the avoidance of the destruction of one’s health and normal physical and mental abilities, and (3) the avoidance of severe pain.³³ Hobbes, who probably invented the idea of a primary good (or maybe it was the idea of a

27. John Rawls, *Reply to Alexander and Musgrave*, 88 Q.J. ECON. 633, 640 (1974). I am grateful to Thomas Pogge for bringing this passage to my attention.

28. This is recognized by Rex Martin in *Rawls and Rights*, when he says that “although the integrity of one’s body may be described as a freedom from certain physical injuries or mutilations, it is not in fact a liberty, not principally something that the rightholder does or can do.” MARTIN, *supra* note 2, at 47. Martin goes on to suggest that Rawls’s first principle should therefore be seen as covering “liberties” and “noninjuries.” *Id.*

29. In his recent essay, *The Law of Peoples*, *supra* note 1, at 57, Rawls treats security as a basic right. He includes “rights to means of subsistence and security (the right to life)” among rights that should be recognized by both liberal and hierarchical societies. *Id.* at 52.

30. A THEORY OF JUSTICE, *supra* note 3, at 212.

31. MARTIN, *supra* note 2, at 47.

32. POLITICAL LIBERALISM, *supra* note 1, at 5.

33. One might try to justify security rights instrumentally—as Shue does—so as to avoid introducing new primary goods in this area. But giving only instrumental justifications for security puts the cart before the horse. One’s main reason for wanting to avoid being stabbed, say, is not to avoid loss of liberty. It is to avoid pain, loss of health, and death.

primary bad), took these to be the most central ones.³⁴ They are essential parts of most life plans, and are necessary to the development and exercise of the two moral powers.

B. *The Omission of Lifestyle Rights*

Hart worried that there are important areas of individual liberty—"sexual freedom and the ability to use alcohol or drugs among them"—that seem to have no place in Rawls's list.³⁵ A related worry is that Rawls nowhere mentions (to my knowledge) rights of privacy as falling under either "liberty of thought and conscience" or under the "freedom of the person."

Contemporary bills of rights usually cover matters of lifestyle with the following rights: (1) privacy—no arbitrary interference with family, home, or correspondence; (2) freedom of association; (3) freedom of movement and residence, including the right to emigrate;³⁶ (4) freedom to choose one's occupation; (5) freedom to marry and found a family, including freedom from forced marriage; and (6) freedom to choose the kind of education one's children receive (within limits). Like Rawls's list, these bills do not address sexual freedom or the use of alcohol and drugs. These six areas of liberty are extremely valuable, but I doubt that they cover everything that is important in the area of lifestyle liberties.

One possible strategy for Rawls to use here would be to say that these six specific liberties are all included in his third category, "liberty of the person," but to say that other liberties—including matters of sexual freedom and the use of alcohol and drugs—should be dealt with "structurally" rather than by enumeration in the list of basic liberties. The structural protection of liberties is an important topic and this is a good place to pursue it briefly. Hundreds of liberties of considerable value cannot be enumerated in a list of basic liberties; that would make such a list too long and dilute its impact. Consider the liberty to wear very unusual clothing (for example, a Tarzan suit) as an example of such a liberty. How can this liberty be protected structurally rather than by enumeration in a bill of rights?

First, this liberty is structurally protected by security rights. When effectively implemented, these rights prevent citizens or offi-

34. THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., MacMillan Publishing 1962) (1651).

35. Hart, *supra* note 2, at 237.

36. Rawls endorses the right to emigrate in *POLITICAL LIBERALISM*, *supra* note 1, at 222, and *The Law of Peoples*, *supra* note 1, at 53.

cials who dislike one's unusual attire from beating one up or threatening to do so. Second, this liberty is structurally protected by due process rights. When effectively implemented, these rights prevent officials from using the power to arrest and imprison as a means to keep people from wearing types of clothing they despise. Third, this liberty is structurally protected by rights of political participation. These rights enable those who wish to wear unusual clothing to use the political process, and appeals to the courts, to defeat governmental measures and actions that would prevent them from doing so. Fourth, this liberty is structurally protected by rights to freedom from discrimination which prevent citizens and officials from discriminating against people on grounds that are irrelevant to the decision or allocation in question. Thus, an employer could not fire an employee upon learning that the employee liked to dress up like Tarzan after working hours.

Finally, this liberty is structurally protected in the Rawlsian scheme by political liberalism with its commitments to tolerance, reasonable accommodation of diverse perspectives and lifestyles, and the resolution of political disputes using processes of deliberation that rely on principles of justice and standards of evidence that are in some sense neutral between competing conceptions of the good. These elements of political liberalism will make it difficult or impossible to pass laws forbidding the wearing of unusual clothing. (Here a legal liberty to do *A* will primarily be the absence of a legal duty to refrain from doing *A*.)

Whether a liberty should be protected structurally or by enumeration is often a difficult question. It may depend on how important the liberty is, how threatened it is, and how definable the liberty is. But only a fraction of the liberties that matter to people can be enumerated, so structural protection must be the normal mode of protection for liberties. Rawls's theory of liberty would be stronger if he had been more explicit about this.

C. *The Reconstructed List*

I will conclude this section by describing how Rawls's list of basic liberties and rights would look if my suggestions were followed:

1. *Liberties of mind*—These include liberties of belief, thought, inquiry, communication, and association.
2. *Liberties of the person*—These include freedom of movement and residence, encompassing the right to emigrate; freedom to

choose and pursue an occupation, including freedom from slavery; freedom of assembly; freedom of religious practice; privacy; freedom to marry and found a family, including freedom from forced marriage; and freedom to choose the kind of education one's children receive.

3. *Political liberties*—These include freedom of speech, press, assembly, to petition government, organize political parties, conduct political campaigns, vote in fair and meaningful elections, and serve in public office.
4. *Security rights*—These include protections against murder, torture, rape, and unjustifiable violence and harm.
5. *Due process rights*—These include rights against arbitrary arrest and detention, against retroactive criminal laws, to habeas corpus, a fair hearing or trial in civil and criminal matters, and a presumption of innocence and assistance of counsel in criminal trials. These five categories provide all the types of rights found in contemporary bills of rights except welfare and equality rights.³⁷

III. JUSTIFYING A SYSTEM OF LIBERTIES

A. *Starting Points for Justification*

As we saw earlier, Rawls's first step in justifying a basic liberty or right is usually to show that it is a primary good. To defend special protection or status for an enumerated list of liberties and rights one usually tries to show that these liberties and rights are of special importance or value.³⁸ This step might be called "the importance test."³⁹

37. In *Political Liberalism*, Rawls effectively accepts welfare rights as fundamental by giving the basic needs principle priority over the basic liberties and rights principle. See *supra*, note 4.

38. When Rawls says that liberties and rights are primary goods, this is often ambiguous. The value of a liberty or right to A may come from (1) the doing or having of A, or (2) from having secure normative protection of A. The difference between these, to use an analogy, is like the difference between the value of having a house and the value of having insurance on that house. Let's say that the first is *the value of the object of a right*, and that the second is *the value of having normative protection of that object*. When Rawls says that a liberty or right is a primary good, he often means that the *object* of that liberty or right is very valuable. The value of being able to choose for oneself what to believe is what makes freedom of conscience valuable. But when he suggests that equal basic rights and liberties are necessary to self-respect, *POLITICAL LIBERALISM*, *supra* note 1, at 319, he seems to mean that equal political and legal *protections* for liberties and rights are necessary for self-respect. (Political inequality in respect to such important protections is an insult to those with lesser protections.) It would be neater if Rawls could always say that it is the *objects* of the basic liberties and rights that are primary goods, and then argue that rights as moral and legal protections are *means* to the effective enjoyment of these.

39. For a discussion of the role of the importance test, see JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 109-12 (1987).

In Rawls's scheme a good can only pass the importance test by being shown to be a primary good. Hence, Rawls needs a substantial and plausible account of what makes a good primary.

In *Political Liberalism* Rawls has provided such an account by introducing his political conception of the person, with its associated idea of two moral powers. This conception of the person enriches the theory of primary goods by showing the fundamental importance of two areas of human activity (developing and exercising a sense of justice and forming, revising, and pursuing a conception of the good). Classical natural law theories did the same job by identifying certain human functions or roles as inherent in human nature and functioning or in God's plan for humans. As part of his variety of liberalism, Rawls wants his theory of the person to be one that is constructed for political rather than "metaphysical" reasons, so he tries to derive his conception of the person from the root idea of his theory: social cooperation for mutual advantage between free and equal persons.⁴⁰

It is a little misleading to describe developing and exercising a sense of justice and forming and revising a conception of the good as merely "powers" or "capacities." Rawls is concerned both with capacities and their *exercise or use*, and hence is concerned as much with areas of action as with capacities. We arrive at the primary goods by asking what social and institutional conditions are necessary for people to be able to develop these capacities and to use them in the ordinary circumstances of human life. Primary goods are to be identified 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."⁴¹

Freedom of movement, say, is a primary good because it is indispensable not only to the development of one's sense of justice and conception of the good, but also to exercising one's conception of justice in relations with others and to revising and pursuing one's conception of the good. If one could not move about in order to meet with others to protest injustices, work on institutional reform, or create and sustain institutions designed to assist in the pursuit of a conception of the good, the exercise of the two moral powers would be severely cramped.

40. *POLITICAL LIBERALISM*, *supra* note 1, at 11-22.

41. *Id.* at 307.

In *A Theory of Justice* Rawls says that the social primary goods are "rights and liberties, powers and opportunities, income and wealth," along with self-respect.⁴² In *Political Liberalism* we are given the following list: (a) "[t]he basic liberties"; (b) "[f]reedom of movement and free choice of occupation against a background of diverse opportunities"; (c) "[p]owers and prerogatives of office and positions of responsibility"; (d) "[i]ncome and wealth"; and (e) "[t]he social bases of self-respect."⁴³

B. *The Justificatory Arguments*

The justification of basic liberties and rights is a process that is begun in the original position and (largely) completed in the constitutional stage. The differences between what may be assumed and known in these two stages make for a certain awkwardness in the presentation of Rawls's views, and if one only looks at the justificatory arguments that Rawls offers to the parties in the original position the full power of his theory is partially hidden.⁴⁴ To avoid this I am going to deliberately blur the boundary between the original position and the constitutional stage. The arguments I describe all come into play in the justification of basic liberties and rights, but they do not all do so in the original position.

Rawls uses three main lines of justification for liberties and rights. The first approach, which he uses extensively because of its availability in the original position, argues that a particular liberty is necessary to allow people to develop and exercise the capacity to form, revise, and pursue a conception of the good (the second moral power), or to allow individuals to attempt to realize their particular conceptions of the good. Arguments of this first type pertain to what is *necessary in the pursuit of a good life*.

The second approach proceeds in the same way in regard to the first moral power. It argues that a particular liberty (for example, a political liberty such as the right to vote) is necessary to allow people to develop and put to use the capacity for a sense of justice. Argu-

42. A THEORY OF JUSTICE, *supra* note 3, at 62.

43. POLITICAL LIBERALISM, *supra* note 1, at 308-09.

44. The main reason for this, according to Rawls, is that the assumption of the original position that the parties are motivated only by self-interest prevents them from viewing the first moral power (the capacity for a sense of justice) as anything more than a means to the realization of their ends, and thus from giving it the sort of weight that it will have once the principles of justice are chosen. POLITICAL LIBERALISM, *supra* note 1, at 315. Thus Rawls's own presentation of his arguments is divided into those that could be given in the original position, *id.* at 309-24, and those that can be given after the two principles of justice have been chosen; *id.* at 334-40.

ments of this second type pertain to what is *necessary to develop and apply a sense of justice*.

The third approach, which is indirect, argues that some liberties and rights (for example, due process rights) are instrumentally necessary to protecting and making secure liberties justified by a direct relation to the two moral powers. Due process rights are essential means of making secure the freedoms of thought, conscience, speech, and association. Arguments of this third type pertain to what is *necessary to the protection of other liberties and rights*. The following are some Rawlsian arguments falling under each of these headings.

1. Necessary in the Pursuit of a Good Life

Most of the arguments that Rawls gives for the basic liberties fall under this heading. In several of them he gives a justification for freedom of conscience which he uses as a model or paradigm.⁴⁵ One familiar argument proceeds from the need to protect one's ability to pursue and realize one's particular conception of the good.⁴⁶ According to Rawls, people may reasonably regard their liberty to follow their own moral, religious, and philosophical views as "non-negotiable," as something that they will not take chances with. Indeed, Rawls suggests that if one were willing to take the chance of being forced to accept alien beliefs and commitments, this would show that one did not really "know what a religious, philosophical, or moral conviction was."⁴⁷ The parties in the original position do not know whether their views will put them in the majority or minority, so if they opted to leave to utilitarian deliberations or to majority rule the question of whether freedom of belief would be enjoyed they would indeed be taking chances with their consciences. Since it is reasonable to be very cautious about things one regards as non-negotiable, the parties in the original position will choose the most secure guarantee of freedom of conscience that is available to them and part of a workable conception

45. I agree with Rex Martin's complaints about Rawls's constant reliance on freedom of conscience as a model case. Martin describes it as a "clumsy device." MARTIN, *supra* note 2, at 51. I suggest below that it is unnecessary.

46. This argument and the two that follow are ones that Rawls envisions being given in the original position. They all appeal to interests in being able to pursue, revise, and see the value of one's determinate conception of the good. It is interesting to consider whether one could give an adequate justification for the basic liberties and rights by appeal to only these interests, thus avoiding any reference to the first moral power. If so, one might be tempted to say that the truly fundamental interest is in having a good life. My own inclination is to move in the opposite direction (as Rawls has), to have a richer rather than a leaner basis for justifying basic liberties and rights.

47. POLITICAL LIBERALISM, *supra* note 1, at 311.

of justice. The basic liberties provide the most secure guarantee of freedom of conscience available in the original position, and hence they would be chosen as part of the two principles of justice.

Another argument suggests that freedom of conscience is essential to *revising* one's beliefs, conception of the good, and way of life. To revise one's present beliefs and way of life one must be free to try out new ideas and commitments, and even to fall into error. Without freedom of conscience one would lack this freedom.⁴⁸

A third argument focuses not on freedom of conscience but on the system of basic liberties as a whole. It claims that without self-respect, our ways of life and conceptions of the good are likely to seem of little value and not worth pursuing. We may have a conception of the good, but lack the will to pursue it. For this reason, it is rational to give great weight to how well a proposed principle of justice supports self-respect. Rawls claims that the two principles of justice, with their commitment to the public recognition of the basic liberties of all, are "more effective than the other alternatives in encouraging and supporting the self-respect of citizens as equal persons."⁴⁹

2. Necessary to Develop and Apply a Sense of Justice

Rawls argues that the political liberties and freedom of thought are social conditions necessary to the development and application of the first moral power (the capacity for a sense of justice).⁵⁰ Rawls does not elaborate this argument, but it is not hard to do so. People will find it very difficult or impossible to develop and exercise their moral capacities if they are denied freedom of thought and freedom of political participation. One's sense of justice cannot be put to work effectively in some of its most important areas of application without knowledge of social institutions and problems. Thus the development and exercise of these moral capacities requires significant areas of freedom to think, question, imagine, inquire, discuss, experiment, travel, organize, campaign, and vote. We see from this that the first moral power can be used to support not only political liberties but also liberties of mind and personal liberties.

Because Rawls mainly focuses on the kinds of justification available in the original position, he makes insufficient use—in my opin-

48. *Id.* at 313.

49. *Id.* at 319.

50. *Id.* at 335.

ion—of justifications that appeal to the first moral power. He uses this approach only to justify rights of political participation, particularly freedom of speech.⁵¹

3. Necessary to Protect Other Liberties

Rawls justifies most basic liberties *indirectly* using two kinds of arguments. First, a liberty can be “instrumental in preserving other liberties.”⁵² Rawls suggests that an instrumental justification applies to the political liberties, but I think that due process rights would be a better example. People cannot be free in their freedom of conscience and association if officials who dislike their views and associates are able to use the legal system, without the constraints imposed by due process rights and the rule of law, to imprison them or deprive them of their property. Security rights are another example. Few liberties can be effectively enjoyed and implemented if others are able to use plausible threats of violence to deter one from exercising those liberties.

The second kind of instrumental justification is that some liberties protect procedures and processes that are essential to regulating the basic structure as a whole.⁵³ Here Rawls mentions the political liberties. Democratic institutions, and the political liberties they presuppose, regulate and stabilize the various institutions needed to enjoy the basic liberties. The same is true of legal institutions, and the due process rights they presuppose.

Under the severe constraints of the original position, only a few liberties are justified directly; most liberties and rights are justified indirectly as essential means to the directly justified liberties. But the weaker constraints of the constitutional stage allow more liberties and rights to be justified directly, and hence indirect justifications play a smaller but still very important role. For example, it was suggested above that security rights and liberties of thought, conscience, communication, inquiry, association, and movement could be justified directly by appeal to the first moral power.

Rawls often implies that there is a distinctive kind of justification for each liberty, so that some liberties will be entirely justified by the second moral power; others largely justified by the first moral power; and still others justified instrumentally.⁵⁴ I submit that a more plausi-

51. *Id.* at 332-63.

52. *Id.* at 299.

53. *Id.* at 309.

54. *Id.* at 332-33.

ble view (at least at the constitutional stage) is that many of the core liberties and rights can be justified by at least two of these approaches, and sometimes by all three.

Consider the freedom to communicate with others through speech, press, and other media. One direct argument is that the ability to engage in this sort of communication is a necessary part of almost any conception of the good; just as one would not risk letting the majority decide whether one could follow one's deeply held religious beliefs, one would not risk letting the majority decide whether one could talk with others about religious and political issues. This is such an important liberty one can reasonably regard it as nonnegotiable. Another direct argument is that it would be impossible to develop or exercise a capacity for a sense of justice if one could not communicate with others (one could not receive information, for example, about which problems of justice are most severe). There are also good indirect arguments for this liberty. Freedom to communicate provides a very important way of exposing governmental corruption and abuse, and hence is instrumental in preserving other liberties. Further, it is essential to the political procedures that regulate the basic structure (for example, one cannot gauge whether equal opportunity is available, or the difference principle satisfied, without talking to people and hearing their frank perspectives and complaints). Table 2 offers a view of which justifications apply to which rights.

If I am correct in suggesting that many liberties and rights can be given direct and multiple justifications, then Rawls's constant reliance on freedom of conscience as a paradigm or model case is avoidable—and is particularly unnecessary in the constitutional stage where the full range of justificatory arguments is available.

C. *The Budgeting Problem*

Rawls never seems to worry that our social resources will be inadequate to provide for all of the basic liberties and rights—at least in the “favorable” circumstances that we are now in. He does warn that it is wise to “limit the basic liberties to those that are truly essential,”⁵⁵ but he seems to think that if we do this we will have the human, financial, and institutional resources to provide at least for the “central range of application” of all of the basic liberties,⁵⁶ and thus have a “fully adequate” system of basic liberties and rights. Let's say that the

55. *Id.* at 296.

56. *Id.* at 297.

TABLE 2—TYPE OF JUSTIFICATION

	Necessary in the pursuit of a good life	Necessary to develop and apply a sense of justice	Necessary to the protection of other liberties and rights
<i>Liberty of mind</i>			
thought	yes	yes	yes
inquiry	yes	yes	yes
communication	yes	yes	yes
association	yes	yes	yes
religious belief	yes	no	no
<i>Liberty of the person</i>			
movement	yes	yes	yes
residence	yes	no	no
occupation	yes	no	maybe
assembly	yes	yes	yes
religious practice	yes	no	no
privacy	yes	yes	yes
marriage	yes	no	no
family	yes	no	no
personal property	yes	maybe	maybe
<i>Political liberties</i>	no*	yes	yes
<i>Equality rights</i>	no*	yes	yes
<i>Security rights</i>	no*	yes	yes
<i>Due process rights</i>	no*	yes	yes

* The answer here may be affirmative if we think that having equal rights in these areas is necessary to self-respect. If we take this view, then every basic liberty and right is necessary to the pursuit of a good life.

“budgeting problem” is the problem of having more essential primary goods in the area of liberty and rights than we can afford to provide uncompromising protections for. If there is a budgeting problem in the area of basic liberties and rights, then we will not be able to go straight from the recognition of a liberty or right as a primary good to bringing its core under the very stringent demands of the first principle—as Rawls seems to do. Additional steps that screen out some claims to liberties or rights based on primary goods will be needed.

Budgeting may be thought to be impermissible because it requires us to deny protections that are morally imperative. But there is at least one approach to budgeting that is not open to this objection. It involves putting another step into the process of justifying a basic liberty or right. This step requires showing that what I earlier described as “structural protections” are not sufficiently strong protections of this liberty given the nature and level of the threats to its

enjoyment. Once we recognize that not all valuable liberties can be included in the list of basic liberties, and that these excluded liberties can nevertheless be given important structural protections, we see that there is available at the constitutional stage a way of fitting the list of basic liberties and rights to a country's resources and capabilities.⁵⁷

IV. ELABORATING AND ADJUSTING THE BASIC LIBERTIES

In formulating a constitutional bill of rights it may be appropriate to prescribe "freedom of speech" or "freedom of movement" in the abstract. But when one reaches the legislative and application stages, the meaning of these abstract liberties has to be made clearer, and whether the system of liberties and rights as a whole is "fully adequate" will have to be assessed.

Some areas of speech and movement will be more important liberties than others, and some forms of speech and movement may justifiably be forbidden. Further, the basic liberties and rights will sometimes conflict with each other, and will need to have their boundaries adjusted to reduce such conflicts. As we saw earlier, Rawls uses the familiar strategy of suggesting that the same ideas and procedures that we used to justify the rights should also be used to interpret and apply them.

To interpret freedom of speech or movement using this approach we would ask why these freedoms are very important primary goods, and that would lead us back to Rawls's conception of the person and the two moral powers. For example, we might try to show that the movements required to participate in a political rally or to go to the polls to vote are extremely important to the exercise of the capacity for a sense of justice (the first moral power). It will be very difficult or impossible to exercise a sense of justice if one is under a sort of house arrest, that is, forbidden to make the movements required to participate in politics. In contrast, we might find that being able to go to the Grand Canyon for sightseeing is a much less important kind of movement since it is not required for the development or exercise of the sense of justice. Rawls devotes an extended discussion to making these sorts of distinctions in regard to speech of various kinds.⁵⁸

57. For a discussion of more radical means of reducing the costs of liberties and rights such as cutting the number of rightholders, restricting weight and scope, and limiting the level of enforcement or provision, see *supra* note 20, at 124-30.

58. POLITICAL LIBERALISM, *supra* note 1, at 340-63.

Rawls introduces the idea of a "fundamental case" to assist in this process of assessing the significance of particular areas of liberty. Rawls's idea is that the most important areas of liberties can be identified by showing that they are central not just to the exercise of one of the two moral powers, but to the application of one of those powers in specific sub-areas that are clearly of great importance within the Rawlsian theory of justice. For the first moral power, this especially important area of activity is the application of the principles of justice to the basic structure of society. "The equal political liberties and freedom of thought are to secure the free and informed application of the principles of justice, by means of the full and effective exercise of the citizens' sense of justice, to the basic structure of society."⁵⁹ For the second moral power, this especially important area of activity is "forming, revising, and rationally pursuing a conception of the good over a complete life."⁶⁰

Rawls then uses these ideas to define the importance of a liberty or a particular area of that liberty:

[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 and effective exercise of the moral powers in one (or both) of the two fundamental cases.⁶¹

I believe that the idea of the two fundamental cases is one of the least successful of Rawls's recent innovations. First, the idea of focusing on the core of the core, and hence of letting everything turn on a narrow range of cases, is not plausible as a theoretical move in this area. Some liberties and rights get their significance from their ubiquity, from supporting an extremely wide range of valuable activities. This is true, for example, of security rights, and of the freedom to communicate. If we focus on a very narrow area—as the fundamental case approach suggests we should—the full significance of these sorts of liberties and rights will be hidden.

59. *Id.* at 334-35. Since Rawls now allows that it would be a good idea to have a basic needs principle that has priority over the basic liberties principle, POLITICAL LIBERALISM, *supra* note 1, at 7, the first fundamental case will now cover not just the application of the original principles of justice, but will also include the application of the sense of justice—or perhaps a person's moral and intellectual powers generally—to the question of what the basic needs are and whether they are satisfied within the basic structure of one's country. The basic needs principle, as I am calling it, is a recent addition that is not accommodated in *The Basic Liberties and Their Priority*, *id.* at 289.

60. *Id.* at 335.

61. *Id.*

Second, the test of the significance of a right that Rawls proposes has implications that are not intuitively plausible. As Rawls defines the first fundamental case, it excludes too much. For example, the use of one's political liberties to learn about and to attempt to influence the foreign policy of one's country seems to me to be just as important or significant as the use of those liberties to deal with questions about justice in the basic structure. But Rawls's test in terms of the first fundamental case would clearly assign greater significance to the latter. I think that the same objection could be made about using one's political liberties to deal with matters of environmental protection, or matters of deep injustice in foreign countries. Since these do not concern the justice of the basic structure of a citizen's country, Rawls's test implies that they are of lesser significance. I do not find that conclusion plausible.

If the first fundamental case is defined too narrowly, the second fundamental case is defined too broadly. It "applies" the capacity to form, revise, and pursue a conception of the good to the formation, revision, and pursuit of a conception of the good over a complete life. Thus the "fundamental case" is almost as broad as the capacity itself. Few things fall outside this definition, and I cannot see that it does much work not already done by testing the importance of rights by reference to their role in protecting the development and application of the second moral power.

What is needed here is some way of saying that some choices one makes in pursuit of a good life are more important than others, and hence more worthy of uncompromising protections. Rawls obviously believes that the choice of one's religion, or of one's moral outlook, is of greater importance than, say, the choice of one's favorite foods, but he never gives an adequate explanation why—except to say that a people who did not view their religious views as nonnegotiable would not know what it was to hold a religious view.⁶² One possibility here is to give greatest importance to those choices that are all-permeating in the sense that they generally affect most other choices within one's life plan. I have in mind choices such as one's life-partner (if any), one's occupation, one's location of residence, whether to have children, one's moral and political outlook, and one's religious or philosophical outlook. These all-permeating choices would serve better, I believe, as test cases for the second moral power. If this approach were followed, the most important liberties (and parts of liberties)

62. *Id.* at 311.

would be those that are necessary to making these all-permeating choices. For example, those parts of freedom of association (or inquiry or movement) that are requisite to choosing a mate, preparing for and finding an occupation, and developing and exercising one's moral, political, philosophical, and religious views would be more significant, on this test, than those that are requisite, say, to finding companions for recreational activities or to organizing a neighborhood food coop (assuming, of course, that food was available in other ways).

Rawls's development of the idea of having a fundamental case for each moral power is largely unsuccessful. From the first fundamental case one is guided to take the political liberties very seriously when they are applied to questions of justice, but this is a conclusion that can be reached easily in a wide number of ways within the Rawlsian framework. Further, this approach underestimates, in my opinion, the significance of political speech about matters other than justice in one's own country. The second fundamental case seems to be just a showcase item. It provides little guidance since it is almost as broad as the second moral power itself, and it is never actually put to use by Rawls in interpreting particular liberties or rights.

V. CONCLUDING REFLECTIONS ON THE TWO MORAL POWERS

Most of the recent changes in Rawls's theory of liberty revolve around the political conception of the person that identifies two moral powers as fundamental. The addition of this conception of the person has helped to make Rawls's theory less formal and more substantive, and thus to provide a more adequate basis for justifying and interpreting basic liberties and rights. But is it not possible, even likely, that there are more than two key areas of human activity that we should use in justifying and interpreting a system of liberties and rights? After all, humans are not merely pursuers of the good and citizens concerned with justice. They are also typically workers, householders, and members of families.⁶³ Do not these areas of activity have an important place in a system of social cooperation?

To put the same question in a different way, is Rawls's political conception of the person arbitrarily selective even within his own framework in what it endorses as fundamental? If there are other

63. Susan Moller Okin argues that Rawls should abandon his "traditional liberal assumptions about public versus domestic, political versus nonpolitical spheres of life" SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 109 (1989).

human capacities with associated areas of activity that are equally presupposed by the idea of cooperation for mutual advantage,⁶⁴ this would affect the shape and priority of the basic liberties and rights.⁶⁵ As a specific illustration of this possibility, I submit that the capacity to produce social benefits through one's actions (roughly the capacity to work, where work is not restricted to formal employment) should be regarded as a third moral power because it is presupposed by Rawls's root idea of cooperation for mutual advantage.

It is not plausible to respond to the suspicion that there may be other fundamental moral powers with a (typically Rawlsian) suggestion that in order to keep things simple and manageable we should limit the moral powers to just two. Too much turns on this matter to allow it to be decided by matters of theoretical convenience. If we take the capacity to engage in productive activity as a fundamental moral power, this will have important implications for how we justify and interpret rights and liberties.⁶⁶ For example, it will boost the priority of economic liberties and rights when they conflict with other sorts of rights.⁶⁷

Rawls defends the two moral powers by arguing that they are implicit in his root idea of social cooperation for mutual benefit.⁶⁸ The capacity to produce social benefits through one's productive activities can be defended in exactly the same way. Social cooperation will not produce most of the kinds of benefits that give rise to questions of distributive justice unless people work. Persons who are capable of being "normal and fully cooperating members of society over a complete life"⁶⁹ must be persons who are capable of producing benefits for society through their deliberate actions. If we view persons as capable of social cooperation for mutual benefit, we are attributing to them not just a capacity to develop and exercise a sense of justice, and to form, revise, and pursue a conception of the good, but also a capacity to benefit themselves and others through their productive activi-

64. POLITICAL LIBERALISM, *supra* note 1, at 300.

65. Notice that in raising this question in this way, I am continuing (for the purposes of this Article) to presuppose Rawls's framework and starting point. I believe that there are also problems of arbitrary selectivity in taking social cooperation for mutual advantage as one's only starting point, but that is not my present concern.

66. Recognizing productive action as a third moral power does not entail some sort of duty to work. Its role, like that of the two moral powers Rawls introduces, is to orient our conception of primary goods and ultimately our conception of justice—including our conception of basic liberties and rights. Like the other key capacities, the capacity to work is to be protected in its development and exercise.

67. For a defense of some economic rights as human rights, see *supra* note 20, at 147-70.

68. POLITICAL LIBERALISM, *supra* note 1, at 300.

69. *Id.* at 301.

ties. This third capacity is certainly presupposed, for example, by the difference principle.

Rawls recognizes that a conception of the person as "homo faber" is a traditional way of identifying certain aspects of human nature as particularly significant. But he dismisses this conception as a personal or moral ideal rather than as one presupposed by his root idea of social cooperation for mutual advantage.⁷⁰ I believe that he is wrong about this.

Because of the very important role that the political conception of the person plays in shaping a system of rights and liberties, the question of whether other human capacities and areas of action can be rooted in exactly the same way in the idea of social cooperation for mutual advantage needs to be very carefully explored. It is not clear that Rawls has conducted a serious exploration of this sort. We have reason to worry that the entire structure that Rawls has constructed in recent years for justifying and interpreting liberties and rights is arbitrarily narrow.

70. *Id.* at 300.

