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## **A Critique of Rawls's Arguments for the Lexical Priority of Liberties**

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**Note on this text (9/24/2009):** this pdf file replaces the old html version of this paper, which was hard to read on some browsers. Although today I would probably change some of my descriptions, at this point the online version has been cited in various articles, so I am leaving the original text as is. I still stand by the essentials of the argument, including the implication that liberties such as freedom of speech have limited scope that should be interpreted in accordance with the ideals and requirements of deliberative democracy. This supports campaign finance laws that ban corporate sponsored political advertising, which is relevant to a case presently before the Supreme Court of the United States.

In his *Theory of Justice*, John Rawls famously defended several "principles of justice" which, working together, are supposed to express deontological implications of basic intuitions about fairness in the social contract for a modern democratic society. Among these results, one of the most important is the *absolute priority* of individual equal liberty for all, which is supposed to safeguard the idea that "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override" (*TJ*, p.3). Rawls views this priority rule as one of the most essential aspects of theory, which differentiates it from utilitarian approaches. This "lexical" priority of liberty to other considerations is meant to capture the illegitimacy of sacrificing any individual's basic personal freedoms for collective gains. However, although this rationale of Rawls's main priority principle is often run together with more basic inviolability of the difference between persons in general, they are not the same. The latter corresponds to the general 'priority of the right to the good' principle which is distinctive of all deontological moral theories, and which in Rawls's case is embodied in the Original Position with its veil of ignorance as a contractarian procedural standard for the legitimacy of basic political institutions. By contrast, Rawls's main priority rule is a *deliverance* that will supposedly follow from the Original Position, just like the two main principles (equal liberty and the difference principle). Moreover, this lexical priority of liberties rule is a specifically *liberalist* result in Rawls's theory: it is part of his deontological approach to social justice by (synthetic)

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John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1971). All references to this text are herein abbreviated *TJ*.

implication, not by definition. This distinction is important, because it reminds us of the in-principle possibility of a deontological theory of justice that does *not* include a protection for individual liberties as strong as the one Rawls advocates. In this paper, I will develop this possibility (a) by critiquing Rawls's analysis of liberties and his case for the lexical priority principle; (b) by arguing alternatively that for reasons brought forward by Jürgen Habermas, deontologists ought to favor a weaker priority rule for individual liberties against the state; and (c) by sketching how such an alternative "conditional priority" of principle might be formulated, taking into account the political effects of differences in the legal scope of various liberties.

Given its central place in his theory, it is not surprising that Rawls retains his commitment to the lexical priority of liberties in *Political Liberalism*. In that book's final chapter, he attempts to deepen the argument for the lexical priority of liberties by grounding it more clearly in a 'political conception of the person.' I will argue, however, that even if we start from Rawls's reformulated political conception of justice based essentially on toleration among competing but reasonable comprehensive worldviews, his account of the basic rights and his arguments (both old and new) for their absolute priority involve serious difficulties. These difficulties are most clearly apparent in his lesser emphasis on the political liberties and in his arguments concerning the worth of liberty. Nor are these difficulties sufficiently addressed by including a "fair-value of political liberties" clause in the first principle of justice, by introducing the notion of a "fully adequate scheme of basic liberties," and other modifications Rawls spells out in his lecture on *The Basic Liberties and Their Priority*. By contrasting the implications of Rawls's fair-value principle with those of Habermas's deliberative-democratic approach to the public sphere, we will see that Rawls's principle require comparatively little reform in civil society for purposes such as the empowerment for the poor and the creation of a more rational 'public sphere.' Furthermore, Rawls's new argument for the priority of liberties still depends on the same assumptions about deviations in the *worth* of liberties as the origin argument in a *Theory of Justice*. These assumptions are vulnerable to critiques of the difference principle which show that it may not adequately control or prevent expanding inequality in the worth of liberties as the scope of basic liberties increases.

## I. The Priority of Liberty in Rawls's Scheme as a Whole

The role of such priority principles, as Rawls explains in *A Theory of Justice*, is to serve as "critical principles" that tell us how to *weigh* the two principles and their parts. Thus the main priority rule is "the absolute weight of liberty with respect to social and economic advantages, as defined by the lexical order" (*TJ*, p.63). In addition, Rawls also maintained in *A Theory of Justice* that within the second principle, fair equality of opportunity is lexically prior to the difference principle (*TJ*, p.89, p.303). The serial or lexical priority of the first principle to the second means that "we must satisfy the first principle in the ordering before we can move on to the second" (*TJ*, p.43). Generally speaking, in lexical ordering:

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I have alluded to this possibility in an earlier paper on deontic theory and determination of the scope of moral precepts. See my "Deontology and Alan Donagan's Problem of Exception-Rules," *Analysis* 55.4 (October, 1995), 261-270, esp. note 2.

A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception (*TJ*, p.43).

In practice, what this means in Rawls's scheme is liberties can only be limited based on other considerations drawn *from liberty*, such as the need to preserve conditions conducive to this or that liberty. Rawls explains how this is to work in more detail when he discusses the adjustment of a complete scheme of liberties.

What is important at this stage is to recognize how crucial Rawls's priority rules are to his entire enterprise in *A Theory of Justice* and subsequent works. He states at the outset that in trying to provide a more general and thorough version of the "theory of the social contract," his aim is to "offer an alternative systematic account of justice that is superior...to the dominant utilitarianism of the tradition" (*TJ*, p.viii). In Rawls's view, his priority principles are *the* distinguishing feature of his contractarian theory. As opposed to utilitarianism, Rawls's weighting principles give *absolute precedence* to considerations of liberty.

This 'absolute priority of liberty' also has a systematic importance that runs throughout Rawls's argument in *A Theory of Justice*, and which reappears in his reformulated political conception of justice in later works. By being in serial or lexical order, the two principles of justice imply the ordinal division of all other facets of the theory to which they directly relate. The "basic structure" of institutions to which the two principles of justice apply is divided into two segments, one of which has priority over the other (*TJ*, p.61). Likewise, there are two "relevant social positions" from whose perspective the principles of justice are to be justified for each person: "that of equal citizenship and that defined by his place in the distribution of income and wealth" (*TJ*, p.96).

Also corresponding to the hierarchy in the principles of justice and in the primary goods, is the "division of labor" (*TJ*, p.199) between the constitutional stage and the legislative stage in the formation of just institutions: the former focuses on specifying and adjusting the equal liberties, while the provisions which realize the second principle for socioeconomic distributive justice are settled in the legislative stage. Hence Rawls says openly that "the priority of the first principle of justice to the second is reflected in the priority of the constitutional convention to the legislative stage" (*TJ*, p.199). It is also the priority rules which put the first principle before the second and fair equality of opportunity before the difference principle that distinguish Rawls's complete formulation of the principles of justice from his "general conception" of justice. Without the priority rules, Rawls's principles collapse into the single general principle that "all social primary goods...are

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Rawls reaffirms this point in *The Basic Liberties and Their Priority*, saying that at the constitutional convention, "although the delegates have a notion of just and effective legislation, the second principle of justice, which is part of the content of this notion, is not incorporated into the constitution itself" (p.52). While it preserves a nice structural parallel to the stagewise prioritization that runs through Rawls's theory, however, this proposal is surely strange on its face. If delegates at a constitutional convention really had clear directives such as the difference principle and fair equality of opportunity to guide them, there would seem to be no reason for not making these principles explicit in at least a general form, thereby establishing constitutional grounds on which any radically unjust social and economic arrangements could be struck down in the judicial stage.

to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored" (*TJ*, p.303).

The lexical priority of liberty also implies a basic hierarchical distinction among the primary goods which are to provide the accepted bases for expectations (*TJ*, p.62, 93). The primary goods are divided into three broad categories with a priority corresponding to the principle of justice that governs them. Rights and liberties governed by the first principle take precedence over access to powers and opportunities, which are governed by the fair equality of opportunity rule in the second principle, and these are in turn prior to income and wealth, which are governed by the difference principle. As we will see, a similar but more complex relation now exists between the categories of primary goods and the serially arranged principles in Rawls's revised theory.

This has the further implication that we must think of liberties first as purely formal freedoms and duties before considering the two groups of socioeconomic primary goods governed by the two parts of the second principle. The liberties enshrined in constitutional law are to be thought of as distinct from *resources*, such as positions of authority in major organizations, education and training, and economic advantages. Thus in discussing the concept of liberty and the application of the first principle to the basic structure, Rawls makes a famous distinction between "liberty" and the "worth of liberty." While liberties themselves are legal permissions, their *worth* consists in the value they have when one can actually exercise them. The worth of liberty is therefore dependent to a large extent on all the socioeconomic primary goods that allow people to make substantial use of rights and permissions given by law:

..the two-part basic structure allows a reconciliation of liberty and equality. Thus liberty and its worth are to be distinguished as follows: liberty is represented by the complete system of liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance within the framework the system defines (*TJ*, p.204)

Equal liberties in the sense of equal legal permissions and responsibilities, then, does not require equal *worth* of liberties for all: rather, citizens's abilities to make use of their legal freedoms and the values their liberties have for them will depend on factors regulated by the second principle of justice. Corresponding to the lexical priority of the first principle over the second, then, is the *priority of formal liberties to the worth of liberties*. In these interrelated ways, the priority of liberty rule provides the basic paradigm for the entire theory, making possible the structural correspondence between different aspects of Rawls's analysis.

The "absolute priority of liberty," then, is not just a minor component in Rawls's approach: it establishes the *distinctively liberalist* direction of the entire theory, for example by implying the necessity of constitutions which strictly limit the power of popular democratic deliberation to influence the scope of prevailing rights and liberties in a just society. Thus it is not surprising that Rawls continues to maintain his priority principle in his *Political Liberalism*, despite the criticisms it has drawn. Surrendering his formulation of the priority rules would mean radically rethinking his liberal contractarian strategy for opposing utilitarianism. A step Rawls has not been prepared to take. Accordingly, in *Political Liberalism*, Rawls has substantially revised and elaborated his grounds for the basic rights, his account of how they are to be balanced with one another, and his approach to the political liberties, in the overall hope of preserving his case for the absolute priority of these basic liberties.

## II. The Priority of Liberties Among the Primary Goods

At the beginning of his new account, Rawls notes that now "the basic liberties and their priority rest on a conception of the person that would be recognized as liberal" (*BL*, p.4). This conception of the person itself evolves, as we have seen, from the notion of social cooperation that is central to Rawls's "political" conception of justice (*JF*, p.195-197). When persons are viewed as "full social cooperators" in Rawls's sense,

..we are attributing to them two powers of moral personality. These two powers are the capacity for a sense of right and justice (the capacity to honor fair terms of cooperation and thus to be reasonable), and the capacity for a conception of the good (and thus to be rational) (*BL*, p.16).

These two moral powers correspond to the elements of "the Reasonable" and "the Rational" in social cooperation (*BL*, p.14); they are necessary because a person must be able to be moved from a reciprocal acknowledgement of the fairness of terms for cooperation, and must also be capable of being "benefitted." The latter requires that they have a sense of their own rational advantage, which must be based on interests defined by their conception of the good.

In other places, Rawls explains these two moral powers of personality as "highest order interests" and adds a third interest that ranks below them but remains significant:

Thus in formulating a conception of justice for the basic structure of society, we start by viewing each person as a moral person moved by two *highest-order* interests, namely, the interests to realize and to exercise the two powers of moral personality. These two powers are the capacity for a sense of right and justice...and the capacity to decide upon, to revise and rationally to pursue a conception of the good. Persons also have a *higher-order* (as opposed to a highest-order) interest in advancing their determinate conceptions of the good (defined by certain specific final ends and aspirations) that they have at any given time (*SU*, p.164-5; emphasis added).

The distinction between the second and third interests has created some confusion. However, I think all Rawls means by this distinction is the difference between the interest in the overall *capacity* to have and revise a conception of the good itself, versus the interest in achieving the ends and excellences mandated by a specific conception of the good. Hence when Rawls talks about "realizing" and "exercising" the two moral powers, he means that citizens have very strong interests in the conditions necessary for the development of the generic capacities themselves and necessary

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See Rex Martin, *Rawls on Rights*, who argues that "in fact, there is virtually no difference between these two interests" (p.49). Martin thinks that by "advancing" one's conception of the good, Rawls means winning adherents for it (p.48), but adds that if we understand it as the interest in achieving the ends specified in one's conception of the good, then this third higher order interest is just the second minus the capacity to *revise* one's conception. I do not agree with this reading.

Thus Rawls writes in "Justice as Fairness: Political Not Metaphysical," "In addition to having the two moral powers, the capacities for a sense of justice and a conception of the good, persons also have at any given time a particular conception of the good that they try to achieve" (p.198). Although I actually think this claim is dubious since persons clearly often operate with no very determinate conception of their good at all the distinction *is* a theoretically important one for Rawls.

for using them (for example, in changing one's conception of the good and altering one's lifestyle accordingly). Realizing and exercising one's capacity for a conception of the good strictly means acquiring and changing such a conception, not pursuing the specific ends and loyalties mandated therein. Interests in the latter are *derivative* from the exercise of one's capacity for a conception of the good, and hence the interest in realizing one's specific ends is only a "higher" interest, rather than "highest-order." This may seem like a fine distinction, but the hierarchy in which the three "essential" interests (as we might call them for convenience) are arranged become extremely important in relation to the absolute priority of liberties.

In Rawls's revised account, the conception of persons in terms of their moral powers is also closely linked to the primary goods. As Rawls explains in his paper on *Social Unity and the Primary Goods*, the five categories of primary goods, beginning with a list of "basic liberties," are determined by "the general circumstances and requirements of social life" when these are understood "in light of a conception of the person determined in advance" (*SU*, p.167). On the basis of the moral powers and essential interests of the person defined in this conception, Rawls claims to pick out not only which liberties should be on the list of *basic* liberties, but also the complete list of the primary goods (of which the list of basic liberties is a part):

1. The basic liberties (freedom of thought and liberty of conscience and so on): these liberties are the background institutional conditions necessary for the development and the full and informed exercise of the two moral powers...; these liberties are also indispensable for the protection of a wide range of determinate conceptions of the good (within the limits of justice).
2. Freedom of movement and free choice of occupation against a background of diverse opportunities: these opportunities allow the pursuit of diverse final ends and give effect to a decision to revise and change them, if we so desire.
3. Powers and prerogatives of offices and positions of responsibility: these give scope to various self-governing and social capacities of the self.
4. Income and wealth, understood broadly as all-purpose means (having an exchange value): income and wealth are needed to achieve directly or indirectly a wide range of ends, whatever they happen to be.
5. The social bases of self-respect: these bases are those aspects of basic institutions normally essential if citizens are to have a lively sense of their own worth as

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Thus for example, the right to *personal* property is included because it is necessary "to allow a sufficient material basis for a sense of personal independence and self-respect" while the right to ownership of capital and natural resources is left out, since this is not said to be necessary for the exercise of the two highest moral powers (*BL*, p.12). Of course, what if your determinate conception is utterly capitalist, and values owning the means of production as the highest good?

Cited from *Basic Liberties and their Priority*, p.22-23. Rawls gives almost exactly the same formulation of the primary goods in his *Social Unity and the Primary Goods*, p.165-6.

The full list of basic liberties is as follows: "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law" (*BL*, p.5).

persons and to be able to develop and exercise their moral powers and advance their aims with self-confidence.

When we look closely at these different kinds of primary goods, it becomes apparent that each category is related to different *combinations* of the three essential interests of persons. As Rawls says, these interests give rise to "three kinds of considerations":

These are considerations relating to the development and the full and informed exercise of the two moral powers...and finally, considerations relating to a person's determinate conception of the good (*BL*, p.24).

The basic liberties are necessary for (a) the sense of justice; (b) the conception of the good; and (c) for many different *determinate* kinds of goods or ideals themselves. Thus in his extended argument for freedom of conscience as a basic liberty, Rawls first begins with type (c) considerations. He argues that the parties must take into account that almost all conceptions of the good (any of which could be theirs) will involve "religious, philosophical, and moral views of our relation to the world," which their adherents would need to be free to practice (*BL*, p.25). This argument involves not just the capacity to form a conception of the good, but some information about the *contents* of different determinate conceptions. Thus it is also an argument based on determinate interests that persons with such conceptions of the good would have. This is one kind of argument for equal liberty of conscience, but in his revised theory, Rawls now adds substantial new arguments that the liberty of conscience and the liberty of association are necessary for the development of conception of the good as an end in itself and for its exercise as a means to our good (*BL*, p.28-29). Finally, he adds three powerful arguments for the liberty of conscience as a necessary for acquiring a sense of justice (*BL*, p.31-35). At this point we need not review these arguments; we must only note that in Rawls's view, *all three* types of considerations underpin the list of basic liberties and their equal juridification for all.

The freedoms in the second category of primary goods are also connected directly to the capacity to form and revise a conception of the good. In addition, they are connected indirectly to the other highest order interests, since "freedom of movement and free choice of occupation" together with the rule of law are considered necessary for guaranteeing the other basic liberties (*BL*, p.50). The background of "diverse opportunities" is a social condition required for most determinate conceptions of the good. Hence again in this category, all three kinds of considerations are relevant.

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This is in fact the only substantial argument Rawls presents in *A Theory of Justice* for equal liberty of conscience, which serves as his test case. He argues first that since "the parties do not know how their religious or moral view fares in their society" for protection they must insist on *equal* liberty of conscience (*TJ*, p.206); and second that the "strength of religious and moral obligations" found in many determinate conceptions of the good "seem to require that the two principles be put in a serial order, at least when applied to freedom of conscience" (*TJ*, p.208). Since these are both arguments from certain *particular* conceptions the parties know they might have, Rawls creates the impression that the grounds for equal liberties is solely in such possible determinate *interests*. This is the misimpression he now strives to correct (see *BL*, p.4). In his revised theory, considerations based on persons' "higher" interest in their determinate ends are no longer the only (or even the primary) reasons for the freedom of conscience.

Rawls in fact includes these freedoms with the basic liberties falling under "the integrity of the person," which leaves some confusion as to why they are initially given as a separate category.

The third category "powers and prerogatives of offices" is only related to the interest in exercising a conception of the good, and to the interest in realizing one's determinate ends. And the fourth category "income and wealth" is only related to the single higher-order interest in the achievement of one's determinate ends. Thus, ignoring for the moment complexities involved in Rawls's notion of self-respect (the fifth category), we have the following breakdown:

Categories of Primary Goods	Considerations related to the moral conception of the person	Governing Principles
1. Basic liberties	(a), (b) & (c)	1st principle
2. Free movement and diverse opportunities of occupation	(a), (b) & (c)	1st principle
3. Powers of offices/positions	(b) & (c)	2nd prin. part B
4. Income and wealth	(c)	2nd prin. part A

This breakdown is significant because it reveals how in his revised theory of justice, Rawls has maintained, within the primary goods, a hierarchy appropriate to his priority rules. Whereas the basic liberties are necessary for the *highest* order interests and many of the *higher-order* interests given in different determinate conceptions of the good, income and wealth are only related to the higher-order interest in achieving one's determinate ends. In other words, the only interest on which the need for income and wealth is based is already hierarchically inferior, in the conception of the person, to the interests on which the basic liberties are based. This anticipates the priority of liberty to the difference principle. Furthermore, the need for powers and prerogatives of offices has a broader basis in the essential interests of the person than does the need for income and wealth: hence the priority of fair equality of opportunity to the difference principle. As Rawls says,

The highest-order interests in developing and exercising the two moral powers, along with the normal conditions of human social life, not only single out the primary goods but also specify their relative importance. Thus, the priority of the first principle over the second, and the priority of part (b) of the second principle over part (a), reflects the pre-eminence of and relation between the highest-order interests in the conception of the person (*SU*, p.166).

Rawls thus retains, on a new basis (i.e. the conception of the person and their essential interests), the systematic correspondence between the categories of primary goods and the serial ordering of the principles which we first saw in *A Theory of Justice*. This shows how important it is for Rawls to give a lower standing to the merely "higher-order" interest in achieving one's determinate ends. In this assumption a predisposition for Rawls's priority principles is created.

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Apparently, the "pre-eminence" mentioned here is the pre-eminence of *both* the highest-order interests over other interests in human life, which establishes the joint significance of the highest order interest for a theory of justice; while the "relation between" these interests is reflected in the priority principle. But Rawls does not clearly explain what he means here when he suggests an *internal* relation of precedence between the two highest-order interests. Officially, they are supposed to be on a par.



### III. The Priority Principle and the Adjustment of Liberties in a "Fully Adequate Scheme"

In *A Theory of Justice*, Rawls explained the meaning of his main priority principle as follows: "When lexical order holds, a basic liberty can be limited only for the sake of liberty itself" (*TJ*, p.204). The priority rule, in other words, limits the kinds of considerations involved in adjusting the specific extensions of each of the basic liberties, so that they can fit together in a coherent scheme. As Rawls says in *A Theory of Justice*, we must realize that "the basic liberties must be assessed as a whole, as one system" when adjusting them to one another (*TJ*, p.203). An interpretation of how this adjustment should take place as the liberties are specified determines the *practical meaning* of the priority principle. Since that principle requires lexical priority for liberties, it must include a rationale that explains how the first principle of justice can be *fully satisfied*, or otherwise the second principle of justice would never even be activated. However, Rawls's understanding of the rational procedure by which the mutual adjustment and balancing of liberties should occur as required by the first principle has now changed in several critical respects.

In *A Theory of Justice*, Rawls's first principle calls for "the *most extensive* total system of equal basic liberties compatible with a similar system of liberty for all" (*TJ*, p.302Cfinal formulation). This involves two intuitive notions: first, that in legal form, a given liberty is more or less "extensive" and second, that as they are made more extensive, liberties will conflict and thus provide a basis for limiting one another: thus "liberty is governed by the necessary conditions for liberty itself" (*TJ*, p.215).

The "extension" of a liberty must be distinguished from its equality for all. Rawls seems to think of extension as a measure of how broad a liberty is in application. We might think of it as a measure of how many legal protections potentially guaranteed under a liberty are actually in force. Thus, for example, freedom of the press is more extensive if it includes the right to completely unregulated television broadcasting; it is less extensive if this right is not legally established. *Equality* of a liberty, on the other hand, is defined in terms of extension: a liberty applies equally to all if it has the same extension or range of application for every citizen. Hence there are two distinct ways to contravene the first principle: "The basic liberties may either be less extensive though still equal, or they may be unequal" (*TJ*, p.244). Lastly, this inequality in which a given liberty has different scopes for different citizens is not to be confused with "inequality in status" *between* different liberties themselves: "some of the equal liberties may be more extensive than others, assuming their extensions can be compared" (*TJ*, p.204).

Rawls implies at some points in *A Theory of Justice* that certain liberties have what could be called natural maximum extensions. For example, Rawls suggests that the extensiveness of the liberty of political participation should be defined relative to "bare majority rule." Hence "Whenever the constitution limits the scope and authority of majorities" by checks, balances, a bill of rights, and so on, "equal political liberties is less extensive" (*TJ*, p.224). This way of thinking about the extensiveness of a liberty, however, seems hard to reconcile with the actual progression of judicial interpretation, in which more and more sub-principles and concrete protections may be *specified* for new circumstances under the *principle* of a given liberty. Thus, the freedom of the press, legislated

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As Rawls says, only certain kinds of principles can meaningfully be prior in a lexical ordering: "unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play" (*TJ*, p.43).

This is my example, not Rawls's.

long before the transistor, was extended when it was found to apply (within limits) to radio and television broadcasts. This model of specificatory application of principles suggests that from one point of view, the potential extension of a liberty may be limited only by the range of possible circumstances in which it could apply.

In this light, there is little reason to think that the scope of each liberty, considered separately, reaches any inherent limit in some threshold relative to which its extension can be *decided* in advance without judicial or democratic deliberation. Liberties can only generate reasons to limit other liberties (and themselves) because some of their applications conflict with conditions necessary for other applications they might have, making impossible some combinations of different liberties, each with particular legal extensions. On these sorts of grounds, and to meet requirements for the stability of the whole system of liberties (*TJ*, p.218), we are justified in adjusting the specific liberties "so as to yield the best total system of equal liberties" (*TJ*, p.203). In *A Theory of Justice*, where the maximum overall sum of extensions in liberties is prescribed as the ideal, Rawls conceives the limitations that liberties place on one another's extensions as marginal exchanges in a maximization problem. Thus, taking the liberty of equal political participation, for example, Rawls says

..we should narrow or widen its extent up to the point where the danger to liberty from the marginal loss in control over those holding political power just balances the security of liberty gained by the greater use of constitutional devices...The priority of liberty does not exclude marginal exchanges within the system of freedom (*TJ*, p.230).

But in *The Basic Liberties and Their Priority*, in response to objections from Hart and others, Rawls abandons this earlier view: instead, "the best scheme of liberties is not said to be the most extensive" in any mereological sense (*BL*, p.46). The first principle is changed to require "a fully adequate scheme of equal basic liberties" (*BL*, p.5), and Rawls must then define what this "full adequacy" condition means and how it can be satisfied. This account involves three new concepts: the "central range" of a liberty; the "significance" of a liberty; and the two "fundamental cases" with respect to which significance is defined.

In adjusting liberties to one another, Rawls now says that the priority of liberty requires that we "preserve intact the central range of application of each basic liberty" (*BL*, p.10). Liberties, in other words, are thought of as having a core set of applications protected by the priority of liberty. For example, Rawls suggests that the central range of the liberty of conscience includes at least "the freedom and integrity of the internal life of religious associations and the liberty of persons to determine their religious affiliations" (*BL*, p.56-8). To take other cases, the "central range of the freedom of political speech" must include full protection of subversive doctrines from charges of "seditious libel" (*BL*, p.57), and the right to own capital is *not* in the central range of the "liberties of the person" (*BL*, p.12). Rawls does not make these decisions intuitively or arbitrarily, but rather

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Thus Rawls can say that his principles in serial order are "analogous to a series of constrained maximum principles" (*TJ*, p.43) a description he now abandons (see *BL*, p.47, footnote 41).

On this point, see my remarks in a paper critiquing libertarian theories of justice: "Deontology and the Antinomy of Libertarianism: A Response to Professor Sterba," in *Rending and Renewing the Social Order, Social Philosophy Today* series, Vol. 12, ed. Creighton Peden and Yeager Hudson (Edwin Mellen Press, December 1996): 177-218, esp. "VII, p.204-212.

from considering which specific rights are "necessary for the development and exercise of the moral powers" to which a given liberty is related (*BL*, p.12). In other words, the applications included in a liberty's central range (or at least its essential elements) are determined along with the decision to count that liberty as basic in the first place, since both are justified directly from requirements for the "adequate development and full exercise of the two moral powers of citizens" (*BL*, p.11).

Thus the maintenance of specific legal rights that are essential to different basic liberties is a necessary but not sufficient condition for having a fully adequate scheme. Full adequacy requires, in addition, that in further filling out the scheme of equal liberties, different specific applications of liberty should be weighted relative to two "fundamental cases." The two "fundamental cases" are derived from applying the two highest-order moral powers to their most comprehensive subjects:

The first of these cases is connected with the capacity for a sense of justice and concerns the application of the principles of justice to the basic structure of society and its social policies. The political liberties and freedom of thought are discussed later under this heading. The second fundamental case is connected with the capacity for a conception of the good and concerns the application of the principles of deliberative reason in guiding out conduct over a complete life. Liberty of conscience and freedom of association come in here. (*BL*, p.47).

The *significance* of a liberty is defined with respect to these fundamental cases as follows:

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 (*BL*, p.50).

This gives Rawls a criterion to govern the specification and adjustment of liberties into a coherent scheme at the constitutional stage. By rating specific extensions of general liberties (i.e. specific legal rights) as more or less "significant" in this sense (i.e. how essential they are to the exercise of the moral powers in the two fundamental cases), Rawls provides a criterion for weighting these claims and determining which should be adjusted to suit which in cases of conflict. Further extensions of less significant liberties may have to be given up "for the sake of the most significant

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Thus, in the case of political liberties, which are most closely related to the sense of justice, Rawls begins to consider its central range by asking "what more particular liberties, or rules of law, are essential to secure the free, full and informed exercise of this moral power" i.e. the sense of justice (*BL*, p.57).

The reason this qualifier is needed is explained in more detail below. The problem is that Rawls appears to have more and less inclusive notions of the central range.

In other words, as I read Rawls, the "fundamental cases" relate to the two moral powers like judgments relate to concepts in Kantian thought. Each "fundamental case" seems to be what we might call a *practical social judgment*, in which a fundamental capacity (rather than a concept) is applied to the basic question of human interaction (rather than to objects).

Thus, even though the liberty of conscience is supported by considerations from all three types of essential interests (as we saw), Rawls associates it primarily with the capacity for a conception of the good. The other basic liberties are likewise supported by all considerations, but they may be especially associated with one of the fundamental cases.

liberties" (*BL*, p.56). Finally, Rawls argues that "basic liberties not only limit one another, but are self-limiting" (*BL*, p.56). He can show this, at least, for basic liberties in their *equality*. Given the requirement that liberties apply equally to all, beyond a point, further specific extensions of a given liberty, when granted to all, may be self-contradictory.

Full adequacy, like significance, is defined in terms of the two fundamental cases for Rawls. Rawls introduces the fundamental cases, as he says, because the "fully adequate" extension of the liberties cannot just be that which maximizes "the development and exercise of both moral powers" unconditionally (*BL*, p.48). It is important to realize that unlike the moral powers considered in abstraction, the "fundamental cases" will vary somewhat from society to society, since they are defined as the *application* of the moral powers to certain comprehensive problems that will appear in somewhat different forms depending on the history and traditions of a given society. Thus when the first principle is understood in terms of these fundamental cases, it calls for "the best, or at least a fully adequate, scheme of basic liberties, *given the circumstances of society*" (*BL*, p.46, my italics). This element of contextualization is apparent again in Rawls's definition of full adequacy:

..the criterion at the later stages is to specify and adjust the basic liberties so as to allow the adequate development and full and informed exercise of both moral powers in the social circumstances under which the two fundamental cases arise *in the well-ordered society in question*. Such a scheme of liberties I shall call "a fully adequate scheme" (*BL*, p.48, my italics).

Putting all these pieces together, it would seem that the "fully adequate" clause in the first principle of justice is satisfied when (a) the central range of each liberty (determined from the moral powers taken noncontextually) is provided for *without* tradeoffs between the components of these central ranges, and (b) beyond their central ranges, liberties are further extended in accordance with the criterion of significance, as it will vary in different societies. This is what Rawls seems to mean when he says that the priority of liberty is premised on the assumption that "the basic liberties can be made compatible with one another, at least within their central ranges of application" (*BL*, p.11). In other words, extensions included in a liberty's central range of application are not supposed to be subject to negotiation in the "balancing" of the full scheme.

However, in a later section, Rawls himself explains the implications of his new criteria in slightly different terms. He concludes his extended analysis of free political speech as follows:

I have tried to illustrate how in the case of political speech, we try to identify the more essential elements in the central range of application of this basic liberty. We then proceed to further extensions up to the point where a fully adequate vision for

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The idea here is similar to Kant's "contradiction in concept" test, which asks whether a maxim can even be a universal *law* for all (i.e. apply equally to all). This test for personal moral norms is supposed to disqualify some maxims as not even capable of becoming universal *regularities*, let alone laws with normative force (i.e. "necessities"). Its political analog is the question of whether a proposed law can even apply equally to all persons (before we even consider whether it can be enforced). This basic test may show one way in which liberties can have inherent internal limits: further extensions of a liberty may be incompatible with that those extensions being made into universal provisions for all.

This point seems to me implicit in what Rawls says about the fundamental cases, although he himself does not emphasize it.

this liberty is achieved, unless this liberty has already become self-limiting, or conflicts with more significant extensions of other basic liberties (*BL*, p.71-72).

This way of putting the matter is somewhat confusing, since it distinguishes two *parts* of a liberty's central range itself: the essential and non-essential segments. The components in the first are apparently determined (as before) from the moral powers directly, and are not subject to tradeoffs. Components in the second are determined according to their "significance" relative to the fundamental cases as the entire scheme of liberties is filled out and completed, and so it appears that components in this "non-essential" segment of a liberty's central range are negotiable. To paraphrase, Rawls basically gives us a conception that distinguishes *three segments* that jointly exhaust a liberty's scope, as follows:

- A) Its *essential* extension, determined from the necessary conditions for the exercise of the moral powers taken noncontextually, and required to be fulfilled *without tradeoffs* between liberties, in *any just democracy*.
- B) Its *preferred* significant extensions in a given society, weighted in "significance" according to how essential such extensions are for the effective application of moral powers to the problems of the basic structure and comprehensive conceptions of the good, as those problems arise in the context of a given society's history, traditions, and circumstances. These extensions continue until (in serial order):
  - (1) they are overruled by more significant extensions of other liberties.
  - (2) they limit themselves under conditions of equal liberty.
  - (3) they provide sufficiently for the use of the moral powers in the fundamental cases as they appear in a given society (i.e. they include all extensions considered *significant* relative to the fundamental cases).
- C) Its *non-basic* further extensions (if any), when these are compatible with essential and preferred extensions of liberties, and based directly on the history, tradition, and political culture of a particular society (such as the right to own capital as a non-basic extension of the freedom and integrity of the person).

Specific rights falling within the first *two* segments of a liberty's scope are considered part of the *basic* liberty, and are protected by the priority of liberty rule under the first principle of justice. Further components in the third segment are considered non-basic liberties (or non-basic extensions of the basic liberty) are not protected under the priority rule. This also implies a stage-wise distinction. As Rawls says, "all legal rights and liberties other than the basic liberties as protected by the various constitutional provisions...are to be specified at the legislative stage" (*BL*, p.53). Only extensions in the third segment of each liberty's range are left up to the deliberative process of popular sovereignty.

Once we have identified these three segments of a liberty's extension, the nomenclature matters little. If we say that segment (A) constitutes the *entire* central range of the liberty, then fulfilling the central ranges of each liberty is a necessary but not sufficient condition for the completion of a fully adequate scheme of basic liberties. All of the specific permissions and rights in the "fully adequate" vision for the liberty must be counted as basic and protected by priority: both those in the central range of the liberty, and those further extensions arrived at through tradeoffs with

further extensions of other liberties, weighted in terms of significance. On the other hand, if we like we can say that segment (A) constitutes the *essential* part of a liberty's central range, and (B) the non-essential part of its central range. But then we have to say that only the essential components of each liberty's central range must be the same in every democracy, and must be completely fulfilled without tradeoffs. The central range of a liberty will then have an essential core that is fixed in advance by what is absolutely necessary for the use of the two moral powers, non-contextually and without comparative considerations from other liberties, and be determined the rest of the way by the balancing of its further significant extensions with those of other liberties according to their significance *in the context of different societies*. To avoid any ambiguity, I prefer "essential basic," "preferred basic," and "non-basic" to designate these three segments.

The definition of the second segment perhaps demands some clarification. Rawls offers no definition for a "fully adequate vision" for a liberty except in terms of significance relative to the fundamental cases. As I understand Rawls's first principle, then, a liberty continues to be extended, unless its further extensions are overruled by more significant extensions of other liberties, or it limits itself, *or it runs out of further extensions that have significance relative to the fundamental cases*. Rawls is less explicit about this last possibility, but it is a necessary element of his scheme for an important reason. If every legally conceivable extension of a liberty has some significance, the theory would imply that any further, non-basic extensions of liberties would be impossible because inconsistent with components of the basic liberties protected under the priority rule. This implication is avoided precisely because we can think of these non-basic extensions in the third segment of a liberty's scope (such as rights to own natural resources, rights to own firearms, etc.) as simply having *zero weight* in the technical sense of "significance." In other words, non-basic liberties are not at all essential to the exercise of the moral powers in the fundamental cases, nor are they necessary institutional means thereto. But, as long as they do not conflict with any liberties already established in the fully adequate scheme, and do not constitute further extensions of a liberty that has already limited itself, these zero-significance extensions are at least possible at the legislative stage.

This analysis shows, however, that Rawls's notion of the fully adequate scheme of basic liberties certainly *does* embody a notion of completeness. Pace Rawls's denials, his concept of full adequacy implies a maximal ideal: the fully adequate scheme starts with the essential extensions of every liberty, and its remainder is then filled in by extensions of every liberty, until one by one, each liberty reaches its logical limit, leaving only the most significant further extensions of various liberties (which overrule others). Finally, these extensions too either limit themselves, or are "completed" in the sense that they include every related legal right that in current knowledge promotes the exercise of the moral powers in the fundamental cases. The "fully adequate scheme" thus exhausts the compossible significant extensions of liberties, in the *most significance-optimal*

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At one point, in discussing "several (non-basic) liberties associated with the second principle of justice" Rawls does mention that "the significance of a liberty (whether basic or non-basic) is tied to its political and social role within a just basic structure.." (*BL*, p.72). This only makes sense, however, if the political and social significance of non-basic liberties is understood as distinct from "significance" relative to the two fundamental cases. For if non-basic liberties had "significance" in this technical sense, they would have to be included among the basic liberties, if possible, for the scheme to be "fully adequate" (and if their inclusion was incompatible with other basic liberties, they also could not be established as non-basic liberties).

*combination*. In a word, the first principle now requires the maximally significant compossible scheme of liberties relative to the fundamental cases. Rawls argues that his notion of the optimum system of basic liberties is not a quantitative maximization, since "acting from the best reasons, or from the balance of reasons defined by a moral conception [such as "significance"], is not in general to maximize anything" (*BL*, p.47 footnote 41). But this is deceptive: Rawls's revised first principle is still calls for a maximization test on schemes of liberties in the sense that it is supposed to serve as a *decision-procedure*, an algorithm by which social contractors commit to decide the answer to a particular fundamental problem in advance of the phronetic risks of democratic deliberation. Thus, although it is defined relative to Rawls's fundamental cases, and therefore does not exhaust all possible extensions of liberties (since some will be "non-significant"), Rawls's conception of how liberties are to be filled out and balanced still attempts to maximize formal liberties (no longer in the *quantitative* sense ("most extensive"), but in the sense of a *logical* maximality of significance relative to a predetermined standard that is supposed to be sufficient to decide the problem without including deliberation essentially in the procedure. We contract to limit significant extensions of liberties only for the sake of more significant extensions of other liberties, or because of their self-limitation, but always by reference to the formal significance of liberties, and not their practical worth. In *A Theory of Justice*, Rawls had maintained that, relative to the complete system of liberties, it is "by and large true that a greater liberty is preferable" (*TJ*, p.203), and I see no grounds for saying that his new characterization of a "fully adequate" scheme of liberties has any fundamentally different implications.

This conclusion, in turn, undermines Rawls's contention that in his scheme, "no priority is assigned to liberty as such" (*BL*, p.5). Rawls makes this point in attempt to distinguish his first principle from a view typical of *libertarian* theories: namely, that "the exercise of something called "liberty" has a pre-eminent value and is the main if not the sole end of political and social justice" (*BL*, p.5). Rawls argues that his "absolute priority of liberties" principle does not have this ultraliberalist implication, because it is proposed only "relative to a given enumeration of alternatives from which the parties are to select" and hence only applies to a specific *list* of liberties (*BL*, p.7-8). He adds:

..to establish the priority of liberty it is not necessary to show that the conception of the person, combined with various other aspects of the original position, suffices of itself to derive a satisfactory list of liberties and the principles of justice which assign them priority (*BL*, p.8).

Rawls's point here, although somewhat opaque, is just that the priority of liberty is not established from the Original Position and the moral conception of the person *by themselves*. Rather, specific claims must be *introduced* into the Original Position (e.g. the traditional liberties Rawls considers);

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This in itself might be a problem, for one wonders whether some incompatible extensions of certain liberties might not be "equally significant" relative to the fundamental cases, entailing the possibility of more than one equally optimal scheme of "fully adequate" liberties. Since a unique solution cannot be guaranteed, there are other ways Rawls might suggest that the parties in a constitutional deliberation could proceed, e.g. by looking to standards of economic efficiency to break ties between equally significant schemes of liberties. But the fact that his standard need not guarantee a uniquely most significant outcome does *not* mean that no maximal ideal is envisioned by it.

and then and only then can the parties decide which set of principles has a better basis in the conception of the person.

This point is analogous to Habermas's reminder that his discourse principle is "formally empty" in the sense that it only produces conclusions when claims stemming from values and ethical conceptions of the Good are brought *into* normative discourse from multiple evaluative traditions. But the similarity here is weaker than it seems, for Rawls's first principle together with the main lexical priority rule come closer to the contemporary libertarian position than he admits. As we have seen, a general presumption of inviolability for every extension of liberty that has any significance relative to the fundamental cases is built into the notion of a fully adequate scheme. This means that *whatever list* of basic liberties is selected out of those proposed from different ethical perspectives, there is a predetermined reason for assigning absolute priority to the complete scheme of these liberties' significant extensions. Thus, while Rawls may say that his theory involves no claim of priority for "liberty" in the abstract, based on the conception of the person and the fundamental cases, he defines a conception of full adequacy which, *prior to the introduction of any content*, does entail the priority of the maximally significant complete scheme of extensions of whichever liberties are selected in the Original Position. Thus the grounds for Rawls's priority of liberty principle are *essentially* independent of all determinate lists of liberties, even if that priority itself must always be specified relative to a given list of liberties to which it will apply. It seems, then, that when the liberalist view is carried "one step further" to its root in the moral conception of the person (*BL*, p.18), it still does in a meaningful sense assign priority to liberty *per se*.

[I have not fully addressed here the the more general issue of minimum satisfactions in the worth of all liberties as a necessary condition for the priority of liberties].

### **VIII. The "Monotonic Assumption" in Rawls's Argument For the Priority of Liberty**

Rawls begins by acknowledging that the case for the equality of the basic liberties and their priority based on the moral powers needs to be supplemented by principles that assure citizens at least some of the "material means" necessary to use their liberties to "advance their good." The basic liberties cannot remain merely "formal" legal permissions which have little substantial value to citizens lacking the means to exercise them: "Whether principles for the basic liberties *and their priority* are acceptable depends on complementing such principles by others that provide a fair-share of these means" (*BL*, p.40-41; my italics). Rawls is referring here to his distinction between liberties and the *worth* of liberties (*BL*, p.40): it is the latter, as we saw earlier, that give rights their value and substantial worth to citizens.

This illustrates another crucial methodological aspect of Rawls's argument. He distinguishes sharply between the two parts of the argument for the priority of liberty. He says that his argument from moral powers to basic liberties and their priority is addressed to the "initial aim" of overcoming the traditional alternatives (*BL*, p.39), because this bears on his disagreement with *utilitarianism*. Rawls wants to keep this part of the argument *prior* to his search for principles to assure the adequate

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See Jürgen Habermas, "Notes on Discourse Ethics," *Justification and Application*, p.103. As he says: "Practical discourse is not a procedure for generating justified norms, but a procedure for testing the validity of [potential] norms that are being proposed and hypothetically considered for adoption. That means that practical discourses depend on content brought to them from outside."



substantial value of liberties, because the latter bears on his opposition to both to rightist *libertarianism* (as in the philosophy of Robert Nozick) and to more leftist social *egalitarianism*. The first argument supposedly refers to a larger disagreement about liberties *per se*, and the second argument is then supposed to be merely a debate *within liberalism* about the appropriate *worth* of liberties. In retrospect, the desire to separate the questions this way, and indeed even to put them in *lexical order*, seems to be one of the primary motivations behind Rawls's distinction between liberties and the worth of liberties.

Although they are abstractly distinguishable, however, we should remember that these two questions are systematically interwoven in the justification of the priority of liberties. While the lexical priority principle constitutes Rawls's response to utilitarianism, Rawls's argument for this priority principle also depends on demonstrating that adequate equity in the worth of liberties is provided for by his principles. This is especially clear in Rawls's main argument for the priority of liberties, which appears near the end of *A Theory of Justice*. At this point, after "all the elements in the theory of justice have been set out" (*TJ*, p.542), Rawls can finally "tie together the grounds" for the lexical ordering of the first principle of justice over the second (*TJ*, p.541). The core of Rawls's argument is that if social and economic conditions are such that "basic liberties can be effectively exercised" by everyone (*TJ*, p.542), persons in the original position would choose the lexical priority of liberty:

As the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office (*TJ*, p.542).

In other words, the priority of liberty would be rational if everyone can exercise their liberties to a sufficient degree, because in that case these liberties would be "worth" enough that one would never want to sacrifice them for compensating socioeconomic gains. One would not wish to accept a reduction in the extensiveness or equality of the system of liberties (a reduction, that is, beyond the limits required by liberties themselves for their adjustment into a fully adequate scheme of liberties).

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Aside from the irony in even approaching the questions this way, there is a danger here that Rawls has not recognized. The first step—the argument for the liberties themselves—is based on showing that they secure the adequate development of the moral powers *under reasonably favorable conditions* (*BL*, p.39). But what if the realization of such conditions requires a threshold level of equity in the "worth of liberties?" Then *even if* the principles established in the second step provide for an adequate minimum worth of liberties for all, *the distinction between the questions has collapsed*.

And it is here that he parts company most radically with the libertarian views of someone like Robert Nozick, who maintains the implausible position that while "a right to life is not a right to whatever one needs to live," the "side-constraints" protecting someone's *purely formal* right to life remain sternly absolute, even if they are absolutely useless to the person (as when they are dying of starvation as a result of having been born with very few natural talents). See *Anarchy, State, Utopia* (p.179f).

This may be immediately doubted when one considers some cultures such as Japan or Korea where a society largely controlled by oligarchic business/government connections seems to be accepted for the overall benefits in economic growth this arrangement brings. Perhaps Rawls could point to recent unrest in those countries indicating desires for greater liberty as evidence that the long-run trend he

This argument is closely related to Rawls' account of "non-ideal theory" (*TJ*, p.245-6). Non-ideal theories covers "two kinds of circumstances that justify or excuse a restriction of liberty" (*TJ*, p.244): (A) circumstances in which persons or institutions violate the principles of justice ("partial compliance"), and (B) circumstances in which "the natural limitations and accidents of human life" or "historical and social contingencies" inhibit the establishment of equal liberties (*TJ*, p.244-5). While the priority rule provides a guide for non-ideal cases (*TJ*, p.246), its application to some liberties depends on the extent of the hindrances arising from natural and social contingencies. For instance, Rawls says that it in some cases it might be rational to accept lesser political liberties and rights of fair opportunity in exchange for socioeconomic benefits to society: "this is especially true when circumstances are not conducive to the exercise of these rights in any case" (*TJ*, p.247). This illustrates how important at least a minimal threshold worth of liberties is for the priority of *formal* liberties. Rawls openly admits that the lexical priority rules cannot cope with what he imagines as extremely non-ideal circumstances: "the principles in their lexical order were not acknowledged with these situations in mind and so it is possible that they no longer hold" (*TJ*, p.245).

In these cases, we fall back on the non-lexical general principle of justice. However, there is an important underlying assumption in Rawls' reasoning here. He takes it for granted that only conditions of very entrenched social and economic underdevelopment would prevent the two principles of justice, in their lexical order, from providing sufficient socioeconomic equity to allow for substantial worth of political and other liberties to the worst off. Based on this unstated assumption, Rawls affirms that:

..as the general conception of justice is followed, social conditions are eventually brought about under which a lesser than equal liberty would no longer be accepted...The lexical order is, so to speak, the inherent long run equilibrium of a just system (*TJ*, p.247-8)

If anything close to the general conception of justice is applied, permitting inequalities in all primary goods when they facilitate the development of the entire society and raise the long-term expectations of the worst off, this should eventually lead to social and economic development making a worthwhile level of exercise of equal liberties possible for everyone, thus meeting the conditions for the priority of liberty. Not in every non-ideal case, then, but only in extremely non-ideal ones, will the priority rules be untenable and await further development. Hence these priority rules will "seem reasonable enough in many cases" (*TJ*, p.303).

The crucial assumption in this argument (which I shall call the *monotonic assumption* for convenience) is that for a given system of basic formal liberties, the capacity for exercising these liberties varies *absolutely* with one's *individual* holdings of primary goods such as all-purpose means. As one's society undergoes economic development and one's absolute index of these goods goes up (although not necessarily as fast as others gain), the worth of one's (potential) liberties increases. Thus, as Rawls says in his final argument for the lexical priority of liberty:

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predicts is occurring. Even if it does, clearly the progression is politically much more complex than Rawls' description would imply.

Of course, the "worth" of a specific liberty will depend in the first instance on the other formal liberties guaranteed, as Rawls says (*TJ*, p.203). But beyond the inherent worth of different liberties given the specification of the full scheme of legal freedoms, the worth of all the basic liberties depends on socioeconomic primary goods.

As the general level of well-being rises (as indicated by the index of primary goods the least favored can expect) only the less urgent wants remain to be met by further advances...At the same time, the obstacles to the exercise of the equal liberties decline.. (TJ, p.542-3)

As the conditions of a well-ordered or just civilization improve, society advances, inequalities decline, the capacity to exercise liberties is secured, and hence the lexical priority of liberty will be justified.

We can briefly see that the same "monotonic assumption" is still necessary for the priority of liberty as discussed in Rawls's *Political Liberalism*. At the very end of *The Basic Liberties and Their Priority* comes a footnote (now the last words in Rawls's new book) in which he says, "I should not have used the notion of the diminishing marginal significance of economic and social advantages relative to our interest in the basic liberties," since these interests are actually incommensurable (BL, p.87f). He refers instead to the idea of a "hierarchy of interests" as we saw, this hierarchy of the highest order interests over the merely "higher" interest in one's determinate ends provides a new basis for the priority of liberty. However, the assumed connection of economic development, absolute changes in individual holdings, and improvements in the worth of one's liberties, is still apparent. Rawls says that he should instead have spoken of "the marginal, or step-by-step, changes reflected in the gradual realization of the social conditions which are necessary for the full and effective exercise of the basic liberties" (ibid). The only departure from the "monotonic assumption" even implied in Rawls's revised theory is his recognition that because "the public facility has limited space, so to speak" (BL, p.43), relative differences in wealth and opportunity between one individual and another may cause cumulative differences in their capacities for effective exercise of political liberties. The fair-value of political liberties principle (weakly interpreted) is supposed to correct for this local anomaly, thus implicitly answering Norman Daniels's point that the worth of liberty may be affected by "comparative access to resources and institutions" needed to exercise liberties, including political rights. With the fair-value clause to take care of this one very limited exception to monotonic variance, it appears that the second principle of justice should do the rest of the work to ensure adequate worth of liberties.

In *Political Liberalism*, Rawls also introduces two new grounds for the priority of liberty. Neither of these challenges the monotonic assumption. First, Rawls suggests that the priority of liberty contributes to the recognition that the principles of justice are unconditionally concerned with our good, which is a basic requirement for them to promote the stability of a just scheme of social cooperation (BL, p.31). This notion that the priority principle enhances stability, however, is clearly made with reference to societies in which the "reasonably favorable circumstances" (BL, p.39) needed for the establishment and exercise of liberties already obtain.

Second, he argues that the primary good of self-respect depends essentially on the equality of basic liberties "and the priority assigned to them," even though "self-respect is further strengthened by the fair-value of political liberties and the difference principle" (BL, p.32). For clarification, we should note that the importance Rawls attaches to "self-esteem" as a primary good adds only a minor amount of weight to political liberties in his theory. While he does acknowledge that "self-government where equal political rights have their fair value" enhances the self-esteem of the

average citizen (*TJ*, p.234), Rawls argues strongly that individuals' self-respect depends most fundamentally on persons' ability to form and pursue a rational life-plan with the affirmation of others (*TJ*, p.440). And as we have seen, it is the subjective liberties on which this capacity most directly depends. They are more essential to the development of a sense of self-worth than are the liberties of political participation.

Moreover, Rawls' whole intention in introducing self-respect as a category among primary goods is to avoid what he calls the problem of envy. Rawls argues that when a person has a sense of his self-worth and confidence in his ability to pursue his life-plan without feeling entirely powerless, "he has no desire to level down the advantages of others at some expense to himself" (*TJ*, p.535). Otherwise, if humans were naturally "vicious egoists," we would have desires that *could not* be fulfilled simply by absolute improvements in our own holdings of primary goods: we would intrinsically value being *relatively* better off and more powerful than others, even at the cost of an absolute reduction in our individual holdings. The concept of self-respect, then, is introduced to overcome a difficulty that would otherwise pose a problem for the "monotonic assumption." Clearly the concept of self-worth could not serve its systematic purpose if self-respect itself depended to any substantial degree on *relative* interpersonal differences. So self-respect as a ground for the priority of liberty even upholds the "monotonic assumption."

Finally, although Rawls abandons talk of the decreasing marginal significance of socioeconomic goods relative to (formal) liberties, it must still be possible to establish some substantial level of effective value for everyone's liberties. As Rawls says, the priority of liberty is "not required under all conditions." Rather,

It is required under what I shall call "reasonably favorable conditions," that is, under social circumstances which, provided the political will exists, permit the effective establishment and full exercise of these liberties. These conditions are determined by a society's culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high). I assume..that in our country today reasonably favorable conditions do obtain, so that for us the priority of the basic liberties is required (*BL*, p.11).

Here again, the belief that substantial worth of liberties will follow with only moderate economic development (barring cultural anomalies), involves the "monotonic" relation between individual holdings (measured "absolutely") and the capacity to exercise liberties.

It is on the basis of this assumption, then, that Rawls believes his difference principle and fair-value clause for political liberties can jointly ensure sufficient equity in the worth of liberties to establish "reasonably favorable conditions" for the priority of liberty. However, several serious inadequacies in the monotonic assumption cast doubt on this faith.

## **IX. Two Critiques of Rawls's Monotonic Assumption**

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For added confirmation of this, see Rawls's "Social Unity and the Primary Goods," in *Utilitarianism and Beyond*, p.165: "The basic liberties (freedom of thought and liberty of conscience etc.) are the background institutions necessary for the development and exercise of the capacity to decide on and revise, and rationally pursue, a conception of the good."

In "II, we saw that Rawls develops his "primary goods" to serve as the "public basis of interpersonal comparisons for questions of social justice" (*SU*, p.163). The different categories of primary goods are based on the "partial similarity" between citizens evident in their shared highest-order interests, and the conditions and means they all require in virtue of their "higher order" interest in pursuing their determinate values and final loyalties (*SU*, p.161). In particular, certain all-purpose means become the basis for "appropriate claims" relative to the second principle of justice, which is supposed to govern the worth of liberties. As we saw, these "means" are categories (c), (d), and (e) of the primary goods: powers and prerogatives of offices, income and wealth, and the social bases of self-respect (*SU*, p.162). Rawls gave a slightly more limited list in *A Theory of Justice*: "the primary goods that vary in their distribution are the powers and prerogatives of authority, and income and wealth" (*TJ*, p.93). Thus in general, the second principle specifies how to arrange both "social and economic inequalities" (*TJ*, p.302).

However, Rawls himself want to avoid the problems of having to weight the social and economic categories of primary goods relative to one another, partially because he thinks this weighting depends on the decision between "private property democracy vs democratic socialism" and other decisions to be made at the legislative stage (in which the second principle of justice is given concrete shape). So instead, for the purpose of prior stages, he proposes to take the two principles of justice in what he calls "their simplest form, so that income and wealth is the only primary good with which the difference principle is concerned," leaving positions of responsibility (category "c") to be governed only by the principle of fair equality of opportunity (*SU*, p.167). The deeper reason for regarding this simplification as largely justified, is that wealth and powers stemming from positions in organizations are closely related for Rawls. In considering primary goods as the objective basis for the comparisons required by his second principle, Rawls notes that the more favored "frequently have more of every primary good, greater powers and wealth tending to go together" (*TJ*, p.94). Likewise, in defining the more well off and least well off representative persons to which the difference principle applies, Rawls writes

..taking these individuals as specified by levels of income and wealth, I assume that these primary goods are sufficiently correlated with power and authority to avoid an index problem. That is, I suppose that those with greater political authority, say, or those in higher institutional forms, are in general better off in other respects (*TJ*, p.97)

In that case, **if** the worth of a person's liberties can be discerned from their economic *and social* advantages, it can probably be discerned just as well from their economic status (i.e. wealth) alone. Implicit in Rawls's statements is also the slightly stronger assumption that the effects of category "c" primary goods on *overall* worth of liberty and category "d" primary goods on the same, are commensurable: in that case, the worst off representative person's worth of liberty in general can be increased relative to those who have positions of greater power and responsibility, simply by monetary transfers to the worst off person.

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In his essay on *The Basic Liberties and Their Priority* and in his new book, Rawls continues to argue for taking the difference principle this way, rather than allowing it to cover other factors such as "special medical health needs, and the variation of preferences between persons" (*ibid*). Rawls thinks it would be unworkably divisive to allow these sorts of differences into the bases for the interpersonal measures to which the difference principle would apply (*BL*, p.44-45).

The deeper question, however, is whether a person's capacities to use their liberties really are *completely determined* by their individual holdings of external goods, such as economic wealth and positions of organizational authority (however these two might be interrelated). If a person's overall worth of liberty is completely determined by such individual holdings, measured in absolute differences, then whether we can simplify these considerations to focus on income and wealth alone is *yet a further question*. While Rawls himself often seems more vexed about the problem of relating social and economic primary goods, I want to concentrate presently on the more fundamental issue: whether a person's individual holdings of *both* social and economic primary goods will be an adequate measure of the "worth" of their liberties to them (although I will concentrate on economic advantages in what follows). Rawls elides this more fundamental question altogether when he simply declares that in justice as fairness, the "worth" or "usefulness" of liberties can be "specified in terms of an index of primary goods regulated by the second principle of justice" (*BL*, p.40). Against this, I will argue that there are strong objections both to focusing on a person's *external* holdings, and to focusing on such holdings in their *individual* absolute measures, in assessing the overall worth of the representative person's liberties. I begin with the latter objection.

### **(A): Relative Differences in External Holdings as Determinants of Inequality**

In *The Basic Liberties and Their Priority*, Rawls argues that his difference principle need only be supplemented by the assurance of a fair-value of political liberties (narrowly interpreted) to assure the minimum equity in the worth of liberties necessary for the priority of liberties. He argues against going beyond these provisions to a "principle of proportionate satisfaction" which would adjust socioeconomic advantages to individual interests (*BL*, p.45), or to the egalitarian alternative, which he considers hopelessly inefficient (*BL*, p.44). Against Norman Daniels, then, Rawls argues that an equal distribution of all primary goods would be "rejected as irrational, since it does not permit society to meet certain essential requirements of social organization, and to take advantage of considerations of efficiency" (*BL*, p.44). Even if Rawls is right about this, however, one aspect of Daniels's "relative rationality" arguments for a more egalitarian distribution deserves closer attention. Daniels arguments are all really based on the claim that "worth of liberty is especially sensitive to relative differences in the index of social primary goods and is not a simple monotonic function of it." As our analysis of Rawls's case for his priority principle indicates, if Daniels is right, then he has an extremely important insight, although he does not explicitly develop its most general implications.

Daniels's intuition is that a person's capacity to exercise liberties will depend in many ways on their *relative* advantage or disadvantage in comparison to others, which will determine their

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The reader will not, therefore, confuse the "monotonic assumption" in the second principle of justice with the Rawls's move to the *simplest formulation* of his difference principle. I want to ensure that my criticisms of the former are not misunderstood as simply criticisms of the latter. The move to the simplest formulation is a separate, more limited issue. I take up its own serious difficulties at the very end of this section.

Norman Daniels, "Equal Liberty and Unequal Worth of Liberty," in *Reading Rawls*, ed. Norman Daniels, p.271. This is Daniels's central reason for holding throughout his paper to the non-Rawlsian distinction between an individual's index of socioeconomic primary goods, and their worth of liberty. Unfortunately, this penetrating premise in Daniels's argument only comes out explicitly near the end of his essay. Part of my intention here is to highlight its centrality with greater clarity.

ability to pursue their ends and goals when this pursuit conflicts with others, and when there is competition for limited institutional resources. As a result, Daniels suggests there is reason to believe that "significant individual and class inequalities in wealth and powers cause or produce inequalities in liberty." This does not mean, however, a poorer individual's reduced capacity to exercise his liberties is simply a function of *his* only having \$500 in the bank, as opposed to *his* having \$10,000. The deeper implication of Daniels's insight is that a person's worth of liberty cannot even be really measured from the variation in his wealth considered *individually*. The same would also apply to offices and positions. Rather, the idea is that someone's capacity to use a liberty such as freedom of speech, for example, may not depend only on their income or the powers they have in their job, considered in isolation, but rather on their being far *wealthier* than others, or *better positioned* than others, and consequently able to outbid others (without major sacrifice) for scarce resources like prime time major television network advertising, or the most talented lobbyists, or the most expensive mailing lists and public relations consultants, etc. In these cases, it is the *relative difference between individuals*, not their absolute index of money or powers, that largely determines what they are really able to do with their freedoms.

In fairness to Rawls, Daniels's own examples suggest that he thinks one's individual index of primary goods and one's worth of liberties part company mainly with respect to *political* liberties. Daniels mentions that "the wealthy have more ability than the poor to select candidates, to influence public opinion, and to influence elected officials," most of whom are from the wealthiest class to begin with. Rawls's fair-value assurance for political liberties seems tailor-made to respond to these problems for preserving adequate worth of liberty for all in the limited context of political elections. As we saw, Rawls thinks these difficulties can be avoided through a few fairly innocuous regulations on parties and public financing for campaigns etc., without affecting other liberties much at all. Daniels criticizes this approach by pointing out Rawls's own admission that fairness in democratic political processes cannot even in theory be completely secured by formal guarantees and arguing that "the process of political control by the dominant class is highly complicated." These points are highly important, but they still focus the effort to secure the worth of political liberties on devising some (albeit imperfect) set of procedures for agenda-setting and balance of powers to mitigate unfair political leverage in legislative and electoral processes, rather than on the effects of inequality throughout the population at large.

The problem is that Rawls has underestimated both the *extent* and the *intensity* of the effects on worth of liberty of relative differences in our socioeconomic primary goods. The relative differences affect not only persons' capacities to exercise their rights of political participation (narrowly understood), but their ability to exercise practically all their liberties to advance their ends.

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ibid, p.255.

Daniels, p.256.

Although even these kinds of regulations, as Rawls rightly notes, have received absolutely unjustifiable rejection from the Supreme Court (see *BL*, p.74-78).

Daniels, p.258. Daniels and Rawls both have in mind Kenneth Arrow's theorem. Daniels goes on in a footnote to assert his own view that class consciousness is necessary because "formal, procedural guarantees are never sufficient to make sure small groups or classes cannot gain significant advantages in political liberty and power" (footnote 8). But perhaps ideological manipulation and minority dominance would be checked more effectively by strengthening the general level of education, conditions of social interaction, and communicative exchange in the public sphere at large, rather than by divisive "class consciousness."

Even my liberty of conscience—the liberty to form and revise my conception of the good—may be drastically affected in its *usefulness* by my ability to live abroad, to travel, to be exposed to and compare many different ideas of the good and their historical backgrounds, and so on. Surely even this very private liberty is affected if I do not have the means to leave my small town in Nevada, where everyone has pretty much the same set of values. What is more, without the means to find out things for myself, even my ability to determine my own conception of the good *in competition with those who would influence me*, is impaired. In this way, we can see some element of competitive advantage, which hinges on relative *differences* in other primary goods, even in the use of my liberty of conscience. Nor would these effects be eliminated by an education intended mainly to ensure fair equality of opportunity to prepare for jobs and careers.

In fact, relative differences in our holdings of socioeconomic primary goods significantly affect our ability to exercise all our liberties in our complex pursuit of the individual excellences, personal goals, and larger social ends that usually comprise our conceptions of the good. First, they dramatically affect our ability to exercise our rights of political participation in their *widest sense*, including our capabilities to go on marches, attend town meetings, find the time to write to people, participate in church communities and discussion groups, contribute to campaigns for causes we believe in, research and bring attention to issues of our own concern, find others who share our concerns, and on and on. Second, these relative differences affect our capacity to exercise the supporting liberties we have, such as freedom of movement and freedom of personal property. Someone else may gain control of property which I need to realize my idea of the good, and due to relative differences in our advantages, I cannot outbid them for it. Finally, even when it comes to supporting freedoms of "legal recourse" that establish what Habermas calls the "actionability" of my other rights, clearly relative differences have an enormous impact. Daniels himself points out that "the wealthy have access to better legal counsel" and "have more opportunity to influence the administration of justice, both in specific cases and in determining what crimes will be prosecuted."

But the dependence of the worth of liberty on relative interpersonal differences is even more clearly evident when we consider *dominance effects*, i.e. large differences in capacities for action resulting even in cases where everyone's situation seems to be improving. Daniels points out one way in which "compounding" reduces the worth of liberties for the worse off and produce dominance effects. He notes that "even greater inequalities in liberty emerge when there are combined effects," such as the wealthy using their greater ability to influence the political process to control the training available to others through school systems: thus the use of one unequal capacity, stemming from a difference in primary goods, heightens another inequality in capacity. But there are at least three *other* basic ways in which dominance can arise *directly* from differentials in primary goods between individuals. The first arises from increasing inequalities with modest but uneven growth in each representative person's holdings considered absolutely. The second arises from more serious "trickle-down" effects in economic changes, and the third arises from "threshold effects" in the relation of primary good differentials to capacities to exercise liberties.

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This argument may seem extreme, but the example is relevant because liberal theory usually assumes that if any freedom is unaffected by competition and interpersonal differences, it is liberty of conscience. If the assumption is naive even in this case, then it is naive for every liberty.

Daniels, p.256.

Daniels, p.257



To illustrate the three effects, let us begin by imagining that there is a direct functional relation between one's worth of liberties and a factor called "Individual Influence" (or *I* for short). This factor will stand for a representative person's ability, through their own talents and resources, to influence decision-making processes and developments in their area (within their city, let us say). Suppose this local "individual influence" in turn depends on the relative distribution of other primary goods, such as income and position, between people in the area. In this example, we will simplify *I* and the function that determines its index for a representative person. No doubt in a real social system the determination of *I* would be more complex, but the point here is to illustrate the implications of its being wholly or in large part determined by comparative measures. In the real world *I* might be affected not only by one's relative wealth in the community, but also by one's fame, social standing, more board memberships with local civic and cultural organizations than one's rivals hold, local power deriving from other positions of responsibility held. Call considered *relative* to the similar holdings of others. In fact, interpersonal inequality is a social gestalt of enormous complexity, which probably cannot be measured with complete accuracy using any reasonably short list of variables.

Nevertheless, the problems posed by such relatively determined measures in the worth of liberty can be illustrated using a simplified measure. These problems, moreover, will be less or more severe, depending on background economic assumptions. In the first example, let us begin with the *strong* assumption that no serious "trickle-down" effects occur in the broad economic changes that alter people's incomes. In this example, for simplicity we will also let *I* in this given region be a function of the disparity between one's income and the income of one's *average* competitor in the region. Now imagine three representative persons for this region, P1, P2 and P3, who start out with annual salaries of \$10,000, \$20,000, and \$30,000 respectively. Imagine that in the economic situation of this area, if we increase the incomes of P2 by \$8,000 and P3 by \$8,000, the resulting investment will create new wealth raising the income of P1 by \$6,000, but that further increases for P2 and P3 would not enhance P1's income (as we see in distribution C):

	P1	P2	P3	Differential: Average-P1
Dist. A	\$10,000	\$20,000	\$30,000	\$10,000
Dist. B	\$16,000	\$28,000	\$38,000	<b>\$11,333</b>
Dist. C	\$15,000	\$35,000	\$45,000	\$16,666

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An assumption that presumably a theory of social justice would like to avoid; if the cogency and fairness of Rawls's difference principle, for example, depends on this assumption, it would weaken Rawls's theory considerably.

This kind of an interpersonal measure for such a factor is wholly in the spirit of Rawls' theory. In trying to define the relevant social position of the "least fortunate group," Rawls suggests that we can regard this group as "persons with less than half of the median income and wealth." He notes that this definition "has the merit of focusing attention on the social distance between those who have least and the average citizen" (p.98). If relevant social positions may be defined in this relative manner, it is not implausible that a factor such as individual influence may also be defined this way.

Thus distribution B is the maximin-optimal one, but if we make adjustments to realize it (as directed by the difference principle in its simplest form), the *difference* between the worst off person's income and average income actually grows by \$1,333. Thus, P1's situation has improved in the absolute individual sense (indeed, it has even improved as much as it can), in the comparative sense, which is more important for the worth of liberties, P1's situation has worsened. Being further underaverage than before, P1 has a further reduced level of individual influence, and hence lesser worth of liberties. This is the kind of problem Daniels has in mind when he says that in many cases, "the very inequality of wealth and powers which, we are assuming, acts to *increase* the index of the worst-off individual can at the same time act to *decrease* his worth of liberties." There is also a small dominance effect in this case, because the wealthiest person (P3) was \$10,000 above average in distribution A, and \$10,666 above average in distribution B: as a result, his influence has increased while P1's has declined.

The problem becomes much worse, however, if we do not grant Rawls the strong assumption that no dramatic trickle-down effects will be encountered. Suppose we now let *I* be determined for person P(n) by the difference in their income and the income of the highest-earning person P(1). When the difference is less than \$10,000, let us say, P(n) will have the maximum level of social influence a person can have in their local area, which we will represent by 9000 "*I-points*" (for mathematical convenience). As the difference grows to \$100,000, P(n)'s influence declines to zero, and cannot go lower. Between these two points, we have a simplified function for influence as follows:

W1: The wealth of a representative individual in the top 5% income bracket  
 Wn: The wealth of a representative individual from the worse off bracket "n"

$$(I)(n) = 10,000 - (W1 - Wn)/10$$

Now, let us add that in the current economic situation, the wealth of the worst off person would increase only as the wealth of best off increases at a faster rate. This is what is meant by a *trickle-down effect*. We then get a set of alternatives like the following:

	Wealth of P4	Influence of P4	Wealth of P1	Influence of P1
Dist. A	\$1,000	9000 points	\$5,000	9000 points
Dist. B	\$2,000	9000 points	\$10,000	9000 points
Dist. C	\$3,000	5300 points	\$50,000	9000 points
Dist. D	\$5,000	500 points	\$100,000	9000 points
Dist. E	\$20,000	0 points	\$800,000	9000 points
Dist. F	\$5,000	0 points	\$2,000,000	9000 points

Person 1: An average individual in the top 5% income bracket in the society;  
 Person 4: The wealth of an average individual from the worst-off segment of

society (assuming here that the worst off group can be identified);

Due to the trickle-down effects in this framework, the distribution which maximizes the worst-off individual's wealth actually minimizes their level of "influence," hurting their capacity to exercise their liberties dramatically. Past a point (distribution B), increased inequalities in wealth that result in *more* wealth in real dollar amounts for the worst-off person also begin to *lower* his *I* index. The paradox is the result of the fact that absolute intrapersonal comparisons (P4 at distribution B and distribution C) are not in a monotonic relation with relative interpersonal measures of comparison, which are more socially relevant.

In this example, the wealthiest person P1 achieves massive gains in influence over the worst-off person, because the difference between his wealth and P1's wealth expands at an accelerating rate. The possibility that the difference principle in its "simplest form" permits such increases in inequality, with dramatic negative effects on the worth of liberty, is a serious problem in itself. However, we do not even need to imagine such an unfavorable case of "trickle-down" asymmetries to derive dominance effects directly from inequalities in primary goods. If we allow that capacities to exercise liberties can involve "threshold effects," there is an even more serious potential for dominance problems.

For example, let us suppose that "influence" as a factor of the worth of one's liberties changes dramatically once certain levels of advantage over others are reached both in economic wealth and in social standing. Imagine that in a local area where persons in the top-level social bracket (managers of mid-sized and large businesses, the largest fifty property owners, etc.) generally earn under two million dollars a year, they cannot personally afford certain *scale-dependent* services, such as expensive mailing services, mass advertising, elite lobbying, starting new media broadcasting services, etc. These will be purchased or owned only by major organizations, and persons with top positions of power in such organizations will gain only modestly in influence through their ability to direct their organization's support for different charities, public relations, and local causes. However, over a ten year period changes in national economic policy are made which double the real income of the worst off citizen, with declining rates of real increase for each succeeding "bracket" of the local population, up to the top socioeconomic bracket we mentioned, whose real income increased by a factor of 1.5 during the decade. However, now that the local elite earn on average three million real dollars, it becomes economical for them personally to purchase short television spots advertizing social causes they believe in. In addition, one of them can now afford to start his own privately owned religious AM radio talk-show station, while another can afford to hire the services of a nationally ranked political lobbyist for abortion-rights to intervene in local city politics for his interests. Yet another now finds that she can afford to run an annual mass mailing for her own local environmental concerns. As a group, moreover, the top social bracket has made gains in influence over regional politics in other ways. Their wealth has now reached a point where it is economical for an exclusive club to open in their city, with only members of this top socioeconomic

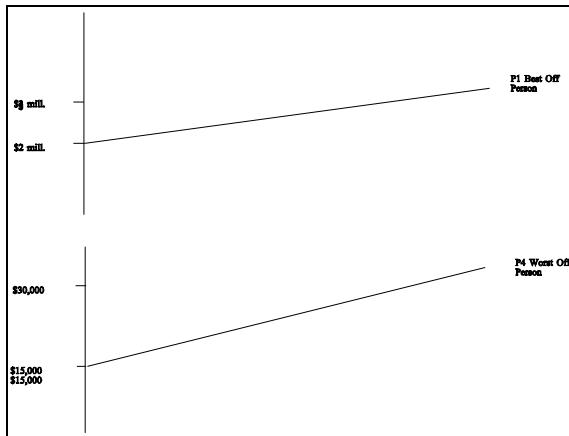
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Rawls could try to escape this difficulty by a maintaining that the trickle-down effect of inequalities in wealth would not in practice continue to hold past the point where further inequalities also reduced the worst-off person's level of "influence." But that would involve the very strong and controversial economic assumption that trickle-down would cease to improve the wealth of the worst off person past a very low level of inequality.

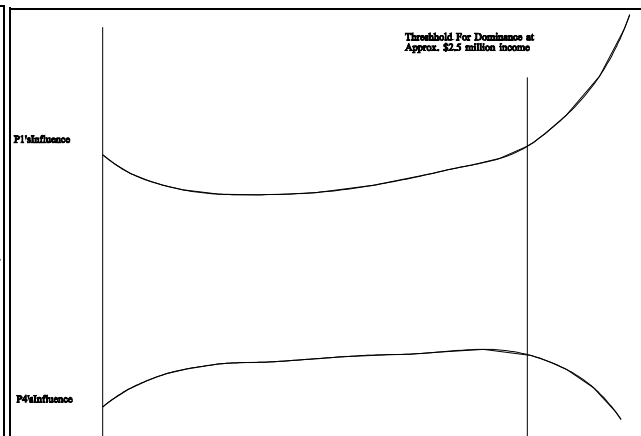
bracket and regional political leaders as members. In addition, local politicians now find they can raise more money by hosting \$1000 a plate dinners for this group than they can by campaigning for support through grass roots donations.

As a result of these kinds of developments, I will suppose that both individually and as a group, the local elite have reached a threshold beyond which their political "influence" has increased sharply. Moreover, since we are assuming with Daniels that influence is sensitive to relative differences, I suppose that the influence of those in other classes has not increased at anything like the same rate, and has even declined for the worst off group. This result can be represented (very roughly) in the next two figures.

Ten Year Changes in Income



Ten Year Changes in Influence



What is most surprising about this imagined but quite plausible case, is that the political "influence" of every member of the top socioeconomic bracket in this area has increased dramatically relative to the influence of persons in the worst off group, despite the fact that the latter's economic holdings improved *at a faster rate* than did those of the best off, considered in absolute terms. This illustrates how the dominance of better off groups of citizens becomes possible through thresholds for factors determining the value or usefulness of our liberties. This is yet another factor which makes it possible for dominance effects to degrade the worth of liberties for worse off members of society, even when their bundle of social and economic primary goods has grown in an absolute sense.

These examples, along with Daniels's explanation of how inequalities in liberties may compound one another, give us four distinct mechanisms by which the worth of liberties comes to depend on relative differences between citizens' holdings and other independently determined variables (such as levels of "scale") and therefore *fails* to vary monotonically with a simple measure of an individual's primary goods as resources for making liberties "useful:" (1) simple dependence of a power or capacity (such as "influence") on relative differences in holdings, with modest and uneven changes in distributions; (2) such dependence of relevant factors on differences, combined with serious trickle-down effects in economic growth; (3) magnification of proportionally smaller gains in resources into proportionally larger gains in worth of liberty, through threshold effects; and (4) knock-on effects whereby modest advantages in the use of one liberty facilitate gains in advantages for the use of other liberties, adding up to substantial overall gains in the overall worth of liberties, at

the expense of others. Moreover, all these scenarios are all potentially compatible with the Difference Principle as a principle governing changes in the distribution of socioeconomic primary goods.

This analysis reinforces Daniels' original argument that inequalities in wealth and powers, which are supposedly justified if they increase the worst-off person's index of primary goods, may well decrease the worth of their liberties when these are "affected by comparative access to those resources and institutions such as qualified legal counsel or the mass media, which are needed for the effective exercise of liberty." When these comparative effects are taken in combination with frequent trickle-down and threshold effects, in fact, it seems virtually inevitable that even moderate inequalities in holdings of socioeconomic primary goods will translate into much larger inequalities in the worth of all liberties, not only political ones. This analysis therefore goes substantially beyond Daniels's original argument, but it backs up his conclusion that "effective exercising of a liberty may require near equality in the ability to exercise the liberty." The reason why is clear: even fairly "moderate" differences in our enabling resources will give critical advantages to the better off, and magnify into "immoderate" inequalities in our abilities for effective use of liberties in pursuit of our conception of the good.

## **(B) Differences in Internal Characteristics as Determinants of Inequality**

So far, all these objections to Rawls's monotonic assumption have operated *within* the supposition that something like Rawls's "primary goods" can constitute the basis of legitimate expectations. We have apparently argued only for assessing an individual's worth of liberty on relative interpersonal differences in holdings of such primary goods and other structural factors, rather than on the basis of the individual's holdings alone. But the penetrating reflections introduced by A.K. Sen in his *Inequality Reexamined* suggests that a more radical critique of Rawls's primary goods themselves should be considered. In his complex argument for what he calls a "capability" conception of our substantial freedom, Sen makes a general point relevant to understanding the "worth of liberty," as well as another more specific criticism of the monotonic assumption in Rawls's approach. I begin with the former.

Sen's primary concern is to analyze the way different theories of justice evaluate the well-being of persons. They do so by focusing on "some focal variable" occupying some "space" of comparative analysis, which answers the question "equality of what?" Equivalently, we can think of this variable and space as "the selection of *relevant personal features*" for comparison, as distinct from a theory's "choice of combining characteristics" (i.e. weighting principles, such as summation, lexical maximising etc.). The variables or personal features selected as a basis for comparisons can

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Daniels, p.271.

Daniels, p.269.

A. K. Sen, *Inequality Reexamined*, p.3-4. He makes the interesting additional argument that virtually all contemporary proposals for ethical theories are "egalitarian" in the purely theoretical sense that they give equal consideration to all in terms of the variable/space they emphasize. Even utilitarianism is "egalitarian" in this sense, since it selects one or another "utility"-space and "attaches exactly the same importance to the utilities of all people" in the combining function within that space (p.14).

Sen, p.73-74. Sen characterizes these two factors as the "informational bases" of theories of justice, and is able to use them to classify different genres and species of theories: for example, "welfarist"

differ widely, but Sen characterizes two large classes of them as (A) "Achievements" and (B) "Opportunities." Achievements, such as "utility" (of various stripes), "opulence" (wealth, income, consumption etc), and "quality of life" as measured by different statistical assessments of standard of living, all evaluate inequalities based on what persons actually manage to accomplish. Opportunities, in the usual (restrictive) sense, include various "particular means" for the achievement of goals, as well as the applicability and non-applicability of "specific barriers or constraints." In this class we can therefore group "liberties," "rights," "resources" of various kinds, and "commodity bundles" (the types of enabling conditions and "all purpose means" which Rawls includes among his primary goods).

Against all the various "achievement" conceptions, Sen makes a strong case throughout his analysis for measuring inequalities in terms of the "freedom" or "capability" to achieve valued "functionings" (modes of "being" and "doing," such as "being well-nourished" and taking part in social life in a variety of ways). This distinction between achievement and freedom is "quite central to social evaluation," as he argues, because it determines the way in which inequalities are understood. *Capability* or "freedom" in Sen's sense means "the *real opportunity* we have to accomplish what we value;" thus it comes *close* to the notion of "substantial freedom" which Rawls aimed to express in the "worth of liberty" as a person's "capacity to advance their ends within the framework the system defines" (*TJ*, p.204). This close similarity between Sen's concept of "capability" and the notion of "capacity" in Rawls's "worth of liberty" will help us see the implications of Sen's views for the monotonic assumption.

Sen argues that freedom in the sense of our actual capability to achieve different functionings is critically related to well-being in two different ways. First, if well-being is measured entirely in terms of "achieved functionings," increased capability in the sense of a wider or better set of possible functioning-combinations will then acquire *instrumental value* and gain a direct relevance in "ethical and political analysis." Additionally, substantial freedom may itself directly constitute part of well-being: "choosing may itself be a valuable part of living, and a life of genuine choice with serious options may be seen to be for that reason richer." But even if we assume that capabilities are only significant as means to achievements, Sen points out that different "capability sets" can be compared according to their best elements (the one that a rational agent with a given capability set would choose) and so capability can serve as a framework for the comparisons in well-being in general,

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theories may be divided into those employing utils of personal happiness or desire-satisfaction as the relevant personal features, but may be further subdivided according to the combining criteria they use (maximization for standard utilitarianism only). See Sen, p.6; p.73-74, and footnote 2. The combining criteria, it is interesting to note, will function as what Rawls calls *weighting principles* just when the relevant personal features selected are themselves "involve a combination of freedoms and achievements" (p.2), as with Rawls's "primary goods."

Sen, p.31.

Sen, p.7.

Sen, p.74.

Sen, p.5.

Sen, p.31

Sen, p.41. Interestingly, Sen mentions Aristotelian sources for both for his notion of life activities and functionings, and for the intrinsic value of certain capabilities (p.5, 39 footnote 3). Support for the latter could also certainly be found in some liberal theories (e.g. Rawls's emphasis on the intrinsic value of "moral powers" such as the capacity to choose and pursue a conception of the good.

whether we give intrinsic value to freedom or not: "there is a case for seeing the theory of evaluation of well-being in terms of capability in general..."

Sen thus proposes that we should focus directly on *capability* or "substantive freedom" as a measure of the richness of real options we have: if someone has less "freedom to achieve valuable functionings" in the real or substantive sense, that will affect the evaluation of their well-being. I want to suggest that this attractive idea amounts to a full-blown *modal conception of well-being* in terms of the possibilities we actually could realize, with the functionings we do achieve also understood in that light. We can think of "capability," then, as the *modal transform* of the space of "functionings," since it permits comparisons in terms of wider and narrower *possibilities* for functioning which individuals have open to them. This approach to well-being is the polar opposite of utilitarianism and other approaches which "confine direct attention only to achievements (e.g. preference-fulfillment, consumer satisfaction)...rather than taking note of the freedom to choose *among* states of affairs." As a result, such utilitarian assessments are particularly unfair in evaluating "entrenched inequalities" in which "situations of long-standing deprivation" have reduced the victims's desires for valuable functions of which they are not capable. By desire-fulfillment "achievement" measures, they will thus seem satisfied, whereas a view that focused on their *real possibilities* for functionings would much more accurately reflect their degradation. Even if this measure focused on their capabilities for "desire-fulfillment," it would avoid the superficiality of their purely empirical, achieved desire-fulfillment.

In this light, it becomes clear why the capability approach diverges completely from utilitarianism. Utilitarianism is an approach to evaluating well-being (and thus inequality) which emerges out of strictly *empiricist* metaphysical assumptions. The capability approach, on the other hand, recovers the modal subtleties levelled off by empiricism. As Sen himself says, "In fact, the capability set is not directly observable, and has to be constructed on the basis of presumptions (just as the "budget set" in consumer analysis is also so constructed...)."

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Sen, p.51. As he points out, some functionings already come with a "modal significance" built-in: for example, "fasting" as a functioning is *not* just starving; it is *choosing to starve when one does have other options*" (p.52).

Sen might find the term "modal" uncongenial. He emphasizes that capabilities and functionings employ the same focal variable space, since a capability is a set of points in that space, each of which is an n-tuple of functionings (p.50). But it comes nearer to experienced freedom to portray this capability alternatively as the modal collection of *possible achievements* accessible to the agent. The space has thus become the *modal space* in which each point is a bundle of functionings really possible for the agent. One highly important implication of this analysis is that a conception of political ethics involving Sen's *capabilities* is probably committed at least to enough metaphysics to make sense of modality.

The movement from an achievement orientation to a freedom-to-achieve orientation will thus always be the modal transformation of a space. This is consistent with Sen's point that the capability perspective will add information whatever relevant variable space we are working with. Thus for instance, he admits that a "desire-based accounting of capabilities" is one option within "the capabilities approach broadly defined," although it would be impoverished since it could not take many valuable functionings relevant for well-being into account (p.54-55).

Sen, p.32.

Sen, p.55. For this and related reasons, Sen argues throughout that his capability approach justifies arguments coming from poverty studies against mainstream rational choice theories.

Sen, p.52. For this reason, he openly acknowledges that there will often be practical problems in the measurement of capabilities. But he rightly urges that the information set demanded by the capability

The importance of looking at well-being in terms of *capabilities* rather than simply empirical variables (such as external holdings of some relevant feature) is the first, "general" point Sen gives us. This shift was already implicit, I suggest, in our previous realization that "worth of liberty" can be determined more directly by *relative* interpersonal differences in external holdings. One explanation now appears as plausible: our *capabilities* to exercise our liberties in pursuit of ends we consider valuable will depend on relative (even marginal) differences in persons's means when certain ends (and necessary intermediate steps towards them) are pursued *competitively* among individuals, or when the availability of certain instrumental means is affected by other structural phenomena such as threshold effects. If we equate "capability" with "worth of liberty" broadly speaking, then "worth of liberty" will no more be captured by individual empirical "achievements" (indices of some *personal* features) than will capability.

Sen's overall approach thus underwrites the arguments of the previous section. However, Sen also adds an additional, more specific point against basing comparisons on resources such as Rawls's primary goods. Sen agrees that concentrating on "the individual's command over *resources* in one form or another as the basis of interpersonal comparisons" (i.e. "Opportunities," in Sen's sense) yields *better* measures than those produced by strict achievement measures. While this opportunity-approach represents "a move in the *direction* of paying greater attention to freedom," however, "since means in the form of resources, primary goods, etc, undoubtably enhance the freedom to achieve," Sen warns against *equating* "opportunities" with the freedoms or capabilities themselves. He argues that "the gap between *resources that help* us to achieve freedom and the extent of *freedom itself* [i.e. capability] is important in principle and crucial in practice."

These measures diverge for reasons that are central to Sen's critique of Rawls. The main reason is that "the resources a person has, or the primary goods that someone holds, may be very imperfect indicators of the freedom that the person really enjoys to do this or be that." Such resources do not vary directly and in perfect proportion (i.e. "monotonically") with capabilities because different social circumstances and factors *internal* to individuals cause resources that open many possibilities to one person to open fewer possibilities to another. There are, as Sen says, "significant variations in the *conversion* of resources and primary goods into freedoms," resulting both from "extremely complex social issues" such as the group relations an individual is involved in, and more directly discernable factors such as "simple physical differences." Sen concentrates on the latter, identifying several characteristics which we may think of as "internal" (as opposed to "external" holdings of goods) that undermine the resource-based approach:

...a person who has a disability can have more primary goods (in the form of income, wealth, liberties, and so on) but less capability (due to the handicap). To take

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approach should always remain as the ideal, no matter whether the data needed to construct it adequately are completely available or not (p.53).

Sen, p.37.

Sen, p.36.

Sen, p.33.

Sen, p.37.

Sen, p.38.

Sen, p.33. Among the most evident of the *social* factors would be ones that involve the kinds of competition, threshold effects, and sensitivity to relative differences which we illustrated with a capability-component such as personal "influence" in one's local community (in the previous section).



another example, this time from poverty studies, a person may have more income and more nutritional intake, but less freedom to live a well-nourished existence [a basic "functioning"] because of a higher basal metabolic rate, greater vulnerability to parasitic diseases, larger body size, or simply because of pregnancy....many of those who are poor in terms of primary goods also have characteristics like age, disability, disease-proneness, etc. that make it more difficult for them to convert primary goods into basic capabilities..

Presumably more examples could have been added, such as inheriting a genetic defect, or even having an accident or catching a disease that eats up our resources. Certainly, even the *possibility* of such health problems can severely drain the capabilities realized from resources, in immediately understandable ways. For example, a person earning a good salary may not be free to take another job with new health insurance, because their (or their relatives') pre-existing conditions would not be covered. Although their legal permission to seek alternative employment exists (a category "c" *opportunity* primary good), their substantial capability of doing so is dramatically reduced. As a result of these important individual differences, "Substantive inequalities" in both capabilities and well-being may even "result from an equal distribution of incomes (given our variable needs and disparate personal and social circumstances)." Resources of any kind therefore never give as much of an informational base as do capabilities.

This insightful point constitutes a direct challenge to using primary goods as the basis of interpersonal comparisons for distributive justice governed by the second principle. The problem is that *capability* does not vary "monotonically" with the *external* primary goods, because capability is affected by *internal* characteristics. Although Sen speaks in terms of the capability-value of *all* the primary goods (including the basic liberties), rather than in terms of the "worth of liberty" generated by external socioeconomic holdings, the failure of monotonic relation is closely analogous in both cases. Hence there is something like a convergence between Sen's proposal that an individual's "claims" be assessed *directly* in terms of "the freedoms they actually enjoy to choose the lives that they have reason to value" (i.e. their *capability*), and Daniels's notion that perhaps "worth of liberty" itself should be the measure for "legitimate expectations" governed by the second principle of justice.

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Sen, p.81-82. Despite the enormous importance of this insight both for theories of justice and even for current policy debates (such as health care), Sen's comments on these factors that cause individual differences in *conversion rates* of resources into capacities are scattered throughout his book (pp.30, 33, 81-82, 107, 111 etc.). As he says, "variations related to sex, age, genetic endowments, and many other features give us very divergent powers to build freedom in our lives.." (p.85-86). No more systematic attempt is made to classify the most significant and easily measurable among such factors, but one would be welcome.

Sen's approach thus clarifies the reason why the health insurance system is part of the *basic structure* of society, in Rawls's sense.

Sen, p.30.

As Sen points out, this holds true no matter what "space" we are in (incomes, functionings, etc.). "Even in the commodity space, the *set* of commodity bundles over which the person has command is a better representation (in that commodity space) than the resources that can be used to establish command over a set of commodity bundles" (p.37. foot. 17). Given an account of persons in terms of any space, we might say that the *modal transform* of that space always generates a richer account.

Sen, p.81. This is his formulation for "the capability-based assessment of justice."

There is a serious question as to whether Rawls can accommodate variations in the worth of liberties (or capability generally) arising from the kinds of individual differences Sen points out. Recall that Rawls argued against accommodating "the variation in preferences" and tastes among persons (*SU*, p.167-8), and against the "principle of proportionate satisfaction," which was "divisive" because it gave more resources to those with determinate conceptions of the good that cost more to pursue effectively. Against the latter, he concludes:

...one main reason for using an index of primary goods in assessing the strength of citizens' claims in questions of political justice is precisely to eliminate the socially divisive and irreconcilable conflicts which such principles would arouse. (*BL*, p.45)

Taken with his rejection of Daniels' "egalitarian" alternative for a wider guarantee, this implies that an index of *external* primary goods is the only non-divisive solution possible, given that one of our goals is to maintain the stability of a well-ordered society. And indeed Rawls's original response to Sen ran along similar lines: he saw Sen as arguing that primary goods would have to be adjusted to what was ultimately valued by persons in their comprehensive conceptions. But Sen's proposal amounts to something very different than the "principle of proportionate satisfaction;" as he notes, valuing capability "need not presuppose unanimity regarding some one specific set of objectives" and evaluating persons' capabilities "need not be based on one particular comprehensive doctrine". He also proves that "a disadvantaged person may get less from primary goods than others, *no matter what comprehensive doctrine* he or she has."

In *Political Liberalism*, however, Rawls applauds Sen's analysis and states: "I agree with Sen that basic capabilities are of first importance and that the use of primary goods is always to be assessed in light of assumptions about those capabilities" (*PL*, p.183). But he still thinks of Sen's modal perspective as forcing reconsideration mainly just on health care issues. He admits that in "instances of illness and accidents," the index of primary goods may not be flexible enough to be fair to individual circumstances making such a dramatic difference to the worth of liberties one derives from the same set of primary goods (*PL*, p.185). He proposes, much as he did in 1980, that this

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Daniels, p.270: Daniels makes this suggestion in his "Liberty-Restricted Difference Principle," which would "permit inequalities in the worth of liberty only if they act to maximize the worth of liberty of those with the least worth of liberty." As he says, this principle "seems to capture Rawls's intention." Rawls's difference principle fails to be equivalent to Daniels's just because the worth of liberty does not vary monotonically with the holding of socioeconomic primary goods (p.271). Daniels goes on to argue, however, that even with this modified principle, Rawls could still not defend the absolute priority given to liberty over worth of liberty.

See Sen's discussion, p.82.

Sen, p.83.

Sen, p.83: see his discussion p.84, where he shows that a person with advantageous internal characteristics may have a capability set that completely "dominates" an internally worse-off person's capabilities, in the sense that the first person's capabilities secure them a *superior* achievement from *either* person's set of values.

In *Social Unity and the Primary Goods*, Rawls suggested in a footnote that at the legislative stage, "a different or more comprehensive notion than that of primary goods" could be adopted as a framework to deal fairly with "special medical and health needs." And he even said that Sen's (then new) conception of "basic capabilities" might be the best line along which to develop this more expansive notion

problem can be resolved at the "legislative stage" by devising a "sufficiently flexible index" that would be fair, given the social facts about health care costs, etc. Rawls unfortunately does not go into detail, but the theoretically interesting notion here seems to be that the primary goods, like other parts of Rawls's scheme, are "stage-relative" and can be further specified with different "discounts" that would adjust for individual differences such as added health care costs, which would otherwise unequally affect the worth of liberties.

This response may still be far short of adequate, however, since Sen's full argument now at least suggests how many other types of individual differences may drive a wedge between worth of liberties (or capability) and external holdings of primary goods. Rawls may be able to deal with some differences in internal characteristics by arguing that (as with tastes and preferences *CPL*, p.185-6), persons themselves are at least partially responsible for them, when they can change them. At least some of the changes in usefulness of resources resulting from developments such as old age will be virtually the same for everybody, and may be dealt with by arguing that distributive justice is supposed to ensure fair worth of liberty over a *complete life*. We can save extra resources to ensure the same capability level following anticipatable changes. Rawls may also be able to appeal to our intuitions about *desert* in the case of some conditions that differentiate people by arguing that even if they are unchangeable once they occur, they were reasonably avoidable. Yet other factors in individual diversity may be held to affect the worth of liberty, but be so hard to measure accurately that they are excluded by "the constraints of simplicity and availability of information" which a political conception of justice requires (*PL*, p.182).

Even after all these moves, however, there will be a surplus of factors that will meet five stringent criteria. These factors will (a) vary widely between people; (b) be measurable by fairly adequate sociological, economic, and actuarial methods; (c) have significant impact on the capability-value of resources; (d) not be reasonably anticipatable or preventable; and (e) be virtually permanent (or at least not such that we can take responsibility for changing them). Let us call internal characteristics with all these five properties *basic internal differences*. Permanent disabilities from birth, for example, would qualify as a "basic internal difference" by this measure, as

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(*SU*, p.168, f.8).

The institutionally simpler solution of distributing health care *availability* itself as a primary good does not seem to occur here, unfortunately. Indeed, one profitable line of response to the modal perspective of individual capability differences may simply be to come up with primary goods that are themselves essentially modal in their construal.

Can we, for example, change our disease-proneness by switching to a healthier lifestyle? Can we even change our basal metabolic rate? Some conditions, like addictions, may occupy a gray area between simple tastes and unchangeable circumstances, such as a paralysis. Problems may occur, however, where the level of our responsibility for controlling a condition may itself be controversial between comprehensive views (as with pregnancy, for example).

As Rawls rightly says, distributive justice in terms of the primary goods does not spare citizens "the consequences of their lack of foresight and self-discipline" (*SU*, p.169). Similarly, if we are handicapped because we fell during mountain-climbing, ought we to have a lower tax rate to adjust for the difference in the capability-value of our earnings to us?

Sen rightly warns against assuming away "interpersonal diversities" to make "the analytics simple and easy" (p.30), but Rawls's constraint may be consistent nevertheless with Sen's analysis, since Sen acknowledges that in many cases we will have to be satisfied with less than perfect information on all the factors affecting capabilities (p.52-53).

probably would large differences in intelligence and aptitudes. Surely these kinds of characteristics which cause "basic internal differences" uncontroversially *must* be taken into account in any fair index. There is no justifiable moral reason why adjusting for people's loss of capability should be socially divisive when it involves characteristics with all the five properties mentioned above. If adjusting for these kinds of factors remains impractically divisive, that will count as a non-ideal imperfection for the implementation of justice in that society, but it ought not to be determining for the ideal theory. This is the only appropriate response to the larger implication in Rawls's earlier criticism of the principle of proportionate satisfaction, namely the implication that any considerations other than the primary goods would be hopelessly divisive if introduced into interpersonal comparisons.

### (C) Conclusion: Inequalities Escaping the Difference Principle

Thus the question of taking internal differences into account in measuring the *worth of* primary goods cannot be dismissed. However, nomatter how the measures of *individual* resources might be altered to correct for such individual differences, the general rejection of any "monotonic" relation between worth of liberty and resources, which is implicit in Sen's specific arguments for the importance of *internal* characteristics, has deeper implications for our analysis. Suppose we operate on the generous hypothesis that an index can be found which fairly takes into account all the "basic internal differences" to which persons are subject, perhaps by discounting a person's index of socioeconomic primary goods to adjust for such characteristics. This will not restore the monotonic relation between this *idealized index* of a person's individual, external holdings and their worth of liberty (or capability), because of the strong effects on the latter of relative interpersonal differences and structural phenomena in the economy and society.

Hence the *first* of the two criticisms of Rawls's monotonic assumption turns out to be more fundamental. Although Sen's critique of Rawls is penetrating and revealing, his point is mainly about the *intrapersonal* relation of an individual's characteristics to the worth of liberty they generate from their resources. Rawls could in principle answer Sen's objection and retain an idealized, but still individualistic index. But the objection that *interpersonal, relative* differentials in external holdings affect the worth of persons' liberties cannot be met in this way. Rawls might be able to measure capacity-differences that are due to internal characteristics by *adjusted* resource measures, but even this would not correct for the dependence of capabilities on Daniels-type relative differences, thresholds, trickle-down, and knock-on effects. Thus even if Rawls can deal with Sen's criticisms in the way he suggests in *Political Liberalism*, the more fundamental problem remains. The monotonic assumption is far from true *even given* an ideal, comprehensive index of primary goods, taking every kind of "basic internal difference" between individuals into account. This vindicates Habermas's contention that reliance on any measure of *individualistic* holdings (such as primary goods), in order to be able to construe legitimation as *rational preference* for such goods as considered from within the standpoint of the original position, will ultimately hinder rather than help the argument for rights protected by deontological priority.

Finally, given that the effects of relative differentials in resources cannot easily be "figured in" by discounts on wealth and income (category "d" of the primary goods), we should not be tempted to think that perhaps they could just be added to the list of the primary goods which establish the "bases of expectations" to which the second principle of justice applies. Consider what would happen, for example, if we defined another class of primary goods, called "competitive advantages,"

which consisted simply in having relatively *more* resources of different kinds, compared to the average. As we already saw in our first table, an index paradox would result if we tried to distribute *both* income and "competitive advantage," so defined, by the difference principle. For distribution of resources "A" maximized "competitive advantage" for the worst off in this case, but distribution "B" maximized their income.

The simplistic resolution is impossible precisely because "competitive advantage" and income differences are not monotonically related. This is analogous to the more "local" problem Rawls faced in reconciling the distribution of opportunities and powers (category "c") with income and wealth (category "d"). Recall, as we saw in the introduction to this section, that Rawls had to assume that income and wealth were "sufficiently correlated" with the social primary goods to justify moving to the simplified version of the difference principle. This is the version he includes in the "simplest formulation" of the two principles of justice as a whole, in which the difference principle *only* applies to income and wealth, and neither to liberties nor to the social goods, such as opportunities and the social bases of self-respect. Notice that this "simplest formulation" of Rawls's scheme is the polar opposite of Rawls's "general principle of justice as fairness," which applies when the conditions necessary for the application of the priority rules do not obtain. As Rawls says, this most undifferentiated version of his scheme "is simply the difference principle applied to all the primary goods including liberty and opportunity" (*TJ*, p.83). This contrast raises the question of whether there could be an "intermediate case" in which the maximin rule applied both to offices and positions of responsibility (category "c"), and to income and wealth (category "d"). The answer is: only if there is a monotonic relation between (c) and (d). If there is not, an index paradox would result, just as it did between "competitive capacity" and income in our example above.

In addition, then, to his general monotonic assumption about the worth of liberties and individual holdings of primary goods (c) and (d), Rawls also has the "special assumption" of a monotonic relation *between* (c) and (d). This is the reason why he can suggest that the more complex "intermediate" difference principle would be redundant. But even at this level, it is highly questionable whether a monotonic correlation holds. Rawls says more in his writings about the social good of opportunity than he does about "the powers and prerogatives of authority" (*TJ*, p.93), but he clearly thinks of these "powers" as deriving from offices, "particularly those in the main political and economic institutions" (*SU*, p.162). Thus they are thought of as holdings with a kind of absolute value, which also tend to generate wealth. However, a position (such as a job as spokesperson for a union, for instance) may lead to certain "powers" in the general sense of "increased chances to exercise one's liberties," which are nevertheless disproportionate to the level of income received from the job. Indicating that the "powers" would not be accurately gauged by the income. Also, a job with more "powers" in the narrower sense of executive entitlements due to a job description might carry a greater income, but not necessarily lead greater *worth of one's liberties* in general. Certain very lucrative jobs, in fact, might carry with them great reductions in the real ability to exercise certain liberties, such as freedom of movement, or freedom to associate with others. More mundanely, the effects of relative differences in one person's job-powers versus another's job-powers may set in, when it comes to actual exercising of liberties. Finally, we have already seen how one could start with wealth, and no "official" powers, but acquire disproportionately more "power" in the wider "capability" sense, due to thresholds for factors contributing to capabilities,

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This is certainly the case with some public celebrities, sports heroes, military and secret service personnel, and political figures.

such as influence, "juice" or whatever phrase is assigned. In sum, there is no reason to think that social powers and income are monotonically related *either* to each other, *or* (separately or together) to the overall worth of liberties.

## X. Refutation of the Absolute Priority of Liberty

We are now at the point where the implications of all our previous analyses can be tied together. As we saw at the end of "VII, when we adopt the widest interpretation of what is required to achieve the fair-value of political liberties, the "significance" of this fair-value requirement increases markedly relative to the formal liberties in the first principle of justice. This revision already called into question the priority of formal liberties as an *absolute* weighting principle, because the strengthened fair-value principle would justify some sacrifices in further formal *extensions* of legal liberties, for the sake of meeting even minimal requirements for the integrity of our democratic public sphere and the *worth* of our political liberties.

However, in addition to this specific issue about the public conditions which the fair-value of political liberties would entail, Rawls faces a more general challenge to his absolute priority principle, based on the demand for equity in the worth of all liberties. Insufficient equity in the worth of liberties undermines the priority principle, as we saw, because Rawls honestly admits that the lexical priority rule can be required only under "reasonably favorable conditions" of equity in citizens' real ability to exercise their liberties (end of "VIII). As he says in *A Theory of Justice*, the priority rules in his scheme will fail for sufficiently "non-ideal" cases (*TJ*, p.303), i.e. those in which "reasonably favorable conditions" do not obtain. Yet Rawls has no doubt that conditions obtain in our own society such that, if his principles of justice were implemented, we would be well beyond the point where "full exercise" of the liberties would be possible (*BL*, p.11), thus making it irrational to limit extensions in liberties for the sake of anything but liberties (see "VIII). The claim that this is *obvious*, however, is precisely what must now be disputed.

In light of our analysis in "IX, several essential points in Rawls's defense of the absolute priority of liberties can now be challenged. Recall that Rawls defended his priority principle against social democratic critics by arguing that there is no sufficient reason to add further guarantees for equity in the worth of liberties, beyond his fair-value principle for the special case of political liberties (understood as rights of "participation" in a narrow sense). Instead, as we saw ("V, p.29), Rawls maintained that the fair-value principle, with the provisions of the second principle of justice, would create a fair and stable balance in the worth of liberties for all.

In response, I will develop the implications of three objections. First, while I accept that implementing Rawls's fair-value principle would increase equity in the worth of political liberties, the limitations inherent in the principle show that, *even if widely interpreted*, the fair-value requirement would not guarantee *sufficient* equity to ground the priority of the first principle of justice over the second. This analysis will allow us to see, in addition, how crucial the operation of the difference principle is for the justification of Rawls's priority rule. Second, Rawls's response to his critics was premised on the notion that a monotonic or near-monotonic relation between variation in *worth* of liberties and variation absolute index of external resources holds for all cases except a range of exercises of political liberties ("VIII, p.42) Can assumption which proved to be very doubtful. On this basis, we can see why the difference principle fails to establish the guarantees

necessary for the absolute priority of liberties. Finally, I will argue that Rawls's own specific objections against wider "fair-value" guarantees miss the real implications of the present critique.

### (A) Failure of the Tendency to Equality

Rawls's purpose in introducing the fair-value of political liberties principle in *The Basic Liberties and Their Priority* was not to originate an entirely new argument, but rather to strengthen the overall coherence of an argument already made in *A Theory of Justice*: namely, the argument that all the principle of fair equality of opportunity working together with the difference principle would establish a "tendency to equality" or to "sufficient equity" in worth of liberties satisfying the conditions necessary for the priority rule to obtain. Indeed, when Rawls first presented fair-value for political liberties not as a separate principle but as a kind of corollary to fair equality of opportunity. The government is justified in taking the kinds of measures Dahl suggests to make parties and elections autonomous from special interests, because the government has a duty to uphold "reasonable" equality in opportunity:

It must underwrite a fair opportunity to take part in and to influence the political process...ideally, those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class (*TJ*, 224-5).

The problem with this formulation, of course, was that the principle of fair equality of opportunity is lexically posterior to the formal rights and liberties which constitutional measures to regulate political speech would restrict. To overcome this difficulty, as we saw ("V"), Rawls had to include the fair-value requirement within the first principle of justice, so that political speech, "even though it falls under the basic liberty of freedom of thoughts, must be regulated to ensure the fair-value of political liberties" (*BL*, p.74). Nevertheless ("VI), the fair-value requirement's power to restrict the extensions of other liberties was kept to a minimum.

Its original derivation, however, explains why the fair-value principle for political liberties shares the same essential limitation found in Rawls's notion of "fair equality" of opportunity." Like the former, the "fair-value" principle only requires an equal worth of political liberties for those *similarly endowed and motivated*. In other words, both these principles are intended to reduce (ideally, eliminate) inequalities that derive *solely* from a person's ethnic identity or race, and social class. They do not, however, reduce any inequalities that are due to greater inborn talent and/or

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Rawls's original formulation of the fair-value criterion made it sound as if it were also *lexically* on a par with the principle of fair equality of opportunity in his scheme. In fairness, however, there were some indications to the contrary in *A Theory of Justice*, however. For example, in "57 Rawls comments that the background for majority rule consists of the political liberties "and the guarantee of the fair value of these freedoms. When this background is absent, the first principle of justice is not satisfied" (*TJ*, p.356).

Interestingly, Habermas argues for institutional arrangements which reduce class differences on quite a different basis than fair equality of opportunity. He argues that the "principle of separation of state and society" is the basis for an autonomous civil society with its own communicative power, to which state organization must remain responsive. In particular, this principle "requires a civil society, thus associational relations and a political culture that are sufficiently detached from class structures" (*Between Fact And Norm*, chapter 4, "A Reconstructive Approach to LawCII," mss p.57).

learned motivation. Thus, fair equality of opportunity does not directly require broad equalities in wealth and income. It is satisfied when, nomatter what class or race a child comes from, he or she receives adequate educational training and other advantages to give him or her an *equal* chance to get into open positions of authority, *relative* to the opportunity enjoyed by others who have roughly equal levels of natural talent (and motivation). Hence fair equality of opportunity embodies a conception of *relative equality within each band of natural talent*: it consists of many different *horizontal* equalities (one for each "band" of natural talent) across social and racial divisions. The inequalities in wealth and income between the less and more talented bands, however, are *vertical* inequalities governed only by the difference principle.

Hence if fair equality of opportunity is completely satisfied first, remaining inequalities in economic means and other resources will generally be inequalities between the less and more talented. But the principle of fair equality of opportunity does not explicitly limit these *vertical* inequalities in the worth of liberties at all; nor does the fair-value requirement for political liberties. As we saw ("V, p.29), Rawls acknowledges that the fair-value requirement is analogous to the principle of fair equality of opportunity in this respect, although his language describing it as a guarantee that the worth of the political liberties will be "approximately equal, or at least sufficiently equal" (*BL*, 42) could lead to misinterpretations. The working of the fair-value requirement is clearer later on, when Rawls argues that it would justify prohibiting large contributions to political election campaign funds.

Such a prohibition may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority, irrespective of their economic and social class. It is precisely this equality which defines the fair-value of the political liberties (*BL*, p.73).

The wording here is almost exactly parallel to the description in *A Theory of Justice* (see passage above). Thus it is clear that Rawls's principle of the fair-value of political liberties only mandates *horizontal* equalities in the worth of political liberties, relative to each talent band.

How, then, could the requirement of fair-value for political liberties complement that argument for the "tendency to equality?" In *A Theory of Justice*, Rawls's argument for the difference principle relied on the assumption that fair equality of opportunity attached to open positions would begin the trend towards equality, which the operation of the difference principle would then enhance. Thus equal liberty and open positions will enhance everyone's interests up to a point, beyond which the difference principle will curtail excessive benefits to the better-off gained at the expense of the worse-off:

While nothing guarantees that inequalities will not be significant, there is a persistent tendency for them to be leveled down by the increasing availability of educated talent and ever widening opportunities. The conditions established by the other principles insure that the disparities likely to result will be much less than the differences men have often tolerated in the past (*TJ*, p.158).

This "tendency to equality" is only fulfilled, however, by the difference principle, which requires advantages gained from greater natural talents to benefit the worse off (*TJ*, p.102) and thus acts as a



"principle of fraternity" to produce "civic friendship and social solidarity" (*TJ*, p.105). Moreover, the long-term prospects of the worst off are not measured solely in terms of social and economic advantages like wealth. Inequalities must also improve the self-esteem of the worst off. For example, in deciding what "vertical" inequalities in education funding might still be to the benefit of the least naturally talented, we have to allow for "the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide each individual a secure sense of his own worth" (*TJ*, p.101). For these reasons, the difference principle "transforms the aims of the basic structure," which no longer emphasize "social efficiency and technocratic values" to the exclusion of all else (*TJ*, p.101). Consequently, Rawls argues, the difference principle would not lead to a "meritocratic" society in which the most talented could acquire far more resources than the least talented: it would not allow the "political domination" of a "technocratic elite" (*TJ*, p.106). The fair-value assurance for political liberties is intended as further defense against such technocratic domination.

But in his "Reasoning for the Two Principles," Rawls openly states that this argument for the effectiveness of the difference principle depends on the assumption that "given the distribution of natural assets and the laws of motivation," excessive inequalities will not in fact result from "a competitive economy...with an open class system" (*TJ*, p.158). In other words, Rawls supposed from the beginning that even the vertical inequalities left over by fair equality of opportunity, and regulated by the difference principle, would already be reduced to a fairly narrow range.

But as we have seen, the strict requirements of these principles alone do not enforce such a narrowing of vertical inequalities. And now comes the crucial point: because of the worth of liberties fails in general to vary monotonically with external resources, *even a relatively narrow range of inequalities in resources does not translate into a similarly narrow range of inequality in the worth of liberties*. Our analysis shows that Rawls's background economic and psychological assumptions would have to be far stronger (indeed, untenably strong) to assure that the difference principle would not permit great differences the *values* which formally equal liberties have for better and worse off representative persons. While it might seem unclear whether fair equality of opportunity and the difference principle could reduce inequities in the worth of liberty resulting from Sen-type variations in individual characteristics, there can be no doubt that they will not in the case of capabilities depending on *relative differences* in external holdings, and other threshold effects tending to give hegemonic advantages to elites.

This objection thus calls into question the power of the difference principle to produce the required "tendency to equality." The principle of fair-value of political liberties was added, ostensibly, to correct for a supposedly *limited range* of exercises in which Rawls acknowledged that the worth of certain liberties might not vary monotonically with resources ("VIII, p.42). But ironically, this fair-value principle *fails to close the gap*, precisely because it still depends on the difference principle to bear the full burden of regulating *vertical* inequalities between talent bands. If we suppose that all the principles are fully satisfied, the difference principle, for reasons of efficiency, will allow some level of inequality in resources between the worst off group (by hypothesis, equivalent to the least talented), and better off (more talented) groups. But even if we assume that these inequalities in resources are moderate, they will magnify to great differences in the

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As Rawls argues, from the importance of self-respect as a primary good, "It follows that the confident sense of their own worth should be sought for the least favored and this limits the forms of hierarchy and the degrees of inequality that justice permits" (*TJ*, p.107).

worth of political (and other) liberties, due the latter's dependence on relative differentials, threshold and scale effects, etc. And because the principle of fair-value for political liberties *says nothing* about inequalities in the worth of liberties between talent bands, it is powerless to rule out this technocratic trend—precisely the one Rawls wished to head off. Even those in average talent-bands may end up with unfairly insufficient worth of political (and other) liberties. Finally, the magnification of even small resource inequalities into great inequalities in the worth of liberties will be especially severe when the factors affecting the worth of political liberties, and thus coming under the fair-value protection, are *narrowly conceived*, rather than expanded to include the entire "public sphere" in Habermas's sense.

How does this result reflect back on the case for the absolute priority of liberties? The problem for this principle is not that nations lack the traditions and moderate economic development which establish the possibility of worthwhile exercise of liberties for all their citizens, but rather that these background conditions do not by themselves *automatically translate* into adequate equity in the worth of liberty for all sectors of society, even when the difference principle is completely satisfied. Thus even in our own country, it is highly questionable whether the "reasonably favorable conditions" Rawls mentions as necessary for the absolute priority of liberties actually obtain. This should not seem astonishing, when we realize that even moderating the inequalities in resources may *never by itself* rule out very large inequalities in the value of various rights and liberties to their owners. More importantly, because the general principle of justice also measures inequalities according to the primary goods, there is no assurance that its sustained application would produce *sufficient* worth of liberties for the worst off to justify the absolute priority rule. As a result, the case for the absolute priority of liberties fails.

In the case of political liberties, it is important that we keep this objection to absolute priority distinct from the argument for a wider conception of factors involved in the value of positive rights. In Sen's terms, we might say Rawls is *both* in the wrong space of analysis for the value of political liberties, and has not considered how differences in resources magnify into greater differences in capacities, in whichever "space" we use. Rawls's analysis operates (at least implicitly) in the wrong space, because he considers only elections and the operations of political parties, rather than *the democratic public sphere* generally. The resources relevant for the latter space are much broader, as we have seen. And then secondly, he fails to see that the worth of political liberties (especially in our "enlarged" sense) may be intolerably reduced for the worst off even if they are only moderately worse off in terms of socioeconomic primary goods, under conditions of fair equality of opportunity. The inequalities in the value of political liberties for persons in different talent bands, which are *entirely unrestricted* by Rawls's new fair-value clause, may then be quite sharp inequalities. To characterize them as "rough equality" (*PL*, p.330), then, is wholly inaccurate. In sum, Rawls's formulation permits more serious inequalities than he admits in the value of a set of liberties whose potential worth for individuals has much more overall significance than the "space" he uses in analyzing it indicates. This combination adds up to a serious defect in the overall shape of the theory.

## **(B) Progressivism and Efficiency *versus* the Priority of Liberties**

Now that the general case against the absolute priority of liberty has been presented, we should ask what implications this result should have for a democratic conception of justice. Understanding these implications requires, in particular, considering the likely responses both from

Rawls and his critics. Only by ruling out certain potential responses will the final implications of our analysis be rendered completely clear.

The compelling reason to we have cited for rejecting the absolute priority of liberty is the continuing possibility and even likelihood of significant inequalities in worth of liberties despite the operation of the difference principle on interpersonal inequalities in external resources. One response to this result would be to regard it as *grounds* either for (a) wider first-principle guarantees ensuring the "fair-value" of *all liberties*, or for (b) a more egalitarian principle of distributive justice than the difference principle. Rawls mentions "equal distribution of all primary goods and not only the basic [formal] liberties" (*BL*, p.44) as one extreme candidate, but we could just as easily define the "egalitarian" ideal as the distribution approaching as near to equality in resources as is necessary to reduce inequalities in the worth of liberties to a very narrow range, regarded as tolerable. Option (a) would, as we have seen, render the priority of liberties effectively meaningless (see end of "VII") by allowing the extension of *any* liberty to be revised in the name of greater equity in the worth of all liberties, and in addition it would still have the drawback that the "equity" required by "fair-value" in Rawls's sense is only equality within talent bands.

For that reason, it is option (b) which probably comes closer to Norman Daniels's expressed ideal of *equal worth of liberty* for all, although to achieve this aim, equal distribution of resources would also need to be adjusted for differences in internal characteristics. But as we noted in "IXCA" (p.43), Rawls has already rejected the egalitarian option (b) by arguing that complete equality in resources would be inefficient and organizationally impossible (*BL*, p.44). Rawls appears to be alluding here to both what Sen calls "operational asymmetries" and "incentives" as necessary for efficiency in meeting aggregate goals for wealth production. The same objection would presumably apply to a modified version of (b) which required redistribution until all relative differences in holdings were minimized.

Rawls is rightly concerned that, in trying to find a way to avoid excessive inequalities in the worth of liberties, we do not engage in wholesale leveling which worsens the quality of life for the worst off, as well as many others. This should not appear paradoxical because, although Rawls's conception places justice and the difference principle prior to efficiency and the maximum aggregate advantage for society, an essential goal of his conception is the attempt to find an appropriate balance-point between justice and efficiency. One critic with social democratic leanings, Ian Shapiro, has seen this concern for efficiency as evidence of "deep conservatism" and unwillingness to criticize existing economic institutions: he characterizes Rawls as thinking that "Since exploitation is held to derive from inefficiencies and malfunctions of the market, there is no sense that the two

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Thus the ideal of equal worth of liberty, or *complete* equality in capacities, would be reached by a two-stage process. First, near-equality in resources, and second, changes in this distributions of resources to correct for persons's inherent disadvantages. We can assume that this arrangement would produce near total equality in worth of liberties, because the relativity and threshold factors would not apply when there was broad equality in resources, excepting adjustments for internal characteristics. However, many theorists, including Sen, have questioned the practicality of this ideal, and indeed Sen emphasizes that the second part of the formula for total equality, namely redistributions to help the disadvantaged achieve their fullest potential capabilities, is entirely separable from the leveling of resources, and less apt to produce incentive problems (Sen, p.142-3).

Sen, p.139-140.

goals of promoting efficiency and distributive justice might systematically conflict." This is somewhat unfair, since Rawls knows that the difference principle would almost certainly conflict with stronger senses of "efficiency," such as the ordinal requirement that everyone's situation be improved (*TJ*, p.79-80), or the ideal of "efficiency" as optimum balance of aggregate advantages over aggregate costs. However, Shapiro is right in one sense: as we have seen, Rawls's insistence on measuring inequalities purely in terms of exchangeable resources surely does blind him to exploitative *power* relations of domination and disempowerment expressing greater-than-indicated patterns of inequality in the worth of liberties.

It is true that in first presenting the "democratic conception" in *A Theory of Justice*, Rawls emphasized the point that "the difference principle is compatible with the principle of efficiency" in the sense of Pareto-optimality, since the point of maximum socioeconomic advantage for the worst-off person is *one* of several points on the horizon of Pareto-optimal arrangements, i.e arrangements that cannot be changed without worsening someone's position (*TJ*, p.79). He also stresses that market systems can be used consistently with political guarantees for equal liberties and fair equality of opportunity (*TJ*, p.272). There is no doubt that Rawls considers "efficiency" as one of the essential advantages of market economic mechanisms and sees no alternative to relying on them in "pure procedural justice." This pursuit of efficiency has limited implications, though, since Rawls suggests that both capitalist and socialist property systems could reap the advantages of pricing systems (*TJ*, p.271), and he acknowledges a large sector of public social goods which "must be arranged for through the political process and not through the market" (*TJ*, p.267). Overall, however, the difference principle itself is the main limitation on the employment of the larger efficiency concepts, such as inequalities in rewards to generate incentives for the more talented to produce nearer to their capacity-frontier.

Thus Shapiro's critique of Rawls is quite one-sided, for in fact Rawls has made an extremely sensitive effort to find a suitable balancing point between efficiency and a larger, progressive conception of distributive justice which is not really the manifesto for a "deeply conservative" position. If anything, the maximin-optimal point of resource distribution probably allows *too little* scope for efficiency considerations bearing on the overall social good. For example, past a given point, it might seem unreasonable to sacrifice larger and larger very significant benefits in average social utility for more and more minute incremental gains for the worst off. In this respect, Sen goes even farther than Rawls, and argues that equality considerations can only assume their proper role in social evaluation when "aggregative concerns" are an essential part of the picture. Thus he regards it as an *advantage* of his capability-criterion that policies to correct for "inequalities associated with human diversity," which his approach would yield, are much less problematic from the point of view

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Shapiro, p.259, p.264. Indeed, when Rawls explicitly refers to organizational and economic efficiency as reasons not to accept equality in income and wealth, Shapiro accuses him of reintroducing "the good old rights-utility synthesis via the market" (p.241). However, I disagree with Shapiro's view that Rawls uses efficiency as one of the *grounds* for the difference principle. This surely seems implausible given the large amount of disincentives the principle would entail. Rather, Rawls's concern is to show that his conception can satisfy all the demands of justice which utilitarianism cynically ignores, and yet maintain the only good feature of utilitarianism, namely its concern for achieving efficiency via markets and incentives.

As Sen says, in fact the "extremism of giving total priority to the interests of the worst off" seriously curtails the use which Rawls can make of *aggregative* efficiency considerations (Sen, p.146).

of incentives than policies to undo inequality arising from differences in effort and application." Concerns for incentives have very little weight as counterarguments to the state's compensating people for these types of differences in internal characteristics. Finally, against Rawls, Sen argues that the fairness of equal *opportunity* to hold offices open to all does *not* show that "focusing on primary goods is a fairer or better way of judging individual advantage than capabilities;" rather, "the case for merit-based selection of officers and influential positions relates, ultimately to the efficiency of such a system." In other words, Sen sees overall *efficiency* considerations as entirely respectable grounds for an open system of competition for jobs with fair opportunity; but he is at pains to show that introducing these kinds of considerations in no way rules out using the richer information of capabilities to measure inequalities. Including efficiency considerations does not require using primary goods as our measuring rod; therefore, neither does fair equality of opportunity, if it turns out to be just.

This last insight is extremely important, because it already points us towards the *problem* lurking in Rawls's response to the egalitarian. If capabilities were used to measure the inequalities between talent bands in Rawls's scheme, the true inequalities in the worth of liberties would be measured, *even though the incentive-based argument for the meritocratic inequalities would remain*. Taking *worth* of liberties as our primary measure, as the social democrat and egalitarian demand, is not *in principle* incompatible with giving full weight to aggregative efficiency consideration.

The problem with Rawls's response to Daniels's egalitarian argument, then, is that it actually provides no defense for the absolute priority of liberties. I completely agree with Rawls's point that a *more egalitarian* distribution of resources than that already provided by his second principle of justice would be inefficient to a destabilizing degree. My argument that substantial inequalities in worth of liberties would result between talent bands in his scheme, even including the fair-value guarantee for political liberties, does not mitigate against *that* point about the inefficiency of greater egalitarianism. But this is still not to accept that these inequalities are just. They may not be efficiently reducible by redistribution, but there is still a third option, which only the absolute priority of liberties has heretofore prevented us from considering: the legal extensions of liberties may themselves have to be adjusted *to reduce inequality in the worth of the legally enforced liberties generally*. In other words, since Rawls's principle of absolute priority for formal liberties founders on the rock of inequity in the worth of liberties, we may be justified in exchanging one set of liberties, with scopes equal for all, for a similar set of liberties with narrower scopes (but still equal across citizens) that has much more overall equity in value. In extreme cases, we might even have to consider accepting *corrective formal inequality* in the scopes of some liberties: by giving greater extensions of certain liberties to the very worst off, we might achieve a better overall balance in

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Sen, p.143, 144.

Sen, p.146.

Sen does, however, insist that the aggregative efficiency of open competition for jobs is an entirely contingent matter, and may be challenged. He discusses a debate in Indian politics in which this rationale was challenged, in favor of something like a system of affirmative action for members of lower castes in competition for government positions (p.147).

worth of liberties. Note, however, that none of these possible reforms necessarily involves an extreme egalitarian redistribution of resources.

Rawls thus fails to perceive that even if the substantial inequalities remaining after the satisfaction of his principles would not justify more egalitarian redistributions of income and wealth, they *would* undermine the rationale for the priority of liberties up to the full extent of the "fully adequate" scheme. And relaxing this priority rule enables us to look at ways of reforming the system of liberties to improve equity in the worth of liberties which need not have more than an incidental effect on overall efficiency.

Let us consider one other potential response to our argument that even with the difference principle, there will be substantial inequalities in the capacity to exercise liberties, probably leaving the worst-off with completely inadequate worth of liberties. These inequalities are increased and exacerbated precisely because there are extensions of certain liberties (such as, say, the right to virtually unregulated free expression through television media) which are *far* more exploitable by those whose resources pass a given threshold, or whose relative advantage in holdings over the average gives them decisive empowerment to use these liberties, etc. Could we compensate for these unfair inequalities, while saving the priority of liberties, by resolving to *maximin* the worth of liberty itself, only allowing differences in the worth of liberties where omitting them would only further reduce the capacities of the worst off to exercise their liberties? This is the ideal Daniels calls the "liberty-restricted difference principle" (LRDP).

Jürgen Habermas seems to come close to this ideal in his fifth category of rights that must be represented in any just democracy. He considers this category *derivative*, and thus procedurally posterior, to the first four categories of right. But he includes in this derivative category not only a requirement for a social safety net, but also an egalitarian provision formulated so as to emphasize capabilities: "basic rights...in the measure this is necessary, under *prevailing circumstances*, for equal chances at utilizing the civil rights" in the first four categories (my italics). This provision appears to require something close to equal capability to exercise all the basic rights. Thus it differs decisively from Rawls's more modest requirements of equal capability *within talent bands* and equal capability to exercise narrowly conceived *political* liberties. Moreover, Habermas's standard clearly refers to the worth of the civil rights, not to the resources needed for exercising them. If we interpret the qualification concerning "prevailing circumstances" as drawing a limit at the point beyond which a closer approximation to equality in the worth of liberties would only be achievable by unacceptable leveling in the worth of liberties for all parties, then Habermas's provision would have the same implications as the Liberty-restricted difference principle.

However, Habermas does give the requirement for equality in the worth of *political* rights of participation a further, special guarantee in his theory, by relating it directly to the "principles of the constitutional state." Habermas develops the architectonic of the constitutional state on the single fundamental idea that "the organization of the constitutional state is ultimately supposed to serve the

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The danger with this new kind of affirmative action, however, is that it might be destabilizing and likely to produce resentment among those who are on average better off in their worth of liberties, but will not perceive themselves as such. Of course, as the next section will make clear, I could not contemplate any inequality in the *essential ranges* of the basic liberties, but only (perhaps) in their Rawls-preferred further extensions.

Daniels, p. 270.

See p.3 for the full text of Habermas's principles of right, and for the reference.

politically autonomous self-organization of a society that has constituted itself" democratically. Then he derives from this, among other principles, an abstract version of the "principle of separation of state and society." As he explains,

..this principle refers in general to the legal guarantee of a social private autonomy granting each person, as citizen of the state, the equal chance to make use of his rights to political participation and communication.

The requirements of this principle go beyond the "bourgeois constitutional state" and justify the provision of "necessary material conditions for an autonomous exercise of formally equal liberties" in order that worse off parties can be effective in political bargaining. Habermas's concern here is that "social power" be balanced so that businesses and organizations do not gain dominant influences over political processes. This is the same concern which led Rawls to his fair-value principle for political liberties. But whereas Rawls simply bases his principle on the need to preserve the value of political liberties, Habermas starts with a rigorous theory of the *general* democratic separation of state from civil society; and whereas Rawls is satisfied with a "fair opportunity" principle for the worth of political liberties, Habermas interprets his principle as requiring more substantial equality in capabilities for the exercise of liberties.

Whatever the merits of Habermas's formulation, Daniels suggests that Rawls could not accept LRDP because, by parallel reason, he would then have to accept public recognition of unequal liberties themselves. But I think Daniels is mistaken here. The "reverse relative rationality" argument he gives for this conclusion would not be a problem for Rawls by itself, because the parallel case for the formal liberties would be: liberties should be equal, unless those receiving a lesser-than-equal liberty would have had to suffer even further-reduced liberties otherwise. But Rawls actually *does* accept just such a "justification of unequal political liberty" (*TJ*, p.231) since it involves no reduction in liberties for greater overall *worth* of liberties, and since it justifies unequal liberty only to compensate those made worse off in terms of formal liberties (and see the priority rule, part (b)*CTJ*, p.250). This is why "the principle of equal liberty can be viewed as a limiting case" (*TJ*, p.220). Daniels's parallelism thus does nothing to break down the distinction between liberties and their worth.

The problem for Rawls lies elsewhere. The real reason he, unlike Habermas, could not accept the LRDP principle is that past a point, redistribution necessary to even to *maximin* (let alone completely eliminate) all inequalities in the worth of liberties would surely conflict with the requirements of economic efficiency and social stability. One of Rawls's primary motivations for cashing out the basis for expectations in terms of *resources*, rather than in terms of modal concepts

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Habermas, *Between Fact and Norm*, Ch. 4: "A Reconstructive Approach to LawCII," mss. p.59.  
ibid, mss p.57.

ibid, mss. p.58.

Daniels, p.277.

Rawls arrives at this conclusion in considering the hard problem of "Toleration of the Intolerant." But in his later writings, Rawls does not emphasize this rationale for less-than-equal liberty in extreme cases, apparently because he thinks this point is part of "non-ideal" theory. For the same sorts of reasons, Habermas presumably could accept unequal formal liberties in non-ideal cases, and accept the LRDP at the same time.

such as "capabilities" or the "worth of liberties," was precisely to *build in* a kind of agreement between justice and economic efficiency. For the point at which further redistribution of *resources* would stop improving the lot of the worst off (measured in terms of resources) will presumably also be a "critical point" in the economic incentive curve of motivation for the more talented to produce according to their ability. The thought is that *below* this point, not only will the more talented not have the incentives necessary to maximize total GNP for the entire society (that is a utilitarian aim rejected *already* rejected in favor of justice as fairness), but also, any further reduction in incentives (through reward structures even closer to a flat rate) would produce such dramatic inefficiencies that *everyone* would end up with less resources in the long run.

As indicated, I am far from saying that Rawls was wrong to seek a proper point for balancing social justice with economic efficiency. It is an entirely rational aim. However, achieving this balance by letting the distribution principle apply only to differences in external resources also reveals the possibility that there will be inequalities in the worth of liberties severe enough to justify lifting the protection of priority for extensions of certain liberties and limiting these extensions on the same grounds, namely the need for social stability.

What our analysis implies, therefore, is that one cannot have simultaneously: (1) a distributional principle of justice that substantially improves the lot of the worse off; (2) an assurance that this principle will not produce intolerable economic inefficiencies; and (3) grounds for an absolute priority for basic liberties, whose extensions are limited only by a self-related algorithm. Whereas the social democrat tends to embrace (1) and possibly (3) at the expense of (2), Rawls defends the necessity of some reconciliation of social justice with economic efficiency, in order to ensure the stability of a well-ordered society. Consequently, Rawls embraces (1) and (2), but runs into a problem when he tries to hold (3) as well. My position is that we ought to accept some set of principles meeting the descriptions in (1) and (2), and sacrifice (3). We should instead embrace a *revised* priority rule (3"), which would make the priority of each extension of a liberty contingent on its being an extension whose worth is not intolerably unequal across talent bands, given that our principle under (1) will not rule this danger out, since it has also been chosen to be compatible with meeting condition (2).

## **XI: Towards A More Flexible "Conditional" Priority Principle**

Before going on to illustrations of a revised priority rule, we should reflect on the *stage* of democratization at which the justification of priorities for liberties would enter into the process. We shall see in the process that a stage-wise distinction should be made between the "essential" components of a given liberty in any society, and its further extensions which are merely "preferred" given their significance in a given society, although Rawls's included both these segments under the priority principle in his explanation of the fully adequate scheme.

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Without such a balance, not only could the human race not make significant progress towards a better world. It would also be impossible to pass along to future generations even as good a set of opportunities as have already been achieved. Intergenerational justice depends on sufficient savings to allow renewed investment to maintain in the future standards of life already achieved now.



## (A) Essential versus Preferred Extensions

For Rawls, as we saw, the absolute priority of liberties does not follow immediately from the standards of the Reasonable embodied in the original position, but rather it follows when a list of liberties is considered in light of the hierarchy of highest-order interests of the person. The choice of absolute priority is thus a decision made within the original position, and it becomes a principle of justice which governs any just democratic constitution specified in the next stage of the sequence.

The situation is rather different with Habermas's model. Habermas does not have to derive guiding principles for constitutional conventions from introducing a list of options into a choice situation which by itself, is underdetermined in its implications, because Habermas derives his most fundamental democratic principles—the basic categories of right, including popular sovereignty—*directly* from the standard of the Reasonable (the discourse principle) taken in conjunction with the rule of law as the basic organizing feature of society. As we saw, these categories are "unsaturated" and must be specified within the historical context of a society engaged in constitution-formation. So the next stage for Habermas is immediately the specification of a particular constitution—there are no "intervening" general principles which specify the weighting of principles institutionalizing the first four basic categories of right and those giving substance to the further socioeconomic requirements of the fifth category. Notice that the absolute priority of liberty does not follow from Habermas's democratic principle *per se*, but the former's requirement that variations in the worth of liberties be *entirely excluded* from consideration in the balancing of "significant" extensions of liberties, proposes to *limit* constitutional discourse on this matter. For Habermas, such a principle could not be introduced "in between" the stages, i.e. *after* the basic categories following from the democratic principle, and *before* the discourse of the constitutional convention had even begun. Rather, for Habermas, an absolute priority protection for a maximally significant scheme of liberties could only be selected in the first, proto-constitutional discourse governed by popular sovereignty, as a *metaprinciple* for all further specification of liberties. The introduction of such a surprising feature, however, could only come from the historical traditions of the society doing the specifying, since it is not included in the basic concept of democracy in general.

One of Habermas's reasons for avoiding the kind of "in between" level which Rawls's original position and its deliverances actually occupy (relative to *Habermas's* sequence, at least), is his deeper conviction that the originary act of founding democratic institutions must be "experienced as an open, incomplete process," so that the "radical democratic embers" can be reignited as each generation reinterprets and even changes the constitution in light of altered historical circumstance. They are not hemmed in by principles deriving from a hypothetical "middle stage" between the basic unsaturated categories which set their agenda, and the living process of constitution-formation. Another reason is that, unless the principles for weighting and co-adjusting the specifications of

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Habermas, *Reconciliation Through The Public Use of Reason: Remarks on John Rawls's Political Liberalism*, mss. p.24. Thus Habermas is quite opposed to Rawls's interpretation of the democratic process as a four-stage sequence of veil-lifting. As he comments, "the theory relieves the citizens of too many of the insights that they would have to appropriate anew in each generation." I am also convinced that if we rigorously follow the logic of Habermas's notion that there is really an ongoing *constitutional convention* in a living democracy, we would also arrive at a conception of the judicial stage requiring more responsiveness of the institutional power of the judiciary to the communicative power of popular sovereignty.

liberties are decided in the ongoing process of constitution-formation, the judgment of these weighting principles is entirely removed from popular sovereignty, which first becomes actual only in real constitution-formation, not in a hypothetical choice situation. For Habermas, in other words, it is *crucial* that the reach of popular sovereignty extend over the whole project of deciding how an adequate scheme of rights ought to be specified. By contrast, as Habermas points out, the lesser significance Rawls gives to the political rights *within* the list of liberties is *reflected* in the absolute priority of liberties, by which "a prepolitical domain of liberties is delimited which is withdrawn from the reach of democratic self-legislation." This marks Habermas's agreement with the growing consensus that *absolute* priority for formal liberties is an untenable position. Although he arrives at the same conclusion for quite different reasons, Sen also agrees that giving "complete priority to the principle of liberty over other principles of justice" is a "rather extreme formulation."

However, Habermas's categories of right do include certain basic conditions for each *kind* of right, especially the political ones, which conditions must be met in the specification and co-adjustment of these rights, for it to be adequate and fair. For example, the right to guaranteed legal recourse must, when concretized, include "an equal claim to a legal hearing, equal treatment before the law" and similar essential components. These basic conditions thus *limit* what can be done in the adjustment of specific legal rights and liberties to one another, with particular emphasis given to the central significance of the political liberties in the process. Habermas further explores such conditions for proper specification of rights in the fourth chapter of *Between Facts and Norms*, in which he analyses the relation between the communicative power that governs the juridification of rights and the necessary forms of state and administrative power the latter presuppose. So for example, under the fourth category of right, we initially find "the freedom of assembly and association, the freedom of belief, conscience, and religious profession," and various fundamental entitlements such as suffrage and the right to organize political parties. But in conjunction with relations to state power, Habermas derives three other essential applications: "the principle of comprehensive legal protection for the individual; the principles of the legality of the administration and judicial monitoring of the administration; as well as the principle of the separation of state and society."

These conditions for each kind of right thus function in the same way as what I have called the non-contextual "essential extensions" of the various liberties for Rawls (see "III, p.17). Habermas's conditions are derived directly from what is necessary from the premise that the principle of communicative legitimation of norms (the discourse principle) is to be instituted in the form of law, rather than being derived from any hierarchy of moral powers, but they do define a range of extension which is essential for the specification of each basic kind of liberty. In other words, there are certain elements of basic liberties which popular political will could not legitimately fail to represent in the constitution, for the sake of socioeconomic advantages. So in this way, we do get

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ibid, mss. p. 25-26.

Sen, p.87.

Habermas, *Between Fact and Norm*, ch. 3, "A Reconstructive Approach to LawCI" mss. p. 58.

Habermas, *Between Fact and Norm*, ch. 3, mss p.63.

ibid, ch. 4, mss. p.50. And there are further conditions perceivable under each of these, such as the "principle of prohibiting arbitrariness in domestic affairs" which limits the power of the executive to make statutory declarations (ch. 4, mss. p.56).

some limitations placed in advance on the action of popular sovereignty with regard to the specification and adjustment of rights.

This again places Habermas in concurrence with Sen, who maintains that some "additional recognition" must be given to liberties, even though in a capability analysis, a violation of liberties may not be distinguishable from other features which limit capabilities:

In this sense, the capability perspective, central as it is for a theory of justice, cannot be entirely adequate for it. There is a real need to bring in the demands of liberty as an additional principle (even if that principle is not given the total priority that Rawls recommends). The importance of *over-all* freedom to achieve cannot eliminate the special significance of *negative freedom*.

Although Sen himself does not provide an elaborated case for this claim, Habermas's derivation of certain essential components for the specification of various categories of right can provide the deeper rationale for Sen's intuition. Sen's concern for the special significance of "negative freedoms" within democracy finds an explanation in a particular principle which Habermas considers essential to the fourth category of right, namely the requirement of the legality of administration. It is because of this essential component that "the civil rights resulting from the right to equal subjective liberties [the first category] acquire the *additional* meaning of liberal *rights against the state*." Thus Habermas ties the special significance of *negative freedoms* to an essential extension of the right of popular sovereignty: the subjective liberties do not acquire this significance on their own.

This analysis shows that on Habermas's account, the conditions which Rawls calls the essential extensions or "central ranges" of various liberties emerge as necessary conditions and implications of the basic categories of rights, derived from the discourse principle and the rule of law. These essential components for the specification of different rights and liberties are prior to any particular constitution-formation, and so *eo ipso* they enjoy a priority under the basic principle of democratic right. However, the same cannot be said for the further "preferred extensions" which Rawls included under priority in his fully adequate scheme. The priority of liberties never becomes a separate principle for Habermas, but remains a structural feature which is built-in for the extensions of various liberties that are essential for their role in fulfilling the democratic principle; but further extensions of these liberties cannot then acquire an absolute precedence over socioeconomic considerations on the strength of their significance in Rawls's two "fundamental cases."

In looking for an alternative to Rawls's absolute priority principle, then, we are not proposing to open any and all rights to reconsideration on grounds of aggregate socioeconomic advantage. That would be to regress all the way back to some form of utilitarianism. Rather, the essential extensions of the various liberties will retain a priority on the autonomous basis of the democratic principle. What we are rejecting is the notion that in specifying the system of formal liberties, the *complete* set of their significant legal extensions in a particular society should be decided *solely* on the basis of the importance of these extensions for the development and application of the moral powers of the person, without any regard to considerations of common social good. It is "absolute priority" in *this sense* that has proven to be unjustified. But since we are rejecting such absolute priority for an entire scheme of significant extensions of liberties, yet retaining the intuition that certain extensions are

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Sen, p.87.

Habermas, *Between Fact and Norm*, ch.4, mss. p.56.

essential and not subject to negotiation, it follows that we are reconsidering the justification of the remaining "preferred extensions" those which might be included in a Rawlsian fully adequate scheme but which are nevertheless *not* essential in Habermas's categories of right. It is with regard to this segment of the "fully adequate scheme" that lexical priority over social and economic concerns must be relaxed.

### **(B) The "Combination of Reasons" Model**

Relaxing lexical priority for the "preferred extensions" of a liberty, however, does not entail that reasons of social or economic advantage would ever be sufficient on their own for revoking these extensions, and thus limiting the overall scope of the liberty. We may continue to hold that, if we are proposing to limit certain applications of a liberty-concept which might be significant from the point of view of the two moral powers, there must be justifying reasons based on the protection of other liberties involved, but it will no longer be the case that reasons of social, psychological, cultural, and even economic advantage do not count at all in the process.

For example, suppose we propose further limitations in the scope of a general right to bear arms. Reasons against a completely unrestricted version of this liberty do not *only* include protecting the *rights* of those who would be killed by crossfire and murder in our cities; there are also substantial social and economic costs, such as the devastation of minority cultures, and skyrocketing emergency room costs. There are, however, other balancing counterarguments that might be made in terms of liberties, such as that guns allow people to protect personal liberties and property, etc. But if we get into an argument over the marginal benefits and detriments to the security of the complete scheme of liberties of having a less limited right to bear arms, then social and economic reasons may have *the decisive effect of tipping the balance* of our judgments in favor of further restricting this liberty. These kinds of reasons count, and it is legitimate to bring them into the constitutional debates and judicial deliberations that concern the scope of our liberties. For social and economic reasons may give sufficiency to a set of reasons based on the protection of rights, which was not clearly seen to be sufficient on its own.

To be fair to Rawls, however, it is questionable whether the right to bear arms has *any* significance relative to the development and application of the two moral powers. So let us instead take the example of freedom to educate one's children as one wishes, which is generally seen as an extension of the liberty of conscience, and necessary to the pursuit of a conception of the good over a complete life. However, if we further extend this right to include, specifically, (1) the liberty to select any curriculum whatsoever; (2) the liberty to retain immediate local control of such fundamental matters as chief administrative officers, the educational programs offered, teacher salaries, and spending for books and supplies; and (3) the right to school choice; then we have extensions which cannot be considered absolutely *essential* to personal liberty of conscience, even though they might end up in a fully adequate scheme that only pays attention to the development of the power to form and pursue a conception of the good, while ignoring social and economic implications. The formal right of parental freedom to educate children according to conscience can

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Someone might argue, however, that the fourth amendment expresses a liberty which has "supporting" significance since it necessary to preserve the political liberties.

not only be regulated, but even limited in various ways, without violating the core of democratic right.

For example, we have already seen how the need to maintain minimal standards of communicative integrity for the democratic public sphere could justify limiting extensional liberty (1), by forbidding its use to pursue the systematic indoctrination of one's children into blatant historical and cultural falsehoods and the hatred of other groups ("VII). In addition, the second extension of the right to educate one's children according to conscience could also be limited in several ways. We might limit the scope of this liberty by a system of national school funding in lieu of local property-based funding and control by school board decisions. In the interests of fair equality of opportunity, our reformed system would provide an equal base amount of funding per student to schools all over the country (perhaps adjusted for key costs that differ by geographic and demographic region, such as heating costs, security costs, back debt, etc.), and raised by national property taxation, or some other form of national taxation. This system, however, would circumscribe a local community's direct control of their schools by permitting them only partial power of the purse. They would be permitted, let us imagine, to raise *additional* local funds for the school programs in their area if people in their community supported it. But they would not have the right to spend less than adequate amounts on supplies, for example, nor to veto decisions which were centralized at the state and even national levels to maintain necessary standards. This would be done for the sake of an administrative system more likely to promote broad equity in opportunities and greater equity in the *worth of the liberty* to educate one's children as desired: for with this system, poorer local populations would be empowered to provide programs for their children which, previously, only wealthy suburban magnet schools could afford.

As things stand, the liberty to educate one's children as desired is obviously worth a lot less to the single mother of three living on welfare on the South Side of Chicago than it is to the corporate millionaire and his family living in a small suburb town in the rich region north of Chicago, where, let us imagine, a new local school choice act now allows him to apply \$4,000 of his annual property taxes towards the \$15,000 annual tuition at his child's private school. The right to local school choice with vouchers is a third extension of the liberty in question, and it is a distressing example of how a "liberalistic" bent on further extending the scope of certain leads to even less equity in the *worth* of such liberties. The formal *right* to choose the private school would be nearly worthless to our single mother, since even with the \$4,000 she is still \$11,000 short of the tuition, and has no way to finance that amount. But the formal right is worth a lot to our wealthy suburbanite. A centrally funded national school system might eliminate this particular liberty-extension, but it would compensate for this loss of greater negative freedoms by giving us greater equity in the worth of the liberty to educate one's children as desired, within that liberty's substantial remaining scope. Here is a clear case where new policies that circumscribe the *extent* of a freedom can also make for a fairer *value* of this freedom to the worst off and, of course, bring us nearer to fair equality of opportunity.

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In view of the problems concerning our public sphere, a comprehensive system of taxation on all major forms of institutional entertainment, including tickets to sports events, subscription to cable television, purchase of satellite dishes, golfing memberships, etc., would be another alternative worth of serious consideration.

Even this, obviously, would not guarantee complete equality of educational opportunities for those similarly talented and motivated, but given the selfishness of local populations, it would take us a lot closer to it than the shockingly decentralized and massively unequitable system we currently have.

But we can only make this argument because it is possible to bring in considerations to which the "fully adequate" extension of significant liberties would be lexically prior in Rawls's scheme.

My point, of course, is not that Rawls is in any way inattentive to grave social injustices of this kind. His arguments have been one of the main inspirations to overcome such injustices in the last half of this century. Rather, my point is simply that we have more leeway in trying to solve such serious social problems once a principle like the absolute priority of liberty, which tends to reinforce the overemphasis on negative, formal liberties in our culture, is exchanged for a more flexible priority rule clearly linked to conditions of equity in the worth of liberties.

### **(C) Scope-Relative Inequality in the Worth of Liberties**

The previous example of school choice illustrates an intuition which points towards a possible "modified" priority principle for the just specification and balancing of the liberties and their extensions. The intuition, which is closely linked with our analysis of relative differentials as causes of inequality, is that under certain conditions, each increase in the *scope* of a liberty beyond its essential range is likely to be of more unequal *value* to different segments of the population. In particular, *where the worth of a liberty depends to a large extent on relative holdings in resources, and where systematic efficiency requires at least moderate inequality in the holdings of such resources, inequalities in the worth of the liberty will increase as the scope of the liberty is increased.* For convenience, we can refer to this qualified correlation as the "postulate of scope-relative inequity." It basically says that when inequalities in resources cannot be eliminated, all the effects of relative differentials in resources (which we have discussed in detail) set in with increasing vengeance as further and further extensions are added to a liberty. As a rough generalization, as each libertarian interpretation of a right widens the specific set of legally defined cases it covers, each further addition to the liberty's scope will tend to have increasing value for the better off and diminishing value for the worse off.

In the school choice case, for example, we see that the value of the liberty to educate one's children as desired does not vary monotonically with the income one has: better off classes tend to perpetuate and widen their hegemony through filling all of the limited places at private schools, whose resources they are better positioned to take advantage of and not merely because of better financial circumstances, but also because of factors such as family history, knowledge of what admission to these schools requires, and so on. In this circumstance, it is predictable from the outset that an extension in the scope of this liberty to include tax vouchers for school choice will not add an equal amount of value to the liberty for the better and worse off. Far from it: this widening of the formal liberty will be of negligible benefit to the worst off group of parents. If it draws a sufficient amount of tax dollars out of *all* the schools from which they will be able to choose the public schools in their area then in fact the value of their liberty to educate their children at the school of their choice may even be *lower* after its scope is increased in this way.

Are there counterexamples to this postulate of scope-relative inequity in the worth of liberties? One could try to argue, for example, that school desegregation following *Brown v the Board of Education* involved an increase in the scope of liberties to educate one's children as desired, but this reform surely benefitted worse off groups of citizens. This is not a counterexample, however, because desegregation involved correcting a situation where black Americans had a less than *formally equal* liberty, or, to be more precise, where there were two different liberties, with the rights

extended to whites worth substantially more than those extended to blacks. Hence the reform only extended the formal scope of liberties held by the black minority. The liberties held by the better-off white populations were not extended but in fact curtailed: they no longer had the formal right to send their children to a school legally mandated to be all-white. In a case like this, obviously the further extensions of the liberty *can only* benefit the worse-off, since only the worse-off groups experienced an extension in their formal liberties. Our correlation of increased scope with increased inequality in the value of a liberty only applies to liberties which are already formally equal or identical for all citizens, and whose formal scope is then *increased* for all citizens. It seems that it is actually quite difficult to identify counterexamples to this correlation.

If the "postulate of scope-relative inequity" is accepted as a premise of fact, then we may add to it a normative premise that seems even more self-evident: the significance of further extensions of a liberty cannot indefinitely justify accelerating inequality in the worth of liberties. Beyond a point, the imbalance in the worth of these greater liberties becomes inherently unjust to the worse off, and threatens stability as much as would productive arrangements taking no account *at all* of economic efficiency. Just as there must be a balance of progressive distributive justice with efficiency, so there must be a balance of equity in the worth of liberties with the significance of greater formal liberty.

The idea at work here can be illustrated with a simplified example. Complete freedom of the press might be exploitable by Ross Perot 10,000 times more than it is exploitable by the average citizen. However, a more limited freedom of the press with some restrictions on how much air time a single person can purchase results, say, in a liberty that is only 100 times more exploitable by Ross Perot than by the average citizen. Perhaps the latter inequality is within bounds that make such a liberty acceptable, but the former is certainly not. Since this is a simplistic example, we should remember that even for a single liberty, deciding where too great an extent creates chances for dominance by the better off, thus threatening to undermine the whole scheme of liberties, is an extremely complex matter for both analysis and judgement, which depends to a large extent on historical experience. Where to draw the line is a matter of political *phronesis*, which can only be decided through the democratic process itself; it cannot be determined in advance with an algorithm that yields a univocal result.

#### **(D) The "Conditional" Priority Principle for Preferred Extensions of Liberties**

We must now put this scope-relative assessment of liberties together with the wider argument of the previous section. Once we are beyond the "core" extensions of a liberty which are essential for any just democracy, the arguments for granting and/or for limiting further "preferred" extensions of the liberty must take into account not only increasing inequality in the *worth* of such further extensions (for the reasons explained in the last section), but also *other* social and economic costs and benefits to the aggregate overall good of society as well. Thus even if an extension, such as the right to carry concealed weapons, were of nearly equal worth to worse-off and better-off individuals (in terms of power to exercise certain liberties), enormous social and cultural costs would constitute a very significant reason for curtailing this extension, when taken in conjunction with other considerations from liberty. The "combination of reasons" model thus means that, in deliberating on

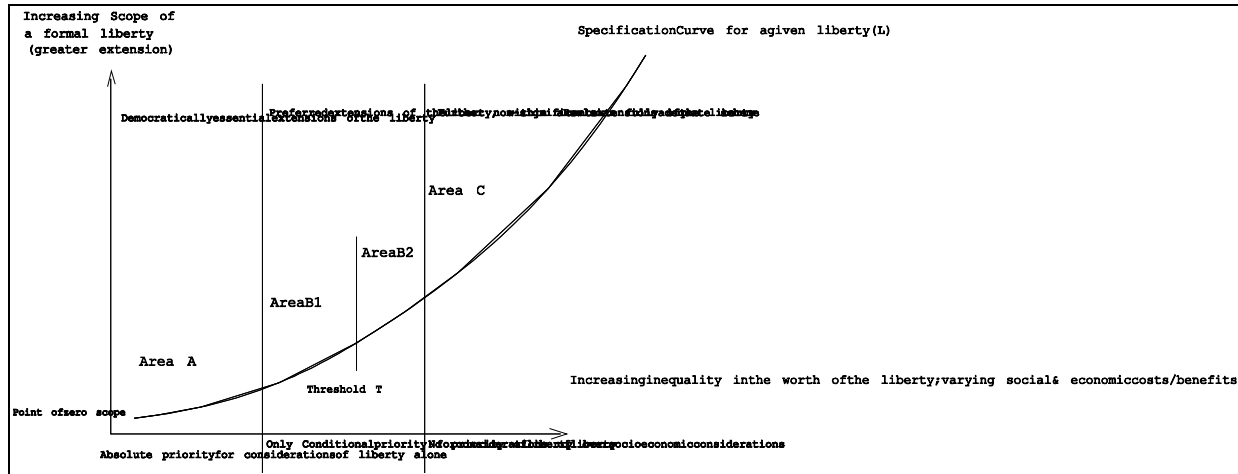
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At times, economic disadvantages can even assume a more significant weight in the overall balance of liberties. In a period of severe economic depression, for example, the national crisis might justify

*preferred* extensions of liberties, both considerations of equity in the worth of liberties and other considerations based on social and economic prediction, may be *combined* with "pure" considerations of formal liberty.

Thus understood, the "combination of reasons" model allows us to give the rigorous breakdown of *scope-relative* deliberation on liberties, within which our principle of "conditional" priority for certain kinds of extensions finds its proper place. The entire scheme can be summarized in terms of the following diagram:

### The Scope-Relative Model of Considerations Relevant for Specifying Liberties



This diagram allows us to see how the democratic concern for the essential cores of different basic liberties may be reconciled with less-than-absolute priority for considerations of liberty in filling out the complete scheme of liberties. With respect to a liberty (L), extensions lying within Area A will be those which are essential in the sense that they are necessary for any just institutionalization of certain rights following from the democratic principle in the form of law backed with state power. Further extensions in Area B are one which would be included in Rawls's fully adequate scheme, because their significance is greater than those of conflicting extensions of other liberties. Area C would include further "non-basic" extensions of the liberty, decided at the legislative stage. For Rawls, then, all the deliberations justifying extensions throughout Areas A and B would be protected by *absolute priority*.

The difference in our conception of how liberties are to be specified is that extensions in Area B are only protected by the "principle of the *conditional* priority of liberties." This principle says:

#### The Conditional Priority Principle

Social and economic considerations of equity in the worth of each further "significant" formal extension of a liberty (L), as well as other considerations of overall social and economic costs and benefits to society from each further extension, can never *by themselves* be sufficient for permitting

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limiting the scope of certain liberties in order to overcome self-perpetuating systemic problems. Improving the overall aggregate situation might, at such times, also assume greater importance than keeping inequalities in the worth of liberties as minimal as possible.



or prohibiting such extensions, but such socioeconomic considerations become relevant *in combination* with other considerations in terms of significance of competing liberties. Thus, social and economic considerations bearing on equity and the overall productive stability of society *potentially* can make a difference in two ways:

(a) by justifying prohibiting further extensions of (L) when these conflict with significant extensions of other liberties, even though on their own (i.e. in Rawls's terms) the latter might not have outweighed the former;

(b) by justifying further extending (L) even against incompatible significant extensions of other liberties, which, if only the significance of the competing extensions were compared, might have overruled the extension of (L).

Finally, we must add that the validity of social and economic considerations introduced under cases (a) and (b) will depend to a large extent on the historical context of different societies, as well as the prevailing economic and social conditions in the societies. This is one fundamental way in which preferred extensions differ from the essential ones in Area A. In sum, the principle of *the conditional priority of preferred extensions of liberties* takes our "combination of reasons" model of political phronesis for determining the scope of liberties, and makes this model the criterion for the formal extensions of liberties falling in Area B.

Note that this conditional priority principle only establishes a rule of practical reasoning for preferred extensions of liberties. It does *not* say that every extension in Area B in fact *applies*, and is covered by conditional priority. Rather, our deliberation may lead us to draw a line somewhere within the extensions in Area B. Beyond this point (Point T on the diagram), let us imagine, further preferred extensions of the liberty are held to produce intolerable levels of inequality in the worth of liberty. Extensions in Area B2, then, are not instituted; they may even in fact be prohibited by extensions of other liberties. The *scope* of the liberty in force will then only include the core extensions in Area A and the further legal extensions in B1. The point of the conditional priority of liberty principle is to say that where the line is drawn *within* Area B (if one is drawn at all), and hence *what* the legal scope of the liberty will be, must depend on a balance of certain kinds of reasons. These legitimate reasons include the "significance" of extensions in Rawls's sense, i.e. relative to the development of the two moral powers, or the conditions necessary for such development. But they also include considerations of equity in the worth of liberties and considerations of social and economic good. Since these reasons will also vary somewhat depending on the context of the society in which the democratic form of political justice is being instituted, where the line is within Area B will also vary for a given liberty from democratic society to democratic society.

This conditional priority principle thus satisfies the intuition that we must adjust the scope of different liberties in order to prevent clearly unacceptable levels of inequality in the worth of these liberties. We have a basic and unfulfilled duty to adjust the scope of liberties to ensure a social minimum of equity in worth of liberties consistent with equal coherent scheme for all, as well as to secure other broad cultural and economic goods.

When we add to this the central significance of the political liberties for democracy, it becomes apparent that we might even have to rethink extensions of other liberties, such as those establishing complete freedom of speech, which we think particularly significant, even if not

essential. Thus a wide interpretation of the necessary minimal conditions for worth of political liberties not only gives greater *significance* to the political liberties relative to other formal liberties; it has the consequence that further extensions of other liberties not previously curtailed by Rawls's fair-value principle, will now be limited for the sake of more significant equity in the worth of political liberties.

Both these revisions of the Rawlsian approach imply that there is no absolute priority for the entire scheme of liberties resulting from our deliberations; such an "absolute priority" would mean that the scopes of liberties are adjusted to one another by the criterion of Rawlsian significance alone. Rather, there is only absolute priority for the essential ranges of the basic liberties, and conditional priority for further significant extensions, which will be adjusted to ensure the *fair worth* of the complete set of liberties. Furthermore, the preferred extensions of liberties which are justified by deliberation in accordance with the conditional priority principle will remain "conditional" in yet a further sense: *such non-essential extensions of basic legal liberties must always remain open to revision*. Since inequalities in *the worth* of the liberties specified in a particular constitutional scheme can change over time, just as can other socioeconomic considerations relevant to the deliberation that justifies the scope assigned to various liberties, these non-essential extensions of liberties are not carved in stone, even if they are considered very significant and protected by constitutional provisions from political decisionism. The conditional priority principle implies that *no part* of a basic liberty can simply be sacrificed "at will" for immediate social and economic advantage, but the *complete* constitutional scheme of liberties is nevertheless not absolutely prior to considerations based on the worth of different liberties, and other socioeconomic considerations. While the conditional priority principle protects all significant extensions of liberties from arbitrary legislative limitation without sufficient deliberation, only an inner core of the complete scheme enjoys absolute weight in the process.

Critics of this new conditional priority model are bound to urge that it returns us to "intuitionism" in deciding how to fill out the scopes of liberties with preferred extensions. Against this charge, it must be said in the strongest terms that the political *phronesis* required by the combination of reasons model *is not* a process of arbitrary intuitionism or preference-balancing. We have criteria that direct us in deliberation about the preferred extensions of liberties, but their application to particular cases in the overall context of our society is complex, and the relevant principles of practical reasoning do not by themselves *determine* univocal solutions in advance of real deliberations. The "combination of reasons" model defines what just deliberation in a constitutional convention and a constitutional supreme court is, when it bears on questions about the proper scope of a formal liberty. As virtually all of the most important Supreme Court cases in our own democracy do. It will not be difficult for an American constitutional scholar to think immediately of cases in which this model for the determination of preferred extensions of liberties might have made a difference in the outcome. Admittedly, this "combination of reasons" model does not base constitutional jurisprudence on a precise contractarian rational decision algorithm. But to label it "intuitionistic" on that basis would be to fall into the rationalistic (and decidedly un-Kantian) fallacy of supposing that either practical reasoning weighs its considerations with the algorithmic exactity of game theory, or it abandons itself to sheer arbitrariness of subjective preference (e.g. the personal opinions of Justices). On the contrary, "deliberative" or "communicative" democratic theory maintains that *contractarianism or intuitionism* is a false dilemma for non-utilitarians: the "combination of reasons" model offers a *third way* of understanding

how constitutional framers and constitutional jurists should determine the scope of liberties beyond their essential ranges.