

## QUESTIONS AND NOTES ON RAWLS, CHAPTER 4, EQUAL LIBERTY

Rawlsian terminology that you need to understand: the four-stage sequence (the gradual lifting of the veil of ignorance throughout an idealized choice of principles, constitutional rules, and laws), lexical priority, the priority of liberty, the equal worth (fair value) of the political liberties, the Kantian interpretation of justice as fairness.

The Equal Liberty Principle is the first principle of justice, the flagship in Rawls's system. The basic liberties it protects are heterogeneous. Questions to consider: what are the basic liberties, what establishes a liberty as basic and so protected by the Equal Liberty Principle, why should the Equal Liberty Principle have strict lexical priority over the other principles in Rawls's system? (The answer to this last question comes in section 82, toward the end of the book.)

Section 33, equal liberty of conscience.

Since the basic liberties are diverse, the case for each one needs a separate argument. Rawls discusses equal liberty of conscience to illustrate how these arguments go. Liberty of conscience is somewhat vaguely characterized by Rawls. It seems to include freedom of religion as usually understood, and would be violated by restriction of religious liberty or by giving one religion special privileges by making it the established church.

In the original position, Rawls argues, the parties will reason as follows:

1. They know they might have religious or ethical obligations.
2. If they do have such obligations, they might be extremely important, top priority.
3. They must do what they can in the original position to enable them to fulfill these possible obligations.
4. Hence they cannot acquiesce in unequal liberty of conscience; they can accept only equal liberty of conscience.

[[Objection: The parties in the original position also know they might have financial and economic interests that are of the utmost importance to them. So by parity of reasoning they must do whatever they can to ensure that they will be able to fulfill their economic and financial goals. So we then get a case for the priority of economic interests, not for the priority of freedom of conscience.

Response: The argument is not trying to establish the priority of the interest in basic liberties over other interests. The argument is trying to establish that people will choose equal liberty of conscience not unequal liberty of conscience in the original position.

[[Objection: Rawls seems to assume the worst possible scenario is that one might end up being a member of a disfavored religion—for example, a Catholic in a society where Catholics are in the minority and Protestantism is the state-established religion. But maybe the worst case the parties should be contemplating, so far as this argument goes, is that one will be converted from one's faith by religious proselytizing. So here is a way to guard against this fate in the original position: Choose a conception of religious liberty that does NOT include religious freedom of speech, the freedom to proselytize and to try to convert other people to one's faith. The Ottoman Empire enforced freedom of religion along this line: The major faiths are all free to worship in their own churches, but none is free to try to convert the adherents of other religions by persuasive speech. This is not equal liberty of conscience as we usually understand it.

[[Objection: Just knowing in the original position that you might have religious or moral obligations of utmost importance does not yet suffice to justify choice of equal liberty of conscience in the original position. The question arises, what is the character of these obligations. One's religious obligations may stress the obligation to make a pilgrimage to Mecca or Ireland once in one's life, and hence to fulfill the obligation one must have sufficient cash. One's religion may not place any importance at all on public worship and hence no importance at

all on the freedom of public worship. One's religion may instead stress the importance of inward spirituality, living according to one's conscience or reserving a lot of time each day for meditation and silent prayer. If living conscientiously is important, what would loom in importance would be securing the training of children to form their consciences. If daily silent prayer is important, one needs above all not to be forced to be engaged in any employment that takes up too much of one's day—one needs leisure time. The connection between "I might have religious obligations of transcendent importance" to "I should favor equal liberty of conscience" is quite loose.]]

Rawls elsewhere suggests lines of thought concerning freedom of conscience and freedom of speech that may be more promising. See p. xii in "Preface to the Revised Edition": The basic rights and liberties "guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of their two moral powers—their capacity for a sense of justice and their capacity for a conception of the good." See also section 82, p. 475, "The parties conceive of themselves as free persons who can revise and alter their final ends and who give priority to preserving their liberty in this respect." On the same page he writes that people have a highest-order interest in how all their other interests are shaped by social institutions. Call this the argument from highest-order interests. It doesn't uniquely single out free speech for protection any more than education and socialization and adequate resources and leisure time, since these latter are also social conditions essential for the development and exercise of the moral powers. But this may not trouble Rawls.

[[Here is a closely related line of thought that Rawls does not to my knowledge explicitly state: People care (and should care) above all not for the satisfaction of their present aims and values, but for the fulfillment and achievement of genuinely choiceworthy aims and values. To the extent that their present aims might be foolish, silly, or unreasonable, they should be alienated from them. One should welcome a social atmosphere of free speech and one in which a wide array of experiments in living are occurring. These social conditions over time help the individual to choose better aims and values and shed worse ones. Of course, by the same token, the individual should prize opportunities for education that develop her critical reflection skills, which are needed in order to take advantage of the kaleidoscope of arguments and considerations, good, bad, and ugly, that a regime and culture of free speech provide. Call this the argument from the possible unreasonableness of one's present aims.

[[Arguments for free speech and equal liberty of conscience must take into account possible costs as well as possible benefits. In a regime of free speech, if others are rational, they will provide one helpful guidance. But in a regime of free speech, if others are susceptible to persuasion toward injustice, they might be induced by bad arguments to act in ways that threaten one's fundamental rights. They may listen to Nazi arguments, become Nazis, and act as Nazis, for example. In part, Rawls's limited project abstracts from this issue. He is considering justice in a society with full compliance (no one is disposed to violate the rights of others). ]] See also the full statement of Rawls's Equal Liberty Principle with its associated priority rules, p. 220. The priority rule says that basic liberty can only be restricted for the sake of basic liberty. A less extensive liberty must strengthen the total system of liberty available to all. (This might justify wartime restriction on free speech when the nation is in peril.) Second priority rule: A less than equal liberty must improve the overall set of basic liberties of those with the lesser liberty.

[[In thinking about equal liberty of conscience, we need to clarify the notion a bit. Religious liberty, the right of conscience, does not presumably give one the right to engage in human sacrifice rituals if one's religion calls for that. So what exactly is "liberty of conscience"? For example, consider *Wisconsin v. Yoder (1972)*. The U.S. Supreme Court held that the conviction of Yoder for refusing to send his children to school past eighth grade, in violation of Wisconsin state law mandating that children go to school until age 16, violated the free exercise clause of the First Amendment (was an unconstitutional burden on the free exercise of religion). Yoder

was Amish, and the Amish argued that secondary schooling was incompatible with their aim of training their children to live in a "church community separate and apart from the world." Granted that parents have a right to indoctrinate their children into the parents' system of beliefs, the question arises, what are the limits of this right. What should Rawls say?]]

Section 82, the Grounds for the Priority of Liberty.

Rawls advances a general conception of justice (society should be arranged to maximize the primary social goods holdings of the least advantaged) and a special conception (the two principles of justice lexically ordered). The general conception holds throughout history. The special conception holds only in modern times. Modern times begin when society becomes wealthy enough so that the basic liberties can be "effectively" exercised. If you are starving or on the margin of bare subsistence, you will have little time and resources to expend on exercising free speech and the like. You rationally give priority to securing basic physical needs such as shelter and food. The onset on modern times also coincides with the attainment of literacy by all members of society. If you can't read or write, you will have little use for a free press.

Why should members of modern societies assign lexical priority to the basic liberties? Rawls suggests that perhaps the most important primary good is self-respect, the confidence that one's plan of life is worthwhile and that one is competent to pursue it. So provision of the social bases of self-respect has priority over provision of other goods and resources society might distribute. The social bases of self-respect are social props to individual self-respect.

If self-respect is gained by comparing one's status to that of others, and noting that one has more wealth or higher social status than others, then self-respect cannot be attained for all. Some will have it but those with little wealth and low social status will not have it. So Rawls conceives that in a modern democratic society we can decide to base self-respect on the status of democratic citizen, which is equally provided for all. The institutions of society, by respecting the Equal Liberty Principle, manifestly treat all members of society as individuals of dignity and worth, deserving respect. So when it is possible to secure self-respect for all in this way, it is irrational not to do so, given the assumed importance of the good of self-respect.

[[Comment. There is something to what Rawls is saying here. These few pages repay careful reading. But I for one do not believe that the priority of liberty can be founded on a prior priority of self-respect. Why not? Self-respect as Rawls defines it stands in complex instrumental relations to many other goods, and these relations are not all positive. Lack of confidence in my plan of life or my competence to fulfill it may goad me to find a better plan of life, to my betterment. A continuing nagging sense of one's incompetence, for some people, may be a necessary spur to lifelong accomplishment. Would you rather be Albert Einstein, Jennifer Lopez, Marie Curie, or Jerry Rice (all highly successful individuals) with low self-respect or Joe or Sally Mediocrity with high self-respect? For each individual, there may be some level of self-respect, below which one cannot function well. But there is no reason to think this threshold level is the same for all people or that arranging society to maximize people's self-respect makes sense. Consider also an alcoholic surgeon whose continued self-respect absolutely depends on his keeping his job. It may be better that society is arranged so that alcoholic surgeons lose their jobs and are not kept in positions where they cause harm to others no matter what the cost to their lifetime self-respect.

[[Moreover, Rawls's argument for assuring self-respect for all by assuring democratic civil liberties for all sounds like a priori sociology, which we should view with skepticism. We cannot just decide by choice of moral principles what factors will influence people's attainment or loss of self-respect. If someone's values, ends, and basic competence are attacked ("You know what? You're a stupid jerk!"), one cannot plausibly respond, "I am a democratic citizen with assured basic liberties, so I am not incompetent nor am I pursuing worthless goals." A regime and culture of robust free speech deliver hard blows and rude shocks to people's cherished values and aims and hence to their secure sense of self-respect in Rawls's sense. Even if we agreed with Rawls that self-respect is of the utmost importance and securing self-respect for all is the first priority of justice, that would not lead to acceptance of the priority of basic liberties.]]

Back to chapter 4. Sections 36 and 37, democratic citizenship.

The basic liberties in Rawls's scheme include the liberties of democratic citizenship—the right to vote and stand for office in free elections.

I am going to flag just one significant aspect of Rawls's discussion of the political liberties. Rawls distinguishes political liberty and the worth of political liberty. What he seems to have in mind is the distinction between the formal rules in place and the individual's opportunity to act effectively under the rules given actual conditions. Rawls asserts in this connection what he calls the "fair value of the political liberties" (see pp. 197-198, this quote is from 198). The requirement here is equality of fair opportunity with respect to political liberty. When fair value is secured, all those similarly endowed and motivated should have the same chance of gaining political office or of influencing the political process. Rawls then is committed to the principle behind campaign finance reform. If contributions from special interest groups play a large role in determining the political agenda and in influencing what laws and regulations are adopted and enforced, this means the fair value of the political liberties is not being secured. If the fair value principle is applied to individuals at each slice of time, then the wealthiest person in the U.S. with the most influential network of connections and the poorest and socially most isolated individual in the U.S.--provided they have equal political talent and equal ambition to influence the political process--must have the same chances of influencing the outcomes of the political process. This is a very demanding norm. If the fair value principle is applied to individuals over the course of their lives, then it may not be violated if homeless and impoverished Arneson has nil prospect of influencing the political process, provided there was a reasonable plan of life available to Arneson earlier, such that if he had followed that course, he would have had over the course of his life the same chance of political influence as anyone else with the same native political talent and the same ambition to influence the political process. This norm is less demanding than on its former construal, but still very demanding.

Although in a Rawlsian society each person is to have equal political liberties and the fair value of the political liberties is to be secured for all, these requirements leave it open the degree to which the political process is democratic or majoritarian. As Rawls sees matters, a society with an entrenched set of rights, constitutionally protected and not subject to elimination by democratic vote, is less majoritarian than a society which does not have in place any similar constraints on majority rule. According to Rawls, the degree to which the society is to be majoritarian is determined by this question: What constitution (incorporating equal political liberty and the fair value of the political liberties) would best fulfill the remainder of the principles of justice over the long run? See section 37.

[[The entry of the principle of equality of fair opportunity into the discussion of political liberty suggests a large question which I can only raise here and not attempt in any serious way to settle: What is the basic argument for Equality of Fair Opportunity according to Rawls? The original position argument in chapter 3 ignores the issue, and it is not clear to me why the parties in the original position as Rawls describes it would opt for equal opportunity.

Suppose one could in the original position choose between two societies: In Society A, a large diverse society with ethnic divisions, there is some tension between groups and equality of fair opportunity is far from realization. But the society is wealthy (suppose for concreteness that the average life expectancy is ten years greater than the life expectancy in society B and that at each level of wealth, life expectancy is greater in A than in B.) Society B is a society which perfectly secures Equality of Fair opportunity but is far less wealthy. As mentioned, life expectancy is significantly less in society B than in society A., Why would those in the original position opt for B over A, or more generally, for priority of Equality of Fair Opportunity in Rawls's sense?

[[If we turn back to section 14 in chapter 2, Rawls raises the question, why not subordinate equality of opportunity to efficiency? (We might put the point this way: would you trade the

prospect of greater wealth for equal opportunity?) Rawls replies: If fair equality of opportunity is denied, those excluded from superior places "would be justified in their complaint not only because they were excluded from certain eternal rewards of office but because they were debarred from experiencing the realization of self which comes from a skillful and devoted exercise of social duties. They would be deprived of one of the main forms of human good" (p. 73). Comment on this argument: Rawls seems to be saying that good jobs are important not just because they provide money and other external benefits but because meaningful work is good in itself, "one of the main forms of human good." But this line of thought suggests to me not equality of opportunity but rather that the difference principle should be revised so that good jobs or meaningful work are among the advantages that should be maximized for the least advantaged in a just society. Or if you don't like the difference principle, the point would be that whatever principle of fair distribution of goods you embrace, the goods to be distributed should include good work or meaningful work. A society in which many people flip burgers and sweep the halls for a living when the economy could be rearranged to provide better, more intrinsically satisfying jobs for many more people, is (other things being equal) not a just society.]]