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**Adjudicating the Basic Liberties: Reasonable Conflicts and the
Conditions of Citizenship**

Inder S. Marwah

Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.¹

Rawls' first principle of justice constitutes the seemingly simple, and yet under-elaborated, grounds upon which his liberalism is founded. Under contemporary conditions of great social, cultural and religious plurality, the priority of the basic liberties guarantees each citizen's equal capacity to choose and pursue his or her own life project under fair conditions of social cooperation. The allocation of an equal scheme of basic liberties for all citizens secures the institutional conditions required for social cooperation in a well-ordered society, that is, the conditions of equality and fairness needed to ensure a fundamental sense of reciprocity and mutual respect between citizens. The basic liberties thus secure the conditions within which to pursue reasonable private life projects, in addition to those required to achieve the most basic level of agreement between citizens that social stability demands. The priority of the basic liberties reflects the very pivotal significance of the conditions that they secure; these liberties fall under the higher-order interests of all citizens precisely because they guarantee a basic institutional framework that is equally desirable and worth endorsing for all. But while Rawls is clear about the critical significance of the *priority* of a basic scheme of liberties, he fails to address how reasonable citizens are to adjudicate between competing ideas of reasonable schemes. Rawls recognizes the possibility of differing, and even conflicting, conceptions of a "fully adequate scheme of liberties" *within* the constraints of reasonability, but fails to suggest how citizens might fairly select between them; I'd like to suggest that this constitutes a significantly greater deficit in Rawls' liberalism than he acknowledges. The problem presents itself initially in the maximizing account of the basic liberties in *A Theory of Justice* (referred to as TJ), an account that Rawls modifies, largely in response to H.L.A. Hart's criticisms, in *Political Liberalism* (referred to as PL). Despite his revisions, in which he acknowledges the problem of conflicting reasonable schemes of liberty, Rawls' response in PL nevertheless remains unsatisfying by failing to recognize that these conflicts erode at the cohesion and stability of the well-ordered society.

¹ Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1996, p. 291. Future references will be given as *Liberalism*.

This paper will argue that Rawls' inability to contend with the conflicts emerging from competing reasonable accounts of "fully adequate schemes of liberty" significantly weakens justice as fairness. In the first section, the priority of the basic liberties will be explained in reference to the overall coherence of Rawls' political conception of justice: the basic liberties establish and guarantee the institutional conditions required for the exercise and development of the two moral powers. The two moral powers, in turn, describe a thin conception of moral personhood that is attributed to every reasonable citizen, securing the mutual respect required for social cooperation and stability. The basic liberties uphold the essential conditions for reciprocity and the mutual recognition of the free and equal status of all reasonable citizens; these liberties guarantee the conditions for the agreement on fair terms of cooperation that a well-ordered society requires. The second section will review and extend criticisms of Rawls' account of the basic liberties, following on H.L.A. Hart and Amy Gutmann's examinations of conflicts between the basic liberties, and suggest that neither they nor Rawls provide a satisfying resolution with respect to such conflicts. The failure to recognize the depth of this problem, and the resulting inadequacy of the responses to it, is of significantly greater damage to Rawls' liberalism than is acknowledged by Hart, Gutmann, or Rawls himself. I will conclude by suggesting that reasonable conflicts over the arrangement of the basic liberties undermine the stability of the well-ordered society as Rawls conceives of it, and also point to Rawls' inability to contend with what constitute some of the more contentious and divisive social and political issues facing the well-ordered society from within the theoretical resources provided by justice as fairness.

1. Moral personhood and the priority of the basic liberties

While the justification for the priority of the basic liberties undergoes substantial revision between TJ and PL, Rawls' insistence on their primary value, articulated in the lexical priority of the first principle over the second, does not waver:

A well-ordered society is defined as one effectively regulated by a public conception of justice. The members of such a society are, and view themselves as, free and equal moral persons. That is, they each have, and view themselves as having, fundamental aims and interests in the name of which they think it legitimate to make claims on one another; and they each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structure of their society is to be governed... The original position is specified to embody the appropriate reciprocity and equality between persons so conceived; and given that their fundamental aims and interests are protected by the liberties covered by the first principle, they give this principle priority.²

The first principle guarantees the fundamental equality between citizens who, in a well-ordered society, recognize one another's entitlement to an identical scheme of basic liberties, as well as the obligation to respect reciprocal constraints in the pursuit of their

² Rawls, John. *A Theory of Justice*. Cambridge: Harvard University Press, 2003, p. 475. Future references given as *Theory*.

own ends and life projects. The reciprocity between moral equals is the basis upon which the well-ordered society is founded; the priority of the first principle represents the minimal conditions, and concurrent restrictions, for social cooperation. Through the first principle and the original position, Rawls gives a rational justification for reasonable behaviour: we accept the constraints imposed by the inviolability of “an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”³ because this system best allows us to pursue our own ends. The recognition that the fulfillment of our rational desires requires reasonable constraints motivates us to endorse the priority of the basic liberties; regardless of the particularities of our private conception of a good and fulfilling life, we require the guarantees that the basic liberties enshrine. Rawls provides a plausible explanation of the motivation for accepting the priority of the basic liberties that depends on a thin conception of moral personhood, characterized as a willingness to accept minimal constraints to guarantee the conditions under which to pursue privately-conceived life projects.

The endorsement of the basic liberties’ priority in TJ is predicated on explicitly *rational* motivations: the original position models the individual as accepting their priority because it serves their rational interests, as a person with private ends, to do so. The fundamental motivation in accepting the basic liberties’ primacy relies on a conception of the individual as rational in the pursuit of her life projects, and reasonable only insofar as the constraints of reasonability are instrumentally necessary for the pursuit of rational ends. This is perfectly congruent with Rawls’ description, in TJ, of the first principle as *maximizing*: members of a well-ordered society seek the maximum scheme of liberties possible within the constraints delimited by reasonability. Rawls’ argument relies on as thin a picture of moral personhood as is conceivable: as rational, self-interested beings, we’re moral (insofar as morality, in Rawls’ account, involves recognizing the equal worth of other members of the well-ordered society, and accepting the reciprocity that this recognition implies) only because a minimum of moral reckoning is required to pursue an otherwise maximally-oriented scheme of liberties, allowing for the greatest breadth of opportunity in the pursuit of indeterminate life projects. As Rawls maintains, “[i]n order to secure their unknown but particular interests from the original position, they are led, in view of the strains of commitment, to give precedence to the basic liberties”⁴. Rawls accounts for the motivation behind recognizing others citizens’ basic liberties without recourse to any thicker conception of personhood or comprehensive doctrine; the reasons for accepting the constraints of reasonability are strictly instrumental. Although Rawls goes on to suggest that members of a well-ordered society acquire a thicker moral personality through the socialization process that occurs in a well-ordered society, sociability is not a *necessary* element of justice as fairness; it simply complements an already functional system of justice.

Rawls’ perspective shifts in PL, significantly altering the account of moral personhood attributed to citizens in the well-ordered society. The basic liberties retain their primacy in the lexical ordering of the two principles; but the extent of the liberties, and the account of reasonability predicated on the social and institutional conditions that

³ Ibid., 220.

⁴ Ibid., 475.

they secure, shift significantly. The reasoning behind the basic liberties' priority remains the same: "the problem of specifying the basic liberties and grounding their priority can be seen as the problem of determining appropriate fair terms of cooperation on the basis of mutual respect"⁵. The basic liberties are critically important for the same reasons as hold true in TJ; their priority secures the basic conditions for the reciprocity and mutual respect that social cooperation requires. The shift occurs in the account of moral personhood explaining the *motivation* for recognizing and endorsing the priority of the basic liberties. The account of personhood articulated in TJ conceives of the individual's motivation for accepting the burdens of reasonability as based on rational self-interest. Citizens are modeled as accepting the limits on rational pursuits imposed by the recognition of others' equal entitlement to the same basic liberties in order to maximize the liberties available to them⁶. In PL, Rawls alters his account of motivation, and consequently of moral personhood, recognizing the problems inherent in *maximizing* the scheme of liberties:

a coherent notion of what is to be maximized is lacking. We cannot maximize the development and exercise of two moral powers at once. And how could we maximize the development and exercise of either power by itself? Do we maximize, other things equal, the number of deliberate affirmations of a conception of the good? That would be absurd... The other reason why the idea of a maximum does not apply is that the two moral powers do not exhaust the person.⁷

The priority of the basic liberties remains; but rather than seeking the *maximum* scheme of possible liberties, Rawls alters the first principle to assert that "[e]ach person has an equal right to a *fully adequate* scheme of basic liberties which is compatible with a similar scheme of liberties for all"⁸. If justice as fairness abandons the maximization of the basic liberties, how is a "fully adequate scheme" determined? Rawls revises his account of moral personhood, basing it on the development and exercise of the two moral powers: the capacity for reasonability (recognizing and honouring fair terms of cooperation) and the capacity for rationality (the ability to develop, pursue and revise one's own conception of the good). The two moral powers describe a minimal account of personhood that differs significantly from that described in TJ; while in TJ a citizen is reasonable because he is *rationally* motivated to respect the liberties, the citizen in PL recognizes the priority of the basic liberties because they secure the conditions for the development of the two moral powers, *both* of which constitute higher-order interests. Rawls' account of moral personhood, and consequently of the motivation to endorse the basic liberties, shifts significantly: while the higher-order interest motivating compliance in TJ is explicitly rational, Rawls maintains that *both* moral powers comprise higher-

⁵PL, 303.

⁶ It's important to note that Rawls is not here suggesting that citizens *themselves* ought to be understood as rational egoists in their social relations; but rather that in modeling sources of motivation for agreement on fair terms of social cooperation, Rawls is committed to conceiving of individuals as acting on explicitly rational imperatives if he's to avoid attributing "thicker" characteristics to agents in the original position, which would clearly defeat the purpose of the device altogether.

⁷ Ibid., 333.

⁸ Ibid., 291, emphasis added.

order interests⁹ in PL. The two moral powers constitute Rawls' revised account of the moral personality required for the well-ordered society to function: "take the two moral powers as the necessary and sufficient conditions for being counted a full and equal member of society in questions of political justice"¹⁰. What, then, is the relationship between the revised account of moral personhood and the priority of the basic liberties? Rawls maintains that "these [basic] liberties are the background institutional conditions necessary for the development and the full and informed exercise of the two moral powers"¹¹. The two moral powers describe a minimal moral personhood that every citizen of a well-ordered society recognizes as equally binding on all members of the social union; the basic liberties guarantee the conditions for their development and exercise. As Rawls maintains, this moral personhood "characterizes how citizens are to think of themselves and of one another in their political and social relationships as specified by the basic structure"¹². This account of moral personhood shifts the motivation for endorsing the priority of the basic liberties, as well as the grounds for social cooperation: the stability of the well-ordered society is predicated on citizens' desire to secure the institutional conditions allowing for the development and exercise of the two moral powers.

2. *Reasonable conflicts*

Given the significance of the basic liberties in securing the conditions for social cooperation and establishing the basic constitutional parameters within which the well-ordered society takes its determinate form, Rawls offers surprisingly little discussion of what threatens to be a critical problem for justice as fairness: how are reasonable members of a well-ordered society to choose between conflicting accounts of what constitutes a fully adequate scheme of basic liberties? The basic liberties establish the constitutional limits within which a just society is constructed; Rawls' failure to address conflicts over these basic liberties undermines the viability of the well-ordered society more significantly than he recognizes. Rawls responds, particularly in PL, to the problems that such conflicts present in several instances; but his arguments downplay the significance of conflicting schemes of basic liberties without adequately responding to them. The basic liberties comprise the foundation upon which the well-ordered society rests; it follows that irremediable conflicts, or even strong disagreements, regarding their arrangement or distribution fundamentally derogate from the social cohesion and cooperation at the heart of such a society.

H.L.A. Hart recognizes the acuity of this problem in an early commentary on TJ. Rawls preserves the priority of the basic liberties by asserting that "liberty can be restricted only for the sake of liberty itself"¹³; the priority of the basic liberties ensures that no amount of economic or material benefit¹⁴ justifies a reduction or compromise in

⁹ For a discussion of the two moral powers as "higher-interest", see PL, pp. 74, 106.

¹⁰ Ibid., 302.

¹¹ Ibid., 308.

¹² Ibid., 300.

¹³ TJ, 214.

¹⁴ Assuming that the society has achieved a reasonable level of development and a minimal level of wealth, such that the worth of a central range of liberties is secured for all citizens.

the equal distribution of the basic liberties to all. Basic liberties can only be limited, and adjustments between them are regulated, for the sake of securing the greatest overall scheme of liberties. The problem of reasonable conflicts emerges *within* these constraints; the lack of specificity to which Rawls is committed in proposing a strictly *political* conception of justice allows for broad variability in possible reasonable schemes of liberty. As Hart points out,

there certainly are important cases of conflict between basic liberties where... the resolution of conflict must involve consideration of the relative value of different modes of conduct... conflicts between basic liberties will be such that different resolutions of the conflict will correspond to the interests of different people who will diverge over the relative value they set on the conflicting liberties.¹⁵

Part of the problem that Hart identifies in TJ lies in Rawls' attempt to *maximize* the basic liberties. As Hart recognizes, and Rawls acknowledges in the shift that he makes in PL, maximizing certain liberties in many cases limits the possibilities for the exercise of others; this leads to the problem of determining *which* liberties to maximize, or, as Hart describes above, which ought to be maximized so as to achieve "the greater liberty". A maximizing distribution of liberties runs into the problem of privately-given, and thus incommensurable, conceptions of what constitutes the *greatest* liberty; such evaluations are contingent on personal assessments of particular liberties' relative value. While the maximizing criterion is abandoned in PL, Hart's criticism regarding the problem of conflicting conceptions of *which* liberties to prioritize remains salient and largely unanswered. Despite Rawls' revisions in the account of the basic liberties in PL, Hart's central concern remains: "I do not understand how the notion of the rational preference of the representative equal citizen can assist in the resolution of conflicts where reasonable men may differ as to the value of conflicting liberties"¹⁶; PL fails to provide a response. How are citizens to adjudicate conflicts at the deep constitutional level without recourse to thicker comprehensive doctrines? Rawls provides little in the way of responding to the question of reasonable conflicts over the arrangement of the basic liberties.

By turning to the two moral powers as the standard by which the scheme of liberties is evaluated in PL, Rawls circumvents the problem of maximization: a fully adequate scheme of liberties is measured by its capacity to foster the development and exercise of the two moral powers, thereby avoiding competing private conceptions of the *greatest* liberty. But the problem persists: as all *reasonable* fully adequate schemes of liberty guarantee the development of the two moral powers, how are we to decide between competing arrangements? There are, by Rawls' own admission, many possible reasonable arrangements, each of which secures the conditions for the development and exercise of the two moral powers – how are we to select among them? Rawls responds that "a central range of application" for each liberty must be secured. He begins by acknowledging that the basic liberties will indeed clash:

¹⁵ Hart, H. L. A. "Rawls on Liberty and its Priority", in *Reading Rawls: Critical Studies on Rawls' A Theory of Justice*. Ed. Norman Daniels. Oxford: Basil Blackwell Publishing, 1975, pp. 240-241.

¹⁶ *Ibid.*, 242.

the various basic liberties are *bound to conflict with one another*... The priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties... Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute; nor is it a requirement that, in the finally adjusted scheme, all the basic liberties are to be equally provided for.¹⁷

Rawls recognizes that liberties will come into conflict within the constraints of reasonability, that none is absolute and that the finally adjusted scheme, as one among many possible reasonable arrangements, determines the fair terms of cooperation between free and equal citizens. The liberties must be regulated such that each retains a certain value; no one liberty can be prioritized at the cost of entirely extinguishing another. How, then, are we to specify such a fair scheme of liberties? Rawls maintains that

[s]o long as what I shall call “the central range of application” of the basic liberties is provided for, the principles of justice are fulfilled... each such liberty has what I shall call a “central range of application”. The institutional protection of this range of application is a condition of the adequate development and full exercise of the two moral powers of citizens as free and equal persons.¹⁸

The basic liberties are to be arranged such that a central range of application is preserved for each of them – this constitutes the extent of Rawls’ discussion on the matter. The central range of the basic liberties is secured to guarantee the institutional conditions required to develop and exercise the two moral powers. The two moral powers constitute the minimal moral personality that we all, as reasonable citizens willing to engage in fair terms of cooperation, seek in each other in our capacity as citizens. We commit ourselves to developing the same two moral powers; through this mutual agreement between all reasonable citizens, the conditions required for a stable and cooperative social union are secured.

Does preserving “a central range of application” for each of the basic liberties assure the conditions required to maintain social cohesion and a fair agreement on the terms of cooperation? I’d like to suggest that the conflicts that Hart alludes to could, and would, occur between reasonable citizens and that disagreements regarding the distribution and regulation of basic liberties *within* the confines of reasonability would undermine the reciprocity and mutual respect necessary for accepting fair terms of cooperation. If, as Rawls maintains, the basic liberties entrench the freedoms and liberties that *all* reasonable citizens prioritize, regardless of particular life projects or comprehensive doctrines, then we must assume that these liberties are deeply significant for all members of society. The basic liberties are subject to our regulative higher-order interests; it is accordingly implausible to assume that variations in their distribution, even within the central range, would remain uncontroversial. It’s precisely *because* of the primary importance of the basic liberties that fundamentally different conceptions of their arrangement might well lead to disagreements between citizens; Rawls’ appeal to

¹⁷PL, 275, emphasis added.

¹⁸ Ibid., 295-297.

maintaining “a central range of application” underestimates the critical value of the basic liberties for them. The arrangement of the basic liberties occurs at the constitutional level, entrenching their particular distribution as the limit conditions within which the well-ordered society functions. The scheme of basic liberties establishes the institutional conditions guaranteeing each citizen an equal opportunity to pursue his or her life projects, *whatever those might turn out to be*. But it is unavoidable that, having adjusted and regulated the liberties into a fully adequate scheme, the resulting arrangement will establish conditions more favourable for the pursuit of certain life projects than others. A citizen may, within the bounds of reasonability, value liberties associated with private autonomy (e.g., “the pursuit of happiness”) more highly than the political liberties (e.g., “good government”); given that these may conflict, how is a fully adequate scheme of liberties determined? There are a number of constitutionally protected liberties that can, and in our lived experience, do contradict one another and whose various arrangements into “fully adequate schemes” lead to substantive differences with respect to citizens’ capacities to realize possible life projects. Liberal democracies exhibit a fair degree of latitude in constitutional provisions for, for example, group-based minority rights; yet the presence or absence of such provisions will significantly affect that society’s basic liberties and the range of life projects that it is capable of accommodating. Certain constitutional “schemes of liberties” recognize and entrench economic rights, rights of cultural recognition and protection, rights of development and even environmental rights; it’s clear that, despite their reasonability, each will favour certain life projects over others. Rawls maintains that the “problem of specifying the basic liberties and grounding their priority can be seen as the problem of determining appropriate fair terms of cooperation on the basis of mutual respect”¹⁹; the basic liberties establish the parameters for consent upon which social agreement depends. But without some means of selecting between reasonable arrangements, Rawls gives little indication as to how these conflicts might be resolved such that “fair terms of cooperation” could be achieved, much less “on the basis of mutual respect”. Disagreements over the arrangement of the basic liberties are precisely disagreements over what constitutes “fair terms of cooperation”; without some means of resolving conflicts at this basic, constitutional level, it is difficult to envision how such fair terms of cooperation could be agreed upon. What else is the arrangement of the basic liberties but a constitutional commitment to accord certain basic liberties a greater range of expression than others? While it might be argued that citizens’ capacity for reasonability leads them to accept a scheme that they don’t wholly endorse, it must be noted that reasonability occurs *within* the boundaries of social cooperation delineated by the basic liberties: “reasonable disagreement is disagreement between reasonable persons: that is, between persons who have realized their two moral powers to a degree sufficient to be free and equal citizens in a constitutional regime”²⁰. Disagreements at the constitutional level, over the arrangement of the basic liberties, represent divergences over the very terms of cooperation of the just society *within which* citizens are reasonable. While Rawls is right to avoid specifying *which* arrangement is to be selected, the principles of justice at the root of citizens’ endorsement of the well-ordered society appear incapable of providing any direction in resolving the types of social, political and constitutional controversies most likely to cause deep rifts in the well-ordered society.

¹⁹ PL, 303.

²⁰ *Ibid.*, 55.

Deep divisions at the constitutional level leave citizens incapable of determining the fair terms of cooperation upon which the stability of the well-ordered society depends.

In a second line of argument, Rawls attempts to resolve the problem of incommensurable schemes of liberty by distinguishing between the basic liberties and their worth. The basic liberties are guaranteed at the constitutional level by the first principle of justice, while their worth is subject to the difference principle. Each liberty retains a central range of application, while the worth of liberties is determined, society by society, at the legislative stage. If the salience of the basic liberties is to be guaranteed without ordering them according to any particular comprehensive doctrine, a division of labour between the liberties and their usefulness is required:

let us distinguish between the basic liberties and the worth of these liberties as follows: the basic liberties are specified by institutional rights and duties that entitle citizens to do various things, if they wish, and that forbid others to interfere. The basic liberties are a framework of legally protected paths and opportunities. Of course, ignorance and poverty, and the lack of material means generally, prevent people from exercising their rights and from taking advantage of these openings. But rather than counting these and similar obstacles as restricting a person's liberty, we count them as affecting the worth of liberty, that is, the usefulness to persons of their liberties. Now in justice as fairness, this usefulness is specified in terms of an index of the primary goods regulated by the second principle of justice.²¹

The basic liberties are entrenched as foundational constitutional limits, as a basic set of legal rights and entitlements subject to further specification at the legislative level. Through this division, Rawls retains the priority of the basic liberties as well as each society's capacity to independently enact particular laws ensuring the worth of these liberties. Again, Rawls appeals to the limits of philosophy: it is beyond the scope of a theory of justice to comment on the worth of liberties so long as a central range of application for each of them is secured by the final scheme. Yet again, he fails to recognize that the arrangement of the basic liberties is itself a matter of contention and contestation precisely because the final, determinate scheme of liberties will establish the limits within which legislative specification occurs. Conflicts over constitutional provisions recognizing, for example, certain group-based minority rights illustrate precisely this: their presence or absence correspond to different and contradictory arrangements of reasonable schemes of liberty. These types of rights are, in many cases, not amenable to legislative adjustment, but are rather either entrenched within the frame of basic constitutional rights or are not. Despite the potential reasonability of either arrangement (in this case, either recognizing or failing to recognize certain group-based minority rights), these differences critically affect citizens' capacities to pursue their privately-given life projects, particularly if they belong to the minority in question. The problem is not in the broad range of well-ordered societies possible; this is precisely what characterizes a pluralistic world. But given that equally reasonable schemes of liberties will favour different private conceptions of the good, the fact of this plurality will lead to

²¹ Ibid., 325-326.

disagreement over the most fundamental terms upon which social cohesion depends. The division between the liberties and their worth, or by Rawls' argument, between the liberties entrenched in the constitutional convention and their specification at the legislative stage, fails to recognize that the constitutional level is itself an arena of contestation. It is at the constitutional level that citizens endorse the basic, fundamental rights and liberties comprising the *minimum conditions* for social cooperation; disagreements at this level represent divergences on the basic conditions and terms for fair agreement and cooperation. Rawls' suggestion that we iron out particular differences at the legislative stage ignores his own prior admission: that at the legislative stage, the worth of the different liberties is already, to a certain degree, determined by their particular arrangement.

Amy Gutmann recognizes the persistence of this problem in her examination of the tension between the democratic liberties of the ancients (emphasizing public autonomy and political self-determination) and the liberal liberties of the moderns (focusing on private autonomy and personal self-determination) in both TJ and PL. Discussing the co-originality of the liberal and democratic liberties, Gutmann asserts that Rawls "does not tell us how the theory values political liberties (such as freedom of political speech, political participation, suffrage, and the right to stand for political office) compared to personal liberties (such as freedom of nonpolitical speech, religion, and conscience) within the 'complete scheme of equal liberty'"²², leading to the critical question: "How can the theory cope with conflicts among basic liberties, and in particular between political and personal liberties, both of which are basic in principle?"²³ Gutmann refers to such contentious issues as abortion and capital punishment to illustrate several instances in which conflicts between the basic liberties challenge the viability of social agreement and Rawls' account of the motivation to agree to its terms. She asserts that "if there are reasonable disagreements among citizens concerning their basic liberties, then political liberalism faces the challenge of specifying how best to deal with these disagreements, which stand in the way of an overlapping consensus concerning the ordering of our basic liberties"²⁴. Many of the most controversial social issues (capital punishment, abortion, etc.) and political issues (reasonable libertarian schemes vs. social democratic schemes) raise problems whose solutions, at the very outset, shape the parameters within which citizens determine their ideas of the good life: "Can pornography be banned for the sake of securing the equal freedom of women? Can restrictions on a woman's basic liberty be justified in the name of respecting the right to life of a second trimester fetus?"²⁵ While Gutmann's criticism is incisive, she offers little in the way of a resolution, suggesting that "[t]his part of political liberalism needs to be developed further in response to the worry that it does not fully face up to the political conflicts caused by reasonable disagreements over matters of justice"²⁶. She appeals to the reasonable citizen's capacity for "civic integrity, magnanimity, and the economy of

²² Gutmann, Amy. "Rawls on the Relationship Between Liberalism and Democracy", in *The Cambridge Companion to Rawls*. Ed. Samuel Freeman. Cambridge: Cambridge University Press, 2003, p. 171.

²³ *Ibid.*, 181.

²⁴ *Ibid.*, 185.

²⁵ *Ibid.*, 184.

²⁶ *Ibid.*, 186.

moral disagreement”²⁷ in dealing with conflicts over the basic liberties; but given the great value that both Rawls and Gutmann attribute to them from the citizen’s own perspective, it seems that these issues are precisely the ones that are least likely to be treated with such magnanimity. Rawls and Gutmann both appear conscious of the problem, but fail to give it its due; as long as a central range of application is secured for each of the liberties, they seem to accept that any greater specification of liberties may be adjusted at the legislative level. The problem of reasonable disagreement is not subjected to further scrutiny because of their shared awareness of the limits of philosophy: any further specification of liberties would favour either liberal/modern or democratic/ancient schemes. But the modesty required of philosophy’s reach does little to contend with the problem that disagreements over the arrangement of the basic liberties at the constitutional level are both plausible (if not likely) and potentially socially disruptive: they undermine the mutual respect and reciprocity grounding agreement to the fair terms of cooperation upon which the stability of the well-ordered society depends.

In the end, there seems to be no clear resolution with respect to conflicts between the different possible arrangements of the basic liberties; we must simply accept the limits of the original position and the irreducibility of conflicting schemes. But disagreements over the basic liberties represent divergences over the most fundamental elements of a society’s self-understanding, and over the types of life projects that the social union ought to enable; as such, these conflicts threaten to disrupt the social cohesion of the well-ordered society. Ultimately, the bulk of the work involved in adjudicating the types of social and political issues that are most contentious, and that effectively present the greatest challenges to the viability and stability of the well-ordered society, ends up being shouldered by the political institutions of any given “well-ordered society”, and by the presumption of reasonability of its citizenry. Rawls’ theory of justice is incapable of responding to what are the most potentially divisive challenges that this society is likely to face; he avoids these problems by delegating them to the deliberative capacities of reasonable citizens and institutions. Rawls remains conspicuously silent on what are some of the most contentious issues that any liberal society faces and provides few conceptual resources for attending to them. By simply shifting these fundamental problems to the level of political deliberation within any given liberal society, Rawls avoids having to contend with the very issues that are most problematic in liberal theory and practice, that are most debilitating to social order, and that most threaten the viability of the political order and conception of justice that he’s so ardently defended. Social conflicts of this kind are precisely those that require a theory of justice, those whose adjudication is most critically in need of a principled defense if the well-ordered society is to maintain its sense of fairness, and if citizens are to feel that they belong to a just social order; and yet these are precisely the matters that Rawls can’t help us with. One wonders about the usefulness of a theory of justice whose principles are pitched at such a level of universalist abstraction that they provide little or no guidance with respect to the most difficult questions that such a society would, and which real liberal societies do, contend with²⁸. Rawls rightly recognizes the limits of

²⁷ Ibid., 187.

²⁸ It’s instructive to note that the problems of disagreement over the arrangement of the basic liberties do not result from the transition between the well-ordered society of Rawls’ ideal theory and real liberal

philosophy; but we must question whether a theory of justice that's incapable of doing anything more than tell us that our most pressing social, political, legislative and constitutional disagreements ought to remain within the ambit of reasonability is one worth endorsing. These are the problems that a theory of justice ought to help us with; and Rawls' conspicuous silence must leave us wondering about what exactly we gain from his theory of justice beyond a basic sense of fairness that shies away from precisely those issues most in need of it.

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The basic liberties constitute the theoretical foundations of Rawls' liberalism: they secure the social, political and institutional conditions within which equal citizens come to endorse the terms of agreement of the well-ordered society. Seen in this light, disagreements over the arrangement of the basic liberties represent deep divisions over the very terms that secure the respect and reciprocity that a union of reasonable citizens requires. The problem lies in the fact that conflicts at the constitutional level, at the point at which citizens are to agree on fair terms of cooperation, erode at the stability of the well-ordered society. In addition to this, while the foundational principles of Rawls' political liberalism establish the parameters within which "reasonable" political deliberation occurs, they are themselves incapable of attending to some of the most socially divisive issues that any liberal society will face. Given the level of abstraction at which Rawls proposes his two principles of justice, we're left with precious few theoretical resources with which to adjudicate these potentially disruptive issues. At issue is not only a question of reasonable disagreement within a given society; at the level of the basic liberties, disagreement undermines the reciprocity required to pursue a just society at all. In view of the complexity of Rawls' theoretical construction, such reasonable conflicts appear, at a first glance, as relatively minor concerns; but given the magnitude of the edifice built atop the conditions that the basic liberties secure, it seems all the more grave to contemplate the consequences of failures at this very foundational level.

societies (although this transition certainly highlights their urgency); but that the social cohesion of the well-ordered society itself, *within* the boundaries of Rawls' ideal theory, is threatened by these conflicts.

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