

## The Basic Liberties

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We have two ways of talking about liberty or freedom, one in the singular, the other in the plural. We concern ourselves in the singular mode with how far someone is free to do or not to do certain things, or with how far someone is a free person or not a free person. But, equally, we concern ourselves with the plural question as to how far the person enjoys the liberties that we take to be important or basic. What are those plural liberties, however? What does it take for something to count as a basic liberty?

The usual approach to this question is to give a list of some presumptive basic liberties — say, those of thought, speech, and association — and then to add a gestural ‘and so on’. My aim in this paper is to do a little better in elaborating a conception of the sorts of liberties at which the ‘and so on’ gestures. I argue that the basic liberties can be usefully identified as the liberties required for living the life of a free person or citizen and I spell out that requirement in three constraints, which I describe as feasible extension, personal significance and equal co-enjoyment.

There are many candidate sets of basic liberties that might be proposed for protection, whether in general or for a particular society. The claim that I defend is that in order to count as a set of basic liberties, the types of choice protected under any proposal should be capable of being equally enjoyed at the same time by everyone (equal co-enjoyment), should be important in the life of normal human beings (personal significance), and should not be unnecessarily restricted: they should be as extensive as the other constraints allow (feasible extension).

The aim of the paper being quite limited, I abstract from many important issues. I do not provide an argument for why it is important that some set of basic liberties be protected, nor do I rate the importance of such protection against other social goals. I say nothing on how far it should be a requirement of democracy that certain sorts of liberties are entrenched—whether constitutionally or otherwise—and how far democratic process should be allowed to vary the specification and protection of basic liberties. And I do not rank the different candidate sets of basic liberties—the different sets that satisfy my three constraints—in relation to one other. These candidate sets will vary in how they invoke co-ordinating

rules to specify the liberties—this variation will be illustrated later—in how they trade off different liberties against one another, in how they trade off the quantity of choices protected against the quality of protection provided, and in how many liberties they actually include.

My own interest in the basic liberties stems from the place that I think they must be given in a republican conception of freedom and government. But the basic liberties are invoked at some point in almost every political theory, so that the topic should be of interest to others also. It should be of particular interest for those who follow John Rawls (1971) in thinking that a first requirement of justice is the institution of a system of basic liberties to which everyone has equal access. H.L.A. Hart (1973) provided an extended analysis of the difficulties facing this Rawlsian claim and his essay will figure prominently in my discussion. Hart brought to light a daunting range of difficulties in the Rawlsian idea. And in the course of doing that he marshalled a number of important observations. My account of the basic liberties is deeply shaped by these, for they identify the rocks that any theory of the basic liberties has to navigate around.

## 1 From Republican Theory to the Basic Liberties

The key republican idea is that a person or citizen will be free to the extent that suitable choices are suitably protected and empowered. The suitable-choices clause means that it will not be enough for the person to have any old choices protected—say, those that have no significance for anyone or even those that harm others. And the suitable-protection clause implies that it will not be enough for the person to have those choices protected by being enabled to appease or buy off would-be offenders, for example, to take evasive action, or to call on some mafia friends.

The republican theory of suitable protection emphasizes the need to guard against domination, not just interference. You will enjoy suitable protection in a particular choice just to the extent that other individuals or groups do not have access to means of non-deliberative control over that choice. Others may be able to deliberate with you on the basis of sincere, take-it-or-leave-it reasons and influence what you do. But they should not be allowed a power of interfering with the choice, without exposing themselves to an inhibiting risk of punishment; they should not be able to block, burden, or deceptively redirect the choice with any degree of impunity. In short, they should not have ‘dominating control’ over what you choose.

Dominating control is not equivalent, it should be noticed, to interference. On the one hand, people may have dominating control in a choice you make, yet not actually interfere with you; they may invigilate what you do and only resort to obstruction, coercion, or deception when such interference is necessary to get you to do as they wish. And, on the other hand, people may interfere in your

choice and yet not have dominating control; their interference may be subject to your check or counter-control. The protected, free choice is the choice that evades dominating control, then, but not necessarily the choice that escapes interference (Pettit 1997; Skinner 1998; Pettit 2008b; Pettit 2008a)

To have a theory of suitable protection is not yet to have a theory as to what choices are suitable for protection. I assume that the set of choices to be protected in any society will have to be choices of the kind that we might expect any free person or citizen to be able to exercise; they will have to be choices that can define the ‘freeman’ of traditional republican discourse (Skinner 2006; Pettit 2007). I call such a set of choices basic liberties. No free citizenship without enjoyment of a suitable set of basic liberties, in this sense, and no enjoyment of such a set of basic liberties without free citizenship. The free person or *liber* is the citizen or *civis* who is fully incorporated into a framework that guards those basic liberties against the control of others. In that sense, to give the equation a Roman cast, ‘full *libertas* is coterminous with *civitas*’ (Wirszubski 1968, 3).

Linking the basic liberties with the ability to enjoy the life of a free citizen has a natural appeal for anyone who affiliates with the long republican tradition but it should make sense within a variety of other approaches too. The linkage is useful, as we shall see, because it enables us to spell out three specific constraints that we might expect any candidate set of basic liberties to satisfy.

## 2 Introducing the Basic Liberties

The question of how to identify the basic liberties is remarkably neglected in the literature. The only prominent discussions are in Rawls’s work and in the essay by H.L.A. Hart (1973) on Rawls’s view of liberty. Rawls argued, in an early formulation of his theory, that the first requirement of justice, one with priority over any other demand on the basic structure of a society, is that everyone should have ‘an equal right to the most extensive liberty compatible with a like liberty for all’ (Rawls 1958). This may have seemed to rule out private property, since the restrictions on the property-less might outweigh the liberties of the propertied (Hart 1973, 538). Perhaps for that reason, he later moved on to a formulation involving liberties, not liberty. ‘Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system for all’ (Rawls 1971, 302; see also 1993; 2001).

By all accounts, the basic liberties are choices, each of which is distinguished by a particular, significant option. Thus, to follow a rough enumeration suggested by Rawls, there is the liberty of judging as one thinks best; speaking one’s mind; associating with others; holding private property; casting a vote; and putting oneself forward for office (Rawls 1971, 61).

People will possess such liberties to the extent that they have the wherewithal to be able to access the distinguishing option, or not, as they choose. This means

that they must be protected against the uninvited control of others over what they say, where they associate, what they own, or how they vote. These liberties will be more valuable for bearers to the extent that their resources do not just provide the basic wherewithal required but make it possible to exercise the liberties more frequently, more widely or more easily. Further resources may enable people to speak on the media, for example, not merely in private; give them a larger network for making contacts with others; provide a wider range of things to own; or just make it easier to go and vote. Although such differences in resources affect the value of the liberties, the idea is that the possession of the liberties does not increase with such access to further resources (Rawls 1971, 204). While those resources enable people to exercise the choices at less and less cost or over a wider and wider range, they do not necessarily mean that those with greater resources possess the liberties in a higher degree than those with fewer (Pettit 1997, 75–6).<sup>1</sup>

All of this serves to introduce basic liberties but not to make the category particularly precise. In this paper I rely on three constraints in order to determine more exactly the sets of liberties that should count as candidates for the status of basic liberties. The three constraints are justified by reference to the association between the basic liberties and being able to live the life of the free citizen. Two can be stated quite briefly but discussion of the third will take up most of the paper.

### 3 The Constraint of Feasible Extension

If the basic liberties are to be required for free citizenship, then a first constraint is that they should be as numerous as possible, subject to the satisfaction of the other constraints that I go on to discuss. The other constraints, as interpreted in a given society, will constitute a bar that choice-types have to pass there, if they are to count as basic liberties that ought to be protected. The constraint of feasible extension holds that, consistently with the other liberties established in any proposal, further liberties that pass that bar also deserve to count as basic liberties and should be suitably protected in the society.

Suppose that the society protects certain liberties that count as basic by other constraints but that it does not do optimally in this respect: there are further liberties that it might equally protect, consistently with those constraints, and

<sup>1</sup> On the republican approach, there will be limits on the poverty or inequality of resources that is tolerable, since a certain level of deprivation or imbalance will make in itself for dominating control; it will reduce the costs of interference to the strong and so give them a controlling power of interference in the lives of the less well off (Pettit 1997; 2006; 2008). But still the distinction remains in place between having a liberty and having the resources to maximize its value. Possession of the liberty will not vary in degree with the addition of resources beyond those that are required to avoid domination by others and—if this makes for a distinct requirement—for having suitable access to the choice involved. One recent theorist who rejects this approach is Kramer (2003); see too (Van Parijs 1995).

doesn't. The members of that society would not count as fully free, on any plausible reckoning; the missing but unimplemented liberties would testify to their deprivation. If we associate the basic liberties with the life of free citizens, therefore, then we have to say that the liberties provided must be as rich as possible, consistently with the other constraints.

Consider a society in which choice-types 1 to  $N$  count as basic liberties by other constraints and are suitably protected. And suppose that choice-types  $N+1$  and  $N+2$  satisfy those same constraints, are consistent with the established liberties, but are not protected. The constraint of feasible extension says that they ought equally to count as basic liberties and to be protected. The class of basic liberties is closed under such extension.

The fact that this constraint comes into play only in the wake of other constraints means that it has a Paretian profile. The Pareto principle says, roughly, that if there are some people who can be given a benefit without depriving those who enjoy the benefit already, then that is what should be done. The constraint of feasible extension says, in loose parallel, that if there are some choice-types that can be protected as basic liberties without denying that status to those choice-types that have it already, then that is the path that should be taken.

The Paretian profile is important, because it means that the constraint does not rely on the controversial idea that the basic liberties should be identified with a view to ensuring that there is as much liberty—liberty in the abstract—as possible. Hart (1973, 543–5) understood Rawls to be committed to that controversial idea in arguing for 'the most extensive total system of equal basic liberties', and he argues from considerations that I rehearse later that the idea does not make sense (see O'Neill 1979–80).<sup>2</sup> But Rawls would certainly have endorsed the weaker Paretian idea and there is nothing in Hart to suggest that he would not have been happy to take the same line.

The Paretian idea is weak enough to be fully persuasive. But is it too weak? Why not replace it with the somewhat stronger idea that even when there is some cost to those choices that already have the status of basic liberties, still it may be reasonable to extend the liberties at that cost? I think that such a trade-off will often be perfectly reasonable and I allow for it, though only indirectly, within the approach taken here.

Suppose that choice-types 1 to  $N$  cannot be extended in the manner required but that if we vary them slightly—if we replace them by choice-types  $1^*$  to  $N^*$ —then we can add choice-types  $N+1^*$  and  $N+2^*$ . To say that it may be reasonable to make the trade-off suggested is just to say that it may be reasonable to prefer to give the status of basic liberties to the larger, starred set of choices than to the smaller, unstarred set. The constraint of feasible extension does not rule out

<sup>2</sup> I came to appreciate this point fully only as a result of an exchange with Onora O'Neill. Her paper on the topic (O'Neill 1979–80), which itself builds on Hart's essay on Rawls, is the classic source on the difficulties generated by the Rawlsian idea that the notion of maximum abstract liberty is well defined.

such a preference. It merely says that no set of choice-types can be a candidate set of basic liberties if it is unnecessarily restricted. The 1 to N set may be a candidate set, if it cannot be extended further, and the 1\* to N+2\* set will be a candidate set on just the same grounds. All that the constraint does is to rule out the 1\* to N\* set. This set is unnecessarily restricted and in breach of the constraint of feasible extension.

#### 4 The Constraint of Personal Significance

A second constraint is supported even more directly by the association between free citizenship and the basic liberties. It says that the types of choices that count as basic liberties should have personal significance for people; they should have the sort of significance that would make them important in the lives of free citizens. Specifically, since the basic liberties are not custom-made to individual, idiosyncratic taste, they should have personal significance for their bearers, by society-wide criteria.

There may be some variation between societies in the criteria of personal significance but on any plausible account this second constraint means that the basic liberties must be relatively distal and relatively general. They must be relatively distal in the sense of not just involving choices over how to move one's tongue or hands or body, without any guarantee as to what this will achieve in the world. One must be free to speak, not merely to make noise, and one must be free to speak to others, not merely to oneself. The basic liberties must be relatively general in the sense of not just involving choices between tightly specified options. One must be free to speak on more or less any topic to others, not merely on whether the weather has improved, and one must be free to speak to others in general, not merely to designated interlocutors.

No liberties can count as basic liberties, according to the second constraint, unless they are intuitively significant in the life of the free citizen. And excessively proximal or specific liberties can clearly fail to have such significance. In order to have the distal, general freedom to speak to others on any topic, I must have the specific freedom to speak about the weather and the proximal freedom to open my mouth. But the more specific and proximal freedoms need not be important as such in my personal life; their importance will turn on the importance of the more distal and general freedom that they can serve. Hence it is the latter freedom that ought to count as a matter of basic liberty.<sup>3</sup>

<sup>3</sup> There is a background issue as to how distal or indeed general an action can count as an option—as something that can be just chosen or enacted—by an agent. One suggestion might be that I can choose to enact an action, A, only if 'A' describes what is to be done in such a way that its realization is logically guaranteed by my trying to enact it. And that might suggest that while I can choose to open my mouth or perhaps speak, for example, I cannot choose to speak to someone else; I have to depend on the logically contingent fact that the person will not disappear or die before my

The second constraint does not say that all personally significant types of choice should count as basic liberties but that only personally significant types should do so. The idea is that a type of choice will only get to be considered as a candidate for a basic liberty insofar as it has personal significance in people's lives, by society-wide criteria. It is perfectly possible that some personally significant types of choice will fail to meet other constraints for counting as basic liberties; in particular, they may fail to meet some versions of the third constraint that I go on to discuss in a moment.

This second constraint, like the first, fits with the approach taken by Rawls and endorsed by Hart. That they each endorse the constraint shows up in a shared assumption about the sorts of choices that illustrate the category of basic liberties; they assume that these will be the choices traditionally associated with freedom of speech, freedom of association, and the like. Neither suggests that we might go to more proximal or specific choice-types in identifying basic liberties.

The third constraint on basic liberties that the linkage with free citizenship supports is the constraint of equal co-enjoyment and it will be the topic of the rest of this paper. This is the most important constraint of all and is indirectly at the heart of the concerns that Hart raises about the Rawlsian approach. While both of them give importance to the constraint, broadly conceived, Hart obviously feels that Rawls does not take sufficient account of the demands it imposes. The discussion to follow broadly supports Hart's side.

## 5 The Constraint of Equal Co-enjoyment

According to the constraint of equal co-enjoyment, no type of choice can constitute a basic liberty unless it is a choice that all of those who count as the full members or citizens of a society can co-enjoy equally: that is, can enjoy equally at one and the same time, however tightly or loosely same time is determined. We may ascribe a certain freedom of choice to someone without any suggestion that that is a degree or form of liberty that others can co-enjoy in equal measure; it may be a sort of freedom that is available only to the few. But talk of a basic liberty does suggest that it must be equally and simultaneously accessible to all. Otherwise it is hard to see why we should treat it as a liberty that marks out all free citizens.

The equal co-enjoyment constraint may impose different sets of requirements, of course, depending on how inclusive is the category of full members or citizens who

words reach them. But this can't be right, since I have to depend on logically contingent facts even to succeed in opening my mouth. For the record, I hold that any action description identifies an option if things are actually such at the time of action that the agent can make the description true; that they are such does not need to be logically guaranteed. An action description will identify an option in a way that engages with the agent's deliberation, of course, only if the further condition is fulfilled that the agent takes the description to be one that he or she can realize. I assume here that the basic liberties will naturally be capable of meeting that further condition.

are to enjoy the liberty equally. Were the citizens restricted to mainstream, propertied males, for example, then certain liberties might count as basic that would not pass the equal co-enjoyment test under other less restrictive conceptions; they could not be made simultaneously available to a wider category of individuals. Thus the *Magna Carta*—the Great Charter of the Liberties of Englishmen (Hobbes 1990, 37)—did not give liberties such that women, or indeed all men, could equally co-enjoy each. In my argument here, I shall assume that any normatively tolerable society will have to be maximally inclusive in its demarcation of full members or citizens and that these will certainly include native or naturalized members of the society who are adult and able, by intuitive criteria of adulthood and ability. Under that assumption, the equal co-enjoyment constraint means that any account of the basic liberties will have to identify choice-types such that all full members of an inclusive society can enjoy each of them equally at one and the same time.

When Rawls formulates his principle governing the liberties, he stipulates that each is to have the same right to a ‘system of equal liberties compatible with a similar system of liberty for all’. Let his stipulation be satisfied and, at least under natural interpretations, the equal co-enjoyment constraint will be satisfied too. Each of the parties will be able to enjoy any of the relevant liberties equally with others, and do so at the same time that others enjoy it. The parties will be able to co-enjoy the liberty equally, as I have been putting it.

Rawls’s stipulation is stronger than the constraint of equal co-enjoyment. It suggests that not only should each basic liberty be co-enjoyable equally by all; in addition, each basic liberty should be capable of being enjoyed equally by all at the same time that other basic liberties are enjoyed equally by all. But for our purposes there is no need to introduce this stronger requirement. Suppose that a set of basic liberties is consistent, as ideally it ought to be. Suppose, in other words, that the exercise of one liberty in the set is guaranteed not to compromise the exercise of any another. Given that each liberty in the set is to be co-enjoyable equally by all, consistency among the liberties will ensure, in itself, that the Rawlsian condition is also satisfied.<sup>4</sup>

Let us agree, then, that besides feasible extension and personal significance, equal co-enjoyment is a constraint on the basic liberties. No type of choice is a candidate for being cast as a basic liberty, unless it is capable of being equally co-enjoyed by all. But it turns out that the equal co-enjoyment constraint can be understood in different ways, with different effects; it devolves into a

<sup>4</sup> At any time, the set of basic liberties established in a society is almost certain to involve hidden inconsistencies, as constitutional and legal history illustrates (Zucca 2007). These inconsistencies are likely to become visible sooner or later, however, and to raise questions for the local democratic process. And if things go well, they will be resolved by the courts or the legislature, or by resort to referendum. Consistency may not be something we can assume at any point in time, then, but over time it serves as a regulative ideal in the process of articulating the basic liberties (Dietrich and List forthcoming).



number of more specific constraints or conditions. In the remainder of the paper, I shall explore three sets of conditions it supports, I shall look at how far each is supported by the association with the idea of the free citizen, and I shall ask about its implications for the organization of a society.

## 6 Two Sources of Ambiguity

The equal enjoyment constraint holds that if any liberty, say the liberty to X or not to X, is to count as basic then it must be possible for all the citizens of a society to co-enjoy that liberty equally. In particular, it must be possible for them equally to co-enjoy freedom in relation to the option, say X-ing, that makes the choice significant and distinctive.<sup>5</sup> But there are two obvious sources of ambiguity in this formulation. The first bears on what it means to co-enjoy a liberty, the second on the sort of possibility involved. As those ambiguities are resolved in favour of more demanding construals, the category of basic liberties gets to be more and more restricted in scope.

In order to introduce the first ambiguity, consider what we might mean when we say that someone enjoys the freedom to X, where this is the option that gives significance to the choice. We might mean that the person enjoys the opportunity to X or, more strongly, that the person enjoys the action of X-ing or, more strongly still, that the person enjoys the benefit associated with X-ing. The person may enjoy the opportunity to X without managing to perform the X-action, but not vice versa. And the person may enjoy the action of X-ing, without actually enjoying the associated benefit, but not vice versa. The gap between opportunity and action comes about because the opportunity ensures only that the agent can try to X, not that the agent can actually do so. The gap between action and benefit comes about because the agent may X in circumstances that undermine the benefit associated with X-ing.

The ambiguity in what it means to enjoy freedom in regard to an X-choice—specifically, in regard to X-ing—generates a corresponding ambiguity in what it might mean for people equally to co-enjoy the associated freedom or liberty. It may mean that they equally co-enjoy the opportunity to X, or equally co-enjoy the action of X-ing, or equally co-enjoy the benefit of X-ing. That is the first of the two ambiguities that affects the interpretation of the co-enjoyment constraint on the basic liberties.<sup>6</sup>

<sup>5</sup> If there is more than one option that confers significance on the choice, then the argument that follows can be adapted to cover that possibility.

<sup>6</sup> For all that the present argument supposes, the equal opportunity to choose X may mean the equal legal opportunity to make that choice, or the equal real-world probability of making that choice. In either case, it will be true that to have the opportunity is to be able to exercise choice as between trying to X and trying not to X.

The second ambiguity is of a kind that is familiar from other contexts. The equal enjoyment constraint might mean that it must be logically or metaphysically possible for all the members of the society to co-enjoy the liberty equally. Or it might mean, more demandingly, that it must also be physically possible—possible in standard physical conditions, under actual physical laws—for all the members to co-enjoy it equally.

The following matrix identifies the different ways in which the ambiguities may be resolved and the constraint imposed. The stronger versions are towards the right and towards the bottom. They identify choices that are equally co-enjoyable in physical conditions, not just logically, and that are equally co-enjoyable in all three respects: that is, in regard to opportunity, action, and benefit.<sup>7</sup>

People can co-enjoy equally	as a logical possibility	or also as a physical
the opportunity to X;	1.	2.
the action of X-ing;	3.	4.
the benefit of X-ing.	5.	6.

## 7 The Top-row Conditions

It would be highly implausible to say that an X-choice is a matter of basic liberty, although it is not possible for people to co-enjoy equally even the opportunity to X. We could scarcely regard the liberty as the mark of a free citizen—a mark shared by each citizen in a body of equally free citizens—if it did not satisfy that minimal possibility condition.

It may not be possible for people to co-enjoy equally the opportunity to X as a result either of logical or of physical constraints. If it is logically impossible for each to have that opportunity equally, then the box 1 condition will rule out the X-choice as a candidate for a basic liberty. If it is physically impossible for each to have an equal opportunity to X—if it is impossible under contextually standard physical conditions—then the box 2 condition will rule out the X-choice.

What sorts of choices do the top-row conditions rule out as basic liberties? The most salient category is the sort of choice that engages one member of the population in particular and that gives that person or the associates of that person a better opportunity to choose the significant option than others can possibly enjoy. We may describe these sorts of choices as particularized, because of their

<sup>7</sup> Hart's interrogation of the Rawlsian principle takes the form of a series of questions that accumulate to support the following suggestion: that it will be desirable to establish a system of basic liberties—and in particular the most extensive version of such a system—only to the extent that the equal co-enjoyment constraint is interpreted more strongly and the basic liberties are construed more narrowly. He thinks that this raises problems for Rawls but those difficulties need not concern us in the present context. Our interest is in giving a plausible account of the basic liberties that we might want a society to establish, not in seeing where Rawls's claims are unsupported or indeterminate or even, as Hart (1973, 547) once suggests, unintelligible.

association with particular people. An example will be provided by any choice in which the significant option refers by name to a particular person, A, as in getting A to do something or enabling A to enjoy some benefit or helping out A's friends.<sup>8</sup>

It will be logically impossible for people to co-enjoy equally the opportunity to make some particularized choices, and physically impossible for them to co-enjoy equally the opportunity to make others. Thus it is logically impossible for everyone to co-enjoy an equal opportunity to decide the mind of a particular person, A, on some issue; as a matter of logic, only that very person can make up A's mind. And so it cannot be a basic liberty for each that he or she make up A's mind on any issue or issues. Again, it is physically impossible in our sense for everyone to co-enjoy an equal chance of exploring friendship with A; there is an inescapable, if contingent, limit on how many people A can know and can contemplate as possible friends. And so it cannot be a basic liberty for each that he or she pursue friendship with A.

Such particularized choices are not candidates, then, for basic liberties. Looking ahead, they will also fail the conditions associated with the second row and third row in our matrix, since not everyone will be able equally to co-enjoy the choice of the distinguishing option and not everyone will be able equally to co-enjoy the benefit of the option. But the important point to notice is that they will fail even the conditions associated with the first row. Not everyone will be able equally to enjoy the opportunity to choose that option, let alone the choice itself or the associated benefit.

## 8 The Impact of the Top-row Conditions

How should we react to this first set of conditions on those choices that can count as basic liberties? The obvious response is to say that while various particularized choices cannot plausibly be matters of basic liberty, this is not the case for corresponding relativized choices: specifically, for corresponding agent-relative choices.

Take the choice of making up A's mind on some question. It is certainly true that not everyone can equally co-enjoy the opportunity to make up A's mind. But what remains true is that for each person, V, that person may have the opportunity to make up their mind—that is, V's mind—that is equal to the opportunity that any other person, W, has to make up their mind—that is, W's mind. With the agent-relative as distinct from the agent-particular choice, each can enjoy an equal opportunity to exercise it.

<sup>8</sup> My discussion in this and the following sub-section was heavily influenced by exchanges with Ian Carter and Serena Olsaretti.

Again, take the choice of exploring friendship with someone. It is certainly true that not everyone can enjoy an equal opportunity to explore friendship with a given person. But nonetheless everyone—or at least everyone in society—can enjoy an equal opportunity to explore friendship with one or another person within their circle of acquaintances. The agent-relative choice can be a matter of basic liberty, then, where it is impossible to give the agent-particular choice that status.

It should come as no surprise that particularized choices are not matters of basic liberty but corresponding agent-relative choices are. Many of the basic liberties that figure in the standard list—the sort of list that is taken for granted, for example, by Rawls and Hart—are of the agent-relative kind. They include the liberty of forming your own views, for example, speaking your mind, following your conscience, and associating with those who will have you.

## 9 The Middle-row Conditions

The conditions in boxes 3 and 4 rule against X-choices such that not everyone in the society can simultaneously perform the X-action, even if the choice is non-particular and everyone can have an equal opportunity to do so.<sup>9</sup> Whether one person is able to perform that action will depend on its not being the case that all others—perhaps even some others—are performing it at the relevantly same time. The association between the basic liberties and the idea of the free citizen argues strongly in favor of ruling out such options. There would be a real paradox in claiming that the X-choice was a basic liberty in the society, suitably protected by public institutions, if there was no physical or even logical possibility that everyone might X together. It would mean that the status of free citizenship that is linked to the enjoyment of the basic liberties would not be a status that all could simultaneously assert.

Suppose, then, that the X-choice can be a basic liberty only if it is logically possible for people to co-enjoy the action of X-ing. Does this box 3 condition put a substantial restriction on the candidates for basic liberties? Yes, it does. Let X-ing be the action of controlling the choices of others, where it may be assumed that if I control your choices, you can't control mine; mutual control is no control (Pettit 2008). Or let it be the action of surpassing others—as distinct from trying to surpass others—where it is manifest that not everyone can surpass others; not everyone can be first or even above average. Let it even be the rather trivial action

<sup>9</sup> A choice will be non-particular if it is agent-relative, as we have seen. But it will also be non-particular if, as in many possible cases, it is agent-neutral and does not involve reference to any particular agents in the options.

of staying out later than others (O'Neill 1979–80, 49). The box 3 condition would say that the freedom to exercise choices over such actions cannot be basic liberties, since it is not logically possible for people to co-enjoy those actions; they cannot each control others—certainly not all others; they cannot each surpass others—certainly not in the same respect; and they cannot each stay out later than others (O'Neill 1979–80, 49).<sup>10</sup>

Box 4 introduces a condition that would make the category of basic liberties even more restrictive. For it would rule out cases of X-ing where it may be logically possible for everyone to co-enjoy the performance of that action but it is physically impossible for them to do so. The farmer and the cowboy may be friends, in the words of the song, if there is country enough for them each to find land that they can use as they wish; the farmer will fence in one region, the cowboy let cattle roam in another. But if there is only so much land to go around, then under that condition of scarcity it will be impossible for them each to use the land as they wish. Put this condition in place and the freedom to use land to one's personal taste cannot be a basic liberty.

In his discussion of Rawls, Hart focuses on competitive actions of the kind that these middle-row conditions—in particular, the condition in box 4—would rule out. In the words of an earlier paper, such actions are paradigmatically illustrated by options where 'owing to scarcity, one man's satisfaction causes another's frustration' (Hart 1955, 175). The choices that the box 3 condition would banish from the category of basic liberties involve necessarily competitive options: actions such that it is logically impossible for everyone to succeed in bringing them off. The options that the box 4 condition would banish involve contingently competitive options: actions that it is impossible in standard physical circumstances, such as the circumstance of scarce land, for everyone to realize.

Hart uses the unrestricted use of land to illustrate the fact that there are some liberties that cannot be simultaneously exercised by all; there would be physically inevitable conflicts among people who sought to exercise that liberty at once (Hart 1973, 546–7). Another example, as he suggests, would be the action of travelling by one's preferred mode of transport, since there would be a similar 'conflict between pedestrians' freedom of movement and the rights of automobiles' (Hart 1973, 546, n 49). And another might be the action of withdrawing one's money from a bank; let everyone try to do that and the institution will break down. Further examples can readily be imagined. Thus an interesting class of illustrations might be derived from G A Cohen's (1979) case, where everyone in a room is free to leave by the doorway, provided that others are not attempting to do so at the same time.

<sup>10</sup> This sort of constraint is close to the constraint of compossibility that Hillel Steiner (1994) imposes on basic rights. For related discussions see Carter 1999; Kramer 2003.

## 10 The impact of the middle-row conditions

Suppose we go along with these anti-competitive conditions. What do we do then? Do we say that use of land or mode of transport, for example, is not an area in which people can have a basic liberty protected? In that case there might be an anarchic free-for-all where the spoils go to the victor. Or there might be a system of central rationing under which people have to live with whatever they are centrally allocated in the way of permits for land-use or transport.

Neither of these alternatives is very attractive but that need not be of concern, for there is a third, more appealing possibility. This would require a society to take two steps: first, to introduce rules of coordination that would eliminate the problem of competition in the use of land or transport or whatever; and then, second, to protect a suitable rule-dependent choice in the manner of a basic liberty. Set up common rules of ownership, for example, and it will be possible for everyone at once to own and use land or any other commodity according to those rules. And then the basic liberty of owning and using property according to those rules can be given suitable protection. Set up rules of the road and it will be possible for everyone at once to use his or her preferred mode of transport; drivers will take one route, pedestrians another. And so, again, a corresponding basic liberty can also be protected in this area: the liberty of travelling under the rules of the road by whatever means one prefers.

This regulatory or coordinating initiative would enable a society to avoid the anarchist or centralist alternatives and introduce instead certain rule-dependent basic liberties. Parallel initiatives could be used to allay a vast array of similar problems. The rules govern banking can make it possible for people to have regulated or coordinated access to their funds. And any rules that coordinate access to something that cannot be accessed at once by all—this, on the model of exit from a crowded room—can make it possible for people to have a basic, protected liberty in the exercise of the rule-dependent choice.

Should a society identify and protect rule-dependent basic liberties rather than going the anarchist or centralist route? The constraint of feasible extension suggests that it should. Take two societies that do equally well in protecting certain basic liberties such as the liberty to speak your mind, associate with those who welcome your association, or reside where you will in the available territory. Now suppose that, consistently with the constraints of personal significance and equal co-enjoyment, one society introduces rules whereby the stock of protected liberties is increased but that the other does not do so. In that case, the principle of feasible extension argues in favor of the first society. The second society does not protect the basic liberties of its members, only an unnecessarily restricted subset of those liberties.

In every case where they serve to extend the stock of basic liberties, then, rules of coordination are desirable on grounds of liberty alone. They are

supported by the principle of feasible extension, which is itself supported by the association between the idea of basic liberties and the image of the free citizen. To make this point is to go along with Rawls (1971), when he suggests that a case can be made on the grounds of liberty for having a system of liberties that includes the freedom to own personal property under the local rules of ownership. But the case made here does not depend on the notion that introducing such a freedom would increase liberty in the abstract, as the Rawlsian argument seems to do; as mentioned earlier, the principle of feasible extension is Paretian in character and does not rely on any such idea. Still, the line taken is in the spirit of Rawls and runs against Hart's suggestion that introducing rule-dependent basic liberties can only be justified on broadly utilitarian grounds (Hart 1973, 547).

But it is one thing to say that the cause of the basic liberties—the cause associated with the idea of the free citizen—argues for introducing rule-dependent basic liberties. It is another thing to argue that this or that set of rules is the best one to put in place in any domain. How is the decision to be made between the different systems of rules that might govern ownership or travel or indeed any similar area of choice?

It should be clear from within the viewpoint defended here that no rules will be appropriate that compromise the project of providing suitable protection for personally significant liberties that every member of the society is to be able to co-enjoy equally. Suppose that suitable protection is identified with robust protection against the dominating control of others, as on the republican approach. It will be important, then, not to introduce rules that give such wide discretion to public officials that protection against those very officials is compromised. And, perhaps even more strikingly, it will be important not to introduce rules—say, rules of ownership—that enable some individuals to gain such economic power that they are bound to dominate others in certain domains. This may require supporting limits on wealth or inequality or restricting the comparative advantages—say, advantages of education or publicity—that money can buy.

But this restriction on suitable rules for establishing rule-dependent basic liberties may well leave various candidate systems of rules in play. And how then should we want the choice to be made between those systems? How should we decide between the different rule-dependent basic liberties that the rival systems would establish?

This, plausibly, should be a matter for democratic process to resolve. In that process it will be perfectly legitimate to introduce values other than liberty, including the utilitarian considerations that Hart supports, in favour of one system of rules rather than others. Among the values that may legitimately be taken into account is the value of having a system that fits with the received culture of the society. Thus there need not be one system of rules, and one set of rule-dependent basic liberties, that is the right one for every society. There may

be a permissible degree of cultural relativity in the liberties that should be established across different societies.<sup>11</sup>

## 11 The Bottom-row Conditions

The conditions in boxes 5 and 6 rule against the sort of choice involving an option such that if everyone chooses it, then the benefit associated with the option is undermined or diminished. The benefit that makes such an option attractive for the person who does not think everyone will go the same way ceases to provide support at the point where all or perhaps just some others opt for the same path. There may or may not be a distinct reason at that juncture for an individual to stick with the option—more on this in a moment—but that will be a different reason from the consideration that made it attractive in the first place.

The association with the free citizen argues for imposing these conditions, as it does for imposing the other conditions associated with the equal co-enjoyment constraint and the earlier constraints of feasible extension and personal significance. If the types of choice that should be protected as basic liberties are to be associated with the status of free citizenship, then it would be strange to allow them to include liberties such that people will frustrate one another by exercising them; in particular, will frustrate one another to the extent of depriving the choice of its original appeal. There is an intuitive case against allowing basic liberties to include such collectively self-defeating or counterproductive choices.

Hart directs attention to our bottom-row conditions with the simple example of speaking to a large group (Hart 1973, 543). Let everyone enjoy the liberty of addressing a group at will. It will be logically and physically possible for them each to address the group at the same time, so that that liberty would pass the top-row, anti-particularized conditions and the middle-row, anti-competitive conditions. But still we might pause over thinking that this liberty should be established and protected in the manner of a basic liberty. For if every member of a group speaks to the assembly at one and the same time, no one will be heard. And so it will be physically if not logically impossible that they should equally co-enjoy the benefit of their speaking to the group. The point of the activity in which the liberty is protected will be undermined in the event that everyone pursues the activity at once.

This sort of example stands in for a wide spectrum of cases. In these cases the type of choice under consideration as a candidate for a basic liberty involves an option that can be chosen at once by all. But let the option be chosen by all and,

<sup>11</sup> This is not inconsistent with the argument, which I have advanced elsewhere (Pettit 1997, 2008), that the judgment as to whether a given choice is relatively dominated or non-dominated, unfree or free, is fixed independently of any value commitments. The notion of freedom as non-domination is not moralized, though the issue as to which choices should be protected from domination may be.



whether as a matter of logical or physical necessity, no one is going to be able to enjoy the benefit that gave the option its original point and attraction. The problem arises, in Hart's words, from the fact that to protect the choice of a certain option as a basic liberty 'necessarily does two things: first, it confers on individuals the advantage of that liberty, but secondly, it exposes them to whatever disadvantages the practice of that liberty by others may entail for them' (Hart 1973, 550). More specifically, the problem is that the practice of that liberty by all may mean that its exercise loses its original point from everyone's perspective.<sup>12</sup>

In every case where the bottom-row conditions apply, then, there is an option that can be protected for all, there is a more or less obvious benefit that the choice of the option promises each, and that benefit is undermined in the circumstance where all or perhaps just some others simultaneously choose the option. Everyone would want to pursue the activity protected were no one else to do so but everyone would prefer the scenario where no one pursues it to that where all do. Everyone would like to address the group but everyone would prefer that no one speak than that all should do so at once; in that case, each would waste effort to no good effect. The exercise of the activity in question may be individually attractive but its exercise by all is self-defeating or at least counter-productive (Parfit 1984, Part 1).

Presumptive examples of choice-types where the bottom-row constraints apply are provided by cases that are familiar from the literature on predicaments where the individual choice of a certain option is attractive for each but the aggregate result of everyone taking that choice makes each worse off. Every householder in a neighbourhood may wish to have the liberty to extend or decorate their house just as they will but if every householder does this, then by their own aesthetic standards they may end up living in a truly ugly public space. Everyone may wish to be able to pry and report on anyone else's private affairs but if everyone does this, they may each live in a society that all abhor. Everyone may wish to have the liberty to own a gun but if everyone owns a gun then, the arms industry apart, no one is likely to be defensively better off.

As in the case of speaking to the group, the claims that give these examples a presumptive connection with the bottom-row conditions are: first, that everyone has a reason to pursue the activity if no one else does; and second, that everyone prefers that no one pursue it to everyone's pursuing it. But it is worth noting that in some of these cases, unlike the group case, a third clause is satisfied too: everyone may have a reason—a new reason—to pursue the activity if others all do so. Setting virtue aside, no one will relish being the only person without a gun in a gun-toting society, or being the only person without the licence to gossip in a

<sup>12</sup> Hart is concerned about any disadvantages that the general practice of the liberty may occasion, not just about the more specific disadvantage on which I focus: that exercising the choice in question loses its point for each. Thus he speaks of the possibility that the general practice of the liberty may involve 'harm or loss of amenities or other elements of real utility'—for example, 'pain and suffering and distress' (Hart 1973, 548).

gossipy society. This makes these particular examples into cases of a broadly free-riding character.<sup>13</sup> In these cases everyone has a reason for pursuing the activity even if all others do—they will not want to be made a sucker, as it is sometimes said—but that reason is not the consideration that originally gave the choice its appeal.

## 12 The Impact of the Bottom-row Conditions

Where does this leave us? What are we to say at a general level about how these bottom-row conditions should impact on the basic liberties to be recognized within a polity?

There are certainly some cases, such as that of speaking to a group, where it seems like the merest common sense to deny the status of a basic liberty to the unregulated choice. In this type of case the required line will be, not to give up altogether on establishing a basic liberty to speak to a group, but to put rules in place that allow us to define a more restricted option—say, speaking under Robert's rules of order—that can satisfy the bottom-row conditions and figure as a basic liberty. This line will be attractive from our point of view, because it will increase the number of basic liberties available, as required by the principle of feasible extension. The case is relatively straightforward because the idea of speaking to a group when everybody else is speaking too has absolutely no value or appeal.

Hart (1973, 543) supports this line, and recognizes that it makes sense in Rawlsian terms, not just in utilitarian (see too Rawls 1971, 203). Thus he recommends 'the introduction of rules of order in debate, which restrict the liberty to speak when we please. Without this restriction the liberty to say and advocate what we please would be grossly hampered and made less valuable to us.' Let the rules be introduced and it will be a basic liberty to address a group according to the rule, but not to address the group when and as one likes.

The suggestion supported by this example is that just as we accommodate the middle-row conditions against competition by introducing rule-dependent basic liberties, and giving them suitable protection, so we should accommodate the bottom-row conditions against counterproductivity by parallel measures. The case for the introduction of rule-dependent basic liberties will be that the stock of protected liberties can thereby be increased, as required by the constraint of feasible extension. And the choice among possible systems of rules will be dictated both by the requirements of suitable protection and by recourse to other values, including the value of fitting well with local mores.

Are there many cases as straightforward as the case of speaking to a group? It may seem not. In other cases, there may be ground for arguing that the choice

<sup>13</sup> On free riding problems and multi-lateral prisoner's dilemmas, see Pettit 1986.

retains its original point in the case where everyone makes it, so that it is not really subject to the aggregate, counter-productive effect. Thus, some rugged individualists may deny that as a matter of fact the defensive point in having a gun is undermined if everyone comes to have a gun. Or they may not agree that its original point was purely defensive; they may give the activity an expressive significance. Other more communitarian types may take a different view, as Hart insists. 'Other persons would not pay this price for unrestricted liberty in these matters, since, given their temperament, they would value the protections afforded by the restrictions higher than the unrestricted liberty' (Hart 1973, 549).

We may all agree, then, that the basic liberties should not be collectively counter-productive in the manner of the liberty to address a group as one likes. But that agreement will leave considerable room for divergence between the rugged individualist attitude and more communitarian views. Communitarians would argue for allowing householders to extend or decorate their houses but only under common rules of zoning, development, and heritage preservation. And they would argue for giving people the liberty to own guns but only subject to strict rules for the possession and use of firearms; these rules might make it impossible for many people to have access to guns. Rugged individualists would insist that such regulations are unnecessary, denying that the aggregative effect of everyone's making the relevant choice undermines the original point of the individual choice. They may hail diversity in house styles as attractive, and the universal possession of firearms as mutually inhibiting and individually protective.

Rugged individualists may pride themselves in such cases on not making the liberties under discussion rule-dependent. But in practice they are bound to agree—on grounds related to the bottom-row conditions—that there should be some rules, however minimal, to regulate certain extreme choices. They are almost certain to think that whatever the point of gun ownership, it is likely to be undermined if some are allowed short-range nuclear weapons and that whatever the point of renovating one's own home, it is in jeopardy if some are allowed to build skyscrapers next to suburban houses. Thus they too will argue for introducing rules to define and channel choices in these domains; that will be the way to extend liberties as far as possible, while respecting the bottom-row conditions. The debate between more individualist and more communitarian types will not bear on whether to have rule-dependent rather than rule-independent liberties in such areas, but rather on how restrictive the rules ought to be.

This means that here as in the case of the middle-row conditions, the crucial issue arises on the supposition that there will be some rules to regulate liberties. That issue bears on which system of rules to prefer in any area of choice. As in the earlier case, the answer will plausibly be resolved in democratic process. It may be determined in part by how well rival systems do in supporting the robust protection of liberties and in part by how well they serve independent values, including the value of fitting with the existing mores of the society. Thus the system of rules ought not to give government such discretion that people are exposed



to domination from public officials; nor ought it to allow individuals or groups such power that domination is more likely on the private front. And the system of rules in any society, while it may be challenging in some respects, ought to have the minimal fit with social mores that is likely to be required for the system to prove resilient. Thus the appropriate rules may be subject to a degree of cultural variation.

### 13 In Conclusion

We began with the connection between the basic liberties and free citizenship, and then identified three constraints on the category of basic liberties that that connection supports: the constraints, respectively, of feasible extension, personal significance, and equal co-enjoyment. Many different sets of liberties satisfy these constraints, as we noted, and compete as candidates for being given the status of basic liberties. In each such set, the choices to be protected will be satisfy our three constraints, being maximally extensive, personally significant, and capable of being equally co-enjoyed by all.

The co-enjoyment constraint is of particular importance, since it imposes three separate sets of conditions on basic liberties. The effect of those conditions is caught in the following variation on an earlier matrix.

People can co-enjoy equally	as a logical and physical possibility
the opportunity to X;	→ no agent-particular options
the action of X-ing;	→ no mutually competitive options
the benefit of X-ing;	→ no collectively counter-productive options

I hope that this discussion gives some guidance on what choices should count as candidates for basic liberties and, to return to a republican key, as choices that ought to be protected from the dominating control of others. I do not think that the sorts of choices to be supported under the approach taken will be a surprising set; if they were, that might be in itself a reason for concern. Thus the basic liberties will certainly include freedoms of thought and speech, association and assembly, the freedom to move around one's society and to own personal property, as well as the freedom to assume a part in public life, whether as voter, candidate, or critic. Let these basic liberties be protected in the manner that republican theory requires—protected against dominating control of any kind over the exercise of such choices—and people will be enabled to perform as equal citizens of the society.<sup>14</sup>

<sup>14</sup> Thus, to connect with another approach, they will share equally in the basic capabilities that are required for functioning in their society (Sen 1985; Nussbaum 1992). See (Pettit 2001).



There may be just one surprise in the list of basic liberties supported. This is that by our account, many liberties will have to be identified in a rule-dependent way, if they are to satisfy the middle-row and bottom-row conditions in the matrix. That necessity raises the question as to which system of rules ought to be established in any domain. I argued that although some freedom-related concerns may help to reduce the set of candidate systems, it may also be necessary to invoke other values to select between those candidates, including the value of installing a set of liberties that fits well with existing mores.

The selection of the particular rules to impose in defining the basic liberties will naturally be left to democratic practice. There are some basic liberties, or some types of basic liberty, such that no society that did not protect them would count as democratic; examples will certainly include freedom of speech and the freedom to take a part in public life. But given that a society does count as democratic on that basis, it is bound to have a degree of discretion in determining the detailed specification of the basic liberties it protects: that is, in fixing the rules whereby various liberties are specified and in resolving the trade-offs and related issues canvassed in the introduction. In every society there ought to be protection for the basic liberties, where these are defined in different ways for different societies. But it is not the case that there are basic liberties, defined on a universal, rule-independent basis, that ought to be protected in every society.<sup>15</sup>

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