



The Role of Free Speech in a Democracy: A Critique of Rawls's Political Theory

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In *The Basic Liberties and Their Priority* (1993), John Rawls attempts to supply a robust political theory that answers the criticisms leveled at his earlier work, *A Theory of Justice* (1971). Central to Rawls's arguments is his conception of the person and the implications it has on the two principles of justice made famous in *Theory*. Yet answering these criticisms leads Rawls to make some questionable arguments regarding the priority of the basic liberties and how they may be made to cohere with one another. In particular, section 10 sees Rawls advocate a near absolute right of free speech by drawing on his theory of the person and attempting to illustrate how the basic liberties may be adjusted at later stages. Thus, this essay will be devoted to critically discussing Rawls's views on his perceived right of free speech. Particularly, it will be argued that Rawls takes an approach to free speech that is far too narrow and seemingly tailored to his general theory and conclusions. Free speech is not a pure good as Rawls seems to suggest, but rather entails consequences with which any well-governed society must be concerned. Rawls inexplicably ignores this possibility. This argument will be fully developed in the subsequent sections, but first a more careful explanation of Rawls's ideas is warranted.

Rawls's defense of free speech depends on his general theory of the person. In section 3 Rawls offers the two powers of moral personality: the capacity to be reasonable and the capacity to be rational.¹ With respect to the two principles of justice, Rawls states that they are the most desirable to those in the original position, for they best promote the two moral powers (Rawls 1993, 306). Further, the basic liberties facilitate social conditions necessary for the exercise of the moral powers in the "two fundamental cases."² For the purposes of the present discussion, we should be concerned only with the first fundamental case: the application of one's moral power of reason to the basic structure of society and its social policies. Free speech, states Rawls, falls under the basic liberty of thought and is significant³ because its priority protects the use of reason in the first fundamental case (Rawls 1993, 340).

To demonstrate the significance of free speech in a democratic society, Rawls provides the examples of seditious libel and subversive advocacy. The aim here seems to be to justify the priority and significance of liberty and thought. Rawls purports to show how liberty of thought may be "adjusted at later stages so as to protect its central range," which is "the free public use of our reason in all matters that concern the justice of the basic structure and its social policies" (Rawls 1993, 348). In achieving this

1. The former refers to a capacity for a sense of justice and the latter refers to the need for people to pursue their own unique conception of the good (Rawls 1993, 302).

2. According to Rawls, the idea of a fundamental case will help us recognize the significance of a liberty, and allow us to further specify it at later stages (332).

3. For Rawls, the significance of a liberty depends on how well it protects the expression of a moral power (335).

end, Rawls first argues that a society that criminalizes seditious libel infringes on the basic liberty of thought. Seditious libel is necessary for the full exercise of reason in the first fundamental case. Further, this is a valuable exercise of the first moral power for prohibition on this type of speech allows for the possibility of self-government, insofar as it censors critical or dissenting views and prevents the electorate from a fair and balanced discussion of the current government administration.

Repression of subversive advocacy similarly violates liberty of thought in the first fundamental case. Here, free speech is valuable even if it promotes lawlessness or revolutionary doctrines, for it indicates a more “comprehensive political view” (Rawls 1993, 334). If this is the case (that it indicates such a political view), free speech coupled with a just political procedure can provide an alternative to forcefulness or revolution that can be injurious to the basic liberties. Subversive advocacy gives vent to social unrest and injustice and forces political leadership to acknowledge such problems. Thus, subversive advocacy and seditious libel serve legitimate purposes in democratic societies and are further justified on the grounds that they represent a public use of our reason in the first fundamental case. To suppress such opinions would result in a violation of the basic liberty of thought (Rawls 1993, 346).

But Rawls notes that an adequate scheme of liberties (guaranteed by the first principle of justice) implies that the liberties must be subject to some restraint if they are to be fully realized. Rawls states that “the basic liberties not only limit one another but they are also self-limiting” (Rawls 1993, 341). This means that we must work out a workable scheme for the exercise of the liberties. In the

case of free speech, everyone must accept restrictions to time and place so as to ensure that their political views are heard. To understand the value of this, we may observe the opposite: if everyone demanded a right to free speech at the same time, it would greatly reduce the ability of one to have their voice heard amidst the competing views. Thus, this feature of a scheme of liberties, says Rawls, implies that we must observe restrictions of time and place if everyone is to enjoy equally the right of free speech (Rawls 1993, 341).

The preceding sections have outlined Rawls's defense of free speech and the restrictions it implies. The balance of this essay will be devoted to the core arguments of this essay. It will be argued that Rawls's account of free speech is far too narrow and does not account for possible consequences of a right of free speech. Rawls's examples of seditious libel and subversive advocacy seem to be included strategically, so as to make his overall theory more coherent and persuasive. Further, it would seem as if Rawls justifies only certain types of speech, and his reasoning cannot advocate a right for free speech in general. Lastly, it will be suggested that if the preceding comments are true, it may render his approach to democracy much less convincing.

The aspect of Rawls's argument for free speech that seems to be most vulnerable to criticism is his argument for the legitimacy of subversive advocacy in a democracy. Simply, the premises that allow Rawls to reach his conclusion are questionable. First, implicit in this argument is the assumption that all subversive advocacy is legitimate, in the sense that it necessarily reflects injustice in the "basic structure and policies" (Rawls 1993, 346) of society. Rawls seems to concede this assumption by

stating, “persons are capable of a certain political virtue and do not engage in resistance and revolution unless their social position in the basic structure is seriously unjust” (Rawls 1993, 347). This assumption seems far-fetched and Rawls devotes little space to proving that such political virtue exists. Though it is sometimes the case that revolution and widespread injustice give rise to subversive advocacy and lawlessness, this need not *always* be the case. In fact, it would not be difficult to conceive of a scenario in which subversive advocacy is motivated by something other than the need for righting injustices. For example, a particular faction in society may wish to use subversive advocacy to overthrow the government and further their agenda. In such a case, most reasonable people would agree that the government would do well to censor such destructive speech. Further, if one concedes the plausibility of the aforementioned example, one has to concede that there are instances where subversive advocacy is illegitimate and justifiably restricted. This example has been left purposely vague to account for the reality that there are other possible reasons and other potential groups in society that may use subversive advocacy for its instrumental purpose, none of which necessarily have to be fighting injustice. The possibility of this scenario casts doubt on the existence of such political virtue but, more importantly, on the idea of unfettered subversive advocacy.

But this possibility has greater implications and leads to the broader argument being advanced: On Rawls’s view, only specific types of free political speech are justified. Recall that Rawls derives a right of free speech from his conception of the person and the priority of the liberties. Specifically, he justifies free political speech by stating that

liberty of thought is necessary to protect the exercise of our public use of reason in the first fundamental case. So far this is agreeable. However, what does not follow from this reasoning is a justification of all types of political speech. That is, Rawls's reasoning may convince us that public use of our reason is legitimate in a democratic society but provides no evidence to suggest that this is the case with all types of political speech. In fact, this was precisely the reason why we saw earlier some types of subversive advocacy are justifiably restricted. Similarly, Rawls does not account for seditious libel that is not grounded in an expression of our sense of justice (seditious libel that is the result of unfounded accusations against the government, for example).

If this is true, then it means that Rawls has mischaracterized the appropriate restraints on free speech as well. In addition to accepting limitations on time and place, citizens may be forced to accept restrictions on the content on their speech if it is harmful to the liberties of others.⁴ Certain types of speech are destructive to a society and, therefore, may justifiably be restricted. This is contrary to Rawls's assertion that the liberties are self-limiting, as it seems to be the case that the liberties may be restricted for reasons other than equality concerns. In the case of free speech, it seems to be the case that we limit offensive public speech to secure social cohesion or possible danger to society.

This leaves us with a critical question for Rawls' approach to democracy. That is, if it can be proven that certain considerations deny the liberties priority, does this necessarily condemn justice as fairness as a political

4. There may be other situations as well; this is only one possibility.

theory? This seems to be too strong an argument to make. What the preceding remarks imply, however, is that there may be principles other than equality that we appeal to when making certain decisions. If this is true, then Rawls's advocacy for the two principles of justice over the other options in the original position (utilitarianism and perfectionism) loses some appeal. Justice as fairness cannot explain why we would restrict one's liberty in a manner described earlier. Yet the utilitarian school of thought can provide an appropriate explanation: that we restrict one's liberty to secure a greater net benefit of liberties. Even a perfectionist justification would suggest that the government seeks to restrict destructive speech because it is inherently unethical and contrary to a pursuit of virtue. Thus, we need not condemn Rawls's approach to democracy altogether, but we have sufficient reason to be skeptical of the claim that his two principles of justice are the best options available.

It has been argued that John Rawls's argument for a right of free speech is partially unfounded. Additionally, it was suggested that this renders his approach to democracy less convincing as a result. This is not to say, however, that his theory is necessarily inferior to other schools of thought. Rather, it may afford an opportunity for improvement. Fairness is an ideal that should be chief amongst our concerns, but we should give way to other principles when it is appropriate. It may be most appropriate to suggest that we must expect a political theory to provide only ideals for a society, but not be bound to them when the situation is not amenable as such. Justice as fairness fails in a way many theories do—namely, that it purports to do much more than a theory can conceivably do.

REFERENCES

Rawls, John. 1993. The Basic Liberties and Their Priority. In *Political Liberalism*, 288. New York: Columbia University Press.