

LIBERAL EGALITARIANISM, BASIC RIGHTS, AND FREE MARKET CAPITALISM

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A key difference between contemporary liberalism¹ and the liberalism that flowered in the eighteenth and nineteenth centuries—often called classical liberalism—concerns the issue of protection for private property rights or rights in the commercial realm. Both contemporary and classical liberalism support basic² rights in the noncommercial realm—e.g., rights to free speech, freedom of religion, privacy.³ But contemporary liberalism denies that any private property rights, other than the right to have exclusive use of personal property, are basic rights; or to put it a slightly different way, contemporary liberalism denies that there are any basic rights in the commercial realm, or the realm of (widespread) exchange.⁴ This difference between contemporary and classical liberalism leads to or is part of another difference, namely the different types of capitalism that they believe are required by justice. In a sense, contemporary liberalism supports capitalism. Like virtually any reasonable person or position these days, liberalism rejects comprehensive and central planning, and once that is rejected the market must be a central (if not the central) economic institution; furthermore, most contemporary liberals reject the claim that justice requires that most capitalist firms be banned. However, though contemporary liberalism views the widespread use of markets and capitalist firms, and the private property rights that define and constitute such markets and firms, as *permissible*, it does not think that *justice* requires that there be significant limits on the power of democratic majorities to interfere with free markets or the private property rights that define or constitute those markets in capitalism,⁵ which I shall call rights to free exchange or robust private

property rights. I shall call a system of this type, where there are no basic rights to free exchange or significant limits imposed by justice on the power of democratic majorities to interfere with those rights, welfare state capitalism. Classical liberalism rejects welfare state capitalism, and supports what I shall call free market capitalism, a system which includes at least some basic rights to free exchange or basic rights in the commercial realm, and where justice requires that there be significant limits on the power of democratic majorities to interfere with these rights.⁶

Two types of considerations would justify contemporary liberalism's different views about basic rights in the noncommercial and commercial realms. First, contemporary liberalism favors an egalitarian theory of distributive justice, and this might rule out the possibility that any robust private property right is a basic right or that there is a basic right to free exchange. Second, even if liberal egalitarianism is compatible with some basic rights in the commercial realm, if the kinds of values or considerations which justify basic rights in the noncommercial realm do not apply, or do not apply in the same way, in the commercial realm, then arguments for basic rights in the former realm cannot transfer over to the latter realm. I believe that neither possibility holds. A plausible liberal egalitarian theory of distributive justice *is* compatible with at least some basic rights to free exchange, and liberal arguments for basic rights in the noncommercial realm *do* apply and transfer to the commercial realm so as to provide grounds for basic rights to free exchange or robust private property rights. In Sections 1 and 2, I defend the former point, and in Section 3, I provide some considerations that make the latter point plausible. If both points are sound, then the kind of premises and arguments that contemporary liberalism employs compels it to recognize basic rights in the commercial realm and, like its classical liberal progenitors, endorse free market capitalism as a matter of justice.⁷

1. The Apparent Conflict between Liberal Egalitarianism and the Basic Right to Free Exchange

In order to show why liberal egalitarianism does not in fact conflict with basic rights to free exchange, one must first see why it appears that this conflict exists. That is the aim of this section.

The apparent conflict between basic rights in the commercial realm and an egalitarian distributive justice can plausibly be understood in one of two ways. First, since basic rights and egalitarian principles are part of the same *subject matter*, namely a theory of justice, there is no reason why information obtained from one part of a theory of justice cannot affect conclusions about the other part. Accordingly, egalitarian principles of distributive justice should be derived in conjunction with basic rights, and if

we are convinced that something like Rawls's difference principle is correct (requiring that social and economic inequalities be to the greatest advantage to the worst off), then we would hesitate to endorse such rights. Second, it is unclear that principles of basic rights have greater *weight* than egalitarian principles. Egalitarian principles of distributive justice might themselves be formulated in terms of rights (e.g., welfare rights) which could take priority over rights to free exchange. Even if egalitarian principles are not formulated in terms of rights, it is unclear that they are outweighed by basic rights in the commercial realm. While rights are often defined so that they typically trump nonrights considerations, it is less clear that they trump nonrights considerations that *are part of a theory of justice*. Thus, basic rights in the commercial realm may have to be restricted and perhaps even rejected when they conflict with egalitarian requirements. While neither the fact that a theory of basic rights is part of a theory of justice nor the fact that it can be outweighed by egalitarian principles *guarantees* a conflict between basic rights in the commercial realm and liberal egalitarianism, it makes this conflict a genuine possibility, and so the former may have to be sacrificed for the latter.

What is the correct formulation of a liberal egalitarian theory of distributive justice? While principles like the difference principle which focus their attention on benefiting the worst off may seem to give a roughly adequate characterization of liberal egalitarianism, in fact these *cannot* be liberal principles. To see why, consider the following example from Will Kymlicka, who asks us to imagine

two people of equal natural talent who share the same social background. One wants to play tennis all day, and so only works long enough at a nearby farm to earn enough money to buy land for a tennis-court, and to sustain his desired lifestyle (i.e. food, clothing, equipment.) The other person wants a similar amount of land to plant a garden, in order to produce and sell vegetables for herself and others. Furthermore, let us imagine ... that we have started with an equal distribution of resources, which is enough for each person to get their desired land, and start their tennis and gardening. The gardener will quickly come to have more resources than the tennis-player, if we allow the market to work freely. While they began with equal shares of resources, he will rapidly use up his initial share, and his occasional farm work only brings in enough to sustain his tennis-playing. The gardener, however, uses her initial share in such a way as to generate a steadier and larger stream of income through larger amounts of work.⁸

The tennis-player has less income than the gardener, but this is

clearly a chosen inequality; he has different preferences for the tradeoff between increased income and leisure than the gardener, and as a result he chooses leisure where she chooses income, though given the example, he could have chosen just the way she did (and vice versa).⁹ A liberal cannot object to this inequality of income. As I shall indicate in Section 3, a key component of liberalism is that there is a right to act in accordance with one's choices, and accordingly liberals must also believe that one is responsible for those choices and the costs of those choices. Freedom implies responsibility, in this context, because it would be unfair or unreasonable for the rightholder to ask those who are under obligations to respect his rights not to interfere with the rightholder's choices *and* then to also ask these others to bear the costs of those choices. The unfairness or unreasonableness of requiring someone to subsidize the cost of someone else's choices is heightened when such subsidization means the subsidizer loses some or all of the benefits obtained from her free choices. In Kymlicka's tennis-gardening example, if the tennis-player is considered not to be responsible for the cost of trading off income for leisure, and if we, say, tax the gardener to raise the tennis-player's income, then what occurs is that the gardener loses some or all of the benefits of increased income which arise from her free choices, while the tennis-player retains the benefits of his increased leisure without paying the costs of lost income. Since there is no reason why liberals should favor tennis-playing over gardening, and since both persons' situations could have been reversed had they wished, there are no liberal grounds for "correcting" the inequality of income between the gardener and the tennis-player.¹⁰

In one sense, what I am saying is uncontroversial. That you are responsible for the costs of your own choices, and that consequently it is unjust that others should subsidize those costs, is a central element of Ronald Dworkin's conception of liberal egalitarianism.¹¹ Rawls recognizes it as well in the context of discussing an objection to his view that primary goods are the appropriate metric for determining in what it is that people should be equal. (Primary goods are basic rights, freedom of movement and free choice of occupation against a background of diverse opportunities, powers and prerogatives and offices of responsibility, income and wealth, and the social bases of self-respect.) The objection is that primary goods are an inappropriate egalitarian metric because two people could have equal income and wealth but have unequal satisfaction, if one person has expensive tastes (e.g., exotic foods and fine wine) while the other has cheaper tastes (e.g., is satisfied with a diet of beans, bread, and milk):

The reply is that as moral persons citizens have some part in forming and cultivating their final ends and preferences. It is not in itself an objection to the use of primary goods that it does not accommodate those with expensive tastes. One must

argue that it is unreasonable, if not unjust, to hold such persons responsible for their preferences and to require them to make them out as best as they can. But to argue this seems to presuppose that citizens' preferences are beyond their control as propensities or cravings which simply happen. Citizens seem to be regarded as passive carriers of desires. The use of primary goods, however, relies on a capacity to assume responsibility for our ends. . . . [P]rinciples of justice view citizens as responsible for their ends. In any particular situation, then, those with less expensive tastes have presumably adjusted their likes and dislikes over the course of their lives to the income and wealth they could reasonably expect; *and it is regarded as unfair that they should have less in order to spare others from the consequences of their lack of foresight or self-discipline*.¹²

Once this principle of responsibility for one's own choices is accepted by Rawls and other liberals, it follows that it is unjust to subsidize people's choices; and so the difference principle and relevantly similar principles which place significant priority on helping the worst off must be rejected, or their characterization of the "worst off" must be revised. To focus on helping the worst off per se does not distinguish between those who are worst off through no fault of their own, and those whose choices made them worst off. Without such a distinction, egalitarian principles could easily justify subsidizing people's choices, and this is clearly unjust on liberal grounds.¹³

A plausible version of liberal egalitarianism, then, will distinguish between chosen and unchosen inequalities or disadvantages. Rather than inequalities or disadvantages per se calling for redress or correction of some kind, the liberal egalitarian view is, roughly, that unchosen disadvantages or inequalities call for redress or correction.¹⁴

To apply a principle of this type, we need to have some idea of what sorts of things are chosen and unchosen. This issue has been the focus of some very interesting work in philosophical liberalism in the last fifteen years.¹⁵ Not surprisingly, there is disagreement among liberals here, but there are paradigm cases. Choice enters very little, if at all, into one's sex, race, family and social background, genetic make-up, physical and mental handicaps that one was born with or received in an accident, and natural talents—though with regard to the last item mentioned, one could have chosen to develop or not develop one's talents and accordingly be held responsible for success or failure in that regard.¹⁶ Paradigm cases of things which are or at least could be chosen are voluntarily acquired tastes, ambitions, preferences, plans, and the development of one's talents—though these will not be listed on the choice side of the spectrum to the extent that they are regarded as obsessions, cravings, and the like, or to the extent

that one had deficient opportunity to acquire alternative tastes, ambitions, etc. We also should distinguish between disadvantages which one did not choose, but which one could now overcome, and those which one did not choose and cannot now overcome. The case for redress or correction is stronger in the second case than in the first.

An example of a liberal egalitarian principle of distributive justice, which I shall henceforth use as my paradigm case, is G. A. Cohen's principle of *equal access to advantage*, where "advantage" is understood very roughly as valuable things, i.e., those things which *ceteris paribus* help one's life go well or help one to achieve one's goals and projects (and thus need not connote having an advantage *over* someone else).¹⁷ Notice that the principle is not that people should have equal advantages, since that would neglect the crucial point that these may be unequal because of choices one is making or has made. Equal *access* to advantage connotes the idea that if one is disadvantaged in some way, justice requires that it be a disadvantage which is a product of one's choices.¹⁸ *Equal access* connotes the idea that if those disadvantages are not a product of one's choices, then justice requires that the gap between the advantaged and the disadvantaged's access to valuable resources, opportunities, etc., be eliminated (to the extent that this is possible). It is the latter point that makes the principle egalitarian.¹⁹

Cohen's principle of equal access to advantage, or any relevantly similar liberal egalitarian principle, appears to conflict with basic rights in the commercial realm, because real free market exchanges, unlike Kymlicka's tennis-gardening example, are influenced and constituted by mixtures of unchosen disadvantages and genuine choices. (Recall that in Kymlicka's example the resulting inequality of income was due solely to different preferences for the income-leisure tradeoff.) Those suffering from unchosen disadvantages in the commercial realm might have their situation improved if rights to free exchange or robust private property rights could be significantly regulated or restricted, and liberal egalitarianism appears to make it at least *permissible* to restrict such exchanges in service of the egalitarian requirement. Thus, the arguments for basic rights in the commercial realm would at the very least have to be weighed against the need to meet the egalitarian requirement, and since it is not obvious that the former necessarily defeats the latter, we could no longer be confident that significant restrictions on private property rights or rights to free exchange would have to be rejected as injustices. Liberals could still reject such policies as unwise, inefficient, and the like, but there would no longer be in-principle objections to such policies.

Notice also that the conflict described here could occur even if one weakened the egalitarian bite of liberal principles of distributive justice. Rather than *equal access* to advantage, liberals might rest content with minimizing or reducing the gap between the involuntarily disadvantaged and the advantaged vis-à-vis access to valuable resources, opportunities, etc., in

the commercial realm. This still apparently causes a conflict, since it would still be permissible to minimize or reduce that gap by restricting the right to free exchange. One could deny that there is a conflict here by claiming that principles of distributive justice can have no effect on or are always trumped by basic rights, but as I have already argued, such claims are quite problematic, if not clearly false.

To summarize, then: Once we realize that liberal egalitarian principles and principles of basic rights are part of the same subject matter (a theory of justice), and that it is not obvious that the former are always outweighed by the latter, then the content of liberal egalitarian principles—to at least minimize the gap between the advantaged and the involuntarily disadvantaged—implies that limiting or eliminating rights to free exchange is permissible.

2. The Compatibility of Liberal Egalitarianism and the Basic Right to Free Exchange

The conflict between liberal egalitarianism and basic rights in the commercial realm comes with a heavy price. The problem is that it is not just market exchanges that are affected and constituted by both choices and unchosen disadvantages. The same is true for interactions in the noncommercial realm—indeed, life itself is a mixture of choices and unchosen disadvantages. Thus, if the permissibility of narrowing the gap between the involuntarily disadvantaged and the advantaged undermines the case for a basic right to free exchange, *it also undermines the case for any of the basic rights that liberalism defends*. Consider, for example, the basic right to free speech and its relationship to articulateness. Clearly, being inarticulate is a disadvantage. First, the exercise of the right to free speech by those who are articulate will, all other things being equal, be more likely to help them achieve their goals as compared with the ways in which the exercise of this right by the less articulate will help *them* to achieve *their* goals. Second, in a competitive interaction between the articulate and the inarticulate for the same goal, the latter's chances of achieving that goal are low because of the presence of the former (and in some cases the inarticulate's overall position is worsened because of the presence of the articulate). It is also clear that while being articulate may depend in part on one's choices (e.g., whether to develop one's capacity to communicate or to pursue a career where articulateness is called for), it frequently depends upon unchosen circumstances—e.g., whether one was born into a family or social background that valued and stressed articulateness, the type of teachers one had, whether one stuttered as a child, etc. Now if the permissibility of correcting for significant unchosen disadvantages means that one does not have a basic right in a realm where such disadvantages exist, then

there is no basic right to free speech—or at least no basic right to free speech as liberals understand it. For if it is permissible for the state to correct for the unchosen disadvantages that the inarticulate face in the realm of communication, then (assuming for the moment that we had accurate information concerning which disadvantages are genuinely unchosen) the state could in principle (a) intervene in or oversee communications to make sure that the inarticulate's situation was not being worsened because they were inarticulate, and/or (b) prevent the articulate from acting in accordance with their choices where this might competitively disadvantage the inarticulate. Option (a) is incompatible with the notion of a *basic* right, since it allows ubiquitous intervention in the realm of speech, and option (b) is incompatible with the notion of a *basic right*, since a group of people (the articulate) no longer have the right to act on their choices in a way that advances their conception of the good.

A liberal might reply that the egalitarian principle calling for correcting unchosen disadvantages is limited in *scope*: it applies only in the commercial realm, or can be used only to restrict or void robust private property rights. The reason for the scope limitation is twofold: (1) the aim of rectifying unchosen disadvantages in the noncommercial realm is more likely to succeed if one does *not* eliminate or restrict basic rights in that realm, while (2) the aim of rectifying unchosen disadvantages is more likely to succeed in the commercial realm if one *does* limit or void robust private property rights. Proposition (1) is true because some of the disadvantages in the noncommercial realm are simply not rectifiable, while others are most easily rectifiable by economic means. For example, some of the disadvantages of the inarticulate may be due to genetic factors or personality traits that may be too deeply ingrained to correct, while others can be rectified without violating rights to free speech, by giving the inarticulate greater economic resources which they can use to purchase goods and services which can make them more articulate (better education, speech lessons, etc.). Proposition (2) is true because the inequalities or disadvantages in question are economic inequalities or disadvantages, and thus it makes sense to address them by limiting or changing the structure of private property rights. Both (1) and (2) presuppose that any liberal principle of justice endorses a course of action only if it has a reasonable chance of succeeding, and this is a requirement of any sensible principle of justice.

I have two objections to this liberal reply. First, while (1) sounds plausible, and I will not challenge it, (2) is problematic. It is not obvious that unchosen disadvantages in the commercial realm can be most successfully rectified by limiting or eliminating basic rights in that realm, for the disadvantages in that realm may be caused by disadvantages elsewhere, and thus it could turn out that limiting basic rights in the commercial realm may be ineffective or counterproductive. If A has less income or wealth than B due to A's involuntary circumstances, this could be because A had

deficient opportunities to acquire such wealth or income, but it could also be because A has a sour disposition which makes him unable to take risks, or because A lacks self-discipline due to his family background, etc. If we, say, limit B's private property rights so that he will generate less income or wealth, or redistribute some of B's property to A, this may not rectify A's unchosen disadvantages, for if the cause of those disadvantages was still operative, it would likely cause a big gap between A's and B's income and wealth in the future. Indeed, the redistribution of B's property could worsen A's situation if, for example, it weakens his self-discipline, etc. This is an abstract example, but the debate about whether the growth of the urban underclass in this country is due to inadequate redistribution of income or an overly generous welfare policy shows that it is not an unrealistic one. The existence of that debate, and the example just given, show why (2) is quite contentious, contrary to first appearances.

Second, and of far greater importance, this liberal reply fails even if one accepts (1) and (2), for their acceptance would not justify violating or restricting basic rights in the commercial realm. Rather, what they justify is the refusal to violate basic rights in the noncommercial realm to satisfy the egalitarian requirement and the permissibility of restricting or eliminating *some* rights in the commercial realm to satisfy that requirement. In order for the liberal egalitarian requirement to conflict with any basic right to free exchange or robust private property right, we would need not (2) but (2'): The aim of rectifying unchosen disadvantages is more likely to succeed in the commercial realm if one *does* limit or eliminate *any* (or *all*) robust private property rights. Proposition (2'), however, must be rejected. For one thing, it is hard to see what the argument for (2') could be. The argument for (2) does *not* transfer to (2'): that a certain *type* of inequality or disadvantage—economic—will most successfully be rectified by restricting or voiding a certain *type* of right—robust private property rights—hardly shows that economic disadvantages are rectified by restricting any or all robust private property rights. In addition, it is not that difficult to show that (2') is false. Recall that I have defined rights to free exchange or robust private property rights as those rights which define and constitute *free markets* in a capitalist society. Since a market is a network of exchanges, one of the most important of these rights is the right to exchange, transfer, or alienate. Now there are a *variety* of ways that this right can be restricted or forbidden. Two principal ways are to restrict or forbid market participants from engaging in certain market exchanges with their property, or to prevent people from entering into a market in the first place. Merely restricting certain exchanges or forbidding people from entering a certain market does not help the involuntarily disadvantaged, since closing off some person's options does not by itself give them new or alternative options, and may in fact harm them if no new options are made available or if the closed off options were an important means by which

they could improve their situation. So (2') is clearly false.

Thus, the claim that liberal egalitarianism rules out any basic rights in the commercial realm or any robust private property rights has run into serious obstacles. If the claim is that basic rights must be restricted or eliminated in order that the gap between the advantaged and involuntarily disadvantaged be lessened (or eliminated, in Cohen's more stringent version), or so that the former can be prevented from exacerbating the gap, then liberal egalitarianism does not just conflict with basic rights in the commercial realm—it conflicts with basic rights, period. If, on the other hand, the claim is that liberal egalitarianism has a limited scope, so that it calls for simply limiting or eliminating rights in the commercial realm, then the best rationale for this scope limitation is compatible with at least some basic rights in the commercial realm.

Perhaps a way out of this problem is for the liberal to reject any basic right to free exchange on the grounds that these rights unduly limit experimentation with different kinds of redistributive policies. The argument contains three parts. The first is the claim that liberalism requires some kind of redistributive policies. Liberal egalitarianism requires that (at least) serious and genuine steps be taken to reduce the gap between the involuntarily disadvantaged and the advantaged. Now it is generally quite difficult to determine, in the real world, on an *individual* level, to what extent one's disadvantages are unchosen or chosen. Even a person who is born with what are typically disadvantages is not, as an adult, simply the sum total of those unchosen disadvantages, and so it will be hard to tell to what extent she is responsible for her situation. Furthermore, it would be intolerably invasive of one's right to privacy to try to determine to what extent one's disadvantages are unchosen. (Imagine: "Hello, I'm from the government, and I'm here to find out to what extent your lack of initiative is your own fault.") But if we move to the level of *class*, occupations, social roles, etc., we can make some reasonable determinations, namely that the least affluent members of society, those in the most socially undesirable occupations, etc., generally suffer from the greatest number of involuntary disadvantages. Now since income, property, etc., can often compensate for or mitigate many of those disadvantages, some kind of redistribution from the affluent to the less affluent is justified. Admittedly, any such redistribution will end up subsidizing people's choices, for reasons set out in the tennis-gardening example, and some disadvantages cannot be compensated for by economic means; but under the circumstances, it is the best we can do.

That liberalism justifies *some* kind of redistribution from the affluent to the less affluent does not rule out *all* basic rights to free exchange or robust private property rights. There are many kinds of redistributive policies; an example of one which still leaves considerable protection for rights to free exchange is a "safety net," i.e., a straight redistribution of income

from the more affluent to the less affluent. One reason income redistribution leaves considerable protection for rights to free exchange stems from the concept of a free market. We already noted that the essence of a market is the right to exchange. Now when the government takes some of one's income that one derives *from* market exchanges, it is not thereby regulating or forbidding those exchanges.²⁰ A restriction on the right to one's income derived from market exchanges is not the same as a restriction of the right to exchange. Another reason redistribution of income is not a major threat to rights to free exchange or robust private property rights stems from the concept of private property. Jeremy Waldron has made a plausible argument that the basic element in the concept of private ownership is that the owner of a resource is the person who has the final say over how it is to be used; when there is more than one person who has authority to determine how a resource is used, the owner is the person who can be shown to have delegated that authority to the others.²¹ In free market capitalism, decisions about who should have the final say over how a resource is used are decided largely by voluntary transfers. Safety nets do not disrupt this; in this sense, a redistribution of income is not a redistribution of property.

However, some redistributive policies are clearly more of a threat to basic rights to free exchange or robust private property rights. Prohibition of certain voluntary exchanges (e.g., price, wage, and rent controls) would count as serious threats to free markets, while the policy of "property-owning democracy" favored by some liberals²²—which would redistribute property by, for example, compelling large firms to give workers shares of the firm—would count as a serious threat to private property rights, since it would significantly compromise the extent to which voluntary transfers determine who has final say over how resources are used.

We now arrive at the second step of the argument, which is that liberals disagree about the kind of redistributive policies that would move us closer to a society that instantiates liberal egalitarianism.²³ One reason they disagree is that presumably the most justifiable redistributive policies would be those that have the greatest chance of rectifying the chief sources of unchosen disadvantages, and liberals have no systematic theory about the main *sources* of unchosen disadvantages. (Notice that the view that many unchosen disadvantages can be mitigated by, e.g., redistribution of income or property does not imply that inequalities of income or property are the main source of unchosen disadvantages.) Indeed, liberals do not even have a developed theory of what the chief *disadvantages* are:²⁴ a disadvantage, as I noted earlier, is something which *ceteris paribus* makes one's life go badly or prevents one from pursuing one's projects or conception of the good; but whether the main disadvantages or causes of other disadvantages are due to property ownership, income, natural talents, character traits, etc., is not clearly articulated in liberalism. This takes us to the third and final

step of the argument, which is that since there is such disagreement, and since *justice* requires that we move in a liberal egalitarian direction, we need to leave open the possibility of many different kinds of redistributive policies. Basic rights to free exchange will block at least some of these policies, and so, this argument concludes, we must reject all of these rights, on the grounds that we need to leave open as many democratic means as possible for achieving the end of liberal justice.

I agree that liberalism requires some sort of redistributive policies. But the fact that liberalism has neither a systematic theory of disadvantage nor of the chief sources of unchosen disadvantages means that the basis for selecting any particular redistributive policy as the best justified within liberalism is likely to be highly speculative. To then use this speculation as a basis for arguing that any redistributive policy which *might* be required by liberal egalitarianism should be pursuable by democratic means is a quite suspect way of showing that liberalism must reject any basic right to free exchange. Arguments *for* basic rights to free exchange which employed premises that were more securely grounded within liberalism would defeat such a speculative argument. In the next section, I shall indicate how one could set out such arguments, by employing the kind of premises that liberals use to establish basic rights in the noncommercial realm. Since arguments for basic rights in the noncommercial realm are quite secure within liberalism, support for basic rights to free exchange which is based on those arguments provides a firm ground for those rights within liberalism. When a fairly well-grounded claim within liberalism meets a highly speculative claim, the former beats the latter; thus, whatever egalitarian policies are most consonant with liberalism must not infringe upon basic rights to free exchange.

3. How Liberals Can Justify Some Basic Rights to Free Exchange

With liberal egalitarianism no longer an obstacle to deriving basic rights in the commercial realm, I shall now show how liberalism could justify these rights, using one type of argument²⁵ liberals employ to derive basic rights in the noncommercial realm. My aim here is to make an in-principle case *that* liberalism supports such rights, rather than deriving specific basic rights to free exchange.

At the root of liberal arguments for basic rights is a notion of respect or concern for persons.²⁶ Liberals understand this idea, and connect it to arguments for basic rights, in three different (and overlapping) ways. First, respect for persons means allowing persons the freedom to develop and exercise those capacities that are considered essential or important to being a person. So, Rawls, for example, justifies basic rights by arguing that they are necessary for the development and exercise of a person's capacity for a

conception of the good (the capacity to form, revise, and act on beliefs about what ends are valuable and important) and a sense of justice (the capacity to apply, understand, and be motivated by principles of fair cooperation), which Rawls believes are the most important capacities of a person, as far as political philosophy is concerned.²⁷

Another liberal view is that to show respect or concern for a person is, in part, to show respect or concern for that person's *good*.²⁸ Liberals think that the freedom and protection from coercive interference provided by individual rights is instrumental to a good life (a necessary means) or is constitutive of that life. It is instrumental because the successful achievement of most if not all plans and projects requires the freedom to act in accordance with one's choices, and even if one's life plan *at present* does not require that freedom, a rational person will at some point need to evaluate and possibly revise his conception of the good, and thus needs that freedom in order to discover or construct a life which is best for himself.²⁹ That freedom is constitutive of one's good if a central aspect of a person's good is autonomy,³⁰ or if one believes that it is good to exercise and develop one's fundamental capacities as a person (e.g., one's capacity for a conception of the good and a sense of justice).³¹

A third liberal line of argument is that respect for persons is demonstrated by appealing to citizens' capacity for reason as well as their sense of reasonableness or fairness in order to decide or discover which principles of justice are legitimate.³² We do this by determining what principles of justice rational persons who are aiming to find principles of fair social cooperation would or do unanimously consent to, or would find justifiable. Principles of individual rights would unanimously be agreed to or found justifiable by such persons, since, for the reasons just mentioned, the freedom such rights provide is a means to their good and/or part of their good.

The respect-for-persons theme justifies standard basic rights in the noncommercial realm such as freedom of speech, freedom of religion, and privacy, on the grounds that communication, religion, and private and intimate relationships are areas of choice which are central to and/or necessary for projects and plans of life, regardless of the particulars of the project or life plan. Thus, these areas of choice are means to and/or part of everyone's good (the second interpretation of the respect theme); accordingly, each rational person could and would want protection for such choices (the third interpretation), and they would likely be involved in the exercise of one's capacity for a conception of the good (the first interpretation).

However, one's choices as a seller or buyer are means to and/or constitute one's good as much as do one's noncommercial activities. Choices about what to buy, where to shop, where to work, the tradeoff between work and leisure, the degree to which one takes risks, investment decisions, one's time-preference, etc., all clearly constitute and reflect one's concep-

tion of the good as much as do decisions about communication, religion, etc. Thus, the respect-for-persons theme supports basic rights in the commercial realm.

One response to the above argument is that one's commercial activities are means to and/or constitute one's good *only if* one has an adequate or significant amount of resources. Inadequate resources³³ prevent choices in the commercial realm from being means to and/or constitutive of one's good because they force one to make significant tradeoffs. If most of one's time and energy is spent trying to earn a rather meager living, one cannot really achieve what one really wants or what is of genuine value. Thus, commercial choices are not important for everyone or almost everyone's projects or plans of life.

This objection presupposes that making tradeoffs and the pursuit or construction of a good life are mutually exclusive. They are not: the good life is not limited to those values or activities that one is unwilling to trade off or sacrifice. Indeed, in making tradeoffs, one's conception of the good life often plays a role. Even if one's commercial choices are more constrained than one would prefer, or constrained to the point that one is not in an effective position to choose those options that would best reflect one's view of the good life, so long as there are some choices and different bundles of options, one's view of the good can play a nontrivial instrumental or constitutive role in the commercial realm. Another problem with the objection is that tradeoffs are ubiquitous in life, and exist in both the commercial and noncommercial realms. In the latter realm, we often cannot assign a monetary value to the option forgone, but clearly there are costs of forgone options. So if the existence of tradeoffs in a certain realm precludes the possibility of defending basic rights on the grounds that the freedom they protect is a means and/or part of one's good, then rights in general cannot be defended this way.

At this point, the objection may shift to the claim that at times one's choices are so constrained that, for all practical purposes, it is fair to say one has *no* choice in the commercial realm. In that case, basic rights in the commercial realm cannot possibly be justified in the ways set out above, for that defense required that the freedom basic rights protect be understood in terms of protected choices or options. Thus, the objection now shifts from the case of someone with inadequate resources to someone who is on the verge of starvation, or something to that effect. I grant that as options get narrower or fewer, at some point it becomes fair to say that one has no choice, and that this can occur in the commercial realm. However, once one reaches this point, the person's options are narrowed everywhere. If one is on the verge of starvation, it is not as if one can be said to have a choice about whether or not to engage in a political demonstration—one simply has to get food, or die. So if the existence of cases of dire necessity precludes the defense of basic rights in the commercial realm, it would

similarly preclude the defense of many³⁴ rights in the noncommercial realm.

A different objection to my argument that the respect theme can support basic rights in the commercial realm is that commercial activities have only an accidental connection with a person's understanding of her own good. A remark made by Rawls might favor this view:

The capacity for a conception of the good is the capacity to form, revise, and rationally to pursue a conception of one's rational advantage, or good. In the case of social cooperation, this good *must not be understood narrowly* but rather as a conception of what is valuable in human life. Thus, a conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups or associations. . . . Moreover, we must include in such a conception a view of our relation to the world—religious, philosophical, moral—by reference to which the value and significance of our ends and attachments are understood.³⁵

It is true that commercial activities are not a necessary means or an essential part of "a conception of the good" as defined above by Rawls. But the same is true of the basic rights that liberals defend. Even the right to freedom of religion, which seems to fit best what Rawls has in mind, might fail to be a necessary means or an essential part of a conception of the good as he understands it, because many people in modern democratic societies do not even in the realm of religion have a relatively determinate set of final ends and/or a definite sense of the value and significance of those ends.

Rawls's motivation for a broad characterization of a conception of the good is understandable; the term has an inherent vagueness and presumably should not cover every preference, or every view about value. But it is a mistake to characterize the term so that only the unusually thoughtful have a conception of the good. In this regard, Dworkin's statement that "the scholar who values a life of contemplation has such a conception [of the good life]; so does the television-watching, beer-drinking citizen who is fond of saying 'This is the life', though he has thought less about the issue and is less able to describe or defend his conception"³⁶ is more on target. In this more modest notion of a conception of the good (where it need not be fully determinate, articulated, or comprehensive in scope), commercial activities are clearly an essential part of or means to it, for reasons already mentioned.

Since interferences with commercial activities or choices can undermine respect for persons as much as does interference with noncommercial

activities or choices—and since (as noted in the last section) of the various private property rights that constitute or define free markets, the right to exchange or transfer is clearly a central right—I have shown that at least *some kinds* of interferences with free exchange violate basic rights. I cannot here argue for specific rights to free exchange. But I can provide some considerations which suggest two likely candidates for such rights: the right to exchange at free market prices and the right to free entry.

Elsewhere I have argued that price (or wage, or rent) controls disrupt people's plans by producing shortages and surpluses, and that they do this by blocking and distorting information about the results of constantly changing economic realities—information that would be more available and accurate were it communicated by free market prices.³⁷ Assuming that earlier argument is sound, then price controls—that is, interference with free market prices—are the kind of interference with decisions to exchange that manifests gross disrespect for persons. If the government blocked and/or distorted information which was essential for people's (peaceful) choices in the noncommercial realm, this would suffice to ground the liberal judgment of gross disrespect for persons and the judgment that a basic right (the right to free expression) had been violated. By parity of reasoning, liberals should judge that such blockage and/or disruption in the commercial realm also violates basic rights.³⁸

Another systematic interference with free markets that liberals should condemn as a basic rights violation is the imposition of barriers that block innovation and the discovery/creation of new opportunities. Liberalism supports an economic system which provides a wide scope for innovation and creativity because, as we have seen, one argument for basic rights is that they provide for the freedom to revise one's plans and projects, so that people can discover what is really good for them or gives value to their lives. This process is blocked when the state places barriers to participating or entering into markets. The state barriers that most clearly block free entry are restrictions on the type of occupation or business one wishes to enter, since for most people decisions about what type of job or business to enter are a central means (either instrumentally or constitutively) by which they pursue and/or revise their conception of the good. Thus, laws forbidding one to enter a certain business or offer a certain service—laws creating state monopolies—violate the basic right to free entry. So do licensing laws, which sharply limit who can enter an occupation or business by making it a crime to offer one's services unless one has taken a lengthy and costly state-approved program of study. Concerning the latter, it needs to be emphasized that licensing goes beyond certification, which is a method of indicating that a person has undergone a certain type of study or passed certain requirements. Certification of certain professions allows noncertified people to practice in the field and is compatible with the right to free entry. Licensing is a violation of the right to free entry not because of the

information-supplying feature it shares with certification, but because it goes beyond certification by making it a criminal offense for nonlicensed practitioners to offer their services.

Since I have only provided argument sketches for specific basic rights to free exchange, I do not claim to have provided an iron-clad case that contemporary liberalism must support free market capitalism as a matter of justice. However, since liberal egalitarianism poses no barrier to the recognition of basic rights to free exchange, and since the kinds of considerations that support basic rights in the noncommercial realm apply in the commercial realm, I have laid the groundwork for such a case.³⁹

1. In this paper, this term refers to the liberalism found in the writings of Bruce Ackerman, Ronald Dworkin, Will Kymlicka, Charles Larmore, Thomas Nagel, John Rawls, and David A. J. Richards.

2. A basic right has a considerable degree of moral weight, so that it typically defeats perfectionist claims and claims of societal or aggregate well-being. A more stringent definition of a basic right, favored by Rawls, is that it has, for all practical purposes, an *absolute* weight vis-à-vis perfectionist claims and claims of societal or aggregate well-being. See Rawls, "The Basic Liberties and Their Priority," in *Tanner Lectures on Human Values III* (Salt Lake City: University of Utah Press, 1982), p. 8. Rawls's definition is a bit idiosyncratic and will not be used here.

3. Since basic rights to free speech, freedom of religion, etc., have implications for private property rights, they could be considered to be "in" the commercial realm as well. For example, the right to free speech protects the right of an owner of a newspaper or television station to publish or broadcast unpopular and even subversive political opinions. However, rights to free speech, freedom of religion, etc., are not usually taken by contemporary liberals to be private property rights, nor are arguments for such rights taken to be arguments for private property rights. The implications these rights have for private property rights are usually considered by liberals to be secondary or derivative.

4. A right to the exclusive use of X does not necessarily give one the right to exchange or alienate X; that is why the recognition of a basic right to the exclusive use of personal property does not imply that there are basic rights to free exchange or basic rights in the commercial realm.

5. Not all of the liberals mentioned in note 1 *explicitly* deny (a) that there any basic rights in the commercial realm, or (b) that free market capitalism is required as a matter of justice. Rawls, Ackerman, and Kymlicka do explicitly deny (a) and/or (b). For Rawls, see "Basic Liberties," p. 12; for Ackerman, see *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), pp. 261-64; for Kymlicka, see *Contemporary Political Philosophy* (Oxford: Clarendon Press, 1990), pp. 85-89. Others do not explicitly deny (a) and/or (b), but in their discussion of basic rights there is rarely any mention of basic rights in the commercial realm. This is true, roughly, for Larmore and Richards. See Larmore, *Patterns of Moral Complexity* (NY: Cambridge University Press, 1986) and Richards, *Tolerance and the Constitution* (NY: Oxford University Press, 1986). Still others are harder to pin down. Thomas Nagel is rather unclear about this matter; see his *Equality and Partiality* (NY: Oxford University Press, 1991), pp. 75-76, 142, versus pp. 141, 144. Dworkin supports robust private property rights at the level of what he calls the ideal world, but when we get to what he calls the real, real world, such rights become fairly weak; see his

"What Is Equality? Part III: The Place of Liberty," *Iowa Law Review*, vol. 73 (1987), pp. 48-52. Thus, as a general group it is fair to say that they do not grant (a) and (b).

6. Notice that "free market capitalism" is *not* equivalent to libertarianism. That free market capitalism places significant limits on legislatures' power to interfere with free markets does not imply that all limitations are unjustified. Thus, as I use the term, free market capitalism is compatible with some redistributive policies. See Section 2.

7. For the rest of the paper, "liberals" and related terms refer to those liberals cited in note 1 or to other writers who have advanced our understanding of contemporary liberalism.

8. Kymlicka, *Contemporary Political Philosophy*, pp. 73-74.

9. Assuming that there is no strange psychological compulsion or the like which makes the gardener and tennis-player have no choice about which occupations they choose.

10. Someone might argue that this example does not show that egalitarian principles like the difference principle cannot be liberal principles, since the inequality in income did not make the tennis-player worse off, because he is pretty much doing what he wants and he achieves a high level of satisfaction. This argument has three flaws. First, Rawls's usual definition of the worst off is in terms of their income and wealth positions. Second, for reasons to be discussed shortly, liberals cannot define the worst off or the disadvantaged simply in terms of low levels of satisfaction, happiness, or some favorable psychological state. Third, even if one objects to Kymlicka's example, it is not difficult to come up with an alternative example that makes the same point: inequalities that result from one bearing responsibility for one's choices or the cost of one's choices cannot be considered by liberals to be unjust, and hence any principle of distributive justice which condemns them is mistaken.

11. Ronald Dworkin, "Liberalism," in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), p. 193. This idea is essential to the egalitarian theory Dworkin calls equality of resources. See "What is Equality? Part I: Equality of Welfare," and "What is Equality? Part II: Equality of Resources," *Philosophy & Public Affairs*, vol. 10 (1981), pp. 185-262, 283-345. Nagel also builds a responsibility condition into his formulation of egalitarianism; see *Equality and Partiality*, p. 71.

12. John Rawls, "Social Unity and Primary Goods," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (NY: Cambridge University Press, 1982), pp. 168-69; italics added. Rawls also emphasizes the role of responsibility in "Kantian Constructivism in Moral Theory: The Dewey Lectures," *Journal of Philosophy*, vol. 77 (September 1980), p. 545. Rawls's criticism shows what is wrong with egalitarian principles that are purely welfarist, that is, that aim solely at rectifying or reducing deficiencies or inequalities in happiness, satisfaction, or some valuable psychological state of the person. Rawls's (and Dworkin's) version of egalitarianism is resourcist; that is, it aims at reducing deficiencies and inequalities in resources, opportunities, capacities, and the like. For my purposes here, the dispute between resourcist and welfarist egalitarian theories is not important, except insofar as it bears on the question of choice and responsibility for inequalities and disadvantages.

13. It will not do to reply that the difference principle is concerned with the basic structures, that is, the fundamental institutions in society, rather than to micro-examples such as the Kymlicka tennis-gardening example. The point is that the statement of the difference principle is completely insensitive to the difference between inequalities which are produced through choice and those which are not. And once fundamental social and political institutions are directed to follow the difference principle, this can easily justify these institutions subsidizing people's choices.

14. Since the difference between what is chosen and what is unchosen lies on a continuum, presumably liberals favor correcting for disadvantages to the extent that they are significantly unchosen, or nonvoluntary.

15. For a superb summary of much of this literature, see G. A. Cohen, "Currency of

Egalitarian Justice," *Ethics*, vol. 99 (July 1989), pp. 906-44.

16. Dworkin mistakenly places talents and abilities completely on the unchosen side. For an exhaustive discussion of Dworkin's theory, see *ibid.*, pp. 916-34.

17. The principle is not simply equal opportunity for advantage, for as Cohen points out in *ibid.*, pp. 916-17, one may have deficient personal capacities, and this could not be plausibly described as a lack of opportunity. Your opportunities are the same whether or not you are weak or stupid; but if you are either of these, you cannot use these opportunities very well, and thus you are disadvantaged.

18. Unfortunately, the principle of equal access to advantage has the rather unnatural-sounding implication that something one has is something one has access to, but it is hard to know what other term would suffice.

19. For a clear discussion of the concept of an egalitarian principle, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 216-33. Raz provides convincing arguments against Dworkin's view that any principle is egalitarian if it expresses the moral equality of persons, i.e., any principle of respect or concern for persons. On Dworkin's understanding of egalitarian principles, see his "What is Equality? Part III," pp. 10-12.

20. Of course, as the level of the tax rises, the *effects* could be the same as a prohibition or a restriction on one's right to exchange. The point, though, is that the tax per se is not a restriction on that right.

21. See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), pp. 37-39, 47-53, 55-57. The concept of (private) ownership should be distinguished from different conceptions of that concept. One gets those different conceptions by arguing that different combinations of claims, liberties, powers, and immunities best capture the rationale for private ownership.

22. For example, by Kymlicka; see *Contemporary Political Philosophy*, pp. 88-89.

23. Thus, Rawls favors a redistribution of property, while Dworkin favors a redistribution of income. For a discussion of the disagreement, see *ibid.*, pp. 87-89.

24. Cohen acknowledges this in "Currency of Egalitarian Justice," pp. 920-21. He refers there to his own theory, but one can find the same problem in all the liberal theories I am concerned with here.

25. I believe that *all* of the arguments liberals use to derive basic rights in the noncommercial realm can be applied in this way, but I do not need to show that given my purposes here.

26. I have avoided the phrase *equal* respect or concern, because the notion of equality is not necessary here. If some aspect of personhood is the property which is the basis for someone being entitled to a certain type of treatment, then of course anyone who has that property is entitled to that treatment. See Peter Westen, *Speaking of Equality* (Princeton: Princeton University Press, 1990), pp. 72-74; and Raz, *The Morality of Freedom*, pp. 218-20.

27. Rawls, "Basic Liberties," pp. 17-18, 22. (Strictly speaking, Rawls views basic rights as specifying fair terms of social cooperation on the basis of mutual respect, but this point need not concern us here.) For related notions of respect, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 272; and Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (Dordrecht: Kluwer Academic Publishers, 1990), pp. 118-19.

28. Dworkin, "What is Equality? Part III," pp. 7-9. Strictly speaking, what Dworkin says is that "government must act to make the lives of those it governs better lives, and it must show equal concern for each" (p. 7). The "and" implies that equal concern is a separate or separable issue from whether people's lives go well. This, however, is dubious, as Gerald Postema argues in "Liberty in Equality's Empire," *Iowa Law Review*, vol. 73 (1987), pp. 66-70.

29. On rights being means to one's ends, see Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 92, and "Kantian Constructivism," pp. 526-27. On the freedom provided by rights allowing one to discover and revise one's life plan, see Rawls,

"Basic Liberties," p. 27, and Dworkin, "What is Equality? Part III," pp. 34-35 (this is one way of interpreting Dworkin's "principle of authenticity").

30. For a valuable discussion of the complex concept of autonomy, see Joel Feinberg, *Harm to Self* (NY: Oxford University Press, 1986), pp. 27-44.

31. See Rawls, "Basic Liberties," pp. 28-29.

32. This idea is developed in different ways by Larmore, *Patterns of Moral Complexity*, pp. 64-66; Richards, *Toleration and the Constitution*, p. 84; Jeremy Waldron, "Theoretical Foundations of Liberalism," *Philosophical Quarterly*, vol. 37 (1987), pp. 136-46, esp. pp. 145-46; and Nagel, *Equality and Partiality*, p. 36. Ackerman also implicitly employs this notion of respect for persons in *Social Justice in the Liberal State*, pp. 3-4, as does Rawls in his model of the original position.

33. "Inadequate resources" can be understood comparatively or noncomparatively. In the comparative sense, the objection is that if one has significantly less than the person(s) with whom one is exchanging, then these exchanges are not necessary means to and/or part of a good life. In the noncomparative sense, the problem is not that one has less, but that one does not have enough in an absolute or nonrelational sense. In the text, I operate with the noncomparative sense, but I think the first argument I raise against the objection would apply to both senses.

34. Many, but not all, because some rights cannot be defended in terms of the choices or freedoms they provide the rightholder. Some rights do not have liberties or powers as their central elements, and thus do not involve the rightholder's freedom to *do* anything—e.g., the right not to be assaulted.

35. Rawls, "Justice as Fairness: Political, Not Metaphysical," *Philosophy & Public Affairs*, vol. 14 (1985), pp. 233-34; my emphasis.

36. Dworkin, "Liberalism," p. 191.

37. See my "Free Speech, Free Exchange, and Rawlsian Liberalism," *Social Theory and Practice*, vol. 17 (Summer 1991), pp. 47-68.

38. This does not mean that the right to exchange at free market prices is part of a right to free expression, or derived from it. The point is that some of the same kinds of considerations used to ground the right to free expression can be used to ground the right to exchange at free market prices.

39. This paper emerged from a longer paper, "Liberalism, Basic Rights, and Free Market Capitalism," which I wrote while I was a Visiting Scholar at the Social Philosophy and Policy Center at Bowling Green State University in the summer of 1992. I would like to thank the directors of the Center for their support, and N. Scott Arnold, Jim Child, John Gray, Loren Lomasky, Edward F. McClennen, and Fred Miller for comments on that paper. A version of this earlier paper was presented at a Current Research Workshop at the Institute for Humane Studies at George Mason University in December 1992. I would like to thank the Institute for sponsoring the workshop, and David Copp and Will Kymlicka for written comments on that version of the paper. I would also like to thank the other workshop participants for their comments: John Hasnas, George Klosko, David Luban, Roderick Long, Geoffrey Sayre-McCord, David Schmitz, Peter Vallentyne, and Viktor Vanberg. The Earhart Foundation of Ann Arbor, Michigan, provided support for me to do research on this topic, for which I am most grateful.