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## **Justice and the Fetus: Rawls, Children and Abortion**

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## Justice and the Fetus: Rawls, Children and Abortion

### **Abstract**

In a footnote to the first edition of *Political Liberalism*, John Rawls introduced an example of how public reason could deal with controversial issues. He intended this example to show that his system of political liberalism could deal with such problems by considering only political values, without the introduction of comprehensive moral doctrines. Unfortunately, Rawls chose “the troubled question of abortion” as the issue that would illustrate this<sup>1</sup>. In the case of abortion, Rawls argued, “the equality of women as equal citizens” overrides both “the ordered reproduction of political society over time” and also “the due respect for human life”. It seems fair to say that this was not the best choice of example, and also that Rawls did not argue for his example particularly well: a whole subset of the Rawlsian literature concerns this question alone.

Rawls went on to clarify his views on abortion and public reason, but he continued to maintain that a society's policy on abortion could be decided without introducing comprehensive moral doctrines concerning the moral status of the fetus. The three aims of this paper are to argue: (i) that a society cannot legitimately decide on its abortion policy using purely political values; (ii) that Rawls' stances on abortion in his two major works are incompatible; and (iii) that neither of Rawls' conceptions of justice could permit abortion.

## **Abortion and Public Reason**

Rawls introduced the problem of abortion in order to illustrate his view regarding the non-admissibility of comprehensive moral doctrines to the domain of public reason: "The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values".<sup>2</sup> The doctrine that abortion is morally unacceptable, therefore, is unreasonable, because it cannot support such a reasonable balance. Why can it not do so? Rawls' original argument runs as follows:

...we consider the question in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens...Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force. Other political values, if tallied in, would not, I think, affect this conclusion.<sup>3</sup>

It is clear that Rawls does not believe that the fetus has a right to life equal to that enjoyed by adult citizens of a society; thus the fetus is not due as much respect as normal citizens. Rawls' critics have argued that he is himself guilty of importing a comprehensive moral doctrine into his pro-abortion argument, namely that the fetus is not a person fully deserving of moral respect and a right to life like the rest of us.

Robert George summarises the problem: "Rawls...seems plainly, if silently, to import into the analysis of the question a range of undefended beliefs of precisely the sort

that 'political liberalism' is supposed to exclude. This [is] smuggling in of controversial moral and metaphysical beliefs."<sup>4</sup> It does indeed appear that Rawls is assuming that the fetus is not to be treated as an equal citizen here, and that he imports a non-public comprehensive doctrine by omitting to accord the fetus equal personhood with the mother. Even if Rawls is not guilty of this, it seems that political liberalism's system of balancing competing political values is biased against fetuses. Rawls says we cannot import moral arguments such as 'the fetus is a person', but by allowing "the due respect for human life" to be outweighed by other considerations is in itself to import a moral argument that the fetus is not a person. Whether this problem with political liberalism applies to other issues is another question, but in the case of abortion, it is loading the dice: it is obvious that, if you believe fetuses are people, you will refuse to weigh the value of its life against any other values.

Samuel Freeman elaborates in support of Rawls that "a legislator, judge, or citizen who on religious grounds assigns absolute weight to the political value of respect for human life while assigning little or no weight to other relevant political values is not engaged in public reasoning."<sup>5</sup> Yet we do not argue, in prohibiting murder, that we are assigning absolute weight to the political value of respect for human life and failing to take account of other political values. This is because the political value of human life trumps (almost) all other values. Why does the same not apply to fetal life, unless a comprehensive doctrine is being smuggled in under the radar? Freeman also argues that "All reasonable doctrines reject slavery and forced servitude and affirm the integrity of human life."<sup>6</sup> Once again, pro-lifers will argue that Rawls and his defenders are not affirming the integrity of human life.

This fact is made clear by Rawls' claim that "at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force." George rightly asks why this right should "override the value" of human life. But a more fundamental flaw in Rawls' 'reason' is that the appeal to equality is clearly flawed: the fetus is clearly not being treated as equal to the woman. Obviously the woman is in a unique situation, given that the fetus depends upon her for life, but to simply state that the equality of women gives her the right to end the fetus's life is to beg the question. The silent premise here is that the fetus is not due equal respect; although this is a political value, it is based upon a moral view. It is clear that Rawls is indeed guilty of importing the comprehensive doctrine that fetuses are not persons equivalent to ourselves.

Jeffrey Reiman has argued that "Since...the moral status of the fetus is controversial, it cannot outweigh the uncontroversially presumed evil of forcing a woman to stay pregnant against her will."<sup>7</sup> There are three points to be made about this line of argument. First of all, It might be uncontroversial that a woman has a right to control her body, but it is somewhat controversial that the fetus is merely part of that body: this is the very matter in question. Secondly, Reiman's argument could be used to justify (for example) the subjugation of women in a predominantly fundamentalist Islamic society: a radical Muslim could argue that 'The controversial position on the status of the woman within society must give way to the uncontroversial right of a man to be obeyed'. Finally, the most significant error here is that, if we accept that the moral status of the fetus is not yet established, we cannot then also say, as some liberals do, that forcing a woman to stay pregnant and give birth is evil: this must also be controversial, as it too is dependent on the ambiguous moral status of the fetus. Any position can be controversial if it causes a

fuss, but here we are dealing with a controversial *issue*, where neither side is uniquely controversial.

Reiman makes the parallel mistake of assuming that controversy attaches solely to the conservative view in the abortion debate; this assumption is made possible by his smuggling in of the comprehensive moral doctrine that fetuses are not persons. Only someone who held this belief would regard the pro-life position as the only controversial one; equally, only a pro-lifer who imported this doctrine would argue that it is the liberals who have the controversial stance. Such a pro-lifer could well argue that 'the controversial position on the right of women to control their own body must give way to the uncontroversial right of the fetus to life'. (Notice that, in the original quote, Reiman says that the controversial thing is the "position" on the status of the fetus, but the uncontroversial thing is a "right": he is already stacking the deck to argue that it is pro-lifers' views that are controversial, rather than the status of the fetus, or any right it might have to life.)

In a similar argument to Reiman's, Stephen Macedo argues (with Rawls) that it is unreasonable for pro-lifers to say that the issue of abortion is not a finely balanced one that is difficult to resolve: "It seems to me...a failure of reasonableness for George and Finnis to assert that abortion is 'not even a close call.' I would say the same of those who come to the opposite conclusion from George and Finnis, of course, and who say that that is not a close call."<sup>8</sup> If anything, it seems a little unreasonable of Macedo to argue that anyone who denies that the arguments on each side in the abortion debate are close to equally powerful is unreasonable. He goes too far in arguing that we should just be reasonable and compromise about abortion; this is the same mistake Rawls makes, assuming that abortion is not

murder, and is thus a suitable subject for compromise. (Note that I am not arguing for a pro-life position; I merely seek to expose the assumptions and fallacies of the politically liberal position.)

It is only fair to allow Rawls a response: he did develop his position a little further than the arguments given in footnote 36 of *Political Liberalism*. In the introduction to a later edition, Rawls states that anti-abortionists:

[1]...need not exercise the right of abortion in their own case. [2] They can recognise the right as belonging to legitimate law and therefore [3] do not resist it by force.[4] To do that would be unreasonable: it would mean attempting to impose their own, comprehensive doctrine, which a majority of other citizens who follow public reason do not accept.<sup>9</sup>

Once again, Rawls makes the assumption (which would be perfectly acceptable were it not for his own requirement of the non-importing of comprehensive moral doctrines) that abortion is not the same as murder. His argument would become ludicrous if we substituted 'homicide' for 'abortion' in the above quotation. How could a sincere pro-lifer even countenance child murder "in their own case"? (I say 'sincere' because of people like George Bush Snr. and Dan Quayle, who are both on record as saying that, although abortion is murder, they would support their daughters if they opted to terminate a pregnancy.<sup>10</sup>) And how could they regard it as legitimate law? If murder is resistible by force, they might also have reasons (although perhaps not compelling ones) to resist the right by force. And once again, Rawls himself is guilty of unreasonably introducing his "own, comprehensive doctrine". These last two points are made with some force by John Finnis, of whom more in the next two sections.



It should by now be clear that Rawls's purely political conception of public reason cannot fairly resolve a contentious issue such as that of abortion. Rawls believes that his system would establish the right to abort through a fair weighing of the relevant political values, without importing any comprehensive moral doctrines. However, the very fact that he thinks we can treat fetal lives as something to be measured in this way reveals that he himself has imported such a doctrine: namely, that fetuses are not persons like the rest of us. The key point is that the political status of the fetus depends upon its moral status, which is itself ambiguous. One cannot, therefore, say what "due respect for life" should be accorded the fetus, and thus cannot weigh this respect against other political values.

Rawls' attempt to sidestep contentious moral issues itself handicaps his theory's ability to resolve such issues politically; as Samuel Freeman puts it, "respect for persons as free democratic citizens requires that metaphysical and epistemological questions of the foundations of justice be avoided in public reasoning about justice"<sup>11</sup> But one fundamental question of justice is who it is to apply to, and this parallels the question of whether the fetus should be treated as a citizen; we cannot speak of abortion at all without addressing one of the very foundational questions that Rawls insists we must avoid.

### **Abortion and the Original Position**

Given Rawls' clear support of abortion as expressed in *Political Liberalism*, it is somewhat ironic that some strong arguments that favour of a political restriction on

abortion should be found in *A Theory of Justice*. Williamson Evers was the first to point out that “the principles that Rawls maintains would be chosen in the original position may have implications for the problem of abortion.”<sup>12</sup> Evers argued that we would not choose to legitimise policies that permitted abortion in the original position because “it seems unlikely that we would decree our own execution”; ie., we would not want, on emerging from behind the veil of ignorance to find ourselves to be fetuses that could end up being aborted.<sup>13</sup> Of course, Rawls states clearly that those in the original position are adults, because children are not rational; Evers acknowledges this, but argues that Rawls requires those behind the veil to consider future generations and children. Although these ‘people’ are not yet citizens, they must be protected by the principles of justice, and Rawls’ choice of words does seem to suggest that fetuses could also be included in this category:

I have said that the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our judgements. Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could not take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice.<sup>14</sup>

Evers also points out that Rawls states “We are not directed to look for differences in natural features that...serve as possible grounds for different grades of

citizenship."<sup>15</sup> This idea of capacity for moral personality has led to much debate between Rawls' defenders and critics. John Finnis quotes the above passage and also takes it to imply that fetuses (and embryos) should be included in the category of potentiality for moral personality.<sup>16</sup>

Setting aside Finnis' more contentious claim about embryos, it is clear that the later-stage fetus has a brain, and his argument does seem to apply here. We have seen that Rawls states that "it is reasonable to say that those who could take part in the original agreement, were it not for fortuitous circumstances, are assured equal justice". Given that some fetuses have a greater capacity for moral personhood than some severely premature infants inasmuch as their mental functions are more developed (more on this point in the next section), it seems only fair to grant these fetuses the same rights as are afforded neonates. Rawls further states that "As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position".<sup>17</sup> If a fetus is further developed than a neonate, it must surely be a person (in Rawlsian terms), although we know less about it than we do about the neonate; thus we should treat it like we would ourselves, or at least our children. Although this particular argument only works for fetuses that are viable outside the womb, it is sufficient to show that Rawls is in error when he arbitrarily draws the pre-citizenship line at birth; this is discussed further in the next section.

Rawls stresses above all else the importance of maximising the good of the worst off, formalising as the difference principle the concept that "the social order is not to establish and secure the most attractive prospects of those better off unless doing so is to the advantage of those less fortunate."<sup>18</sup> If we are to extend the protection of

the principles of justice to children and infants, some of whom are younger than some fetuses, it seems an arbitrary distinction to deny that such fetuses are also members of society. And if they are members of society, the difference principle must apply; who, after all, is worse off in society than a human being that is older than some other humans but could still be aborted? Once again, the problem is the ambiguity surrounding the moral status of the fetus. Rawls argues that "We must choose for others as we have reason to believe they would choose for themselves if they were of the age of reason and deciding rationally," but refuses to even consider the idea that fetuses might also constitute "others" who should be accorded justice.<sup>19</sup>

### **Abortion, Children and Fetuses**

A more specific example of what I mean by some fetuses being older than some neonates will be useful here. I do not intend this section to be read as a pro-life argument, except within the specific context of Rawls' political theory where recent medical and bioethical developments call into question Rawls' drawing of the justice-protection line at birth.

The Nuffield Council on Bioethics report "Critical care decisions in fetal and neonatal medicine: ethical issues" states that, in the UK, "Abortion is illegal after 24 weeks of gestation except in cases where the fetus is at risk of serious handicap or there is a risk of grave permanent injury to the life or physical or mental health of the woman."<sup>20</sup> The report mainly concerns those babies born at less than 25 weeks, and who consequently run an increased risk of disability or death. But the unavoidable fact is that babies born after 22 weeks of gestation can and do survive to adulthood.

This has led some to suggest that abortion law should be changed to forbid termination after 22 weeks. But the significant point for Rawls and his theory is that it is purely contingent whether a fetus is accorded the protection of justice.

As already stated, many premature babies are born before the cut-off date for abortion. If we accept that these babies have rights and are protected, and it is thus wrong to commit infanticide upon them, how can it be consistent to deny these same protections to fetuses that are more fully developed and have a greater chance of survival? Remember that Rawls says "it is reasonable to say that those who could take part in the original agreement, were it not for fortuitous circumstances, are assured equal justice" and also, in *The Law of Peoples*, that "the equal rights of women and the basic rights of their children as future citizens are inalienable and protect them wherever they are."<sup>21</sup> Yet it seems that Rawls' later theory would protect fetuses only if they are not inside a woman, and are thus counted as children.

It is clear that fetuses are dependent on moral luck for their moral status and hence survival within the system of political liberalism. Take fetus A: he is born on the predicted day after exactly 9 months, and becomes baby A. Then we have fetus B: she is born premature after 22 weeks, becomes baby B and is put on life support, after which she develops healthily. But fetus C is unwanted, and is aborted at 23 weeks. Now, for Rawls, baby A becomes a future citizen in the normal manner at the instant of its birth. Baby B becomes a future citizen early, but her underdevelopment and reduced chances of survival do not count against her in terms of rights. Fetus C, however, does not become a future citizen on Rawls' terms, *despite the fact that it is between baby A and baby B in terms of development* and, one might venture,

capacity for moral personality. Defenders of the pro-choice position will justifiably argue that this analysis does not take account of the woman's right to control her own body; this point has some force, but is not relevant here. It is clear that Rawls' distinction between future citizens and fetuses consists merely in the fact of their location. If this is not a fortuitous circumstance, it is difficult to envisage what Rawls meant by the term.

Finnis misunderstands Rawls when he writes that it is "the question of how it could be rational to think that the child [fetus] just before birth has no rights (no status in justice, fairness, reciprocity) when the child just after birth has the rights of a citizen free and equal to other citizens".<sup>22</sup> Although the child has rights and protection, it is not yet a citizen nor equal to a citizen, as (Rawls holds) it is not yet rational. Nonetheless, Finnis is right that there is an inconsistency here, at least from the Rawlsian perspective. It seems only reasonable and fair to include fetuses that are protected by law (from everyone except their mothers and their doctors) in the system of reciprocity enjoyed by those who are lucky enough to have been born. Finnis points out that, in the majority of US states, killing a fetus is homicide unless it is performed by a doctor at the request of the mother.<sup>23</sup> More recently, such laws have been federalised: "under federal law the death of a fetus, at any stage of development, resulting from a violent attack, is now recognized as homicide."<sup>24</sup>

It does seem somewhat strange to treat the fetus as a person with the same protections from homicide afforded to adult citizens and children, with the exception that a woman and her doctor can end its life if they want to. This point parallels Rawls' inconsistency in granting protection to a 22-week old human being, but not a

23-week-old one, merely because of its location. Once again, the problem for Rawls' theory is that it is purely contingent who counts as a member of society, and this can hardly be just. We can attempt to remove the inconsistency by granting that both the fetus and the premature baby are future citizens: both are viable outside the womb: both can be said to have interests. Of course, if we do this, then it does seem that the non-public reason aspects of Rawls' theory would tend to prohibit some types of abortion.

As mentioned earlier, my argument only applies to viable late-stage fetuses, but Rawls' principles of justice should be future-proof, and advances in medical science mean that early-stage fetuses may be viable outside the womb in the not-too-distant future. Furthermore, Rawls limits his argument to first-trimester abortions, but his reasons for doing so are ambiguous. If he draws the line of citizenship at birth, then abortions at any stage should be permissible according to *Political Liberalism*, regardless of the supposed weighing in the balance of "due respect for human life"; equally, if earlier-stage fetuses do become viable due to new technology, then the restrictions suggested by *A Theory of Justice* would have to be extended to many more fetuses. Either way, Rawls' two stances on abortion appear to be incompatible.

Why does this inconsistency on abortion between the different aspects of Rawls' theory arise? A possible explanation is that Rawls fails to apply the principles generated in the original position rigorously enough, and that a slight 'peeping' through the veil occurs when Rawls declares that we are all contemporary rational adults. The original position generates principles that will protect us from being slaves or members of a persecuted religion when the veil is lifted; this is sensible because we want to avoid such fates. But it does not generate rules that would

protect us from being aborted, as this is something that could simply not happen to us, due to the fact that we know we are contemporary rational adults (the peeping). But the fact that we could not be fetuses does not mean that we should not protect them: we also know that we cannot be children in the real world, yet Rawls thinks that we would choose principles that will protect them.

In fact, there is selfishness at work in the original position despite the presence of the veil: as already stated, we guard against things that could only happen to adults, and not things that could happen to anyone in the womb. It is true that we can never be fetuses again, but this does not mean that, in choosing our principles of justice, we should not think of them. It is not as if fetuses are non-human, and we were all fetuses once. Imagine a world where it has been established as scientific fact that, when someone dies, their essence transfers to a fetus whose brain is starting to form. This 'reincarnation' involves no memories of our previous existence(s), but does allow us a chance at a new life. Would knowledge of this natural fact not persuade legislators in the original position to prohibit abortion?

## **Conclusion**

In the first section we examined Rawls' argument that the pro-life position imports a comprehensive moral doctrine to the sphere of public reason. While this is true, Rawls himself also imports such a doctrine, namely that the fetus is not a person or future citizen. It appears that abortion is an issue that could simply not be resolved without introducing a specific moral argument about the status and rights of the fetus: therefore, political liberalism cannot provide an argument for the provision of



abortion, nor indeed against such provision. This in turn suggests that Rawls' revised political theory cannot deal with certain issues on purely political terms, at least when an ambiguous moral issue is at the centre of the debate.

In the second section, we saw that Rawls' original position and difference principle suggest that the fetus (certainly at a late stage) is due the same protections as children. Taken in tandem with the third section's neonate-fetus argument, it becomes clear that Rawls' definition of "the fundamental political relationship of citizenship" as "a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death" arbitrarily draws the line beyond which humans are protected by rights. Rawls states in the paperback edition of *Political Liberalism* that "Citizens are reasonable when, viewing one another as free and equal in a system of social co-operation over generations, they are prepared to offer one another fair terms of social co-operation."<sup>25</sup> Given that some fetuses have more capacity for moral personality than some children, should we not then 'co-operate' with them at least to the extent of not aborting them?

Ultimately, it appears that despite his own views on abortion, Rawls' own words dictate that his system of public reason cannot decide on abortion; therefore, it seems on balance that fetuses, as future citizens, do deserve protection under the principles of justice. Exactly when a fetus becomes a future citizen is a problem that remains to be resolved.

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