AT THE ORIGINAL POSITION AS A FETUS:
RAWLSIAN POLITICAL THEORY, HUMAN RIGHTS, AND THE PRO-LIFE IMPERATIVE

Christopher D. Hare
University of California, Davis
Department of Political Science
One Shields Avenue
Davis, CA 95616
cdhare@ucdavis.edu

1 April 2018

Abstract: The approach of liberal political philosopher John Rawls on the issue of abortion relied on his construct of "public reason," in which citizens in a pluralistic democracy restrict the use of deliberative arguments and reasons which are drawn from their "irreconcilable comprehensive doctrines," including their religious worldviews. From this reasoning, Rawls concludes that a just society is one which includes the legal right to abortion. However, I contend that the use of another of Rawls's theories—"justice as fairness"—leads to an alternate conclusion: that legally sanctioned abortion represents the unjust persecution of a specific population—the unborn. This theoretical approach lends itself to the conclusion that a just society ought to protect the fetus as a uniquely vulnerable position in society.[1]

[1] The author wishes to thank Professor M. Troy Gibson for his teachings, thoughts, and comments on the subject of Rawlsian political theory and applied ethics, contributions which were essential to the formulation and design of this essay.

Introduction

In awarding John Rawls (1971-2002) the National Humanities Medal, President Bill Clinton aptly summarized the importance of Rawls's work, which, in President Clinton's words, "placed our rights to liberty and justice upon a strong and brilliant new foundation of reason… with his argument that a society in which the most fortunate helped the least fortunate is not only a moral society, but a logical one."[2] Indeed, Rawls's groundbreaking political and ethical theories have impacted modern philosophical thought to such a degree that Robert Nozick, who offered a libertarian rebuke to Rawls's *A Theory of Justice*, wrote that "[p]olitical philosophers now must either work within Rawls's theory or explain why not."[3]

While Rawls is a figure traditionally associated with the pro-choice position, in this essay I contend that the use of Rawlsian political theory on the issue of abortion has relied too heavily on his framework of "public reason," (PR) which excludes direct religious appeals in public deliberation. Instead, I propose that the application of another of Rawls's theories—"justice as fairness" (JAF), in which we design a just society without any information about which position we will occupy in that society—is more germane to the bioethical issue of abortion. Its use also leads us to an alternate, pro-life result. I conclude with an argument that the central claim of Rawls's theory of JAF—that a society becomes just on the basis of the treatment of *all* of its members—serves as a rational affirmation,

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[2] The White House, Office of the Press Secretary, "Remarks By The President At Presentation Of The National Medal Of The Arts And The National Humanities Medal," September 29, 1999, http://clinton4.nara.gov/WH/New/html/19990929.html.

[3] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 183.

consistent with a natural law approach, of an expansive interpretation of human rights that includes protection of the unborn.

Abortion in the Just Society

In his 1993 book *Political Liberalism* and his 1997 article "The Idea of Public Reason Revisited," political philosopher John Rawls examines the difficulty posed in liberal, pluralistic society between the often competing demands of tolerance and an adherence to processes and values, such as free speech and majority rule.[4] In these works, Rawls argues that a just society, one in which political discourse can take place while maintaining pluralistic tolerance and civil harmony, is one in which citizens retain their individual worldviews in their private lives and relationships, but meet at the "overlapping consensus" between these doctrines while in the public square.

At Rawls's overlapping consensus, we limit our reasons to premises to which all can agree and are therefore "accessible" to others, despite pluralistic differences which remain. Rawls himself defines this system of PR as a "freestanding view," one which "offers no specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself" and is "guided by a political conception the principles and values of which all citizens can endorse."[5]

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[4] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); John Rawls, "The Idea of Public Reason Revisited," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 573-615.

[5] Rawls, *Political Liberalism*, 10.

Since its inception, Rawls's argument for the use of PR and its implications for political society—particularly its prohibition of the use of explicitly religious reasons in the public square—has endured extensive criticism. The critiques of PR generally fall into two categories: one which questions whether it is sustainable as a philosophical system, the second which contends that PR is an undemocratic doctrine—one which constrains citizens' most central convictions about the just, the good, and the right.[6] By Rawls's own (and much-critiqued) writings on the subject, PR has been historically interpreted as a theoretical justification of the legal right to abortion in a just society.[7]

However, while the validity of PR continues to be a pressing and important debate in the field of political theory, and whether or not an adherence to the constraints of PR is compatible with pro-life argumentation,[8] I instead contend that these questions themselves are irrelevant because PR is inapplicable on bioethical issues such as abortion.

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[6] M. Troy Gibson, "God Says It, That Settles It? The Nature and Place of Moral Authorities in Political Discourse,""*Christian Bioethics* 24, no. 1 (2018): 95-110. For an in-depth review of the philosophical and political critiques of public reason, see Hunter Baker, *The End of Secularism* (Wheaton, IL: Crossway, 2009), 114-119. For a series of analyses on the compatibility of natural law doctrine and public reason, see Robert P. George and Christopher Wolfe, eds., *Natural Law and Public Reason* (Washington, DC: Georgetown University Press, 2000).

[7] Rawls, *Political Liberalism*, 243-244, n. 32; Baker, *The End of Secularism*, 116-117.

[8] On this point, a number of scholars, including Robert George, Christopher Tollefsen, and Francis Beckwith, have all made compelling cases for legal restriction of abortion on rational and philosophical—not religious—grounds. See Robert P. George and Christopher Tollefsen, *Embryo: A Defense of Human Life* (New York: Doubleday, 2008), 202-209; Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, DE: ISI Books, 2001), 65-69; Francis J. Beckwith, *Defending Life: A Moral and Legal Case against Abortion Choice* (Cambridge: Cambridge University Press, 2007), 42.

For Rawls, while PR represents a function and a feature of a just political society, it does not provide a justification for such a society in the first place. Rather, Rawls develops "justice as fairness" to formulate and explain *why* a liberal political society is just; and *why* it is rational for citizens to adopt such a political system. Through JAF, Rawls develops an aggregate conception of justice which includes individual fundamental human and political rights, the protection of which is a value that supersedes other features of a just political society (including the use of PR.)[9]

Indeed, as Charles Larmore notes, while both justice and civil peace are important values, the assurance of fundamental rights prevail when the two are in conflict: "One of the benchmarks not just of Rawls's conception of public reason but of his political philosophy as a whole is that basic justice takes precedence over civil peace or, perhaps better put, that it is a precondition for any civil peace worthy of the name."[10] Thus, because PR fails to directly confront and answer fundamental questions of basic justice, we ought to remove our deliberation on the issue of abortion from the domain of PR. In Rawlsian political theory, issues of basic justice precede the principle of public reason.

"Justice as Fairness" and Religious/Secular Public Ethics

[9] John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited,"* (Cambridge, MA: Harvard University Press, 2001), 68.

[10] Charles Larmore, "Public Reason," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 385.

In order to formulate a just political and social order, Rawls emphasizes the need for impartiality in introducing his concept of "justice as fairness" in *A Theory of Justice*.[11] While Rawls grounds his theoretical approach in social contract theory, in which the basis of legitimate governmental powers rests in a hypothetical agreement with persons who—in the "state of nature"—consent to cede powers to the state in order to protect their interests (security, rights, etc.), his construct of JAF is one that proposes a fundamental shift in the conditions through which this hypothetical agreement takes place. For Rawls, parties in the social contract theory framework operate from a biased position given their known status, position, and interests in society. Given this predisposition, questions of distributive justice are settled through the lens of individual perspectives and biases, and this process is thus a procedurally unfair one.[12]

Rawls proposes a remedy to social contract theory by altering the point at which this agreement is made—the state of nature—to one in which members of a society continue to assemble to develop the principles of a just social contract, but in doing so are metaphorically blind-folded behind a "veil of ignorance," in which we know nothing about our position in that society: our race, our religion, our gender, our social and economic class, etc.[13] From what he terms "the original position," Rawls contends that we can fairly arrive at a conception of justice because we all operate from a shared position,

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[11] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). Throughout this essay, I use Rawls's 1999 revised edition: John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999).

[12] Thomas Nagel, "Rawls and Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 62-85.

[13] Rawls, *A Theory of Justice*, 11.

and our ignorance to our respective positions provides a fair playing field from which we can come to a mutual agreement of a justly arranged society.[14] On this point, Rawls writes that "since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain… 'justice as fairness'… conveys the idea that the principles of justice are agreed to in an initial situation that is fair."[15]

From this premise, Rawls contends that persons at the original position will agree to two fundamental provisions of justice. First, parties will arrive at the "equal liberty principle," in which the state universally extends fundamental human and political rights ("freedom and integrity of the person," speech, thought, conscience, and private property) to all persons. Second, the just state will ensure equality of opportunity, in which persons are free to advance themselves in society, and will also utilize the "difference principle," in which society is arranged so as to provide the greatest benefits to the least advantaged.[16]

Rawls's schema of justice as fairness provides an important logical underpinning in the creation of a moral political society. Since persons behind the veil of ignorance may be members of minority racial, ethnic, or political groups, their societal design would not be one which permitted legal discrimination or oppression of such groups. For example,

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[14] Ibid., 15-19.

[15] Ibid., 11.

[16] Richard J. Arneson, "Justice after Rawls," in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin (New York: Oxford University Press, 2009), 111-126; Samuel Freeman, "Introduction," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 4.

persons at the original position would prohibit slavery, racial segregation, or religious persecution in their society since they, too, might occupy the position of the enslaved, segregated, or persecuted in society.

Rawls's thought experiment is one which—in a manner that is certainly consistent with the demands of PR—supports many of the key principles of Christian public ethics. By placing individuals behind a veil of ignorance in their determination of a just society, Rawlsian political theory treats all human persons with universal value—a premise which parallels the Judeo-Christian doctrine of *imago Dei*, "an understanding of the inviolable dignity of every human person, the notion that each person, regardless of race, sex, age, national origin, religion, sexual orientation, employment or economic status, health, intelligence, achievement, or any other differentiating characteristic, has dignity and is worthy of respect."[17] However, this intersection with Christian public ethics does not make the pro-life argument an inherently (or at least a necessarily) religious one, any more than it transforms Rawlsian political theory into a sectarian system of thought.

In exploring the nexus of JAF and Christian public ethics, I raise the question, as M. Troy Gibson has, that if JAF provides a rationale for prohibiting slavery—because one might occupy the position of a slave—then shouldn't a just society also prohibit the legal sanctioning of abortion, since one might also inhabit the position of an aborted fetus?[18]

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[17] Susan J. Stabile, "Catholic Legal Theory," *Journal of Catholic Legal Studies* 44, no. 1 (2005): 422-423. Of course, the concept of *imago Dei* ("image of God"), unlike justice as fairness, has an explicitly theistic grounding. However, my contention is that justice as fairness serves to affirm—and by no means replace—the implications of *imago Dei* in political society as a method of human reason to discover natural law.

[18] M. Troy Gibson, "God Says It, That Settles It?" Rawls's limited writings on abortion focused on public reason and the implications of limiting the use of explicitly

The most serious objection to this line of reasoning will be that fetuses are not fully developed human persons and thus the status of a fetus is not a valid perspective from which to operate at the original position.

However, if it can be established that the unborn are human persons *or at least* valid positions of personhood in Rawls's schema of JAF, then it logically follows that the most fundamental right that it seeks to ensure—the right to life—is threatened for a class of citizens to such an extent that no just society could permit its practice, even if state prohibition requires the subordination of other values (such as the freedom to terminate a pregnancy).[19] Because Rawls uses his system of JAF—not PR—to develop and justify the assurance of essential rights of all persons as the first aim of the just state (which he terms "the priority of liberty"), the result is in accord with both the Thomistic natural law tradition in Christian theology and Rawls's PR, and can thus appeal to those both inside and outside the Christian faith.[20]

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religious arguments in democratic deliberation, for which he later conceded that a pro-life case could be made within the parameters of public reason. Rawls, "The Idea of Public Reason Revisited," 605-606, n. 80. John Seery notes that "Rawls hasn't considered potentially-aborted fetuses as contractors; and thus his contractarianism, situated between perfectionism and utilitarianism, begs or erases the question of consent for parties that may or may not wish to be born." John Seery, "Moral Perfectionism and Abortion Politics," *Polity* 33, no. 3 (Spring 2001): 350. Thus, the question of fetus qualification in justice as fairness is effectively one left open to argumentation.

[19] Frank Michelman notes that Rawls's "first principle of justice" not only permits, but indeed requires, constraints on some liberties in order to assure "a fully adequate scheme of basic liberties for everyone." Frank I. Michelman, "Rawls on Constitutionalism and Constitutional Law," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 416-417.

[20] Ibid.; Arneson, "Justice after Rawls;" John Rawls, "Social Unity and Primary Goods," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 366-367. On this point, Rawls writes that "[w]hat have come to

"Justice as Fairness" and the Human Fetus

Perhaps the most compelling argument for the inclusion of fetuses as perspectives of personhood at the original position comes from Rawls himself. In *A Theory of Justice*, Rawls provides an explanation of "moral persons," his term for those who are guaranteed "equal justice": "One should observe that moral personality is here defined as a potentiality that is ordinarily realized in due course. It is this potentiality which brings the claim of justice into play… We see, then, that the capacity for moral personality is a sufficient condition for being entitled to equal justice. Nothing beyond the essential minimum is required."[21] On the question of the standing of fetuses in Rawls's schema, the standard of "capacity for moral personality" is more expansive than alternative standards of sentience (which would exclude comatose persons), intelligence (excluding the mentally challenged), or developmental maturity or capabilities (excluding infants or the developmentally disabled).

In casting such a wide definitional net to encompass such individuals, Rawls himself substantially strengthens the argument for the inclusion of fetuses as persons with moral standing. Indeed, Williamson Evers notes that based on this definition, in tandem

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be called human rights are recognized as necessary conditions of any system of social cooperation… These rights do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature." Rawls, *The Law of Peoples*, 68. This statement illustrates two important facets of Rawls's conception of justice: (1) that the universal protection of fundamental human rights is a necessary feature of any valid conception of justice; and (2) that an argument for the assurance of such universal human rights is one that meets the requirements of public reason, in that while citizens may ground their conception of human rights in their own comprehensive doctrine, the principle itself is one that falls within the overlapping consensus.

[21] Rawls, *A Theory of Justice*, 442.

with Rawls's insistence that a just society cannot seek differences among persons (e.g., race, ethnicity, religion, wealth, age) as a basis for decisions about the fair distribution of justice, the notion that the unborn should be included in Rawls's schema of JAF "fits extraordinarily well with the Thomist notion of the status of a fetus."[22]

As Francis J. Beckwith notes, the notion which excludes fetuses as human persons rests on the view that human value is derived by properties (sentience, ability to reason, self-awareness, physical features, or some combination) rather than *a priori* intrinsic worth (what he terms "the substance view").[23] Of course, as a principle the property-based view of human value leads us to a number of morally objectionable implications: how would a society which employs these criteria treat, for example, those with cerebral palsy, Down syndrome, or muscular dystrophy, among other serious physical and/or mental impairments? Put another way, if properties (or lack thereof) provide the basis for discriminating between our treatment of the born and unborn, what is to prevent our use of such a principle among all persons?

Clearly, Beckwith's "substance view" is one which is far more sustainable as a system of bioethics. The question then becomes whether fetuses have a human nature? John Finnis' point on this matter is that from the point of conception, the human fetus

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[22] Williamson M. Evers, "Rawls and Children," *Journal of Libertarian Studies* 2, no. 2 (1978): 110.

[23] Francis Beckwith defines "the substance view" as the belief that "organisms, including human beings, are ontologically prior to their parts." As an example, he writes that "[a] domestic feline, because it has a particular nature, has the ultimate capacity to develop the ability to purr. It may die as a kitten and never develop that ability. Regardless, it is still a feline as long as it exists, because it possesses a particular nature, even if it never acquires certain functions that by nature it has the capacity to develop." Beckwith, *Defending Life*, 132-133.

undergoes no further substantive change of nature, only of development (which humans do throughout their lives).[24] The fetus is a self-encompassing organism, one already with a human and individual nature:

> Each living human being possesses, actually and not merely potentially, the radical capacity to reason, laugh, love, repent, and choose as this unique, personal individual, a capacity which is not some abstract characteristic of the species but rather consists in the unique, individual, organic functioning of the organism… a capacity, individuality and personhood which subsists as real and precious even while its operations come and go with many changing factors such as immaturity, injury, sleep, and senility.[25]

The self-encompassing aspect of the fetus is one that also includes an autonomy of development, as Maureen L. Condic notes: "[t]he embryo is not something that is being passively built by the process of development, with some unspecified, external 'builder' controlling the assembly of embryonic components. Rather, the embryo is manufacturing itself."[26] The claim that fetuses have already realized their complete, unique, and individual human nature, supported by both philosophical and scientific evidence, provides a substantial logical impetus for us to include the fetus as a valid position in the schema of "JAF." Thus, if we grant that fetuses are individual beings with a unique human nature and character, and that such persons are entitled to equal moral standing in society, then certainly the unborn qualify for Rawls's criterion of "capacity for moral standing" and inclusion in JAF.

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[24] John Finnis, "Abortion, Natural Law, and Public Reason," in *Natural Law and Public Reason*, ed. George and Wolfe, 75-105.

[25] Ibid., 91.

[26] Maureen L. Condic, "When Does Human Life Begin? A Scientific Perspective," The Westchester Institute for Ethics and the Human Person, October 2008, http://www.westchesterinstitute.net/images/wi_whitepaper_life_print.pdf.

If we stipulate that the fetus possesses the scientific standing of a human being –"a distinct, unified, self-integrating organism" with a complete, human genetic code—then we are logically and ethically compelled within the framework of JAF to extend to the fetus the moral standing of a human being.[27] Indeed, I contend that this is a moral truth that is both supported by a natural law approach (i.e., utilizing Rawls's theory of JAF) and already reflected in many of our legal norms—for example, by "the bifurcated fetal-rights scheme" in which fetal homicide laws clearly present and exercise a conception of the fetus as a being with human moral and legal standing.[28] If a society is unjust if it extends fundamental human rights to only some persons, or to persons only in some instances or scenarios, then we are compelled by the weight of this reasoning to include—not exclude— the position of the fetus as a perspective of complete and unqualified human standing in the schema of JAF.

Assessing Abortion through Rawlsian Political Theory

From behind the veil of ignorance at the hypothetical position of a fetus, our design of a just society would preclude legal abortion, given not only the loss of life but the

[27] Although outside of the purview of this essay, for an excellent review of recent scientific findings which support this claim, see George and Tollefsen, *Embryo*, 27-56, 144-173; Beckwith, *Defending Life*, 65-92; and Condic, "When Does Human Life Begin?"

[28] Milligan offers his own version of an argument for the personhood of fetuses through the framework of Rawls's justice as fairness, concluding that the legal status of fetuses as grounded by fetal homicide laws is incompatible—through the lens of Rawlsian political theory—with their diminished, non-person status in the legal schema of abortion. Luke M. Milligan, "A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process," *Boston University Law Review* 87, no. 5 (December 2007): 1181.

likelihood of fetal pain involved with abortion procedures.[29] Even if one were to consider the position of an aborted fetus as one in which he or she is likely to face poverty or other negative life circumstances, it is unlikely that a consensus would be reached that they would prefer no existence to one which may be difficult, at least initially. Further, Rawls precludes the attainment of any knowledge about their status in society at the original position, and thus the schema of JAF would not entertain such a possibility in the first place.[30] From the logic of considering oneself as a fetus in designing a just society, then, we also find an important refutation of thinkers and philosophers such as Judith Jarvis Thomson (the "violinist" analogy) who argue that abortion can remain a morally and legally permissible act even if the statuses of fetuses are stipulated to be akin to that of human persons.[31] If we carry the bioethical premise of the fetus as a human person to its conclusion in Rawls's schema of JAF, we are logically compelled to admit that a just political and social order is one in which fetuses receive equal justice. From behind the veil of ignorance, in which one may inhabit the position of a fetus, I contend that rational persons at the original position arrive at the conclusion that a just society should treat fetuses with the full moral and legal standing due to all human persons.

Thus, while Rawls's system of PR severely constricts the use of explicitly religious arguments in the public square, and has been used by many pro-choice thinkers to exclude religious conceptions of the human worth of the fetus, the use of his schema of

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[29] K.J.S. Anand, Bonnie J. Stevens, and Patrick McGrath, eds., *Pain in Neonates and Infants*, 3rd ed. (Amsterdam: Elsevier BV, 2007).

[30] Milligan, "A Theory of Stability," 1226.

[31] Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1, no. 1 (Fall 1971): 47-66.

JAF reaches an alternate finding. In placing ourselves behind the veil of ignorance in developing a shared and unbiased conception of justice, we must consider how a just society should treat its unborn. Because we cannot exclude the possibility that the fetus is a human being, and thus a valid position in which to place ourselves at the original position, we find that a society's sanctioning of abortion constitutes the discriminatory treatment of a class of citizens (the unborn) and therefore fails to meet Rawls's "priority of liberty," in which the first objective of the just state is to extend an equal slate of basic human and political rights to all of its citizens.

Ultimately, the theoretical approach of JAF is one in considerable accordance with the view that a just political society is constituted not simply through the fulfillment of democratic procedures as ends of justice in themselves, but rather through a deeper substantive commitment to the fundamental values of human dignity and the desire for the pursuit of the common good. Rawlsian political theory ultimately affirms our responsibilities to provide support for the most vulnerable in society, as well as provides reasons in support of these claims which adhere to Rawls's criteria of PR and can thus appeal to those in a non-sectarian context engaged in a cooperative pursuit of the common good in shared political society.