

Rawls on Abortion: Adapting his Theory of Justice To the Controversy

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Feminists often decry John Rawls' *A Theory of Justice* for its neglect of gender issues. While Susan Moller Okin argues that Rawls' "principles of justice can lead us to challenge fundamentally the gender system of our society," the imperative word is "can."¹ Central to Rawls' theory of justice is the equalizing veil of ignorance, which can support quite radical notions of gender equality and can be used, as I will show, to justify the legality of abortion. In a later essay, Rawls acknowledges that his veil of ignorance makes people ignorant of their sex;² however, in the original work, if people behind the veil are unaware of their genders, it is in no way made explicit. When Rawls first details what knowledge people behind the veil are ignorant of, he states, "[N]o one knows *his* place in society, *his* class position or social status, nor does any one know *his* fortune in the distribution of natural assets and abilities, *his* intelligence, strength, and the like."³ If Rawls had intended gender to be among "the like" characteristics, his repeated and consistent usage of the male pronoun indicates otherwise. Despite Rawls'

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general neglect of issues central to gender relations, the principles and concepts Rawls utilizes to formulate his theory of justice can provide a much-needed reformulation of Justice Harry Blackmun's pro-choice ruling in *Roe v. Wade*.

The Supreme Court's opinion on *Roe v. Wade*, as delivered by Justice Blackmun, can be quickly torn asunder. The ruling arbitrarily divided the period of pregnancy into three trimesters and prohibited the states from illegalizing abortion in only the first two. Central to the decision was the "right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," which the Court tenuously claimed to be "broad enough" to include a woman's right to terminate her pregnancy.⁴ Justice Blackmun also emphasized, perhaps to the point of exaggeration, the economic, psychological, and physical suffering bearing a fetus to term could impose upon a parent.⁵ In effect, the Court held the liberty of a pregnant mother in greater esteem than the potential life of a fetus.

Justice Blackmun conceded, "If this suggestion of personhood [for the fetus] is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."⁶ Citing the leniency with which states had historically treated abortion, the Court decided that the appellee had failed to prove the fetus' personhood; however, this does not mean that the Court considered the question of personhood to be resolved. Indeed, the Court declared, "We need not resolve the difficult question of when life begins."⁷ These findings are not antithetical. It may be the case that life does begin at conception, yet the legal need to defend that life only begins at a later time. Justice Blackmun stressed the United States' consistent record of differentiating between abortion and murder, which would be an arbitrary distinction if the Constitution viewed the fetus as an equal person. Until 1860, abortion "before quickening" was not a crime in Connecticut, and in 1828, New York ruled that aborting an "unquickened fetus" was a misdemeanor, while aborting a "quick fetus" was still only second-degree manslaughter.⁸ Even the specific Texas state law pertaining to the case failed to hold

consistently that the fetus was a person.⁹ If a fetus were just as much a person as an adult, then in cases in which the mother's life is not at stake (because otherwise self-defense could be argued), abortion and murder would deserve equal punishments, yet the widespread opinion among the American public then and now did not consider the two crimes equivalent.

History has proven that the decision reached in *Roe v. Wade* was not convincing enough to dispel the controversy surrounding either the morality or the legality of abortion. In his dissent, Justice Rehnquist singled out three dubious points in particular: the debatable argument that the Court need not defend the life of a fetus because the laws of the past had often construed abortion as a lesser crime than murder,¹⁰ the arbitrariness in allowing states to illegalize abortions in the last trimester but not the first two,¹¹ and the questionable assumption that the right to privacy applies to abortions.¹² Indeed, pro-life advocates can find much worthy of denouncement in the ruling, including the matters brought up in Rehnquist's dissent and also in Justice Blackmun's hyperbolic description of how much suffering a pregnant woman undergoes.¹³ The philosophically deficient argument presented in *Roe v. Wade* must either be bolstered or entirely dismissed, and it is here that Rawls' theory of justice can provide much-needed support.

A quick summary of Rawls' theory of justice is in order. The cornerstones of his theory are the two principles of justice: first, "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all," and second, "[s]ocial and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."¹⁴ The first principle has priority over the second principle, meaning that "infringements of the basic equal liberties protected by the first principle cannot be justified ... by greater social and economic advantages."¹⁵ Were the right to procure an abortion a "basic liberty," then the priority of the first principle over the second

would immediately answer the question of its legality; however, Rawls does not provide such a straightforward answer to the conundrum, nor should he. He limits the basic liberties to a concise list, which includes “political liberty ... and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault ... [and] the right to hold personal property and [the] freedom from arbitrary arrest and seizure.”¹⁶ While he leaves open the possibility of additional basic liberties, the right to procure an abortion does not seem concurrent with the scope of those rights on the list. In Rawls’ later book, *Political Liberalism*, he makes explicit that the list should not be significantly expanded because “[w]henver we enlarge the list of basic liberties we risk weakening the protection of the most essential ones.”¹⁷ Moreover, Rawls’ overwhelming silence on feminist issues provides even greater reason to think that abortion would not be on the list.

Since the answer cannot be found in the basic liberties, we must return to the veil of ignorance. As previously mentioned, *A Theory of Justice* is somewhat reactionary in its treatment of gender, but Rawls’ later statement that a person’s sex is unknown behind the veil allows for the possibility that a person behind the veil could be a woman and could even be pregnant. In addition, people in this position “do not know their conceptions of the good or their special psychological propensities.”¹⁸ Rawls later clarifies this by stating that a person’s “particular religious, philosophical, or moral ... doctrine with its associated conception of the good is not a reason ... to propose, or to expect others to accept, a conception of justice that favors those of that persuasion.”¹⁹ Because this claim will prove essential in the argument for abortion, it is important that it be justified. Behind the veil, all persons seek to pursue that which is to their personal benefit; however, due to their ignorance of who they are and due to their unwillingness to gamble away their lives based on mere probabilities, they seek a society in which the worst off person is as well off as possible. Their decision behind the veil is thus unanimous. Were people permitted to be aware of their particu-

lar conceptions of the good, this decision would not be unanimous, as people would seek to ensure the successful implementation of their individual conceptions. As Ronald Dworkin states in his essay on the subject, just as “[m]en who do not know to which class they belong cannot design institutions, consciously or unconsciously, to favor their own class[, m]en who have no idea of their own conception of the good cannot act to favor those who hold one ideal over those who hold another.”²⁰ As difficult as it is to ignore one’s particular conception of the good, it is necessary in order to ensure impartiality – in order to ensure that people are not seeking their own interests at the expense of others. This is a rational precondition to the veil of ignorance. Anyone who admires the concept of the veil for allowing people to pursue their self-interest unselfishly cannot grant an exemption to special conceptions of the good.

Any tenet held by people of conviction that is not purely factual would qualify as a conception of the good to be forgotten behind the veil. Admittedly, such a sentence is problematic. Many people claim not merely to possess a particular belief on when personhood begins, but rather to *know* when it does. It requires careful, unbiased scrutiny of the objective facts to determine what is belief and what is knowledge. In his analysis on Rawls, Thomas Nagel discusses the difficulty in determining when “an appeal to truth collapses into an appeal to belief:” Nagel explains that “some people might try to deny objective ... scientific methods that most of us would consider as clear cases of impersonal verification, whereas others might claim objective status for certain theological arguments or forms of revelation.”²¹ Even still, the empirical difficulty in distinguishing between what is a matter of belief and what is a matter of knowledge is not reason enough to dismiss Rawls’ notion. Certainly some people can distinguish a belief from a fact, and that is all that is needed.²²

Some would argue that it is a matter of fact when life begins, and perhaps that is true; however, what is not a matter of fact is when personhood begins, and personhood is what is essential. The central tenet of the pro-life defense is not simply that

fetuses are alive—after all, mice are alive and few would argue that killing mice is *prima facie* immoral—but that the fetuses are living *persons*. Whether something is alive is verifiable, but whether something is a person is not, so the question must arise as to what makes something a person. Should we determine personhood by genetics? If that is the case, do people with Klinefelter’s syndrome, who therefore have an extra chromosome, meet the criterion for personhood? Perhaps to be more inclusive, we should define personhood by parentage, but if that is the definition and since the theory of evolution has shown that humans and chimpanzees have a common ancestor, should we not include chimpanzees as persons? Perhaps these biological definitions do not hold the answer. The most widely accepted view today is that a person is a “rational” entity who exhibits “consciousness,” yet this definition is also rife with problems.²³ Do people in temporary comas qualify as rational persons? What about people in permanent vegetative states, or what about our ancestors billions of years ago? Again, the facts of evolution serve to muddle the definition. The entity that was the common ancestor of humans and rabbits, for instance, was not a rational being. Was Lucy, the *Australopithecus afarensis*, rational? What about Java Man, the *Homo erectus*? It is unlikely that rationality suddenly struck in the course of human evolution; rather, there was a spectrum of varying levels of rationality. Wherever the line is drawn would be arbitrary. Indeed, to choose any of the definitions would be arbitrary, and at its foundation, based on an unproven and unprovable belief pertaining to the nature of personhood. With the objectivity of personhood undermined, pro-life advocates could argue instead that abortion is wrong because a fetus is a potential person, and as Eike-Henner Kluge has argued, “a potential person has the same moral status as an actual person;”²⁴ however, this argument is even more apparently a matter of belief than was the former argument. This defense relies on an abstract claim about what is right—a claim with which reasonable people could rationally disagree.

Pro-life advocates could then proceed to claim that none of morality is factual, and that the same reasoning used to sup-

port skepticism of a fetus's right to life applies to all moral claims. Should we be likewise skeptical of the right to life for all persons? This question returns us to Rawls' first principle of justice. A just society prohibits the wanton murdering of persons because the freedom from physical assault is among the basic liberties. The findings in the previous two paragraphs may question why the basic liberties should be ensured. Here it is important to emphasize that Rawls is establishing a theory of justice, not a theory of morality *per se*. The protection of basic liberties is an outgrowth of Rawls' "general conception of justice," which states that "[a]ll social values—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."²⁵ Rawls seeks to establish a theory of justice under which all persons could live and thrive with dignity. For this reason, the freedom from physical assault and the other basic liberties are ensured. Refraining from granting fetuses this freedom does not threaten the ability of persons within the society to achieve that dignity (remembering that whether fetuses are persons is a matter of belief to be set aside).

Here we return to the veil of ignorance. People behind the veil must put aside their conceptions of the good, including their belief pertaining to abortion's morality or immorality. In their ignorance, they must acknowledge three facts: one, they could possibly be pregnant; two, they could possibly be in a state in which bearing and raising a child would be exorbitantly taxing; and three, they might consider abortion to be immoral, but they might not. The decision they make must be one they could abide by in self-respect, which as Rawls states, "implies a confidence in one's ability ... to fulfill one's intentions."²⁶ If Person A would choose to legalize abortion, then were the veil lifted and were she to find herself pregnant, pro-choice, and desiring an abortion, would she be able to live a self-respectful and law-abiding life in such a society? The answer is clearly no. On the other hand, if Person B would choose to mandate—not just legalize—abortion, then were the veil lifted and she to find herself pregnant, pro-life, and desiring to bear the fetus, would she be

able to live a self-respectful and law-abiding life in such a society? The answer here is also no. If, however, the society simply were to allow a person the choice to obtain an abortion, then Person A could obtain an abortion, while Person B could bear her child. Both could live in self-respect: both could follow their consciences. This same reasoning must apply to the doctors who deal most with the issue of abortion. Were Person C to decide, behind the veil, that abortion ought to be legal and that doctors in the pertinent field ought to be required to handle the procedure, only to discover that she in fact was a pro-life doctor, she could not live self-respectfully. She could not follow her conscience.

Had Justice Blackmun utilized these concepts in issuing his opinion, the argument would have been much more philosophically sound. Such an argument would have been as follows: 1) honest, goodhearted people can sincerely disagree on the morality of abortion; 2) these people disagree on whether or not fetuses have achieved personhood; 3) the Constitution only secures the right to life for persons; 4) when there exists a legitimate disagreement on the morality of an issue, the Court should err on the side of liberty (citing the Fourteenth Amendment) in order to avoid imposing a particular conception of the good upon people of other convictions; 5) in an effort to err on the side of liberty, the Court would grant the impregnated the right to choose whether or not to undertake an abortion at any stage of the pregnancy; 6) moreover, for liberty's sake, the Court would also grant doctors the right to refuse to partake in the abortion procedure.

Of Justice Rehnquist's three points of dissent, this Rawlsian defense of abortion successfully bypasses two—the historical treatment of abortion and the arbitrary trimester scheme—and offers a fuller and better explanation of the third—the assumption that the right to privacy applies to abortions. This defense also bypasses the potential argument from the amount of suffering a pregnancy causes. By not relying on an account of the history of abortion laws or on how much suffering pregnancy entails, this defense is sounder than that offered in Justice Blackmun's ruling. While some might recoil at the idea of third-

trimester abortions, the arbitrariness of the trimester scheme is too great to use it in formulating laws. People behind the veil of ignorance must put aside their personal conceptions of the good—in this case, whether or not they consider abortions in the third trimester to be immoral—when they are deciding on the laws of their society. The argument for third trimester abortions runs in parallel to that described earlier for abortions more generally. Here it is important to emphasize that the law would not mandate that pregnant women undergo abortions, nor that doctors with moral convictions against such procedures perform them.

The Rawlsian explanation detailed in the prior paragraphs of why pregnant women ought to have the private choice to undergo an abortion is difficult to dismiss on philosophical grounds. The only way to refute the argument is by refuting Rawls' veil of ignorance, and that cannot be done without dismissing the notion of selfless pursuit of self-interests and the entirety of Rawls' theory of justice. While many philosophers have done just that, their alternative theories consistently seem to be of a worse nature. If Rawls' theory is dismissed, a different theory must be accepted in order for societies to function, and the two leading alternatives both allow for practices widely and accurately considered unacceptable. A utilitarian theory of justice, under which a society perpetually seeks to maximize the good, fails to treat people as individuals with rights and freedoms worthy of respect. A libertarian theory of justice, such as that offered by Robert Nozick in *Anarchy, State, and Utopia*, institutes a callous social Darwinism, which does nothing to alleviate the suffering of the impoverished. Rawls' theory of justice is certainly preferable to either of these theories, and the notion of the selfless pursuit of self-interest is preferable in its own right.

Despite the fact that Rawls' theory of justice outwardly seems silent on the issue of abortion, the theory offers, upon extended analysis, a clear argument in favor of legalizing abortion. Since any belief regarding the morality or immorality of abortion is purely that—a belief—and since particular conceptions of the good are to be disregarded behind the veil of ignorance and in

light of the arguments put forth here, the only reasonable ruling would be to legalize abortion. A Rawlsian defense of abortion avoids the problems found in Justice Blackmun's dubious ruling in *Roe v. Wade* and is thus much more difficult to refute. It is important to stress that this does not settle the question of abortion's morality; rather, it settles only the question of abortion's legality. A truly unselfish pursuit of one's self-interests, as shown by Rawls' veil of ignorance, would lead to a unanimous verdict proclaiming abortion to be legal; hence, the legality of abortion ought to be guaranteed.

NOTES

1. Okin, *Justice, Gender, and the Family*, 89.
2. Rawls, "Fairness to Goodness," 537.
3. Rawls, *A Theory of Justice: Revised Edition*, 11, italics mine.
4. Blackmun, "Roe et al. v. Wade, District Attorney of Dallas County," 36.
5. *Ibid.*, 36: "The detriment that the State would impose ... by denying this choice altogether is apparent. Specific and direct harm medically diagnosable ... may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."
6. *Ibid.*, 38.
7. *Ibid.*, 40.
8. *Ibid.*, 31.
9. *Ibid.*, 39: Justice Blackmun mentioned three ways in particular: first, the Texas law gave an exemption to "abortion[s] procured or attempted by medical advice for the purpose of saving the life of the mother"; second, the law did not consider a woman who had undergone an abortion as either "a principal or an accomplice"; and third, the penalty the law demanded for aborting a fetus was "significantly less" than that for murdering a person.
10. Rehnquist, "Mr. Justice Rehnquist, Dissenting," 46: Justice Rehnquist argues that the laws historically enacted in the U.S. pertaining to abortions actually proved the reverse. "The fact that a majority of the States ... have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' ... [T]he very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe."
11. *Ibid.*, 46: "The decision here to break pregnancy into three

distinct terms and to outline the permissible restrictions the State may impose in each one ... partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."

12. Ibid., 45: "I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case.... [Abortions are] not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy."

13. Nathanson, *Aborting America*, 220. This is not one of the arguments present in Justice Rehnquist's dissent, perhaps because it appears to belittle the real toil many women undergo in the course of pregnancy; nevertheless, it is worth considering. Nathanson presents a detailed argument for this point, claiming, "Pregnancy is not a sickness. Few pregnant women are bedridden and many, emotionally and physically, have never felt better."

14. Rawls, *A Theory of Justice*, 266.

15. Ibid., 53-54.

16. Ibid., 53.

17. Rawls, *Political Liberalism: Expanded Edition*, 296.

18. Rawls, *A Theory of Justice*, 11.

19. Rawls, *Political Liberalism*, 24.

20. Dworkin, "The Original Position," 50.

21. Nagel, "Moral Conflict and Political Legitimacy," 235-36.

22. Ibid., 235: Nagel considers whether people can truly hold beliefs that they know might be false. While his argument poses several interesting questions, it is not of concern here. People could and do exist who are skeptical of everything that is not verifiable, and if the non-skeptics were unable to distinguish between belief and fact, it is to these people we could turn.

23. Hui, "Personhood and Bioethics: A Chinese Perspective," 29.

24. Kluge, *The Practice of Death*, 17. (Cf. Ibid., 91: "A person is an entity ... that is either presently aware in a manner characteristic of rational beings, or can become thus aware without any change

in the constitutive nature of its composition.”)

25. Rawls, *A Theory of Justice*, 54.

26. *Ibid.*, 386.

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