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A Precautionary Tale: Separating the Infant from the Fetus

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Abstract: This article confronts growing conservative opposition to abortion based on the slippery slope claim that abortion is morally equivalent to infanticide. By examining the relationship between moral skepticism and precautionary ethics the article promotes a completely permissive position on abortion from conception to birth while consistently rejecting the possibility that such a position entails permissive implications for infanticide. The article introduces and traces the implicit relationship between moral skepticism, the precautionary principle and political liberalism.

Key Words: Abortion, Infanticide, John Rawls, Moral Skepticism, Moral Pluralism, Political Liberalism, Precautionary Principle, Public Reason

Introduction

This paper addresses the complicated relationship between abortion and infanticide from a liberal perspective and specifically from the politically liberal perspective advocated by John Rawls. It will be shown in what follows that by approaching the issue of abortion from a Rawlsian framework one can maintain a thoroughly permissive liberal view on abortion while consistently condemning the infanticide of healthy newborns.¹ A philosophical defense of such a position is both necessary and relevant to public policy, as very few nations have unrestricted laws regarding abortion, and infanticide is still practiced by many in poor nations as a form of

¹ This paper will not discuss the related issue of infant euthanasia. Therefore, the reader should assume unless specified that infanticide refers to the killing of healthy infants.

population/birth control.² Of relevance is the fact that many opponents of abortion (following the late ethicist and theologian Paul Ramsey)³ eagerly raise the specter of infanticide as a slippery slope argument against abortion entirely, or more moderately, against fully liberalized laws regarding abortion! Such arguments contribute to the shrill nature of the debate and encourage a non-reflective confidence in conservative positions that are gaining traction in the United States, Great Britain and elsewhere. One purpose of this paper is to decisively remove such slippery slope arguments as obstacles to fully liberalized laws regarding abortion. It can be argued that if abortion were more widely available, unrestricted, and less stigmatized, fewer cases of infanticide would exist in all nations.

Positions that fully defend abortion at all stages of fetal development and consistently oppose the infanticide of healthy infants are surprisingly difficult to defend on secular grounds, if one takes into consideration the moral status of the fetus. In the past, efforts inspired by liberal theories such as that of J.S. Mill have been rightly criticized for sidestepping the essential question of the fetus (Singer 1993). This is

² Infanticide most often targets female infants in impoverished and overpopulated parts of the world. See George (1996).

³ See Ramsey (1980).

⁴ It must be recognized at the outset that removing the stigma of abortion at the level of political theory in a way that supports non-restrictive laws is only part of the task needed to reduce instances of infanticide. If infanticide is to decrease globally (and especially in poor areas of the world where there are cultural and economic sex-selective pressures in place), then an urgent priority must be placed on increasing access to education, healthcare, birth-control, foster and abortion services across all societies. This will require a shift in thinking related to global economics, politics, religious doctrines, and the responsibilities of governments to people both domestically and abroad. It must further be said that part of the assumption being made in this paper is that abortion, even sex-selective abortion, is preferable to infanticide. If sex-selective abortion is wrong from the perspective of public-reason, it is so indirectly, because of the sexist pressures in place in a society in which these kinds of abortions happen for economic and cultural reasons. Again, a great deal of global reformation has to occur in order to sufficiently address this problem. Such reforms are beyond the scope of this paper. This paper will deal exclusively with the theoretical justification of non-restrictive abortion laws while allowing a means to consistently condemn the infanticide of healthy infants. For more on the topic of sex-selective abortion and its effects in depressed parts of the world: See Amartya Sen (1990) and (1992). For an epidemiological factor that, in part, explains Sen's findings, see Oster (2005).

because without first addressing the status of the fetus any classically liberal argument for abortion is circular. Yet arguments that do address the fetus are open to the charge of circularity on a comprehensive moral/ontological front.⁵ So, what is one to do? In what follows I will show why the politically liberal Rawlsian framework avoids such difficulties.

On of the best, most well known, secular defenses of abortion is Judith Jarvis Thomson's justification in the context of her famous thought experiments involving an accomplished violinist, the healing hand of Henry Fonda, and floating people seeds. (Thomson 1971). While Thomson succeeds in sidestepping the sticky issue of infanticide by presuming the moral relevance of the fetus in her arguments, her position on abortion is at best applicable to cases of rape and failed contraception. However, we require an equally secular defense capable of securing a woman's right to choose in all circumstances while still condemning infanticide.

Therefore, in what follows I will outline an argument rooted in moral skepticism that utilizes the Rawlsian approach to moral pluralism tied to such skepticism. I will show that an application of the "precautionary principle" is embedded in such an approach, and will argue that when explicitly considered, the precautionary principle provides a useful heuristic in negotiating the controversial moral issues of abortion and infanticide against the backdrop of the modern morally pluralistic milieu.

⁵ Arguments that address the moral relevance of the fetus must assume that an implicit value exists in the nature of human life, potential, sentience, or any number of possible place markers for moral value. In doing so a particular characteristic is promoted as morally meaningful, yet, arguments for the particular characteristic must be circular on pain of infinite regress. See the skeptical discussion below in this paper. In a similar vein, as pointed out by the philosopher Michael Tooley, any argument for the moral relevance of a fetus between conception and birth is ultimately arbitrary. See Tooley (1985).

The precautionary principle is not usually discussed in the context of Rawlsian political theory, but it has become a commonly evoked principle in the domain of environmental policy. But in fact, the precautionary principle provides a crucial insight into the type of risk analysis that is intrinsic to a consistent application of Rawlsian strategies regarding public reason. So applying the precautionary principle allows us to negotiate a politically liberal approach that provides philosophical traction in defending a completely permissive position on abortion while consistently condemning infanticide. Such an argument provides an important framework that meaningfully separates the infant from the fetus while avoiding relativistic considerations.

Abortion and Infanticide

Imagine the following case: Alexia is a serious, highly motivated, and morally conscientious undergraduate student who is planning for a career in medicine. She plans to train as a pediatrician and has in fact been accepted to a prestigious medical college. Once armed with her medical degree, her goal is to spend time providing pediatric care for children in an impoverished nation. Alexia finds that she is pregnant. By her own honest evaluation of the situation, it is because she was careless. She knows that her pregnancy has come at an inopportune time. She has thought through her options deeply and soberly, and as a philosophy minor, she is familiar with many of the most influential arguments regarding abortion. She knows that she is not ready to be a mother and she also knows that the demands of pregnancy will seriously interfere with her plans to begin medical training. As she thinks through the theoretical factors which she is familiar with from her ethics class, she becomes increasingly troubled. By the time Alexia begins her second trimester she is still wrestling with the horns of her dilemma. Alexia does not

believe that the fetus has the same moral relevance that a fully self-aware person does. Yet she cannot shake the idea that a permissive view regarding abortion seems to have unwanted consequences for the moral status of infants; Alexia cannot ignore her fear that abortion may be the moral equivalent of infanticide. The idea of infanticide is completely repugnant to Alexia and she is considering going through with the pregnancy (even if it means giving up on medical school). Alexia would rather postpone a medical career or even give one up than commit an act that she fears may lend implicit justification to infanticide. Pulling from her studies in political philosophy, Alexia chooses to identify herself as a progressive liberal. Therefore she is further distressed by a sincere conviction that a woman must have an absolute right to the autonomy of her own body, health, and life plans. Are there any arguments to which Alexia can turn that clearly justify her right to an abortion while consistently condemning infanticide?

As Alexia knows, the complexity of the relationship between abortion and infanticide is brought out when one recognizes that many of the strongest advocates of a liberally permissive position regarding abortion are unable to satisfactorily overcome permissive entailments regarding infanticide.⁶ This is because the liberal position advocated by some of the most influential philosophers writing on the topic of abortion is tied to a particular conception of what constitutes a person (Engelhardt 1996; McMahon 2003; Singer 1993; Tooley 1985). The assumption made is that what makes the killing of an innocent human being morally wrong, in a secular non-dogmatic sense, is not that a "human being" is killed but that a "person" is killed. Proponents of this view believe that to be a "human

⁶ Obviously, this is not to suggest that these thinkers regard the implications their positions on abortion have for infanticide as detrimental to their arguments. In the case of H. Tristram Engelhardt Jr. who holds a strong religious view condemning abortion and infanticide the results are consistent with his notion that secular reason cannot provide enough substance to give us the kind of rich moral guidance necessary to organize one's private life in a satisfying way.

being" is merely a status trait of biology and thus cannot be a source of moral relevance, in and of itself, without evoking a religious notion of the sacred or succumbing to a non-rational bias favoring one's own species. In contrast, a "person" is self-aware and autonomous.

It is not an uncommon position in bioethics to argue that severely disabled infants may benefit from active euthanasia. More controversial, and distressing to Alexia, is the fact that if abortion is to be permitted based on the human/person distinction, then a stronger than expected case can be made for the infanticide of healthy infants. In order to mount an argument against the infanticide of healthy infants, some of the most influential philosophers writing on this topic are left with no other recourse but to appeal to the social value placed on the infant by the community of actual persons into which it is born (Engelhardt 1996; McMahan 2003; Singer 1993; Tooley 1985).

While this approach does provide an indirect case against infanticide, the problem with it is that it is only able to condemn infanticide in circumstances where the social community into which the healthy infant is born already condemns such acts and already places a value on the infant. As a young, socially conscious woman intent on helping impoverished children, Alexia is painfully aware of and saddened by the widespread practice of female infanticide in some parts of the world. She finds it impossible to accept that the practice of killing female infants could be justified in any way by sex-biased cultural and economic pressures pervasive in a society.

The philosophers familiar to Alexia, mentioned above, readily accept the implications of infanticide as a consistent outcome of their overall positions.⁷ Nevertheless, permissive entailments for infanticide seem unsatisfying on at least two

⁷This is not to imply that they readily condone the killing of infants under any and all circumstances.

grounds. One, a more permissive view of infanticide seems to be a position that is too often embraced as a compromise that allows for argumentative consistency regarding a liberal view on abortion. There is no good reason to argue for a tolerant position on infanticide otherwise; there is no other reason one would set out in the first place to show why it ought to be permissible to kill a healthy infant. Even in parts of the world where there is an severe population crisis, the practical debates ought to be on environmental sustainability and contraception. Infanticide by its very nature is a desperate act, far more so than a clinical abortion. So, there is no need to argue for infanticide unless it is a corollary argument that allows for a more consistent position on abortion. The second problem with the established positions, as realized by Alexia, is that to determine the moral relevance of an infant by the social values of its parents or society seems arbitrary and relativistic. We may expect of more from our ethical theories than a socially relative means of judging particular actions.

A separate strategy for arguing against infanticide might at first glance be found by considering time-relative interests. According to this account, as a fetus progresses in development, its time-relative interests in continuing to live increase, as the odds of it developing into a full person with a robust moral status multiply. According to this argument, as discussed by Jeff McMahan:

Late abortions [...] involve the killing of someone who, in most cases, would otherwise have had a long life that would have been well worth living. But because the developed fetus is almost totally isolated psychologically from the person it might later become, its time-relative interests in continuing to live is very weak, despite the magnitude of the good that lies in prospect for it (McMahan 2003 p.339).

Because there is so little difference between a newborn infant and a late term fetus, time-relative difference is insufficient to provide a strong case against infanticide. What is

more, the time-relative interest strategy seems too vague altogether. At what point are time-relative interests ever sufficient to make killing wrong? It would seem that the only point when a developing entity is not isolated psychologically from the person it might later become is exactly when that entity has become that person. When might this be? This might be a valuable conundrum for existentialists, but here it seems arbitrary and defensible only at the price of circularity.

Whether explicitly recognized or not, time-relative interests bank heavily on the value of potentiality. Once one allows concerns over potentiality to factor into this debate, consistency demands that a completely prohibitive view on abortion be adopted. The project of positing a point in development when a potential person crosses a morally relevant threshold, necessarily involves a dubious amount of philosophical conjuring. Alternative middle positions concerning straightforward arguments from potential are *prima facie* open to the same arbitrary circularity to which the time-relative account is open.

All of this considered, Alexia increasingly wonders if the most consistent strategy is to simply make a serious endorsement of potentiality and conclude that abortion is altogether morally wrong from conception to birth, and of course as a corollary, so is infanticide. However, this position has its own set of well known problems that do not escape Alexia's notice. It is true that persons value things based on potential worth all the time. The value of an investment, for instance, is largely predicated on its potential for growth. The value of a lottery ticket is contained solely in its potential; as slight as its potential is, so therefore, is its value. So we are used to making value judgments based on potential. Nevertheless, moral value is sufficiently different to warrant a discrete standard

governing its considerations. For instance, just as one is not guilty of crimes one might potentially commit, one is not guilty of moral infractions one might potentially make. A person deserves no moral laudation for charitable donations that she may potentially give, promises that she might potentially keep, or any other form of potential moral activity, precisely because moral value cannot adhere to potential states.

There is no obvious argument as to why the mere potential of future moral relevance should be enough to grant moral status to potential persons that don't exist, any more than moral relevance can be placed on potential acts that have not occurred. Furthermore, if one were to allow potential to carry moral weight, then one would be confronted with the cloudy issue of where to draw the starting line regarding potential. Some go so far as to argue that birth-control is morally impermissible. This position can quickly become absurd, since there is no obvious reason why the line should be drawn at birth-control, so that celibacy itself becomes a serious barrier to potential human life and thus morally culpable.⁸

As Alexia wrestles with all of these issues, she begins to understand why some opponents of abortion feel secure in a "pro-life" rhetoric that does not refer to potential but instead references the inherent value of life. Yet, as Alexia knows, without making a clear argument for some distinction between life *qua* life and life *qua* human life, challengers of abortion advocate an absolute claim on the value of life that makes it impossible for anyone to live within the bounds of morality. No human being can live without encroaching on the existence of other life-forms to some degree, be they plant or microbial. If an opponent of abortion attempts to be more precise in limiting her "pro-

⁸ For instance, it is well known that the Roman Catholic Church condemns "artificial" methods of birth control as an interruption of the possibility of human life. The organization also demands celibacy from its priests and nuns.

life" arguments to human life, then she is once again confronted with the issues of personhood and potential. Otherwise, the only alternatives are dogmatic religious views that limit the meaningfulness of her arguments to a community of fellow devotees, and/or, speciesist arguments that lack a rational underpinning to distinguish them philosophically from racist arguments of the same logical form (Singer 1993).

Alexia can see clearly the rational nature of the positions discussed above, but none of them are ultimately convincing to her. She increasingly feels unable to find one rational solution that is clearly superior to equally rational counter positions. She knows that it may be a simple matter of utilitarian calculus to argue that this one abortion will make it easier for her to help a large number of children in the future. However, the very condition of possibility for Alexia to even consider such an argument is the fact that she places an equal moral value on the life of each individual infant. Furthermore, this argument does not help Alexia, since she can readily imagine such arguments being used to justify the practice of infanticide in poverty stricken nations with swollen populations. Alexia is overwhelmed by doubt and increasing desperation. How can one ever hope to know what to do in such a situation? Is there a set of considerations that Alexia, or someone like her, could turn to that addresses her particular and ethical values?

Skepticism, Moral Pluralism, and the Precautionary Principle

It is no wonder that the abortion debate is one of the most complex and divisive debates in which any democratic and morally pluralistic society can possibly engage. Depending on one's moral strategy, moral first principles, and religious concerns, one can come to a variety of conclusions that are equally problematic but no less rational (or at least internally consistent) in comparison to one another. This fact of rationality, that

we can rationally construct and constantly defend mutually contradictory positions, was long ago recognized and explored in the tropes of the ancient skeptics, as the tradition carried on by Diogenes Laertius, Cicero, and Sextus Empiricus⁹ Yet, for our purposes a public position, one unambiguous regarding the implications of abortion for infanticide, must be endorsed in the interest of social cohesion and the normative legislation required for such cohesion at the level of civil society. Therefore, public approaches to abortion must involve an explicit understanding of pluralism, its root causes, and its intractable nature.

It is important to recognize that the idea of moral pluralism is tied closely to the notion of moral skepticism. There is a meaningful sense in which an appropriate level of ethical uncertainty recommends that one should prefer to err on the side of caution given any particular dilemma that involves unknown variables. Indeed, one may consistently use a skeptical approach, in harmony with the demands of public reason, when confronted with a moral dilemma. Regarding the moral influence that a moderate skepticism ought to have on human behavior Bertrand Russell writes:

(1)...when the experts are agreed, the opposite opinion cannot be held to be certain; (2) That when they are not agreed, no opinion can be regarded as certain by a non-expert; and (3) that when they all hold that no sufficient grounds for a positive opinion exist, the ordinary man would do well to suspend his judgment. These propositions may seem mild, yet, if accepted, they would absolutely revolutionize human life. The opinions for which

⁹ In particular, one is reminded of the tropes of disagreement, assumption, circularity, and infinite regress attributed to Agrippa by Diogenes Laertius. In other words, for any moral assumption offered regarding abortion and infanticide an accompanying justification must be presented. However, the effort of justification spawns an infinite regress because any justification that is offered on any position must itself be justified. Because each justification demands its own justification, the process spirals on *ad infinitum*. In order to escape this vicious regress, one must refuse to continue in endless justifications and stake out one's position dogmatically. In doing so, one may begin to build a robust and comprehensive position. Yet, in building upon the still unsubstantiated posit, all subsequent arguments on the topic are reducible to circularity. The skeptic is therefore justified in rejecting my given comprehensive position on the grounds of its circularity. Because this is the fate of any attempt at rational argument disagreements abound. See Landesman and Meeks (2003).

people are willing to fight and persecute all belong to one of the three classes which this skepticism condemns (Russell 1928 pp. 2-3).

It is a simple matter to apply this argument to abortion. The "experts," those professional ethicists who write on this topic, are far from agreeing.¹⁰ There is in fact a vast literature chronicling the degree to which rational people coherently and persistently disagree on the topic of abortion. The essential issues regarding the abortion debate are unsettled and there is good reason to assume that they will remain unsettled.

Incommensurable rational arguments can be put forward revealing a great deal of uncertainty about the moral relevance of potential, personhood, and the nature of killing. This may lead one to the conclusion that as long as one cannot be certain of the moral status of a fetus, then *ceteris paribus* one ought to refrain from imposing any restrictive legislation regarding a woman's freedom of choice. This is consistent with Russell's argument, because Russell's assumption is that suspension of judgment will have social repercussions specifically because the vast majority of people base their actions on unsettled and unjustified beliefs. This position is further buttressed by the arguments of W.K. Clifford, who famously states that because beliefs influence actions both directly and indirectly, one is always morally culpable for holding a belief that is not supported by appropriate evidence (Clifford 1877). Such an attitude encourages agnosticism to the extent that one's beliefs are held in strict proportion to available evidence, and therefore as a corollary, one's actions are morally justifiable (in part) to the degree to which they can be traced back to evidentially warranted beliefs.

The risk of acting without evidence can be grave. There is a very real threat to the safety of women if abortion laws are restrictive rather than liberal; such arguments have

¹⁰ For an interesting discussion of what might constitute "moral expertise," see the short article by Peter Singer titled "Moral Experts," reprinted in Selinger & Crease (2006).

proven effective in liberalizing public policy on abortion in the past. It is thought that removing a woman's right to abortion will not so much lessen the rate of abortions, as it will increase the danger to women forced to obtain abortions in less than clinical circumstances. This was one of the influencing factors in Canada's formation of liberal policy on abortion." It is not worth risking the life and health of a woman for a being with uncertain moral relevance. Beyond this very practical concern for physical safety we may add that it is simply not worth oppressing a woman's freedom of body and conscience for a being with uncertain moral relevance. These permissive conclusions regarding abortion follow on the acceptance of moral skepticism. Moral skepticism, it should be made explicit, is a crucial aspect of Rawls' later thinking. This is evident from the importance that his "burdens of judgment" play in the formulation of his conception of moral pluralism and the political response to it (Rawls 1993). It follows that while one need not like abortion, or agree that it is morally neutral, one does need to tolerate its availability to others in a free society.

The skeptical arguments above connect political liberalism with what has in other contexts been called the "precautionary principle." Applied to morality, we may take the principle to stipulate that where one is unsure of an action's moral status and cannot justify claims against it that other rational agents must accept, then one ought to give that action the benefit of the doubt (at least as far as the rights of others are concerned), and tolerate it. The principle itself originates from the German concept of the *Vorsorgeprinzip*, which was evoked in twentieth century efforts to save valued forests in Germany. This concept is typically translated into English as the "precautionary

¹¹ Canada fully liberalized its abortion law in 1988 and remains one of the few nations in the world with no legal restrictions on abortion. See Singer 1993.

principle" and is most often referenced in discussions of environmental policy.¹²

However, the principle, as seen below, has theoretical precedent that predates the twentieth century.

Even when it has not specifically been recognized as the "precautionary principle" this implicit rationale is widely applied in issues of public policy. For instance, it could be claimed that whenever one argues that an issue is best decided according to the legislative processes of individual states, as is often argued regarding abortion, then one is advocating a precautionary position that urges against any hasty, generalized federal ruling and encourages extended debate and dialogue.¹³ Arguments that evoke the precautionary principle are clearly in the realm of public reason." In evoking such a principle, there is no need to call attention to any metaphysically or religiously comprehensive doctrine. In fact, when one considers the parameters of Rawls' original position in light of the precautionary principle, the similarities are obvious.

The original position itself reads like an alternative formulation of the precautionary principle. The original position stipulates that one is to decide on principles in a condition marked by a great deal of uncertainty (the veil of ignorance),

¹² Others suggest it is better translated as "*for caring*." (Meyer 2002). The term *for caring* has Heideggerian undertones that are suggestive of *Dasein*'s unique mode of "caring" as a *Being in the world*. This is consistent with the wide use of the principle in relation to environmental concerns and perhaps there is an interesting exploration of this concept in relation to Heideggerian philosophy, but it is beyond the scope of the topic at hand.

¹³ Arguments that suggest issues such as abortion, euthanasia and same-sex marriage should be handled at the state level make an implicit appeal to the precautionary principle if not an explicit one. This is because such arguments often recognize the great amount of disagreement and uncertainty on a specific issue that suggests against any conclusive federal ruling. One might say that because the federal government is so bad at making ethical arguments, it ought as a precaution, to avoid making them altogether.

¹⁴ For an extended discussion of what kinds of argument most readily fall into the domain of public reason see Torcello (2008).

and the original position is meant to suggest the need for caution in the face of such uncertainty (decisions should be considered from the losing end of the social and natural lotteries). If a being that finds itself in the original position were to make decisions with the precautionary principle in mind, it is not clear that the outcome of such a process would be any different than the outcome advocated by Rawls (Rawls 1971).¹⁵ In fact, one can profitably use the precautionary principle to explain the strategy that Rawls is assuming to be the most reasonable in his political approach to moral pluralism and public discourse.

The Essential Features of Public Reason

John Rawls maintained that his arguments in "Political Liberalism" (1993) allow for a great many points of view to enter the realm of public discourse. In his later writings Rawls consistently emphasizes that the idea of public reason is not about what the right answers to controversial questions of a constitutional nature are, but about the types of arguments to which people can legitimately and publicly appeal, for the purposes of legislation in a just liberal society (Rawls 1993).¹⁶ In order to meet the criterion of public reason, arguments must not rely on controversial philosophical or religious positions. Such positions belong to the domain of comprehensive doctrines. For reasons articulated above, no comprehensive doctrine can be established categorically such that all

¹⁵ Of course one of the problems with Rawls' original position is that not everyone is necessarily bound to proceed cautiously. There is nothing surprising in the notion that some entities in the original position may be very comfortable gambling on principles that favor a majority of society at the expense of a minority. This criticism cannot be extended to the point being made in this paper, since it is not being suggested that rational self-interested beings as such will naturally embrace and apply the cautionary principle. The similarities between the original position and the precautionary principle suggest that environmental policy might be an area where Rawlsian concepts can be profitably applied. To what degree such applications of Rawlsian concepts are applicable to environmental issues are beyond the scope of the present work, and will be left for another investigation.

¹⁶ See Rawls' "Political Liberalism," especially _____ and Rawls' 1998 "Commonweal Interview with John Rawls," *Collected Papers*, Harvard 1999, as well as the 1997 "The Idea of Public Reason Revisited," *Collected Papers*, Harvard 1999.

reasonable persons are compelled to accept its content. A just society, therefore, cannot favor any one comprehensive doctrine that would force its influence upon reasonable citizens who do not subscribe to its metaphysical/religious posits. Public arguments, in contrast to private comprehensive arguments, are those which in principle can be understood and considered without any reference to a particular comprehensive doctrine.

The ideal of public reason manifests when at the public level of society, citizens hold what Rawls referred to as an *overlapping consensus* on constitutional principles of justice. Under the conditions of an overlapping consensus, each citizen has reason to agree to fundamental constitutional principles of justice from within the domain of a particular comprehensive tradition (so long as the tradition is reasonable, or simply put, tolerant of other reasonable traditions). This is important, because an overlapping consensus is more stable than a mere compromise or *modus vivendi*. Overlapping consensus does not require any one group to give up deeply entrenched beliefs that are constitutive of a comprehensive doctrine. So long as a comprehensive doctrine is reasonable there can be an overlapping consensus among a plurality of comprehensive doctrines. Reasonable comprehensive doctrines are distinguished by three main features.

First, a reasonable doctrine is concerned with major theological, moral, or otherwise philosophical aspects of human life in an all-inclusive fashion that organizes values in a consistent and meaningful manner. Secondly, a reasonable comprehensive doctrine is not merely an exercise in theoretical reasoning. Such doctrines are also exercises in practical reasoning, because they involve choices concerning the significance of particular values. Finally, though reasonable comprehensive doctrines evolve, they are nonetheless, derived from and remain a part of an established tradition. As such, comprehensive doctrines

display a degree of stability paired with the flexibility sufficient for the doctrine to evolve according to developing arguments and information deemed relevant from the perspective of the tradition itself.

In "Political Liberalism" (1993), Rawls argues that excluding doctrines as unreasonable should be avoided unless there are strong grounds for such exclusion. Doctrines that are to be excluded from the category of the reasonable are doctrines that fail to apply the tolerant standards of reason to other doctrines, and therefore make public claims to exclusivity, which are not warranted and cannot be warranted, in terms that all reasonable citizens should be expected to accept. This being the case, a politically liberal society can be expected to demonstrate a wide sampling of differing points of view on controversial issues. A citizen in such a society who adheres to a reasonable comprehensive doctrine may therefore find herself in the position of disagreeing with a particular point of view or practice, while consistently endorsing the right of others to embrace such a view or practice.

Abortion is a prime example of such an issue. If we are to accept that, from a legal point of view, the question of abortion has been settled in some nations then, one might reasonably claim (as many do) that while one disagrees with the decision to have an abortion, one recognizes the legal right of a woman to make her own decision on the matter. An instance of this position was displayed by Senator John Kerry in the third United States Presidential Debate of 2004 against George W. Bush:

Q: Some Catholic archbishops said that it would be a sin to vote for a candidate like you because you support a woman's right to choose an abortion and unlimited stem-cell research. What is your reaction to that?

A: I completely respect their views. I am a Catholic. And I grew up learning how to respect those views. But I disagree with them, as do many. I can't legislate or transfer to another American citizen my article of faith. What is an article of faith for me is not

something that I can legislate on somebody who doesn't share that article of faith. I believe that choice is a woman's choice. It's between a woman, God and her doctor [...] I will not allow somebody to come in and change Roe v. Wade (Third Bush-Kerry debate, in Tempe AZ Oct. 13, 2004).¹⁷

To make arguments consistent with the demands of public reason is to accept that one cannot argue at the level of public policy from personal metaphysical/religious positions. To be sure, one may in fact admit to the personal comprehensive views that inform one's own beliefs, but in bracketing one's personal comprehensive doctrine, one is left with the task of providing reasons for a particular position that can be understood by any reasonable person regardless of comprehensive doctrines. To be reasonable for Rawls is to recognize the limits of rational argumentation, and therefore, to be fully cognizant that one's own position can be in error. With such knowledge, a precautionary epistemological and moral approach leads by default to a tolerant liberal position on a score of controversial issues.

Political Liberalism and Abortion

In a footnote contained in "Political Liberalism," Rawls' commits to the position that abortion should be permitted at least in the first trimester. This does not rule out the possibility of abortion in other trimesters, but Rawls is hesitant to make a firm declaration on that matter.

Suppose first that the society in question is well-ordered and that we are dealing with the normal case of mature adult women [...] Suppose further that 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 (Rawls 1993 pp. 243-244).

¹⁷ http://www.ontheissues.org/2004/JohnKerry_Abortion.htm.

It is worth pointing out that Rawls is so certain of a woman's right to abortion during the first trimester that he judges any doctrine that does not recognize such a right to be unreasonable." Although Rawls does not extend his discussion to later periods of pregnancy, a consistent reading of Rawls' position suggests a permissive position on abortion from conception to birth. If a society holds the reasonable default position that women are citizens of undeniable moral relevance, then any denial of a woman's right to an abortion at any stage of pregnancy must be accompanied by a strong public reason for such a denial. Indeed, it is right to begin with the assumption that the healthy adult woman, by virtue of being a person with self-awareness, has a high degree of uncontroversial moral relevance. One need not discount the moral relevance of sentient beings to recognize that self-awareness sets the conditions of possibility for entering into moral discourse and so is necessarily a condition of moral relevance. Therefore, to deny the moral relevance of the woman in question is unreasonable.

As controversial as it is to decide whether or not a fetus or infant is a person in the morally relevant sense of the term, it is just as non-controversial to recognize that the woman who is carrying the fetus, if otherwise healthy, is a full person with self-awareness and the accompanying moral status that such personhood denotes within the bounds of the societal contract. While any argument that can be made from public reason will intrinsically recognize the moral priority of the actual person, only arguments that are rooted in a comprehensive doctrine, whether religious or philosophical, can be

¹⁸ This fact has powerful repercussions in terms of what is and is not a reasonable comprehensive doctrine from the Rawlsian point of view. It is widely assumed, for instance, that the three major monotheistic religions of Judaism, Christianity, and Islam are for the most part reasonable doctrines from a Rawlsian point of view. However, there are many widely accepted versions of these belief systems that would absolutely reject Rawls' declaration of a woman's right to terminate her pregnancy in the first trimester. It may be the case that Rawls overestimates the number of doctrines that would count as reasonable in relation to his political theories. This is a topic that will need to be explored in a future study.

appealed to in order to grant moral status to the fetus in a way that can seriously stand against the moral relevance of an actual adult woman. Any argument granting moral status to the fetus will involve a robust comprehensive doctrine concerning the distinction between human and person or the sanctity of human life,¹⁹ and therefore, such arguments must be bracketed out of public debates over abortion.² Consequently, the default politically liberal position regarding abortion must be fully permissive in deference to a woman's right to choose at any time in her pregnancy.

To reiterate, Rawls' emphasis on bracketing away comprehensive doctrines leads to a liberal position in which political decisions must ultimately find their grounding in public reason. In order to offer a public reason as to why a woman should be denied a right to an abortion after the first trimester, one would have to make an argument showing that a fetus after the first trimester has a right to life which supersedes a woman's right to choose. However, the strongest arguments attempting to establish a fetus' right to life above and beyond the right of a woman to choose tend to place a comprehensive value on the life of the fetus. Though from a Rawlsian perspective it is acceptable to utilize comprehensive doctrines in a debate, such doctrines must be easily converted into public terms to be relevant to legislation, otherwise they should be accompanied by separate public reasons. Arguments that are meant to establish the right to life of a fetus above the right of women to choose are comprehensively thick. Such arguments contain little or nothing that can be converted to a public reason. Therefore, as

¹⁹ Regardless of how inconsistent such arguments about the "sanctity of human life" may be.

²⁰ Generally speaking this will seem like a controversial claim to many scholars of political liberalism. Nevertheless, arguments that do not contain comprehensive metaphysical claims, even from a secular perspective, are very hard to find. Therefore, a consistent application of public reason will always be minimalistic. For an argument supporting the claim that arguments falling into the domain of public reason are limited to states rights appeals, appeals for equal civil liberties, appeal to harm, and appeals for compromise, see Torcello (2008).

far as public legislation is concerned, such arguments cannot circumvent the *prima facie* right of the actual woman to choose.

A Possible Objection: The Precautionary Argument against Abortion

Thus far, I have been making the case that where moral uncertainty is a factor, a society is not justified in enacting oppressive legislation that encroaches on the physical and mental autonomy to which free and equal citizens otherwise have a right in a just liberal society. However, the opponent of abortion might assert that the precautionary principle can be just as easily applied to a prohibitive view regarding abortion. Applied to morality, we ought to formulate the precautionary principle as holding where moral status/relevance/evidence is uncertain and the risk of potential moral wrong is substantial. Formulated in a way that is specifically relevant to the issue of abortion, one might argue the following: The precautionary principle applies where moral argument is inconclusive, moral relevance is uncertain, and the potential risk of harm is great. There are reasonable grounds for concern that an abortion will harm a morally relevant agent, and therefore one ought to refrain from an abortion.

It was claimed above that the most consistent position to hold regarding abortion, from the Rawlsian point of view grounded in public reason, is an entirely permissive stance from conception to birth. At first glance the objection just outlined seems consistent with public reason and it is an argument with precedent in policy debates evoking a state's rights approach. Indeed, I have claimed that the precautionary principle is implicit to the spirit of Rawls' political liberalism itself. So this objection would seem to be a very compelling challenge to the permissive view on abortion advocated above.

Response

The precautionary argument against abortion is not strong enough, however, given the unique circumstances of abortion, to overturn the permissive argument outlined initially. The reasoning behind such a claim is that even though the precautionary principle does not rely on any uncertain and controversial claim regarding the nature of personhood, the unique circumstances of abortion require one to take into consideration the interests of at least one non-controversial person. In most cases, abortion is considered from the perspective of an actual woman with all of the moral status that comes with non-controversial personhood. The precautionary argument dictates that in the absence of certainty, the default position should be that of caution. When dealing with a decision between the freedoms of choice and consciousness belonging to an actual woman as opposed to the uncertain moral status of a fetus gestating in her body, the most cautious option is to honor the physical and mental integrity of the woman and her best judgments regarding her own interests. This position requires the least amount of comprehensive assumptions.

When moral uncertainty stems from the inability to articulate a compelling argument against a certain practice (like abortion) from a non-comprehensive point of view, then the precautionary position ought to recognize the autonomy of an otherwise free and equal citizen whose physical and mental well-being must be given priority. Once again, if we turn to Rawls, we are given insight as to why erring on the side of liberty is, in effect, the most reasonable application of the precautionary principle. Reasonable caution in the face of persistent uncertainty, and consequently intractable moral pluralism, demands that one err on the side of freedom and equality or risk the very real harm of bloodshed, persecution, and oppression.

It is important to understand that a diversity of reasonable philosophical, religious, and moral comprehensive doctrines is necessarily endemic to a just democratic society, because such pluralism is, as Rawls phrases it, "the inevitable outcome of free human reason" (Rawls 1993 p.37). The only way to diminish reasonable pluralism for Rawls would be through the unjustified use of state force. In a passage that is of great consequence in understanding why a just and peaceful society cannot be one in which a particular comprehensive doctrine is legislatively foundational or morally dominant, Rawls repeatedly underscores that only with an oppressive use of state power can the dominion of just one comprehensive (political, religious, philosophical or moral) doctrine be maintained:

A [...] general fact is that a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power. If we think of political society as a community united in affirming one and the same political doctrine, then the oppressive use of state power is necessary for one political community. In the society of the Middle Ages, more or less united in affirming the Catholic faith, the Inquisition was not an accident; its suppression of heresy was needed to preserve that shared religious belief. *The same holds, I believe, for any reasonable comprehensive philosophical and moral doctrine, whether religious or non-religious [...]* Call this 'the fact of oppression' (Rawls 1993 p.37, *italics mine*).

If we apply the precautionary principle in the public domain of legislation in favor of the life of the fetus, then we are hedging our bets that comprehensive doctrines endowing the fetus with the existence of robust moral interests are correct. A society can only do this at the risk of oppressing the interests of the actual person whose body is home to the fetus. This is an application of the precautionary principle that misrepresents the moral dangers of abortion in a uniquely Pascalian way. In cautiously imagining that the greatest harm will come from aborting a fetus whose moral existence is unclear, one is throwing caution to the wind regarding any other moral possibility surrounding

abortion. And this is yet to mention the consequences, already proven by historical precedent, that a society which bans abortion does not make abortion less likely to occur, but less safe for women with unwanted pregnancies.

To reiterate, there are harms that are more certain to result from the banning of abortion than from unrestricted legalization of it. In particular one risks the harm of ignoring the clear interests of actual persons to live in accordance with their own liberty of conscience in the absence of comprehensive moral and religious oppression. In hedging one's bets to protect the fetus, one is necessarily acting to oppress the physical and mental freedom of pregnant women, who unlike fetuses, are not in a state of moral ambiguity. By organizing abortion policy in a way that recognizes a woman's freedom of body and conscience, one avoids the certain and historically documented harms of oppression. As Rawls further illustrates:

There are long periods in the history of any society during which certain basic questions lead to deep and sharp conflict and it seems difficult if not impossible to find any reasoned common ground for political agreement. To illustrate, one historical origin of liberalism is the Wars of Religion in the sixteenth and seventeenth centuries following the Reformation; these divisions opened a long controversy about the right of resistance and liberty of conscience, which eventually led to the formulation and often reluctant acceptance of some form of the principle of toleration (Rawls 2002 p.1).

A society is more cautious if it wagers on the benefits of freedom of conscience rather than on any particular and uncertain comprehensive moral doctrine. The price of political liberalism is the insistence that in order to guarantee the defense of one's own comprehensive doctrine, one must often tolerate behaviors that are deemed categorically wrong and offensive from one's own limited comprehensive perspective.

Critics might argue that on the conditions outlined, this argument can be taken to mean that where moral uncertainty exists, liberal autonomy should always be favored.

But such a position would encourage an irresponsible *carte blanche* where the natural environment and lives of actual people are concerned. It is always important to favor individual liberties according to this approach, but every case must be considered in and of itself. Each moral risk must be analyzed on the merits of the evidence available and potential harm, both certain and imagined, must be considered accordingly. If it were not the case that the existence of the fetus depended on a direct and physical gestational link to a woman who might deem that it is not in her best interests to allow the pregnancy to continue, then one might very well find that the precautionary principle recommends giving the fetus the benefit of the doubt. But the physical reality of pregnancy makes the situation otherwise. There are circumstances, as we shall see below, where this is not the case. Though application of the precautionary principle does not condemn abortion, it is nevertheless a strongly compelling argument that allows for the moral consideration of non-persons *including* healthy infants.

Public Reason, the Precautionary Principle and Infanticide

Recall the case of Alexia and her concern that abortion may be an act that is morally equivalent to infanticide. The point of this article is not simply to offer a consistent argument permissive of abortion from conception to birth and supported by public reason, but to show how such a position can be endorsed while not compromising opposition to infanticide. It is true that in the face of moral uncertainty one must refrain from unjustifiably imposing one's own comprehensive doctrines on others therefore, particularly in a morally pluralistic society, the default position regarding abortion ought to be permissive. Once the fetus has been delivered, the resulting infant is still morally

ambiguous outside of any specific comprehensive doctrine, but in this case, the precautionary principle favors the life of the fetus.

It must be assumed that there are no intervening defects or illness that create a shortened or otherwise compromised life filled with suffering for the infant. Under such circumstances, there are good reasons to justify euthanizing an infant. However, there is no public reason that can be given outside of a comprehensive doctrine that could justify the killing of a healthy infant. This is especially true in industrialized societies where adoption and foster services are available (even if not ideal). In this case, all things being equal, a consistent publicly reasoned application of the precautionary principle recommends erring on the side of caution in favor of the infant's life.

This cautionary concern for the infant does not depend on utilitarian considerations involving parents, family, or a society that values the infant. The value of the infant is not to be confirmed or denied relative to such factors. Simply put, the most reasonable stance to take, absent of embracing any one doctrine bestowing the infant with a comprehensive metaphysical value, is to respect the life of the infant by default. One is not obliged to care for the infant, but neither does one have any non-comprehensive justification in actively harming, killing the infant, or of preventing others who comprehensively value the infant from caring for it. Furthermore, under conditions where care for the infant is possible and not an undue burden one ought to see that the infant is safely transferred to others who are capable of caring for it. Prior to birth, the moral ambiguity of the infant is to be weighed against the clear moral consideration due to the pregnant woman and her freedom of conscience. After birth, the infant's moral ambiguity

is discrete and need not be contrasted against the moral weighing of personhood.

Precaution favors preserving the life of the infant.

Such conclusions run in the same vein of publically reasoned precaution that drives the process of tolerance in a politically liberal society. A straightforward and consistent application of the same principle that *condones* the abortion of a morally ambiguous fetus also *commends* the protection of the morally ambiguous infant. The precautionary principle is a useful heuristic whenever moral relevance is uncertain. It is straightforwardly applied to the infant from within a politically liberal framework of moral skepticism.

Non-comprehensive reason cannot condemn the specific case of abortion; neither can it generally recommend harming non-people. To argue that a being falls outside the social contract does not imply that one is morally justified in doing whatever one wishes to the being. The absence of a reason for not doing something *does not* provide one with a default reason for doing it, anymore than the absence of evidence against a particular claim provides one with evidence for that claim.²¹ The politically liberal acceptance of moral skepticism allows one to place the wrongness of infanticide with moral uncertainty. Therefore, the politically liberal argument against infanticide avoids relativism in that it does not depend on family or society to value the infant in order to condemn infanticide. On the politically liberal thesis outlined here, one ought not commit infanticide even in cases where society or families withhold value from an infant.²²

²¹ On these grounds, it may be the case that the precautionary principle can be applied to non-persons who are also non-humans to produce an argument for animal rights rooted in political liberalism in a way not previously considered to be consistent with social contract approaches to morality.

²² Again, this is only the case, barring any non-arbitrary and well backed arguments regarding the infant's health and potential for suffering. Arguments concerning infant euthanasia must be evaluated in and of themselves. That being said, the bar is now raised; If the infant does not have the certain prospect of a shortened life filled with suffering, then it will not be possible to justify infanticide.

Conclusion

In this paper I have offered an argument that approaches abortion and infanticide from within the specific framework of public reason. The assumption behind this strategy is that skeptical considerations render moral pluralism a permanent feature of society. Consequently, there is no position on abortion or infanticide that can be rendered categorically convincing. Against the backdrop of moral pluralism, fair and just legislation demands that the topic be approached from the neutral framework of public reason, thus bracketing out comprehensive doctrines. My argument involves the claim that a precautionary approach is demanded by public reason in the context of moral uncertainty.

What does this mean for Alexia and her concerns? In the case of her concerns about abortion, it means that she will be justified in erring on the side of her own liberty, freedom of conscience, and future aspirations, as weighed against the uncertain moral interests of a fetus. Furthermore, a free and just society *must* err on the side of Alexia's autonomy when weighed against the uncertain moral status of a fetus. We can offer Alexia the assurance that the same precautionary approach that supports a permissive position on abortion condemns the infanticide of a healthy infant from a precautionary point of view. This politically liberal argument from public reason accomplishes what is notoriously difficult to do from the perspective of comprehensive rationality. Namely, it effectively separates the infant from the fetus to support a non-restrictive liberal stance on abortion while consistently condemning the slippery slope of infanticide. Though Alexia's decision may still be difficult, even excruciating, we can reassure her that the

question of infanticide need not factor into it. Nor should the specter of infanticide be an obstacle to completely liberalized laws on abortion in free societies.

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