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Public Reason and Abortion: Was Rawls Right After All?

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Abstract
In 'Public Reason and Prenatal Moral Status' (2015), Jeremy Williams argues that the ideal of Rawlsian public reason commits its devotees to the radically permissive view that abortion ought to be available with little or no qualification throughout pregnancy. This is because the only (allegedly) political value that favours protection of the foetus for its own sake—the value of 'respect for human life'—turns out not to be a *political* value at all, and so its invocation in support of considerations bearing upon the permissibility of abortion is beyond public reason's remit. Thus, it will scarcely if ever be legitimate to restrict women's equality and bodily autonomy for the sake of the foetus, even at full term. In this paper, I argue that Williams fails to establish that Rawlsian reasonable citizens must endorse the radically permissive stance *vis-à-vis* abortion. Citizens can, I claim, reasonably accord the value of respect for human life weight, and indeed converge on the claim that it outweighs other salient political values, during later stages of gestation. Nevertheless, Williams's argument gets something right in that it reveals why the value of respect for human life is inadmissible at the bar of public reason in early stages of pregnancy. But then, far from throwing Rawlsian public reason into disrepute, Williams's argument actually (albeit inadvertently) provides arguably more compelling grounds than any hitherto rallied for endorsing Rawls's much maligned claim that opposition to the duly qualified right to abortion in the first trimester of pregnancy is 'unreasonable'.

Keywords Abortion · Public reason · Political liberalism · John Rawls · Jeremy Williams

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1 Introduction

In one of the more provocative footnotes in the literature of contemporary political philosophy, John Rawls took occasion to ponder 'the troubled question of abortion' (1996: 243, fn. 32). Therein, he declared that on any reasonable balance of three political values centrally relevant to that question—those of respect for human life, reproduction of political society over time, and equality of women—citizens of liberal democracies committed to the ideal of public reason could scarcely fail but to find it unreasonable to deny a woman a right to abortion in the first trimester of pregnancy. Unsurprisingly, Rawls's comments invited considerable ire, predominantly emanating from commentators of a pro-life persuasion. Recently, however, Jeremy Williams (2015) has suggested that, in fact, Rawls undersold the conclusion public reason commits citizens to concerning abortion. Far from licencing merely first trimester abortion, Williams argues, Rawlsian reasonable citizens must, if reasoning in good faith, endorse the much more radically permissive view that abortion should be available with little or no qualification throughout pregnancy. For, according to Williams, the only value of the three Rawls cites that favours protection of the foetus for its own sake—the value of respect for human life—is not a *political* value at all. Thus, its invocation in support of considerations bearing upon the permissibility of abortion is beyond public reason's remit (Williams 2015: 25). With respect for human life struck from the balance accordingly, reasonable citizens will necessarily find themselves steeply inclined towards the view that it is never legitimate to restrict women's equality and bodily autonomy for the sake of the foetus, even at full term. As a result, public reason apparently commits citizens to a stance on abortion that is deeply inhospitable, not only to pro-life advocates, but also the vast majority of pro-choice advocates (i.e., virtually everyone). If so, Williams suggests, this would appear deeply disconcerting with respect to the viability of Rawlsian public reason.[1]

In this paper, I argue that Williams fails to establish that Rawlsian reasonable citizens must endorse the radically permissive stance *vis-à-vis* abortion. Citizens can, I claim, reasonably accord the value of respect for human life weight, and indeed converge on the claim that it outweighs other salient political values, during later stages of gestation. Nevertheless, Williams's argument gets something right in that it reveals why the value of respect for human life is inadmissible at the bar of public reason in early stages of pregnancy. But then, far from throwing Rawlsian public reason into disrepute, Williams's argument actually (albeit inadvertently) provides arguably more compelling grounds than any hitherto rallied for endorsing Rawls's much maligned claim that opposition to the duly qualified right to abortion in the first trimester of pregnancy is 'unreasonable'.

[1] Williams's arguments are restricted in scope, as are mine in this paper. First, no case is made for or against 'public reason' as a mode of political deliberation. The only objective is to identify the abortion stance the ideal of public reason commits its adherents to. Second, the discussion to come focuses on the standard Rawlsian variant of public reason. Thus, the arguments posited here may not touch upon distinct variants of public reason liberalism others have developed; e.g., Gerald F. Gaus (2011) and Kevin Vallier (2014).

I begin by introducing the core tenets of the Rawlsian ideal of public reason before going on in section three to recount Rawls's musings on abortion and the main objections they have invited. In section four, I unpack Williams's argument and then proceed, in section five, to show that it fails to establish that public reasoners are disbarred entirely from appealing to the value of respect for human life of foetuses. In section six, I show how Williams's argument, once appropriately restricted, actually furnishes us with what Rawls never really did—an argument for why he was right after all, before closing with some final thoughts about the arbitrariness of viability.

2 The Ideal of Rawlsian Public Reason

In *Political Liberalism* (1996), Rawls develops his eponymous framework for resolving the problem of moral disagreement in constitutional democratic societies via adherence to the ideal of public reason. At the core of this deliberative ideal is the claim that:

> citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a reasonable political conception of justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably to endorse.
>
> (Rawls 1996: xlviii)

Concretely put, public reason mandates that political discussions of constitutional essentials and matters of basic justice proceed absent appeals to principles drawn from comprehensive doctrines, secular or religious, that some might reasonably dispute. What political liberalism promises thus is a political conception of justice 'that we hope can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it' (Rawls 1996: 10). With the realisation of some such reasonable 'overlapping consensus', citizens—however deeply divided by their competing reasonable comprehensive doctrines—are empowered to respectfully coexist in, affirm and maintain a just and stable democratic constitutional regime (Rawls 1996: xviii).[2]

Emphatically, Rawls stresses, it is no part of political liberalism to attack or criticize comprehensive doctrines, religious or nonreligious, liberal or non-liberal, nor to recommend their usurpation by the political conception of justice. Rather, his fervent hope was that his framework be amenable to all, whatever their doctrinal persuasion (Rawls 1996: xxxviii). Underpinning this hope is Rawls's conviction that, despite our diverse doctrinal stripes, we are able to engage with one another politically on fair

[2] A comprehensive doctrine, even if incompatible with other comprehensive doctrines, can nevertheless be 'reasonable', according to Rawls, insofar it 'does not reject the essentials of a democratic regime' (1996: xvi).

and proper terms of cooperation provided 'the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions' (1996: xliv). This 'criterion of reciprocity', in turn, underwrites 'the liberal principle of legitimacy', according to which 'our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason' (Rawls 1996: 137). Only then—when legitimate political power is exercised in accord with a political conception of justice that all citizens may reasonably endorse—is the ideal of public reason realised.

Conscious of the need to deflect accusations that public reason is objectionably exclusionary, Rawls is at pains to emphasise how accommodating political liberalism is of reasonable moral pluralism. He assures us, for example, that people remain free to appeal to beliefs deriving from their comprehensive doctrines concerning public issues wherever constitutional essentials and matters of basic justice are not at stake (Rawls 1996: 214). And even when such matters are at stake, Rawls ekes out residual space for appeals to comprehensive doctrines subject to the proviso that 'in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support' (1996: xlix). Indeed, ultimately, Rawls proclaims that '(t)he *only* comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values' (emphasis added) (1996: 243). It was, then, on the heels of this last claim, that Rawls chose by way of the infamous footnote to provide an illustration of just how wide the scope of public reason is with regard to constitutional essentials and matters of basic justice. So wide, complete, or near-complete in fact that it is even capable, apparently, of delivering a determinate resolution on 'the troubled question of abortion' (Rawls 1996: 243, fn. 32).

3 Rawls, Abortion and the Incompleteness Objection

And so it was that Rawls came to describe opposition to the duly qualified right to abortion in the first trimester of pregnancy as 'unreasonable'. He writes:

> Suppose…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.
>
> (Rawls 1996: 243, fn. 32)

Predictably, this apparently throwaway footnote (which, one suspects, Rawls may have subsequently wished he *had* thrown away) elicited vehement backlash. In what many depicted as an act of arch hypocrisy, Rawls stood accused of surreptitiously loading the dice in favour of his own substantive liberal policy preference, whilst painting the prolife opposition as not only unreasonable, but perhaps even 'cruel and

oppressive; for example, if it denied the right altogether except in the case of rape and incest' (1996: 234–235, fn. 32). In a critique not unindicatively scathing, Tim Hurley said of Rawls's view that it 'may be unique in the history of political thought in that it takes the practice of insulting the cultural opposition, heretofore merely an enjoyable pastime, and turns it into an act with philosophic and political significance' (2003: 49). With similar incredulity, Robert P. George (1997: 2488), John Finnis (1998: 368–369) and David M. Shaw (2011: 93–96) have variously accused Rawls of importing into his analysis precisely the sorts of moral beliefs drawn from his own comprehensive liberal conception of the good that political liberalism purportedly precludes. The particular sectarian belief he is charged with smuggling in is of course the belief that the foetus does not possess full moral status, and thus is not due equal respect or a right to life equivalent to the woman.

Later, in a defensive note that appeared in the introduction to the paperback edition of *Political Liberalism*, Rawls wrote, in response to those inclined to lambast his 'argument' for abortion: 'I do not intend it to be one. (it does express my opinion, but an opinion is not an argument.)' (1996: liii, fn. 31). Even if not intended as an argument, though, it is nevertheless a 'reasoned' (in the quotidian sense) opinion, so it is hardly surprising that some took umbrage with the reasons Rawls adduces in its favour. These include the claim that 'at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force' (Rawls 1996: 243, fn. 32); and the further claim that: 'Other political values, if tallied in, would not, I think, affect this conclusion' (Rawls 1996: 243, fn. 32). On face value, the first claim, that unless the right to first trimester abortion is granted, the 'overriding' weight of the value of the equality of women is not truly being recognised, arguably 'does worse than beg centrally important questions—it ignores them altogether' (George 1997: 2488).[3] And the phrasing of the second only exacerbates matters by implicitly gesturing that the reasonable balance Rawls favours is so obviously correct, that we needn't even bother 'tallying in' other political values.[4] As to the broader conclusion, moreover, it seems far from self-evident that a right to abortion will inevitably fall out of any 'reasonable balance' of the three political values specified. As many dissenters hasten to point out, it seems perfectly possible that a Rawlsian citizen could, in good faith, reason entirely in terms of those three values and arrive at a weighing that yielded the opposite conclusion—that abortion should be prohibited. For plausibly some might reasonably grant overriding weight to the political value of 'due respect for human life' parsed as a right to life extended to all human beings, first trimester foetuses included.

For many critics, then, the seeming disservice done to pro-life advocates by Rawls's hand, whilst perhaps regrettable, is not the real issue. The more philosophically pressing issue, they contend, is that once Rawls's liberal policy bias is seen for what it is and appropriately purged, his claim that public reason contains within it the conceptual resources to settle the abortion question utterly collapses. And to the extent that this is not a feature unique to the abortion issue (some believe

[3] See also Shaw (2011: 94).

[4] For an insightful forensic examination of the texts and discursive contexts of each of Rawls's comments on the issue of abortion throughout his works, see Patrick Neal (2012).

controversies around marriage equality, intergenerational justice, and the treatment of animals fall foul of the same difficulty), it reveals a potentially much more thorough-going problem for the project of public reason generally. The problem—known in the literature as the 'incompleteness objection'—is that public reason apparently lacks the capacity to yield determinate resolutions on various questions of significant political import. This is because, oftentimes, fruitful deliberation and adequate policy responses are forestalled on account of the very fact that appeals to comprehensive religious and non-religious moral claims that reasonable people disagree about are excluded from the domain of public reason (Dworkin 2006: 253–254; Horton 2003; Reidy 2000; Sandel 1998: 210–218).

In the specific context of abortion, this objection standardly starts from the assumption that before reasonable citizens can establish whether the right to life should be extended to foetuses, they must first determine the moral status of the foetus. However, since in seeking to do so public reasoners will invariably hit an impasse that they cannot navigate without pulling on their inadmissible comprehensive doctrines, they are effectively precluded from giving the kind of content to the value of respect for human life necessary to reach collectively agreeable resolutions *vis-à-vis* abortion. Thus, Rawlsian public reason 'runs out' with respect to the abortion issue, as reasonable citizens will be unable ever to properly debate or collectively arrive at determinate policy resolutions without violating Rawls's 'duty of civility' (1996: 217).[5] It is in light of this indeterminacy, then, even with respect to various fundamental constitutional essentials and matters of basic justice (of which abortion is one, by Rawls's own admission), that public reason is deemed to be objectionably 'incomplete'.[6]

4 Disputing the 'Political' Value of Respect for Human Life

According to Jeremy Williams (2015), however, the claim that Rawlsian public reason is indeterminate on the particular issue of abortion is quite mistaken. And yet, far from redeeming Rawls, Williams's argument rather portends that the fault lines the abortion controversy rives for Rawlsian public reason run even deeper than previously imagined. According to Williams, 'public reasoners may say *nothing* about

[5] For Rawls, 'the ideal of citizenship imposes a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason' (1996: 217).

[6] For most critics, the sense in which public reason is classified incomplete with respect to the question of abortion is that by which it is deemed insufficient to yield a determinate answer to that question at all. A second variant of the incompleteness objection holds that public reason is inconclusive rather than indeterminate. According to the inconclusiveness critique, different orderings of political values will yield a plurality of legitimate responses from which public reason lacks the internal resources to distinguish the most reasonable. I believe the inconclusive variant may become operative when considering the permissibility of medically indicated abortion, but since the main concern of the critics I am engaging with is elective abortion, I restrict my focus here to the indeterminate variant of the incompleteness objection. For discussion of the two variants, see Gaus (1996: 151–158).

prenatal moral status' (original emphasis) (2015: 23), since the value of respect for human life of foetuses is not, he argues, strictly a 'political' value, and so must be left off the scales altogether. Crucially, however, it does not follow from the fact that public reason is incomplete regarding the question of foetal moral status that it is therefore indeterminate on the question of abortion. Rather, once the inadmissible value of respect for human life is jettisoned from the scales, leaving only the political values of women's equality and reproduction of political society to be weighed, public reasoners will necessarily find themselves heavily inclined to the radically permissive (yet perfectly determinate) conclusion that elective abortion should be permitted right up to full term (Williams 2015: 25).

Evidently, the success of Williams's claim that public reason commits reasonable citizens to this radically permissive abortion stance depends straightforwardly on the success of his prior claim that value of respect for human life is not a properly 'political' value, and so must be disbarred altogether. To establish this, Williams first notes that of the 'family of political conceptions of justice' to which those engaged in public reason may appeal, each depends for its justification on political values alone. As Rawls puts it:

> In public reason the justification of the political conception takes into account only political values, and I assume that a political conception properly laid out is complete…That is, the political values specified by it can be suitably ordered, or balanced, so that those values alone give a reasonable answer by public reason to all or nearly all questions concerning constitutional essentials and basic justice (Rawls 1996: 386).

As well as being negatively identifiable on the basis of being 'freestanding' of comprehensive doctrines, Williams identifies the 'core liberal values' (2015: 32) of a political conception positively as those fundamental liberal democratic values to which all reasonable citizens in Rawls's idealized constituency subscribe in virtue of their shared normative horizons. These include: '(1) the *freedom* of the person (understood according to Rawls's political conception of the person…); (2) the *equality* of such persons; (3) *fairness* in social cooperation; and (4) *public reason* itself' (original emphases) (Williams 2015: 29). And beyond these core liberal political values, Williams allows that reasonable citizens will recognise them as entailing further political values consonant with Rawls's claim that 'there are many political values and ways they can be characterized' (1996: 240).

According to Williams, however, 'respect for human life' is not amongst or entailed by the core liberal values, and thus does not meet the Rawlsian criteria to qualify as 'political' at all. Just as political conceptions take into account only political values, the political values of public reason, in turn, enjoin respect only for political persons understood according to Rawls's 'political conception of the person' that adherents to the deliberative ideal are required to presuppose (Williams 2015: 31). Under this political conception of the person, in Rawls's words, 'we think of persons as reasonable and rational, as free and equal citizens, with the two moral powers [the capacities for a sense of justice and a conception of the good] and having, at any given moment, a determinate conception of the good, which may change over time' (1997: 800). But, as Williams point out, foetuses clearly do not satisfy the

Rawlsian criteria of political personhood. They are, to borrow a term from Philip K. Dick, 'pre-persons';[7] i.e., forms of human life to which political personhood does not extend. And so, the obvious next question is: is the value of respect for the human life of prenatal pre-persons a genuinely political value that public reasoners may appeal to without risk of violating the duty of civility?

The answer, according to Williams, is a resounding no. In order for the value of respect for the human life of prenatal pre-persons to qualify as political, it would have to be a normative commitment that all reasonable citizens share, or an entailment thereof. Clearly, however, it is not a commitment reasonable citizens share under the terms of their Rawlsian idealisation, and so the possibility of it being a 'political' value in the Rawlsian sense is extinguished. And if the shared core liberal values of reasonable citizens do not include or entail respect for the human life of prenatal pre-persons, it is neither unreasonable for citizens fully committed to the core liberal values to reject it, nor possible to justify political decisions by appeal to that value (or some interpretation thereof) without transgressing the terms of public reason (Williams 2015: 32). Thus, any judgements that appeal to the value of respect for human life of foetuses must be dismissed at the bar of public reason, which, in Williams's view, is practically equivalent to assuming that, throughout gestation, the foetus has no moral status whatsoever. From the perspective of public reason, then, since, in effect, nothing of the maternal-foetal conflict remains, it will scarcely if ever be legitimate to restrict women's equality and autonomy for the sake of the foetus, even at full term (Williams 2015: 42).

5 When Does Political Personhood Begin?

It would, I submit, be deeply disconcerting if the stance on abortion public reason commits reasonable citizens to is inhospitable, not only to pro-life advocates, but also the majority of pro-choice advocates (i.e., virtually everyone). There is, however, a way in which one might resist this conclusion. For Rawls evidently believed that political conceptions must recognise children and indeed that 'the principles of justice impose constraints on the family on behalf of children who as society's future citizens have basic rights as such' (1997: 790). But, if 'the basic rights of…children as future citizens are inalienable' (Rawls 1997: 791) and 'the equality of children as future citizens' (Rawls 1997: 793) qualifies as a political value such that constitutional essentials and matters of basic justice concerning them are admissible at the bar of public reason, why not simply extend the status of political personhood accorded to children in virtue of their being 'future' citizens to foetuses?

Williams foresees this line of response but rejects it as unworkable. Although somewhat suspicious in the first place that Rawls's extension of political personhood to children is merely an ad hoc fix required to shore up political liberalism, Williams allows it is at least conceivable that this extension might be justified on the basis

[7] The term comes from Dick's short story *The Pre-Persons* (2000) about which I will say more in the final section.

that it is among the central commitments of a liberal democratic political culture to regard children as equal members and rights-holders—a commitment citizens can thus be expected reasonably to share (2015: 34). Even so, however, Williams contends that this strategy by which political liberalism brings matters of justice concerning children under the umbrella of public reason could not be emulated to bring matters of justice concerning foetuses under it. That is:

> a political liberal could not (or at least would be ill-advised to) argue that, just as the political conception of the person needs to be interpreted generously to ensure that the rights of young children as future citizens are a proper concern of public reason, so it ought to be expanded again so that foetuses as well as children fulfil its conditions.
>
> (Williams 2015: 34)

But is it so obvious that all foetuses fail to fulfil the conditions political liberalism requires for political personhood? Consider Williams's two arguments for why this would be.

The first argument he gives for why it would be unacceptable to extend political personhood to foetuses states that, 'insofar as the political values are supposed to be artifacts of a liberal-democratic political culture, it would commit political liberals to the implausible suggestion that it is part and parcel of such culture to view membership of society as acquired before birth' (Williams 2015: 34–35). What I interpret Williams to mean by this is that it is implausible to suggest that it is among the central commitments of a liberal-democratic political culture to allow that the *basic rights and legal protections* of membership are acquired before birth. However, this seems far from obviously implausible. For one thing, it is a fact that some foetuses are more developed in terms of their mental functions and whatever capacities, moral or otherwise, one takes to be relevant for admission into political society, than some neonates born severely premature. If we think infanticide of premature neonates born before the cut-off date for abortion should be prohibited by law, how can we consistently deny extending the same rights and protections to foetuses that are older, more developed and more likely to survive? Imagine a scenario in a country like the UK (where abortion is legally permitted up to 24 weeks) involving two foetuses A and B in which the former is 22 weeks old and the latter 23 weeks old. Suppose foetus A is born premature at 22 weeks, at which point she becomes neonate A who, with the aid of intensive medical assistance, goes on to develop healthily. By Williams's lights, A ceases to be a pre-person and becomes a *bona fide* political person when she is 22 weeks old, endowed with all the basic rights and legal protections of membership afforded future citizens (i.e., infants and young children). At the same time, however, foetus B, who is unwanted, is aborted at 23 weeks. If we insist, as Williams argues political liberals must, that membership of society cannot be acquired before birth, B does not become a member of society and is thus denied any of the basic rights and protections granted to A, despite being older and more developed than A. But if anything seems implausible, isn't it this? If foetus B is developmentally more advanced than neonate A, it seems unconscionably arbitrary to deny B the rights and protections of political personhood we automatically

ascribe to A. Thus, insofar as we wish to maintain that neonates born severely premature are entitled to the rights and protections of membership we typically think they are, consistency requires we reject Williams's claim that it would be implausible or in any way inconsistent with political liberalism to extend the same rights and protections to viable foetuses, despite their being unborn.

Moreover, it is far from obvious that believing membership should extend further back than birth to at least the point of foetal viability is not amongst the central commitments of liberal-democratic political culture. When the citizens of Ireland went to the polls on abortion in 2018, the choice they were presented with was whether to vote no to repealing the Eighth Amendment of the Irish Constitution which forbade abortion, except under very restrictive circumstances, or whether to vote yes to repeal and the introduction of legislation that would permit elective abortion up to 12 weeks.[8] There was no third option to vote for repeal and the introduction of legislation mandating unrestricted abortion up to full term, nor public appetite for such laws. And Ireland is hardly unique in this regard. Of the countries in which abortion on request is legal, the vast majority of them that qualify as developed or even developing liberal democracies do not permit unrestricted abortion of healthy foetuses past the point of viability, which plausibly suggests that some such commitment in fact is a staple of liberal-democratic political culture. There is famously not a great deal of shared ground between pro-life advocates and pro-choice advocates, but if there is any, it is that neither camp seems especially bent on legalizing unrestricted elective abortion of healthy foetuses past the point of viability right up until full-term.

The second of the reasons Williams gives for why political liberals cannot adopt the strategy of extending to foetuses the basic rights and protections of political personhood afforded neonates as future citizens is that doing so would 'generate deeply unsatisfactory restrictions on public reasoning' (2015: 36). For this would in effect mean deliberators could not deny that foetuses are entitled to the rights and protections of membership, except on pain of becoming unreasonable; i.e., by rejecting an idea that reasonable citizens are required to accept. This would, I concur, objectionably restrict public reasoning if the claim reasonable citizens are required to accept is that liberal protections and rights afforded to future citizens must be extended to *all* foetuses. Indeed, were this so, then Williams would have a point when he augurs that, in effect, '(r)evising the political conception of the person to incorporate foetuses…would transform the constituency of public justification into a pro-life sect' (2015: 35). However, extension of political personhood to the viable unborn would

[8] Article 40.3.3 of *Bunreacht na hÉireann* became the Eighth Amendment to the Irish Constitution after a referendum in 1983. It stipulated that: 'The State acknowledges the right to life of the unborn, and with due regard to the equal right to life of the mother, guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right'. By guaranteeing to protect the equal right to life of the foetus and the mother, the Eighth Amendment effectively prohibited abortion in all cases prior to 2013 and the enactment of 'The Protection of Life During Pregnancy Act'. This legislation allowed abortions in cases in which two relevant health specialists (or three in the case of suicide risk) jointly certified termination of pregnancy to be the sole treatment by which the woman's life might be saved. In all other case, abortion remained illegal and carried a prison sentence of 14 years. On 25 May 2018, the Irish people voted by referendum to repeal the Eighth.

have no such effect. Pro-choice advocates could still challenge the claim that foetuses prior to the point of viability are entitled to the basic rights and protections of political personhood future citizens enjoy without risk of being thereby tarred unreasonable. For in doing so—i.e., denying the political personhood of pre-viable foetuses—the idea they are challenging is not one that all citizens as free and equal can reasonably be required to accept, even if, as I suggest, they can reasonably endorse the political personhood of late-term foetuses. As such, allowing that membership can be acquired before birth would not problematically restrict public reason precisely because extending the rights and protections of political personhood to unborn foetuses past the point of viability is not implausible or incompatible with the central commitments of liberal-democratic political culture. On that much, at least, reasonable citizens can agree. Thus, they are perfectly able to converge on laws that protect late-term foetuses from within the purview of public reason. And if any further justification were needed for legislation prohibiting late-term abortion, the difference principle (application of which must then also extend to late-term foetuses) surely provides it. For, as David M. Shaw poignantly puts it, 'who, after all, is worse off in society than a human being that is older than some other humans but could still be aborted?' (2011: 97).

At this juncture, it might seem we have already significantly parted ways with Rawls, for at various points he states that members gain entry to society only by birth and exit only by death (1996: xliii; 12; 18; 40–41; 68; 135–136). There are two things one might say here. First, it is plausible to think Rawls did not intend this restriction quite literally, but merely as a device for delineating his hypothetical political society as a self-contained closed social system artificially cleansed of the messy realities of immigration and emigration. Moreover, it is possible to muster support for the view that Rawls might be open to idea that the basic rights and protections of membership can be acquired before birth from some of his other writings. On children in *A Theory of Justice*, for example, Rawls writes:

> I have said that the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice…Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could not take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice.
>
> (Rawls 1999: 445–446)

And later, in 'The Idea of Public Reason Revisited', he writes 'the equal rights of women and the basic rights of their children as future citizens are inalienable and protect them *wherever they are*' (emphasis added) (Rawls 1997: 791), which plausibly implies irrelevance of the only salient difference in the circumstances of neonate A and foetus B: physical location relative to the maternal organism. Whilst some critics see such comments as being in tension with Rawls's views on abortion—a tension which is then typically worked up into the full-blown incompleteness

objection[9]—this need not be so. For it is not implausible to suppose the extension of membership to late-term foetuses might well lie within the horizon of Rawls's sympathies, even if extension to foetuses *simpliciter* does not. Indeed, the suggestion that Rawls might be so inclined is, to state the obvious, already implied by the fact he would apparently restrict elective abortion to the first trimester.

Second, even if this speculation is spurious—even if when Rawls said we enter society as members only by birth he meant it quite literally such that the rights and protections of membership afforded future citizens must be denied to all foetuses—then Rawls was simply wrong. Not only would holding resolutely to birth as the demarcation point of membership render his own claims inconsistent, such a resolution would itself be unreasonable. For it would not, as we have seen, comport with the view reasonable citizens in fact do converge upon in the court of public reason; i.e., that late-term foetuses are to be extended protections against being killed by elective abortion, just as premature neonates are protected against being killed by elective infanticide. Indeed, insofar as all reasonable citizens can each accept this extension of the boundaries of membership to late-term foetuses, it really doesn't matter what Rawls thought ultimately. To say birth demarcates the limits of membership 'because John said it does' doesn't make it so, even if the John in question tended to be right a fair bit of the time.

6 Vindicating Rawls

I have argued that a constituency of reasonable citizens can collectively endorse extension of political personhood to foetuses past the point of viability, complete with all the basic rights and protections it affords neonates in virtue of their being future citizens. As such, legislation prohibiting abortion of late-term foetuses can reasonably and legitimately be arrived at in accord with the precepts of public reason. So far so good. But what we want to know now is: how can it be that the same constituency of reasonable citizens could converge on the opposite resolution, as Rawls declares they must, regarding early-term abortions? In particular, how can they do so without appealing to claims imported from their comprehensive doctrines; typically, the claim that first trimester foetuses do not possess moral status?

The answers to those questions, I submit, have already been spelled out in this paper, for they are to be found in the portion of truth in Williams's otherwise unsuccessful argument. Williams's argument gets something right in that it successfully shows that the value of respect for human life of pre-persons does not meet the criteria to be a Rawlsian 'political' value. The only place it goes wrong, if what I have argued is plausible, is in its insistence that pre-personhood ends and political personhood begins only at birth. As missteps go, however, this is a significant one. For if reasonable citizens can, as I have argued, reasonably endorse the view that the rights and protections of membership in society apply from viability rather than from birth, then public reason does not commit them to the radically permissive stance that Williams says it does. What it does commit them to, rather, is the view that elective

[9] See, e.g., Finnis (2000: 99, fn. 37) and Shaw (2011: 97).

abortion should be permitted up to the point of viability, but prohibited thereafter. So, the view we end up with is permissive, but not radically so. Indeed, if anything, it is starting to look a lot like the claim Rawls made in the original footnote.

With an appropriate redrawing of the boundaries of political personhood, then, comes vindication of Rawls and his claim that it would be unreasonable, at least during the first trimester, to deny a woman a duly qualified right to decide whether or not to end her pregnancy. When deliberating the permissibility of aborting viable foetuses, the value of respect for human life can and indeed must be included in the balance as, in that context, it does satisfy the Rawlsian criteria to qualify as 'political'. That is, the value of respect for the human life of the viable unborn is one that all citizens, as free and equal members of liberal democratic societies, can reasonably endorse. In so doing, they collectively affirm that, at least from the point of viability on, foetuses warrant the standing of political personhood in line with Rawls's political conception of the person. And since a balanced weighing of all three political values may reasonably accord respect for human life greater weight than women's equality or the ordered reproduction of society, that is why public reason commits citizens to the view that elective abortion of late-term foetuses is impermissible. However, when seeking resolutions concerning early-term abortion, we must, as per Williams's argument, disbar the value of respect for human life from the balance. For, in that context, reasonable citizens cannot deliberate, far less agree upon, whether such respect is due early-term foetuses that have yet to reach the point of viability without invariably leaning on claims about foetal moral status drawn from their comprehensive moral doctrines. This means that, when the topic is early-term abortion, the only relevant political values legitimately in play are the ordered reproduction of political society over time and the equality of women as equal citizens. Thus, deliberators committed to the precepts of public reason will be driven to grant the right of abortion because, *out of these two political values*, the equality of women is, just as Rawls said, 'overriding'. This isn't exactly what he wrote, of course, for he spoke of the need to balance all three political values. But that's perfectly true. You do need to weigh all three values to reach a determinate resolution on the troubled question of abortion. For the question is not just about whether or not first trimester abortion is permissible, but about when or at what point in the whole gestation period—from conception to birth—reasonable citizens should draw the line demarcating permissible and impermissible abortion.

7 Arbitrariness and Moral Personhood

In his short story *The Pre-Persons* (2000) Philip K. Dick envisages a future in which it is legal to abort children up until they turn twelve—the point at which Congress has determined ensoulment occurs on account of the fact that, at age twelve, children can understand basic algebra. The story begins with 12-year-old Walter who, whilst out playing, scurries into hiding in a blackberry bush upon spotting the white abortion truck "Come to take some kid in for a postpartum down at the abortion place". He hides there, terrified, wondering to himself, "Maybe my folks called it. For me". Later, when the truck is gone, Walter trudges home in tears to his mother who upon seeing him exclaims:

"What in the name of God have you been doing?"

He said stammeringly, "I—saw—the abortion—truck."

"And you thought it was for you?" Mutely, he nodded.
"Listen, Walter," Cynthia Best said, kneeling down and taking hold of his trembling hands, "I promise, your dad and I both promise, you'll never be sent to the County Facility. Anyhow you're too old…They couldn't take you now. Look—you have a soul; the law says a twelve-year-old boy has a soul. So he can't go to the County Facility. See? You're safe. Whenever you see the abortion truck, it's for someone else, not you. Never for you. Is that clear? It's come for another younger child who doesn't have a soul yet, a pre-person."

Staring down, not meeting his mother's gaze, he said, "I don't feel like I got a soul; I feel like I always did."

"It's a legal matter," his mother said briskly. "Strictly according to age. And you're past the age."

(Dick 2000: 275–276)

First published in *Fantasy & Science Fiction Magazine* in 1974, just 1 year after *Roe v. Wade*, Dick clearly intended *The Pre-Persons* as a *reductio ad absurdum*, singling out for particular scorn the arbitrariness of specifying a precise point at which pre-personhood ends and political personhood begins, replete with basic protections of the right to life.[10]

Is drawing the line beyond which it is no longer permissible to abort a human life at viability, as *Roe v Wade* did, arbitrary? Yes. Morally-speaking, it is every bit as arbitrary as drawing it at the age of twelve when humans develop the capacity to understand basic algebra. It is difficult to fathom that foetuses possess moral status from the second they become viable outside the womb despite it not being there just a moment before. But nothing I have said here implies viability marks the point at which *moral* personhood (as distinct from political personhood) begins. And nor do I believe it necessary to provide any such argument.

Recall the crux of the incompleteness objection levelled at Rawlsian public reason in the context of abortion: that reasonable citizens will not be able to collectively agree upon determinate policy resolutions concerning abortion without dipping into their

[10] At one point in *The Pre-Persons*, Dick's main protagonist Ed Gantro reflects that:

The whole mistake of the pro-abortion people from the start…was the arbitrary line they drew. An embryo is not entitled to American Constitutional rights and can be killed, legally, by a doctor. But a fetus was a "person," with rights, at least for a while; and then the pro-abortion crowd decided that even a seven-month fetus was not "human" and could be killed, legally, by a licensed doctor. And, one day, a newborn baby – it is a vegetable; it can't focus its eyes, it understands nothing, nor talks… the pro-abortion lobby argued in court, and won, with their contention that a newborn baby was only a fetus expelled by accident or organic processes from the womb. But, even then, where was the line to be drawn finally? When the baby smiled its first smile? When it spoke its first word or reached for its initial time for a toy it enjoyed? The legal line was relentlessly pushed back and back. And now the most savage and arbitrary definition of all: when it could perform "higher math."

(Dick 2000: 291).

comprehensive moral doctrines to first settle the question of when moral personhood begins. This is a mistake. We may not, it is true, be able to agree about when moral personhood begins, or even what it consists in, but this doesn't prevent reasonable citizens from agreeing that the law should prohibit what Walter calls 'postpartums' in the 47th trimester, so to speak. It is simply untrue that reasonable citizens need to first settle the question of when moral personhood begins in order to collectively reach a determinate resolution concerning ascription of the basic rights and legal protections of political personhood to 11-year-olds. It is enough for the purposes of determining policy legislation that reasonable citizens can agree that the elective abortion of healthy 11-year-olds should not be legally permitted. And, by the same token, nor do Rawlsian public reasoners need to settle the question of when moral personhood begins in order to be able to converge upon a consensus that the law should not permit elective abortion beyond the point of viability in the second and third trimesters. For, again, it is enough that they can agree that a right to electively abort late-term foetuses should not be enshrined in law. Admittedly, agreement may appear decidedly less stark with respect to the viable unborn than it is regarding 11-year-old children in the 47th trimester of their development. But reasonable citizens accord these 47th trimester children basic rights and legal protections no more or less stringent than those they accord 2nd trimester neonates born severely premature, and do so, crucially, for public reasons. For extending to children the protections of equal membership and regarding them as rights-holders are amongst the foundational commitments of liberal democratic political culture—commitments that citizens, whatever their doctrinal leanings, can be expected reasonably to endorse. And, as we have seen, if reasonable citizens can concur, without appeal to non-public reasons or risk of violating the duty of civility, that the right to commit elective infanticide upon a 22-week-old neonate born severely prematurely (but otherwise healthy) should not be enshrined in law, then they must, on pain of consistency, also deny that the law should permit elective abortion of a healthy viable foetus that is the same age or older, merely on account of its being unborn.[11]

[11] It is worth noting that even those who defend the view that infanticide or 'after-birth abortion' of healthy neonates can be morally permitted do not claim that their arguments imply that such practices be legally permitted. On the fact that their ethical argument for after-birth abortion sits uneasily with what the majority of people believe and the position the majority of legitimate social authorities uphold, Alberto Giubilini and Francesca Minerva write: 'it is important to take these elements into account, especially in cases where someone is arguing in favour of a change of policy or legislation (which is not so in our case)' (2012: 60). More explicitly still, Peter Singer writes in his discussion of infanticide that:

> where rights are at risk, we should err on the side of safety. There is some plausibility in the view that, for legal purposes, because birth provides the only sharp, clear and easily understood line, the law of homicide should continue to apply from the moment of birth. Because this is an argument at the level of public policy and the law, it is quite compatible with the view that, on purely ethical grounds, the killing of a newborn infant is not comparable with the killing of an older child or adult.
>
> (Singer 2011: 153)

Admittedly, whether abortion and/or infanticide should be legally permitted in cases where severe abnormalities of the foetus/neonate or risks to maternal health are present is much more complicated. And perhaps Singer, Giubilini and Minerva might think that legislative reform is required with respect to those kinds of cases. However, since the arguments of this paper depend only on claims pertaining to elective abortion or infanticide of viable healthy foetuses and neonates born premature but otherwise healthy, these complications are set aside here. I am grateful to an anonymous reviewer for the *Journal of Ethics* for bringing the need to clarify these points to my attention.

Thus, from the perspective of Rawlsian public reason, the fact that, at present, viability marks the cut-off point for elective abortion boils down to the fact that all citizens can reasonably endorse the view that foetuses past the point of viability are due the basic rights and protections of political personhood. If there were to come a time when a first trimester foetus could be extracted from the womb and assisted to develop healthily as a result of advances in medical technologies, it would not follow from anything argued here that reasonable citizens would then be committed to moving the legal cut-off date for elective abortion back to align with earlier viability. The only thing that could render any such adjustment reasonable would be if all citizens could reasonably share the view that political personhood should extend back further to foetuses younger than 22 weeks. But whether they could or not is not a question that can be settled in advance, just as the fact that citizens of liberal democracies today reasonably agree that elective abortion is impermissible beyond the point of viability could not have been foreseen in earlier centuries. This is not, however, a problem for Rawlsian public reason, for Rawls himself was very clear that the family of political conceptions and the resolutions they yield through public reasoning are dynamic and susceptible to change over time such that what might be reasonable for one generation might not be for the next.[12]

In the end, then, it is only when we come back to early-term foetuses that we find deep and apparently intractable disagreement amongst reasonable persons about whether they are pre-persons or political persons. In this context, proponents of the incompleteness objection may be right that citizens may not have the conceptual resources to resolve this question in the absence of an account of when moral personhood begins. And they may also be right that, short of flouting the duty of civility at the heart of the ideal of public reason and appealing to their non-public comprehensive moral doctrines, citizens may be unable to deliberate, far less agree upon, when moral personhood begins. But, as per the portion of truth in Williams's argument, it does not follow from the fact that public reason is incomplete with respect to the question of when moral personhood begins that it is indeterminate on the question of whether to permit abortion in the early stages of pregnancy. For the very fact that citizens reasonably disagree about whether early-term foetuses are pre-persons or political persons and thus whether the value of respect for human life extends to them means that, in that particular deliberative context, the value of respect for human life does not meet the criteria to qualify as a genuinely 'political' value in the Rawlsian sense. Thus, that value must be left off the scales of public reason entirely when abortion of early-term foetuses specifically is under deliberation. And since, of those political values remaining, the overriding value will tend to be that of the equality of women, reasonable citizens should find in favour of the woman's right to choose whether or not to continue her pregnancy, certainly in the first trimester, if not up to the point of viability in the second.

[12] In the introduction to the paperback edition of *Political Liberalism*, for example, Rawls writes:

> Social changes over generations give rise to new groups and different political problems. Views raising new questions related to ethnicity, gender, and race are obvious examples, and the political conceptions that result from these views will debate the current conceptions. The content of public reason is not fixed, any more than it is defined by any one reasonable political conception.
>
> (Rawls 1996: l–li)

I am grateful to Thomas Besch for helpful discussion of this point.

8 Conclusion

Contra proponents of the incompleteness objection, Rawlsian public reason is not indeterminate on the troubled question of abortion; and *contra* Williams, it does not commit reasonable citizens to the radically permissive view that elective abortion should be permitted right up to full term. The determinate resolution the ideal of public reason does commit reasonable citizens to, at present, is that elective abortion should be permitted up to the point of foetal viability but prohibited thereafter. And so, it seems, Rawls was (more or less) right after all.

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