

Abortion and Public Policy

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Imagine that you live in a world where people occasionally wake up and find themselves tethered to strangers. Whenever this happens, one of the strangers (perhaps a famous violinist) is sure to die unless the tether is maintained for nine months. You might someday find yourself on either side of that tether, with both sides equally likely. Do you want cutting the cord to be legal?

Here's why I ask: The famous violinist made his first public appearance in a much-quoted essay by the philosopher Judith Jarvis Thomson (1971), who analogized him to a fetus. Her argument, in brief, goes like this: First, finding yourself tethered to a violinist is analogous in important ways to finding yourself pregnant. Second, according to a cluster of moral intuitions that we presumably share, severing yourself from the violinist should be legal (though perhaps not encouraged). Third, it follows that in those cases where the analogy holds, abortion should be legal as well. Much of the rest of Jarvis's essay is devoted to delineating those cases.

One problem with that line of reasoning is that people have a lot of conflicting moral intuitions, which makes it too easy to (consciously or unconsciously) cherry-pick the intuitions that support a predetermined conclusion. No matter who you are, some policies will serve your expected needs better than others. So if we are setting out to pass judgment on those policies, the first thing we should all do is recuse ourselves. The only fair judge is a judge who either *has* no personal interests (which seems extremely unlikely) or who at least is *unaware* of his or her own interests— due, perhaps, to a severe case of amnesia.

Of course severe amnesia is rare, but we can still try to figure out what an amnesiac judge *would* conclude, if only such a judge existed. That standard was first proposed by the economist John Harsanyi (1958), then taken up and popularized by the philosopher John Rawls, and is often called “Rawlsian”. In the intervening decades, economists,

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legal scholars, policy analysts, and a substantial number of philosophers have largely converged on Rawlsianism as the right approach to policy questions.¹

For example, most countries have some form of social safety net, whereby rich people are taxed to provide assistance to poor people. What justifies that social safety net? The Rawlsian answer is to envision an impartial judge—perhaps a sort of disembodied soul on the cusp of becoming a human, but entirely in the dark about whether that human will be rich or poor, smart or stupid, ambitious or lazy, male or female. In Rawls’s language, that soul currently abides “behind a veil of ignorance” that shields it from any knowledge of its own future characteristics. We can, in fact, envision a community of such souls, and ask what sort of world they’d prefer to be born into. Because we know that people are generally risk averse, it’s a pretty good bet they’d want to be born into a world with some sort of social safety net.

How large a net? Harsanyi had some ideas about that. If you’re an unborn soul, a safety net is effectively an insurance policy: It costs you money if you end up not needing it, but it also protects you against disaster. Well, we happen to have a lot of real-world data on how much insurance people prefer to buy when they’re facing different levels of risk. We also happen to have a whole lot of real-world data on variations in earning ability, which translates into a pretty good estimate of how much risk you were facing back when you were waiting to be assigned your human identity. We can cobble those together to get a pretty good estimate of how big a safety net you’d have wanted to sign on for. And because, as a disembodied soul, you were a perfect Rawlsian judge, we ought to take that preference seriously.

There remains plenty of room for quibbling about how to make those estimates and how to apply them, but social scientists have reached something like a consensus that this is the right *approach* to determining not just the size of the safety net, but public policies in general. Among economists, it is the go-to approach for analyzing everything from tax policy to public health measures.

Many philosophers first encountered this circle of ideas in 1971, with the publication of John Rawls’s monumental work, *A Theory of Justice*. Coincidentally, Thomson’s essay

¹ Rawls drew various specific conclusions about what an amnesiac judge would decide. My use of the word Rawlsian refers to the general approach and does not necessarily embrace those specific conclusions.

on abortion appeared in the same year. It is therefore perhaps not surprising that her essay entirely ignores the (now) traditional Rawlsian approach.

In this essay, I will revisit Thomson's violinist analogy from the Rawlsian viewpoint. At first, the calculus appears simple: You might someday find yourself on either side of a tether. If so, and if cord-cutting is prohibited, there's a 50-50 chance you'll be at least partially immobilized for nine months. Or, if cord-cutting is legal, there's a 50-50 chance you'll die. It seems clear that most of us would prefer to take our chances with the former. (Indeed we have good empirical evidence on this point, because, in the real world, most people who learn they are going to be bedridden for nine months do not commit suicide.) The naive Rawlsian conclusion, then, is that (contrary to Thomson), cutting the cord—and by analogy many abortions—should be prohibited.

I am going to argue that the naive Rawlsian conclusion is not the correct Rawlsian conclusion, and that a more careful Rawlsian analysis, fully consistent with the way Rawlsianism is routinely employed by philosophically minded policy analysts and practically minded philosophers, leads to the conclusion that most abortions should be unrestricted. Of course it is only a coincidence that this has something in common with the conclusion that Thomson reached in her decidedly non-Rawlsian framework. But when policy decisions have to be made, multiple approaches leading to similar conclusions is the happiest sort of coincidence one might hope for.

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Like Thomson, I will start here: If a fetus is no more than a lump of cells, then the abortion question is easy and our work is done. I therefore, again like Thomson, will start by stipulating that a fetus is a person, in the sense that it has interests that merit the same respect we would accord to the interests of a forty-year-old violinist.

There remain important differences between a fetus and a tethered violinist, one of which is that violinists can *negotiate*. Even if cord-cutting is legal, the violinist might offer a payment to induce his tethermate to leave the cord intact. Or, if that's impractical—for example, if the violinist is destitute or unconscious—he can choose in advance to insure himself against such situations, so that the negotiation process and the payment become the responsibility of an insurance company with substantial resources. Or, in a world where tethering actually occurs, people can form voluntary associations whose members

all agree not to cut the cord if they find themselves tethered to another member. We might expect that nearly everyone will choose to join such organizations and will want to belong to an organization with a near-universal membership, in which case the organizations will merge into one, and cord-cutting will be de facto illegal.

None of these options is available to a fetus. But mainstream Rawlsian policy analysis demands that when negotiations are impossible, the law ought to enforce the terms of contracts that we are confident people *would* have signed onto, if only they could have. As we've seen, this is the Rawlsian justification for a social safety net.

Here's another example of applied Rawlsianism: Your boat has sprung a leak. You happen to be very close to my dock. You can save your boat only by tying it to that dock. If I happen to be out sunning myself on that very dock, we will presumably strike a deal. If it happens that I'm nowhere to be found, no deal can be struck, but Anglo-American common law enforces the agreement that we presumably *would* have reached, by allowing you to tie up your boat. Lawyers call this the *necessity* rule.

A long tradition in law and economics² asserts that the common law almost always both *does* and *should* enforce such hypothetical contracts.³

Although the law generally conforms to the hypothetical contracts rule, there is one apparent and striking exception, known as the Good Samaritan rule: The common law does not require you (or anyone else) to be a Good Samaritan. If you are walking by the side of a canal carrying a life preserver, and if you spot a drowning man, you are not required to save his life. Yet clearly if a negotiation were possible, you'd sell him the life preserver and his life would be saved. Many authors have struggled to reconcile the Good Samaritan rule with the hypothetical contracts rule. Some believe that a reconciliation

² See, for example, Posner (1972), Landes and Posner (1984), and Posner (2010).

³ More precisely, the law does not generally enforce the payment we would have hypothetically agreed on. The necessity rule is concerned with saving your boat, not with the exchange of money. The general rule is that we enforce the terms of hypothetical contracts insofar as they are concerned with the use of resources—such as my dock—and not with who bears the costs. The reasons for this distinction are spelled out frequently in the literature on law and economics, and I won't digress enough to reiterate them here.

is possible.⁴ Others consider the Good Samaritan rule to be an isolated anomaly. Either way, most scholars agree that the Good Samaritan rule is a poor indicator of the principles that underlie the common law more generally. It is therefore striking that Thomson (in her original article, though not in the version that was widely reprinted) relies on an analogy with the Good Samaritan rule for part of her argument. Had she relied instead on consistency with the necessity rule or the hypothetical contracts rule, she might have been forced to different conclusions.

Indeed, it's easy to imagine that a fetus, if it were possible, would surely offer, say, 40 percent of its lifetime earnings in exchange for being carried to term. If so, and if we accept the hypothetical contracts rule, then the apparent implication is that a great many abortions—those where we have good reason to believe that the pregnant woman would have accepted a large payment to continue the pregnancy— should be prohibited. In what follows, I will argue that this is in fact the wrong conclusion.

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To explain why I believe the conclusion is wrong, I will first push the argument a little further. If the hypothetical contracts rule calls for penalizing or prohibiting abortion, then it seems to call just as strongly for penalizing or prohibiting any decision to remain childless (or for that matter to limit one's family size). After all, I am very glad that my mother carried me to term, but I am equally glad that she (with some help from my father) conceived me in the first place. If you'd asked me in advance, I'd have offered, if necessary, a substantial fraction of my future earnings in exchange for that act of conception.

Of course negotiating before you're conceived is quite impossible, but no more so than negotiating during the nine months thereafter. If we're bound to respect the results of one hypothetical negotiation, how can we ignore the results of another? If our argument proves that we should discourage abortion, it also proves that we should discourage

⁴ Most attempts at reconciliation begin with the observation that if the law were otherwise, we'd rearrange our lives to avoid situations in which we might be called on to become Good Samaritans because of the negative consequences that outweigh the benefits of Good Samaritanship. See, for example, Landes and Posner (1978).

any failure to reproduce.⁵

That conclusion might strike you as absurd, which might tempt you to believe that there must be some flaw in the underlying logic. That's of course a possibility. But another possibility is that what we've encountered here is not an absurdity but a surprise. Sometimes, logic leads you places you never expected to go. If that never happened, there would be no point in bothering to think logically. So let's press on.

First, a quick review: I've made two assumptions and drawn two conclusions. The assumptions are that the interests of the unborn command the same respect as the interests of the born, and that we should be guided by the hypothetical contracts rule. From here, and with some appeals to consistency, I've concluded that we should both discourage abortion and encourage conception.

What we *can't* conclude is that abortion should be prohibited or that conception should be mandatory. There are, after all, multiple ways to encourage and discourage things. For reasons I'll review in the next paragraph, the best way to discourage a behavior is usually to tax it, and the best way to encourage a behavior is usually to subsidize it. So at best we've constructed an argument for taxing abortion and subsidizing conception.

Why taxes and subsidies? Suppose for example that we've decided we want to increase agricultural production. We can do this by mandating increased production on individual farms, so that farmers Smith, Brown, and Jones are required to increase their production by, say, 5 percent, 10 percent, and 15 percent (or perhaps all by equal percentages). Economists generally consider this a very poor solution, because Smith, Brown, and Jones all have private information about costs on their individual farms. Smith, for example, finds it extremely costly to hire additional labor while Brown is flooded with job applicants. At the same time, Brown has planted 60 percent of his land and knows full well that the remaining 40 percent is far less fertile, while Jones has planted 70 percent and knows that the remaining 30 percent is just as good. If we want to minimize produc-

⁵ A possible response is that a fetus, by virtue of its existence, commands a sort of respect that a *prefetus*, by virtue of its nonexistence, does not. But that logic seems to require a complete disregard for the interests of anyone who hasn't been conceived yet, and so is at least at variance with almost all mainstream policy analysis, which demands that we respect the interests of future generations. For example, nearly everything that's been said about climate and environmental policy would have to be drastically rewritten if we chose to deny the interests of the unconceived.

tion costs (which is to say, if we want to minimize the value of the resources consumed by the agricultural sector so those resources are available for other uses), we can best accomplish that by offering a subsidy to production and letting each farmer respond to that subsidy.

The same is true if we want to increase the production of life. Not all pregnancies are created equal. The emotional, financial, medical, and other costs of a pregnancy vary widely—and they vary in ways that are often visible only to the individual who bears those costs. She is therefore the only person who can fully account for those costs. If we want those costs accounted for—and we should—we have got to trust her to make that decision.

Of course (given our assumptions) we also want her to account for the interests of the unborn. But we can ensure that with appropriate taxes on abortion and subsidies for childbirth. Depending on our priorities, we might want to make that tax so high that abortions become extremely rare. But we should still prefer taxes to mandates, so that we can move to a world where the (possibly rare) exceptions are at least the *right* exceptions.

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It remains to determine exactly how big the abortion tax (and the corresponding conception subsidy) should be. Two additional principles will serve us well here.

First: We don't get to play favorites. Everyone's interests are entitled to equal respect. What this means in economic jargon is that the social welfare function is invariant under permutations of the individuals. What it means without the jargon is that in a conflict between Alice and Bob, the resolution should depend only on facts relevant to the conflict, and not on anything else about Alice and Bob. In the case at hand, this means that one unborn (or unconceived) life is exactly as valuable as the next.

Second: If you're taxing an activity because you think it has bad consequences, the amount of the tax should not exceed the cost of ameliorating those consequences. This follows from the hypothetical contracts principle: If you are willing to pay a \$10 tax for the privilege of causing me \$5 worth of harm, then we can presume that if only you and I had been able to negotiate, you'd have paid *me* for that privilege and I'd have assented. We want that hypothetical contract fulfilled, so we don't want to risk disincentivizing

your action by setting the tax too high.

Taken together, these principles tell us that abortion should be taxed, at most, at the rate necessary to fund the subsidization of one additional pregnancy. If A has an abortion but simultaneously coughs up enough money to induce B to become pregnant and carry a baby to term, then *even if you buy the hypothetical contracts rule for restricting abortion*, the world as a whole is no worse off than before—and in fact better off, because the pregnancy has been voluntarily transferred from A to B. If A is willing to pay that price, there is no reason to disallow it.

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Let's pause a moment. Having stipulated that the interests of a fetus are entitled to exactly the same sort of respect as the interests of (say) your brother-in-law,⁶ I've argued that it's OK to kill that fetus as long as you create another life in the process—because one life is as valuable as another. One might then reasonably ask whether the same argument applies to your brother-in-law himself. Should I be allowed to kill him in order to harvest his organs and save another life? Even more to the point, should I be allowed to kill him as long as I commit to fathering one additional child—or paying someone else to father a child?

I think the answer is no. Even if we treat their interests with equal respect, there remain important differences between your brother-in-law and a fetus.

From the day your brother-in-law was born, he began mastering skills, accumulating knowledge, and cultivating relationships, all of which vanish if he dies. Those losses affect not only your brother-in-law (which is already enough to matter) but all of his friends, lovers, family members, and business partners as well. In other words, fetuses, *even if we respect their interests—or their rights—just as we would anyone else's*, remain, in an important sense, more interchangeable than you, me, and your brother-in-law. Indeed, the placement of fetuses behind the veil of ignorance, without any established individual characteristics, guarantees their interchangeability in the sense that I am using that word.

⁶ In the jargon of welfare economics, I take “treating their interests with equal respect” to mean treating them symmetrically in the social welfare function. A philosophy of rights might require this kind of symmetry, but I (again, in accordance with mainstream policy analysis) am treating the symmetry as a desideratum in and of itself, without regard to the nature of rights, or to whether those rights exist at all.

There is a second key difference between a fetus and your brother-in-law. In a world where murder is legal, we are all looking over our shoulders all the time. We are vulnerable to blackmail, to violent rage, and to recreational sadism. We suffer from the *anticipation* of death (or of death threats) in ways that a fetus does not.

For both reasons, I contend that my argument applies to a fetus, but not to you, me, or your brother-in-law. It applies to the unborn but not to the middle-aged. This requires us to ask where, prior to the onset of middle age, we draw the line.

Another good economic principle is that lines should be clear and bright. If we draw the line either fourteen days before birth or fourteen days after, we will be forever arguing about whether it should be moved to thirteen or to fifteen. To cut off endless, costly and probably fruitless debate, it would probably be a good idea to pick a dividing line that strikes people as natural. (This is what economists call a *Schelling point*.) The moment of birth might be a useful Schelling point. So, of course, might the moment of conception, which is a point I think I must concede to the opponents of legalized abortion.

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Subject to our assumptions, I claim to have established that abortion should be discouraged, if at all, by a tax that is no greater than the amount needed to subsidize one additional birth.⁷

But the next question is whether there might be some alternative policy that is superior to that tax. I think that there is, and here is why: Our argument is that abortions should be discouraged in the interests of the fetus, and that by the same token, conceptions should be encouraged in the interests of the unconceived. Presumably we have a collective responsibility to respect those interests, which suggests that the cost of respecting those interests should be borne by society at large, and not imposed exclusively on people who happen to be female and fertile.

⁷ That amount might be pretty small. Experiments done in Austria in the 1990s indicate that in exchange for a onetime payment equivalent to about ten thousand of today's American dollars, about 15 percent of young couples will have one additional child, over and above what they'd originally planned. (See Lalive and ZweimÄijller, 2009.) Similar experiments in other European countries (usually with smaller payouts) have yielded mixed results.

Consider an analogy: Suppose we have collectively decided that we, as a society, ought to have more philosophers. Unfortunately, only about 15 percent of us have the mental capacity to philosophize. Fortunately, we've identified those people. Now we have three courses of action available. First, we could conscript some of those people. This is a poor option for the same reason that it's a poor idea to conscript farmers into increasing their output—we can't know the individual circumstances of these people, and therefore we can't make wise choices about whom to conscript. The second course of action is to incentivize philosophizing through subsidies—and to fund those subsidies with a tax on the 15 percent who are capable of philosophizing. We could try to justify this policy by arguing that what we need is more philosophy; these are precisely the people who are capable of providing philosophy; therefore these people have a moral responsibility to do just that, either by philosophizing or paying others to do so. The third course is to incentivize philosophy through subsidies, and fund those subsidies out of general tax revenue.

I venture to guess that most people will find the third option more palatable than the second. It's been decided that philosophy is good for all of us; therefore all of us should be called upon to support it. The fact that Alice was born with a talent for philosophy while Bob was born with a talent for bicycle repair does not impose any greater moral burden on Alice than it does on Bob.

At the risk of belaboring this point, let me make the analogy explicit: The argument presented here suggests that we should encourage births because we have a collective moral responsibility to respect the outcomes of hypothetical contracts. Unfortunately, only about 15 percent of us have the capacity to give birth. Now we have three courses of action available. First, we can prohibit abortions, or mandate conceptions, or both; this is a bad idea because we don't know who among the 15 percent can bear children at the lowest cost. Second, we can subsidize conception and fund the subsidies through a tax on abortion, which effectively places the entire burden for our collective moral responsibility on 15 percent of the population. (In particular, it places no responsibility on men who owe their own births to the system we're trying to fund.) Or third, we can shoulder that collective moral responsibility collectively, by subsidizing birth out of general revenues.

I think that at this point the case for the third option should be self-evident.

Summary

1. One way to defend legalized abortion is to deny that a fetus has any legitimate interests. The advantage and disadvantage of such a defense is that it shuts down any further argument, and therefore has no chance of changing anybody's mind. Therefore any useful argument in favor of legalized abortion must begin by stipulating those legitimate interests.
2. Given those legitimate interests, any abortion policy must weigh some legitimate interests against others. Rawlsianism is the industry-standard approach to settling such conflicts.
3. A Rawlsian analysis (based on hypothetical contracts with souls who abide behind the veil of ignorance) argues for more births. (It does not argue for an unlimited number of births, because even from behind the veil, souls will weigh the advantages of being born against the disadvantages of overpopulation. But the right number of births will surely be greater than it is in a world where our Rawlsian contracts are ignored.)
4. Therefore, on Rawlsian grounds, there should be more life. But life, like everything else we value, should be produced efficiently. Wheat, cars, and haircuts should be produced at the lowest possible cost, and for exactly the same reasons, so should babies. In this case, the low-cost producers are the potential parents who want to have babies.
5. But you cannot look at a woman and know whether she is a low-cost producer. Only she knows. The only way to produce babies efficiently is by leaving reproductive choices up to individual women, just as the only way to produce wheat efficiently is to leave agricultural choices up to individual farmers. Therefore, if we want more babies, the efficient way to get them is not to conscript people for parenthood, but to subsidize parenthood.
6. **The two main conclusions are these:** First (to reiterate point 5) a conception subsidy funded by an abortion tax is superior to a ban on abortion. Second, a conception subsidy funded out of general revenues is superior to the same subsidy funded by an abortion tax. If we're subsidizing childbirth because of a

shared obligation, then we should share the cost of that obligation.

7. Rawlsianism is not the only route by which one might reach the conclusion that there should be more births. Even without Rawlsianism, the rest of the argument still applies. If you believe there are too few babies being born (either because the unborn and unconceived have rights that command our respect, or because you believe that a larger population will improve the quality of life for the rest of us, or for some other reason), you might want large conception subsidies. Otherwise (for example, if you are concerned about overpopulation), you might want smaller subsidies, or no subsidies, or even negative subsidies (otherwise known as taxes). We can argue about what the right subsidies should be, but wherever you stand on that spectrum, there is no case for conscripting people into parenthood.

Coda

Here are a few things I left out:

1. At some point in the gestation period, it becomes possible for fetuses to feel pain. That matters. There is certainly a good argument for discouraging abortions that cause pain or panic. This is likely to mean that if we try to draw a clear bright line past which abortions are prohibited, we should draw it sometime before birth, possibly at the expense of making the line less clear and bright than we'd like it to be.
2. I've considered the interests of the mother and the fetus. I've ignored the interests of people who are just plain offended by abortion and feel distress when they know that abortions are happening. The question of how to account for such psychic stress in a cost-benefit analysis is a thorny one, and many strong arguments have been made for and against it. I am generally inclined not to give it much weight, at least partly on the grounds that it's impossible to tell how much of that stress is genuine and how much is manufactured for the pleasure of wallowing in one's own moral superiority. (This is an issue with the "psychic stress" of those who are just plain offended by *prohibitions* on abortion just as much as those who are just plain offended by abortion itself.) I worry about creating incentives for people to suddenly discover they are psychically

stressed about a thousand things that might otherwise not have bothered them. But this is far from a conclusive argument.

3. It is sometimes argued that a tolerance for abortion gives rise to a callousness toward the value of life generally and can therefore lead to a more cruel and violent society. I do not know how to evaluate this, though I certainly don't think it can be rejected out of hand. On the other hand, one might also argue that a prohibition on abortion gives rise to a callousness toward the values of liberty and efficiency. I don't know how to evaluate that one either.

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