

## Public reason and prenatal moral status

Williams, Jeremy

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# Public Reason and Prenatal Moral Status

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Jeremy Williams, University of Birmingham

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## 1. Introduction

At the heart of Rawlsian political liberalism is its ‘ideal of public reason’. As standardly understood, this ideal concerns the way in which democratic deliberation is to be conducted when fundamental political matters are at stake (what Rawls calls ‘constitutional essentials’ and ‘questions of basic justice’), and requires that citizens justify their decisions regarding those matters in terms that *each can reasonably accept*. More precisely put, the ideal requires citizens to bracket their reasonable disagreements over religion, metaphysics, and the other elements of their rival ‘comprehensive doctrines’, and instead adduce justifications framed entirely in terms of a special set of ‘political values’ - values that all reasonable citizens can be expected to recognise, irrespective of their comprehensive doctrinal commitments, and that therefore provide each with properly *public* reasons.<sup>1</sup> Political liberalism holds citizens

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<sup>1</sup> This description of the ideal skirts around what Rawls (2005, p. liii) calls the ‘wide view’ of public reason, whereby citizens may freely appeal to their comprehensive doctrines, subject to the proviso that they be able to produce, in due course, sufficient public reasons to yield the same conclusion. Because public reasons must be forthcoming *at some point*, neither the ‘incompleteness objection’ to

to be under a (non-enforceable) moral ‘duty of civility’ to conform to the ideal of public reason, thus construed, and abstain from supporting resolutions to fundamental political questions whose justifications necessarily rest on comprehensive (and hence ‘sectarian’) considerations. In so acting, Rawlsians claim, citizens respect each other’s freedom and equality, provide assurance of their commitment to liberal-democratic principles, and realise the value of reciprocity in their political relations.

A recurring objection to the foregoing ideal avers that Rawlsian public reason is *incomplete*, in the sense that it excludes from democratic deliberation moral and other philosophical ideas without which citizens will be unable to properly debate or resolve a variety of problems concerning constitutional essentials and basic justice (see, e.g., Dworkin 2006, pp. 253-4; Greenawalt 1988, ch.s 6-8; de Marneffe 1994; Quinn 1995; Reidy 2000; Sandel 1989). The example of such a problem most frequently cited by the objection’s proponents is that of *abortion*. To decide whether and how far abortion should be legally available, it is standardly assumed, we must first determine the moral status the fetus through pregnancy. According to proponents of the incompleteness objection, however, citizens conforming to Rawls’s duty of civility cannot do so.

In making this claim, critics of political liberalism dispute Rawls’s own story about how public reasoning on the subject of abortion would go. In a footnote in *Political Liberalism* which many subsequent authors have found frustratingly brief and

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which I presently turn in the text, nor the argument of this paper, is affected by Rawls’s endorsement of the wide view, which I therefore leave aside throughout.

cryptic (Rawls 2005, p. 243 n32; see also Rawls 2001, p. 117), Rawls stated that the political values upon which public reasoning is based include what he called ‘the due respect for human life’. And he suggested that, within public reason, citizens would be able to more closely interpret the demands of that value, weighing them against the demands of competing values, such as the equality of women, to arrive at fairly fine-grained judgements concerning the range of circumstances under which abortion should be permitted. Advocates of the incompleteness objection typically grant - or at least do not deny - that respect for human life is a political value that can be affirmed by all reasonable citizens. They do not, then, claim that public reason requires citizens to remain entirely mute over prenatal moral status. They *do* insist, however, that the idea of respect for human life will prove too vague and insubstantial to enable citizens to reach firm conclusions regarding the permissibility of abortion, unless or until it is given further content, drawn from citizens’ inadmissible comprehensive doctrines.

This paper provides a new analysis and critique of Rawlsian public reason’s handling of the abortion question that takes the foregoing incompleteness objection as its point of departure, but is importantly distinct from it. I defend two key claims. The first is that Rawlsian public reason, when the restrictions on its content are fully laid out, requires greater argumentative restraint from citizens debating abortion than Rawlsians or their critics have hitherto acknowledged. As specified by Rawls, I argue, and as understood by Rawlsian reasonable citizens, the political values of public reason enjoin respect only for *persons*. Therefore, beyond confirming the preliminary point that fetuses do not qualify as persons under political liberalism’s ‘political conception of the person’, public reasoning about prenatal moral status completely ‘runs out’, as the literature sometimes puts it – there is nothing further that it can say.

Put differently, since persons represent only a subset of human life, the value of respect for human life that Rawls identifies is not (when distinguished from the narrower idea of respect for political persons) a *bona fide* political value at all. Hence, the interpretation of that value and its moral implications is not within the remit of public reason.

Importantly, however - and this is my second key claim - this gap in the content of public reason does not threaten deliberators' abilities to decide how far abortion should be available in their society. On the contrary, precisely because public reason strikes out any fetus-regarding normative concerns that might weigh against the interests of women in controlling their bodies and fertility, it has radically permissive implications for the legal regulation of feticide, inclining heavily towards the view that abortion should be allowed with little or no qualification, right until birth. I end by providing grounds for thinking that the argumentative restraint which Rawlsian public reason enjoins over prenatal moral status is objectionable, even if it does not cause indeterminacy on the question of abortion. It lies beyond the paper's scope, however, to establish whether the abandonment of political liberalism is consequently justified on balance.

In making my case, I aim to make progress in a debate between political liberals and their opponents that has long been stuck at a frustrating impasse. As political liberals have been keen to point out, those who object that Rawlsian public reasoning will struggle to resolve the moral status of the fetus, and thus the legal status of abortion, have tended to go little further than to state their suspicion or intuition that their objection is correct. But conversely, rather than explaining to the perplexed how, despite its heavily restricted content, public reason can indeed successfully grapple with these issues, political liberals typically only *assert* that it can

do so, and/or insist that the onus is on sceptics to prove otherwise.<sup>2</sup> Hence, both sides seem vulnerable to the charge of begging the question against each other. In a recent survey of the state of the debate over Rawlsian public reason, Jonathan Quong (2013a, p. 278) rightly observes that, if they are to make their case more conclusively in future, both those who affirm and those who dispute public reason's power to resolve complex moral problems will have to engage in close, case-by-case analysis of particular issues, isolating the public reasons relevant to them, and evaluating how much work these can do in enabling citizens to draw appropriate conclusions. This paper makes a start on that overdue task.

Before I begin, three important points of terminology. First, my arguments are directed not at public reason liberalism generally, but at its mainstream Rawlsian variant specifically. I put aside the rival 'convergence conception' of public reason, developed by Gerald Gaus (2011) and Kevin Vallier (2014), and various revisionist political liberalisms, such as that of Martha Nussbaum (2006), which make sufficiently major alterations to the Rawlsian theoretical architecture as to require separate treatment. In this paper, then, unless otherwise specified, 'public reason' always means *Rawlsian* public reason, in its standard form.

Second, by 'moral status', I mean the property of mattering non-instrumentally from the moral point of view, and of warranting some form of *respect*. We can distinguish three ways in which a being may warrant respect, and so have moral status: as a bearer of rights, to whom principles of justice apply; as a bearer of

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<sup>2</sup> See, e.g., Williams (2000, p. 208), Quong (2012a, p. 213, p. 282), Freeman (2004, pp. 2054-6), and Boettcher (2012, p. 169). According to Schwartzman (2004, p. 207), 'we should assume that public justification is ... determinate until we can be shown otherwise.'

interests, to whom principles of beneficence apply; as an object of intrinsic value. I assume throughout that the claim that X warrants respect, and the claim that X has moral status, are equivalent. And I also therefore interpret Rawls, in his claim that respect for human life is a political value, to be saying that regard for the moral status of human life is such a value.

Third, in the literature, public reason is generally described as ‘incomplete’ insofar as it disbars consideration of reasons without which citizens cannot collectively reach a conclusion on some question. Below I shall sometimes say that public reason is incomplete with respect to prenatal moral status, meaning that it cannot say what the status of the fetus is. But this is to be distinguished from the claim that public reason is incomplete with respect to the permissibility of abortion. On my argument, to repeat, public reason has clear and radical implications for that question, and is therefore not incomplete with respect to it - at least in the literature’s technical sense.

## **2. Why public reason cannot address prenatal moral status**

To recapitulate, Rawlsians and their critics have formed contradictory assumptions regarding whether public reason provides citizens with the argumentative resources needed to debate and resolve the issue of prenatal moral status. Indeed, interestingly enough, Rawlsians contradict *one another* over which perspectives on prenatal moral status public reason can accommodate. For instance, Quong (2012a, p. 213) and Stephen Macedo (1997, pp. 16, 24) claim that public reason allows citizens to voice a variety of pro-life and pro-choice moral views, and that pro-life arguments to the effect that fetuses are persons with full rights to life can constitute reasonable interpretations and balances of available political values. But Samuel Freeman says

(2007, p. 408) that the case for fetal personhood has not hitherto been rendered in terms acceptable to public reason, and that it is unclear how it ever could be. Andrew Williams (2000, p. 208) suggests that public reason can resolve the question of whether fetuses have interests, and at what stage in gestation they acquire them. But Freeman (2007, p. 407) states that it is beyond public reason's powers to rule on whether a fetus has the 'moral status of a being with interests'. Williams (2000, p. 208) also contends that public reason can determine whether and how far prenatal human life (independent of its possession of rights or interests) possesses intrinsic value (or 'sanctity', to use the synonym coined by Dworkin [1994]). And perhaps Freeman would agree, for he indicates (at 2007, pp. 407-8) that even if public reason cannot determine whether the fetus is a person with rights, or a being with interests, there is nonetheless a further form of respect (which he does not altogether clearly articulate) that reasonable citizens can acknowledge as attaching to human life in a 'straightforward' biological sense, and factor into their decision-making. Quong, however, tells us (2012a, p. 17, and 2012b, pp. 57-8) that a distinguishing mark of political liberalism is that it disbars attributions of intrinsic value or sanctity from figuring in public justification.<sup>3</sup>

As these disagreements suggest, the limits which public reason imposes on participants in the abortion debate are far from immediately or intuitively clear, but

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<sup>3</sup> Surprisingly, Quong claims elsewhere (2012a, p. 282) that 'the sanctity of human life' is a political value. Quong has clarified to me, however, that he intended in that passage only to affirm the looser Rawlsian idea that respect (in some sense) for human life is such a value.



rather something that requires analysis. To that end, in section 2.1, I first embark on a reconstruction of the Rawlsian position on the *content* of public reason (that is, of the total stock of deliberative resources on which public reasoners may draw), against which arguments concerning fetal moral status can be cross-checked for compatibility. Then, in section 2.2, I outline my overall case to the effect that such arguments necessarily fall outside the content of public reason, thus understood. Section 3 refines my thesis in light of two likely objections, and sections 4 and 5 buttress it with additional arguments concerning public reason's inability to accommodate disputes over fetal interests and intrinsic value. Section 6 draws out the implications for the decisions that public reasoners will be liable to reach about the legality of abortion.

### *2.1. The content of public reason*

Rawls tells us that 'the content of public reason is given by a family of political conceptions of justice', and that '[t]o engage in public reason is to appeal to one of these political conceptions ... when debating fundamental political questions' (Rawls 2005, p. 450, p. 453). Crucially, insofar as a *family* of such conceptions provides the relevant content, public reasoners are permitted to appeal to their favoured conception even when not everyone endorses it. Public reason does not, then, require citizens to bracket all points of moral controversy. Hence, if arguments concerning fetal moral status do indeed violate public reason, this will not be merely on grounds that they are controversial, but rather that they cannot be articulated entirely within a political conception of justice.

To determine whether they can be so articulated, we need a closer understanding of these conceptions. According to Rawls, the status of a conception

of justice as political depends upon its subject matter and mode of justification. Regarding subject matter, political conceptions address the design and functioning of the basic structure, rather than issuing moral demands to agents in all areas of life (Rawls 2005, p. 11). Regarding justification, political conceptions depend for their justification on *political values*. These are moral values which, Rawls says, belong to a 'special domain of the political' - a 'subdomain of the realm of all values' (Rawls 2005, p. 139) - and 'provide public reasons for all citizens' (Rawls 2005, p. 386), meaning that citizens can be expected to see them as reason-giving, and take them into account in their political deliberations, whatever their comprehensive doctrinal affiliations (though they need not interpret them in the exact same way, or agree how much weight they are to be accorded). The justificatory relationship between the political values and a political conception of justice, according to Rawls, is twofold. First, the political values are the sole normative basis out of which a political conception must be constructed. And second, it is the job of a political conception to interpret, weigh, and order the political values so that they become specific enough to produce determinate answers to fundamental political questions, without supplementation from any comprehensive doctrine. As Rawls (2005, p. 386) summarises this relationship:

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.

Thus, in defending both their choice of a conception of justice, and their answers to fundamental political questions, public reasoners must appeal only to moral values that are political. Which values fall within this set, however?

On the standard Rawlsian formulations, political values are identifiable in (a) being ‘freestanding’ of comprehensive doctrines, and (b) representing fundamental liberal-democratic ideas that any reasonable citizen will share.<sup>4</sup> Formulations (a) and (b) are generally presented as equivalent to each other, or two sides of the same coin. But that is not to say that either, employed on its own, is equally helpful in determining whether some value is political.

To see why, consider (a). To try to identify political values by their freestandingness is to try to identify them not *positively*, by their possession of distinctive, political-making features, but *negatively*, by elimination from an independently-identified category of the comprehensive. For a negative approach to isolating political values to work, we would need in hand a prior understanding of the comprehensive with clear, well-demarcated boundaries. Political liberals, however, have not furnished us with this. To be sure, they provide *examples* of ideas, or branches of philosophical enquiry, which they say belong to the comprehensive realm. Religious and metaphysical claims, and conceptions of the good, are the most commonly cited (with others including, e.g., rule-consequentialist or Scanlonian accounts of what it means for an act to be wrong). But rather than providing a general, positive account of the sphere of the comprehensive, which can be used to

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<sup>4</sup> I here ignore a number of other less prominent or promising descriptions of the political domain found in Rawls’s work. For a forensic examination of Rawls’s varied and problematic use of the term ‘political’, see Gaus (2003, ch. 7).

throw light on the category of the political, Rawlsians standardly work in the other direction, defining the comprehensive negatively, as the sphere of the *nonpolitical*.<sup>5</sup> Thus, it is the domain of political values that needs to be identified first, with our understanding of the boundaries of the comprehensive falling out from it, rather than the other way around. This is where (b) - the understanding of the political values as the shared liberal-democratic commitments of reasonable citizens - comes in.

Unlike attempting to identify the political values by exclusion from a hazily-defined category of comprehensive value, identifying them as the common values of reasonable citizens promises greater certainty regarding what is and is not a political value. This is because the shared normative horizons of reasonable citizens, as Rawls characterises them, are limited, and easier to pinpoint. Indeed, Rawlsian reasonable citizens are an idealised constituency who are definitionally committed only to the following normative beliefs: (1) the *freedom* of the person (understood according to Rawls's political conception of the person, discussed below); (2) the *equality* of such persons; (3) *fairness* in social cooperation; and (4) *public reason* itself (this last commitment following from reasonable citizens' acceptance of the so-called 'burdens of judgement') (see Rawls 2005, pp. 48-58). Let us refer to these as the *core liberal values*. As Rawls (2005, pp. 13-14) presents them, they are the central commitments of a liberal democratic political culture, and acceptable therefore to anyone who has properly internalised that culture. Rawls goes into a fair amount of detail regarding how, in liberal-democratic culture, he thinks the foregoing values are understood. For instance, the value of freedom, according to Rawls, includes the right to choose and

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<sup>5</sup> See especially Rawls (2005, p. 13), and also, e.g., Lister (2013, p. 181 n38).

revise a conception of the good, the status of being a ‘self-authenticating source of valid claims’, and the capacity to take responsibility for one’s ends (see Rawls 2005, p. 30-34). At first sight, then, to reason publicly on the basis of values shared by all reasonable citizens means restricting oneself to arguing for, and on the basis of, a conception of justice that takes in, refines, and expresses precisely (and only) these core liberal values.<sup>6</sup> As Quong (2012a, p. 261) encapsulates the resultant Rawlsian position:

To show that some political proposal, X, is publicly justified, we appeal to what reasonable people have in common - we appeal to their shared view of society as a fair system of social cooperation between free and equal persons, and any further beliefs entailed by that ideal. You are not engaged in the practice of public reason unless you offer a reason or argument that will be acceptable to everyone in their capacity as free and equal citizens.

Someone might query how, if the political values are values that are acceptable to all reasonable citizens, and the latter are defined by their acceptance of only the small set of values identified above, Rawls could claim, as he does (at 2005, p. 240), that ‘there are many political values and ways they can be characterized.’ I take it, however, that (as Quong’s words suggest) the answer is that citizens who are committed to the core liberal values will recognise them as entailing or containing certain further values, which also therefore have political status. For instance, I take it that the political liberal view is that for a citizen to be committed to the values of freedom, equality,

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<sup>6</sup> Rawls tells us that justice as fairness is such a conception, for instance. See Rawls (2005, p. 90).

and social cooperation, in their Rawlsian specifications, is also for her to be committed, e.g., to freedom of religion, equality of opportunity, and the social bases of mutual respect, to name some of the more specific political values mentioned by Rawls.<sup>7</sup> Hence, there can be many political values, as Rawls claims, even if they have their sources in just a few.<sup>8</sup>

The promise of public reason, as I understand it, is that citizens who are divided on a host of philosophical matters can still resolve fundamental political problems in mutually acceptable terms by explicating the bounded set of liberal values that all of them, if reasonable, will accept.<sup>9</sup> The substance of the incompleteness objection, meanwhile, is that this promise is illusory.

## *2.2. Respect for human life as a political value*

Return, then, to that objection. It would be easy to think that it is too difficult to show that public reason is incomplete on some issue, X, because this seems to require considering X from the perspective of all the political conceptions of justice that exist, or might in future.<sup>10</sup> But this overstates the problem, at least in some cases.

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<sup>7</sup> For an impressively thorough list of the political values identified by Rawls across his relevant works, see Freeman (2004, pp. 2030-31 n25). It seems plausible to think that nearly all of these would indeed be concomitant commitments of anyone who subscribes to the core liberal values - the standout exception being, as I argue below, respect for human life.

<sup>8</sup> As for the many *characterisations* of those values, this results from the fact that citizens interpret them through their different political conceptions of justice.

<sup>9</sup> For consonant readings, see, e.g., Freeman (2004, p. 2027) and Quong (2012a, p. 5, p. 261).

<sup>10</sup> Cf. Williams (2000, p. 207).

Because publicly-admissible conceptions of justice must interpret and express only political values, one way to show that some dispute cannot be conducted within public reason is to show that is a dispute over the interpretation of a nonpolitical value.

Now, recall Rawls's suggestion that respect for human life is a political value. I say that Rawls was mistaken in identifying this value as political, and that therefore the question of prenatal moral status is entirely beyond the remit of public reason. To begin, I need to explain more closely how I (take Rawls to) understand respect for human life.

Unlike a range of other political values, Rawls says nothing explicitly about what he takes respect for human life to involve. But we can make at least one important assumption about how he understands it. To wit, we can assume, as others have done (e.g., Freeman 2007, p. 84), that he has in mind a value that requires (as the name implies) respect for *human* life, as opposed, more narrowly, to respect only for the lives of persons. I do not assume, note, that Rawls thinks that to be committed to the value of respect for human life involves believing that strictly *all* human life warrants respect. Nor do I assume that he thinks it involves believing that the respect due to human life (when it is due) is due because there is something special about membership of the human species. All I assume is that, on Rawls's view, a citizen who subscribes to the value of respect for human life accepts that the boundaries of the moral community take in at least some humans who are not persons, and believes that political decisions should give appropriate weight to that fact.

That Rawls understands respect for human life in this way is shown, first, by his listing it as a separate value, in addition to the political values enjoining various forms of respect for persons, and, second, by his invoking it in the context of

abortion. Abortion involves the killing of beings who, while human, are undoubtedly not persons - at least under the 'political conception of the person' that reasonable citizens are defined as recognising, and required to presuppose in public reasoning, in preference to whatever moral or metaphysical notion of personhood is suggested by their comprehensive doctrines. To say that the fetus is not, politically speaking, a person, is not to beg any substantive questions about prenatal moral status. Under the political conception of the person, in Rawls's words (2005, p. 481), 'we think of persons as citizens' – that is, as individuals with the requisite minimum psychological capacities to take part in and benefit from fair social cooperation. More specifically, 'we think of persons as reasonable and rational, as free and equal citizens, with the two moral powers and having, at any given moment, a determinate conception of the good, which may change over time' (Rawls 2005, p. 481, footnote deleted). It is, according to political liberalism, a hallmark of liberal political culture that citizens characteristically see themselves and each other in this way. A fetus, however, does not fulfil the criteria of political personhood at any stage of gestation.<sup>11</sup> In order, then, to make sense of Rawls's claim that respect for human life is relevant to abortion, and weighs on the side of restricting abortion rights, we must interpret it as a value enjoining respect for forms of human life beyond political persons.

The analysis of the content of public reason above enables us to see, moreover, that unless respect for human life thus construed is indeed a political value, citizens will be forbidden from publicly expressing or evaluating arguments to

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<sup>11</sup> It might be replied here that young children do not fulfil the criteria either, yet Rawls sometimes says that *they* are persons. I address this point in detail in section 3.1.



the effect that prenatal human life warrants respect or possesses moral status. If respect for human life is indeed a political value, public reasoners are free to appeal to it in political argument, as refined through their various political conceptions of justice. If not, however, then it is not for public reason to interpret the value's requirements (or, for that matter, argue against its existence), just as, analogously, it is not for public reason to interpret (or criticise) a religious value of monogamy or sexual virtue to which some but not all reasonable citizens are committed.<sup>12</sup>

Having seen what is at stake in asking whether respect for human life is a political value, then, let me defend my answer. On the understanding of what it means for a value to be political set out earlier, if respect for human life is a political value then this must be in virtue of its being a normative commitment that reasonable citizens share, or an entailment of such a commitment. It is not, however.

To elaborate: as we have seen, reasonable citizens are an idealised constituency defined by acceptance of the core liberal values of freedom, equality, fairness, and public reason. According to Rawls, moreover, those values are conceptually tied to the moral powers, and therefore, by implication, limited in their zone of application to persons. Persons are held to be free and equal in a liberal society, Rawls claims, on grounds they are rational and reasonable to the minimum degree required for social cooperation (Rawls 2005, pp. 29-35, p. 79). And being free and equal in those respects, they are also consequently taken to be owed fair cooperative terms, and justifications for exercises of political power which they can reasonably accept (Rawls 2005, p. 213). Now, to be committed to the value of respect

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<sup>12</sup> On monogamy's status as a nonpolitical value, see Rawls (2005, p. 457).

for human life is, to reiterate, to be committed to the view that the boundaries of moral status are not drawn exclusively around persons, but also take in at least some other forms of human life. Thus understood, however, respect for human life cannot be seen as following from the core liberal values alone, nor as representing a more fine-grained specification of one or more of them. Rather, respect for human life is a broader ethical commitment on which there is no consensus among reasonable citizens, under the terms of their Rawlsian idealisation. It is perfectly consistent with a commitment to the core liberal values to deny that any modicum of respect is due to any beings who are not political persons. The shared core values do not, then, entail respect for human life, and nor therefore is it unreasonable for a citizen to reject that value. Of course, some reasonable citizens might situate their own support for liberal political values within a wider ethic of respect for human life, and join an overlapping consensus on the political values on that basis. Such an ethic is not, however, *itself* a shared political value.

Since the shared values of reasonable citizens do not include or entail respect for human life, political decisions justified with reference to (some interpretation of) that value always transgress the terms of public reason. To put the point in language due to Gerald Gaus (2011, p. 42, and *passim*), respect for human life is not among the subset of citizens' *evaluative standards* against which they can all agree their basic structure should be judged. If that is right, public reasoners would still be permitted to argue that prenatal human life is of instrumental value to persons (a point to which I return in section 6). However, at the bar of public reason, the protection of prenatal life *for its own sake* (i.e. on grounds of its native moral status) is a sectarian concern.

At this point, I envisage defenders of political liberalism objecting that the foregoing argument overlooks, and is incompatible with, various statements by Rawls

to the effect that political conceptions of justice not only may but *must* confer protection on two groups of humans who, like fetuses, currently lack the moral powers, and therefore seem not to qualify as political persons, to wit: young children, and unconceived members of future generations. If political conceptions *must* recognise members of the latter groups as having moral status, one might think, it is surely at least open to them to grant such recognition to fetuses. And if *that* is true, one might also think, discussion of prenatal moral status can indeed occur within public reason, between conceptions of justice offering rival perspectives on the matter. In the next section I refine and reaffirm my thesis that questions regarding prenatal moral status fall outside the competence of public reason, in the face of these alleged counter-examples.

### **3. Justice, Personhood, and Rights**

#### *3.1. Fetuses and children*

Consider first the objection that my thesis ignores the fact that, according to Rawls, public reason takes in arguments regarding the status and rights of young children, even though the latter, like fetuses, are too morally and rationally under-developed to engage in social cooperation. It is true that, particularly in ‘The Idea of Public Reason Revisited’, Rawls is at pains to insist that family life, including child protection, is a concern of public reason (see Rawls 2005, pp. 466-74). Indeed, he says (2005, p. 474) that *any* reasonable political conception of justice will endorse ‘the equality of children as future citizens’. However, it would be too quick, pending further argument, to assume that Rawls’s claims about children undermine my argument regarding fetuses. For first, Rawls’s position on children might turn out to be *ad hoc*. And second, even if it has a coherent rationale, this might not extend to fetuses.

As to the first possibility, there is certainly room for puzzlement over the status of children in political liberalism. To be sure, in *A Theory of Justice*, Rawls assumes that children are subjects of justice (see Rawls 1999, p. 446), and stipulates (1999, pp. 218-20) that the inhabitants of the original position are to be deprived of knowledge of whether they represent individuals who are currently children or adults. It is not clear, however, that these holdings of *Theory* would successfully make the transition to political liberalism. Whether they can do so depends on whether the claim that children are subjects of justice, whom it is appropriate to represent in the original position, can be rendered in terms acceptable to all Rawlsian reasonable citizens. If it cannot, the inclusion of children as subjects of justice would, like the account of congruence presented in Part III of *Theory*, become another element of justice as fairness that falls foul of the problem of reasonable pluralism (given Rawls's depiction of the parameters of that pluralism). Moreover, we have strong prima facie reason to suspect that the inclusion of children is indeed in tension with political liberalism. As we have seen, the political values on which political conceptions of justice are based apply to persons, conceived as cooperative citizens. But children, Rawls says, are not cooperative citizens, only *future* citizens. How, then, can a political conception see them *now* as subjects of justice, much less *equal* such subjects?

The latter question – which concerns the accommodation of children's rights issues in Rawls's theory of political legitimacy, as opposed to the conception of justice presented in *Theory* – tends to be overlooked in the otherwise voluminous literature on the moral and political status of children. In addressing it, then, we will have to rely on Rawls's own scattered comments on the matter, in *Political Liberalism* and subsequent works. Insofar as an answer suggests itself there, it appears to rest on the suggestion that it is among the central commitments of a liberal-democratic

political culture to regard children as equal members and rights-holders - a commitment which reasonable citizens can thus be expected to share. Rawls says (2005, p. 41), for instance, that in a democratic society ‘we are not seen as joining society at the age of reason, as we might join an association, but as being born into society where we will lead a complete life.’ And he also says (2005, p. xliii) that ‘[t]he fundamental political relation of citizenship... is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death.’<sup>13</sup> These claims imply and correspond with a roomier specification of the political conception of the person, to which Rawls sometimes makes explicit appeal, whereby a person is not necessarily someone who *now* has the requisite moral powers for citizenship, but rather someone who ‘*can be* a citizen, that is, a normal and fully cooperating member of society *over a complete life*’ (Rawls 2005, p. 18, emphases added). If we take reasonable citizens to be defined in part by acceptance of this more expansive conception of the person, then a range of debates about the rights of young children can indeed proceed within public reason, on terms that all such citizens accept. Citizens would be free to advance rival views regarding precisely which rights children have, and how they ought best to be protected. They would not, however, of course, be free to dispute the idea that children are persons warranting protection under justice in the first instance.

It is not necessary here to interrogate the claim that acceptance of young children as persons is a hallmark of a liberal-democratic political culture. For even if it

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<sup>13</sup> Note that, in saying that entry and exit are *only* by birth and death, Rawls means to abstract from the phenomenon of immigration.

is not merely an *ad hoc* fix for political liberalism to bring questions of children's rights under the rubric of public reason by expanding the political conception of the person in this way, that move does not help bring questions of *fetal* rights (or moral status generally) under it. Indeed, the expanded conception of the person, as someone who has gained entry to her society by birth, draws a line between the infant and the fetus, thus providing grist to my mill. Importantly, moreover, the strategy by which political liberalism brings debates over the rights of children under the umbrella of public reason could not be emulated to bring debates over prenatal moral status 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 are a proper concern of public reason, so it ought to be expanded again so that fetuses as well as children fulfill its conditions. That move would be doubly unacceptable. For first, 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. And second, it would generate deeply unsatisfactory restrictions on public reasoning, since deliberators could not then question the personhood of the fetus except on pain of becoming unreasonable, by rejecting an idea that reasonable citizens are required to accept. Revising the political conception of the person to incorporate fetuses, in short, would transform the constituency of public justification into a pro-life sect.

I shall return below to the question of whether the defining beliefs of reasonable citizens could in another way be revised to allow deliberation to take place in a more suitably unrestricted form over prenatal moral status. To conclude this discussion, meanwhile: by adopting Rawls's more generous interpretation of political

personhood, and stipulating that reasonable citizens accept it, political liberalism can ensure that public reasoners are able to consider a range of questions arising in relation to the rights of young children. But that theoretical move does nothing to facilitate debate among public reasoners over prenatal moral status, and hence poses no threat to my thesis.

### *3.2. Fetuses and future generations*

As we have just seen, Rawls sometimes makes use of an expanded political conception of the person, whereby a person is not necessarily someone who can *now* exercise the moral powers, but rather someone who has joined political society by birth, and begun a life within it over which she *will* develop and exercise those powers. As I have argued, fetuses are still not persons under this wider conception of the person, and therefore still not beings whose treatment or status public reason has a remit to consider. However, members of future generations, it might now be objected, are analogous to fetuses, in that they too have yet to acquire the moral powers, or gain entry by birth to political society. Yet Rawls nonetheless contends that the question of what is owed *to them* is on the agenda of public reason. Indeed, he says (2005, at, e.g., p. lxii, or p. 15) that reasonable citizens view political society as an ongoing fair cooperative venture *across generations*. Thus, the objection avers, the characterisation of public reason as a forum for debate over the status and rights only of political persons (in either the narrow or wide senses described above) runs afoul of Rawls's position on future generations.

The first point here is that, as Rawls acknowledges (2005, p. 245), his claim that a political conception of justice can settle the question of what is owed to future generations is *conjectural*. For rather than exploring fully how public reason would

approach that question, he relegates it to the status of one of the so-called ‘problems of extension’ (Rawls, 2005, p. 20). These are a category of political problems that it seems reasonable (in a quotidian sense) to expect public reasoning to be able to handle, but that also appear to test the resources of a political conception of justice, and will therefore need to be given further theoretical attention somewhere down the line, once it has been shown that public reason can adequately settle what Rawls considers the primary problem of political justice (the terms of social cooperation between contemporaneous citizens). So one option here would be for me to try to show that Rawls’s conjecture is false. In fact, however, I believe that it is not incoherent for political liberalism to claim that the issue of obligations to future generations belongs to political justice, and hence public reason, whilst maintaining that principles of political justice apply only to the born.

To explain: the objection under discussion appears to assume that to be committed to the claim that we are under obligations to future generations involves understanding the latter to have moral status and rights *here and now*, in advance of their existence or entry into society. However, it is coherent and arguably more plausible to instead claim, as philosophers often do, that while persons acquire the moral status of subjects of justice only if and once they exist, certain of the rights that as-yet-non-existent future persons will later acquire, insofar as they can be fulfilled or violated now, impose obligations on us in advance of their birth. By appealing to the latter claim, political liberals can say both that political society is to be conceived of from the point of view of reasonable citizens as a fair intergenerational scheme of social cooperation, wherein current members are under duties of justice to provide for their successors, *and* that, according to the democratic political culture that provides the content of public reason, membership of the scheme of social



cooperation, and the status of political personhood, is dependent upon birth. Precisely on those grounds, however, Rawls's stipulation that reasonable citizens think of obligations to future generations as a question of political justice, to be addressed in public reason, is not in tension with my argument that the moral status of fetuses is not such a question.

I conclude anew, then, that the terms of public reason preclude appeal to, or debate between, accounts of prenatal moral status. Before moving on in the next two sections to some supporting arguments for this conclusion, some final observations about this part of the discussion are merited.

First, the objections I have anticipated here press against me the cases of two groups of beings who have not yet developed the moral powers of political personhood, but whose status and entitlements are, according to Rawls, nonetheless to be settled in public reason. Notice, however, that there is another group of beings who lack the moral powers whose treatment by Rawls can plausibly be thought to lend weight to my thesis – namely nonhuman animals. In contrast to children and future generations, Rawls is notably noncommittal (at Rawls 2005, p. 21) about whether political justice is the right lens through which to view the protection of animals and the environment (and by implication, therefore, over whether public reason can address those matters). And later, in a troubling passage (Rawls 2005, pp. 245-6), he seems to indicate that the political values on which public reason can call in resolving these questions are entirely anthropocentric, and would generate, if relied upon, the conclusion that animals and nature are entirely 'subject to our use and

wont' – to be preserved, that is, only insofar as this serves our interests.<sup>14</sup> This, note, is exactly what is implied by the account of public reason adduced in section 2.<sup>15</sup> Rawls acknowledges (2005, p. 246) that many people will be deeply unsatisfied with any resolution of animal and environmental protection questions that relies only on person-affecting values, and concludes his discussion with reassurance that, since these questions are not constitutional essentials or matters of basic justice, they are not issues on which he takes the use of public reason to be obligatory, but rather on which 'citizens can vote their nonpolitical values and try to convince other citizens accordingly.' That permission, however, is not available in the case of the abortion, which, as Rawls notes, either is a constitutional essential, or at least 'borders on one' (Rawls 2001, p. 117).

Consideration of Rawls's position on animals provides corroboration, I believe, of this paper's understanding of the limits of public reason. Rawls was right

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<sup>14</sup> I say that Rawls 'seems to' suggest this conclusion. I acknowledge a difficulty of interpretation, in that it is not wholly clear (at Rawls 2005, p. 245) whether he means to say that political conceptions of justice generally are apt to yield anthropocentric conclusions, or that *contractarian* conceptions like justice as fairness specifically do so. Tellingly, however, when Rawls considers the perspective of citizens who reject the view that animals and nature are to be thought of as instruments of use, and how they might make their case in the democratic forum, he does not claim that they can avail themselves of political values that justice as fairness, say, neglects. Rather, he envisages them going beyond the limits of public reason altogether, as, given his view that public reasoning is required only when constitutional essentials and questions of basic justice are at issue, they are entitled to do.

<sup>15</sup> And is also consonant with the view in *Theory*, where Rawls suggests (1999, pp. 448-9) that a full account of our moral relationship with the natural world is not a task for a theory of justice but for *metaphysics*.

to be concerned that the terms of public reasoning he had drawn up would obstruct deliberation over, or affirmation of, the moral status of animals, and should have seen here the parallel with fetuses. The analogy with animals is, moreover, salient to this paper in another way. It is sometimes supposed (e.g. in Schwartzman 2004, p. 203) that Rawls was led to restrict the scope of public reason to matters concerning constitutional essentials and basic justice out of concern that, in other areas, public reason would prove indeterminate. Rawls's discussion of animals, however, suggests that he may (instead or also) have been concerned that public reason, if relied upon across the board, would be in danger of returning determinate but ethically defective answers to some political questions – here, for instance, that because claims to the effect that animals have any kind of moral status depend on unshared comprehensive philosophical resources, animals must for political purposes be considered entirely liable to our 'use and wont'. I return to this sort of possibility later.

Finally, notice that, because what counts as a public reason depends on what reasonable citizens share, if political liberals are to alleviate the gap I have identified in the content of public reason concerning fetuses, they will need to somehow revise the normative beliefs that a person must hold in order to qualify as reasonable. We saw above that an unacceptable way to do this would be to widen the shared conception of the person so that fetuses fall under it. Another possibility, however, would be to insert respect for human life (or, perhaps, some comparable value, such as respect for sentient life, or for life *simpliciter*) among the shared values. If this were done, the terms of public reason would allow citizens to debate the new value's content and requirements, and publicly justify their political decisions with reference to it, as with the other political values. I contend, however, that such an amendment to the criteria of reasonableness could not be made without undue sacrifice to the

coherence of the Rawlsian ideal of public reason. According to this ideal, where fundamental political matters are concerned, any citizen who accepts the basic tenets of liberal democracy is entitled to justifications for the ways in which political power is exercised over her, in terms that she is able to accept. As Rawls puts it, public reason ‘is a way of reasoning ... that does not trespass on citizens’ comprehensive doctrines so long as those doctrines are consistent with a democratic polity’ (Rawls 2005, pp. 490). In making the mooted amendment to the terms of reasonableness, however, political liberals would be shutting some citizens (namely anyone who does not accept the newly inserted political value) out of the constituency of public reason, despite their affirming the core liberal values concerning their fellow citizens, and thus holding doctrines consistent with a democratic polity. As a result, some fully paid-up liberals would end up governed according to ethical values that they cannot accept. By Rawlsian lights, then, the proposed amendment would render political liberalism an objectionably sectarian theory. Even supposing I am wrong, however, to doubt that some such revision to the constituency of public reason could be made without serious cost to the coherence of political liberalism, the central thrust of the paper to this point would still stand: to wit, that *in its current form*, Rawlsian public reason is unable to accommodate deliberation over prenatal moral status.

#### **4. Fetal interests**

As we have seen, a citizen’s public reasoning must proceed, as Rawls (2005, p. 453) puts it, ‘entirely within a political conception of justice.’ If, then, as I have argued, fetuses cannot be regarded as subjects of justice under a political conception of justice, there is nothing more to be said about prenatal moral status within the parameters of public reason. For anything one *could* say would necessarily be drawing

on, or taking issue with, resources taken from the comprehensive philosophical realm. Now, many people believe that fetuses have rights, or acquire them at some point during gestation. On my analysis, while these people may be appealing to a conception of justice, they cannot be appealing to a *political* conception of justice, and are thus disbarred in public reason from making their case. Other people believe that, while fetuses lack rights, they nonetheless have, for at least part of pregnancy, an interest in living, which merits respect as a matter of beneficence.<sup>16</sup> Again, however, because this view appeals to a moral principle beyond political justice, public reason does not allow it to figure in justification, but rather insists on neutrality towards it.

In this section and the next I provide two supplemental arguments regarding public reason's inability to accommodate debate over prenatal moral status. According to the first, public reasoners will be unable to stake any claims concerning whether and how far fetuses have an interest in continuing to live. This would be a serious setback for public reasoning about abortion even if everything I had argued to this point were wrong. For consider: those who believe that the morality of feticide is best judged through the lens of beneficence clearly need an account of whether fetuses have interests in living, when they acquire them, and how strong they are. So do those who believe that the morality of feticide should be viewed as a matter of justice and rights, if they share the common view that the injustice of killing is explained at least partially by the harm the victim. As I now argue, however, citizens cannot answer these questions about fetal interests, except by violating public

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<sup>16</sup> For such a view of prenatal moral status, and an associated bifurcation of morality between a *morality of respect*, or justice, and a *morality of interests*, or beneficence, see McMahan (2002).

reason's requirement of neutrality over the good.

I first need to clarify what the aforementioned requirement involves. It is *not* a requirement to abstain from making any claims whatsoever about the good of individuals (or, to use terms which I assume to be synonymous, their well-being, or interests). For, as Rawls stresses (2005, at, e.g., p. 175-6), public reasoning cannot fruitfully proceed without invoking ideas of the good. For instance, unless deliberators have some handle on what individual well-being consists in, they will be unable to evaluate what a fair distribution of benefits and burdens looks like. But while public reasoning must, Rawls accepts, draw on certain ideas of the good, all such ideas must, to meet the requirement of neutrality, be sufficiently *thin* as to be endorsable by reasonable citizens generally, irrespective of the details of their specific *conceptions* of what makes life go well. Rawls takes the claim that persons have an interest in obtaining more rather than fewer primary social goods to be thin in this sense, for instance, since it can be viewed as following from the democratic idea of persons as free (which includes their being rational project pursuers) that reasonable citizens share.

Insofar as public reasoning must maintain neutrality, in general, between conceptions of the good, it must, I contend, maintain neutrality, in particular, between the following reasonable conceptions of what makes life go best, and their various permutations: (1) the *experiential account*, whereby the good of individuals consists in having certain experiences (pleasurable experiences, in the case of the best-known, hedonic version of the account, but conceivably others too); (2) the *desire-fulfilment account*, whereby our lives go well insofar as our desires (or some subset of them, such as rationally-reflective desires) are satisfied; (3) the *objective list account*, whereby an individual flourishes when her life meets certain objective criteria (e.g. the

cultivation of particular virtues), irrespective of whether they are desired, or affect her experience. Unfortunately, arguments to the effect that a fetus, at some stage of gestation, does or does not have an interest in not being killed, are unavoidably non-neutral between such conceptions.

Some familiar arguments about fetal interests in life are explicitly non-neutral. Thus, on one familiar view, fetuses cannot (at any gestational age) have such an interest because: (a) to have an interest in some good, G, presupposes a desire for G, and (b) the fetus is incapable of desiring the good of continued life, since, lacking self-consciousness, it is incapable of conceiving of itself as having a future. Irrespective of its merits, this argument avows a controversial thesis about the relationship between well-being and desire that conflicts with some reasonably-held conceptions of the good.

Other perspectives on fetal interests may not wear their commitments to a conception of the good on their sleeves to the same extent, but all are nonetheless incompatible with the truth of at least some conceptions which citizens might reasonably hold. Thus, to say that fetuses have interests in living, at any point in pregnancy, is to say, by implication, that at least some aspects of well-being are independent of rationally-reflective desires (the reason being that, as we just saw, fetuses are at no point in pregnancy self-conscious, nor therefore capable of rationally-reflective desires). Even to argue that an early, non-sentient fetus lacks interests (as, e.g., Williams [2000, p. 208] envisages public reasoners doing) is to deny the truth of any version of the objective list account on which there are modes of flourishing available to a non-sentient human being. Such views of well-being may strike many as utterly implausible. However, sizeable numbers of people clearly believe them. They believe, for instance, that to allow an early embryo to develop into

an infant is good *for the embryo*, and that, at the other end of existence, life for a brain-dead adult on life support can still, in various respects, go better or worse *for her*. These beliefs, whether or not implausible, are not unreasonable. That is, they do not offend against the core normative commitments of reasonableness in a way that would, under political liberalism, justify abandoning neutrality with respect to them. Rawls (2005, p. 59) insists that political liberalism ‘avoid[s] excluding doctrines as unreasonable without strong grounds based on clear aspects of the reasonable itself.’ In sum, then, claims about the interests of fetuses in going on living always are, or entail, publicly-inadmissible, thick claims about the good.

## **5. Intrinsic value**

This penultimate section provides one last argument concerning the argumentative restraint which public reason calls for on prenatal moral status. As noted in section 2, Andrew Williams has suggested that it lies within the power of public reason to determine whether and how far fetal human life is intrinsically valuable, or sacred (see Williams 2000, p. 208). ‘Without denying the truth of any reasonable comprehensive doctrine’, he says, citizens ‘might argue that a first trimester foetus enjoys some moral status because of the intrinsic value of human life... Even so, they might still believe that the intrinsic value of human life was outweighed by other more weighty political values, and conclude that the status of the foetus is not a sufficient reason to restrict women’s procreative liberty.’ Three points, I believe, suffice to show that arguments on this question cannot be true expressions of public reason.

First, consider a parallel between the value of life and the value of autonomy. On a Kantian view, autonomy (or the human capacity for it) is intrinsically valuable - not merely valuable insofar as it is *good for* the agent or anyone else. According to



political liberalism, Kantian understandings of the value of autonomy are an unsuitable basis for public justification. Public reasoners, Rawls argues, should not take any stand which reasonable citizens would not all accept about the ways in which autonomy is of value (Rawls 2005, p. xliii). But by that token, to allow the affirmation (or denial) of the claim that human life is intrinsically valuable, independently of whether it is good for the individual whose life it is, or for third parties, while prohibiting the expression of equivalent claims regarding autonomy, would be inconsistent.

Second, as political liberalism conceives them, a citizen's comprehensive doctrine provides her with a systematic account of value. In Rawls's words, a fully comprehensive doctrine aspires to cover 'all recognized values and virtues within one rather precisely articulated system' (Rawls 2005, p. 13). I take it, then, that such a doctrine seeks to explain what in life and the universe matters in itself, and what has value only derivatively. By that token, however, for public reason to pass judgement on questions of intrinsic value is for it to abrogate to itself tasks which are the preserve of individuals' comprehensive doctrines.

Third, the role of the political conceptions of justice on which public reason is based is to articulate what individuals owe to each other, and are owed, as members of a political society. They specify, that is, rights to liberties and opportunities, and adjudicate competing claims to the fruits of social cooperation. However, questions about what objects in the world have intrinsic value, and what respect for them requires, are not questions about justice thus construed, since the duty to respect or not waste intrinsic value is *impersonal*, not correlative to anybody's right.

I conclude, then, *pace* Williams, that public reason would be overstepping itself in determining whether fetal life has intrinsic value, just as, according to the

arguments above, it would be overstepping itself in determining whether fetuses have rights, or interests in continued life. It remains, then, to investigate what all this portends for public reason's handling of the question of abortion's legality.

## **6. The incompleteness objection reconsidered**

I have argued that public reason is entirely indeterminate on prenatal moral status. It can confirm no more than that the fetus is not a person, in the Rawlsian political sense; subsequent to that, it simply 'runs out'. In this final leg of the paper, I first argue that public reason's muteness on prenatal moral status does not produce indeterminacy on the question of abortion, but rather produces a radically permissive answer to it (section 6.1). I then argue that the availability in public reason of arguments for restricting abortion for the sake of parties other than the fetus cannot be relied upon to significantly moderate that radical result (6.2). Finally, I distinguish several grounds for thinking that public reason's incompleteness regarding prenatal moral status is problematic, despite its not depriving citizens of the ability to reach a verdict on abortion policy (6.3).

### *6.1. How public reason remains determinate on abortion*

The claim that public reason disbars citizens from deliberating about prenatal moral status, but does not thereby prevent them from resolving the abortion question, may seem peculiar. The latter question is standardly regarded as a matter of deciding whether and how far to prioritise the interests and rights of the woman over the life of the fetus when these are in conflict. And surely, one might think, citizens cannot form a view on that matter until they can say how much the fetus counts for from the moral point of view. The confusion is dissolved by noticing that, if judgements about

prenatal moral status are not admissible in public reason, deliberators must give them no weight, which is equivalent in practical upshot to their assuming that, throughout gestation, a fetus simply has no moral status. Without denying that fetal life warrants respect in some form, then, public reason requires that citizens ignore claims to that effect for political purposes, just as they must, say, ignore without denying claims to the effect that such-and-such a policy is commanded by God.

If this is correct, however, public reason is far from indeterminate on the question of abortion. From the perspective of public reason, there is no maternal-fetal conflict to resolve, at any point prior to birth. From that perspective, then, it is never legitimate to restrict women's rights of procreative and bodily autonomy for the sake of the fetus, even at full term. This position on abortion is obviously permissive to a degree that very few people would be willing to accept. Even those who identify as staunchly pro-choice typically favour a legal cut-off, coinciding with what they take to be a morally significant point in fetal development, before which the woman's decision to end her pregnancy should generally be dispositive, but beyond which a termination should be provided only with a strong justification.

In arguing that public reason is not rendered indeterminate on abortion by its incompleteness regarding prenatal moral status, I dissent from standard articulations of the incompleteness objection. The difference between us appears to arise from the fact that proponents of that objection generally do not dispute the political status of the value of respect for human life. The problem they envisage is therefore that, although public reasoners will know that respect for human life is a salient political value, that needs somehow to be factored into their decision-making, they will be unable to determine *how much* to count it for, without support from their comprehensive doctrines, and will therefore fail to reach any conclusions. On my

account, however, public reasoners do not face this particular difficulty. Indeed, the example of abortion highlights a point that is often under-appreciated in the literature: that more restrictive rules of public reasoning can enhance rather than hamper determinacy, by screening out considerations that complicate decisions.

Some political liberals have anticipated that public reason would prove inhospitable to pro-life abortion settlements, by disbarring citizens from invoking the accounts of embryonic/fetal personhood and rights that underpin them (see, e.g., Freeman 2004, p. 2060; Williams 2000, p. 208). They have not, however, anticipated that public reason would also prove inhospitable to the moderate qualifications on abortion rights favoured by mainstream pro-choicers. And they would, I assume, be very unlikely to welcome that consequence of their theory (for reasons which I explore in more detail later). A political liberal might here object, however, that we should not be too quick to assume that public reason is incompatible with moderate or more restrictive perspectives on abortion. To do so, she might claim, would be to take for granted too narrow an understanding of the range of reasons that are relevant to determining the legal status of abortion, and more specifically to wrongly suppose that the only grounds for restricting abortion must be given by an account of prenatal moral status. To obtain a fuller picture of what public reason implies for the resolution of the abortion issue, we will need to consider this point in detail.

### *6.2. Third parties and abortion*

In his abortion footnote in *Political Liberalism*, Rawls (2005, p. 243 n32) envisaged public reasoners deciding how far to permit abortion by weighing respect for human life against two further political values – women’s equality, and what he called ‘the ordered reproduction of political society over time’. We can distinguish, more

generally, between reasons for (dis)favouring some candidate abortion settlement that focus on its impact for (a) the fetus, (b) the woman, and (c) third-parties, or society at large. Even if appeal to reasons of type (a) are disallowed by public reason, a political liberal might emphasise, at least some type-(c) reasons also count in favour of restricting abortion rights. Thus, she might conclude, public reason does not constrain citizens to accept the extreme view that the right to end a pregnancy should be entirely unqualified in law.

Viewed one way, this envisaged response may seem somewhat beside the point. To reiterate, the question of abortion, as standardly construed, is the question of whether and how far women's reproductive and bodily autonomy should be curtailed out of concern for the moral value or worth of prenatal human life. And as I have argued, public reason settles *that* question by fiat. The reply we are considering appears to concede this point, while adding only that public reason can do a better job at handling the related *but distinct* question of how far rights to procreative choice should be abridged for the sake of other persons in society. But that was not in dispute.

The political liberal might counter-reply, however, that the fact that public justifications for limiting abortion rights are available after all renders my argument much less worrisome. For it suggests that the content of public reason would not unduly restrict citizens' options in political advocacy, or constrain a community to accept conclusions about abortion that are too discordant with its members' moral convictions. Indeed, the political liberal might suggest that, since the duty of civility does not require citizens to defend their political decisions on grounds of the moral reasons that actually motivate them, as long as they provide a balance of public reasons that they sincerely think adequate to justify those decisions, sufficiently

reflective citizens should be able to come up with third-party or society-focused arguments whose implications for the legal regulation of abortion coincide with, and can be used in public reason as a substitute for, their inadmissible views about the fetus.<sup>17</sup>

These claims have some surface plausibility. But as a defence of political liberalism's handling of the abortion issue, they are ultimately, I believe, just clutching at straws. On reflection, there seems little cause for confidence that the set of third-party-focused reasons for limiting abortion rights can be relied upon to do the work in political argument that the defence requires – and abundant reason to suppose otherwise. The best way to confirm this is to explore the various third party or societal claims and interests that are, or could be, invoked in democratic debate in support of limitations on the right to choose. And it makes sense to begin by returning to Rawls's political value of the ordered reproduction of political society.

It may seem natural to interpret Rawls, in citing this value, to be referring to a societal interest in ensuring that whatever reproduction its members decide to engage in occurs in a safe, reliable fashion. Interpreted this way, the value of ordered reproduction seems to support rather than undermine the case for more generous abortion rights (since when women cannot access legal abortion, they are at risk of turning to more dangerous alternatives). Perhaps surprisingly, however, what Rawls in fact appears to have had in mind is a societal interest in perpetuating itself, which is in tension with the interests of individuals in deciding whether to bear children. For

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<sup>17</sup> In assuming that citizens need not argue in public reason on the basis of the reasons that really motivate them, I follow Schwartzman (2011).

when speaking elsewhere of the ordered reproduction of society he writes that

[p]olitical society is always regarded as a scheme of social cooperation over time indefinitely; the idea of a future time when its affairs are to be concluded and society disbanded is foreign to the conception of political society. Thus, reproductive labor is socially necessary labor. (Rawls 2005, p. 467.)

Assume that reasonable citizens, insofar as they endorse the idea of society as an ongoing scheme of cooperation, would also therefore endorse this interpretation of the value of ordered social reproduction, and the associated claim that reproductive labour is socially necessary. Nonetheless, the view that the social necessity of reproductive labour provides a sufficiently strong public reason to justify coercively directing people's reproductive capacities seems highly eccentric – it is questionable that more than a small minority of reasonable citizens would affirm it, especially given the availability of other, less intrusive governmental means for adjusting population levels, such as immigration policy, or financial incentives to procreation. Indeed, the value of ordered social reproduction does not count more heavily in favour of restricting abortion than contraception. So unless we can readily imagine a diverse liberal democracy agreeing to limit access to contraception on grounds of this value, we should doubt that it would be likely to conclude that that same value is sufficient to justify restricting abortion rights – at least if its members cannot articulate an intrinsic moral difference between killing a fetus and preventing the existence of a person, as public reasoners cannot.

The view that reproductive labour can be coerced on grounds of the value of ordered reproduction seems unlikely to find favour under conditions of evaluative

diversity, then. In addition, however, it is unclear that the view actually qualifies as reasonable. Rawls tells us that reasonable citizens, in endorsing the political values of freedom, equality, and fairness, will also endorse political conceptions of justice that are liberal, in the sense of awarding citizens the sorts of basic rights and liberties familiar in constitutional regimes (including, I take it, rights to bodily and reproductive autonomy), and conferring on those rights ‘special priority’, ‘especially with respect to the claims of the general good’ (Rawls 2005, p. 450). It is dubious, however, that restricting abortion on grounds of society’s alleged need for new members would be compatible with this special priority - at least outside the context of some national emergency. But in that case, as well as being bizarre, the argument is not publicly admissible.

So much, then, for the Rawlsian value of ordered societal reproduction. It seems unlikely that most observers of the public debate over abortion will have come across arguments that appeal to it. Other arguments pertaining to the supposed effects of abortion on society do, however, crop up in the real world with somewhat greater frequency. To take a notable example, it is sometimes said that the practice of abortion contributes to a ‘culture of death’, or to breaking down the taboos against harming others on which all our safety depends. Even if this claim could be empirically supported, it would not necessarily provide the basis for a plausible argument for restricting abortion rights (this would depend on such factors as the extent of the social harm done, and whether it could be counteracted by other means). However, as David Boonin notes (2003, pp. 298-9), the claim is *not* empirically supported, and is, indeed, vulnerable to evidence that abortion access reduces not only rates of illegal infanticide, but violent crime more generally. This may not concern proponents of the argument, who seem often to be conservatives



who think it self-evident that liberal societies are in a state of decline into barbarism. It should concern *us*, however. For it is worth noting that, although the central and most distinctive aspect of the Rawlsian duty of civility is its requirement that citizens abstain in political argument from reliance on reasonably contestable comprehensive doctrines, the duty also includes requirements of conformity to accepted standards of inference and evidence (Rawls 2005, at, e.g., p. 139, 465). These requirements seem well-motivated elements of a duty that aims, as Rawls has it, at genuine public justification, as opposed to mere rhetoric or persuasion (Rawls 2005, p. 220). But therefore, citizens who propose to coerce their fellows on the basis of the culture-of-death argument in the absence of the needed empirical corroboration violate both the letter and spirit of public reason.

Are there any other arguments available to the effect that abortion should be restricted for the benefit of, or to avoid harms to, society at large? Consider a further, less familiar proposal. It might be claimed that, since permitting feticide without restriction throughout pregnancy would be repugnant at the bar of many citizens' comprehensive doctrines, for the state to adopt that policy would be for it to invite unrest. Thus, one might think, limitations on the right to abortion could be publicly justified on grounds of social stability and security (political values to which any reasonable citizen must be committed, insofar as they are prerequisites of justice).

A major problem with this suggestion is that to threaten unrest, and insist that one's comprehensive doctrine be given priority over the determinations of public reason, is to make oneself unreasonable by political liberal lights. And it is therefore unclear why, for the political liberal, the correct response to the unreasonableness of citizens who cannot accept public reason's implications for abortion should be to accede to their demands, rather than, in particular, adopt a policy of containment

towards them and their doctrines. Indeed, appeasement would arguably only create perverse incentives to further unreasonableness, to the greater detriment of stability and security, as well as the ideal of public reason itself.

To be sure, under certain specific societal conditions, a policy of appeasement may indeed be justified on balance. But insofar as those conditions are not reliably met, appeal to the values of stability and security provides only a contingent and unstable public justification for imposing restrictions on abortion. In addition, and more fundamentally, any society in which the threat of unrest is sufficiently serious and widespread to warrant appeasement of the unreasonable, at the cost of some citizens' procreative and bodily autonomy, does not seem to have a claim to be regarded as *well-ordered* according to the ideal of public reason. For the stability of which it is capable, and which appeasement purchases, is not the sort of stability that, according to Rawls, characterises such a well-ordered society. It is not, that is, 'stability for the right reasons', which is based on general willing acceptance by citizens of the deliberative primacy of the political values over their rival comprehensive doctrines (as opposed to a mere balance of forces). Remember that the suggestion we are currently considering, to the effect that restrictions on abortion could be publicly justified on grounds of the political values of stability and security, is envisaged as a defence of public reason against the charge that it generates (or fails to provide effective argumentative means for citizens to challenge) extreme libertarianism about abortion. It is not satisfactory as such a defence, however, to cite the possibility of a democratic argument whose success is conditional precisely on the fact that the ideal of public reason is not properly in force. In a society truly governed by the ideal of public reason, the stability/security-based argument could not be made.

So far I have considered arguments against permissivist abortion laws that do not distinguish between the expected effects of the law on different groups in society. But there are other arguments sometimes voiced in the public forum that do so. I have in mind three in particular. First, some contend that prenatal testing and selective termination for fetal disability ought to be prohibited for the sake of existing disabled members of society, upon whom it is said to have a negative impact (for instance, because it is seen to send an objectionable, inegalitarian message about the quality of their lives and value to others). Second, others aver that *sex*-selective abortion should be banned, out of parallel concern about the damage it is seen to do to the interests and social standing of women and girls. Third, still others believe that biological fathers are entitled to a say in (or at least to be pre-notified about) their partners' abortion decisions, on grounds of the equal significance for them of parenthood. Do the availability in public reason of any of these arguments help the Rawlsian's case?

Each of the aforementioned arguments is, of course, extremely controversial - turning, as they do, on disputed claims about (inter alia) the scale of the effects of women's abortion choices on others, and the scope of persons' legitimate prerogatives to do what is best for themselves at others' expense. Intriguingly, of the three restrictive policies, it seems that opposition to sex-selective abortion currently has the widest currency in the public debate, whereas in most liberal societies it is a relatively settled matter that fathers should not have legal rights in respect of their partners' abortions, and that women should not be prevented from selectively

aborting disabled fetuses.<sup>18</sup> It seems plausible, however, to suppose that, in a political community governed by the ideal of public reason, democratic support for all these policies would decline somewhat. This is because at least part of that support derives not from people's beliefs about the interests or rights of third parties, but from their beliefs about prenatal moral status. Many who oppose selective abortion do so because they believe that disabled or female fetuses have rights not to be discriminated against on grounds of morally arbitrary personal characteristics. And at least some who support paternal abortion rights do so on grounds that fathers have (as they see it) responsibilities to act as guardians for their unborn children. This suggests that the prospects for any of these policies making it into law in a political liberal society will be somewhat more remote than they are at present. Other than that, it is obviously difficult to engage in firm predictions about their chances of democratic enactment. There is, however, an important point to be made about the third-party-focused arguments for those policies that does not rely on such predictions.

This is that, because these arguments address issues that are orthogonal to the moral problem of abortion (as traditionally understood), they will predictably do little, if anything, to establish conclusions about the way abortion law should be framed that allay the central concerns of citizens who hold either moderate or more conservative views. They are not, in other words, likely to be effective or valuable proxies in public reason for those citizens' inadmissible views about prenatal moral

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<sup>18</sup> For an argument, however, to the effect that those of us who are committed to a woman's right to selectively abort for fetal disability ought also to affirm a right to sex-selective abortion, see Williams (2012).

status. Consider, as illustration, the mainstream view that it is seriously wrong for the law to permit third-trimester abortion on demand, or without a weighty justification (such as the preservation of the woman's life or health). Those who take this view are unlikely to find it a substantial improvement if the law is qualified so that third trimester abortions can take place whenever the biological father does not oppose it, or whenever the woman's aim is not, specifically, to select against an unwanted fetal trait. For those legal provisions fail to restrict many instances of what the mainstream view takes to be wrongful feticide. Indeed, these citizens may well think that to qualify the right to choose as proposed by the foregoing arguments would be worse than not qualifying it at all. It is a mistake to assume that, from the point of view of those who believe that abortion is wrong (at some gestational stage), any restrictions on the legal permission to end a pregnancy (at that stage), however justified, must be a welcome improvement. Many proponents of moderate pro-choice views, for instance, would clearly rather accept unrestricted late-term abortion as the lesser evil than grant men rights to interfere with their partners' reproductive decisions, or deny women the option of using prenatal selection to avoid having children who will (perhaps owing to a social climate of unjust discrimination) disadvantage them. Nor would it necessarily be incoherent for pro-life citizens, who believe that abortion is in general wrong to refuse to endorse those proposals. They might do so, for instance, on grounds that to restrict procreative rights for reasons less compelling than the defence of innocent life would set a dangerous precedent for the dilution of individual autonomy. In short, then, arguments that appeal to the adverse effects of selective abortion on the disabled or women as social groups, or to the interests of men in deciding whether to become parents, are of little advantage to citizens whose aim is to mount a case for moderate or conservative abortion regimes, even if their

moral beliefs would permit them to invoke them, as they may well not.

I have now covered all the third-party-centred arguments for limiting abortion rights that I can think of. Our aim in exploring them was to evaluate a defence of public reason according to which, because citizens have the option of invoking arguments that appeal to the effects of abortion on others in society as a substitute for their non-public views about prenatal moral status, a political liberal society will not find itself unduly constrained to adopt abortion policies that are entirely permissive, or that diverge sharply from its members' considered moral judgements. Our survey of third-party-focused arguments suggests that their utility as substitutes for conventional arguments concerning prenatal moral status is severely limited, not only because the policy implications of the two sets of arguments will often fail to substantially align, but also because the third-party-based arguments are in general extremely lacking in persuasive power, breadth of appeal, and applicability under diverse social circumstances. The claim that those arguments stand to win sufficient democratic support to significantly shape abortion policy in a society governed by public reason, or that they could serve as a reliable and effective brake against public reason's otherwise wholly permissive implications for the legal regulation of feticide, seems optimistic, to put it mildly.

To be sure, public reason is *in principle* compatible with the imposition of restrictions on abortion. The balance of eligible public reasons, however, can nonetheless be said to *incline* strongly towards radically permissive laws (and away from both mainstream moral views and legal practice in most liberal regimes), in the sense that the most powerful, generally applicable, and widely-shared moral reasons

for favouring more moderate laws have been stripped out, significantly increasing the impediments to their enactment.<sup>19</sup>

The constraints of public reason, in sum, would alter the terms of the democratic debate over abortion unrecognisably, while orienting it heavily towards conclusions that most citizens are likely to find morally jarring. For a political liberal to claim otherwise, on grounds of the availability in public reason of third-party-focused justifications for restricting abortion, is, I submit, for her to place far more weight on the latter justifications than they can plausibly be expected to bear.

### *6.3. Why determinacy is not enough*

My task so far has been to bring out the implications of public reason for the way in which a Rawlsian society will resolve the political issue of abortion. In doing so, I have merely assumed that the implications identified would be judged objectionable, both by critics of public reason and political liberals themselves. It is, however, important to clarify what makes them so. If our complaint against public reason's incompleteness on prenatal moral status can no longer be (as earlier critics had it) that it causes indeterminacy regarding abortion's legal permissibility, what might it be instead? And how damaging would our complaint(s) be to political liberalism? I close the paper by speaking to these questions. My answers suggest the need for further work exploring the implications of public reason for political issues beyond abortion.

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<sup>19</sup> My use of the language of an incline in public reason toward a particular set of rules or rights is reminiscent, of course, of Gaus. My explanation of the way in which Rawlsian public reason inclines towards radically permissive abortion laws differs, however, from his account (in, e.g., Gaus 2011, ch. VIII) of how his own model of justificatory liberalism inclines towards classical liberalism.

Probably the simplest available objection to political liberalism's approach to abortion begins by endorsing the mainstream moral view that, at least in the late stages of pregnancy, a fetus warrants at least some protection in law for its own sake, which it would be morally wrong for the law to fail to reflect. The objection goes on to claim that, since Rawlsian public reason inclines strongly towards laws that are morally defective in this way, it is therefore itself morally unsound. Call this the *ethical objection*. It might be suspected that the ethical objection begs the question against public reason, by assuming precisely the approach to politics that political liberalism sets itself against: 'the zeal', as Rawls puts it, 'to embody the whole truth' (Rawls 2005, p. 442). But this would be a mistake. As Rawls notes, 'whether this [i.e. his own] or some other understanding of public reason is acceptable can be decided only by examining the answers it leads to over a wide range of the more likely cases' (Rawls 2005, p. 254). Moreover, in evaluating whether the answers delivered by public reason are acceptable, our perspective cannot be that of public reason itself, since from that point of view, the answers reached will *ex hypothesi* be reasonable. Hence, what ultimately matters, in assessing the Rawlsian model of public reason, is whether its pronouncements are sufficiently in line – in *reflective equilibrium* – with our considered moral judgements (as evaluators of political liberalism). If not, there is no higher court of appeal, as it were, at which public reason might be acquitted.

That said, the ethical objection is limited in two respects. First, while radical permissivism about abortion is clearly a minority view, it has adherents. For those who accept it, the fact that public reason inclines towards a policy of unrestricted abortion choice would not make political liberalism more unattractive. Second, even those who are committed to a more moderate view of abortion may not, if they are sympathetic to political liberalism, be sure whether the less philosophically costly path



is to reject that theory, on grounds of its implications for abortion, or bite the bullet, by retaining their commitment to political liberalism, and achieving reflective equilibrium by abandoning the belief that the protection of fetal life for its own sake is within the legitimate remit of the state.

The viability of the latter, bullet-biting response depends crucially on whether public reason's implications for other political issues are all found to be appropriate. As noted at the outset of this paper, the incompleteness objection has been raised in relation to a range of political controversies other than abortion. And it is certainly possible that some of these will likewise turn out to be cases in which public reason returns determinate but ethically questionable answers. This would increase the costs of the bullet-biting strategy, perhaps to an unacceptable degree. Whether there do indeed exist such other cases can only await further work. But it is worth highlighting at least one possibility, suggested by the discussion above in section 3.2.

Jonathan Quong (2012a, pp. 273-87) and Micah Schwartzman (2004, pp. 201-3) have argued that, on grounds of consistency, political liberals should accept that the use of public reason is mandatory not only in deliberations over fundamental political matters, as Rawls believed, but in all debates over citizens' collective exercises of political power. On their view, political liberalism is committed to the position that respect for free and equal persons requires, quite generally, that they be governed in accordance with political principles and laws that can be justified in terms that they can reasonably accept - in which case it is arbitrary to exempt some exercises of political power from that test. Suppose Quong and Schwartzman are right. If so, it appears that the ethical objection can also powerfully be pressed with reference to the question of animal welfare. For as we have seen, the political values of public reason prescribe respect exclusively for political persons, and would

consequently yield, if applied to the latter question, the unpalatable conclusion that our treatment of nonhumans should be constrained only insofar as this would benefit *us*.

The ethical objection focuses on the impediments to accepting Rawls's theory of public justification, assessed in terms of the intuitions or considered judgements of political philosophers. A distinct objection emerges by considering the tension between public reason and the beliefs of reasonable citizens. According to Rawls, it is a desideratum of the answers to political questions reached in public reason that they lie 'within the leeway' allowed by citizens' reasonable comprehensive doctrines (Rawls 2005, p. 246). Those doctrines should, Rawls says, be able to 'accept, even if reluctantly, the conclusions of public reason, either in general or in any particular case.' The reason political liberalism hopes for this is that conspicuous or widespread conflicts between the determinations of public reason and citizens' comprehensive doctrines would compromise the latter's ability to affirm the deliberative primacy of the political values, or continue to abide by their duty of civility. In other words, such conflicts would undermine the prospects for a society's becoming *well-ordered* by political liberal lights. Public reason's implications in the case of abortion, however, are clearly in sharp tension with the moral worldviews of a high proportion of liberal citizens (both as we know them, and under foreseeable future conditions). And accordingly, a second available objection to public reason's exclusion of fetus-regarding moral considerations from political argument would be that the options for democratic advocacy which are thereby left open to citizens, and the collective decisions rendered most likely, will not be within the leeway allowed by most reasonable comprehensive doctrines. Call this the *incongruity objection*. Unlike the ethical objection, the incongruity objection holds that public reason is undermined

not from a perspective of external moral evaluation, but *in its own terms*. In common with the ethical objection, however, the incongruity objection will gain traction if there are other political questions to which public reason delivers problematic answers, and which place the commitment of citizens to the deliberative priority of the political values under further strain.

So far I have focused on the fact that public reason is predisposed towards conclusions about abortion that are more permissive than most people's moral beliefs will likely allow. But irrespective of the moral merits of the conclusions towards which public reason is weighted, the fact of its being so might plausibly be regarded as an objectionable dilution of the democratic ideal, whereby citizens debate and resolve issues of fundamental moral importance together. While the ethical and incongruity objections outlined above are (to my knowledge) largely unfamiliar, the criticism that too many determinations of public reason are fixed prior to actual deliberation, as a result of the philosophical restrictions imposed on its content, has a prominent place in the literature (see especially Habermas 1995, and Benhabib 2002, p. 108ff). In at least some cases, Rawlsians might plausibly respond to this objection with the claim that the content of public reason, as given by the family of political conceptions of justice, provides ample room for democratic disagreement (see, e.g., Quong 2013b). But that reply will not do in the case under discussion, since if my analysis has been correct the members of the family exhibit absolutely no diversity on the issue of prenatal moral status, on which the problem of abortion so centrally turns.

The foregoing *antidemocratic objection* is not the only pre-existing objection to public reason that may get a new outing, or receive further augmentation, as a result of my argument. For instance, proponents of the so-called *integrity objection* (on which

see, e.g., Vallier 2014, pp. 57-66) will likely interject that to require citizens not to engage in the public forum on the basis of their beliefs about prenatal moral status, even when the abortion of very late-term fetuses is at issue, is to demand that they alienate themselves from their deepest moral convictions, thereby compromising their moral integrity, and harming them. Undoubtedly, further objections are also possible. I shall not attempt to catalogue them all, since I believe we have now made enough progress for one day. As we have seen, Rawlsian public reason carries implications for the question of abortion that are strikingly out of step with mainstream moral judgements and most citizens' comprehensive doctrines, are likely to seriously test the loyalties of many citizens to their duty of civility, and are largely insulated against effective democratic challenge. Even if one thinks that these problems are not sufficient to warrant abandonment of the ideal of public reason, they are strikes against it. Determinacy, after all, is far from the only desideratum of a model of public reasoning. So the fact that the Rawlsian model does after all produce an answer on abortion is not enough to vindicate it.

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