

## RAWLS AND CHILDREN

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The status of children in the societal scheme proposed by John Rawls is determined by what would be the decision of persons in the original position. To see how Rawls's concept of justice pertains to children, we will look at three things: (1) Who the decision-makers are in the original position; (2) How the principles chosen in the original position apply to abortion; and (3) Whether the principles of paternalism chosen in the original position are satisfactory.

### ORIGINAL POSITION

The original position is a fictional place where a hypothetical decision is made.<sup>11</sup> In the original position, an agreement is made as to the principles which will govern the society which will exist after the parties leave the original position.

Rawls takes this as his starting point because he writes in the contractarian tradition. He wants to have the binding moral force of an agreement, promise, compact, or contract — call it what you will — behind the principles and institutions of his society.

Since the original agreement is final and made in perpetuity, there is no second chance. In view of the serious nature of the possible consequences, the question of the burden of commitment is especially acute. A person is choosing once and for all the standards which are to govern his life prospects. Moreover, when we enter an agreement we must be able to honor it even should the worst possibilities prove to be the case. Otherwise we have not acted in good faith. Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances.<sup>12</sup>

It should be noted, however, that this agreement, as described, has many of the moral difficulties associated with selling oneself into slavery or with compelling specific performance of a contract for personal services.<sup>13</sup>

It should also be noted that promising and

contracting are part of a public system of rules that govern the society after the parties leave the original position.<sup>14</sup> To read this particular set of moral principles back into the conditions governing the original position is certainly invalid. Yet the principles chosen in the original position are not binding unless one of the chosen principles (obligation of promises) has already been accepted (and in a special form that allows something like slave contracts).

The parties in the original position are contemporary rational adults.<sup>15</sup> Rawls asserts that it is best to take a present-time-of-entry interpretation of the original position in which, by hypothesis, all parties are contemporaries.<sup>16</sup> Rawls wants to exclude any notion of the parties to the original position as including all possible persons — all persons who will ever live.<sup>17</sup> He says this is unnecessary because choice in the original position is “equivalent” to rational deliberation which takes place at any time and which satisfies certain conditions and restrictions.<sup>18</sup> Of course, if one takes this latter view and holds to it consistently, one loses the contract metaphor with its binding force on subsequent acts and newborn persons, and one might be tempted to decide moral questions on an act-by-act basis.

Rawls has said that the parties in the original position are rational,<sup>19</sup> and that children do not possess reason.<sup>110</sup> He confuses this picture by maintaining that the parties to the original position do not know to which generation they will belong.<sup>111</sup> Since, however, they know they are contemporaries and they know they are not irrational children, they know they are adults and hence know of their common status as adults in the society after they leave the original position. All that the restriction on knowledge of one's generation amounts to is not knowing

how economically developed a society one will live in.<sup>121</sup> The parties in the original position must have adult capacities to reason in order to conduct their deliberations.

Because parties to the agreement in the original position are adults and must know that they have adult rationality, it cannot correctly be said of them that "no one knows his situation in society, . . . and therefore no one is in a position to tailor principles to his advantage".<sup>123</sup>

No matter how we look at Rawls's original position, only adults are present. If it is a hypothetical situation designed to serve merely as an expository device, only adults can operate properly in the hypothesis.<sup>124</sup> If it is a procedure for formulating a social contract, which in order to be valid must *actually* be carried out (as Rawls sometimes indicates),<sup>125</sup> then only adults, according to Rawls, have the capacity to do that. If the original position is merely another name for deliberative choice with special side constraints, again only adults are fit for the task. Rawls's decision-makers in the original position do know an important part of their place in society, their position, their status, and their relative strength — so long as they are adults.<sup>126</sup> And they can deliberate and choose only if they are adults. But it is not obvious that children will consider this method for choosing the principles of justice a fair one.

It should be added that not only are no children participants in the making of the social compact, but Rawls explicitly rules out any moral necessity of express consent on the part of new parties in the society.<sup>127</sup>

Rawls assumes away all problems presented by the all-adult character of the parties to the agreement in the original position by hypothesizing that the adults represent family lines, and that they are concerned for the welfare of persons in subsequent generations.<sup>128</sup> But their descendants may not accept these ancestors as spokesmen for the descendants themselves.

Maintaining that the decision-makers will be concerned for the welfare of others is an arbitrarily *ad hoc* hypothesis added only in the case of intergenerational justice. If it is plausible here, one might as well assume that the parties in the original position are always altruistic rather

than self-interested. Rawls introduces intergenerational altruism only to make the results come out the way he wants. He has no warrant on the basis of his previous approach to allow this anomaly.

Rawls argues that later generations could object to the principles chosen in the original position only if the prospects offered by some other conception (e.g. utility or perfection) were such that the parties in the original position might not have been sufficiently intergenerationally altruistic in formulating it.

Thus, for example, Rawls develops a feudal notion of inheritance as the principle to govern the forced saving that will be carried out by the state. His notion is feudal rather than individualist because he focuses on the right to be given an inheritance rather than on the right of bequest as an aspect of property rights: "Imagining themselves to be fathers . . . they are to ascertain how much they should set aside for their sons by noting what they would believe themselves entitled to claim of their fathers."<sup>129</sup> Thus, for Rawls, justice between generations is a matter of feudal entail rather than individual will.<sup>120</sup>

## ABORTION

The principles that Rawls maintains would be chosen in the original position may have implications for the question of abortion. Unfortunately some of the most important principles that apply are among the least developed in Rawls's theory. He confines extended discussion to those matters of right which directly bear on justice, to the neglect of other virtues.

First of all, Rawls argues that a "capacity for moral personality is a sufficient condition for being entitled to equal justice". By this he means that a being who is owed just treatment must have a moral personality or a potentiality for such a personality "that is ordinarily realized in due course".<sup>121</sup> This fits extraordinarily well with the Thomist notion of the status of a fetus.<sup>122</sup>

Perhaps it could be argued that at present — given existing technology, laws, and mores — many fetuses are aborted. Hence the personality

of a fetus is not "ordinarily realized in due course". But such a view certainly diminishes the universality of Rawls's scheme, a formal property that he himself deems necessary.<sup>1231</sup>

Historically, during prohibition of abortion, fetuses did ordinarily develop into moral persons. Given this historical fact, it seems difficult to point to some moment in time and say that from then on it was all right not to allow fetuses to develop, because in order to deny them status as Rawlsian moral persons they would already ordinarily not be allowed to develop.

An examination of Rawls's sketchy and admittedly vague comments on moral personality shows that it is at least plausible to contend that fetuses are entitled to full justice. Rawls says, "We are not directed to look for differences in natural features that . . . serve as possible grounds for different grades of citizenship". He adds:

I have said that the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our judgments. Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice.<sup>1241</sup>

In addition, the fact that little is known about a fetus's character does not affect the justice owed to it. "As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position."<sup>1251</sup> It seems unlikely that we would decree our own execution (unless it were deserved) in the original position.

Moreover it should be emphasized that Rawls may not have available to him the standard libertarian justification for allowing abortions. This libertarian position emphasizes that one does not have a binding obligation to support others. Hence, even if a fetus is a moral personality, no duty of the mother to support it exists.<sup>1261</sup>

Rawls, however, contends that all persons have a natural duty to render low-cost aid to the imperiled.<sup>1271</sup>

In his formulations of the duty of mutual aid, early in the book, Rawls says (as Bentham does) that the duty holds only when one can aid someone without "considerable" or "excessive" risk or loss to oneself. However, this utilitarian formulation may in practice be called into question by value theory and probability theory. Since costs are completely subjective<sup>1281</sup> and since no assessment of the risk of a single event occurring can be given scientifically,<sup>1291</sup> it would be difficult to know when to punish for omission of the duty of mutual aid.

This might mean that the duty of mutual aid should be acted upon only when the potential benefactor subjectively evaluates the opportunity cost of aid as negligible. Or this might mean that the state will set up an authority which will subjectively assess costs and then order persons to aid others or punish them for neglect of this duty. Such a state authority seems to share the drawback that Rawls pointed to in the impartial-spectator construct. It fails to take seriously the distinction between persons.<sup>1301</sup> A state authority overseeing mutual aid would conflate all desires into one system of desire.<sup>1311</sup>

The difficulty in justly enforcing the duty of mutual aid may leave the way open for abortion, but if it does so, it rules out all punishment for individual refusal to aid the needy and all impressment into such service. The consequences of such a notion for Rawls's difference principle in institutional life might be severe.

There remains, however, an additional problem: the priority of the duty of mutual aid. This is an underdeveloped aspect of Rawls's account. But there are reasons to believe that Rawls's position may still entail total prohibition of abortion, or at least frequent prohibitions.

In his formulation of the duty of mutual aid, later in the book, Rawls follows and expands upon a Kantian justification for the duty.<sup>1321</sup>

Kant argues that the mutual aid principle ought to be acknowledged because in the long run we are as likely to need help someday as the next fellow. Kant does not include any Benthamite rider which limits the duty's application to only low-cost situations. Rawls too leaves off

such qualifiers at this point.

Rawls also makes another sort of argument. He says that social life would be different and unpleasant if we did not know we could conscript others into serving our needs. Somewhat extravagantly, he claims that in such a situation self-esteem, that is "a sense of our own worth," would be "impossible".

More realistically, in a society in which the mutual aid principle was not enforced (this is the case in all present societies following the English common law practice of not mandating any duty to aid the imperiled), persons going into perilous situations would, with self-esteem intact, make contracts with rescue services in anticipation of possible needs. In addition, some rescue services might well operate on a charitable basis in such a society.

All that aside, Rawls presents the duty of mutual aid as a major natural duty and as one of a group of natural duties that are compatible with his principles of justice.<sup>1341</sup> So, while the duty of mandatory mutual aid is perfectly compatible, according to Rawls, with liberty, fair equality of opportunity, and the difference principle, it may be in conflict with other natural duties, contractual obligations or good that could be achieved via supererogatory acts.<sup>1351</sup> Since the other natural duties (according to Rawls) are mutual respect, not injuring others, and not causing others to suffer, the priority question is important.<sup>1361</sup> It seems as if most contractual obligations and possible supererogatory good would be overridden by a mother's duty to aid and support a fetus dependent upon her for life. It also seems that the duty of mutual respect and the duty not to injure others would prohibit the abortion of a potential moral person.

Furthermore the origin of the pregnancy in voluntary sexual intercourse or in rape would not matter for Rawls, since natural duties apply unconditionally without their acceptance in any voluntary act of express or tacit consent.<sup>1371</sup>

Hence, the only likely possibility is that sometimes the prevention of suffering to the fetus could justify abortion. Two possible cases might be certitude that the fetus would be a monster baby or certitude that no one, anywhere, would provide better than insuffer-

able child care for the fetus when born. Even not causing suffering might rank lower than not injuring others in a fully developed system of Rawlsian natural duties.

It is impossible to be sure about the priorities Rawls would see until he writes more on the subject. In any case, the fact that Rawls's concept of right may well rule out most abortions is certainly a notable feature of his moral theory.

### PRINCIPLE OF PATERNALISM

One of the principles chosen by the parties in the original position, according to Rawls, will be the principle of paternalism. This principle will be necessary because persons in the original position will want to protect themselves against the possibility that they will suffer from feeble-mindedness.

Rawls asserts as a matter of brute fact that in society "others are authorized and sometimes required to act on our behalf".<sup>1381</sup> The wording of this description appears to have built into it authorization of the involuntary mental hospitalization of non-aggressive persons. In any case, Rawls, in this discussion, is searching for a general principle to govern all cases of incapacitation. He never considers the possibility that persons may wish to make their own separate contractual provisions for different sorts of incapacitation at different times.

The general principle (the principle of paternalism) that Rawls decides upon is a "real will" notion: "We must choose for others as we have reason to believe they would choose for themselves if they were of the age of reason and deciding rationally."<sup>1391</sup>

There are at least two versions that this real will principle could take.<sup>1401</sup>

In the first version it is argued that it is permissible to restrict a person's liberty if his choice to act is not rational and if he would not act in this way if he were rational. In this case, rational choice would have to be defined in contradistinction to uninformed choice, emotional choice, and ill-considered choice.

To apply this version then to children as a general rule and as a matter of right, it would have to be argued that all children always were

incapable of making rational choices. This does not seem to be true.

Not only does this version assume that children are always irrational, but also that were they rational adults they would agree to the restrictions placed on them. However, common restrictions placed on children (governmental prohibition on purchasing cigarettes, governmental prohibition on running away from home) are not necessarily restrictions that rational persons would accept.

An alternative version of the real will notion makes use of what Gerald Dworkin terms "future-oriented consent".<sup>1411</sup>

However, Rawls himself rules out future-oriented consent because he thinks it could be undermined by brainwashing a child to accept what was done to him.<sup>1421</sup>

He therefore adds two restrictions on paternalism: (1) paternalistic acts can be engaged in only when the ward has neither will nor reason; and (2) paternalistic acts must be compatible with the ward's known preferences, the principles of justice, and the known primary goods.<sup>1431</sup> Rawls's center of attention is the vague notion of brainwashing, but this is not the root of the problem.<sup>1441</sup>

The problem with real will notions of the sort that Rawls invokes to justify paternalism lies in their distinction between the real and the actual will.<sup>1451</sup> A person exists in time and makes decisions in time. To take the uninformed, emotional, and ill-considered choices and call them the actual will while taking opposite sorts of choices and calling them the real will, comes quite close to applying new terms to our normal distinction between good and evil choices.<sup>1461</sup>

In reality, persons only make choices — some of them good, some of them bad. If these choices and actions violate the rights of others, they should be halted if possible or punished. If they are simply bad for the actor, this experience is part of living a life in which one's morality counts and is the proper assignment of risk-bearing.

What Rawls seems to forget is that children have a special relationship to certain adults — their parents. Because these parents have produced the children, as parents they have a right to the initial custody of the immobile

infants. While the children live on the parents' property, the parents have the right to set conditions (e.g. curfew hours) on the continued use of that property, provided that these conditions do not violate the children's rights to self-ownership. (For example, physical child abuse would be an invasion of a child's rights.)<sup>1471</sup>

Under this libertarian conception of children's rights, no general principle of paternalism is required as part of the theory of the right. While children are on their parents' property, the parents may have need of a theory of the good in order to properly set the conditions for their children's use of the parents' property. Once the children leave or run away from their parents (which they have an absolute right to do), the same principles of right ought to apply to them as apply to another person, including the right to make mistakes in self-regarding actions.

## NOTES

1. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), sec. 3, p. 12; sec. 4, p. 21.
2. Rawls, sec. 29, p. 176.
3. John Norton Pomeroy, Jr. and John C. Mann, *A Treatise on the Specific Performance of Contracts*, 3rd ed. (Albany, N.Y.: Banks, 1926), sec. 24, pp. 78–79; sec. 310, pp. 683–686; sec. 311, p. 687.

Jean-Jacques Rousseau, *The Social Contract*, bk. 1, chap. 4 in *Great Books*, vol. 38, p. 389; see also Locke, *Second Treatise of Civil Government*, chap. 4, in *Great Books*, vol. 35, p. 30; Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (Edinburgh: T. & T. Clark, 1887), p. 99. In Robert Paul Wolff's book *In Defense of Anarchism*, he criticizes civil obedience as being in conflict with autonomy.

John Stuart Mill, *On Liberty*, chap. 5 in *Great Books*, vol. 43, p. 316; see also Herbert Spencer, *Justice*, sec. 70.

4. Rawls, sec. 52, pp. 344–350.
5. Rawls, sec. 24, p. 140; sec. 25; sec. 39, p. 249.
6. Rawls, sec. 24, p. 140; sec. 44, p. 292.
7. Rawls, sec. 24, p. 139.
8. Rawls, sec. 24, p. 138.
9. Rawls, sec. 25.
10. Rawls, sec. 39, p. 249.
11. Rawls, sec. 24, p. 137; sec. 44, p. 287.
12. Rawls, sec. 44, p. 287.
13. Rawls, sec. 24, p. 139.
14. Rawls, sec. 3, p. 12; sec. 4, p. 21.
15. Rawls, sec. 14, p. 86.
16. Rawls, sec. 3, p. 12.
17. Rawls, sec. 3, p. 13; sec. 51, p. 335.
18. Rawls, sec. 22, p. 128. Compare the similar view of Sir Robert Filmer. See Gordon J. Schochet, *Patriarchalism*

- in *Political Thought* (Oxford: Basil Blackwell, 1975), p. 150.
19. Rawls, sec. 44, p. 289.
  20. For an economic treatment of the notion of a just rate of savings, see Murray N. Rothbard, *Man, Economy and State* (Princeton, N.J.: Van Nostrand, 1962), pp. 832-833.
  21. Rawls, sec. 77, p. 505.
  22. John T. Noonan, Jr., "Abortion and the Catholic Church: A Summary History," *Natural Law Forum*, vol. 12 (1967), pp. 85-131.
  23. Rawls, sec. 23, p. 132.
  24. Rawls, sec. 77, p. 509.
  25. Rawls, sec. 39, p. 249.
  26. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, vol. 1, no. 1 (Fall, 1971), pp. 47-66.
  27. Rawls, sec. 19, pp. 114, 115, 117; sec. 51, pp. 338-339.
  28. James M. Buchanan, *Cost and Choice* (Chicago: Markham, 1969).
  29. Richard von Mises, *Probability, Statistics, and Truth*, 2nd rev. English ed. (London: Allen and Unwin, 1957). Cf. Rawls, sec. 28, pp. 168-169.
  30. Rawls, sec. 30, p. 187.
  31. Rawls, sec. 30, p. 188.
  32. Rawls, sec. 51, pp. 338-339; see also Kant, *Foundations of the Metaphysics of Morals* (Indianapolis: Bobbs-Merrill, 1959), p. 41; H. J. Paton, *The Categorical Imperative* (New York: Harper & Row, 1967), p. 173.
  33. Rawls, sec. 51, p. 339.
  34. Rawls, sec. 51, p. 334.
  35. Rawls, sec. 51, p. 339.
  36. Rawls, sec. 19, p. 115; sec. 51, p. 337. Rawls also speaks of duties to aid just institutions and duties during just wars, both these do not apply to abortion or child neglect.
  37. Rawls, sec. 51, p. 335.
  38. Rawls, sec. 39, 249.
  39. Rawls, sec. 33, p. 209.
  40. I am here following Laurence D. Houlgate, "Children and the Right to Liberty," unpublished ms.
  41. Gerald Dworkin, "Paternalism," in Richard Wasserstrom, ed., *Morality and the Law* (Belmont, Calif.: Wadsworth, 1971), p. 119.
  42. Rawls, sec. 39, p. 249.
  43. Rawls, sec. 39, p. 250.
  44. Thomas Szasz, "Some Call It Brainwashing," *New Republic*, vol. 174, no. 10 (6 March, 1976), pp. 10-12.
  45. Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (London: Oxford Univ. Press, 1969), pp. 132-134.
  46. J. P. Plamenatz, *Consent, Freedom and Political Obligation*, 2nd ed. (London: Oxford University Press, 1969), p. 49.
  47. Murray N. Rothbard, "Kid Lib," in *Egalitarianism as a Revolt against Nature* (Washington, D.C.: Libertarian Review, 1974), pp. 88-95.