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Abortion and the Limits of Political Liberalism

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Abstract. In this article, I argue that laws permitting abortion are incompatible with political liberalism since such laws necessarily are dependent on beliefs or doctrines incompatible with other reasonable comprehensive doctrines. To demonstrate this I argue against two lines of defense for the compatibility between abortion and political liberalism. These two lines of defense are: (a) the agnostic position, according to which abortion are justified by reference to the uncertainty about on the status of the fetus and (b) the irrelevance position, according to which the rights of the woman to terminate the pregnancy override the rights of the fetus no matter whether or not the moral status of the fetus is considered as strong as the status of the woman. My conclusion is that both of these two lines of argument rest on beliefs or doctrines in conflict with other reasonable comprehensive doctrines. They are therefore in conflict with political liberalism. I finally discuss the implications for political liberalism given that my argument is sound. I conclude by arguing for a transformation of the duty to avoid conflicts with reasonable comprehensive doctrines to a mere ambition to avoid disputiveness as such.

Key words: political liberalism, abortion laws, John Rawls, comprehensive doctrines.

The question of whether or not laws permitting abortion are compatible with political liberalism is contested. John Rawls, the originator of political liberalism, seems to imply that they are since he considers a prohibition of at least early abortion unreasonable (Rawls 1993, 243-44 n. 32).[1] Consequently, laws permitting *early* abortions seem – at least – to be considered compatible with political liberalism according to Rawls. Several proponents of political liberalism support Rawls´s view.[2] Many theorists, however, also reject the compatibility between abortion and political liberalism. And the most common argument for this position is that a justification of abortions laws necessarily implies a position on the moral status of the fetus, which is dependent on one or another comprehensive doctrine and in conflict with others (Quinn 1997; Galston 1991; Greenawalt 1987). I will adhere to this position. My aim is to evaluate, and, in the end, reject two argumentative strategies to avoid taking a position on the moral status of the fetus. The first one can be labeled the agnostic position, according to which position on the moral status of the fetus is avoided by reference to the uncertainty about on the status of the fetus. This argumentation is employed by Judith Jarvis Thomson (1995) and most recently by Lawrence Torcello (2009). Considering the prominence of Thomson and the fact that Rawls refers

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1] Even if this position was modified in a later article (Rawls 1999, 169 n. 80), I will argue that this modification cannot be interpreted as if Rawls abandons his former position. In the later article "The Idea of Public Reason Revisited" Rawls' position still seems to imply that denying the right to abortion is "unreasonable" and therefore not in accordance with public reason (1999, 170). For a similar interpretation of Rawls, see Dombrowski 2001, 127.

2] See for example Macado 2001; Schwartzman 2004; Thomson 1995; Torcello, 2009.

to her article, her article has received surprisingly little attention, which is illustrated by the fact that Torcello does not refer to her even though his argument builds on hers. The second one can be labeled the irrelevance position, according to which a position on the moral status of the fetus is avoided by reference to the claim that the rights of the woman to terminate the pregnancy override the rights of the fetus even if the status of the fetus is considered as strong as the status of the woman. The status of the fetus is therefore irrelevant. To my knowledge, this strategy has not been used in order to argue for the compatibility between political liberalism and abortion, only to defend abortion normatively. The reasons for this are probably that this strategy rests on an conservative assumption (that the status of the fetus is considered as strong as the status of the woman during the whole pregnancy), which makes the case for abortion much more difficult to defend normatively than if this assumption was not accepted. To not only accept a conservative assumption about the status of the fetus as the starting point of the discussion, but also accepting the constraints of public reason may be considered as too hard which possibly explains the lack of previous research. But I will mainly consider this argument as a strategy to defend abortion under very certain circumstances like pregnancies caused by rape and when the pregnancy causes a threat to the life of the mother.

My aim is to reject these arguments for the compatibility between abortion laws and political liberalism without appealing to views that explicitly deny women the right to abortion in the first trimester. For the sake of the argument I follow Rawls in this regard and consider such views unreasonable, which means that it must be demonstrated that the conflict between the constraints of public reason and abortion laws are caused by other views than simply a conservative position on abortion. By adding this premise, the rejection of the arguments for the compatibility between abortion and political liberalism will not be dependent on questions whether or not a conservative position is reasonable, which in turn makes my argument more robust.

I. PUBLIC REASON AND ABORTION

According to political liberalism, political conceptions of justice must be presented independently from comprehensive doctrines of any kind (Rawls 1999, 143). We should not, says Rawls, justify political power with regard to "constitutional essentials and questions of basic justice" just by appealing to philosophical, ethical or/and religious comprehensive doctrines (1993, 215). In order to meet the requirements of public reason, such public power needs to be justified by political values, which "free and equal citizens might also reasonably be expected to endorse" (Rawls 1999, 140). Otherwise, the autonomy of citizens rejecting the comprehensive worldviews is threatened because political power – which is coercive in character – then restricts the life plan of those citizens by reasons they cannot apprehend (Weithman 2002, 201-2). To avoid this is, to quote Rawls "the liberal principle of legitimacy" (1993, 137).

But what does Rawls mean when he says that we should avoid dependence on comprehensive doctrines? To answer that question we first need to describe and define a comprehensive doctrine and then establish what a dependency on such a doctrine means. According to Rawls comprehensiveness is a matter of scope. A doctrine is comprehensive when "it includes conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our nonpolitical conduct (in the limit our life as a whole)" (Rawls 1988, 252). This definition of comprehensive conceptions fits, in particular, the major religious, ethical or/and philosophical traditions such as Catholicism, Utilitarianism and Platonism. Justifications in the public sphere, which depend on such comprehensive doctrines, will be in conflict with other doctrines and should therefore be avoided. By avoiding dependence on comprehensive doctrines an overlapping consensus in constitutional essentials and questions of basic justice is reachable.

However, as Rawls also recognizes, probably very few people possess a single coherent comprehensive view of life (Rawls 1993, 160). And certainly, by introducing the concept of partially comprehensive conception, Rawls narrows the scope of its application and makes space for a more loose articulation of its content (1993, 13). Nevertheless, Rawls still seems to consider the comprehensiveness per se as the core of the problem in relation to the principle of legitimacy. But I don't see how this can be the case. The implication of that interpretation is that the criteria of public reason will not be applicable to more or less isolated beliefs. For example a belief in God does not necessary imply either a full or partial comprehensive view – even though this often may be the case.[3] Still it would be an unreasonable interpretation of the criteria of public reason to conclude that a dependence on such a belief in constitutional essentials and questions of basic justice would be permissible because of the lack of comprehensiveness.

Furthermore, consider the question of issue here, abortion. As I will argue below, proponents of political liberalism tend to place this issue within the realm of public reason, which in Rawlsian terms means that it belongs to "constitutional essentials and questions of basic justice". Abortion must therefore be justified without being dependent on comprehensive doctrines. And, certainly, some justification of positions on abortion implies a dependence on comprehensive doctrines, but this is not necessarily the case. Take for example the position of those who argue that the personhood is constituted by brain waves (see, for example, Brody 1975). This position does not imply a comprehensive doctrine since this criterion does not "include conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our nonpolitical conduct". Nor does it imply a partially comprehensive doctrine since such doctrines still "compromise a number of…non-political values and virtues" (Rawls 1993, 13). I cannot see that the criterion of brain waves compromises virtues of any kind and the scope of its application is restricted to the domain of issues of life and death. Regardless of its limited scope of application, this position of abortion is, as Francis Beckwith states, embedded in

3] This example is taken from Gaus 1996, 263.

metaphysics of the human being (2001). And as such, this criterion is highly controversial, not least because of its (restrictive) consequences for the possibilities of abortion. As I noted above, Rawls contends that a comprehensive doctrine that leads to the exclusion of rights to abortion in the first trimester is unreasonable, which in turn means that abortion laws are permitted to be in conflict with such a view and still compatible with public reason. But this line of reasoning would not be applicable to conclusions about the permissibility of abortion if they were drawn from isolated beliefs or from systems of beliefs narrower than comprehensive doctrines. In other words: the implication of the fact that Rawls – and others after him – define the problem in terms of comprehensiveness is that the constraints imposed by public reason are not applicable to isolated beliefs or narrower system of beliefs. My point is that this implication is unacceptable from the point of view of the liberal principle of legitimacy. It does not matter whether or not the conclusions are drawn from comprehensive doctrines, or from a narrower system of beliefs or even from isolated beliefs – if the conclusions are drawn from premises which citizens cannot reasonably be expected to endorse, the autonomy is threatened.

The central question for liberal legitimacy is consequently whether or not conclusions justifying public power in constitutional essentials and questions of basic justice are based on premises which citizens reasonably can be expected to endorse. But what are the criteria for reasonable endorsable premises in constitutional essentials and questions of basic justice? At a minimum, such premises should not be irreconcilable with reasonable beliefs and doctrines held by the citizens since it would be unreasonable to expect citizens to endorse premises in conflict with their own reasonable beliefs and doctrines. To examine the compatibility between abortion and political liberalism, which is the task of my paper, one therefore needs to answer the question whether or not abortion can be justified without being dependent on premises irreconcilable with reasonable beliefs and more or less comprehensive reasonable doctrines of the citizens. However, in this regard I will follow Rawls and focus on reasonable comprehensive doctrines rather than reasonable beliefs. This choice is certainly not unobjectionable. It can be argued, as Gerald Gaus does, that a focus on exclusively reasonable doctrines at the expense of reasonable beliefs can be considered arbitrary and discriminating (1996). However, it is sufficient for my purposes to demonstrate the incompatibility between abortion and comprehensive reasonable doctrines since it is uncontroversial from the point of view of political liberalism that justifications of public power should not be in conflict with reasonable comprehensive doctrines. According to Rawls, the political conception of justice should be like a module that fits into reasonable comprehensive doctrines (1993, 12). At best, those doctrines should support the political conception of justice, but even if this must not necessarily be the case, to uphold the liberal principle of legitimacy, the political conception of justice should at least not be in conflict with reasonable comprehensive doctrines.

To be able to examine the compatibility between reasonable comprehensive doctrines and abortion, a definition of the former is of course necessary. As Peter Jones notes, somewhat surprisingly Rawls defines the reasonableness of doctrines differently than he

defines the reasonableness of persons (1995, 526). According to Rawls, reasonable comprehensive doctrines have three general characteristics (1993, 59). James Boettcher summarizes them in the following manner:

> First, as an exercise of both theoretical and practical reason, reasonable comprehensive doctrines coherently address the major philosophical, theological and moral concerns of human beings. Second, each doctrine organizes and weighs values, including non-political values, in a particular fashion. Finally, comprehensive doctrines are usually tied to a tradition of thought so that they tend to develop slowly, remaining stable over time (2004, 607).

In contrast, reasonable people are defined in terms of virtues of persons. Reasonable people are characterized by willingness to both propose and honor fair terms of cooperation and to recognize the burden of judgment. The latter implies an acceptance of the claim that pluralism is a permanent feature of a free society. The definition of a comprehensive doctrine is quite undemanding; as Brian Barry argues it can probably be interpreted as meaning that doctrine should be considered as reasonable unless otherwise is proven (1995, 897). Considering this, it is quite uncontroversial to define those doctrines which I will refer to in this article as reasonable.

However, much more interesting is to consider the fact that a reasonable doctrine can be interpreted in an unreasonable way (Rawls 1993, 60 n. 14). This will be the case if the virtues of reasonable persons are not practiced. Applied on the abortion issue, it is sometimes argued that an interpretation of Catholicism according to which women are denied rights to abortion in the first trimester conflicts with the conditions of a reasonable interpretation of an otherwise reasonable doctrine.[4] Since it is a matter of dispute whether or not an interpretation according to which women are denied the right to abortion in the first trimester is reasonable or not, I will for the sake of the argument assume that such an interpretation is unreasonable. Consequently it will not be sufficient to demonstrate the incompatibility between abortion and interpretations of doctrines stating that abortion should be prohibited in the first trimester; rather the incompatibility between abortion and obviously not unreasonable interpretations of doctrines must be demonstrated. Of course I will not be able to test the compatibility between abortion laws and reasonable comprehensive doctrines in an exhaustive way; it is only necessary to demonstrate the incompatibility between abortion laws and at least one reasonable comprehensive doctrine.

II. THE AGNOSTIC POSITION

Rawls does not make a lot of comments on abortion specifically, but in a quite famous note in *Political Liberalism* he singles out three political values with relevance to abortion: "the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens".

4] See for example Dombroski 2000, 129-30. Rawls seems to take the same position, see 1993, 243 n.32.

These values are political and not metaphysical because they are considered independent from comprehensive doctrines. A reasonable balance of these three political values will, says Rawls, "give a woman a duly qualified right to decide whether or not to end her pregnancy under the first trimester" (1993, 243 n. 32). Since this conclusion about the abortion rights is claimed to be derived from a purely political value, the abortion rights should, according to this line of thought, be considered as exclusively political. However, he does not present any argument for why his position evades dependence on comprehensive views. Following Philip L. Quinn (1995), it must therefore be concluded that he is not able to show how this balance is justified within the scope of public reason. However, when commenting abortion in a later text, Rawls refers to Judith Jarvis Thomson's article "Abortion" in *Boston Review* (1995) for a "more detailed interpretation" of those values "when properly developed in public reason" (Rawls 1999, 169 n. 80). To make Rawls' argument complete one must thus turn to her article.

It is important to note that Thomson's article is not explicitly occupied with political liberalism. However, the way Rawls refers to her makes it reasonable to assume that he considers her argument as being at least compatible with the requirements of political liberalism.[5] Thomson defends abortion rights not primarily by arguments about the lack of moral status of the fetus. On the contrary, she finds no conclusive reasons for denying that fertilized eggs have a right to life and therefore, consequently, no conclusive reason for denying that abortion is a violence of those rights. But this position does not lead her to conclude that women should be denied abortion rights. This is because there are at the same time no conclusive reasons for giving fertilized eggs a right to life and a protection from abortion. Her conclusion is thus that neither side has proven its case.

If there is no conclusive reason either to deny or to give fertilized eggs the right to life, how could one then defend women's right to have an abortion? Thomson argues here that the lack of conclusive proof of either side leads to the conclusion that the side whose position implies an imposition of force has to lose because it constrains the liberty of women. Women should not be constrained to exercise self-determination when there are no conclusive reasons for it at hand. She argues that such constraints would impede the equality of women (Thomson 1995, 15).

My aim here is not to challenge Thomson's view normatively,[6] but rather to test whether or not her reasons for permitting abortion is compatible with the demands of public reason. According to my interpretation public reason are not allowed to be in conflict with reasonable comprehensive doctrines. For the sake of the argument I previously assumed that an interpretation of a doctrine which denies a qualified right to abortion during the first trimester is unreasonable. In order to demonstrate the incompatibility be-

5] It can be noted that even though he refers to Judith Jarvis Thomson article, he states that he "would want to add several addenda to it" (Rawls 1999, 169 n. 80). But although he seems to consider her article incomplete, I think it reasonable to expect it to be compatible with political liberalism since he refers to it.

6] For this, see Beckwith 2004.

tween Thomson's argument and political liberalism, I consequently have to show that her argument is in conflict with other doctrines than those which proscribe a conservative position. And it is obvious that this it the case. Her agnostic view on the moral status of the fertilized egg is namely not only in conflict with conservative positions but also with liberal approaches to the status of the human embryo.[7] This is the case since she – in contrast with the liberal view - rejects the conclusiveness of denying fertilized egg a right to life. That also means that her agnostic argument differs from the Rawlsian "method of avoidance". The method of avoidance calls us to refrain from engaging in metaphysical issues when justifying principles of justice (Rawls 1987, 12). It is by applying the method of avoidance that a political conception of justice can be as a module that fits into and can be supported by different doctrines (Rawls 1993, 12). For example, one could argue that certain human rights could be justified without references to specific ethical doctrines, which mean that those rights are compatible with a wide range of doctrines. Therefore, one could defend human rights and still avoid taking positions on ethical doctrines. Thomson, however, does not apply this method since she does not refrain from taking positions on doctrines when she declares that there are neither conclusive reasons to deny nor to give fertilized eggs rights. Consequently she explicates the arguments for the conservative, as well as the liberal approach to the status of human embryo, refutes them eventually, and therefore comes to an agnostic conclusion, which in turn clears the way for her pro-choice position about abortion. In contrast, the arguments for fundamental human rights do not spring from such a doctrinal divergence, but rather the reverse.

The limitation of Thomson's argument in relation to the criteria of public reason raises the question about one other possible way to argue for abortion rights. Namely, whether or not agnosticism about the moral status of the fertilized egg and the fetus could be defended without claims about the inconclusiveness of available positions. This line of defense for abortion is recently pretty much employed by Lawrance Torcello (2009). According to him, there is a precautionary argument for permitting abortion:

> In most cases, abortion is considered from the perspective of an actual woman with all of the moral status that comes with non-controversial personhood. The precautionary argument dictates that in the absence of certainty, the default position should be that of caution. When dealing with a decision between the freedoms of choice and consciousness belonging to an actual woman as opposed to the uncertain moral status of a fetus gestating in her body, the most cautious option is to honor the physical and mental integrity of the woman and her best judgments regarding her own interests. This position requires the least amount of comprehensive assumptions (2009, 26).

The similarity between Torcello's and Thomson's argument is obvious – even though she does not conceptualize her argument in terms of a precautionary principle. Still the essence of their arguments is the same: the uncertainty of the status of the embryo and the early fetus makes it unjustified to constrain the possibilities for at least early abor-

7] For an overview of these approaches, see Steinbock 2006.

tions. However, there is one important difference: while her arguments for abortion rights are based on a refutation of the conclusiveness of the liberal as well as more conservative approach, his arguments for abortion rights are based on a judgment of the comprehensiveness of the two positions. And since the liberal position "requires the least amount of comprehensive assumption" women should be given abortion rights. The question is consequently whether this line of argument is compatible with political liberalism. I would argue that it is not. First of all, it can be noted that his "comparative approach", according to which the liberal view needs lesser amount comprehensive assumption than the conservative view, cannot sufficiently justify abortion rights according to the Rawlsian version of public reason. To be justified in this way, it is not sufficient for abortion rights to be justified in a less comprehensive way than what would be the case of a more restrictive position on abortion. Abortion rights need to be justified in a way that totally avoids dependence on comprehensive doctrines. That is the goal of the Rawlsian "method of avoidance" – a goal which Torcello does not reach with his argumentation.

However, as I have argued previously in this article, the decisive point of view should be whether or not abortion laws are in conflict with reasonable comprehensive views. The question is consequently whether or not Torcello's position is in conflict with such views. I assumed for the sake of the argument that doctrines proscribing a conservative view on abortion are not reasonable. The question is consequently whether Torecello's position is in conflict with other doctrines than those proscribing conservative positions. I think it is obvious that this is the case. Arguing for agnosticism of the status of the fetus and the permissibility of abortion during the whole pregnancy his position is not only in conflict with conservative positions but also with positions sometimes called "moderate" or "gradualist" (see for example Alward 2007; Tsai 2005). According to this position, an unborn human being gradually becomes a person during the pregnancy, which also means that the protection of the fetus also is gradually prioritized. Abortion in the early stages of the pregnancy is according to this view considered morally permissible while the normative case for restriction becomes stronger as the pregnancy proceeds. This gradualist or moderate position is doctrinally integrated in for example religious traditions which take a position on abortion without adhering to either the conservative or the liberal position (Tsai 2005).[8] Since Torcello's agnostic position – according to which the uncertainty of the status of the fetus makes abortion on demand permissible until birth – is in conflict with this gradualist position, Torcello´s position is incompatible with political liberalism.

The premises of inferences for abortion rights within the limits of political liberalism so far discussed have been a stipulated agnosticism. In the case of Thomson's argument, this agnosticism was an implication of her claim about the inclusiveness of the liberal as

8] This position is in conflict not only with conservative abortion laws but with abortion laws in general since almost any abortion law in the world limits the access to abortion in the later phases of the pregnancy – only Canada, China, Vietnam and North Korea have no further time limit for abortion (Rahman et al.1998). However, it may be hard to identify a specific comprehensive doctrine behind these laws.

well as the conservative position on the moral status of a fertilised egg while Torcello's agnosticism is more taken for granted. Nevertheless, both of these two lines of argument for abortion rights are incompatible with political liberalism. More specifically, the mere claim of the inclusiveness of the liberal position by Thomson is incompatible with political liberalism. In the case of Torcello's argumentation, his liberal position – according to which abortion should be permissible during the whole pregnancy – is in conflict with not only conservative positions on abortion but also wish so called moderate or gradualist ones. Abortion laws may, however, be justified independently of the status of the fetus, which means that premises about the status of the fetus will be irrelevant. This is in fact pretty much what Judith Jarvis Thomson does in her earlier article *A Defense of Abortion,* when she argues for the permissibility of abortion even if the fetus has a right to life. I will now turn to this line of Thomson's reasoning.

III. IRRELEVANCE POSITION

To be independent of positions of the status of the fetus Judith Jarvis Thomson takes as her point of departure in *A Defense of Abortion* the premise that the fetus is a person from the moment of conception (Thomson 1971, 48). If abortion can be justified despite this premise, then abortion can be justified regardless of the status of the fetus. The dependence on beliefs about the (low) moral status of the fetus will thus be eliminated. This in turn means that one obstacle to making abortion compatible with comprehensive doctrines compromising a view on the status of the fetus will be overcome. However, obviously this move cannot justify an unqualified right to abortion according to political liberalism. That is so because this line of defense of abortion assumes that the fetus is a person with a right to life. And it would certainly be in conflict with many comprehensive doctrines to claim that an existing right to life does not entail any protection from actions analogously with an abortion. The question is rather whether there are any situations in which such protection may be removed without being in conflict with reasonable comprehensive doctrines. To be able to answer that question, we need to identify situations when the reasons for abortion are as strong as possible. If the argument does not succeed in these situations, there is no reason to believe that it will work at all. Two situations will be considered here: a pregnancy as a result of a rape and when the life of the mother is threatened by the pregnancy. But before this can be done we need to summarize Thomson's argument.

The beginning of Thomson's argument is well known (1971, 48-49). She asks you to imagine that a person, a famous violinist, is being involuntarily plugged into your body because his kidneys are not working. Thanks to this intervention, your kidneys can be used to extract poison from his blood as well as yours. The situation needs to last for nine months before you are free to unplug yourself. However, if you unplug the violinist before the nine months have passed, he dies. Thomson contends that you have the right to unplug the violinist because you did not agree to being plugged even if you know unplugging would result in his death. Analogously she also contends that a woman whose pregnancy

is the result of an involuntary intercourse has the right to abortion. She also argues that you have the right to unplug the violinist if your kidneys are being damaged because of the arrangement. Analogously, the woman should have the right to abortion if the pregnancy threatens her life (1971, 52). The question is whether or not this defense can justify abortion within the limits of political liberalism when the pregnancy is the result of a rape or is threatening the life of the mother. In other words: is it possible to justify abortions in these situations without conflicting reasonable comprehensive doctrines? I think the answer is no. And the reason why is that such justification will either be supported by or in conflict with two principles or doctrines deeply embedded in moral theories on human action. These two principles are the doctrines of doing and allowing and of double effect. My aim here is to demonstrate the following: firstly that a position on these two doctrines is unavoidable in taking a position on abortion when the life of the mother is threatened by the pregnancy or when the pregnancy is the result of rape; and secondly, that the space for abortions in these two circumstances is determined by the positions taken on these two doctrines.

The doctrines of double effect and of doing and allowing become relevant when our aim to promote good causes serious harm (Quinn 1989; McIntyre 2004). According to the principle of double effect actions with bad consequences can be permitted if these consequences are foreseen rather than intended. Granting that the abortion will result in the death of an innocent person with a right to life, this is obviously a bad consequence. For those adhering to moral theories accepting the principle of double effect the death of the person consequently must be only foreseen and not intended (McIntyre 2004). Those adhering to the doctrine of doing and allowing doctrine ascribe moral significance to the distinction between killing and allowing to die. They consider killing more objectionable than letting die. Therefore, it may be justified to let an innocent person die while it is prohibited to kill him/her (Howard-Snyder 2002). Consequently, according to this doctrine, the death of the fetus must only be allowed and not caused by an act of killing. Now I find it rather obvious that these two doctrines are relevant in relation to the situations considered here, i.e., when the pregnancy threatens the life of the mother and when the pregnancy is caused by a rape. The aim is to promote good by terminating an involuntary pregnancy and eliminate a deadly threat against the woman respectively, and, granting that the fetus is a person with a right to life, this course of action will obviously cause harm. Either the moral significance of the distinctions between doing and allowing and between intended and unintended effects are acknowledged or they are refuted. Of course it is possible to remain agnostic about them, but as soon as the space for abortion needs to be specified (which necessarily would be the case when an abortion law is to be legislated) a position for or against these doctrines would be unavoidable. In other words: a conclusion about the space for abortion in the two circumstances discussed above implies a position on these doctrines.

Consequently when an abortion law covering the abovementioned circumstances is to be legislated either these distinctions will be recognized, which implies stronger limita-

tions on how and under which circumstances an abortion is allowed than the case would be if these distinctions were not recognized. The difference is probably most obvious with regard to the doctrine of double effect. According to the most orthodox version of this principle, the following criteria must be fulfilled:

> 1. that the action in itself from its very object be good or at least indifferent;
> 2. that the good effect and not the evil effect be intended;
> 3. that the good effect be not produced by means of the evil effect;
> 4. that there is a proportionately grave reason for permitting the evil effect" (Mangan 1949, 43).

I think it is obvious that the space for an action (in this case an abortion) would be more limited if these conditions are considered than if they are not. Certainly, there are different versions of the doctrine of double effect, but no matter how "thin" they may be, all versions of the doctrine of double effect imply some constraints on the course of action, which means that it makes a difference whether or not this doctrine is applied. This would also be the case with the doctrine of doing and allowing. As Anton Tupa in a recent article claims: albeit it is "quite complicated" to determine what constitutes killing and letting die, still "…some methods of abortions clearly involve killing the fetus – this much is not controversial" (2009, 3). Recognizing the distinction between allowing and doing – or in this case – between killing and letting die – implies consequently that all methods of abortions involving killing are impermissible.

The disagreement over the status of the doctrines of double effect and of doing and allowing makes it impossible to avoid conflicts with comprehensive doctrines in justifying abortion granting that the fetus is a person with a right to life. Certainly, it is possible to find a consensus about the permissibility of abortion when the life of the mother is in danger and in case of pregnancy as a result of rape respectively, but different stances on those doctrines determine the limitations of this opportunity. The acceptance of these two doctrines limits the possibilities for abortion substantially compared to what the case would be if these were rejected. So even if it were possible to reach a consensus about the permissibility of abortion in these two cases, disagreements about the status of these doctrines will still make conflicts with comprehensive doctrines unavoidable when the specific content of the law is outlined. Consequently, even in case the pregnancy is a result of rape or when the pregnancy is threatening the life of the mother, an abortion law would be incompatible with political liberalism. Depending on what position is taken on the doctrine of double effect and of doing and allowing either the law would be considered as unjustified limited or unjustified permissible.

IV. IMPLICATIONS

If my argument about the incompatibility between political liberalism and abortion laws is sound, the implications are more problematic to political liberalism than to abor-

tion laws. This is so because the compatibility with comprehensive reasonable doctrine is more central to those defending political liberalism than to those defending abortion laws. Therefore, I will concentrate on the former. According to the interpretation made initially in this article, the essence of the criterion of political liberalism is to avoid dependence on beliefs which citizens not reasonably can be expected to endorse. That implies that abortion laws, at a minimum, must be justified without being in conflict with reasonably comprehensive doctrines. Rawls therefore stipulates that *the duty of civility* commands us to justify political power in "constitutional essentials and questions of basic justice" without dependence of comprehensive doctrines (1993, 154-55). However, given my initial interpretation of Rawls, this means that the duty of civility does not only apply to comprehensive doctrines but also to beliefs which citizens not reasonably can be expected to endorse.

But what if this scope of public reason is too limited to justify abortion laws? Considering the arguments I make here as well as arguments put forward of others regarding the incompatibility between restrictive abortion law and political liberalism, such a conclusion seems close to inevitable. At least it remains for those who disagree to prove their case. If this cannot be done, the consequences for political liberalism are quite serious. Since it is reasonable to assume that political liberalism endorses the Kantian maxim that "should" implies "can", the mere uncertainty about the possibilities to actually settle constitutional essentials and questions of basic rights within the scope of public reason, undermines the legitimacy of the duty of civility. In other words: it would be gravely unreasonable to endorse this duty when it is uncertain whether or not it can be fulfilled.

On a general level, there are two ways of handling the implication of the uncertainty regarding the possibility to fulfill the duty of civility. One way is simply to remove abortion from constitutional essentials and questions of basic justice and the other way is to modify the duty of civility.

By removing the abortion issue from constitutional essentials and questions of basic justice it would be possible to depend on reasonably disputable beliefs in justifying abortion laws since the criteria of the Rawlsian version of public reason only applies to constitutional essentials and questions of basic justice (Rawls 1993, 215). However, this move will be in conflict with Rawls's as well as many other liberals' inclination to locate the question of abortion within public reason (Rawls 1999:169; Macado 2000; Dworkin,1992; Thomson 1995, Audi 2000; Gutmann and Thompson 1990). This inclination is, I think, very reasonable from the perspective of political liberalism. Removing the abortion issue from public reasoning would, for example, open up for legislations based on comprehensive doctrines like Catholicism or Utilitarianism. The implication of this would be that legislations on abortion theoretically could vary from a total prohibition of abortion one term to an acceptance of abortion during the whole pregnancy (and of killing infants after birth) the next term. I think many proponents of political liberalism would consider such implications very problematic since the very aim of political liberalism is to secure legitimacy of political order and, in the end, the stability of a well-ordered society. And this aim

would be hard to reach, one could argue, if questions like abortion were unconstrained by the criteria of public reason.

Considering the negative consequences of removing abortion from "constitutional essentials and questions of basic justice", it seems plausible from the perspective of political liberalism to try reconciling "solutions" to the abortion issue with criteria of public reason. But such reconciliation must, if my arguments are warrant, be preceded by a modification of public reason because of the uncertainty regarding the possibility to fulfill the duty of civility. As far as I can see there are here also two ways to do this. One way is to weaken the obligation to be independent of reasonably disputed beliefs. The other way is to keep the status of the obligation unchanged, but to adopt a more inclusivistic approach to beliefs. Given the impossibility to discuss these two ways of reconciling abortion laws with political liberalism exhaustively, I will only comment on the former one since I find this way more promising than the latter one.[9]

One way to weaken the obligation to avoid conflicts with comprehensive doctrines is to transform this obligation into a mere goal or a prima facie duty. Such a transformation would make the avoidance of conflicts with comprehensive doctrines in constitutionals essentials and questions of basic justice desirable but not mandatory. By doing this, political liberalism obviously confirms to the principle that "should implies can". According to this revised criterion of political liberalism it may then be acceptable to rest on beliefs or doctrines in conflict with comprehensive doctrines in order to reach a settlement in very polarized issues, where no plain truths widely accepted are to be found.[10]

One objection to the strategy to transform the obligation to avoid conflicts with comprehensive doctrines to a mere ambition or prima facie duty is that public reason then would be too unconstrained to secure the stability and legitimacy of political order. Applied to the abortion issue, the consequences would be the same as the previously discussed consequences of the strategy to solve the problem of the uncertainty regarding the possibility to fulfill the duty of civility by removing the abortion issue from "constitutional essentials and questions of basic justice". By removing the abortion issue from this category, political solutions to the issue of abortion would be unconstrained by the criterion of public reason, which in turn, as I argued before, would open up for dependence on very controversial doctrines like Catholicism and Utilitarianism. According to this objection, the same would be the case if this weak criterion was adopted. Since no plain and widely accepted truths can be found in the abortion issue, reasoning in the political sphere is, according to this criterion, allowed to be dependent on some comprehensive doctrines (like Catholicism and Utilitarianism) and in conflict with others. And, as I argued before, from

9] The problem with the latter one is to find a criterion that in a justified way broadens the scope of public reason to embrace doctrines and beliefs at a level high enough to settle questions like abortions but still exclude not reasonably endorsable claims that threaten the legitimacy and stability of the liberal society. For example, it seems at least disputable if the exclusion of religious argument can be justified; see Eberle, 2002 and Gaus 2009.

10] For a similar conclusion, see Lott 2006.

the point of view of political liberalism, this fact should be seen as an unacceptable threat against the stability and legitimacy of political order.

According to the above mentioned objection, the consequences of making the obligation to avoid comprehensive doctrines to a mere ambition will open up for any beliefs – no matter how controversial it may be. However, this consequence is not an entailment of the strategy to weaken the constraints of public reason. As I argued previously the central question for liberal legitimacy is whether or not conclusions justifying public power in constitutional essentials and questions of basic justice are based on premises which citizens reasonably can be expected to endorse. And for moral reasons it seems reasonable to expect the possibilities for endorsements to vary with the level of disputivness of these premises. The more disputable the premises are, the stronger are the moral reasons to oppose them. Therefore, one could reformulate the goal to not only avoid disputable beliefs or doctrine in general but to avoid disputivness as such. Such reformulation would imply that some certainly reasonably disputable beliefs nevertheless are more disputable than others. A statement that the earth is flat is for example more disputable than the statement that aliens exist even though both statements are reasonably disputable. Consequently, a criterion which stipulates a duty to try to avoid disputivness as such favours less reasonably disputable beliefs compared to more disputable beliefs.[11] That means that public reason still will be constrained.

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11] The method of avoiding disputiveness as such is related to ideas of convergence like John Rawl's *overlapping consensus* (1993), Amy Gutmann's and Dennis Thompson's *economy of moral disagreement* (1995) and Cass Sunstein's *incompletely theorized agreements* (1996). However, the method of avoiding disputiveness as such is a less demanding idea since it primarily not aims to establish convergences but rather to decrease divergences.

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