

The *Argument from Back-Street Abortion* Revisited

A Consequentialist Approach to Abortion Legal Policy

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Abstract

Motivated by recent political trends surrounding the legality of abortion, and noting the apparent difficulty with which partisan agreement can be found when engaging with arguments from foetal personhood, this paper revisits a classic axiological argument for the legalisation of abortion which relies on a commitment to the moral relevancy of consequences and the empirically sound nature of said consequences. Academically known as the *Argument from Back-Street Abortion*, agreement with the argument's premises entails the legalisation of abortion is morally obligatory, and agreement to said argument's premises are possible regardless of one's position regarding a foetus' right-to-life. As such, this oft-overlooked argument deserves revisiting due to its potential for bipartisan reconciliation in service of the establishment of ethical abortion policy.

Introduction

Recent abortion policy trends in the United States of America have reinvigorated public attention towards the “abortion debate.”¹ Generally, there exist two mutually exclusive

1. Most notably, the Alabama Human Life Protection Act's criminalisation of abortion wherein (actual or attempted) abortion entails felony offences except in cases where abortion is necessary in order to prevent a serious health risk to the unborn child's mother. (To clarify: a woman who receives an abortion will not be held criminally culpable or civilly liable for receiving the abortion. It is the individual who performs or attempts an abortion who will be held culpable or liable.)

ideological positions in the public consciousness: pro-life and pro-choice. The former can be roughly characterised as advocating for policy that will at least restrict access or otherwise render access to abortion impossible, whereas the latter advocates for at least non-restrictive or complete access.²

As indicated by the labels of either ideological position, public discourse is dominated by a class of argument known to the field of Biomedical Ethics as *Arguments from Personhood*; those arguments who build their foundations upon the affirmed or denied personhood of the foetus, and by extension the affirmed or denied right-to-life of the foetus. This paper treats an argument belonging to an entirely different class, and as a result does not directly concern itself with the question of personhood.

While this class does not possess a formal label, the treated argument variant is known (at least in those academic traditions belonging to the Commonwealth of Nations) as the *Argument from Back-Street Abortion* (hereafter nominally referred to as “[the] argument”). While the label itself may be unfamiliar, the argument structure very well may be. It is a unique argument precisely because it does not rely on the often thorny issue of foetal personhood. Instead, it notes empirical social realities and relies on a basic commitment to the moral relevancy of consequences to conclude that abortion ought to be legalised as a matter of ethical obligation.

To begin, the fundamental features of Consequential ethical theory will be outlined. If one is already familiar with these fundamental features, or is already in agreement with the proposition that the consequences of actions (or in this case, socially-enforced policies/laws) represent a factor of intrinsic moral significance and are indeed morally relevant, then one can skip to the following sections wherein the argument proper is outlined and discussed.

2. Again, these are merely rough characterisations. Those individuals belonging to either ideological position possess a great diversity of thought and advocacy. That said, the generalisations described above are sufficiently descriptive to frame the arguments to come.

Fundamental Features of Consequential Ethical Theory

Since the argument treated in this paper relies upon the theory of Consequentialism, it would be prudent to briefly outline what the structure of the theory used is and what it entails. Consequentialism as a kind of ethical theory can be said to be typified by two theses.³

- Value is independent of the right
 - It is possible to give an account of the value of states of affairs and thus a comparative ranking of alternative states of affairs without appeal to the concept of right action. The states of affairs relevant in a consequentialist theory of right action are consequences (or outcomes) related in some way to the action.
- Explanatory priority of value
 - A full and proper explanation of what makes an action right (or wrong) can be given (*solely*) in terms of the value of the consequences that are related in some way to the action.

Reduced to a single proposition, Consequentialist ethical theories would see that an act is right if and only if (and because) some action *A* possesses the best consequences of all available alternatives within the agent's power from an impartial standpoint.⁴ Consequentialism is thus a kind of ethical theory that is *teleological*, *maximising*, and *impartial*. That is, theories of the kind assess the deontic status of agent action based on their consequences (*teleological*), the action with the best consequences is the obligatory action an agent must take to behave ethically (*maximising*), and the agent is to regard the consequences of their actions impartially.

3. Timmons 2013, p.112.

4. Although the many competing tokens of Consequentialism (Act Utilitarian, Rule Utilitarian, Satisficing Consequentialist, to name a few) all have differing notions of what will ultimately count as "best consequences," Consequentialism as a kind of ethical theory is now sufficiently outlined for the purposes of this article.

The Argument from Back-Street Abortion

Although variants of the argument have existed since at least the turn of the twentieth century, it was most recently comprehensively articulated by Harry Lesser with the ideological divide endemic to foetal personhood arguments in mind.⁵ As such, the argument form as Lesser represents it will be the one treated in this paper. It is a *conclusive* argument, which is to say that if the argument is sound and is unsuccessfully refuted by counter-argument, it *guarantees* the legality of abortion as morally obligatory.

Schematically, the argument possesses the following form.

1. The law ought to reflect actual positive morality, meaning that
 - (a) “to make abortion illegal is contrary to our actual morality, as opposed to our official moralising”⁶
2. “Back-street abortion” (criminalised abortion policy), as opposed to legalised abortion policy, is necessarily unregulated, such that
 - (a) considerations of morality, medical safety, (social) justice, to name a few, will have no affect whether and how abortions occur.
3. Any law that criminalises abortion is ineffective as a matter of empirical fact, since
 - (a) it is the case (both historically and contemporaneously) that “it is always possible for any woman to obtain an abortion, with little risk of prosecution, provided that she is sufficiently determined and able to raise the money for the fee.”⁷
4. Even if there are beneficial consequences to the criminalisation of abortion, they are necessarily outweighed by the harms criminalisation entails.

5. Lesser 2005.

6. *ibid.*, p.8.

7. *ibid.*, p.10.

Objections to the Argument

Since propositions 1 through 4 are either necessarily true or plausibly true, and even then a desire to maximise the Good entails policy that will ensure safety, justice, to name a couple, it is morally obligatory to legalise abortion and morally impermissible to criminalise it. In this section, objections to the propositions outlined above will be treated. They are represented in good faith, which is to say every attempt is made to render them as strong and comprehensive as possible. All objections will be italicised for clarity.

Abortion is simply morally wrong. Whether informed by theological values about the soul existing at conception or axiological principles about the potential humanity of the foetus, the morality of abortion is such that any law criminalising abortion is itself a reflection of actual positive morality, and enough people agree with me to ensure that abortion legality could never represent the actual positive morality of my society.

First, let us clarify what is meant by “positive morality.”

[The] law ought to reflect existing morality, whatever it is, and that it is a mistake to prohibit what is widely believed not to be wrong, or to punish any crime with what is seen as excessive severity. (In early nineteenth century England the widespread use of the death penalty had the consequence that juries often refused to convict.) [...] Thus it might be held that there is no sense in imposing severe penalties to deter crime if a consequence of their severity is that juries refuse to convict and criminals are not punished at all.⁸

There is ambiguity, however, in when this applies. Should it be a general principle applied to the set of all laws in a society? For example, should those laws criminalising racial discrimination not have been passed solely because they did not reflect the actual positive

8. Lesser 2005, p.8.

morality of society at the time? Had it been up to the masses, a great deal of progressive legislation would never have been passed in the nineteenth and twentieth centuries. Sometimes, the law leads and morality follows. Furthermore, it is not altogether clear what constitutes the positive morality of any given society. Granted, a great many surveys might be generated to ascertain the values of a populace, but a populace will habitually betray their values on a regular basis. Yet, if we were to base the positive morality of a society on what a populace does, we would be left with a great degree of confusion.

Applied to the question of abortion legality, proposition 1 supports the larger argument only in those societies where the majority hold that there are no good moral reasons for restricting abortion, and that abortion is at least morally neutral. As such, it is a circular proposition that fails to support the larger argument when used in societies that contain many individuals predisposed to thinking of abortion legality as morally impermissible.

In countries with great diversity of thought on issues such as abortion, proposition 1 fails. Fortunately, it is also the weakest component of the larger argument and can be safely ignored since it is logically inconsequential. However, we can imagine an ideal society wherein its members possess a morality that is consistent with moral principle. For example, Consequentialism, or at least the moral principle that *ceteris paribus* we ought to maximise the Good and minimise harm. In that society, abortion legalisation would indeed reflect actual positive morality.

For those societies where such is not the case, proposition 1 does little to advance the moral obligation of abortion legalisation, but it does not cripple the larger argument either.

It is no concern of mine whether abortions will be rendered less safe, or that it will be harder for those of lower-incomes to access abortion services in general. In fact, it seems as though that would entail less abortions happening, which is precisely what I want. There is no relevant way in which abortions can be regulated, principled. Abortion is wrong and the only regulation required is criminalisation.

To frame the issue, proposition 2 exists to further legitimise and bolster propositions 3 and 4. Furthermore, it is similar to proposition 1 in that it only clearly succeeds when understood by an individual who is predisposed to thinking of abortion as at least morally neutral. In consequence, it too does little to advance the larger argument on its own, and its rejection is not fatal to the larger argument.

However, if one agrees that the consequences of actions are at least morally relevant—never mind there existing a moral obligation to maximise the Good—and the potential and actual consequences of criminalised, unregulated abortion are many and harmful, it would be awfully callous at best and cognitively dissonant at worst for an individual to hold true to moral principle and have no regard for such important values as accessibility and safety.

If one is to hold this objection, they are essentially stating that they would rather abortions be criminalised (unsafe, unduly difficult to access, potentially exploitative, to name a few) and lead to actual harm done to a fully realised moral agent than allow an abortion to occur—even on the (true) assumption that abortions will occur regardless of legality. Framed in this manner, it is difficult to see the morality inherent to the objector’s statement above. There is little intuitively moral in such a stance.

Nevertheless, the objector might retort that any harm that befalls an individual as a result of their seeking an abortion is a matter of personal responsibility, and was invited upon themselves. *It was a choice to go about an abortion even when it was criminalised and less safe, and there are always other choices—such as adoption—that are always available. It is not the job of the law to protect those who would break it. Again, at least this would reduce the overall number of abortions.* It is precisely this retort, and others of a similar character, which we will now address in treating propositions 3 and 4, since they revolve around the *effectiveness* of abortion legislation.

Since abortion is an applied ethical issue, any moral verdict reasoned to has actual, measurable consequences in the world, as does the issue itself. A society’s moral stance on

abortion—should it directly inform policy—ought to be a stance that not only agrees with abstract ethical principles, but promotes the Good and reduces harm in reality. Since it is certainly the case that well-intentioned policy can result in the actual harm of moral agents, how would harm plausibly come to those who live in societies where abortion is criminalised?

Before we can come to a useful answer, it is crucial to recognise that in virtue of criminalised abortion being unregulated, there is no concrete data with which to draw a perfect comparison between a criminalised abortion society and a legalised abortion society. In the latter society, there would exist reliable reporting of all abortion-related activities that itself would be used to better refine policy. In the former society, all is obscured. Even on this point, I think, legalisation is preferable.

In any event, Proposition 3 advances the indisputable fact that abortion did, can, and will occur regardless of criminalisation. As Lesser explains, “[it is] the nature of the [abortion] operation, which can fairly easily be kept secret, [since] it is very hard, without an eyewitness, to prove that a woman has had an abortion rather than a miscarriage.”⁹ It would simply be impossible to enforce the criminalisation of abortion in any effective manner without a massive infringement of civil rights.

Of course, merely stating this fact is insufficient to conclude that a law that criminalises abortion is wholly ineffective, for even if it is the case that abortions continue to occur under criminalisation, there would likely be some measure of deterrence such that some individuals who would have sought out an abortion did not *because* of its criminalised status. The ardent anti-abortionist, then, might declare that *since abortion is equivalent to murder, even if only one abortion does not take place because of criminalisation, the law is justified.*

So, to contend with the final anti-abortionist retort, we must refer to proposition 4 which states that any beneficial aspects of criminalisation (such as directly impeding an abortion from taking place) are necessarily outweighed by the harms entailed by it.

The most important [entailed harm] is the encouragement given to unskilled

9. Lesser 2005, p.10.

and unscrupulous abortionists working outside the normal medical framework, resulting at worst death or permanent injury, but also in many other evils—financial exploitation, the general injustice of “one law for the rich one for the poor,” difficulties in providing any psychological support or advice for the women in question, the problems caused by people being recommended unreliable and dangerous “home remedies.” [...] But essentially the argument would be that a possible slight reduction in numbers, even if seen as a gain, is easily outweighed by the sometimes permanent injuries, danger, physical and mental suffering, injustice, and even deaths caused by criminalisation.¹⁰

Yet, the anti-abortionist still has grounds for their final retort. *Even if all of those harms are entailed by criminalisation, abortion is “in itself so wicked that the reduction in numbers is enough to outweigh all the [potential harm done].” Besides, “it is wrong to make calculations at all with regard to an action such as abortion or murder: it must simply be forbidden.”*¹¹

It is here that a difference of values is made apparent. A commitment to a broadly Consequential ethical theory would disagree with that final retort, not only because it fails to maximise the Good, but because there is no reasonable basis with which to deem all of the empirically plausible harm-done to moral agents as irrelevant. It is one thing to reject an amount of harm-done to a moral agent as being sufficient, but it is altogether another to disregard harm entirely on the basis of “principle.”

Conclusion

It seems as though the most ardent anti-abortionist is unreachable and unlikely to be convinced by the larger argument. Yet, most individuals are not as radical in their thinking as the final anti-abortionist’s objection might have suggested. For example, the most recent

10. Lesser 2005, p.12.

11. *ibid.*, p.13.

gallup poll on the issue reports that of the sixty percent of Americans who believe first-trimester abortions are morally permissible, forty-eight percent of them consider themselves “pro-life.”¹² Almost half of those individuals typically characterised as being against abortion entirely were in fact for it (within limits of the first trimester).

This indicates to me that the argument developed in this paper—while not entirely convincing to the most radical anti-abortionist (but no argument would be)—would likely be very convincing to the moderate majority. In spite of the technical presentation of the larger argument in this paper, it is actually incredibly simple in both form and content. “Even if you are personally against abortion, it will assuredly occur regardless of whether you approve of it or not. If you support criminalisation, you will ensure unnecessary harm will come to those who choose, but if you support legalisation no unnecessary harm will occur. Is it not better to ensure less harm than more harm?”

If the answer is still no, then there is not much more to be said on the matter. It is my belief, and that of Lesser’s, that “with regard to issues of what laws it is right to have, and what conduct should be outlawed, an empirical demonstration that a law is, or would be, ineffective, should be a conclusive reason against having that law.”¹³ For those who to some degree believe in foetal personhood or those who reject it, it is clear to many that abortion criminalisation is an ineffective law, and ought not be in place.

At the very least, though, the harms entailed by criminalisation cannot be legitimately ignored. At most, the anti-abortionist can argue that the harms entailed are less weighty than the abortion itself, but this is likely to be unpalatable to those moderates who share the belief that ineffective laws ought to be repealed. In being forced to weigh all of the harms entailed by a society which criminalises abortion versus a society that legalises it, coupled with a commitment to maximise the Good (or at least do no unnecessary harm), it is likely sufficient for a moderate to see the *Argument from Back-Street Abortion* sensible.

It is my sincere hope that those who believe they are entirely convinced of the necessity

12. Saad 2018.

13. Lesser 2005, p.14.

of abortion criminalisation will at least consider this argument and determine for themselves if they can conscientiously continue to support ineffective, harmful legislation.

References

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