Abortion: A Fresh Policy Approach

Adam White, Bowling Green State University

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The abortion debate is beyond well-worn: it is in a political and philosophical rut. In response this paper proposes a novel approach. The proposal, although presented as a policy, is intended as a thought experiment to illuminate some under-explored possibilities for the debate. The paper unfolds in seven sections; the policy is introduced in Section 2. We begin with a few preparatory comments.

Section 1: Conceptual Set Up
The moral dilemma of abortion is familiar: aborting a fetus at any point of development can be conceived of as murder; yet the mother’s liberty, conceived as the right to bodily privacy, is violated should the state force her to carry the fetus to term against her will. Seemingly any abortion policy designed to secure one aim must abandon the other. The established debate assumes that the more immoral practice should be eliminated. This paper however defends a standard of minimizing the aggregate moral loss of three considerations. Any enforced abortion policy will require a value concession on the part of those obligated to obey. Posit that the relevant kinds of concessions morally offend the authenticity of the conceding parties. To speculate, much of the heat of the abortion debate is due more to this threat than to the threats of terminated fetuses and violated liberty. Given three intrinsic values, the proposed policy outlined below employs three primary provisions.

The reasons the nonmedical termination of a fetus is morally troubling are familiar. They include: the valuable future lost by a potential person; the loss for close relations of a

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1 Abortion literature abounds; two primary sources for this paper are Baird and Rosenbaum, and Cozic and Tipp.
2 As is clear from this paragraph’s summary, a primary standard for evaluating any abortion policy is the moral status of the fetus. This paper’s argument is intended to be relevant regardless of fetal status. This is also the case with the other two moral questions of the content of liberty and the content of inauthentic concession.
3 D. Marquis
person to care for; the horror of an unnatural removal of functioning flesh from an adult’s body; the violation of Divine Command; and a violation of intergenerational solicitude.

Nor is it necessary to rehearse why coercing an adult against her will is morally troubling. Imagine that the state, upon failing to garner support for an attractive tax policy, injects her with a mind-altering drug to manipulate acquiesce. This is troubling because the state resorts to bodily invasion rather than to autonomy-affirming reason. Naturally state coercion can also limit the opportunities to carry out one’s own life plan. Many personal choices have high life plan stakes, say purchasing a house, but the choice of offspring is especially intimate and determinate of self-identity. The protection of liberty maintains the relationship between the state as a means and the individual as the intrinsic end to be served by that means. Liberties exist not to promote popular aims but to give space for individual flourishing. The moral fault for any resulting suboptimal outcome lies with the actor, not the liberty.

The argument will employ a “moral community” metaphor to better explicate the policy preferences motivated by abortion. A moral community is a self-reinforcing group of persons who share moral values. Unlike political institutions, moral communities need not coordinate action. As well, the theoretical correctness of their values is secondary to their value’s relevance to human experience. Rather, the unique value of moral communities is that they are manifest

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5 Fowler, and Zindler, both in Cozik and Tipp.
6 Reiman, Justice and Modern Moral Philosophy, p. 184.
7 Or, most significantly in the nine months of pregnancy, assuming the possibility of (costless) adoption. Rawls examines the relationship between punishment and liberty in Theory, Section 34 and pages 241, 314 and 575.
8 While not explicitly stated, I believe this is implied by Rawls’ conception of political liberalism, as well as the lexical superiority of liberty in the two principles of justice as fairness. See p. 60, Theory.
9 The content of liberty is a matter of constitutional politics. Abortion policy motivates this politics. Thus the justification of competing policies must include the justification of competing conceptions of liberty.
10 This paragraph is not intended to be a complete theory of moral community or authenticity. The aim is to invite consideration of a general moral consideration that is relevant to but underutilized in evaluating abortion policies. Section 7 will provide further elaboration.
11 I am indebted to Scott Simmons for pushing the concern that some communities espouse values that are not legitimate conceptions of the moral. Surely there is no moral concern for example with a policy limits the actions of
sites of personal authenticity in its full manifestation: proper reasoning, good faith critique, good character, stewardship of values beyond self-interest, and cooperative trust. Threats to a moral community’s authenticity is the third consideration in the evaluation of any abortion policy.

A liberal polity allows all moral communities to compete in political contest. Obviously each will judge and fiercely attempt to influence abortion policy. Surely very few biological parents actually want an abortion; rather abortion is regretfully accepted as a means to other ends. A woman considering an abortion operates from within her moral community. For example, a community of virtue might find a set of ends properly weighted if the mother loves her unborn, while a feminist community might find the burdens of unwanted pregnancy an explicit aim of patriarchal oppression. Recognizing such plurality helps avoid the “pro-life versus pro-choice” straightjacket, that while effective as bumper sticker rhetoric, frustrates the possibility of effective public justification of competing policies.

The argument’s aim is to show that the proposed abortion policy satisfies the standard of optimally minimizing the three moral threats that arise from unwanted pregnancies.

Section 2: The Proposal
The proposed abortion policy involves three provisions:

1. Fair Punishment Provision: Abortions before P weeks of gestation are legally permissible, while abortions after P are punished. However the punishment is split equally

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12 Authenticity is necessarily relational as an isolated person with their own values is not a moral community.
13 To speculate, more of the abortion debate’s motivational urgency is due to this threat than the explicitly stated threats to unborn fetuses and mothers’ liberty.
14 Swomley; p. 114.
15 Rudy, p. xxv and ch. 7; and p. 307 of Callahan, in Baird and Rosenbaum.
16 If the fetus’s moral status is a feature of its biological development, the risk of moral offense increases as time period P increases. Choosing a particular P represents balancing that risk with the moral risk of constraining liberty via punishment. In evaluating liberty claims, metaphysical judgments about the moral status of a developing fetus may have the same nature as the metaphysical judgments about a supreme being and an eternal afterlife.
between the father and the mother. For example, six-years of incarceration would be served
three years by the father and three years by the mother.17

2. Service Provision: The state expends R resources to establish and maintain service
organizations, perhaps modeled after the Peace Corps, where persons serve willing abortion-
considering women in return for her promise to carry to term. The pregnant woman’s
accepting this service is fully at her own discretion.

3. Democracy Provision: Both the P and R variables are settled by democratic politics,
not by court rulings.18 All citizens are free to participate in this politics.19 It is posited that their
motivating values will reflect and be explained by their respective moral communities.

The claim is that the practical interplay of the fair punishment, service and democracy
provisions will uniquely minimize the aggregate of the three moral threats raised by unwanted
pregnancies: terminated fetuses; violated bodily liberty; and coercively enforced inauthentic
concessions.20

The main function of the fair punishment provision is twofold. First, to provide an
incentive for men to think twice about impregnating abortion-prone women. To the extent this is
effective, there will be fewer unwanted pregnancies, less liberty violation, and fewer abortions.
Fair punishment also changes abortion politics: if men also face the risk of punishment they will
politically support a different P and R than they would when only women are punished.

The main function of the service provision is to increase the percentage of woman willing
to carry the unwanted fetus to birth by having what she gains from service be more valuable to

17 Six years of punishment is just an illustration. To clarify, a greater P implies a lower probability of punishment
because less time remains to abort. P thus actually reflects the combination of the length of the time window and the
severity of the punishment.
18 The motivations for influencing public policy are plural, but once settled P and R apply uniformly to all citizens.
19 These provisions do not eliminate other effective responses to abortion, such as preventive education, etc.
20 It is posited that “aggregating” moral threats is coherent, even if aggregating particular moral wrongs is not.
her than what she loses by the burdens of the pregnancy. This too will reduce the frequency of both fetal termination and subsequent punishment.

The main function of the democracy provision is to replace narrow legal reasoning with the broader reasoning of a plurality of moral communities. In so doing not only is policy settlement achieved, but democratic participation affirms citizens and their moral communities rather than stoking a spiral of “race to the bottom” politics and ever-more desperate actions.21

The proposed policy’s three provisions relate in a constructive fashion. Increasing state punishment should increase the motivation of abortion-considering parents to seek the service organizations, and the more effective this service the less the need for punishment. Constructive implies that there is: a) a stable equilibrium point for P and R; and b) that gender-symmetric democratic participation will attain that point; and c) doing so reduces the motivation of persons to engage in less legitimate responses to the three moral threats of unwanted pregnancies.

The following sections elaborate on the proposal’s three provisions.

Section 3: The Fair Punishment Provision
The fair punishment provision punishes both the mother and father equally for abortions after P weeks. The pragmatic logic is that deterring both men and women equally would be more effective than deterring women alone. Shared punishment effectuates a bicameral filter with exponential results not attainable by punishing only one parent. Further, because fair punishment impacts both males and females equally the gender bias of abortion politics is removed. As noted, this would allow P and R to be set with gender impartial politics.

Unwanted pregnancies occur because two adults concurrently were indifferent to engaging in negligently careless sex. While the personal choice to do this is symmetrically shared by the male and female, more often the choice to subsequently abort is the mother’s

21 The unique drama of abortion politics suggests that the non-theatrical settlement of legal settlement is thereby more legitimate. This suggestion is unfounded.
alone. If the woman alone chooses to abort is it unjust to also punish the man? Respect for autonomy suggests that persons be punished only for their own acts.

In response, this is not always the case in law. Parents can be held liable for the acts of their minority children, and bars and party hosts can be liable for the actions of their inebriated patrons. And the moral principle of “easy rescue” requires that costs be paid by persons not responsible for the serious threat upon another person. Perhaps the rationale in all these cases is a sufficiently secure causal link between events that threaten sufficiently serious consequences.

The same reasons justify punishing the male when the female unilaterally makes the choice to terminate the fetus. Equal parental punishment is justified by their symmetrical biological contribution and their equal understanding of the threat of legal punishment.

Still, intuition might be uncomfortable with the novelty of punishing the father. One way to present the concern is that any cooperative scheme that imposes an obligation upon the father should also provide him a suitable right. That right could be a legal limit on the choices of the mother. More generally, readers should avoid the temptation of the fallacy of novelty. The fallacy of repetition assumes that a claim is sound only because it has been repeated often enough. The fallacy of novelty assumes that a claim (i.e., that fathers are punishable) is unsound only because it has not (yet) been repeated enough, if at all.

Section 4: The Service Provision
The common claim is that fetuses have a right to life. This is incorrect: if there is a fetal right it is only to uncompensated gestational services (to term) of the unwilling mother. Service organizations can be thought of as adult proxies of the fetus paying rent to the mother for the temporary use of her womb. The payments could be either monetary or in the form of service.

I am indebted to Colin Manning for pushing this consideration. Note however that a landlord cannot claim that they have no obligation to salt slippery rental steps simply because it is the renters' own choice to use the steps, even when unsafe. Similarly, a father cannot claim they have no obligation to the fetus should the mother be better positioned to make decisions concerning abortion.
I will not detail the specific tasks service organizations could carry out for their pregnant clients.23 As a competitive industry, each independent organization would be motivated and free to experiment and innovate attractive services.

Service organizations would require the support of the state. Resources and protections could be a mix of liability protection, favored tax status, including of donations, regulative oversight and permissions, and possibly tax-funding. These details are the content of variable R.

At the limit, practical considerations become theoretical considerations. Four concerns with service are relevant.

Section 5: Concerns with Service
Service organizations would be grossly prone to fraud, where women who are not actually considering abortion ask for “free” service out of self-interest. Dishonest women swamping the organizations would be fatal to the policy. In reply, offering service does not create the problem, it only makes it transparent. All unwilling mothers who choose to abort do so because their own burdens swamp their private resources and support. Institutionalizing these costs would decrease the burden on particular mothers. There are two practical responses to the risk of fraud.

First, organizations would self-police, and can simply ask the women they judge to be dishonest to leave. The moral hazard is not eliminated however because this decision could be made incorrectly. Second, there could be public coordination solutions, for example providing optional pledges that any woman can sign well in advance of becoming pregnant. Presenting the signed pledge then provides favored status with the service organizations.

The second general concern with service organizations is that they could be staffed by “extremists” motivated to prevent abortion at all costs. For four reasons this concern might be overblown. First, women receiving undesired treatment can simply leave. (Assuming that

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23 Service could take various practical forms such as offering domestic and health support and so on. Such support is not a new idea; institutionalizing it with state support is however. See Rudy p. 36 and p. 92.
barring exit is not one of the manipulations.) Second, like any industry, free speech and press would help keep the organizations transparent. Third, pregnant women and their representatives are free to start and operate service organizations themselves, and would simply discharge agenda-laden staff. Most important, when support organizations flourish, those who value less abortion in the world would be less motivated to turn to extreme measures. It is only in the absence of positive practical options that highly motivated “rescuers” consider blunt and offensive options.24 By analogy, the way to have less ignorance in the world is to educate, not to coerce and manipulate the ignorant. Extremists will still exist, but they would have little interest in serving in effective service organizations.

A third possible worry with service organizations is that negotiation is required at some point of the relationship with the abortion-considering client. The concern is that any negotiation morally disrespects the intimate nature of the mother’s position. This could have the same moral geometry as a massive bribe to a woman to go through with her wedding after she has called it off. The monetary offer itself is disrespectful, even if it is financially attractive. The reply is that an unwilling mothers’ moral status is not insulted by a mere offer of service, provided the three conditions are satisfied: a) full knowledge of the purpose of the service relationship; b) free exit; c) no state restrictions on morally permissible mutually attractive deals.25

Finally, a fourth objection to service is that pregnant women not willing to be mothers do not deserve service. Such persons put themselves morally out of bounds by being reflectively indifferent to the consequences of careless sex. However, consider unwilling mothers the equivalent of nannies. Nannies do not have a morally wrong attitude if they do not love their

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24 The term “rescue” as used here may be misleading. Rather than the evangelical perspective, the Catholic value of sponsorship better expresses the notion. See Rudy, p. 36, p. 91, and ch. 3. My argument posits that actions taken with positive motivations will have better unintended secondary consequences than those with negative motivations.  
25 A similar practical and moral concern, left undeveloped, is whether it will be feasible to identify biological fathers who flee due to the risk of punishment.
charges as the children’s natural mothers do. Obviously it is fitting to pay nannies to serve rather than threatening punishment if they do chose to not serve.

Service personnel, be they volunteers or committed professionals, consider serving the unborn intrinsically valuable and a profound opportunity. For such persons, the negligent sexual behavior of their clients is not grounds for prohibiting their own service to their unborn. To clarify the point, service can be a unique means for persons to honor their authentic moral values.

Section 6: The Democracy Provision
In addition to service, authenticity in word and deed can occur through democratic participation. But the democracy provision is also a political settlement mechanism. It rejects the solely legal settlement of both P, the time period of shared punishment, and R, the resources provided to the service organizations. The democracy provision places no limit on the content of P and R; there is no objectively “correct” standard apart from just democratic procedure. The claim is that gender-symmetric politics will set these two variables such that the three moral threats of unwanted pregnancies will be in the aggregate minimized.

The claim is that the three policy provisions effect an incentive structure for a two variable game of political bargaining.26 Game theory could model different levels of P and R given different motivations of the players. With complete and symmetric information the game would be optimally positive sum. Adjusting two variables suggests four general political positions:27

- Conservative - increase punishment/increase service
- Liberal- decrease punishment/increase service
- Authoritarian - increase punishment/decrease service
- Libertarian- decrease punishment/decrease service

27 These four positional labels are only organizing guides and not substantive.
All four of these value positions could permit some abortion and some violation of the mother’s liberty. For example, the authoritarian might claim that the unborn should not be bartered as a coin of political strategy. Any policy that permits any objectification of the unborn is unjust. In fact however politics frequently barters human lives. For example, taxes that would fund traffic safety programs to reduce the death of the innocent are limited to protect property rights. In war soldiers’ lives are traded for territory. Similar justifications can apply to bartering fetal lives.

One objection to the democracy provision is that it requires state coercion. For example, Kathy Rudy argues for no state involvement so that moral communities can “sell” their conceptual wares directly to citizens rather than indirectly through legislative and legal battle. Abortion implicates many moral commitments: love, courage, indifference, grief and ceremony, service and celebration, fear of punishment and so on. Democratic discourse attempts not simply to aggregate preferences but to reinterpret and evolve these moral commitments. An effective and legitimate democracy will involve both unconstrained discourse and coercive institutions.

To summarize the demands of the policy proposals’ three provisions:

- Morally wrong abortions should be punished, with both parents punished equally.
- If resources are expended to minimize abortion, they ought to support women willing to carry their pregnancies before going to frustrate the ends of unwilling women.
- The political contests that seek to satisfy these aims should be settled by democratic means that affirm the authenticity of plural moral communities.

Section 7: Concession as Inauthentic

A central objection to these demands is that it is unjust to coerce persons to make concessions in their authentic values. The injustice is not failing to promote the “good” of prevailing in political contest, nor remaining psychologically comfortable. The injustice tracks what is

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28 Rudy, p. 142.
logically meant by a moral value. To concede a value is to violate that value and thereby to act immorally. To lie for a good cause for example does not mean one has not lied. One has still violated the prohibition against lying. Being morally authentic requires sacrificing the good cause to avoid lying. Similarly, leaving the abortion policy’s P and R open to democratic determination will require that persons who authentically judge the termination of a fetus to be morally unacceptable to accept some fetal deaths. The same applies to those who judge violating a parents’ liberty as immoral. Therefore, the proposed policy is unjust relative to any policy that protects qualifying moral communities from masking a value concession.

On first blush, a qualifying moral community is the one with the correct moral values. But correctness is a matter of theoretical authority, not practical authority. The practical authority of state policy restricts only conduct, not belief. And in what ways are actions and beliefs relevant to concession? How “concession” and “authenticity” are understood is itself a theoretical question. I propose that to be inauthentic is to defect on one’s duties of stewardship. And citizens have three lexical duties of stewardship: to legitimate state constitutionalism; to their chosen moral community; and to their chosen self-interest.

Constitutional stewardship takes lexical supremacy due to its intrinsic nature. It is optional whether to recognize constitutional obligations or the practical opportunities (and threats) of the state of nature. But the state of nature provides almost no opportunities to debate and practice the values that transcend self-interest. The practical conditions necessary to authentically judge one’s own beliefs and courses of action must be constitutionally coordinated. The threat of a value concession is not a reason to defect on constitutionalism but a reason to

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29 This is not a claim that all values generate deontic demands.
30 The reverse is also true: authenticity can be demonstrated by giving the good cause its due over the prohibition on lying. Either example affirms rather than negates the formal point.
participate well.\textsuperscript{31} We conclude that under legitimate constitutional authority it is not inauthentic to obey an abortion policy that requires a value concession.

\textsuperscript{31} Participating well can include attempts to morally improve the constitution or to exit the polity.