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Contraception and Abortion: A Utilitarian View

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Conservative and liberal approaches to the problem of abortion are oversimplified and deeply flawed. Accepting that the moral status of the conceptus changes during gestation, the author advances a more sophisticated and nuanced perspective on contraception and abortion policy. He also critically questions the moral relevance of the conceptus' membership of the human species and reviews other crucial meta-ethical presuppositions to bolster his case. Through applying a form of rules in practice utilitarianism within the context of overall population policy, he provides a compelling ethical and legal framework for regulating contraception and abortion practices.

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1. Introduction

There are very few ethical disputes that arouse the passion and bitterness of its protagonists as much as the abortion controversy. Conservatives steadfastly urge that the conceptus¹ has the same moral status as other human beings. In opposition, liberals just as vehemently make the counterclaim that the conceptus is not a human being, and so has correspondingly no or considerably less moral status.² The conceptus, it seems, is stuck in a no-man's land between contraception, which is generally regarded as morally permissible, and infanticide, which is equally generally considered as morally abhorrent. If the conceptus is akin with the germ cells (spermatozoa and ova) in not being a human being, then abortion is no more morally blameworthy than contraception. If the conceptus, on the other hand, is a human being, then to kill it is as morally repugnant as killing a newborn infant.

This dramatic polarization between the conservative camp and the liberal camp, centred as it is around the question of whether the conceptus is a human being, is, I hope to show, a much too simple approach to the abortion problem. Between conception and birth, the conceptus develops continuously from a single-celled microbe, comparable in complexity to an amoeba, to a multi-billion-celled, conscious organism that displays a complex relationship with its environment, and whose form and function is comparable to an adult human being. To attribute the same moral status to such a being in all of its various stages of development courts serious difficulties, as the extreme positions have demonstrated.

The conservatives' moral condemnation of a very early abortion performed on a minor pregnant due to rape is just as unconvincing as the liberals' claim that a very late abortion performed solely for the sake of avoiding a postponement of an overseas holiday is not morally questionable. These extreme positions are both unconvincing because they make the gaining of moral status an all or nothing affair which occurs at a single point in time during the gestation period. And this point is made to correspond to that stage at which the conceptus is believed to become a human being; either at conception or at birth.

It should not only strain our credulity to think that full moral status is gained in an instant during a long and complex process of development. Equally suspicious is the view that the property of being a human being simpliciter is sufficient for being accorded such status. Why should there be a general prohibition against killing human beings, but not against members of other species? The conservative and liberal alike, in their passionate attacks on the opposing side's belief that the conceptus is or is not a human being, have failed to address the question of why this property is morally relevant at all to the morality of killing.

¹In this essay, I will refer to the zygote, embryo and foetus by the general term, 'conceptus'.

²For the purposes of this essay, (a) 'moral status' may be defined operationally as: x has the same moral status as y iff x is the subject of the same obligations as y , and (b) a normal adult human being is the paradigm case of a being with full moral status.

What is needed is an approach to the abortion problem that recognizes these biological and conceptual complexities. In the course of this essay, I hope to develop such an approach. In the next section, I will continue and complete the task of outlining the central theoretical difficulties faced by the traditional views. I will do this in order that we may better appreciate the mistakes that need to be avoided.

2. The Traditional Positions

The traditional debate between conservatives and liberals centres on the application of some prohibition against killing, such as ‘It is always wrong to kill an innocent human being’, or ‘It is always wrong intentionally to kill an innocent human being’. Such prohibitions are often worked into some more comprehensive normative theory. The more usual of these theories are the acts and omissions doctrine and the doctrine of double effect.

The acts and omissions doctrine, as it is applied to the abortion problem, stipulates that there is a crucial moral distinction between killing an (innocent) human being and letting one die. According to this doctrine, the former is absolutely prohibited while the latter is allowable or is less blameworthy. The doctrine of double effect, on the other hand, when applied to acts of abortion, is used in conjunction with an absolute prohibition against the intentional killing of (innocent) human beings. The purpose of the doctrine is to indicate the conditions under which the killing or letting die of an (innocent) human being is allowed. These conditions are, briefly stated, that the act of killing or letting die must not involve the transgression of an absolute prohibition, the death must not be intended, the death must be sufficiently outweighed by some good effect, and this good effect must not be a direct causal product of the death.

The acts and omissions doctrine has not survived fatal objections levelled against it,³ even in spite of recent defences.⁴ I have nothing more to add to these well-known objections here. The doctrine of double effect has also been severely criticized and found wanting.⁵ I have dealt with this doctrine in detail my Allan [2015b]. All such absolute prohibitions against some or all forms of killing human beings, however, have one defect in common; they all prohibit some rare cases of killings that seem morally obligatory.⁶

The conservatives who advocate some such absolute prohibition are in a doubly difficult position, for they have so far failed in their attempt to demonstrate that the conceptus is a human being and, therefore, covered by the absolute prohibition. The liberals’ attack on this point seem well-founded.⁷ Conservative discussions on this issue have played fast and loose with the meanings of such varied terms as ‘human’, ‘human being’, ‘person’, ‘life’, ‘human life’ and ‘humanhood’, often conflating their meanings with the result that obvious fallacies ensue.⁸ For example, conservatives sometimes claim that the zygote of human parents is human (it is not canine, equine, etc.) and, therefore, is a human being. The fallacy is exposed by the fact that the spermatozoa and ova (the germ cells) of human parents are also human (they are not canine, equine, etc.), and yet conservatives do not equally go on to conclude (and rightly so) that germ cells are human beings.

³See, for example, Glover [1977: ch. 7], Tooley [1973, 1980], Bennett [1966] and Thomson [1973].

⁴For recent defences, see Foot [1971], Dinello [1980], Murphy [1980] and Trammell [1980].

⁵See, for example, Glover [1977: ch. 6] and Thomson [1973].

⁶For some examples, see my Allan [2015b: §3.4].

⁷See, for example, Becker [1975] and Kohl [1974: 41–5].

⁸See, for example, Noonan [1973], Ramsey [1971] and Grisez [1975].

But even if the conservatives were successfully able to show that the conceptus from the time of conception is a human being, their case would not yet be fully established. For the conservative, to kill the human zygote is as morally unjust as the past discrimination practised against Negroes during the time of the slave trade.⁹ However, it may be the case that slavery is unjust not because Negroes are human beings, but because they share with us some other morally relevant characteristic, such as self-consciousness or the capacity to suffer. In fact, it is difficult to see how species membership, in itself, can be the required morally relevant characteristic.

Unless the conservative can demonstrate why species membership *simpliciter* is any more a morally relevant criterion for enjoying moral status than race or gender membership, he may turn out to be as unjust as the liberal opponents that he criticizes. If this charge of unjust discrimination on the basis of species membership, or speciesism (like racism and sexism), is correct, and I shall argue below that it is, then the moniker, 'Right to Life' movement, is a misnomer. The movement is misnamed because it seeks to maintain special status for members of its own already privileged species at the expense of the lives and sufferings of those creatures not endowed with the good fortune of being a member of the privileged class, *homo sapiens*.

Some conservatives, in order to circumvent the semantic difficulties they experience in classifying the human zygote as a human being, have claimed that we have the same obligations to potential human beings as we do to adult human beings (or that they have the same rights as adult human beings). However, this is far from obvious. It seems nonsensical, even meaningless, to allow zygotes the freedom to travel, to vote in elections, to purchase alcoholic beverages, and so on (or to grant them the corresponding liberty rights).

A second difficulty for the conservatives is that the class of objects that can be identified as the class of potential human beings is relative to the technological capabilities of the day. In the future, it may become possible to clone any given cell of a living human being into a new adult. Under these circumstances, the conservative would be forced, for the sake of consistency, to morally prohibit haircuts and shaves, nail clipping, removal of diseased organs, and so on, for all of these actions would result in the deaths of potential human beings.

The conservative may reply that it is only potential human beings who will reach adulthood during the natural course of development that we are obligated to keep alive. However, this rebuttal is faced with the paradoxical conclusion that an *in vitro* zygote has no moral status while an *in utero* zygote has full status. What is the reason for this discrimination? In other similar circumstances, we do not discriminate between beings with natural potential and those with artificial potential. A bomb victim, for example, whose potential to stay alive is dependent on the availability of medical technology, does not forfeit our obligation to keep him alive merely because to keep him alive requires artificial means.

But even if this distinction between natural and artificial potential were found to be morally relevant, the conservative would be faced with a further serious objection.

⁹See, for example, Noonan [1973].

Spermatozoa and ova have the potential to reach adulthood during the course of their natural development, and so are in this respect akin to zygotes. And yet we are under no *prima facie* obligation to copulate whenever possible in order to maintain the lives of as many germ cells as possible.

The Right to Lifer's claim that the right to life is anterior to all other rights, and the one on which all others depend, is similarly untenable.¹⁰ There is no logical fallacy committed in denying a sentient¹¹ creature a right to life while granting it, say, a right to be free from unnecessary suffering. Of course, if the creature is killed it no longer has the right to be free from unnecessary suffering. However, this only demonstrates that its right to be free from suffering is logically dependent on its being alive and not on a right to life.

The liberal position is similarly fraught with difficulties. The traditional feminist position that people have the right to control their own bodies, and that this entails that women have the right to abortion, assumes without argument that there is no need to take into consideration the welfare of other parties. Furthermore, it is not at all clear that people have an inviolable right to determine what happens to their bodies. For example, the state may be obligated to conduct compulsory vaccinations in the interests of its constituents. It may be similarly obligated to conduct the compulsory sterilization of grossly mentally retarded public patients afflicted with severe heritable diseases.¹² The more sophisticated defence by Thomson [1971], which recognizes that there may be a conflict of interests, stands or falls on the credibility of her theory of liberty rights. In my discussion of Tooley below, I will give reasons for thinking that this theory is untenable.

Tooley [1974]¹³ has provided a radical liberal defence of abortion that also condones infanticide. He has argued that abortion and infanticide do not infringe on the right to life of the conceptus and infant because the conceptus and infant have no such right. This is because, according to Tooley, a necessary condition for a being having a right to *x* is that he/she has the capacity to have the corresponding desire for *x*. For Tooley, the conceptus and infant have no such capacity to desire a future life. Tooley's actual argument is more complicated than this; however, this summary captures its central point.

The major difficulty in Tooley's analysis lies in the apparent independence of many rights from their corresponding desires. A young child has a right to a free secular education and an adequate nutritional diet, even though he/she does not have the capacity to have the corresponding desire. Similarly, patients with severe cognitive dysfunction have rights to physical protection and a stimulating environment even though they do not have the capacity to desire such. I think Tooley fails to distinguish between the having of a right and the right-holders capacity to recognize that right.

¹⁰See, for example, N.S.W. Right to Life Association submission 585 to Royal Commission on Human Relationships, reported in Evatt *et al* [1977: 149]. See also Margaret Tighe, president of Right to Life Association of Victoria, Letters to the Editor, *The Age*, 25th September, 1980.

¹¹I take a 'sentient' being to be a being capable of feeling pleasure and pain.

¹²For a fuller presentation of these arguments, see Sumner [1981: 49–57], Warren [1975: 121] and Roe v. Wade [1973: 78].

¹³Tooley's paper was originally published in 1972 in *Philosophy and Public Affairs* 2/1. A revised version of the same essay appears in Feinberg [1973: 51–91].

Even if Tooley had succeeded in giving an account of what we ordinarily *mean* by a 'right', he has not given us any reasons for thinking that there *are* any such rights. He has failed to provide a theoretical grounding for the view that adults have a right to life whereas conceptuses and infants do not.¹⁴

The traditional moderate views on abortion also fall short on making their case. Only the most credible of these warrants brief comment here. This is the view that viability, the point during gestation at which the foetus is able to survive *ex utero*, marks the moral dividing line between allowable and wrongful abortion. After the point of viability, the foetus is able to lead an independent existence, being no longer physically dependent on its mother for its life. The most serious objection to this view is that in other situations of dependence, we do not think that the physical dependence for life of one being on another is a sufficient reason for denying an obligation to keep the dependent being alive. Quadraplegics, Siamese twins and some mentally incapacitated fall into this category. In any case, even the neonate remains physically dependent on others for its continued existence for some considerable time after birth. The moral dividing line, it seems, is not so easily drawn.

This concludes my summary critique of the traditional stances on abortion. Neither conservatives nor liberals have provided a satisfactory account of the ethics of abortion, primarily because both sides have presumed that the gaining of moral status is an all or nothing affair. However, just as importantly, neither side has fully appreciated why the question of abortion strains the very limits of our moral sensibilities. Neither side has recognized that the problem of abortion is a complex and perplexing problem precisely because there is a conflict of interests between two parties, the pregnant woman and the foetus.¹⁵ The conservative and the liberal alike, by almost exclusively ignoring the interests of one of the parties, have been led to their respective untenable, one-sided solutions.

The complexity of the problem is many times further magnified by the fact that the biological and psychological nature of one party to the conflict is not fixed, but varies exponentially from the beginning to the end of the gestation period. To regard the newly fertilized ovum (which is more akin biologically and psychologically to the germ cells) and the late term foetus (which is more akin biologically and psychologically to the adult) as having the same moral status is to take a too simple approach. To fix on some intermediate point during the gestation period as the point at which the conceptus suddenly gains full moral status, as the traditional moderates do, is also to fail to do justice to the gradual development of the conceptus' biological and psychological characteristics.

¹⁴Sumner [1981: 57–64] has levelled a similar criticism against Tooley.

¹⁵I take it that something is in a being's interest if it promotes his/her/its future pleasure or happiness. It is debatable whether the present capacity to feel pleasure or pain is a necessary condition for a being's having interests. If this were the case, then the earliest point at which the conceptus would have interests is the time at which it gains sentience; sometime later than the 18th week of gestation. If the weaker condition of future or present capacity is favoured, the zygote would have interests. However, if this were the case, germ cells would also have interests. I am not sure that we would want to admit that, say, spermatozoa had an interest in frequent sexual intercourse.

The interests of the conceptus are not constant during its development. Neither is its interests dramatically altered at some fixed point during this developmental process. The abortion question is even more complicated than this, however. So far, I have avoided mentioning the interests of third parties. A credible view on abortion must take into consideration the interests of the prospective father, the state, and any other affected persons and institutions. Below, I will sketch out how I think such a view should look.

3. A Utilitarian View

3.1 Meta-Ethical Preliminaries

Many of the views expressed on the abortion question prove unsatisfactory because of their shallowness. They neglect to indicate the source and nature of the principles used in formulating a moral view on abortion; they fail to ground the abortion question in an overall ethical theory. So, for example, much is heard of the conceptus' 'right to life' and the woman's 'right to control her own body'. But little is heard of the origin of these rights and how such rights are related to other rights and obligations. What I am saying is that a view on abortion and related moral questions will stand or fall on the meta-ethical and normative theories that it presupposes. With this in mind, I will begin with the essential task of outlining my presuppositions.

I shall adopt a form of non-cognitivism¹⁶ known as sophisticated emotivism. This view of ethical discourse was propounded by C. L. Stevenson in his two major works, *Ethics and Language* [1944] and *Facts and Values* [1963]. I further articulated and defended this approach in my Allan [2015a].¹⁷ On this view, moral judgements (as opposed to non-moral judgements) are fundamentally descriptions of objects, people and events inextricably coupled with the speaker's expression of his/her highest-level attitudes to the thing described. An essential aspect of such judgements is the speaker's invitation-so-to-speak to the hearer to share the speaker's attitude. These highest-level attitudes, or ideals, that are involved in moral discourse concern the type of person that the speaker desires to be and the kind of world that he would like to see. In this respect, our moral judgements are independent of our day to day lowest-order wants. So, we may often want that which we judge to be bad and voluntarily do that which we judge to be wrong.

What of cognitivist alternatives? Intuitionist, divine command, naturalist and natural law theories (both theistic and naturalist versions), in my view, do not succeed in giving an adequate account of moral discourse. One key reason for this failure is that their proponents cannot give us a convincing reason for acting in what each of them stipulates to be the 'morally right' way and for desiring what each of them considers to be 'good'. Why should we be attracted to certain non-natural supervenient qualities and be motivated to act in accordance with certain necessary synthetic *a priori* constraints on our behaviour (intuitionism)? Why should we act in accordance with some deity's commands (divine command theory) or act in accordance with some natural law (natural law theory)? Any answer offered by the cognitivist is, at bottom, either arbitrary ('just because, and that's the end of the matter'), a simple appeal to authority ('because *God* commands it'), which itself is arbitrary, or a relapse into egoism.

¹⁶I take non-cognitivism to be the view that the primary function of moral utterances is to express the speaker's attitudes or preferences. Cognitivism, on the other hand, is the view that moral utterances express a special class of moral facts that are essentially independent of the speaker's attitudes and preferences.

¹⁷'Non-cognitivism' and 'emotivism' are somewhat misnomers for C. L. Stevenson's meta-ethical theory. He had stressed the special function of factual reasoning in ethical discourse, moreso than any 'cognitivist' could. Secondly, on his theory, moral judgements are not ejaculations of emotion, but expressions of the more psychologically stable, and cognitively dependent, attitudes.

Consider one such answer. Here, the cognitivist responds to the challenge by saying that most of us think and act morally because we are naturally so predisposed to think and act. Cognitivists who argue this way are faced with the difficulty of explaining why we should compel others to think and act the way we do and punish those who happen to think and act differently. Any solution is bound to provide an arbitrary or question-begging answer ('because it is wrong') or lapse into some type of interest theory ('because punishment is in his interest' or 'because it is in the community's interest'). Some solutions are a synthesis of both, especially in those cases in which the cognitivist divides the moral sphere into moral rules that satisfy someone or some group's interests and those that do not. Answers based on the interests of people other than the person to whom the appeal is made will simply beg the further question of why we should satisfy the interests of these others.

In many cases, arguments for the social utility of specific divine commands or natural laws are accompanied by rather trite social analyses. These include public appeals for absolute prohibitions on voluntary euthanasia, divorce and marriage between homosexuals. In any case, if the deity's commands or his natural laws did align with social utility, this would be a contingent fact that could have been otherwise. The link to communal benefit and the attendant reason for choosing to obey once again appears arbitrarily imposed.

Some proponents of divine command and theistic natural law theories contend that one must obey the commands of their deity, or act in accordance with his natural law, for it is in one's own interests to do so. These kinds of answer still fail to escape the charge of arbitrariness: Why did the deity command just *these* commands, or institute just *this* natural law, and not any other?

This move also comes at the expense of a regression to a *de facto* egoism. To abide by a command, or to act in accordance with a natural law, even when one knows that to do so will involve allowing avoidable suffering, for the sake of one's own future welfare, is simply selfishness in the guise of religious piety. For these kinds of moral dilemmas, we are right to question the beneficence and motives of such a deity who commands his followers to opt for the 'ethical' egoistic option even in the face of the needless suffering that will ensue.

All of these unconvincing answers mask the real, but veiled, motivations of the cognitivist. Through the use of ethical language and moral discourse, they are doing no more than urging us to adopt the same pro-attitude as they are to their perceived necessary synthetic *a priori* constraints, their deity's commands, etc. Their appeal to 'moral facts' about divine commands and supervenient properties, etc., serve as the (mistaken) motivational bridge for getting their audience to act in accord with the interests of the individual and the community. As commendable as their feelings for the welfare of the individual and the community are, the central place they give to supposed intervening divine commands, natural law and supervenient properties in their meta-ethical theories put them at risk of giving voice to sectional interests and socially conditioned prejudices. Arguments for or against abortion founded on such religious sanctions or supposed self-evident moral truths are, on my view, based on mistaken metaphysical assumptions and unsupported action-guiding principles.

We have seen that the cognitivists' answers to the question of why we should act morally are fraught with problems. What is accounted for with difficulty and artificially within a cognitivist's scheme, however, is explained easily and naturally on a sophisticated emotivist's rendering of moral language. Sophisticated emotivism draws a direct link between moral judgements and practical action. For a sophisticated emotivist, a person is motivated to act in accord with what they deem moral because such deeming is the expression of their highest-level motivations.

In addition to the problem of motivation, the intuitionist, divine command theorist and theistic natural law theorist are faced with another problem not faced by the naturalist. This is a problem of ontology. The historical and scientific evidence to date makes the existence of a supernatural deity, either immanent in the cosmos or as its transcendent creator, guiding the lives of men and women, highly improbable. Meta-ethical theories dependent on the existence of such a being, therefore, rest on shaky foundations.

Similarly, I think the view that there are supervenient non-natural properties and synthetic *a priori* truths is encumbered with insuperable psychological and epistemological difficulties, and, therefore, also untenable. Our intuitions are partly the result of our social conditioning (and partly the result of our genetic constitution), and so should not be relied upon in an unreflective and uncritical manner. By appealing to supposed unmediated and immediately experienced intuitions, we are more likely to be resistant to moral reasoning and remain content with our own personal biases and narrow preconceptions.

Arguments about the morality of abortion typically appeal to a general principle of the form that it is wrong to kill an innocent human being. Returning to the question of motivation, an adequate meta-ethical theory should explain why a moral agent would want to act in accord with such a moral principle.

Cognitivist theories of the subjectivist and relativist type appear to explain moral reasoning and motivation quite naturally. Meta-ethical subjectivists and relativists render moral injunctions, such as '*x* is the right thing to do' as 'I prefer doing *x*' or 'My social group prefers doing *x*'. When asked about a morally obligatory act, 'Why do *x*?', the subjectivist's and relativist's answer that they or their social group prefers to do *x* flows seamlessly from their analysis. However, their answer seems entirely misguided. To support an ethical stance with the reason that the speaker or the speaker's social group supports it is not to give an ethical reason at all. A reason in support of an ethical view must, of necessity, transcend the individual moral agent and his parochial allegiances.

When we reflect on what it is to give a moral reason for acting, we can easily contrast it with what it is to give an immoral reason. An immoral reason is one that takes one's own interests or the interests of one's own favoured group into account while discounting or ignoring the interests of others. To think and act morally, on the other hand, is to be free of bias and prejudice; to be impartial in one's treatment of others.

We rightly feel meta-ethical subjectivists and relativists have missed entirely the central importance of impartiality in ethical discourse.¹⁸ This notion of objectivity

¹⁸This notion of the centrality of impartiality to ethical discourse is a dominant theme in other major meta-ethical views, such as R. M. Hare's prescriptivism and Immanuel Kant's categorical imperative.

delineates moral discourse from other discussions about human decision-making, such as planning your next holiday with your spouse and deciding which train to catch. It is in this sense that 'objectivity' is central to ethics and not in the elusive but mistaken idea of acting in accord with some realm of 'moral facts'. Here, 'objectivity' in ethics is contrasted with 'subjectivity'; where 'subjectivity' is the placing of one's interests and that of one's social group above the interests of others. I will further develop this notion of impartiality in the next section on normative ethics.

I will end this meta-ethical preliminary with a short note on 'rights' talk. Some cognitivist meta-ethical theories employ 'rights' as a primitive moral concept. The general criticisms of cognitivist theories that I have offered above also cover such 'God-given rights' and 'natural rights' theories. Many of these so called 'rights' seem to appear from nowhere and, conveniently enough, at precisely the time that they are required. For example, the Catholic Church, on the issue of state aid to private schools, proclaims that 'Every child, simply because it is a human being, is entitled to expect a state-assisted education where the assistance is expressed in terms of a "base grant" which can be topped up according to the "needs" principle'.¹⁹ It is left as an inexplicable mystery how such a 'right', presupposing as it does such complex social and monetary concepts as 'the state' and 'base grant', can be 'simply' derived from the mere fact that a being belongs to a particular biological species.

My own view is that a utilitarian theory is the most able for providing an adequate grounding for the attribution of rights, and, furthermore, is the only theory that can provide a satisfactory and non-arbitrary method of arbitration between conflicting rights. (Although, I must admit, a social contract theory almost succeeds in providing such a grounding and method of dispute resolution.) None the less, for a utilitarian, the notion of a 'right' is a derivative concept, and so is not essential to the determining of the moral status of abortion and related acts. The primitive moral concepts of the 'good' and 'duty' or 'obligation' are all that is required for a utilitarian analysis.

¹⁹Reported in *The Age*, 10th February, 1983: 1.

3.2 Normative Ethical Preliminaries

The upshot of the meta-ethical considerations canvassed in the previous section is that for a position to be counted as ethical, it must, of necessity, take an objective viewpoint. Whether a decision concerns who should be punished, how material wealth should be distributed or what rules should govern marriage, decision-makers need to treat the various interests of the parties involved impartially. To be objective in an ethical sense, the interests of each party should be considered equally, irrespective of the identity of the interest holder. Applying the principle of impartiality means giving no greater weight to the interests of one being simply because of its membership of a particular group. Giving preference on the basis of race, gender or species *simpliciter*, for example, contravenes the requirement for objectivity. This requirement for impartiality, coupled with a naturalistic view of the world devoid of religious concepts and other cognitivist baggage, seems naturally to lead to some form of utilitarianism. On this view, interest satisfaction is good in itself and all else is good or bad, right or wrong, commensurate with the amount of interest satisfaction that it produces.

Utilitarian normative theories vary according to what is to be regarded as interest satisfaction (what is the good) and what is to be appraised (what is right). On the first question, classical (or mental state) utilitarians view happiness or pleasure as the good while preference utilitarians regard the satisfaction of preferences to be the good. With due recognition of the challenges faced in defining and measuring the mental states of pleasure, happiness, pain and suffering, I do think that the classical view gets to the core of what it is we value and disvalue intrinsically. For the purposes of this essay, I will assume the mental state view. Whether we choose the mental state view or the preference view, however, will not impact how the problem of abortion is to be decided. I shall have no more to say on this here.

On the question of what is to be appraised, act utilitarians apply the utilitarian calculus to the individual acts of moral agents (such as an act of promise breaking). For rule utilitarians, on the other hand, what should be judged for utility is the general rule (such as 'never break a promise'). No normative theory is without its problems; however, I consider the best answer to this question is provided by a third option. This view is defended by J. Rawls [1967] in his seminal essay, 'Two Concepts of Rules'.²⁰ This third option, rules in practice utilitarianism, can be viewed as a variant of rule utilitarianism. Whereas the early rule utilitarians saw moral rules as simply generalizations of individual acts, rules in practice utilitarians argued that moral rules logically precede the acts they describe.

Rules in practice utilitarianism arises from an initial consideration of what is in the interests of rational, adult human beings. A little reflection reveals that our interests are best served by social cohabitation with other rational adult human beings. (I exclude from consideration here rare cases, such as extreme religious ascetics, who desire the barest minimum of social contact.) By participating in a mutually dependent social community, we are able to satisfy many important interests that would not otherwise have been satisfied. For example, we can cultivate and enjoy long lasting personal relationships, reward

²⁰Rawls' essay was first published in 1955 in *Philosophical Review* 64: 3–32.

ourselves in intellectual pursuits, such as philosophy and the sciences, and find pleasure in the arts, such as music and painting. Most notably, we have rid ourselves of the fear of the elements through our remarkable improvement in our material condition brought about by the specialization and the division of labour.

The maximization of utility, therefore, requires the formation and continuance of social life. However, social existence is not possible unless the members of a society are able to co-ordinate their activities in order to achieve their social and individual goals. To achieve such goals, each member must reasonably be able to predict and depend on the actions of others. Specific roles and duties in a number of areas of human behaviour must be set up for this purpose, along with a system of penalties for infringements of duties and a specification of allowable defences against punishment.

What results from these considerations is a set of social practices or institutions. Each practice will be specified by the rules defining the particular roles, duties, penalties and defences. Social institutions here include private ownership, marriage, punishment, public education, money, parliament, and so on. The rules governing private ownership, for example, define moves within the practice, such as 'buying', 'contracting', 'title transfer' and 'stealing'. What rules in practice utilitarianism contributes uniquely to this analysis is the observation that the descriptions of such acts within a practice have no meaning except in terms of the rules that define the particular practice. The rules, in this sense, are logically prior to the acts.²¹

The upshot of this is that because it is certain social practices that are of great social utility, and because act-descriptions subsumed by a practice can only be defined by the rules governing the practice, utilitarianism is best thought of as principally justifying the practice and not the single acts falling under the practice. Singular acts subsumed under a practice are justified or unjustified in a derivative sense; in terms of the justification or criticism of the practice that defines it.

Rules in practice utilitarianism has the distinct advantage over act-utilitarianism in that it recognizes that social practices are not built up by the application of act-utilitarian considerations to many singular acts, but that the singular acts themselves are defined in terms of the practice. This allows the utilitarian to avoid the intractable difficulties confronting act-utilitarianism from well-known counterexamples. In the past, act-utilitarian attempts at dealing with such cases have proved, I think, unsatisfactory.

Such scenarios include breaking desert island promises, stealing money from rich people to give to charity, using scarce resources in times of rationing, punishing innocent people and avoiding compulsory voting in safe seats. In each of these counterexamples, the act-utilitarian is committed to approving the action of the moral agent as the agent's action ensures a slight increase in utility while there is virtually no chance of the act being discovered. In contrast, the rules in practice utilitarian is in agreement with the considered moral view that condemns the agent's act in each of these cases.

²¹This version of utilitarianism is not only applicable to state institutions. It likewise applies to small social groupings, such as bowling clubs, and to large international organizations, such as the United Nations.

The rules in practice utilitarian is now able to account satisfactorily for the (mostly) deontic status of our moral acts. When we adopt a practice on utilitarian grounds, such as rationing, promising, private ownership, and so on, we do not allow defences of ration-breaking, promise-breaking, stealing, and so on, based on act-utilitarian considerations. We necessarily abdicate our role as act-utilitarians in order to maximize our communal interests. This deference is written into the rules of the practice.

Importantly, though, the practice should allow exceptions in extreme circumstances. We allow, for example (on utilitarian grounds), for private citizens to disregard a ration in order to save a life. Such considerations are either explicitly written into the rules of the practice or are part of the discretionary ambit allowed judges hearing such cases. Acts subsumed by general rules, such as 'Do not disregard a ration', 'Do not steal', then, are largely deontic, but not absolutely.

A weaker form of rules in practice utilitarianism can be applied to less formal and less structured social practices, such as truth-telling and respect for privacy. A social rule that allowed act-utilitarian defences for, say, lying and phone-tapping would engender widespread feelings of uncertainty and anxiety amongst its citizens. Once again, utilitarianism justifies the establishment and maintenance of such practices. These practices have the usual specification of duties, roles, penalties and defences. The respect for privacy practice, for example, specifies which role-players are at liberty to listen in to another person's phone conversation (for example, parent, spouse) and specifies the social penalty for infringement (for example, social rejection and public criticism).

The only difference between this weaker form of rules in practice utilitarianism and the stronger form that identifies some rules as logically prior to acts is that the particular acts to which the weaker form applies do not, in our own language, have any descriptions that are of necessity at least partly specifiable in terms of the rules of the practice. Lying, for example, can be described as saying a falsehood with the intention of deceiving, without any reference to social conventions. I think, though, this lack of logical dependence in these cases is immaterial. Semantic differences based on the contingencies of the English language do not obscure the fact that the weaker rules in practice version shares the essential insights of the stronger version. And they are that our most important moral rules are not built up piecemeal through a continuous application of the act-utilitarian calculus. Our moral rules are justified in the more direct manner of considering their social utility.

The act of abortion may be considered as being subsumed under an informal social practice; the practice of refraining from killing human beings. (Hence the popularity in the abortion debate over the question of whether the conceptus is a human being.) The social practice against the killing of human beings has obvious utilitarian advantages. However, before considering the issue of killing, I wish to discuss briefly a related matter. Abortion is subject to legal restrictions in many countries. So, it is pertinent to this discussion to consider the utilitarian attitude to the relationship between law and morality.

4. Utilitarianism and the Law

It seems indisputable that it is in the interests of all social groups to institute and maintain legal and penal institutions and practices. The advantages are numerous: to co-ordinate the behaviour of its citizens in order to achieve specific social goals, to grant liberties so that individuals may achieve their personal objectives free from unwarranted interference, to distribute the wealth of society for maximum benefit, and so on. Indeed, it is hard to envisage a social group existing for long without such institutions. Political institutions for the distribution of decision-making power are also a necessary prerequisite for continued social existence. As I've argued, for a utilitarian, the form of the political, legal and penal institutions must be justified on utilitarian grounds.

According to rules in practice utilitarianism, once such institutions with utilitarian warrant are established, we abdicate our liberty to circumvent the established political process or to disobey a law simply on act-utilitarian grounds. (These moves would be prohibited by the rules governing this complex system of social practices.) For example, it would be morally wrong to forge extra votes in order to guarantee the election of a political candidate who is working towards the repeal of Draconian divorce laws. Similarly, there would be no moral justification for a citizen evading income tax on the grounds that too much federal income is spent on sports promotions and not enough on housing.

However, if a form of government is clearly the cause of much unnecessary suffering, then its citizens are under a moral obligation to work towards its dissolution. In the case of law, if a particular law results in a terrible amount of needless misery, the citizens of the state are under a moral obligation to campaign for its removal from the statute books and to engage in civil disobedience. In a legal system with a utilitarian rationale, the provision that a law may justifiably be broken if so doing will prevent enormous needless suffering will be written into the rules of the practice. Once again, rules in practice utilitarianism accounts for the mostly deontic requirement for citizens to abide by the law.

There is, then, an intimate connection between morality and legality. However, the connection is complex. In a society in which the political, legal and penal institutions have utilitarian warrant, that which is illegal must also be immoral (excepting, as we saw, those cases in which the legal prohibition causes substantially more suffering than it prevents). This follows from the recognized utility of the social institutions. For the same reason, that which is moral must also be legal (excepting those cases in which an act or omission will substantially increase utility, but is legally prohibited).

The intention of the moral agent figures largely in moral and legal reasoning in many jurisdictions. Deontologists have used this as a criticism of consequentialist theories, such as utilitarianism. Rules in practice utilitarianism can now satisfactorily explain the relevance of intention in determining the moral status of an act or omission. It would be inefficacious to legally prohibit and punish citizens for unintentional acts or omissions resulting in misfortune (unless, of course, the citizen was negligent). Punishing parents for giving birth to a person who later turned out to be a mass murderer, for example, does no help in preventing such murders in the future. For a utilitarian, unintended acts or omissions such as these, then, cannot be morally culpable.

Barring exceptional circumstances, I've argued that where public institutions have a utilitarian warrant, a moral act is a legal act. However, the converse relationship between morality and legality does not hold in such a society. An act or omission may be legal and yet immoral. I don't regard this asymmetry as morally disconcerting for it follows naturally for these two reasons. Firstly, an act or omission of a particular kind may diminish utility, and yet an attempt by law-makers to legally prohibit such acts or omissions may diminish utility even further, rather than increase it. Not all citizens are utilitarians, and not all utilitarians would submit to being legally compelled to act as perfect utilitarians.

For example, by applying the well-accepted economic principle, the principle of declining marginal utility, we know that if the citizens of a state substantially increased its voluntary donations to the poor and disadvantaged, the general level of utility in that society would increase substantially. It would be unwise for a government, though, to compel by legal means all of its citizens to so contribute. Either this act would cause a massive capital outflow from the country, along with the owners of the capital, or the government would be quickly overthrown. Neither alternative would be nothing short of catastrophic. So, even though moral laws and legal laws are inextricably linked in numerous cases, there remains an important distinction to be made, and that is the distinction between that which is immoral and that which ought to be illegal.

The second reason for thinking that although an act or omission may be legal, it may never the less be immoral is this. An act or omission of a particular kind may diminish utility, and yet law-makers may not in actual fact have legally prohibited it, even though they are morally obligated to do so. For example, the Draize test, a particularly painful, but unnecessary, commercial method of testing new cosmetics by gauging their toxic effects on the eyes of conscious rabbits, ought to be legally prohibited. In this country, as yet, this practice is not banned. So, a second important distinction needs to be made about utilitarian laws, and that is the distinction between that which is immoral and that which is in fact illegal.

As these distinctions show, for a rules in practice utilitarian, there remains a large area within the ethico-legal sphere for act-utilitarian considerations. And this area is bounded by those acts and omissions not legally prohibited, either because prohibiting such acts and omissions by law-makers:

- a) is morally wrong because doing so leads to a decrease in utility; or
- b) is morally obligatory, but in actual fact they have not done so.

In short, we do not fully discharge our moral responsibilities simply by being law-abiding citizens living in a utilitarian society.

I have now sketched the basic structure of a credible normative utilitarian theory. This theory is partly explanatory and partly reformist. Utilitarianism explains the existence of and moral justification for many of our most basic social institutions, such as parliament and the courts. On the other hand, it also provides a social critique of our treatment, for example, of the poor living in underdeveloped countries and of non-human animals suffering due to our inhumane practices.

On this theory, the moral status of particular acts of abortion will depend on whether the act in question is subject to the compulsions or prohibitions of either a rule of law or an informal public practice that enjoys a utilitarian rationale. If the act is not covered by any such laws or practices, or the existing laws or practices have no utilitarian justification, then its moral status must be decided on act-utilitarian grounds.

It is prudent, then, to begin by asking: What would an ideally utilitarian set of laws or practice concerning abortion look like? I will not be principally concerned with contractual agreements within private bodies nor between individuals. Neither will I review the existing laws in various countries in order to determine whether they ought to be obeyed. Doing this would involve addressing complex questions about what conditions would need to be satisfied before civil disobedience is justified. In particular, it means asking just how deleterious must the consequences of the application of a particular law be before it is morally permissible, or even morally obligatory, to break it. To answer this question is beyond the purposes of the present essay.

Once an optimal utilitarian set of laws or practice is determined in a particular jurisdiction and is enforced by the community, whatever acts such a set of laws or practice prohibit is *ipso facto* immoral to commit. In the case of acts of abortion, I will argue in §5 and §6 below that such a set of laws and practice should be guided primarily by a reasoned population policy. For acts of abortion that are not prohibited or made mandatory by such a set of laws or practice, act-utilitarian considerations must be applied to determine their moral status. In §7.2 below, I will deal with the application of act-utilitarian principles in deciding these cases.

5. A Utilitarian Maximizing Principle

Governments and informal social groups, in deciding how to maximize net utility, are immediately faced with a theoretical problem when dealing with variable populations. Moral issues concerning contraception and abortion bring this problem into sharp focus. These issues strain utilitarian theory because the classical utilitarian principle of producing the greatest happiness for the greatest number leaves unspecified how this is to be done for populations in which the numbers are not fixed. For such populations, net utility may be increased in one of two ways. It may be increased by either increasing the happiness of the existing population or by the production of extra happy beings.

This lack of specificity of the classical principle has led to the formulation of three different utilitarian principles of maximization. The 'total' view specifies that the aggregate of utility ought to be maximized, the 'average' view countenances the maximization of average utility, while the 'prior existence' view stipulates that the only obligation is to maximize the aggregate utility²² of beings that exist, or will exist, independently of the act or rule under consideration. To help us determine the adequacy of each of these three utilitarian theories of maximization, consider the obligations of a hypothetical deity in creating one world from a number of possible worlds. Judging the competing theories in this manner will allow us to judge them in principle, free from any personal biases that might arise if we considered how they will in fact apply to the real world of human beings, scarce natural resources, and so on. Prematurely dealing with these real world variables creates very complex problems in itself.

Consider, firstly, the 'total' view by imagining a deity with limited power faced with a choice of creating *ex nihilo* either a world with a very small number of extremely happy beings or a world with a large number of beings whose lives are only just worth living. Let us say that the beings in the first option number 1,000 and that each of them has, on an arbitrary scale of happiness, a happiness value of 10 units. The second possible world, let us say, contains 20,000 beings, each with a happiness level of one unit. Let us further stipulate that the creation of either possible world will neither increase nor lessen the happiness of our supposed deity.

For this scenario, the 'total' view entails that the deity is under a moral obligation to actualize the second possible world in preference to the first. (The first possible world has a total utility of 10,000 units while the second totals 20,000 units.) Like many utilitarians, I find such a solution unpalatable. We choke on this solution because it seems that the existence of many beings whose lives are only just bearable is not sufficient compensation for the non-instantiation of an extremely happy being.

The 'average' view is similarly faced with unacceptable consequences. Consider the same deity, but now faced with the choice of either creating a world in which 1,000 extremely happy beings exist, each with a happiness value of 10 units, or a world with 1,000 beings, each with a happiness value of 10 units, plus 1,000 beings, each with a happiness value of 8 units. For this scenario, the 'average' view entails that the deity is morally bound to actualize the first possible world, in which the average utility is 10 units, in preference to

²²Or what amounts to the same thing under the 'prior existence' principle of maximization; the average utility.

the second with an average utility of 9 units. But the only difference between the two possible worlds is that the second has an additional number of happy beings. Anyone who regards happiness as intrinsically valuable must agree that the existence of the second possible world is more valuable than the existence of the first.

Alternatively, consider a choice between the creation of a world in which 1,000 extremely happy beings with a happiness value of 10 units exist and a world in which there are 5,000 beings only slightly less happy, each with a happiness value of 9 units. In this case, the 'average' view entails that the deity is obligated to create the first possible world. This result seems counterintuitive. The slightly lower level of average happiness in the second possible world compared to the first possible world is more than compensated by its much greater aggregate utility (45,000 units compared with 10,000 units in the first possible world).

The 'prior existence' view was designed as a solution to the problems encountered by the 'total' and 'average' views. However, I find it similarly unconvincing. Consider once again our deity with limited power whose utility is unaffected by the decisions he makes. Let us say that this time he has the power to either create a world in which 1,000 extremely happy beings exist or create no world at all. Let us further stipulate that no sentient being could exist or come into existence except for the fiat of our deity. On this scenario, the 'prior existence' view entails that the deity is under no moral obligation to create a world of extremely happy beings under these circumstances. It entails that he has done nothing wrong in abstaining from creating anything at all. But this judgement seems to be in sharp contrast to the motivating spirit behind utilitarianism. The core of utilitarianism is that happiness is intrinsically good, and the more of it there is the better, other things being equal. We must also reject the 'prior existence' view, then, since it is inconsistent with that which is central to utilitarianism.

Without too much effort, we can see why we need to put aside the three utilitarian maximizing theories advocated so far. What is much more difficult to do is to propose an adequate replacement. I cannot pretend to be able to supply such a theory complete in all details and free from problems. What I will do instead is outline what I think is the most promising approach to take in developing a complete theory of maximization. I propose that the 'total' and 'average' theories both contain valuable insights and that in isolating the reasons for their failure, we will have at our disposal the tools necessary for constructing a more viable replacement.

To begin with, the 'total' view recognizes the idea that is central to utilitarian ethics. This axiom is that given any two possible worlds, or states of affairs, with identical average utilities, the state of affairs that contains the greater aggregate utility is morally preferable. What the 'total' view ignores to its detriment is that the loss of a high average utility in one state of affairs cannot be adequately compensated by a simple multiplication of beings with a lower utility, even where the result is the same aggregate utility. In other words, the 'total' view fails because it does not recognize that quality of life, as well as quantity, is important. It falls short in not acknowledging that each individual's aggregate utility, as well as that of the population as a whole, is morally significant. This observation leads me to state my first postulate:

from the equation $m = t.a$ by simply keeping t constant. The second postulate (where average utility is fixed, decreasing total utility is morally undesirable), likewise, can be derived by keeping a constant. In order to decide upon which population level ought to be instantiated in a given problem situation, simply calculate the mixed utilities for all of the population levels under consideration. The population level that ought to be instantiated is that which has the highest mixed utility.

Consider now a more complex population; a population in which its members have different utilities. Here, calculating its mixed utility is slightly more difficult. To accomplish this, first segment the population into sections consisting of members with equal utilities. Then calculate the mixed utility of each segment separately using the formula given above. Finally, simply add the mixed utilities of the separate segments to give the mixed utility of the whole population.

As an example, take the case of a population consisting of 1,000 beings, each with a happiness level of 10 units, and, in addition, 500 beings, each with a happiness level of 5 units. Begin by calculating the mixed utility of each of the two segments of the population, m_1 and m_2 .

$$\begin{aligned} m_1 &= a_1^2 \cdot n & m_2 &= a_2^2 \cdot n \\ &= 10^2 \cdot 1,000 & &= 5^2 \cdot 500 \\ &= 100,000 & &= 12,500 \end{aligned}$$

Then calculate the mixed utility of the whole population by summing the mixed utilities of the two segments.

$$\begin{aligned} m_{\text{total}} &= m_1 + m_2 \\ &= 100,000 + 12,500 \\ &= 112,500 \end{aligned}$$

It is important to note that the maximizing theory advocated here is intended solely for application to problems involving a variable population base. The classical theory stipulating the maximizing of total utility (or what is an extensionally equivalent consideration in this case, average utility) must still be used for fixed populations.

The theory advocated here will now successfully generate all of the moral conclusions arrived at intuitively in my criticisms above of the 'total', 'average' and 'prior existence' views. None of the three theories considered were able to achieve this. In the next section, I will argue that this maximizing principle is able to solve the problem of abortion and, simultaneously, provide a conceptually neat and satisfying solution to the related problem of contraception.

6. A Utilitarian Population Policy

A utilitarian is committed to maximizing utility. The practices of contraception and abortion vary population numbers and, hence, the sum of utility within a population. Without an unambiguous and acceptable maximizing principle, it is unclear what a utilitarian's obligations are with respect to contraception and abortion. In the previous section, I developed a 'mixed' view form of utilitarianism that is now up to the task of guiding how we should manage population size.

It may be thought that the conservative and the liberal are immune to considerations of population size. This, I think, is a mistake. In terms of personhood and biological development, the zygote is very similar to the spermatozoa and ova from which it results. If the conservative is to insist that we have the same moral obligations to a zygote as we do an adult because they are both 'human', for the sake of consistency, he is obligated to prevent as many spermatozoa and ova from dying as possible.

Likewise for the liberal. The feminist view that we have the right to control our own bodies cuts both ways. The right to abort is complemented by the woman's right to conceive and give birth to as many babies as she desires. The consequence of both views for population size and a community's right to regulate it in its medium- and long-term interests is often overlooked by the conservative and the liberal. This short-sighted oversimplification of the issues is made all the more stark considering many countries' concerted efforts to bring their rapid population growth under control.

In considering how a population policy ought to be shaped within a utilitarian framework, I will begin by outlining what is involved in formulating such a policy. As I've argued, an optimum population size for a human society²³ is one that enables mixed utility to be maximized. The optimum population size for a particular country will depend on such variables as availability of natural resources, efficiency of food production techniques, maturity of social infrastructure such as schools and hospitals, and so on.

Consider my own country, Australia. Let us assume, for the moment, that the citizens of Australia are solely responsible for maximizing the mixed utility of its inhabitants and for no other communal groups. It is possible that the mixed utility of Australia's population may be maximized by radically expanding its population level to, say, 50 million inhabitants. On the other hand, it is also possible that it may be maximized by maintaining a relatively steady increase, as it has done over recent decades. With this steady increase, Australians have also witnessed a reasonably even improvement in their standard of living.

Just what our optimum population size is, I am not competent to judge. However, if it is a much larger number than exists at present, there is a further complicating factor that must be taken into consideration. We have been assuming that the Australian community is morally independent, responsible only for the welfare of its own inhabitants. But this is not the case. We share a global responsibility for the welfare of other nations. I doubt, though, that the best way to help developing nations is for all Australians to pack their bags and

²³I will not consider here optimum population sizes for non-human populations, although I think that my maximizing principle can be applied to these cases as well.

head for these countries in a philanthropic frame of mind. It seems that Australians can best offer aid in the short term through provisioning food, clothing, medical supplies, and so on, and in the long term through sharing expertise and technical assistance. This does not mean that we are presently fulfilling our international moral obligations. Far from it. Australia's foreign aid budget is paltry compared with what it ought to be.

So, even though our responsibility to other nations will not require us to alter our basic social structure, it may cause us to revise an expansionist population policy. Considering the mixed utility of the world's population as a whole, the resources required for us to increase our population size in order to maximize our own mixed utility may be better spent in directly improving the welfare of poor nations. Maintaining a relatively stable population level while increasing our aid to other countries may turn out to be a more morally defensible way of increasing mixed utility on a global level. These are complex questions requiring expertise in a number of areas if they are to be answered with confidence.

Whatever Australia's optimum population size may be, taking into consideration our part in maximizing the mixed utility of the global population, our population growth rate should remain steady. This is because rapid changes in population level dramatically alter demographic age distribution, resulting in severe economic dislocation as the number of people producing goods is no longer balanced by the number of consumers.²⁴ It is in our local interest and in the global interest, then, for developed nations such as ours to maintain either a stable or nearly stable population size. Our optimum growth rate cannot be radically different from our present growth rate.

²⁴For a brief discussion, see the editor's introduction in Bayles [1976: xxi].

7. Contraception and Abortion

7.1 Rules in Practice Considerations

Using Australia as an example, I have now given in outline how an optimum population size and growth rate ought to be calculated on utilitarian grounds. The policy developers in each country will need to decide the optimum population size and growth rate for their own communities. Where policies are successfully developed, law-makers should enact laws to regulate births in relation to their country's rate of deaths, immigration and emigration, or to fine-tune their existing laws. This legal framework constitutes the rules in practice utilitarian justification for communal decisions on contraception and abortion social practices.

The establishment and maintenance of such a regulative mechanism is all the more critical in countries suffering from population explosion. In these countries, the preferred family planning choices of the individual citizen, considered in isolation, may be counterproductive to the community's interest. For example, many citizens of these nations perceive that because many children die prematurely from malnutrition and disease, it is in their own interests to bear as many children as possible in order to guarantee that they will be cared for in old age. However, such reproductive practices deplete the already severely limited food and medical resources.

Ignoring the regulation of births in this situation has the same kind of deleterious consequences as not instituting a practice of rationing in times of severe water shortage. Here, individuals behaving according to act-utilitarian principles quickly diminish overall utility as the valuable resource rapidly runs out. What is required in both these scenarios is a regulated social practice that serves to co-ordinate social behaviour and limit act-utilitarian rationales.

It is important to note here that for countries with depleted populations now or in the future, prohibiting abortions with the aim of increasing population size will incur significant negative social consequences. Studies by Donohue and Levitt [2001]²⁵ and Reyes [2007] have shown that a comprehensive restriction on abortion practices within a state leads to considerably higher crime rates. Forcing women with unwanted pregnancies to go to term should be seen as a last option after all other policy options that aim to encourage woman to conceive voluntarily have been exhausted.

In my own country, optimum population growth can be achieved, or nearly achieved, by simply allowing women, in concert with their partners, to determine for themselves whether they will bear children or not. I am making the important assumption here that the combined effect of the death rate (including infant mortality), immigration and emigration balances or is slightly less than the rate of uncoerced births. With that proviso, mixed utility can be maximized in this country through a suite of policies that include granting women an unrestricted legal right to procreate. This policy allows them to act in accordance with how

²⁵For a reply to critics, see Donohue and Levitt [2006].

they perceive their own interests to be, as opposed to constrains their choices with coercive regulative laws.

If, perchance, Australia's growth rate were not optimal, fine-tuning could be achieved through socio-economic incentives. For example, growth rate may be increased by offering higher tax rebates for dependent children or free child care. Conversely, growth rate could be decreased by offering free contraceptive medical procedures or return-to-work tax incentives for women. Such policies, which retain a woman's autonomy, would result in a higher mixed utility compared with legally coercing women to carry through an unwanted pregnancy or compelling them to undergo an abortion against their wishes.

These policy options illustrate the fact that the mixed utility resulting from a particular population policy is not simply a function of the number of births performed or prevented, but also of the type of policy. For any targeted population growth, a policy that expands the range of people's choices by eliminating socio-economic barriers will result in a higher mixed utility compared with a policy that restricts the range of choices by imposing socio-economic sanctions or loss of other liberties. Coercive measures need only be seriously considered in those situations of severe under-population or overpopulation. Even here, though, they should only be contemplated when all other less coercive policies have little chance of succeeding.

In my own country of Australia, then, a liberal contraception and abortion policy seems indicated. This policy is favourable just so long as it is practicable to weigh the aggregate of prevented conceptions and performed abortions against the number of conceptions leading to birth. If the government is able to maximize mixed utility by allowing for the abortion of one conceptus while providing an incentive for or removing barriers to the conception of another, then this ought to be done.

Applying the mixed utility maximizing principle and the utilitarian principle of impartiality, the utility of the former conceptus can count for neither more nor less than the utility of the latter conceptus in our maximizing of mixed utility. To discriminate on the basis that the former conceptus exists now while the latter will exist only at some time in the future is to abandon the principle of impartiality. As we have seen, rejecting this principle leads to discrimination on the basis of morally irrelevant characteristics. In this case, its abandonment entails that we have no obligations to future generations in preserving, say, natural resources, just because they do not exist now but will exist only at some time in the future. The time at which a being exists can be no more relevant to the consideration of its interests than its race, gender or species.

Although conceptuses are in this sense replaceable, it is unnecessary and unhelpful to speak in literal terms, as if *this* particular conceptus is replacing *that* particular conceptus. A population policy, such as the one I have been advocating for Australia, deals with the balancing of many thousands of births with many thousands of abortions. In heavily populated countries, the numbers involved run into the millions. It also makes little sense, then, to speak of the abortion of one conceptus being replaced by the conception of some future conceptus. There is no particular conceptus that one could point to and say, 'Here is its replacement'. The balancing of abortions with live births to achieve the required

population growth rate will be calculated using gross numbers and not be done on a case by case basis.

The second point to note is that a population policy cannot be expected to aim for an *exact* growth rate and population level because of the practical uncertainties involved in determining such optimum values. Even if it were possible to calculate such exact values, with the type of policy that I advocate for Australia, it would be impossible to predict the exact growth rates and population levels resulting from the application of any given detailed policy. For these reasons, a population policy can only be expected to maintain growth rates and population levels within a certain accepted margin of uncertainty.

What these reflections amount to is that a woman contemplating an abortion ought not be concerned with whether her particular abortion will result in a direct replacement with another conceptus and what the effect will be on the country's growth rate and population level. These are properly the concerns of the policy makers at the macro-level.

In his [Practical Ethics](#), Professor Peter Singer [1979a: ch. 5] has argued for the need for an identifiable replacement once the conceptus reaches a level of basic consciousness during its gestational development. At this point, the conceptus has the capacity to feel pain, although it is not self-conscious. In applying his replaceability²⁶ thesis to non-self-conscious sentient beings, he writes as if the killing of the conscious foetus can only be morally justified if its replacement can be explicitly identified. So, in his discussion of the killing of a defective infant whose life, none the less, is still worth living, Singer [1979a: 134] asks if the killing of the defective infant will motivate his parents to have another child whom they would not have had if the defective infant continued to live. This same question applies to the aborting of a normal sentient foetus. In either case, why should it matter whether *this* woman will replace her aborted foetus?

Consider the example of a pregnant woman whose husband has died some time after her foetus has gained sentience and now, understandably, wishes to terminate the pregnancy with no intention of producing more children. Or take another case of a rape victim who changes her mind late in pregnancy and decides against giving her baby up for adoption because of the enormous psychological burden she would incur. Singer's version of the replaceability thesis entails that these cases of abortion could not be morally permissible because the women involved would not replace their foetuses at some later date, or because, for the less stringent reason, the replacement foetuses cannot be explicitly identified.

Paradoxically, Singer's replaceability thesis would, however, allow a late-term abortion for the trivial reason that the woman wished to postpone the demands of pregnancy until after her summer vacation. Singer's version faces this difficulty because he had adopted a 'total' view for non-self-conscious beings, in which the total utility of these beings must be rigorously maintained or increased when one of them is deliberately killed. For Singer, this rigour can only be satisfied by guaranteeing an identifiable replacement. I think that by adopting the 'mixed' view advocated here and placing the problem of abortion within the context of a population policy, these paradoxical conclusions can be avoided.

²⁶Singer argues for the replaceability thesis for non-self-conscious beings in his [1979a: 102f].

On this view, a woman contemplating contraception or abortion is not morally bound to consider the future utility of the possible or actual conceptus expected to lead a *normal* happy life. This utility is already accounted for in the social population policy. So, the population policy has the explicit effect of rendering morally irrelevant the potential utility of the conceptus in the woman's personal deliberation over contraception or abortion. Even though the population policy grants the woman her legal right to contraception and abortion, whether these acts are moral or immoral in particular cases will depend on act-utilitarian considerations. What is characteristic of the 'mixed' view advocated here is that these act-utilitarian considerations at the level of individual decisions will not include the future utility of the normal conceptus in the calculus. On the other hand, if the conceptus is or will be defective, then, as I shall argue below, the future utility of the conceptus will be relevant in determining the moral status of contraception and abortion in particular cases.

The view that I advocate can now be seen to be both liberal and strict in certain respects. It is liberal in that it allows the woman, in concert with her partner and existing family, her autonomy in choosing whether or not to become pregnant or to carry her pregnancy to term. But, at the same time, it is strict in insisting on our communal responsibility for achieving an optimum growth rate and population level. The 'prior existence' view safeguards the woman's autonomy to some degree, but at the expense of denying our obligation to create new beings.

7.2 Act-utilitarian Considerations

I now want to go on and suggest how certain act-utilitarian considerations come into play in deciding whether to conceive or abort a conceptus that is expected to be normal. Below, I will go on to consider the case in which the conceptus is or is expected to be defective. I have argued that in a developed country such as Australia, a utilitarian population policy would grant women the liberty of deciding whether to become pregnant and whether to terminate a pregnancy already in progress. As I will argue here, such a liberty also needs to be exercised with restraint. Although a woman contemplating conception or abortion would not be morally obligated to consider the potential utility of the normal conceptus, she would, none the less, remain bound by her moral obligations to others.

The situation bears similarity to our monetary institutions, such as banks, stock markets, note printers and the like. These institutions contribute to the maximization of social utility. They constitute, for example, a far more efficient system for the transaction of goods than other systems, such as the direct barter system. However, they are only able to do this by granting citizens the liberty (within certain limits) to spend and invest their money in accordance with how they perceive their own interests to be. As this complex of financial systems has utilitarian warrant, each citizen is relieved of deciding how this particular purchase or that investment will impact the financial system *in toto*. None the less, individuals remain morally bound to spend and invest their money in a way that will maximize utility for the people impacted by the particular financial act.

The woman contemplating conception or abortion, likewise, would be required to balance her interests against the interests of others. She would have to consider how having a baby would affect her partner and her other children, if she had any. Would having a baby allow her to fulfil her previous commitments? How would having an abortion affect her relationship with her partner? Could she cope with giving the baby up for adoption?, and so on. The theory that I advocate is sufficiently complex to take seriously the interests of all parties in determining the moral status of particular acts of contraception and abortion. The potential utility of the conceptus is given due weight (by means of the population policy), along with the utilities of the woman, her family, and any other parties involved. This is in sharp contrast to the narrow solutions offered by the traditional approaches.

For cases in which the conceptus is, or will be expected to be, defective in some way, the above act-utilitarian considerations also apply. Such cases of deformed conceptuses, however, require additional and special consideration. Here, the future utility of the conceptus is also directly morally relevant in determining the moral status of these particular cases of contraception and abortion.

I will first consider cases in which the actual or possible conceptus will suffer such gross deformities that its future life will not be worth living. The conception or continued existence of such a being will result, of itself, in a definite decrease in mixed utility. The sufferings of the parents, other children and family members, and so on, potentially also diminish mixed utility. A prudent utilitarian population policy will not encourage its continued existence. In addition, act-utilitarian considerations dictate that its existence ought to be terminated for its own sake.

An exception to this is where the prospective parents would suffer such deep and long-lasting distress at its death as to outweigh the gain in mixed utility resulting from its being aborted. For this reason, there ought to be no legal compulsion in terminating the lives of such conceptuses. Instead, it should be left up to the decision of the prospective parents involved. In some cases, such heartrending decisions may have been avoided by effective genetic counselling prior to conception. Such counselling ought to be encouraged by social policy and possibly publicly funded for families known to be at risk.

The second type of case concerns actual or possible conceptuses that suffer from some defect, where this defect is not so severe as to rob the future human being of a happy life. None the less, the existence of the defect makes it probable that its life will not be as happy as a normal human being. Since the life of such a being is likely to be happy to some extent, if the mother is unable to give birth to a normal baby at some time in the future (say, because one parent carries a defective gene), then the moral status of its conception or abortion will be dependent on the above act-utilitarian considerations that apply to normal conceptuses.

If, however, the mother is capable of delivering a normal baby, the moral considerations are different. The mixed utility resulting from the birth of a normal baby will most probably be higher than that resulting from the birth of a defective baby, assuming that the parents will not suffer excessively from the aborting of the defective conceptus. On act-utilitarian grounds, and in accord with the replaceability thesis, the potential parents are morally obligated in this case to abort the defective conceptus and try again for a normal conceptus.

If, on the other hand, the prospective parents will suffer excessively at the death of the conceptus, abortion is not morally obligatory. Once again, the decision to abort or not to abort ought to be left to the prospective parents and not be determined by legislative fiat. For utilitarian reasons, the government ought to provide a free counselling service for all prospective parents in such unfortunate circumstances. Such counselling will serve to fully inform the prospective parents of the possibilities open to them and give them the opportunity to discuss their personal problems.

The view advocated here for countries such as Australia does not licence people doing whatever they want with conceptuses. Far from it. The social practice or laws regulating the population level only grant women the liberty of deciding whether to have an abortion or not. In the interests of maximizing mixed utility, laws and social mores ought to protect the welfare of conceptuses whose mothers intend to bring their pregnancies to term. A human being disadvantaged as the result of a harm incurred during pregnancy is likely to have less utility than if it had not been so harmed. So, although the future utility of a normal conceptus is not morally relevant in deciding whether to abort or not, all other actions pertinent to the pregnancy must be evaluated on an act-utilitarian basis if the intention is to carry the pregnancy to term.

Even if it is known that the pregnancy will not be carried to term, act-utilitarian considerations dictate that the life of the sentient foetus must be made as comfortable as possible for the duration of its existence. The neurophysiological evidence indicates that the

conceptus develops a rudimentary level of sentience at no less than 18 weeks of gestation; sometime around the middle of the second trimester.²⁷

Laws protecting the welfare of the sentient foetus ought to be enacted and enforced, excepting for those cases in which to do so would even further diminish social utility. Harmful actions that cannot be legally proscribed for this reason remain subject to the domain of personal morality. So, for example, to willingly engage in smoking or the drinking of alcohol, knowing that doing so will harm the future welfare of the foetus, is morally prohibited on act-utilitarian grounds, regardless of whether or not these acts are subject to legal prohibition.

I have argued that the ethics of abortion should be viewed in the context of a utilitarian population policy and so, in this respect, as a natural but significant extension of a utilitarian attitude to contraception. I want to stress that there are, none the less, important ethical distinctions between contraception and abortion. The distinctions are these. It is both imprudent and immoral to rely on abortion as a method of contraception, in ordinary circumstances. It is imprudent because the morbidity and mortality rates are higher for abortion at all phases of pregnancy compared with those for contraception. In addition, an abortion requires the expenditure of time by all parties involved that could be better spent in less stressful circumstances.

It is immoral because the resourcing and conducting of such abortions places an unnecessary burden on public revenue. Public hospitals and hospital staffs can be better utilized in the prevention and treatment of unavoidable illnesses. Also, some hospital staffs find attendance to abortions distasteful, especially those performed at a late stage of pregnancy. For the same reasons, once a woman decides to have an abortion, it is imprudent and immoral to delay it longer than is necessary. A late term abortion may also cause pain to the foetus, which can be avoided by termination at an earlier stage. In fact, governments seriously intent on maximizing the welfare of its citizens are committed to instituting a comprehensive public education programme on the benefits of effective contraception, coupled with an extensive sex education programme in schools.

²⁷*The Use of Fetuses and Fetal Materials for Research 1972*, chairman, Sir John Peel, London, and reported in Singer [1979a: 118, 227].

8. Objections Considered

This completes my systematic development of a tenable ethical view on the morality of contraception and abortion. In this section, I want to address the most significant objections to this view. A fundamental objection to viewing the morality of abortion in terms of a social population policy, as I have done, is that if one conceptus is replaceable with another conceptus, then there can be no utilitarian qualms about replacing one adult with one conceptus. If there happens to be an oversupply of conceptuses, the objection continues, then a utilitarian may countenance the selected killing of some mature persons in order to clear places for the extra conceptuses. A related objection to this one is that if a woman is not morally required to take into consideration the future utility of the conceptus in deciding whether or not to abort, then, in the same vein, the future utility of an adult cannot be a moral reason against killing him.

In dealing with these objections, I will begin by outlining why the killing of normal adult human beings is prohibited within a utilitarian ethical framework. Firstly, to kill an adult is to deprive him of his future happiness. Secondly, it will cause grief and suffering to those with whom he had enjoyed close personal relationships. The loss of individual utilities identified in these first two reasons will result in an overall substantive reduction in mixed utility.

Thirdly, a legal prohibition against the killing of adults (except in certain extraordinary cases) and supported by penal sanctions is a practical prerequisite for the continued existence of an ordered society. The absence of such a legal prohibition would result in a general feeling of acute uncertainty and insecurity. Consider some such law that allowed the exception that an adult can be legally killed by his fellow citizens if the killing results in a slightly higher net utility. A law that allowed such exceptions would fail the requirement that it promote a general feeling of security necessary for ordinary citizens to go about their day to day business, free from constant anxiety. A utilitarian law proscribing the killing of adults, therefore, must disallow these kinds of act-utilitarian defences and must allow the plea of mitigating circumstances in only the most exceptional cases. Hence, the rules in practice form of utilitarianism that I've advocated here accounts satisfactorily for the (mostly) deontic status of our strictures against the killing of adult human beings.

As is now evident, on this form of utilitarianism, the objections to killing a normal adult do not apply to the killing of the conceptus. The third reason against the allowing of the killing of adults, that an absence of a prohibition against killing will spread fear and alarm throughout the community, cannot apply to conceptuses. This is because conceptuses cannot be alarmed at the lack of such a prohibition. It is only beings that understand the concept of death, by recognizing themselves as distinct entities with a past and a future, that can become anxious at the prospect of their future non-existence. This capacity for self-consciousness is only attained by the conceptus sometime after birth. Before the 18th week of pregnancy, the conceptus is not conscious at all. It is for this reason that non-self-conscious sentient beings are replaceable while self-conscious beings are not. A self-conscious being is able to suffer at the prospect of its future death. However, this is impossible for a non-self-conscious sentient being.

The second reason against killing adults, that it will cause grief and suffering to others, also does not apply to those conceptuses for which its host and partner prefer that it were aborted. The first reason against killing adults, that the killing will deprive the being of his future utility, has no direct application to the killing of the conceptus. The killing of an adult human being will result in a definite loss of mixed utility (excepting extraordinary circumstances), and therefore wrong. Under the scheme advocated here, however, the killing of a conceptus will not result in an identifiable loss of mixed utility. In fact, abortions performed under a well-formulated population policy, and for the type of act-utilitarian reasons discussed above, will increase mixed utility rather than decrease it.

These moral distinctions between the killing of an adult and the killing of a conceptus bring into focus the reasons why the killing of an adult cannot be compensated by the creation of a conceptus. In considering objections, I have also sought to clarify why a rules in practice utilitarian view does not countenance the killing of adults in the interests of maximizing mixed utility.

9. Infanticide

It will be evident that what I wrote in the previous section concerning the distinction between killing adults and killing conceptuses also applies to newborn infants. This is to be expected if birth does not mark a morally significant dividing line. This conclusion is not as shocking as it first seems, as will become clear in the course of the following clarifying remarks. Infants born with defects so severe that they have no or little chance of leading a worthwhile life,²⁸ and whose parents will not suffer immensely if it dies, ought to be killed painlessly. Even in these distressing cases, euthanasia ought to be practised only upon the consent of the parents. My previous comments concerning severely deformed conceptuses (see §7.2 above) apply equally to these kinds of scenarios.

Similarly, my previously stated position on defective conceptuses whose future lives, none the less, would be worth living (see §7.2 above) is applicable to neonates in the same condition. Infants can be regarded as replaceable up until the age at which they become self-conscious. For infants without damage to the central nervous system, as with normal infants, this is unlikely to occur before two years of age. A utilitarian population policy would, of course, need to take demographic account of such deaths.

In some cases, infanticide may be morally and practically preferable to abortion. This is true in circumstances where the defects either cannot be accurately diagnosed, or their extent accurately diagnosed, until after birth. Delaying the decision until then will save some perfectly normal conceptuses and conceptuses with only minor defects. Some parents, quite understandably, may still prefer early abortion, with its attendant possibility of disposing of an otherwise wanted conceptus, to the option of possible later infanticide. As with abortion, and for the reasons given previously, the final decision to kill the defective neonate ought to be left up to the parents concerned.

If the birth results in a healthy baby, the situation is considerably different. Most parents feel a strong natural bond to their newborn. Where such parental ties are lacking, the woman usually would have terminated her pregnancy by this stage. If, perchance, the neonate is unwanted either by both parents or by the mother alone, the balance of interests to be considered will now usually have changed somewhat from the time the neonate was still within the mother's womb. During pregnancy, the mother's interest in maintaining her health, her career, her personal relationships, and so on, may have ruled out alternatives to abortion. However, beyond birth, such conflicts of interest have either disappeared or been greatly mitigated. The risks and disbenefits of pregnancy no longer form an insuperable barrier to, for example, bringing joy to the lives of a childless couple, placing her baby in her parents' care until she is able to care for it herself or handing it over to the care of the state.

Once again, as with conceptuses, just because neonates are replaceable does not licence people to treat them as they wish. Strict laws ought to be in place protecting the welfare of infants; no less strict than those protecting adults. Further than this, laws protecting the lives of infants also ought to be on the books. Once physically separated from their mother's womb, infants are especially vulnerable. The death of a wanted infant due to negligence or malicious intent will result in a terrible loss to its family or guardians and bring

²⁸Infants with anencephaly (without a brain) are a case in point.

about a considerable drop in mixed utility. This type of loss of life is significantly morally different from the justified killing of deformed infants, performed with the intent of considerably increasing mixed utility. Such morally unjustified killing deserves the full prohibitive force of the law.

Consequently, law-makers will also need to legislate for the regulation of acts of infanticide. I am not sure whether it is advisable to set up a medico-legal tribunal to oversee applications for approved infanticide. The extra delay incurred in awaiting an approval may cause undue stress in the unfortunate parents, who will already be living a veritable nightmare. Perhaps an informal consultation with their doctor, and possibly one other doctor, may be all that ought to be legally mandatory.

The same problem arises with approval boards for applications for abortions. In some cases, the delay in obtaining an approval for an abortion has resulted in what would have been a relatively safe first trimester abortion becoming a more medically hazardous second trimester abortion. Perhaps all that should be required here also, for the sake of the woman concerned, is an informal consultation with her doctor or via a specially instituted abortion counselling service.

Concluding this discussion on infanticide, it seems that the implications of the utilitarian policy advocated here do not turn out as revolutionary as it first appeared. In fact, the resulting prohibition against the killing of infants is almost as strict as the prohibition against killing adults. In both cases, special provisions must be made for exceptional situations.

10. Conclusion

This concludes my development of a utilitarian view on contraception and abortion. I have argued that within such a perspective, the utilitarian is able to give due weight to all of the interests involved, unlike the traditional conservative and liberal positions. I have tried to show that by seeing the problems of contraception and abortion within the context of a social population policy, satisfying and conceptually coherent solutions may be generated. To achieve this, I developed a new 'mixed' view maximizing principle that guides how social and legal rules in practice are to be implemented. These formed the framework within which social policies on contraception and abortion, I argued, ought to be developed. I then showed how act-utilitarian principles can be applied at the level of individual decisions.

The ethical framework I advocated in this essay satisfactorily explains the general asymmetry between the immorality of knowingly giving birth to a severely deformed infant and the moral permissiveness with which we treat the birth of healthy infants. This theory also explains the increasing moral seriousness with which we treat contraception, abortion and infanticide. Another advantage brought to light is the theory's ability to make sense of the asymmetry between the permissiveness of abortion and the prohibitions against killing an adult. Some previous versions of utilitarianism had encountered difficulties in explaining all of these commonly held intuitions. Throughout, I illustrated how the ethical principles proposed and the utilitarian framework developed in this essay are applied using the Australian social and legal context as an example.

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