

Back Alley Regulation

Before Roe vs. Wade, pregnant women were almost never prosecuted for breaking anti-abortion laws. Instead, enforcement focused single-mindedly on the sellers of abortion services.

[T]here is a long record of states treating women as the second victim of abortion in the law that can be found and read. To state the policy in legal terms, the states prosecuted the principal (the abortionist) and did not prosecute someone who might be considered an accomplice (the woman) in order to more effectively enforce the law against the principal. And that will most certainly be the state policy if the abortion issue is returned to the states. Why did the states target abortionists and treat women as a victim of the abortionist?

It was based on three policy judgments: the point of abortion law is effective enforcement against abortionists, the woman is the second victim of the abortionist, and prosecuting women is counterproductive to the goal of effective enforcement of the law against abortionists.

That's from Americans United for Life, but Katha Pollitt concurs in *The Atlantic*:

[T]he general lack of enthusiasm for prosecuting those who perform abortions and the almost total failure to prosecute and jail women for having them suggest that whatever Americans may consider abortion to be, it isn't baby killing, a crime our courts have always punished quite severely.

Now suppose you actually care about a woman's effective right to choose. If so, the *target* of the punishment is far less important than the *probability* and *severity* of punishment. If you had an unwanted pregnancy, would you rather live in a world where anti-abortion laws imposed a \$50 fine on the mother with 1% probability? Or a world where anti-abortion laws imposed the death penalty on the doctor with 100% probability? Obviously the former.

In the topsy-turvy world of political debate, however, the target is what matters. “You want to put women in jail” is widely seen as a “pro-choice” claim, and “We don’t – and never did!” is widely seen as a “pro-life rebuttal.” Severity of punishment? Probability of punishment? These variables are too dull to discuss – even though strict punishment of doctors can easily be just as prohibitive as strict punishment of mothers. (Indeed, strict punishment of doctors is probably *more* prohibitive than strict punishment of mothers, because one doctor is capable of performing thousands of abortions).

What’s going on? This heated discussion is a special case of a more general pattern of “back alley regulation” that I discussed five years back. Governments strongly prefer to concentrate their coercion on dehumanized “businesses” rather than human beings... even though businesses are, in fact, composed of human beings.

Governments rely on indirect coercion because direct coercion seems brutal, unfair, and wrong. If the typical American saw the police bust down a stranger’s door to arrest an undocumented nanny and the parents who hired her, the typical American would morally side with the strangers. If the typical American saw regulators confiscate a stranger’s expired milk, he’d side with the strangers. If the typical American found out his neighbor narked on a stranger for failing to pay use tax on an out-of-state Internet purchase, he’d damn his neighbor, not the stranger. Why? Because each of these cases activates the common-sense moral intuition that people have a duty to leave nonviolent people alone.

Switching to indirect coercion is a shrewd way for government to sedate our moral intuition. When government forces Costco to collect Social Security taxes, the typical American doesn’t see some people violating their duty to leave other people alone. Why? Because they picture Costco as an inhuman “organization,” not a very human “bunch of people working together.” Government’s trick, in short, is to redirect its coercion toward crucial dehumanized actors like business (and foreigners, but don’t get me started). Then government can coerce business into denying individuals a vast array of peaceful options, without looking like a bully or a busy-body.

My point: Regulating sellers is a “back alley” method of regulating consumers. If you actually care about consumer welfare, you won’t focus on the de jure targets of the punishment. You’ll focus on what the punishment accomplishes de facto. Indeed, if you think a regulation is a bad idea, you should probably prefer regulations that target the *most humanized* humans involved. Why? Because when the law orders people to harshly punish sympathetic targets, law enforcement looks for excuses not to enforce the law. And such excuses are never hard to find!