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The 'Undue Burden' of restrictions on abortion: A feminist bioethics analysis

Samantha Scott
University of Puget Sound

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Abortion divides politicians, religious groups, courts, and the media; it weighs heavily on Americans' opinions. People have strong moral opinions on abortion that go beyond right or wrong of the act itself, but also include timing, reasoning, definitions of personhood, and method. Depending on state laws, women have differentiating access to abortion, a result of the United States Supreme Court cases *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In 1973 in the case *Roe v. Wade*, the court ruled that laws prohibiting abortion except in life saving procedures to save the mother violate the due process clause of the 14th amendment. Additionally, the court outlined per trimester what restrictions the state could impose (*Roe v. Wade*, 1973). In 1992, the Supreme Court upheld the *Roe v. Wade* decision in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* but rejected the trimester framework and ruled that before viability, abortion can be restricted in several ways as long as it does not place an undue burden on the mother (*Planned Parenthood of Southeastern Pennsylvania*, 1992). A law or statute is considered placing an undue burden on women if: "its purpose or effect is to place a substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability" (*Planned Parenthood of Southeastern Pennsylvania*, 1992).

Although the 1992 ruling essentially upheld the legalization of abortion, it is important to note that the ruling made abortion a state issue and perpetuated an institutional framework that controls and moderates women's abilities to have control over their own bodies. For the purposes of this paper, I will agree with the Supreme Court in that abortion after viability should not be permitted but argue that restrictions on abortion prior to viability do in fact put an "undue burden" on the mother and are therefore unconstitutional. My argument is based on feminist ethics in that it addresses vulnerability women face, considers knowledge that comes from individual experiences, and includes a structural analysis of the situation (Holland, 2014).

For the purpose of this paper, I will be using the gender binary and referring to individuals seeking abortions as women. However, it is important to understand that there are individuals who do not identify as female and have the reproductive organs to become pregnant. These individuals face similar burdens in obtaining abortion services as women and different burdens due to not identifying as female gendered but will not be addressed in this paper.

Feminist bioethics is an ethical approach that intends to take into account the oppression and inequalities that women face. Unlike moral principles and traditional ethical concepts, feminist ethics accounts for social structures (Vaughn, 45). Vaughn portrays a potential feminist ethics analysis in the case of abortion:

It is not enough, for example, to respect a woman's decision to have an abortion if she is too poor to have one, or if her culture is so oppressive or oppressed as to make abortion impossible to obtain or if social conditioning leads her to believe she has no choice or that her views don't count. Theoretical autonomy does not mean much if it is so thoroughly undermined in reality (Vaughn, 2013).

Feminist ethicists therefore reject the traditional moral agent framework of bioethics, and aim to capture a "richer conception of persons as historically and culturally located, socially related and essentially embodied" (Crosthwaite, 2001 as cited in Vaughn, 2013). Feminist bioethicists, although rooted in the same essential framework, often disagree about many bioethical issues, abortion included (Vaughn, 2013).

To analyze restrictions on abortion from a feminist perspective, I will be using two prevalent restrictions: (1) waiting periods, affecting 26 states, and (2) parental involvement, affecting 38 states (Gutmacher Institute, 2014). In order to effectively analyze the restriction requirements of waiting periods and parental involvement, I will address each restriction in the context of three feminist ethics components: (1) vulnerability, (2) the knowledge that comes

from experience, and (3) structural analysis of the institutions and systems at play (Holland, 2014).

Waiting Periods

Waiting periods for abortion are mandated in 26 states. These states require a woman seeking an abortion to wait a specified period of time, or a ‘waiting period’ of usually 24 hours, between the appointment first attended and when the abortion is performed. Additionally, ten of these states mandate a woman to make two separate trips to the clinic to have the abortion (Guttmacher Institute, 2014).

Vulnerability

When using a feminist ethical standpoint, it is essential to “privilege those most vulnerable and those on the margins” (Holland, 2014). When discussing abortion, the most vulnerable women are: the poor, the young, those with chronic disease, those with drug addictions, those with HIV/AIDS, and victims of rape or incest (Sherwin, 1991). Considering the poor is essential in considering the most vulnerable and those on the margins for a waiting period restriction. If a woman is poor and needs to travel to a particular clinic for an abortion, the waiting period puts a financial burden on her in terms of finding transportation. If she works, the woman must take twice the amount of time to have the procedure performed, and she therefore loses twice the amount of hours to earn a wage due to the waiting period. For poor women, a waiting period is feasibly impractical if not impossible; a waiting period is a significant obstacle for a woman to have an abortion.

Knowledge from Experience

The second aspect of feminist ethics to consider for waiting periods is the differentiating experiences women have. One woman’s experience may be different than another’s; feminist

ethics aims to provide a framework that empowers women in their individual experience.

Returning to the example of the poor woman, a waiting period disempowers a poor woman in terms of her ability to pay for transportation and take an extended period of time off work. For a woman who is pregnant by rape however, a waiting period may disempower her differently. For the woman pregnant due to rape, she may suffer further psychologically to know that she is carrying her rapist's child for 24 hours more. Both the poor woman and the woman who is a rape victim are burdened by the waiting period, however the main reasons they are burdened by the waiting period are different due to their contextual experiences. Eliminating the waiting period for abortion serves as empowerment for women regardless of their individual experiences. Although experiences differ, a waiting period still serves as a significant obstacle for both of these anecdotes and therefore is an undue burden.

Structural Analysis

The third aspect of feminist ethics to consider for waiting periods is a structural analysis of the setting in which the dilemma occurs. The more specific question to be considered is: what structures and systems in the United States need to be considered when examining waiting periods? At a systemic level, it is important to note that a woman's ability to access abortion services and the restrictions imposed on these services differentiates according to what state individuals live in. Since restrictions differentiate by state, women are subject to different experiences, which is in itself an undue burden. For example, some women can receive abortions after the first trimester and some cannot. Any restriction therefore could be argued to be an undue burden since women across the United States are subject to different restrictions. In terms of gender, it is also important to consider the historical obstacles that have faced women. Traditionally, women have been regulated by a government comprised of men in arenas such as

voting, marriage, and the work force (Sherwin, 1991). Our current society perpetuates these systemic issues; women make \$0.77 to the \$1.00 that men make and 1 in 3 women will be assaulted in their lifetime (NY Times, 2014; National Institutes of Health, 2014). This historical dominance of men is important to consider when acknowledging that the Supreme Court rulings and numerous laws that have regulated abortion have been created by the male-dominated political system. The restrictions of any kind on abortion, but particularly those made regarding a waiting period, can be viewed and felt by women as an effort to control and moderate the female body, an empowerment that should only belong to the woman herself (Petchesky, 1980 as cited in Sherwin, 1991).

Parental Involvement

The second restriction on abortion I will examine with a feminist bioethics lens is parental involvement. Currently, 38 states require parental involvement in a minor's decision to have an abortion. Of these states, 21 states require one or both parents to provide consent, 12 states require that both parents are notified, and 5 require that parents are notified and give consent (Guttmacher Institute, 2014). For the purpose of this section, I will be referring to parental involvement as the consent component of the parental involvement restriction.

Vulnerability

In terms of vulnerability, young women faced with parental involvement restrictions have limited ability and autonomy to be fully capable of making their own medical decisions. The inability to make these decisions already makes a woman vulnerable. Her future is not contingent on her wishes, but rather her parents'. For young women who have sex prior to the age of 18, there is a cultural stigma attached to their actions; the stigma of pregnancy at a young age is perhaps incredibly shameful. This stigma makes young women vulnerable to an emotional

burden to begin with. If the woman could not have the abortion due to someone else's decision, this emotional burden could increase.

For a woman who did employ birth control methods and became pregnant regardless, it is important to understand that there is no sure birth control measure: "There is only one contraceptive option which offers women safe and fully effective birth control: barrier methods with the back up of abortion" (Sherwin, 1991). If a woman under the age of 18 engages in sex and becomes pregnant despite birth control methods, her choice to use birth control (which would indicate a choice to not become pregnant) is no longer important or viable if a parent will not provide consent. Women who do not have parental consent and are not permitted to have an abortion are vulnerable to seeking out abortion methods that are dangerous and harmful (Sherwin, 1991). If the woman does have a child at a young age, she may decrease her chance of education and further life opportunities: "The earlier a woman has a baby, it seems, the more likely she is to drop out of school; the less education she gets, the more likely she is to remain poorly paid, peripheral to the labour market, or unemployed, and the more children she will have-between one and three more than her working, childless counterpart" (Petchesky, 1984 as cited in Sherwin, 1991).

For those who have secure and healthy attachments with their parents, the parental involvement mandate will unlikely have as severe consequences. But for the women who have insecure attachments with their parents, this mandate may promote further conflict; these women may be subject to abuse (emotional, sexual, physical, and/or mental). Perhaps most importantly, young women are most vulnerable to sexual coercion. Sexual coercion is difficult to recognize because "women are socialized to be compliant and accommodating, sensitive to the feelings of others, and frightened of physical power" whereas men "are socialized to take advantage of

every opportunity to engage in sexual intercourse and to use sex to express dominance and power” (Sherwin, 1991). The multitude of vulnerabilities discussed that are further exasperated by a parental involvement restriction clearly put an undue burden on young women who become pregnant.

Knowledge from Experience

It is next important to consider the different experiences women encounter: “Abortion decisions, are by their very nature, dependent on specific features of each woman’s experience” (Sherwin, 1991). Just because a woman is a minor does not mean she is less entitled to her experience and her reasoning for abortion; women should be granted full autonomy in their decision making since the decision will likely have a huge impact on their lives. With the right for full autonomy in mind, it is important also to consider how individuals might be affected differently by the parental involvement restriction. Returning to the parental attachment component, it is important to consider the repercussions for parental involvement. Will the young woman experience further harm and shame? What about the woman who is pregnant by incest; how is it fair in this case to involve parents in such a decision? Even if the minor obtains permission from a judge to overrule the parental consent, the fact that she has to go out of her way to obtain such permission is a further undue burden. Although parental involvement may be helpful in some cases, a mandate for parent involvement does not honor each woman’s different experience and may very well place a huge obstacle in obtaining an abortion; further autonomy must be granted to women so that they can best address their decision given their experience.

Structural Analysis

Finally, we must structurally analyze the setting in which the dilemma of parental restriction occurs. Many schools and employers will not tolerate pregnancy. For young women in

particular who do not have the economic means or education that an older woman does to support a child, having a child is impractical if she must work or is trying to receive an education (Sherwin, 1991). The fact that a woman may not be able to pursue an education or have a job are not obstacles to having an abortion but are burdens that occur as a result of being prohibited to have an abortion. Patriarchy already places a burden on women; as discussed above in terms of assault and economic earnings, women are already disadvantaged. Mandating parental involvement exacerbates this burden by taking further control over a woman's reproductive rights and not allowing her to make a choice. Feminist bioethicists agree that women can only be free from male dominance when they claim control of their reproductive rights, "the condition under which women are able to make truly voluntary choices about their reproductive lives" (Sherwin, 1991).

Counterarguments

It can be argued that the electorate is comprised of legislators elected by the people, for the people. Since there are such restrictions on abortion, these restrictions represent the larger beliefs about restrictions. This argument is not valid because it fails to recognize the patriarchal structures in place. Congress at the national level and legislators at the state level tend to be majority male and white. Although elected by the electorate, men are not informed by the experiences of women because they are not women (unless they identify as such). Feminist ethics is largely based on knowledge from experience.

Another argument that could be made is that parental involvement and consent is consistent amongst many medical decisions and should be held in minor abortion as well. This argument, however, is also not informed by the young woman's knowledge from experience. Having a child, particularly an unwanted child, will forever alter a woman's life experience. Her

parents' life experience is hardly, if at all, altered in comparison to the young woman's. Her experience, in this case, should be primarily considered.

Conclusion

When examining just two restrictions on abortion, parental involvement and waiting periods, it is easy to see the undue burden placed on women. By virtue of the ruling made by the United States Supreme Court, these restrictions are unconstitutional. This analysis brings into question other restrictions that exist on abortion. Do they impose undue burdens on women also? It is imperative that legislators proceed carefully in their drafting of legislation surrounding abortion and begin to consider what an undue burden truly is for women. In such a patriarchal society, it is unacceptable for legislators to continue controlling women's bodies. Abortion restrictions, if not outlawed for their immorality, must be acknowledged as violations of the United States Constitution as they pose undue burdens.

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