Borders as Burdens

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B. Jessie Hill, *The Geography of Abortion Rights*, _ **Geo. L.J.** _ (forthcoming 2021), available at SSRN.

In *The Geography of Abortion Rights*, Professor B. Jessie Hill provides a novel, timely mapping of the "geographic dimension of abortion restrictions." (P. 4.) Some restrictions rely on borders to serve as actual barriers, such as laws that attempt to restrict adults from transporting young people across state lines for abortion services. The effects of other laws, which force clinics to close, fix the borders of "abortion deserts" around which patients travel hundreds of miles to reach the nearest provider. Still other laws, such as medically-unnecessary ultrasounds, trespass bodily borders by requiring "visual and narrative mapping of physical spaces within the woman's body." (P. 5.)

In all and more of these examples, Hill argues that "regulating place is a way of subtly drawing lines of social exclusion and inclusion and re-inscribing social inequality." (P. 6.) By this, she suggests that states, under the guise of protecting a patient's health and safety, use law to demarcate borders that marginalize abortion care. The effects are uneven and regional, and the burdens of inaccessible care fall hardest on people who already find complying with state restrictions costly and difficult.

Hill spends a significant portion of the article analyzing state laws governing abortion facilities and providers that are designed to force clinics to close. As Hill explains, standalone clinics are the almost-sole providers of abortion in the country. Because of clinics' isolation from health care generally, legislators easily can target abortion clinics through regulations that providers and clinics cannot and (in terms of patients' health and safety) need not meet.

Mandating that providers obtain hospital admitting privileges, a restriction that has been at the center of two Supreme Court decisions, provides an example. Hill demonstrates that states typically defend regulation as neutral and apolitical; these laws do not ban abortion outright. Yet abortion rarely entails surgical intervention or necessitates a hospital bed, making privileges difficult if not impossible for most abortion providers to acquire.

As Hill highlights, the Supreme Court struck down Texas's and Louisiana's privileges requirements by concentrating on the lived consequences of law, particularly for rural and low income patients. The Court held that when clinics close, patients will have longer drives, more expense if pregnancy progresses, more logistical hurdles to overcome—like arranging childcare, time of work, transportation. A plurality of the Court raised similar concerns in the recent case, June Medical Services v. Russo. Even though five justices could not agree on the proper application of the undue burden test, both the judgment of the Court and Chief Justice Roberts's concurrence concluded that a law that would shutter all but one clinic in Louisiana was an undue burden on the right to abortion.

Of course, courts have not uniformly struck down restrictions on providers and clinics. As Hill writes, "the line of causality [between the existence of onerous facility regulations and reduced abortion access] is not always obvious." (P. 27.) One need only look to the dissent penned by Justice Alito in Whole Woman's Health v. Hellerstedt, which argued that clinic closures are not the fault of a privileges requirement; instead, Texas's clinic closures are tied to provider shortages and decreasing rates of abortion.

Hill responds to the problem of causality by reimagining the application of constitutional doctrines, such as the right to travel or state action. For example, laws forcing women to leave the state to exercise a constitutional right contravene, as Hill proposes, a right *not* to travel. The result, were courts to embrace such an approach, would be a constitutional guarantee for a minimum level of abortion access within state borders. But the willingness of courts to recognize such rights is also contingent on location: on the federal level, abortion rights depend on the district in which one files and the circuit that hears an appeal. And, as Hill notes, in a country where *Roe* is overturned and numerous states outlaw abortion, place becomes all the more important. In the near future, legal abortion rights could depend entirely on the states: half will permit abortion and just under half, concentrated in the south and Midwest, will probably ban abortion.

Constitutional challenges to abortion restrictions may go only so far in addressing the unequal distribution of abortion care because courts may be unable or unwilling to make geography matter less. In this regard, Hill might explore other avenues of delivering abortion services together with or beyond constitutional litigation.

The remote delivery of medication abortion, though far from a perfect solution, can help erase the stark lines that abortion restrictions draw and that future bans might impose. A physician licensed in a state (even if not physically present in that state) can counsel (online or over the telephone), prescribe, and, during the pandemic, mail pills to induce a medication abortion. Federal and state laws, however, have not made the expansion of remote care easy. Nineteen states, for example, require a physician to be present upon delivery of medication abortion. The FDA, through one of its safety protocols, requires patients to obtain the first drug in a medication abortion (mifepristone) in-person at the practice location of a certified provider. The rule effectively bars teleabortion, which is one reason why a federal district court suspended it for the duration of the COVID-19 national emergency.

A new administration could abandon the FDA requirement number of state legislatures already have expanded teleabortion within and across their borders. The challenge moving forward is building capacity for health care providers to prescribe and to deliver medication abortion over state lines. Place will still matter, but it could matter less with abortion-supportive policies and increased resources to help ensure access to abortion care.

That is to say, while constitutional arguments are important, political and legislative action may more immediately reconfigure the map of abortion access. And that is, ultimately, one of the central aims of Professor Hill's article—upending borders to protect the right to abortion, an issue all the more important if the Supreme Court overturns *Roe*.

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