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Does overruling Roe discriminate against women (of color)?

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Abstract:

*On the 24th of July 2022, the landmark decision *Roe v. Wade* (1973), that secured a right to abortion for decades, was overruled by the U.S Supreme Court. The Court decision in *Dobbs v. Jackson Women's Health Organization* severely restricts access to legal abortion care in the United States, since it will give the states the power to ban abortion. It has been claimed that overruling *Roe* will have disproportionate impacts on women of color and that restricting access to abortion contributes to or amounts to structural racism. In this paper, we consider whether restricting abortion access as a consequence of overruling *Roe* could be understood as discrimination against women of color (and women in general). We argue that banning abortion is indirectly discriminatory against women of color and directly (but neither indirectly, nor structurally) discriminatory against women in general.*

Keywords: Abortion - Induced; Feminism; Public Policy; Women's rights

Introduction

On the 24th of July 2022, the landmark decision *Roe v. Wade* (1973),¹ that for decades had secured a right to abortion was overruled by the U.S Supreme Court. The Court decision in *Dobbs v. Jackson Women's Health Organization* severely restricts access to legal abortion care in the United States.

Overruling the constitutional right to abortion has an immediate impact on the lives of millions of American women.ⁱ Trigger laws, or statutes that seek to make abortion illegal

ⁱ The lives of girls who need abortions are also affected by a ban (arguably, even more so than those of adult women). Transgender, non-binary, and other gender-nonconforming people can also become pregnant and their lives are no doubt changed too because of *Dobbs*.

immediately following the overturning of *Roe*, are in place in 13 U.S. states. States like Kentucky, Louisiana, South Dakota, and Missouri are already moving to institute sweeping bans on abortion access.²

Scholars in bioethics and related fields have raised worries that overruling *Roe* would have a negative impact on existing health disparities, disadvantaging women of color in particular.³ But it is not just women of color who face disadvantages as a result of the overruling of *Roe*, *all women* are negatively affected by the abortion ban. It has been claimed that overruling *Roe* would mean that *any* pregnant woman could become vulnerable to legal surveillance, civil detentions, forced interventions, and criminal prosecution.⁴ Even women who are not pregnant will be disadvantaged by the mere awareness of how unwanted pregnancy might seriously and unavoidably put them at risk of potential surveillance or forced interventions.

In this paper, we consider the overturning of *Roe* and potential abortion ban from the point of philosophy of discrimination. This means that our main concern is neither with U.S. legal definitions of discrimination nor with the interpretation of whether banning abortion is incompatible with a right to privacy putatively attributed to U.S. citizens by the Constitution.ⁱⁱ Rather, our main concern is to explore whether a ban on abortion is discrimination – and if so, in what way – according to the definition in the philosophical literature on discrimination (which includes much of the legal theory literature on abortion published in law journals also). We argue that overruling *Roe* is indirectly discriminatory against women of color and directly discriminatory against all women. Our arguments continue the current discussion of racism and sexism in healthcare^{5,6} and our analysis contributes to understanding how discriminatory aspects of overruling *Roe* constitute structural racism and structural sexism.

Accordingly, while, for the purposes of our argument, we do not need to offer a strict definition of women, we should note that by “women” we mean to refer not just to cis women, but also to people who do not classify as women by conventional and binary classificatory schemes. We also focus on women as the defined socially salient group in our definitions of direct and indirect discrimination.

ⁱⁱ While it is highly relevant to ask these questions for some purposes, from the point of view of a philosophical assessment of a ban on abortion they are not so relevant, e.g., a conclusive argument to the effect that a ban on abortion is not discriminatory against women can, from the perspective we adopt, always be effectively countered by the reply that, while this might be so, that just shows that we ought to change the law so that it does not discriminate against women in the relevant, non-legal and morally relevant sense of ‘discrimination’.

Does overruling Roe discriminate against women of color?

Let us adopt the following definition of direct discrimination.

X directly discriminates against Y relative to Z if and only if: (i) X treats Y disadvantageously relative to Z; and (ii) X does this either because X mentally represents Y as being a member of a particular socially salient group and Z as not being so or because X formulates a rule, policy or the like that explicitly picks out or corresponds to people in the socially salient group to which Y belongs and imposes on them disadvantageous treatment.⁷

Because of the second disjunction in (ii), our definition does *not* imply that something can count as direct discrimination only if it involves, e.g., an intention to discriminate, to exclude, or to disadvantage etc. the putative discriminatees. While, generally, definitions of discrimination in the philosophical literature are intention-focused, some theorists reject this focus. More specifically, most theorists think that, e.g., for something to count as direct, gender discrimination it must involve disadvantageous treatment of the discriminatee because of her gender, where they understand ‘because of’ as involving an essential reference to the content of the discriminator’s intention or some other mental representation of hers. (For a UK court case which rejects such a mentalist understanding of ‘because of’, see *James v Eastleigh Borough Council*.⁸) It is our position that discrimination can occur even when the intention is lacking as the particular rule or policy can still correspond to a socially salient group and impose disadvantageous treatment upon them as the second disjunction states.

If we apply the above definition of direct discrimination in the context of an abortion ban, we can ask, first, whether a state – or the Supreme Court – (X) that imposes restrictions on abortion treats women of color (Y) disadvantageously relative to white women (Z).ⁱⁱⁱ

Next, we can ask whether a state (or the Supreme Court) that imposes restrictions on abortion does so because of a mental representation of women of color as a members of a specific socially salient group separate from white women or because they formulate rules or policies that explicitly pick out or correspond to people in the socially salient group to which women of color belongs and imposes upon them disadvantageous treatment. Though some doubt that collective entities like the state and the Supreme Court can have mental representations, we

ⁱⁱⁱ There is an interesting question here about whom the relevant agent is whose mental representations matter for the purpose of determining whether direct discrimination has taken place, which, however, we do not have the space to explore.

cannot discuss the huge issue of whether collective entities can have mental states here. In any case, the second disjunct in (ii) means that we need not postulate that they can for them to engage in direct discrimination (For a defence of the attribution of intentions to collective entities, see List and Pettit⁹, for discussion see Goldsworthy¹⁰).

If banning abortion involves direct discrimination against women of color, the answer to both questions must be “yes”. However, the answers to both questions seem to be “no”.^{iv} That is the case because, first, women, whatever their race, are denied legal access to abortion when the Supreme Court overruled *Roe*. Second, the Supreme Court’s verdict is not that the Constitution does not recognize a constitutionally guaranteed right to abortion specifically for women or Black women – after all, the ruling implies that *no one* – whatever their gender or racial identity – has a constitutionally guaranteed right to abortion. Hence, if a state after *Dobbs* introduces a ban on abortion in the U.S. it does not engage in direct discrimination against women of color.^v

But just because the abortion ban does not discriminate *directly* against women of color, it does not follow that it is not discriminatory. It could be indirectly discriminatory. To see whether overruling *Roe* discriminates against women of color *indirectly*, let’s adopt the following definition of indirect discrimination.

X indirectly discriminates against Y relative to Z if and only if: (i) X does not directly discriminate against Y relative to Z and (ii) X, does, however, act in a way which imposes disadvantages on the group of people to which Y belongs

^{iv} In *Dobbs*, Justice Clarence Thomas (p. 30, note 41) notes that, historically, some ‘supporters [of legalizing abortion] have been motivated by a desire to suppress the size of the African-American population’. However, he does not use this as an argument for banning abortion as he refrains from questioning ‘the motives of either those who have supported or those who have opposed laws restricting abortions.’ While we agree that those who support legalizing abortion intending to reduce the size of the African-American population engage in direct discrimination against African-Americans, and that if abortion had been legalized with this intention the historical act of doing so – as opposed to legalizing abortion per se – would have been directly discriminatory against them. However, possibly like Justice Clarence Thomas we do not think this was the intention behind *Roe v. Wade*. Furthermore, there is scant evidence that supporters of access to abortion were historically motivated by a desire etc. to suppress the African American population in the United States.

^v This is not to deny that if a ban on abortion is directly discriminatory against women, one could say that in a sense this entails that it is directly discriminatory against women of color. In the same sense, one could say that if a policy is discriminatory against women, it entails that it is discriminatory against gay women. Saying this, however obscures, as it were, the ground of discrimination (sexism).

that are disproportionate relative to the benefits that acting in this way confers on others.⁶

Now, we can ask does the state – or the Supreme Court – act in a way which imposes disadvantages on the group of people to which women of color belongs that are disproportionate relative to the benefits that acting in this way confers on others. Answering this question involves clarifying three sub-questions: (1) What are the disadvantages for women of color involved in a ban? (2) What are the benefits for others, if any? And (3) are the benefits disproportionate relative to the harms?

In response to the first question, we note that, on average, women of color are already in a disadvantageous position. In the most recent data from the CDC in 2019,¹¹ Black women, for instance, had the highest rate of abortions with 23.8 abortions per 1,000 women. In the state of Mississippi, people of color make up 44% of the population and receive 81% of the state's abortions.¹²

The higher rate of abortion among women of color is mainly due to a higher rate of unintended pregnancies.¹³ Women of color are already also impacted by poverty and lack of proper healthcare. Many studies have found that women in states where abortion restrictions have already been implemented often have to travel across state lines to access abortion services.¹⁴ Women of color receive worse healthcare partly because of large disparities in health insurance coverage.¹⁵

The repercussions of the disparities in access to quality healthcare are staggering. For example, in 2018 Black people in Texas were almost twice as likely as whites to die of preventable conditions because they did not get the healthcare they needed.¹⁶ Many of them are women. Racial and ethnic disparities exist in terms of mortality rates, disease prevalence, and comorbid chronic illnesses.¹⁷ With respect to reproductive care, Black women have the highest rate of infant mortality and adverse birth outcomes of any major ethnic and racial group in the United States.¹⁸ Accordingly, given a prioritarian view about the moral significance of harms and benefits being greater, i.e. the view that the worse off the recipient is, the more do harms and benefits count, morally speaking¹⁹ – disadvantages to women of color seem to have extra weight, thus, supporting an affirmative answer to (3).

Women of color, and Black women in particular, are also the most vulnerable to pregnancy-associated violence. For example, Black women are three times as likely to die from pregnancy-associated intimate partner homicide as compared to white women.²⁰ However, it

is not only women of color that are disproportionately affected by abortion restrictions. Pregnant minors and cognitively disabled women often lack the ability to travel²¹ – which makes it difficult to have an abortion if one must travel to a different state to get one. It is also the case that women of color have already been subject to surveillance, forced pregnancy interventions, civil detentions, and even arrests related to pregnancy at higher rates than white women.²²

Overturing Roe and thus restricting access to abortion forces many women to carry unwanted pregnancies to term. This will exacerbate issues like poverty that already disproportionately impact women of color. According to a longitudinal study of the impacts of unwanted pregnancy on women’s lives, women who are denied an abortion and forced to continue their pregnancy are four times more likely to live below the Federal Poverty Level and face economic insecurity and hardship that can last for years.²³ In conclusion, a ban on abortion involves many burdens on women of color that are morally significant.

In response to the second question, we should consider whether fetuses can be disadvantaged or wronged.^{vi} There is a huge and growing literature on the ethics of abortion and a detailed response would be book-length. However, we believe the most promising accounts on fetal personhood rely on sentience.

Sentience is widely considered to be the basis of moral status in both deontological and consequentialist ethics.^{24,25} Abortion before 18 weeks does not involve harming an entity with moral status because of lack of sentience, and many other features we generally associate with persons (fetuses also lack consciousness and they cannot survive outside the womb anyway).²⁶ Whether early fetuses feel pain is not clear, and whether fetal pain has a moral relevance is dubious.²⁷ Even if fetuses could feel pain, it is far from clear that the harm inflicted to the fetus is such gravity to compel a woman to carry a pregnancy to term (and even then abortion without inflicting pain would be unproblematic). Thus, we conclude that a ban on abortion appears not to involve any weighty benefits for the purposes of determining whether such a ban is indirectly discriminatory.

Suppose we are wrong. Suppose fetuses have an equal moral status to any of us. We think that even in that case abortion ban would be discriminatory and abortion should be legal. The reason for this can be found in the legal case *McFall v. Shimp*.²⁸ The court ruled that a person

^{vi} We thank an anonymous reviewer for pressing us on this.

is not legally obligated to give bone marrow to his dying relative – even though the person is the only potential donor and refusing to give the bone marrow would kill him. Based on the case, Boonin, reasons in light of Thomson’s famous argument²⁹, that people, whether fetuses or not, do not have a right to use other people’s bodies to sustain their own life.³⁰

In response to the third question, we can simply say that since a ban on abortion does seem to have a morally weighty disadvantageous impact on women of color and since it does not involve any obvious benefits to weigh up against the disadvantages, a ban on abortion satisfies the disproportionality condition irrespective of how this condition is fleshed out.

Based on the societal facts of disparities in health and access to health care, it seems that abortion ban would indirectly discriminate against women of color. Therefore, restricting abortion access by overruling *Roe* is discriminatory and thus contributes to societal injustice.

Does overruling *Roe* discriminate against women?

We now move on to the question of whether banning abortion is discriminatory against women in general as opposed to discriminatory against women of color only. The abortion ban affects women more than men because it is generally those who identify as women who can and will get pregnant. Women bear the burdens and costs of pregnancy with their own lives and bodies. Thus, it is worth asking if overruling *Roe* discriminates against women as compared to men?

Using the earlier definition of direct discrimination, we can again ask two questions. First, does a state – or the Supreme Court – that imposes restrictions on abortion treat women disadvantageously relative to men. And second, does a state – or the Supreme Court – that imposes restrictions on abortion do so because of a mental representation of women as members of a socially salient group or does it formulate rules or policies that explicitly pick out or correspond to people in the socially salient group to which women belong.

Here answers to both questions seem to be ‘yes’. In relation to the first question, we note that a ban on abortion does disadvantage women compared to men considerably relative to a situation where there is free access to abortion. Being pregnant causes a wide range of symptoms that range from relatively minor inconvenience to those that impair normal functioning and might even become lethal. Not providing accurate treatment for people who are pregnant disadvantages women compared to men.

When it comes to the second question, an objector might say that men do not have access to abortion either, so restricting abortion access is not discriminatory against women since everyone is denied access to it. However, we should look at the issue from a different perspective.

We believe that many would, rightly, think it discriminatory to ban access to prostate cancer operations. That is the case even if women are denied access to such operations as well. The view would be that only men need prostate cancer operations and, thus, the charge of discrimination is not defeated simply on the ground that women too are denied access to it. By parity of reasoning, we cannot defeat the charge that a ban on abortion is gender discrimination on the ground that men too are not permitted to have an abortion. Furthermore, in *Dobbs*, Justice Samuel Alito submits that ‘a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications.’ Whatever the merits of this contention, it bears on whether a ban on abortion involves discrimination against women in a legal sense. Since our concern is whether a ban is discrimination in the expounded philosophical sense (see introduction), which does not rest on any notion of ‘heightened scrutiny’, Justice Alito’s concern is orthogonal to our concerns. Something that (does not count) as discrimination as our definition might not (might) be discrimination in a legal sense in a particular jurisdiction, e.g., in many jurisdictions around the world much of what, on our definition, amounts direct discrimination against gay people does not count as discrimination in a legal sense. A ban on abortion discriminates against women and furthermore, constitutes direct discrimination within the relevant framework.

Does overruling Roe constitute or result in structural discrimination?

We now turn to the question of whether overruling Roe constitutes or results in structural racism or sexism. This question is important. Many would argue that a narrow focus on whether policies etc. are directly discriminatory, e.g., motivated by certain discriminatory intentions etc., results in our overlooking the, causally speaking, most important drivers of discrimination. More generally, recently there has been considerable attention to issues of structural sexism in connection with the #MeToo movement and structural racism in connection with Black Lives Matter.

Unfortunately, the concept of structural discrimination has not received the attention that it deserves, and different theorists offer quite different characterizations of what it – or related notions such as structural racism or sexism – amounts to. Following Hacking,³¹ we take our

clue from what the point of characterizing a certain type of discrimination as structural as opposed to discrimination of a more straightforward kind is.

We posit that when discrimination is said to be structural in this way, this involves two central points. First, the discrimination in question is systematic in that it occurs in a lot of different contexts and that there are stable social structures in place such that we can reasonably expect the relevant discriminatory behavior to be stable over time. Second, the discrimination in question does not rest on specific individuals being biased or flawed in particular ways. In principle, structural discrimination could take place even if the agents whose behavior the relevant social structure is realized in are free from discriminatory biases.

Accordingly, we propose to understand structural discrimination as a subspecies of indirect discrimination:

X engages in structural discrimination against Y relative to Z if and only if: (i) X does not directly discriminate against Y relative to Z and (ii) X, does, however, act in a way which imposes *systematic* disadvantages on the group of people to which Y belongs that are disproportionate relative to the benefits that acting in this way confers on others.

We can now ask whether banning abortion either constitutes or increases structural discrimination against women of color and women in general in this sense. In relation to the question about structural discrimination against women of color, we simply note that while it is reasonable to assume that a policy etc. which amounts to structural discrimination also boosts discrimination, it need not be the case. In relation to the former question, we conclude in view of our earlier discussion that banning abortion constitutes structural discrimination against women of color. As indicated, they are consistently subjected to disadvantages across a wide range of different contexts. Indeed, banning abortion is also likely to increase these disadvantages. When it comes to the question of structural discrimination against women in general, it is plausible to conclude that banning abortion involves the imposition of a systematic disadvantage on women. One important thing to bear in mind is that women have been, for a long period of time, treated as second-class citizens. Women's pain, discomfort and diseases have been constantly ignored and medicine has failed women by treating their bodies as alien and other.³² Indeed, these disadvantages seem to obtain across a wide range of different contexts and stably so. Hence, given our definition of structural discrimination as a subspecies of indirect discrimination, given our claim that overturning Roe amounts to direct

discrimination against women, and given the widespread assumption that direct and indirect discrimination are mutually exclusive, we must conclude that banning abortion does not amount to structural discrimination against women in general. It does discriminate against women as we argued above, of course, but the discrimination in question is direct.

Some are bound to disagree with us on this matter. In response, we note that our position is consistent with saying that the direct discrimination – which banning abortion is an instance of – is a result of structural discrimination against women. We are not saying that it is, but simply that, for all we have said, it could be and saying that would be no different from saying that many forms of sexist, indirect discrimination on the job market, say, results in more direct discrimination against women even if these indirect forms of job market discrimination, e.g., working schedules that are difficult or impossible for persons with childcare responsibilities (or persons who take these responsibilities seriously), are not instances of direct discrimination. Also, if, in response to the present challenge (i.e., the one articulated two sentences above), we say direct discrimination too can constitute structural discrimination, the point of saying that a certain form of discrimination is structural and, thus, that we need not engage in fault-finding in the individuals engaged in it, disappears.³³ On this view, wrongful, blameworthy acts of direct discrimination might constitute structural discrimination and not just be the causal result of structural discrimination.

An anonymous review raised a different objection. Appealing to Johan Galtung's definition of structural violence,³⁴ the reviewer suggested that, roughly, structural discrimination should be defined as follows: "X structurally discriminates against Y relative to Z if and only if: (i) X systematically disadvantages Y relative to Z, e.g., by making Y, unlike Z, vulnerable to various kinds of harm and (ii) 'X' does not refer to a particular agent (whether an individual person or a collective agent) but rather to a social structure.

Adopting this definition instead of the one we have proposed makes no difference to our claim that a ban on abortion is (part of) structural discrimination against women. However, since acts of direct discrimination presumably can be components in structural discrimination, on the definition suggested by the reviewer, adopting that definition implies that while *Dobbs* itself does not amount to structural discrimination – to say that would imply that the disadvantage in question is a result of a simple causal process involving clearly identifiable perpetrators, i.e., legislators and Supreme Court judges, which goes against the

impulse behind the definition of structural discrimination at stake here – arguably it is a constitutive *part* of a sexist social structure that discriminates against women.

Conclusion

In this paper, we have argued that overturning *Roe* and thus giving states a right to ban abortion for a large subset of women, discriminates indirectly against women of color and directly against women in general. Based on the assumption that structural discrimination is a subset of indirect discrimination, we have also argued that overruling *Roe* involves structural discrimination against women of color, but not against women in general. Banning abortion simply is direct discrimination against women. It is also the case that in the overturning of *Roe* and the resulting limitations on abortion access throughout U.S. states, women are the socially salient group that these policies correspond to. Given the harm that the overturning of *Roe* will perpetuate, it seems evident that this constitutes an injustice to women.³⁵

¹ *Roe v. Wade*, (1973). 410 U.S. 113.

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