Fetal Anomalies, Undue Burdens, and 20-week Abortion Bans

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By Lisa M. Corrigan | Thursday, May 23rd, 2013

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REPRODUCTIVE RIGHTS
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With the introduction of a 20-week abortion ban in the District of Columbia in April by Rep. Trent Franks (R-AZ), anti-choice activists are once again looking to restrict abortion access in a city where blowback from the residents won't have much political fallout for members of Congress.

The Pain-Capable Unborn Child Protection Act follows the 20-week abortion ban template provided to legislators across the country by the National Right to Life Committee and Franks hope to use it in D.C. to capitalize on the success of 20-week bans nationwide. Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, North Dakota, and Oklahoma have passed similar 20-week abortion bans since 2011. Many of the 20-week bans have not been tested through court challenge, with the exception of Arizona, where the Ninth Circuit Court of Appeals recently tossed out the ban on constitutional grounds, and Georgia. In Georgia, the American Civil Liberties Union won a temporary injunction against the implementation of the 20-week bans after a state judge upheld the law by citing the presence of "fetal pain" at 20 weeks.

Additionally, the Idaho ban was recently struck down by Chief District Judge Winmill, who wrote:

> *The State's clear disregard of this controlling Supreme Court precedent and its apparent determination to define viability in a manner specifically and repeatedly condemned by the Supreme Court evinces an intent to place an insurmountable obstacle in the path of women seeking non-therapeutic abortions of a nonviable fetus at and after twenty weeks' gestation.*

Judge Winmill passionately argued that the purpose of the 20-week "categorical ban is to protect the fetus — not the mother," thereby undermining Supreme Court rulings since *Roe* on viability, particularly in *Colautti v. Franklin*, which held:

> *Because this point [of viability] may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor — as the determinant of when the State has a compelling interest in the life or health of the fetus.*

Winmill's decision emphasized the illegality of categorical bans legislating the point of viability and lambasted the legislature for gross overreach and for attempting to impose an "undue burden" on women seeking legal medical care.

Mapping the changes in state abortion laws demonstrates how the proliferation of 20-week bans (and those banning abortion even earlier) are changing the nature of legal abortion access across the nation. This is despite the fact that 20-week abortion bans are a tiny fraction of the abortions performed in the United States. The Centers for Disease Control and Prevention document that 98.7 percent of abortions happen before 21 weeks.

Nonetheless, the 20-week bans were the top legislative priority of the National Right to Life Committee for 2012 who saw them a measures designed to slowly roll back the viability standard introduced in the Supreme Court's 1972 decision in *Roe v. Wade*. In that decision, the Court opined that abortion was a right up until natural or assisted viability between 24-28 weeks.

Advocates of 20-week abortion bans generally rely on junk science based on the pseudoscience of fetal pain to warrant the stat laws prohibiting third trimester abortions. Their claims stem from erroneous assertions that the fetus feels pain at 20 weeks, despite several comprehensive literature reviews demonstrating no credible evidence of fetal pain until the third trimester. Likewise, the case for "fetal pain" rests on the argument that the rights of the fetus should take precedence over the civil rights of the mother.

Missing in the larger public conversation about 20-week abortion bans is the fact that contemporary medical textbooks show a large number of fetal anomalies are only detected via ultrasound after 18-24 weeks because gynecological norms suggest that "the ideal time to perform the second trimester ultrasound is between 20-22 weeks." While ultrasounds administered prior to 20 weeks are generally adequate to assess major organ systems, they fail to detect major cardiac, skeletal, and craniofacial anomalies, particularly those that are lethal to the fetus.

Of particular concern are two classes of fetal anomalies that cannot be detected early in a pregnancy. First are the variable-onse fetal anomalies. These anomalies begin at variable gestational ages but are often detected beyond 20 weeks. Second are the late-onset anomalies that develop late in the gestational age of the fetus, typically in the second or third trimester, or are undetectable until the abnormality is at the end-point of a pregnancy. Importantly, the 20-week bans passing across the states generally do not include exceptions for lethal fetal anomalies, meaning women are forced to carry fetuses with anomalies to term regardless of viability.

The American College of Obstetricians and Gynecologists, or ACOG, writes that variable-onset and late-onset anomalies are difficult to diagnose before 20 weeks. In a brief supporting the doctors who have challenged Arizona's law , ACOG notes, "by the time a diagnosis is confirmed by a specialist capable of diagnosing these anomalies, the pregnancy has often progressed beyon 20 weeks." This is usually due to the length of time it takes to schedule additional tests and to receive results. They add that the obesity epidemic in states like Arizona compounds the ability of earlier ultrasounds to detect major anomalies, including those tha are lethal.

Numerous examples of lethal fetal anomalies detected after 20 weeks include, but are not limited to:

- anencephaly, which is a lethal fetal anomaly characterized by the absence of the brain and cranium above the base of the skull, leading to death before or shortly after birth
- renal agenesis, where the kidneys fail to materialize, leading to death before or shortly after birth
- limb-body wall complex, where the organs develop outside of the body cavity
- neural tube defects such as encephalocele (the protrusion of brain tissue through an opening in the skull), and severe hydrocephaly (severe accumulation of excessive fluid within the brain)
- meningomyelocele, which is an opening in the vertebrae through which the meningeal sac may protrude
- caudal regression syndrome, a structural defect of the lower spine leading to neurological impairment and incontinence
- lethal skeletal dysplasias, where spinal and limb growth are grossly impaired leading to stillbirths, premature birth, and often death shortly after birth, often from respiratory failure

For many families who have never dealt with the trauma of fetal anomalies, it may seem difficult to understand why third term abortions are necessary. But when abortion care is restricted at 20 weeks, women are often forced to carry nonviable fetuses, often to term. In the case of lethal fetal anomalies, this requirement means countless appointments, treatments, tests, and conversations about the imminent death of their fetus, inflicting preventable trauma on families who want to carry a healthy fetus to term.

Above and beyond the fact that major fetal anomalies often go undetected before 20 weeks and that these anomalies compromise the viability of the fetus is the fact that many of these 20-week bans provide no exceptions for life of the mother. Anc even with a life of the mother exception, women often face numerous serious health complications during their pregnancies.

Cancer, diabetes, lupus, and major heart conditions can all arise during pregnancy, making adequate treatment impossible if such treatment compromises the fetus. In their brief supporting the challenge to Arizona's 20-week ban, the ACOG explains that allowing abortions only in the case of the life of the mother

> *"will jeopardize women's health by severely curtailing physicians' ability to treat patients who face serious health conditions later in pregnancy and will force women to carry pregnancies to term when their fetuses suffer from serious impairments, including those that are incompatible with life. And notwithstanding the legislature's and Defendants' claim that the Act is intended to protect women from the alleged health risks posed by abortion,* ***clear medical evidence shows that abortion is many times safer for a woman than carrying a pregnancy to term and giving birth****, that abortion past 20 weeks is not more dangerous than carrying to term and giving birth, and that abortion does not harm the psychological well- being of pregnant women." [Emphasis added]*

Even in the case of an exception for the life of the mother, infections and complications that can seriously harm the life or fertility of the mother are insufficient to meet the criteria under such narrow exceptions.

The devastating consequences of these laws forcing the birth of nonviable fetuses are wide-ranging. First, beyond the physical stress of carrying a nonviable fetus, is the psychological stress on families dealing with fetal anomalies, particularly if they are fatal. In restricting abortion access, these callous and patently unconstitutional laws impose an undue psychological burden on families whose ability to plan their families is circumscribed by laws based on dubious science and erroneous logic.

Second, recent studies demonstrate that certain populations of low-income women and women of color are likely to face enormous financial and physical barriers to reproductive health care, including gynecological care, meaning that pregnancy detection is delayed. A 2009 study published in the American Journal of Public Health concludes, "The cost of abortion is an important factor in access to care because abortions increase in price with weeks of pregnancy and are therefore more expensiv later in the second trimester. When associated expenses, such as transportation, overnight lodging (because later second-trimester abortions require more than one day to perform), and child care are added, the price of abortion in the later second trimester rises dramatically." Likewise, given the declining availability of abortion access in the United States due to unreasonable legislation, at-risk women are unlikely to have received abortion counseling until later in their pregnancies because the logistics and cost delay examination and treatment. These two factors suggest that 20-week abortion bans have a disproportionately negative effect on poor women and women of color.

Third, these bans contribute to an erosion of scientifically driven public policy on issues of reproductive access. The reliance on junk science instead of data on fetal anomalies leads to laws that ignore double-blind, peer-reviewed science in favor of laws tha punish women and doctors unnecessarily. These laws complicate the ability of doctors to provide timely and complete prenatal care for women and they elevate the fetus, regardless of viability, over the rights of women and their families.

Finally, most of the 20-week bans also do not even contain exceptions for rape or incest. And, many of them also impose crimina penalties for mothers and doctors who pursue abortions after 20 weeks. Taken together, these two aspects of 20-week bans highlight how punitive the legislation is for women and their families and underscore how 20-week bans actually undermine competent medical care for pregnant women while simultaneously categorizing women as criminals even as they pursue constitutionally protected medical care.

Sadly, the proliferation of 20-week bans suggests that efforts to roll back abortion access impose substantial physical, psychological, and political consequences on women and their families. Legislation prohibiting access to reproductive health care at any arbitrary point alienates women from the policymaking process by objectifying them and attempting to erode their right to physical autonomy by privileging the fetus over the needs of the mother.

Lisa M. Corrigan, Ph.D. is an Assistant Professor of Communication and Co-Chair of the Gender Studies Program in the Fulbright College of Arts & Sciences at the University of Arkansas.

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