WHERE ARE THE GROUNDS FOR THE LEGALITY OF ABORTION? A 13TH AMENDMENT ARGUMENT

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(Justice Kennedy, for the majority): The government has a legitimate and substantial interest in preserving and promoting fetal life . . . a confirmation of the State's power to restrict abortions after fetal viability. . . . We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face . . . . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman . . . . Respect for human life finds an ultimate expression in the bond of love the mother has for her child.[1]

(Justice Thomas, concurring): I write separately to reiterate my view that abortion jurisprudence, including *Casey* and *Roe*, has no basis in the Constitution.[2]

(Justice Ginsburg, dissenting): The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D & E *sans* any exception to safeguard a woman's health . . . . The Court invokes an anti-abortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices.[3]

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[1] Gonzales v. Carhart, 550 U.S. 124, 156-59 (2007). The majority, Kennedy, Roberts, Scalia, Thomas, and Alito, gave this as part of their opinion. The majority expresses both their skepticism about abortion precedent and their impression that they are nonetheless following it.

[2] *Gonzales*, 550 U.S. at 169. This is a concurring opinion filed by Justice Thomas, and joined by Justice Scalia, which clearly demonstrates an interest in overturning *Roe v. Wade* and its declaration of a woman's right to an abortion.

[3] *Gonzales*, 550 U.S. at 181-83. This is a dissenting opinion filed by Justice Ginsburg, and joined by Stevens, Souter, and Breyer in the same case, arguing that the decision in this case repudiates *Roe v. Wade*. *See* Roe v. Wade, 401 U.S. 113 (1973). While this article agrees that the right to abortion is critical, it expresses the fear that the decision in *Gonzales* and those cases which may follow from it and

INTRODUCTION

Recently, the United States Supreme Court upheld a congressional ban on "partial-birth" abortions that does not contain an exception for women's health, chipping away at the rights contained in *Roe v. Wade*.[4] As more stringent abortion laws in more states are upheld under court tests, supporters of abortion rights in the United States are increasingly concerned about a possible overturning of the case that provided certain legal protections for abortion. Some argue that these recent decisions repudiate *Roe*, but this article proposes instead that *Roe v. Wade* was decided on inappropriate grounds, and that abortion is not a privacy issue, but a gender subordination issue.

This article uses the term "gender subordination" rather than "gender equality" because it argues that part of what is wrong with gender jurisprudence is indeed the privacy framework, but that the problems that such a framework present cannot be effectively redressed by moving to an equal protection jurisprudence, since equal protection jurisprudence relies on the assumption that women and men are similarly situated as to the legal decision needing to be made—an assumption as false in this area of the law as in many others. Since women experience pregnancy—and thus experience the option of abortion—and men do not, similar situation logic cannot be applied. By using the term "gender subordination," I argue that women's disadvantage is a question of oppression and subordination, not inequality. Subordination is a problem that can be envisioned and redressed without the requirement of similar situation. Thinking about abortion as a gender subordination issue, I argue, reframes the problem and allows one to envision alternative—and stronger—constitutional grounds for the legality of abortion. Particularly, this article argues that the Thirteenth Amendment holds in it grounds for preserving and extending the legality of abortion in the United States.

Seeing the *Roe* opinion and its progeny as gendered is fundamental to this argument.[5] For example, the *Roe* Court found it necessary to reference Ms. Roe's

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further temper the rights in *Roe* do not contradict *Roe*, but betray it as decided on weak grounds.

[4] Gonzales v. Carhart, 550 U.S. 124 (2007); David Savage, *High Court Backs Ban on Disputed Abortion Method*, L.A. TIMES, Apr. 19, 2007, at A1. *See also* Linda Greenhouse, *In Reversal, Of Course, Justices, 5-4, Back Ban on Abortion Method*, N.Y. TIMES, Apr. 19, 2007, at 1; Charlie Savage, *High Court Upholds Ban on Abortion Procedure*, BOSTON GLOBE, Apr. 19, 2007, at A1.

[5] Perhaps it would be useful here to spend a moment on what I mean by "gender". Though the word gender is commonly used, the underlying meaning is not easy to read or decode. Instead, gender is an inter-subjective social construction that constantly evolves with changing societal perceptions and intentional manipulation. Feminist scholars contend that the social division between male and female is unnatural and reifies "gendered" power disparities. V. Spike Peterson, *Sexing Political Identities/Nationalism as Heterosexism*, 6 INT'L FEMINIST J. POL. 34, 38 (1999). In common parlance, the term "sex" identifies biological differences between people understood as men and people understood as women. DONNA HARAWAY, SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE 149 (1988). Usually, gender describes socially constituted difference between the same groups. LAURA SJOBERG & CARON GENTRY, MOTHERS, MONSTERS, WHORES: WOMEN'S VIOLENCE IN GLOBAL POLITICS 18 (2007). While the distinction between biological sex and social difference seems clear enough, some scholars question the ease of distinguishing between biological sex and social gender. Some feminists investigate whether social or biological differences came first, while others see the sex

marital status not once, but several times in making the decision to allow her to have an abortion. This brings up the question of exactly *where* Roe's protected privacy right is located. Certainly, it was not in her entitlement to privacy for her love life.[6] Is privacy inside a woman's head? Is it inside her womb? Is the government not already present in those places? Feminists have long wondered if the word *private* carries with it implications of shamefulness as it is used in the *Roe* decision, and have been critical of the public/private divide.[7]

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body and social gender as constructions reliant on each other for existence. *See* CATHARINE MACKINNON, SEX EQUALITY (2001); Anne Fausto-Sterling, *The Bare Bones of Sex: Part 1, Sex and Gender*, 30.2 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 1491 (2005). Fausto-Sterling sees an overlap between the sexed body and social gender in many areas, including professional success and sexual promiscuity. *Id.* Still, Fausto-Sterling's analysis preserves the notion that sex is limited to male and female. A closer look reveals that even the biological dichotomy between male and female is the product of the social construction of simplicity where complexity exists. Laura Sjoberg, *Agency, Militarized Femininity, and Enemy Others: Observations from the War in Iraq*, 9 INT'L FEMINIST J. POL. 84 (2007). There are, in fact, biological sexes that cannot be understood as either male or female. In fact, there are persons who fall into the biological categories asexual, intersexual—formerly and now controversially known as hermaphroditic—and transsexual. While these categories and their members will not be the main focus of this analysis, their existence and the neglect that they face in every day sex and gender discourses demonstrates both the depth and complexity of gender construction, which is a key point. Judith Butler, UNDOING GENDER 23 (2004). Sex/gender categories, whatever their genesis, are often divided into masculinities and femininities. Masculinities and femininities are made up of behavior expectations, stereotypes, and rules, which apply to persons because they are understood to be members of particular sex categories. Cynthia Enloe, THE CURIOUS FEMINIST 1-17 (2004). The exact content of genders change with various and shifting sociopolitical contexts, but gender subordination—defined as the subordination of femininities to masculinities—remains a constant feature of social and political life across time and space. Social classification and treatment based on perceived gender is called "gendering." J. ANN TICKNER, GENDERING WORLD POLITICS 8 (2001). The fact that gender is socially constructed should not be taken to mean that gender and gender subordination are somehow less real—that social construction, when used in discussions about gender, is a synonym for fake or non-existent. Instead, social constructions such as gender *construct* social life. ELISABETH PRUGL, THE GLOBAL CONSTRUCTION OF GENDER 8 (1999). People live gender and genderings across time, space, and culture. Given the diversity of masculinities and femininities, men and women, it would be unrepresentative to characterize a *gendered experience* as if there was something that all people perceived to be men or all people perceived to be women shared—it is false to assume that gender commonality makes life experiences similar. Instead, each perceived member of a gender group differs, and these different people live gender differently. The genderings that they experience are diverse, as are the processes by which they operate. CHARLOTTE HOOPER, MANLY STATES: MASCULINITIES, INTERNATIONAL RELATIONS, AND GENDER POLITICS 15 (2001). Perhaps the common threat between genderings in global politics—if there is one—is the near-universality of gender subordinating discourses. As such, "gender is a set of discourses which can set, change, enforce, and represent meaning on the basis of perceived membership in or relation to sex categories." R. W. Connell, MASCULINITIES 14 (Allen & Unwin eds., 1995); Laura Sjoberg, *Agency, Militarized Femininity, and Enemy Others*, 9 INT'L FEMINIST J. POL. 84, 86 (2007); J. K. Gibson-Graham, *Stuffed if I Know: Reflections on Postmodern Feminist Social Research.* GENDER, PLACE, & CULTURE 219 (1994). Gender discourses, so defined, are everywhere in politics.

[6] CATHARINE MACKINNON, SEX EQUALITY 1222 (2001).

[7] Here, I do not use the "public/private divide" as a monolith or red herring. Instead, I use it while recognizing the hybridity of its effects. The perception that women have a "private" sphere not available to men and/or not applicable to them has been a source of many protections for women and gender, including the original grounds for the decision in *Roe v. Wade*. At the same time, however, that this perception has provided women with legal rights, it has preserved the assumption that women are both different and inferior. The relegation of women to the "private sphere"—whether that is a sphere of protection or one of violation—perpetuates the stereotype that women are weak, apolitical, and incapable *even when* it also bestows them a legal right. This has practical implications including difficulty organizing women and the inadvertent allowing of abuse; but its real harm is in the symbolic

Many women's rights in the United States—for example, abortion—were originally granted to women in terms of their constitutionally protected right to privacy.[8] Even though the language has evolved from strictly privacy to a liberty/autonomy framework,[9] important elements of the privacy framework remain.[10] Other rights have been consistently denied to women because the law is powerless to interfere in the private sphere.[11] This article looks to change that by mounting a general critique of the public/private dichotomy and its gender-subordinating implications as it is applied in the law, then applying those insights in the context of the jurisprudence of abortion. Section I reads the privacy grounds on which abortion was judged (sometimes) legal through feminist lenses, arguing that this jurisprudence, while it is employed in service of women's rights and keeps a particular right legal, is based in the gender-subordinating public/private dichotomy and therefore net harmful to the cause of ending gender subordination. Section II contends that the problem is not with the public/private dichotomy alone, but with the preservation of the individual—rather than the gender—as the location of rights and relegation of gender-based rights to a sphere where they are both considered less important and pliable. Section III looks at abortion jurisprudence through the lenses of these feminist criticisms of prevailing concepts of privacy and autonomy, contending that these bases for the legality of abortion make both for bad law and bad public policy. Section IV explains why equal protection does not provide adequate protections for abortion. Next, in Section V, the article argues that the appropriate grounds for the right to abortion in the United States is the Thirteenth Amendment prohibition against involuntary servitude. Finally, Section VI explores some of the theoretical and practical benefits of such an approach, and the article concludes by looking forward to the possibility of reformulating legal regimes to take account of gender subordination in other areas.

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affirmation of women as members of a *private* sphere—most often, the household—rather than a public one.

[8] *See* Roe v. Wade, 401 U. S. 113. *See also* Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL. F. 137, 145 (2002).

[9] *See, e.g.*, Ginsburg's dissent in Gonzales v. Carhart, 550 U.S. 124, (2007) at *25 (contending that this is a different sort of privacy, concerned with body ownership and individual autonomy).

[10] *See* LAURIE SHRAGE, ABORTION AND SOCIAL RESPONSIBILITY: DEPOLARIZING THE DEBATE 117 (2003). *See also* Rosemary Nossiff, *Gendered Citizenship: Women, Equality, and Abortion Policy*, 29 NEW POL. SCI. 61, 68 (2007); MACKINNON, *supra* note 6, at 1125.

[11] For example, some state governments have been reticent to interfere in—or even make illegal—domestic violence or marital rape, because those happen in the "private" sphere. Other states have denied women contraceptives, since that is the private business of the household—and therefore the husband's domain. *See, e.g.*, Juan Cole, *The Taliban, Women, and the Hegelian Private Sphere*, 70 SOCIAL RESEARCH 771, 800 (2003); JEAN ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN (1981); Valentine Moghadam, *Women's Activism and the Public Sphere: Introduction and Overview*, 2 J. MIDDLE EAST WOMEN'S STUD. 1, 6 (2006).

I. PRIVACY THROUGH GENDERED LENSES

Lenses serve as filters; choosing, sorting, and ordering what a person sees and understands.[12] Lenses are used, consciously or unconsciously, to "foreground some things, while backgrounding others" in political thought and practice.[13] A lens can be thought about as a determination of what one is looking *for* when one looks at a political event or phenomenon; as a question of framing. A frame is an inter-subjective system of representations and representation-producing practices, present across political, social, and academic discourses.[14]

Feminist scholars look at the world through "gendered lenses."[15] Gendered lenses look to find, define, and redress gender subordination in the political situations that they evaluate. As scholarly tools, "gender lenses also focus on the everyday experiences of women as *women* and highlight their unequal social position."[16] Gender, then, is "a particular kind of power relation" central to political understandings.[17] A gender lens serves to "guide the way that actors understand events and relations, enabling some lines of inquiry and disabling others."[18]

I come to the study of the concept of privacy looking through gendered lenses. Identifying the scope of privacy rights that we are discussing is crucial to a successful critique of privacy through gendered lenses. As Daniel Solove, John Marshall Harlan Research Professor of Law at George Washington University Law School, explains:

> Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations. Time and again philosophers, legal theorists, and jurists have lamented the great difficulty in reaching a satisfying conception of privacy.[19]

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[12] LAURA SJOBERG, GENDER, JUSTICE, AND THE WARS IN IRAQ: A FEMINIST REFORMULATION OF JUST WAR THEORY 113 (2006), citing V. SPIKE PETERSON & ANNE SISSON RUNYAN, GLOBAL GENDER ISSUES 9 (1999). These deductions come from the social movement's literature on framing. *See, e.g.*, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

[13] This interpretation contends that there is no such thing as objective fact or objective importance; rather the frames we use to see certain political, social, or legal facts define their contents and their ordering. Such an approach is taken in V. SPIKE PETERSON & ANNE SISSON RUNYAN, GLOBAL GENDER ISSUES 21 (1999).

[14] *See* SJOBERG, *supra* note 12, at 13.

[15] *See* PETERSON & RUNYAN, *supra* note 13, at 35; CHRISTINE SYLVESTER, FEMINIST THEORY AND INTERNATIONAL RELATIONS IN A POSTMODERN ERA 31 (1994).

[16] JILL STEANS, GENDER AND INTERNATIONAL RELATIONS: AN INTRODUCTION 5 (1998).

[17] *Id.*

[18] KATHY FERGUSON, THE MAN QUESTION: VISIONS OF SUBJECTIVITY IN FEMINIST THEORY 230 (1993).

[19] Daniel Solove, *Conceptualizing Privacy*, 90 CAL. L. REV.1087, 1088 (2002).

In other words, the exact content of privacy has been both a philosophical and jurisprudential controversy for much of recent history. In fact, "several theorists have surveyed the interests that the law protects under the rubric of privacy and have concluded that they are distinct and unrelated."[20] While exactly what is covered in the topic of privacy—either intellectually or under the law—may be less than clear, the gendered nature of the delineation of the public/private sphere is reflected in many areas of the law characterized as privacy jurisprudence.

In many legal discourses, men are described as a part of the public sphere while women are relegated to the private sphere.[21] While men's problems are considered political, women's problems are often considered to be a part of the personal—or private sphere—within a household or otherwise outside of public domain. Even as women are increasingly accepted as an appropriate part of public life, their rights and needs are still often characterized as apolitical; a part of the private sphere.[22] The private sphere is often characterized as either outside the reach of the law, or a space that the law protects but does not know of or care for its contents. There are two problems with this logic for gendered lenses studying jurisprudence; the separation of the public and private domains, and the fact that the private domain is often used to protect violations of women's rights, and to draw distinctions between men and women.

The divide between the personal and the political categorizes the suffering of many marginalized groups and peoples, especially women, as non-political or "private." Some rights and privileges fail to obtain recognition because they have

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[20] *Id.* at 1089. I argue that abortion rights are some of the most misplaced rights protected in privacy jurisprudence. The placement of abortion within privacy law both confuses the substance of privacy, and, as the remainder of this article argues, inadvertently harms the interest of women who seek abortion rights.

[21] Susan Okin, *Feminism, Women's Rights, and Cultural Differences*, 12 HYPATIA 23, 31 (1998). Okin observes that it is hard to get some rights recognized because they have been dismissed as a part of the "private" sphere. *Id.* at 27. The division of the political and social world into "public" and "private" marginalizes those interests which are in "private" places, like inside the home. Spike Peterson contends that the "private" is always public, as "to the extent that personal gender identities constitute a "core" sense of "self," they fundamentally condition our self-esteem and psychological security." Peterson, *supra* note 5, at 61. The classification of "self" as "private" is insidious in political interaction. Cynthia Enloe applies this critique to international relations. CYNTHIA ENLOE, BANANAS, BEACHES, AND BASES 195 (1990). She begins with the transformation of the popular feminist phrase "the personal is political" into "the personal is international." *Id. See also* CHARLOTTE HOOPER, MANLY STATES 93 (2001). Enloe explains that, "to make sense of international politics we also have to read power backwards and forwards. Power relations between countries and their governments involve more than gunboat maneuvers and diplomatic telegrams." ENLOE, *supra*. Instead, international relations is about everything from a Campbell's soup can to a nuclear bomb. Enloe describes the relationship between public and private—and personal and international—as hybridized and complex. Gillian Youngs concludes that feminisms need "multi-locational perspectives on patriarchal forces in terms of state and market, to recognize that the public/private social and spatial constructions are, in certain senses, mobilized and reconfigured in this globalizing world." Gillian Youngs, *Breaking the Patriarchal Bonds: Demythologizing the Public/Private Dichotomy*, *in* GENDER AND GLOBAL RESTRUCTURING: SIGHTINGS, SITES, RESISTANCES 44 (Marianne Marchand & Anne Sisson Runyan, eds. 2000). In other words, the margins are both important to see and constantly changing, negotiating the boundaries of public and private.

[22] SJOBERG, *supra* note 12, at 176.

been dismissed as a part of the "private" sphere.[23] The division of the political and social world into "public" and "private" marginalizes those interests which are in private places, like inside the home, or inside their bodies. When issues fall on the "private" side of the public/private dichotomy, they are considered rights of individual bodies, which are often negative rights and even more often subject to situational enforcement.[24] As such, the relegation of women's rights to the private sphere commits the double transgression of privatizing women's gender identities and providing inadequate protection for the given right.[25] This relegation is a result of political processes that work through a "patriarchal prism," which encourages "a prioritization of public sphere activities over the private realm on the basis of a power relationship between the two."[26] The public/private dichotomy that has marginalized women for centuries is used to keep "normal politics" as seen exclusively in the public realm and women's lives as exclusively in the personal realm.[27] There is a problem when women have to seek their rights in the private realm; when women are "distinctively unequal" in private, and are "defined as second-class citizens by virtue of their being identified with the private."[28] As feminist lawyer Catherine MacKinnon describes:

> [W]hile the private has been a refuge for some, it has been a hellhole for others, often at the same time. In a gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability . . . Everyone is implicitly equal in there. If the woman needs something – say, equality to make these assumptions real, privacy law does nothing for her.[29]

Some feminists protest MacKinnon's theory by arguing that the use of a privacy ground to vindicate women's rights is actually counterproductive to the goal of gender equality. In this logic, for example, an anti-abortion statute is not a violation of women's privacy rights, but a violation of her right to equal protection of the law; not a personal issue, but a sex equality issue. Privacy grounds for the vindication of women's rights take away the second dimension—that of sex

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[23] Okin, *supra* note 21, at 50. For example, it has been difficult to obtain recognition for the rights of women who work as maids or in other household service positions, as the internal affairs of a household are often considered private. CHRISTINE CHIN, IN SERVICE AND SERVITUDE: FOREIGN FEMALE DOMESTIC WORKERS AND THE MALAYSIAN "MODERNITY" PROJECT 6 (1998).

[24] Okin, *supra* note 21, at 46. By negative rights, I mean that private sphere rights are generally considered the right to non-interference in the private sphere, rather than the positive possession of certain rights within the private sphere.

[25] Peterson, *supra* note 5, at 37.

[26] Youngs, *supra* note 21, at 45.

[27] TICKNER, *supra* note 5, at 11.

[28] MACKINNON, *supra* note 7, at 1411.

[29] Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1311 (1991). MacKinnon is arguing that privacy jurisprudence preserves inequality rather than promoting equality. While this article disagrees with MacKinnon's focus on equality, her point that privacy jurisprudence negatively distinguishes women and inadequately protects their rights is well-taken.

subordination—by making the abuse and subordination of women appear individual, rather than group-based; unique, rather than perpetuating.

II. PRIVACY AND ABORTION

Abortion was generally legal in the United States until the mid-nineteenth century.[30] Original campaigns to make abortion illegal centered on the policing of women's sexual morality, a cause which courts and legislators alike have long since abandoned as a sound approach to lawmaking. When abortion is a crime, many women die from it.[31] Worldwide, there is one death per every 100 illegal abortions, and over 100,000 women die per year from illegal abortions. It is estimated that the death rate from illegal abortions is eight times as great as the death rate as associated with legal abortions.[32] Further, legalizing abortion in the United States did not change the abortion rate.[33]

Anti-abortion laws around the country were overturned in 1973 with the decision in *Roe v. Wade*.[34] The Supreme Court decision recognizing women's partial right to an abortion was on privacy grounds. Recognizing a privacy right for women's bodies and women's lives has become established law in American jurisprudence. In overturning a Connecticut law prohibiting the use of contraception, Justice Douglas writing for the majority in *Griswold v. Connecticut* stated: "This law . . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[35] "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . ." Various guarantees create zones of privacy.[36] The *Griswold* decision relies on the logic that a law prohibiting the use of contraception interferes with people's intimate relationships, and reflects with horror on the possibility of police searching couples' bedrooms for evidence of the use of contraceptives. In this decision, the private sphere is something that the law is properly blind to and cannot interfere with absent legitimate government interest. The government cannot deny the use of contraceptives, because it should not be able to see them being used.

After *Griswold*, *Roe v. Wade* affirmed the existence of the right to privacy and applied it to the situation of abortion.[37] In *Roe*, the court struck down Texas'

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[30] *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY (1978).

[31] *See* Phillip G. Stubblefield & David A. Grimes, *Septic Abortion*, 331 NEW ENG. J. MED. 310, 310-11 (1994).

[32] *See* HENRY MORGENTALER, ABORTION AND CONTRACEPTION 110 (1982).

[33] *See* Brief of Seventy-Five Organizations Committed to Women's Equality as Amicus Curiae Supporting Respondents at 18; Sternberg v. Carhart, 492 U.S. 490 (1999).

[34] 410 U. S. 113.

[35] Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[36] *Id.* at 484.

[37] 410 U.S. 113.

criminal abortion statute.[38] The Court held that the right to choose abortion is a liberty protected in its privacy from unwarranted government intrusion, and that the state had no compelling interest in preserving fetal life before viability.[39] The Court also held that the fetus is not a "person" within the meaning of the Fourteenth Amendment.[40]

In *Roe*, the Court affirmed that it had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[41] This right has been applied in cases relating to parenting and education,[42] contraception,[43] family relationships,[44] marriage,[45] and now abortion. The court classified this right as located in the Fourteenth Amendment jurisprudence of substantive due process. Justice Blackmun explained the harm that criminal abortion laws cause:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional off-spring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family unable, psychologically or otherwise, to care for it . . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in the consultation.[46]

The Court asserted that a woman's right to choose abortion is a fundamental right which can only be limited by a compelling state interest, and that preserving the life of a fetus before viability is not a compelling state interest.

Justice Sandra Day O'Connor warned that relying on the concept of viability might create a slippery slope, contending that access to improved technology continues to drive back the date of potential viability and thus allows states to over-

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38 *Id.*

39 *Id.* at 163-65.

40 *Id.* at 157.

41 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

42 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

43 Griswold v. Connecticut, 381 U.S. 479 (1965).

44 Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

45 Loving v. Virginia, 388 U.S. 1, 12 (1967).

46 Roe v. Wade, 410 U.S. 113, 153 (1973). This article finds this passage of the opinion particularly interesting, given that the Court recognizes that forcing a woman to continue with a pregnancy that she is not interested in is an appropriation of her body and labor. The reasoning of the opinion favors grounds which remove a woman's body from the public sphere and do not inquire into what she and her physician choose to do in the private sphere, until or unless that woman's private decision infringes on public interest. While the fetus' rights are described as a public interest, women's rights are not.

regulate abortion.[47] Today, fetuses are indeed being declared viable between two and four weeks earlier than they were at the time *Roe* was decided.[48] *Roe* decriminalized abortion when the fetus was not viable, and left the decision in the hands of the woman and her doctor. The decision in *Roe* was affirmed in *Planned Parenthood v. Casey.*[49]

III. FROM PRIVACY TO AUTONOMY

Like in *Casey*, a number of the women's rights which were originally supported on privacy grounds are now often discussed in terms of liberty and autonomy of one's body.[50] The discussion has moved from women's right to "privacy" to women's right to "privacy and autonomy of her body."[51] At first glance, the addition of bodily autonomy grounds seems to—at least partially—remove the rights from the private sphere, and transgress the problems with the private individualism of the assignment of women's rights. Still, the idea of autonomy as litigated in these cases remains a problematic and gendered concept.

The idea of individual autonomy assumes that each individual has equal power and control over his or her own body, and that people act independently of other people's wishes, desires, and interests. In other words, an "autonomous" woman is able to utilize her right to abortion because the only force that could stop her, a law against that abortion, does not exist. In reality, the reliance of women's rights decisions on autonomy grounds is harmful for several reasons. First, it is inaccurate—women are not radically autonomous. Second, it creates the appearance of equal opportunity, equal access, and equal agency where none exist,

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[47] *Id.* at 161.

[48] The NICHD (National Institute of Child Health and Human Development) now notes a 20% survival for 22 weeks gestation and a 76% survival rate for 25 weeks gestation, http://savingviableinfants.com/2010/12/28/extremely-premature-births-survival/.

[49] There are those that see *Casey v. Planned Parenthood* as a significant backing off from the liberal grounds of *Roe*. Casey v. Planned Parenthood, 505 U.S. 833 (1992). While affirming *Roe*—and thereby the privacy ground on which *Roe* was decided—*Casey* focuses on a woman's liberty. Still, this "liberty" is bound up in the private-sphere notion of personal choice. The Court decided that "a husband's interest in the life of the child his wife is carrying does not permit the state to empower him with this troubling degree of authority over his wife" *because* his wife still has the right to her "personal" decisions. *Id.* at 840. This article calls further attention to a section in *Casey,* like that in *Roe*, which recognizes motherhood as a sacrifice and a commission of labor. The Court explains that: "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, [and] to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice." *Id.* at 838. Still, rather than explain the woman's right to abortion as a right to control her labor, the Court in *Casey* describes the suffering in privacy terms, calling it "too intimate and too personal for the State to insist, without more, on its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Id.* at 839.

[50] JEAN COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 155 (2002); Marybeth Herald, *A Bedroom of One's Own: Morality and Privacy After* Lawrence v. Texas, YALE J.L. & FEMINISM 1 (2004).

[51] *See* supra notes 47-49. The language of autonomy was used in *Casey.*

defining the problems of gender subordination out of existence rather than addressing them directly.

The perception that women *can* act autonomously is inaccurate; both the nature of human interaction and the relative deprivation of power that women experience interfere to make autonomy impossible. University of Pennsylvania feminist political theorist Nancy Hirschmann's understandings of political and moral obligation are a useful starting point for the construction of this argument. Obligation, in liberal and/or social contract terms, is generally characterized as something which limits behavior by requiring non-action.[52] Many theories of obligation, then, assume implicit—but voluntary—consent to many imposed behavioral limitations in our social and political lives.[53] This is a fundamental tenet of many social contract theories as well, that we, as people, have given up certain rights to free behavior implicitly in exchange for the protection of the state.

In practice, though, many of the enforced limitations on our behaviors are not voluntary, implicitly or directly. Feminists scholarship the gender bias in this understanding of how obligation works makes it possible to see the problems with this notion of consent.[54]

In discussing gender bias in obligation, Hirschmann asserts the "claim that freedom is central" to traditional understandings.[55] Freedom is central because we often understand the central purposes of civil society as protecting natural freedom and ensuring that individuals can act rationally.[56] These perceived "natural" freedoms are often not gender-neutral. In psychoanalytic terms, a girl is more likely to learn sameness from a mother figure, whereas a boy is more likely to learn difference; as such, the boy develops conflicting tendencies while the girl develops peaceful ones.[57] Given this, psychoanalytic approaches see that boys' freedom is reactive autonomy; girls' is relational autonomy.[58] Even setting psychoanalysis aside, the expected values of gender roles in social situations constrain actors. This has a twofold effect according to Hirschmann, both in the ways that people live and

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[52] Nancy Hirschmann, *Freedom, Recognition, and Obligations: A Feminist Approach to Political Theory*, 83 AM. POL. SCI. REV. 4 at 1227 (1989). I use Hirschmann's 1989 article here because I believe it to be still the clearest articulation of these principles. Hirschmann herself has written further on this issue, most notably a recent book, NANCY HIRSCHMANN, THE SUBJECT OF LIBERTY: TOWARDS A FEMINIST THEORY OF FREEDOM (2004). "[C]hoices and the selves that made them are constructed by context, discourse, and language; such contexts make meaning, self-hood, and choices possible." *Id.* at xi.

[53] Hirschmann, *supra* note 52, at 1228.

[54] Hirschmann is not talking about a gender bias in the application of obligation, like disparate impact. Instead, she is talking about a structural gender bias in how societies understand and treat obligation. She defines structural gender bias as "the bias of the very structure of obligation—it being defined solely in voluntarist terms, and the fact that *nonvoluntary obligation* is an oxymoron—toward a masculinist perspective which automatically excludes women from obligation on an epistemological level." *Id.* at 1229.

[55] *Id.* at 1233.

[56] *Id.* at 1234.

[57] Hirschmann, *supra* note 52, at 1235.

[58] *Id.*

experience gendered lives and in the dominant narratives of our political and social lives.[59] Hirschmann explains the latter, as she talks about the relationship between freedom, recognition, and violence:

> If the conception of freedom as negative is premised on the struggle for recognition, particularly on the ability to be recognized without reciprocation—if non-recognition is (as it is for the Oedipal boy and Hegel's master) a form of power and violence—freedom, too, must be at least in part an expression of that same power and violence.[60]

In a relationship between someone who is obligated and an obligor, there is an inherent inequality, where the obligated person must recognize and defer to the obligor, who does not owe the same debt in return.[61] Often, in practice, men—obligors—obligate women—the obligated—in a self-perpetuating cycle, where women/femininity are obliged to recognize and defer to men/masculinity but the reverse is not true. These dynamics, however, often go unnoticed as we assume consent insidiously, such that "consent thus seems to save us from authoritarian coercion. But in reality it merely masks it."[62] This is because femininities are disadvantaged in the allocation of obligation both structurally and in distribution processes. Hirschmann explains it as a trap where "[e]ven acts of dissent are interpreted as acts of consent, and unfair bargaining positions belie the freedom implicit in free choice."[63]

A feminist reading of consent interrogates the assumption that all choices made are made from a freely and without the constraints imposed by interdependence.[64] Such a reading interprets "responsibility in the sense of response, or even obligation itself; that is, from a 'feminist standpoint,' perhaps obligation needs to be taken as given."[65] While individuals, then, exist, and are meaningful units, but they make their choices constrained by social power, social place, social expectation, and social pressure. Therefore, "one cannot merely add women's experience to the dominant discourse because the two utilize different ontological and epistemological frameworks."[66] Instead, "a fully consistent consent theory would have to include (perhaps paradoxically) the recognition that not all obligations are self-assumed."[67] Obligation is sometimes involuntary, and

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[59] *Id.* at 1238.

[60] *Id.*

[61] *Id.* at 1239.

[62] Instead of a general social norm, we assume that consent exists despite the fact "that such consent is non-existent for all but a select few." Hirschmann, *supra* note 52, at 1239. The struggle for discursive recognition here interacts with the gendering of social norms.

[63] *Id.* at 1239.

[64] *Id.* at 1241.

[65] *Id.* at 1241. In other words, it is not an issue of making women "free" in order to accept obligation; women's experience proves that freedom to choose and obligation are both not necessarily related and not a one-to-one map even if they are related.

[66] Hirschmann, *supra* note 52, at 1242.

[67] *Id.* at 1229.

always assigned or acquired relationally. If decisions are relational, there is insidiousness in claiming that they are "autonomous," because such a claim hides the constraints under which decisions are made and implemented. The assumption of radical autonomy, then, can perpetuate gender subordination.

Many other feminist scholars reach similar conclusions about the impossibility of a voluntary model of consent. Feminists' understandings of consent, then, operate by "revealing concealed elements of reactive man . . . and sites of struggle by women for and against and around those elements."[68] The concept of autonomy used in gender jurisprudence defines women as radically autonomous: un-problematically capable of making "their own" decisions, an "independence gained by pitting oneself against, as in putting up boundaries and establishing separateness from, another," which is a masculine concept.[69]

Many feminists argue that this picture of women's lives appears to have solved the gender subordination problem while it really entrenches women's disempowerment by hiding it. Instead, feminist scholars can envision a world where "women give up on anti-hegemonic outcomes and embrace post-hegemonic . . . processes which promote a transformed rather than reciprocated form of autonomy and obligation."[70] This is relational autonomy, which does not deny separate identity, but problematizes the idea that all decisions are made independently. Sylvester explains that "relational autonomy establishes identity independence for oneself in and while maintaining relationships with difficult others," keeping in mind power relations and choice.[71] This approach might suggest that, rather than either a privacy or autonomy approach, gender rights should be treated *as such* in order to avoid the gender subordination inherent in apparently gender neutral privacy and autonomy approaches. Feminist critiques of abortion jurisprudence help to flesh out this argument.

IV. ABORTION JURISPRUDENCE

Many feminist critics would prefer if the right to abortion were distributed as an equal protection right, rather than a privacy right.[72] An amicus brief in *Roe*

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[68] Christine Sylvester, Feminists and Realists on Autonomy and Obligation 31 (Feb. 20, 1990) (unpublished manuscript, on file with the University of Southern California Center for International Studies).

[69] CHRISTINE SYLVESTER, FEMINIST INTERNATIONAL RELATIONS: AN UNFINISHED JOURNEY 118 (2002).

[70] Sylvester, *supra* note 68, at 24.

[71] Sylvester, *supra* note 69, at 119.

[72] Most of the approaches discussed below focus on the Fourteenth Amendment—equal protection of the laws—as grounds for abortion as a gender equality right. The pluses and pitfalls of such an approach are discussed in more detail below. Other feminist approaches to abortion as a gender equality right focus on a potential or de facto Equal Rights Amendment ("ERA") to the United States Constitution. Lisa Baldez et al., *Does the U. S. Constitution Need an Equal Rights Amendment?* 35 J. LEGAL STUDIES 271 (2006). Most proposed texts of the ERA include three provisions: one substantive and two for enforcement. The substantive clause usually reads "equality of rights under the law shall not be abridged by any state on account of sex." The Equal Rights Amendment (2007),

argued that criminal abortion statutes "violate the most basic Constitutional rights of women" due to the fact that "women bear the disproportionate share of the *de jure* and *de facto* burdens and penalties of pregnancy, child birth, and child rearing. Thus, any statute which denies a woman the right to determine whether she will bear these burdens denies her equal protection of the laws."[73] Because women bear a disproportionate burden when pregnancy results from sex, feminists argue that forcing women to continue to bear that burden against their will denies them equal protection of the laws. Ruth Coker extended this argument, contending that "an equal protection approach can demonstrate that female adolescents are, in fact, the group *most* in need of heightened scrutiny because the sphere of family-related privacy, coupled with legislative insensitivity, has caused them to be a highly disadvantaged and politically powerless group."[74]

The argument that abortion is a sex equality issue is not a new one. In fact, one of the first constitutional challenges to a state abortion statute contended that it constituted discrimination against women on the basis of sex.[75] Abortion is considered a sex equality issue in several other countries, including Germany and South Africa.[76] In these countries, the interconnections with regard to women's inequality between forced sex, economic deprivation, and reproduction are recognized as a matter of law.[77] Professor Reva Siegel of Yale Law School frames a sex-equality ground for overturning anti-abortion laws:

> Abortion-restrictive regulation is state action compelling pregnancy and motherhood, and this simple fact cannot be evaded by invoking nature or a woman's choices. . . . it presents equal protection concerns that *Roe*'s psychological reasoning obscures. . . . The objective of abortion-restrictive

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equalrightsamendment.org. The first version of the ERA was written at the Seneca Falls 75th Reunion Convention in 1923, and it was introduced before Congress every year until it passed in different wording in 1972. The version that Congress passed had a seven-year deadline for state ratification, which the states did not meet. Anti-ERA activists played on some of the same fears that had garnered female opposition to women's suffrage, arguing that women would lose privacy rights, the right to be supported by their husbands, and the right to be exempt from the draft. Though the deadline for ratification was extended until 1982, it was not ratified. The ERA has been put in front of every session of Congress since 1982. See David C. Huckabee, *Equal Rights Amendment: Ratification Issues*, Memorandum, Mar. 18, 1996 (Congressional Research Service, Library of Congress); The Equal Rights Amendment (2007), equalrightsamendment.org. Some believe an equal rights amendment would mandate that abortion remain legal. Their argument is that the institutionalization of women's equality would require Congress to allow women to have the *equal status* of not being pregnant. Still, because there is no directly similar situation for men, women might be denied the right to abortion *equally* since women have no right to abortion. This is why I contend that sex subordination is a more fruitful framework than sex equality for revising the privacy right to abortion.

[73] Brief for New Women Lawyers, Women's Health and Abortion Project, Inc. and National Abortion Action Coalition as Amici Curiae, Roe v. Wade, 410 U.S. 112 (1973) (No. 70-18).

[74] Ruth Coker, *An Equal Protection Analysis of U.S. Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 359 (1991).

[75] Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971).

[76] MACKINNON, *supra* note 6, at 1245.

[77] *Id.* at 1246.

> regulation is to force women to assume the role and perform the work that has traditionally defined their secondary social status.[78]

Cass Sunstein, Professor at the University of Chicago School of Law, also argues that "abortion restrictions selectively turn women's reproductive capacities into something for the use and control of others" while "no parallel disability is imposed on men."[79] Existing abortion law, based on an allegedly sex-neutral privacy standard, wrongly relies on the assumption that the sexual order and reproductive status quo are "natural, just, and pre-political."[80] This assumption is in itself sex-discriminatory. Moreover, the "sexual order" is in itself discriminatory, and privacy-based abortion laws, which assume the naturalness of women's roles as mothers, entrench that discrimination.

Still, Fourteenth Amendment reformulations of the right to abortion may be inadequate to reverse the gender-discriminatory tide of privacy jurisprudence. This is because equality jurisprudence assumes the similar situation of the parties. As MacKinnon explains:

> In the modern period, movements for human liberation and the legal changes they have inspired and impelled have used the concept of equality as a legal tool for social change, demanding that it be delivered as well as guaranteed. In this process, the legal concept of equality itself . . . has largely escaped scrutiny. . . . [Therefore] sex equality is often guaranteed by law, including where sex inequality is pervasive in society. More imagined than real in life, sex equality in law tends to be more formal or hypothetical than substantive and delivered.[81]

This is because equality under the law is based in the notion that similarly situated equal people should be treated similarly. Feminists ask "how can subordinated groups be seen as 'like' dominant groups if society has organized its inequalities along the lines of perceived 'unalikeness'?"[82] Even when there is no perceived "unalikeness" to interrogate this notion of equality, *actual* unalikeness—for example, pregnancy—makes it difficult to employ.

V. ABORTION AND INVOLUNTARY SERVITUDE

To deal with this concern, this article addresses abortion not as a question of privacy or equal protection, but as a question of gender subordination and involuntary servitude.[83] It proposes that the Thirteenth Amendment provide grounds for women's right to abortion.[84] The Thirteenth Amendment argument

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[78] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 350-51 (1992).

[79] Cass Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 31-2 (1992).

[80] *Id.* at 4.

[81] MACKINNON, supra note 6, at 3.

[82] *Id.* at 7.

[83] *See* discussion, *supra* note 5.

[84] The text of the Thirteenth Amendment reads in its entirety: "Neither slavery nor involuntary

encourages the Supreme Court to break from the privacy-based logic which serves as the defense of a woman's right to abortion in *Roe v. Wade*, the foundational and continuing rule which gives American women a constitutional right to abortion.[85] It further asks the Court to look at abortion as an issue of labor and gender subordination, rather than equal protection.

This argument contends that forcing a woman to remain pregnant when she is unwilling to do so constitutes involuntary servitude, which is a violation of her rights under the Thirteenth Amendment to the Constitution of the United States. While the Supreme Court has discussed the Thirteenth Amendment in several previous cases, the scope of the amendment's protections has never been decisively determined. Some feminists argue that the amendment applies both to women as a class and to every woman individually.

The Supreme Court has never ruled on the question of the extent of protection from involuntary servitude. Involuntary servitude means a condition of slavery in which the victim is forced, either by the use or threat of physical restraint or the use or threat of legal coercion, to work for defendant.[86] In resolving a conflict among the circuits, the Supreme Court limited the definition of involuntary servitude to physical force or legal coercion, excluding psychological coercion.[87] This article contends that legal prohibition of abortion fits into the first group, rather than the second. According to the Court, the phrase "involuntary servitude" was intended to "cover those forms of compulsory labor akin to African slavery."[88] The amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances," and thus provides a constitutional guarantee.[89]

Still, the circumstances under which the Thirteenth Amendment is applicable and the nature of the constitutional guarantee that it gives have yet to be specified. In *Kozminski*, the Court explained that "while the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define."[90] The Court has characterized the Thirteenth Amendment as abolishing slavery and establishing universal freedom, but has left open the question of whether Section One of the amendment did anything more

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servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation." Some have argued that the Thirteenth Amendment should be applied to abortion jurisprudence, but most see the Thirteenth Amendment as a fuzzy area of the law which is not fully developed *or* as a narrow prohibition of black slavery at the end of the Civil War. *See, e.g.*, Lauren Kares, *The Unlucky Thirteenth: A Constitutional Amendment in Search of A Doctrine*, 80 CORNELL L. REV. 372 (1995).

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

86 United States v. Kozminski, 487 U.S. 931, 931 (1988).

87 *Id.* at 939.

88 Butler v. Perry, 240 U.S. 328 (1916).

89 *Civil Rights Cases*, 109 U.S. 3 (1883).

90 United States v. Kozminski, 487 U.S. 931, 942 (1988); Clyatt v. United States, 197 U.S. 207 (1905).

than abolish slavery.[91] The Court has intentionally left that question open several times.[92]

Lower courts have examined the question of the application of the Thirteenth Amendment to issues outside of slavery, but their decisions are in conflict. In *Lyes v. City of Riviera Beach*, the Eleventh Circuit decided that the Thirteenth Amendment did not apply to any circumstances outside of race discrimination.[93] The court held:

> It is clear that section 1985(4) was enacted, at least in part, under Congress' authority to eliminate the 'badges and incidents' of slavery pursuant to section 2 of the Thirteenth Amendment. Congress' authority is limited, however, to the prevention of discrimination on the basis of race. Thus, if we are to interpret section 1985(3) as preventing sex discrimination, we must find some other constitutional grounding.[94]

Additionally, the United States District Court for the District of Utah has held that the Utah Abortion Act is not a violation of the Thirteenth Amendment.[95] There, the Court maintained that prohibiting elective abortion did not bring a woman into involuntary servitude, and that equating carrying a child to term with "compulsory labor" "strains credulity" and "borders on the frivolous."[96] On the other hand, the United States District Court for the District of New York held that the Thirteenth Amendment did apply to women's rights.[97] The Court held, in relevant part:

> The Thirteenth Amendment bears on the interpretation of the law insofar as it attempts to protect the right of mothers and children not to be forcefully separated without being 'convicted'—here adjudicated properly as neglectful and neglected. It provides in part: 'Neither slavery nor involuntary servitude, except as punishment for a crime . . . shall exist within the United States.'
>
> The word race does not appear in the Thirteenth Amendment. Even if it did, it would not preclude the inclusion of this amendment in an overall application of the Constitution to the issue at hand.
>
> . . .
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> Discrimination against women was deeply imbedded in our law until relatively recently. The law cannot ignore the profound sexual connotations of the Thirteenth Amendment.[98]

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91 Jones v. Alfred H. Meyers Co., 392 U.S. 439 (1968).

92 *Id.*; Memphis v. Greene, 451 U.S. 100 (1981).

93 Lyes v. City of Riviera, 166 F.3d 1332 (11th Cir. 1999).

94 *Id.* at 1348 (internal citations omitted).

95 *See* Jane L. v. Bangerter, 794 F. Supp. 1528 (10th Cir. 1992).

96 *Id. at* 1549.

97 Nicholson v. Williams, 203 F. Supp. 2d 153 (2d Cir. 2002).

98 *Id.* at 247.

In short, not only is the question of the applicability of the Thirteenth Amendment to abortion rights unsettled, it is the subject of conflicting opinions at the district court level.

There are a number of ways that one can interpret forcing women to remain pregnant as engaging in labor which is involuntary which may meet the threshold of involuntary servitude. Certainly, there is physical labor involved in an unwanted pregnancy; both the process of *labor*—having the baby itself—and during the time when one is pregnant and awaiting birth. When one is pregnant and awaiting birth, physical burdens are placed on one's body: added weight, decreased mobility, heart health risks, morning sickness, and other physical impacts on one's body. Additionally, there are financial burdens of medical care and childbirth. After giving birth to an unwanted child, a woman is obligated to the labor of engaging in the adoption process involuntarily.[99] If one were to add the psychological burdens of carrying an unwanted pregnancy to term to this list, the imposition on women's lives might be even larger.

Every society in the world, including our own, assumes that it is natural and fair for a woman to perform the labor of childbearing and childrearing without compensation, despite the recognition of the intensity of that labor.[100] This postulation comes from the parallel assumptions that women are both naturally interested in motherhood, and that they are second-class citizens.[101] These assumptions are manifested in anti-abortion laws.[102] Andrew Koppelman, John Paul Stevens Professor of Law at Northwestern University, describes laws which limit a woman's access to abortion as not only individual denials of equal protection but also individual and group subjections to involuntary servitude:

> That injury has both individual and social aspects: forced pregnancy is a deprivation of individual liberty (and this is what the privacy argument stresses), but that deprivation is selectively imposed on women—and women are a group that has traditionally been regarded as a servant caste, whose powers (unlike those of men) are properly directed to the benefit of others rather than themselves. Compulsory motherhood deprives women of both liberty and equality.[103]

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[99] The Court has already recognized the suffering and service that women who have children endure and provide. This suffering is described in terms which, were this any other jurisprudential doctrine, would be classified as labor. The Thirteenth Amendment argument, then, does not go far beyond current jurisprudence conceptually, though it does politically. *See also* text accompanying note 47 and note 49.

[100] *Casey*, 505 U.S. at 845 (noting just how natural pregnancy is before deciding that its naturalness cannot be grounds to force women to endure it. This assumed naturalness allows us to take women's pregnancy outside of the conceptual sphere of labor).

[101] *See, e.g.*, Rosemary Crompton and Claire Lyonette, *The New Gender Essentialism – Domestic and Family 'Choices' and their Relation to Attitidues*, BRITISH JOURNAL OF SOCIOLOGY 56(4): 601-620, 2005.

[102] *See, e.g.*, Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKLEY JOURNAL OF GENDER LAW AND JUSTICE 30 (2005).

[103] Andrew Koppelman, *A Thirteenth Amendment Defense of Abortion*, 84 N.W. U. L. REV. 480,

The strength of this argument over its companion privacy and equal protection-related defenses of abortion is that it provides a gender-equal balancing test of the rights of a woman and the fetus: that fetal personhood is not enough to deprive a woman of her constitutional right to an abortion, rebutting the argument in *Gonzales*.[104] According to Koppelman,

> This argument makes available two responses to the objection that the fetus is a person. The first is that, even if this is so, the fetus' right to continued aid from the woman does not automatically follow. As Thomson observes, 'having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself.' Quite the reverse, giving fetuses a legal right to the continued use of their mothers' bodies would be precisely what the thirteenth amendment forbids. The second response is that since abortion prohibitions infringe on the fundamental right to be free of involuntary servitude, the state bears the burden of having to show that the violation of this right is justified. The State cannot carry this burden, because no one knows how to prove (or disprove) that a fetus is, or should be considered, a person. The mere possibility that it might be is not enough to justify violating women's Thirteenth Amendment rights by forcing them to be mothers.[105]

In addition to making a clear rule for abortion, a Thirteenth Amendment standard makes substantive sense. A number of scholars contend that the Thirteenth Amendment was meant to go further than covering the situation of slavery as defined in the antebellum Southern United States.[106] Were the Thirteenth Amendment intended to be applied narrowly to slavery, it would have only included the term "slavery" among its prohibitions. The language of the Thirteenth Amendment, however, includes prohibitions against *both* slavery and involuntary servitude, implying strongly that the term "involuntary servitude" adds a prohibition not covered by the term "slavery," an inference very much supported by the words of Senator Trumbull quoted above.[107]

Koppelman correctly argues that the Thirteenth Amendment has been adjudicated as about ownership of self, a blanket prohibition against the master/slave relationship, even when voluntarily acceded to by the person in the position of slavery.[108] This prohibition is meant to protect the individual from coercion and the group of which the individual is a member from invidious symbolism. This interpretation of the Thirteenth Amendment rebuts the potential

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481 (1990).

[104] *Gonzales*, 550 U.S. at 124.

[105] Koppelman, *supra* note 103, at 485.

[106] *See, e.g.*, James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002); D. L. Colbert, *Liberating the 13th Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995).

[107] Koppelman, *supra* note 103, at 485.

[108] *Id.* at 508.

counterargument that women assume the risk of pregnancy when they choose to have sex. First, this would still be a disparate impact in equal protection terms. Second, involuntary servitude is not something one can assume the risk of; the Constitutional prohibition is a blanket one, which includes assumed risk and even original voluntary assent of the servitude. Third, a woman who uses a method of birth control that is ninety-five percent effective has a fifty percent chance of pregnancy over the course of a decade, making pregnancy a risk even cautious women are unlikely to avoid.[109] Likewise, under contract law, a worker is permitted to break an *at will* contract provided he or she pays any damages incurred by the employer as a result. The application of involuntary servitude jurisprudence to the question of abortion draws a parallel: whether a woman assumes the risk of pregnancy or originally agrees to the labor, she cannot be forced to continue such labor against her will, because in other circumstances such forced labor would be considered involuntary servitude and would be prohibited by the Thirteenth Amendment.

VI. REPLACING THE PRIVATE SPHERE: VOICES FROM THE MARGINS

Feminist scholarship suggests some new directions for understanding women's lives outside of the public/private divide, and therefore outside of—and liberated from—the privacy grounds on which *Roe v. Wade* mandated the legality of certain abortions. Some approaches, like equal protection litigation, have been discussed above. While many of these approaches address the problem, they do so in a manner inadequate to provide all-inclusive relief. It is necessary to reformulate our understanding of society as a whole and the expected role of women in order to address both the explicit and implicit gendering of the jurisprudence of issue areas such as abortion. Adopting a Thirteenth Amendment approach to abortion jurisprudence would be more consonant with many feminists' approaches to thinking about gender subordination, and might act to help redress gender subordination in our legal theory and practice.

The project of feminist knowledge-building provides some direction for choosing alternatives to privacy jurisprudence. Often, the political content of feminist knowledge-building and knowledge-seeking focuses on political interest in marginalities.[110] The diversity and multiplicity of feminisms is not simply theoretical but political.[111] Seeing feminisms as multiple will allow for an

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[109] *See* Ross, *Contraception: Short-Term and Long-Term Failure Rates*, 21 FAM. PLAN. PERSP. 158 (1988). The person who calculated this statistic isolated the effectiveness of birth control per instance of sex, then estimated the number of times a woman has sex per decade, permuting the possibility that she gets pregnant. While this statistic looks correct, it is not necessary to this argument that it be true. It is only necessary that a woman can take all available precautions—protection, safe sex, and even abstinence—and due to failure or rape still become pregnant against her will.

[110] J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS 9 (Columbia University Press, 1992).

[111] Laura Sjoberg, *Introduction to Security Studies: Feminist Contributions*, 18 SECURITY STUDIES 189 (2009).

understanding both of the importance of the category "women" and the necessity of understanding diversity therein.[112] By considering factors and holding ethical views that are generally invisible in political study or practice, feminisms add disorder to orders that appear tidy because of their exclusiveness, such as abortion jurisprudence.[113]

Feminist political projects, then, are often about seeing and understanding gender in politics and law without reifying genderings or the essentialization of women.[114] Such a project necessarily walks a tightrope: "Feminist critical theorists are trying to find a way forward which retains both gender as a category of analysis and retains the historical commitment to the emancipatory project in feminism, but which takes on board the postmodern and postcolonial critique of the exclusionary practices of Western feminism."[115] The provision for diversity within feminisms provides space for considering diversity more generally and developing a direct political concern for marginalities.[116] Often, feminist theorists look at the world and see the marginalization of women and of feminine values.[117] Women are "at the vortex of contending social forces in the international arena" in a way that not only merits but demands social and political analysis.[118] It is in this context that feminism has focused on the need for recognition of gender inequality and subordination.

Recognizing gender subordination necessarily requires different "lenses" than legal scholarship and practice have traditionally used; it requires looking at the world through the experiences of the oppressed.[119] Feminists often pay attention to marginalities because they see that women occupy many margins in politics.[120] Here, I am not thinking of "marginalities" as absolute, or all women as marginalized, but understanding that looking for women at the margins is a different, and meaningfully so, epistemological position from which to do legal

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[112] STEANS, *supra* note 16, at 29; Floya Anthias, *Beyond Feminism and Multiculturalism: Locating Difference and the Politics of Location*, 25 WOMEN'S STUD. INT'L FORUM 275, 281 (2002).

[113] Sylvester, *supra* note 68, at 35.

[114] In other words, not all women are the same, nor are all of their rights and their needs. While all women—like all people—make relationally autonomous choices, they differ in, among other things, power, degree of constraint, constraining factors, and life experiences. There is, not a single "woman's experience" or even a "feminine experience"—and, by extrapolation, there is no single experience of pregnancy. A critical feminist approach to the law must take into account *both* gender subordination and the variation of women's experiences. *See also* text accompanying note 5.

[115] STEANS, *supra* note 16, at 29.

[116] *See, e.g.*, Sarah Brown, *Feminism, International Relations Theory, and International Relations of Gender Inequality*, Millennium: Journal of International Studies, 17 MILLENNIUM: J. OF INT'L STUD. 461, 480 (1988).

[117] *E.g.*, Anne Marie Goetz, *Feminism and the Limits of the Claim to Know: Contradictions in the Approach to Women in Development*, 17 MILLENNIUM: J. OF INT'L STUD. 17, 477 (1988).

[118] STEANS, *supra* note 16, at 31.

[119] TICKNER, *supra* note 5, at 14; JAN JINDY PETTMAN, WORLDING WOMEN: FEMINIST INTERNATIONAL POLITICS 45 (1996).

[120] *E.g.*, CYNTHIA ENLOE, BANANAS, BEACHES, AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS, 7 (University of California Press, 1989).

analysis.[121] There can be some women *at the margins* and some women *in the center*.

It follows that feminist scholars have a political commitment to illuminate the world from the points of view of marginalized peoples and actors, whether or not they are women.[122] In other words, feminist scholarship might *prioritize* what has traditionally been marginalized as the private sphere. "Private sphere" rights might be seen as more precious, more crucial, and more under-protected than "public sphere" rights. Feminists take their concern for women and apply it to other—interrelated—facets of sociopolitical situations, as feminism is "fundamentally a political act of commitment to understanding the world from the perspective of the socially subjugated."[123] I call this a solidaristic interpretation of the feminist research mission.[124]

This solidaristic interpretation can lead feminists to suggest political dialogues led by traditionally marginalized voices to propose alternatives to policies and practices gendered by the public/private divide. A feminist ethic of politics and justice must take substantive account of difference *and* subordination.[125] The first step to setting up an effective discussion of the requirements of gender justice is understanding knowledge as situated, and thus as an unfinished—and unfinishable—process.[126] The second step is to understand knowledge creation as a multiple dialectical process. Dialectical knowledge creation produces conceptual frameworks by signifying social facts through reflection and thought; a "dialectic between the subjective and objective."[127] A respectful dialogue of diverse observations and perspectives gives the resulting understanding of justice situational validity for the conversants. The third step is the construction of a dialectic of ethical discussion:

> One of the most pressing theoretical and political issues of the present moment is to consider the potential found in the dialogical moment that moves beyond collective imaginings. This involves thinking about ways that on the one hand validate and respect differences of location and positionality (as well as the validity of the collective imaginings that inform peoples valued and cherished beliefs, cultural practices, and self-identities), without neglecting the important issue of equality for individuals and groups.[128]

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[121] *See, e.g.*, TICKNER, *supra* note 5.

[122] *Id.* at 23.

[123] Sarah Brown, *Feminism, International Theory, and the International Relations of Gender Inequality*, 17 MILLENIUM 461, 472 (1988).

[124] Sjoberg, *supra* note 111, at 189.

[125] SANDRA HARDING, IS SCIENCE MULTICULTURAL? 32 (1998).

[126] Anthias, *supra* note 112, at 281; HARAWAY, *supra* note 5, at 47.

[127] STEANS, *supra* note 16, at 30.

[128] Anthias, *supra* note 112, at 81.

This analysis is referring to discussion of values related to women's lives and needs, but her concept could be applied to a feminist dialogue on the meaning of gender justice. The dialogue can be structured to attempt to understand the ways in which ideas relate, conceptually and in terms of power. Such a dialogue is an alternative to the dichotomy of universalism and relativism in moral decision-making; it allows autonomy but recognizes relationality.

A dialogical meaning of justice prioritizes subjectivity and marginality. Conversations can produce alternative discourses that entail new subject positions.[129] Conversations about values can both inspire and constitute gender relations. Still, there is no way to guarantee that a conversation between radically different viewpoints will be productive, even given respect, communication, good will, and power equality. Empathy moves closer to such a guarantee. Empathy bridges the gap between simple conversation and cooperation. Empathy entails a different sort of talking and listening; one with emotional involvement with the position of the other. Feminist philosopher of science Evelyn Fox Keller discusses the product of a multi-sited conversation about values as "dynamic objectivity" based in empathy.[130] She explains that:

> Dynamic objectivity aims at a form of knowledge that grants to the world around us its independent integrity but does so in a way that remains cognizant of, indeed relies on, our connectivity with that world. In this, dynamic objectivity is not unlike empathy, a form of knowledge of other persons that draws explicitly on the commonality of feelings and experience in order to enrich one's understanding of another in his or her own right.[131]

Empathy, however, does not by itself ensure a productive conclusion to a dialogue meant to understand justice, or a conclusion at all for that matter. The participants in a conversation could behave empathetically—even under the conditions described above—and empathy may not solve a complex disagreement.

At heart, disagreements are *arguments*, and dialogical values will not be produced without engaging in argumentation.[132] This understanding of feminist knowledge-building makes the contention that it is not only the substance of privacy jurisprudence which is gender-marginalizing, but the paternalistic and non-inclusive fashion in which such jurisprudence is produced.

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[129] Gibson-Graham, *supra* note 6, at 119.

[130] EVELYN FOX KELLER, GENDER AND SCIENCE 2 (1985).

[131] *Id.* at 117.

[132] MARTEEN HAJER, THE POLITICS OF ENVIRONMENTAL DISCOURSE: ECOLOGICAL MODERNIZATION AND THE POLICY PROCESS 6 (1995); Thomas Risse, *Let's Argue: Communicative Action in World Politics*, 54 INT'L ORG. 1, 6 (2000); Janice Moulton, *A Paradigm of Philosophy: The Adversary Method in Women*, KNOWLEDGE & REALITY (A. Garry & M. Pearsall eds., 1996); HAYWARD ALKER, REDISCOVERIES AND REFORMULATIONS 8 (1996).

CONCLUSION

Gender lenses looking to redress gender subordination might not only question the many manifestations of the explicit and assumed public/private dichotomy in the law, but also the continuous reproduction of that dichotomy by the continued process of making law within and about only the public sphere, only by elite members of that sphere. For now, those seeking gender justice continue to look for alternative grounds for gender rights and promote gender awareness within the current legal system.

The argument that abortion should be a Thirteenth Amendment issue addresses gender subordination, pay discrimination, and gendered labor issues without the crutches of the self-reifying private sphere or the smoke-and-mirrors of equality jurisprudence. In the future, perhaps, feminist critiques of the public/private dichotomy and the liberty/autonomy framework may not only change the way we think about abortion or women in the legal sphere, but also the way we think about the legal sphere more generally. Gender discrimination in our laws and practices may be addressed in a piecemeal fashion; the gender biases in our law-making will remain until addressed holistically. Until then, gendered lenses point out the shortcomings of substance in the law, which reflect the shortcomings both in social perceptions of gender and in the social construction of law-making and law-enforcement. Recasting the abortion debate in terms of involuntary servitude would be a step in the right direction of decoding and deconstructing the implicit gender essentialism in women's rights jurisprudence.