Deterritorializing Abortion: Gender, Law, and Procedure

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In the wake of the *Dobbs v. Jackson Women’s Health Organization* United States Supreme Court decision—which overturned the landmark decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*—UC Berkeley Law Professor Khiara M. Bridges testified before the United States Congress about the potential catastrophic consequences of the ruling. Bridges discussed abortion as an issue impacting people with the capacity for pregnancy,1 which was met with intense opposition and disregard from Missouri Republican Senator Josh Hawley. He insisted that abortion was a “women’s right issue,” while pressuring Bridges to agree.2 However, in a clear and direct response, Bridges offered firm rebuttal, noting that this line of questioning from Hawley was transphobic, stating further, “Denying that trans people exist and pretending not to know that they exist is dangerous.”3 This, she argues—and the argument presented here will agree—“opens up trans people to violence,” given that multiple genders are represented under the umbrella of people needing abortion access and care.4

While Bridges’ trans-inclusive Senate testimony was largely lauded by abortion rights advocates, what is curious about this exchange is the alignment between Hawley’s insistence that abortion is a women’s rights issue and the feminist legal literature written on reproductive and abortion rights. A scan of the literature would suggest that feminist legal thought also, though from a different premise, largely announces the need and crisis of

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3 Id.

4 Id.
abortion access as an issue pertaining to cis-women. It would be disingenuous to suggest that there is a complete void of feminist legal literature that accounts for the varying genders of people who need, seek, and complete abortion procedures. However, these inclusions are largely presented in additive models, where cis-women and non-women are listed in conjunction with one another, despite arguments almost exclusively centering the experiences of cis-women. Considering this discursive tendency, what would it mean to refuse the additive gesture of coupling the experiences of cis-women and non-women? Furthermore, how does the procedure of acknowledging that multiple genders desire abortions without calling into question the bio-essentialism represented in feminist legal thought also perform a type of violence?

On these grounds, I want to consider what it could mean, as the title of this article suggests, to deterritorialize abortion in feminist legal thought. By this I mean, what would conversations and support of abortion look like if cis-womanhood is removed from the center of concern? The argument here is not a call to expand the list of genders represented in feminist legal thought but a more radical push to delegitimate cis-womanhood as the central anchor for understanding the violence of anti-abortion positions and the value of unmitigated abortion access. The concern is with considering how cis-womanhood as a prefigurative assumption about the subject of abortion stifles and limits the potential for expansive legal demands as well as impedes economic, medical, and social access to abortion as a necessary procedure.

In “Beyond June Medical and Roe v. Wade,” Michele Goodwin addresses the implications of the 2019 U.S. Supreme Court ruling in June Medical Services v. Russo. The 5-4 decision held that a Louisiana law imposed an undue burden on access by requiring that abortion providers have admitting privileges at a local hospital in order to provide abortion services. Goodwin introduces the argument by noting how “[i]n recent years, hundreds of targeted regulations of abortion providers (TRAP laws) and other provisions have been introduced and enacted by state legislatures, imposing numerous constraints on the providers rather than directly on the pregnant person.” However, this argument does not consider the particular experiences of pregnant people writ large, and instead “addresses abortion rights, social norms, and the status of women.” The anti-abortion lessons learned from June Medical are articulated exclusively in relation to cis-women, this providing the context for Goodwin to “briefly consider the future of abortion rights.” While Goodwin is cognizant that not only cis-women seek abortions, the substance of the article is silent about what June Medical, Roe, or the future of abortion may mean for the category of pregnant people or pregnant patients, which is the terminology used as introductory

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6 Id.
7 Id.
framing. While Goodwin argues that “millions of poor women are trapped, living in states where only one abortion clinic remains,” suggesting that more clinics will expand access, the barriers faced by non-women are indicative of and exacerbated by the environments that exist inside these clinics. Physicians who provide care to and research barriers to care for trans, non-binary, and gender variant people are clear that centering cis-women in arguments about abortion and pregnancy is not only illusive but causes irreputable harms.\(^8\) One fundamental harm is that gender exclusive environments deter patients from seeking care.\(^9\) Similarly, clinics premised on vague gender inclusivity produce the same effects when patients are misgendered, denied care, and/or interrogated about the types of care they are seeking.\(^10\) Thus, simply advocating to increase clinics and structuring clinics around gender inclusivity is not enough. Goodwin produces an argument that is exemplary of a pervasive issue in the field: feminist legal thought is belated in understanding what it means that the clinical mistreatment that leads to abortion barriers for trans, non-binary, and gender variant people is not mitigated by state-level healthcare policies.\(^11\) This, in turn, implies the law is an insignificant indicator of how trans, non-binary, and gender variant people experience and access abortion care.\(^12\) This structural predicament is concretely distinct and indicative of how sex/gender assumptions that are deeply interwoven in society permeate clinical spaces.

Dean Spade has argued that most laws or legal frameworks that explicitly attempt to extend protections to trans people are contained within anti-discrimination and hate crime laws.\(^13\) However, the premise of these laws is more focused on punishing perpetrators of hate crimes, and in the case of discrimination, there is a high litmus test for proof.\(^14\) What is insightful about the argument Spade offers is its apprehension around rights frameworks as a remedy for the failures of other forms of law. He argues that this framework “will not reduce the premature death that pervades trans communities, and, in fact, those paths lead to legitimization and expansion of the very systems that most endanger trans lives.”\(^15\) Spade makes clear that legal visibility that is sutured by superficial trans-inclusivity is inadequate given the necropolitical daily realities of trans life. These realities are rooted in the normalization of trans people’s deaths, which the law is implicated in

\(^8\) See Heidi Moseson et al., The Imperative for Transgender and Gender Nonbinary Inclusion: Beyond Women’s Health, 135 OBSTETRIC & GYNECOLOGY 1059 (2020).

\(^9\) Id. at 1060-61.

\(^10\) Id. at 1061-62.


\(^12\) Id.


\(^14\) Id. at 41.

\(^15\) Id. at 18.
and responds to belatedly. Furthermore, there needs to be a deeper
understanding of how gender is administered institutionally to meet legal and
also social movement demands. If trans or other non-women genders are not
critically considered in how gender becomes administered in the abortion
clinic or in abortion discourse, then the violence is not rectified by inclusion
but is simply masked.

Considering that the law glosses over the daily realities of abortion
needs and care, it may be more apt to turn to lived experience as a way to
think beyond and outside of simply responding to legal denials such as Dobbs
or legal permissions such as Roe in the limited language and imagination they
provide. I am thinking about Roe and Dobbs concurrently as a way to
acknowledge that Roe was already flawed in its framing as a privacy case
because it also refused to explicitly announce that abortion should be an
unmitigated necessity.

In this respect, what does feminist legal theory stand to learn from a
figure like the abortion doula, someone who supports abortion on the ground?
Ash Williams, a Black transmasc North Carolina-based abortion doula
explains his work: “My goal is to get people the best abortion they can have,
because I know that it is possible.” Williams understands the best abortion
possible requires the fulfillment of multiple imperatives. The first imperative
is economic, which is to ensure that all abortions that are desired are funded.
What is a right when one is economically barred from accessing it? Studies
have found that “[t]ransgender and gender nonbinary people are more likely
than the general U.S. population to be uninsured.” Other research shows
that an overwhelming number—thirty six percent—of transgender, non-
binary, and gender variant pregnant people “reported considering trying to
end a pregnancy on their own without clinical supervision, and a subset of
these (n=40; 19% of those ever pregnant) reported attempting to do so.”
The reasons given for the choice or consideration of nonclinical options, such
as self-induced abortions using herbs, again includes a lack of health
insurance but also “legal restrictions, denials of or mistreatment within
clinical care, and cost.” Economic barriers are intersectional in nature.
Prohibitive costs are enabled by the law and the structures of gender
binarism. The second imperative is that all bodies, regardless of gender
identity, are provided with gender-affirming and supportive care as they seek
and complete abortion procedures. The practicality of this political
commitment brings abortion and its legal battles back down to the level of
the body. Feminist legal thought has spent considerable time theorizing the

16 Destinee Adams, *What It’s Like Being an Abortion Doula in a State with Restrictive Laws*, NPR
[https://perma.cc/2LND-HNWM].
17 Moseson et al., *supra* note 8.
18 Moseson et al., *Abortion Attempts Without Clinical Supervision Among Transgender,
Nonbinary and Gender-Expansive People in the United States*, 48 BMJ SEXUAL & REPRODUCTIVE
HEALTH e22 (2022).
19 Id.
impact and necessity of abortion as a right. However, the abortion doula understands in theory and practice that rights are always an exclusive enterprise insofar as the subject of rights is codified in material terms as an ideological body upon which rights are conferred. The fight over protecting this ideological body under and from law territorializes abortion and its procedure in a manner that misunderstands the complexities of ensuring the best abortion possible. Williams as an exemplary model of an abortion doula serves as an intermediary, shielding nonwomen clients from navigating alone the material consequences of the violating gendered theories of abortion law and clinical practices.

In this respect, the abortion doula as a political response to the ongoing need for abortion can be an instructive model for how feminist legal thought engages and responds to the law. Upon learning about the Dobbs ruling, Williams simply states, “It’s done,” and understands that his work continues. To Williams, the decision is a reminder to continue the call that he and other abortion doulas have already taken up.\(^{20}\) What is radical about this response is it does not pivot to assert the U.S. Supreme Court as the primary body of permissibility nor heed to its authority in a manner that changes the tenor of an already tenuous battleground. As I have written elsewhere, “ninety-percent of U.S. counties do not have any abortion providers and this erosion provided the political possibility of Dobbs rather than lack of access being created by the ruling.”\(^{21}\) Williams illustrates how attacks on abortion have been constant and unanticipated at the state and local levels, which produce everyday conditions where “time is an undue burden.”\(^{22}\) Time, he explains, increases the cost by extending the wait to have an abortion, which inevitably changes the complexity of the process often for those in areas with the most restricted access to clinics. Thinking about abortion as a time-restrictive procedure highlights the problematic primacy of wading into legal battles—where time is theoretically infinite—given that the need for abortions cannot wait. In this respect, Williams is instructive in stating, “We are not going to stop showing up for people in the face of criminalization; we’re going to keep providing care.”\(^{23}\)

Considering that the law is a constituent element of abortion battles in the United States, the law cannot be staved off completely. However, what Williams and the concept of the abortion doula clarify is the need for the law and the legal battle to respect the daily realities of what it means to obtain an abortion regardless of gender. The way feminist legal thought approaches that battle is central to ensuring that additional borders are not placed around abortion access. That is to say, there are explicit and implicit consequences of using narrow political frameworks to rebut anti-abortion debates. For

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\(^{20}\) Adams, supra note 16.

\(^{21}\) Patrice D. Douglass, Against the Post and Prior To: Abortion, Dobbs, and Analytics of Raciality, J. LEGAL ANTHROPOLOGY (forthcoming).

\(^{22}\) Adams, supra note 16.

\(^{23}\) Id.
example, legal scholar Patricia J. Williams highlights how conversative prescriptions about the fetus as child produce a consequence where “the idea of the child is pitted against the woman; her body, and its need for decent health care, is suppressed in favor of a conceptual entity that is innocent, ideal, and all potential.” While the fetal question has been firmly rejected by feminist legal thought under the premise that Williams presents here, cis-womanhood has yet to undergo a similar contestation as it has maintained a space as one of the most protected borders placed around abortion. This is emblematic in statements such as “a woman’s right to choose.” Like holding the woman accountable to the fetus, holding the abortion procedure accountable to the cis-woman submerges how the forced imposition of womanhood is a violent structure that impacts the quality and capacities of many bodies to access the already constricted and restrictive terrain of abortion and other reproductive forms of care.

Again, the role of the abortion doula, as one who offers guidance and support that meets the needs of the person seeking and completing an abortion, helps clarify what legal fights submerge. Understanding the value and importance of abortion as a practice and politic requires critical consideration of the many ways seeking and successfully carrying out an abortion assist in deadening forced potentialities. Abortions help to chip away at what has been forcefully inscribed on the body through categories and terms like gender, sexuality, caregiving, and obligation, just to name a few. Thus, framing the fight for abortion simply in response to the law is not enough. The paltry legal language of privacy was never an adequate logic for abortion. Some bodies are constricted by legal terminology that is not enough to express the fullness of their lives or the necessity for broader ways of existing. A feminist legal theory that accounts for this reality must be bold enough to contend with how the category of woman imposes violent strictures on how life can be imagined for those resisting and living outside of that designation.

Lastly, the call for this special issue asks if feminist legal thought can be radical. While this question can be answered in many ways, I would suggest that if it can let go of its most possessive investment—cis-womanhood as its given and uncontested subject of concern—then feminist legal thought can approach radicality on issues like what abortion can and should mean in its most broadly expansive iterations. Rather than rebutting the conservatism of law, feminist legal thought might, then, imagine what different relations of existing could be if gender is both refused as a given and also theorized beyond biocentric or ontological assumptions pertaining to what bodies need what types of freedoms.