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Birth Rights and Wrongs: Paradoxical Reproductive Abuse and the Maintenance of Migrant Intervenability

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Abstract

The entwinement of nationalism and population control policy is well documented within studies of migrant reproductive abuse. Historically, this abuse has taken the form of coerced sterilizations, as exemplified in *Madrigal v. Quilligan* (1978). However, the recent restriction of abortion rights for migrants in *Azar v. Garza* (2017) requires a re-theorization of migrant reproductive control. How do state-funded anti-immigrant initiatives both forcibly restrict (through sterilizations as in *Madrigal*) and require (through mandated birth as in *Azar*) immigrant reproduction? Drawing on legal documents, court transcripts, and historical materials from the two cases, I identify four institutional discourses that position migrants as vulnerable to contradictory forms of reproductive intervention and abuse. This analysis demonstrates that the simultaneity of forced sterilization and forced birth is a result of the intersection of pro-life and anti-immigrant political movements in the resurgence of ethnonationalism in the United States. I find that the forms of control undergirding state reproductive abuse are not purely restrictive, as has been formerly argued. Rather, restriction is one side of an ethno-national logic that expresses itself both negatively and positively through the sustained intervenability of migrant bodies.

Keywords: *immigration; abortion; sterilization; nationalism; gender; reproduction.*

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The reproductive abuse of migrants held in detention after crossing the border into the United States has proliferated in the last few years. Most recently, allegations of forced hysterectomies populated headlines after a nurse working in Irwin County Detention Center (ICDC), Dawn Wooten, filed a complaint with Project South on behalf of detained immigrants citing sterilization abuse¹. Detainees told Wooten they were having their uteruses removed without proper full knowledge or consent. As the investigation into Wooten's complaint advances, scholars and the public alike have made comparisons to the historical practice of forced sterilizations of Latina immigrants in the United States (Donegan 2020). These historical practices are represented in the case *Madrigal v. Quilligan* (1978), brought on behalf of ten Latina women who were forcibly sterilized in an LA county hospital at the height of state-funded population controls of the post-war period. Considered on their own, such historical precedents provide an inadequate analytic for contemporary reproductive abuse at the border. As *Azar v. Garza* (2017) demonstrates, the restriction of abortion rights for migrant teenagers and the threat of forced birth is another form of state-funded reproductive abuse used to control immigration. *Azar* was publicly debated by a panel of Judges and exposed the federal government's practice of forcing teenagers to choose between self-deportation and giving birth. These two forms of state reproductive control, sterilization and abortion restriction, appear contradictory in nature. Considering them together thus indicates the necessity of re-examining the underlying logics of migrant reproductive control.

This article is organized around two central questions. First, how do state-funded anti-immigrant initiatives both forcibly restrict (through sterilizations as in *Madrigal*) and require (through mandated birth as in *Azar*) immigrant reproduction? Second, what can these contradictory forms of reproductive abuse tell us about the underlying logics of immigration and reproductive control? Scholars have focused on sterilization practices as one of the main forms of reproductive abuse of immigrants (Stern 2005; Hannabach 2013) and sees sterilizations as a means to restrict immigrant access to birthright citizenship and de-incentivize immigration overall (Chavez 2017). The relationship between national borders and state control of reproduction should be

¹ The full complaint can be found at Project South <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf>.

understood as part of the way nations claim sovereignty (Ngai 2004). The entwinement of national boundaries and reproductive control has been well documented by social-scientific theorists of reproduction (Yuval-Davis 1997; Kligman 1998; Fixmer-Oraiz 2019; Briggs 2018; Stevens 1999; Stern 2016; Brown and Ferree 2005). In the American context, reproduction is hierarchically organized around race, ethnicity, and citizenship (Roberts 1997, 2009; Collins 1998; Briggs 2018). These hierarchies form the basis of which groups are figured as suitable to reproduce the nation, a phenomenon that can broadly be understood as an *american reproductive imaginary*. Latinos as a group have been squarely centered in anxieties about borders and over-producing (Chavez 2013; Santa Ana 2000). As a result, Latinos as a group have been subjected to legal violence and face health disparities and family separation due to restrictive immigration policies (Menjívar and Abrego 2012; Villalón 2010; Heckert 2020). Prior work has examined the ways immigration laws pathologize Latino reproduction, but few studies have examined how this pathologizing has resulted in seemingly contradictory forms of reproductive abuse.

This article offers a systematic analysis of the two representative legal cases *Madrigal v. Quilligan* and *Azar v. Garza* to attend to the contradictions of migrant reproductive abuse. I draw on 60 legal documents obtained directly from the federal government's court system PACER as my main source material for the analysis of *Azar*. I additionally analyzed 15 law review articles and 25 national newspaper articles that explicitly discuss the case to supplement my empirical analysis. For *Madrigal*, I relied on secondary historical sources. Additionally, I drew historical context from a host of secondary sources covering the early eugenics movement and post-war population policies. Based on a framework examining the american reproductive imaginary and an inductive methodological approach, I formed a coding scheme using two dominant discursive anti-immigrant frames, migrants as a demand on resources ("abortion on demand") and migrants as deviant or undesirable national subjects ("undocumented status"). I identified two additional discursive pro-life frameworks, paternalism and fetal personhood. Each of these discursive frameworks function to position immigrants as intervenable subjects of the state and render migrants as vulnerable to contradictory forms of reproductive abuse. These findings indicates that these four discourses work together to re-inscribe intervenability on contemporary undocumented migrant minors held in federal shelter facilities.

This analysis demonstrates that the simultaneity of forced sterilization and forced birth is a result of the paradoxical intersection of pro-life and anti-immigrant political movements in contemporary ethnonationalist populism in the United States. Understanding the ways in which these two forms of population control are related can shed light on how the phenomenon of forced birth acts as a means for limiting immigration. By examining the history of American reproductive control, key differences emerge that further refine an analysis of forced-birth in *Azar v. Garza*. In particular, *Garza* emphasizes how the border is an important site for re-imaginings of migrant bodies as controllable in order to reaffirm national sovereignty. Further, it provides evidence for a re-theorization of immigrant reproductive control in ethnonationalist terms. Finally, my analysis shows how forms of control undergirding state reproductive abuse are not purely restrictive, as has been formerly argued. Rather, restriction is one side of an ethno-national logic that expresses itself both negatively and positively through the sustained intervenability of migrant bodies.

Nations, Populations, and Reproducing Boundaries

The connection between nationalism, race, ethnicity, family, and reproduction has been an important focus of inquiry for reproductive theorists and sociologists of nationalism, migration, and family (Franklin 2007; Abrego 2014; Briggs 2018; Menjívar 2006; Luibhéid 2013; 2018). Reproductive control is a means by which nation-states affirm nationalist regimes of sexual, ethnic, and political domination. Historically, nations were first formed as mechanisms through which material inequalities could be constructed and maintained on a global scale (Luibhéid 2002; Stevens 1999). Moreover, the specific settler-colonial history of the U.S. functions as a structure of American nationalisms, built on a “logic of elimination”, in which the establishment of settler-society cannot be understood as an entirely past event (Wolfe 2006; Steinmetz 2014; McKay, Vinyeta, and Norgaard 2020). Immigration scholars such as Ngai (2004) have argued that nations fundamentally implicate reproductive politics in the “belief in the right to define [their] citizenry” (Ngai 2004:24.) Therefore, national sovereignty includes a presumed right to exclude built on regimes of sexual, ethnic, and political domination. The interdependency of reproduction and nationalism has proved to be enduring and this relationship maintains the longevity of a system of value that organizes particular ideas of gender, sexuality, race, government, and freedom in the United States.

It is through these ideas that the United State has become the “imagined community” identified by Benedict Anderson (1983) in his important and influential work of the same title. Whereas Anderson argues that the politics of the nation are organized around a particular history of land acquisition and language uniformity during the transition to capitalism, theorists of reproduction such as Silvia Federici (2004) and Nira Yuval-Davis (1997) have additionally argued that the seizure of reproduction as a form of national property was integral to national formation itself. Anderson’s concession to the imagined, and not naturalized, aspects of nationalism remains a useful theoretical starting place for theorizing the relationship between nationalism and controlling birth. Recognizing nations as largely imagined or ideological constructs provides a base-line demystification of national origin. Anderson argues that because the language of kinship is so frequently used to describe the nation, “something of the nature of this political love can be deciphered from the ways in which languages describe its object”, hinting at reproductive regimes’ centrality to national ideology (Anderson 1983:159).

American Reproductive Imaginary

I follow Gary Gerstle (2017) when using ethnonationalism to describe recent resurgences of what he calls “racial nationalism”, in which national belonging relies on an imagined shared racial/ethnic and genetic origin. I am considering resurgent nationalist populism in the Trump Administration as a discursive political tactic, notable for its distinct “us” vs. “them” ideology (Muller 2008). This nationalist and populist political movement relies on ethnonationalism as the characteristic that bonds the “us” in the populist binary. This ethnonationalism is characterized in America “in ethnoracial terms, as a people held together by common blood and skin color and by an inherited fitness for self-government” (Gerstle 2017). The family is the gateway into this common origin and is central to the ideology found in the rise of nationalist political groups coming to power, making the crucial connection between race, populist politics, and the nation state. Feminist scholars have further elaborated what these studies of nationalism have failed to fully explicate: the role of reproduction in organizing the nation through specific ideologies of race, ethnicity, and gender (Nira Yuval-Davis 1997; Franklin and Ginsburg 2019; Kligman 1998; Sufirin 2019; Andaya 2019; Spillers 1987; Berlant 1997; Chavez 2017; Collins 1998; Colen 1986). This scholarly tradition has examined the ways in which gender, and specifically women, are categorically positioned

in relation to ethnic and national collectivities. In nationalist discourses, birth is a highly contested site positioned within the larger and equally contested discussion of reproduction (Yuval-Davis 1997). The imagined myth of a common origin is essential to the construction of a national collectivity and is claimed most frequently “by [individuals] being born into it” (Yuval-Davis 1997:26). The rhetoric of who can give birth within national borders has played a central role in the racialization of nation-states, both presently and historically. Therefore, we can understand resurgences in American ethnonationalism as drawing on, and contributing to, what I call a shared *reproductive national imaginary*².

The American reproductive imaginary is formed and maintained through social and legal conventions which designate who is encouraged, discouraged, or penalized for reproducing within the national territory. The rhetoric of family values prescribes the acceptable ways in which racial belonging can be achieved through reproduction (Cooper 2017). The valuation of families, in the specific American context, is what Dorothy Roberts (2009) calls a “reproductive caste system” in which, heterosexual, white, nuclear families are the most valued. Reproductive norms are therefore significant not just for what they render normal, but for what they render abnormal. As many social scientists studying reproduction have noted, black and Latina women are marginalized and demonized for their reproductive choices, whereas white women’s reproduction is both implicitly and explicitly valued in the United States (Roberts 1997; Spillers 1987; Collins 1998; Briggs 2018; Davis 1981; Schurr 2017). Sociologists specializing in race and gender have furthered this argument that the discourse surrounding the potential citizenship of certain immigrants is framed according to their supposed suitability to be reproducers of the nation (Collins 1998; Morgan and Roberts 2012). Controlling reproduction is therefore always part of state decisions involving the fate of incoming migrant families. The primacy of white womanhood, motherhood, and the defense of the white family in ethnonationalist populist movements has had an enduring effect on the reproductive lives of marginalized racial and ethnic groups in the United States (Davis 1981). Migrant women from Central and Latin American countries constitute one such ethnic group. These migrants, restricted in their

² In this paper I extend Asha Nadkarni’s phrase “reproductive national imaginary” used in her 2006 article “Eugenic Feminism: Asian Reproduction in the U.S. National Imaginary”.

labor options because of their lack of “legal status”, form an underclass of low-wage reproductive care for the children of affluent white people in the United States, a phenomenon dubbed by Laura Briggs (2018) as “offshoring reproduction”. Immigration policy restrictions (such as Trump Administrations “zero tolerance policy”) maintain instability in the lives of undocumented and migrant workers, solidifying their status as exploitable laborers while maintaining a rhetoric that profiles certain immigrants as so-called economic welfare burdens (Briggs 2018; Collins 1998; Brown 2013). So, an American national imaginary is tied to an American reproductive imaginary, and this imagination rests on a reproductive hierarchy (dividing internal/external populations).

Reproductive Categories: Latina Immigrants

Latino migrants have been centered squarely in the middle of fears and debates about borders. As Santa Ana (2000) demonstrates, mainstream media coverage in the United States has been permeated with metaphorical language about the growing Latino population. This metaphorical language has functioned as more than just figures of speech, inducing a negative perception of Latinos as dangerous, invasive, and burdensome (Santa Ana 2002). The myth that Latinas are “hyper-fertile” and “over-producers” comes from the idea that Latina child-bearing forms “the basis for a potential takeover or reconquest of U.S. territory” (Chavez 2004:184.). Within this logic, all reproduction is too much reproduction, blamed for “leading... the diminishing of the power of the dominant Protestant, northern-European American racial/ethnic group” (Chavez 2008:70). Immigrant babies are emblematic of the flexible reality of borders in which families can “transgress the border between immigrants and citizens” (*ibid.*:75). The fleshy, porous bodies of those who migrate to the U.S. are criticized because they represent the permeability of citizenship. Since the bodies of Latin American immigrants are the site through which borders can be literally and metaphorically broken, Latina reproduction is frequently pathologized, considered illegal (despite actual legal status) and, consequently, is figured as a force that must be intervened upon for the maintenance of the state.

Despite these studies of the discursive framing of immigrant reproduction, few studies have actually taken up how these frames have repeatedly resulted in reproductive abuse³ (with notable exception of Messing, Fabi, and Rosen 2020). Several theoretical frameworks for understanding migrant health and experiences with violence have been proposed including legal violence (Menjívar and Abrego 2012), bureaucratic violence (Heckert 2020), and pathogenic policy (Kline 2017), but these theories seek only to explain the impact of immigration policy on access to resources within the United States and lack the specificity to fully attend to reproductive abuse (Andaya 2018; Menjívar and Abrego 2012; Slack 2019). Immigration policy and enforcement has been shown to directly impact Latino health (Hardy et al. 2012; Stuesse and Coleman 2014) and immigrant policing is used as a disincentive to migrants and a means to convince immigrants to “self deport” (Kobach 2008). Judicial reasoning can provide important insight into the social control capacity of immigration regimes, showing how legal debates and court decisions are made through uneven interpretations (Asad 2019). Studies have additionally shown that illegality, regardless of actual documentation status, can impact immigrants who are socially perceived as illegal and draws on a wide range of socio-economic factors (Flores and Schachter 2018). Reproductive abuse, like other forms of violence targeting migrants and immigrants, can be far-reaching, beyond a single narrow definition of “illegal” status, race, or ethnicity, and may take many shapes and forms. Kline (2017) proposes a “biopolitics of immigrant policing” that understands Foucault’s (1978, 2003) theory of biopolitics to be fundamentally implicated in the control, regulation, and intervention of populations. For Kline, illegality and undocumented status become a racialized category for the function of biopolitics that manages populations through the “broad technology of race” (Kline 2017:399). While immigrants are not a homogenous racial group, they function as a racialized category that is “legible to agents of the state” (Kline 2017:399; Alexander and Fernandez 2014) and cannot be easily separated from illegality (Brown 2013).

Intimate interventions on migrant reproduction are therefore discursively figured as essential for policing both the border and the internal population of the nation (Ngai 2004, 2007; Villalón 2017; Luibhéid, Andrade,

and Stevens 2018)). This *intervenability* is a vulnerable state in which migrants are subjected to intimate abuses that transgress their reproductive autonomy, a power seen as a right for states to maintain national sovereignty in an increasingly fluctuating international landscape. Migrant reproductive intervention is justified through two main discursive frameworks: migrants are a demand on resources (Chavez 2013; Stern 2005; Brown 2013) and the lack of documentation means migrants are deviant and undesirable as national subjects (Santa Ana 2002; De Genova 2002; Rodriguez 2016; Chauvin and Garcés 2014). However, studies of anti-abortion (or pro-life) movements have additionally recognized the discourse of fetal personhood (Duden 1993; Cromer 2019; Leach 2020; Petchesky 1987) and paternalism (Chavez 2013; Mayans and Vaca 2018) as important rhetorical means through which states intervene in reproductive autonomy. Together, these literatures support an analysis of four discourses which emerge from *Azar v. Garza* that work together to re-inscribe intervenability on contemporary undocumented migrant minors held in federal shelter facilities. Immigrant intervenability is a description of the process in which an ethnonationalist logic informs political investments in a shared reproductive national imaginary, fueling nationalist political movements. These movements pull from various political logics to produce policy that facilitates the outcome of reproductive abuse. In this case, the two important political movements are the anti-immigrant and pro-life movements. I have consolidated this argument into a figure which can be found in *Appendix 1*.

This article broadens the scope of previous work on reproduction and migration that focuses on sterilization abuse by attending to a new means of reproductive abuse, forced birth. The restriction of abortion rights for migrant teenagers in *Azar v. Garza* (2017) requires such a re-theorization of migrant reproductive control as I have articulated it: through the confluence of reproduction and migration politics at the site of migrant bodies. *Azar v. Garza*, when understood alongside *Madrigal v. Quilligan*, is an ideal case to explore, illustrate, and further develop an understanding of an American national imaginary and the sustained intervenability of migrant bodies. Finally, the following analysis exposes the obscured relationship between state and nation as state-actors lay claim to reproduction. *Azar v. Garza* provides evidence that the state can enact power over populations through reproductive abuse using the rhetoric of a shared national interest in reproductive control.

DATA AND METHODS

In order to understand state-funded anti-immigrant reproductive abuse, I draw on two cases exhibiting such practices: *Madrigal v. Quilligan* and *Azar v. Garza*. In 2017, press coverage and headlines about the restriction of abortion for migrant teenagers in detention seemed drastically different from most of the social scientific writing on reproductive abuse of migrant populations in the United States. I began gathering relevant court documents regarding the case and examining the news coverage of the litigation of *Azar* among conservative and liberal news sources. *Azar v. Garza* stood out to me as a significant case given the exceptional challenge to abortion rights, pro-life argumentation in the courts, detention context, and dramatic break from historical sterilization practices. During the initial litigation of *Garza* the case garnered national news coverage from major press of all political affiliations and spurred widespread protests by pro-choice and immigration activists (Quinlan 2017; Raysam 2017; Dedaj 2018; Fernandez 2017). The case contradicts the former standard of anti-natal anti-immigrant ideology studied extensively by social scientists interested in reproduction. Although scholars have documented the difficulty of accessing reproductive care in other carceral settings (Sufrin 2019) there has been little research on reproduction within contemporary detention. This makes *Azar v. Garza* an especially compelling case in which the federal government argued two things: 1) abortion restrictions could be justified based on immigration status, and 2) abortion restrictions could be used to manipulate migrants to self-deport.

Madrigal v. Quilligan illustrates prior articulations of state-funded anti-immigrant reproductive abuse. It has been widely cited as a representative case of national sterilization policies during the 1960s and 1970s (Manian 2019; Stern 2005, 2016). Scholars of the period have claimed that *Madrigal* can be understood as "...a concluding link in the history of forced sterilization" (Stern 2005). For many, *Madrigal v. Quilligan* is framed as a "turning point" in reproductive justice, one in which boundaries restricting governmental intervention on bodies were supposed to have been drawn (Manian 2019). The case is representative of the practice of sterilization and anti-immigrant reproduction during the height of population control ideology; it is representative of reproductive abuse as restriction. The *Madrigal* decision was unpublished so I collected secondary materials from historians

and social scientists who have written extensively on the case (Stern 2005, 2016; Rojas 2009; Gonzalez-Rojas and Lindley 2012; Gutiérrez 2008; Espino 2000; Manian 2019; Enoch 2009; Suite, La Bril, Primm, and Harrison-Ross 2007) and oral history from the documentary film *No Mas Bebés* 2015. The film *No Mas Bebés* provided important first-hand accounts through interviews with doctors, nurses, lawyers, activists, and the women who testified in *Madrigal v. Quilligan*. Finally, I supplemented this work with sources from the eugenic archive run by the Cold Spring Harbor Laboratory and other secondary historical sources for information regarding the early eugenics' movement⁴ (Lombardo 1985; McWhorter 2009).

For my analysis, I conducted a qualitative review of the legal documents from *Azar v. Garza*. These included general court documents such as complaints, briefs, judicial opinions, court transcripts, exhibits (including correspondence between ORR staff and Scott Lloyd), and related governmental responses. Additionally, I surveyed law review articles that critiqued *Azar v. Garza* to get a sense of significance of the case for legal scholarship. Following Charmaz and Belgrave's (2012) constructivist grounded theory method, I formed an "inductive, comparative, iterative and interactive" approach to my source material (Charmaz 2012). This process included identifying a set of relevant thematic trends that were organized and translated into specific codes. I read and coded the documents generally first and then narrowed my coding strategy overtime. I was able to obtain 60 legal documents from the case directly from the federal government's court service PACER. I qualitatively coded the documents using ATLAS.ti software, initially to construct the case narrative and then according to the codes of interest: paternalism, undocumented status, fetal personhood and abortion on demand. Given the importance of public reception to the case, this research was additionally supported by a survey of 15 law review articles and 25 newspaper articles from around the country to supplement the empirical findings (Menjívar and Abrego 2012). To identify relevant articles, I searched for discussions of the case using the search terms "*Azar v. Garza*, abortion, detention, pro-life, anti-abortion, pregnant, ORR, undocumented minors" over the time period the case was initially active in order to capture public reaction as it progressed, starting in October 2017, up until the present, in order to capture public reaction to the outcome. I focused on collecting sources from

⁴ The eugenics archive compiles information from 11 different international archives: <http://www.eugenicsarchive.org/eugenics/list2.pl>.

across the political spectrum and found that conservative news articles framed the case similar to the judicial arguments focusing on fetal personhood and abortion on demand. News coverage provides evidence of the vacillating relationship between the public and the courts. Such evidence bolsters my argument that legal discourses are formed in conjunction with the public sphere and are interrelated to political, historical, and social contexts. Such sources have been important to key pieces of sociolegal research on abortion (see this relationship exemplified in Beisel and Kay 2004). I approached both cases, *Madrigal* and *Garza*, by focusing on how reproductive intervention was justified.

In the following, I take a historical, contextual, and analytic approach to the material. I briefly contextualize *Madrigal* by outlining the key state-funded initiatives that supported sterilizations in public hospitals during the 1960s and 1970s, as well as anxieties about immigrants at the time. In my analysis of *Madrigal*, I discuss three important elements that figured the *Madrigal* women intervenable. Next, I outline the historical and political context of the Trump administration and the resurgence of a nationalistic regime of population control starting in 2016. I then present my findings from the analysis of court documents and supplementary material regarding *Azar v. Garza*. My attention to history and political context aims to emphasize the specific historical circumstances of the time. Depending on such historical and political contexts, this enactment of control can take the form negatively, as in forced sterilizations to restrict migrant reproduction, or positively, as abortion-blocking to require migrant reproduction. The result in both cases is the same: control.

Madrigal v. Quilligan

The United States' sterilization and eugenic history has a long-standing relationship with immigration. In some of the earliest immigration acts immigration was prohibited on a eugenic basis⁵. U.S. associations such as the American Breeders Association founded in 1903 made biological arguments that immigrants were “so-called

⁵ For further discussion, see the Eugenics Archive accessible at: <http://www.eugenicsarchive.org/eugenics/list2.pl>. This digitized and curated collection pulls from numerous international archives. The section on immigration restriction and archival materials 967, 955, 381, and 1245 are especially relevant.

morons”, including “uncontrollable sexualities” which mapped onto the justifications for massive sterilizations of those deemed “feeble minded” from the 1890s- 1920s (McWhorter 2009:205). These practices culminated in the widely cited *Buck v. Bell* (1927), in which the US ruled that sterilization of the intellectually unstable was constitutional “for the protection and health of the state”; the ruling has never been overturned. From the beginning, sterilization and reproductive abuse has been intricately intertwined with immigration. However, by the early 1960s, the health of the nation found a new outlet in growing fears of overpopulation⁶ (Lombardo 1985). In 1970, congress passed the Family Planning Services and Population Act setting up the Office of Population Affairs in order to allocate financial resources to medical institutions providing sterilization services for “every wanting woman” (Stern 2016). This increase in funding for family-planning initiatives was a consequence of overpopulation panic and rising hostility towards Central and Latin American immigrants (Ehrlich 1971). This combination led to a socially encouraged and government-funded agenda to reduce population sizes of low income, Spanish speaking communities (Stern 2005; Manian 2019). Physicians carried out this agenda using the most “effective birth control: permanent sterilization” (Ordover 2003). This practice culminated in the landmark case *Madrigal v. Quilligan*: a lawsuit brought on behalf of ten Latin American women who had been forcibly sterilized in a Los Angeles county hospital. These sterilizations were performed during births or related medical procedures such as C-sections, in which nurses either used coercive tactics to obtain consent or did not obtain consent at all (Manian 2019).

The class of plaintiffs in *Madrigal v. Quilligan*, as it would be argued at trial, were sterilized in LA County hospital run by “physicians at the top of the chain of command [who] were partisan to racially slanted ideas about population control” (*No Mas Bebes* 2015). Through a mixture of training and quotas that pressured obstetric residents to perform large numbers of sterilizations, a culture of coercion was established at LA County (Stern 2016:1134). This practice had been going on for some time but was brought to public attention by a former

⁶ For further discussion on immigration and eugenics, see McWhorter 2009 and Ordover 2003. The eugenic intent of the Immigration Act of 1924 and its quota system which systematically excluded immigrants deemed undesirable by the United States remained in place until it was usurped by the Immigration and Nationality Act in 1965.

medical resident, Dr. Bernard Rosenfeld. Dr. Rosenfeld's own learning that sterilizations were being performed unethically was during observation of a senior physician conducting a tubal ligation⁷. During the procedure, the physician instructed Rosenfeld to "ask all these girls to have their tubes tied, I don't care how old they are" (*No Mas Bebés* 2015; Gutiérrez 2009). Another former medical resident Michael Kreitzner affirmed that consent was rarely obtained before the patient was in labor, and that after C-section operations, tubal ligations were almost always performed (*No Mas Bebés* 2015; Gutierrez 2009). Antonia Hernandez and Charles Nabárette, two Latino lawyers and activists of the Los Angeles Center for Law and Justice, brought charges in defense of the ten plaintiffs who came to be known as the "Madrigal ten" (Manian 2019). Nabarrete and Hernández argued that a culture of coercion at LA County included a perception that targeting Spanish-speaking women for sterilizations would lower the birth rate and was therefore morally defensible. Dr. Karen Benker, a former medical resident, was the prosecutor's chief witness and testified that she was told directly by the head of hospital, Dr. Quilligan, that "poor minority women in L.A. county were having too many babies; that it was a strain on society; and that it was good that they be sterilized" (Stern 2005:1135). Benker additionally testified she witnessed doctors threatening to withhold pain medication from patients to coerce them into signing consent documents and that Dr. Quilligan claimed to have been allocated a "big grant" of over two billion dollars to, in his words, "show how low we can cut the birth rate of the Negro and Mexican populations in Los Angeles County" (*No Mas Bebés* 2015; Stern 2005).

Judge Curtis declared that the suit was the result of a "clash of cultures", implying that there was something about "Mexican culture" which "suggested that if the plaintiffs had not been naturally inclined toward such large families, their post-partum sterilizations would have never congealed into a legal case" (Manian 2019). This "clash of cultures" was proof that "doctors could not have known that they [the women] would be damaged by sterilization" because the "cultural background of these particular women has contributed to the problem" (*ibid.*). Judge Curtis did not rule in favor of the women. In an unpublished opinion, Curtis denied there was a

⁷ Another name for the surgical procedure in which the fallopian tubes are permanently closed.

widespread pattern of sterilization abuse at LA County. Instead, Curtis viewed the case as a result of ten tragic outliers in which a “breakdown in communications between the patients and the doctors” resulted in the women’s unhappiness (Manian 2019:12). The *Madrigal* litigation, along with the arguments made by Judge Curtis, illustrate the normative assumptions which undergirded the reproductive abuses of the time period. First, reproductive abuse and sterilizations were seen as morally defensible if these practices served a greater purpose, in this case, to mitigate the reproduction of a group seen as over contributing to the American population. Second, the case figured the target of reproductive abuse as “unwanted” groups, regardless of their documentation status—an explicitly racial and ethnic classification. Third, the women are figured as being out of control, and as benefiting from superintendence. Such superintendence was carried out by doctors using federal funding allocated to target specifically immigrant women. Finally, it is important to note the way in which the sterilizations were justified using an “us vs. them” logic of exclusion/preservation encapsulated in the American national imaginary. By singling out Latina immigrants, the rhetoric functioned to reify those families which could, and should, reproduce, despite fears of over population.

One of the goals of the *Madrigal* litigation was to strengthen sterilization protections. The U.S. Department of Health, Education, and Welfare (‘HEW’) issued guidelines for hospitals receiving family planning funds which required Spanish-language consent forms and an accountability program that monitored whether the hospitals followed the guidelines (*ibid.*). Historians argue that *Madrigal v. Quilligan* should also be analyzed as a “concluding link in the history of forced sterilization” (Stern 2005). *Madrigal v. Quilligan* is framed as a “turning point” in reproductive justice, one in which the boundaries set by HEW were supposed to restrict governmental intervention on bodies. Despite the subsequent protections, reproductive abuses have not ended with restrictions on sterilization practices in hospitals. The rise in populism and nationalism in the United States over the past 15 years has revitalized the logic behind state reproductive abuses. However, as *Azar v. Garza* exemplifies, there has been a significant shift in such logic. Instead of foreclosed birth (through sterilization), state violence is enacted through forced birth (through abortion restriction) resulting from an unlikely allegiance between strong anti-abortion and anti-immigration rhetoric.

Donald Trump used fear as a source of political power by running his 2016 campaign for presidency on a platform of racist and anti-immigrant rhetoric advanced through the language of reproductive politics. The main electoral tactic mobilized in Trump's campaign was to position himself as a leader who could provide the means to save the United States from a variety of social problems. In order to position himself as an American savior, however, Trump needed to convince Americans they were under attack. For this, illegal immigration is a convenient and historically generative object. Historically, immigration has been manipulated to explain economic crises, a failing health care system, and a gun-violence epidemic in the United States. Using incoming migrants as a scapegoat for social problems also suggests a simple, politically viable solution: securing the border. Trump employed this tactic when he suggested building a wall where the U.S. meets Mexico and with his frequent "crack downs" on illegal immigration (Walker 2015; Smith 2019). Notably, this escalation in immigration enforcement is primarily fixated on the separation of families, mistreatment of pregnant detainees, numerous deaths of children and trans women in ICE custody, and the explicit targeting of pregnant women for deportation (Messing, Fabi, and Rosen 2020; Cromer 2019; Franklin and Ginsburg 2019; Silva 2019; Acevedo 2019; Moore 2019). The gravitation to the reproduction of immigrants in the Trump administration's claim to legitimacy and power exemplifies how immigrant reproductive control works for political legitimacy and the mobilization of an American reproductive imaginary. The Trump administration's political dependence on conservative support, notably through a series of pro-life policies such as "abortion bans" and appointing several pro-life politicians to state office (Cromer 2019), has forced a growing alignment between the conservative anti-abortion and generalized anti-immigration movement. Anti-immigration policies are non-partisan and proliferate on all sides of the political spectrum. However, the convergence of pro-life and anti-immigration enforcement is historically specific and significant (Migration Policy Institute 2017). The combination of utilizing pro-life and conservative "family values" as a means to police the borders of belonging is the Trump administration's key to "making America great again". This intersection became explicit as a consequence of Donald Trump's appointment of Scott Lloyd as head of the Office of Refugee and Resettlement (ORR) in March 2017.

Before his appointment to ORR, Scott Lloyd had devoted his career as a lawyer to advancing conservative interests, especially the pro-life movement against abortion (Cancryn and Rayasam 2018). As head of the Office of Refugee and Resettlement, Lloyd presided over minors under 18 years of age who were apprehended at the border by the Department of Homeland Security ('DHS') or the Immigration and Customs Enforcement ('ICE') and were unaccompanied by an adult⁸. Once DHS or ICE verifies that the child is under 18 years of age, they are referred to ORR for processing (DHS 2014). ORR is a sub-division of the U.S. Department of Health and Human Services (HHS) which houses undocumented minors in shelters before it places them in immigration proceedings. ORR regulation requires that all ORR funded shelters must provide unaccompanied minors "who are victims of sexual assault while in federal custody with access to reproductive health care." According to internal guidelines, ORR must provide "routine medical care... family planning services, including comprehensive information about and access to medical reproductive health services and emergency contraception" (ACLU 2018). This policy, legally mandated by the federal government, requires ORR to assist in providing comprehensive reproductive health care for minors within their custody (ORR 2015).

In March of 2017, ORR implemented a new policy directly from Scott Lloyd and Kenneth Tota⁹ restricting important reproductive health information, including information about abortion, from pregnant minors¹⁰. During this time, ORR employees discouraged abortion by forcing minors to disclose their pregnancies to their families, pressuring them to withdraw abortion requests, and requiring minors to receive "life-affirming counseling" from religiously affiliated anti-abortion Crisis Pregnancy Centers (CPCs) on a list of "approved providers" despite no such requirement in federal or state law (ACLU 2018). The list of anti-abortion providers was personally compiled by Scott Lloyd, who had additionally instructed privately funded shelters that housed the minors to physically prevent them from attending their abortion appointments¹¹. This policy is a divergence from the official policy of

⁸ Details of ORR's policy can be found on their website:

<https://www.acf.hhs.gov/orr/programs/ucs/about#:~:text=ORR%20helps%20unaccompanied%20alien%20children.pro%20bono%20legal%20representation%20capacity>.

⁹ Deputy Director of ORR in 2017.

¹⁰ Complaint. *Azar v. Garza*, 138 S. Ct. 1790, 201 L. Ed. 2d 118, 2018 U.S. [hereby shortened to *Azar v. Garza*].

¹¹ *Ibid.*

other detention contexts including the Bureau of Prisons (‘BOP’) and Immigration and Customs Enforcement (‘ICE’). In ICE detention, guidelines state that officers “shall arrange for transportation [to an abortion provider] at no cost.” BOP guidelines require that in federal prisons, “the clinic... shall arrange for an abortion to take place”¹². While there have been reports of women’s abortion requests being blocked in ICE detention and in prisons, the right to the abortion is usually not directly contested (Sufirin 2019). In addition to the restrictions on abortion and various coercive anti-choice tactics, ORR surveilled and tracked the menstrual cycles of the minors in ORRs custody as well as observing the minors’ emotional states, behaviors, and eating patterns¹³. These practices led ORR to block at least four migrants from obtaining abortions. These actions were justified by Lloyd, ORR employees, and judicial arguments through four anti-abortion and anti-immigration discourses.

Azar v. Garza

In September 2017, a young woman, named Jane Doe (‘JD’) by court documents to protect her identity, was apprehended at the Mexico-United States border for crossing “illegally” into Texas. JD, who was 17 at the time, was classified as an “unaccompanied minor” and was placed under the care of the United States’ Office of Refugee Resettlement (ORR). JD was subsequently processed and placed in an ORR funded youth shelter. While in the shelter, JD discovered she was pregnant and requested to leave the shelter in order to have an abortion. Given the Texas state-laws on abortion for minors, JD needed either parental consent or a Judge’s permission to proceed with the procedure¹⁴. Being an unaccompanied minor, Jane Doe sought a hearing before a local Judge in order to fulfill the “parental consent requirement” and was given permission from a Texan Judge to obtain the procedure as soon as possible¹⁵. ORR, however, denied JD’s request to obtain the abortion on the basis of the new orders instituted by Lloyd, which mandated that ORR funded shelters cannot take “any action that facilitates” an abortion without his explicit approval¹⁶. Following the denial, Rochelle Garza, the appointed guardian ad litem

¹² 28 CFR § 551.23.

¹³ Exhibit D. *Azar v. Garza*.

¹⁴ Complaint. *Azar v. Garza*.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

to unaccompanied minor Jane Doe, sued the United States Secretary of Health and Human Services¹⁷ on behalf of Jane Doe and three other young women similarly situated.

The American Civil Liberties Union- National appointed the lawyer and activist Arthur B. Spitzer to represent the class of affected women. In response to ORR's denial, Jane Doe was granted a Temporary Restraining Order (TRO) which would release her from ORR's supervision in order to obtain the state's required abortion counseling and then proceed with the abortion on October 19th, 2017¹⁸. The government filed "emergency motion to stay the order", rendering JD unable to leave the shelter. On October 20th, the United States Court of Appeals for the District of Columbia Circuit formed a three-Judge panel consisting of Karen L. Henderson, Brett Kavanaugh, and Patricia Millet to debate JD's right to an abortion (ACLU 2018). Judges Henderson and Kavanaugh wrote the opinion, removing the portion of the original TRO that allowed for the abortion procedure to take place. In its place, the Judges allowed ORR to keep JD in its shelter as long as they found JD a sponsor so she would be able to receive an abortion outside of government custody¹⁹. Judges Henderson and Kavanaugh ruled that ORR had a right to deny JD's request for an abortion because of the Hyde Amendment, which bars federal funding to pay for abortion. Because ORR is a federal agency, Henderson and Kavanaugh reasoned that ORR-facilitated transportation would constitute the use of federal funds for abortion. However, the two Judges concluded that if JD could be put into a sponsor's custody and that the delay to find a sponsor "would not unduly burden the minor's right", this would solve the Hyde Amendment infraction (Roholt 2018). Dissenting, Judge Millet argued that it would be at least an "undue burden" if not an outright "obstacle...full-on denial of, and flat probation on Jane Doe's right to make her own reproductive choice"²⁰. ORR alternatively proposed that Jane Doe could voluntarily elect to leave the country if she would like to procure an abortion which Judge Millet rebuked as a paradoxical request in which the government conditioned abortion on surrendering the fundamental right to seek asylum. Judge Kavanaugh stipulated that an external sponsor for JD

¹⁷ Eric Hargan, and then Alex Azar after Hargan stepped down.

¹⁸ Complaint. *Azar v. Garza*.

¹⁹ *Ibid.*

²⁰ Judge Millet's dissent, Order, *Garza*, 874 F.3d 735 (No. 17-5236)

wedged a constitutional compromise between ORR’s proposal and Judge Millet’s dissent. The court of appeals vacated the panel order and sent the case back down to the district court in which Rochelle Garza amended her original request, asking JD to be released so she could again seek required counseling for her abortion²¹. The district court agreed, releasing Jane from ORR’s custody, and she was able to get an abortion the same day. Absent JD’s pregnancy, there was no longer a legal conflict between JD and ORR and so the case was moot. Three other minors were included in the *Azar* complaint, dubbed Jane Roe (JR), Jane Poe (JP), and Jane Moe (JM). Each minor faced substantial difficulty in obtaining abortion services, had their privacy violated, and experience degrading treatment by ORR employees. JR’s medical abortion was obstructed by ORR, JP had her abortion request denied despite her pregnancy resulting from sexual assault, and JM was forced to wait over two weeks for abortion services. A full description of these complaints can be found in *Appendix 2*.

Undocumented Status

In each case described above, undocumented status was used as a means to constrain abortion access or to contest the young women’s asylum in the United States. The decision is admittedly complex, with Judges concurring in part and dissenting in part over different matters at issue. Judge Millet criticizes her colleagues’ interpretation of the right to privacy in *Azar v. Garza*. In particular, she points out that Jane Doe’s status as an undocumented minor should not compromise her constitutional right to an abortion. Millet argues that her colleagues claim Jane Doe’s right to an abortion is impinged upon because she herself “refuses to leave” custody to obtain an abortion²². Judge Millet identifies a key contradiction, in which JD’s immigration status is framed by Henderson and Kavanaugh as the true oppressor to JD’s free will and abortion access. If Jane Doe simply undertook the “burden of extracting herself from custody” she would be free to pursue an abortion. However, if her location in custody is the reason she is being denied an abortion, and she is in custody because she is an

²¹ As per Texas state law, women are required to receive counseling 24 hours before an abortion procedure by the same doctor who will perform the procedure. In this case, JD had received counseling for the abortion prior to ORR’s refusal to transport her to the abortion procedure. However, when the appeals court reversed the panel decision, JD had to submit a petition to receive counseling for the abortion once again, because the doctor who had originally counseled her was no longer available. When JD was released for this counseling, she was notified that the original doctor was, in fact, available, and she was able to receive the abortion that same day.

²² Judge Millet’s dissent.

undocumented migrant, then her immigration status appears to be an underlying necessary condition for the denial. The government effectively constrained JD's choices into only two options: (1) to abandon her right to stay in the United States and undergo immigration proceedings or (2) to find a sponsor who would be willing to take custody of her without interfering with her abortion decisions.

The first option required Jane Doe to self-deport. However, JD had originally migrated to the United States to seek asylum after fleeing violence and she would not receive the abortion she sought because it was not yet legalized in her country (Harvard Law Review 2018). ORR's own policy includes responsibility for undocumented minors' wellness; by exercising custody over undocumented minors they have taken responsibility for their health. The deportation proposal abrogates ORR's own directive to care for their charges' health. Lastly, the deportation proposal as a "solution" to JD's pregnancy implies that ORR would have assisted JD in returning to her home country, knowing she was doing so in order to procure an abortion. This is the logical equivalent of ORR facilitating JD's abortion, only instead of an abortion clinic she is being sent back to her country of origin. The only substantive difference is that JD has given up her right to stay in the country.

This left Jane Doe with the second option, finding a sponsor. Locating appropriate sponsorship for undocumented migrants is a process similar to locating a foster parent. The sponsor must agree to house and care for JD and ensure her attendance for court appointments (Domezich 2017). In order to protect the vulnerable position of an undocumented minor, Congress requires that HHS carefully reviews and restricts who can apply to be a sponsor, requiring that potential sponsors must either be "related to Jane Doe" or have some "bona fide social relationship...which existed before" her arrival in the United States²³. Migrants frequently arrive without pre-established family connections and even if they do, relatives are often difficult to locate or too afraid to come forward to act as a sponsor. Locating a sponsor is neither quick nor easy. Additionally, after the 11 days allocated for the expedited search to find a sponsor, JD would be required to restart litigation if no sponsor was identified. This posed a serious threat to JD's ability to procure an abortion given the parameters of Texas state law and

²³ *Azar v. Garza* 2018.

substantially constrained her choices among abortion procedures, putting her health and safety at risk.

Sponsorship was used, functionally, to prohibit Jane Doe's abortion.

Undocumented status came to have two central functions in JD's case. First, as elaborated further in the paternalism section, Jane Doe's status as an undocumented minor meant she was held in a government facility without her parents, enabling ORR to have unbridled influence on her decision making. Second, undocumented status was the basis on which abortion access became a representational erasure of the division between citizen and non-citizen. In her dissent, Judge Henderson argued against JD's right to an abortion, and that "to conclude otherwise rewards lawlessness and erases the fundamental difference between citizenship and illegal presence in our country"²⁴. By framing JD's abortion as an erosion of the border between citizen and immigrant, her abortion erodes the actual borders of the United States. This is couched within Henderson's analysis of the difference between an affirmative right and a negative prohibition. For Henderson, JD is entitled to a negative prohibition, the right to not being physically abused, but she is denied access to affirmative rights. Affirmative rights are those positive entitlements listed in the Bill of Rights and should only be fully accessible to citizens²⁵. JD's access to affirmative rights, in Henderson logic, is therefore invasive to both JD's own body and the nation. This is a meaningful elaboration of the way an ethnonationalist logic works in underlying both forced birth and sterilization. It is not the act of reproducing, but the access to reproductive decision making, that is figured as a positive right and a citizen privilege. The alliance between the pro-life and anti-immigrant ideologies make it possible for the government to exclude forced pregnancy as "physical abuse" but include abortion as a positive right at the same time.

Paternalism

As was identified in *Madrigal*, paternalism plays an important role for figures of authority (such as doctors and government officials) in their adjudication over immigrant women's reproduction. In *Azar*, paternalism plays

²⁴ *Ibid.* Judge Henderson's dissent.

²⁵ *Ibid.*

an especially important role because of the ambiguous status of the law. A paternalistic framing employed by ORR allows them to claim authority over decision making acting in loco parentis as the minors do not have legal guardians when they arrive in the United States. However, ORR's role as parental figures is ambiguous. This legal ambiguity served a rhetorical function: ORR could advocate for any outcome as long as it was under the auspices of protecting the young women in their care. While some U.S. states require parental notification or consent for minors to access abortion services, minors can seek exemption through judicial bypass.²⁶ However, acting as a paternalist figure, ORR intervened. Exhibit B in the case documents show email communications within ORR about stopping grant-funded shelters from facilitating abortions in accordance with the ORR policy that require Lloyd's personal permission for abortion procedures: "To restate and reinforce the existing policy, *grantees may not perform Heightened Medical Procedures without written authorization from the ORR Director, except in emergency medical situations (as described in Emergency Medical Services, 3.05)*"²⁷. This policy is in direct violation of state law, even if ORR is acting as the minor's guardian while they are in custody. This is not an interpretation of the law but a willful misinterpretation furthering ORR's paternalistic agenda to subsume total control over the medical decisions for minors:

Under section 462 of the Homeland Security Act of 2002 and section 235 of the Trafficking Victims Protection Reauthorization Act of 2008, the Department of Health and Human Services, through the Director of the Office of Refugee Resettlement (ORR), is entrusted with the care and custody of unaccompanied alien children in the United States. This means that the Director of ORR is empowered by Congress to make all medical decisions for the unaccompanied alien child (UAC) in place of the child's parents.²⁸

During the court proceedings, ORR defended its actions by claiming that abortions undertaken in their custody would constitute a federal facilitation of abortion (a violation of the Hyde amendment). However, in the same email reiterating restricting abortion services provided by shelters, Lloyd empathizes "...that the requirement for written authorization by the ORR Director applies whether the procedure will be paid for with Federal funds or by other means" (*ibid.*). ORR was not, as they have claimed in the court proceedings, interested

²⁶ with the exception of Maryland, in which a doctor can exempt minors from the parental consent requirement (Guttmacher Institute 2020).

²⁷ Exhibit B. *Azar v. Garza*.

²⁸ *Ibid.*

in assisting the young women in arriving at an informed decision. Instead, they were seeking to override the federally granted autonomy of the young women:

Effective immediately, ORR is requiring grantees to notify ORR through their assigned Federal Field Staff immediately [sic] of any request or interest on any girl's part in terminating her pregnancy. A response from ORR Director would be required before taking any next steps (i.e., scheduling appointments, pursuing a judicial bypass, or any other facilitative step).²⁹

Additionally, ORR issued strict instructions to ORR funded shelters that they should not provide any counseling related to abortion pre or post release, extending the oversight of ORR beyond their time in the shelter:

ORR previously provided the grantee with specific direction regarding the type of services the UC should be connected with. Please see his direction that the program should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling.³⁰

ORR policy indicates that, in the best case scenario, migrants are eventually placed in foster homes or with appropriate guardians. As part of a longer term attempt to oversee the minors' pregnancies, Lloyd sought to place pregnant young women in pro-life homes. In correspondence regarding the status of a pregnant minor, Lloyd assured a coworker that "if things get dicey with *redacted* sponsor, I know a few good families with a heart for these situations who would take her in a heartbeat and see her through her pregnancy and beyond"³¹. Lloyd's paternalist treatment of the migrants included detailed tracking of the girls' eating habits and monitoring of their pregnancies. In discussing the developments in a minor's pregnancy with staff, Lloyd instructed ORR employees to have "her clinician keep a close eye on her"³². ORR justified such close monitoring through a concern about the psychological impacts of questioning a pregnancy. In an email sent by Lloyd, he expressed his concern: "often these girls start to regret abortion, and if it comes up, we need to connect her with resources for psychological and/or religious counseling"³³. Finally, ORR mandated that shelters notify the parents of migrants seeking to obtain abortions, even after they received a judicial bypass. This was considered part of the general tactic to counsel the young women out of the decision:

²⁹ *Ibid.*

³⁰ Exhibit C. *ibid.*

³¹ *Ibid.*

³² Exhibit D. *ibid.*

³³ *Ibid.*

Thank you-the grantee or the federal field staff must notify her parents of the termination in this case. This should happen alongside of resources to the UAC for post-abortion counseling as part of post-release care.³⁴

A key element of the paternalist stance is constructing minors as emotionally unstable and unable to make their own decisions. The desire to seek an abortion is always rendered as a problem to be solved by ORR, a problem reflecting the minor's emotional disturbance. ORR additionally accessed and leveraged clinician records and psychological evaluations of minors seeking abortions:

It looks like there are issues in addition to the pregnancy, as she mentioned suicide and the clinician describes her demeanor as "obnoxious" and "sad." Clinician should work to identify any pressures that might be leading her to desire termination (does she feel pressure to get to work, is there emotional abuse, etc.) and what is leading to her sadness and anger. I am sure some of this work has already commenced, but it bears mention.³⁵

Finally, ORR's insistence on producing options that are pro-life and/or religious are framed as solutions to the minor's desire for abortion:

Along these same lines, let's make sure that she is aware of the option of having spiritual counseling that is sensitive to her religious preference.³⁶

In Judge Kavanaugh's dissent, he argued JD could not responsibly choose an abortion because of her lack of "a support network of friends and family"³⁷. This attempt to bolster the appropriateness of sponsorship was irrelevant to the state-mandated requirements to procure an abortion, which JD had fulfilled. Instead, it indicates an underlying ideology of immigrant rationality and the sexual politics of decision making that played a role in coercive and forced sterilizations in the 1970s. This renders undocumented minors in federal custody as especially vulnerable to transgressions of personal autonomy. Kavanaugh's argument invokes the same discourse employed in eugenic and population control arguments that invalidates immigrant authority and individuality, stripping immigrants of "subject status" (Chavez 2013).

³⁴ Exhibit H. *ibid.*

³⁵ Exhibit G. *ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.* Judge Kavanaugh's dissent.

The paternalist framing of the ORR allowed the federal government to intervene and monitor the intimate reproductive status of migrants. Additionally, it functioned to produce a dichotomy in which ORR is knowledgeable, rational, and level-headed while the minors are emotional, vulnerable to coercion, and unable to proceed with their own healthcare decisions. ORR was able to mobilize this framework to control multiple dimensions of the reproductive health care of pregnant minors in order to restrict their counseling options, notify their parents, and limit sources of emotional support to religious, pro-life organizations.

Fetal Personhood

A Freedom of Information Act filed in 2019 by the progressive organization American Bridge revealed the tracking of pregnancies and menstrual cycles of young women in ORR's care (North 2019). The 28-page document included information regarding the age of the minor, how far along in their pregnancies they were, whether the pregnancy was a result of a sexual assault, and whether the minor had requested an abortion (*ibid*). This meticulous tracking was not simply a means for observation but indicates a specific discursive framing in which the progression of the pregnancy became imbued with meaning called "gestational age" by ORR. The focus on the age of the fetus and progression of the pregnancy is the third discursive pattern identified in my analysis. This kind of subjecthood—when allocated to a fetus—has been described as "fetal personhood" by feminists and legal theorists alike and works to produce the fetus as a subject in and of itself (Berlant 1997; Petchesky 1987). By allocating the status of a person to the fetus, ORR assumed the responsibility for ensuring the health and safety of what Lloyd claimed was now an additional "unborn child" in ORR custody. In discussing the pregnancy of a minor in their custody, Lloyd reiterates this perspective: "as things stand now, the unborn child is a child our care, so the medical team should continue with standard prenatal care"³⁸. The claim that the fetus is a child is contingent on knowing and using the so-called "gestational age" of the fetus as it provides ORR with

³⁸ Exhibit G. *ibid*.

the standards of fetal personhood used to restrict abortion in general pro-life discourse. In an email sent by Scott Lloyd on this topic, he emphasized the importance of an ultrasound at a pro-life “crisis pregnancy center” (CPC)³⁹:

If she has not had her ultrasound yet, she should do so at the following place: <http://www.cpcphoenix.org/> If she has had it, she does not need an additional ultrasound, but the grantee *I* field staff should set up a session of options counseling there. Once we know the gestational age, that will be material, as it may already be too late to legally obtain an abortion.⁴⁰

The interest in “gestational age” is utilized as one of the “materials” for ORRs attempts to construct a legal scenario in which they can force an undocumented minor to give birth. The last line of Lloyd’s correspondence regarding the young woman summarizes the main objective of the efforts to monitor closely the pregnancies development: “she should not be meeting with an attorney regarding her termination or otherwise pursuing judicial bypass at this point”.⁴¹

In a memorandum labeled urgent from Kenneth Tota, Acting Director of ORR on March 4th, 2017 care, Tota alerted ORR personnel that an unaccompanied alien child “UAC” had begun a medical abortion procedure — sometimes called “the abortion pill” — against the wishes of ORR medical officers. Medical abortion procedures require the administration of two pills taken 24 hours apart, usually under observation of a doctor. ORR apprehended the young woman after the administration of the first pill and brought her to the emergency room of a local hospital in order to “determine the health status of the UAC and her unborn child”⁴². The individuality of the fetus is centralized *over and against the teenage girl* in order to emphasize the right to block the migrant’s completion of the abortion. The memorandum directs ORR to take steps “in order to preserve the life of the UCA and her unborn child”. The memorandum effectively instructs ORR officers to forcibly obstruct the completion of a medical abortion procedure:

³⁹ Such centers are coercive institutions that appear to provide free or low cost counseling services but are run by conservative pro-life individuals and further the spread of misinformation. The selection of a CPC ensures that minors will not be given the full range of information regarding terminating a pregnancy, as many CPC’s provide false and misleading information about abortion (Bryant and Swartz 2018).

⁴⁰ Exhibit G. *ibid.*

⁴¹ *Ibid.*

⁴² Exhibit A. *ibid.*

If steps can be taken to preserve the life of the UAC and her unborn child, those steps should be taken. If it is confirmed that the unborn child has already expired due to the beginning of the abortion procedure, steps can be taken to safely remove the body of the unborn child.⁴³

The use of the term *body* functions of imbue the act of medical abortion with meaning that likens the fetus to the status of another person. At the gestational stage in which a medical abortion can occur, there is unlikely to be a body, and this discursive framing functions to prioritize the health of the fetus over the health and wishes of the migrant.

Finally, these arguments are especially unusual in light of the long history of reproductive abuse of immigrants in the United States. As exemplified in *Madrigal*, concerns over the potential lives of fetuses were entirely absent from population control arguments. However, the empowerment of a political right-wing movement that seeks to enforce their own agenda by emboldening fetal personhood have fused in this case with ant-immigrant sentiment. Such is especially evident in the *Amicus for Appellant Brief* which Judge Henderson draws upon in her dissent. Submitted by conservative and pro-life governors, the brief focuses on the state's investment in the fetus:

“The States also have ‘a legitimate and substantial interest in preserving and promoting fetal life,’ as well as an ‘interest in promoting respect for human life at all stages in the pregnancy.’ *Gonzales v. Carhart*, 550 U.S. 124, 145, 163.⁴⁴

The life of the fetus is compared to the right of the government to defend itself through a “legitimate and substantial interest in preserving and promoting fetal life” (Vasquez 2017). As the Attorney General Ken Paxton said, “Texas must not become a sanctuary state for abortions” (*ibid.*). “Sanctuary state” typically refers to the protection of undocumented individuals facing deportation, but here the right to protect fetal life is juxtaposed against with the right to asylum. Thus, state-funded reproductive control operates on a logic in which protecting the fetus, whether real or imagined, is connected to the right of the government to protect the population from the threat of a pregnant, immigrant minor. Therefore, the protection of the fetus and proscription of abortion is not

⁴³ *Ibid.*

⁴⁴ *Amicus for Appellant Brief, Azar v. Garza.*

concerned for the wellbeing of pregnant minors. Such reproductive violence maintains the U.S. border as a reproductive boundary that can turn away those who threaten the white, nationalistic reproductive politics of the current political administration. The government, in its arguments for the right to restrict abortion, sought to both advance a pro-life agenda, while maintaining a strong anti-immigrant stance. In *Madrigal*, the interest the state has in the fetus is a “fetal-lack”, in which sterilization ensures there is no future possibility of a fetus that may result in undesirable reproduction (as imagined in an American reproductive order). In *Azar*, the fetus is centered at the expense of the migrant. When the American reproductive imaginary circulates around fetuses or a “fetal lack”, personifying the fetus is a powerful means for state-actors to adjudicate and intervene on bodies in marginal spaces such as detention.

Abortion on Demand

The final framework employed in the maintenance of an interventionist logic in *Azar* is exemplified in the opinions of the panel of district appellate court Judges. In Judge Kavanaugh’s dissent, he alleges the decision to let JD obtain an abortion created “a new right for unlawful immigrant minors in U.S. government detention to obtain immediate *abortion on demand*” (emphasis added). However, pregnant minors in the United States have the constitutional right to obtain an abortion in accordance with state law. Having satisfied the Texas state requirements, JD did not seek a “new right”. Instead, those dissenting sought to put forward a new restriction. This restriction sought to limit abortion access on the basis of immigration status alone, an integral part of Scott Lloyd’s hyper-surveillance of immigrant reproduction at ORR. The phrase “abortion on demand” is a dog-whistle for, and key idiom of pro-life, conservative movements and appears three times in Kavanaugh’s short dissent. It portrays the requests of the plaintiffs in *Azar v. Garza* as overly-excessive abortion seekers, unable to keep themselves in control.

While Kavanaugh did not directly challenge whether an ‘illegal’ immigrant has the constitutional right to have an abortion, Judge Henderson argued that illegal immigrants are not protected by the same constitutional rights as citizens. Henderson claimed that because Jane Doe was apprehended at the border and did not enter the

United States at a formal port of entry, her illegal status precluded her from certain constitutional rights “accorded to those persons legally within the country’s borders”⁴⁵. Additionally, she emphasized that the Supreme Court had previously restricted constitutional rights to non-citizens, like the freedom from warrantless search or trial without jury (*ibid.*). Henderson was particularly insistent that allowing abortion access for migrants would create an incentive (or remove a disincentive) to migrate to the United States:

The same interest is, to put it mildly, implicated here. Border authorities, immigration officials and HHS itself would be well served to know *ex ante* whether pregnant alien minors who come to the United States in search of an abortion are constitutionally entitled to one. And under today’s decision, pregnant alien minors the world around seeking elective abortions will be on notice that they should make the trip.⁴⁶

Such reasoning to deter immigrants is similar to the logic employed in *Madrigal v. Quilligan*. Henderson maintains that immigration as a whole is demanding and undesirable, and that abortion is an incentive, an american resource that cannot and should not be made available to migrants.

If the district court in Texas had not intervened, Jane Doe would have been forced to self deport or carry out her pregnancy to term. The court never found a sponsor for her and, after she turned eighteen in January 2018, she was released from governmental custody (ACLU 2018:23). *Azar v. Garza* exhibits the agenda promoted by “MAGA” politics which seeks to control “illegal” immigration through reproduction. Jane Doe’s case is reflective of a larger regime stemming from the Trump administration’s dual agenda targeting reproduction and immigration. In Judge Millet’s original dissent, she wrote that the government had attempted “an astonishing power grab” by blocking Jane Doe’s abortion. According to Millet, what the government really claimed was “a right to use *immigration* custody to nullify J.D.’s constitutional right to reproductive autonomy prior to viability”.⁴⁷

Discussion

⁴⁵ *Ibid.* Judge Henderson’s dissent.

⁴⁶ *Ibid.*

⁴⁷ *Azar v. Garza*, 2018:753.

In the above analysis, I argue that *Azar v. Garza* exemplifies a newfound alliance between anti-abortion and anti-immigration rhetoric that has been put into practice through four emergent discursive patterns. However, in order to deepen the analysis of the paradoxical existence of both forced sterilization and forced birth as practices of control, it is necessary to draw a number of comparisons between *Azar v. Garza* and *Madrigal v. Quilligan*. In the context of *Madrigal*, Latina immigrant women were often left entirely out of the decision making process for their own sterilizations. In the context of *Azar*, ORR sought to strip women of their subject status, frame the minors as helpless, and subject them to a highly intimate level of interrogation regarding their reproductive lives. In *Madrigal* the ten women were of various documentation status: from a variety of national origins, some women were new immigrants while others had been settled in the U.S. for a number of years. In *Azar*, the minors were all undocumented with refugee status, largely from Central and Latin America. In this way, despite the “minor” status of the young women in *Azar*, both *Madrigal* and *Azar* show that migrants can be made intervenable regardless of their age, immigration status, or national origin, if they appear to endanger national priorities in health care, sovereignty, or both.

When considered in contrast to the public health crisis alleged in *Madrigal v. Quilligan*, the above analysis of *Azar* finds that the interrelationship between reproductive regimes, and national borders can produce widely different reproductive outcomes for the migrants caught in the web of immigration policy. These cases explain the interconnectedness of a resurgence of moral panic around families and borders in the United States and their centrality to nationalist political regimes. In resurgent populist and ethnonationalist political movements, state-sanctioned reproductive abuse controls certain nationals, however the outcome of this control is not always predictable. Through restricting reproductive care, the state seeks to reinforce boundaries between national and non-national women, segregating out the ‘illegitimate’ immigrants who are either indulging in pregnancy and motherhood for immigration lenience or seeking “abortion on demand”. The racialized strategies of immigration control which separate undocumented individuals from nationals effectively turn immigrant reproduction into a tool with which the nation can reinscribe itself. By restricting Jane Doe’s abortion through her condition of detention, *Azar* demonstrates how pregnant bodies provide a locus for the United States to extend an exclusionary

national ideology. Because detention centers are at the margins, state actors use these spaces to harvest the discourses that make up a national reproductive imaginary—developing their own reproductive agendas. My analysis provides a means to further understand the obscured relationship between state and nation as state-actors lay claim to reproduction. *Azar v. Garza* provides evidence that the state can enact power over populations through reproductive abuse using the rhetoric of a shared national interest in reproductive control.

The political claim-making in the agenda for reproductive control is only part of the significance of *Azar v. Garza*. The case amplifies a fundamental contradiction between the U.S. conservative right that seeks to restrict abortion access as much as possible and xenophobic, nativist politics that defames immigrants as burdens and over-producers. The intersection of conservative pro-natal and anti-abortion ideology with anti-immigrant sentiment due to the rising ethnonationalist political agenda of the Trump administration has resulting in required reproduction. Immigrant intervenability can be expected to continue as long as it enables state officials to act under a shared national desire to control reproduction.

Currently, undocumented migrants are considered external to the health care system, but their time in detention and refugee shelters subjects them to health care administered by the U.S. government. Reproductive abuses such as forced birth can have a grave impact on the health of migrants in ORR's care. From 2008 to 2010, the University of California San Francisco's Advancing New Standards in Reproductive Health program (ANSIRH) conducted a prospective longitudinal study examining the effects of unintended pregnancy on women's lives. The study compares the emotional, physical, and economic consequences of carrying unwanted pregnancies to term (Foster 2020). There have been more than three dozen papers published using the study, reporting that women who were denied an abortion and carried their unwanted pregnancies to term were four times more likely to live below the Federal Poverty Level (FPL), experience serious health complications (such as eclampsia and death), remain in abusive relationships, suffer from anxiety, and were less likely to have positive aspirations for their immediate future (*ibid.*). The study's comprehensive body of research is a testament that the consequences of forced birth are not only serious, but also a threat to public health.

The public outrage in response to *Azar v. Garza* made it one of the more visible examples of the Trump administration's reproductive regime. Along with *Azar*, this regime includes the mistreatment of pregnant detainees, family separations, failed family reunifications, deaths of children and women in ICE custody, endorsement of white supremacist policies, and new "abortion ban" and "heartbeat" laws across the country. Most recently, a complaint⁴⁸ was filed on behalf of Dawn Wooten, former ICE nurse who alleged that ICE personnel had been performing hysterectomies on women in their custody (Dickerson, Wessler, and Jordan 2020). These allegations are currently being investigated, but there have already been a number of women who have come forward to verify the allegations (*ibid.*). These recent events confirm that sterilization practices are not "over", and that paradoxical forms of reproductive abuse can and do exist in tandem. Within this political context, *Azar v. Garza* makes two things clear: 1) immigration status is considered an exceptional circumstance for reproductive abuse and 2) reproductive abuse is a means of controlling immigration status. In the first instance, Jane Doe's undocumented status is the reason why her constitutional right to an abortion was constrained. Because she is an 'illegal' immigrant, her status is an exception to the constitutional rule that all people in the U.S. have a constitutional right to an abortion pre-viability. However, to the second point, her pregnancy status was alternatively used as a viable reason she should seek self-deportation. In both cases, immigration and reproduction work together as a powerful method of control. These logics are currently at work in sterilization abuses in ICE detention centers.

Azar v. Garza exemplifies how state reproductive violence is central to the differing ideological and moral approaches for fixing perceived issues in the American population. In *Madrigal v. Quilligan*, sterilization and the prevention of childbearing was encouraged as the morally correct and efficient way to solve the social problem of over population. In *Azar v. Garza*, the state attempts to address the problem of immigration by denying minors the right to an abortion on the presumption that they will either carry the child to term or self deport. *Garza* brings the conservative positions of anti-immigration and anti-abortion into conflict and produces a double bind of

⁴⁸ Complaint. Project South, Institute for the Elimination of Poverty and Genocide 2020. <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf>

ideological failure. This conflict indexes the underlying power of these ideologies. Ethnonationalist sovereignty involves the extension of sovereignty over populations- not just in restriction (negative modes) but in positive modes as well. The reproductive injustices happening in detention cannot be understood simply as infringements of negative liberties. Immigrant intervenability is not just negative or restrictive control on populations, as in the limiting of undesirable populations, but as a power that expresses itself positively or negatively as the intervenability of migrant bodies. Intervenability is the state's sovereign right to intervene.

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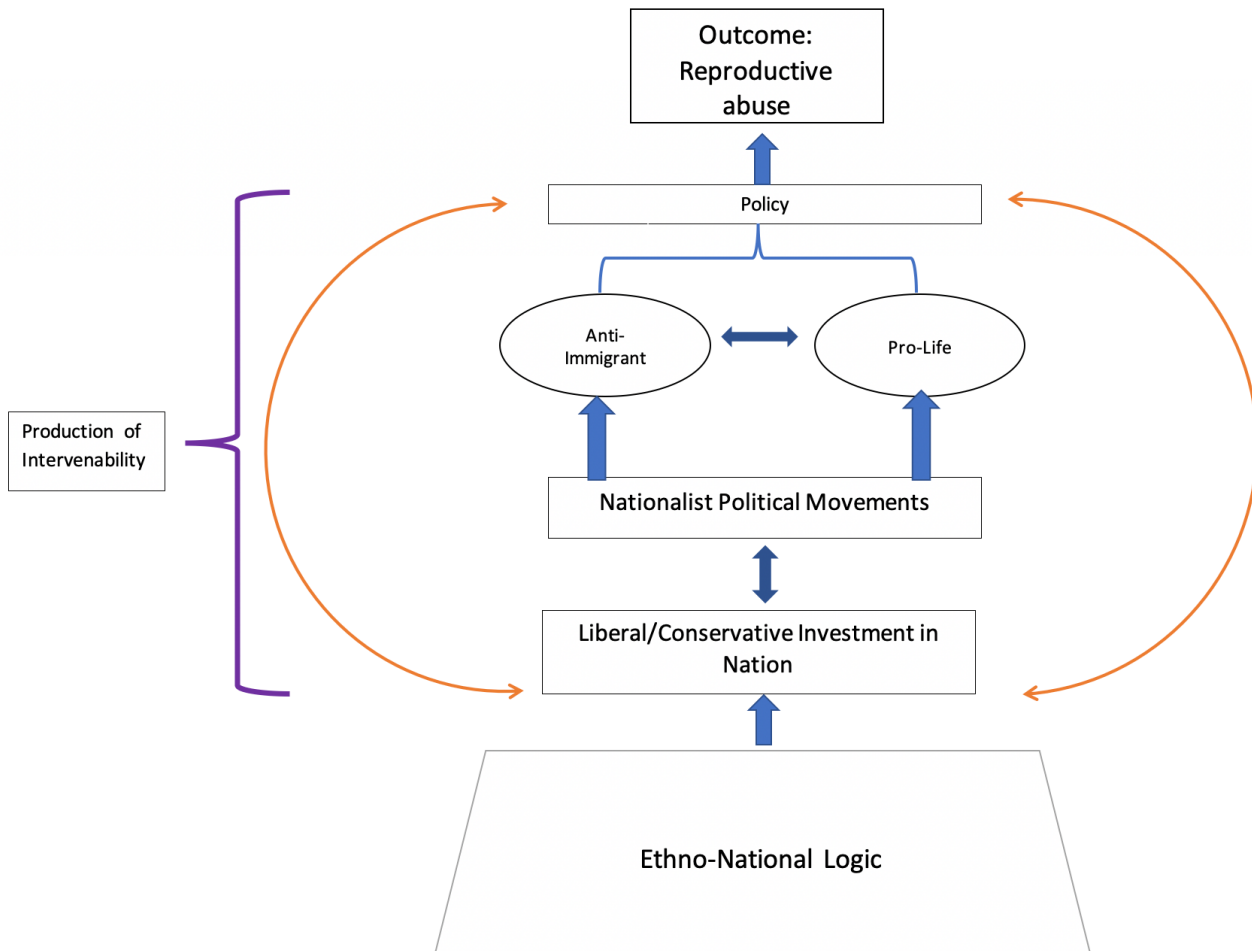
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Appendix 1



Appendix 2

The second minor to bring accusations against ORR and join *Azar v. Garza* was dubbed “Jane Roe” (JR). Much like Jane Doe, she came to the united states without her parents and was apprehended by border control and placed in the care of ORR. In November 2017, JR learned she was pregnant and requested a medical abortion. Her request was ignored, delaying her abortion and precluding the option to choose a medical abortion (ACLU 2018:7). JR again requested an abortion and ORR required her sponsor, JR’s sister, to be notified of the abortion request, against her wishes. After waiting for more than three weeks since her request, she sought “emergency relief” in December 2017 and was granted relief by the district court, however ORR appealed the decision, only to claim Mrs. Roe was actually 19 years old. Since she was no longer considered a minor she was transferred to ICE’s custody where she was released and obtained the abortion (*Azar v. Garza*, 2018).

The third plaintiff in *Azar v. Garza* was a minor dubbed “Jane Poe” (JP). Like the two other individuals in the case, Jane Poe came to the united states unaccompanied and was living in a private but federally funded shelter (*ibid*). During her travel, JP was raped and became pregnant as a result. Upon arriving in an ORR funded privately run shelter, JP requested an abortion in November of 2017. ORR told JP that she either must tell her mother and potential sponsor about her pregnancy or the shelter would do so on her behalf, despite JP reporting

that her mother had threatened to physically harm her if she had an abortion. JP temporarily withdrew her request for an abortion after reportedly feeling suicidal before renewing her request. More than two weeks after her original request, Scott Lloyd denied her access to an abortion based on the justification that a pregnancy brought on by violence should not be aborted because “here there is no medical reason for abortion, it will not undo or erase the memory of the violence committed against her, and it may further traumatize her. I conclude it is not in her interest” (*ibid.*). In response, Jane Poe was granted emergency relief by the district court and was able to obtain an abortion. Without court intervention she would have been forced to carry the pregnancy to term.

Lastly, the fourth minor dubbed “Jane Moe” (JM) was detained by the federal government after traveling to the United States alone and was living in a federally funded, private shelter. JM asked the shelter for an abortion. After waiting two weeks without being granted access to abortion services she joined *Azar v. Garza* as a plaintiff. Before the court could rule, ORR placed JM with a sponsor in which she was able to obtain the abortion (*ibid.*).