THE BODY AS BORDERLAND:
The Abortion (Non)Rights of Unaccompanied Teens in Federal Immigration Custody in the Trump-Pence Era

J. Shoshanna Ehrlich

Abstract

In 2017, Scott Lloyd, the newly appointed director of the Office of Refugee Resettlement (ORR) declared that henceforth pregnant teens in federal immigration custody could not obtain an abortion without his express consent. This quickly proved to be an impossibility on account of Lloyd's deeply held and religiously saturated antiabortion beliefs. In justifying his denial of consent to all who sought it, Lloyd insisted that ORR had a statutory obligation to provide refuge to the unborn as well as to protect unaccompanied minors in the care and custody of the agency from the trauma of abortion regret.

This article focuses on the origins and implementation of Lloyd's abortion-consent policy within the broader context of the Trump administration's "pro-life" and anti-immigrant agendas, and its contestation in the much-publicized *Garza v. Hargan* class-action lawsuit brought by the ACLU Reproductive Freedom Project. As argued, by mapping these twinned commitments onto the transgressive bodies of undocumented pregnant teens in federal immigration custody, the policy appropriated the seemingly private and intimate in order to both punish these young women by compelling motherhood as a sanction for their infractions and deter those who might otherwise be tempted to breach the Southern border as "abortion tourists."

About the Author

J. Shoshanna Ehrlich is a Professor in the Women's, Gender, and Sexuality Studies Department at UMass Boston. She graduated from Northeastern University School of Law in 1982.

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Introduction

In September of 2017, after traveling thousands of miles from her home in Central America, seventeen-year-old "Jane Doe,"[1] was apprehended by Customs and Border Patrol (CBP) shortly after crossing the U.S. border.[2] In undertaking this journey, Jane joined the growing number of teens who have fled El Salvador, Guatemala, and Honduras since 2011 due to "the augmented violence . . . in the region by organized armed criminal actors including drug cartels and gangs or by State actors," or "abuse and violence in their homes . . ."[3]

Following the determination that Jane was what the government refers to as an "Unaccompanied Alien Minor" (UAC), she was transferred to the Office of Refugee Resettlement (ORR) and placed in an ORR funded shelter in the Rio Grande Valley in South Texas.[4] A medical examination revealed that she was pregnant. Certain that she did not want to carry her pregnancy to term, Jane informed the shelter staff that she wanted to have an abortion. Jane was equally adamant that she did not want her parents to know about her pregnancy or abortion plans, as she had fled home in order to escape their abuse.[5] Particularly relevant, her parents had severely beaten her sister upon learning that she was pregnant, resulting in a miscarriage, and had assaulted Jane when she sought to intervene to protect her sister.[6] Accordingly, as required by Texas law, Jane sought and was granted court authorization for an abortion through a confidential judicial bypass hearing.

With the order in hand, Jane's court-appointed guardian *ad litem*, Rochelle M. Garza, contacted shelter staff to arrange for transportation to the clinic. To her surprise, Ms. Garza learned that ORR had instructed the staff that neither they nor she were permitted to transport Jane to her clinic appointments.[7] Ms. Garza also

1. This name is a pseudonym.

2. *Hearing on the Nomination of Brett Kavanaugh to the Supreme Court of the United States Before the Comm. on the Judiciary*, 115th Cong. 528 (2018) (written testimony of Rochelle M. Garza, Managing Attorney, Garza & Garza Law). Regarding the apprehension and transfer of unaccompanied minors to ORR custody, *see Children Entering the United States Unaccompanied*, Off. Refugee Resettlement § 1.1 (January 27, 2015), https://www.acf.hhs.gov/orr/report/children-entering-united-states-unaccompanied-section-1#1.1.

3. U.N. High Comm'r for Refugees, Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection 4 (2014).

4. *Hearing*, *supra* note 2, at 2.

5. *Id.* at 2, 4.

6. *Id.* at 4.

7. *Id*.

learned Jane had been compelled to visit a crisis pregnancy center (CPC) for "life-affirming" counseling, where she was prayed over in order to dissuade her from terminating her pregnancy, and that her mother had been informed of her pregnancy and abortion decision.[8]

The Reproductive Freedom Project of the ACLU subsequently filed the class-action *Garza v. Hargan* (subsequently *J.D. v. Hargan*) lawsuit challenging ORR's "wielding [of] an unconstitutional veto power" over Jane Doe's abortion decision in contravention of the Fifth Amendment.[9] After three years of battling ORR's seemingly intransigent usurpation of authority over the abortion decisions of unaccompanied minors, Brigitte Amiri, deputy director of the Reproductive Freedom Project and lead attorney in the case, announced that the government finally had "abandoned its attempts to block young people in its custody from accessing abortion," thus righting "one of the wrongs [the Trump] administration has committed against immigrants in detention."[10] The parties accordingly entered into a joint stipulation of dismissal that was approved and adopted as an order of the federal district court.[11] Expressing her relief at the outcome, Jane Doe emphasized that the "decision to have an abortion is personal and belongs to each individual . . . I came to this country to make a better life for myself . . . I am happy to know that my fight means that other young women like me will be able to make the decision about whether to become a parent for themselves."[12]

As developed in this article, ORR's challenged abortion-consent policy casts teens like Jane Doe as doubly subversive for having first breached the liminal space of the nation's vulnerable Southern

8. *Id.* at 34.

9. Complaint for Injunctive Relief and Damages at 8, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (No. 17-cv-02122-TSC). The complaint also alleges that compelled disclosure of an unaccompanied minor's identity, pregnancy, and abortion plans to a "crisis pregnancy center, parents, and/or immigration sponsors" violates their rights against compelled speech and to informational privacy under the First and Fifth Amendments respectively. *Id.* at 13. This article does not address these claims, but rather focuses on ORR's exercise of an unconstitutional veto power over the abortion decisions of unaccompanied minors. For a detailed recounting of the early stages of the *Garza* litigation, *see En Banc D.C. Circuit Upholds Order Requiring HHS to Allow an Undocumented Minor to Have an Abortion*, 131 Harv. L. Rev. 1812 (2018).

10. *As a Result of ACLU Litigation, Trump Administration Ends Policy Prohibiting Immigrant Minors From Accessing Abortion*, ACLU (2020), https://www.aclu.org/press-releases/result-aclu-litigation-trump-administration-ends-policy-prohibiting-immigrant-minors.

11. *See* Joint Stipulation of Dismissal Without Prejudice, *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (No. 17-cv-02122-TSC).

12. Press Release, *supra*, note 10..

border and then having the audacity to insist upon the right to an "abortion on demand"—a demand that Justice Kavanaugh, while still a judge on the DC Circuit Court of Appeals, derisively characterized as a "radical extension of the Supreme Court's jurisprudence."[13] It also presents us with a paradox. Namely, why, given the long history in this country of discouraging women like Jane Doe from becoming mothers, at times through active campaigns of involuntary sterilizations, based on the nexus of factors such as ethnicity, age, income, and immigration status, did compelled motherhood emerge as ORR's preferred pregnancy outcome?[14] As Risa Cromer bluntly put it, in "light of Trump's sustained contempt for migrating pregnant Latinas and their children, why wouldn't his administration happily take Doe to the abortion clinic;" in short, should we not expect the current administration to "be eager to limit the reproductive capacities of those deemed threats to the greatness, whiteness and righteousness of the nation . . . ?"[15]

As argued here, the answer lies in the fact that ORR's abortion-consent policy can be understood as a form of reproductive governance aimed at "exert[ing] power over bodies marked as Other through both border and reproductive control."[16] In short, the policy advances a double strategy of containment through the simultaneous mapping of the government's "pro-life"[17] and border control agendas onto the transgressive bodies of unaccompanied minors.

13. *Garza v. Hargan*, 874 F.3d 735, 751 (D.C. Cir. 2017) (Kavanaugh, B., dissenting). In this regard, it is important to recognize that the government was deemed to have waived its right to argue "for purposes of this entire litigation, including in the Supreme Court," that undocumented immigrants do not have a constitutionally protected right to abortion by failing to have raised it during oral arguments. *See* Transcript of Oral Argument at 18-19, *Hargan*, 874 F.3d 735 (No. 17–5236).

14. *See generally* Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, Reproductive Rights and Justice Stories, 97 (Melissa Murray, et. al., eds., 2019); J. Shoshanna Ehrlich, Regulating Desire: From the Virtuous Maiden to the Purity Princess 87-110 (2014); Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 Am. J. Pub. Health 1228 (2005); Elena R. Gutierrez, *Policing "Pregnant Pilgrims": Situating the Sterilization Abuse of Mexican-Origin Women in Los Angeles County*, Women, Health, And Nation: Canada And The United States Since 1945 379 (Georgina Feldberg, et. al., eds., 2003).

15. Risa Cromer, *Jane Doe*, 34 Cultural Anthropology 18, 20 (2019).

16. Elise Andaya, *"I'm Building a Wall Around My Uterus": Abortion Politics and the Politics of Othering in Trump's America*, 34 Cultural Anthropology 10, 14 (2019).

17. In order to communicate the views of government officials vis-à-vis the abortion rights of unaccompanied minors, in places I have chosen to use language that is expressive of their position as this best conveys what is at stake

This article proceeds in six parts. Part I provides a brief overview of the status and rights of unaccompanied minors in federal immigration custody. Part II reviews the abortion rights of minors. Part III focuses on the underpinnings and rationale of ORR director Scott Lloyd's religiously saturated abortion-consent policy. It also locates this policy within the Trump administration's broader "pro-life" and anti-immigrant commitments. Part IV addresses the ways in which ORR instrumentalized youthful immigrant bodies in order to advance these commitments by way of a transient concern for emotional harm. Part V examines the government's unsuccessful efforts in the *Garza* case to persuade the federal courts that ORR's abortion-consent policy was both constitutional and in the national interest. It then uses the framework of reproductive governance to unpack the paradox of a policy that effectively reversed the historic discouragement of women, such as Jane Doe, from reproducing. The concluding part then looks at both the significance and fragility of the victory in the *Garza* case in light of both the recent regime change and solidification of a conservative majority in the Supreme Court.

I. Jane Doe: Her Rights As An Unaccompanied Minor Under The Flores Settlement Agreement

Once an undocumented young person has been detained at or near the border, a determination is made as to whether she fits within the definition of an unaccompanied minor. A young person meets this definition if she is (1) under the age of 18, (2) in the country unlawfully, and (3) without a parent or legal guardian in the United States who is "available to provide care and physical custody."[18] If determined to be an unaccompanied minor, she is transferred to the care and custody of ORR, rather than being placed in an Immigration and Customs Enforcement (ICE) detention facility, as would be the case with an adult.[19] As discussed below, due largely to the settlement agreement in the case of *Flores v. Meese,* ORR has a series of specific obligations towards minors in its care and custody.

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in this context. It is not intended to bestow personhood on those still in utero.

18. *About the Program*, Off.Refugee Resettlement, https://www.acf.hhs.gov/orr/programs/ucs/about.

19. *See* Con.Rsch. Serv., Unaccompanied Alien Children: An Overview 6–9 (2019). Regarding adult detention, *see Detention Management*, U.S. Immigr. & Customs Enf't, https://www.ice.gov/detain/detention-management; *Immigration Detention & Enforcement*, Nat'l Immigrant Just. Ctr., https://immigrantjustice.org/issues/immigration-detention-enforcement.

A. *A. Prioritizing Release over Detention: The Flores Settlement Agreement*

Prior to 1984, most unaccompanied minors who were apprehended at or near the border, without valid entry documents, were released to a parent or other adult relative living in the United States, rather than being detained by the Immigration and Naturalization Service (INS).[20] However, in 1984, in response to an increasing number of minors crossing into California from Central America, immigration detention became the preferred approach of that regional INS office.[21] As a result of this policy shift, detained teens were routinely incarcerated with unrelated adults and subjected to strip and body cavity searches.[22] Notably, even INS itself admitted that conditions were "deplorable."[23]

In 1985, children's and immigrant rights advocates filed the class-action lawsuit *Flores v. Meese* asserting that the government was engaged in an unconstitutional "pattern of illegal and discriminatory conduct in incarcerating persons under the age of eighteen (18) years."[24] Of central concern was the inherent conflict of interest created by the push and pull of INS's twin duties of punishment and care. As averred in the complaint:

> The conditions under which defendants jailed juveniles, coupled with their refusal to give due consideration to release to other available, responsible adults, belies defendants' professed concern with the welfare of these youngsters. Rather, defendants' policy and practice are a thinly veiled device to apprehend the parents of incarcerated juveniles and to punish children for allegedly having entered the United States without lawful authority.[25]

As this passage makes clear, in making detention, rather than release to a responsible adult, the norm, INS opted to privilege its prosecutorial role over its concomitant responsibility to care for minors entrusted to its custody.

In 1997, after years of litigation, the parties entered into a binding settlement agreement (*Flores* Settlement Agreement) which

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20. INS is the predecessor agency to the Department of Homeland Security.

21. *See Reno v. Flores*, 507 U.S. 292, 296 (1993).

22. *See* Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus at 9, *Flores v. Meese*, 681 F.Supp. 665 (C.D. Cal.) (No. 85–4544).

23. Susan J. Terrio, Whose Child am I? Unaccompanied, Undocumented Children in U.S. Immigration Custody 57 (2015).

24. *Meese* Complaint, *supra* note 22, at 29. .

25. *Id.* at 4.

adopts a policy favoring the release of unaccompanied minors to an adult sponsor; with preference to parents, legal guardians, or adult relatives; and further requires that minors, who are not released to a sponsor, be placed in the "least restrictive setting [possible and] appropriate to the minor's age and special needs."[26] Additionally, the setting must be "licensed by the state to provide residential, group, or foster care services for dependent children," and provide a range of care services, including, classroom instruction, recreational activities, and counseling.[27] The setting must also ensure that each teen receives "[a]ppropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination . . . within 48 hours of admission."[28]

B. *The Inherent Conflict of Interest Between INS' Prosecutorial and Custodial Roles*

As Susan J. Terrio writes, the *Flores* Agreement was "an achievement that advocates and scholars heralded as a watershed moment in the troubled history of immigration detention in this country."[29] However, it soon became evident that despite this progress, as the Office of Inspector General for the Department of Justice documented in a 2001 report, "deficiencies in the handling of juveniles continue[d] to exist . . . that could have potentially serious consequences for the well-being of the juveniles."[30] This finding was reinforced by the Women's Commission for Refugee Women and Children (Women's Commission) which reported after intensive investigation that "[r]elease and placement decisions for children have frequently remained ad hoc, arbitrary, and inconsistent, with little heed given to what is in the best interests of each child."[31]

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26. Stipulated Settlement Agreement at 7, 9–11, *Flores v. Reno*, No: CV 85–4544-RJK (Px), (C. D. Cal. Jan. 17, 1997).

27. *Id.* at 4–5, 10, Exhibit 1.

28. *Id.* at Exhibit 1. Many of the protections written into the *Flores* Settlement Agreement were subsequently reinforced by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. *See* Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635, 1653–1655 (2012).

29. Terrio, *supra* note 23, at 54.

30. Office of the Inspector Gen., U.S. Dep't of Justice, *Unaccompanied Juveniles in INS Custody, Executive Summary* (Sep. 28, 2001) (Rep. No. 1–2001–009).

31. Women's Commission for Refugee Women and Children, *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children* at10 (2002) (now the Women's Refugee Commission). For further detail, *see* Terrio, *supra* note 23, at 65–68.

The Women's Commission further concluded that, as in the pre-*Flores* era, these problems reflected the fact that "the INS has been assigned two irreconcilable and competing functions;" specifically, the agency was "charged with providing custodial care to unaccompanied children at the same time that it is acting as the prosecutor arguing in favor of the child's removal from the United States."[32] Although INS could have opted to resolve this conflict by privileging its custodial obligations to unaccompanied minors over its prosecutorial function, the Women's Commission concluded that because the agency was "dominated by enforcement concerns at the same time it completely lacks child welfare expertise, its enforcement functions frequently override consideration of the best interests of the children in its custody."[33]

In 2002, the Homeland Security Act (HSA) offered a way out of this seemingly intractable tension by transferring responsibility for the care and custody of unaccompanied minors to ORR, which, structurally, is a subagency of the Administration for Children and Families within the Department of Health and Human Services (HHS).[34] Critically, in contrast to the prior organizational arrangement, ORR does not have any competing responsibility to seek the removal of unaccompanied minors from the country; rather, this responsibility remains with the Department of Homeland Security (DHS), the successor agency to INS.[35] By separating out the care and prosecution responsibilities, and assigning them to separate agencies, the HSA settled the conflict of interest problem that existed when these "irreconcilable and competing functions," were assigned to a single agency, resulting in some overall improvement in the treatment and care of unaccompanied minors.

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32. *Id.* at 2.

33. *Id.* at 13.

34. It should be noted that resolution of this conflict was not the primary purpose of the Homeland Security Act. Rather, its principle objective was to address the threat of terrorism in the wake of the 2001 attack on the Twin Towers. To this end, the Act abolished the INS and created the mega-Department of Homeland Security (DHS). Within DHS, responsibility for enforcing the nation's immigration laws at and near the borders is assigned to Customs and Border Patrol (CBP) while responsibility for enforcing them within the country is assigned to Immigration and Customs Enforcement (ICE). *See* Stuart Anderson, *Why Was the Homeland Security Department Created?*, Forbes (May 12, 2019), https://www.forbes.com/sites/stuartanderson/2019/04/12/why-was-the-homeland-security-department-created/?sh=5a56facdad4b.

35. Regarding enforcement of the immigration laws, *see* U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions* (Oct. 23, 2020), https://www.dhs.gov/immigration-statistics/enforcement-actions.

C. *C. The Plight of Migrant Children and Teens in the Trump Era*

Despite the change wrought by the HSA, the border crisis that erupted into public view in the summer of 2018, as a result of the Trump administration's open and notorious crackdown on the "invaders" from Central American,[36] highlights the contingent and instrumental nature of the politics of care and disposability. Not only were families torn asunder by the administration's cruel family separation policy, the Office of Inspector General for the Department of Homeland Security issued an urgent Management Alert warning of the "dangerous overcrowding and prolonged detention" of unaccompanied minors (and others) in CBP holding facilities.[37]

Warren Binford, a member of a team of experts responsible for monitoring compliance with the *Flores* Agreement, forcefully stated after a visit to a holding facility in Flint, Texas:

> This was, by far, the worst situation that I've seen not just by the conditions but by the sheer number of children who are being kept at this facility and being kept in really dangerous, unsanitary conditions. . . . They are worse than actual prison conditions. It is inhumane. It's nothing that I ever imagined seeing in the United States of America. And that's why we have gone to the press. We never go to the media about our site visits. And after the second day of interviewing these children, you know, we called up the attorneys who are in charge of this case. And because of the extreme conditions that we saw there, we were given permission to speak to the media because children are dying on the border in these stations. And now we know why.[38]

Referencing the requirement under *Flores* Agreement that children be kept in "safe and sanitary conditions," Ms. Binford urgently stressed that "there is *nothing sanitary* about the conditions they are in. *And they are not safe*, because they are getting sick, and they are not being adequately supervised by the Border

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36. For Trump's reference to migrants seeking entrance to the U.S. as invaders, *see* Julia Carrie Wong, *Trump Referred to Immigrant 'Invasion' in 2,000 Facebook Ads, Analysis Reveals,* The Guardian (Aug. 5, 2019), https://www.theguardian.com/us-news/2019/aug/05/trump-internet-facebook-ads-racism-immigrant-invasion.

37. U.S. Dep't of Homeland Sec., Office of Inspector Gen., *Management Alert- DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley* (July 2, 2019) (OIG-19-51).

38. *Weekend Edition Sunday: Law Professor Describes Poor Conditions Where Migrant Children Are Held,* Nat'l Public Radio (June 23, 2019),

https://www.npr.org/2019/06/23/735191289/law-professor-describes-poor-conditions-where-migrant-children-are-held.

Patrol officers. This is a violation of the case law."[39] She further emphasized that although most of the unaccompanied minors had a sponsor in the US, typically a parent or adult relative, they were not being released to them in accordance with the *Flores* time frames. Specifically, she said that "these children are not supposed to be in a Border Patrol facility any longer than they absolutely have to, and in no event are they supposed to be there for more than seventy-two hours. And many of them were there for three and a half weeks."[40]

This callous disregard for the welfare of minors detained at the border, as also described below, stands in disturbingly sharp contrast to the "life-affirming" approach that ORR adopted vis-à-vis Jane Doe and the other teens who sought agency authorization for an abortion. Although a detailed discussion of the border crisis is beyond the scope of this article, it is clear that the very concept of what it means to "affirm life" was infused with instrumentalized contradictions in the simultaneous service of the antiabortion and anti-immigrant agendas of the Trump administration.

II. If Jane Doe Were Not A "UAC:" Minors and the Constitutional Right to Abortion

In order to fully grasp the significance of ORR's abortion-consent policy, it is important to have a basic understanding of the Supreme Court's jurisprudence regarding the abortion rights of minors. As will be made clear, the foundational principle is that parents, or those in *loco parentis*, may not be vested with veto power over their daughter's abortion decision; in short, minority does not divest a young woman of the constitutional right to abortion.[41]

In wake of the Supreme Court's landmark 1973 *Roe v. Wade* decision, holding that abortion is a constitutionally protected fundamental right,[42] states immediately began to test the boundaries

39. Isaac Chotiner, *Inside A Texas Building Where the Government is Holding Immigrant Children,* The New Yorker (June 22, 2019) (emphasis added), https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children.

40. *Id.*

41. In this regard it should be noted that during oral argument before the D.C. Circuit Court of Appeals in which the government was seeking an emergency stay of the trial court's temporary restraining order preventing ORR from interfering with Jane Doe's abortion access pending an appeal, the government was deemed to have waived its right to argue that as an "illegal alien" she did not possess a constitutional right to abortion because it had proceeded on the assumption that she did in fact have this "base" right. Transcript of Oral Argument at 1, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (No. 17-5236).

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

of the decision by enacting a variety of restrictive measures. Teens were a favored target of these efforts, and within a few short years, a number of states had enacted laws requiring minors to either give notice to or obtain the consent of one or both parents prior to terminating a pregnancy.[43] These parental involvement mandates were promptly challenged as impermissibly burdening the *Roe* right, resulting in the landmark *Planned Parenthood of Cent. Mo. v. Danforth*[44] and *Bellotti v. Baird*[45] decisions. Although dating back to the 1970s, these decisions continue to control the constitutional parameters of a minor's right to abortion.

In *Danforth*, the Court faced a challenge to Missouri's newly enacted law requiring teens to obtain the consent of a parent prior to having an abortion.[46] In analyzing the constitutionality of this mandate, the Court began from the premise that, like adult women, minors have a protected right of choice. Relying on an earlier line of children's rights cases, it stressed that: "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[47]

Grounded in this understanding of minors as rights-bearing persons, the Court held that states do not have the constitutional authority to vest parents with "an absolute, and possibly arbitrary veto" over their daughter's abortion decision.[48] The Court also made clear that a state may not vest this authority to someone standing *in loco parentis*[49]—which effectively is the relationship that ORR occupies vis a vis unaccompanied minors in its care and custody. The Court's ruling was anchored in the concept of "impermissible delegation," meaning that a state may not delegate an authority—namely, in this instance, the power to veto a young woman's abortion decision—that it itself lacks.

In striking down the Missouri law, although the *Danforth* Court made clear that minors are possessed of constitutional rights, it also iterated that the "Court…long has recognized that the State

43. Massachusetts and Missouri were two of the earliest states to enact parental involvement laws resulting in the two landmark Supreme Court cases on the abortion rights of minors discussed in this section. For detail, *see* J. Shoshanna Ehrlich & Jamie Ann Sabino, *A Minor's Right to Abortion: The Unconstitutionality of Parental Participation in Bypass Hearings*, 25 N. Eng L. Rev. 1185 (1991).

44. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

45. *See Bellotti v. Baird,* 443 U.S. 662 (1979).

46. *See Danforth*, *supra* note 44, at 72–75.

47. *Id.* at 74.

48. *Id.* at 75.

49. *Id.* at 74.

has somewhat broader authority to regulate the activities of children than adults.[50] Accordingly, it intimated that a less intrusive parental involvement law might pass constitutional muster.[51] Three years later, in the case of *Bellotti v. Baird*, the Court had the opportunity to consider such a law when confronted with a challenge to the Massachusetts parental consent law.[52] On its face, this statute resolved the parental veto problem that had doomed the Missouri law by giving a young woman whose parents had refused consent the right to go to court and essentially seek a judicial override of their decision.[53]

Again stressing that minors are "not beyond the protection of the Constitution,"[54] the *Bellotti* Court reaffirmed that states may not grant parents (or persons *in loco parentis)* "'an absolute, and possibly arbitrary, veto power'" over a young woman's abortion decision.[55] Elaborating on the problematic implications of divesting young women of decisional authority over their pregnancies, the Court explained:

> The potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probably education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor . . .[56]

It accordingly stressed that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."[57]

Attuned to the "exceptionally burdensome" nature of forcing a teen to become a mother against her will, the Court concluded that the right of "appeal" provided by the Massachusetts parental consent law did not cure the *Danforth* veto problem since:

> There are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court . . . many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court.[58]

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50. *Id.*
51. *See id.* at 75.
52. *See Bellotti, supra* note 45, at 625.
53. *See id.* at 639.
54. *Id.* at 643.
55. *Id.*
56. *Id.* at 642.
57. *Id.*
58. *Id.* at 645.

As the Court clearly grasped, for these minors, the ability to seek judicial authorization for an abortion would be a cruel hoax that effectively would put them in the same position as teens in Missouri whose parents had denied consent. Anchored in this recognition, the *Bellotti* Court invalidated the Massachusetts parental involvement law for imposing an impermissible burden on the abortion rights of teens.[59]

Having struck down the Massachusetts law, the Court made clear that a parental involvement law that enabled a teen to bypass her parents completely and instead seek court authorization for an abortion in an expeditious and confidential hearing would pass constitutional muster.[60] It further elaborated that once in court, a young woman must be given the opportunity to show that she is mature enough to make her own abortion decision, or if found not sufficiently mature, to show that an abortion is in her best interest.[61]

III. "Wrong Under All Circumstances"

In clear contravention of the *Bellotti* Court's injunction that parents, or those in *loco parentis*, may not exercise veto power over the abortion decision of teens, upon taking office ORR director Scott Lloyd encoded his fierce antiabortion views into official government policy through his non-consent policy. Designed to surveille and manage the reproductive decisions of pregnant teens in federal immigration custody, his approach makes clear that these young women were positioned at the fraught and highly unstable juncture of two regulatory regimes: one that seeks to control the corporeal bodies of unaccompanied minors as "illegal" immigrants and another that attempts to contain their reproductive autonomy. As Cromer puts it, "[t]wo contentious issues in America—abortion and immigration—intersect in Doe's story.""[62] It is through the juxtaposition of Lloyd's *ostensible* concern for the wellbeing of unaccompanied minors seeking an abortion, with his callous disregard for the wellbeing of minors separated from or seeking

59. *See id*. at 645–647.

60. Although Justice Rehnquist asserted in his concurring opinion that this aspect of the decision was merely advisory in nature because it addressed "the constitutionality of an abortion statute that Massachusetts [had] not enacted," the Court has since made clear that the *Bellotti* decision is not advisory in nature, but that it establishes the applicable legal standards relative to the abortion rights of minors. *Id.* at 656. *See*, *e.g.*, *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 511–14 (1990); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490 (1983).

61. *See Bellotti*, *supra* note 45,at 646–647.

62. Cromer, *supra* note 15, at 19.

release to a sponsor, that the double politics of containment are vividly revealed.

A. *Loyal Foot Soldier in the "Trump-Pence Religious Health Movement"*

Although Lloyd was removed from the ORR directorship in the spring of 2018,[63] it is important to recognize that his views on abortion did not set him apart as a lone wolf within HHS. Critically, as Brigitte Amiri, stressed in an interview with Rolling Stone magazine, "[h]igher-ups really backed him up" and fought the ACLU "tooth on nail" in its legal challenge to his abortion nonconsent policy.[64]

That Lloyd was backed up by his superiors in HHS should come as no surprise given the agency's deeply conservative makeover in the Trump-Pence era. With Vice President Mike Pence taking the lead role, the agency was staffed with a cadre of "pro-life staff members," so as to align federal health policy with his "evangelical Christian principles."[65] Under the direction of Secretary Alex M. Azar II, who declared that the mission of the agency "is to enhance the health and well-being of all Americans, *and this includes the unborn,*"[66] this cadre of appointees served as loyal "foot soldiers" in what has aptly been described as the "Trump-Pence religious health movement."[67] By way of illustration of this shift, Diane Foley, the Trump administration's choice for Deputy Assistant Secretary of Population Affairs and Director of the Office of Adolescent Health came to HHS via her leadership position at Life Network. [68] In this capacity, in a speech at Charis Bible College,

63. *See* Tessa Stuart, *Trump's Anti-Abortion Refugee Program Chief Has Been Removed From His Post,* Rolling Stone (Nov. 19, 2018), https://www.rollingstone.com/politics/politics-news/scott-lloyd-removed-o-r-r-755468/.

64. *Id.*

65. Joseph Tanfani & Yasmeen Abutaleb, *The Foot Soldiers in the Trump-Pence Religious Health Movement*, Special Report, Reuters (May 30, 2019), https://www.reuters.com/article/usa-pence-hhs-people/the-foot-soldiers-in-the-trump-pence-religious-health-movement-idUSL2N2360IL.

66. Alice Ollstein, *Amid Shutdown Chaos, HHS Moves to the Right on Women's Health*, Talking Points Memo (Jan. 24, 2018), https://talkingpointsmemo.com/dc/amid-shutdown-chaos-hhs-moves-to-the-right-on-womens-health.

67. Tanfani & Abutaleb, *supra* note 65.

68. *See* Ally Boguhn, *Trump's HHS Installs Fake Clinic Leader to Oversee Family Planning Funds,* Rewire News Groups (May 30, 2018), https://rewirenewsgroup.com/article/2018/05/30/trumps-hhs-installs-fake-clinic-leader-oversee-family-planning-funds. According to its web site, Life Network's mission is to "cultivate a community that values life through the love of Christ." To this end, it runs two "life affirming" crisis pregnancy centers in Colorado. *Our Mission*, Life Network, https://www.elifenetwork.com (last visited Apr. 12, 2021).

Foley stressed the importance of countering the amorality of secularists by lovingly introducing them to the biblical world view that "God's word is the basis for absolute truth," including the unassailable verity that "the destruction of human life . . . is a direct attack on the unique act of God's [sic] because every human being is created in His image . . ."[69]

B. *The Only Thing That "Our Church Requires Is That a Woman Has the Child Growing Inside of Her"*

In an essay that Lloyd wrote for a law school ethics class in the early 2000s, he articulated his firm belief that abortion "is wrong in all circumstances."[70] When looked at closely, this essay reveals Lloyd's "pro-woman/pro-life" antiabortion stance, which, as demonstrated below, undergirds the strict zero-tolerance policy that he would come to put in place as ORR director.

Turning first to his views regarding the sanctity of life, Lloyd equates abortion with the horrors of the Holocaust. As he explains, both represent "the violent result of society assigning lesser value to a vulnerable segment of its population," which, as he makes clear, includes the unborn in its count.[71] Although Lloyd proclaimed that "[n]either type of murder is more or less tragic," in a particularly chilling passage, he bewails the fact that while "the Jews who died in the Holocaust had a chance to laugh, play, sing, dance, learn, and love each other" these opportunities are denied to "the victims of abortion."[72] This passage thus suggests that the genocide of the Holocaust is the lesser of these two evils because its victims were at least given the opportunity to enjoy life prior to their deaths.

Secondly, in addition to characterizing abortion as genocidal murder, Lloyd further claimed that abortion is inimical to women's true nature, stressing that while "martyrs that built our church sacrificed their whole bodies to the most violent, torturous treatment," the only thing that "our Church requires is that a woman

69. Diana Fogley, *Healing School with Dr. Diana Fogley*, YOUTUBE (Sept. 15, 2016), https://www.youtube.com/watch?v=HgYZ63dXlWM.

70. Hannah Levintova, *The Trump Official Who Failed to Reunify Dozens of Separated Children is Getting a New Role,* MOTHER JONES (Jan. 2019), https://www.motherjones.com/politics/2018/11/scott-lloyd-abortion-child-migrants-office-of-refugee-resettlement/.

71. *Id.*

72. Hannah Levintova, *The Trump Official Overseeing Migrant Girls' Health Care Once Wrote He Couldn't 'Support Abortion for Any Reason*,' MOTHER JONES (Aug. 22, 2018), https://www.motherjones.com/politics/2018/08/scott-lloyd-essay-orr-pregnant-migrants-abortion/.

has the child growing inside of her. . . ."[73] Further underscoring his contempt for "abortion-minded" women, he insisted that it "doesn't speak highly of [them] to assume that they can't handle the pressures of being a mother, and that they will need a procedure *that is so directly opposed to femininity*."[74] Hence, as understood by Lloyd, the evil of abortion is not limited to the literal death of the unborn, but also encompasses the figurative death of the woman who, in rejecting motherhood, annihilates her gendered self.

While the "abortion is murder" trope is generally understood as being firmly grounded in the twin religious beliefs that life begins at conception and that all children are a gift from God,[75] as Lloyd makes clear in his essay, his view that abortion is destructive of woman's true essence is also infused with a deep religiosity. Although recognizing that his view of God's maternal mandate might be "gibberish, even to some Catholics," he stressed that it was "more real [to him] than anything else on this mortal earth."[76]

In invoking this maternalist mandate, Lloyd clearly aligned himself with the "pro-woman/pro-life" antiabortion position that emerged in the late twentieth-century as a way to combat the growing public perception that pro-life activists were violent "right-wing religious zealots" who did not care about the well-being of women.[77] As exemplified by his essay, Lloyd's approach follows that of David. C. Reardon, a leading architect of the "pro-woman/pro-life" position, who sought to gain new adherents by persuading the "ambivalent majority" that abortion harms women thus positioning the antiabortion movement as the authentic advocate of women's right to autonomy and dignity.[78]

Encapsulating the animating religiosity of this woman-protective antiabortion argument, Reardon explains that in accordance with the dictates of natural law it "is simply impossible to rip a child from the womb of the mother without ripping out a part of the

73. *Id.*

74. *Id.*

75. *See also* Carrie Gordon Earll, *What the Bible Say About the Beginning of Life*, Focus on the Family (Oct. 22, 2014), https://www.focusonthefamily.com/pro-life/what-the-bible-says-about-the-beginning-of-life/.

76. *Supra,* note 72.

77. John C. Willke, *Life Issues is Celebrating Ten Years with a New Home*, Life Issues (Feb. 1, 2001), https://www.lifeissues.org/2001/02/life-issues-institute-celebrating-ten-years-new-home/. *See also* J. Shoshanna Ehrlich & Alesha E. Doan, Abortion Regret: The New Attack on Reproductive Freedom (2019); Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument,* 57 Duke L. J. 1641 (2008).

78. David C. Reardon, *Making Abortion Rare: A Healing Strategy for a Divided Nation* 98–99 (1996).

woman herself."[79] He further proclaims that the abortion decision represents a pitched battle between Christ and Satan for the soul of the abortion-minded woman. Thus, while Christ entreats her to "not do this thing," Satan pulls her in the opposite direction imploring her to do "this one thing and then you will be back in the driver's seat of life."[80] If, however, she turns her back on Christ by choosing to terminate her pregnancy, Satan will do an abrupt about-face and seek to "pump as much despair into [her life] as he can generate" thus trapping her in a "tarpit of despair."[81]

In short, as understood by Lloyd and Reardon, the aborting woman has turned her back on God and, in repudiating the gift of life, she also renounces her femininity, thus leading her down a path of traumatic grief and regret. Driving home the underlying religiosity of this "abortion harms women" trope, Reardon explains that "when we are talking about the psychological complications of abortion, we are implicitly talking about the physical and behavioral symptoms of a *moral* problem."[82]

C. *Abortion Exceptionalism: The Remaking of ORR's Abortion Consent Policy*

As set out in a 2008 policy memo, subject to an emergency exception, ORR funded care providers must obtain agency approval prior to the expenditure of funds for "serious medical services," which are defined as "significant surgical or medical procedures, abortions, and services that may threaten the life of a UAC."[83] This "heightened involvement" requirement has typically been understood as limited in scope to a review of the cost of the requested care to ensure that the charges are appropriate, and not to a review of whether the care itself is necessary and proper.[84] In short, it has not been read as constituting the agency as a super-review board with plenary powers to override the medical judgment of a treating physician.

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79. *Id.* at 4.

80. *Id.* at 108.

81. *Id.* at 109, 111.

82. *Id.* at 10. For further detail on the origins and consolidation of the abortion regret narrative as a rationale for limiting (if not outright eliminating) abortion access, *see* Ehrlich & Doan, *supra* note 77; Siegel, *supra* note 77.

83. David Siegal, *Medical Services Requiring Heightened ORR Involvement*, Department of Health & Human Services (Mar. 21, 2008), https://immpolicytracking.org/media/documents/Medical_Services_Requiring_Heightened_ORR_Involvement.pdf.

84. Interview with Brigitte Amiri, ACLU Reproductive Freedom Project (July 7, 2019).

Using the extraction of a wisdom tooth as an example, Lloyd explained in his deposition in the *Garza* case that "in most cases, the question of payment is before me where I would say approved or disapproved, and I would check the appropriate box at signing . . . *usually there is only one question, and that's the question of payment*."[85] Similarly, in speaking of the approval needed for childbirth, which Lloyd initially mischaracterized as one requiring heightened ORR involvement, he reiterated that if such a matter were to come across his desk, he was required to "put his signature on the payment . . . *but my involvement is not as a medical professional* . . . ."[86]

Notably, under prior administrations, the abortion requests of unaccompanied minors in federal immigration custody were treated in this manner.[87] Accordingly, if a teen wanted to terminate her pregnancy, the only question for the ORR director to resolve was whether or not federal funds could be allocated in accordance with agency policy and existing rules prohibiting the use of federal monies for an abortion unless it was the result of rape or incest or a physician certified it was necessary to protect the pregnant teen from the "danger of death"[88] Critically, however, as with the advisability of a wisdom tooth extraction, a decision on the merits of the abortion procedure was deemed to be outside the purview of the ORR director.[89] As Robert Carey, who served as ORR director under Obama, explained, his involvement was limited to determining if the *reason* for the abortion qualified the minor for federal

85. Deposition of Scott Llyod at 79:4–7, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (No. 17-5236) (emphasis added).Although this deposition was originally conducted in the case that the ACLU of Northern California case filed against Hargan to likewise challenge the denial of abortion access to unaccompanied minors, it was submitted as evidence in the *Garza* case, and thus will be referred to for purposes of clarity as the *Garza* deposition.

86. *Id.* at 80:12–14 (emphasis added).

Lloyd further noted that if anything looked "weird" in the medical record, he might ask a question about it, but he gave no indication that he would seek to substitute his judgment for that of the medical providers.

87. Interview with Brigitte Amiri, *supra* note 84; *See also*, *J.D. v. Azar*, 925 F.3d 1291, 1302 (D.C. Cir. 2019); Levintova, *supra* note 70.

88. These limitations track the requirements of the Hyde amendment, a federal appropriations bill that prohibits the use of federal monies to pay for abortions in all but the most limited of circumstances. *See* Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *"The Hyde Amendment and Coverage for Abortion Services,"* KFF (March 5, 2021), https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/.

89. Interview with Brigitte Amiri, *supra* note 84; *See also J.D.*, *supra* note 87, at 1302;Levintova, *supra* note 70.

funding: "I wasn't approving their right to have the procedure."[90] Further, if a pregnant teen had access to a nonfederal source of funding, as was the case for Jane Doe, ORR simply did not get involved.[91] However, in a sharp break from this past practice, upon assuming the directorship of ORR, Lloyd arrogated power to himself to determine if the *abortion itself* was in the best interest of a pregnant minor based upon his evaluation of the "totality of the circumstances."[92]

D. *"My Religious Beliefs [are] at the Core of Anything I Would Do in All Settings"*

Needless to say, it is deeply troubling to think that Lloyd would reshape ORR's abortion policy in accordance with his personal religious views. Suggesting, however, that this is exactly what occurred, during the course of his deposition, he specifically acknowledged his belief that abortion "involves the destruction of human life" and is, therefore, a sin.[93] However, when asked point-blank by Brigitte Amiri how important his religious beliefs were when making a case-by-case determination regarding a teen's abortion request, Lloyd responded: "My religious beliefs form the—*they're at the core of anything I would do in all settings.* They motivate me to treat other people the way that I do and to—they are in a sense—they're just part of who I am, core part of who I am. *But they're not a part of an analysis as to what happens in the termination request when I'm acting as director of the Office of Refugee Resettlement*."[94]

It is difficult to square the italicized portions of Lloyd's response to Amiri's inquiry as they pull in opposing directions. However, an examination of the record assembled over the course of the *Garza* litigation clearly reveals that Lloyd in fact seamlessly enfolded ORR into his "*all settings*" big tent. To set the stage for this review of the record, in addition to keeping Lloyd's law school essay in mind, it is instructive to revisit one other aspect of his past; specifically, his role as cofounder of the law firm Legal-Works Apostate.[95]

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90. Renuka Rayasam, *Trump Official Halts Abortion Among Undocumented, Pregnant Teens*, Politico (August 5, 2019), *https://*www.politico.com/story/2017/10/16/undocumented-pregnant-girl-trump-abortion-texas-243844.

91. *See id.*

92. Lloyd Dep., *supra* note 85.

93. *Id.* at 114:11–13, 212:11–17

94. *Id.* at 253:11–14. (emphasis added)

95. Levintova, *supra* note 70 (This article also provides additional detail regarding Lloyd's extensive record of antiabortion activism).

As described on its website, LegalWorks Apostolate is "a full-service firm dedicated to offering legal counsel for a Culture of Life."[96] Operating within a "framework of faithfulness"[97] as "legal apostolates," the website proclaims that their attorneys make a "unique commitment to turning our professional work on behalf of clients into acts that witness to our faith and enrich our own relationships with our clients and, ultimately, with our Lord . . . our incorporate faith into our law practice so that it permeates our lives rather than remaining separate and apart from our professional work."[98] To facilitate this dissolving of boundaries between the sacred and the secular, the firm is located within the headquarters of Human Life International, which serves to provide the staff with "daily access to the sacraments and to all the graces that ensue."[99]

Unsurprisingly, LegalWorks is committed to obtaining justice for those experiencing post-abortion "emotional anguish and psychological harm," as well as for those who have been "fraudulently deceived into tolerating abortion as a sometimes 'necessary' evil."[100] Recognizing, however, that "legal recourse is no substitute for the sacrament of reconciliation," and that seeking "mercy and forgiveness," may well be the first step in the abortion-recovery process, the firm's attorneys are also available to "facilitate communication with appropriate counselors for anyone interested in beginning the mourning and healing process."[101]

As the below discussion makes evident, Lloyd imported the same religiously saturated approach into his work at ORR, at least with respect to the formulation of the abortion-consent policy, that had previously inspired him to co-found LegalWorks Apostolate. We now turn to an examination of the reasons Lloyd provided to justify his refusal to authorize *any* of the abortion requests of pregnant teens in federal immigration custody that came before him, thereby underscoring the veracity of his statement that his religious beliefs are "at the core of anything I would do in *all* settings."

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96. LegalWorks Apostolate, (last visited April 16, 2021), http://www.legalworks.com/default.cfm.

97. *Id.*

98. *Id.*

99. *Id.*; Human Life Int'l (emphasis in original), https://www.hli.org (last visited April 16, 2021). According to its website, Human Life International is the "world's largest global apostate" with the overarching vision of a "world where the incalculable vision of every human life is *respected*, *protected*, *loved*, *and served*, and the family is ordered in accordance with God's design."

100. LegalWorks Apostolate, *supra* note 96.

101. *Id.*

E. *Not in Her "Best Interest"*

In asserting his authority over the abortion decisions of unaccompanied minors, Lloyd explained in his deposition that he made a case-by-case determination as to whether or not the requested abortion was in the minor's best interest, based on a "totality of the circumstances."[102] By way of further elaboration, he revealed that this entailed a multi-faceted evaluation of a range of factors, including her prospect for sponsorship, how far along she was in her pregnancy, her mental health, and her family circumstances.[103] He also disclosed that if the record which reached his desk was not sufficiently developed so as to enable him to make a best-interest assessment, he would take it upon himself to "chase [the missing] information down" in order to ensure that he had a complete picture of the minor's particular circumstances.[104]

Although Lloyd claimed to be making individualized determinations that were attuned to each young woman's life circumstances, the end result was always the same: a rejection of every abortion request that came across his desk.[105] Paternalistically dismissive of the ability of young women to make this determination for themselves, he unabashedly declared in his deposition that he had no compunction overriding a minor's own reproductive decision.[106] In short, notwithstanding clear Supreme Court precedent to the contrary, Lloyd effectively was claiming the right to exercise "an absolute and potentially arbitrary veto power" over the abortion decisions of young women in the care and custody of ORR.[107]

If, however, one locates the reasons that Lloyd gave for these denials within his "framework of faithfulness," rather than seeing them as arbitrary, they instead appear as a coherent extension of his religious beliefs. This, in turn, undercuts his assertion that they were "not a part of an analysis as to what happens in the termination request when [he was] acting as director of the Office of Refugee Resettlement."[108]

A review of the record reveals four closely entwined thematic reasons behind Lloyd's refusal to approve abortion requests. Although they have been separated out for purposes of clarity, they are mutually co-constitutive of one another and there is, accordingly, some inevitable overlap between them.

102. Lloyd Dep., *supra* note 85, at 62:12–64:5.
103. *See id.* at 62:5–9.
104. *Id.* at 64:2–3.
105. *See id*. at 64:19–21.
106. *See id.* at 154:8–156:6.
107. *Danforth*, 428 U.S. at 75.
108. Lloyd Dep., *supra* note 85, at 253: 11–14.

1. Protecting Unborn Life

As previously noted, Lloyd clearly believes that abortion is the "destruction of a human life." Moreover, as stated in his deposition, he regards this as an "objective fact," which transcends an individual's belief system, although he does acknowledge that individuals might "internalize" this truth in different ways.[109] Grounded in this inescapable verity, he thus claimed that it is ORR's duty "to choose to protect life rather than to destroy it."[110] This rationale for the exercise of veto power over a young woman's abortion flies directly in the face of Supreme Court abortion jurisprudence, which has not wavered from the essential principle set down in Roe v. Wade that the fetus is not a juridical person with cognizable rights. It also runs afoul of the Court's admonition in Planned Parenthood v. Casey that "at the heart of liberty is the right to define one's own concept of existence . . . and of the mystery of human life," and hence the "destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[111]

Expanding outward from the negative injunction that ORR must refrain from destroying life, Lloyd further believes that the agency has an *affirmative* duty of care towards the unborn children of pregnant minors in federal immigration custody. As specifically stated in a file memo setting out his reasons for refusing to authorize the abortion of a minor who was a rape victim and had threatened to harm herself if denied consent, Lloyd wrote that "[r]efuge is the basis of our name and is at the core of what we provide, and we provide this to all the minors in our care, *including their unborn children*."[112]

Roe v. Wade notwithstanding, as understood by Lloyd, the unborn children of unaccompanied pregnant teens are thus to be treated as legal persons with co-equal claims to the agency's protective mantle. This view clearly accords with Azar's above-referenced injunction that the overarching mission of HHS is to protect the wellbeing of *all* Americans, including those not yet born.[113] The

109. *Id.* at 114:11–24; 212:7–10, 16.

110. Note to File from Scott Lloyd, Dir., Office of Refugee Resettlement (Dec. 17, 2017).

111. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

112. Note to File, *supra* note 110.

113. *See* Alice Ollstein, *Amid Shutdown Chaos, HHS Moves to The Right on Women's Health*, Talking Points Memo (Jan. 24, 2018, 6:00 AM), https://talkingpointsmemo.com/dc/amid-shutdown-chaos-hhs-moves-to-the-right-on-womens-health.

move to enfold the unborn children of unaccompanied minors into ORR's jurisdictional mandate clearly marks Lloyd as a loyal "foot soldier" in the "Pence-Trump religious health movement."

Taking this disturbing expansion of ORR's custodial obligations a significant step further, Lloyd appears to have fused the identities of the above-mentioned minor and her unborn child into a singular being whose best interests ran along parallel tracks. As he stated in justifying the refusal to grant consent: "[a]t bottom, this is a question of what is in the *best interest of the young woman and her child*. How could abortion be in *their* best interest where other options are available . . . ?"[114] This articulation of a conjoined best interest is a direct expression of the "pro-woman/pro-life" antiabortion view that "*the best interests of the child and the mother are always joined* . . . if we hurt either, we hurt both . . . This is not an optional truth."[115] By merging their identities, Lloyd can claim to be advancing ORRs mission to protect "*all* children" as discursively constituted within the "religious health movement" that took up residence in HHS during the Trump era.

2. Protecting Teens from Abortion Regret

As a direct corollary of his assumed duty of care to the unborn children of the pregnant teens in federal immigration custody, Lloyd further asserted that in denying consent he was motivated by the desire to protect the teens themselves from the trauma of abortion regret. As he explained in the above-referenced file memo: "[e]ven supposing it was possible to justify abortion in this context, abortion does not cure here the reality that she is the victim of an assault. It also carries with it a significant risk of further complicating the matter. *It is possible, and perhaps likely, that this young woman would go on to experience an abortion as an additional trauma* . . . ."[116] By way of further support for his "protective" stance towards this minor, he stressed that "[a]lthough formal research on this matter appears to be sparse, those who have worked with women who have experienced abortion have compiled a catalog of *anecdotal evidence*, impossible to ignore, that shows that many women go on to experience it as a *devastating trauma*, even in the instance of rape."[117]

It is perhaps here in his paternalistic desire to shelter women from the "devastating trauma" of abortion that Lloyd's fealty to the "pro-woman/pro-life" antiabortion platform is most evident.

114. Note to File, *supra* note 110 (emphasis added).
115. Reardon, *supra* note 78, at 4–6 (italics in original).
116. Note to File, *supra* note 110 (emphasis added).
117. *Id.* (emphasis added).

Grounded in his conviction that abortion is the repudiation of motherhood, emotional trauma is cast as the inevitable consequence of turning one's back upon God. Elucidating this truth, Reardon explains, "if our faith is true, we would expect to find compelling evidence which demonstrates that acts such as abortion . . . lead, in the end, not to happiness and freedom, but to sorrow and enslavement . . . . Despair involves a loss of faith and trust in God. In the case of abortion, the desperate woman has lost faith in the promise that God has a plan for her life and a plan for her child's life."[118]

Consistent with this doctrinal framework, the anecdotal evidence that Lloyd found "impossible to ignore" comes directly from Hope After Abortion, an on-line resource affiliated with Project Rachel, which is the Catholic Church's "confidential ministry of hope and healing for post-abortion women and men" that is "[e]ntrusted . . . with the mission to share the compassionate love of Jesus Christ for all people."[119] By way of specific support, Lloyd quotes from two stories posted on the "Your Own Words" section of the Hope After Abortion website.[120] As recounted there, Brenda writes of her suffering in "a state of mortal sin" for having killed her baby, while Georgia expresses her pain over the fact that even with knowing she has been "forgiven," she still lived in "dread [of] the day when I have to come face to face with my little girl and explain why mamma took her life."[121]

I want to stress that I am not interested in challenging the authenticity of Brenda or Georgia's narratives of grief; nor am I interested in questioning the support that Project Rachel undoubtedly offers those seeking its services. Rather, what is of deep concern is Lloyd's infusion of a culturally relative belief system in which "pregnant women see themselves as mothers, their aborted fetuses as dead children, and the abortion as murder"[122] into federal policy to justify his exercise of veto power over the abortion decisions of young women in ORR custody. Closely hewing to Reardon's admonition that "when we are talking about the psychological complications of abortion, we are implicitly talking about the physical and behavioral symptoms of a *moral* problem,"[123] it

118. Reardon, *supra* note 78, at 11, 106.

119. Project Rachel, (last visited April 16, 2021), https://projectrachelboston.com.

120. Hope After Abortion, (last visited April 28, 2021) https://hopeafterabortion.com.

121. *Id.*

122. Terry A. Maroney, *Emotional Commonsense as Constitutional Law*, 62 Val. L. Rev. 851, 894–895 (2009).

123. Reardon, *supra* note 78, at 10.

is clear that rather than being shunted to the side, as he claimed, Lloyd's personal religious beliefs were at the center of his decision-making calculus.

Although Lloyd found it "impossible to ignore" anecdotal evidence about abortion regret, he had no difficulty ignoring the substantial body of evidence-based studies conducted by highly credentialed professional organizations that refute the notion of abortion regret as a debilitating condition that warrants restricting abortion access. For instance, in its 2009 meta review of existing studies, the Harvard Review of Psychiatry reported that the studies which had reported a robust connection between abortion and negative mental health outcomes had significant methodological flaws.[124] In contrast, the studies which had been conducted with scientific rigor consistently concluded that pre-existing psychosocial problems, as well as prior experiences of rape or sexual assault, are the most significant predictors of mental health concerns following an abortion.[125]

Similarly, the "Turnaway Study," a five-year longitudinal study of outcomes associated with abortion compared to carrying to term, likewise stresses the "importance of disentangling emotions regarding an unwanted pregnancy from those regarding an abortion."[126] In so doing, it determined that women "felt more regret, sadness and anger about the pregnancy than about the abortion, and felt more relief and happiness about the abortion than about the pregnancy."[127] Tracking the results of other studies, it further concluded that "postabortion emotions vary from woman to woman—and for a given woman, from abortion to abortion—largely as a function of life circumstances, difficulty with decision making, and social support, including from romantic partners."[128] Distilled down to its essence, the Turnaway Study unequivocally concluded that "abortion does not harm women," and does not increase the "risk of having suicidal thoughts, or the chance of developing PTSD, depression, anxiety, low self-esteem or lower life satisfaction . . . [or the] use of alcohol, tobacco or drugs."[129]

124. *See* Gail Erlick Robinson, et at., *Is There an 'Abortion Trauma Syndrome'? Critiquing the Evidence,* 17 HARV. REV. OF PSYCHIATRY 268, 272–276 (2009).

125. *Id.* at 275–277.

126. Corrine H. Rocca, et. al, *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, 45 PERSPS. ON SEXUAL AND REPROD. HEALTH 122, 128 (2013).

127. *Id.* at 128.

128. *Id.* at 130.

129. Bixby Center for Global Reproductive Health & ANSIRH, Turnaway Study, https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf.

Although Lloyd may have been specifically concerned about the psychological impact of abortion on teens on account of a presumed youthful vulnerability, studies have consistently found that "minors experience abortion similarly to adults."[130] Tracking the findings of the research on adults, abortion has not been causally correlated with "either depression or low self-esteem" in teens,[131] and most "express satisfaction with their ultimate pregnancy decision [with] no significant differences . . . between adolescents who choose abortion and those who bear children."[132] Particularly salient in the present context, a key consideration influencing a teen's satisfaction with her pregnancy outcome, be it abortion or childbirth, is whether or not she feels a sense of "ownership" over the decision, rather than feeling that it was made for her[133]—something that Lloyd's intervention clearly disrupts. Critically, when read as a whole, the available data "do[es] not suggest that legal minors are at heightened risk of serious adverse psychotically responses compared with adult abortion patients or with peers who have not undergone abortion."[134]

3. Protecting ORR

Inextricably linked with the preceding two reasons undergirding Lloyd's zero-tolerance abortion policy, he also makes clear that in withholding consent, he was seeking to protect ORR from being implicated in wrongful conduct. As he explains in the memo discussed above, "I cannot authorize our program to *participate* in the abortion requested, even in this most difficult case. Here where the pregnancy is advanced to such a late state, we have in stark relief that abortion entails . . . violence that has the ultimate destruction of another human being as a goal."[135] This avowal goes well-beyond an abstract statement of moral principle, since, as understood by Lloyd, when a teen seeks his approval for an abortion, it is

130. Lauren Ralph, et. al., *The Role of Parents and Partners in Minors' Decisions to Have an Abortion and Anticipated Coping After Abortion,* 54 J. OF ADOLESCENT HEALTH 428, 432 (2014).

131. Jocelyn T. Warren, et. al., *Do Depression and Low Self-Esteem Follow Abortion Among Adolescents? Evidence from a National Study*, 42 PERSP. ON SEXUAL & REPROD. HEALTH 230, 234 (2010).

132. Comm. on Adolescence, Am. Acad. of Pediatrics, *Policy Statement: The Adolescent's Right to Confidential Care When Considering Abortion*, 139 PEDIATRICS 1, 6 (2017).

133. *Id.* at 6.

134. Nancy E. Adler, et al., *Abortion Among Adolescents*, 58 AM. PSYCHOL. 211, 213 (2003).

135. Note to File, *supra* note 110 (emphasis added).

tantamount to asking ORR to actually "*participate* in killing a human being in [its] care."[136]

Lloyd's protective stance towards ORR is deeply troubling on several levels. Most obviously, once again, he confers the status of personhood on the fetus and, by extension, expands the scope of ORR's custodial mandate to those still in utero, who, in no sense of the word, come within the agency's statutory obligation to provide care and services to *unaccompanied minors*. However, even if one accepts Lloyd's concern about "participating" in conduct that he believes is sinful as somehow being legitimate, one still needs to parse his use of the word "participate," as it is problematic in two closely related ways.

First, under Texas law, if she does not have the consent of a parent, a teen who is 17 or under must obtain judicial authorization for an abortion based on a finding that she is mature enough to make her own decision or that an "attempt to obtain consent" would not be in her best interest.[137] In short, this constitutional schema locates the decisional authority "to kill a human being" outside the scope of ORR's custodial authority over unaccompanied minors.

Second, Lloyd brought this quandary upon himself by, as discussed above, expanding the director's role from one of simply authorizing, or not, the expenditure of federal funds in accordance with existing guidelines to that of actually deciding if an abortion was in a young woman's best interest, based upon a "totality of the circumstances."[138] In so doing, it is Lloyd who cast himself as a potential participant in the killing of a human being by expanding the domain of his decisional authority to encompass the abortion decision itself, rather than keeping it limited to decisions about the use of federal funds to pay for the abortion, as had been the practice of prior ORR directors.

Third, in seeking to avoid the taint of participating in the destruction of life, Lloyd further asserted that he did not want to implicate ORR in causing harm to the young women who were

136. *Id.* (emphasis added).

137. *See* TEX. FAM. CODE § 33.003(i) (1999). It should be noted that in addition to the consent requirement Texas law also requires the doctor to give notice to the parent of a minor who is 17 or under at least 48 hours before the abortion. *Id*., sec. 33.002 (1). This requirement can likewise be waived in the bypass hearing. Id. § 33.003(i).

For other statutory exceptions to the consent and notification requirements, *see* Minors and Abortion Care, https://www.plannedparenthood.org/planned-parenthood-south-texas/patients/abortion-care-services/minors-and-abortion-care.

138. Lloyd Dep., *supra* note 85, at 62:10–17.

seeking his authorization for an abortion. Noting that abortion is "a form of violence against the mother," he explained that "if the young woman was to go on to regret her abortion and experience it as a trauma, ORR will have had a hand in causing that trauma, and *I am unwilling to put this young woman or ORR in* that position."[139] Again, Lloyd's desire to shield ORR from causing harm is deeply troubling. First, as with his anti-killing rationale, it similarly presumes that ORR is the rightful decision-maker, thus negating the Supreme Court's constitutional mandate that parents or those in *loco parentis* may not exercise veto power over a minor's abortion decision. Thus, in like fashion, Lloyd is solely responsible for bringing the purported problem onto himself through his usurpation of the decision-making role. Moreover, Lloyd was seeking to protect ORR from inflicting a harm, specifically abortion-related trauma that, as discussed above, has been shown to lack a sound evidentiary basis. In short, his expression of concern for the emotional well-being of young women in ORR custody can, in fact, be better understood as a direct manifestation of Lloyd's antiabortion position.

4. "Refuge is the Basis of Our Name"

As the final coup de grace by way of justification for his zero-tolerance policy, Lloyd concludes the above-referenced file memo by stating that "refuge is the basis of our name and is at the core of what we provide" and that ORR simply cannot "be a place of refuge while we are at the same time a place of violence."[140] As seen through his "framework of faithfulness," denying the abortion requests of unaccompanied minors in federal immigration custody thus serves to both avoid the destruction of human life and prevent the violent rupture of the sacralized mother-child bond, which, as imagined by the proponents of the pro-woman/pro-life antiabortion position, cannot be accomplished "without tearing out a part of the woman herself."[141] Underscoring the depth of his conviction in this regard, although recognizing that "[w]omen who experience pregnancy from rape must wrestle with phenomena of being the mother of a child whose other parent brutally terrorized and did violence to her,"[142] even here, Lloyd does not regard forcing a woman to become a mother against her will as an act of violence. In this way, Lloyd is able to credit his non-consent policy for preserving ORR as a place of refuge for unaccompanied minors.

139. Note to File, *supra* note 110. (emphasis added).
140. *Id.*
141. Reardon, *supra* note 78, at 5.
142. Note to File, *supra* note 110.

However, it is impossible to square the idea of an agency that has adopted a policy of compelled motherhood, even in the case of rape, as being a "place of shelter or protection from danger or distress."[143] And yet, even if one could somehow suspend judgment and accept the wild incongruity of this pairing, Lloyd's purported interest in so preserving ORR is thrust into the realm of Orwellian disbelief when one considers his abject disregard for the danger and distress associated with the policies of family separation and delayed reunification. As discussed in the following section, Lloyd was deeply implicated in these policies, albeit to different degrees.

IV. "Refuge is the Basis of Our Name"—At Least It is Some of the Time

As discussed above, notwithstanding the *Bellotti* Court's pointed admonition that unwanted motherhood is likely to be "exceptionally burdensome" for teens, Lloyd assiduously asserted that he was seeking to protect the young women entrusted to his care from emotional trauma through his adoption of a blanket veto policy of any requested abortions, and was, thus, carrying out ORR's statutory mandate to "act in the best interest of the [unborn] child."[144] However, Lloyd's professed interest in protecting these young women from emotional harm is undercut when considered alongside his lack of concern for the welfare of children and teens impacted by other immigration policies he was implicated in, most notably the separation of families at the border and the delayed-release to sponsors.

A. *Separated at the Border: Creating a Class of Unaccompanied Minors*

Until this juncture, the Article's focus has been on unaccompanied minors. However, the gaze now shifts to accompanied minors—meaning those who traveled and were apprehended at or near the border with a parent or guardian. Prior to 2001, the majority of these families were released together from detention while their immigration cases were pending.[145] However, as part of the general tightening of immigration policies in the wake of September 11th, 2001, the preferred approach became to confine parents

143. *Refuge*, Merriam-Webster.com Dictionary, (last visited Apr. 16, 2021), https://www.merriam-webster.com/dictionary/refuge.

144. Lloyd Dep., *supra* note 85, at 23:23–24.

145. *See Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016), *aff'g in part, rev'g in part, and remanded Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015).

and children together in secure, unlicensed family detention centers.[146] Subsequently, in 2014, in response to the "surge" of Central Americans arriving at the Southern border, ICE adopted a blanket "no-release" policy during the pendency of immigration proceedings."[147] However, in 2015, this policy was invalidated by the Ninth Circuit Court of Appeals as a material breach of the *Flores* Settlement Agreement.[148]

A possible response to this ruling could have been a return to the earlier preference for release over detention. However, by 2017 it appeared that the Trump administration was instead opting to separate children and parents in an effort to deter unlawful entry into the country[149]—a strategy that would soon be incorporated into its zero-tolerance policy. Justifying the importance of breaking up families at the border, President Trump explained "I'll tell you something: . . . that's why you see many more people coming . . . They're coming like it's a picnic like, 'let's go to Disneyland.'"[150]

Although Lloyd was not the architect of the administration's family separation policy, his abject silence on the matter speaks volumes about his deeply dichotomized sense of distress over the traumatization of apprehended teens. As discussed, he felt no compunction about overriding the reproductive decisions of young women in ORR custody in order to "protect" them from emotional injury. In fact, wrapping his antiabortion views tightly around their bodies in a paternalistic mantle of care and protectionism, he was able to declare that in denying their abortion requests, he was looking out for their emotional wellbeing.

In contrast, Lloyd showed no such solicitude for the wellbeing of minors who were forcibly separated from their parents as part of the administration's zero-tolerance policy aimed at deterring

146. *See id.*

147. *Id.*

148. *See id.* at 905. However, the Circuit Court reversed the lower court's holding that parents were to be released along with their children on the grounds that the Flores Settlement Agreement, while applying to both unaccompanied and accompanied minors, "provides no affirmative release rights for parents." *Id.* at 907–09.

149. *See* U.S. Dep't of Health & Human Servs., Office of Inspector Gen., Separated Children Placed in Office of Refugee Resettlement Care 1–5 (2019) (regarding the increasing number of children separated from a parent or guardian as of 2017 by DHS).

150. Eliza Relman, *Trump Says Without the Family Separation Policy, Migrants Are Treating the Journey to the United States Like a Trip to Disneyland*, Bus. Insider (Apr. 9, 2019), https://www.businessinsider.com/trump-migrants-picnic-disneyland-family-separation-policy-2019–4.

unlawful entries into the country. Although he was repeatedly warned by Commander Jonathan White, a licensed social worker and high-ranking career official at HHS, that family separation was "inconsistent with our legal requirement to act in the best interest of the child and would expose them to an unnecessary risk of harm,"[151] Lloyd stood silently by. When pressed by Representative Jayapal (D-Wash) in a House Judiciary Committee hearing as to whether he had ever told "the administration, 'this is a bad idea, this is what my child welfare experts have told us, we need to stop this policy?' Did you once say that to anybody above you?" Lloyd responded, "I did not say those words."[152]

In short, at the same time that Lloyd was deeply preoccupied with advancing the best interests of pregnant teens by protecting them from the emotional trauma of having their unborn child "ripped from the womb," he was stunningly unconcerned with the emotional trauma associated with ripping migrant children from their mothers or other guardians.

B. *Delayed Release to Family Sponsors*

While Lloyd stood silently by in the face of repeated warnings about the traumatizing consequences of separating migrant children from their parents, shortly after assuming office he added a new director review and consent step to the sponsorship release process for unaccompanied minors who were or ever had been "housed in a staff-secure or secure facility," thereby delaying the prospective reunification with a parent or adult relative.[153] This policy was promptly challenged in federal district court by the New York Civil Liberties Union for introducing considerable delays

151. Jeremy Stahl, *Three Trump Officials Were Warned Family Separation Would Be Illegal and Scar Children*, Slate (Feb. 7, 2019), https://slate.com/news-and-politics/2019/02/three-trump-officials-were-warned-about-family-separation.html.

152. Priscilla Alvarez, *Senior HHS Official Says He Didn't Share Concerns About Family Separation with Superiors*, CNN (Feb. 26, 2019), https://www.cnn.com/2019/02/26/politics/family-separation-hearing-house-judiciary/index.html (explaining that under Lloyd's leadership, ORR has also been called to task for its mishandling of efforts to reunify families which is part of a broader congressional inquiry into the administration's family separation policy); *see also* H. Comm. on Oversight & Reform, The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment (2019).

153. *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 608–09 (S.D.N.Y. 2018). When an unaccompanied minor enters ORR custody, she is placed into the least restrictive setting "based on an assessment of the level of security risk and harm to self or others that the child poses." *Id.* Running from least to most restrictive, that setting will either be shelter care, a "staff-secure" facility, or a "secure" facility. *Id.*

into the release process.[154] Characterizing Lloyd's director review policy as "unconscionable,"[155] the federal district court issued a preliminary injunction ordering that it be vacated. In so ruling, the court stressed that its "prolonged period of detention" was causally linked with "depression, deterioration in mental health, as well as behavioral problems" that "are not necessarily resolved once the detainee is freed."[156] Significantly, the government did not question the fact that "prolonged detention is deleterious to young children and obviously, the longer the detention the greater the harm."[157] The court further excoriated Lloyd for granting himself "unfettered discretion to approve, deny, or request additional information, unguided by any rule or fixed set of criteria, giving him unrestricted power to rule over the fate of vulnerable children" despite his lack of "expertise or experience" to make these decisions[158]—a characterization that, it should be noted, equally applies to Lloyd's assumption of decisional authority over the abortion requests of unaccompanied minors.

In adopting this policy, Lloyd willingly turned a blind eye to these undisputed harms based upon concerns about "criminal gang activities involving immigrant minors" in "unidentified news reports."[159] However, as the court made clear, rather than being grounded, as is required by the Administrative Procedures Act, in a "reasoned analysis," Lloyd's director review policy was instead premised upon his personal "will and private affectations."[160]

Paralleling the environment of hostility towards abortion rights within which Lloyd exercised his veto power over the reproductive bodies of detained minors, his arrogation of control over family reunification decisions likewise took root in a mounting environment of hostility towards the immigrant "invasion" of the nation's southern border.[161] More specifically, it can be read as

154. *See id.* at 609; Complaint at 11–13, *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601 (S.D.N.Y. 2018) (No. 18 Civ. 1453).

155. *L.V.M., supra* note 153, at 620.

156. *Id.* at 611, 618.

157. *Id.* at 618. The government did, however, question whether or not the damage would be "irreparable."

158. *Id.* at 610, 613. Accordingly, the judge concluded that Lloyd's unchecked and "arbitrary and capricious" exercise of authority over release decisions contravened the Administrative Procedures Act.

159. *Id.* at 609, 618.

160. *Id.* at 618–19.

161. Julia Carrie Wong, *Trump Referred to Immigrant 'Invasion' in 2,000 Facebook Ads, Analysis Reveals*, The Guardian (Aug. 5, 2019), https://www.theguardian.com/us-news/2019/aug/05/trump-internet-facebook-ads-racism-immigrant-invasion.

the encoding of animosity towards Central American youth, who were cast as animalistic gang members posing as "wolves in sheep's clothing," in order to take "advantage of glaring loopholes" in our nation's immigration laws.[162]

V. Abortion Tourism and the (Ill)Logic of Reproductive Governance

As showcased above, despite his protestation to the contrary, Lloyd's assumption of veto power over the abortion decisions of young women in ORR custody was rooted in his personal and deeply held religious beliefs that cast abortion as both tantamount to murder and in oppositional tension with women's divinely inscribed femininity. Obfuscating the fact that his abortion-consent policy was the direct result of "private affectations," Lloyd claimed he was simply fulfilling his obligation to protect the best interest of those entrusted to his care—be they born or in utero—thereby pressing this statutory mandate into the service of his anti-abortion agenda.

As played by Lloyd, solicitude for the emotional well-being of unaccompanied minors was instrumentalized—being of deep concern where abortion was concerned and of no apparent consequence when it came to managing the flow of youthful bodies across the Southern border. As discussed thus far, however, these embedded antipathies towards abortion and undocumented immigrants have run along parallel tracks. Notably in this regard, my review of the record, including Lloyd's depositions, emails, and other communications, does not provide any direct evidence that his abortion-consent policy was rooted in anything other than his fierce "pro-life" stance. This is certainly not to say that hostility towards "illegal" immigrants did not play a quiet role in shaping this policy as a means of doubling down on these transgressive bodies, but simply that the record does not offer express support for this conclusion.

When it came to defending ORR's abortion-consent policy, the government initially deployed a two-pronged constitutional argument in an effort to persuade the courts that it did not impose an undue burden on the abortion rights of young women in federal immigration custody.[163] However, this strategy was notably

162. Complaint, *supra* note 154, at 1–2, 9–10.

163. For details on the progression of the case through the courts, *see Garza v. Hargan*, 131 Harv. L. Rev. 1812 (2018); Garza v. Hargan—*Challenge to Trump Administration's Attempts to Block Abortions for Young Immigrant Women*, ACLU (Aug. 8, 2018), aclu.org/cases/garza-v-hargan-challenge-trump-administrations-attempts-block-abortions-young-immigrant-women.

unsuccessful and in 2018, the district court issued an injunction barring ORR from "creat[ing] or implement[ing] any policy that strips UCs of their right to make their own reproductive decisions."[164] In appealing the injunction, in addition to its usual constitutional arguments, the government also sought to persuade the federal appeals court for the D.C. Circuit that the abortion-consent policy advanced the administration's immigration policies by doubling down on subversive young women whose lack of regard for the sanctity of unborn life was matched by their callous disregard for national borders. This discussion leads us directly back to and enables us to at last answer the question posed at the outset of the article—namely, "in light of Trump's sustained contempt for migrating pregnant Latinas and their children, why wouldn't his administration happily take Doe to the abortion clinic?"[165]

A. *Defending ORR's Abortion-Consent Policy*

Over the course of the *Garza* litigation,[166] the government's defense of ORR's abortion-consent policy was initially framed in terms of its conformity with the Supreme Court's abortion rights jurisprudence. Deploying a two-pronged argument, it first contended that the policy did not constitute a ban on abortion, but simply represented a decision by ORR to not facilitate access to it in conformity with "Supreme Court decisions holding that an individual's right to obtain an abortion does not generally include the right to have the government fund it" or to commit any resources towards it.[167] By way of further support, it asserted that ORR's non-facilitation stance was in furtherance of the government's "legitimate and significant interest in promoting childbirth."[168]

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164. *Garza v. Hargan*, 304 F. Supp. 3d 145, 165 (D.C. Cir. 2018), *aff'd in part, vacated in part, and remanded sub nom. J.D.*, *supra* note 87. The Circuit Court subsequently clarified its order to make clear that in addition to enjoining the "government from interfering with or obstructing any class members' access to pre-viability abortions and abortion-related care," it was further enjoining it from "revealing, or forcing class members to reveal, the fact of their pregnancies or their abortion decisions to anyone." *Id*. at 1305–06, 1325. As succinctly put by the Circuit Court, the injunction thus included an "access mandate" as well as a "disclosure bar." *Id.* The Circuit Court upheld the access mandate, which is our focus, but vacated the disclosure bar and remanded the matter back to the district court for further development. *Id.* at 1337–39. For purposes of this article, discussion of the courts' preliminary injunction refers only to that portion addressing the access bar.

165. Cromer, *supra* note 15, at 20.

166. *See supra* note 163 (all cites).

167. *J.D.*, *supra* note 87, at 1326–27.

168. *Id.* at 1328.

Rejecting this argument, the district court made clear that the government was not being asked to simply "promote, transport, pay for, or otherwise further a UC's decision to have an abortion."[169] Instead, it had chosen to "categorically blockade" exercise of UCs "constitutional right' to choose."[170] As the appeals court for the D.C. Circuit succinctly stated in upholding the lower court's injunction, "the class members . . . do not assert 'an affirmative right to governmental aid' (internal citation omitted). They instead ask for the government to step out of the way."[171]

In the alternative, the government argued that even if "ORR's policy works as a ban on access rather than as a mere withholding of funding," a pregnant minor can avoid the problem by either seeking a voluntary departure from the U.S to her home country or being placed with a sponsor.[172] As with the non-facilitation argument, the courts made short shrift of the government's claim that these purported "escape-valves" obviated the problem.

With regard to the option of voluntary departure, the district court made clear that this proposal:

> conditions the exercise of UC's constitutional rights on their willingness to relinquish any claim that may entitle them to remain in the United States, and to return in what is in many instances . . . a country from which they fled due to alleged abuse. Such a proposal renders the exercise of constitutional rights a Hobson's choice, wherein one set of rights must be waived in order to effectuate another . . . . This court will not sanction any policy or practice that forces vulnerable young women to make such a choice.[173]

Moreover, as the appeals court stressed in upholding the injunction, this option is tantamount to a legal fiction. Not only is the decision in the control of the government, but even in the unlikely event of an approval in a timely manner, the vast majority of teens in federal immigration custody are from Honduras, Guatemala, and El Salvador where abortion is a crime.[174]

Further, the government's argument that release to a sponsor was also a viable escape hatch, met a similar fate. In the grant and affirmance of the preliminary injunction, the courts stressed that release is a lengthy multi-step process with "no guarantee that release to a sponsor—if it occurs at all—would happen in a timely

169. *Garza v. Hargan*, *supra* note 164, at 163.
170. *Id.* (quoting *Garza*, *supra* note 13, at 737(Millet, J., concurring)).
171. *J.D.*, *supra* note 87, at 1328.
172. *Id.* at 1329–31.
173. *Garza*, *supra* note 164, at , 154.
174. *See J.D.*, *supra* note 87, at 1330.

fashion . . ."[175] Moreover, it likewise is a process that "a detained unaccompanied minor . . . has precious little control over."[176]

Having been rebuffed in its effort to persuade the courts that ORR's abortion-consent policy did not impose an undue burden on the abortion right, in its appeal of the preliminary injunction, the government introduced a new argument—namely, that the abortion-consent policy advanced the nation's immigration agenda. Cutting to the chase, it sought to shift the blame for the lack of abortion access to the unaccompanied minors themselves. Specifically, it argued that the lack of access was a "self-imposed," as distinct from a government-imposed, obstacle on account of the fact that these young women were "in federal custody because they entered the United States illegally."[177] In other words, this access problem could have been avoided altogether had they declined "to enter the United States illegally" in the first place.[178]

The government did not stop with blaming these young women for the fact that the door to the abortion clinic had been slammed in their faces on account of their unlawful behavior. Engaging in fearmongering, it continued on to warn the court that if it were to invalidate ORR's abortion-consent policy, the ruling would effectively "constitutionally mandate what would amount to *abortion tourism*, where minors who cannot obtain abortions lawfully in their country of nationality demand abortion services at our border or upon illegal entry into our country."[179] In short, an adverse ruling would be tantamount to putting out the welcome mat for those who, as one journalist put it, are "hankering for a D & C."[180] Needless to say, the abortion tourism argument cruelly suggests that the decision to flee one's home for the United States is made lightly and capriciously. It also ignores the fact that, as ORR itself recognizes, the journey puts unaccompanied teens at a heightened risk of "human trafficking, exploitation and abuse."[181]

It is here that one sees the explicit infusion of anti-immigrant sentiments into Lloyd's abortion-consent policy. As envisioned,

175. *Id.* at 1332.

176. *Garza*, *supra* note 13, at, 739 (Millett, J., concurring).

177. Brief of Appellants," at 40, *J.D. v. Azar*, 925 F.3d 1291(D.C. Cir. 2019) (No. 18-1593).

178. *Id.*

179. *Id.* at 45 (emphasis added).

180. Stephen Young, *Ken Paxton Thinks Women Will Travel to Texas Just for the Abortions*, Dall. Observer (July 9, 2018), https://www.dallasobserver.com/news/ken-paxtons-new-abortion-fight-10880564.

181. J.D., *supra* note 87, at 1337 (quoting *About Unaccompanied Alien Children's Services*, Office of Refugee Resettlement (June 15, 2018), https://www.acf.hhs.gov/orr/programs/ucs/about).

compelled motherhood serves a dual function. First, the assertion of coercive control over the reproductive bodies of young women already in federal immigration custody is aimed at punishing them for having unlawfully crossed the nation's southern border. From the perspective of the government, they have no one but themselves to blame for the government privileging of fetal life over their claims to non-motherhood. Second, it is intended to serve as a deterrent to those who might otherwise set out on the abortion tourist trail to take unfair advantage of our laws.

In upholding the district court's preliminary injunction, the appeals court was quick to shut down the government's effort to justify ORR's abortion-consent policy as a vital plank in its southern border containment strategy. Emphasizing that this "hazardous journey for minors is not 'tourism,' much less 'tourism' to 'demand abortion,'" it concluded that "we cannot accept the suggestion that minors in ORR custody should be compelled to carry pregnancies to term against their wishes—even in cases of rape—so that others will be deterred from desiring to come here."[182] In short, they cannot be divested of rights and their bodies commandeered in the service of securing national borders.

B. *"So Why Didn't the Trump Administration Happily Take Doe to the Abortion Clinic?"*

In light of the above discussion, we are now able to answer the question raised at the outset of this article. Specifically, in "light of Trump's sustained contempt for migrating pregnant Latinas and their children, why wouldn't his administration happily take Doe to the abortion clinic?" Although this question is posed in a tongue-in-cheek manner, given the administration's staunch antiabortion position, its underlying sentiment meshes with the historic coercive discouragement of childbearing by teens, immigrants, and low-income women of color.[183] It is here that the concept of "reproductive governance" as developed by Lynn M. Morgan and Elizabeth F.S. Roberts can help make sense out of this seemingly anomalous *encouragement* of motherhood.[184]

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182. *Id.* at 1337.

183. *See* sources *supra* at note 14. .

184. *See* Lynn M. Morgan & Elizabeth F.S. Roberts, *Reproductive Governance in Latin America*, 19 Anthropology & Med. 241 (2012). The authors developed the "concept of 'reproductive governance' as an analytical tool for tracing the shifting political rationalities directed toward reproduction," in the context of Latin America, with "the hope that the perspective may be usefully applied elsewhere." Id. at 241.

Critically, the theory of reproductive governance "allows for the examination of how the subject making powers of moral regimes directed towards reproductive behaviors and practices are fully entangled with political economic processes,"[185] and can thus render visible the ways in which "[r]eproduction, which has been made to appear domestic, intimate, and apolitical is fully enmeshed within the production of . . . nation-states."[186] Particularly salient in the present context, Morgan, and Roberts further posit that it offers a way to make sense out of the contestation between the "dueling figures" of the "immigrant-as resource-depleter to whom rights can be denied, versus the rights-bearing foetus-as-citizen who takes nothing from the neoliberal state."[187]

This framework is indeed valuable for making sense out of the seemingly irrational pro-maternal tilt of ORR's abortion-consent policy in which these "dueling figures" are firmly embedded. Starting with the "rights-bearing foetus-as-citizen," Lloyd readily extended ORR's statutory obligation to act in the best interest of the unborn children of pregnant minors in federal immigration custody. In doing so, he fully embraced them as juridical persons with co-equal claims to the agency's protection. In fact, the fetus actually emerged as the clear victor in this battle as its interests (presuming for the sake of argument only that a fetus has an interest in being born) were clearly privileged over the interests of the pregnant minors in avoiding motherhood. With regard to the figure of the "immigrant-as-resource-depleter to whom rights can be denied," Lloyd's steadfast refusal to honor their abortion requests punished them for audaciously insisting that as illegal entrants they had the right to an "abortion on demand." Moreover, as argued by the government, denying them this right also served as a caution to prospective "resource-depleters" who might otherwise seek to enter the country without authorization in order to claim rights denied them at home.

So understood, the youthful bodies of pregnant teens in federal immigration custody are, thereby, forcibly "enmeshed" with the production of a "nation-state" that seeks to both elevate the fetus to the status of a juridical person and zealously safeguard its Southern border from invasion. Of course, a deep irony pervaded this discursive practice. Specifically, as illustrated beforehand, Lloyd's non-consent policy was born of his pro-woman/pro-life commitments, which stresses the inviolable sacred bond between

185. *Id.* at 244.
186. *Id.*
187. *Id.* at 250.

a pregnant woman and her unborn child. However, a deep fissure destabilizes this unity when it comes to the undocumented pregnant immigrant who is cast as an unwanted invader, while the child in her womb is heralded as, to quote President Trump, "a majesty of God's creation."[188]

Conclusion

In the wake of ORR's adoption of a revised policy by which, as noted above, it agreed to not obstruct or interfere with the ability of teens in federal immigration custody to access confidential abortion services, the parties entered into a joint stipulation of dismissal without prejudice.[189] This stipulation was subsequently approved and adopted as an order of the federal district court.[190] Accordingly, as it currently stands, the threat of compelled motherhood is no longer interwoven into ORR policy as a sanction for unlawful entry into the country or as a warning bell to would-be "abortion tourists."

However, a few significant cautionary notes are in order. To begin with, the parties agreed to dismiss the case, rather than entering into a binding settlement agreement. Presumably this was done to avoid committing future administrations to a legally enforceable policy of noninterference in the abortion rights of unaccompanied minors in federal immigration custody. Instead, pursuant to the joint stipulation of dismissal, ORR retains the right to modify its abortion policy, subject to the limitation that it provide the ACLU Reproductive Freedom Project, as counsel for the plaintiff class, with at least fourteen days advance notice of these changes for a period of two years.[191] Layering onto the potential insecurity of this outcome, the case was dismissed at the preliminary injunction

188. Julia Arciga, *Trump Declares Himself the "Most Pro-Life President" Ever at March for Life*, Daily Beast (Jan. 24, 2020), https://www.thedailybeast.com/trump-props-up-his-evangelical-support-at-march-for-life.

189. *See J.D. v. Garza*, No. 17-cv-02122-TSC, at *Exhibit A (D.C. Cir. Sept. 29, 2020) (laying out the revised policy in the Joint Stipulation of Dismissal Without Prejudice).

190. *See Id.* In keeping with the focus of this article, the discussion focuses on the policy changes regarding the non-interference with abortion access only; however, it should be noted that the changed policy also provides that "ORR federal staff and ORR care providers shall not take actions to obstruct or interfere with UAC access to state judicial bypass proceedings . . . non-directive options counseling, abortion counseling, or an abortion." *Id.* Additionally, subject to limited exceptions, it also stipulates that ORR federal staff and care providers shall not "communicate information about a UAC's pregnancy . . . or decision whether to have an abortion" to third parties, including the minor's parents. *Id.*

191. *See Id*.

stage, which, of course, means that although the issuing courts concluded that the plaintiff class has a strong likelihood of success on merits, there is no final ruling on the constitutionality of ORR's abortion-consent policy.

So, what does this portend for the future? Of course, the shining lodestar is that it seems highly unlikely that any official in the Biden-Harris administration would adopt this kind of draconian policy, such that "the mere act of entry into the United States without documentation" would again signal that "an immigrant's body is no longer her . . . own."[192] Accordingly, one should not expect to see efforts by the current administration—and hopefully beyond—to reelevate the fetus to the status of a juridical citizen with a claim to custodial protection within ORR's statutory mandate.

And yet, one cannot be sanguine about what the future holds, particularly in light of the changed composition of the Supreme Court following the appointment of Amy Coney Barrett, who is demonstrably antiabortion, to fill the vacancy left by the death of Justice Ruth Bader Ginsburg.[193] Although it is too soon to predict how the currently constituted Court will rule when deciding the next abortion rights case, it is clear that antiabortion Justices are now in the majority. Recognizing the fragility of the ACLU Reproductive Freedom Project's victory in having righted "one of the wrongs that [the Trump] administration has committed against immigrants in detention," Brigitte Amiri makes clear that the "health and safety" of pregnant unaccompanied minors "are still very much at stake." To protect reproductive freedom for all, we still have a fight ahead of us—including ensuring that *Roe v. Wade* remains the law of the land."[194] Underscoring the weight of Amiri's caution, Justice Blackmun's haunting warning dating back to 1989: "I fear for the future. I fear for the liberty and equality of the millions of women who have

192. *Garza*, *supra* note 13, at, 737 (Millet, J., concurring).

193. *See* Barbara Sprunt, *Amy Coney Barret Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court ; Anna North, *What Amy Coney Barret on the Supreme Court Means for Abortion Rights*, Vox (Oct. 26, 2020), https://www.vox.com/21456044/amy-coney-barrett-supreme-court-roe-abortion; Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Court to the Right*, N.Y. Times (Nov. 2, 2020), https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html.

194. *Three Years After the ACLU First Challenged the Policy in Court, the Office of Refugee Resettlement Changes Its Policy to Ensure Young People in Its Custody Will Not Be Blocked from Accessing Abortion*, ACLU (Sept. 29, 2020), https://www.aclu.org/press-releases/result-aclu-litigation-trump-administration-ends-policy-prohibiting-immigrant-minors..

lived and come of age in the 16 years since *Roe* was decided . . . the signs are evident and very ominous, and a chill wind blows,"[195] is more prescient today than at any time in the past.

195. *Webster v. Reproductive Health Services*, 492 U.S. 490, 538–60 (1989) (Blackmun, J., concurring in part and dissenting in part).