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"Like Some Kind of Legal Houdini": Abortion Access and the State in Garza

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IMMIGRATION, LIKE ALL POLITICS, IS REPRODUCTIVE POLITICS TOO...

—RISA CROMER, "JANE DOE"[1]

[1] Risa Cromer, "Jane Doe," *Cultural Anthropology* 34, no. 1 (February 2019): 18.

The degree to which bodies are regulated depends on where they are institutionally, legally, and geographically situated.[2] This reality came into stark focus in the 2018 court case *Garza v. Hargan*, which captures one of the latest attempts to intervene in abortion access—continuing the fraught and ongoing efforts by certain states and the federal government to circumscribe the extent to which reproductive rights apply and to whom. And now, even since the initial writing of this piece, this reality has become starker with the passing of the Texas Senate Bill 8 (SB 8). The state's draconian bill, which went into effect on September 1, 2021, ends abortions in Texas after approximately six weeks. Even more dystopian, however, is that the law is enforced by vigilante citizens who have been granted the legal right—incentivized with a bounty of $10,000—to sue anyone who assists a person seeking an abortion.[3] In conjunction with Texas Senate Bill 4, which will go into effect December 2, Texas has, for the time being, succeeded in almost entirely eliminating abortion in the state.[4] These efforts connect with the state's decades-long commitment to severely curtail mobility, citizenship, and immigration rights. This piece does not address SB 8. It instead looks to *Garza* to better understand how we arrived here. Through Garza it is possible to see how the state of Texas has developed a legal strategy to restrict access for certain bodies both spatially and temporally and how it has managed to outsource enforcement to private entities, be they subcontractors or citizens. Garza sets the stage for today's private enforcement of Texas's anti-abortion law, and for ever more extreme restrictions that deem certain bodies (brown, reproducing, and immigrant) unequal to others.

[2] This essay expands upon my section "Spatial Exploitation: Usurpation of the Abortion Rights of Unaccompanied Minors in Federal Immigration Custody," in a collaboratively written essay "No Refuge(es) Here: Jane Doe and the Contested Right to 'Abortion on Demand'" with J. Shoshanna Ehrlich and Nicole Guidott-Hernandez, which will be published later this year.

[3] Neelam Borha, "Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the US Supreme Court Takes No Action," *Texas Tribune*, September 1, 2021, link.

[4] Melody Schreiber, "New Texas Law Bans Abortion-Inducing Drugs after Seven Weeks Pregnancy," *Guardian*, September 22, 2021, link; Kevin Reynolds and Kate McGee, "Bill Limiting Abortion-Inducing Pills Heads to Gov. Greg Abbott's Desk to Be Signed into Law," *Texas Tribune*, August 30, 2021, link; "Bill SB 4," Texas Legislature Online, link.

In 2017, the government stipulated that in order for Jane Doe (J.D.), a pregnant, undocumented minor who was being housed in a shelter funded by the Office of Refugee Resettlement (ORR), to be granted access to an abortion, she must voluntarily leave the United States or, if she remained in the country, find a sponsor who would take custody of her and not intervene in her abortion decision. While sponsorship is a requirement specifically related to immigration, placing a minor in the custody of qualified guardians, it intersects

with abortion access in the time it can take for the government to approve a sponsor. In the case of J.D., this approval process created extensive delays to her abortion care. Thus, while abortion is regulated spatially—it must occur beyond the confines of the government-funded facility (in this case the ORR-funded shelter)—it is also regulated temporally. By controlling J.D.'s access to medical care inside their facilities, and the conditions under which she could access care outside of them, ORR, and a minority of judges on the US Court of Appeals for the D.C. Circuit in the *Garza* case, severely curtailed abortion access for undocumented, unaccompanied minors while detained in federal immigration custody. Even though the decision did not prevail—and J.D. was eventually able to receive an abortion—the case reveals how the state simultaneously functioned as custodian and barrier to care, and how a body's different legal status is mapped onto and constricted differently in space. In doing so it highlights the challenging situations teens seeking abortion encounter depending on the spaces where they are contained; these spaces are overseen by state and federal governing bodies who often produce conflicting rulings that significantly reduce and, in this case, temporarily prevent a pregnant person's self-determination.

What does it mean to consider the *Garza* case through a spatial framework? For one, it means accounting for the various scales at work throughout the legal ruling: J.D.'s body, the ORR-approved shelter where she was detained, the jurisdiction of state and federal laws. The federal, legal, and spatial frameworks governing young women held in Texas ORR-affiliated shelters impose a regime of surveillance and bodily control. Texas serves as a bellwether because the significant restrictions the state legislates for reproductive health care and immigration policy have enormous implications on a national level.[5] Recent Texas history demonstrates the willingness of the state legislature to radically reduce access to reproductive health care. In 2013 and 2014, almost half of all the clinics providing abortion services closed across the state due to restrictive state laws. In 2013 there were more than forty state clinics and in late 2019, only twenty-two of those clinics were open.[6] In 2016 $800 million was allocated to border security, while the budget for family planning support shrank to $40 million (from $112 million), shuttering eighty-two family-planning clinics across the state.[7] When one considers these policies in conjunction with Texas state immigration laws and practices, it is clear that anti-abortion and anti-immigration policies work in tandem to govern whose rights matter most.

These tactics have only continued during the COVID-19 pandemic. Texas Governor Greg Abbott removed abortion from the essential medical procedure and surgery list, *delaying* access to abortion care during the public health crisis. Texas attorney general Ken Paxton clarified that "any type of abortion that is not medically necessary to preserve the life or health of the mother" would be postponed.[8] COVID-19 abortion restrictions were also created in Alabama, Arkansas, Iowa, Louisiana, Mississippi, Ohio, Oklahoma, Tennessee,[9] Kentucky, West Virginia, and Alaska.[10] Some of these state bans have been blocked by court order (Alabama, Ohio, Oklahoma, and Tennessee), and some bans are no longer in effect (Alaska, Arkansas, Iowa, Kentucky, Louisiana, Mississippi, West Virginia, and Texas).[11] The strategy to acutely, if not entirely, eliminate reproductive rights also follows the severe

[5] Lori A. Brown, "Don't Mess with Texas: Abortion Policy Texas Style," in *Abortion Across Borders Transnational Travel and Access to Abortion Services*, ed. Christabelle Sethna and Gayle Davis (Baltimore, MD: John Hopkins University Press, 2019).

[6] Ashley Lopez, "For Supporters of Abortion Access, Troubling Trends in Texas, NPR Shots Health News, NPR, November 18, 2019, link.

[7] Elise Andaya, "I'm Building a Wall around My Uterus: Abortion Politics and the Politics of Othering in Trump's America," *Cultural Anthropology* 34, no. 1 (2019): 14.

[8] Sabrina Tavernise, "Texas and Ohio Include Abortion as Medical Procedures That Must Be Delayed," *New York Times*, March 23, 2020, link.

[9] Michelle J. Bayefsky, Deborah Bartz, and Katie L. Watson, "Perspective Abortion during the Covid-19 Pandemic—Ensuring Access to an Essential Health Service," *New England Journal of Medicine*, May 7, 2020, link; and Ashoka Mukpo, "Defying Medical Experts, Lawmakers Are Weaponizing COVID-19 to Restrict Abortion Access," ACLU, April 21, 2020, link.

[10] Olivia Cappello, "Surveying State Executive Orders Impacting Reproductive Health During the COVID-19 Pandemic," Guttmacher Institute, July 24, 2020, link.

border restrictions placed on immigration by the Trump administration under the pretense of public health amid COVID-19.[12]

Exclusions may apply: Reproductive rights for the incarcerated

States continually configure and reconfigure themselves in relation to access to reproductive health care. In then-Circuit Judge Brett Kavanaugh's dissent to *Garza*, the decision that overturned the governments' denial to abortion access and required HHS to allow an undocumented minor (J.D.) to access an abortion, he mentions the rights of those in detention in comparison to those who are incarcerated—adult women held in either federal prison or government immigration custody—are legally allowed access to abortion.[13] This is an important comparison because it provides a space to consider the legal frameworks of abortion access of people held in different forms of government custody and how spatial and temporal barriers are used by the government to deny self-determination for those it deems unworthy. The incarcerated have their mobility severely curtailed, controlled, and surveilled by the government, and yet, abortion remains a legal right for them. Political scientist Rachel Roth's research on abortion access for incarcerated people underscores that "federal and state courts have consistently held that imprisonment does not negate women's constitutional right to abortion … [yet] reproductive control takes on new meaning, because jails and prisons literally control women's movements and contact with the outside world."[14] Access to abortion while in prison is supported by both the Fourteenth Amendment's right to privacy and the Eight Amendment's right to adequate care of serious medical needs.[15] In *Estelle v. Gamble* (1976), "the Court firmly established the government's constitutional obligation to meet the important medical needs of those in its custody."[16] However, how these medical needs are defined—as elective or necessary, for example—can differ from state to state, prison warden to prison warden, further complicating and politicizing access to basic reproductive health care, and all too often turning pregnancy itself into a form of punishment.[17]

Abortion access within spaces of incarceration is not consistent across the country—similar to the disparities encountered by people who are not imprisoned. For the incarcerated, approximately one-third of states have clear policies around reproductive options including abortion; another third uses conditional language suggesting abortion may only be discussed if the incarcerated person inquires about it.[18] Another seven states have created a series of multistep requirements including vast amounts of paperwork, money transfers, and contact with a community provider. Other states place the responsibility of locating an abortion provider on the imprisoned person. Eight states have no written abortion policy whatsoever, creating opportunities for prison officials to interpret the law *as they see fit*.[19] Additionally, some states require the imprisoned person to pay for the abortion, for transportation to the facility, and even the officer's time during transportation as well as vehicle wear and tear.[20] These extreme variations and inconsistencies across states reveal that although legally guaranteed, abortion is often made difficult to access for the incarcerated. These barriers also intersect with the ways in which abortion access is unevenly distributed geographically and legally even

[11] Laurie Sobel, Amrutha Ramaswamy, Brittni Frederiksen, and Alina Salganicoff, "State Action to Limit Abortion Access During the COVID-19 Pandemic," *Kaiser Family Foundation*, August 10, 2020, link. See also Adam Liptak, "Supreme Court Revives Abortion-Pill Restriction," *New York Times*, January 12, 2021, link; and *Food and Drug Administration, et al. v. American College of Obstetricians and Gynecologists, et al.* 592 US No. 20A34 (2021) Sotomayor, dissenting.

[12] Michael D. Shear and Zolan Kanno-Youngs, "Trump Administration Plans to Extend Virus Border Restrictions Indefinitely," *New York Times*, May 13, 2020, link.

[13] Kavanaugh dissent, *Garza v. Hargan* 17-5236 (D.C. Cir. 2017), 4.

[14] Rachel Roth, "Abortion Access for Imprisoned Women: Marginalized Medical Care for a Marginalized Group," *Women's Health Issues* 21–35 (2011): S14.

[15] Rachel Roth, "Do Prisoners Have Abortion Rights?" *Feminist Studies* 30, no. 2 (Summer 2004): 357. See also Carolyn B. Sufrin, Mitchell D. Crenin, and Judy C. Chang, "Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers," *Perspectives on Sexual and Reproductive Health* 41, no. 1 (March 2009).

[16] This protection is provided under the Eighth Amendment outlawing cruel and unusual punishment. Diana Kasdan, "Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?" *Perspectives on Sexual and Reproductive Health* 41, no. 1 (March 2009): 60.

[17] Carolyn Sufrin, "When the Punishment Is Pregnancy: Carceral Restriction of Abortion in the United States," *Cultural Anthropology* 34, no. 1 (2019): 37.

[18] Roth, "Abortion Access for Imprisoned Women," S14.

[19] Roth, "Abortion Access for Imprisoned Women," S15.

[20] Crystal M. Hayes, Carolyn Sufrin, and Jamila B. Perritt, "Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression," *American Journal of Public Health, AJPH Perspectives* 110, no. 51 (2020): S23. See also Sufrin, "When the Punishment Is Pregnancy," 37.

for women who are not incarcerated. Take, for example, Texas where abortion after approximately six weeks is now illegal. Women are forced to travel to the neighboring states of Oklahoma, Louisiana, New Mexico, and Colorado in hopes of being able to secure an appointment.[21] However, in Oklahoma there is a seventy-two-hour waiting period between a counseling appointment and procedure appointment; in Kansas there is a twenty-four-hour waiting period; in Louisiana there is a twenty-four -hour waiting period and counseling is mandated to be in person, thus requiring two visits to the clinic.[22] Combine state restrictions with the number of clinics that remain in these states—four in Oklahoma, three in Louisiana, five in New Mexico, and sixteen in Colorado—and women have far fewer choices for care. These examples further underscore how access, whether for someone who is incarcerated, in detention, or free, significantly depends upon *where* that person is. Location and jurisdiction can determine whether access to reproductive health care will be granted in a timely manner, if at all.

"Rather than being transparent," Roth writes, "the state in the prison context is instead opaque, multifaceted, increasingly privatized, and characterized by high levels of decentralization, delegation, and discretion that render ambiguous the locus of official state authority. This particular configuration of state power creates distinctive challenges and vulnerabilities for women seeking to safeguard their reproductive health and rights and raises serious questions about accountability for how governments regulate women's lives."

Before 1987, the US Bureau of Prisons paid for incarcerated persons' abortions. It wasn't until President Reagan's administration that coverage changed—only extending to abortion as a result of rape, incest, or if a person's life was endangered by carrying the pregnancy to term.[23] At the federal level, things may be clearer but are in no way better. In reaction to the Supreme Court's 1973 *Roe v. Wade* decision, the Hyde Amendment, first passed in 1977 as part of Medicaid appropriations, prohibited federal Medicaid funds to pay for abortion except when a person's life was in danger. Hyde continues to exist but the terms of coverage have since varied.[24] Some years federal exceptions are expanded to include survivors of rape or incest. Additionally, Hyde's exclusions affect a diverse group of people receiving government benefits: federal employees and their dependents; Peace Corps volunteers; Native American women; low-income women in Washington, DC; military personnel and their dependents; and federal prisoners.[25] An incarcerated person may not be aware of these changes, which often coincide with the change of administrations. Currently this is being disrupted through Biden's 2022 budget proposal; it is the first time since Hyde was passed that this federal abortion ban has not been included in a proposed budget.[26]

[21] Shefail Luthra, "After the Texas Abortion Ban, Clinics in Nearby States Brace for Demand," *Guardian*, September 3, 2021, link.

[22] "Counseling and Waiting Periods for Abortion," State Laws and Policies, Guttmacher Institute, October 1, 2021, link. There are many other consistencies across the country.

[23] Ann M. Starrs, "Forty Years Is Enough: Let's End the Harmful and Unjust Hyde Amendment," Guttmacher Institute, September 29, 2016, link.

[24] "Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion," ACLU, link.

[25] "Access Denied," link.

[26] "Biden Budget Drops Hyde Amendment to Allow Public Funding of Abortion," *Reuters*, May 28, 2021, link.

Delaying access: Barriers to abortion in *Garza v. Hargan*

The *Garza* case creates some strange spatial gymnastics as it maps the pregnant body of unaccompanied minors onto and out of various institutional sites. Spatial control spans from the border to federal detention centers to ORR-affiliated shelters to reproductive health care facilities. For example, J.D.'s sponsor—the person in whose custody she must make the decision to have

an abortion—and the clinic itself cannot be in government-run facilities. As a result, the minor's body must inhabit two highly regulated spaces: the space of detention and the space of the abortion clinic. Reading Judge Patricia Millet's and Judge Kavanaugh's opinions on where J.D. should be placed through a spatial framework demonstrates how the actual geographic location and who oversees this literal space is a critical factor in J.D.'s ability to access reproductive health care—one that must be outside of state control. Because the judges' opinions discuss institutional oversight and the space where oversight occurs, these are important spatial distinctions for several reasons. One, both types of spaces are controlled to different degrees; in the case of an ORR-affiliated shelter, the government is responsible for legal oversight, and in the case of the abortion clinic, the state legislates access, some health care protocols, and building codes. For an unaccompanied minor, the ability to physically leave one space to access another is highly regulated, orchestrated, and extremely difficult, or often impossible, to do in a manner dictated by the framework in *Roe v. Wade*. The three-trimester, twelve-week framework in *Roe* is based on fetus viability outside the womb. The first trimester provides a pregnant person complete autonomy over their decision in a medically safe environment by a licensed doctor; during the second trimester, the state can regulate access to abortion but not outlaw the procedure; and during the third trimester when there is fetus viability, the state can outlaw abortion except to save a pregnant person's life and/or health.[27] Two, with the former administration, unaccompanied minors in an ORR-affiliated facility are being treated similarly, albeit not exactly, to people in prison. This includes how the space looks and feels, the way young bodies are forced to adhere to disciplinary codes of conduct, migrants' clothing requirements, what they are fed, and when they can play. These daily routines discipline and reinforce the states' power over their bodies, and because it may feel like prison, it begins to be like prison. Three, in his dissent Judge Kavanaugh compares similarities of abortion access for an incarcerated versus a detained person, and he highlights that the type of space an unaccompanied migrant teen is in may possibly affect her decision-making ability. There is a tacit understanding in this statement that the quality and type of space influences one's well-being—both materially and psychologically. Additionally, he concedes that to be removed from one's support networks in spaces of confinement could also make J.D.'s experience far more challenging. Although acknowledging these intersecting aspects, Kavanaugh still seeks to deny J.D. the basic agency and autonomy over her abortion plan.

Judge Kavanaugh's dissent reveals his disbelief in a teen's ability to make an informed decision on their own, and a bias for sponsor-facilitated decision making outside of a government facility. Prioritizing private space for Doe's decision-making abilities calls into question government custodial space and its effects. He writes:

> … IT COULD TURN OUT THAT THE GOVERNMENT WILL BE REQUIRED BY EXISTING SUPREME COURT PRECEDENT TO ALLOW THE ABORTION, EVEN THOUGH THE MINOR AT THAT POINT WOULD STILL BE RESIDING IN A US GOVERNMENT DETENTION FACILITY. IF SO, THE GOVERNMENT WOULD BE IN A SIMILAR POSITION AS IT IS IN WITH ADULT WOMEN PRISONERS

[27] *Roe v. Wade*, 410 US 113 (1973), link; "*Roe v. Wade* Case Summary: What You Need to Know," FindLaw, link.

IN FEDERAL PRISON AND WITH ADULT WOMEN UNLAWFUL IMMIGRANTS IN US GOVERNMENT CUSTODY. THE US GOVERNMENT ALLOWS WOMEN IN THOSE CIRCUMSTANCES TO OBTAIN AN ABORTION.[28]

[28] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam); Kavanaugh at 21.

Kavanaugh equates safer space to custodial space in a spatial ploy: "It is merely seeking *to place the minor in a better place* when deciding whether to have an abortion… It surely seems reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision in an *isolated detention camp* with no support network available."[29]

[29] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam); Kavanaugh at 21–22.

One must ask why would a "better space" even be necessary for decision making? Why would this custodial space allow for a greater degree of freedom of choice than another? What Kavanaugh argues as a "better space" is one that the government can and does take its time in finding. This response comes with enormous life-altering consequences for the pregnant migrant teen. Not only was J.D. forced to visit a "crisis pregnancy center"—an anti-abortion, religiously affiliated center that provides inaccurate medical information—and to endure a medically unnecessary sonogram, but also, as a minor, she was required by Texas law to seek a "judicial bypass." This mechanism grants minors the ability to get an abortion without notifying a parent or legal guardian—in other words, it allows a minor to *bypass* parental permission and to provide their own consent for the procedure.[30] However, even access to this bypass is checked. It entails navigating the court system, working with a court-appointed guardian and attorney ad litem, and attending a hearing before a judge—all of these bureaucratic conditions and legal requirements impede minors to various and unequal degrees. So although immigrant minors are able to *bypass* one Texas state-law barrier to abortion (i.e., parental consent), ORR's added restrictions and refusals produce other significant and time-consuming burdens, delaying access to abortion.

[30] Prior to this, Jane Doe's judicial bypass had been assisted by Jane's Due Process, a nonprofit organization working with pregnant minors in Texas and a network of attorneys to ensure legal representation. As described in "Testimony of Rochelle M. Garza," Judiciary Committee United States Senate Hearing on the Nomination of Brett Kavanaugh to the Supreme Court of the United States, September 7, 2018, link.

After J.D. received the bypass orders, she had to attend two appointments required by Texas law: one for mandatory counseling and one for the procedure. On the first scheduled day, ORR would not allow J.D. to be transported to her appointment. At this point J.D. was approximately between eleven and twelve weeks pregnant. Locating a sponsor had taken a long time. The sponsor, who is typically a family member, must undergo an involved and timely review process including a background check, fingerprinting, and sometimes a home visit all of which are controlled by ORR. The sponsors J.D. had suggested for herself were either denied or deemed unsuitable by ORR, and the process had already taken six weeks. J.D. had been forced to remain pregnant an additional month after the judicial bypass was obtained. Time was critical because Texas law bans abortion after twenty weeks.[31]

[31] From Garza's Judiciary Committee testimony, 5 (2018), the *Hargan v. Garza* Petition for a Writ of Certiorari, 13a (2017) and *Garza v. Hargan* 17-5236 Appeal Hearing Transcript, 17 (2017), one relative J.D. provided was considered as a sponsor but declined and there was some concern about her safety with the second person proposed by J.D. because he was a family relation who was a single male.

Judge Millet illustrates how the government limits J.D.'s movement, resulting in significant and time-sensitive delays in abortion access, through a variety of spatial restrictions—even more restrictive "than the contractor imposes on the non-pregnant minors in its care…"[32] And yet, if J.D. were to continue her pregnancy to term, she would easily be able to leave to access prenatal medical care at a separate facility from the shelter.[33] Judge Millet writes:

[32] Millet dissent, *Garza v. Hargan*, 17-5236 at 3.

[33] Millet dissent, *Garza v. Hargan*, 17-5236 at 4.

> THE GOVERNMENT HAS INSISTED THAT IT MAY CATEGORICALLY BLOCKADE EXERCISE OF HER CONSTITUTIONAL RIGHT UNLESS THIS CHILD (LIKE SOME KIND OF LEGAL HOUDINI) FIGURES HER OWN WAY OUT OF DETENTION BY EITHER (I) SURRENDERING ANY LEGAL RIGHT SHE HAS TO STAY IN THE UNITED STATES AND RETURNING TO THE ABUSE FROM WHICH SHE FLED, OR (II) FINDING A SPONSOR—EFFECTIVELY, A FOSTER PARENT—WILLING TO TAKE CUSTODY OF HER AND TO NOT INTERFERE IN ANY PRACTICAL WAY WITH HER ABORTION DECISION… SURELY THE MERE ACT OF ENTRY INTO THE UNITED STATES WITHOUT DOCUMENTATION DOES NOT MEAN THAT AN IMMIGRANT'S BODY IS NO LONGER HER OR HIS OWN. NOR CAN THE SANCTION FOR UNLAWFUL ENTRY BE FORCING A CHILD TO HAVE A BABY. THE BEDROCK PROTECTIONS OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE CANNOT BE THAT SHALLOW...
>
> ALL THE GOVERNMENT ARGUES WITH RESPECT TO SPONSORSHIP WAS THAT ITS FLAT AND CATEGORICAL PROHIBITION OF J.D.'S ABORTION WAS PERMISSIBLE BECAUSE SHE COULD LEAVE GOVERNMENT CUSTODY IF A SPONSOR WERE FOUND OR SHE SURRENDERED ANY CLAIM OF LEGAL RIGHT TO STAY HERE AND VOLUNTARILY DEPARTED.[34]

[34] *Garza v. Hargan*, 874 F.3d 735; Millet at 1–2, 5.

Regarding the government's position on facilitating an abortion, Millet claims: "[t]he government argues that it need not 'facilitate' J.D.'s decision to terminate her pregnancy. But the government is engaged in verbal alchemy… This case does not ask the government to make things easier for J.D… It just has to not interfere or make things harder."[35]

[35] Garza supra note 56, at 740–741 (Millet concurring).

On the one hand, the government will not promote abortion, take her to the clinic, pay for the procedure, or in any way support what is needed for such a decision. Yet, the government cannot "interfere or make things harder" by adopting a policy and practice to "categorically blockade exercise of [unaccompanied child's] constitutional right" to choose.[36] ORR policy, however, did appear to be making access far more difficult. For example, it included

[36] *Garza v. Hargan*, 874 F.3d 735, 740 (D.C. Cir. 2017) (Millett concurring) Id. at 737, 26.

> A BAN ON "ANY ACTION THAT FACILITATES AN ABORTION" (ECF NO. 5-4 AT 2), WHICH INCLUDES, *INTER ALIA*, ANY ACTION RELATING TO SCHEDULING APPOINTMENTS, ARRANGING TRANSPORTATION, MAKING THE UC AVAILABLE TO BE TRANSPORTED, PURSUING A JUDICIAL BYPASS, "DRAFT[ING] APPROVAL DOCUMENTS," "REVIEW[ING] INFORMATION RELEVANT TO HER HEALTH AND THE PROCEDURE," AND EVEN "MAINTAIN[ING] CUSTODY OF HER (WHILE ENSURING HER HEALTH REMAINS STABLE) DURING AND AFTER THE ABORTION PROCEDURE."[37]

[37] *Garza v. Hargan* Civil Action No. 17-cv-02122 (TSC) (2018), 25.

According to United States District Judge Chutkan, ORR's interpretation of "facilitation" is "so capacious that it prevents not only government officials or employees from assisting pregnant UCs, but also applies to private contractors and persons who are unaffiliated with the government."[38]

[38] *Garza v. Hargan* Civil Action No. 17-cv-02122 (TSC) (2018), 25.

The government's interest in facilitation only occurs in cases of *minors* in immigration custody.[39] Once J.D. turns eighteen, she is moved from an ORR-approved space of government oversight for children to DHS, a space of government control for those eighteen years and older where abortion is allowed because J.D. is now an adult.[40] This is also true when eighteen and in ICE custody. The government's position on facilitation also rests on the unaccompanied minor immigrant's ability to voluntarily depart the facility where they are detained and leave the United States. What the government fails to acknowledge is the difficulty with voluntary departure—J.D. cannot just leave while in government custody because she wants to. Voluntary departure can only be granted by the government. Departure is not necessarily expeditious, further prolonging the pregnancy. Additionally, abortion is completely banned in most Central American countries where the majority of these young women are fleeing from.[41] Leaving the US would force her to remain pregnant.

[39] *J.D. v. Azar*, 925 F. 3d 1291, 1330 (D.C. Cir. 2019), 30.

[40] *J.D. v. Azar*, 925 F. 3d 1291, 1330 (D.C. Cir. 2019), 30.

[41] Maria Antonieta Alcalde, "Central America," IPAS, link.

Millet's position prevailed and the government permitted J.D. to access abortion. ORR eventually changed its policy in September 2020. As of February 2021, their website states that ORR provides "[f]amily planning services, including pregnancy tests and comprehensive information about and access to medical reproductive health services and emergency contraception."[42]Although this multi-year legal challenge ended positively with the federal government policy change, *Garza* is a pattern that demonstrates the extent to which abortion access for some is increasingly restricted through ever more legal barriers.

[42] "Children Entering the United States Unaccompanied: Section 3," Office of Refugee Resettlement, link. See also *ACLU*, September 20, 2020, link.

This spatial limbo of an unaccompanied, pregnant migrant minor evokes Giorgio Agamben's "state of exception." For Agamben, the "state of exception" "… is not a special kind of law… rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept."[43] Through this expansion, these exceptions eventually can become juridical order. Through *Garza*, we witness how the state created yet another legal mechanism to control women's bodies in connection with immigration policy.[44] This "exception" is being further deployed through Texas's criminalization of abortion in SB 8 (and SB 4) that is now in the process of being adopted by at least six other states including Arkansas, Florida, Indiana, Mississippi, North Dakota, and South Dakota.[45] What appears as an exception is quickly becoming the norm.

[43] Giorgio Agamben, *State of Exception* (Chicago: The University of Chicago Press, 2005), 4.

[44] Andaya, "I'm Building a Wall around My Uterus," 13.

[45] Samira Sadeque, "Republicans in Six States Rush to Mimic Texas Anti-Abortion Law," *Guardian*, September 3, 2021, link.