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Citation: 30 Colum. J. Gender & L. 84 2015

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Fri Jan 27 10:53:06 2017

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INTERSECTIONS AT THE BORDER: IMMIGRATION ENFORCEMENT, REPRODUCTIVE OPPRESSION, AND THE POLICING OF LATINA BODIES IN THE RIO GRANDE VALLEY

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INTRODUCTION

A series of events in 2014 brought significant attention to the United States-Mexico border. Over the summer, reports of an influx of undocumented Central American immigrants began circulating.¹ Though most coverage mentioned only children crossing the border, many of these young migrants traveled alongside their mothers.² Reports of this influx raised public awareness about the increased level of immigration enforcement at the border and the rise of federal family detention centers in the American southwest. That same year, a series of lawsuits against the State of Texas's House Bill 2, which implemented significant restrictions on reproductive health clinics and abortion services

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1 See, e.g., *Under-age and On the Move*, ECONOMIST (June 28, 2014), <http://www.economist.com/news/briefing/21605886-wave-unaccompanied-children-swamps-debate-over-immigration-under-age-and-move> [<http://perma.cc/DT6B-UMHL>]; Dan Nakamura et. al., *Obama Aides Were Warned of Brewing Border Crisis*, WASH. POST (July 19, 2014), http://www.washingtonpost.com/politics/obama-aides-were-warned-of-brewing-border-crisis/2014/07/19/8b5d2282-0d1b-11e4-b8e5-d0de80767fc2_story.html [<http://perma.cc/WD6G-JG2P>]; P.J. Tobia, *No Country for Lost Kids*, PBS NEWSHOUR (June 20, 2014, 2:18 PM), <http://www.pbs.org/newshour/updates/country-lost-kids> [<http://perma.cc/26PF-AGV9>].

2 See, e.g., Michelle Tullo, *U.S. Reaction to New Immigrant Influx Could Violate International Law*, INTER PRESS SERV. NEWS AGENCY (June 29, 2014), <http://www.ipsnews.net/2014/06/u-s-reaction-to-new-immigrant-influx-could-violate-international-law> [<http://perma.cc/V5GH-3CUR>].

in the state, shone a light on the health crisis facing women in the Rio Grande Valley.³ Though seemingly unrelated—and often treated as such by both government and media—these circumstances have had inter-related results, particularly for Latina women in south Texas communities.

Scholars have long understood immigration enforcement as a mechanism of racial control⁴ and reproductive oppression as a tool of gender subordination.⁵ Yet Latino/a rights and mainstream reproductive rights organizations have historically failed to address the way these mechanisms operate together to police immigrant Latina women.⁶ Through an intersectional framework, this Note examines the outcomes of two coexistent and interrelated systems in the Rio Grande Valley and illuminates the racial control dynamics of

3 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 594–96 (5th Cir. 2014); Whole Woman’s Health v. Lakey, 769 F.3d 285 (5th Cir. 2014), *partially vacated*, 135 S. Ct. 399 (2014) (Mem.).

4 See, e.g., Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185, 1194–95, 1199 (2002) (“Immigration law, therefore, exerts a gravitational force that weakens the constitutional rights that subordinated communities may use to countervail the exercise of governmental power.”); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 28, 38 (1998) (discussing the history of the Chinese Exclusion Act of 1882, its motivation to prevent integration of Asians into American society because of their perceived inferiority; “[t]he consequences of racial discrimination in immigration are similar to domestic legal manifestations of white supremacy.”); Kevin Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (discussing United States immigration enforcement’s disproportionate focus on Latinos as a mechanism of social control).

5 See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992) (discussing the historical development of abortion regulation and recent framing of reproductive autonomy as one of gender and sexual equality); see also *Gonzales v. Carhart*, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting):

[Women’s] ability to realize their full potential, the Court recognized, is intimately connected to “their ability to control their reproductive lives.” . . . Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.

Id.; DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY* 22, 56 (1997) [hereinafter ROBERTS, *KILLING THE BLACK BODY*] (discussing, in particular, the regulation of Black women’s reproduction as far back as slavery and through the rise of the birth control pill as a means of achieving particular social objectives related to the control of Black women).

6 See *infra* Part IV.A.

state anti-abortion policies as well as the doctrinal shortcomings of abortion jurisprudence in providing remedies for marginalized women.

Although a vast body of work has addressed the intersectional dynamics of reproductive oppression and racial control,⁷ most of this work looks at oppressive forces of state policies related to reproduction outside of the abortion context or at the negative outcomes of advocates' narrow focus on abortion rights. There is a historical reason for this: activists and academics concerned about the marginalization of women of color sought to address the various reproductive oppressions experienced by Black, Latina, Asian, and Native American women that have been largely neglected by the mainstream (mostly white) feminist/pro-choice movement.⁸ Women at society's margins have faced forced sterilizations,⁹ lack of access to culturally sensitive birthing care,¹⁰ family caps on welfare benefits,¹¹ and the criminalization of miscarriages,¹² among other infringements of bodily and reproductive autonomy.¹³ The

7 See, e.g., ROBERTS, *KILLING THE BLACK BODY*, *supra* note 5 (addressing the intersection of race and reproductive oppression, as well as the racialized outcomes of narrowly focusing on abortion rights, and arguing for a new definition of reproductive freedom); Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL'Y & L. 59 (2005) (arguing for a vision of reproductive freedom that better encompasses the specific needs of Latina communities); Cynthia Soohoo, *Hyde-Care For All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391 (2012) (discussing the far-reaching ramifications of the Hyde Amendment and the need for reproductive justice to expand its vision beyond a negative-rights approach); Mary Ziegler, *Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J. L. & FEMINISM 1 (2013) (discussing the intertwined history of reproductive rights activists and population control activists and the racialized outcomes of this alignment).

8 See generally Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* (2004); Hooton, *supra* note 7 (describing the history of the divergent "reproductive rights" and "reproductive justice" movements").

9 ROBERTS, *KILLING THE BLACK BODY*, *supra* note 5 at 70–72, 89–90; SILLIMAN ET AL., *supra* note 8, at 127.

10 SILLIMAN ET AL., *supra* note 8, at 127 (discussing, for example, forced extra-tribal adoptions).

11 Rebekah J. Smith, *Family Caps in Welfare Reform*, 29 HARV. J. L. & GENDER 151, 152–54 (2006).

12 Lynn Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States (1973–2005): The Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013), available at http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/executive_summary_paltrow_flavin_jhpl_article.php [<http://perma.cc/H723-JGYL>].

13 See generally SILLIMAN ET AL., *supra* note 8.

American healthcare, welfare, and prison systems still frequently and pervasively deploy similar tactics.¹⁴

By focusing on anti-abortion legislation in this Note, I do not mean to suggest that the reproductive freedom¹⁵ movement should prioritize abortion access—or “choice”—over these other violations of reproductive autonomy. Nor do I mean to suggest that abortion should continue to be held at the forefront of conversations surrounding reproductive freedom, rights, and justice.¹⁶ Rather, I focus on anti-abortion measures here because advocates on both sides are currently waging battles over autonomous reproductive control couched in the language of abortion.¹⁷ Furthermore, much of the academic work discussing abortion and abortion jurisprudence has failed to address the racial control dynamics of anti-abortion policies, the ways in which anti-abortion policies work alongside other subordinating structures and government forces to police race, and the negative

14 See, e.g., CAL. WELF. & INST. CODE § 11450.04 (West 2015) (prohibiting increase in welfare aid to accommodate for children born to families during the time they are receiving aid); Lynn M. Paltrow, *Why Caring Communities Must Oppose C.R.A.C.K./Project Prevention: How C.R.A.C.K. Promotes Dangerous Propaganda and Undermines the Health and Well Being of Children and Families*, 5 J.L. Soc’y 11, 11 (2003) (discussing community programs offering \$200 to drug-addicted women to consent to sterilization or the use of long-acting birth control); Paltrow & Flavin, *supra* note 12 (discussing the continued criminalization of women for negative birth or pregnancy outcomes); CORR. ASS’N OF N.Y., *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, available at <http://www.correctionalassociation.org/resource/reproductive-injustice> [<http://perma.cc/9YS5-JGEW>] (reporting that despite anti-shackling laws many incarcerated women in New York are still handcuffed to the bed while giving birth).

15 I use the phrase “reproductive freedom” here because I believe it best names the broader social movement that includes both the reproductive rights movement and reproductive justice movement. These two distinct movements have long worked parallel to one another but are today more and more often collaborating in their advocacy efforts. My choice to eschew either in this instance is in deference to and recognition of the important work both factions have contributed to and continue to engage in.

16 As indicated above, these are each different branches of a larger movement. Activists and advocates within each have different, but related, priorities. “Reproductive rights” typically refers to the mainstream movement, often called “pro-choice,” whereas “reproductive justice” refers to a more commonly grassroots movement rooted in the experiences of women of color. For more on the difference between these movements, see generally Hooton, *supra* note 7.

17 For example, though the 2014 decision in *Hobby Lobby* centered on employee coverage of contraception, the plaintiffs sought relief, in part, because they argued that many contraceptives are abortifacients. This line of reasoning, though scientifically dubious, opens the door to abortion-centered regulation. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). For further evidence that abortion-related concerns permeate legislation of family planning and other reproductive health services, see *infra* note 81.

impact these disciplining mechanisms have on women who are either not pregnant or who are and wish to carry to term.¹⁸

A long history of progressive advocates marginalizing both Latina women and their reproductive health needs have contributed to what Professor Kimberlé Crenshaw calls “conditions of possibility.” Disregard for the needs of women of color within these social movements, coupled with pervasive social stigma associated with reproductive healthcare, has rendered women of color especially susceptible to this particular form of contemporary, state-imposed gender and racial oppression. This Note uses undocumented women in the Rio Grande Valley as its site of study, looking at the conditions present in this geographic and social space that make its inhabitants particularly vulnerable. I point to the broad ripple effects of anti-abortion legislation on other areas of reproductive freedom and healthcare to show how one instance of reproductive oppression reinforces myriad others. Using frames established in earlier intersectional works, this Note illuminates the ways that anti-abortion measures work as a tool of racial oppression. My purpose is to move conversations about anti-abortion regulations from the doctrinal realm of “choice” and “undue burden” into more critical, intersectional discussions about the racial and gender dynamics at play in reproductive oppression.

Part I of this Note lays out the constituent systems of immigration enforcement and anti-abortion policies in recent Texas history and situates these systems within larger national trends. Part II addresses the way the systems work together, using a framework of “intersectional subordination” to highlight the particular violence they work upon undocumented immigrant Latina women and Latino/a communities more broadly. Part III gives a brief historical perspective on the intersectional failure of the Chicano/a¹⁹ rights

18 Within the realm of reproductive justice theory, organizing, and activism, significant and important work has been done to address the failure of the reproductive rights movement to center the needs of women of color. Much of this academic work, however, suggests that the disproportionate effect of anti-abortion policies felt by women of color communities is merely “collateral damage” in the larger anti-choice/pro-life mission to prevent white women from choosing against pregnancy. LORRETTA J. ROSS, *THE COLOR OF CHOICE: WHITE SUPREMACY AND REPRODUCTIVE JUSTICE* (2006), <http://www.racialequitytools.org/resourcefiles/The-Color-of-Choice---Public-Version-with-footnotes-1.pdf> [http://perma.cc/JF96-YQAM]. In contrast, I argue that anti-abortion policies are deployed specifically with women of color communities in mind as a policing mechanism meant to maintain white supremacist social and political hierarchies.

19 Throughout this Note, with the exception of Part IV, I use the term Latino/a to refer to the population I discuss. I do this because I am referencing people with national and ancestral origins in Latin America, not only Mexico. In Part IV, and when referring to that portion of this Note, I use the term “Chicano/a.” Chicano/a refers primarily to individuals of Mexican descent. Because, in Part IV, I am speaking of a particular movement in American history, I rely on the language and name used within and about that movement.

and reproductive rights movements. It argues that the marginalization of Latina women generally, and activism against Latina reproductive oppression specifically, has contributed to the development of an abortion jurisprudence that fails to remedy the expansive negative outcomes of anti-abortion policies. Finally, Part IV concludes by arguing that the undue burden standard fails to protect marginalized women from violations of their reproductive and bodily rights and argues for reworking abortion jurisprudence and reproductive justice advocacy to better encompass the full intersectional experience and racialized outcomes of anti-abortion policies.

I. Two Forces at Work

Texas is home to approximately 4.3 million immigrants,²⁰ the majority of whom are Latino²¹ and about 1.7 million of whom are undocumented.²² The foreign-born population in Texas, consisting of both documented and undocumented immigrants, is largely concentrated in seven areas of the state, one of which is the Lower Rio Grande Valley (“The Valley”).²³ Four counties comprise The Valley—Starr, Hidalgo, Willacy, and Cameron—and the region

20 *Texas State Data Profile “Demographics and Social” for 2012*, MIGRATION POLICY INST., <http://www.migrationpolicy.org/data/state-profiles/state/demographics/TX> [<http://perma.cc/5Z69-HW9X>] (last visited Jan. 9, 2015).

21 CAROLE KEETON STRAYHORN, SPECIAL REPORT, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY (Dec. 2006), <http://www.coloradoimmigrant.org/downloads/TX%20Study%20on%20Undocumented%20Immigrants%20and%20Economy.pdf> [<http://perma.cc/WPV2-NHWU>] [hereinafter COMPROLLER REPORT] (71% of Texas’s foreign-born population is Latino). A recent report shows an increase in the Asian population in Texas and indicates that Latinos now make up closer to 60% of the foreign-born population. Sue Owen, *20% of Austinites foreign-born, mostly from Mexico, Asian nations*, POLITIFACT.COM, <http://www.politifact.com/texas/statements/2013/nov/20/city-austin/20-austinites-foreign-born-mostly-mexico-asian-nat> [<http://perma.cc/N52U-AJCM>] (66% of Austin’s foreign-born population is from Latin American nations and suggesting that this reflects broader Texas demographics).

22 MICHAEL HOFFER, NANCY RYTINA & BRYAN C. BAKER, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, 4 (Feb. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf [<http://perma.cc/82KP-6TAB>]. “Undocumented immigrants” or “unauthorized immigrants” refers to non-citizens present in the United States without proper visa status. Many of these citizens entered the United States legally, but failed to leave at the end of their legal status duration. Many entered the United States illegally. Distinguishing between the two is nearly impossible, thus I do not attempt to do so in this Note. I recognize that the language surrounding immigrants is politically and socially fraught and choose to use this terminology because it eschews the violent terminology of “alien” and “illegality.” Further, it aligns with U.S. Census Bureau and the Department of Homeland Security language used in their population reports and estimates.

23 COMPROLLER REPORT, *supra* note 21.

includes a string of *colonias*, unincorporated communities that house many of the region's Latino/a immigrants²⁴ and typically lack such infrastructure as electricity, paved roads, sewage and drainage systems, and clean water.²⁵ In total, The Valley has a population of approximately 1.3 million people.²⁶ The vast majority is Latino/a²⁷ and over one quarter is foreign-born.²⁸ The region is one of the most impoverished and poorly educated in the country, with almost half its residents reporting an education level below ninth grade and over a third living under the poverty line.²⁹

These stark conditions of inequality and disadvantage make The Valley especially vulnerable to neoliberal policies that have dominated American governance in the past several decades.³⁰ The term neoliberalism refers to policies that dismantle the public safety

24 *What is a Colonia?*, TEX. SEC'Y OF STATE, http://www.sos.state.tx.us/border/colonias/what_colonia.shtml [<http://perma.cc/X5YP-T6ZQ>] (last visited July 15, 2015).

25 NUESTRO TEXAS, CTR. FOR REPRODUCTIVE RTS. & NAT'L LATINA INST. FOR REPRODUCTIVE HEALTH, NUESTRA VOZ, NUESTRA SALUD, NUESTRO TEXAS: THE FIGHT FOR WOMEN'S REPRODUCTIVE HEALTH IN THE RIO GRANDE VALLEY 15 (2013), <http://www.nuestrotexas.org/pdf/NT-spread.pdf> [<http://perma.cc/47FQ-TCKB>].

26 RIO GRANDE VALLEY TEXAS, <http://riograndevalleytx.us> [<http://perma.cc/CB8R=85GE>] (last visited July 15, 2015) ("As of January 1, 2012, the U.S. Census Bureau estimated the population of the Metropolitan Area known as the Rio Grande Valley at 1,305,782."). See also U.S. CENSUS 2010 AMERICAN FACTFINDER, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml#none [<http://perma.cc/F6FU-52ML>] (last visited July 15, 2015) (search for Cameron County showing population of 406,220), (search for Hidalgo County showing population of 774,769), (search for Starr County showing population of 60,968), (search for Willacy County showing population of 22,134). County populations total to 1,264,091.

27 *2010 Census County Quickfacts for Cameron County*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48061.html> [<http://perma.cc/KZ2V-3GQB>] (last visited June 23, 2015) (showing Cameron County is 88.5% Hispanic/Latino); *2010 Census County Quickfacts for Hidalgo County*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48215.html> [<http://perma.cc/BL7R-QWE3>] (last visited June 23, 2015) (showing Hidalgo County is 91% Hispanic/Latino); *2010 Census County Quickfacts for Starr County*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48427.html> [<http://perma.cc/A2ZC-KPHF>] (last visited June 23, 2015) (showing Starr County is 95.7% Hispanic/Latino); *2010 Census County Quickfacts for Willacy County*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48489.html> [<http://perma.cc/DRL3=9XU9>] (last visited June 23, 2015) (showing Willacy County is 87.4% Hispanic/Latino).

28 NUESTRO TEXAS, *supra* note 25, at 14.

29 NUESTRO TEXAS, *supra* note 25, at 15.

30 Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477–78 (2012) [hereinafter Roberts, *Prison, Foster Care*] (discussing the rise of neoliberalism within the United States and its impact on communities of color).

net and transfer services into “the private realm of family and market.”³¹ Neoliberal policies shift public services into the private market and simultaneously strengthen punitive systems that intervene in disenfranchised communities, particularly those of color.³²

The effects of state government divestment from the reproductive healthcare safety net alongside increased federal funding for immigrant detention and deportation provide an example of the mechanisms neoliberal governance deploys to contain oppressed communities. In the case of undocumented immigrant women in The Valley, this containment is both physical and social. The immigration system uses the threats of apprehension, detention, and deportation to prevent travel and movement, trapping undocumented immigrants in poor, undeveloped border communities. The intersection of that threat with the evisceration of the reproductive healthcare safety net especially burdens undocumented Latinas, policing their immigration status, bodies, and family structures, and limiting their ability to rise in the social hierarchy.

A. The Rise of Coercive Detention and Deportation

In the past decade, immigration enforcement has increased dramatically throughout the United States and, particularly, in Texas.³³ Though illegal immigration has largely “leveled off” over the past eight years, the Obama administration has adopted a strong enforcement policy in order to assert its commitment to securing the nation’s borders.³⁴ Increased enforcement has manifested itself not only in the greater presence of immigration officials in border communities, but also in a dramatic rise of deportations³⁵ and an overall

31 *Id.* at 1477.

32 *Id.* at 1477–78.

33 Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RESEARCH CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013> [<http://perma.cc/QZW2-2DGS>] (stating that during his tenure President Obama has overseen the deportation of over two million immigrants).

34 WILLIAM C. GRUBEN & TONY PAYAN, JAMES A. BAKER III INST. PUB. POL’Y, “ILLEGAL” IMMIGRATION ON THE U.S.-MEXICO BORDER: IS IT REALLY A CRISIS? 7 (2014), <http://bakerinstitute.org/files/8338> [<http://perma.cc/59CS-HNPH>] (explaining that illegal immigration is estimated based on rate of apprehensions, which has dropped 64% since 2004, but noting that apprehensions have increased recently from its lowest point in 2011).

35 *See generally* ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM (2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf [<http://perma.cc/J5ZZ-XE9G>] [hereinafter AMERICAN EXILE].

policy shift toward detention as a “deterren[t]” mechanism.³⁶ In 2013 and 2014, the federal government used an influx of women and children to justify a dramatic escalation of enforcement along the United States-Mexico border, especially in the Rio Grande Valley.³⁷ The increased presence of the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”), and Customs and Border Patrol (“CBP”) has had the government’s intended effect of stemming the tide of new would-be immigrants,³⁸ but, meanwhile, has had a devastating impact on Latino/a communities in The Valley.³⁹

1. The National Context

According to a recent report by the American Civil Liberties Union (“ACLU”), in 2013 the federal government conducted a record 438,421 deportations, the majority through cursory administrative procedures without a hearing or an immigration judge present⁴⁰ against immigrants without criminal convictions.⁴¹ Since 1996, DHS has employed expedited removal proceedings against people apprehended both at the border and within the United States interior.⁴² Among those deported are “arriving” immigrants (i.e., those apprehended while attempting to enter the United States), as well as asylum seekers, individuals present in the United States with legal status, and, in some instances, United

36 R.I.L-R v. Johnson, No. CV 15-11 (JEB), 2015 WL 737117, at *5 (D.D.C. Feb. 20, 2015); *see also Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, Memorandum from Jeh Charles Johnson, Secretary of the Department of Homeland Security, to ICE, CBP, and U.S. Citizenship and Immigration Service (“USCIS”) (Nov. 20, 2014) (directing DHS officials to prioritize removal of “aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States”); Cristina Costantini & Jorge Rivas, *Shadow Prisons*, FUSION (Feb. 4, 2015), <http://interactive.fusion.net/shadow-prisons> [<http://perma.cc/ULP5-RMQY>].

37 GRUBEN & PAYAN, *supra* note 34, at 7 (showing that, since 2003, Border Patrol has doubled its staffing on the United States-Mexico border), and 5 n.3 (noting that between 2013 and 2014 the DHS shifted ratio of agents along the border, moving large numbers into the Rio Grande Valley from more western locations due to reported rise in border crossings by women and children). *See also* AMERICAN EXILE, *supra* note 35.

38 GRUBEN & PAYAN, *supra* note 34, at 7.

39 AMERICAN EXILE, *supra* note 35, at 94.

40 AMERICAN EXILE, *supra* note 35, at 2.

41 Deportations of “non-criminals” have increased from 198,000 in 2011 to 240,000 in 2013. For further comparison, in 2002, the United States deported only 92,000 “non-criminal” immigrants. Gonzalez-Barrera & Krogstad, *supra* note 33.

42 AMERICAN EXILE, *supra* note 35, at 4.

States citizens.⁴³ The hastiness of expedited removal procedures can lead to unfair—and unconstitutional—outcomes for people apprehended and removed, and aggressive border enforcement increases the risks of such outcomes.⁴⁴ Further, the wide range of individuals subject to these procedures creates a threat for anyone living in a heavily policed region or community like The Valley.

Apprehension by DHS, ICE, or CBP poses risks beyond deportation. These agencies can choose to apprehend any person they encounter who is unable to provide evidence of his or her legal presence in the United States and keep these persons in detention. Approximately 23,000 to 25,000 immigrants are held nightly in Criminal Alien Requirement (“CAR”) prisons—low-security, typically private and for-profit, detention centers established specifically to hold non-citizens.⁴⁵ Most people detained in these facilities are held under immigration-related charges, particularly illegal entry and re-entry, meaning they have left the country and attempted to return without proper visa status or other legal documentation.⁴⁶ Overall, the increase of DHS, ICE, and CBP enforcement leaves immigrant populations, particularly undocumented individuals or authorized immigrants and citizens living with undocumented immigrants, extremely vulnerable.

Though President Obama has used executive orders to offer relief to some undocumented immigrants living in the United States,⁴⁷ these orders actually protect a relatively small

43 AMERICAN EXILE, *supra* note 35, at 4–6, 11.

44 AMERICAN EXILE, *supra* note 35, at 5.

45 ACLU, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 2–5 (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> [<http://perma.cc/NJM4-3TLJ>] [hereinafter WAREHOUSED AND FORGOTTEN] (describing general practices and background of CAR facilities); *id.* at 19 (“Today, more than 25,000 ‘low-security criminal aliens’ are incarcerated in thirteen private prisons under CAR contracts. Five of these CAR prisons are located in Texas, and they are home to roughly half of BOP’s segregated non-citizen population.”); *id.* at 22 (majority of prisoners detained on immigration misdemeanor and felony charges, but others sentenced for drug-related crimes and other miscellaneous charges); Constanini & Rivas, *supra* note 36.

46 WAREHOUSED AND FORGOTTEN, *supra* note 45, at 20 (“Although BOP refers to the individuals it consigns to CAR prisons as ‘criminal aliens,’ many were convicted only of immigration offenses like unlawfully crossing the border.”); *supra* note 45, at 22–23 (“By 2012, [the Bureau of Prisons] was holding 23,700 people convicted of immigration offenses in its custody on a daily basis—more than the total state prison populations of Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont combined.”).

47 The first of these is the Deferred Action for Childhood Arrivals program, which was announced June 15, 2012. See *Consideration of Deferred Action for Childhood Arrivals*, USCIS, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<http://perma.cc/HWF7-95CA>] (last

population of immigrants.⁴⁸ Indeed, over six million undocumented immigrants remain at risk⁴⁹ and, alongside the announcements of the Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parental Accountability (“DAPA”), DHS reiterated its intention to continue escalating enforcement among unprotected populations.⁵⁰ Because the decision to continue increasing detention and deportation has garnered significantly less media attention than the more benevolent Deferred Action programs, the federal government has been able to use DACA and DAPA as cover for a general strengthening of its coercive and punitive immigration system.

2. Enforcement Along the Texas-Mexico Border

The situation facing immigrants in Texas exists within this broader national context of enforcement. Due to its geographic location, the Rio Grande Valley has experienced the brunt of additional enforcement measures in the state. Communities that lie within the

visited Jan. 9, 2015). The second of these executive actions is known as the Deferred Action for Parental Accountability and was announced November 20, 2014; it was renamed Deferred Action for Parents of Americans and Lawful Permanent Residents. See *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens and Permanent Residents*, Memorandum from Jeh Charles Johnson, Secretary of the Department of Homeland Security (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/ZFV9-CJVU>] [hereinafter DHS November Memo]; *Executive Actions on Immigration*, USCIS, <http://www.uscis.gov/immigrationaction> [<http://perma.cc/B2YS-E4HR>] (last visited July 16, 2015).

48 Moreover, it remains unclear whether these actions will remain available for eligible unauthorized immigrants. As of this writing, a federal district court in Texas has ruled both DAPA and DACA unconstitutional. DHS and DOJ have appealed the case to the Fifth Circuit and it will likely find its way to the Supreme Court in the 2015–2016 term. See *Texas v. United States*, B–14–254, 2015 WL 648579, at *1 (S.D. Tex. Feb. 16, 2015).

49 Fernando Peinado, *The Immigrants Left Behind by Obama’s Executive Action*, BBC NEWS MAG. (Dec. 2, 2014, 7:05 PM), <http://www.bbc.com/news/magazine-30284316> [<http://perma.cc/56MK-GSM8>].

50 White House Office of the Press Secretary, *FACT SHEET: Immigration Accountability Executive Action* (Nov. 20, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<https://perma.cc/TRB7-88RC>] (detailing a series of executive actions announced on November 20, 2014 including measures to “crack down on illegal immigration at the border” such as “shifting resources to the border” and “streamlining the immigration court process”). See also *Southern Border and Approaches Campaign*, Memorandum from Jeh Charles Johnson, Secretary of the Department of Homeland Security (Nov. 20, 2014) (discussing the continued need for increased DHS efforts in south Texas due to the “spike” in illegal migration); *Secure Communities*, Memorandum from Jeh Charles Johnson, Secretary of the Department of Homeland Security (Nov. 20, 2014) (discussing end of the Secure Communities program and its replacement with Priority Enforcement Program to take over Secure Communities’ aim to “identify and facilitate the removal of criminal aliens”).

nation's one hundred mile "border zone," as do the counties and *colonias* of The Valley, are subject to various moving "tactical checkpoints" as well as permanent checkpoints along major highways.⁵¹ In 2009 DHS reported at least eighteen such tactical checkpoints throughout the Rio Grande Valley, including the Lower Rio Grande Valley.⁵² Any time a Latino/a in the region chooses to travel outside of the immediate community, particularly if that travel requires driving on a highway, s/he risks an encounter with DHS, ICE, or CBP. If a Latino/a is an immigrant, and especially if s/he is an undocumented immigrant, such an encounter could result in detention or deportation.

In addition to the CAR prison in Willacy County, South Texas is newly home to the largest "family residential center" in the nation's history.⁵³ Opened in December 2014, the South Texas Family Residential Center ("Dilley" or "Dilley Center") is a private, for-profit detention center intended especially for women and young children.⁵⁴ DHS opened the center to replace the temporary facility in Artesia, New Mexico, which became overfilled during the summer of 2014 by women and children seeking asylum.⁵⁵ Dilley has bed space for 2,400 detainees and is quickly moving toward capacity.⁵⁶ Families held in Dilley are often fleeing horrific, life-threatening conditions in their home countries, including intimate partner violence, gang violence, and discrimination due to sexuality and disability, among other things.⁵⁷

51 Cristina Costantini, *For Undocumented Immigrants, It's Nearly Impossible To Get an Abortion in South Texas*, FUSION (Oct. 10, 2014), <http://fusion.net/story/20689/for-undocumented-immigrants-its-nearly-impossible-to-get-an-abortion-in-south-texas/> [<http://perma.cc/YZ53-L5SU>] (last visited Dec. 30, 2014).

52 U.S. GOV'T ACCOUNTABILITY OFFICE, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS (2009), available at <http://www.gao.gov/assets/300/294558.html> [<http://perma.cc/PYU7-HDPX>]. Some reports indicate that there may be as many as seventy-one total checkpoints (both tactical and permanent) in South Texas, but it is unclear whether these reports extend their understanding of "The Valley" beyond the four counties discussed in this Note. For a detailed overview of tactical and permanent immigration checkpoints, see U.S. GOV'T ACCOUNTABILITY OFFICE, BORDER PATROL: AVAILABLE DATA ON INTERIOR CHECKPOINTS SUGGEST DIFFERENCES IN SECTOR PERFORMANCE (2005), <http://www.gao.gov/new.items/d05435.pdf> [<http://perma.cc/5KTD-LBWM>].

53 Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES, Dec. 16, 2014, at A18.

54 *Id.*

55 *Id.*

56 Interview with Elora Mukherjee, Associate Clinical Professor of Law, Columbia Law School, in N.Y.C., N.Y. (Feb. 27, 2015).

57 *Id.*

Prior to the 2013–2014 “surge” of women and children, DHS policy allowed asylum-seekers to remain with family or friends living in the United States while they awaited the processing of their applications.⁵⁸ But during the summer of 2014, Vice President Joe Biden and DHS Secretary Jeh Johnson announced a new “no release” policy for detained women and children.⁵⁹ Immigration advocates have called this a “mommy penalty,” as the policy impacts only women traveling with their children.⁶⁰ Single men, single women, and children traveling alone seeking asylum are typically released from custody or granted relatively low bonds.⁶¹ This allows refugees to integrate into a community and more easily access legal services throughout the asylum process. The shift in DHS policy, however, leaves women and children to languish in detention centers while they seek asylum, after they have been apprehended.

Family detention centers have deplorable, and often dangerous, conditions.⁶² Though no such accounts have surfaced from Dilley, detainees from the now-closed Hutto facility and the Karnes City, Texas center have reported multiple instances of sexual assault and abuse at the hands of guards.⁶³ Advocates that have visited Dilley further report that women there face particularly gendered punishments and coercive measures including rules that require women to care for their children around-the-clock, even while meeting with attorneys, and disciplinary measures that often prevent women from letting their children crawl or play.⁶⁴

DHS has been vocal that its shift toward detention seeks to deter women and children considering attempting escape from their home countries to the United

58 *Id.*

59 See Complaint for Declaratory and Injunctive Relief at 2, *R.I.L.R. v. Jeh Johnson*, ___ F. Supp. 3d ___ (D.C.C. 2015) (No. 15–11 (JEB), 2015 WL 737117), available at https://www.aclu.org/sites/default/files/assets/02_complaint.pdf [<http://perma.cc/23HJ-ULGK>].

60 Interview with Elora Mukherjee, *supra* note 56.

61 Interview with Elora Mukherjee, *supra* note 56.

62 Interview with Elora Mukherjee, *supra* note 56.

63 Ian Gordon, *Inside Obama's Family Deportation Mill*, MOTHER JONES (Dec. 19, 2014, 6:15 AM), <http://www.motherjones.com/politics/2014/12/family-detention-artesia-dilley-immigration-central-america> [<http://perma.cc/XK25-LYP7>] (discussing allegations of sexual assault in Hutto and Karnes City detention centers); see also LUTHERAN IMMIGRATION & REFUGEE SERVICE AND WOMEN'S REFUGEE COMM'N, LOCKING UP FAMILY VALUES AGAIN: A REPORT ON THE RENEWED PRACTICE OF FAMILY IMMIGRATION DETENTION I (2014), <https://womensrefugeecommission.org/images/zdocs/Locking-Up-Family-Values-Again-Exec-Summ.pdf> [<http://perma.cc/PS7W-4TWK>].

64 Interview with Elora Mukherjee, *supra* note 56.

States.⁶⁵ Further, the abhorrent circumstances inside family detention centers encourage immigrants to drop their asylum cases and return to their native countries.⁶⁶ Such policies particularly burden women and children who are vulnerable both inside and outside of detention centers.⁶⁷ Policies that encourage a return “home” and discourage asylum-seeking do injustice to immigrants fleeing dangerous political and personal circumstances and fail to provide the protection from violence and persecution that is the very reason for the asylum process.

3. Immigration as a Mechanism of the Police State

The detention and deportation system stands as one of the primary mechanisms of America’s punishment system.⁶⁸ Within the regime Beth E. Richie calls “the prison nation,” detention and deportation work to constrain the movement and social roles of immigrant Latinos/as in America.⁶⁹ Defining the term, Richie identifies four pillars of social control: (1) “practices that increasingly punish or disadvantage norm violations”; (2) “institutional regulations designed to intimidate people without power into conforming with dominant cultural expectations”; (3) “legislation that deliberately narrows opportunities for cultural expansion”; and (4) “ideological schemes that build consensus around conservative values.”⁷⁰ In this frame, detention and deportation serve to punish immigrant Latinos/as who dare to move outside of the geographical space federal and state governments have

65 *R.I.L.-R v. Johnson*, No. CV 15-11 (JEB), 2015 WL 737117, at *4–5 (D.D.C. Feb. 20, 2015); *see also* White House Press Conference Transcript, June 20, 2014, *available at* <https://www.whitehouse.gov/the-press-office/2014/06/20/press-call-efforts-enhance-enforcement-southwest-border> [<http://perma.cc/9J5F-QWFN>] (“We are surging resources to increase our capacity to detain individuals and adults with children, and to handle immigration court hearings. This will allow Immigration and Customs Enforcement—or ICE—to return unlawful migrants from Central America who are ordered removed to their home countries more quickly.”).

66 White House Press Conference Transcript, *supra* note 65.

67 The Mexican American Legal Defense and Education Fund (“MALDEF”) has recently filed two complaints with the Department of Homeland Security regarding circumstances at the Family Detention Center in Karnes, Texas. The first alleges significant and repeated sexual assault of women by detention center guards. The second alleges inadequate food, health, and mental services as well as unjust disciplinary tactics. News Release, MALDEF, Complaint Detailing Sexual Abuse, Extortion, and Harassment of Women at ICE Family Detention Center in Karnes City (Oct. 2, 2014), *available at* http://www.maldef.org/news/releases/maldef_other_groups_file_complaint_ice_family_detention_center_karnes_city [<http://perma.cc/Z8G5-9T74>].

68 Roberts, *Prison, Foster Care*, *supra* note 30, at 1478.

69 BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 3–4 (2012).

70 *Id.*

carved out for them,⁷¹ or to seek work outside of the largely agricultural, construction, and care-based industries to which immigrants are so often relegated.⁷² Additionally, as Richie further points out, the detention and deportation systems use immigrant Latinos/as as scapegoats,⁷³ blaming them for, among other things, the use of tax dollars (through over-reliance on public services), broader economic harms (such as a dearth of jobs for American citizens), and crime (particularly in the war on drugs).

The presence of family detention and CAR facilities in the Rio Grande Valley, and the enforcement power they represent, looms large over South Texas immigrant communities. The facilities and horrific experiences of those held within them reinforce the “deportability” of immigrant Latinos/as in the United States.⁷⁴ Practically, too, Latinos/as in South Texas face the regular possibility of interacting with DHS, ICE, or CBP. For immigrants, both documented and undocumented, such encounters can ultimately mean detention or deportation, however inappropriate such measures may be.⁷⁵

Latino/a citizens also experience subordination at the hands of the immigration system. Many citizens in The Valley, for instance, live with family members who are undocumented. As detailed by the ACLU’s report addressing the deportation of United States citizens, even Latinos/as born and raised in the United States face personal risk in these heavily policed areas.⁷⁶ Furthermore, Latino/a citizens report fearing that by venturing too far outside of the community, or otherwise stepping outside of their socially assigned roles, they may “out” their family members.⁷⁷

The assertion of the federal government’s power to detain and deport—whether through “tactical checkpoints” or detention centers—creates what Lisa Sun-Hee Park calls

71 For a brief history of the establishment of Texas’ *colonias* and their current circumstances, see *Colonias FAQ*, TEX. SEC’Y OF STATE, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> [<http://perma.cc/Q39K-5YTJ>].

72 LISA SUN-HEE PARK, ENTITLED TO NOTHING: THE STRUGGLE FOR IMMIGRANT HEALTH CARE IN THE AGE OF WELFARE REFORM 50 (2011).

73 RICHIE, *supra* note 69, at 3–4.

74 PARK, *supra* note 72, at 15.

75 AMERICAN EXILE, *supra* note 35, at 44–46.

76 AMERICAN EXILE, *supra* note 35, at 44–46.

77 Esther Yu-His Lee, *They Came to America For Freedom and Opportunity, But Ended Up Trapped in Their Own Home*, THINK PROGRESS (July 23, 2014, 9:30 AM), <http://thinkprogress.org/immigration/2014/07/23/3462037/trapped-rio-grande-valley/> [<http://perma.cc/M5WP-VCWP>].

“a liminal state of perpetual insecurity.”⁷⁸ Park argues that the government deports a select subsection of the immigrant population “in order that most may remain in the United States as vulnerable workers to ensure that U.S. citizens enjoy low food cost and home care.”⁷⁹ Stories from Dilley and other facilities like it work their way into Latino/a communities in the surrounding areas and serve as a warning. These forces—both physical and psychic—constrain Latino/a populations to particular, “acceptable” labor forces and geographical locations. Financial and social investment⁸⁰ in increased immigration enforcement under neoliberalism violently disrupts immigrant communities. These policies punish and disenfranchise Latinos/as while simultaneously re-entrenching patriarchal white supremacist social hierarchies.

B. The Far-Reaching Impact of Anti-Abortion Measures

Over the past four years, the Texas state legislature has eviscerated the state’s reproductive health safety net.⁸¹ Beginning in 2011, a series of policy changes motivated by anti-abortion sentiment⁸² restricted funding and increased regulation of both family planning centers (that do not provide abortion) and reproductive health clinics (that do). Fifty of the state’s seventy-one family planning clinics have been shuttered⁸³ and an

78 PARK, *supra* note 72, at 15.

79 PARK, *supra* note 72, at 15.

80 Costantini & Rivas, *supra* note 36.

81 For a brief but comprehensive review of Texas policies related to reproductive healthcare, see Kinsey Hasstedt, *How Texas Lawmakers Continue to Undermine Women’s Health*, GUTTMACHER INST. (May 20, 2015), <http://www.guttmacher.org/media/inthenews/2015/05/20> [<http://perma.cc/QCP3-DN3B>]. It is also worth noting that this series of legislation developed amidst a nation-wide attack on abortion providers and access to the procedure. The Guttmacher Institute reports that between 2011 and 2013 more anti-abortion bills have passed state legislatures than has been passed in the past ten years. While the full range of this legislation is outside the scope of this paper, the national trend indicates that reproductive oppression through anti-abortion measures has become a new American norm. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—And the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL’Y REV. 9, 9 (Winter 2014), available at <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html> [<http://perma.cc/4EDM-JJNJ>].

82 Wade Goodwyn, *Gov. Perry Cut Funds For Women’s Health in Texas*, NPR (Sept. 20, 2011, 12:01 AM), <http://www.npr.org/2011/09/20/140449957/gov-perry-cut-funds-for-womens-health-in-texas> [<http://perma.cc/BLM5-4LMV>] (reporting that state Representative Wayne Christian stated, “Well of course this is a war on birth control and abortions and everything—that is what family planning is supposed to be about.”).

83 See *id.* (noting that prior to these cuts, in 2011, Texas had seventy-one “family planning clinics,” which do not provide abortion services).

additional twenty-six have stopped providing family planning services.⁸⁴ All but nine of the state's reproductive health clinics stand at imminent risk of closure, pending action by the United States Supreme Court.⁸⁵

These results have been devastating for women across Texas. The losses have been especially acute in the Rio Grande Valley, an area already designated a “medically underserved area” because of its dearth of primary healthcare providers.⁸⁶ Because of the nature of the attacks, the divestment from family planning has been particularly burdensome on Latina women—and even more so on immigrant and undocumented immigrant women—who are less likely to have health insurance⁸⁷ or access to other reproductive healthcare options.⁸⁸ While opposition to abortion motivated these maneuvers, their results have been to diminish the overall reproductive health and safety of Latina women, including women who are not pregnant and those who are but want to continue their pregnancies full-term.

84 Becca Aaronson, *Legislature Restores Some Family Planning Cuts*, N.Y. TIMES, Mar. 1, 2013, at A17.

85 *Whole Woman's Health v. Cole*, No. 14A1288, 2015 WL 3947579, at *1 (U.S. June 29, 2015) (granting a stay of the Fifth Circuit's decision that would shutter at least seven of the open reproductive health clinics in Texas, pending the filing and disposition of a writ of certiorari). *See also* Andrea Grimes, *Texas' Omnibus Anti-Abortion Law Heads to the Fifth Circuit Court*, RH REALITY CHECK (Jan. 6, 2015, 9:28 AM), <http://rhrealitycheck.org/article/2015/01/06/texas-omnibus-anti-abortion-law-heads-fifth-circuit-court/> [<http://perma.cc/W3DD-WDYG>] (addressing the impact of HB2 as of January 2015 prior to the issuance of the 5th Circuit's June 9, 2015 ruling in *Whole Woman's Health v. Cole*, No. 14–50928, 2015 WL 3604750, at *1 (5th Cir. June 9, 2015), modified by *Whole Woman's Health v. Cole (II)*, No. 14–50928, 2015 WL 3852971, at *1 (5th Cir. June 19, 2015) (Mem.) (partially vacating district court's injunction of the ASC requirement)).

86 The Department of Health and Human Services (“HHS”) designates all four counties of The Valley “medically underserved areas.” This designation is based on the ratio of primary care providers per one thousand residents and accounts for other health markers such as infant mortality rate and elderly population. For more information on this rating process, see *Health Professional Shortage Areas & Medically Underserved Areas/Populations*, HHS, HEALTH RESOURCES & SERVICES ADMIN. (“HRSA”), <http://www.hrsa.gov/shortage> [<http://perma.cc/M292-QSJ8>] (last visited July 16, 2015).

87 JENNIFER J. FROST & ANNE K. DRISCOLL, *SEXUAL AND REPRODUCTIVE HEALTH OF U.S. LATINAS: A LITERATURE REVIEW* 12 (2006), <https://www.guttmacher.org/pubs/2006/02/07/or19.pdf> [<http://perma.cc/B3YS-NNM9>] (“[Latinas] are more likely to be uninsured and unable to pay for care without insurance.”); Risha Foulkes et al., *Opportunities for Action: Addressing Latina Sexual and Reproductive Health*, 37 GUTTMACHER POL'Y REP. 39, 39 (Mar. 2005), available at <http://www.guttmacher.org/pubs/journals/3703905.html> [<http://perma.cc/NG4B-D8VR>] (“43% of low-income Latinos were uninsured in 2002, in contrast with 25% of low-income whites and 26% of low-income blacks”).

88 Foulkes et al., *supra* note 87, at 40 (noting that Latinas are “finding that basic sexual and reproductive health services, information and referrals are unavailable at the growing number of hospital clinics operated by Catholic institutions”).

1. State Budgetary Divestment From Family Planning

In 2011, the Texas legislature announced a two-thirds cut to its family planning program, reducing the budget from \$111 million to just \$37.9 million.⁸⁹ This, on its own, would have been disastrous for many of the clinics throughout the state, but, making matters worse, the legislature also altered its funding distribution criteria.⁹⁰ The new funding structure established a three-tier system giving funding priority to public clinics providing family planning *in addition to* other health services. The plan gave second priority to “nonpublic entities that provide comprehensive primary and preventative care[,] including family planning,” and third priority to clinics providing only family planning services.⁹¹ Thus, the new model redirected a large percentage of funding from clinics specializing in family planning services to those that offered such services as only part of their practice.

Second in its string of anti-abortion legislation, the state legislature instituted a prohibition on funding any Planned Parenthood affiliate health center because of these clinics’ connections with abortion providers.⁹² The previous year Planned Parenthood affiliates served more than half of all Texas women that received family planning care through the state’s Women’s Health Program (“WHP”).⁹³ The “affiliate rule” now legally prevents the WHP from providing any funding whatsoever to clinics associated with Planned Parenthood.⁹⁴ And because federal law restricts funding based on state designation,⁹⁵ the rule further barred clinics from receiving over \$32 million in federal matching Medicaid funds.⁹⁶

The state’s tiered funding model together with the affiliate rule disproportionately affected third-tier clinics, forcing 39% of them to close and almost all to reduce staffing,

89 NUESTRO TEXAS, *supra* note 25, at 17.

90 NUESTRO TEXAS, *supra* note 25, at 17.

91 NUESTRO TEXAS, *supra* note 25, at 17.

92 NUESTRO TEXAS, *supra* note 25, at 17; *see also* Goodwyn, *supra* note 82.

93 NUESTRO TEXAS, *supra* note 25, at 17.

94 NUESTRO TEXAS, *supra* note 25, at 18.

95 Social Security Act §§ 2105(c)(7)(a)–(c), 42 U.S.C §1397(ee) (2006).

96 NUESTRO TEXAS, *supra* note 25, at 17.

hours, and services offered.⁹⁷ These closures included nine reproductive health clinics in The Valley. Though twenty-three clinics remained open following the funding changes, the cuts significantly diminished their capacity. Some clinics now open only once a week and their range of services—including available birth control options—has been severely limited.⁹⁸ The remaining clinics are largely clustered in the more urban areas of the region. Thus, rural residents, particularly in the *colonias*, face greater difficulty securing care.⁹⁹ The combination of limited hours and services along with the necessary travel to clinics makes access nearly impossible for some Latinos/as.

2. Texas House Bill 2

The passage in 2013 and enactment in 2014 of House Bill 2 (“H.B. 2”) further exacerbated the crisis in The Valley. The omnibus bill instituted multiple provisions regulating abortion access. Two of these provisions, in particular, have placed burdens on physicians and clinics, severely limiting available care options. The first provision requires all abortion providers to secure admitting privileges in a hospital within thirty miles of their practice,¹⁰⁰ despite consensus among medical experts that such privileges are irrelevant to providing abortion care.¹⁰¹ The second provision requires all clinics providing abortion to adhere to building regulations for Ambulatory Surgical Centers (“ASC”),¹⁰² regardless

97 NUESTRO TEXAS, *supra* note 25, at 17–18.

98 NUESTRO TEXAS, *supra* note 25, at 18.

99 NUESTRO TEXAS, *supra* note 25, at 23.

100 Regulation of Abortion Procedures, Providers, and Facilities; Providing Penalties, 2013 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 1 (H.B. 2) (Vernon’s), amending TEX. HEALTH & SAFETY CODE ANN. § 171.0031 (West 2015) to provide:

(a) A physician performing or inducing an abortion:

(1) must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that:

(A) is located not further than 30 miles from the location at which the abortion is performed or induced; and

(B) provides obstetrical or gynecological health care services. . .

101 Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiff-Appellees and in Support of Affirmance, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

102 Regulation of Abortion Procedures, Providers, and Facilities; Providing Penalties, 2013 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 1 (H.B. 2) (Vernon’s), amending TEX. HEALTH & SAFETY CODE ANN. § 245.010 (West 2015) to provide that, “. . . on or after September 1, 2014, the minimum standards for an abortion facility must

of the fact that such measures are medically unnecessary and, in most circumstances, prohibitively costly.¹⁰³ One effect of H.B. 2 has been to further limit the availability of reproductive healthcare in the already desolate Rio Grande Valley. Given the earlier clinic closures, the availability of care and family planning services at each and every clinic has been crucial for women and families in The Valley. As of December 2014, one abortion-providing clinic remains open in the region.¹⁰⁴

The state government has been explicit that its goal of ending abortion motivated its decision to divest from family planning programs and to further regulate reproductive health clinics.¹⁰⁵ Amidst the debate surrounding H.B. 2 then-Governor Rick Perry stated that his goal, in his capacity as an elected official, was “to make abortion, at every stage, a thing of the past.”¹⁰⁶ The state’s actions have done far more than merely limit abortion access. Its divestment and regulatory measures prevent women from accessing a full-range of necessary reproductive healthcare and from effectuating their constitutional rights. Women who do not face economic, geographic, and racial barriers to accessing healthcare are better able to overcome state-imposed hurdles to abortion and other services. For those that do not have a safety net, private or otherwise, the ramifications of divestment and privatization of family planning can be life-threatening.

This threat is felt especially by Latina women, particularly undocumented immigrants, who have been left in a precarious position because of their frequent inability to access care, either because of geographic limitations or simply because providers lack capacity to serve all those in need.¹⁰⁷ Even those able to reach a clinic and secure an appointment may face language barriers and significant hardship covering the cost of necessary medical care. An intersectional examination of the way anti-abortion policies impact the overall reproductive

be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers.”

103 Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees-Cross-Appellants and in Support of Affirmance, *Whole Woman’s Health v. Lakey* No. 1:14-C V-284-LY, 2014 WL 4346480 (W.D. Tex. Aug. 29, 2014).

104 *Whole Woman’s Health v. Cole*, No. 14A1288, 2015 WL 3947579 (U.S. June 29, 2015).

105 See *supra* note 82.

106 Press Release, Governor Rick Perry, Tex., Gov. Perry Announces Initiatives to Protect Life (Dec. 11, 2012), <http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2012/speech121112.pdf> [http://perma.cc/CWN2-KLDD] (“Now, to be clear, my goal, and the goal of many of those joining me here today, is to make abortion, at any stage, a thing of the past.”).

107 See HHS, *supra* note 86.

health safety net upon which so many immigrant Latina women rely illuminates the ways single-minded attacks harm multiply subordinated women.

III. Forces of Domination and Lived Outcomes

To this point, this Note has documented two systems of injustice—immigration enforcement and reproductive oppression—that regulate and punish marginalized communities in the Rio Grande Valley, with a particular emphasis on the experience of undocumented immigrant Latinas. Framing the intersectional subordination faced by this population in such a way uncovers “the outcomes produced in the interface between private institutional configurations. . . and the policing power of state actors.”¹⁰⁸ A full appreciation of these outcomes requires an understanding not only of the ways immigration and regulation of abortion work in conjunction with one another to police and punish the bodies of undocumented immigrant Latinas, but also how the dynamic situational and structural vulnerabilities faced by this population facilitate and exacerbate negative outcomes.¹⁰⁹

A. The Matrix of Domination

Patricia Hill Collins coined the phrase “matrix of domination” in reference to the way intersecting systems of oppression are organized and function to discipline the lives of oppressed populations.¹¹⁰ Collins roots her work in the lives of Black women, noting that they experience a unique set of social practices aligned with their particular history and place within society.¹¹¹ Because the history and dynamic relationship between Latino/a communities and hegemonic structures varies from that experienced by Black women, the matrix governing Latina women’s lives is itself distinct from that identified and analyzed by Collins. However, the paradigm she presents remains a helpful framework for examining the ways various social structures and practices work together to police the lives of Latina women. In addition to the systems already identified and explained in this Note, socioeconomic injustice and inequality as well as stigmatizing social narratives undergird the matrix of domination shaping Latina immigrant women’s experiences.

108 See Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012).

109 *Id.* at 1449 (“The interplay between structures and identities are key elements in understanding the ways that [women of color] are situated within and affected by the various systems of social control.”).

110 PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 18 (2d ed. 2000).

111 *Id.* at 23.

1. Socioeconomic Hardship

Socioeconomic factors significantly determine women's abilities to secure healthcare. Nationwide Latinos/as make up the largest uninsured minority.¹¹² Within that group women are even worse off.¹¹³ The border communities in the Rio Grande Valley reflect national trends. In Texas, where 27% of the population is uninsured, Latinos/as are more than twice as likely as whites to be without insurance coverage.¹¹⁴ Within this group, foreign-born Latinos/as are twice as likely as U.S.-born Latinos/as to be uninsured¹¹⁵ and nearly half of Latina women of reproductive age lack insurance coverage.¹¹⁶ Undocumented immigrants face more critical challenges because federal law bars them from receiving Medicaid (except in some circumstances surrounding pre- and post-natal care).¹¹⁷ Thus, any policy that increases healthcare costs will disproportionately affect Latino/a communities.

Furthermore, because healthcare is so often unavailable to women in The Valley, they must be able to travel, and to afford to do so, in order to access care. Such journeys can require securing time off from work, child care, a car in which to travel—public transportation is almost non-existent in the region¹¹⁸—and money for gas and, in the case of an extended trip, often necessary if a woman seeks an abortion,¹¹⁹ lodging. Forced to choose between paying for these expenses and otherwise providing for themselves and their families, many women choose the latter and sacrifice necessary healthcare.¹²⁰ This

112 Foulkes et al., *supra* note 87, at 39.

113 Foulkes et al., *supra* note 87, at 39.

114 NUESTRO TEXAS, *supra* note 25, at 15; Foulkes et al., *supra* note 87, at 39.

115 Foulkes et al., *supra* note 87, at 39.

116 Foulkes et al., *supra* note 87, at 39.

117 Immigrants lawfully present in the United States are eligible for Medicaid after spending five years in the United States, but are subject to various state and federal eligibility criteria and conditions. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996); *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care*, SISTER SONG, NAT'L LATINA INST. FOR REPRODUCTIVE HEALTH, CTR. FOR REPRODUCTIVE RTS. at 30-31, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17560_E.pdf [<http://perma.cc/MUL2-NJ98>]. For more on the history and context of the PRWORA, see PARK, *supra* note 72, at 24-26.

118 NUESTRO TEXAS, *supra* note 25, at 31.

119 TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2015).

120 NUESTRO TEXAS, *supra* note 25, at 36 (describing various women's inability to secure appointments or

predicament leaves Latina women more susceptible to a variety of health risks, including but not at all limited to unwanted pregnancy and maternal death. Of course, a lack of funds forces many women to simply forgo necessary care without any true choice in the matter at all. Yet social refusal to acknowledge the *absence* of choice inherent in coercive structures renders marginalized women vulnerable not only to negative health outcomes associated with lack of care, but to stigma related to their perceived irresponsible decision-making.

2. The Stigmatic Virgin/Whore Dynamic in Latino/a Communities

Notions of women as irresponsible for their sexuality and family structures pervade conversations about reproductive healthcare access. For instance, in a bit of rhetorical trickery amidst the contraceptive mandate debate, former Arkansas Governor and Fox News host Mike Huckabee argued that the mandate evinced a belief in its proponents that women “cannot control their libido or reproductive system” and suggested that the pursuit of these services made women “victims of their gender.”¹²¹ Classist, patriarchal norms portray women seeking public support for reproductive healthcare as disempowered victims, unable to overcome the weakness of womanhood. In addition to these widespread notions surrounding women’s behavior, Latinas are specifically stigmatized in public discourse with a racial, dichotomous virgin/whore identity¹²² that dissuades them from seeking reproductive healthcare.

Like most women in America, Latinas contend with the narrative of delinquency surrounding those seeking reproductive care. But this stigma is enhanced by social stereotypes codified in American immigration law¹²³ that immigrants are “public charges.” Such renderings engender fear that immigrant populations, particularly women, over-rely on social services and leech off of the tax dollars of more “productive,” worthy (i.e., white, middle- and upper-class) Americans.¹²⁴ Latinas that *do* seek to conceive and bear children are similarly painted as uncontrollable foreigners in need of state aid to care for

affordable options for necessary mammograms and instead living with lumps in their breasts or other negative symptoms).

121 Aaron Blake, *Huckabee: Dems think women can't control their libido*, WASH. POST POST-POL. BLOG (Jan. 23, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/01/23/huckabee-dems-think-women-cant-control-their-libido/> [<http://perma.cc/8QJ3-9FW9>].

122 SILLIMAN ET AL., *supra* note 8, at 216.

123 Immigration and Naturalization Act of 1952 § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006). For a general history of public charge designation and its interplay with reproductive health, see PARK, *supra* note 72.

124 PARK, *supra* note 72, at 50–53.

their constantly expanding broods.¹²⁵ Immigration and reproductive oppression build upon and reinforce social perceptions that portray immigrant Latina women as irresponsible, expensive victims of their own irrepressible sexuality.

Latinas paradoxically contend with pervasive, essentializing beliefs that they are largely religious, docile, and, therefore, non-sexual.¹²⁶ Though, in the United States, 99% of sexually active women between the ages of fifteen and forty-four, regardless of religion, use contraception at some point in their lifetime¹²⁷ and about one-in-three women will have an abortion by the age of 45,¹²⁸ stereotypes of religiously devout Latinas obscure these lived experiences. Moreover, the myopic tendency to allow abortion and contraception to stand in for all reproductive healthcare fails to consider how anti-abortion policies prevent women from accessing a range of services, including pre- and post-natal care, mammograms, annual pap smears, and prescription medications. This failure injures women who might in fact, because of religion or other motivations, opt against contraception and/or abortion.

When Latina women seek out reproductive healthcare, regardless of the nature of that care, they risk being labeled as sexually promiscuous or deviant, or as irresponsible dependents—and sometimes as a combination thereof. That these two narratives work together to police gender and sexuality is not coincidental; gendered social stigma is intrinsic to mechanisms of reproductive oppression. But the use of religion and immigration status as proxies for race inflicts particular violence on Latina women's dual identities.

B. Outcomes

This “matrix of domination,” results in dire circumstances for women in The Valley. To begin with, the immigration system physically traps women in rural communities, erecting a (sometimes literal) barricade between them and the care they require. Many Latinos/as in The Valley maintain strict mileage boundaries that govern their travel throughout the

125 See Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 907–08 (1997) (discussing how immigration and welfare reform otherize immigrants as “little brown peons” taking advantage of social services).

126 SILLIMAN ET AL., *supra* note 8, at 216; see also Alma M. Garcia, *The Development of Chicana Feminist Discourse, 1970–1980*, 3 GENDER & SOC'Y 217, 222 (1989).

127 *Contraceptive Use in the United States*, GUTTMACHER INST. (July 2015), http://www.guttmacher.org/pubs/fb_contr_use.html [<http://perma.cc/4TKW-WLMH>] (91% of Latinas currently use some form of contraception).

128 *Facts on Induced Abortion in the United States*, GUTTMACHER INST. (July 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html [<http://perma.cc/T7BT-EFB5>].

region.¹²⁹ If a family planning or reproductive health clinic does not exist within those boundaries, women seeking the services offered are faced with two options to secure care: risk driving north¹³⁰ or venture across the border to Mexico.

The first option means traversing numerous tactical and permanent CBP checkpoints and, if the woman is undocumented, risking outing herself as such to officials. But, as explained in Part I, even legal presence within the United States does not guarantee protection from overzealous enforcement, so Latina citizens must also weigh the risks of this journey.¹³¹ The second option may allow women to access more affordable healthcare in Mexican hospitals or, alternately, to secure medication from one of the many border *mercados*.¹³² However, every time a woman leaves the United States she faces the possibility that an encounter with CBP, ICE, or DHS will prevent her from re-crossing the border or subject her to immigration detention. In either situation a woman leaving her home to seek care may find herself unable to return and, possibly, still without the care she sought. Furthermore, these journeys require financing and support structures that many women living in The Valley simply cannot access. The risk and cost combined often force women to succumb to a decision to forego travel and rely on what few healthcare options remain in their immediate vicinity. A fourth course of action also exists and is all too prevalent: women and families go without care altogether, too fearful of financial burdens and the threat of immigration enforcement to take necessary trips even for regular check-ups.¹³³

The results of this lack of care can be seen in the general health of Latinas in the United States and in Texas. Nationally, relative to their white counterparts, Latinos/as suffer

129 Lee, *supra* note 77.

130 Currently one reproductive health clinic remains open in the Rio Grande Valley in McAllen, Texas. The next nearest clinic in the state is in San Antonio, approximately 235 miles away from The Valley. *Whole Woman's Health v. Cole*, No. 14-50928, 2015 WL 3604750, at *23 (5th Cir. June 9, 2015), *as modified by* No. 14-50928, 2015 WL 3852971 (5th Cir. June 19, 2015).

131 AMERICAN EXILE, *supra* note 35, at 44.

132 Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, ATLANTIC (June 27, 2014, 9:00 AM), <http://www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240> [<http://perma.cc/U8CW-8DQ3>].

133 See, e.g., Sarah Varney, *Texas' Struggling Rio Grande Valley Presses for Medicaid Expansion*, KAISER HEALTH NEWS (May 21, 2013), <http://kaiserhealthnews.org/news/texas-border-counties-medicare> [<http://perma.cc/9RSR=JCG9>] (describing the challenges of finding and affording health care for immigrants in The Valley). See also PARK, *supra* note 72, at 92–93 (describing accounts from social workers and health clinic directors of immigrants in California choosing to avoid the emergency room in dire situations).

from higher rates of, among other things, contraceptive failure,¹³⁴ sexually transmitted infections such as gonorrhea and chlamydia,¹³⁵ and maternal mortality.¹³⁶ Reports from the past five years indicate that Latina women in Texas experience a higher incidence of cervical cancer than their white and Black counterparts, usually detected at later stages, with higher risk because Latinas are less likely to have seen a doctor in the past twelve months.¹³⁷ These numbers are mirrored and exacerbated in The Valley,¹³⁸ and the impact of these barriers extends beyond the medical. Evidence shows that women lacking access to reproductive care are more likely to remain in violent relationships.¹³⁹ Thus, anti-abortion policies increase the risk of continued domestic and intimate partner violence to women.¹⁴⁰ Other studies show that women who would prefer to have an abortion, but are unable to, experience ill effects both physically (such as increased rates of hypertension) and socio-economically.¹⁴¹ According to a study done by the University of California, San Francisco, for example, women denied abortions are three times as likely to fall below the federal poverty line and are also more likely to struggle with maintaining employment.¹⁴² For communities already subject to extreme poverty, negative socio-economic outcomes are all the more likely and dangerous.

Anti-abortion policies within a regime of coercive immigration enforcement, social stigma, and other factors of inequality do violence to the physical, emotional, and social

134 Foulkes et al., *supra* note 87.

135 2012 *Sexually Transmitted Diseases Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/std/stats12/minorities.htm> [<http://perma.cc/EE4F-CRR3>] (last visited July 15, 2015) (reporting that Hispanics have a “chlamydia rate” over two times higher and a “gonorrhea rate” almost two times higher than whites).

136 Foulkes et al., *supra* note 87, at 42.

137 NUESTRO TEXAS, *supra* note 25, at 15–16.

138 See NUESTRO TEXAS, *supra* note 25, at 15–16.

139 Sara C.M. Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied An Abortion*, 12 BMC MEDICINE 144 (2014), <http://www.biomedcentral.com/1741-7015/12/144> [<http://perma.cc/23K9-JPR4>].

140 *Id.*

141 Joshua Lang, *What Happens to Women Who Are Denied Abortions?*, N.Y. TIMES, June 16, 2013, at MM42.

142 *Id.*

well-being of immigrant Latina women and reinforce their subordinated social status. These outcomes in turn have lasting negative effects on women's families and communities.

IV. The Origins and Ramifications of Intersectional Failure

The rise of neoliberal policies has shaped conditions in the Rio Grande Valley that police and oppress immigrant female populations. The ease with which this regime has taken hold can be partially attributed to an "intersectional failure" by social movements best positioned to advocate on behalf of immigrant Latina women. Indeed, failure by both the feminist and Chicano/a-rights movements to center women of color's health needs (reproductive and otherwise) in their advocacy has left Latina women vulnerable to punitive and coercive state measures¹⁴³ and without effective legal recourse to address the widespread ramifications of anti-abortion policies.

A. An Advocacy Gap

Both the Chicano/Latino-rights movement(s) and the feminist/pro-choice movement have historically failed to fully account for the lived experiences of Latina women such that their needs, especially with regards to reproductive health, have been marginalized within the activist efforts of both fronts.

In the early days of the Chicano movement, Chicanas faced an internal struggle to define their place within the movement. Chicana activists sought to combat sexist oppression within their communities, but movement leaders resisted efforts to redefine gender roles, arguing that feminism threatened political Chicano unity.¹⁴⁴ Indeed, Latinas within the Chicano movement combatting reproductive oppression, particularly those seeking access to contraception and abortion, faced accusations of advocating for Latino/a

143 See Crenshaw, *supra* note 108, at 1428. Crenshaw discusses the "material presence and substantive absence" of women of color in social movement agendas

that render antiracist and feminist politics vulnerable to the debilitating agendas of neoliberalism. . . . In their mutual inattentiveness to the intersections of patriarchy and racial power, feminist and antiracist rhetoric provide uncontested space for neoliberal ideology to gain traction not only within political culture more generally, but within the narrowed scope of social justice advocacy as well.

See supra note 108, at 1428.

144 Garcia, *supra* note 126, at 221–22, 224.

genocide. According to the primary Chicano discourse, reproductive rights countered the Nationalist prescription that women's roles within the movement were to serve as mothers and homemakers and "to produce lots of brown babies."¹⁴⁵

Yet, these Chicana activists also struggled to find a place for themselves within the mainstream feminist movement, which primarily valued and considered the needs of middle and upper-middle class white women and devalued the racist oppression experienced by Latinas and other women of color.¹⁴⁶ Even compared to the broader feminist movement, some reproductive freedom activists seemed to take a narrow view of women's needs and experiences, a fact made especially clear in the history of abortion- and contraceptive-rights activists collaborating with eugenicists and other members of the population-control movement.¹⁴⁷

Outside of this extreme alignment, mainstream reproductive rights activists still failed to consider and highlight the expansive range of reproductive health issues facing women of color.¹⁴⁸ In fighting for "the right to choose," mainstream feminism neglected the fact that many women, particularly those of color, are left with little "choice" in their reproductive lives.¹⁴⁹ Racial oppression, socioeconomic inequality, immigration status, and incarceration—among other factors—often leave women with little reproductive liberty.¹⁵⁰ These "choices" exist both within and outside of the abortion paradigm, yet remain unquestioned by the feminist focus on "choice." In foregrounding abortion as the frontier

145 SILLIMAN ET AL., *supra* note 8, at 225.

146 Garcia, *supra* note 126, at 229–30.

147 Ziegler, *supra* note 7, at 19. *See also* ROBERTS, KILLING THE BLACK BODY, *supra* note 5, at 57, 72, 79.

148 *See, e.g.*, ROBERTS, KILLING THE BLACK BODY, *supra* note 5, at 229 (calling for a new understanding of reproductive freedom that better acknowledges and addresses the racial contours of reproductive oppression); SILLIMAN ET AL., *supra* note 8 (describing various ways Black, Latina, Asian American, and Native American women's concerns within and contributions to the reproductive rights movement were marginalized or erased); Hooton, *supra* note 7, at 59; Melanie M. Lee, *Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 87, 93–95 (2000); Rachel N. Pine, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407 (1992).

149 ROBERTS, KILLING THE BLACK BODY, *supra* note 5, at 5.

150 ROBERTS, KILLING THE BLACK BODY, *supra* note 5, at 4–6.

of the reproductive rights battle, mainstream feminist activists ignored the myriad other mechanisms of reproductive oppression deployed by state actors.¹⁵¹

Further, following the victory in *Roe v. Wade*,¹⁵² pro-choice activists continued to focus their defense of reproductive freedom on the right to choose abortion rather than the right to access the procedure and effectuate that constitutional right, or to link that right to a larger discourse about reproductive autonomy, dignity, and a right to health. Isolating the right to choose from other areas of social and reproductive oppression meant adhering to a negative rights framework—battling state impediments to choice—rather than pursuing a strategy that enabled all women to take advantage of their newly recognized right.¹⁵³

Among the largest and most divisive outcomes of this strategy is the still-relevant Hyde Amendment. Passed in 1976, “Hyde” prohibited the use of Medicaid funds in procuring an abortion, except in the cases of rape or medical necessity.¹⁵⁴ The Amendment disproportionately disadvantaged women of color, impoverished women, young women, and women living in rural communities.¹⁵⁵ Yet, in the immediate wake of Hyde, mainstream feminist activists named the amendment a victory because it did not impede the right to “choice.” Only in relatively recent history has the mainstream reproductive rights movement called for an end to the Hyde Amendment. Yet the statute is so entrenched in public law that it has been re-authorized every year since its enactment,¹⁵⁶ and many impoverished women remain unable to effectuate their rights to bodily autonomy and reproductive liberty.

In short, mainstream feminism’s neglect of women of color’s varied experiences further subordinated women at the margins of the feminist movement and American society at large. Since *Roe*, an over-zealous, under-inclusive focus on the “right to choose” within abortion litigation has helped to facilitate the development of legal doctrine that fails to

151 See generally ROBERTS, *KILLING THE BLACK BODY*, *supra* note 5; SILLIMAN ET AL., *supra* note 8.

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

153 See FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES 155–56 (Stephanie Gilmore ed., 2008); ROBERTS, *KILLING THE BLACK BODY*, *supra* note 5, at 297, 300.

154 ROBERTS, *KILLING THE BLACK BODY*, *supra* note 5, at 231; Sandra Berenknopf, *Judicial and Congressional Back-Door Methods That Limit the Effect of Roe v. Wade: There Is No Choice If There Is No Access*, 70 TEMP. L. REV. 653, 656 (1997).

155 See Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 86 (2011); Soohoo, *Hyde-Care For All*, *supra* note 7, at 154.

156 Berenknopf, *supra* note 154, at 657.

consider the intersectional subordination and full “matrix of domination” experienced by immigrant Latina women and other marginalized women, especially those of color.

B. Doctrinal Failure

While *Roe v. Wade* remains the constitutional basis of women’s right to choose an abortion, the Supreme Court’s later opinion in *Planned Parenthood v. Casey*¹⁵⁷ guides legal analysis of anti-abortion legislation. *Casey* lays out the Court’s “undue burden” standard, which states that a law is not constitutionally prohibited unless it creates a “substantial obstacle” to securing an abortion.¹⁵⁸ However, in the wake of *Casey*, courts assessing whether a burden is “undue” often consider abortion-related provisions in a vacuum, not only separate from other regulations but also from the full social and structural realities limiting a woman’s ability to seek care.¹⁵⁹

As Walter Dellinger anticipated following the Supreme Court’s ruling in *City of Akron v. Akron Center For Reproductive Health*,¹⁶⁰ a state may now “pile on ‘reasonable regulation’ after ‘reasonable regulation’ until a woman seeking an abortion first ha[s] to conquer a multi-faceted obstacle course.”¹⁶¹ The resultant obstacle course necessarily handicaps some women more than others, depending on her structural location within social hierarchies. *Casey* ostensibly leaves room for courts to engage in a fact-intensive analysis of the specific burden imposed by a regulation, dependent on such factors as “longer travel distances between clinics; most costly abortion procedures; poorer populations; and other unique social, economic, and geographic circumstances.”¹⁶² Unfortunately, though,

157 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992).

158 *Id.* at 846.

159 Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *YALE J.L. & FEMINISM* 317, 363 (2006).

160 *Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416, 416 (1983).

161 Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 *U. PA. L. REV.* 83, 100 (1989).

162 *Casey*, 505 U.S. at 887. The Court did not find, for example, that twenty-four hour waiting periods are absolutely constitutional but rather that the waiting period in Pennsylvania, “on the record before us” did not present an undue burden. Thus it is possible that a court applying *Casey* could determine, based on a different factual record, that a twenty-four hour waiting period violates patients’ constitutional rights. See also Wharton et al., *supra* note 159, at 359 (noting that in *Fargo Women’s Health v. Schafer*, 507 U.S. 1013 (1993) (mem.), Justice O’Connor concurred specifically so as to point out that the *Casey* Court had done a rigorous factual analysis of the record).

courts have regularly failed to engage in this type of analysis. Instead judges often either mechanically apply the result in *Casey* to regulations mirroring those approved in that case, or otherwise reject facial challenges that do not present unquestionable proof of a law's negative impact.¹⁶³ This latter trend reflects courts' behavior even in situations in which they do engage in more careful factual assessments. Linda Wharton et al. report that, even when engaging in fact-intensive analyses, courts still often misapply the *Casey* standard and place a tremendously high burden of proof on plaintiffs.¹⁶⁴

Each of these kinds of misapplication can be seen in the 2014 Fifth Circuit opinion in *Planned Parenthood v. Abbott*.¹⁶⁵ A unanimous three-judge panel found that the admitting privileges provision of H.B. 2 did not constitute an undue burden despite the district court's finding that the provision would force the closure of one-third of the state's abortion providers and prevent at least 22,286 women annually (one-third of those typically seeking the procedure) from securing abortion.¹⁶⁶ The court noted, first, that constraining the rights of one-third of the women in the state seeking abortion does not impact a "significant number" and, second, that a 300-mile round-trip drive did not constitute an "undue burden" under *Casey* because the trip "takes less than three hours on Texas highways."¹⁶⁷ In so deciding, the court failed to consider the web of additional punitive, geographic, and socioeconomic factors further inhibiting such travel. The court's assertion assumes that all women needing to make the 300-mile journey have access to a car as well as the time and financial ability to travel for a minimum of six hours. Moreover, the decision erases the lived experience of women in The Valley, ignoring the well-documented barriers imposed by immigration enforcement and the dangers inherent in such travel for immigrant women.

163 Wharton et al., *supra* note 159, at 359.

164 Wharton et al., *supra* note 159, at 359.

165 *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

166 *Abbott*, 748 F.3d at 594–96. Indeed, here the Fifth Circuit rejected plaintiff's empirical data showing the harm the provision would do to women and communities in favor of the state's "rational speculation" that such a law would benefit women's health. The court failed to address the testimony provided rebutting the State's evidence that requiring admitting privileges does nothing to impact quality of care and instead applied rational basis review, finding that the State acted "within its prerogative," *id.* at 595. *See also* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013), *rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

167 *Abbott*, 748 F.3d at 597–98.

The Fifth Circuit's decision in *Whole Woman's Health v. Cole*,¹⁶⁸ the most recent challenge to H.B. 2's provisions, acknowledges the unequal outcomes on abortion access the statute affects on "women in poverty," but summarily dismisses these as irrelevant to the undue burden analysis.¹⁶⁹ As the court did in *Abbott*, it first notes that the number of women precluded from securing the procedure does not rise to the level of a "large fraction of women."¹⁷⁰ The decision then points to Supreme Court precedent in *Harris v. McRae*¹⁷¹ and *Maher v. Roe*¹⁷² suggesting that no constitutional obligation forces courts to examine obstacles outside the particular regulation in question.¹⁷³

The analysis deployed in this series of cases indicates that consideration of such obstacles—indigency, for example, in *Maher* and *McRae*—is inapposite to undue burden review. These impediments, the logic goes, are "the product not of governmental restrictions on access to abortion,"¹⁷⁴ but rather incidental facts of a woman's life. But, as this Note has pointed out, that is simply not the case. The various economic and social barriers patients face in accessing care cannot be cleanly separated from the burden imposed by a particular regulation. Moreover, these barriers often *are* the product of state abortion regulation or other state action, such as zealous immigration enforcement. The reasoning put forward by the Supreme Court and now the Fifth Circuit reinforces a legal fiction entirely out of synch with the reality of women's lives. Moreover, it fails to hold state governments accountable for the role they play in stripping women of their Constitutional rights and denying healthcare access to entire communities.

That failure is compounded by the fact that the undue burden standard and abortion jurisprudence more generally do not take account of the full range of ramifications experienced by women at the hands of anti-abortion regulations. Though H.B. 2 and other Texas anti-abortion policies leave immigrant Latina women lacking many standard, everyday reproductive healthcare services, legal challenges to the law consider only its

168 *Whole Woman's Health v. Cole*, No. 14-50928, 2015 WL 3604750, at *23 (5th Cir. June 9, 2015) modified, No. 14-50928, 2015 WL 3852971 (5th Cir. June 19, 2015).

169 No. 14-50928, 2015 WL 3604750, at *20.

170 *Id.*

171 *Harris v. McRae*, 448 U.S. 297, 297 (1980).

172 *Maher v. Roe*, 432 U.S. 464, 464 (1977).

173 No. 14-50928, 2015 WL 3604750, at *20.

174 448 U.S. at 316.

impact on a woman's ability to choose abortion. Courts do not consider, for example, the resultant higher rates of contraceptive need, teen pregnancy, cervical cancer, and other health risks or the likely increased risk of domestic violence and socio-economic impact on communities. Moreover, because abortion jurisprudence is concerned with whether women seeking abortion are able to secure the procedure, courts absolutely fail to consider the effects of anti-abortion policies of women that do *not* seek abortion—though as this Note documents, they are many and significant. The doctrine, then, and the failure of those movements best poised to fight for its change, has resulted in a regime that ostensibly protects that particular choice but leaves marginalized women, whatever their relation to the abortion procedure, in precarious positions with few effective options.

CONCLUSION

The above analysis has shown the ways that anti-abortion laws and policies work alongside other governmental and social policing mechanisms to subordinate marginalized women along dynamic axes of gender, sexuality, and race. The effects of these laws cannot be separated from the context in which they are deployed because Latina women do not experience anti-abortion policies outside of their racial identities, geographic location, or socio-economic and immigration statuses. These intersecting oppressions result in disproportionate harm to women and communities of color, resulting in outcomes far beyond a lack of access to abortion. Meanwhile, the detention of Latina women apprehended while traveling to secure reproductive healthcare shores up the state economy, increases fear within Latino/a communities, and scapegoats Latina women as irresponsible public charges requiring social control. Anti-abortion policies applied within a coercive and punitive regime of deportation and detention necessarily work to entrench racial as well as socio-economic hierarchies in American communities.

To overcome these mechanisms of racial and gender oppression, courts and advocates should not disregard the lived experiences of women subject to subordinating policies. Rather, they must center women and look critically at their experiences. In particular, courts should focus their analyses on those most vulnerable: women with intersecting marginalized identities and those living at the intersections of structural subordination. Any jurisprudential model that fails to account for the myriad burdens experienced by women will fail to fully and justly protect them and their rights.

Advocates for reproductive justice and women's rights have long argued that courts should abandon, or at least move away from, the due process/privacy basis of the abortion

right and toward an understanding more grounded in equality¹⁷⁵ or human rights.¹⁷⁶ Either avenue presents a preferable option to the current frame because they allow space to center women of color. The human rights framework, in particular, allows advocates to assert positive state obligations for protection rather than seek a lack of government interference in the exercise of one's rights.

The recent Supreme Court decisions *United States v. Windsor*¹⁷⁷ and especially *Obergefell v. Hodges*¹⁷⁸ may present a third jurisprudential model in line with reproductive justice aims: equal dignity. The Court's majority opinion in *Obergefell* acknowledged, in no uncertain terms, that "women have their own equal dignity"¹⁷⁹ and reinforced the important Constitutional right to liberties that "extend to certain personal choices central to individual dignity and autonomy."¹⁸⁰ Under Justice Kennedy's analysis, the denial of such liberties demeans individuals entitled to protection under the law.¹⁸¹ In examining the way denial of the right to marry degraded homosexuals, the majority looked to material burdens imposed by marriage bans, as well as the general instability, pain, and humiliation that gay men and lesbian women experienced under the bans.¹⁸²

As evidenced throughout this Note, anti-abortion regulations similarly impose financial burdens, instability, pain, and humiliation on those subject to them, and on the communities in which those citizens live. As with the denial of the liberty interest in marriage, restrictions on abortion access get to the very heart of questions of autonomy. State regulations limiting the procedure exclude women from equal access to healthcare and fair participation in society. Judicial affirmation of this subordinating legal regime "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is

175 See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

176 NUESTRO TEXAS, *supra* note 25, at 53–54; London, *supra* note 155, at 75, 99.

177 *United States v. Windsor*, 133 S. Ct. 2675 (2013).

178 *Obergefell v. Hodges*, No. 14-556, 2015 WL 2473451, at *1 (U.S. June 26, 2015).

179 *Id.* at *9.

180 *Id.* at *2.

181 *Id.* at *19.

182 *Id.* at *16.

then denied.”¹⁸³ By placing and reinforcing these stigmas and material burdens on women, particularly marginalized women, state governments undermine the equal dignity that has been long fought for and judicially recognized.

Applying the dignity model deployed in *Windsor* and *Obergefell* to abortion jurisprudence presents an opportunity for courts to more realistically examine the interconnected and expansive oppressions felt by women at all levels of society. Adopting this line of legal thinking would allow for the rejection of the over-simplistic, fictitious undue burden analysis in exchange for a more comprehensive considerations of the multiple burdens that diminish women’s dignity and wellbeing.

Though recent developments in jurisprudence present a hopeful alternative to the ineffectual undue burden standard, solutions to the problems facing women in the Rio Grande Valley—and marginalized women throughout the United States—cannot be rooted solely in the courts. True justice can only be achieved through a dismantling of the matrix of domination that polices the bodies and lives of marginalized populations. So long as Latina women face stigma in relation to their sexual lives and health, their access to healthcare will remain impeded. So long as the federal government deports and detains undocumented immigrants, Latino/a populations will remain socially, economically, and geographically constrained and access to care will remain obstructed. So long as women of color struggle to access necessary reproductive healthcare, their communities will remain subjugated. To address these injustices and lift up communities we must adjust our advocacy away from legal designations of “undue burdens” and toward a critical examination of the very real oppressions felt by women and communities at the intersection of restrictive subordinating policies.

183 *Id.* at *17.