

# REPRODUCTIVE JUSTICE

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Women's efforts to control their fertility date back almost four thousand years.<sup>1</sup> The irony of our current circumstances is that even as technology has put that control within reach, politics and law have stood in the way. Issues surrounding reproductive rights took center stage in the 2016 presidential campaign. The result of that election has placed women's reproductive autonomy at increased risk.

Donald Trump's views on reproductive rights have been persistently inconsistent. For most of his life he was pro-choice, but by the 2016 campaign his position had, in his words, "evolved."<sup>2</sup> The evolution was in expedient directions. He pronounced himself "totally against abortion."<sup>3</sup> He also promised to defund Planned Parenthood, "because of the abortion factor."<sup>4</sup> Although Trump acknowledged Planned Parenthood's claims that only three percent of its work involved abortion, he expressed unfounded doubt about that percentage, saying he really did not "know what percentage it is."<sup>5</sup> In a *60 Minutes* interview, Trump reiterated his pledge to appoint Supreme Court Justices who would overturn *Roe v. Wade*, the landmark decision protecting women's access to abortion in the first trimester of pregnancy.<sup>6</sup> In response to concerns that this would foreclose access in many jurisdictions, Trump admitted that residents

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1. The earliest medical records from around 1850 BC record methods of birth control. See JOHN RIDDLE, *CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE* 66-73 (1992); Richard G. Lipsey et al., *Appendix 9.1: Historical Record on the Control of Family Size*, in *ECONOMIC TRANSFORMATIONS: GENERAL PURPOSE TECHNOLOGIES AND LONG-TERM ECONOMIC GROWTH* 335-40 (Richard G. Lipsey et al. eds., 2005).

2. *Donald Trump on Abortion*, ONTHEISSUES, [http://www.ontheissues.org/celeb/Donald\\_trump\\_Abortion.htm](http://www.ontheissues.org/celeb/Donald_trump_Abortion.htm) (last visited Feb 4, 2017).

3. *Id.*

4. *Id.*

5. *Id.*

6. See *President-Elect Trump Speaks to a Divided Country on 60 Minutes*, CBS NEWS (Nov. 13, 2016), <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.

would “have to go to another state.”<sup>7</sup>

On related issues, candidate Trump waffled. As the headline of a *Washington Post* article noted, “Donald Trump Took 5 Different Positions on Abortion in 3 Days.”<sup>8</sup> He told Chris Mathews of MSNBC that women who violated his new abortion restrictions would face “some form of punishment,” but later repudiated that statement and claimed that only doctors would be liable.<sup>9</sup> The promises made towards the end of his campaign were increasingly hostile to reproductive rights. In a letter to the pro-life community, Trump expressed support for the Pain Capable Unborn Child Protection Act, which would ban abortion twenty weeks after probable fertilization, the point at which, according to anti-abortion activists, the fetus can feel pain.<sup>10</sup> Because many fetal abnormalities cannot be detected until after that point, such legislation would effectively force many women to carry a seriously impaired fetus to term. Trump also pledged to make permanent the Hyde Amendment, which is typically tacked on as a rider to appropriations bills, in order to prohibit use of any federal funds to pay for abortions except in cases of rape, incest, or danger to the mother.<sup>11</sup> Trump sent similar signals by selecting as his running mate Mike Pence, one of the Republican Party’s most avid abortion opponents. In the early days following his inauguration, President Trump took action to make good on his campaign pledges. On his first day in office, he issued an executive order reinstating the global gag rule, which prevents any foreign aid to facilities that provide abortion counseling, referrals, or services even when paid for by their own funds.<sup>12</sup> With Trump’s support, the House of Representatives passed legislation to make the Hyde Amendment permanent.<sup>13</sup>

The current administration poses obvious concerns to the reproductive justice agenda, and not only because of its stance on abortion. As that agenda is commonly understood, it includes the right to have a child, the right not to have

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7. Linda Greenhouse, *Chasing Abortion Rights Across the State Line*, N.Y. TIMES (Nov. 24, 2016), <https://www.nytimes.com/2016/11/24/opinion/chasing-abortion-rights-across-the-state-line.html>; WITW Staff, *What Will Happen to Reproductive Rights Under Trump?*, N.Y. TIMES: WOMEN IN THE WORLD (Nov. 15, 2016), <http://nytlive.nytimes.com/womenintheworld/2016/11/15/what-will-happen-to-reproductive-rights-under-trump/>.

8. Philip Bump, *Donald Trump Took 5 Different Positions on Abortion in 3 Days*, WASH. POST (April 3, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/04/03/donald-trumps-ever-shifting-positions-on-abortion/?utm\\_term=.f3086e8d516a](https://www.washingtonpost.com/news/the-fix/wp/2016/04/03/donald-trumps-ever-shifting-positions-on-abortion/?utm_term=.f3086e8d516a).

9. *Id.*

10. See Hanna Kozłowska, *How a Trump Presidency Will Threaten Women’s Reproductive Rights*, QUARTZ (Nov. 11, 2016), <https://qz.com/834521/trump-birth-control-reproductive-rights/>.

11. *See id.*

12. See Matt Ford, *Here’s What Trump’s Latest Executive Orders Do*, ATLANTIC (Jan. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-executive-orders/514139/>.

13. See Theresa Riley, *No Woman is Safe: How the Hyde Amendment and H.R. 7 Punish America’s Most Vulnerable*, SALON (Jan. 29, 2017), [http://www.salon.com/2017/01/29/no-woman-is-safe-how-the-hyde-amendment-and-h-r-7-punish-americas-poor-women\\_partner/](http://www.salon.com/2017/01/29/no-woman-is-safe-how-the-hyde-amendment-and-h-r-7-punish-americas-poor-women_partner/).

a child, the right to parent a child, and the social conditions and policies necessary to realize these rights.<sup>14</sup> Those options for reproductive control need to be safe, affordable, and accessible. The United States is a considerable distance from such goals, and the new administration is likely to move us much further. The discussion below focuses on abortion because it is the right most clearly at risk under the Trump administration. But similar attention needs to focus on other issues central to reproductive justice, including the social safety net for poor families, accurate birth control education, and insurance coverage for contraception and other maternal health conditions.

### I. THE CHALLENGE

The legal and political landscape as Donald Trump takes office is already riddled with restrictions on reproductive rights. Since the 1980s, anti-choice activists have bombed or burned over 100 clinics, vandalized over 400, and killed eleven staff.<sup>15</sup> About a quarter of clinics report incidents of severe violence annually.<sup>16</sup> Some seventy percent of abortion providers report frequent harassment.<sup>17</sup> Physicians' names and addresses have been posted on websites under labels such as "Deadly Dozen GUILTY;" radio ads have proclaimed "Some doctors deliver babies. Some doctors kill babies."<sup>18</sup>

Partly in response to such activism, the number of physicians willing and qualified to perform abortions has steadily decreased. Only fourteen percent of obstetricians and gynecologists provide abortions, and only a minority of medical education programs offer training in the procedure.<sup>19</sup> Even some doctors willing and able to provide abortion services cannot do so because of formal and

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14. See, e.g., *Unity Principles*, WOMEN'S MARCH ON WASHINGTON, <https://www.womensmarch.com/principles> ("We believe in Reproductive Freedom. We do not accept any federal, state or local rollbacks, cuts or restrictions on our ability to access quality reproductive healthcare services, birth control, HIV/AIDS care and prevention, or medically accurate sexuality education. This means open access to safe, legal, affordable abortion and birth control for all people, regardless of income, location or education."); Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fid=4051>.

15. See KATHERINE T. BARTLETT, DEBORAH L. RHODE & JOANNA GROSSMAN, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 741 (7th ed. 2017). For a history of such attacks, see generally Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), <https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html>; DAVID S. COHEN & KRISTEN CONNOR, LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM (2015).

16. See SARAH ERDREICH, GENERATION ROE: INSIDE THE FUTURE OF THE PRO-CHOICE MOVEMENT 149 (2013).

17. See BARTLETT, RHODE & GROSSMAN, *supra* note 15, at 741.

18. *Id.*; Eyal Press, *My Father's Abortion War*, N.Y. TIMES MAG. (Jan 22, 2006), <http://www.nytimes.com/2006/01/22/magazine/my-fathers-abortion-war.html>.

19. See BARTLETT, RHODE & GROSSMAN, *supra* note 15, at 737; Eve Espey et al., *Abortion Education in Medical Schools: A National Survey*, 192 AM. J. OBSTETRICS & GYNECOLOGY 640 (2005).

informal policies restricting abortion provision by their private group practices, employers, and hospitals.<sup>20</sup> Over four-fifths of counties have no abortion provider.<sup>21</sup>

Anti-abortion activists have also succeeded in passing a broad array of restrictive statutes designed to make abortion more costly and less accessible. Since 2010, states have adopted 334 restrictions.<sup>22</sup> More than half of states have TRAP laws—Targeted Regulation of Abortion Providers.<sup>23</sup> These statutes seek to force clinic closures by imposing expensive requirements, such as demanding that doctors have admitting privileges at nearby hospitals and that clinic facilities meet similar building standards as hospitals. These regulations have nothing to do with patient safety and everything to do with restricting access; other medical offices that perform even riskier procedures than abortion are not required to meet such standards.<sup>24</sup> The Supreme Court concluded as much in its recent decision in *Whole Woman's Health v. Hellerstedt*.<sup>25</sup> There, a narrowly divided Court struck down a Texas TRAP law. If fully implemented, that law would have cut the number of facilities providing abortion in the state to only seven or eight, which would have meant caseloads ranging from 7500 to 10,000 patients per year.<sup>26</sup> Although the plaintiffs in *Whole Woman's Health* were successful in challenging Texas's regulations, a change in the composition of the Court, as signaled by the nomination of Neil Gorsuch, could change the outcome in such cases.

Other restrictions on abortion remain in force, either because reproductive rights groups have lacked resources to challenge them, or because courts have found that they meet the prevailing constitutional standard. That standard requires that restrictions not have the purpose or effect of placing an undue burden on women seeking abortion of a non-viable fetus.<sup>27</sup> Under prevailing law, thirty-eight states require that women receive counseling before they can obtain an abortion.<sup>28</sup> Some of the information required is inaccurate, incomplete, or irrelevant to the procedure that the woman is undergoing.<sup>29</sup> A majority of states

20. See Lori Freedman et al., *Obstacles to the Integration of Abortion into Obstetrics and Gynecology Practice*, 42 PERSP. ON SEXUAL & REPROD. HEALTH 146 (2010).

21. See DEBORAH L. RHODE, *WHAT WOMEN WANT* 85 (2014).

22. See Kozłowska, *supra* note 10.

23. See Mary Tuma, *Can You Hear Us Now?*, MS. MAG. (Summer 2013), <http://www.ms magazine.com/summer2013/canyouhearusnow.asp>.

24. See ERDREICH, *supra* note 16, at 65.

25. 136 S. Ct. 2292, 2300 (2016).

26. *Id.* at 2316.

27. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

28. See BARTLETT, RHODE & GROSSMAN, *supra* note 15, at 734.

29. See BARTLETT, RHODE & GROSSMAN, *supra* note 15, at 734; Nancy Gibbs, *I Woman at a Time*, TIME MAG. (Feb. 26, 2007), <http://content.time.com/time/magazine/article/0,9171,1590444,00.html?cnn=yes>; Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357 (2011); Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 112 (2008).

require women seeking abortions to wait a specified interval after they receive mandatory counseling, sometimes as long as seventy-two hours.<sup>30</sup> These waiting periods substantially increase the expense and difficulty for women who do not live close to an abortion provider.<sup>31</sup>

A final barrier to access involves funding. Women living below the federal poverty line account for forty-two percent of abortions, which the federal government and thirty-three states do not fund.<sup>32</sup> An estimated one-third to one-fifth of poor women cannot obtain abortions they desire due to lack of resources or other restrictions.<sup>33</sup>

## II. STRATEGIES

How, then, should those who care about reproductive justice respond? The first and most obvious point is that they need a repertoire of strategies. Focusing too much on Trump personally can deflect attention from the more critical issues of policy.<sup>34</sup> Lawyers need “integrated advocacy,” which entails “venue shopping” in multiple legislative, administrative, legal, media, funding, and grassroots arenas.<sup>35</sup> By working on multiple levels, lawyers can help focus resources strategically in light of “windows of opportunity.”<sup>36</sup> As Ralph Nader once summed it up, “[y]ou have to deal with the adversary on all the fronts on which the adversary deals with you.”<sup>37</sup>

That, of course, requires time and money, and lawyers should donate both. The National Network of Abortion Funds has a list of organizations that work on this issue and provide support for those seeking abortions. Groups that focus on women of color are in particular need of assistance.<sup>38</sup> Supporting reproductive justice fellowships can help build the next generation of advocates, and has proven especially useful for enlisting students of color.<sup>39</sup> Lawyers committed to

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30. See *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Feb. 1, 2017), [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf).

31. See BARTLETT, RHODE & GROSSMAN, *supra* note 15, at 731

32. See Kozłowska, *supra* note 10.

33. See RHODE, *supra* note 21, at 87.

34. See Jesse Singal, *Why Some Protests Succeed While Others Fail*, N.Y. MAG.: SCI. OF US, (Nov. 20, 2016, 9:00 PM), <http://nymag.com/scienceofus/2016/11/how-should-trump-protesters-organize-themselves.html>.

35. Scott L. Cummings, *Movement Lawyering*, U. ILL. L. REV. (forthcoming 2017).

36. BARBARA C. CROSBY & JOHN M. BRYSON, *LEADERSHIP FOR THE COMMON GOOD* 3 (2005).

37. NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 90 (1989).

38. For examples, see Megan J. Smith & Shaya French, *Protecting Reproductive Autonomy in the Age of Trump: A Call to Fellow White Feminists*, REWIRE (Nov. 22, 2016, 12:13 PM), <https://rewire.news/article/2016/11/22/protecting-reproductive-autonomy-age-trump-call-fellow-white-feminists/>.

39. See IF/WHEN/HOW, *GUIDE TO INTERNSHIPS & FELLOWSHIPS 2016-2017* (2016). About two-thirds of fellowships have gone to people of color. IF/WHEN/HOW, *LAWYERING FOR REPRODUCTIVE JUSTICE: CONVENING REPORT* 13 (2016)

these issues who cannot find full time jobs in reproductive rights organizations can provide pro bono work to those organizations and their clients. Such contributions are crucial, not only on substantive legal issues but also in meeting organizational needs on contract, employment, tax, and related matters.<sup>40</sup> Pro bono attorneys served as co-counsel and helped draft many of the forty-five amicus curiae briefs in the *Whole Woman's Health* litigation.<sup>41</sup>

Lawyers and law students can be equally critical in organizing reform efforts. Social movements depend on the creation of social networks and social ties that keep people involved and that make activism part of their lives.<sup>42</sup> The 2017 Women's March was an example of the galvanizing force that protests can inspire. Some, but by no means all, of this organizing work can be done online. Social media initiatives can increase participation in reform movements by lessening the efforts that it requires. People can become armchair activists by pushing a few buttons. But building deep and sustained support remains more difficult. Because online organizing networks tend to lack strong centralized leadership, they have difficulty reaching consensus and developing coherent long-term strategies.<sup>43</sup> As Malcolm Gladwell notes, these new technologies make it "easier for activists to express themselves, and harder for that expression to have any impact."<sup>44</sup> Venting is easy, but organizing is not, and there is no substitute for the personal contact that sustains reproductive justice reform initiatives.<sup>45</sup>

Communication strategies must be part of that effort, and they need to reach a broader base of individuals. Public opinion on abortion paints a worrisome picture. Americans are about evenly divided among those who label themselves pro-choice (forty-seven percent) and pro-life (forty-six percent).<sup>46</sup> Although fifty-nine percent of adults think abortion should be legal in all or most cases, thirty-seven percent believe it should be illegal all or most of the time.<sup>47</sup> More Americans think abortion is morally wrong (forty-seven percent) than morally acceptable (forty-three percent).<sup>48</sup> Although the latest poll on *Roe v. Wade*,

40. See IF/WHEN/HOW, CONVENING REPORT, *supra* note 39, at 18-19.

41. See *Id.*

42. See *id.* See generally ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS (2009).

43. See DEBORAH L. RHODE & AMANDA PACKEL, LEADERSHIP (2d ed., forthcoming) (on file with author).

44. Malcolm Gladwell, *Small Change: Why the Revolution Will not be Tweeted*, NEW YORKER (Oct. 4, 2010), <http://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell>.

45. See Jessica Gonzalez-Rojas, *Bold, Brave, and Proactive: Advocacy and Organizing at the Intersection of Reproductive Justice and LGBTQ Liberation*, 29 COLUM. J. GENDER & L. 156, 158 (2015).

46. *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Feb. 8, 2016).

47. Michael Lipka & John Gramlich, *5 Facts About Abortion*, PEW RESEARCH CTR. (Jan. 26, 2016), <http://www.pewresearch.org/fact-tank/2017/01/26/5-facts-about-abortion/>.

48. GALLUP, *supra* note 46.

conducted in 2017, found that most Americans (70 percent) did not want it overturned, other surveys suggest cause for concern.<sup>49</sup> In some polls, only thirty-three percent of Americans are satisfied with the current state of abortion laws, and of those who are dissatisfied, twenty-nine percent want stricter laws, compared with only thirteen percent who want less restrictive laws.<sup>50</sup> Moreover, among young adults, age eighteen to twenty-nine, only forty-four percent know anything about *Roe v. Wade* and sixty-two percent say abortion is “not that important” an issue.<sup>51</sup>

Those concerned about reproductive justice must do a much better job of communicating what is at stake for women in the decision whether to bear a child. For millions of Americans, the decision to have an abortion is crucial to controlling their destiny and realizing their deepest aspirations.<sup>52</sup> It is also an exercise in moral and social responsibility: it reflects a deep-seated commitment not to bring a child into the world without adequate financial and family support. Anti-abortion activists must not be allowed to claim the moral high ground and to frame the debate as “life” versus “choice.” Many reproductive rights groups have recognized as much and abandoned those labels.<sup>53</sup> We need a more nuanced debate, which recognizes the moral values and concerns regarding quality of life underlying women’s decision to terminate a pregnancy.

In 1969, when the New York State Legislature was considering abortion law reform, women organized the first “Speakout” on the issue, which revealed their life stories and the importance of control over their reproductive destiny.<sup>54</sup> Since then, such narratives have been important organizing tools. They have also been useful in legal cases such as *Whole Woman’s Health*, in which women lawyers filed an amicus brief revealing the importance of abortion in their own lives.<sup>55</sup> We need more such efforts targeting broader audiences.

Finally, the reproductive justice movement should emphasize aspects of its agenda that can find common ground among most Americans. In a 2009

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49. Hannah Fingerhut, *About Seven-in-Ten Americans Oppose Overturning Roe v. Wade*, PEW RESEARCH CTR. (Jan. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade>.

50. GALLUP, *supra* note 46.

51. *Young Adults Least Likely Age Group to Know Roe v. Wade About Abortion*, PEW RESEARCH CTR. (Jan. 22, 2013), <http://www.pewresearch.org/daily-number/young-adults-least-likely-age-group-to-know-roe-v-wade-about-abortion>.

52. See generally KATHA POLLITT, *PRO: RECLAIMING ABORTION RIGHTS* (2014).

53. Planned Parenthood no longer uses the pro-life/choice distinction. See RHODE, *supra* note 21, at 90.

54. See Marlene Gerber Fried, *Reproductive Rights Activism in the Post-Roe Era*, 103 AM. J. PUB. HEALTH 10, 14 n. 33 (2013).

55. Brief of Janice MacAvoy, Janie Schulman, and Over 110 Other Women in the Legal Profession Who Have Exercised their Constitutional Right to an Abortion as Amici Curiae in Support of Petitioners, *Whole Woman’s Health v. Cole*, 136 S. Ct. 2292 (2016) (No. 15-274); see also Michele Coleman Mayes, ‘I Had an Abortion’: One Lawyer’s Story of a Life-Changing Decision, NAT’L L.J. (Jan. 25, 2016), <http://www.nationallawjournal.com/id=1202747714790/I-Had-an-Abortion-One-Lawyers-Story-of-a-LifeChanging-Decision?slreturn=20170102142324>.

commencement address at Notre Dame, President Obama stressed the importance of focusing on such unifying issues. “So let us work together to reduce the number of women seeking abortions, let’s reduce unintended pregnancies. . . . Let’s make adoption more available. . . . Let’s provide care and support for women who do carry their children to term.”<sup>56</sup> Lawyers can play a key role in that effort, and this special issue is a welcome reminder of the importance of their contributions and commitment.

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56. *Obama’s Commencement Address at Notre Dame*, N.Y. TIMES (May 17, 2009), <http://www.nytimes.com/2009/05/17/us/politics/17text-obama.html?pagewanted=all>.