False science and misogyny: Trump's assault on reproductive rights

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Abstract: Falsa scienza e misoginia: l'assalto di Trump ai diritti riproduttivi – This article provides an overview of the various actions undertaken by the Trump Administration to dismantle the protection of reproductive rights, both domestically and internationally. First, the article tackles the use of false science in the Trump Administration's measures regulating access to abortion and contraception. Next, it traces the most salient domestic policies, legislative measures and judicial cases that affected reproductive rights during the Trump Administration. The article then moves to the analysis of US international action to boycott reproductive rights globally during the Trump presidency. Finally, the article places the anti-reproductive rights action carried on under Trump in the frame of the Administration's attempt to reframe fundamental rights in illiberal ways.

Keywords: abortion, contraception, gender equality, human rights, conscientious objection.

1. Introduction

Since the 1990s, right wing Christian anti-abortion lobbies have exercised a considerable influence in Republican primaries and, in a system with relatively low voter participation, "they offer a dedicated and highly motivated voting bloc".[1] As a commentator has put it, in the United States "Abortion … essentially functions as a litmus test for Republicans with federal ambitions. Candidates must embrace a right-to-life position even if their actual track record is murky". [2]

Donald Trump's record was certainly murky. In a 1999 interview, he described himself as "very pro-choice", [3] and in 2012, he confessed that abortion had "never been [his] big issue". [4] As he decided to run for President in 2016, however, he quickly followed the steps of his Republican predecessors

[1] P. Flowers, *The Right-to-Life Movement, the Reagan Administration, and the Politics of Abortion*, Berlin, 2018,146.
[2] *Id.*, 147.
[3] J. Colvin, *Once proudly pro choice, Trump attends March for Life, The Mercury News*, 24 January 2020, available at: www.mercurynews.com/2020/01/24/once-proudly-pro-choice-trump-attends-march-pro-life/ (last accessed 15 December 2020).
[4] Heather Timmons, Trump shifted from pro-choice to pro-life only as he planned a presidential run Quartz, available at qz.com/1623437/trump-shifted-from-pro-choice-to-pro-life-as-he-planned-a-presidential-run/

and sided with extreme religious anti-abortion groups to secure votes. He chose as his Vice-President Mike Pence, who was well-known for his extreme positions against sexual and reproductive rights. Indeed, among his many pro-life initiatives as a Congressman, Pence co-sponsored a bill to prohibit taxpayer funded abortions and to provide for conscience protections, which narrowed down sexual violence as "forcible rape" in order to restrict abortion access.[5] As Governor of Indiana, Pence sustained, *inter alia*, a bill to prohibit women from terminating their pregnancies based on the diagnosis of the fetus having Down syndrome or any other disability, and forcing them to hold funerals for fetal tissue.[6] Throughout the electoral campaign, Trump became increasingly vociferous about abortion: he promised to nominate only anti-abortion judges, in the hope to overturn *Roe v Wade*, [7] and expressed the view that women should be "punished" for interrupting a pregnancy.[8] By the end of his presidential term, he had gained a reputation as the most anti-abortion President in United States history. Indeed, he called it his "profound honor" to be the first President to attend the Washington March for Life in 2020.[9]

This chapter provides an overview of the various actions undertaken by the Trump Administration to dismantle protection of reproductive rights, both domestically and internationally. First, the chapter tackles the use of false science in the Trump Administration's measures regulating access to abortion and contraception. Next, the chapter traces the most salient domestic policies, legislative measures and judicial cases that affected reproductive rights during the Trump Administration. The chapter then moves to the analysis of US international action to boycott reproductive rights globally during the Trump presidency. Finally, the chapter places the anti-reproductive rights action carried on under Trump in the frame of the Administration's attempt to reframe fundamental rights in illiberal ways.

[5] Section 309, H.R. 3 To prohibit taxpayer funded abortions and to provide for conscience protections, and for other purposes Introduced in the U.S. House of Representatives 2011 Jan 20 112th Congress. Available from: www.congress.gov/112/bills/hr3/BILLS-112hr3ih.pdf.

[6] House Enrolled Act no. 1337 (2016) An Act to amend the Indiana Code concerning health. Available at: iga.in.gov/static-documents/5/1/b/5/51b52d50/HB1337.05.ENRS.pdf

[7] P. Sullivan, *Trump promises to appoint anti-abortion Supreme Court justices. The Hill*, 5 November 2016, available at: thehill.com/policy/healthcare/279535-trump-onjustices-they-will-be-pro-life

[8] M. Flegenheimer and M. Haberman, *Donald Trump, Abortion Foe, Eyes 'Punishment' for Women, Then Recants*, The new York Times, March 30, 2016, available at www.nytimes.com/2016/13/31/us/politics/donald-trump-abortion.html (last accessed 15 December 2020).

[9] E. Dias, A. Karni and S. Tavernise, *Trump Tells Anti-Abortion Marchers, 'Unborn Children Have Never Had a Stronger Defender in the White House, The New York Times*, Jan. 24, 2020, available at: www.nytimes.com/2020/01/204/us/politics/trump-abortion-march-life.html (last accessed 15 December 2020).

2. False science and misogyny

One of the signature marks of the Trump Administration was the appointment of militant anti-reproductive rights activists in crucial positions within the Department of Health and Human Services.

Trump's appointees did not only dismantle reproductive health programs. [10] They also consistently upheld false science to further their ideological anti-reproductive rights purposes.[11] Their appointment to the Federal Administration, thus, not only served as a microphone to enhance the dissemination of false information, but also helped legitimizing the latter in the eyes of public opinion. Under Trump, false science has systematically guided governmental action in the field of reproductive rights, it has shaped federal programs, and served as a *rationale* for measures and policies that heavily limit women's rights. False science fosters myths concerning both abortion and contraception, and blurs the line between the two, asserting, for example, that commonly used contraceptives are in fact "abortifacient". This runs counter the universally accepted notion that pregnancy begins *after* implantation.[12] Both hormonal contraceptives as well as devices such as the IUD, can prevent ovulation, block fertilization or keep a fertilized egg from implanting in the uterus. Hence, *none* interrupts a pregnancy. As we will see, however, US law –both at the federal and at the state level- accepts exemption from the application of general laws claims, based on the theory that contraceptives *are* abortifacient, thus broadening dramatically the space for conscientious objection. Many Trump appointees who are in charge of family planning programs also assert the ineffectiveness of contraception in protecting against unwanted pregnancies, and, as a consequence, in preventing abortions, which, again, runs counter all scientific evidence[13], (as well as, one may add, common sense), but justifies shutting down federal reproductive health programs that serve particularly vulnerable women.

Other false information systematically disseminated by Trump's appointees concern the effects of abortion and contraception on women's physical and mental health, and provide the *rationale* to measures that restrict women's access to reproductive services purporting to protect them. These "women protective" arguments are by no means new. In fact, they testify to a shift in the arguments put forward by the anti-abortion

[10] O. Ahmed, S. Phadke and D. Boesch, *Women have paid the price for Trump's regulatory agenda*, *Center for American progress*, September 10, 2020, available at: www.americanprogress.org/issues/women/reports/2020/09/10/480241/women-paid-price-trumps-regulatory-agenda/ (last accessed 15 December 2020).
[11] R. Alta Charo, *Alternative Science and Human Reproduction*, *New England Journal of Medicine* 2017, 377, pp. 309-311.
[12] This notion, as Charo (*supra* note) remarks, is also reflected in federal regulation, that define pregnancy as "the period of time from implantation to delivery" (45 C.F. R. par. 46.2020).
[13] *Ibid:* "Hormonal methods are 91% effective and long-acting reversible contraceptives such as intrauterine devices (IUDs) are 99% effective at preventing pregnancy". See also the report by the Washington University School of Medicine, available at: contraceptivechoice.wustl.edu/ (last accessed 15 december 2020).

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movement that occurred in the 1980's. Instead of focusing primarily on the representation of the fetus as a person, the anti-abortion discourse shifted its attention to women's rights and women's health. It appropriated feminist language and human rights rhetoric as well as scientific and medical jargon. Instead of showing graphic images of aborted fetuses, blaming women for killing their unborn babies, it began to suggest that women were hurt by abortion.[14] Central to the growing success of the new antiabortion strategy were the alleged link between abortion and breast cancer and the invention of the Post Abortion Syndrome (PAS). Thus, the previous focus on morality and emotions gave way to a "rational" (scientific) message: abortion jeopardizes women's physical and mental health. This message achieved two important results: it turned women from murderers into victims, eliminating altogether the notion that a conflict of rights exist, and it provided a new legal platform to challenge abortion regulation. As Ellie Lee explains, "Central to the PAS claim is a critique of the legal concepts and arguments that have tended to legitimize abortion": courts and legislators have wrongly assumed that abortion is a safe procedure, but under the new frame, government should restrict or prohibit abortion to protect women's health.[15] Against this background, the fight against reproductive rights in the name of preserving gender roles subsequently (and unsurprisingly) shifted from abortion to contraception. This shift indicated without ambiguities that the value of prebirth life is not the fundamental interest at stake in the struggle against reproductive rights. [16]

Under the Trump Administration false science in the field of reproductive rights was *de facto* institutionalized. The examples of members of the Trump's Administration disseminating false information and using it as the *rationale* for their action are countless. One of the most well known opponents to reproductive rights was Charmaine Yoest, who served as Assistant Secretary of Health and Human Services for Public Affairs, and was previously the president of the anti-abortion lobby Americans United for Life. Yoest holds that "condoms (whose use reduces the risk of HIV transmission by at least 70%) do not protect against HIV or other sexually transmitted infections, and that "contraception does not reduce the number of abortions". [17] She also consistently maintains that there is a correlation between abortion, breast cancer and mental illness,[18] despite all sound

[14] R. B. Siegel, *The Rights' Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, *Duke Law Journal* 57 (2008).
[15] E. Lee, *Abortion, Motherhood, and Mental Health: Medicalizing Reproduction in the United States and Great* Britain (Aldine de Gruyter, 2003), 38.
[16] On the transnational dimension of these anti-reproductive rights arguments see S. Mancini and K. Stoeckl, *Transatlantic Conversations. The Emergence of Society-Protective Anti-Abortion Arguments in the United states, Europe and Russia* in: 220-257, in S. Mancini and M. Rosenfeld eds., *The Conscience Wars* Cambridge University Press, 2018)
[17] R. Alta Charo, *supra* note.
[18] "Abortion carries substantial risks to women including hemorrhage, infection, cardiac and respiratory arrest, and even death:" *Yoest on Cuccinelli's abortion clinics*, August 24, 2010, American United for Life, aul.org/2010/08/24/yoest-on-cuccinelli-

scientific studies having radically discredited such "findings".[19] Another fervent believer in "alternative science" is Teresa Manning, former deputy Assistant Secretary of Health and Human Services, and a lobbyist for the National Right to Life Committee. Her task in the Trump Administration was to build federal programs for family planning, which provide birth control access to mostly low-income and uninsured women. Likewise Yoest, however, Manning beliefs that "contraception is ineffective" in preventing pregnancies.[20] Trump also nominated to the Domestic Policy Council Kate Talento, a vocal anti-contraception advocate, who published articles claiming that contraceptives amount to "a bunch of dangerous, carcinogenic chemicals",[21] that cause infertility, miscarriages, and the rupture of the uterus.[22]

Alongside false science, misogyny has been a driving force of the Trump Administration. The insulting and often obscene comments that the President himself directed to women were only the tip of the iceberg in an Administration that upheld the patriarchal family structure, using women's reproductive role to undermine their legal status. Indeed, many of Trump's appointees displayed heavily discriminatory attitudes against women, particularly in the field of reproductive rights. Roger Severino, the Director of the HHS Office of Civil Rights, advocated for the discrimination in access to healthcare of transgender women and women who have undergone (legal) abortions .[23] Severino also attempted to block Planned Parenthood –which provides legal and affordable reproductive health services, including abortions- from Title X, the only federal grant program which is supposed to offer comprehensive family planning and related health services.[24] Another Trump's appointee was Scott Lloyd a lawyer

abortion-clinic-opinion/

[19] On the inexistence of a correlation between abortion and breast cancer see *e.g.* : National Cancer Institute, *Abortion, Miscarriage, and Breast Cancer Risk: 2003 Workshop*, 2010, available at: www.cancer.gov/types/breast/abortion-miscarriagerisk (last accessed 15 December 2020). On abortion and mental health see: *Report of the APA Task Force on Mental Health and Abortion*, www.apa.org/pi/women/programs/abortion/mental-health.pdf (accessed May 22, 2017).

[20] D. Michaels, The Triumph of Doubt: Dark Money and the Science of Decept, Oxford University Press, 2020, 222

[21] K. French Talento, *Ladies: Is Birth Control The Mother Of All Medical Malpractice?*, *The Federalists*, January 5, 2015, available at: thefederalist.com/2015/01/05/ladies-is-birth-control-the-mother-of-all-medical-malpractice/ (last accessed: 15 december 2020).

[22] K. French Talento, *Miscarriage Of Justice: Is Big Pharma Breaking Your Uterus?*, *The Federalist*, January 22, 2015, available at: thefederalist.com/2015/01/22/miscarriage-of-justice-is-big-pharma-breaking-your-uterus/ (last accessed: 15 December 2020).

[23] R. Severino and R. T. Anderson, *Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians.*
The Heritage Foundation, January 6 2016, available at: www.heritage.org/health-care-reform/reports/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience (last accessed 15 December 2020)

[24] "To ensure that taxpayers are not forced to subsidize America's number one abortion provider, Congress should make Planned Parenthood affiliates ineligible to receive either Medicaid reimbursements or Title X grants if they continue to perform abortions". J. Hall and R. Severino, *Disentangling the Data on Planned Parenthood Affiliates Abortion Services and Receipt of Taxpayer Funding*, *The Heritage Foundation*, September 30, 2015, available at: www.heritage.org/health-care-reform/report/disentangling-the-data-planned-parenthood-affiliates-abortion-services (last

with the Catholic anti-abortion organization Knights of Columbus, and a fervent opponent of commonly used contraceptives, which he mischaracterized as "expelling the life [of the embryo]".[25] In his capacity as Director of the Office of Refugee Resettlement, he launched a crusade to prevent unaccompanied and undocumented teenagers at federally funded shelters from obtaining abortions, even in case of rape or incest, and even when the young women could afford to pay for the procedure. Lloyd's victims were underage girls, mainly from Latin American countries, many of whom fell "victims of rape and sexual violence, either in their home countries or during the perilous journey" to the United States.[26] Lloyd required that federal shelters "should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling". He "personally visited and called pregnant girls in shelters, directed them to a list of approved [anti-abortion]… centers, instructed staff to block minors from meeting with attorneys", and to "call a minor's parents" (presumably in a faraway country) even after a judge had given her permission to have an abortion *without* parental consent.[27]

As we will see in the following pages, the combination of political cynicism and religious zeal typical of the Trump Administration resulted in an unprecedented plethora of attacks on reproductive rights that impacted both the domestic as well as the international landscape.

3. The Assault on Reproductive Rights: the Constitutional Dimension

The strategy pursued by conservative forces aimed at eliminating reproductive rights is complex and multifaceted. It targets both the legal frame that provides access to contraception and abortion as well as the *de facto* access to such services. Importantly, it is an incremental strategy: it pursues a particular legal change, but, once it has been obtained, conflict is not settled. To the contrary, each victory galvanizes prolife actors, who raise the threshold and engage in new battles. While the means used to undermine reproductive rights are by no means new, the Trump Administration has provided a particularly fertile terrain for their success and further expansion.

3.1 TRAP laws

Targeted regulations on abortion providers (colloquially referred to as TRAP laws) are one of the most effective ways to drastically reduce the number of facilities offering reproductive services. The strategy consists in adopting legislation imposing highly onerous and unnecessary requirements

accessed 15 December 2015).
[25] S. Lloyd, *Does contraception really prevent abortion? The Federalist*, August 15, 2015, available at: thefederalist.com/2015/08/18/does-contraception-really-prevent-abortions/ (last accessed; 15 December 2020).
[26] R. Raysam, *Trump official halts abortions among undocumented, pregnant teens, Politico*, 16 October 2017, available at: www.politico.com/story/2017/10/16/undocumented-pregnant-girl-trump-abortion-texas-24844 (last accessed December 15, 2020).
[27] *Id.*

upon medical facilities offering abortion services, that are presented as protecting women's health from the procedure's supposed very substantial risks, despite all evidence showing that abortion is among the safest medical procedures.[28] TRAP laws make it *de facto* impossible for most facilities to continue operating. Indeed, since the constitutionalization of abortion in 1973, most abortion procedures in the United States are carried on in freestanding medical facilities. TRAP laws typically mandate requirements that freestanding facilities do not meet. These include, for example, that doctors performing abortions must have admitting privileges at a hospital located not further that 30 miles from the location where the abortion is performed, and which provides obstetrical or gynecological health care services.[29] Other requirements impose the minimum dimensions for the widths of facility hallways or doorways; the presence of specialized rooms; minimum specifications for air ventilation or temperature; or require that regulated facilities use specified levels of nursing staff.[30] Importantly, such requirements are not mandated for facilities that carry on "many medical procedures, including childbirth, [that]are far more dangerous to patients".[31]

In 2016, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court struck down the Texas TRAP law, on the ground that ambulatory surgical centers and admitting privileges requirements constitute an undue burden on women's right to terminate their pregnancy. The Court dismantled the law's women protective *rationale*, holding that "nothing … shows that…. the new law advanced Texas' legitimate interest in protecting women's health". The Court also unmasked the real purpose of the Texas' statute, noting that "the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts".[32] For these reasons, the Court concluded that "in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered.[33]"

The case constituted a major victory for abortion rights,[34] because it

[28] National Academies of Sciences, Engineering, and Medicine. 2018. *The safety and quality of abortion care in the United States*: The National Academies Press, available at: doi.org/10.17226/24950.
[29] *Whole Woman's Health v. Hellerstedt*, 579 U.S. (2016) (Ginsburg concurring).
[30] Bonnie S. Jones, Sara Daniel and Lindsay K. Cloud, "*State Law Approaches to Facility Regulation of Abortion and Other Office Interventions*", American Journal of Public Health, 2018 April;108(4): 486–492.
[31] *Whole Woman's Health v. Hellerstedt*, 579 U.S. (2016).
[32] *Ibid.*
[33] *Ibid.*
[34] On the implications of this decision see L. Greenhouse and R. B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, *Yale Law Journal Forum* 126 (2016). ("Yale Law School Public Law Research Paper No. 578", *SSRN*, August 16, 2016, ssrn.com/abstract=2838562).

reinforced and clarified the "undue burden", test upon which courts rely in assessing the constitutionality of abortion regulation since *Planned Parenthood v Casey*.[35] According to the decision in ***Whole Woman's Health***, courts must in the first place assess whether a law that restricts access to abortion pursues a valid state interest; they must weight the benefits of abortion restrictions against the burdens that it places on women's abortion rights; and, finally, when balancing benefits and burdens, courts must rely on credible evidence, that rest on reliable methodology. The latter principle is crucial, as it takes a clear position against the use of false science to restrict abortion rights. Moreover, and most importantly, by affirming that to pass the test a law must further a valid state interest, and not simply be rationally related to one, the Court clarified that the undue burden test subjects measures that restrict abortion rights to heightened scrutiny, excluding deference to state lawmakers.

The potential of *Whole Woman's Health* was severely challenged only four years later in *June Medical Services v. Russo*. The case was an important test for the new composition of the Court, after the nominations by President Trump of two vehemently anti-abortion justices, Neil Gorsuch and Brett Kavanaugh. The appointment of the latter in 2018, in particular, had galvanized pro-life state policymakers, resulting in a new wave of measures banning or heavily limiting reproductive rights. In 2020, in *June Medical Services v. Russo*, the Supreme Court apparently upheld *Whole Woman's Health*, ruling that a Louisiana state law, which placed hospital-admission requirements on abortion clinics doctors, was unconstitutional. The impugned law was almost identical to the Texas statute that the Court had declared unconstitutional in *Whole Woman's Health v. Hellerstedt*. In the latter case Chief Justice Roberts had sided with the dissenting judges. To the contrary, in *June Medical Services*, Roberts voted with the "liberal" justices, thus providing the critical fifth vote in favor of striking down the Louisiana statute. He did, however, file a concurring opinion that raises worrisome questions concerning the future turn of the Court on abortion rights. Instead of the test in *Whole Woman's Health*, which balances the benefits of an abortion restriction against its burdens, Chief Justice Roberts proposed a different test, which would hold constitutional any regulation that can be justified by a non arbitrary reason and does not impose a "substantial obstacle". Moreover, Roberts introduces a flexible standard, maintaining that "the validity of admitting privileges laws depend[s] on numerous factors that may differ from State to State". Chief Justice Robert's test thus reversed the heightened scrutiny standard established in *Whole Women's Health*, and rejected the notion that the balancing of costs and benefits of an abortion regulation was "a job for the courts", holding instead that in the

[35] "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability". *Planned Parenthood v Casey*, 505 U.S. 833, 877 (1992).

abortion context, "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty", [36] thus paving the terrain for false science to again constitute the *rationale* of state legislation that limit women's rights.

In practice, Chief Justice Robert's opinion sounded like an invitation to state legislatures to carefully carve abortion limitations of all sorts under the guise of women's health protection. As a commentator put it, " Roberts is telling states wanting to impose all sort of needless regulations that it doesn't matter if they are utterly without health benefits, so long as the burdens on women are not that bad".[37] As expected, the invitation was promptly accepted. Two months after the decision in *June Medical*, the US Court of Appeals for the Eighth Circuit instructed the court below it to rely on Justice Roberts' separate opinion in *June Medical* as sole constitutional authority to reconsider its preliminary injunction of a sweeping abortion law that requires the burial or cremation of fetal remains, among other restrictions. [38]

In sum, *June Medical* truly constitutes a pyrrhic victory, which set the ground for a proliferation of abortion restrictions This is especially true in the light of the further change occurred in the Court's composition, with the appointment of a fundamentalist Christian judge, who has clearly stated that "public response to controversial cases like Roe reflects public rejection of the proposition that [precedent] can declare a permanent victor in a divisive constitutional struggle rather than desire that the precedent remain forever unchanging".[39]

3.2 Crisis pregnancy centers

A more subtle strategy to restrain abortion rights centers around the role of Christian-based fake women's health facilities. The latter, known as "crisis pregnancy centers", are often unlicensed pro-life "organizations that seek to intercept women with unintended or 'crisis' pregnancies who might be considering abortion" -particularly low-income women and women of color- to convince them to carry to term.[40] These centers have existed for decades,

[36] Roberts, C.J., concurring in judgment at 2136 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)).
[37] D. Lithwick, *Roberts isn't a liberal. He's a perfectionist who wants to win*, *Slate*, June 29, 2020, available at: slate.com/news-and-politics/2020/06/roberts-june-medical-strategy.html?sid=58dd2687dd4c29dc118b457d&utm_medium=email&utm_source=newsletter&tm_content=TheSlatest&utm_campaign=traffic (accessed December 15, 2020).
[38] US Supreme Court. Order List, July 2, 2020 and *Hopkins v Jegley*, No. 17-2879 (8th Cir. 2020): "As a result, we vacate the district court's preliminary injunction and remand for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*, which is controlling, as well as the Supreme Court's decision in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam)".
[39] A. Coney Barrett, *Precedent and Jurisprudential Disagreement*, *Texas Law Review*, vol. 8, 2013, 1727.
[40] A. G. Bryant and J. J. Swartz, *Why crisis pregnancy centers are legal but unethical*, *AMA Journal of Ethics*, 2018;20(3):269-277. Available at: journalofethics.ama-

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but have significantly expanded since the 1990's, as a consequence of the turn towards "women protective" anti-abortion arguments mentioned above, that rely on false information to dissuade women from making informed choices. [41]

Crisis pregnancy centers convey the impression of being medical facilities providing professional advice. Their lay volunteers, who are not licensed clinicians, often wear white coats and see women in exam rooms. They offer counseling on "all options" for pregnancy, but refuse to refer women to abortion facilities. They purport to offer "medical information", but "the counseling provided on abortion and contraception … falls outside accepted medical standards and guidelines for providing evidence-based information and treatment options".[42] Indeed, what they do provide is the usual false information, such as that abortion is a particularly dangerous procedure, and that it causes cancer and mental illness. They use ultrasound "for reaching abortion-minded women" [43] and misleading terms such as "unborn children", to exercise psychological pressure and persuade them to continue their pregnancy.

Ultimately, these centers are deceptive, they create a "coercive environment",[44] and "do not meet the standard of patient-centered, quality medical care".[45] Yet, they are often subsidized by state governments, and many also receive federal funding.[46] This makes for a striking contrast with the treatment of abortion providers, who are licensed professionals that operate according to the highest medical standards, and yet receive no funding and face, as we have seen above, often insurmountable barriers disguised as legislative requirements to protect women's health. In 2018, in *National Institute of Family and Life Advocates* v. *Becerra*, the Supreme Court struck down a California law that required centers providing pregnancy-related services to post notices informing patients if they were not licensed medical centers and stating that California offers publicly-funded reproductive healthcare services, including contraception and abortion care. [47] The law was intended to protect consumers, ensuring that "pregnant women in California know when they are getting medical care from licensed

assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03 (last accessed 15 December 2020).

[41] B. R. Clark, *Commentary on National Institute of Family and Life Advocates v. Becerra* (December 1, 2020). Loyola Law School, Los Angeles Legal Studies Research Paper No. 2020-32. Available at SSRN: ssrn.com/abstract=3742453

[42] A G. Bryant and J. J. Swartz, *supra* note.

[43] The website of National Institute of Family and Life Advocates (NIFLA), which "exists to protect life-affirming pregnancy centers targeted by pro-abortion groups and legislation", admits that: "*NIFLA recognized the importance of using ultrasound in a pregnancy center setting for reaching abortion-minded women more than two decades ago, and has been pioneering the way in which the pro-life movement uses this important tool ever since. Ultrasound offers a window to the womb, and this impacts a woman's decision to choose life*" available at: nifla.org/about-nifla/ (last accessed December 15 2020).

[44] B. R. Clark, supra *note*, 3.

[45] *Ibid.*

[46] A. G. Bryant and J. J. Swartz, *supra* note.

[47] *National Institute of Family and Life Advocates* v. *Becerra* 138 S.Ct. 2361 (2018).

professionals", and that they "make their personal reproductive health care decisions knowing their rights and the health care services available to them". [48] The five-justice conservative majority decided that such notices requirements constituted a content based regulation of speech prohibited by the First Amendment. Justice Clarence Thomas, writing for the majority, held that the First Amendment prohibits California from forcing the fake health centers to provide a "government-scripted message about the availability of state-sponsored services", which include abortion, that is "the very practice that petitioners are devoted to opposing. Accordingly, by requiring petitioners to inform women how they can obtain state-subsidized abortions, the licensed notice plainly "alters the content" of petitioners' speech". A different interpretation had been provided by the U.S. District Court and Ninth Circuit of Appeals, which had held the California law constitutional, considering that the licensing notices were forms of professional speech. To the contrary, the majority justices did not recognize the latter as a "separate category of speech". "Speech" –held the Supreme Court- "is not unprotected because it is uttered by 'professionals.'" According to the majority, in the Court's precedents, there are only two circumstances in which "professional speech" is subject to less than strict scrutiny: "where a law requires professionals to disclose factual, *non controversial* information in their 'commercial speech;'"[49] and "where States regulate professional conduct that incidentally involves speech". [50] Neither authorities are, however, applicable in this case, because "abortion, is anything but an 'uncontroversial' topic", and because "the licensed notice is neither an informed-consent requirement nor any other regulation of professional conduct".

Justice Breyer, writing for the minority, pointed out that under the majority's reasoning "[v]irtually every disclosure law could be considered 'content based' for virtually every disclosure law requires individuals to 'speak a certain message,'" including "numerous commonly found disclosure requirements relating to the medical profession". Justice Breyer also highlighted that the "marketplace of ideas", as mentioned in the majority opinion, "is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies". The dissenting justices also pointed to the double standard produced by the Court's decision: "[i]f a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?" Finally, the dissenting justices also raised questions concerning

[48] California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act Assembly Bill No. 775. Sec 1 (e) and Sec. 2.
[49] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* 471 U.S. 626, 651 (1985).
[50] *Planned Parenthood of Southeastern Pa v. Casey* 505 U.S. 833, 884 (1992).

the majority's characterization of abortion as not a medical procedure, noting that "[n]o one doubts that choosing an abortion is a medical procedure that involves certain health risks".

3.3. Conscience Clauses: Freedom of Religion and the Dismantling of Obamacare

Probably the most pernicious attack against reproductive rights has taken place in the United States through the broadening of religious conscientious objection.[51] Following the *Roe v. Wade*[52] decision in 1973, Congress adopted the Church Amendment,[53] which provided that receipt of federal funds would not provide a basis for requiring a physician or nurse "to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions",[54] and that no "entity" could be compelled to "make its facilities available for the performance of any sterilization procedure or abortion if [such] performance . . . is prohibited by the entity on the basis of religious beliefs or moral convictions".[55] "In the 1990s and 2000s, laws at the state and federal levels grew to include contraception and to cover a much broader range of acts and actors. This new generation of laws went beyond the Church Amendment and plainly sought to accommodate objections to many more forms of conduct, interactions, and associations thought to make the objector complicit in the wrongdoing of another person".[56]

The escalation of religiously motivated exemption claims reached its peak in 2014 with the *Hobby Lobby* case,[57] in which the claimants, closely held for-profit corporations, objected to providing their employees' health insurance benefits that covered certain contraceptives (such as the morning after pill and intra uterine devices that they deemed "abortifacient"), under the Affordable Care Act. The latter, colloquially known as "Obamacare", mandated individual health insurance and employers of a certain size to insure their employees as part of the employment relationship. In particular, this insurance explicitly included an obligation to offer contraceptive coverage to any woman who wished to avail herself of it. This was an important change from the previous insurance arrangement that often denied women the essentials of reproductive health coverage, which put women at a disadvantage in obtaining equal access to health care. Obamacare sought to remedy these deficiencies but immediately ignited a

[51] See S. Mancini and M. Rosenfeld eds., *The Conscience Wars. Rethinking the Balance Between religion, Identity and Equality*, Cambridge University Press, 2018.
[52] *Roe v. Wade*, 410 U.S. 113 (1973).
[53] The Church Amendment was passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)-(c), 87 Stat. 91, 95.
[54] 42 U.S.C. § 300a-7(b)(1) (2012).
[55] 42 U.S.C. § 300a-7(b)(2)(A) (2012).
[56] D. NeJaime and R. B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *The Yale Law Journal* 124 (2015), 2538.
[57] *Burwell* v. *Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014).

heated debate that coalesced libertarian interests set against government intervention and religious interest rigidly opposed to promotion of reproductive rights. The Supreme Court upheld the claim by *Hobby Lobby* that offering to their employees the required health care substantially burdened their free exercise of religion under the Religious Freedom Restoration Act (RFRA).[58] The Court did however find that the employees would not lose their contraception coverage because the state itself could provide for it.

Under the Trump Administration, a new wave of legislative and regulatory measures and judicial decisions dramatically broaden the space for religious exemptions at the expense of reproductive rights. Importantly, the weaponization of religious freedom by the federal Administration does not mirror the views of the majority of American religious groups, which support employer-provided health care coverage that includes free access to contraception.[59] Fundamentalist Christian lobbies thus dictate the Republican agenda.

In 2018, the U.S. Department of Health and Human Services (HHS), together with the Departments of Labor and of the Treasury, issued two final rules to provide regulatory relief to American employers, that have religious or moral objections to providing coverage for contraceptives, "including those they view as abortifacient", in their health insurance plans. The Supreme Court upheld these measures in *Little Sisters of the Poor Saints Peter & Paul Home*, [60] Justice Ginsburg dissented, raising preoccupations concerning the practical consequences of the ruling on poorer women, and pointing to the unprecedented expansion of religious freedom: "In accommodating claims of religious freedom, this court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs", she wrote. "Today, for the first time, the court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree".[61] Justice Ginsburg's concern was certainly well-grounded.

A few months after deciding *Little Sisters of the Poor*, the Court decided another case, which did not address religiously motivated exemptions to reproductive rights, but to same-sex marriage. The case concern Kim Davis, a Christian county clerk in Kentucky, responsible for authorizing marriage licenses. Davies was sued for refusing licenses to gay couples, after the Court had ruled that the fundamental right to marry is guaranteed to same-sex couples in the landmark case of *Obergefell* v. *Hodges*.[62] The USSC did not

[58] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993).
[59] O. Ahmed, S. Phadke and D. Boesch *supra* note.
[60] *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2400 (2020).
[61] *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2400 (2020) (Ginsburg. J. dissenting).
[62] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

grant Davies certiorari, but two justices –Thomas and Alito- filed a concurring opinion, holding that: "Davis is the first victims of the Court's cavalier treatment of religion in *Obergefell*. Due to Obergefell, those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society. It would be one thing if recognition for same-sex marriage had been debated and adopted through the democratic process, with the people deciding not to provide statutory protections for religious liberty under state law. But it is quite another when the Court forces that choice upon society through its creation of non textually based constitutional rights and its ungenerous interpretation of the Free Exercise Clause, leaving those with religious objections in the lurch. Moreover, *Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss. For example, relying on Obergefell, one member of the Sixth Circuit panel in this case described Davis' sincerely held religious beliefs as "anti-homosexual animus".[63]

In the light of the recent changes in the Court's composition, this opinion casts a long shadow on the future of sexual and reproductive rights. Indeed, the severe imbalance on the Court is likely to invite Christian conservative state policymakers to intensify aggressive policies that uphold patriarchal structures and discriminate against women and sexual minorities, in the hope that they will be held constitutional under the umbrella of religious freedom.

4. The Assault on Reproductive Rights: the International Human Rights Dimension

The Trump Administration has been particularly active in countering reproductive rights not just domestically, but also globally. On Day Three of his Presidency, Trump signed an Executive Order reinstating the Mexico City Policy, colloquially referred to as the "Global Gag Rule", which makes "neither performing nor actively promoting abortion as a method of family planning in other nations" conditions of receiving federal funding for any NGO. While the Global Gag Rule is not new, under Trump it was extended for the first time to "all global health assistance furnished by all departments and agencies". In order to undermine sexual and reproductive rights internationally, Trump pursued cooperation with authoritarian countries, particularly infamous for their severe and consistent violations of women's rights, such as Saudi Arabia, Pakistan and Lybia. In December 2020, the Permanent Representative of the United States to the United Nations addressed a letter to the Secretary General, affirming that: "There is No International Right to Abortion", and calling attention to the "Geneva

[63] *Davis* v *Ermold*, 582 U. S. ____ (2020).

Consensus Declaration on Promoting Women's Health and Strengthening the Family". The Declaration, which emphasizes women's "critical role in the family", and their contribution to the welfare of the latter, was co-sponsored by the USA, Uganda, Hungary, Indonesia, Egypt and Brazil and it was signed by a total of thirty-four countries, none of which with sound democratic credentials.[64] The alliance of the Trump Administration with states that treat women as second class citizens to fight reproductive rights should not be surprising. Reproductive rights are a fundamental condition for women's equal place in society, in the family, in politics and in the workplace. The ability to control one's reproductive rights is key in protecting women's health, and in preventing women from developing economic dependency upon others. Reproductive rights are thus crucial tools of social and economic empowerment for women and a structural component of gender equality.

The Trump Administration has also engaged ina bitter confrontation with human rights experts concerning the discriminatiory effects of its abortion policies. In a letter made public in August 2020, the UN Working Group on Discrimination Against Women and Girls together with the Special Rapporteurs on the Right to Health, and on Violence Against Women, raised alarm at efforts by several U.S. states to restrict abortion access during the COVID-19 pandemic and reiterated that human rights protect access to abortion.[65] The human rights experts accused the US of "exacerbating systemic inequalities" by denying women access to time-sensitive abortion care: "Denying women access to information and services which only they require and failing to address their specific health and safety is inherently discriminatory and prevents women from exercising control over their own bodies and lives".[66]

Finally, under the Trump Administration, the international assault on reproductive rights also occurred indirectly, through the action of various conservative Christian lobbies, which routinely provide pro bono services, submit amicus briefs, and represent clients before international, regional and domestic courts. Many of these groups had ties with Trump and/or his Administration. The chief counsel of the American Center for Law and Justice (ACLJ), for example, is Jay Sekulow, a prominent member of the Trump's legal team, who served as lead outside counsel for Trump's impeachment trial before the United States Senate. Kerry Kupec, the top spokesperson at the Department of Justice, was previously the Director for

[64] United Nations General Assembly, 7 December 2020, Seventy-fifth session, A/75/626 Agenda Item 131, available at undocs.org/A/75/626 (last accessed 15 December 2020).
[65] United Nations Human Rights Office of the High Commissioner, *United States: Authorities manipulating COVID-19 crisis to restrict access to abortion, say UN experts*, 27 May 2020, available www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25907&LangID=E
[66] *Ibid.*

Legal Communications in another extreme Christian right wing organization, Alliance Defending Freedom (ADF). ACLJ and ADF have offices in Europe, and have intervened in countless European court cases, upholding all encompassing notions of religious freedom, and countering sexual and reproductive rights. Recently, for example, the European branch of the ACLJ submitted an amicus to the Polish Constitutional Tribunal, [67] in the case where the latter decided that abortion is unconstitutional in cases of fetal abnormalities, thus removing the basis for nearly all abortions in Poland.[68] The case, which occasioned unprecedented reactions in Poland, was condemned by the Council of Europe as a grave "human rights violation". [69]

5. Concluding remarks: reproductive rights as a "canary in the coal mine" of liberalism

As mentioned above, reproductive rights are a crucial component of women's equality. As the U.S. Supreme Court recognized in *Casey*, women's ability to realize their full potential is intimately connected to "their ability to control their reproductive lives".[70] Thus, restrictions on contraception and abortion access affect women's autonomy to determine the course of their lives, and to enjoy their equal citizenship stature.[71] Restrictions motivated by arguments centered on women's nature are particularly pernicious in this respect, because their effect is not limited to interfering with women's equal rights. These restrictions directly question women's agency, and women's wholeness as rights holders, because they are founded on the claim that the law should recognize that men and women have different roles based on their biology. This claim is actually reminiscent of nineteenth-century biological and medical arguments supporting opinions about the existence of a "natural" difference between men and women, that centered on women's reproductive role and supported their intellectual inferiority and legal status.[72]

It would be a mistake, however, to confine the effects of Trump's assault on reproductive rights to women's equality. Borrowing the

[67] Amicus Curiae Brief Submitted to the Constitutional Tribunal of Poland In the case K 1/20 by the ECLJ, available at: media.aclj.org/pdf/Amicus-Curiae-Brief-to-the-Constitutional-Tribunal-of-Poland-K-1.20-ECLJ-October-2020.pdf (last accessed 15 December 2020).
[68] Judgment of the Constitutional Court of Poland of 22 October 2020 (ref. K 1/20)
[69] Claire Provost & Adam Ramsay, *Revealed: Trump-Linked US Christian 'Fundamentalists' Pour Millions of 'Dark Money' into Europe, Boosting the Far Right*, openDemocracy (Mar. 27, 2019), www.opendemocracy.net/en/5050/revealed-trump-linked-us-christian-fundamentalists-pour-millions-of-dark-money-into-europe-boosting-the-far-right [perma.cc/6LBD-MKCK].
[70] 505 U.S., at 856.
[71] R. B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, *Stanford Law Review* 44 (1992).
[72] C. Lombroso and G. Ferrero, *Criminal Woman, the Prostitute, and the Normal Woman*, ed. N.Hahn Rafter and M. Gibson (Durham: Duke University Press, 2004).

expression from Françoise Girard, reproductive rights as a "canary in the coal mine" of human rights,[73] and, more broadly, of liberalism and liberal democracy. In the first place, women's rights are not sectorial. They are the rights of half of humanity and could thus not be more universal. As we have seen, attacking women's rights goes hand in hand with a selective vision of human rights, whereby some are elevated as inherently moral and thus truly fundamental, while other rights are disregarded as merely political. In 2019 U.S. Secretary of State Mike Pompeo launched a "Commission on Unalienable Rights", to introduce "reforms of human rights discourse where it has departed from our nation's founding principles of natural law and natural rights".[74] The Commission was chaired by Harvard Professor Mary Ann Glendon, according to whom "the post-World War II dream of universal human rights risks dissolving into scattered rights of personal autonomy…. a range of novel sexual liberties might one day become the bread and circuses of modern despots—consolation prizes for the loss of effective political and civil liberties".[75] Pompeo himself decried the merger between "unalienable", or God-given, and man-made (*ad hoc*) rights, a dichotomy that contradicts the fundamental tenet of human rights law, that all rights are universal and equal, interdependent and interrelated.[76] In July 2020, the Commission released a Draft report, [77] which suggests how American international human rights policy should better reflect what the Commission characterizes as the nation's founding principles: Protestantism, civic republicanism and classical liberalism. In this light, not all rights are equally fundamental: to the contrary, property rights and religious liberty are supposedly "foremost" among human rights, while social and economic rights are not "compatible [with the American founding principles] when they induce dependence on the state, and when, by expanding state power, they curtail freedom — from the rights of property and religious liberty to those of individuals to form and maintain families and communities".[78] According to the Draft Report, at the core of inalienable

[73] I borrow this expression from F. Girard, *Reproductive Rights: The Canary In The Coal Mine*, *The Huffpost*, 24 January 2018, available at: www.huffpost.com/entry/reproductive-rights-the-c_b_14348816?guccounter=1 (last accessed: 18 December 2020).
[74] National Archives, Federal Register, A Notice by the State Department on 05/30/2019: Department of State Commission on Unalienable Rights, available at: www.federalregister.gov/documents/2019/05/30/2019-11300/department-of-state-commission-on-unalienable-rights
[75] M. A. Glendon, *Reclaiming Human Rights*, First Things (August 2016), available at: www.firstthings.com/article/2016/08/reclaim-human-rights
[76] "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis". Art. 5, Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993), available at: www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx
[77] Report of the Commission on Unalienable Rights available at: www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf
[78] *Ibid.*

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rights lies the concept of human dignity, upon which rests the UN Universal Declaration of 1948, which "is not created by political life or positive law but is prior to positive law and provides a moral standard for evaluating positive law".[79]

Under the incoming Biden Administration, it is expected that the Pompeo Commission will be dismantled, and its Draft Report disregarded. The philosophy of rights that lie at its core, however, is likely to survive in future courts' rulings, in state laws and regulations, and in the domestic and international endeavors of conservative Christian actors, challenging the fundamental conditions for pluralistic democracy.[80]

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[79] *Ibid.*
[80] For an in-depth analysis of this phenomenon see S. Mancini and M. Rosenfeld, *Nationalism, Populism, Religion, and the Quest to Reframe Fundamental Rights*, *Cardozo Law Review* (2020) vol. 42: 101-169.