

2018

Mr. Trump's Contribution To Women's Human Rights

Barbara Stark

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Barbara Stark, *Mr. Trump's Contribution To Women's Human Rights*, 24 318 (2018)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1155

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

MR. TRUMP’S CONTRIBUTION TO WOMEN’S HUMAN RIGHTS

*Barbara Stark**

I. INTRODUCTION: THE DAY AFTER	317
II. CIVIL AND POLITICAL RIGHTS: THE MARCH	319
A. <i>Legal Grounds</i>	320
B. <i>Civil and Political Rights</i>	321
1. Organizing	321
2. The November 2017 Elections.....	322
III. SEXUAL HARASSMENT.....	324
A. <i>In America</i>	324
1. Title VII, the Women’s Movement, and Catharine MacKinnon	324
2. Anita Hill and Clarence Thomas	324
3. The 2016 Campaign	325
B. <i>Women’s Human Rights Law</i>	330
IV. WOMEN’S HEALTH	332
A. <i>The Affordable Care Act and Other Federal Programs</i>	332
B. <i>Women’s Reproductive Health</i>	336
1. In the United States	336
2. Abroad.....	339
V. CONCLUSION: A YEAR OF RESISTANCE.....	341

“Well, at least he’s got us moving.”¹

I. INTRODUCTION: THE DAY AFTER

The day after Donald Trump’s inauguration, women and their supporters marched across the United States (and around the world), in what was probably the largest single day of protest in American history.²

* Barbara Stark 2017. Professor of Law and Hofstra Research Fellow, Hofstra Law School. Thanks to reference librarian Patricia Kasting for outstanding research assistance; to Jonathan Hafetz, Baher Azmry, and Azadeh Shashani for their participation in the panel on *International Human Rights After Trump* at International Law Weekend, Oct. 20, 2017, where an early version of this paper was presented, and to Joyce Cox, for her patience in preparing the manuscript.

1. “[W]hen Donald Trump beat Hillary Clinton it triggered a visceral response in masses of American women, and their trauma may be turning into a political uprising more powerful than the Tea Party.” Gail Collins, *Donald Trump’s Gift to Women*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/opinion/donald-trump-women.html>.

2. See Jenna Wortham, *Who Didn’t Go to the Women’s March Matters More than Who Did*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/magazine/who-didnt-go-to-the-wome>

More than 500,000 people clogged the capital.³ Four hundred thousand protested in New York City, Trump's hometown.⁴ The official march was cancelled in Chicago after 250,000 overflowed Grant Park.⁵ One hundred seventy-five thousand showed up in Boston.⁶ Protests are fine, of course, but they are ephemeral. Their significance may be especially questionable when they purport to represent such a large and fractious group.⁷

But I start with the March because that's how women started, not even twenty-four hours after Trump took the oath of office. I also start with the March because that astonishing outpouring, the sheer numbers of people who literally took to the streets, was not a one-off, but a harbinger. Trump's presidency is for those who support women's human rights, what *Roe v. Wade*⁸ was for abortion opponents, a "target," as Justice Ruth Bader Ginsburg has characterized it, an event that has focused and united people who did not realize how much they had in common.⁹ "[A]nger over *Roe* fuel[ed] a state-by-state campaign that has placed more restrictions on abortion."¹⁰ As Justice Ginsburg has explained, "[t]hat was my concern, that the court had given opponents of access to abortion a target to aim at relentlessly. . . . My criticism of *Roe* is that it seemed to have stopped the momentum that was on the side of change."¹¹ Just as *Roe* did for the

ns-march-matters-more-than-who-did.html (noting photo of black woman holding sign, "Don't Forget: White Women Voted for Trump.").

3. Anemona Hartocollis & Yamiche Alcindor, *Women's March Highlights As Huge Crowds Protest Trump: 'We're Not Going Away'*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html> (quoting homeland security director, Christopher Geldart).

4. *Id.* (quoting Mayor Bill deBlasio's office). See also Emma G. Fitzsimmons, *In Trump's Hometown, A Clear Message of Defiance from Women*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/nyregion/womens-march-donald-trump-manhattan.html>.

5. Hartocollis & Alcindor, *supra* note 3 (quoting the Chicago Tribune).

6. *Id.* (citing Mayor Martin Walsh's office).

7. See Wortham, *supra* note 2 (noting that fifty-three percent of white women who voted, voted for Trump); see also Susan Chira, *Since When Is Being A Woman A Liberal Cause?*, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/sunday-review/since-when-is-being-awoman-a-liberal-cause.html> (noting that conservative women feel left out).

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

9. Associated Press, *Ginsburg: Roe Gave Opponents Target*, POLITICO (May 11, 2013, 9:56 PM), <https://www.politico.com/story/2013/05/ruth-bader-ginsburg-roe-v-wade-abortion-091218> [hereinafter *Roe Gave Opponents Target*].

10. *Id.*

11. *Id.* (emphasis added).

radical right, this presidency has not only unified those concerned with women's human rights but galvanized them.¹²

This Article focuses on three major areas of women's human rights: civil and political rights; the right to be free from sexual harassment; and the right to health. All of these rights were vigorously and creatively asserted during the marches. The range of these rights shows the scope of women's resistance to this Administration, and how women's international human rights law supports that resistance.

II. CIVIL AND POLITICAL RIGHTS: THE MARCH

I also begin with the March because the signs, posters, hats, chants, songs, and speeches addressed the full array of what the protesters were marching *for*. These included: an end to sexual harassment and domestic violence; support for women's health, especially reproductive health, including contraception and abortion; support for a healthy environment, including international cooperation to combat climate change; peace in general and the elimination of nuclear weapons more specifically;¹³ a reversal of unprecedented, and growing, economic inequality; the rejection of draconian immigration policies, including 'Muslim bans' that have been struck down by federal courts; and the rejection, and repudiation, of racism.¹⁴

This Part first sets out the legal grounds for these claims, ranging from blackletter American law to emerging norms of international human rights. Second, it sets out the civil and political rights which those who support women's human rights exercised during the marches and have continued to exercise ever since.

12. Editorial, *Pumping Life into the Equal Rights Amendment*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/opinion/sunday/pumping-life-into-the-equal-rights-amendment.html> [hereinafter *Pumping Life*].

13. Months after the March, Trump's repeated taunts of North Korea's President Kim Jong-un has fueled anxiety, and more protests. See, e.g., Choe Sang-Hun, *Fearing Korean Nuclear War, Women of 40 Nations Urge Trump to Seek Peace*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/world/asia/north-korea-trump-nuclear-war.html>.

14. Trump's public and private statements since the march, including Tweets and remarks leaked by aides, continue to stoke criticism and protest. See, e.g., Andrew Rafferty, Marianna Sotomayor & Daniel Arkin, *Trump Says 'Two Sides' Share Blame for Charlottesville Rally Violence*, NBC NEWS (Aug. 16, 2017, 7:19 AM), <https://www.nbcnews.com/news/us-news/trump-defends-all-sides-comment-n793001>; Sophie Tatum, *Trump: NFL Owners Should Fire Players Who Protest the National Anthem*, CNN POL. (Sept. 23, 2017, 4:05 PM), <https://www.cnn.com/2017/09/22/politics/donald-trump-alabama-nfl/index.html>; Sierra Teller Ornelas, *Donald Trump Would Make A Terrible Navajo*, NY TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/opinion/sunday/donald-trump-navajo-pocahontas.html> (describing Trump's interruption of ceremony to "honor Navajo code talkers to degrade Senator Elizabeth Warren by referring to her as Pocahontas").

A. Legal Grounds

Women's resistance to the Trump administration's position on the issues raised by the marchers is grounded in several distinct legal arguments. First, some of Trump's actions clearly violate American law, such as his admission in the Access Hollywood tapes that he has sexually assaulted women.¹⁵ He has not, however, called for the decriminalization of sexual assault.¹⁶

Second, other claims represented claims to women's human rights that are not recognized as "rights" under United States law but are recognized as rights under well-established international human rights law. These include economic rights, such as the right to health and the right to an adequate standard of living.¹⁷ These claims are significant because they show the widespread influence of women's human rights, and their rhetorical power even in a country that refuses to recognize them. They also show why ratification of international human rights treaties is so important for American women.

Third, there were claims made by marchers that are better understood as emerging human rights law, such as the claims against discrimination on the basis of sexual orientation¹⁸ and the right to a healthy environment.¹⁹ Nor is there a specific human right to peace, freedom from the threat of a nuclear war; or freedom from staggering economic inequality. The rights of immigrants and their families, similarly vary under domestic laws. But these claims, like those that draw on international law not yet recognized in the United States, show that Americans who support women's human rights are attuned to an international zeitgeist. They show further that these Americans are ready and able to participate in the process of developing and crystalizing emerging human rights.

15. See Maggie Haberman & Jonathan Martin, *Trump Once Said the 'Access Hollywood' Tape Was Real. Now He's Not Sure*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/us/politics/trump-access-hollywood-tape.html>.

16. He has, however, subsequently questioned his own public admission of the legitimacy of the tapes. *Id.*

17. International Covenant on Economic, Social and Cultural Rights arts. 11–12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

18. *The Yogyakarta Principles Plus 10*, YOGYAKARTA PRINC. http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf; see, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, OYEZ, <https://www.oyez.org/cases/2017/16-111> (last visited Feb. 10, 2018).

19. *Our Mission*, WOMEN'S MARCH, <https://www.womensmarch.com/mission> (last visited Feb. 27, 2018).

B. *Civil and Political Rights*

The clearest human rights claims—by all of the roughly four million marchers—were the civil and political rights recognized under the Constitution, as well as the International Bill of Rights.²⁰ These include the rights to freedom of expression, access to the courts, to associate with others, and the rights to vote and to be elected.²¹ Among other notable effects, the exercise of these rights culminated in victories for women in the first wave of national elections since Trump has occupied the White House. The political resistance of those who support women's human rights is broad and deep. It encompasses issues ranging from electing more women to public office to addressing gun violence to resuscitating the Equal Rights Amendment (ERA).²² It deploys a similarly broad range of tactics including litigation, lobbying, marches, town halls, and door-to-door canvassing.

1. Organizing

The marchers did not go home after the marches. In Chicago, women in their 60s, 70s, and 80s organized monthly meetings in which they planned, email and canvassing campaigns, organized phone trees, and developed strategies for electing more women to office.²³ More than 100 'Solidarity Sunday' groups formed throughout the United States, from New York to California, including groups in Missouri, Texas, and Louisiana.²⁴ They meet every second Sunday to "tackle national issues at a local level."²⁵ By February, one month after the inauguration, the group had 12,000 members, meeting in twenty-seven states.²⁶

20. See G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; ICESCR, *supra* note 17. It is globally recognized as the definitive law of international human rights. See *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987).

21. ICCPR, *supra* note 20, at arts. 14, 19(2), 22, 25.

22. Martha Holstein, Opinion, *Ways to Resist Trump*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/opinion/ways-to-resist-trump.html>; *Pumping Life*, *supra* note 12.

23. Holstein, *supra* note 22.

24. Adam Gabbatt, *Solidarity Sundays: Women Resist Trump with Monthly Activism Meet-ups*, GUARDIAN (Mar. 31, 2017, 7:00 PM), <https://www.theguardian.com/us-news/2017/mar/31/trump-resistance-movement-solidarity-sundays-meetup>.

25. *Id.*

26. Ronda Kaysen, *Home Is Where the Resistance Is*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/17/realestate/home-politics-resistance.html>.

Plans included a strike by women on International Women's Day (March 8, 2017). More than 30,000 people registered to participate, mostly from California and New York.²⁷ Women were encouraged to stay home from work, wear red, and refuse to spend money.²⁸ While some schools in North Carolina, Virginia, and Maryland closed because of teachers' absence, the national turnout was far from that seen on January 22nd.²⁹ But the strike's leaders said that that had never been the objective.³⁰ "The object for us isn't that we hope to shut the whole economy down, we see this as an opportunity to introduce women to different tactics of activism," said one of the co-chairs.³¹ These women are looking forward to 2018 and to 2020.

2. The November 2017 Elections

Trump has energized women, who have begun to run for office in unprecedented numbers.³² According to the deputy press secretary at Emily's List, more than 25,000 have contacted her organization expressing an interest in running for local or state office since Trump's election.³³ In the first nation-wide elections since Trump took office, there was a clear surge in women's political visibility.³⁴ "[A] wave of first-time female candidates stood for state and local office . . . across the United States—and they won."³⁵ In Virginia, women gained ten seats in the House of Delegates, bringing their total to twenty-seven.³⁶ "Virginia's blue wave ' . .

27. Susan Chira et al., *'Day Without a Woman' Protest Tests A Movement's Staying Power*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/us/a-day-without-a-woman.html>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Karin Kamp, *Women Becoming More Politically Engaged Since Trump's Win*, MOYERS & CO. (Mar. 31, 2017), <http://billmoyers.com/story/women-becoming-politically-engaged-since-trumps-win/>.

33. *25,000 Reasons to Be Excited for 2018*, EMILY'S LIST (Dec. 20, 2017), <https://www.emilyslist.org/news/entry/emilys-list-announces-that-20000-women-are-ready-to-run-for-office>.

34. Claire Zillman, *5 Ways Women Won Big on the First Trump-Era Election Night*, FORTUNE (Nov. 8, 2017), <http://fortune.com/2017/11/08/election-results-2017-women-trump/>.

35. Tom McCarthy, *'Women Are Pissed': Trump Protest Turns to Action – and Surge in Female Candidates*, GUARDIAN (Nov. 24, 2017, 10:22 PM), <https://www.theguardian.com/usnews/2017/nov/24/trump-women-female-candidates-pennsylvania-the-promise>.

36. Michelle Cottle, *Women Exit the Party of Trump*, ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/politics/archive/2017/11/why-republican-women-arent-galvanized-bythetrumpera/546533/>.

. was about Trump,’ [observed] a long-time [Republican] party strategist.”³⁷ “It was not specific issues. It was a visceral reaction to what people perceive of his representing. And it’s not welcoming. It’s not inclusive. It makes people very uncomfortable.”³⁸

Women won mayoral elections for the first time in Manchester, New Hampshire; Provo, Utah; and Milledgeville, Georgia.³⁹ Seattle elected its first woman as mayor in almost a hundred years.⁴⁰ Women won all seven of the open judicial posts in Pennsylvania.⁴¹ New Jersey elected a Democratic governor who received 55% of the women’s vote.⁴² The victories—including the election of the first transgender state legislator—were encouraging, especially on the West Coast.⁴³ And the Democrats are looking forward to the 2018 midterm elections.⁴⁴

But American women remain far from meaningful political parity. Women in the United States comprise approximately 19.8% of the representatives in Congress, while women in Europe comprise between 30% and 40% of their national parliaments.⁴⁵ The first-time, candidates have few to mentor them. Here again, international women’s human rights law and institutions could provide resources, experience, and guidance for American women.

37. *Id.*

38. *Id.*

39. *Id.*

40. McCarthy, *supra* note 35.

41. *Id.*

42. *Id.*

43. Cottle, *supra* note 36.

44. Rachel Shorey & Lilia Chang, *Democrats Leave Few Seats Unchallenged in Quest for House Control*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/us/democrats-house-control-2018-midterms.html> (noting that, “[n]early a year out from the election, Democratic candidates have filed in all but 20 House districts held by Republicans”).

45. See, e.g., *Women in the U.S. Congress 2018*, CTR. FOR AM. WOMEN & POL., EAGLETON INST. POL., RUTGERS U., <http://www.cawp.rutgers.edu/women-us-congress-2018> (last visited Mar. 18, 2018); *Facts and Figures: Leadership and Political Participation*, UN WOMEN, www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures (last updated July 2017). See also Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why It Won’t Fly in the United States*, 60 AM. J. COMP. L. 99 (2012); Steven Hill, *Why Does the US Still Have So Few Women in Office?*, NATION (Mar. 7, 2014), <https://www.thenation.com/article/why-does-us-still-have-so-few-women-office/>.

III. SEXUAL HARASSMENT

A. In America

1. Title VII, the Women's Movement, and Catharine MacKinnon

As Professor Joanna Grossman has succinctly explained, growing feminist consciousness in the late 1970s and early 1980s resulted in:

The eventual melding of outrage with the protections of Title VII, a statute that had been on the books for more than a decade already. In the background was the women's rights movement, and in the foreground was Catharine MacKinnon's theory of why harassment should be deemed an actionable wrong.⁴⁶

As Professor MacKinnon defined it in her groundbreaking book, “[s]exual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”⁴⁷ The Equal Employment Opportunity Commission (EEOC) adopted MacKinnon's framework, issuing guidelines that recognized two forms of harassment under Title VII: 1) *quid pro quo* harassment, in which sexual favors are demanded in return for a job or a promotion and 2) hostile environment harassment, in which people are demeaned or intimidated at their workplace because of their sex.⁴⁸ As Professor Grossman concludes, however, after more than thirty years, “sexual harassment remains disturbingly common and unaddressed . . . the law has done little to change the cultural understanding of sexual misconduct.”⁴⁹

2. Anita Hill and Clarence Thomas

Twenty-five years ago, Professor Anita Hill testified against Clarence Thomas in the hearings on his nomination to the United States Supreme

46. Joanna Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U.L. REV. 1029, 1032–33 (2015).

47. CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979).

48. Grossman, *supra* note 46, at 1047.

49. *Id.* Rather, as she describes at length elsewhere, a growing body of affirmative defense case law inspired employers to adopt convoluted policies and procedures that did little to improve the workplace. See, e.g., Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as A Rights-Claiming System*, 86 N.C. L. REV. 859 (2008).

Court.⁵⁰ Professor Hill had worked for Justice Thomas at two federal agencies, the Department of Education and the EEOC. She told the all-male Senate Committee that Thomas had repeatedly made unwelcome sexual comments and advances.⁵¹ The Committee was skeptical, and Thomas was confirmed.⁵²

Although Professor Hill was criticized by many at the time of the hearings, and her testimony widely discredited, polls taken a year later showed that public opinion had reversed in her favor. As Professor Hill described her subsequent experience:

The response to my Senate Judiciary Committee [t]estimony has been at once heartwarming and heart-wrenching. In learning that I am not alone in experiencing harassment, I am also learning that there are far too many women who have experienced a range of inexcusable and illegal activities—from sexist jokes to sexual assault—on the job In letters to me, women tell of incidents that occurred fifty years ago when they were first entering the workplace, incidents they [have] been unable to speak of for that entire period.⁵³

But the letters to Hill were private. Women came forward to support her, but not to join her in publicly exposing the men who had harassed them.

3. The 2016 Campaign

The conduct Trump bragged about on the Access Hollywood tape clearly constituted sexual harassment as well as sexual assault: “[W]hen you’re a star, they let you do it. You can do anything Grab ‘em by the pussy. You can do anything.”⁵⁴ Millions of women were appalled, although their outrage took time to coalesce and to build. Only 42% of

50. Clyde Haberman, *Do We Believe Women Yet? The Battle to End Sexual Harassment*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/retro-sexual-harassment.html>.

51. *Id.*

52. For an analysis of the ways in which “the harassment of women of color is distinctive and cannot be fully understood simply as a more virulent form of harassment faced by white women,” see MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 246–50 (2d ed. 2003).

53. Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445–46 (1992).

54. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

women who voted, voted for Trump,⁵⁵ compared to the 54% who voted for Clinton, including 94% of black women and 68% of Hispanic women.⁵⁶ Even if 53% of white women who voted, voted for Trump,⁵⁷ 78% of them said that “they were bothered to some extent by his treatment of women.”⁵⁸

In October, after the release of the Access Hollywood tape, Trump admitted that he had made the remarks attributed to him and he apologized.⁵⁹ But, he emphatically denied that he had actually committed the assaults he bragged about.⁶⁰ Several women came forward, however, to contradict him and corroborate his initial account.⁶¹ He called them all liars.⁶² One of the women, Summer Zervos, filed a defamation suit against him.⁶³

The election was a wake-up call for millions of women who realized that “a predator was in the Oval Office.”⁶⁴ The co-workers who had harassed them were not outliers; norms of male behavior that they thought they could take for granted were not norms at all. Press coverage and social media picked up steam after the election. As Jessica Bennet, the new “gender editor” of the New York Times, explains it:

Some see it as the other shoe dropping after Donald J. Trump’s taped boasting about offensive behavior did not block his path to the presidency: He may have gotten away with it, but women

55. Clare Foran, *Women Aren’t Responsible for Hillary Clinton’s Defeat*, ATLANTIC (Nov. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/11/hillary-clinton-white-women-vote/507422/>.

56. *Id.*

57. *Id.*

58. Chira, *supra* note 7.

59. Michael D. Shear, *Trump Sexual Misconduct Accusations Repeated by Several Women*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/us/politics/trump-accused-sexual-misconduct.html>.

60. *Id.*

61. *Id.*

62. Margaret Hartmann, *What Happened to the 19 Women Who Accused Trump of Sexual Misconduct*, N.Y.: DAILY INTELLIGENCER, <http://nymag.com/daily/intelligencer/2017/12/whathappened-to-trumps-16-sexual-misconduct-accusers.html> (last updated Dec. 12, 2017).

63. *Id.*

64. Time Waits for No Woman, *The Real Sexual Predator Is in the White House Now*, DAILY KOS (Nov. 19, 2017, 12:55 AM), <https://www.dailykos.com/stories/2017/11/18/1716932/-Trump-Has-Done-What-Franken-is-Accused-of-Many-Times>.

were no longer going to let that boss, that mentor, that colleague get away with it, too.⁶⁵

Roger Ailes, founder of Fox News, had been forced out of his job the year before because of multiple, detailed complaints of harassment by over twenty women.⁶⁶ But after the election, Bill O'Reilly, Bill Cosby, and Harvey Weinstein found their former impunity gone.⁶⁷

As journalist Ronan Farrow explains, although Weinstein's behavior was an "open secret" in Hollywood and beyond for over twenty years, victims and witnesses were afraid that their careers would be over, their lives ruined, and that they would be crushed if they spoke out.⁶⁸ But after the election, they realized that they—and their daughters—would not only be crushed if they didn't speak out, but that their harassers would persist, even more openly and unapologetically.⁶⁹ As Farrow writes:

65. Jessica Bennett, *The 'Click' Moment: How the Weinstein Scandal Unleashed A Tsunami*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/05/us/sexual-harrasment-weinsteintrump.html>.

66. Gabriel Sherman, *The Revenge of Roger's Angels*, N.Y. MAG. (Sept. 2, 2016, 7:30 AM), <http://nymag.com/daily/intelligencer/2016/09/how-fox-news-women-took-down-roger-ailes.html> (detailing an account of "[h]ow Fox News women took down the most predatory, and powerful, man in media").

67. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; see Michelle Goldberg, *Save the Phony Weinstein Outrage, Republicans*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/16/opinion/columnists/weinsteinsexual-harassment-republicans.html> (concluding that: "The movie business is corrupt, depraved and iniquitous—and still morally superior to the Republican Party under Trump. Betraying the principle of gender equality is bad. Rejecting it is worse."); See also Laura Bates, *A Thank-You to Taylor Swift*, N.Y. TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/20/opinion/a-thank-you-to-taylorswift.html> (contrasting the subservience of women with the "overconfidence of mediocre men It is no coincidence that such men celebrated the triumph of Donald Trump, a man who has boasted about being able to grab women 'by the pussy.' The president is the very epitome of overconfident male mediocrity and, unsurprisingly, a big proponent of pliant, pretty femininity.").

68. Farrow, *supra* note 54.

69. Editorial, *Will Harvey Weinstein's Fall Finally Reform Men?*, N.Y. TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/opinion/sunday/harvey-weinstein-sexual-harassment.html> (noting "Then, of course, there's the current occupant of the Oval Office, who won the election only weeks after the public heard him brag about grabbing women's genitalia, and who once said that if his daughter were ever sexually harassed at work, she should go find a new job."). See also Kantor & Twohey, *supra* note 67.

It's likely that the women who spoke to me have recently felt increasingly emboldened to talk about their experiences because of the way the world has changed regarding issues of sex and power. Their disclosures follow in the wake of stories alleging sexual misconduct by public figures, including Donald Trump . . .

. . .⁷⁰

In response to a comment by Woody Allen, warning of “a witch hunt atmosphere,” Lindy West wrote an op-ed in the *New York Times*, “Yes, This is a Witch Hunt.”⁷¹ What Allen means, she says, is “an atmosphere in which [men] are expected to comport themselves with the care, consideration and fear of consequences that the rest of us call basic professionalism and respect for shared humanity.”⁷² West attributes this “whole catastrophic cultural moment” to our predator in chief.⁷³

In Sacramento, “more than 140 women—including legislators, senior legislative aides and lobbyists—came forward to denounce what they describe as pervasive sexual misconduct by powerful men in the nation’s most influential legislature.”⁷⁴ In early December, the focus shifted to Congress, as the Democrats pressured Congressman John Conyers and Senator Al Franken to resign in response to allegations of sexual misconduct.⁷⁵ Republican Trent Franks also resigned after he was asked to do so by Paul Ryan, following his admission that he had discussed surrogacy with two of his female aides.⁷⁶ A culture of silence and acquiescence had enabled many of these powerful men to maintain their positions, wealth, and reputations for decades.

The law had helped, through nondisclosure agreements and confidential settlements. In fact, under the Congressional Accountability

70. Farrow, *supra* note 54.

71. Lindy West, Opinion, *Yes, This Is a Witch Hunt. I’m a Witch and I’m Hunting You.*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/opinion/columnists/weinstein-harassment-witchhunt.html>.

72. *Id.*

73. *Id.*

74. Adam Nagourney & Jennifer Medina, *Women Denounce Harassment in California’s Capital*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/california-womensexual-harassment-sacramento.html>.

75. Makini Brice & Richard Cowan, *Franken and Franks Resign As Misconduct Charges Batter Congress*, REUTERS (Dec. 7, 2017, 6:02 AM), <https://www.reuters.com/article/us-usa-congress-franken/franken-and-franks-resign-as-misconduct-charges-batter-congress-idUSKBN1E11DG>. For a cogent and persuasive argument that Senator Franken was treated unfairly, see Zephyr Teachout, *I’m Not Convinced Franken Should Quit*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/11/opinion/franken-resignation-harassment-democrats.html>.

76. *Id.*

Act of 1995, taxpayers have been paying for settlements to those who have accused members of Congress of violations of workplace safety, as well as employment and civil rights, including claims of sexual misconduct.⁷⁷ Since 1997, more than \$17 million has been paid to settle more than 260 claims.⁷⁸

But the law's failure, or complicity, no longer means that there are no consequences. On October 15th, actress Alyssa Milano tweeted, "[i]f you've been sexually harassed or assaulted, tweet #MeToo in response to this tweet." Twelve million people on Facebook tweeted the hashtag #MeToo in the first twenty-four hours.⁷⁹ On December 6, Time Magazine named "The Silence Breakers" of the #MeToo movement the 2017 Person of the Year.⁸⁰

In December 2017, in the wake of the #MeToo movement, post-Weinstein, and after the first democrat had won a Senate seat in Alabama in twenty years,⁸¹ Professor Hill was asked to head a privately-funded Sex Abuse Commission to "tackle widespread sexual abuse and harassment in the media and entertainment industries."⁸² A critical mass has been reached—enough women are willing to speak out and enough women have the money, clout, and political savvy, to establish institutions to support them.⁸³ The announcement of the Time's Up movement included a pledge

77. Editorial, *What Congressmen Are Hiding*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/27/opinion/congressmen-sexual-harassment-taxpayers.html>.

78. *Id.*

79. *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:26 PM), <https://www.cbsnews.com/news/metoo-more-than-12-millionfacebook-posts-comments-reactions-24-hours/>; see Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html>.

80. Erik Ortiz, *Time's Person of the Year Is 'The Silence Breakers' of #MeToo Movement*, NBC NEWS (Dec. 6, 2017, 5:53 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/time-s-person-year-silence-breakers-metoo-movement-n826936>.

81. Editorial, *Roy Moore Loses, Sanity Reigns*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/opinion/roy-moore-loss-alabama.html>.

82. Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html>.

83. See, e.g., Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html> (describing the Time's Up movement and the 300 prominent actresses and female agents, writers, directors, and entertainment executives supporting these women).

of support for working class women.⁸⁴ Despite the success of #MeToo, working class women have complained that little has changed for them.⁸⁵

B. *Women's Human Rights Law*

Even if the American justice system had failed to adequately address sexual harassment, moreover, it has been in the crosshairs of international human rights law for some time. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) unequivocally condemns sexual harassment as a violation of women's human rights.⁸⁶ In July 2017, the Committee adopted General Recommendation No. 35 on Gender-Based Violence Against Women, updating General Recommendation No. 19 on Violence Against Women.⁸⁷ The Committee noted that in the twenty-five years since its adoption, "[t]he *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law."⁸⁸ This means that even states that are not parties to the CEDAW, such as the United States, are bound since customary law is binding on all states that have not persistently objected to it.⁸⁹ Violence against women explicitly includes "harassment."⁹⁰ The state is responsible for non-state actors as well as state actors.⁹¹

Human rights law also requires states to provide human rights education. The Universal Declaration of Human Rights (UDHR), for

84. *Id.*

85. See, e.g., Susan Chira & Catrin Einhorn, *The #MeToo Moment: Blue-Collar Women Ask, 'What About Us?'*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/the-metoo-moment-blue-collar-women-ask-what-about-us.html> (noting \$10 million settlement reached with Ford in August by EEOC for sexual and racial harassment at two Chicago plants). See also Susan Chira & Catrin Einhorn, *Ford Apologizes for Sexual Harassment at Chicago Factories*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/ford-apology-sexual-harassment.html?>

86. See generally G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

87. See Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, CEDAW/C/GC/35 (July 14, 2017), http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf [hereinafter General Recommendation No. 35].

88. *Id.* at para. 2.

89. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (noting Justice Gray held "[i]nternational law is part of our law").

90. General Recommendation No. 35, *supra* note 87, at para. 14.

91. G.A. Res. 34/180, *supra* note 86, at art. 2(e).

example, requires that: “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights.”⁹² The Economic Covenant, similarly, states that education shall “strengthen the respect for human rights.”⁹³ The Convention on the Rights of the Child (CRC) repeats this language and further requires states to prepare children for “responsible life in a free society, in the spirit of . . . tolerance [and] equality of sexes.”⁹⁴ The CEDAW goes further, requiring that states teach “the common responsibility of men and women in the upbringing and development of their children.”⁹⁵

Despite the proliferation of international treaties, regional and domestic laws, reports by special rapporteurs, white papers by experts, country monitoring reports, and harassment-prevention training sessions, sexual harassment persists. In part, this can be attributed to states’ failure to comply with their own obligations under CEDAW. According to the WORLD Policy Analysis Center at UCLA, sixty-eight countries have no laws against sexual harassment at the workplace.⁹⁶ While this might leave countries that are parties to the CEDAW in violation of their obligations under international human rights law, individuals cannot rely on that law to proceed directly against their employers until and unless they are authorized to do so under their own domestic law. This leaves 424 million working age women with no legal protection against harassment on the job.⁹⁷

The #MeToo movement resonated globally. Over 1.7 million women in more than eighty-five countries throughout the world responded to the tweet on Twitter.⁹⁸ On October 29th, thousands of French women and men took to the streets in every major city in France protesting sexual harassment.⁹⁹ Even in Sweden, that paradigm of gender equality, tens of thousands of women signed a series of appeals in the national press documenting harassment of women, not just by famous and powerful men,

92. G.A. Res. 217A (III), *supra* note 20, at art. 26.

93. ICESCR, *supra* note 17, at art. 12.

94. Convention on the Rights of the Child art. 29(1)(d), Nov. 20, 1989, 1577 U.N.T.S. 3.

95. G.A. Res. 34/180, *supra* note 86, at art. 5(b).

96. Jody Heymann & Rachel Vogelstein, *Commentary: When Sexual Harassment is Legal*, FORTUNE (Nov. 17, 2017), <http://fortune.com/2017/11/17/sexual-harassment-legal-gaps/>.

97. *Id.*

98. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017, 12:43 PM), <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-milliontweets/>.

99. James McAuley, *Weinstein Scandal Sparks Uproar in France*, WASH. POST (Oct. 29, 2017), https://www.washingtonpost.com/world/weinstein-scandal-sparks-an-uproar-in-france-enough-is-enough-indeed/2017/10/29/e7a03aac-bcbd-11e7-9294-705f80164f6e_story.html?utm_term=.cc6318d97331 (noting that the hashtag in France is #balancetonporc, or “squeal on your pig”).

but by men in virtually every profession.¹⁰⁰ Journalist Jenny Nordberg characterizes the Swedish workplace as “more cold, correct, and asexual on the surface” than its American counterpart.¹⁰¹ So perhaps all those agencies promoting gender equality have had some effect. But after work, or after a drink, Nordberg continues, Swedish men lose their inhibitions.¹⁰² Perhaps in Sweden, as in other countries where women now work in fields traditionally dominated by men, there are simply more opportunities for harassment, and a corresponding, if inadequately unrecognized, need to nip it in the bud. Finally, no one ever suggested that law alone was enough to transform culture. But it can certainly help. The on-going global shaming of harassers may contribute to such cultural transformation.¹⁰³

IV. WOMEN’S HEALTH

This Part addresses the impact of the Trump administration on women’s health in general, and on women’s reproductive health more specifically. It also examines the ways in which those who support women’s human rights have challenged and resisted the onslaught of cutbacks and the denial of healthcare for women and their families. The first section focuses on federal law, including the Affordable Care Act (ACA or Obamacare),¹⁰⁴ Medicaid, and Medicare. The second section discusses Trump’s efforts to restrict reproductive healthcare, not only in the United States but throughout the world. This Part concludes by describing the right to health under human rights law recognized and accepted in virtually every other country, and what the human right to health, including reproductive health, would mean for American women.

A. *The Affordable Care Act and Other Federal Programs*

Medicare, which covers everyone over age sixty-five, and Medicaid, which is available to those with low enough incomes, qualified pregnant

100. Jenny Nordberg, *Yes, It Happens in Sweden, #Too*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/opinion/sunday/sweden-sexual-harassment-assault.html>.

101. *Id.*

102. *Id.*

103. Motoko Rich, *She Broke Japan’s Silence on Rape*, N.Y. TIMES (Dec. 29, 2017), <https://www.nytimes.com/2017/12/29/world/asia/japan-rape.html> (noting that when a young Japanese journalist reported that she was raped by “one of Japan’s best-known television journalists,” her claim was met with skepticism).

104. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

women and children; and those on SSI,¹⁰⁵ were basically the only forms of government healthcare assistance until the passage of the ACA in 2010.¹⁰⁶ Historically, insurance coverage was provided by employers. But with changes in the labor market, including the decline of union jobs, the growth of the non-unionized service worker sector, and the entry of women into the workforce, coverage was unavailable or unaffordable for many. The ACA provided more than sixteen million people with health insurance.¹⁰⁷ It is undisputed that having health insurance is consistent with better health.¹⁰⁸

Yet the repeal of the ACA was among Trump's earliest, and most frequently repeated, campaign promises. "If we don't repeal and replace Obamacare, we will destroy American healthcare forever," he reiterated at a rally in King of Prussia, Pennsylvania a week before the election.¹⁰⁹ Despite his "repeated, confident assertions on the campaign trail that it could be done in just a day," however, Trump and the Republican Congress, have been unable to do so to date.¹¹⁰ Rather, on July 18th, after

105. See Supplemental Security Income Home Page -- 2017 Edition, SOC. SECURITY, <http://www.ssa.gov/ssi/> (last visited Jan. 16, 2018) (providing that Supplemental Security Income is a federal income supplement for low-income aged, blind, or disabled people).

106. Michelle Andrews, *Women Could Pay More Than Men for Health Care Under Trump*, NPR (Nov. 29, 2016, 11:44 AM), <https://www.npr.org/sections/health-shots/2016/11/29/503713772/women-could-pay-more-than-men-for-health-care-under-trump>. In addition to expanded coverage, the ACA prohibited insurance companies from discriminatory pricing. Before the ACA, women were typically charged more than men even for health plans that had no maternity coverage. *Id.*

107. Barry Liss, *The Patient Protection and Affordable Care Act Six Years Later*, 299 N.J. L. 41, 41 (2016).

108. *Id.*

109. Jenna Johnson, *Trump's Grand Promises to 'Very, Very, Quickly' Repeal Obamacare Run into Reality*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/politics/trumps-grand-promises-to-very-very-quickly-repeal-obamacare-run-into-reality/2017/07/18/91b5f220-6bd3-11e79c15-177740635e83_story.html?utm_term=.c5ec8526053d.

110. Robert Pear & Kate Kelly, *Trump Concedes Health Law Is 'Unbelievably Complex'*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/us/politics/trump-concedes-health-law-overhaul-is-unbelievably-complex.html> (providing that Trump was "surprised that health care could be so complicated").

yet another healthcare bill failure,¹¹¹ Trump gave up: “[W]e’ll just let Obamacare fail. We’re not gonna own it”¹¹²

But Obamacare has not imploded. 8.8 million people signed up during the last open enrollment period, only slightly less than the 9.2 million who had signed up during the previous open enrollment period, which had been twice as long and much better advertised.¹¹³ The Tax Cuts and Jobs Act (TCA) eliminates the public mandate, which required everyone to obtain coverage and imposed a penalty on those who did not.¹¹⁴ But the TCA did not repeal Obamacare, although Trump claims that it did.¹¹⁵ As Larry Levitt of the Kaiser Family Foundation explains, “[t]he heart of the ACA—the premium subsidies, the Medicaid expansion, and protections for pre-existing conditions—remain in place The premium subsidies should provide enough of an incentive for many healthy people to get coverage to keep the individual market reasonably stable.”¹¹⁶ In fact, by ending the public mandate, the Republicans are driving healthy people from the market, inadvertently increasing the role of Medicaid.¹¹⁷

The future of Medicaid and Medicare is an open question. On one hand, another of Trump’s early, oft-repeated promises was, “[s]ave

111. Gail Collins, *Susan Collins and Lisa Murkowski, the Health Vote Heroines*, N.Y. TIMES (July 29, 2017), <https://www.nytimes.com/2017/07/28/opinion/health-susan-collins-murkowski.html> (explaining that the bill ultimately failed because of two Senate Republicans, Susan Collins and Lisa Murkowski, who became “fierce, consistent forces of resistance” after the thirteen men Majority Leader Mitch McConnell appointed to write the bill deleted the requirement that insurance plans cover contraceptives and barred Medicaid reimbursement for any services provided by Planned Parenthood).

112. Kristen Welker et al., *Trump: ‘Let Obamacare Fail...I’m Not Going to Own It’*, NBC NEWS (July 18, 2017, 3:44 PM), <https://www.nbcnews.com/politics/donald-trump/trump-lays-blame-health-care-bill-failure-n784006>.

113. Robert Pear, *Obamacare Sign-ups at High Levels Despite Trump Saying It’s ‘Imploding’*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/politics/health-obama-careaffordable-care-act.html>.

114. MR. BRADY, TAX CUTS AND JOBS ACT, H.R. Doc. No. 115, at 153–54 (2017).

115. See Jon Greenberg, *Trump Wrongly Says End of Mandate is ‘Essentially’ Obamacare Repeal*, POLITIFACTS (Dec. 21, 2017, 11:59 AM), <http://www.politifact.com/truth-ometer/statements/2017/dec/21/donald-trump/trump-wrongly-says-end-mandate-essentially-obamaca/>.

116. Jon Greenberg, *Mandate Rollback Not A Repeal of Obamacare, but It May Undermine It*, POLITIFACTS (Dec. 21, 2017, 11:19 AM), <http://www.politifact.com/truth-ometer/promises/trumpometer/promise/1388/repeal-obamacare/>.

117. Robert Pear, *Years of Attack Leave Obamacare A More Government-Focused Health Law*, N.Y. TIMES (Dec. 27, 2017), <https://www.nytimes.com/2017/12/26/us/politics/republicans-trumpaffordable-care-act-obamacare.html> [hereinafter *More Government-Focused Health Law*].

Medicare, Medicaid and Social Security without cuts. Have to do it.”¹¹⁸ At the same time, the 2018 White House budget proposal released in May, before passage of the TCA, cut Medicaid more than \$600 billion “over [ten] years, compared to current spending levels.”¹¹⁹ Medicare spending would be cut by more than \$50 billion over the same period, again, compared with current levels.¹²⁰ The TCA tax cut is projected to increase the deficit by more than a trillion dollars, according to the Congressional Budget Office.¹²¹ In December, Speaker Paul Ryan promised that Republicans would try to slow the growth of federal spending on healthcare because “it’s the health care entitlements that are the big drivers of our debt.”¹²² In contrast, Senator McConnell has indicated that the Republicans will not revisit health care, at least not in an election year.¹²³

Threats to health care entitlements are threats to women. Women are disproportionately affected by cuts to such entitlements in two ways, as healthcare consumers and as healthcare providers. As Quoctrung Bui and Susan Chira explain, “in the United States, women tend to benefit from social safety net spending more than men.”¹²⁴ As healthcare consumers, women receive sixty-nine percent of total Medicaid spending.¹²⁵

As healthcare providers, women will also be hurt by cuts in Medicaid.¹²⁶ Nursing homes, home care and community-based programs

118. Allison Colburn, *Future of Medicare Funding Uncertain Under Trump Presidency*, POLITIFACTS (Sept. 13, 2017, 11:09 AM), <http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1347/make-no-cuts-medicare/> (quoting from his presidential announcement speech).

119. *Id.*

120. *Id.*

121. Damian Paletta & Jeff Stein, *Sweeping Tax Overhaul Clears Congress*, WASH. POST (Dec. 20, 2017), https://www.washingtonpost.com/business/economy/gop-tax-bill-passes-congress-as-trump-prepares-to-sign-it-into-law/2017/12/20/0ba2fd98-e597-11e7-9ec2-518810e7d44d_story.html?utm_term=.ff0e604634c9 (noting that a 2010 law known as “‘PAYGO,’ or ‘pay-as-you-go’ . . . requires spending cuts to Medicare and other programs if legislation is approved that is projected to add to the deficit.” A waiver is likely to be sought when Congress reconvenes.).

122. *More Government-Focused Health Law*, *supra* note 117.

123. *Id.*

124. Quoctrung Bui & Susan Chira, *How Trump’s Budget Affects Women*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/interactive/2017/05/24/upshot/how-trumps-budget-affects-women.html>.

125. *Id.*

126. See Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 255–56 (2017) (explaining how neoliberalism has produced the “privatized American family,” and what this has meant for American women).

for seniors account for roughly two-thirds of Medicaid spending.¹²⁷ Unpaid family caregivers, who are overwhelmingly women, already spend about two weeks of full time work, or seventy-seven hours, per month, with dependent parents.¹²⁸ As recent research from the Center for Retirement Research at Boston College shows, an already-overextended caregiving system is likely to collapse if there are deep cuts to Medicaid.¹²⁹

B. *Women's Reproductive Health*

Denying women control over their own bodies and their own reproductive capacity may well be the most effective way to disempower them.¹³⁰ Trump has eliminated American support for women's reproductive health from contraception¹³¹ to providing women with information about safe abortions—not only throughout the United States, but everywhere in the world. As journalist Michelle Goldberg has shown, after merely six months in office, “Mr. Trump ha[d] already surpassed George W. Bush as the American president most hostile to reproductive rights and measures to promote sexual health.”¹³²

1. In the United States

In the United States, the Trump administration has focused on reducing insurance coverage for contraception, tightening restrictions on clinics that provide abortion services, and forcing clinics to close.¹³³ As Professor Grossman has explained, the Obama administration addressed

127. Editorial, *Daughters Will Suffer from Medicaid Cuts*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/06/15/opinion/medicaid-health-care-bill-daughters.html>.

128. *Id.*

129. *Id.* (providing that such cuts are virtually assured by both the House and Senate versions of the proposed new tax law).

130. See, e.g., MARGARET ATWOOD, *THE HANDMAID'S TALE* 308 (1st ed. 1985). Susan Brooks Thistlethwaite, *Barefoot and Pregnant: The Supreme Court and the War on Women*, HUFFPOST: BLOG, https://www.huffingtonpost.com/rev-dr-susan-brooks-thistlethwaite/barefoot-and-pregnant-the_b_5563422.html (last updated Sept. 6, 2014, 10:51 AM).

131. Robert Pear, *Foes of Obama-Era Rule Work to Undo Birth Control Mandate*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/10/us/politics/birth-control-contraception-healthcare-bill.html>.

132. Michelle Goldberg, Opinion, *The Playboy President and Women's Health*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/donald-trump-women-reproductiverights.html>.

133. Joanna L. Grossman, *Sex, Lies, and Trump's Rollback of the Contraceptive Mandate*, VERDICT JUSTIA (Oct. 10, 2017), <https://verdict.justia.com/2017/10/10/sex-lies-trumps-rollback-contraceptive-mandate> [hereinafter *Sex, Lies, and Trump's Rollback*].

contraception in 2011, requiring all employer-based health plans to pay for prescription contraceptives.¹³⁴ This was grounded in solid, scientific, non-partisan evidence that, “access to contraception is a necessity for women’s health.”¹³⁵ As a result, fifty-five million women gained access to free contraceptives, expanding their workplace opportunities and reducing unintended pregnancies, abortions, and maternal deaths.¹³⁶

Although unable to “repeal and replace Obamacare,”¹³⁷ Trump has undermined it. For example, he repealed a regulation promulgated by Obama requiring states to pass along Title X funds to Planned Parenthood. Title X governs the federal family planning program. The repealed regulation was a response to more than twelve states that had blocked Planned Parenthood from receiving Title X funds.¹³⁸ Trump told Planned Parenthood that it could continue to receive funding if it stopped providing abortions.¹³⁹

In addition, in *Burwell v. Hobby Lobby*,¹⁴⁰ the Supreme Court held, in a five to four decision, that closely-held, for-profit companies could deny contraceptive cover to employees on the basis of “sincerely held” religious beliefs.¹⁴¹ Trump compounded the Court’s error by promulgating a regulation allowing employers who disapprove of contraception on “moral convictions” to deny employees contraceptive coverage.¹⁴²

Those who support women’s human rights have fought back on a number of fronts. Limits on contraceptive coverage have been addressed

134. *Id.*

135. *Id.* (providing the “Congressionally chartered group, the Institute of Medicine” that had found that birth control was an essential health benefit for women, and that the major barrier was cost).

136. *Id.*

137. *See supra* Part IV. A.

138. Julie Hirschfeld Davis, *Trump Signs Law Taking Aim at Planned Parenthood Funding*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/us/politics/planned-parenthoodtrump.html>.

139. Maggie Haberman, *Trump Tells Planned Parenthood It’s Funding Can Stay if Abortion Goes*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/plannedparenthood.html> (noting that, “[i]n private discussions with people close to Planned Parenthood, White House officials have suggested that there could even be an increase in federal earmarks if the work related to abortion ends.”).

140. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

141. *See, e.g., Sex, Lies, and Trump’s Rollback*, *supra* note 133 (noting “the dubious idea that a for-profit corporation meaningfully engages in the “exercise of religion”). Gregory M. Lipper, *The Contraceptive Coverage Case and Politicized Free-Exercise Law*, 2016 U. ILL. L. REV. 1331 (2016).

142. *Sex, Lies, and Trump’s Rollback*, *supra* note 133.

on the state level.¹⁴³ In addition, “[i]n a massive public comment submission effort . . . more than a dozen leading reproductive and civil rights organizations, members of Congress, and allies [from all fifty states] . . . delivered over a half-million public comments” opposing the new regulation to the Department of Health and Human Services.¹⁴⁴

As noted above,¹⁴⁵ those who oppose women’s right to choose, have made abortion the subject of a long, fierce campaign. Abortion, of course, is a constitutionally-protected right under *Roe*.¹⁴⁶ But because rights are generally framed negatively under the Constitution, i.e., as freedom *from* state interference rather than as an affirmative obligation on the part of the state, the state is not required to fund abortions. In *Harris v. McRae*, the Supreme Court upheld the Hyde Amendment of 1976, barring the use of federal Medicaid funds for abortion, even for medically necessary abortions, unless the mother’s life was in danger.¹⁴⁷ Thus, poor women effectively have a right without a remedy; woman have a right to an abortion, but only if they can afford one. As Professor Reva Siegel has shown, the overwhelming majority of American woman who give birth raise their children, regardless of their circumstances.¹⁴⁸ By 2011, low-income women were more than five times as likely to become pregnant unintentionally than better-off women.¹⁴⁹ Those who sought an abortion but were unable to obtain one “were three times as likely to fall into poverty over the following two years as those women who were able to get one.”¹⁵⁰ Women who can’t afford an abortion can’t afford a child.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld *Roe* but allowed states to impose restrictions on abortions as long as they did not amount to an “undue burden” on the pregnant woman’s

143. Sheryl Gay Stolberg, *States Lead the Fight Against Trump’s Birth Control Rollback*, N.Y. TIMES (June 9, 2017), <https://www.nytimes.com/2017/06/09/us/politics/states-lead-the-fight-against-trump-birth-control-rollback.html>.

144. Press Release, Ctr. for Reprod. Rights, *Over a Half-Million Public Comments from Across the Country Submitted Opposing Trump Administration Rules Threatening Access to Contraception* (Dec. 5, 2017) (on file with Ctr. for Reprod. Rights).

145. See *supra* text accompanying notes 8–10.

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

147. *Harris v. McRae*, 448 U.S. 297, 318 (1980).

148. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 370 (1992).

149. Bryce Covert, Opinion, *Why Abortion Is A Progressive Economic Issue*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/opinion/why-abortion-is-an-progressive-economic-issue.html>.

150. *Id.*

right to choose.¹⁵¹ The states responded by passing a wide range of requirements making abortions harder to obtain.¹⁵² Almost 400 restrictions on abortion have been passed at the state level since 2010, including twenty-two in Texas alone.¹⁵³

Those who support women's human rights have filed lawsuits challenging some of the more egregious restrictions. On November 22, 2017, the federal district court in Austin struck down a Texas measure banning one of "the safest and most common methods of ending a pregnancy after approximately [fifteen] weeks" in *Whole Woman's Health v. Paxton*.¹⁵⁴ "Every court that ha[d] looked at a ban [like the Texas measure] ha[d] blocked it, including courts in Alabama, Arkansas, Kansas and Oklahoma."¹⁵⁵

2. Abroad

The Helms Amendment to the Foreign Assistance Act of 1973 already bans the use of United States foreign aid for abortions "as a method of family planning."¹⁵⁶ The Mexico City Policy, also known as the Global Gag Rule, adopted by Ronald Reagan in 1984, goes much further.¹⁵⁷ It bars any United States aid to any foreign non-governmental organization (NGO) that even counsels women regarding abortion in the course of providing family planning services.¹⁵⁸

Trump has taken the Gag Rule to a new level. His plan, protecting life in "global health assistance" extends the Gag Rule beyond the \$600 million

151. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871, 874 (1992).

152. See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 *YALE L.J.* 1428, 1430, 1449 (2016) (critiquing and focusing on those attacks purporting to protect women's health).

153. Press Release, Ctr. for Reprod. Rights, Texas Court Strikes Down Ban on Safest, Most Common Method of Abortion After Approximately 15 Weeks (Nov. 22, 2017) (on file with Ctr. for Reprod. Rights) [hereinafter Texas Court Strikes Down Ban].

154. *Id.*; See *Whole Woman's Health v. Paxton*, 264 F. Supp. 3d 813, 824 (2017).

155. Texas Court Strikes Down Ban, *supra* note 153.

156. Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 104(f)(1) 75 Stat. 13 (as amended by the Foreign Assistance Act of 1973, Pub. L. No. 93-189 (1993)); Ann M. Starrs, *The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid*, 389 *LANCET* 485 (2017).

157. LUISA BLANCHFIELD, CONG. RESEARCH SERV., R41360, ABORTION AND FAMILY PLANNING RELATED PROVISION IN U.S. FOREIGN ASSISTANCE LAW 10 (2017); Starrs, *supra* note 156.

158. BLANCHFIELD, *supra* note 157; Starrs, *supra* note 156.

family planning funding to which it has historically been applied.¹⁵⁹ Under Trump's plan, it applies to "\$8.8 billion in global health funding [from] the State Department, United States Agency for International Development (USAID), and the Department of Defense (DoD)."¹⁶⁰

The consequences are likely to be far-reaching. As Nicholas Kristof has recently noted, this will be devastating for countries like Liberia, where American aid historically benefitted half the population.¹⁶¹ Trump's plan also includes cutting the United States' annual contribution to the United Nations (U.N.) Population Fund, which promotes family planning. As Eugene Linden, author of *The Alms Race*, recently observed, "Remember the Population Bomb? It's still ticking."¹⁶² The "population bomb" has been used since the 1970s to refer to the risks posed by unchecked population growth given the finite resources of the planet.¹⁶³ The Green Revolution and globalization may have postponed the reckoning, Linden argues, but the risks are even greater now, in view of the current population figures (approximately 7.6 billion) and the impact of climate change.¹⁶⁴

The Senate Appropriations Committee voted in September to overturn the Mexico City Policy.¹⁶⁵ While this is likely to be symbolic, symbols matter. Eliminating funding from the budgets of the State Department,

159. See Memorandum from President Donald Trump to the Secretary of State, the Secretary of Health and Human Services, the Administrator of the United States Agency for International Development (Jan. 23, 2017) (on file with Law & Justice); BLANCHFIELD, *supra* note 157.

160. Laura Bassett, *Donald Trump Drastically Expands 'Global Gag Rule' On Abortion*, HUFFPOST (May 15, 2017, 2:09 PM), http://www.huffingtonpost.com.au/2017/05/15/donald-trump-drastically-expands-global-gag-rule-on-abortion_a_22092544/?utm_hp_ref=au-sexual-health (Austl.). See also Starrs, *supra* note 156. Ann Starrs, President of the Guttmacher Institute, anticipates an even broader impact. As she explains, "Under Trump's order, the gag rule now applies not only to US bilateral family planning assistance (US\$575 million for fiscal year 2016), but also to all 'global health assistance furnished by all departments or agencies'—encompassing an estimated \$9.5 billion in foreign aid." *Id.*

161. Nicholas Kristof, Opinion, *President Trump, Meet This 2-Year Old*, N.Y. TIMES (June 24, 2017), <https://www.nytimes.com/2017/06/24/opinion/sunday/president-trump-meet-this-2-year-old.html> (describing child dying of malaria in Liberia after taking ineffective, probably 'counterfeit' drugs).

162. Eugene Linden, *Remember the Population Bomb? It's Still Ticking*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/opinion/sunday/remember-the-population-bomb-its-still-ticking.html>.

163. *Id.*

164. *Id.* World Population, WORLDOMETERS, <http://www.worldometers.info/> (last visited Jan. 21, 2018).

165. Lev Facher & Ike Swetlitz, *Senate Panel Votes to Reverse Mexico City Policy, Signaling Support for Global Family-Planning Assistance*, STAT NEWS (Sept. 7, 2017), www.statnews.com/2017/09/07/senate-mexico-city-family-planning.

USAID, and the DoD, moreover, may well inspire more concrete opposition.

As Professor Martha F. Davis has shown, under international human rights law, abortion is not viewed primarily as a question of women's rights.¹⁶⁶ Nor is contraception. Rather, state support for both are situated squarely within women's right to health.¹⁶⁷ This approach would help address the illusory right to abortion of poor women under *Harris v. McRae* and *Maher v. Roe*.¹⁶⁸

Viewing contraception and abortion as part of a continuum of women's reproductive health, which also includes infertility, pregnancy, and postpartum care, makes it possible to deal with the ways in which reproductive healthcare has been shaped by racism. Abortion in the United States has often been viewed as a concern of white women, while women of color have historically been more concerned with efforts to discourage their childbearing, through "denial of welfare benefits, forced contraception, or even sterilization."¹⁶⁹

In addition, as Professor Davis demonstrates, "contextualizing" abortion as an element of women's broader right to health has had strategic advantages, as pro-choice advocates in the United States increasingly recognize.¹⁷⁰ Analyzing decisions from Colombia, Mexico, and the European Court of Human Rights, Davis shows that where the right to health was already recognized, and incorporated in a national health plan (like the ACA), extending coverage to abortion "generated little controversy."¹⁷¹

V. CONCLUSION: A YEAR OF RESISTANCE

The Women's March was the beginning of a year of resistance.¹⁷² Each Part of this Article has shown how Trump's attacks against women's

166. Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657, 1657 (2010) [hereinafter *Abortion Access*].

167. See ICESCR, *supra* note 17, at art. 12. G.A. Res. 34/180, *supra* note 86, at art. 5.

168. See *Maher v. Roe*, 432 U.S. 464, 479–80 (1977) (holding that states have no constitutional obligation to pay for non-therapeutic abortions).

169. *Abortion Access*, *supra* note 166, at 1659.

170. *Id.* at 1657.

171. *Id.*

172. Michelle Goldberg, *The Year in Resistance*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/opinion/trump-2017-resistance.html> (noting "a recent poll show[ing] that [fifty-three] percent of voters want [Trump] to resign" and concluding, "Trump has done more to spur progressive political organizing than Bernie Sanders, George Soros, and Saul Alinsky combined."). Paul Krugman, *America Is Not Yet Lost*, N.Y. TIMES (Dec. 25, 2017), <https://www.nytimes.com/2017>

human rights have inspired a backlash and fueled a movement. Part I showed how millions of women, and their supporters, took to the streets following his inauguration. Rather than return home after the marches, they organized powerful and effective get-out-the-vote initiatives that produced a wave of progressive victories in the first national elections following Trump's move to Washington. As impressive and promising as these efforts were, however, they are unlikely to produce greater political parity for women absent express demands for such parity. Ratification of the CEDAW, and United States appearances before the committee that monitors the CEDAW, would help clarify the need for gender parity, and provide tools for achieving it.

Part II focused on the impassioned outcry against sexual harassment, sparked by the Access Hollywood tapes and fueled by the Weinstein scandal. Outrage against Trump's crude misogyny inspired actresses, like Ashley Judd, to speak out and journalists to investigate their allegations. Wealthy, powerful men lost their positions, their power, and their once-unrestricted access to vulnerable women. It soon became clear, however, that American anti-harassment law alone cannot identify and remediate the wide-ranging harms.

Again, women's international human rights law could be useful. Legal instruments addressing a range of harms have already been drafted and ratified by many states.¹⁷³ These have been clarified by the Reports of the Special Rapporteurs on Violence Against Women and applied to country-specific situations by the CEDAW Committee in its reviews of countries' self-monitoring reports. Americans do not have to re-invent the wheel.

Part III analyzed Trump's attacks against women's health, at home and abroad, and the real dangers they pose for us all, as well as the planet itself. His plan to abruptly terminate desperately needed funding for health services, including former President George W. Bush's campaign for H.I.V. prevention, will devastate women and their families throughout the world.

This Article has focused on the response of American women and their supporters to Trump's physical, rhetorical, and fiscal attacks. It has pointed out how human rights law can be used to counter or deflect such attacks. But, human rights law also connects Americans to the rest of the world and shows how this President seeks to undermine the human rights of women everywhere.

/12/25/opinion/america-is-not-yet-lost.html (suggesting that, “[i]f American democracy survives this terrible episode, I vote that we make pink pussy hats the symbol of our delivery from evil.”).

173. See, e.g., Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence, Apr. 7, 2011, C.E.T.S. No. 210; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 33 ILM 1534, 1537 (1994).

Now, even as Trump congratulates himself on the Tax Cuts and Jobs Act (that promises to slash the few remaining safety nets to further enrage the richest Americans, including himself and his family);¹⁷⁴ he continues to fuel a growing resistance. Though many were dumbfounded a year ago, the shock has been replaced by commitment and determination. As Paul Krugman recently noted, “tens of millions of Americans have risen to the occasion,”¹⁷⁵ organizing, canvassing, protesting, filing lawsuits, and running for office. As Trump’s approval ratings continue to sink, women and their supporters continue to build on their momentum.¹⁷⁶

174. Editorial, *The Tax Bill That Inequality Created*, N.Y. TIMES (Dec. 16, 2017), <https://www.nytimes.com/2017/12/16/opinion/sunday/tax-bill-inequality-created.html> (noting that “the top [one] percent of the population by wealth—the group that would primarily benefit from the tax bill—controls nearly [forty] percent of the country’s wealth.”). Susan Faludi, *The Patriarchs Are Falling. The Patriarchy is Stronger than Ever.*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/28/opinion/sunday/patriarchy-feminism-metoo.html> (noting that the Act “systematically guts benefits that support women who need support the most”).

175. Krugman, *supra* note 172.

176. See Kate Zernike, *The Trump Resistance Found Early Success. Can It Also Find Momentum?*, N.Y. TIMES (Apr. 9, 2017), <https://www.nytimes.com/2017/04/09/health/the-trumpresistance-found-early-success-can-it-also-find-momentum.html>. See also Editorial, *What Trump Doesn’t Get About the State of the Union*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/30/opinion/editorials/donald-trump-sotu-boasting.html> (noting that, “If not exactly ‘woke,’ this country might certainly be described as awakening, with a shot at shedding the civic apathy that has afflicted it for far too long. It is with backhanded gratitude that we might all thank President Trump for that.”).

