

*Opinion*

## Reproductive Health: Assessing the Damage

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THE WASHINGTON POST RECENTLY REPORTED THAT MARYLAND'S House Speaker Mike Busch withdrew a bill placing on the 2020 ballot a question considered a "no-brainer" in a bright blue jurisdiction; whether women's access to abortion should be adopted as a matter of state constitutional right.<sup>1</sup> The reason was the state senate president's conclusion that the ongoing controversy surrounding laws easing access to exceptionally rare, invariably-tragic late-term abortions necessitated scuttling for now any discussion of basic rights.

The Maryland story is one in a sea of developments in the drama surrounding reproductive health protections for American women and their families. Having worked on these matters for more than 40 years, I can state unequivocally that I have never witnessed anything like the current environment. Efforts to strip women of core protections appear to be closing in from multiple political directions: a president carried into office on the strength of his promise to pursue extreme ideology, who appears committed to these positions despite a 2018 mid-term drubbing in the House; a Congress, many of whose Republican members view allegiance to the aim of undermining women's access to health care as part of the road to victory in 2020; and state legislatures, the source of so much of this dangerous energy. Hovering over all of this is the specter of a US Supreme Court on the verge of toppling rights in the face of political forces pressing to eviscerate binding legal precedent.

The danger is not just to abortion but to birth control as well—one of the 20th century's greatest public health achievements. Contraception is the chief reason why the abortion rate has fallen by over half since *Roe v Wade* was decided.<sup>2</sup> Experts say that proper preventive care can reduce the rate still further. Yet inconceivably, 21st century America is staring at not only an end to access to safe abortions but, unthinkable, a perilous erosion in access to our most effective forms of birth control.

## The State Onslaught

The Guttmacher Institute, the nation's paramount and indispensable tracker of reproductive health policy, reports that during 2018 alone, 15 state legislatures enacted 27 new state law restrictions, bringing to 424 the number of abortion restrictions enacted in the past eight years—one-third of all restrictions enacted since *Roe v Wade* was decided in 1973.<sup>3</sup> Twenty-three of these new laws take aim at abortion; the remaining four restrict access to family planning. Five states seek to ban first-trimester abortions, while another twenty-nine impose bans at varying points throughout the previability period—five prior to the twentieth week.

Guttmacher researchers currently classify 29 states as hostile or extremely hostile to abortion rights and note that 4 states already have constitutional bans in place if the Court overrules *Roe v Wade* (whose essential holding was preserved but modified by *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833 [1992]). Collectively, these state laws seek to curtail access to the earliest and safest abortions while simultaneously making it virtually impossible for women and their health care providers to jump through clinical, licensing, and procedural hoops governing later abortions.

The legislative damage does not end at abortion. Four states moved in 2018 to exclude Planned Parenthood—a critical source of primary health care for poor women—as a Medicaid family planning provider. The courts have stepped in to stop this unlawful exclusion, but to date, two separate appeals courts have upheld this state action.

As Guttmacher notes, one can take heart in the fact that in 2018, 29 state legislatures enacted 80 separate laws aimed at expanding access to abortion, contraception, and testing and treatment for sexually-transmitted infections; improving reproductive care for minors; expanding sex education; and improving coverage for infertility treatment. But the picture remains inescapably grim.

## The Trump Administration and Congress

Federal legislative efforts to curtail, ban, and defund abortions are nothing new, of course. In the face of clumsy legislative efforts in Virginia and New York<sup>4</sup> to ease unnecessary restrictions on late-term abortions

(which represent only 1.3% of all abortions and take place only under the most difficult health and life circumstances imaginable), the president and his Congressional supporters have seen a new opportunity to further inflame matters. Launching an attack as part of his State of the Union address, the president demanded legislation to ban the procedure nationwide; bills are sure to follow.

Furthermore, in a bow to the political forces that proved so vital to his 2016 election, the president has devoted considerable attention to eroding family planning access and ending federal funding to Planned Parenthood, a vital source of care in underserved communities. The House and Senate both included provisions excluding Planned Parenthood from Medicaid as part of their failed 2017 Affordable Care Act “repeal and replace” efforts. Undeterred by failure, the Trump administration has, for the past year, been laying the regulatory groundwork to achieve this aim, beginning with a rescission of Obama administration policies barring states from engaging in such exclusionary practices under its interpretation of federal law.<sup>5</sup> Paving the way for the exclusion of Planned Parenthood would be accompanied by other key regulatory moves: a sweeping exemption to the ACA’s contraceptive guarantee for employers who claim religious or moral objections to coverage (the rules have been halted by a nationwide lower court injunction for the time being); and now, new final rules that bar federal Title X family planning grants not only to providers that furnish or “advocate” for abortion (read Planned Parenthood) but to clinics that engage in impartial and nondirective counseling about all lawful pregnancy options, including state health agency clinics, independent nonprofit organizations, and community health centers. Expect more litigation.

## **The Courts**

In the midst of this, the US Supreme Court continues to tenuously hold on, even in the face of stepped-up efforts by certain radical lower-court judges to test the Court’s most important reproductive health precedents and its desire to proceed with great caution. The best known of these recent skirmishes occurred in February, when the Court temporarily blocked a Louisiana abortion law that would have left women in the state virtually without care. Louisiana’s law is a replica of one overturned by the Court in 2016; despite this, and in a shocking move, the Fifth Circuit Court of Appeals upheld the law in what was widely viewed as an act of

defiance. Soon thereafter, this same circuit gave an encore performance of sorts when a three-judge panel upheld Texas's Medicaid ban on Planned Parenthood literally days *after* the Supreme Court had refused to touch two previous decisions favorable to Planned Parenthood—one of which had been issued by a different Fifth Circuit panel in a Louisiana case.

What is at stake is not just women's rights that have become part of the fabric of American society, but access to safe health care. One is hard pressed to think of any historical precedent for a deliberately engineered public health threat of this magnitude.

## References

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