

FROM THE PAGE TO THE PILL: WOMEN'S REPRODUCTIVE RIGHTS AND THE LAW*

*Panel 1 – The ACA's Other Mandate:
Contraceptive Coverage,
Conscientious Objection, and
Reproductive Rights*

REMARKS OF MELISSA WEILER-GERBER**

Hearing Sandra talk brought me back to a memory that I was not planning to share but I feel like I should because I'm a Georgetown Law alum myself. I started law school in the fall of 1990, coming from an undergraduate atmosphere where you went to the infirmary, you could get an exam, and you literally left with a paper bag full of a supply of birth control pills. So, I arrived quite naively on Georgetown's campus and visited the nurse, who couldn't give me pills or a prescription. I remember having to travel to some place that felt like the middle of nowhere in Maryland, in the dark, by myself one night, trying to find her off-campus clinic so that I could get an exam and get prescription that I could then take back into the city to get filled. I had never had such a complicated experience for something that seemed like just a basic part of a twenty-something's health care.

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** Melissa Weiler-Gerber is the Executive Director of the Family Planning Council located in Philadelphia, Pennsylvania. Prior to holding that position, Ms. Weiler-Gerber worked for over ten years as the Executive Director of Woman's Way.

I am here to talk about a topic that's really near and dear to my heart - ensuring that women have the opportunity to achieve their full potential by allowing and enabling them to make informed decisions about whether and when they're ready to have children, and then providing access to the contraceptives they need to act on that decision. What I think is really shocking, and not a figure that everyone focuses on, is that half of the pregnancies in the U.S. each year are unintended.¹ Half of those unintended pregnancies end in abortion.² A recent Guttmacher Institute study found that in 2006, the year that was studied, the federal and state governments spent about 11.1 billion dollars on births resulting from unintended pregnancies.³ Two-thirds of all the births that result from unintended pregnancies are publicly funded births.⁴ Increased contraceptive use has been found to be responsible for significant drops in unplanned pregnancies, especially among teens.⁵ So you would think that all these facts together would give those on both sides of the abortion debate and the reproductive rights debate incentive to find common ground and promote responsible decision-making and access to the use of contraceptives. But obviously since we're here today for several hours to talk about this issue, the world is a lot more complicated than that.

I'm going to give you a bit of an overview about what I'm going to cover today. Today I am going to provide you with some history and context for this debate. The goal of this panel is to discuss the contraceptive mandate and I am going to set the stage in a broader way for the intersection of government and birth control over the last couple of decades. I can't resist going back to the landmark case that probably everyone studied in law school, *Griswold v. Connecticut*,⁶ to talk about that first big case which ensured the right of married couples to access contraception. We will look at the rationale of that decision because it really sets

¹ *Facts on Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2012), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Jacqueline E. Darroch & Susheela Singh, *Why is Teenage Pregnancy Declining? The Rules of Abstinence, Sexual Activity and Contraceptive Use*, GUTTMACHER INST. (Jan. 1998), http://www.guttmacher.org/pubs/or_teen_preg_decline.html.

⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

the stage for the history and politics of family planning for many years to come. Then we're going to look at some public polling data, because I think it's also important to put this discussion in the concept of what's really happening in the U.S. at large, versus just what's happening for the entities that are debating the issue. Then I will give you a brief overview of Title X,⁷ which is the Federal Family Planning Program. My organization, the Family Planning Council,⁸ is one of about 80 organizations in the country that is a grantee to that program and serves as the conduit to federal and state funds that bill out and fund contraceptives in family planning for those who are otherwise unable to afford it. Finally, I'll talk a little bit about what's been happening at the state and federal level, including a little more background about the birth control debate under the ACA. At the outset, I must acknowledge the Guttmacher Institute⁹ and the National Family Planning and Reproductive Health Association,¹⁰ which I may refer as NFPRHA, for preserving and disseminating the history and the impact of family planning efforts in the U.S. through the many reports, articles, polls, and studies from which I have drawn for this presentation.

Before delving into the substance of this talk, I wanted to give you a little bit of background about how I came to this work. As I mentioned, I am a Georgetown Law alumni and a lawyer by training. I will absolutely admit without apology that I went to law school to save the world, but deferred that modest goal for a few years to pay off student loans. I worked at a major law firm doing health care and insurance regulatory work overseeing in the early and mid-90's, when managed care was coming on the scene in my region in Philadelphia. I left to practice public interest law, first assisting homeless clients with getting benefits and getting them back on their feet. Then, for a little over a decade, I ran an organization in Philadelphia called Women's Way,¹¹ which is a women's funding and advocacy organization

⁷ Family Planning Services and Population Research Act of 1970, 42 U.S.C. §§ 300-300a (1988).

⁸ See generally *Family Planning Council*, FAMILYPLANNING.ORG, <http://www.familyplanning.org/familyrwho.shtml>.

⁹ See generally *About the Guttmacher Institute*, GUTTMACHER INST., <http://www.guttmacher.org/about/>.

¹⁰ See generally *About NFPRHA*, NATIONALFAMILYPLANNING.ORG, [HTTP://www.nationalfamilyplanning.org/page.aspx?pid=327](http://www.nationalfamilyplanning.org/page.aspx?pid=327).

¹¹ See generally *About Women's Way*, WOMEN'S WAY, <http://womensway.org/about>.

with a particular focus on women's access to reproductive health care and abortion. During my last year there, I watched the health care reform battle. I can certainly say that for many in the women's community in Philadelphia and across the nation, the passage of the ACA was really a bittersweet moment, where everyone was very excited about the expansion of health care coverage for so many who needed it, but also the concern that as health care was expanding, reproductive health access was actually constrained in many ways by the law. And furthermore there is concern that women who wanted to obtain insurance coverage for pregnancy termination, a very common and legal medical procedure, are going to have to go through a lot of hoops to do that. I am now the Executive Director of the Family Planning Council. The work we do there relates to breast and cervical cancer prevention, access to a full range of contraceptives, work around and preventing the spread of HIV, and working with the LGBT committee about reproductive health disparities and other issues.

So why do I care about these issues so much? I think it is because I am a real feminist at heart, and I believe firmly that the ability to decide whether and when to have children has an enormous and fundamental impact on your ability as a woman to achieve full equality at home, at school, in the government, and in the workplace. The pill was really revolutionary in this regard. Opening the door for women who wanted to further their education, really pursue an established career path, and plan their families when they felt ready to handle that level of responsibility. There's been some recent research that bears this out, that women who have better access to the pill actually earn 8% more than those who didn't by the time they reached age 50.¹² According to UVA and University of Michigan researchers, their estimates imply that the pill can account for 10% of the closing of the gender wage gap in the 1980's and 30% in the 1990's, which is pretty remarkable.¹³ The Guttmacher Institute just surveyed about 2000 women in family planning clinics across the nation

¹² Dino Grandoni, *Women with Access to the Pill Earned 8% More Than Those Without*, ATLANTIC WIRE (Mar. 6, 2012), <http://www.theatlanticwire.com/national/2012/03/women-access-pill-earned-8-more-those-without/49560/>.

¹³ Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gaps in Wages* (Nat'l Bureau of Econ. Research, Working Paper No. 17922, 2012).

about the benefits they receive from contraception.¹⁴ The results, according to the *International Business Times*, were, and I quote, “The results confirm what most people in this day and age already believe. Women use contraception because it ultimately allows them to better care for their families, complete their education, and achieve economic autonomy.”¹⁵ The number one reason why the women surveyed used birth control was because they couldn’t afford to care for a child. They just weren’t ready and they didn’t have the means. This is also one of the main reasons that women cite for going to have an abortion. Our major public health institutions understand the importance of family planning. In 1999, the CDC named the development of modern contraception as one of the ten most important public health developments in the entire 20th century.¹⁶ The Department of Health and Human Services’ April 20 20 objectives, including increasing the rate of intended pregnancies from 51% to 56% and increasing the number of insurance plans offering contraceptive services and supplies.¹⁷ In the last 12 to 18 months, you wouldn’t think any of that was true, because these months have been among the most tumultuous and uncertain times for women’s reproductive health access, making it appear that contraception is really controversial.

How is it that in the 21st century in the United States we are still battling over the rights of women and men to access birth control? Well, let’s go back to 1965 and *Griswold v. Connecticut*. Just to remind you in case you skipped that class or you haven’t had that class yet, Planned Parenthood of Connecticut’s executive director and its medical director were arrested and charged with providing information and advice about contraception to a married couple, which was in violation of the Connecticut statute that made it a crime to counsel or provide

¹⁴ Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, 16 GUTTMACHER POL’Y REV. (2013) <http://www.guttmacher.org/pubs/gpr/16/1/gpr160108.html>.

¹⁵ Ashley Portero, *It Turns Out, Using Contraception Drastically Improves Women’s Quality of Life: Study*, IBTIMES.COM (Sept. 26, 2012), <http://www.ibtimes.com/it-turns-out-using-contraception-drastically-improves-womens-quality-life-study-796267>.

¹⁶ *Ten Great Public Health Achievements in the 20th Century*, CTRS. DISEASE CONTROL (1999), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm>

¹⁷ OFF. OF POPULATION AFFS., REPRODUCTIVE HEALTH AND HEALTHY PEOPLE 2020 at 8 (2010), <http://www.hhs.gov/opa/pdfs/reproductive-health-and-healthy-people-2020.pdf>

medical treatment to married people for the purpose of preventing conception. The law specifically prohibited the use of any drug, medicinal article, or instrument for the purpose of preventing conception. So, they were each arrested and they were found guilty and they were fined \$100 each. The issue presented in the case to the Supreme Court was whether the Constitution provided for a right of privacy for married couples. In a 7-2 decision, the Supreme Court held that the Bill of Rights has a penumbra, expanding the rights of privacy that were guaranteed by certain other of the Constitution's amendments. It also found that the Connecticut law, by forbidding the use of contraceptives rather than just regulating their manufacture or sale, was too broad. It was not until 1972, seven years later, that these same rights would be afforded to unmarried people in *Eisenstadt v. Baird*.¹⁸ 1972 is also an important year for another reason, because it's the year that the Supreme Court held in *Roe v. Wade*¹⁹ that laws banning abortion in the first trimester were unconstitutional. After that, the battle was on and has been on ever since.

If you flash forward 40 years to today, we find ourselves facing the following. In 2011, legislators across the nation facing dismal economic conditions, job loss, and unrest internationally decided to focus their attention on controlling women's bodies and introduce 1,100 reproductive health and rights related legislative permissions.²⁰ By the year's end, 135 had become law.²¹ In the first half of 2012, 95 new provisions related to reproductive health and rights had been enacted.²² If we look at those provisions specifically on contraception, here's what we find. Over the past two years, some states have used the economic downturn to severely cut state funding for family planning services for poor and uninsured women. For example, Texas cut state funding for family planning by about 66% and defunded Planned Parenthood entirely.²³ The Federal Government did not

¹⁸ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁰ *Laws Affecting Reproductive Health and Rights: 2011 State Policy Review*, GUTTMACHER INST. (2011), <http://www.guttmacher.org/statecenter/updates/2011/statetrends42011.html>

²¹ *Id.*

²² *Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2012*, GUTTMACHER INST. (2012), <http://www.guttmacher.org/statecenter/updates/2012/statetrends22012.html>

²³ TEX. WOMEN'S HEALTHCARE COAL., TEXAS WOMEN'S HEALTHCARE IN CRISIS 5

approve of this, which in the end meant that Texas had to turn over its Medicaid match from the Federal Government, losing about 33 million dollars that could have been used to provide health care services for low income folks in Texas.²⁴ Abstinence-only education is coming back into fashion with 37 states now mandating it as part of their sex education curriculum.²⁵ And of course if you've been watching the primary Presidential, it's obviously still a major issue in the political arena with Republican hopefuls Rick Santorum, Mitt Romney, and Newt Gingrich all declaring their opposition to the Title X Federal Family Planning program and vowing to eliminate all Title X money in their first budget. On the other side of the aisle, President Obama and the Democrats are making women's health issues a primary focus.

So again, how is it that in 2012 birth control finds itself in the center of such supposed and intense controversy? Are Americans really are so vehemently opposed to birth control? Well, it turns out that the answer is no, they are not. In spring of 2011, NFPRA and the Communications Consortium Media Center commissioned a poll by like research partners to survey public attitude around family planning services because these issues were heating up so much and they wanted to see what was happening in the general public.²⁶ What the survey showed was a remarkable level of support for family planning services and an overwhelming consensus that it should be widely accessible and free from restrictions. That was consistent with other recent surveys that found similar findings and favorable beliefs about family planning and access to it. Key findings were that Americans strongly believe in the importance of family planning services as a basic preventive health measure across all demographic and political lines, thereby rising to what the researchers describe as a core value. Americans see birth control pills as one of the most important and favorable medical breakthroughs in women's lives, and as the key to women's

(2013), available at <http://www.texaswhc.org/wp-content/uploads/2013/01/Texas-Womens-Healthcare-in-Crisis.pdf>

²⁴ *Id.*

²⁵ *State Policies in Brief: Sex & HIV Education*, GUTTMACHER INST. (2013), http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf

²⁶ *Key Findings on Public Attitudes on Family Planning*, FAITH IN PUBLIC LIFE (May 2011), <http://www.faithinpubliclife.org/poll/key-findings-on-public-attitudes-on-family-planning/>

ability to achieve equality. They deem birth control pills as a preventive measure that should be covered by insurance like other preventive measures, such as vaccines and medicines to control high blood pressure or high cholesterol. Americans support family planning programs even in the face of budget crises across demographic groups.

So with all that in mind, I wanted to give you a little bit of history about Title X, because given the very politically charged and very highly partisan atmosphere about family planning services right now, it's really interesting and almost a bit entertaining to learn about the roots of the Federal Government's family planning program. So to take us back, the 1960's and 70's showed rates of unplanned and unwanted child bearing were at least twice as high among low-income women. As part of the War on Poverty in 1965, some federal funds were made available for family planning through the Office of Economic Opportunity. Then in 1967, the Social Security Act was amended to require state welfare agencies to offer and provide family planning services to those who were receiving public assistance.²⁷

Title X came about as the first comprehensive Federal approach to family planning. It came into being under a president who promised, "No American woman should be denied access to family planning assistance because of her economic condition."²⁸ Who was that progressive-sounding president? Republican President Richard Nixon. One of Title X's most outspoken proponents was a member of Congress who believed, "We need to make population and family planning household words. If family planning is anything, it's a public health matter."²⁹ Who was that liberal-sounding congressman? Then Republican congressman from the state of Texas, future Vice-President and then President George Herbert Walker Bush. Not many people know that he is also a former Planned Parenthood board member. Title X was actually enacted with very broad bipartisan support on Christmas Eve in 1970 to promote public

²⁷ Pub.L. No. 90-248, § 201(a)(1)(C), 81 Stat. 821, 878 (1968) (codified as amended at 42 U.S.C. § 300 (2006)).

²⁸ Richard Nixon, Special Message to the Congress on Problems of Population Growth, (July 18, 1969) *available at* <http://www.presidency.ucsb.edu/ws/?pid=2132>.

²⁹ See Editorial, *Title X: A Proud Past, An Uncertain Future*, 84 *CONTRACEPTION J.* 209, 209 (2011), *available at* <https://www.arhp.org/UploadDocs/journaleditorialsept2011.pdf>

health and welfare, by expanding, improving and better coordinating the family planning services and population research activities of the Federal Government. The major purposes of title X are to assist in making comprehensive volunteer family planning services readily available to all persons desiring the services, to coordinate domestic population in family planning research, to develop and make readily available information about family planning population growth to all people desiring such information, and to assist in providing the manpower needed to effectively carry out these programs. This broad, forward-looking, and expansive that language really emphasizes the comprehensiveness of the coverage and the accessibility of information and services, which is very different than the spirit of the debates in the last couple of years around birth control access, both domestically and internationally, which has really been about living content, constraining access, limiting and withholding even medically accurate information in some cases over the last several years.

Thought Title X was set up with broad bipartisan support in 1970, it has really been under pretty much relentless attack since the Reagan era. In 1981, Congress added language stating that to the extent possible, clinics had to encourage family participation in the program.³⁰ For a while, that was interpreted as meaning that parents had to be notified if a minor was going to get a prescription for a contraceptive. This was called the 'squeal rule' for obvious reasons. Many teenagers come to family planning clinics because they feel they can't talk to their parents about these issues for various reasons but they want to be smart about the decisions they're making, and this was really a hindrance to that. In 1983, those regulations were finally challenged and revoked.³¹ Moving forward, there were additional restrictions about what could be said about providing abortion-related information even if requested by a patient. These restrictions also required separation of abortion from other services in Title X clinics and prohibited the engaging in any activity that could be seen as promoting abortion. These restrictions were upheld in 1991 but ultimately withdrawn by

³⁰ Pub. L. No. 97-35, § 931(b)(1), 95 Stat. 570 (1981) (codified at 42 U.S.C. § 300(a) (2006)).

³¹ Parental Notification Requirements Applicable to Projects for Family Planning Services, 48 Fed. Reg. 3600, 3614 (1983).

President Clinton in 1993.³² Then in 2004 a federal refusal clause was introduced which protected organizations that refused to provide, pay for, or refer for abortions.³³ This led to some conscience clause regulations years later and of course we're still seeing the impact of those types of regulations in the debate you are hearing about today.

I am now going to talk briefly about health care reform. While Barbara McClusky's amendment, the Women's Health Amendment,³⁴ put forth a number of pieces that IOM and that HHS finally adopted, certainly the most controversial one was around the full range of FDA-approved contraceptive devices. When HHS released its interim final rule that really built on the private sector changes in contraceptive coverage that happened over the last 20 years, there was celebration on one end and a lot of angst on the other end. This is really consistent with the way the insurance market has been moving over the last two decades. Many states have required plans to cover contraceptives; the EEOC Center has made it clear that an employer's failure to do so violates the Pregnancy Discrimination Act.³⁵ By 2002, the vast majority of private insurance plans were covering a comprehensive array of contraceptives anyway, so we have had very big changes in a very short period of time. The HHS rules are really about closing remaining gaps in coverage in individual small group plans and bringing these plans in line with the coverage on contraception by other programs.

I would like to finish by saying that there were additional public opinion polls that remain consistent with the first one I told you about, with the vast majority of Americans being in support of this, even among Catholics. I think it's easy to understand why, because 99% of adult American women used birth control at some point in their lives, and 98% of adult Catholic women used birth control during their lives.³⁶ So, this

³² Title X Gag Rule, 58 Fed. Reg. 7455, 7455 (1993). *See also* Jennifer J. Frost et al., *The War on Women: Federal Remedies to Fight Back Against States That De-fund Planned Parenthood*, 37 VT. L. REV. 495, 520 (2012).

³³ Hyde-Weldon Conscience Protection Amendment, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. F, tit. V, 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004).

³⁴ 42 U.S.C. §300gg-13(a)(4) (Supp. 2010).

³⁵ Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

³⁶ Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, GUTTMACHER INST. (Apr. 2011), <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf>

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really is a situation where you've got an institution that is putting out a position that's not consistent with public opinion or the way American citizens are behaving. Thank you for your interest and attention on this issue.