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

Panel 2–Reproductive Healthcare Legislation: Where We've Been and Where We're Going

REMARKS OF TRACEY BROOKS**

What I'm going to speak to you about today is some of the legislation that's standing before the New York State legislature now. I am also going to talk about some more legislation that's being passed around the country and producing some challenges in the courts. When we talk about where we are, where we've been, and where we're going, where we've been is women have died from abortions. Where we are is that fewer women are dying. And where are we going? I hope to a society that recognizes that women should make their own personal private health care decisions. Women might ask lots of people to be part of that decision making process. We might ask a person of faith, we might ask our family, we may ask our medical provider. However I'm sure the one person we're not going to call up and invite to the kitchen table to have a conversation with is our local elected official, the President of the United States or a Supreme Court justice.

* On October 11, 2012, the Albany Law Journal of Science and Technology presented a symposium on women's reproductive rights and the law. These remarks have been annotated and edited by the Journal staff. The webcast of the event is available at http://www.totalwebcasting.com/view/?id=albanylaw.

** Tracey Brooks, Albany Law School Alum class of 2000, is president and CEO of Family Planning Advocates of New York State. She has been an essential part of New York's promotion of affordable and comprehensive reproductive health care. She has also served as the Regional Director for then-Senator Hillary Rodham Clinton, and serves as counsel to the New York State Assembly Judiciary and Codes committees.

Women are trusted decision makers because they make decisions every single day. They make decisions for their families, for their communities, for their children, and that the law has recognized this. In the State of New York, we have the Reproductive Health Act,[1] which will guarantee that every woman will make her own personal private health care decisions, especially when her health is in danger. This is a wonky bill and unfortunately it's not really making any new ground. We're not talking about whether or not New York's going to have abortion, legal or not. We certainly aren't creating a fundamental right because the state legislature can't do that. No matter how many times people are going to tell you this bill creates an inherent fundamental right for women to have abortions, the state legislature doesn't have the authority to do that, nor does the bill create that. What it does do is take a long overview chapter of women, and enacts it. The bill says it shouldn't be a matter for a criminal court, it should be a matter of our public health law, that's where all other medical health care is regulated. The bill regulates medical providers so that when a provider does something that's inappropriate you still have the ability to bring criminal action and you also have the ability to bring civil action. In the past this couldn't happen because it wasn't where we could get political. However New York has, in a bipartisan fashion, recognized that women shouldn't die anymore and that we should make sure that abortions are done in a legal, appropriate health care facility. So we need to so we need to move it from one area of the law to the other in order to do that.

The other piece that happened when we let abortion be legal in the State of New York is that we didn't include a health care exemption. There is the exemption federally in *Roe v. Wade*, but we don't have it explicitly in the state law. So medical providers and doctors who perform this procedure, medically trained and educated doctors with the appropriate background, are faced with sort of an imbalance. If we had a health exemption, and a woman came and her opinions were shutting down and she was beyond the 24-week period, then the medical provider and the woman can make a decision was best for her and her family. However because we don't have an explicit health exemption and we're in the criminal code, medical providers get very concerned when issues arise with pregnancies beyond the 24-week point.

[1] Assemb. B. 6112, 2011-12 Reg. Sess. (N.Y. 2011).

This isn't a woman that wakes up one day and says "oh crap, I forgot to get my abortion. I meant to take care of that." These are babies that are wanted, these are babies that have nurseries, showers have probably already been planned for these babies. When we're talking about with the health exemption we're talking about a very rare occurrence and a very heart wrenching time for a family when for some reason the mother's health is greatly compromised, to the point where we may not rehabilitate her back to what she was prior to her pregnancy. She may be on dialysis for the rest of her life, and they already have children at home besides the child that will come. And how will she take care of those children beyond dialysis? So hard, gut-wrenching decisions are made by a family who has wanted to accept this child into their life. And now they have to travel outside of New York because our medical providers are really caught up between the criminal code issue and the fact that we don't have an inherent, explicit health exception in the law.

If we had a health exception medical providers would feel more comfortable being able to work with patients to find the best outcome for them. If we worked in the criminal code when we just relied on the federal policy, or we're in the public health law, then the providers again feel very comfortable and confident in being able to work with patients to come up with the best health care decision making for them. But do you see where we're in a double-edged sword right now, without both of them, and what kind of predicament that could put a doctor in? And a family? And are already extremely trying time in a pregnancy? So the health care exception is the second really critical piece of what will happen with the reproductive health act, ensuring that we have a specific health exception, so life and health. This doesn't make abortion on demand throughout nine months of gestation, nor does the Supreme Court, because health and life of the mother are real-life medical determinations, and so if folks think that you know a mother living or you know not being able to be treated for breast cancer and ultimately be able to survive and take care of her family is demand, and flippant reason, to consider ending a pregnancy, I say that's not my call. Nor is it my judgment. I'm glad women aren't dying any more, and that women have the ability to make health care decisions that are best for their families, and that every woman can do that. So those are the important aspects behind why we need in the State of New York to really update our law, to provide a chapter

amendment after 42 years of health delivery that has really shown itself to be (a) at need for the State, but (b) we know that making it illegal wouldn't change that. Abortion existed prior to any of the State's legalizing it. Just because it becomes legal and safe to make it illegal just makes it unsafe again. Okay? Now that's not – the Reproductive Health Act isn't addressing either of those two things, like I said, we're dealing with nuances here in the State of New York, and the thing that I can tell you about is that seven out of ten New York voters want to see this updating of the law in the State of New York, and are asking their legislators to please go ahead and pass this law, and really update and bring New York into the 21st century. We are very glad that we are on the cutting edge forefront of making health care available to women, and also making it available to women at every socioeconomic level. But we were only able to do it in certain ways, and today we need to modernize it. So I just want to make sure of my talking points. The final piece that it does do, and I think this is where people get confused in the law, giving a fundamental right to an abortion as I told you obviously the state and the legislature can't do, what it does do is affirms the rights of New Yorkers to use and refuse contraception. That contraception can't be used in a discriminatory way or in a course that women have the ability to say yes or no. And to recognize that. So it's a really basic law, like I said it's not sexy, it's certainly not controversial, it's updating something that's 42 years old, based on practice of what we've seen, it's time, it's appropriate, and it helps families who are facing really, really tough decisions in a really, really troubling time, without having to leave our state to find medical providers who feel comfortable providing health care too. So that's what the reproductive health act was going to do. Why do we know that this is an extreme or cutting edge, because there are seven states that already have this. That most of what we're doing is really just bringing to the line a law that was passed prior to Roe v. Wade, what the Federal findings have been in the Supreme Court. And so we're thrilled to be able to say that we feel confident that the Reproductive Health Act will be passed. While it takes a long time to pass it in any state in the nation, but we're getting there, we're getting to the age and I hope that all of you will join us in helping to pass this, so that parents don't have to be in such a state of anguish. So doctors don't have to worry about going to jail for providing health care services to patients. That's our

premiere piece of legislation, but I want to talk about some legislation that's going on across the nation and yes it seems weird in 2012 that we're having a whole symposium, a whole day dedicated to talking about reproductive health. And when we talk about reproductive health, we're not just talking about abortion and birth control, we're talking about the protection of our fertility. Ensuring that fertility exists for men and women when they're ready to use it. We're making sure that people stay healthy, having access to health care providers, to be able to preserve their fertility and maybe what we should be talking about is much broader. Instead of limiting from 24 weeks to 20 weeks when women can have abortions, whether saying, whether judging in a chair who can and when she can, and why she can and why she can't, recognizing that non-judgmental care is appropriate, and especially in a country like the United States, rather than looking at humiliating requirements, ultrasounds, and transvaginal ultrasounds, that would then re-classifying what the definition of rape is in the United States and making victims suffer humiliation over again, and rather than handing medical providers and doctors a script to say, I need a prescription, I mean a written statement to say to their patients that it is completely medically incorrect, maybe what we should be talking about is a reproductive health plan. Maybe what we should be talking about is sexuality education for our youth, K-12. Talk about appropriate relationships, interpersonal relationships, up through the ability to make decisions as large as when and where you're going to become sexually active, and will or won't you use protection when you do that, and are or aren't you ready to become a parent. And maybe what we should be talking about is pre-conception healthcare. Because if women had reproductive health plans, then thought about pre-conception health care, then we would be very purposeful in our actions. We plan our education, we plan our careers, we plan many things in our life, but I have a feeling that most of us fly by the seat of our pants on some of our reproductive policies. We miss our annual exam. We just didn't have the $30 this month for our birth control. Maybe you wake up when you're 38 and oh crap you didn't have your kids because you were focusing on your career because you didn't have your reproductive health plan that said okay this is where I wanted to start thinking about am I ready in shape and prepared to become a parent. And that preconception health care? That's talking about am I physically

healthy enough to have a very healthy pregnancy. Women have pregnancies every day and deliveries every day, and that some were saying about abortion, we have way more deliveries than abortion, let me tell you, it's not an easy thing. And women die still in the state of New York delivering children. We shouldn't just take it for granted that every woman is healthy enough to carry a healthy pregnancy and have a healthy delivery. So if we're having pre-conception health care, and we're consciously aware and thinking about are we ready, then we are more consciously aware of when we're ready and we're spacing and we're having healthier pregnancies, healthier families, healthier outcomes for our children. So instead of working on health care delivery and like that, what are we dealing with in legislatures across the state, across the country. We're talking about abortion bans that restrict access from Medicaid dollars to abortion services, except in the case of incest, rape or the life of the mother. Okay, so that means only if you have enough money can you access the full range of reproductive health care services, including abortion. Constitutional abortion bands, four states have laws that would impose near-total criminal bans on abortion if the Supreme Court were to overturn Roe v. Wade. We've got – and that's enacted in 15 states, the unconstitutional abortion bans. We have outlaws of abortion acts in the 12th week of pregnancy with no exception for protection, to protect a woman's health, that's enacted in 21 states. In health care restrictions, including abortion services for health insurance plans that are federal exchanges, to prevent a woman from accessing care unless her life is in danger, so that's the reason these new health care exchanges that we have, you didn't have the ability as a state to say plans have to have abortion coverage. The states did have the ability to say, none of the plans can cover abortion services in the health exchange, and that's even if you're paying your own private dollars with no federal subsidies, okay? But you couldn't say, so New York State will likely be a state that would say yeah, we should have coverage of abortion services. New York State can't say that. But over 80% of private health insurance plans cover abortion services. So luckily in New York State hopefully we're going to see that, that we'll have it covered, but there's a lot of states in Mississippi where those poor women won't have the same access that women in New York have. So let's first say yay, thank God we live in New York. That this gives us a broader ability to make decisions that are

right for our families when our families need it. It doesn't mean there is a soul standing in this room today cheering that any one woman might ever need to access abortion services. It's a very hard decision and no one should be cavalier about saying what goes through a woman's mind when she makes that decision. So we also have health care restrictions that allow individuals or entities to refuse to provide abortion services, this includes hospital, health care facilities and individuals, 43 states have that, we have a tax on family planning funding, entities which provide abortion may not receive family planning funds, that's enacted in six states, three of them are unenforceable right now, while it's pending in the State, so that's saying if you also happen to provide abortion services, that no federal funds can touch, it's very clear the high amendment has been very clear, that you can't get state family planning done, or they won't let you be a Title X recipient if the State is the grantee. So you can help make access to breast cancer screenings, pap smears, contraception, a number of STI treatments, a number of screenings and preventative health care services on a sliding fee scale for people who are underinsured, or can't use their health insurance because they have a $2,500 deductible, and most of us healthy people right now don't use $2,500 for health care. So if you provide abortion services, you can't help people access affordable health care on a sliding fee scale because you can't access any of that grant. So with that attacks on restrictions on contraception, pharmacists are allowed to refuse to dispense contraceptives, including emergency contraception in six states, restrictions on access requires that at least 24 hour waiting period between meeting with a physician and receiving abortion care, restrict patients' access, particularly in states that really have few abortion providers, few doctors, I just got my time, I'm going to try to wrap it up and carry on for two minutes, but restrictions on medical personnel narrows the scope of practice for physicians' assistants who provide abortion services, enacted in 39 states, and the list goes on. But let me tell you that Congress has done the most to really spend an awful lot of time instead of helping the country deal with significant economic downturns, significant debt, they have spent the majority of their time standing up on the floor and fighting whether or not women can have access to reproductive health care and abortion services in this country where it is already the law of the land, that it is legal. And what I want to say to you in this last little piece, I

have a lot more that I want to talk to you about, there's been a huge spike since 2011 in the number of bills that are really restrictive of health care, but what I want to say to you is that during this financial recovery, small women-owned businesses are the largest job producers in the nation right now, they have created more jobs than any of the big companies or man-owned small businesses. And at the time when women of the economic driver of this country creating jobs, we should not also have to be fighting and worrying about losing access to reproductive health care which means protecting our fertility, ensuring that we can space our pregnancies, and have access to legal, safe health care services that have ensured by the Supreme Court. So for that, I thank you very much and I'm happy to answer any questions.