Key Reproductive Health–Related Developments in the States: 2003

By Rachel Benson Gold

As this issue of *The Guttmacher Report* goes to press, the legislatures in all but five states (Massachusetts, Michigan, New Jersey, Ohio and Pennsylvania) had adjourned for the year, and lawmakers across the nation had taken a variety of final actions related to reproductive and sexual health issues.* As has been the case consistently over the last many years, abortion was a major topic of interest in state legislatures, with 18 new measures enacted this year alone. While lawmakers addressed a range of abortion-related topics, including so-called partial-birth abortion (see related story, page 12), 2003 is notable for the attention given mandatory counseling and waiting periods for women seeking an abortion. Meanwhile, efforts to impose state-level "gag rules" on family planning funds continued, with two state legislatures taking extreme actions under this rubric that could have devastating consequences for young and low-income women needing subsidized contraceptive services. On a more positive note, five states took important steps this year to increase women's access to emergency contraception.

Abortion Counseling and Waiting Periods

In 2003, four states—Minnesota, Missouri, Texas and West Virginia—enacted new laws requiring women seeking an abortion to receive state-directed counseling, while three others—Arkansas, South Dakota and Virginia—expanded their existing laws; Missouri's new law was enjoined pending a legal challenge. This year's actions bring to 27 the number of states with state-directed counseling requirements in effect.

Under these provisions, physicians must provide material on possible alternatives to abortion and services available to women who continue their pregnancy. Physicians must offer women state-prepared materials, which often detail the psychological effects of abortion, fetal development and fetal pain. Notably, Minnesota and Texas require information about a purported link between abortion and an increased risk of breast cancer, although the National Cancer Institute has found that no such link exists.

All three of the new laws, as well as the enjoined Missouri statute, require women to wait 24 hours after receiving the counseling before having the abortion. In all, 21 states have mandatory waiting period laws in effect.

State-Level Gag Rules

For several years, conservative activists' attempts to condition the receipt of public family planning dollars on what a private-sector organization does with its nongovernmental funds have played out both in U.S. foreign policy and in state capitals across the country. Internationally, debate has centered around a U.S. government requirement (often referred to as the "Mexico City" policy) that developing-country nongovernmental organizations receiving U.S. family planning funding pledge that they will not use any of their *other* funds for abortion-related services or advocacy ("Global Gag Rule Revisited: HIV/AIDS Initiative Out, Family Planning Still In," *TGR,* October 2003, page 1). On the state level, the issue has centered on requirements that agencies receiving state family planning funds be financially and physically "separate" from any privately funded activities related to abortion ("Efforts Renew to Deny Family Planning Funds to Agencies That Offer Abortions," *TGR,* February 2002, page 4).

This year, Texas enacted a restriction more akin to the international version than what has generally been implemented at the state level. The measure flatly prohibits the receipt of federal family planning funds—including Title X and Medicaid—by any organization in the state that provides or contracts with another entity to provide "elective" abortions—notwithstanding the degree to which the two activities may be separated. The funding prohibition was immediately challenged and its enforcement enjoined.

Meanwhile, this year, a long-running saga in Missouri also took a potentially devastating turn for women in need of publicly subsidized family planning. For several years, litigation has swirled around increasingly stringent state requirements that family planning providers be separate from agencies providing abortion. With enforcement of the separation requirement appearing to be finally blocked as a result of the litigation, the Republican leader of the state Senate moved to "make this a moot issue," according to press accounts. Rather than continue the wrangling, the legislature terminated *all* state funding for family planning services. With the demise of the Missouri program, and the ongoing challenge in Texas, four states—Colorado, Michigan, Ohio and Pennsylvania—have abortion-related

*More detailed information on state policy on key sexual and reproductive health issues is available at <www.guttmacher.org/statecenter>.

restrictions on family planning funds, commonly regarded as state gag rules, in effect.

Emergency Contraception

Although much of the legislative attention in 2003 was on restricting access to reproductive health services, five states moved to increase access to emergency contraception, taking two different approaches to the issue.

Three states—New Mexico, New York and Oregon—enacted new laws pertaining to hospital emergency room provision of emergency contraception to women who had been sexually assaulted. The New Mexico and New York measures require hospital emergency rooms both to provide information about emergency contraception and to dispense the medication on request. The Oregon law authorizes state payment when emergency contraception is dispensed to women who have been assaulted, although it does not mandate treatment or information. With these enactments, six states (not including Oregon) now require hospital emergency rooms to provide services related to emergency contraception.

None of the three measures enacted in 2003 includes a provision allowing hospitals to refuse to comply because of moral or religious objection to emergency contraception. However, the New York law does not require hospitals to provide emergency contraception to any woman who is "pregnant," a clause added to reflect current practice at many Catholic hospitals. These hospitals administer a pregnancy test that, if used within the window of time that emergency contraception is effective, would only determine whether the woman had been pregnant prior to the rape.

Also this year, two states passed measures aimed at facilitating the ability of pharmacists to dispense emergency contraception without a prescription, bringing to five the number of states taking this approach. A Hawaii law allows pharmacists to dispense emergency contraception under a collaborative practice agreement with a physician. California, which previously had a law similar to the Hawaii measure, became the first state to give pharmacists the option of dispensing the medication either under a collaborative practice arrangement or in accordance with a specific, state-established protocol.

Christopher Guttridge, Elizabeth Nash and Chinue Richardson also contributed to this article.

Federal Abortion Procedures Ban Heads to Court; Abortion Foes Pledge More Bills in 2004

By Amy Deschner

President Bush's signing of the Partial-Birth Abortion Ban Act on November 5, 2003, was not just a moment of political triumph for abortion opponents, who had seen almost identical legislation vetoed twice by President Clinton. It was also, in the words of the Family Research Council's former president, Kenneth L. Connor, part of social conservatives' long-term strategy of dismantling, "brick by brick, the deadly edifice created by *Roe v. Wade.*" The law represents the first federal ban on an abortion procedure since the Supreme Court legalized abortion nationwide more than 30 years ago, setting the stage for a court challenge that could redefine the scope of abortion rights in the United States.

Issues in Contention

Three years ago, the Supreme Court struck down by the narrow majority of 5–4 a similar ban that had been enacted in Nebraska. In *Stenberg v. Carhart,* the Court cited two distinct constitutional problems with the state law: that the language used to define a "partial-birth" abortion was so broad as to potentially outlaw a range of abortion procedures and that the law lacked an exception that would allow a physician to employ such procedures when necessary to protect the health of the woman. Congressional supporters of the bill claim to have addressed these problems.

Supporters argue that they have sufficiently narrowed the definition of a "partial-birth" abortion by describing it as the performance of an "overt act" intended to kill the partially delivered living fetus. Opponents say that the language is still too imprecise and could cover a much broader category of procedures, including the dilatation and evacuation (D&E) procedure that is commonly performed during the second trimester of pregnancy—well before fetal viability, the point at which the Supreme Court has said states may act to restrict or prohibit abortion. The procedure that comes closest to what antiabortion groups say they want to criminalize is known as dilation and extraction (D&X). To avoid confusion, the bill's authors could have used that medical term and given the corresponding *medical* definition in the legislation. Instead, they chose to use the *political* term "partial-birth" abortion and create their own definition, purposely leaving the door open to broad interpretation.

(Continued on page 14)

Federal Ban…

Continued from page 12

Proponents also say they have addressed the health issue by including in the legislation itself congressional "findings" that "partial-birth" abortion is never necessary to preserve a woman's health, that it poses serious risks to a woman's health and that it lies outside the standard of medical care. Critics cite a substantial body of medical opinion to the contrary and argue that according to Supreme Court precedent, only a doctor evaluating an individual woman's particular circumstances can determine the best way to protect that woman's health.

'You Can Weave Them Together'

President Bush has stated that the country in not "ready" for a total ban on abortion. Republican leaders have already served notice that they hope to move the country closer to that day by bringing up for congressional consideration a number of other abortion-related bills in 2004. The election-year legislative agenda prominently includes the Unborn Victims of Violence Act, which, while not affecting abortion legality per se, would create a separate crime for harm to an "unborn child" caused while committing a crime against a pregnant woman; alternative proposals that carry the same penalties as the Unborn Victims of Violence Act but would not, however, grant the fetus legal rights independent of the woman have already been rejected. Other likely candidates include the RU-486 Suspension and Review Act, which would remove mifepristone from the U.S. market, as well as a bill requiring parental notification for minors seeking an abortion on military bases. "Each of these issues can stand on their own," Sen. Sam Brownback (R-KS) recently remarked. However, "you can weave them together."

Meanwhile, it will be up to the Supreme Court to determine the final outcome of the "partial-birth" abortion ban. Challenges filed by Planned Parenthood Federation of America, the American Civil Liberties Union and the Center for Reproductive Rights have already resulted in temporary restraining orders blocking the law from enforcement throughout much of the country. The Justice Department has appealed these rulings, and hearings are slated in all three cases in March 2004, although the legal battle could take several years to play out.

Proponents of the measure are hopeful that by the time the case reaches the Court, President Bush will have had an opportunity to appoint at least one new justice, who could tip the balance in their favor. With this in mind, both sides agree: The 2004 presidential election will likely play a pivotal role in defining the scope of abortion rights in the future.

THE GUTTMACHER REPORT
ON PUBLIC POLICY

December 2003

120 Wall Street, 21st floor
New York, NY 10005

ADDRESS SERVICE REQUESTED

PRSRT
First Class
U.S. Postage
PAID
Binghamton, NY
PERMIT No. 588