CENTER FOR REPRODUCTIVE RIGHTS

The Center for Reproductive Rights 2009 Legislative Wrap Up

In the United States, state legislatures wield enormous power to control women's access to abortion and other reproductive healthcare services. In 2009, as in past years, legislatures throughout the country considered hundreds of bills that would have significantly endangered women's reproductive health and autonomy. The Center for Reproductive Rights worked alongside advocates in many states to ensure that women's access to critical healthcare was not burdened by restrictive legislation.

Ultimately, pro-choice legislators and activists successfully defeated most of the over eight hundred restrictive bills proposed in 2009. Nonetheless, approximately fifty of those bills were enacted into law. These laws included additional obstacles for women seeking abortions, such as waiting periods and mandated counseling and new regulations targeting criminal or civil penalties at women for their behavior during pregnancy.

Despite these set-backs, pro-choice advocates also celebrated some victories in 2009, passing several important bills that will improve women's access to reproductive healthcare and ensure their health, safety and autonomy. Among these were three laws prohibiting the shacking of pregnant prisoners during labor and delivery and a number of laws expanding access to emergency contraception.

The Center's summary of major abortion and reproductive health legislation from the 2009 session is intended to inform pro-choice allies around the country about the landscape of reproductive rights law after last session and to help them prepare to confront these and new challenges in 2010.[1]

States Erode Women's Rights

During the 2009 legislative session, eleven states enacted laws that impose significant obstacles to women's access to abortion and other reproductive healthcare, as well as significant burdens on abortion providers. In fact, three of these bills are so restrictive that the Center for Reproductive Rights has brought litigation challenging their constitutionality.[2] In addition to the

[1] As noted above, fifty laws restricting women's access to reproductive healthcare were enacted last year, and over forty laws increasing access to care were also enacted. This legislative wrap-up does not include every one of those new laws: it is intended to provide a summary of the most significant developments. For more information on individual states' new laws, please contact Jordan Goldberg, State Advocacy Counsel, at jgoldberg@reprorights.org .

[2] For more information about these three cases, please visit the Center for Reproductive Rights' website: *Tucson Women's Center v. Arizona Medical Board*, (Arizona), http://reproductiverights.org/en/case/tucson-womens-center-

harmful new restrictions enacted last year, four state legislatures also demonstrated their hostility to women's reproductive rights by enacting resolutions calling on Congress and the President not to pass pro-choice legislation.

These states most seriously impacted women's access to reproductive healthcare in 2009:

Arkansas

Arkansas passed a so-called "partial birth abortion ban" (AR HB 1113), continuing the trend nationwide of state's passing bills that mimic the federal law upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

Arizona

Arizona enacted one of the most restrictive laws passed in 2009 (HB 2564). This "omnibus" law contains provisions that restrict access to reproductive abortion for both adult women and minors and impose unique and extreme burdens on providers of healthcare. First, the new law requires all women to come to an abortion clinic twice before they may receive an abortion; women must receive state-mandated counseling at the first visit and only then may return, after at least 24 hours, to obtain an abortion. The information that must be provided during the first visit is intended to persuade women not to have abortions, and is in some respects inaccurate. For example, the law requires a physician or a qualified health professional to tell patients that there are state services that may be able to provide financial assistance if the woman chooses to continue the pregnancy, even if there is no funding truly available. Moreover, the statute requires that a physician describe the anatomical features of the fetus at the time the abortion is to be performed. The law makes no exception for women who are victims of rape or incest or who have wanted pregnancies but are terminating due to fetal anomalies, even though these women may find the information upsetting or traumatizing.

The new law also prohibits any healthcare provider who has been asked by any person about abortion to charge for his or her services until after the twenty-four waiting period has expired– and the law is not clear about what to do when the patient asks but does not then seek out the counseling. In addition, the new law makes it more difficult for minors to obtain judicial approval for their abortion when they do not wish to involve a parent, and prohibits all health professionals other than physicians from performing surgical abortions.

This law has many unconstitutional provisions and would impose serious obstacles for women seeking abortions in Arizona. For that reason, both the Center for Reproductive Rights and Planned Parenthood of Arizona have challenged the law to prevent it from going into effect. Several parts of the law were enjoined by an Arizona state court in September 2009, including the requirement that women make two trips to the abortion provider, and both lawsuits are still pending.

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v-arizona-medical-board; *MKB Management Corp. v. Stenehjem* (North Dakota), http://reproductiverights.org/en/case/mkb-management-corp-v-stenehjem*Davis v. W.A. Drew Edmondson* (Oklahoma), http://reproductiverights.org/en/case/davis-v-wa-drew-edmondson-ok.

The Arizona legislature also enacted three other restrictive bills: it amended its already existing so-called "partial birth abortion" ban act to conform the language to the federal ban (HB 2400); passed a new law establishing that a pregnant woman's use of drugs during her pregnancy constitutes child neglect (SB 1047); and passed a separate law prohibiting anyone but a physician from providing a surgical abortion, in addition to the same provision found in the "omnibus" bill (SB 1175).

Georgia

Georgia enacted a law (HB 509) prohibiting physician assistants from performing medication abortions.

Idaho

Idaho enacted a new law (HB 185) that governs the practice of midwifery, which establishes a state board of midwifery and explicitly prohibits that board from allowing midwives to perform abortions.

Kansas

Kansas enacted a new law (SB 238) that requires all abortion providers to inform patients that prior to their abortion they have the right to have an ultrasound performed, the right to view the ultrasound, and the right to receive a copy of the ultrasound image. The law requires the patient to wait at least thirty minutes after receiving that information before she may obtain her abortion. In addition, all facilities that provide abortion services must post large, conspicuous signs informing their patients that women cannot be coerced into having abortions and listing a litany of law enforcement options for women who are being coerced.

Louisiana

The Louisiana legislature adopted two resolutions urging the President and Congress to enact legislation to prohibit "fetal torture and dismemberment," asserting that fetuses after twenty weeks feel pain during abortions (SCR's 101 & 102).

Missouri

The Missouri legislature made its opposition to abortion clear by enacting a resolution (HR 294) urging Congress to reject a "Freedom of Choice Act," even though no such act was proposed in Congress at the time.

Nebraska

Nebraska enacted a law (LB 675) incorporating a host of new counseling requirements for women seeking abortion: Patients must now be told that no one can coerce a woman to have an abortion and must be offered a list of facilities offering free ultrasounds. Generally, such facilities are "crisis pregnancy centers," which offer free pregnancy tests or ultrasounds in the hopes of convincing women not to have abortions. The statute also requires any physician who

uses ultrasound in the process of providing abortion services to: (1) perform the ultrasound at least one hour prior to the abortion; and (2) simultaneously display the ultrasound image to the woman so that she may view it if she chooses. The statute then requires the patient to certify that she has been given all of the required information and offered the opportunity to view the ultrasound.

North Dakota

North Dakota enacted several laws in 2009 designed to restrict access to reproductive healthcare or to discourage women from obtaining abortions. First, the state passed a law (HB 1371) that requires all abortion providers to inform women that they may receive an ultrasound and hear a fetal heartbeat before obtaining an abortion. The requirements of this law concerning offering women an opportunity to hear fetal heart tones were so unconstitutionally vague that CRR filed a lawsuit in state court before the law took effect and received clarification that the abortion clinics must only inform women that they may seek out those services prior to the abortion if they choose to. In addition, North Dakota enacted a law (HB 1445) requiring all women seeking abortion to be told that an abortion "terminates the life of a unique, existing human being." The state also indicated its opposition to abortion by passing a resolution (HCR 3015) calling on Congress not to pass a Freedom of Choice Act. Finally, North Dakota enacted a law (SB 2394) prohibiting pregnant minors from consenting to their own prenatal care except in certain very limited circumstances.

Oklahoma

In 2009, Oklahoma passed a law creating the most extreme reporting requirements for abortion providers in the United States. The law (HB 1595) requires abortion providers to fill out a 37-question questionnaire for each abortion patient that asks intrusive and personal questions, including the patient's reasons for seeking the abortion. The bill also requires other physicians who encounter women who may be suffering from any type of complication from abortion to fill out an extensive questionnaire. The questionnaires must be sent to the state for compilation and public release of information. In addition, the bill bans the performance of abortions when the primary reason for the procedure is the gender of the fetus. The Center for Reproductive Rights has filed a lawsuit challenging the bill because it violates the Oklahoma State Constitution's prohibition against bills addressing more than one subject. The Center has been granted an injunction by the state court for the time being and the litigation is currently pending.

In addition, the Oklahoma legislature also affirmed its opposition to abortion by passing a resolution urging the United States Congress to reject a "Freedom of Choice Act."

Tennessee

In 2000, the Tennessee Supreme Court interpreted the state's Constitution as granting strong protections for women's right to choose abortion. The Tennessee legislature has tried for several years to pass a constitutional amendment that would effectively overturn that decision. In 2009, the legislature took a significant first step towards that goal: Both houses passed an amendment

that would add language to the state constitution stating that it does not protect any right to abortion and that the legislature can act to expand or restrict access to abortion as it sees fit (SJR 127). Before this harmful amendment becomes law, it must be passed by another session of the legislature and then approved by the voters on the ballot.

Utah

Utah also took steps to restrict women's access to abortion or to discourage women from seeking abortion. First, the state enacted a law (HB 90) redefining fetal "viability" and increasing restrictions on abortions after viability. While constitutional standards dictate that the determination of whether a fetus is viable is a case-by-case determination that must be left to the judgment of the treating physician, the new law's definition limits physician discretion by requiring physicians to rely on general medical standards. Second, the new law limits post-viability abortions to situations where they are necessary to save the life of the mother, where the pregnancy was a result of rape or incest, where the woman's health will be permanently and seriously affected, or where two doctors have diagnosed a fatal fetal anomaly. The bill also increases the criminal penalty associated with performing an unlawful post-viability abortion.

Utah also amended an existing law (HB 114) to further ensure that it has plenty of funding to defend its anti-choice legislation should it be challenged in court. The legislature had previously created an "abortion litigation trust account," which was to be funded entirely by private donations and used only to defend one law. The amendment allows the legislature to divert state tax dollars into this fund to defend any anti-abortion law.

Finally, Utah amended its already-existing biased counseling law (HB 222) to require physicians to give patients seeking an abortion on a fetus after 20 weeks gestation information about the fetus's capacity to feel pain and a state-prepared brochure about fetal pain, and to inform women that they can receive anesthetic for the fetus. The law does allow the physician to share his or her own views about fetal pain with the patient and does not require patients undergoing abortions to save their own lives, prevent grave damage to their health or experiencing medical emergency to receive this information.

Virginia

Virginia enacted a law (SB 817) that will create special "Choose Life" license plates that may be purchased by motorists for an additional fee. The funds received from this new fee will go into the "Choose Life Virginia Fund," which will give grants to anti-choice "pregnancy centers."

Pro Choice Victories in 2009

Pro-choice legislators and advocates successfully fought back most of the harmful and restrictive anti-choice legislation proposed in 2009. At the same time, they advocated for new laws that

would increase women's access to abortion and other reproductive healthcare and were able to enact a number of proposals into law. The following states took significant, positive steps to ensure access to reproductive healthcare for women last year:

Connecticut

Connecticut enacted a law (HB 5635) intended to restrict the practices of crisis pregnancy centers, which often attract women by offering free ultrasounds. The law prohibits anyone from performing an obstetric ultrasound unless it has been ordered by "a licensed health care provider" *and* is for a "medical or diagnostic purpose."

Idaho

Idaho amended the fee schedule for civil court filings to waive the fee for young women seeking a judicial bypass of the requirement that a parent consent to the abortion (HB 105)

New Mexico

New Mexico became one of six states in the nation to prohibit prisons, juvenile correctional facilities, and detention centers from shackling or restraining pregnant women while in labor, unless there are compelling reasons to believe that the woman poses a threat of harm to herself or others or is a substantial flight risk and cannot be otherwise constrained. The new law (SB 423) also provides that pregnant women in the second or third trimester should be restrained only with the least restrictive restraints necessary.

New York

New York also became one of the six states that prohibit shackling of pregnant inmates in most circumstances. The New York law (SB 1290) prohibits correctional officers from using any restraints during the transportation of a pregnant woman from a correctional facility to a healthcare facility and during and in recovery from labor. There is an exception for when it is necessary to restrain the woman to prevent her from injuring herself or others, but even under those circumstances she may only be cuffed by one wrist.

New York also established harsher penalties for those who harm women, healthcare providers or volunteers accessing or providing reproductive healthcare services (AB 8924). Existing law already made it a misdemeanor for a person to intimidate, injure or interfere with anyone attempting to obtain or provide reproductive healthcare services or to intentionally damage the property of a reproductive health care facility. The 2009 law increased the severity of the penalties for some of those crimes and added new protections for volunteers at clinics, making it a felony to physically injure someone attempting to or helping others obtain or provide reproductive healthcare services.

Tennessee

The Tennessee House of Representatives passed a resolution (HR 82) creating a committee to study how to reduce infant mortality and teen pregnancy. The resolution highlights that

education and access to birth control are likely to be important factors in reducing teen pregnancy. The committee is required to report back with recommendations and proposed legislation in February 2010.

Texas

Texas also addressed the shackling of pregnant inmates in 2009 by enacting a law (HB 3653, HB 3654) that prohibits correctional officers from using restraints on pregnant women while they are delivering or in recovery after labor, except when the woman poses a threat of harm to herself or others or is a significant flight risk.

Utah

While Utah took steps this year to restrict women's access to abortion, the state also enacted a requirement (HB 132) that all hospitals provide information about emergency contraception to victims of sexual assault and to provide the medication if the victim requests it.

Virginia

Virginia passed a law (SB 965) that will make it easier for victims of sexual assault to access emergency contraception by authorizing physicians to allow registered sexual assault nurse examiners to provide emergency contraception.

Trends in 2009; What to Watch For in 2010

Anti-choice legislators propose a slew of new bills each year, but not every bill is unique: In fact, many anti-choice legislators take their cues from proposals in other states or from anti-choice organizations that prepare "model" legislation for use across the country. Identifying trends among the bills proposed in 2009 can help pro-choice advocates and legislators predict, and prepare to defeat, legislation that will be put forth in 2010. The Center has surveyed the proposals from 2009 and found several stand-out trends that are likely to come up again this session. In each case, these harmful proposals threaten women's access to abortion and other reproductive healthcare and do nothing to improve women's health or safety.

In 2009, dozens of anti-choice proposals included "biased counseling" requirements, which compel physicians to provide their patients with state-mandated information before the women are permitted to obtain abortions. Under such laws, physicians and other health care professionals are often obligated to provide their patients with medically inaccurate information, such as a statement linking abortion with increased risk of breast cancer, or to repeat state policy positions designed to dissuade women from having abortions. Biased counseling laws can also involve multiple restrictions on women's access to abortion, including requiring women to view ultrasounds or to wait a specified period of time between receiving the state-mandated information and being permitted to obtain abortions.

Although waiting period laws already exist in many states, last year saw resurgence in such proposals, with at least fifteen legislatures considering new laws or amendments to already

existing requirements to make them more onerous. As described above, Arizona enacted the year's most extreme waiting period law, requiring women to make two visits to a clinic with at least twenty-four hours in between, while Nebraska and Kansas enacted laws requiring women to wait an hour or thirty minutes after having or being offered ultrasounds. Waiting period laws, particularly those requiring two trips, are incredibly burdensome. In some cases these laws endanger women's health and safety; for example, women who are in abusive relationships may not be able to come to a clinic twice without alerting their abuser to their plans. Moreover, even in cases where the law does not require two trips, the counseling required is often misleading, biased, and sometimes even false, such as informing women that there is a link between breast cancer and abortion despite clear scientific evidence to the contrary.

In addition, an overwhelming majority of biased counseling proposals last year included provisions requiring physicians to provide and, in some cases, describe ultrasounds to all abortion patients, whether or not the ultrasounds are medically necessary or the information helpful or relevant to the patient. Twenty-six legislatures considered such legislation and three states enacted them. Ultrasound bills vary in extremity, from proposals such as the bill that passed in Nebraska, requiring that an abortion provider who uses ultrasound offer each patient the opportunity to view the image, to proposals such as the law passed in Oklahoma in 2008, requiring physicians to display an ultrasound image to the patient and describe it to her in detail, with no exceptions other than giving the woman permission to avert her eyes. Several of these laws also require providers to offer a woman the opportunity to listen to the fetal heartbeat. In 2010, legislatures are likely to take up these types of laws again in all of their many forms.

Ultrasound requirements demeaning to women, implying both that they do not understand their pregnancies and that they cannot make reasoned decisions without receiving information that the state deems important. For women who have wanted pregnancies or who have been victims of rape, incest, or abuse, these requirements can result in unnecessary emotional suffering. These bills also interfere with the doctor/patient relationship, forcing physicians to give each woman "one size fits all" treatment instead of allowing the physician to treat each patient individually according to his or her professional judgment.

Also in 2009, a number of bills were considered that were ostensibly intended to "protect" women from being coerced into having abortions. Coercion proposals varied from bills like the one that passed in Kansas that requires abortion facilities to put large signs in visible places reminding patients that it is unlawful to coerce a woman to have an abortion, to bills that sought to criminalize performing an abortion on a woman when the physician might believe she was coerced. While these bills purport to safeguard women, they instead again discount women's decision-making, ignore the careful screening already performed by abortion providers, impose sometimes vague requirements on physicians, and interfere with the relationship between women and their health care providers.

Another growing trend that is likely to continue in 2010 will be consideration of "fetal personhood" measures. These proposals, raised both in the legislatures and as ballot initiatives that will be put before the voters in several states, seek to extend legal rights to embryos and

fetuses from the moment of conception. They are intended to ban abortion completely and would have other, far reaching implications for women's reproductive rights and health.

Legislators must be made aware that all of these measures are harmful to women and do not improve the decision-making process. Moreover, they are all important pieces of the agenda of the anti-abortion movement, which sees these bills as a way to reduce access by further burdening physicians and their patients.

The Center for Reproductive Rights works closely with state-based pro-choice advocates to help defeat bills that would reduce or restrict women's access to reproductive healthcare. The Center also helps advocates in the states put forward proactive legislation to increase access to essential reproductive healthcare. If your state is considering a law that would make it harder for women or girls to access reproductive healthcare and you would like to get involved in fighting back, or if you have a proactive piece of legislation you would like assistance with, please contact Jordan Goldberg, State Advocacy Counsel, at jgoldberg@reprorights.org.