

## The States in 2000: Major Actions on Reproductive Health-Related Issues

By Elizabeth Nash

As the year 2000 draws to a close, only a handful of state legislatures are still in session, and no additional reproductive health-related laws of significance are expected to be enacted. Moreover, this year's major policy actions were by no means exclusively legislative. The courts also played a major role, handing down decisions on a range of controversial abortion-related issues, including U.S. Supreme Court decisions on "partial-birth" abortion and clinic access; federal and state court decisions on parental notification and public funding; and a groundbreaking state court decision on a woman's fundamental right to abortion. Other controversial issues on the 2000 agenda that have abortion-related ramifications included a state's authority to regulate pregnant women's behavior, on which the Supreme Court is expected to rule next year, and the use of embryonic stem cells and tissue from aborted fetuses for biomedical research.

State legislatures were also active in 2000. Three states enacted private-sector contraceptive insurance coverage mandates, bringing the total of statewide mandates to 13. At the same time, California became the first state to have its contraceptive coverage law challenged in court. But it was the issue of infant abandonment, which was virtually nonexistent as recently as last year, that created a firestorm of activity. Thirteen states enacted measures allowing a new mother to relinquish an unharmed infant to specified people. These legal and legislative developments have set the stage for continuing debate on complicated and politically charged questions in the coming year.

### Abortion

In a 5-4 decision on June 28, the Supreme Court struck down Nebraska's "partial-birth" abortion statute in *Stenberg v. Carhart*. The Court declared the law unconstitutional on the grounds that it was overly broad and did not include an exception to protect women's health. Most prochoice legal experts believe that the decision effectively invalidates most, if not all, of the other 30 "partial-birth" abortion bans.

In addition to affecting current laws, the Court's decision may have laid the groundwork for new antiabortion legislative initiatives next year, since Justice Sandra Day O'Connor, who voted to overturn the Nebraska law, implied that her vote might have been different if the law had been more narrowly written and had included an exception to preserve the health of the woman. In the past, however, abortion opponents have resisted including a health exception, contending that to do so would effectively nullify the ban.

On the same day and by a more decisive margin, 6-3, the Court upheld a Colorado statute that requires an eight-foot "bubble zone" around individuals within 100 feet of a health care facility. The Court held in *Hill v. Colorado* that the law did not violate protestors' right to free speech even as it protected those entering or leaving a health care facility from harassment. The Court's ruling likely will give reproductive health advocates in other states a framework for similar measures next year, and one state already has taken action. Within weeks of the decision, on August 10,

Massachusetts enacted a measure similar to Colorado's.

Prochoice advocates successfully used state constitutional arguments this year to block requirements for parental notification before a minor may obtain an abortion and bans on public funding for abortion. On August 15, the New Jersey Supreme Court found that under the state constitution, New Jersey's parental notification law was an undue burden on a woman seeking to control her child-bearing and created an unconstitutional imbalance by separating minors who choose to continue a pregnancy from those who choose to end one. On August 17, a Colorado parental notice law was deemed unconstitutional by a federal district court because it did not include a health exception, thereby violating teenagers' rights. Challenges to new parental consent requirements on state constitutional grounds are pending in Idaho and Arizona.

Ruling for the second time in two years, an Alaska superior court judge on July 27 ordered the state to resume paying for abortions for poor women after determining that the elimination of funding violated the state constitution's privacy protections. The Alaska legislature eliminated funding of "medically therapeutic" abortions for poor women in 1998. Meanwhile, in May, an Arizona judge determined that the prohibition on Medicaid coverage for medically necessary abortions was unconstitutional because of the strong right to privacy provisions in the state's constitution.

The Tennessee Supreme Court, meanwhile, broke new ground in the reliance on state constitutional arguments to examine the validity of abortion restrictions when it held on September 15 that the right to abortion itself is a fundamental privacy right under the Tennessee Constitution and that regulations regarding abortion are subject to

strict scrutiny. The decision in *Planned Parenthood of Middle Tennessee v. Sundquist* invalidated provisions requiring second-trimester abortions to take place in a hospital, state-directed physician-only counseling and a two-day waiting period. After the verdict, anti-choice advocates announced a campaign for a constitutional amendment that would reverse the ruling.

### Pregnant Women's Behavior

In February, the U.S. Supreme Court announced that it would hear arguments in its October 2000 term in a case raising the highly controversial issue of what, if anything, a state may do to regulate a pregnant woman's personal behavior in the interest of protecting her fetus. *Ferguson v. City of Charleston* challenges a South Carolina policy that allowed pregnant women suspected of cocaine use to be tested for criminal-justice purposes. The suit was brought by 10 women who were tested, without a warrant or consent, while receiving obstetric care; a positive test result was reported to the police as grounds for possible criminal charges. The plaintiffs charge that the policy to test pregnant women for cocaine abuse violated the Fourth Amendment protection against unreasonable searches.

Although the *Ferguson* case is based on the Fourth Amendment unreasonable-search clause, the heart of the policy goes to a heated debate between those who seek to protect a fetus from harmful prenatal behavior and advocates for women's rights who argue that allowing these restrictions not only will gradually erode abortion rights but also are a slippery slope toward criminalizing other personal behavior of pregnant women that in some cases may be harmful to their fetus. Along with major medical organizations, women's rights advocates also contend that punitive measures do not ultimately protect maternal

and infant health, because they scare women away from seeking prenatal care ("Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women," *TGR*, October 1998, page 3). Throughout the 1990s, several states, including Wisconsin and South Dakota, enacted measures that established criminal penalties for mothers of drug-exposed infants, and the outcome of the *Ferguson* case may determine how these and other states develop policies in the future.

### Fetal Tissue Research

For the past year, the University of Nebraska Medical Center has been at the center of a controversy over the use of fetal tissue in its medical research. The conflict, which began last November, ultimately led the university to find alternative sources for much of the tissue needed for research on such diseases as Alzheimer's, Parkinson's, multiple sclerosis and AIDS-related dementia.

National reporting of the Nebraska controversy led to legislative activity in several states this year. Kansas and Colorado enacted bans on the sale of fetal tissue for profit, and South Dakota prohibited all embryo research in the state. In a related development, the Clinton administration in August issued new regulations allowing federal funds to be used for medical research on stem cells derived from human embryos created for fertility treatment purposes, so long as the cells were actually obtained with private funds (see *For the Record*, page 12).

### Contraceptive Coverage

Although the legislative momentum on contraceptive coverage slowed this year compared with 1999, Iowa, Rhode Island and Delaware enacted new laws, bringing to 13 the total number of states mandating private-sector contraceptive insurance coverage. The laws require coverage of all Food and Drug Administration-

approved prescription contraceptives in health plans written in the state that cover other prescription drugs and devices.

Less than a year after enactment of such a law in California, however, a local Catholic organization challenged the statute, arguing that it does not provide an adequate exemption for religious organizations. In fact, the law contains an exemption for religious employers, which are defined as organizations that have as their purpose the inculcation of religious values and that primarily employ and serve people who share those religious values. The suit brought by Catholic Charities of Sacramento, argues that the exemption is too strict and should be broadened to include religious hospitals and similar organizations; it further contends that the Catholic Church should be allowed to create its own definition of religious employer. Since California's religious-employer exemption is narrower than those in most of the other eight states that have them, the outcome of the suit may determine the shape of contraceptive coverage legislation in the upcoming legislative sessions. The case is pending in state superior court.

Meanwhile, in response to a nationwide trend toward mergers between Catholic and non-Catholic health care entities, in which the provision of church-opposed reproductive health services are often sacrificed, reproductive health supporters in California were able at least to secure enactment of legislation that requires health plans to provide enrollees with information about the availability of contraceptive services and related services. The new law, which was signed by Gov. Gray Davis (D) on September 7, requires health plans to notify enrollees through their provider directory and Web site that services relating to family planning (including emer-

gency contraception), sterilization, tubal ligation at the time of labor and delivery, infertility treatments and abortion may not be furnished by all providers in the plan and that enrollees should check with providers in order to find out which services are offered. Recent data from The Alan Guttmacher Institute show the need for such a requirement. A 1996–1997 survey of managed care plans in five states, including California, found that only 4% of the managed care plans routinely notified enrollees that some plan

providers may not provide or refer for contraceptive services.

### **Infant Abandonment**

Following enactment of a Texas law in 1999, legislation to address the issue of infant abandonment was introduced in 28 states in 2000. In 13 of those states, laws based on the Texas model—which allows a parent to relinquish an unharmed infant less than 30 days old to designated emergency medical personnel—were enacted. Most reproductive health advocates agree that while the prob-

lem of newborns being abandoned in public places deserves to be addressed, it may be more productive to focus on preventing these situations from developing in the first place than on establishing legal mechanisms for babies to be abandoned after birth (“The Drive to Enact ‘Infant Abandonment’ Laws—A Rush to Judgment?,” *TGR*, August 2000, page 1). However, there is currently no indication that the momentum behind such legislation is about to slow. ☪