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Legislative Restrictions on Abortion

B. Jessie Hill, JD

More anti-abortion legislation was passed in 2011 than in any other year since *Roe v. Wade* was decided in 1973 [1]. In the first half of the year, when most of the legislative activity took place, more than 80 abortion-related restrictions were enacted across the United States [1, 2]. Though this statistic encompasses a wide array of rules and regulations, a few trends clearly emerge. Many of these laws are more extreme than any we have seen in decades. The following are a few of the most common or most notable types of laws to appear this year.

Banning Abortion before the Fetus Is Viable

In April 2010, Nebraska passed a law banning all abortions after the twentieth week of pregnancy, except to save the life of the woman or protect her from a severe threat to her physical health [3]. In 2011, five more states (Alabama, Idaho, Indiana, Kansas, and Oklahoma) followed suit. These laws are sometimes justified by the legislators' view that fetuses can feel pain at or around 20 weeks' gestation—a view that is mostly rejected by the medical literature [4, 5].

Regardless of the state of the medical evidence on fetal pain, the U.S. Supreme Court has made it clear that states may not ban abortion outright before the fetus is determined to be viable [6]. Viability must be determined by the individual physician but is generally understood to occur at approximately 24 weeks' gestation. Yet, despite their apparent unconstitutionality, such laws are currently in effect in the six states named. Only one—Idaho's—has been challenged in court, and it was not struck down because the woman challenging the law did not have the legal “standing” to challenge it; that is, she was neither a patient seeking a late-term abortion nor a doctor who performs them, and therefore she was not directly affected by the law [7].)

In Ohio, legislators introduced the so-called “Heartbeat Bill,” which would ban all abortions (except to save the life of the woman or prevent severe physical harm) after the fetal heartbeat could be detected—which can be as early as 6 weeks' gestation [8]. This bill would be the most stringent abortion law in the country, prohibiting virtually all abortions. The bill has not yet become law, however, and if it does pass, several abortion-rights groups have stated their intention to challenge it immediately in court.

Informed Consent and Waiting Periods

Although informed consent is a standard requirement before providing medical treatment of any kind, many states have abortion-specific informed consent laws that can be burdensome or inappropriate. For example, a law passed this year in South Dakota created a 72-hour waiting period before an abortion may be performed and requires any woman seeking an abortion to visit a pro-life crisis pregnancy center, which is specifically defined in the law as an entity with the principal mission of “help[ing] a pregnant mother maintain her relationship with her unborn child” [9]. Before the law went into effect, however, a federal judge blocked it, finding that it violated women’s constitutional rights.

Other states besides South Dakota have passed laws requiring the provision of medically irrelevant or inaccurate information. Indiana amended its existing informed consent law to require abortion providers to inform women that “human physical life begins when a human ovum is fertilized by a human sperm” and that “objective scientific information shows that a fetus can feel pain at or before twenty (20) weeks of postfertilization age” [10]. A legal challenge to the Indiana law has not succeeded so far in lifting these requirements.

A North Dakota law passed in 2011 requires women be given information such as “the possible increased risk of breast cancer” and “the possible adverse psychological effects associated with an abortion” [11]. Neither breast cancer nor adverse mental health effects have been shown to correlate with abortion, however.

Restrictions on Medication Abortion

Several states acted in 2011 to restrict abortions that are performed medically rather than surgically with the abortifacient mifepristone (also known by its brand name Mifeprex or RU-486). Three states (Kansas, North Dakota, and Oklahoma) passed laws requiring mifepristone abortions to be provided using the same protocols that were used in clinical testing when the drug was approved by the FDA in 2000. The evidence-based protocol adopted by the overwhelming majority of clinicians today involves a significantly smaller dosage of mifepristone than that used in the earlier FDA protocol and allows medication abortions to occur up to 63 days’ gestation, rather than only up to 49 days, as in the clinical trials. States have nonetheless passed legislation preventing doctors from applying their best medical judgment with respect to dosage and timing of the abortion drug. These state laws are similar to an Ohio law, the constitutionality of which continues to be litigated, that was passed in 2004 but only recently allowed to go into effect by a federal judge.

Finally, a number of states have taken aim at medication abortion by outlawing the use of telemedicine for this purpose. Telemedicine has given many women access to medication abortion without an in-person meeting with a physician. Women could receive the medication from on-site staff at the abortion clinic after counseling via videoconference from a physician who is off-site. Telemedicine is a particularly valuable technology for women in rural or remote areas, to whom abortion would otherwise be inaccessible.

Bans on Insurance Coverage for Abortion

Another prominent area of legislative activity in 2011 was insurance coverage for abortion. Five states (Florida, Idaho, Indiana, Ohio, and Virginia) passed laws restricting insurance coverage for abortion in plans that will be offered in state health insurance exchanges under the Affordable Care Act, beginning in 2014 [1, 2, 12]. Four additional states (Kansas, Nebraska, Oklahoma, and Utah) went further, banning insurance coverage not only in the state-sponsored exchanges but in all private insurance plans [1, 2].

Other Efforts on the Cutting Edge of Abortion Regulation

Many other types of initiatives have been introduced or are likely to be introduced in various states. For example, voters in Mississippi rejected a proposed amendment to the state constitution that would define a fetus or embryo as a “person” beginning at the moment of fertilization. This measure was widely understood to threaten the legality not only of abortion but also of any method of contraception with a possible post-fertilization effect (such as emergency contraception and progestin-only birth control pills), as well as any in vitro fertilization methods or stem cell research that results in the destruction of embryos. Despite the law’s defeat in Mississippi, its backers will likely attempt to introduce similar measures in other states, including California, Florida, Montana, Nevada, Ohio, and Oregon in 2012 [13].

Legislatures continue to target abortion providers in other ways as well. Though not new, so-called TRAP laws (targeted regulations of abortion providers) continue to be put in place, imposing onerous requirements specific to abortion clinics, such as precise room temperatures, minimum dimensions for waiting rooms and recovery rooms, and hospital admitting privileges for all physicians who perform abortions [14]. Some states have cut funding to Planned Parenthood and other family planning organizations, affecting not only abortion services, but also the provision of other core reproductive health services such as contraception and screening for cervical cancers and STDs.

If 2011 is any indication, a new era of attacks on abortion rights has begun, with very little resistance from the courts. Though only a small number of physicians in the country will be directly affected in their practices by these restrictions, all physicians should be profoundly concerned. These measures represent an unprecedented level of intrusiveness in the doctor-patient relationship and a thorough disregard for the exercise of independent medical judgment. Regardless of beliefs concerning abortion, all physicians have reason to object on professional grounds to state interference with the practice of medicine.

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B. Jessie Hill, JD, is a professor of law at Case Western Reserve University in Cleveland. She received her law degree from Harvard Law School. Her research focuses on constitutional law, with a particular emphasis on reproductive and religious rights. Previously, Ms. Hill worked for the Reproductive Freedom Project of the American Civil Liberties Union (ACLU).

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