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Reproductive Choice folder, 1989-1990 (League of Women Voters Records box 42, folder 22)

Maine League of Women Voters Staff
Maine League of Women Voters

Excerpts from Justice Blackmun, with whom Justice Brennan and Justice Marshall join, concurring in part and dissenting in part:

HARRY A. BLACKMUN

TODAY, ROE V. WADE, 410 U.S. 113 (1973), and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive, but are not secure. Although the court extricates itself from this case without making a single, even incremental change in the law of abortion, the plurality and Justice Scalia would overrule Roe . . and would return to the states virtually unfettered authority to control the quintessentially intimate, personal and life-directing decision whether to carry a fetus to term.

Although today, no less than yesterday, the Constitution and the decisions of this court prohibit a state from enacting laws that inhibit women from the meaningful exercise of that right, a plurality of this court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line, the court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before Jan. 22, 1973.

Never in my memory has a plurality announced a judgment of this court that so foments disregard for the law and for our standing decisions.

Nor, in my memory, has a plurality gone about its business in such a deceptive fashion. At every level of its review, rom its effort to read the real meaning out of the Missouri statute, to its intended visceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis.

With feigned restraint, the plurality announces that its analysis leaves Roe "undisturbed," albeit "modified and narrowed." But this disclaimer is totally meaningless. The plurality opinion is filled with winks and nods, and knowing glances to those who would do away with Roe explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State.

. .The simple truth is that Roe would not survive the plurality's analysis, and that the plurality provides no substitute for Roe's protective umbrella. I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since Roe was decided. I fear for the integrity of, and public esteem for, this court.

No one contests that under the Roe framework, the State, in order to promote its interest in potential human life, may regulate and even proscribe nontherapeutic abortions once the fetus becomes viable. . . .

A requirement that a physician make a finding of viability, one way or the other, for every fetus that falls within the range of possible viability, does no more than preserve the State's recognized authority.

Although, as the plurality correctly points out, such a testing requirement would have the effect of imposing additional costs on second-trimester abortions where the tests indicated that the fetus was not viable, these costs would be merely incidental to, and a necessary accommodation of, the State's unquestioned right to prohibit nontherapeutic abortions after the point of viability.

In short, the testing provision, as construed by the plurality, is consistent with the Roe framework and could be upheld effortlessly under the current doctrine.

Thus, 'not with a bang, but a whimper,' the plurality discards a landmark case of the last generation and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children.

The plurality does so either oblivious or insensitive to the fact that millions of women and their families have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life.

The plurality would clear the way once again for government to force upon women the physical labor and specific and direct medical and psychological harms that may accompany carrying a fetus to term. The plurality would clear the way again for the State to conscript a woman's body and to force upon her a "distressful life and future." . . .

The result, as we know from experience . . . would be that, every year, hundreds of thousands of women, in desperation, would defy the law and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists, or they would attempt to perform abortions upon themselves, with disastrous results. Every year, many women, especially poor and minority women, would die or suffer debilitating physical trauma, all in the name of enforced morality or religious dictates or lack of compassion, as it may be.

Of the aspirations and settled understandings of American women, or the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous. It is also profoundly destructive of this court as an institution.

For today, at least, the law of abortion stands undisturbed. For today, the women of this nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

THE BOSTON GLOBE

TUESDAY, JULY 4, 1989

FEDERAL CAMPAIGN FINANCE REFORM...

The League's National Office reports that efforts to overhaul federal campaign finance laws picked up momentum with recent announcements that House and Senate Democratic leaders intend to schedule legislation for floor action by summer. "Stung by scandals involving breaches of congressional ethics and campaign rules, Republicans and Democrats alike have renewed calls for reform, but whether long-standing partisan disagree-ments can be resolved remains to be seen."

Sen. Mitchell has said that congressional fund-raising practices "undermine confidence" in Congress and "distort" its ability to function. He has pledged to push for reform. The League applauded the passage last Nov-ember of ethics reform and pay raise legislation, which banned House honoraria and a gradual Senate phaseout. The League is urging the Senate to approve an immediate ban on honoraria this year.

However, the League insists that, in order to regain public confidence and prevent special interests from exerting undue influence, there must be major revi-sions in federal campaign finance rules.

The League is pushing for a bipartisan agreement that caps PAC (political action committee) contributions, provides public benefits for candidates who agree to voluntary spending limits and tightens rules governing soft money (donated to state and local parties for party-building activities, but recently spent on campaigns).

The most difficult areas of disagreement are:

Democratic leaders advocate campaign spending limits as the key to reform. Their proposals would set voluntary limits and provide public benefits--cash grants or reduced postal or broadcast rates--as an incentive. There seems to be general agreement among most Demo-crats that a reform bill would have to curb PAC contribu-tions and address party-building.

Many Republicans, concerned that spending limits might hurt challengers, oppose any spending cap. Instead, they want to increase the amount national parties can give to congressional candidates--a fundraising edge for the GOP--and reduce what PAC's and labor unions can contribute--key sources of Democratic financial support. Not all Republicans oppose limits. Sen. Rudman (NH) thinks, however, that most proposals to limit are too low because of the high cost of television advertising.

Until now, a Supreme Court ruling prohibited mandatory limits on campaign spending as an uncon- stitutional limit on free speech. But according to news reports last week, the Court upheld a Michigan law which sets strict limits on political campaign spending by corporations from their treasuries directly to candidates, saying that their free-speech rights are outweighed by the need to subdue big-money influence over elections. The law does allow businesses to donate to special funds or PACs but must disclose the names of contributors. The ruling also said the state law was justified by the state's interest in preventing corruption or its appearance.

SENATOR BOB PACKWOOD
of Oregon

will be speaking on

"The Webster Case: We Have Lost the Battle But We Will Win the War. We Will See Them at Yorktown."

Saturday, May 5
7:30 pm
Luther Bonney Auditorium
University of Southern Maine
96 Falmouth St., Portland

sponsored by
Family Planning Association of Maine
and supported by the
University Women's Forum
Admission $5

For more than 20 years, Bob Packwood has been the U.S. Senate's leading pro-choice advocate. Even before Roe v Wade, he introduced a bill to legalize abortion. He has led many battles since then, fighting against bans on federal funds to pay for abortions, anti-abortion amendments, so-called human life statutes, and decreased funding for international and domestic family planning programs.

Senator Packwood has said: **"...any action...that restricts or limits a woman's rights granted under Roe vs Wade is far more than an attack solely on the right to abortion. Any limiting...action would significantly impact the lives and dignity of American women."**

There will be a fund-raising reception with Senator Packwood at 6:00, with proceeds benefiting the Family Planning Assoc. of Maine. For more information call 622-7524, or P.O. Box 587, Augusta, Me. 04332.

FREDOM OF CHOICE ACT of 1989

In the U.S. Congress....

In "Report from the Hill", the LWVUS notes that Congressional lawmakers have taken the offensive in the battle over reproductive rights by sponsoring legislation to codify (put into law) the Supreme Court's 1973 Roe v Wade decision, which allowed women to make reproductive choices without excessive government restrictions.

The **"FREEDOM OF CHOICE ACT", H.R. 3700 in the House** and **S.1912 in the Senate,** has attracted Republican and Democratic support in both chambers and recently won strong endorsement from the Pro-Choice Coalition, which includes the League.

Although the Supreme Court's decision in Webster v. Reproductive Health Services did not overturn Roe v. Wade, it gave the states more latitude to restrict abortions. "The League was deeply disappointed by the Supreme Court's decision in Webster," said the League's National President, Nancy Neuman after the Supreme Court announced its decision. "We are particularly concerned that because of this decision, reproductive choice has become a matter of chance; in some states, constitutional rights will be fully protected, while in others, efforts will be undertaken to undermine those same rights. More than ever before, a woman's right to privacy will be reserved only for those who can afford it."

Under the Freedom of Choice Act, states would be prohibited from interfering with a woman's right to end a pregnancy before fetal viability or, at any time, if necessary to protect her life or health. States could impose restrictions, but only if medically necessary. For example, a state could demand that abortions be performed by licensed physicians, but it could not require a 24-hour waiting period or spousal consent. Rep. Pat Schroeder (D-Co), explained "Our bill simply cements into law a basic constitutional right that a woman, not the government, will decide for herself whether...to terminate her pregnancy."

House and Senate subcommittee Hearings may be held during March with full committee action possible this summer.

The League's Lobby Corp in Washington is working to get as many members of Congress as possible to cosponsor the Freedom of Choice Act. The last count available was 114 in the House and 23 in the Senate. Reps. Brennan and Snowe; and Sen. Cohen were early co-sponsors.

Senator Mitchell needs to hear from you!
Portland Office: 874-0883
537 Congress St.

REPRODUCTIVE PRIVACY...

RESTRICTIVE EFFORTS IN THE STATES...

The following are the eight basic types of legislation the **National Right to Life Committee** & others are working to pass in many state capitols.

- prohibiting "abortion as a means of birth control" (effectively outlawing almost all abortions; in fact, a large number of abortions are preformed on women whose birth control method has failed.)
- prohibiting "abortion for reasons of sex selection"; (this sounds reasonable, but is almost non-existent.)
- requiring "informed consent" forcing doctors to read a litany of anti-choice materials intended to deter women from choosing abortion;
- requiring "spousal notification";
- requiring "parental consent", without a judicial by-pass option;
- cutting state funding for reproductive health services; (can seriously affect birth control information.)
- funding services that provide "alternatives to abortion"; (primarily those that exclude information on abortion.)
- and requiring states to include anti-choice information in public school curricula.

Because the anti-choice advocates now realize the public does not want to outlaw abortions, their strategy is to portray their legislation in "moderate" language. These more "moderate" approaches were selected by anti-choice advocates primarily based on public opinion polls, in areas of the abortion issue where people have the most ambivalence, particularly when the questions are framed in certain ways. On the other hand, polls show a very large majority of the public believe government should not be involved at all.

Since the Webster decision, Maine has avoided joining the heated debates going on in other states, by deciding not to consider legislation concerning abortion during this year's shorter, "emergency" session of the Legislature. But a new election season is soon approaching, when all seats in the Maine Legislature will be up for grabs. The League as an organization does not support or oppose candidates or parties, but members are encouraged, as individuals, to work on behalf of candidates of their choice.

REPRODUCTIVE RIGHTS

It was an ominous way to start the new year. On January 9, 1989, the Supreme Court agreed to review *Webster* v. *Reproductive Health Services*, a case involving a Missouri state law severely challenging a woman's legal right to an abortion. That the Court agreed to review the specific provisions of the Missouri law in *Webster* was cause for pro-choice concern. That it also agreed to reconsider *Roe* v. *Wade*, the landmark 1973 case legalizing abortion, in the process was even more alarming.

In the wake of the January announcement, *Roe* supporters, including the League of Women Voters, mobilized for action. Sensitive to rules about lobbying the Supreme Court, the League looked for ways that it could work in Washington and at the state level before the Court heard formal arguments on April 26. The League's goal: to prevent the "chipping away" or complete reversal of the law as a result of one of the most controversial abortion cases in 16 years.

As this issue of *The National Voter* goes to press, a Court decision is imminent. Whether the justices declare the challenged provisions of the Missouri law unconstitutional, uphold parts of the law or completely overturn the 1973 *Roe* decision, the League and others who support a woman's right to privacy in making reproductive choices will continue their work, whenever and wherever it is needed.

A History of Challenges

According to LWV of Missouri Public Policy/Reproductive Rights Director Milly Cohn (see "Profile, p. 20), there's "not much legislative support" in her state for the right to choose an abortion. Maybe that's why Missouri has instigated three major challenges to *Roe* that have come before the Supreme Court in recent years.

In 1976, in the case of *Planned Parenthood of Central Missouri* v. *Danforth*, the Court struck down a law that required a woman seeking an abortion to secure either parental or spousal consent. In 1983, however, the justices upheld a Missouri law that imposed several restrictions on abortions, including the requirement that minors seeking abortions obtain parental permission.

The 1989 *Webster* case focuses on a bill adopted by the Missouri legislature in 1986. The preamble to the legislation states that human life begins at conception and that unborn children have protectable interests in life, health and well-being. Other portions of the bill prohibit the use of public funds to counsel a woman to have an abortion, bar abortions performed at all public hospitals and clinics or by public employees and require viability tests on fetuses more than 19 weeks old—restrictions applied to all abortions, except those necessary to save the life of the mother. Planned Parenthood and the St. Louis Reproductive Health Services clinic challenged the constitutionality of the legislation immediately upon passage, and it never was fully implemented.

These challenges and others waged in Missouri, Connecticut, Massachusetts, Ohio and Pennsylvania addressed the law as established by the Supreme Court in the historic and divisive case of *Roe* v. *Wade*. Before *Roe*, abortions were illegal in most states, and women had to search for backdoor, life-threatening options to exercise their right to choose. In the landmark 1973 case, the Court overturned a Texas law banning abortions except to save the life of the mother. The constitutional right to privacy, the Court maintained, protects a woman's decision to have an abortion without state interference during the first trimester of pregnancy.

Friends of the Court

The Supreme Court's decision to review the *Webster* case as well as the 1973 *Roe* decision was good news for some and for others, a nightmare. As a result, a record 78 friend-of-the-court or *amicus curiae* briefs were filed by both sides before the late-March due date. The briefs varied in scope and intent—from outlining reasons to uphold the statute challenged in *Webster* to detailing why *Roe* is an effective decision that should not be weakened.

For the League of Women Voters, the desire to participate at this critical stage of the process was particularly strong. "The *amicus* brief allows groups and individuals to make their opinions known to the Court," says LWVEF Director of Election Services and Litigation Cynthia Hill. "You don't know if an *amicus* brief will persuade the justices, but in a case of such major significance, it is very important to have recognized citizen groups like the League participate in a document that could contribute effectively to the Court's deliberations."

After reviewing a range of possible *amicus* briefs, LWVEF staff recommended that the League sign on to a brief jointly prepared by the National Abortion Rights Action League (NARAL) and the Women's Legal Defense Fund (WLDF). The League's national board agreed. "We were looking for the brief that aligned as nearly as possible with the League's positions," notes LWVEF Staff Attorney Linda Swift. "Most briefs were written to represent the viewpoints of special groups, such as state attorneys general, law professors and labor, medical and religious groups. The NARAL/WLDF brief specifically addressed the League's concerns."

A Question of Equality

According to WLDF Staff Attorney Maxine Eichner, the NARAL/WLDF brief increased its effectiveness by employing a new approach to defending a woman's right to choose.

The Supreme Court's decision in *Roe* and most subsequent reaffirmations of the law have been based on the woman's constitutional right to privacy. Says Eichner, "We thought it was very important that someone focus on the abortion issue as one of a woman's right to equality, rather than the right to privacy that is the typical approach." And so the NARAL/WLDF Women's Equality approach gathered steam, with 77 organizations—mostly women's organizations—signing on.

For NARAL Staff Attorney Marcy Wilder, the equality argument made perfect sense. "No one's talking about equality these days," says Wilder. "If women don't have reproductive choices, there is no way that we can be equal to men."

With these principles as guidelines, the authors of the NARAL/WLDF brief argued a long list of issues. Prime consideration was given to the state's "compelling interest" in protecting fetal life—an interest that, the brief maintains, "deprives a pregnant woman of her fundamental right to decide whether and when to bear a child." "Fetal rights are the flip side of a woman's right to choose," explains Eichner. The question is how a woman's constitutional rights can be maintained in the face of state interference on behalf of the fetus.

The brief also focused on an individual's constitutionally guaranteed right to bodily integrity. According to Wilder, courts have applied strict interpretations of this principle in the past, in some cases prohibiting the state from extracting a bullet from a person to obtain critical evidence or from pumping the stomach of a criminal defendant. "If these instances are not allowed," suggests Wilder, "then certainly the greater intrusion of forcing a woman to bear a child would not be permitted."

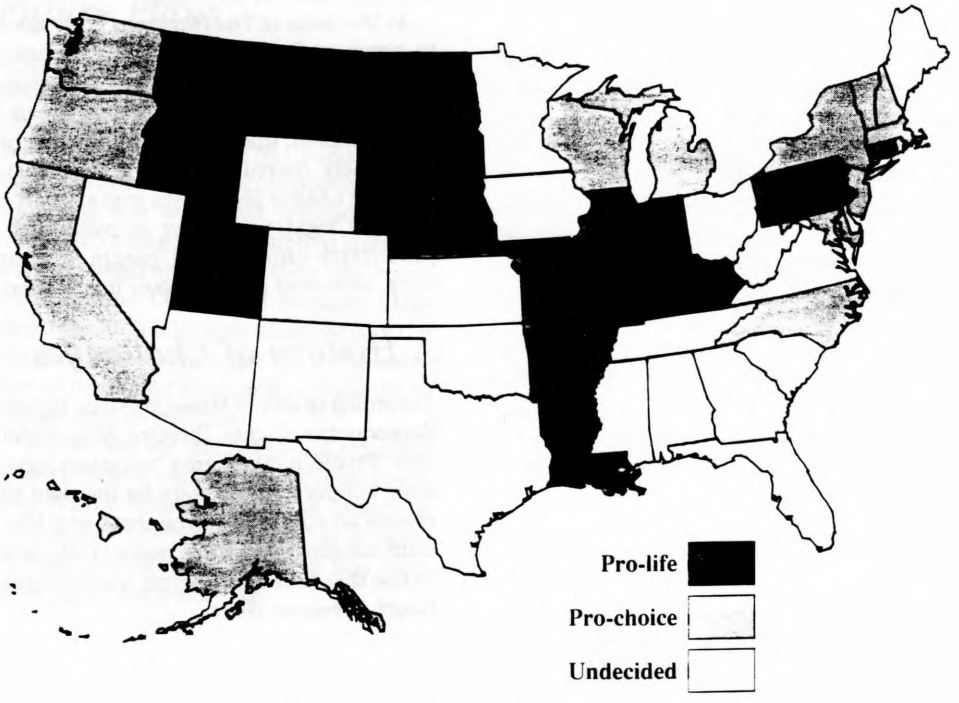
According to the brief, pregnancy also creates social burdens for women that men do not share. Women can lose jobs, forego schooling and postpone other ways of improving their lives. According to Eichner, the situation is tantamount to using a woman's body "as an incubator over her interests."

Where the States Stand on Abortion
(based on current law)

Pro-life. Six states already have laws on the books purporting to restrict abortions: Arkansas, Idaho, Illinois, Louisiana, South Dakota and Utah. Another eight states passed legislation after 1973 to protect fetal life to the maximum extent allowed under the Court ruling: Connecticut, Indiana, Kentucky, Missouri, Montana, Nebraska, North Dakota and Pennsylvania.

Pro-choice. Alaska, New York, Washington and Wisconsin had eliminated all restrictions on abortions before *Roe*. New Hampshire and the District of Columbia, since *Roe*, have repealed any restriction on abortion. In addition, 13 states currently provide financing for abortions for poor people: Alaska, California, Hawaii, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island and Vermont.

Undecided. All other states are on the undecided list.



 Sources: Alan Guttmacher Institute; American Legislative Exchange Council.

The League's Position

Grounded in the "constitutional right of privacy of the individual to make reproductive choices," the League's Public Policy on Reproductive Choices (PPRC) position provided the basis for supporting the NARAL/WLDF brief. The League previously had used the PPRC position, determined in 1982, in fighting proposed constitutional amendments prohibiting abortions, restrictive federal regulations, legislative riders and a 1985 *Roe* challenge that also came before the Supreme Court.

But this time around, as a way of establishing an even broader base of organizational support for the *amicus* brief and for a woman's right to choose, the League also turned to its Equal Rights position. "The League of Women Voters of the United States supports equal rights for all regardless of sex," states the LWVUS position language. If restricting a woman's right to choose an abortion restricts her ability to participate equally in society with men, then the option must remain open and subject to her personal choice.

The NARAL/WLDF brief echoes the call for equal opportunity. "If this Court were to overrule *Roe*, thereby depriving women of the right to control the frequency and timing of their pregnancies, it would deny women the ability to plan and shape their futures and assume their place in the public world."

"In Gear for Action"

The Supreme Court's decision to hear arguments in the *Webster* case turned all eyes on Washington. The April 9 pro-choice march to the U.S. Capitol, which drew hundreds of thousands of supporters from across the country, as well as the mid-January anti-abortion rally that included a supportive speech from President Bush, were visible signs that for this spring, at least, the ball was in the national court.

State and local League activists, however, were not out of the picture. Whether organizing local rallies on April 26 or marching down Pennsylvania Avenue with family members, they played valuable roles.

New Jersey

For the LWV of New Jersey, reproductive choices has been a primary focus of attention since 1982. That year, the LWV-NJ's new Public Policy on Abortion position, along with that of the LWV of Massachusetts, led to the formulation of the national LWV's PPRC stance, in an official League "concurrence" or agreement process involving approximately 82 percent of recognized local Leagues.

Patrick Fn'Piere

League President Nancy Neuman (left) and her daughter, Jennifer Neuman, at the April 9 pro-choice march.

In 1989, according to state Women's Issues Director Dottie Dunfee, the League continues to be outspoken in its commitment to reproductive choice in a state whose traditionally liberal tendencies seem to be on the wane. "We're in gear for action," says Dunfee. "We need to be prepared for a flexible response this summer if the abortion issue is sent back to the states."

This spring, before the April 26 hearing, Dunfee appeared on a local television talk show focusing on the *Webster* case, prepared a letter to the editor that ran in major state newspapers and advised her state League to sign on to a major National Organization for Women advertisement in support of *Roe* and reproductive freedom. The letter received an especially large response—and strengthened the League's pro-choice work.

Dunfee, her 15-year-old daughter and another 50 to 60 members of the New Jersey League also made the trek to the nation's capital to participate in the April march. "It certainly was very thrilling," she recalls. "You felt like you were a part of history."

Dunfee maintains that there is substantial support among New Jersey League members for *Roe* and the right to privacy in making reproductive choices. She received numerous calls this spring about the League's state and national involvement in the *Webster* case and says that "even though it is a divisive issue, people don't want to let it lie.

"The League has a reputation for being careful and thorough in important debates such as this one," says Dunfee. Count on Dunfee and the LWV of New Jersey to maintain that reputation.

Missouri

In Missouri, home of the *Webster* case, LWV President Roseanne Newcombe reports they "face an uphill battle." She adds, "If they do throw the abortion issue back to the states, we know what's going to happen here."

Still, according to Milly Cohn, the level of activity is high. The Missouri League's pro-choice campaign, explains Cohn, is primarily waged through its involvement in the Freedom of Choice Council, a coalition of state groups including NARAL, the Religious Coalition for Choice and the National Council of Jewish Women. Earlier this year, Cohn worked with coalition members raising money and organizing a 17-bus delegation of pro-choice supporters attending the Washington march. On May 10, the group held its annual "Freedom of Choice Lobby Day" in the state capital of Jefferson City. "We're trying to build legislative support," says Cohn, "but there's not much of it now in Missouri."

On the day the Court's decision in *Webster* is handed down, Cohn and other coalition and League members were planning to be together at a large outdoor rally in St. Louis. Pro-choice supporters, along with the attorneys who argued the *Webster* case on behalf of Reproductive Health Services, were set to attend. Says Cohn of the planned event: "No matter what, we want to be together."

Massachusetts

The LWV of Massachusetts adopted a pro-choice position in 1972 and has been working diligently on the issue ever since. In fact, state Women's Issues Specialist Betsy Dunn reports that reproductive rights is the League's top action priority for 1989.

That billing and long-term commitment explains the League's high-paced activity this year. From testifying against dangerously restrictive abortion bills to working to ensure that pro-choice language appears in state and national party platforms, LWV-MA has been in the forefront of the action in this historically anti-choice state.

LWV-MA, like the Missouri League, performs a substantial part of its pro-choice work in a statewide "Coalition for Choice," established in 1983. Sixty organizations make up the group, and the League and five others sit on the steering committee.

Late last year, the coalition mounted a vigorous campaign against the anti-choice "Operation Rescue," a national effort that sends members to abortion clinics to demonstrate and to harrass prospective pa-

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Reproductive Rights

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tients. "Operation" leaders had targeted several Brookline clinics, and the coalition brought out 3,000 people to line the streets in protest. In the end, Operation Rescue abandoned its plans and moved on to another state. An injunction that would limit some of Operation Rescue's more strident activities is supported by the League and now rests in state court. At press time, a decision was imminent.

But the League has been just as effective working outside the coalition. In March, the LWV collaborated with Massachusetts Attorney General James Shannon in an effort to build support among other state attorneys general for upholding *Roe*. A letter from then-LWV President Arlene Stamm and Dunn called on state League presidents to "consider appropriate and timely action" to persuade attorneys general across the country to sign on to an *amicus* brief Shannon filed in the *Webster* case. The brief addressed the problems of enforcing the law in the event *Roe* v. *Wade* were overturned. The strategy proved helpful, and at least six "AGs," including those from California and New York, signed on.

Each of these activities has piqued League energies, but "all hell broke loose," says Dunn, when the League heard that several of the state's U.S. representatives might not sign a congressionally sponsored pro-choice *amicus* brief. Local Leagues around the state turned up the heat, and each undecided lawmaker eventually supported the effort. "One representative got calls from 13 Leagues in one day," Dunn proudly remembers.

The League and Mass-Choice, the state's NARAL affiliate, are now making final plans for a post-Court announcement rally. "We want to be speaking with one voice," says Dunn.

Future Plans

Regardless of the Supreme Court's decision this year, there will be room for future League efforts to maintain a woman's right to reproductive choice. The Court's declaring the Missouri law unconstitutional and upholding *Roe* would not preclude other cases from rising up through that state's or another's legal system for their day in the U.S. Supreme Court. And certainly chipping away at *Roe* by upholding parts of the Missouri law would open up a Pandora's Box of new state rules and regulations to oppose and to monitor.

"Either way, we still have a full schedule of work before us," admits League President Nancy Neuman. "But the League is committed to helping ensure that all women have the right to privacy in this most personal of decisions." ■

COPING WITH CONFLICT

Reproductive Choices and Community Controversy

League of Women Voters Education Fund

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Contents

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Researched and written by Deborah Arrindell, Marlene Cohn, Cynthia Hill, Beth Martin and Mary Stone; edited by Monica Sullivan.

Introduction

In 1973 the Supreme Court ruled that a woman has the right to choose to have an abortion and that her right to make that choice is founded upon the constitutional right of privacy. The abortion issue always has generated intense emotion—and since 1973 it has been the focus of heated debate and controversy. Many observers of the American political process have become concerned about the intrusion of the abortion issue into unrelated legislative matters and about the threats and violence it has sparked in some communities. Others view the constitutionally protected right of privacy to choose an abortion as an invitation to destroy a fetus, which they believe has human life, and thus to commit murder. Clearly such concerns can polarize communities and distort the perspective of public officials.

The League of Women Voters Education Fund (LWVEF) has prepared this publication to aid organizations and individuals seeking to understand how their community responds to reproductive choice issues and to improve citizen understanding of the issues involved. It also is designed to serve as a basic guide for those who wish to ameliorate community conflict and stimulate informed discussion. It is not intended as a comprehensive primer on the issue; rather, it sketches the big picture—what the courts have said, what the legislative and the community issues are and what policy issues are raised by the harassment and the violence that have become an increasing part of the reproductive choice debate.

The current legal context frames the issues discussed in this manual. The LWVEF recognizes that the issue of reproductive choices is a dynamic one and that courts and legislatures continue to grapple with the interpretation of the Supreme Court's decisions.

Public opinion surveys show that the right of privacy to choose an abortion rests on broad support within the American public. And national opinion polls indicate that Americans do not want to lose the right to make that choice. A November 6, 1984 *Los Angeles Times* survey of 7,310 voters found that 77 percent did not approve of a constitutional amendment to prohibit abortion. A *New York Times* survey of 8,671 voters on the same day found that 74 percent of those interviewed believed that abortion should be either as legal as it is now (44%) or legal in some circumstances (30%). Twenty-six percent believed abortion should be illegal. An ABC News poll on January 18–20, 1985 found that 52 percent of its sample supported legal abortion and 36 percent supported it in some circumstances. According to the Alan Guttmacher Institute and the National Abortion Rights Action League, about 1½ million women choose abortion each year.

In such a context, opposition to the right of reproductive choices is juxtaposed against the law of the land and majority opinion. The puzzle of how communities can devise a means for various groups to coexist on this issue is not easily solved. But an openness and willingness to explore issues, solve problems and reach understanding can go far in defusing community conflict or preventing its occurrence.

The State of the Law

National policy on reproductive choice is set by the Supreme Court's 1973 landmark ruling in *Roe* v. *Wade.* The Court held that the constitutional right to privacy encompasses a woman's right to make reproductive choices, including decisions about terminating a pregnancy.

According to the Court's ruling, a state may not regulate a woman's exercise of the right of choice unless the regulations are based on a "compelling state interest," are reasonably designed to further that interest and do not impose a significant burden on the woman's exercise of her right.

The Court established as a framework for its analysis three stages of pregnancy: the first, second and third trimesters. It recognized two compelling government interests and the points at which they may justify regulating abortions: (1) protecting the health of the woman, which becomes compelling after the first trimester (i.e., after the third month of pregnancy); and (2) protecting potential life, which becomes compelling at the point of viability of the fetus (the point at which the fetus can survive outside the uterus). Thus, as the pregnancy progresses, the state's interest in regulating abortions increases.

In the wake of the *Roe* decision, many questions were raised about what regulations the government could impose directly or indirectly on the exercise of a woman's right to have an abortion. Key issues included whether states could require notification of or consent from the parents or spouse of a woman before an abortion, whether public funds could be used to pay for abortions and what restrictions could appropriately be placed on abortions.

The Supreme Court addressed the first issue in three cases between 1976 and 1981. In two cases, the Court struck down parental and spousal consent requirements and a provision requiring parental consent or court order with parental notification restricting the rights of mature minors. But in the third, it upheld a parental notification requirement as applied to immature and unemancipated minors.

In 1977 and 1980, the Court heard several cases on the issue of public funding of abortion, including a case dealing with the restriction on Medicaid funding. The Court held that states and the federal government may restrict or prohibit the use of public funds and access to public facilities for medically necessary as well as nontherapeutic abortions.

For a fuller discussion of *Roe* v. *Wade,* the early public funding and spousal/parental consent cases and the history of the development of federal policy on reproductive choices, see *Public Policy on Reproductive Choices,* LWVEF, Pub. #286, $1.25 (75¢ for LWV members).

Ten years after *Roe* v. *Wade*, the Supreme Court again was called on to define the limits of the states' powers to regulate abortions. In June 1983, the Court ruled on the constitutionality of several model provisions of local and state abortion laws in three cases that have come to be known as the *Akron* cases: *City of Akron* v. *Akron Center for Reproductive Health, Inc.*; *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft*; and *Simopoulos* v. *Virginia*.

City of Akron v. *Akron Center for Reproductive Health, Inc.*

In this case, the Court affirmed, 6–3, the principles of *Roe* v. *Wade* and retained the trimester approach as the proper analysis for determining whether and to what extent a state can regulate abortions. Applying these principles, the Court struck down all the disputed provisions of an ordinance enacted by the city of Akron. The provisions were:

1. requirement of parental or judicial consent for all unmarried minors under 15 seeking abortions;
2. hospitalization requirement for all second-trimester abortions;
3. an extensive "informed consent" provision, which included counseling by a physician;
4. a mandatory 24-hour waiting period;
5. requirement of "humane and sanitary" disposal of aborted fetuses.

- The Supreme Court ruled that it is unconstitutional to require minors under 15 to obtain parental or judicial consent before having an abortion if there is no process for determining on a case-by-case basis whether a minor is mature enough to make an informed decision without parental involvement.
- The Court invalidated the ordinance requiring that abortions during the second trimester be performed in a hospital, because the requirement departed from accepted medical practice. The Court also ruled that the blanket hospitalization requirement placed a heavy and unnecessary burden on the exercise of the right to choose abortion.
- Also struck down was an "informed consent" provision that required the attending physician to tell patients the stage of fetal development, the date of possible viability and that the fetus was a "human being from the moment of conception"; to advise the patient of available birth control, adoption and childbirth services; and to warn the woman of possible risks and complications involved with the abortion procedure. Although a requirement of informed consent was recognized by the Court as a valid means for the state to protect the health of the pregnant woman, the Court determined that the information required by this ordinance was designed instead as a tactic to dissuade a woman from choosing abortion. Thus, it was deemed to be an unreasonable obstacle.

A section of the informed consent provision in the Akron ordi-

nance made it necessary for the attending doctor to inform the woman personally of the medical risks involved with abortion rather than delegating the responsibility to some other qualified counselor. The Court agreed that the information requirement was consistent with the state's interest in maternal health but was unpersuaded by the assertion that only a doctor could provide adequate information and counseling.

- The Court also held that Akron had failed to show that any legitimate state interest was furthered by the requirement of a 24-hour waiting period between the signing of a consent form and the abortion. The Court was not convinced that the state's legitimate concern that the woman's decision be informed was reasonably served by an inflexible waiting period.

Planned Parenthood of Kansas City, Missouri, Inc. v. *Ashcroft*

This case challenged the constitutionality of sections of a Missouri abortion statute that required:

1. parental or judicial consent for unemancipated minors under 18;
2. hospitalization for second-trimester abortions;
3. a pathology report for every abortion performed, regardless of the stage of pregnancy or the facility;
4. the presence of a second physician for abortions performed after fetus viability.

The Supreme Court struck down the hospitalization requirement for the reasons given in *Akron* but upheld the remaining provisions. In reviewing the parental/judicial consent requirement, the Court's majority interpreted the Missouri provision, unlike the one in Akron, as having an adequate judicial process for a minor either to prove sufficient maturity to make her own abortion decision or, despite her immaturity, to obtain an abortion if it is in her best interests.

The Court concluded that the requirement of a pathology report was a relatively insignificant burden to the woman having the abortion. The Court also held that the required presence of a second physician for abortions performed after viability reasonably met the state's interest in protecting the lives of viable fetuses.

Simopoulos v. *Virginia*

In this case, the Court upheld the conviction of a doctor who had performed a second-trimester abortion in an unlicensed clinic, in violation of a Virginia law requiring that second-trimester abortions be performed in licensed hospitals. Virginia laws define "hospitals" to include licensed outpatient clinics.

Issues Left Unsettled or Undecided by the Akron *Cases*

Despite the reaffirmation of *Roe* v. *Wade* in the *Akron* cases, a number

of issues were not totally resolved or were not addressed at all by the Court: parental consent/notification; second-trimester hospitalization requirements and licensing of abortion facilities; counseling for informed consent; waiting periods; pathology reports; and insurance coverage for abortions. These issues may be subject to further judicial interpretation and are being addressed in Congress and in state legislatures. (For a fuller discussion of the legal issues, see appendix.)

Roe *v.* Wade *III: The Next Round*

In November 1985, the Supreme Court heard oral arguments in two abortion cases that challenge the constitutionality of state restrictions on abortions. At issue on appeal in *Thornburgh* v. *American College of Obstetricians and Gynecologists* are provisions of a Pennsylvania law that require, among other things:

1. that techniques used in abortions involving viable fetuses be those most likely to result in live births, unless they pose a "significantly greater" risk to the mother;
2. the presence of a second physician at late-term abortions;
3. that a woman be given certain specified information before consenting to an abortion;
4. that doctors file with the state health department information on each abortion and any complications;
5. that minors obtain parental consent.

(A lower court ruling invalidating a provision requiring insurers to offer policies without abortion coverage at a lower rate than for policies with abortion coverage has not been appealed.)

In *Diamond* v. *Charles*, the Court has been asked to decide the constitutionality of Illinois provisions that obligate doctors to perform abortions by methods that minimize the risk of harm to a fetus "known as viable," and to inform women patients that specified birth-control devices, including intrauterine devices, inflict fetal death. Provisions related to standards of care require physicians to use the same care in late-term abortions as they would in live births. (In June 1984, the Illinois definition of "viable" was amended to allow more discretion to the physician prescribing abortion.)

The U.S. Solicitor General, on behalf of the Justice Department, filed an *amicus* brief urging the Supreme Court to use these two cases to overturn its decision in *Roe* v. *Wade*. The Justice Department argued that the right to privacy does not include the right to choose abortion. Instead, according to the brief, decisions about abortion regulations should be based on the Fourteenth Amendment, which was adopted during a period in which states were free to regulate abortion. The Court turned down the Justice Department's request that it be allowed to participate in oral argument to present its views to the Court. The Supreme Court's decision is expected by the summer of 1986.

State, Local, National Issues

Although public-opinion polls show wide public support for the right of women to choose abortion, a committed minority opposes that right. These two conflicting points of view have been pitted against one another in several policy arenas.

Since the Supreme Court decision in *Roe* v. *Wade* in 1973, attempts to interpret, limit or restrict access to abortion have continued at the national, state and local levels. This section is designed to provide an overview of those attempts. The issues discussed include: attempts to amend the Constitution, funding restrictions, fetal status, restrictions on minors' access, Akron-type legislation, informed consent and insurance. For each of these, the scope of the issue is defined, and examples are provided when appropriate. Because the status of legislation is constantly changing, this section may make reference to state proposals or bills that have already passed or been defeated by the time this manual is published. However, they are included to illustrate both the range and variety of activity across the country. This section is not intended as a comprehensive chronology of state or national activity, nor as a guide to the status of any particular legislative effort.

Attempts to Amend the U.S. Constitution

Anti-choice (also called pro-life) organizations at the national level have worked for many years to secure a constitutional amendment prohibiting abortion. The last serious effort faltered in 1983, when a "human-life" amendment failed in the U.S. Senate. As initially proposed, the amendment would have allowed both Congress and the states to restrict or ban abortion by denying to Congress the power to override provisions of restrictive state laws. This would have been accomplished by establishing an area of concurrent congressional/state jurisdiction providing that, in case of disagreement, the more restrictive law should govern.

The proposed amendment further stated that the right to an abortion was not to be secured by the U.S. Constitution. As the amendment moved through the Senate committee, all language was deleted except the statement that the right to an abortion is not secured by the Constitution. It failed to receive the necessary two-thirds vote for passage of a constitutional amendment, and the Court's *Akron* decisions came shortly after. Another human-life amendment was introduced in Congress in 1985 by Senator Orrin Hatch (R UT) using the same language as the failed amendment of 1983.

Funding Restrictions

In several cases that it reviewed in 1977 and 1980, the Supreme Court held that states and the federal government may restrict or prohibit the use of public funds for abortion. In federal statute, yearly restrictions are enacted on the use of federal funds for abortions except for cases in which the life of the mother is in danger. These annual "Hyde" amendments (named after Rep. Henry Hyde, a Republican from Illinois, who led the fight to place restrictions on the use of federal funds for abortions in the late 1970s) apply to Medicaid, federal employees' health programs and other federal benefit programs. Such legislation often has taken the form of riders on appropriations bills, a tactic that seems likely to continue.

The National Abortion Rights Action League (NARAL) has catalogued several federal statutes that restrict reproductive choices if health services are paid for by federal funds. NARAL notes that as originally enacted in 1977, "Hyde" amendments restricted the use of federal Medicaid funds for abortions unless the mother's life was in danger or the woman would suffer severe, long-term damage to physical health, or unless the woman was a victim of rape or incest. Since 1981, the use of federal funds for abortion has been narrowed to only those instances in which the woman's life is in danger.

NARAL lists other federal funding restrictions, in addition to those on Medicaid funding:

- Department of Defense appropriations bills that restrict employee health insurance coverage for abortion except in cases of life endangerment;
- an amendment to Title VII of the 1964 Civil Rights Act stating that employers cannot be required to pay for health insurance coverage for abortion except for life endangerment;
- a prohibition in the Family Planning Services and Population Research Act of 1970 against abortion as a method of family planning;
- prohibitions against using federally funded legal-aid services for securing a nontherapeutic abortion;
- restrictions on Peace Corps workers using federal funds for abortion services;
- provisions against Indian Health Services involvement in providing abortion services;
- provisions in appropriations bills for the District of Columbia that prohibit federal funding of abortions except for rape or incest victims or when the woman's life is endangered;
- restrictions on abortion coverage under federal employee health insurance plans.

In 1984, permanent abortion restrictions on health care funds for Department of Defense employees and dependents were enacted. Anti-choice proponents undoubtedly will continue to seek across-the-board

permanent restrictions enacted on the use of federal funds for abortions, except when the life of the woman is in danger.

Restrictions on public funding affect certain categories of people—primarily low-income women—and hamper their ability to exercise a constitutionally protected right. Therefore, an effort was made to counter restrictions in 1984 and 1985 with the introduction in Congress of the Reproductive Health Equity Act, a bill that would guarantee all women an equal opportunity to choose abortion in spite of economic status and despite the fact that their health-care insurance is provided by the federal government. It would repeal all abortion restrictions in federal legislation, such as the "Hyde" amendment limiting Medicaid funds for abortion.

At the state level restrictions also have been placed on funds. Only 16 states still permit the use of state funds for abortion, and in five of those states funding is provided only under court order. In 1977 the Supreme Court ruled (in *Maher* v. *Roe* and *Beal* v. *Doe*) that neither the Constitution nor the federal Medicaid statute prevents a state from refusing to pay for "elective" abortions. Abortion opponents subsequently made an effort to limit state Medicaid funding as a constitutionally valid means to restrict abortion. Before the Court's decision, many states already had attempted to impose such limits through laws or administrative policies, but these actions had been rebuffed by the courts. However, as early as the end of 1979, 40 states had moved to restrict Medicaid funding for abortion; in 23 of these states, funding was restricted by executive or administrative decree.

Fetal Status

The status and rights of the fetus are central issues in the debate over reproductive choices. Abortion opponents argue for fetal "personhood" and contend that the fetus has civil rights—specifically the right to be born. At the state level, proposed fetal personhood legislation often defines life as beginning at conception. Legislation also has been introduced that relates to fetal viability and fetal pain.

In the United States, more than 95 percent of abortions are performed before the 15th week of pregnancy—well before medical scientists consider a fetus to be viable. Women who have late abortions tend to fall into well-recognized categories. Forty-four percent of abortions after 21 weeks gestation are performed on teenagers, many of whom did not know they were pregnant until very late or live in a state in which parental-consent laws may directly or indirectly pose obstacles to abortion. Other recipients of late abortions include poor women who have difficulty finding the money necessary for the procedure, women with a history of irregular menses and women who attribute missed periods to menopause.

Medical technology has resulted in another category of late-abortion

recipients. Amniocentesis, a test to identify possible genetic abnormalities, cannot be performed until the 14th to 17th week of pregnancy, and the test results may not be ready until the 21st week or later. Therefore, abortions performed as a result of amniocentesis findings often are late abortions.

State legislatures are increasingly grappling with the issue of viability in cases involving very late abortions. Doctors and medical scientists do not agree on when the fetus should be considered viable. Some viability legislation being considered at the state level would mandate that two physicians be present at an abortion in which gestation is beyond a set number of weeks (usually 24 or 25), to care for a possible resultant live birth. Arkansas passed such a bill in 1985. A New Jersey bill pending in 1985 proposed an ongoing review of the point of viability by the state's Board of Medical Examiners. In 1985 a bill was pending in Kansas to prohibit abortion of a "viable" fetus except to save the life of the woman.

While some legislation defines viability at a specific week, it is not unusual for proposals to leave the viability decision to the physician. A Tennessee bill defines viability as "that stage of fetal development when a doctor in his good judgment believes that the fetus can survive life outside the womb with or without artificial support."

The issue of fetal pain—whether or not a fetus experiences some form of organic pain in the course of an abortion—is an issue that has received widespread media attention and has been the focus of heated debate. At both the state and national levels, legislation has been proposed that would require that women be advised of medication that can be administered to the fetus to alleviate pain. While many abortion opponents contend that the fetus feels pain, there is a large body of medical opinion that holds that the neurological pathways necessary for pain perception are not well developed until very late in fetal development and perhaps not until after birth. Pro-choice advocates charge that such bills attempt to influence a woman's choice during an abortion proceeding and note that such actions are proscribed by the Supreme Court's *Akron* decisions.

Restrictions on Minors' Access

Almost 50 percent of the 1.1 million U.S. teenagers who get pregnant each year will give birth. But the right of minors to terminate unwanted pregnancies and the extent to which the state can require their parents to play a role are questions that were not considered in *Roe* v. *Wade*. Consequently, opponents of abortion have successfully placed obstacles in the way of pregnant teenagers seeking access to abortion. As of mid-1985, 18 state legislatures had passed laws that make it difficult or impossible for minors to legally terminate unwanted pregnancies, and legislation was pending in 19 other states. These laws require

parental consent/notification or court intervention as prerequisites for legal abortion. The definition of a minor varies from state to state.

Parental-consent requirements can significantly hamper access to abortion. NARAL reports that, while more than half of pregnant minors discuss their decision to have an abortion with their parents, many teenagers say they are unable to confide in their parents. In addition to poor family relationships, teenagers cite a variety of reasons including concern for the welfare of an emotionally or physically ill parent, fragile marital situations or a history of family violence.

In recognition of the fact that a pregnant minor cannot always confide in her parents, the U.S. Supreme Court requires that states with parental-consent laws for abortion give minors the option of appearing before a judge to receive the necessary consent. Minors who appear in court must prove that they are mature enough to make their own decisions or that the abortion is in their best interests. However, many choice advocates do not consider such a judicial process an acceptable alternative. Even though the overwhelming majority of abortion petitions that come before the courts are granted, choice advocates argue that judicial-bypass procedures impede a teenager's constitutional right. Many believe that requiring a young woman to go to court for permission to obtain an abortion places a burden on teenagers that can result in increased medical risks due to delays, or in teenagers running away from home or making clandestine trips to another state that does not require consent.

In 1983, the Department of Health and Human Services issued a federal regulation requiring family-planning clinics to notify parents within ten days when their minor daughters received birth-control devices from federally subsidized clinics. The regulation, which was issued under Title X of the Public Health Service Act, was challenged by concerned organizations and stopped by the District of Columbia and Second Circuit Courts of Appeal.

Family planning legislation, which addresses a wide range of reproductive health and choice issues including consent for birth control, prenatal care and confidentiality, is being considered in many states. While most proposals are new legislation, in some cases efforts are being made to change existing statutes. For example, a bill providing penalties for physicians who prescribe contraceptives to minors without notifying their parents was defeated in South Dakota in 1985. A number of legislative proposals related to reproductive health and choice for minors support confidentiality or the upgrading of school health clinics that provide information on birth control. But the picture is clearly mixed. In Washington state, for example, two concurrent bills pending in 1985 took very different approaches: one would require agencies to develop public-service advertising, directed toward teenagers, about contraceptive information and services; the other would amend the

state constitution to give parents the inherent right "to direct and control the rearing of minor children—including education, religious instruction, medical care .... "

"Akron-type" Legislation

Comprehensive anti-choice statutes that include a "laundry list" of provisions such as informed consent, waiting periods, parental notification, reporting requirements and fetal disposal have been introduced in some states. In early 1985, Akron-type legislation was introduced in Arizona, Mississippi and Texas.

Informed Consent

Most informed-consent requirements specify that women be informed of the physical, psychological or emotional consequences of abortion. However, a proposal that was pending in California in mid-1985 would require that, in the absence of an emergency, women considering abortion be shown a sonogram of a fetus before consenting to an abortion. Some proposals require that women be advised of the methods that will be used to dispose of the fetus. A Nebraska proposal would require that a woman be advised of the risks of repeat abortions, while a Washington state proposal would require that women be advised of the danger of abortion, the technique performed and the "physical characteristics of the unborn child." Informed-consent provisions may require that the physician advise women of anesthetics or analgesics that can purportedly alleviate "fetal pain."

Insurance

Some state legislatures are considering proposals to ban abortion coverage in state employee insurance plans other than to save the life of a pregnant woman. A proposal in Utah would limit abortion coverage for *all* insurance policies in the state to coverage in life-threatening situations.

Harassment and Violence

The sharp increase in violence and harassment in recent years is probably the most visible and frightening indication of the force of differing views about reproductive choice.

In January 1985, a women's clinic in Washington, DC was torn apart by a homemade bomb. The bomb caused extensive damage to the clinic and shattered more than 200 windows in apartments across the street. In February 1985, a deliberately set fire destroyed the Women's Clinic in Mesquite, Texas and the shopping mall in which it was located, causing $1.5 million in damages.

Tragically, these are not isolated incidents. In fact, violence against abortion-related facilities has accelerated sharply over the past five years. A summary by the National Abortion Federation, (NAF) shows a dramatic increase: in 1981 nine specific acts of violence were recorded; in 1985 there were 209. (See chart on clinic violence.)

Violence against clinics occurs against the backdrop of daily harassment of individual clinic patients and staff members. Anti-abortion demonstrators who describe themselves as "sidewalk counselors" often shout epithets and wave posters picturing bloody fetuses in the faces of clinic patients and staff members. NAF reports that in recent years groups of picketers are larger than in the past and that they also are much more likely to employ intimidating, even illegal, tactics. It is not unusual for picketers to yell through bullhorns, or form human chains to deny access. Clinic patients have been followed home or to work by demonstrators. Dolls covered with red paint have been thrown at patients or piled into garbage cans. Some protesters have taken pictures of license plates and called patients at home. It is important to note that since many family-planning clinics are multiservice facilities, harassed patients may be seeking services that are not related to abortion.

While bombings and arson are easily identifiable as crimes, it is much less clear whether violations of federal law occur when there are threats or acts of harassment and intimidation. In spring 1985 the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee addressed the civil-rights issues raised by the harassment of clinic staff and patients.

The hearing record of the subcommittee was replete with stories related by both patients and clinic workers of attempts by anti-choice individuals to interfere with and intimidate staff and patients. Included were such incidents as invasions of clinics, bomb threats, arson, telephoned death threats, assaults on staff and patients, photographing

of patients, trespassing, interfering with ambulance transport of a patient to a hospital, picketing, shouting at entering patients, blocking entrances to clinics, vandalism against staff cars, and economic pressure against owners of buildings that house clinics. Staff of clinics have sometimes responded with violence as well, as in the 1985 instance in Maryland in which a clinic doctor was convicted of stabbing a demonstrator with a hypodermic needle.

Anti-abortion groups have maintained that they have a right under the First Amendment to be on the sidewalks and in parking lots of clinics and other facilities in order to present alternative viewpoints to prospective patients. Joseph Scheidler, Director of the Pro-Life Action League, testified before the House subcommittee in March 1985, that

Incidence of Reported Violence Toward Abortion Providers

TYPE OF VIOLENCE	1977–1980	1981	1982	1983	1984	1985
Picketing & Harassment (no. of clinics affected)	22	2	22	61	158	138
Hate Mail/Harassing Phone Calls (no. of clinics affected)	0	0	0	9	17	32
SPECIFIC ACTS OF VIOLENCE						
Invasions	35	3	14	16	32	44
Vandalism	6	2	8	19	33	46
Death Threats	1	2	0	1	22	15
Bomb Threats	0	0	7	9	40	73*
Assaults/Batteries	5	0	3	3	7	7
Burglaries	0	0	3	0	2	2
Kidnapping/Hostage-Taking	0	0	1	1	0	0
Attempted Arson/Bombings	2	1	1	1	6	6
Arsons	8	1	4	0	6	8
Bombings	4	0	4	3	18	4
Attempted Package Bombings	0	0	0	0	0	4
TOTALS	**61**	**9**	**45**	**53**	**166**	**209**

*number of clinics affected, not total number of threats

Source: National Abortion Federation

his organization tries through "nonviolent direct action" to stop activities at abortion clinics. He noted that his organization is "aware of attacks against abortion facilities." Scheidler said that, "Knowing what takes place inside the abortion chambers, we understand the moral

outrage at the waste of human life that prompts this response. The Pro-Life Action League and others refuse to condemn it because we refuse to cast the abortionists in the role of victims when they are in fact victimizers.''

A pivotal issue is whether federal civil-rights laws (passed during Reconstruction to protect blacks against intimidation and violence) protect citizens attempting to exercise their rights to select reproductive services or whether these protections are adequately provided by state and local laws. The Justice Department has adopted the stance that private actions against clinic patients and staff are not violations of these federal civil-rights laws.

At the hearings, Deputy Assistant Attorney General Victoria Toensing presented the Justice Department's position, explaining that state or local laws currently provide for prosecution of such violations as trespassing, personal violence and threats of personal violence. Toensing averred that there has been ''a great reluctance'' for the federal government ''to tread upon traditionally state matters,'' and that the federal civil-rights statutes are aimed at ''state action''—an act by a state or local government—to deprive a person of a federally defined right. She emphasized that the right of privacy to make reproductive choices is such a right, flowing from the Fourteenth Amendment. But, according to Toensing, the Justice Department has ''no reason'' to believe that states or officials have ''participated in, actively connived in, or intentionally closed their eyes to criminal actions taken against abortion clinics, their staff and patrons.''

Absent such ''state action,'' the Justice Department has declined to act. Toensing noted that if information about such official action were presented as described above, the Justice Department would not hesitate to investigate; she requested that any relevant information be conveyed to the Civil Rights Division at the Justice Department.

Earlier testimony before the House subcommittee had revealed incidents in which state or local officials took no action against persons harassing clinic clients. The director of a women's health center in the state of Washington testified that, despite repeated instances of harassment and intimidation including physical threats and bomb threats, local government authorities failed to enforce no-parking laws when anti-abortion activists continually blocked parking places at clinics, to restrict anti-choice picketers to a reasonable number and to insist on a manner of picketing that would not interfere with entering or exiting from the clinic.

A Virginia clinic director testified that charges against picketers for obstructing pedestrian traffic were ''dismissed'' by a city attorney, in disagreement with on-the-spot determination by police. Such official equivocation clouds an already confusing picture.

The issue of whether private intimidation can be dealt with by the

federal government was addressed in the House subcommittee hearings by Rhonda Copelon, Associate Professor of Law at CUNY Law School at Queens College in New York City. Copelon argued that there are "ample and diverse legal grounds for the Civil Rights Division of the Justice Department to prosecute under [the civil-rights statutes] private conspirators who seek to impede women from obtaining abortions and to disrupt, indeed, shut down reproductive health clinics."

Copelon noted that prosecution under the "state action" concept is warranted because of state failure to prosecute illegal activities and because harassment is targeted at facilities that provide abortions and other health services funded in part by federal monies (under Title X and social-service block-grant funds for poverty and low-income patients). In addition, she argued that federal civil-rights laws should be utilized for prosecutions against private interference with a right (for example, right of privacy) protected under the Fourteenth Amendment, whether or not state action is present.

Copelon also asserted that the Department of Justice has the "obligation to prosecute harassers based on their intent to prevent exercise of the right to abortion itself," arguing that trends in federal case law as well as the Fourteenth Amendment itself provide a basis for using it in clinic-harassment incidents. She concluded that "where police refuse to provide protection against harassment, the Justice Department has a heightened obligation to enter."

At the state level there have been legislative initiatives that condemn or prohibit violence and harassment against abortion clinics and patients. Yet these efforts are mixed and have had mixed success. Maryland considered a bill in 1985 that would "prohibit a person from harassing another." A bill introduced in New Mexico provided criminal penalties for harassment of patients and employees of an abortion clinic and for persons delaying medical procedures; the bill died in committee in 1985. In late 1985 resolutions condemning violence against clinics were pending in a number of states.

While most proposed legislation condemns or prohibits violence, a very different piece of legislation was introduced in Missouri in 1985. The Missouri proposal would allow acts normally considered criminal to prevent legal abortion and would allow such acts (other than murder or Class A felonies) to be committed against persons or property as long as the perpetrator could prove he or she acted in "good faith belief" in order to prevent imminent harm to human life.

Such an array of conflicting remedies and community incidents highlights the difficulty of arriving at reasonable solutions. Yet it is important to understand the scope and nature of conflicts in order to deal with them. The next section focuses on ways to deal with the reproductive choice issue in your community.

What Citizens Can Do

Under the Constitution, individuals have a right to make reproductive choices. And yet, this right has been constantly under threat. For example, public agencies have withheld services, legislative bodies have eliminated public funding or placed restrictive conditions on the provision of abortion and other services and anti-choice groups have employed confrontational and violent tactics. However there are some actions that citizens and community organizations can take to help eliminate the contradiction between law and practice. You can, for example:

—Monitor the actions of public officials and legislative bodies.
—Build community understanding.
—Develop effective mechanisms for coping with violence and harassment.
—Influence public policy.
—Or, when other methods have failed or a quick response seems necessary, turn to litigation.

The first steps you may want to consider are building a coalition to expand your resources and surveying your community to find out what services are available.

Building Coalitions

Any actions you or your group decide to take will be more effective in coalition with other groups that share the same goal. Coalitions can pool resources, including information, political clout, funds and volunteers. Coalitions also can demonstrate solid community support for a controversial position.

A solid core of like-minded organizations that share a set of common goals on reproductive-choice issues can bring together a broader, looser coalition, taking advantage of areas of agreement. In dealing with an issue such as reproductive choice, where actions are most often taken in response to threats from public bodies or opposition groups, flexibility and rapid communication are essential. However, continuity and leadership must be provided by the core organizations.

Potential groups for coalition membership must be identified, informed and recruited. They must be given a meaningful role in coalition decision making and know what resources and actions are expected of them. If regular coalition meetings are necessary, they should always be planned carefully, with a set agenda and clear expectations of what the meeting should accomplish. An informal newsletter or regular mailings can keep organizations and their members informed about what

is happening in the community and what actions the coalition is planning in response. Personal or phone consultation is needed when joint statements are released or joint actions are taken.

In a large community, the organizations in coalition may decide to pool funds to hire staff. In a small community, a telephone tree may be sufficient to keep coalition members alert and informed.

Surveying the Community

Citizen action must be based on a foundation of knowledge. In order to determine existing needs, to select the most effective strategy and to provide documentation for public information, testimony or litigation, it is important that you start with first-hand information about community resources and the attitudes of public officials and citizens' groups.

An individual's ability to make a reproductive choice depends on the availability of services and information and on access to those services. When surveying available community services, it is important to look at the number of clinics that provide abortion services or public agencies that provide contraception counseling, at the quality of the services provided and at the accessibility to citizens—especially young, minority or low-income women. Questions that should be asked include:

Accessibility

- Where are the facilities located?
- Is there public transportation?
- Is the cost of services prohibitive—or is there a sliding fee system based on income?
- If state Medicaid funding is provided, will the facility accept clients using this method of payment?
- Is access limited by the confrontational tactics of groups opposed to abortion?
- Is there adequate protection and psychological support for clients?

Services

- If no services are provided in your community, how far must a woman travel to receive services? Is that information available in your community?
- What range of services is provided?
- Is counseling provided? Both before and after services are received?
- Is post-abortion instruction in pregnancy prevention and family planning provided?
- Are services such as counseling and instruction provided for partners?

Abortion services are available through private and public hospitals, specialized clinics and private physicians. Abortion is most readily avail-

able in large metropolitan areas. An Alan Guttmacher Institute survey indicated that in 1982 only two percent of all abortions were performed in nonmetropolitan areas. There were no abortion services available in 72 percent of all counties in the United States.

In 1973, most abortions were performed in hospitals. Since then this proportion has steadily declined, and most abortions now occur in private clinics. This may pose an accessibility problem for poor women who are accustomed to going to public hospitals for their health services. In surveying resources, it is important to determine whether public hospitals and clinics that do not provide abortion services will refer a patient to a private clinic or physician.

Public and private hospitals provide varying levels of support, counseling and family-planning instruction. Abortions in private hospitals can be very costly. For example, local hospitals in the Albany, New York area were charging $700–$1,000 for abortions in 1985, while clinics operated by Planned Parenthood in the same area charged $195.

Increasing evidence that abortions can be performed safely outside a hospital have led to the proliferation of many private specialized clinics. Most clinics provide a full range of reproductive health-care services, including general gynecological services, family-planning counseling and contraceptive services.

Any survey of area resources should include services provided by local governments, since they have responsibilities and powers that affect the provision of reproductive services. In surveying your community you should try to get the following information about local government services:

- Does the health planning agency consider the need for reproductive health services in its planning activities?
- Do licensing standards for public and private facilities exist and are they enforced?
- Are government powers (including licensing requirements, zoning regulations or housing codes) used to close down facilities or prevent their establishment for unrelated reasons?
- Do social-service agencies make appropriate referrals for their clients in need of reproductive services?
- Do agencies follow confidentiality and reporting procedures and standards that encourage young people to seek assistance?

Information about the availability of reproductive health services can be communicated to the public in many ways. Advertising, posters, media coverage and ads in the Yellow Pages are relied on by many as guides to services. Community organizations can help alert the public to any deceptive advertising of reproductive services, such as ads and posters that appear to be for abortion clinics but actually bring respondents to storefront "Pregnancy Crisis Centers" that counsel, cajole or frighten the patient into carrying a pregnancy to term. These mis-

leading ads have been specially designed to appeal to young people, and are often placed on college campuses or in student newspapers. Any evaluation of community resources should include a check of advertised facilities to make sure they offer the services advertised.

Many public and private agencies that do not provide direct services do provide information and support. If you decide to publish your findings, include a listing of social-service agencies, commissions for women, local universities and counseling centers, organizations serving women and families, etc., in your survey of resources. Organizations that support reproductive choice and provide assistance for individuals also can be listed. For example, the National Abortion Federation has a telephone hotline (800-772-9100) that provides reliable information about the medical, legal and psychological aspects of abortion and accepts complaints about particular physicians and facilities for follow-up investigation. Some organizations, such as Birthright, that do not support abortion could also be included in your survey since they offer other services and support.

Finding Out What's Happening: Monitoring

Monitoring is essential for groups that plan to take informed action. You must be aware of actions pending in the administrative and legislative public-policy arenas, and you should be alert to possible community disruption.

- Watch newspapers carefully and keep a file of clippings. Follow up on news reports.
- If violence at a clinic is reported, find out what protection was offered by police and what action is being taken to investigate and prosecute.
- If a clinic is closed down for zoning violations, find out what the alleged violations are, what notice was given to the clinic and what is necessary to reopen the facility.
- If a public hospital is considering a ban on abortions, monitor its board meetings.
- Ask to be placed on the mailing lists of your local Health Planning Agency, Commission for Women and School Board, and attend meetings when reproductive-choice issues are on the agenda.
- Be aware of actions under consideration by city and county councils that might restrict choice.
- Let local government officials know that you expect them to protect clinic patients and staff and to provide a responsible way for protests to be carried out by anti-choice groups.

Know and use laws and regulations concerning open meetings, public disclosure and freedom of information since public agencies will sometimes try to take actions to restrict reproductive choice quietly and privately, behind closed doors, in order to avoid controversy and opposition.

Since many of the policy decisions affecting reproductive choice occur in state legislatures, monitoring at this level is essential. Several organizations publish legislative newsletters to advise citizens of bills submitted to the legislature and their probable impacts. Others keep their members informed through representatives in the state capital. Women's organizations can be a particularly good source of information about pending legislation affecting reproductive-choice issues. Staffs of family-planning and abortion facilities also can provide useful information.

Facilitating Community Understanding

Civic organizations can help citizens separate public-policy issues from private moral beliefs by providing information about judicial, legislative and governmental actions affecting these issues.

Start at the beginning. The Court decisions described earlier establish the limits of governmental intrusion into the individual's right of privacy to make reproductive choices and confirm the legality of abortion. The community should be aware that those who threaten and harass patients and employees of abortion clinics are interfering with legitimate rights. Both the local government and its citizens should understand the responsibility of local law-enforcement officers to enforce the law and protect the rights of individuals. The Supreme Court's rulings with regard to federal legislation and the parameters of state legislative action provide the public policy focus for the issue.

Community organizations also can make sure citizens have the "straight story" on issues of equity and public health. If your organization has systematically surveyed the services provided in your community—or if another group has done such a survey—you can determine if problems of access and equity exist and can share findings with the community.

Methods for providing information to increase public understanding and provide a public policy focus include:

- press briefings or press releases;
- publication of your community survey of available resources and services;
- development of a publication for distribution through libraries and schools;
- letters to the editor, or "op-ed" articles; and
- appearances on TV or radio talk shows.

Many organizations traditionally hold public meetings or forums that present pros and cons or divergent points of view in order to educate citizens about an issue in controversy. In the confrontational climate of the dispute over abortion, however, such dialogue or debate may not prove effective. Some who have attempted to conduct evenhanded discussions caution against providing a public forum for sloganeering and unsubstantiated verbal attacks.

More LWV Resources

These League publications may be useful in planning your strategies for community action.

Reaching the Public, LWVUS, Pub. #491, 85¢ (60¢ for members)
Getting Into Print, LWVUS, Pub. #484, 65¢ (40¢ for members)
Speaking Out: Setting Up a Speakers Bureau, Pub. #299, 35¢ (20¢ for members)
Going to Court in the Public Interest, LWVUS, Pub. # 244, 85¢ (60¢ for members)
The Verdict is in: A Look at Public Interest Litigation, LWVUS, Pub. # 536, 85¢ (60¢ for members)
Public Policy on Reproductive Choices, LWVEF, Pub. # 286, $1.25 (75¢ for members)

Dealing with Confrontation

Concerned organizations can initiate campaigns to inform the community of the laws governing reproductive choice and the central issues generating controversy. Beyond that there is a variety of actions that community organizations can take. Some examples follow.

In May 1985, the National Abortion Rights Action League (NARAL), in coalition with other pro-choice groups, launched an "Abortion Rights: Silent No More" campaign featuring written and oral testimony from thousands of women relating their personal experiences with abortion. In state "speakouts" and at a vigil in Washington, DC, NARAL drew attention to the needs of women faced with reproductive-choice decisions.

The National Organization for Women (NOW) counters demonstrations, sit-ins, and clinic invasions scheduled for Mother's Day by planning NOW-sponsored abortion-clinic vigils and patient-escort programs.

The American Civil Liberties Union (ACLU) has published a comprehensive guide *Denying the Right to Choose: How to Cope with Violence and Disruption at Abortion Clinics.* It differentiates between legal and illegal actions of harassment and includes suggestions for preventing and dealing with both. There are guidelines for communicating with police and public officials, for ensuring the security of facilities and records and for dealing with disruptions ranging from petty harassment to full-scale invasions by anti-choice activists.

Some organizations and clinics provide escort services for abortion-clinic patients or help dispel fears through off-hour "vigils" to protect clinic premises. Such activities provide needed reassurance and

protection to individuals, and they are visible evidence of community support.

Influencing Public Policy

Very often, effective change can be brought about by alerting public officials to a problem and suggesting an appropriate remedy. But if this doesn't work, you can take further steps. For example, if public officials in your community are not enforcing picketing laws or if you discover a substandard abortion facility, you may want to consider the following actions:

- Write letters to the local public health agency, describing your findings and calling for improvements.
- Write letters to the editor of your local newspaper.
- Alert local reporters.
- Appear on radio or TV talk shows. Discuss the responsibility of public officials.
- Meet with officials of the state Department of Health to determine state regulations and put pressure on the local agency to carry out its responsibility.
- Use petitions, letter-writing campaigns, meetings with legislators and staff and other lobbying techniques to get conditions improved, or to affect law enforcement.
- Work with your local public health agency to set up procedures for inspection and enforcement.

Litigation as a Strategy

If all other avenues for seeking to influence public policy on reproductive choices have failed, or when circumstances dictate a quicker response than may be achievable through other strategies, litigation may be needed. There are times when litigation may be the best vehicle for influencing public policy, times when it may be the only effective strategy and times when it may not be a good idea at all. Almost always, the appropriateness of litigation depends not only on what the state or local policy is, but also on the particular circumstances under which the policy operates.

Deciding whether and when to resort to litigation involves a number of questions. Is it possible to achieve change through litigation? Does the case fit your organization's needs? Is the case a good one? Is it viable? Are the possibilities for relief by a court consistent with your goals? Who will benefit from the court's decision?

Even if the answers to these questions indicate that litigation is the best strategy to pursue, your organization may be able to accomplish the desired results without a full-scale litigation effort.

The mere threat of a lawsuit—as long as it is clear that you are willing and able to follow through—may be enough to get public officials to

change their minds about adopting or enforcing policies that interfere with a woman's right to make reproductive choices. This may be especially true in instances in which the disputed action is very similar to those the Supreme Court already has voided as unconstitutional. Moreover, by carrying out the threat and filing the suit, you may yet be able to prod officials to reach a settlement without going through the entire litigation process.

However, if publicizing your intentions to resort to legal action does not achieve change, be prepared to bring the full force of the judicial process into play to accomplish your goals.

Selecting an Attorney

In considering whether litigation is the answer, you should consult an attorney who will be able to advise on whether you have grounds to sue, whether there are other alternatives you should try or additional steps you must take before filing suit and how to obtain and organize needed information to enhance the possibility of a successful outcome.

Among the places to start your search for a good attorney in your community (especially one who will handle your case for reduced or no fees) are referral services of local bar associations (especially women's bar groups), legal services programs and law schools. Also consider both private law firms that may have the resources to take on "pro bono" cases and public-interest law firms or legal defense funds.

Talk to other public-interest organizations with litigation experience. Groups working on reproductive choices issues may already have identified attorneys who would be interested in taking on the specific public-policy issue your organization wants to address. Of course, your organization may already have excellent leads on members, spouses or friends who are attorneys. Attorneys with whom your organization has worked before on other public-interest issues may also be able to suggest other attorneys who might be available.

Interview potential attorneys, keeping in mind how you will want a lawyer to work with your group. (Find out first if there will be a fee for the initial consultation.) Among the matters you will need to discuss are:

- your organization's purposes and goals, including what you want to accomplish by pursuing legal action and any limitations on the choice of outcomes;
- your organization's decision-making process, so that the attorney can understand how decisions about strategies will be made; and
- how far your group is willing to pursue legal action and whether the attorney can make a similar commitment.

Discuss finances. Ask about the attorney's fees, if any, and what services they cover. Get a good estimate of what other costs (e.g., filing

fees and out-of-pocket expenses) will be involved. Make sure the attorney understands the limits of your available financial resources, and be sure that both sides have a clear understanding of payment arrangements.

The most important consideration is frank discussion of your group's needs, concerns and ability to work well with the attorney. You should explore all the options and ramifications of the choice of courts and judges and of legal strategies. Make sure you understand everything the lawyer tells you.

Working With Your Attorney

If you reach mutually clear understandings about goals, roles, strategies and finances from the outset, you will have gone a long way toward being able to work well with the attorney you select to handle your case.

Be willing to share your organization's knowledge of the issues and its ability to help gather needed information. Always ask questions, especially about the reasons for strategies the attorney chooses, but respect the attorney's judgment on the appropriate legal theories to be applied to accomplish your goals.

It is very important to designate a representative to stay in constant contact with the attorney. Your designated liaison will need to share information with the attorney, keep your members apprised of developments and make recommendations about whether to pursue a particular action. In this way, your group can make timely decisions about the direction the case should take and be effective in helping to prepare and follow through on the litigation.

Planning Legal Action

Your attorney will advise you on how the legal action should be pursued, including who should sue, who should be sued; in what court the suit should be filed; what kind of legal action should be filed, and what kinds of results you can expect. In addition, the attorney can advise on the development of facts to support the case and the appropriate way to coordinate the litigation with other activities.

Who Should Sue

Among the decisions to be made is who should be the plaintiff in the suit. Should the organization sue on its own behalf, or on behalf of its members? An organization might be a good plaintiff, for example, in a challenge to restrictions on the organization's provision of family-planning services or a challenge to limitations on insurance coverage for its members.

Perhaps the primary plaintiffs should be individuals who are most immediately and directly affected, for example, women seeking abortions who are being turned away from a public hospital or representa-

tives of teenage women who may not receive the preferred birth-control methods if their parents are notified. If the suit involves individuals as plaintiffs, it may need to be pursued as a class action so that a court can grant relief for those who could be affected by the same policy in the future.

Who Should Be Sued

If a state law or regulation is involved, you will need to sue state officials, including those charged with enforcing the challenged policy (e.g., administrators of public health agencies). If local policies are involved, you will need to sue the appropriate level officials; you also may need to include state officials for example, if the state has authorized the policy that is being implemented.

Perhaps even the federal government might be an appropriate defendant if, for example, the entity responsible for the challenged policy is receiving federal funds and the federal government fails to prohibit use of the funds to violate the exercise of the right to make reproductive choices.

In What Court

Your attorney will advise you whether the suit should be brought in state or federal court. Most often, to enforce the constitutional guarantees of *Roe* and *Akron*, the choice will be the federal courts.

What Kind of Legal Action

Among the possible remedies that can be sought in a legal action are a temporary restraining order, a preliminary injunction and a permanent injunction.

A temporary restraining order is an order for immediate, temporary relief to forbid the defendant from taking a certain action (e.g., enforcing a requirement for a second-trimester hospitalization or denying or revoking licenses for clinics that perform abortions) until a full hearing of the issues. A preliminary injunction would be a continuation of short-term relief to make the defendant refrain from taking or continuing an action. Success in obtaining either of these forms of relief also may have the effect of persuading officials to abandon the challenged policy altogether.

If not, a permanent injunction is the next step. Such an order would permanently prohibit a defendant from taking a certain action, or require it to take an action (e.g., permitting abortions by doctors willing to perform them in public hospitals, or making advisory rather than mandatory a provision for parental notification about family-planning services to minors).

Participation as an *amicus curiae* (friend of the court) in a pending lawsuit also may be an option. The *amicus* brief provides the court with

information and expertise that may not be fully provided by the parties. For example, the *amicus* may be able to demonstrate how a regulation that appears to be constitutional actually discriminates against particular groups of women, such as minority or poor women. The role of the *amicus* is very limited, and participation may not be allowed at all at the trial level. Nevertheless, this may be the best role for an organization that is not able to commit to a sustained litigation effort, is unsure of what relief it would seek or is not a proper plaintiff.

Developing the Facts

For some issues, the success of the litigation will depend upon how a policy affects women in your community. This would especially be true if the disputed policy has not been determined by the Supreme Court or another court with jurisdiction over your community, such as a federal district court or your state's highest court, to be invalid under all circumstances. Your lawyer will tell you what information is needed to support your suit and how best to gather that information.

For example, if you are considering whether to challenge a public hospital's refusal to permit doctors to perform abortions, among the facts you may need to have are whether there are comparable facilities nearby, what costs and difficulties patients would encounter in going to other facilities and whether any doctors on staff would be willing to perform abortions.

Coordinating Litigation with Other Activities

Although litigation can be effective in mobilizing community support to oppose public policies that interfere with reproductive choices, it is more effective if it is coordinated with other efforts, such as community education and media campaigns. (Other strategies can have another positive effect, that of aiding in fundraising efforts for the lawsuit.)

Remember, however, to consult with your attorney about the advisability of pursuing other strategies while the litigation is pending. Some strategies may be counterproductive to the goals sought through the lawsuit; timing may be critical to the effectiveness of others. Especially check on the appropriateness, timing and content of any media efforts.

Financing the Litigation

Consider as sources of financial assistance other groups that would be especially concerned about the effect of public policies on reproductive choices on their own members or pursuit of the organizational purposes. For example, unions and other employee associations may be particularly interested in supporting litigation dealing with restrictions on employee benefits, especially insurance

programs. Women's organizations, including professional associations, and student groups will be concerned about the impact of regulations on individual women. Medical groups may want to help finance (or provide expertise for) litigation on such matters as hospitalization and licensing requirements and on issues that affect the doctor-patient relationship.

To keep expenses down, you may want to join with other organizations and share costs. Your members and others could help to do some of the research and data-gathering to relieve the attorney of that aspect of case preparation. You might also be able to get some services donated. These services could range from copying and printing to expert advice on technical issues.

Getting Maximum Results from Legal Action

Case Selection: Achieving your goals through litigation may depend on your organization's ability to choose the right issue and the right case to pursue at the right time.

If a state has a law on the books, but is not enforcing statutory provisions that the Supreme Court has held unconstitutional (e.g., lengthy waiting periods or extensive counseling requirements for abortions), then litigation may be a wasted effort, since such provisions cannot be validly enforced. On the other hand, if the state attempts to enforce these or similar provisions, a lawsuit may be needed to protect the rights of women who are being penalized by their doctors' fears of threatened prosecution.

If a public hospital declines to provide abortion services, it may be difficult to change its policy through litigation. But if the same hospital is the only available facility within a reasonable distance, and if it refuses to allow staff doctors to perform abortions even though they are willing to do so, a woman who wants an abortion not only may have a good case, but also may need much quicker action than she could obtain by relying on administrative channels; litigation may be the best answer.

If a state urges, but does not require, family-planning centers to notify parents when they provide prescription contraceptives to teenagers, it may not be worthwhile to challenge the state's policy. If the state requires notification in all cases, perhaps legal action is in order. But if the state allows for waivers to the notification requirement, then whether or not the policy is worth challenging depends a great deal on how the policy actually is applied to individual teenagers.

Moreover, for an issue as controversial as public policy on reproductive choices, cases with the greatest potential to achieve the maximum results are likely to be those for which the facts are not in dispute and the issues turn solely on legal interpretations of whether the challenged policies violate the standards of *Roe* and *Akron*, or those in which the

impact of the policies on women is devastating (complete absence of alternatives). With these types of cases, your organization stands the greatest chance of getting clear, straightforward rulings from the courts.

Follow-through Strategies: If your organization does obtain a favorable ruling in a lawsuit, your work is not through. Be prepared to engage in at least three more strategies. First, educate the media and the public on what the litigation has achieved and what the decision means. Second, be vigilant. Monitor the actions of public officials, to determine whether they comply with the court's orders. Finally, if officials do not carry out the terms of the decision, or if they develop new policies to accomplish the same objectives as the policies you have succeeded in having invalidated, consider going back to court.

Appendix: Unresolved Legal Issues

Parental Consent/Notification

A majority of the Supreme Court justices who heard the *Akron* case would uphold this requirement if it left open an alternative for mature minors to obtain a confidential judicial or administrative review to prove their maturity and thus make their own abortion decisions. Questions may still be raised about the adequacy of alternative procedures that would allow immature minors to receive abortions without parental consent or notification. A major problem for mature or immature minors could be the standards to be applied by adjudicators ruling on abortion decisions.

Second-Trimester Hospitalization Requirements

In *Akron* the Supreme Court ruled that states have the power to regulate facilities and techniques for second-trimester abortions. The hospitalization requirement was struck down in both the *Akron* and *Ashcroft* cases because "hospital" was defined only as a full-service, acute-care facility. In *Simopoulos,* however, the hospitalization requirement was upheld because "hospital" was defined to include licensed outpatient clinics.

The Court implied that it might have taken a different view of Akron's hospitalization requirement if it had not covered *all* second-trimester abortions. Although the Court clearly disapproved of such a restriction on abortions performed early in the second trimester, it left open the possibility that the restriction might be justifiable for abortions performed closer to viability.

In addition, a problem that could arise from interpretations of *Simopoulos* is a state's refusal to grant licenses to clinics that perform second-trimester abortions. However, the Supreme Court has ruled that licensing requirements may not be designed to interfere with reproductive choices.

Informed Consent

The Court rejected the requirement that a physician be personally responsible for relaying the information needed to make an "informed consent" but appeared to approve of holding a doctor liable for verifying that counseling takes place. Although education and training standards may be set for counselors, such standards might be open to challenge if the qualifications are burdensome and not related to the skills required for abortion counseling, or if they create an additional

burden on women's access to abortions by raising the cost of abortion and/or hindering clinic operations.

Waiting Periods

Although the Court struck down state-imposed 24-hour waiting periods because they created an undue burden on the woman's right to choose abortion, it is not entirely clear whether more flexible, shorter waiting periods might be valid.

Pathology Reports

Even though the Supreme Court upheld the pathology report requirement in Missouri, pathology reports do not necessarily become a matter of course for all abortions. If in a particular community it is not accepted medical practice to require pathology reports, then requiring them solely for abortions may be questionable. The majority described the requirement as a "comparatively small additional cost" to an abortion; the amount quoted was $19.40. If instead, such a requirement significantly raises the cost of abortions for women of limited resources, it may be subject to further challenge.

Insurance Coverage for Abortions

Finally, the issue of insurance coverage for abortions remains unanswered. This includes regulations requiring insurers to charge more for abortion benefits or to exclude them altogether. For example, the extra cost of an abortion rider on an insurance policy (if available) may not be considered unduly burdensome if the rider would cost relatively less than did the pathology report that was found not to be burdensome in *Ashcroft*. However, an argument against the extra rider, also from the reasoning in *Ashcroft*, is that there is no important health objective in eliminating abortion from insurance coverage. A major question might be raised about whether the courts could differentiate between coverage provisions affecting the first and second trimesters.