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## **The Right to Choose, Neutrality, and Abortion Consent in Massachusetts**

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In 1980, the Massachusetts legislature enacted a law “concerning informed consent prior to abortion.”<sup>1</sup> The law revised a parental consent provision the federal courts had struck down earlier and added a requirement that abortion consent forms include specific information.<sup>2</sup> The law directed the State Department of Public Health to produce standard forms that describe the stages of fetal development, the type of abortion procedure to be used, any possible medical complications, and the alternatives to an abortion.<sup>3</sup> The law also instituted a reflection period of at least twenty-four hours between the time a woman gives her consent and the scheduling of the abortion.<sup>4</sup>

For reasons detailed below, the State has never enforced the provisions requiring a fetal description and reflection period. Legislation first filed in 2003 and refiled in 2005 seeks to re-institute these requirements and modify other parts of the current law.<sup>5</sup> Similar proposals, which supporters call

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1. 1980 Mass. Acts 240 (codified at MASS. GEN. LAWS ch. 112, § 12S (2004)). Introduced by Representative W. Paul White and other sponsors as “An Act relative to Parental Guidance and Informed Consent Concerning Certain Medical Procedures Within Present Constitutional Limits,” House Bill 5361 passed both branches of the Massachusetts General Court on June 2, 1980, and Governor Edward J. King signed it into law on June 5, 1980. H.B. 5361, 171st Gen. Ct., Reg. Sess. (Mass. 1980); Associated Press, *Abortion Counseling, Consent Required for Some in New Law*, BOSTON GLOBE, June 6, 1980, at 21.

2. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (striking down Massachusetts law requiring minors to obtain parental consent prior to abortion).

3. MASS. GEN. LAWS ch. 112, § 12S (2004).

4. *Id.*

5. At the time of this writing, identical Senate and House versions of the legislation had been filed but

“woman’s right to know” bills, have passed in thirty-two other states.<sup>6</sup>

Abortion rights advocates characterize such laws as “anti-choice” and “biased.”<sup>7</sup> The Massachusetts Supreme Judicial Court has ruled that the state constitutional guarantee of privacy requires governmental “neutrality” in any policy that burdens protected choices.<sup>8</sup> Opponents argue that mandating only information tending to discourage abortion and encourage the continuation of pregnancy fails the neutrality test.<sup>9</sup>

This Article addresses the “neutrality” issue arising under Massachusetts constitutional law with respect to woman’s right to know legislation. Given the one-sided nature of abortion provider counseling practices, which current regulations and other official actions in Massachusetts aid and abet, such legislation renders the abortion decision-making process more neutral, and thus should survive the neutrality test.

This Article first describes the convoluted history of the current abortion informed consent statute in Massachusetts, and then details the proposed “Act Relative to a Woman’s Right to Know” currently before the Massachusetts General Court. Next, this Article discusses the requirement of neutrality in the abortion consent process, following federal and state jurisprudence. It then outlines the opposition to neutrality in abortion counseling on the part of abortion advocates and the lack of neutrality in abortion counseling practice. Finally, this Article argues that the woman’s right to know legislation is

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had not yet received permanent bill numbers for the 2005-2006 session. H.D. 726, 184th Gen. Ct., Reg. Sess. (Mass. 2005); S.D. 1116, 184th Gen. Ct., Reg. Sess. (Mass. 2005). The same legislation was filed in the previous session. H.B. 2644, 183d Gen. Ct., Reg. Sess. (Mass. 2003); S.B. 1069, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

6. ALA. CODE. §§ 26-23A-1 to -13 (2004); ARK. CODE ANN. § 20-16-903 (Michie 2004); CONN. GEN. STAT. §§ 19a-116, -601 (2003); DEL. CODE ANN. tit. 24, § 1794 (2004); FLA. STAT. ch. 390.0111(3) (2004); IDAHO CODE § 18-609 (Michie 2004); IND. CODE ANN. §§ 16-34-2-1.1, 16-18-2-69 (Michie 2004); KAN. STAT. ANN. §§ 65-6708 to -6715 (2003); KY. REV. STAT. ANN. § 311.725 (Michie 2004); LA. REV. STAT. ANN. § 40:1299.35.6 (West 2004); MASS. GEN. LAWS ch. 112, § 12S; MICH. COMP. LAWS §§ 333.17014-17015 (2004); MINN. STAT. §§ 145.4241-4249 (2003); MISS. CODE ANN. §§ 41-41-33, 41-41-35 (2004); MO. REV. STAT. § 188.039 (2004); MONT. CODE ANN. §§ 50-20-104, -106, -301 to -308 (2003); NEB. REV. STAT. §§ 28-327, -327.01 to -327.02 (2003); NEV. REV. STAT. 442.252-253 (2004); N.D. CENT. CODE §§ 14-02.1-02 to -03 (2003); OHIO REV. CODE ANN. § 2317.56 (Anderson 2004); 18 PA. CONS. STAT. §§ 3205, 3208 (2004); R.I. GEN. LAWS §§ 23-4.7-1 to -5 (2004); S.C. CODE ANN. § 44-41-10 to -30 (Law Co-op. 2003); S.D. CODIFIED LAWS §§ 34-23A-10.1 to -10.3 (Michie 2003); TENN. CODE ANN. § 39-15-202 (2004); TEX. HEALTH & SAFETY CODE ANN. §§ 171.011 to .017 (Vernon 2004); UTAH CODE ANN. § 76-7-305 to -305.5 (2004); VA. CODE ANN. § 18.2-76 (Michie 2004); W. VA. CODE § 16-2I-1 to -10 (2003); WIS. STAT. § 253.10 (2003); ALASKA ADMIN. CODE tit. 12, § 40.070 (2004).

7. Memorandum from NARAL Pro-Choice America Legal Dep’t, to Interested Parties 1, 3, 4 (Oct. 9, 2003), at <http://www.prochoiceamerica.org/facts/loader.cfm?url=/commonsspot/security/getfile.cfm&PageID=5586> (discussing anti-choice state legislative trends). When the original bill passed in 1980, the Boston Globe editorialized against it, claiming its supporters intended to “punish” or “intimidate or harass women who want or need abortions.” *A Punitive Abortion Measure*, BOSTON GLOBE, June 9, 1980, at 14.

8. *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 398-400 (Mass. 1981).

9. The Civil Liberties Union of Massachusetts first raised this argument during a hearing before the Joint Committee on the Judiciary of the Massachusetts General Court on May 18, 1999.

constitutional in light of current practices and judicial requirements.

## I. HISTORICAL BACKGROUND

When the Beatles sang about “the long and winding road,” they could have been anticipating the history surrounding the Massachusetts informed consent statute.<sup>10</sup> As noted above, key portions of the law have never been implemented. Here are the events that explain why this never occurred.

### A. 1980: Judge Mazzone’s Ruling

The Planned Parenthood League of Massachusetts (PPLM) and other abortion advocates filed a class action lawsuit in federal court immediately after the statute was enacted, but before it took effect. On September 2, 1980, Judge A. David Mazzone of the United States District Court for the District of Massachusetts denied PPLM’s motion for a preliminary injunction.<sup>11</sup>

In his decision, Judge Mazzone made several key factual findings. First, he found that “[t]he state clearly has a legitimate interest in assuring that a woman’s decision to have an abortion is made of her own volition upon thoughtful consideration of relevant factors.”<sup>12</sup> Second, abortion providers avoided giving women truthful information about their unborn children to the point of denying or downplaying medical facts.<sup>13</sup> According to Judge Mazzone, the evidence PPLM and other abortion providers submitted revealed:

[T]he clinics and counselors avoid discussion of the stage of [fetal] development. Their counseling language is couched in terms such as ‘tissue,’ or ‘fetal tissue,’ or ‘products of conception.’ One counselor states that she would make every effort to avoid telling the patient about the physical characteristics of the embryo.<sup>14</sup>

Further,

[t]he record reflects the extent to which the plaintiffs shield the woman from this information. For example, in their efforts to discount the value of, or need for this type of information, the plaintiffs’ evidence describes the 8 week old embryo as a largely undifferentiated cell mass. . . . But the Resource Manual [produced by plaintiffs] . . . describes and illustrates the 8 week old embryo as largely developed, with head, arms and legs.<sup>15</sup>

Third, according to the testimony of one prominent Massachusetts abortion

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10. The Beatles, *The Long and Winding Road*, on LET IT BE (Capitol Records 1970).

11. Planned Parenthood League of Mass. v. Bellotti, 499 F. Supp. 215 (D. Mass. 1980), *aff’d in part and vacated in part*, 641 F.2d 1006 (1st Cir. 1981).

12. *Id.* at 218.

13. *See id.* at 219 (discussing terminology clinic counselors utilize).

14. *Id.* at 219.

15. *Bellotti*, 499 F. Supp. at 219.

provider, Dr. Philip G. Stubblefield,<sup>16</sup> “a small percentage [of women seeking abortions], 1-3%, might change their minds” if they read a consent form “describing the embryo in terms of size and mass at certain times, and relating times at which heart beat, movement and full development is reached.”<sup>17</sup> Moreover, “after the [abortion] procedure is completed, some patients may ask the sex, and some may even ask to see the embryo.”<sup>18</sup>

Fourth, abortion providers themselves offered a rationale for giving women information about the unborn child. Citing one doctor’s testimony, Judge Mazzone stated that:

The patient should be aware of all of the alternatives and implications of her [abortion] decision. The abortion repeaters rate is high, about 25%, and is rising. Failure to resolve properly the unwanted pregnancy crisis can potentially arrest development progress. *The message of pregnancy must be understood and taken seriously if repetition is to be avoided.*<sup>19</sup>

Regarding the twenty-four hour reflection period, Judge Mazzone found that “an informed consent not only requires sufficient information, but also a period of time in which to reflect upon that information.”<sup>20</sup> A twenty-four hour delay imposes no meaningful burden in a geographically compact state such as Massachusetts, where abortion providers typically schedule abortions to occur on a date subsequent to when a woman first calls for an appointment. According to the evidence submitted,

40% of the patients do not have abortions performed immediately. . . . At Pre-Term, the time between the first call and the appointment varies between 48 hours to 1 week. Saturday appointments are always filled 2 to 3 weeks ahead, suggesting that the delay in itself may not be as important as the convenience of having the appointment on a Saturday. The evidence further shows that approximately 22% of appointments do not appear as scheduled. Of those, a small percentage fail to keep appointments because they have changed their minds.<sup>21</sup>

### *B. 1981: 1st Circuit Court of Appeals Ruling*

PPLM appealed. On February 9, 1981, the United States First Circuit Court of Appeals reversed those parts of Judge Mazzone’s decision upholding the

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16. Dr. Stubblefield has been performing abortions for twenty-five years and teaches Obstetrics and Gynecology at Boston University School of Medicine according to an online profile. Fellowship in Family Planning, *Where are the Fellowships Located?* Boston University, at <http://www.familyplanningfellowship.org/locations.html> (last visited Apr. 1, 2005).

17. *Planned Parenthood League of Mass. v. Bellotti*, 499 F. Supp. 215, 219 (D. Mass. 1980), *aff’d in part and vacated in part*, 641 F.2d 1006 (1st Cir. 1981).

18. *Id.*

19. *Id.* (emphasis added).

20. *See id.* at 222.

21. *Bellotti*, 499 F. Supp. at 222.

fetal description and reflection period requirements and ordered the lower court to issue a preliminary injunction against these provisions.<sup>22</sup> The three-judge appellate panel emphasized that “because we hear this matter on appeal from a denial of a preliminary injunction, all of our ‘conclusions’ and ‘holdings’ as to the merits of the various issues presented are to be understood as statements as to probable outcomes.”<sup>23</sup> At the time of the appeal, the United States Supreme Court had not yet ruled on the fetal description and reflection period questions. Thus, the appellate court could only predict how these requirements would fare upon Supreme Court review.

The linchpin of the appellate court’s ruling against the fetal description requirement was its view that such information “is not directly material to any medically relevant fact.”<sup>24</sup> Because of this supposed defect, the state’s interest in informed consent did not, in the court’s opinion, justify possible emotional reactions to learning about the unborn child’s development.<sup>25</sup> This portion of the decision was not unanimous. According to dissenting Judge Levin H. Campbell, “to say the fetus is irrelevant to an abortion is like saying the tonsils are irrelevant to a tonsillectomy.”<sup>26</sup> “Certainly to some patients the stage of development will be of perfectly rational interest,” Judge Campbell continued, because “it tells the potential mother something about the embryo being aborted.”<sup>27</sup> To exclude factual information of this sort as a matter of constitutional dictate “could have the peculiar effect of forbidding the state from including any factual information going to the broader social and public health aspects of an abortion.”<sup>28</sup> As made evident below, Judge Campbell, and not the majority, proved the better constitutional prophet in the long run.

The appellate court also opined that the reflection period requirement was not strictly “necessary” to achieve the state’s interest in “reduc[ing] impulsiveness and promot[ing] optimal decisions,” although the court conceded that such an interest was “not wholly irrational.”<sup>29</sup> Under the then-applicable strict scrutiny test the Supreme Court employed in abortion cases, the appellate court felt obliged to rule that both the fetal description and reflection period requirements were “probably unconstitutional.”<sup>30</sup>

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22. Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1023 (1st Cir. 1981). The appellate court upheld the statute’s requirements pertaining to minors and to the other informed consent provisions. *Id.*

23. *Id.* at 1009.

24. *Id.* at 1021.

25. *Id.* at 1022.

26. *Bellotti*, 641 F.2d at 1028 (Campbell, J., dissenting in part).

27. *Id.*

28. *Id.* at 1029.

29. *Id.* at 1016; *see id.* at 1014-16 (discussing reflection period issue).

30. Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1023 (1st Cir. 1981).

*C. 1986-1992: Judge Mazzone's 1987 Judgment*

After the appellate court remanded the case to the district court for trial, and after Judge Mazzone issued an appellate court-mandated preliminary injunction on April 22, 1981, nothing happened in the case with respect to the fetal description and reflection period requirements for several years.<sup>31</sup> On October 22, 1986, PPLM moved for a final injunction against the two provisions in question. PPLM based its motion on two Supreme Court decisions issued in 1983 and 1986 that struck down informed consent laws in other states.<sup>32</sup>

In *City of Akron v. Akron Center for Reproductive Health*<sup>33</sup> and *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>34</sup> the Supreme Court ruled that the state could not “influence the woman’s informed choice between abortion or childbirth,”<sup>35</sup> or “require[] the dissemination of information that is not relevant to such consent.”<sup>36</sup> The Court struck down mandates in Ohio and Pennsylvania that, similar to the Massachusetts law, required the discussion of specific information or categories of information beforehand, declaring that these laws were “nothing less than an outright attempt to wedge the Commonwealth’s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician.”<sup>37</sup> The Supreme Court also prohibited the state from requiring a twenty-four hour reflection period.<sup>38</sup> Thus, it appeared that a majority of the Supreme Court, in the words of PPLM’s 1986 brief accompanying its motion for a permanent injunction, “disapprove of virtually any attempt by the state to dictate to a physician the types of information that must be presented to a woman making the decision whether to have an abortion.”<sup>39</sup>

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31. A copy of the preliminary injunction was not included in the court records now in storage at the National Archives Waltham, Massachusetts Records Center, but a later document that PPLM filed noted that “[o]n or about April 22, 1981, the mandate of the Court of Appeals, directing the issuance of a preliminary injunction as to the statute’s waiting-period and fetal description requirements, was received in the District Court” and later asserted that “plaintiffs have obtained preliminary, but not permanent, injunctive relief.” Plaintiff’s Motion for Partial Summary Judgment & Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment at 3, 4, *Planned Parenthood League of Mass. v. Bellotti*, 499 F. Supp. 215 (D. Mass. 1986) (No. 80-1166-MA). The Archives has assigned the following identification number to the records: Accession # 21930002, Location C605929, Box 32.

32. See Plaintiff’s Motion for Partial Summary Judgment & Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment at 6-7, *Planned Parenthood League of Mass. v. Bellotti* (D. Mass. 1986) (No. 80-1166-MA) (citing *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)).

33. 462 U.S. 416 (1983).

34. 476 U.S. 747, 763 (1986).

35. *Akron*, 462 U.S. at 444.

36. *Thornburgh*, 476 U.S. at 763.

37. *Id.* at 762.

38. *Akron*, 462 U.S. at 450-51.

39. Plaintiff’s Memorandum of Law in Support of Motion for Partial Summary Judgment at 7, *Planned Parenthood League of Mass., Inc. v. Bellotti*, 499 F. Supp. 215 (D. Mass. 1986) (No. 80-1166-MA) (on file with the Massachusetts Catholic Conference (MCC)).

In an October 24, 1986 response to PPLM's motion, then-Attorney General Francis X. Bellotti was forced to concede that *Akron* and *Thornburgh*

make it unlikely that, regardless of any evidence [the state] might be able to offer [at trial], the [trial court] could find that the fetal description and twenty-four hour waiting period provisions of section 12S satisfy *current* constitutional standards, at least as those standards are defined by a majority of the present complement of the Supreme Court.<sup>40</sup>

One year later, on October 27, 1987, PPLM and new Attorney General James Shannon entered a joint "Stipulation and Agreement for Judgment" whereby both parties stipulated that

the [trial] Court may declare that the provisions of § 12S requiring that a woman's written consent to an abortion be obtained on a form containing a description of the development of a fetus and that the woman sign the prescribed form at least twenty-four hours in advance of having the abortion, are unconstitutional on their face.<sup>41</sup>

Consequently, Judge Mazzone issued a judgment dated November 2, 1987, stating that "[p]ursuant to § [¶] 2 of the stipulation of the parties . . . these provisions . . . are unconstitutional on their face."<sup>42</sup> On February 28, 1992, in what appears to be the final action in litigation spanning twelve years, Judge Mazzone reaffirmed that the 1987 judgment against the fetal description, and reflection period provisions "remain in full force and effect."<sup>43</sup>

There are three crucial points in Judge Mazzone's final judgment. First, as a final disposition of this portion of the case, the 1987 judgment effectively dissolved the 1981 preliminary injunction, even though the judgment did not refer to that injunction.<sup>44</sup> Second, Judge Mazzone approved the declaratory judgment *before* the Supreme Court overruled its *Akron* and *Thornburgh*

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40. Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment at 2, Planned Parenthood League of Mass., Inc. v. Bellotti, 499 F. Supp. 215 (D. Mass. docketed Oct. 27, 1986) (No. 80-1166-MA) (on file with MCC).

41. Stipulation for Agreement for Judgment at 1 ¶ 2A, Planned Parenthood League of Mass., Inc. v. Bellotti, 499 F. Supp. 215 (D. Mass. 1986) (No. 80-1166-MA) (on file with MCC).

42. Planned Parenthood League of Mass., Inc. v. Bellotti, No. 80-116-MA (D. Mass. Nov. 2, 1987) (order declaring section 12S unconstitutional).

43. Planned Parenthood League of Mass., Inc. v. Bellotti, No. 80-116-MA (D. Mass. Feb. 28, 1992) (order affirming judgment).

44. "A preliminary injunction . . . expires on entry of a final judgment in the cause, whether or not the final judgment makes mention of it." 14A CALLAGHAN & CO., CYCLOPEDIA OF FEDERAL PROCEDURE § 73.70 (3d ed. 2002) (citing *Parker v. Judges of the Circuit Court of Maryland*, 25 U.S. 561 (1827)); *see also* *Heasley v. United States*, 312 F.2d 641, 648 (8th Cir. 1963). The only portion of section 12S currently subject to a court injunction and thus unenforceable as written is the requirement that both parents consent to an unmarried minor's abortion. *Planned Parenthood League of Mass. v. Atty. Gen.*, 677 N.E.2d 101, 107 (Mass. 1997). In 1997, the Massachusetts Supreme Judicial Court ruled on state constitutional grounds that abortion providers need only obtain the consent of one parent and upheld an injunction prohibiting the State from enforcing the statute's two-parent requirement. *Id.* at 109.

decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>45</sup> on June 29, 1992. In overruling the earlier cases and upholding a Pennsylvania law that provided for a twenty-four hour reflection period and included a fetal description requirement even more detailed than that of Massachusetts, the Supreme Court eliminated the precedents upon which the 1987 declaratory judgment rested.<sup>46</sup> Third, the 1987 judgment failed to include injunctive language and is therefore tantamount to an outdated advisory opinion.<sup>47</sup> Thus, no binding injunction exists that bars enforcement of the entire informed consent statute.<sup>48</sup>

#### D. 1992: *The United States Supreme Court Decides Casey*

Between 1986 and 1992, the membership of the Supreme Court changed. Pennsylvania re-enacted essentially the same informed consent provisions and many commentators anticipated that, with the membership changes, the Supreme Court would not only reverse *Akron* and *Thornburgh* by upholding the provisions, but would also overturn *Roe v. Wade*.<sup>49</sup> Although the latter did not happen, the former did, as five Justices voted to uphold *Roe* and a different combination of seven Justices approved the informed consent provisions in *Casey*.

Regarding informed consent, four Justices maintained that *Akron* and *Thornburgh* were not controlling because *Roe* itself was wrongly decided.<sup>50</sup> "In light of our rejection of *Roe*'s 'fundamental right' approach to this subject," these Justices considered informed consent and reflection period provisions rational means to further the state's interests in "ensuring that the woman's consent is truly informed" and in protecting life.<sup>51</sup> Moreover, even under *Roe*,

[t]hat the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids

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45. 505 U.S. 833 (1992).

46. See *id.* at 881-87 (explaining reasoning behind overruling *Akron* and *Thornburgh*). "In order for an injunction to issue in the first place there must have been an existent right which was violated. The injunction is coextensive with that right. When the right ceases . . . the injunction also ceases to have any force or power." *Heasley*, 312 F.2d at 648 (quoting *Hafer v. Flynn*, 144 N.E.2d 747, 753 (Ill. App. Ct. 1957)).

47. FED. R. CIV. P. 65(d). Rule 65(d) of the Federal Rules of Civil Procedure requires that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *Id.*; see *Gunn v. Univ. Comm. to End the War in Vietnam*, 399 U.S. 383, 389 (1970) (recognizing lower court opinion lacked specific terms for injunctive relief and was thus non-binding); *Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir. 1990) (holding state not enjoined until federal judge specifies court action).

48. See *infra* notes 56-71 and accompanying text (discussing Attorney General's failure to enforce statute in its entirety).

49. *Roe v. Wade*, 410 U.S. 113 (1973).

50. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

51. *Id.* at 968-969.

the provision of such information. Indeed, it only demonstrates that this information might very well make a difference, and that it is therefore relevant to a woman's informed choice. . . . "[T]he ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice."<sup>52</sup>

Three other Justices also voted to uphold the informed consent and reflection period requirements, but not on the ground that *Roe* should be overturned.<sup>53</sup> In their opinion, *Akron* and *Thornburgh* went beyond what *Roe* required.<sup>54</sup> Specifically, the three Justices noted that these cases

are inconsistent with *Roe*'s acknowledgment of an important interest in potential life. . . . [M]ost women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.<sup>55</sup>

As for the fact that information about the unborn child only indirectly relates to the woman's health, the three Justices observed:

We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. . . . As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed even when in so doing the State expresses a preference for childbirth over abortion.<sup>56</sup>

Thus, these three Justices voted to overturn *Akron* and *Thornburgh* to the extent the rulings prevented the state from requiring the dissemination of "truthful, nonmisleading information."<sup>57</sup>

These three Justices concluded that a twenty-four hour reflection period requirement was constitutional as well.<sup>58</sup> Abandoning the constitutional framework found in *Akron* and *Thornburgh*, which the Justices described as a "strict prohibition of all regulation designed to promote the State's interest in . . . life," the Justices employed a more lenient "undue burden" analysis.<sup>59</sup> Only legislation "likely to prevent a significant number of women from

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52. *Id.* (citations omitted).

53. *Id.* at 882 (O'Connor, J., concurring).

54. *Casey*, 505 U.S. at 882 (O'Connor, J., concurring).

55. *Id.*

56. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882-883 (1992).

57. *Id.* at 882.

58. *Id.* at 886.

59. *Id.*

obtaining an abortion” would constitute an undue burden.<sup>60</sup> Even though a reflection period requirement might cause “increased costs and potential delays,” these burdens alone were not considered undue in light of the state’s legitimate interest in promoting careful decisionmaking.<sup>61</sup>

In *Casey*, seven out of the nine Supreme Court Justices upheld informed consent and reflection period requirements nearly identical to, if not more extensive than, the requirements at issue in the Massachusetts litigation. Moreover, since *Casey*, federal and state courts have upheld statutes based on the Pennsylvania model in eleven states.<sup>62</sup> The Supreme Court, with the addition of Justices not on the Court when *Casey* was issued, has declined to review three subsequent lower court decisions involving informed consent and reflection period requirements.<sup>63</sup>

Thus, because Judge Mazzone’s 1987 judgment lacks all force and effect according to federal precedent, the judgment no longer prevents Massachusetts from enforcing the fetal description and reflection period requirements of section 12S. Unfortunately, the Massachusetts authorities continue to abide by the 1987 judgment and thus fail to enforce the informed consent law in its entirety.

#### *E. 1995-Present: Attorneys General Decline to Act*

On August 22, 1995, the Pro-Life Legal Defense Fund, a Massachusetts attorneys’ organization dedicated to the protection of human life, requested that

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60. *Casey*, 505 U.S. at 893 (discussing why spousal notice requirement created undue burden).

61. *Id.* at 886-87.

62. See generally *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002); *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992); *Summit Med. Ctr. of Ala., Inc. v. Riley*, 274 F. Supp. 2d 1262 (M.D. Ala. 2003); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000); *Karlin v. Foust*, 975 F. Supp. 1177 (W.D. Wis. 1997), *aff’d in part and rev’d in part*, 188 F.3d 446 (7th Cir. 1999), *reh’g en banc denied*, 198 F.3d 620 (7th Cir. 1999); *Hope Med. Group for Women v. Ieyoub*, No. 95-1979, 1996 U.S. Dist. LEXIS 228 (E.D. La. Jan. 10, 1996); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409 (D.S.D. 1994), *aff’d*, 63 F.3d 1452 (8th Cir. 1995); *Utah Women’s Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482 (D. Utah 1994), *dismissed in part, rev’d and remanded in part*, 75 F.3d 564 (10th Cir. 1995); *Mahaffey v. Att’y Gen.*, 564 N.W.2d 104 (Mich. Ct. App. 1997), *appeal denied*, 616 N.W.2d 168 (Mich. 1998); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645 (Miss. 1998); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), *rev. denied*, 624 N.E.2d 194 (Ohio 1993). Appellate courts in two other states have struck down reflection periods longer than twenty-four hours in duration and informed consent provisions requiring the abortion physician to deliver the information personally, so ruling on the basis of state constitutional law. See generally *Florida v. Presidential Women’s Ctr.*, 707 So. 2d 1145 (Fla. Dist. Ct. App. 1998), *modified*, 23 Fla. L. Weekly 953 (Fla. Dist. Ct. App. 1998) (voiding requirement that referring or abortion physician personally inform woman of abortion risks and alternatives); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (striking forty-eight hour reflection period and requirement that abortion physician personally inform woman of abortion risks). In 1999, a single Montana state trial judge struck down on state law grounds a comprehensive informed consent statute in an unpublished ruling that was not appealed. *Planned Parenthood of Missoula v. Montana*, No. BVD 95-722 (Mont. Dist. Ct. Lewis & Clark County Dec. 29, 1999).

63. See generally *Leavitt v. Jane L.*, 520 U.S. 1274 (1997); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); *Barnes v. Moore*, 506 U.S. 1013 (1992).

then-Attorney General L. Scott Harshbarger enforce the parts of section 12S at issue. Writing on the Pro-Life Legal Defense Fund's behalf, Dwight Duncan and John Lahive argued that "[a]s a result of the *Casey* decision, it is abundantly clear that the Feb. 28, 1992, declaratory judgment is a nullity" and urged the Attorney General to "begin enforcing the provisions" of the law.<sup>64</sup> In the alternative, they argued that "if [the Attorney General does] consider [Judge Mazzone's judgment] an obstacle," the Attorney General is obligated to seek relief from the judgment on the grounds "that it is no longer equitable that the judgment shall have prospective application."<sup>65</sup>

On November 3, 1995, First Assistant Attorney General Thomas H. Green responded in a letter that the Attorney General's Office had decided to postpone any decision "on further litigation" because legislation to remove the twenty-four hour waiting period was pending.<sup>66</sup> According to Green, "we believe that it is reasonable to continue to avoid costly litigation over an issue that could be mooted in the Legislature. In the meantime, we will continue to monitor the issue and assess the basis for further litigation."<sup>67</sup> Green's letter did not reference any pending bills eliminating the fetal description requirement.

Green contended further that Judge Mazzone's 1987 judgment "is not . . . a nullity, at least not in the sense that it now lacks legal force."<sup>68</sup> He referred to *GTE Sylvania, Inc. v. Consumers Union of United States*,<sup>69</sup> arguing that the 1987 Judgment "remains a presumptively valid judgment until modified or vacated."<sup>70</sup> Yet, in the part of *Consumers Union* Green specifically cited, the United States Supreme Court held only that those parties "subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to reverse the order."<sup>71</sup> *Consumers Union* did not address a scenario where, as here, a court has issued only an outdated declaratory judgment rather than an injunction. The state in such a case is "under no decree. It need not dance to the judge's tune."<sup>72</sup> Thus, there is a compelling basis for concluding that Judge

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64. Letter from Dwight G. Duncan & John A. Lahive, Jr., Pro-Life Legal Defense Fund, Inc., to L. Scott Harshbarger, Massachusetts Attorney General 1, 2 (Aug. 22, 1995) (copies of all correspondence between Legal Defense Fund and office of Attorneys General L. Scott Harshbarger and Thomas Reilly on file with MCC).

65. *Id.* at 2 (quoting FED. R. CIV. P. 60(b)(5)).

66. Letter from Thomas H. Green, First Assistant Attorney General, to Messrs. Duncan and Lahive (Nov. 3, 1995) (on file with MCC).

67. *Id.*

68. *Id.*

69. 445 U.S. 375, 386 (1980).

70. Letter from Thomas H. Green, *supra* note 66.

71. Letter from Thomas H. Green, *supra* note 66.

72. *Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir. 1990); *see also* *Gunn v. Univ. Comm. to End the War in Vietnam*, 399 U.S. 383, 389 (1970) (recognizing per curiam "opinion" of lower court lacking specific terms for injunctive relief as non-binding).

Mazzone's 1987 judgment lacks legal force.

Nonetheless, Green advised that "before any public official could take action to enforce the 24-hour waiting period [and presumably the fetal description requirement], it would be necessary to move to modify or vacate the declaratory judgment."<sup>73</sup> As long as a bill proposing to delete the relevant portions of the informed consent law is pending before the legislature, the Attorney General's Office, under Green's reasoning, should refrain from making such a motion.

In response, Duncan and Lahive argued that "it is unreasonable in the extreme for the State's Attorney General to ignore for over three years an obviously applicable Supreme Court decision on the theory that he does not have to enforce the law if an amendment is merely introduced in the legislature."<sup>74</sup> They concluded that "[i]n effect, your view makes hash of the separation of powers" because "[i]t is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit."<sup>75</sup>

In March of 1999, after current Attorney General Thomas Reilly took office, representatives of the Pro-Life Legal Defense Fund requested a meeting to discuss the situation and urge the new Attorney General to enforce the provisions in question.<sup>76</sup> A meeting between Pro-Life Legal Defense Fund representatives and Reilly finally took place on March 30, 2000.<sup>77</sup> On December 6, 2000, Reilly informed the Pro-Life Legal Defense Fund that "this office has decided against moving to vacate [Judge Mazzone's] eight- and thirteen-year-old declaratory judgments."<sup>78</sup> To support his decision, Reilly cited "this office's extensive past use of resources in defending Section 12S over a period of many years, . . . the principle of finality . . . [and] other considerations" he failed to explain.<sup>79</sup> In sum, while unconstrained by any federal decree, the Attorney General nonetheless chose as a matter of internal office policy not to enforce the law on the books in its entirety.

## II. THE WOMAN'S RIGHT TO KNOW LEGISLATIVE PROPOSAL

Identical House and Senate bills entitled "An Act Relative to a Woman's Right to Know" are filed in the 2005-06 legislative session of the

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73. Letter from Thomas H. Green, *supra* note 66.

74. Letter from Dwight G. Duncan & John A. Lahive, Jr., Pro-Life Legal Defense Fund, Inc., to L. Scott Harshbarger, Massachusetts Attorney General 1 (Mar. 18, 1996) (quoting Opinion of the Justices to the Senate, 375 Mass. 827, 833 (1978)) (on file with MCC).

75. *Id.*

76. Letter from Philip D. Moran, Dwight G. Duncan & Luke Stanton, Pro-Life Legal Defense Fund, to Thomas Reilly, Massachusetts Attorney General 1 (Mar. 27, 1999) (on file with MCC).

77. *See generally* Minutes of the Pro-Life Legal Defense Fund Board of Directors (Apr. 12, 2000) (on file with MCC).

78. Letter from Thomas F. Reilly, to Robert H. Quinn (Dec. 6, 2000) (on file with MCC).

79. *Id.*

Massachusetts General Court.<sup>80</sup> The legislation establishes a process for informing a woman seeking an abortion prior to obtaining her consent, designates who is responsible for offering the information, and describes the information they should provide.<sup>81</sup> Pursuant to the legislation, at least twenty-four hours before an abortion is scheduled to be performed, the referring physician, the physician who will perform the procedure, or a person either of these physicians designates must inform the woman that state-provided general information about abortion and its alternatives is available in the form of a printed brochure, through an online website, or by phone-recorded audio message.<sup>82</sup>

A woman must give her written consent before the abortion is performed.<sup>83</sup> Prior to her consent, however, the legislation requires two further oral exchanges. First, the woman's referring physician or the physician performing the abortion must directly provide the woman with certain information specific to her situation.<sup>84</sup> Second, one of these two physicians or a person that either of them designates must tell the woman that alternatives to abortion are available and give the woman an opportunity to contact abortion alternative agencies.<sup>85</sup> During this exchange, the physician or their designee must again offer the woman access to the general information packet that contains the list of abortion alternative agencies.<sup>86</sup>

The legislation specifies the information that the state must include in the general information packet, as well as the information that physicians must provide in their case-specific exchange with the woman. The pamphlet, replicated for online and phone access, must include:

- written notice of the rights guaranteed in the Massachusetts patients' rights statute;
- a comprehensive list, with contact information, of abortion alternatives and pregnancy assistance agencies in Massachusetts;
- a description, including pictures, of fetal development at two week stage intervals;
- a discussion of the various abortion methods, pregnancy, and delivery, and the risks commonly associated with each;
- an explanation of the support obligations of the father; and
- statements that refusing an abortion is not grounds for denial of public

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80. H.D. 726, 184th Gen. Ct., Reg. Sess. (Mass. 2005); S.D. 1116, 184th Gen. Ct., Reg. Sess. (Mass. 2005); *see also* H.B. 2644, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (containing women's right to know legislation as originally filed in House); S.B. 1069, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (containing women's right to know legislation as originally filed in Senate).

81. *See supra* note 80.

82. *See supra* note 80.

83. *See supra* note 80.

84. *See supra* note 80.

85. *See supra* note 80.

86. *See supra* note 80.

assistance, that the law permits adoptive parents to pay the costs of childbirth-related care, that coercing a woman to obtain an abortion is unlawful, and that physicians who perform abortions without obtaining informed consent may be liable for civil damages.<sup>87</sup>

The legislation instructs the Department of Public Health to produce the materials in the required formats, rely on the definitions of key terms found in other sections of the comprehensive abortion statutes, ensure that the materials are “objective, nonjudgmental and designed to convey only accurate scientific information,” and craft the documents so that a person unfamiliar with medical technology can understand them.<sup>88</sup> The state must offer translations of the materials in Spanish, Portuguese, and any other language that more than two percent of the state’s population speaks.<sup>89</sup>

The oral exchange between the woman and her physician must cover the nature of the proposed abortion method, the risks associated with this method, and the alternatives.<sup>90</sup> The exchange must include any information concerning these topics that “a reasonable patient in the woman’s position would consider material to the decision of whether to undergo the abortion.”<sup>91</sup> In addition, the physician must inform every woman about the probable gestational age and anatomical and physiological characteristics of the child the woman is carrying.<sup>92</sup>

Opponents have attacked the proposed woman’s right to know legislation as biased.<sup>93</sup> State neutrality in all laws regarding the abortion decision is consistent with both federal abortion jurisprudence and Massachusetts Supreme Judicial Court decisions. The proposed legislation, however, does not fail this requirement. Far from creating an imbalance in abortion counseling, the woman’s right to know law would help right the imbalance that presently exists.

### *A. The Need for Neutrality in the Abortion Decision*

#### *1. Federal Jurisprudence: Neutrality is Constitutional*

In the 1973 *Roe* decision, Justice Blackmun conceptualized a woman’s “right . . . to choose to terminate her pregnancy”<sup>94</sup> as a “right of privacy.”<sup>95</sup> While the shield *Roe* erected against governmental intrusion was not

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87. See *supra* note 80.

88. See *supra* note 80.

89. See *supra* note 80.

90. See *supra* note 80.

91. See *supra* note 80.

92. See *supra* note 80.

93. See *supra* notes 7-9 and accompanying text (citing arguments against legislation).

94. *Roe v. Wade*, 410 U.S. 113, 129 (1973).

95. *Id.* at 152.

impermeable, and the *Roe* decision recognized the reality of the choice to continue pregnancy, the judicial scrutiny *Roe* unleashed against public policymaking on abortion was suspicious and hostile.<sup>96</sup> Decisions prior to 1992 maintained that the right to an abortion is protected not only from outright prohibition, but also from any less restrictive public policy “designed to influence the woman’s informed choice between abortion or childbirth.”<sup>97</sup> Rather than accepting at face value the government’s assertions of more benign motives, the Court in 1983 and 1986 regarded laws requiring women to receive particular information as “poorly disguised” attempts to discourage abortion<sup>98</sup> and to “intimidate women.”<sup>99</sup> The Court faulted these laws for wedging supposedly inappropriate public values into the privacy of the doctor-patient relationship.<sup>100</sup>

In 1992, a change in the Court’s judicial personnel led to a shift in the way the Court characterizes the individual interest at stake. The Court became somewhat less antagonistic toward public oversight of abortion. In *Casey*, abortion was largely recast as a “liberty” claim rather than a “privacy” interest.<sup>101</sup> As a result, regulations are no longer subject to strict scrutiny merely because they intrude into the privacy of the doctor-patient relationship.<sup>102</sup>

This allowance for greater state intrusion reflects a reappraisal of the actual circumstances surrounding an abortion choice. Viewing the right to choose solely as a matter of privacy overlooks reality. The choice to abort is not an insular act. Rather, according to the joint opinion:

[abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.<sup>103</sup>

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96. See *supra* Part I.B-C (discussing judicial decisions disfavoring government abortion choice regulation).

97. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983).

98. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 763 (1986).

99. *Id.* at 759.

100. *Id.* at 762.

101. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 883, 896, 900 (1992). The joint opinion of Justices O’Connor, Souter, and Kennedy refers only four times to “privacy,” while using the term “liberty” almost exclusively and certainly far more frequently. *Id.* Four other Justices rejected outright the privacy reference. See *id.* at 950-51 (Rehnquist, C.J., dissenting in part and concurring in part); see also *id.* at 980 (Scalia, J., dissenting in part and concurring in part).

102. See *id.* at 871 (noting change in Court’s approach to scrutiny analysis); *id.* at 966 (Rehnquist, C.J., dissenting in part and concurring in part) (arguing “Constitution does not subject state abortion regulations to heightened scrutiny”).

103. *Id.* at 852; *id.* at 952 (Rehnquist, C.J., dissenting in part and concurring in part) (opining “[o]ne cannot ignore the fact that a woman is not isolated in her pregnancy”).

Thus, the Court need not treat the right to choose between abortion and childbirth as a decision made in a vacuum. Similarly, the joint opinion explained that the Court should abandon *Roe*'s "rigid trimester framework," which severely circumscribed state regulation, because "it misconceives the nature of the pregnant woman's interest."<sup>104</sup> The right to choose abortion is not "an absolute right" protecting against all state interference whatsoever.<sup>105</sup> Only interference "which deprive[s] women of the ultimate decision" is impermissible.<sup>106</sup> In sum, "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."<sup>107</sup>

As a result, because abortion is consequential for the woman, for her unborn child, for her family, and for society, the *Casey* Court found that the state may establish a procedural framework that affords women the opportunity to consider these consequences fully.

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. . . . It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.<sup>108</sup>

This brief survey of federal jurisprudence demonstrates the existence of two different conceptions of the "right to choose." The earlier view of the Supreme Court locates the woman in nearly impregnable isolation, while the later view situates her within a web of relationships and consequences. In the earlier view, the objectionable constitutional injury results from even minimal contact with influences potentially altering a woman's decisional course. In the later view, the objectionable injury results only when restrictions are so overriding as to unduly burden a woman's ability to make a choice one way or the other. The later view recognizes that extenuating circumstances exist that belie any claim that the choices at stake are made in black holes, bereft of any connections to the surrounding fabric of social interests. Pursuant to this view, the law is not obliged to stop every outside influence on a woman's right to choose. It is not anti-choice<sup>109</sup> to allow that the woman's choice affects other choices. Nor is it anti-choice to permit the government to open up the wall around the right to choose in order to accommodate the inflow of information

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104. *Id.* at 873.

105. *Casey*, 505 U.S. at 875.

106. *Id.*

107. *Id.* at 877.

108. *Id.* at 872-73.

109. See *supra* note 7 and accompanying text (characterizing woman's right to know laws as "anti-choice").

about other affected interests. A deliberative framework for informed choice that does not wrest from a woman ultimate control of the decision fails to impermissibly infringe on her right to choose.

The shift in federal jurisprudence that the Supreme Court effected in *Casey* can be summarized in terms that relate directly to the abortion jurisprudence in Massachusetts. The *Casey* ruling instructed states that neutrality in the abortion decision-making process, or, more specifically, neutralizing statutory measures, are consistent with federal guarantees of protected choice and thus constitutional.

### *B. State Jurisprudence in Massachusetts: Neutrality is Required*

In *Moe v. Secretary of Administration & Finance*,<sup>110</sup> the Massachusetts Supreme Judicial Court (SJC) referred, for the first time in an abortion case, to a state constitutional jurisprudence that exists independently from federal law.<sup>111</sup> The SJC characterized the protected choice as “the decision whether or not to beget or bear a child.”<sup>112</sup> The SJC equated the constitutional status of this choice to that associated with “a strong interest in being free from nonconsensual invasion of [one’s] bodily integrity.”<sup>113</sup>

The state constitutional guarantee of privacy, according to the SJC, differs in certain respects from any federal guarantee. First, a government decision to subsidize one option but not the other is treated as a burden on the right to choose. Under federal jurisprudence, a selective funding policy creates no government obstacle to the unsubsidized option, and thus is not characterized as interference.<sup>114</sup> Under state jurisprudence, however, the SJC determined that it “is not free to disregard the practical realities.”<sup>115</sup> Facilitating one option in the face of private obstacles blocking the other option, such as the inability to pay, is considered a “coercive” intrusion.<sup>116</sup> In effect, state encouragement of one option is deemed a burden on the right to choose because the lack of encouragement for the other option is characterized as “discouraging” the other option.<sup>117</sup> Under this analysis, funding all medically necessary services related to childbirth, but not all medically necessary services related to abortion, “deprives the indigent woman of her freedom to choose abortion over maternity.”<sup>118</sup>

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110. 417 N.E.2d 387 (Mass. 1981).

111. *Id.* at 399, 400.

112. *Id.* at 399 (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977)).

113. *Id.* (quoting *In re Spring*, 380 Mass. 629, 634 (1980)).

114. *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 399-400 (Mass. 1981) (citing *Williams v. Zbaraz*, 448 U.S. 358 (1980), *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977)).

115. *Id.* at 401 (citation omitted).

116. *Id.* at 402 (citation omitted).

117. *Id.* (citing Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court’s Role in American Government*, 66 GEO. L.J. 1191, 1196 (1978)).

118. *Moe*, 417 N.E.2d at 402 (citation omitted).

Second, according to the SJC, “once [the government] chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman . . . .”<sup>119</sup> In other words, “the limitation on State action which is imposed . . . is one of neutrality.”<sup>120</sup> Thus, the government “may not use criteria which discriminatorily burden the exercise of a fundamental right.”<sup>121</sup>

Third, a finding of such a burden on the right to choose will not trigger automatic, and usually fatal, strict scrutiny.<sup>122</sup> Rather than employing the undue burden analysis used in *Casey*,<sup>123</sup> however, the SJC will apply a balancing test that weighs the various competing interests.<sup>124</sup> In *Moe*, the SJC claimed that federal constitutional law “constrained” the court “from imputing to the State any interest in protecting the fetus as a ‘third party’” before viability.<sup>125</sup> As a result, the SJC struck down a state ban on abortion funding because the resulting discouragement of abortion would lead to “enforced pregnancy,” thereby leaving “the balance in this case to be decisively in favor of the individual right [to choose abortion].”<sup>126</sup>

Other SJC decisions provide further insight. In *Planned Parenthood League of Massachusetts v. Attorney General*,<sup>127</sup> the SJC recognized that “[t]he State has an independent interest in ensuring that the decision to have an abortion is free and considered.”<sup>128</sup> Although the SJC limited its ruling in that case to decision making by minors,<sup>129</sup> it has recognized a similar interest applicable to adults in the context of medical choices.

In the seminal opinion issued in *Harnish v. Children’s Hospital Medical Center*<sup>130</sup> the SJC described the contours of “the patient’s right to know”<sup>131</sup> with respect to medical treatment consent:

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119. *Id.*

120. *Id.* at 400.

121. *Id.* at 401 (citations omitted).

122. *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 403 (Mass. 1981).

123. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874-79 (1992) (setting forth undue burden test).

124. *Moe*, 417 N.E.2d at 402-03. Using the “undue burden” test, the joint opinion in *Casey* examined the extent of the burden to see if it created a “substantial obstacle” barring the exercise of a particular choice. *Casey*, 505 U.S. at 877. Under the “balancing” test, however, the SJC compares the competing state and private interests and weighs the resulting harms where either interest is not effectuated. *Moe*, 417 N.E.2d at 403-04.

125. *Moe*, 417 N.E.2d at 404 n.21.

126. *Id.* at 404. Of course, federal jurisprudence after the Supreme Court’s decision in *Casey* allows the state to justify regulations throughout pregnancy, not just after viability, by reference to an interest in protecting “potential” life and encouraging childbirth. *Casey*, 505 U.S. at 871-72.

127. 677 N.E.2d 101 (Mass. 1997).

128. *Id.* at 106.

129. *Id.* at 104. “It is, of course, crucial in justification of these [parental consent and alternative judicial approval] requirements that the person seeking to have an abortion is a minor.” *Id.*

130. 439 N.E.2d 240 (Mass. 1982).

131. *Id.* at 244.

There is implicit recognition in the law of the Commonwealth, as elsewhere, that a person has a strong interest in being free from nonconsensual invasion of his bodily integrity. . . . In short, the law recognizes the individual interest in preserving the inviolability of his person. One means by which the law has developed in a manner consistent with the protection of this interest is through the development of the doctrine of informed consent. [I]t is the prerogative of the patient, not the physician, to determine . . . the direction in which . . . his interests lie. Every competent adult has a right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession. Knowing exercise of this right requires knowledge of the available options and the risks attendant on each. We hold, therefore, that a physician's failure to divulge in a reasonable manner to a competent adult patient sufficient information to enable the patient to make an informed judgment whether to give or withhold consent to a medical or surgical procedure constitutes professional misconduct .

. . . [A] physician owes to his patient the duty to disclose in a reasonable manner all significant medical information that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a proposed procedure. . . . Materiality may be said to be the significance a reasonable person, in what the physician knows or should know is his patient's position, would attach to the disclosed risk or risks in deciding whether to submit or not to submit to surgery or treatment. The materiality determination is one that lay persons are qualified to make without the aid of an expert. Appropriate information may include the nature of the patient's condition, the nature and probability of risks involved, the benefits to be reasonably expected, the inability of the physician to predict results, if that is the situation, the irreversibility of the procedure, if that be the case, the likely result of no treatment, and the available alternatives, including their risks and benefits. The obligation to give adequate information does not require the disclosure of all risks of a proposed therapy or of information the physician reasonably believes the patient already has, such as the risks, like infection, inherent in any operation.

Many jurisdictions have adopted the rule that a physician must disclose to his patient only such information as is customarily disclosed by physicians in similar circumstances. We think that the better rule is the one we adopt today. The customary practice standard overlooks the purpose of requiring disclosure, which is protection of the patient's right to decide for himself.

We recognize that, despite the importance of the patient's right to know, there may be situations that call for a privilege of nondisclosure. For instance, sound medical judgment might indicate that disclosure would complicate the patient's medical condition or render him unfit for treatment. "Where that is so, the cases have generally held that the physician is armed with a privilege to keep the information from the patient. . . . The physician's privilege to

withhold information for therapeutic reasons must be carefully circumscribed, however, for otherwise it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels the patient really needs.<sup>132</sup>

In light of *Harnish*, the parameters of the right to choose in Massachusetts necessarily implicate the duty of full disclosure on the part of abortion providers because abortion is a medical procedure. Thus, it is not anti-choice to require that a woman receive information that a reasonable patient in her situation would deem material, even if such information may persuade her not to choose an abortion and even if most women would not be similarly persuaded. Nor is it anti-choice when the state acts to make the informed consent process more neutral, requiring physicians to either divulge material information, even if they believe it will lead to an unwise rejection of their medical services, or face disciplinary action for misconduct. Finally, even if the state is barred constitutionally from advancing a direct interest in protecting unborn human life, if a reasonable patient in the woman's position would want to know about an abortion's impact on the unborn child, then it is not anti-choice to require the disclosure of such information.

The Massachusetts courts have not yet addressed the informed consent issue in a case involving an adult woman seeking an abortion. Taking into consideration current informed consent practices that reflect a lack of neutrality and applying the existing Massachusetts precedents, however, the proposed woman's right to know legislation should be upheld as constitutional.

### III. CONSENT IN MASSACHUSETTS AND THE CURRENT LACK OF NEUTRALITY

Women in Massachusetts undergo a pre-abortion process that lacks neutrality and thus fails to ensure their receipt of information material to a reasonable patient in their circumstances. Evidence of this lack of neutrality is not difficult to unearth. Judge Mazzone's findings of fact in *Planned Parenthood League of Massachusetts v. Bellotti*<sup>133</sup> have already been discussed.<sup>134</sup> In *Bellotti*, abortion counselors at PPLM admitted they "shield[ed] women" from factual information relating to fetal development and "discount[ed] the value of, or need for this type of information," even though providing it might have led some women to change their minds.<sup>135</sup>

The following discussion looks more closely at recent signs of the lack of

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132. *Id.* at 242-44 (footnotes, citations and internal quotation omitted).

133. 499 F. Supp. 215 (D. Mass. 1980).

134. See *supra* Part I.A (discussing *Bellotti* decision).

135. *Bellotti*, 499 F. Supp. at 219. PPLM is the largest abortion provider in Massachusetts, performing 13,309 of the 26,293 abortions performed statewide in 2001, the latest year for which statistics are available. REGISTRY OF VITAL RECORDS AND STATISTICS, MASS. DEP'T OF PUB. HEALTH, ABORTION TABLES 2001 tbls.1, 10 (2003).

neutrality in the abortion consent process, namely published materials describing an ideological opposition to neutrality among feminist theorists, official counseling standards that abortion ethicists and practitioners promulgate, and state-approved abortion consent forms in Massachusetts.

#### A. Ideological Opposition to Neutrality

The lack of neutrality in abortion counseling practice is best understood with reference to the ideology of abortion rights advocacy. Abortion rights advocates tag woman's right to know laws of the kind introduced in Massachusetts as "anti-choice,"<sup>136</sup> positing informed choice as antithetical to protected choice. This antithesis suggests an ideological understanding that does not believe that balanced information regarding available options leads to a truly free choice.

Abortion rights advocates' opposition to informed consent requirements appears to stem from two ideological considerations.<sup>137</sup> First, to compel disclosure of any kind suggests an anti-feminist judgment against women and their capacity to decide.

In the early days, we were so excited to have abortion legal, women had been wanting this for so many decades, that we looked at each other and said, 'Of course, they know what they're doing.' Providers shared a basic belief that patients arrived resolved, and they were reluctant to intrude on the women's privacy. [Our policies were] founded on an attitude of 'Who am I to prod?' and 'Who am I to second-guess?' says [Ruth] Arick [an abortion clinic consultant for the past thirteen years].<sup>138</sup>

There are those who continue to insist on the following approach as a supposed dictate of feminist principles:

By definition, all abortion provision is a feminist endeavor. In a simple interaction, a woman defines her own problem and comes to a doctor or a physician assistant to ask for a specific procedure. She says, 'May I please have an abortion?' and the practitioner replies, 'Yes you may.' The physician, generally accustomed to controlling the interaction, providing nomenclature, diagnosis, and treatment, listens to the woman and does what she asks. Where

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136. See generally Memorandum from NARAL Pro-Choice America Legal Dep't, *supra* note 7.

137. More practical influences may also be at work.

In . . . large metropolitan areas around the country, there are not too few abortion providers, as abortion proponents have lamented for years. There are too many. . . . [A]s the number of abortions has declined, abortions increasingly have been concentrated in specialty clinics in cities and pockets of competition have developed. . . . Dr. Warren Hern, owner of the Boulder Abortion Clinic in Colorado . . . said, 'the competition for patients is absolutely ruthless.' . . . 'As altruistic as women and feminists want to be, the reality is that we can only stay in business if we earn enough to keep our doors open,' Ms. [Renee] Chelian [who runs three abortion clinics in the Detroit suburbs] said.

Gina Kolata, *As Abortion Rate Decreases, Clinics Compete for Patients*, N.Y. TIMES, Dec. 30, 2000, at A1.

138. Daryl Chen, *Are You Ready to Really Understand Abortion?*, GLAMOUR, Sept. 2003, at 264, 294.

else in medicine do we consistently find this happening?<sup>139</sup>

Second, given the abortion right's centrality in the postmodern feminist identity, certain information is deemed irrelevant per se to a woman's choice, especially data that abortion providers believe could reinforce a sense of inadequacy or imply a second-class status for women. Particularly touchy subjects are negative post-abortion reactions and fetal development.

The online materials of the Planned Parenthood Federation of America (PPFA) provide a case-in-point. In a discussion of studies relating to post-abortion emotional effects, PPFA portrays abortion as "a maturing experience, a successful coping with a personal crisis situation," and theorizes that this "positive relationship of abortion to well-being may be due in part to abortion's role in controlling fertility and its relationship to coping resources."<sup>140</sup> Any contention that abortion poses risks of psychological trauma known as "'post-abortion syndrome'" purportedly stems from the "fact . . . that anti-abortion groups have invented this condition to further their cause."<sup>141</sup>

Elsewhere on its website, PPFA avows its organizational convictions that "[a] woman is more than a fetus" and that it is for the woman to decide whether her "fetus is a 'person' that is 'indistinguishable from the rest of us' and that . . . deserves rights equal to women's."<sup>142</sup> To grant the fetus "rights equal to or superior to a woman's—a thinking, feeling, conscious human being—is arrogant and absurd. It serves only to diminish women."<sup>143</sup> PPFA concludes that "[a]t the most basic level, the abortion issue is not really about abortion. It is about the value of women in society."<sup>144</sup>

These convictions, combined with the belief that abortion must be available

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139. Elizabeth Karlin, *We Called It Kindness: Establishing a Feminist Abortion Practice*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 273, 279 (Rickie Solinger ed., 1998). The author, an abortion clinic administrator, describes herself as "an unapologetic feminist physician" who performs "unapologetic, feminist abortions." *Id.* Other feminists dispute the claim that an allegiance to feminism mandates this no-questions-asked acceptance of abortion. See Serrin M. Foster, *The Feminist Case Against Abortion*, at <http://www.feministsforlife.org/news/commonw.htm> (last visited Mar. 25, 2005). Serrin Foster, President of Feminists for Life, observes that "[t]he now revered feminists of the 19th century were also strongly opposed to abortion because of their belief in the worth of all humans." *Id.* Citing evidence that such feminist pioneers as Susan B. Anthony and Elizabeth Cady Stanton "condemn[ed] abortion in the strongest possible terms," Foster argues that "certain factions of the woman's movement" have "made a drastic about-face" by claiming abortion access to be an essential feminist tenet. *Id.* Foster asserts that right to know legislation is not inconsistent with feminism because such laws "empower women" to exercise their "right to make informed decisions about pregnancy" and their "right to full disclosure." *Id.* See generally *THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION* (E. Bachiochi ed., 2004) (containing excellent series of recent pro-life feminist reflections on abortion's impact on women).

140. PLANNED PARENTHOOD FEDERATION OF AMERICA, FACT SHEET: THE EMOTIONAL EFFECTS OF INDUCED ABORTION, at [http://www.plannedparenthood.org/library/facts/emoteff\\_010600.html](http://www.plannedparenthood.org/library/facts/emoteff_010600.html) (last visited Mar. 25, 2005).

141. *Id.*

142. PLANNED PARENTHOOD FEDERATION OF AMERICA, ABORTION: NINE REASONS WHY ABORTIONS ARE LEGAL, at <http://www.plannedparenthood.org/abortion/9reasons.html> (last visited Mar. 25, 2005).

143. *Id.*

144. *Id.*

to women for any reason, exert an inevitable prejudice. In effect, these convictions make it difficult to maintain a position of neutrality with respect to abortion and its alternatives.

According to Dr. Maureen Paul, former medical director for PPLM:

In my work, I've come to know the enormously diverse reasons that women choose abortion, and I have never met a woman with a 'bad' reason for doing so. I've cared for some women who feel guilty, many more who feel relieved, and all who know that their decision makes sense in the context of their own lives and responsibilities. The only 'morality' of abortion that I recognize is the moral authority of women to determine their own destinies.<sup>145</sup>

Further, according to noted feminist theorist Beverly Wildung Harrison, any comparison between fetal and maternal interests should never fail to favor the latter.

It is morally wiser for a woman deliberating about abortion early in pregnancy to recognize that she has an *active* obligation to think of the embryo or fetus *not* as an existing human life, but as a powerfully potential soon-to-be human life that will require deep moral commitments and claim her obligations dramatically. The most conscientious decisions at this point in pregnancy can be made only if a woman or girl can free her imagination to ponder what it may mean to have a child. There is much to be gained morally from helping pregnant women to learn to think this way.<sup>146</sup>

As perceived within this particular frame of feminist theory, even the act of presenting a fetal image to a woman considering abortion threatens the interests of women. When "the politics of fetal personhood" employs fetal photographs or ultrasound glimpses that may humanize the unborn child, this supposedly constitutes a "theft of meaning of gender, maternity, and childbirth from women," according to Lauren Berlant.

This focus on the fetus, Berlant claims, "has pushed the mother into the fuzzy, unfocused part of the picture, throwing her body into a suspension of meaning and value with implications both intimate and national."<sup>147</sup>

When the ideological scales tilt in this manner, the resulting informed consent process cannot help but to become skewed. In her revealing book *Abortion at Work: Ideology and Practice in a Feminist Clinic*,<sup>148</sup> Wendy Simonds recounts practices at an abortion facility performing first and second trimester abortions. She reports that "[p]ro-choice activists have generally

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145. Maureen Paul, *Abortion's Past*, BOSTON REVIEW, Summer 1996, at 26, 27, available at <http://www.bostonreview.net/BR21.3/Paul.html>.

146. GERMAIN KOPACZYNSKI, NO HIGHER COURT: CONTEMPORARY FEMINISM AND THE RIGHT TO ABORTION 201 (1995) (quoting Beverly Wildung Harrison, *Feminist Realism*, 46 CHRISTIANITY AND CRISIS 233, 235 (1986)).

147. *Id.* at 212.

148. WENDY SIMONDS, ABORTION AT WORK: IDEOLOGY AND PRACTICE IN A FEMINIST CLINIC (1996). Simonds is a feminist who supports abortion rights. See *id.* at 7.

striven to separate our language from the antis', utilizing medicalized or sanitized words as if they would neutralize the antis' efforts: Center staff members commonly said 'the pregnancy,' 'the tissue,' 'the products of conception.'"<sup>149</sup>

Simonds refers to an earlier "ethnographic work at an abortion clinic that performed first trimester abortions," written by Carole Joffe.<sup>150</sup> According to Simonds, Joffe reported that "[a]lthough it was acknowledged that many clients would refer to this as the 'baby,' or the 'pregnancy,' new counselors were, not surprisingly, urged not to use these charged terms, but instead to use the more neutral, though admittedly more awkward, 'product of conception' or 'tissue.'"<sup>151</sup>

This ideological imbalance makes honesty about abortion difficult for abortion advocates.<sup>152</sup> At another point in her book, Simonds writes that:

Center staff often remarked that pro-choice rhetoric obscured abortion itself with innocuous words. They said it refused to acknowledge what abortions look like and what abortions feel like for the women who decide to have them. Basically, pro-choice language does not speak openly about abortion.<sup>153</sup>

Simonds then quotes a clinic staffer:

I think the pro-choice movement has neglected to deal with a lot of the stuff that goes on as far as, like they always say, 'It's a choice.' . . . Well, it's a hell of a lot more than a choice. It's, you know, one of the most difficult decisions a woman will ever make in her life. . . . It is a very fundamental decision that is going to affect the rest of your life. And I think the antis prey on that. . . . It can be a traumatic thing for a woman. I think the pro-choice movement has just neglected to deal with . . . a lot of the feelings that women actually have about abortion.<sup>154</sup>

A notable rebellion of sorts is occurring among abortion providers. The September 2003 issue of *Glamour Magazine* carried an article on the "November Gang," a group of abortion providers who advocate "intensive counseling" to all women, "whether they're calm and resolved or terrified and guilt-ridden."<sup>155</sup> The counselors are free to use words such as "killing" and "baby" if those are words the woman uses.<sup>156</sup> The article continued:

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149. *Id.* at 80. The term "antis" refers to "anti-abortionists." *Id.*

150. *Id.* at 80 (referencing CAROLE JOFFE, *THE REGULATION OF SEXUALITY: EXPERIENCES OF FAMILY PLANNING WORKERS* (1986)).

151. SIMONDS, *supra* note 148, at 79 (quoting CAROLE JOFFE, *THE REGULATION OF SEXUALITY: EXPERIENCES OF FAMILY PLANNING WORKERS* 94 (1986)).

152. See Naomi Wolf, *Our Bodies, Our Souls*, *NEW REPUBLIC*, Oct. 16, 1995, at 26 (containing pro-choice feminist philosopher's more extensive treatment of this topic).

153. SIMONDS, *supra* note 148, at 93.

154. SIMONDS, *supra* note 148, at 93.

155. Chen, *supra* note 138, at 265.

156. Chen, *supra* note 138, at 265-66.

Prior to November Gang, I used the language of the movement: ‘It’s your choice, what do you want to do?’ says member Renee Chelian, executive director of three Northland Family Planning Centers in Detroit. ‘But we know when a woman comes into the clinic she’s pregnant, and when she leaves, she’s not. I’ll let her call that what she wants to call it.’ . . . [If it is revealed in counseling] that a patient equates ending her pregnancy with murdering a living person, Chelian and other November Gang members tell her to take more time to think about the decision. ‘Murder is illegal,’ says Chelian. ‘If someone is asking us to participate in murder, I can’t feel good about the work I do and neither can the staff.’ Although this scenario rarely occurs, she has received letters from some of the patients she turned away, thanking her for the intervention that resulted in the child they have today.<sup>157</sup>

The November Gang procedures, however, have met with stiff resistance within the abortion rights movement. Among other responses noted, the

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157. Chen, *supra* note 138, at 266. In a recent, attention-getting article, long-time abortion rights activist Frances Kissling admitted that:

[T]hose committed to the right to choose have felt forced to defend what appears to be an absolute right to abortion that brooks no consideration of other values, legal or moral. This often means a reluctance to even consider whether or not fetal life has value, or an attempt to define that value or to see how it can be promoted without restricting access to legal abortion. As the fetus has become more visible through both antiabortion efforts and advances in fetal medicine, this stance has become less satisfying as either a moral framework or a message strategy responding to the concerns of many American who are generally both supportive of and uncomfortable with legal abortion.

Frances Kissling, *Is There Life After Roe?: How to Think About the Fetus*, at <http://www.catholicsforchoice.org/conscience/current/LifeAfterRoe.htm> (last visited Mar. 25, 2005). Further, Kissling noted that:

the conventional wisdom in the prochoice movement has been that talking about fetal life is counterproductive. In the polarized climate created by absolutists opposed to legal abortion, a siege mentality has developed. Prochoice advocates fear that any discussion of fetal value will strengthen the claim that if the fetus has value, abortion must be prohibited in all or most circumstances.

*Id.* Kissling worried

whether or not regular exposure to the taking of life in abortion or the defense of a right to choose abortion would, if not addressed, lead to a coarsening of attitude toward fetal life. The inability of prochoice leaders to give any specific examples of ways in which respect for fetal life can be demonstrated or to express any doubt about any aspect of abortion suggests that such a hardening of the heart is possible.

*Id.* Kissling wondered if there are “ways to affirm and protect the right to choose abortion while actively promoting policies which would actually enhance reflection and good decisionmaking and supporting voluntary mechanisms for nonjudgmental reflection and alternatives to abortion?” *Id.* She specifically recommended that the prochoice movement not reflexively oppose an “informed consent” proposal in Congress requiring abortion providers to tell women seeking abortions about the pain that an abortion may cause the fetus and offer the woman the opportunity to anesthetize the fetus beforehand. *Id.* She advised that:

this is one more opportunity to assure the public that we do value fetal life. We are concerned about the possibility that fetuses may feel pain and are committed to ensuring that abortion services are delivered in a way that respects a woman’s right to choose, and that provides her with all available information about the abortion procedure and its risks. . . . Thus we would recommend that those who provide abortion provide the option of fetal anesthesia.

*Id.*; see also Julia Duin, *Pro-Choicers Told to Rethink*, WASH. TIMES, Dec. 6, 2004, at A4 (discussing Kissling’s article); Sharon Lerner, *The Fetal Frontier: Pro-Choice Advocates Wrestle with the Uncomfortable*, VILLAGE VOICE, Dec. 14, 2004, at 44 (describing Kissling article’s focus on fetus as “surprise” due to Kissling’s pro-choice stance).

*Glamour* article reported the reaction of PPFA president Gloria Feldt. Feldt said that while PPFA counselors “are permitted to echo the language of patients, . . . ‘I don’t think a counselor is obligated to use that terminology if a patient does, because we have our moral position too.’”<sup>158</sup>

What emerges from this brief overview is a picture of a moral position and ideology that infuses and distorts medical ethics and commands opposition to woman’s right to know legislation.<sup>159</sup> Samantha Brennan attributes to feminist ethical theories the aim “to achieve a theoretical understanding of women’s oppression with the purpose of providing a route to ending women’s oppression.”<sup>160</sup> According to Robin West, the state has failed in its justice obligation to ensure “a society in which being a mother with attached, connected, or simply dependent children, does not unduly burden participatory citizenship.”<sup>161</sup> Abortion has thus become “a defensive right against patriarchy.”<sup>162</sup> The state has failed to live up to its duty to eliminate the patriarchal oppression deemed to necessitate access to abortion and therefore cannot be allowed, in turn, to “regulate the conditions within which [women] exercise” their abortion right.<sup>163</sup>

These considerations about what is best for women cannot, however, justify a “paternalistic”<sup>164</sup> silence on the part of abortion providers, a silence that diverts attention away from information that a woman may find material to her decision. Unfortunately, the bias discussed above has permeated the ethical

158. Chen, *supra* note 138, at 295.

159. The possibility of distortion becomes apparent when taking into account another school of “feminist ethics” that also supports “a woman’s right to choose abortion” and yet does not seem to be as hostile towards informed consent guarantees. Susan Sherwin, a feminist and abortion rights supporter, observes in her much anthologized article *Abortion Through a Feminist Ethics Lens* that “[t]he value that women ascribe to individual fetuses varies dramatically from case to case and may well change over the course of any particular pregnancy.” SUSAN SHERWIN, *NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE* 99, 111 (1992). According to Sherwin,

[t]he fact that fetal lives can neither be sustained nor destroyed without affecting the women who support them implies that whatever value others may attach to fetuses generally or to specific fetuses individually should not be allowed to outweigh the ranking that is assigned to them by the pregnant women themselves.

*Id.* Sherwin notes further that “[f]eminists positively value fetuses that are wanted by the women who carry them; they vigorously oppose practices that force women to have abortions they do not want.” *Id.* at 116. Thus, the practice of giving women all the information about fetal development and other aspects of abortion and its alternatives that a reasonable abortion patient would consider relevant is not intrinsically incompatible with feminism. *Cf. id.* (arguing “no women should be subjected to coerced abortion”). Providing such information gives the woman the opportunity to make a fully informed decision, and thus is “feminist” to the extent that it respects the woman as a full moral agent. *Cf. id.* (observing connection between “judgments on abortion and conditions of domination and subordination of women”).

160. Samantha Brennan, *Recent Work in Feminist Ethics*, in 109 *ETHICS* 858, 860 (1999).

161. Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein’s Analysis of Casey*, 45 *HASTINGS L.J.* 961, 965 (1994).

162. *Id.* at 966.

163. *Id.* (citation omitted).

164. *Harnish v. Children’s Hosp. Med. Ctr.*, 439 N.E.2d 240, 244 (1982).

standards and recommended practices of abortion providers.

### *B. The Counseling Standards of Abortion Providers*

The official standards governing abortion practices, the state-mandated consent forms that the Massachusetts Department of Public Health distributes, and other published sources provide additional documentation of the non-neutral characteristics of the abortion counseling and consent process.

#### *1. The National Abortion Federation Guidelines and Commentary*

The National Abortion Federation (NAF), the “voice of abortion providers,” represents

some 400 nonprofit and private clinics, women’s health centers, Planned Parenthood facilities, and private physicians, as well as nationally and internationally recognized researchers, clinicians, and educators at major universities and teaching hospitals, who together care for more than half of the women who choose abortion each year in the United States.<sup>165</sup>

The NAF has adopted clinical policy guidelines governing the provision of abortion services.<sup>166</sup> The guidelines concerning “counseling and informed consent” require that “accurate information must be provided regarding the risks and benefits of abortion.”<sup>167</sup> After receiving this information, the woman must affirm her understanding of “the procedure and its alternatives,” as well as “the potential risks, benefits, and complications” of each alternative.<sup>168</sup> Pre-abortion counseling, as distinct from informed consent, “may include an exploration of the woman’s feelings, help with decision-making and contraceptive choices, values clarification, or referral to other professionals,” but it “must not create a barrier to service and must be voluntary.”<sup>169</sup>

An accompanying article provides more insight.<sup>170</sup> According to Anne Baker and her co-authors, informed consent in abortion practice “typically” addresses a range of issues that include “[g]estational age of the pregnancy” and “fetal anomalies,” but the authors fail to mention fetal development.<sup>171</sup> The authors note, however, that in a voluntary counseling session, a woman may ask questions relating to fetal status.<sup>172</sup>

First, a woman may indicate that she is feeling guilty about “killing a

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165. National Abortion Federation, *About NAF*, at <http://www.prochoice.org/> (last visited Mar. 25, 2005).

166. National Abortion Federation, *1998 Clinical Policy Guidelines*, in A CLINICIAN’S GUIDE TO MEDICAL AND SURGICAL ABORTION 255 (Maureen Paul et al. eds., 1999) [hereinafter NAF, *Guidelines*].

167. NAF, *Guidelines*, *supra* note 166, at 256.

168. NAF, *Guidelines*, *supra* note 166, at 256.

169. NAF, *Guidelines*, *supra* note 166, at 256.

170. Anne Baker et al., *Informed Consent, Counseling, and Patient Preparation*, in A CLINICIAN’S GUIDE TO MEDICAL AND SURGICAL ABORTION 25 (Maureen Paul et al. eds., 1999).

171. *Id.* at 35.

172. *Id.* at 27.

baby.”<sup>173</sup> The authors recommend the following responses:

‘Your believing that you are killing a baby must make this very hard for you. Tell me more about how you are feeling.’

‘Do you believe that having an abortion is the same act as killing a 4-year old child?’ If no: ‘Many people agree with you, that the two situations are different. In what ways are they different to you?’ If yes, the two acts are the same: ‘How do you think you will feel about your decision to have an abortion after it is over?’ ‘How do you think you will feel about yourself?’ ‘What will you do to cope?’

‘How strongly do you believe that abortion is the best choice for you?’ After listening to her response: ‘What about adoption?’<sup>174</sup>

While the reference to adoption is commendable, the proposed responses nonetheless promote a subtle bias. For example, if the woman indicates that the “two situations” are different, the authors suggest the counselor reinforce her belief with the assurance that “many people agree with you.”<sup>175</sup> If the woman sees no difference between the prenatal and postnatal acts, however, she is not similarly reassured that others agree, even though such support exists.<sup>176</sup> True neutrality is compromised.

Second, the authors acknowledge that women may “request to see the products of conception” and that “[s]ome clinicians are reluctant to grant this request, wanting to protect the patient from potentially disturbing aspects (aesthetic, emotional, visceral, or moral) of viewing her own disrupted pregnancy.”<sup>177</sup> This confirms that information about the unborn child is material to women and that abortion providers are not always willing to address

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173. *Id.*

174. Baker, *supra* note 170, at 27-28.

175. Baker, *supra* note 170, at 27.

176. See *Speaking Frankly: Late-Term Abortion*, MS., May/June 1997, at 64, 67 (suggesting abortion rights advocates agree that both circumstances involve killing). According to abortion rights advocate Faye Wattleton, the former president of Planned Parenthood Federation of America, “we have deluded ourselves into believing that people don’t know that abortion is killing.” *Id.* Frances Kissling, of Catholics for a Free Choice, added “I agree that the way in which the arguments for legal abortion have been made include this inability to publicly deal with the fact that abortion takes a life.” *Id.* “[T]he pro-life slogan, ‘Abortion stops a beating heart,’ is incontrovertibly true.” Wolf, *supra* note 152, at 29. Moreover, the laws or court decisions of at least twenty-nine states expressly recognize as a matter of public policy that the life of a new human being begins at conception/fertilization, including Massachusetts. See MASS. GEN. LAWS ch. 112, § 12K (2004) (defining “unborn child” as “the individual human life in existence and developing from fertilization until birth”); Daniel Avila, *The Present Standing of the Human Embryo in U.S. Law*, 1 NAT’L CATHOLIC BIOETHICS QUARTERLY 203, 213 n.55 (2001) (listing states and quoting from laws or court decisions). The Los Angeles Times commissioned a national poll in June 2000 that asked 2,071 adults whether “you agree or disagree with this statement: ‘Abortion is murder?’” *Los Angeles Times Poll Study No. 442, Nation: Abortion, Gay Rights*, LOS ANGELES TIMES, (June 2000), available at <http://images.latimes.com/media/acrobat/2003-07/8643135.pdf> (last visited Mar. 25, 2005). Fifty-seven percent agreed with the statement while thirty-five percent disagreed. *Id.*

177. Baker, *supra* note 170, at 28.

this concern. The authors advise abortion providers to allow a woman who requests such information “to see, hold, grieve, bless, or say goodbye to her pregnancy” and agree that “[p]ictures and a description of embryofetal development at her stage in the pregnancy are especially useful” to a woman in deciding whether to see her aborted child.<sup>178</sup> The goal at this point is to provide post-abortion “closure.”<sup>179</sup> The authors apparently consider information about fetal development relevant only after the abortion is performed. Before the abortion, however, such information might make a difference in a woman’s decision whether to undergo the abortion itself.

Finally, the authors address the problem of “involuntary viewing of the products of conception” as a result of “medical abortion,” in which an abortion pill causes a premature expulsion of the embryo or fetus.

When discussing the expulsion of the pregnancy during a medical abortion, asking ‘What do you expect it to look like?’ allows the patient to verbalize her expected image. The counselor should then provide an accurate description and offer to show photographs of the sac or embryo at her stage of gestation. The closer the photographs are to the actual size, the better. If the pregnancy is less than 8 weeks, the woman is likely to see grayish tissue and blood clot. If the pregnancy is 8 weeks or beyond, she may indeed see a tiny embryo. The presence or absence of human shape and extremities may have an important impact. After providing a description, ask what, if any, effect this information has on her and then validate her reaction.<sup>180</sup>

Again, information about the unborn child, even that pertaining to the “presence or absence of human shape and extremities” is deemed relevant only to a discussion concerning a post-abortion event.<sup>181</sup> In addition, the authors recommend such disclosure in cases involving medical abortions, where the woman is likely to see the aborted fetus, but not in surgical abortions, in which the abortionist can prevent the patient from viewing the fetus.<sup>182</sup>

The NAF Guidelines and accompanying commentary provide important information about abortion counseling in Massachusetts. Considering the bias apparent in the nationally proposed practice recommendations, one expects to find such bias in actual practices locally. The NAF promulgated the current guidelines almost twenty years after a federal judge identified bias in the practices of the largest abortion provider in Massachusetts.<sup>183</sup> Based solely on the content of the NAF guidelines and commentary, it is reasonable to conclude

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178. Baker, *supra* note 170, at 28.

179. Baker, *supra* note 170, at 28.

180. Baker, *supra* note 170, at 34.

181. Baker, *supra* note 170, at 34.

182. Baker, *supra* note 170, at 34. “Involuntary viewing of the products of conception is not an issue during surgical abortion . . .” *Id.*

183. See *supra* notes 13-15 and accompanying text (discussing and quoting Judge Mazzone’s opinion in *Bellotti*).

that such bias continues to characterize pre-abortion counseling in the Commonwealth.

## 2. *Planned Parenthood Counseling Materials*

Various public sources provide additional evidence of abortion counseling practices elsewhere, from which the nature of counseling practices in Massachusetts can be inferred. For example, PPFA asserts the following on its national website:

Planned Parenthood takes great care to advise and counsel women and their partners of the various options for managing an unwanted pregnancy. These include continuing the pregnancy with the options of keeping the child or giving it up for adoption, or having an abortion. Those who elect abortion are advised, as with other surgical procedures, of the risks and benefits that may be associated with the procedure. They are given a written fact sheet detailing the potential complications that can occur with abortion. As part of an individual counseling session, all questions are answered and an informed request form for the procedure is signed. For those who wish further information about the fetus and its developmental stages, this information is provided. To require that women receive such information or view the film when they do not wish it is punitive.<sup>184</sup>

In a brief filed in *Casey*, abortion facilities challenging the Pennsylvania law requiring informed consent explained how

absent statutory mandate, abortion providers would not inform *all* women seeking abortions about the availability of child support payments and medical assistance benefits if a woman carries to term, nor show them pictures and a description of fetal development. Nor would petitioners provide options counseling or a complete discussion about the many medical risks of carrying a pregnancy to term to those women who have already obtained this counseling or who clearly indicate that their decision to choose abortion is firm. . . . [P]etitioners, consistent with medical standards, offer accurate and appropriate information and referral of the type mandated by the [Pennsylvania abortion informed consent statute] to some women, some of the time . . . .<sup>185</sup>

The State of Pennsylvania's response is instructive, citing a rule of law in Pennsylvania similar to that found in Massachusetts regarding a patient's right to know:

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184. PLANNED PARENTHOOD FEDERATION OF AMERICA, THE FACTS SPEAK LOUDER THAN THE "SILENT SCREAM," at <http://www.plannedparenthood.org/abortion/silentscream.htm> (last visited Mar. 25, 2005).

185. Reply Brief for Petitioners and Cross-Respondents at 20, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902) (filed for Planned Parenthood of Southeastern Pa., Reprod. Health Services, Inc., Women's Suburban Clinic, Allentown Women's Ctr., and Thomas Allen, M.D., on behalf of himself and all others similarly situated), in 216 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 323, 352 (Philip B. Kurland & Gerhard Casper eds., 1992) [hereinafter LANDMARK BRIEFS & ARGUMENTS] (emphasis added) (citations omitted).

More broadly, the petitioners appear to be arguing for a *per se* rule that an informed consent law can *never* require the provision of *any* specific piece of information, on the ground that ‘the supply of specific information to all patients regardless of their specific circumstances . . . is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient.’ . . . There is no warrant for such a rule . . . . Pennsylvania law on informed consent requires that all patients be given the information that a ‘reasonable patient’ would consider material, . . . an approach that allows the patient to decide what information is relevant to his or her specific circumstances. The approach the petitioners advocate, not surprisingly, would allow the petitioners to decide this question *for* their patients, on the paternalistic ground that patients must be protected from ‘anxiety.’ . . . This approach, simultaneously patronizing and self-serving, *see Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), is certainly not the norm in Pennsylvania.<sup>186</sup>

The foregoing evidence reveals that abortion providers refuse to offer all women relevant information potentially material to a reasonable abortion patient. The providers will speak up only when asked, thus failing to afford full disclosure to women who do not solicit all the information they need.

### 3. Massachusetts Department of Public Health (MDPH) Consent Forms

The MDPH created the current state-mandated consent forms in 1996.<sup>187</sup> A “statewide advisory group consisting of doctors, nurses, [abortion] clinic directors, counselors, and Department staff” helped draft the forms.<sup>188</sup> MDPH has issued three versions of substantially the same form, each version applying to a separate trimester of pregnancy.<sup>189</sup>

Contrary to the requirements of the unenforced portions of the Massachusetts informed consent law,<sup>190</sup> the state forms make no reference to the unborn child or the stages of fetal development. Instead, they describe abortion as a procedure where “the contents of the womb (uterus) are

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186. Brief for Respondents at 63-65, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), in 216 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 185, at 267-69 (emphasis added).

187. See Memorandum from Mass. Dep’t of Public Health, to Physicians 1 (May 1996) [hereinafter MDPH Memorandum] (on file with MCC). State law requires use of a form the MDPH created to document informed consent. MASS. GEN. LAWS ch. 112, § 12S (2004).

188. MDPH Memorandum, *supra* note 187, at 1.

189. MDPH Memorandum, *supra* note 187, at 1.

190. See MASS. GEN. LAWS ch. 112, § 12S (requiring MDPH to include “description of the stage of development of the unborn child”); *see also* MASS. GEN. LAWS ch. 112, § 12K (defining terms used in section 12S). Section 12K contains the following definitions: “Abortion, the knowing destruction of the life of an unborn child or the intentional expulsion or removal of the unborn child from the womb;” “Pregnancy, the condition of a mother carrying an unborn child;” “Unborn child, the individual human life in existence and developing from fertilization until birth.” *Id.*

removed.”<sup>191</sup> The forms contain a list of “Possible Medical Problems” that includes physical complications but excludes any reference to possible psychological or emotional problems associated with abortion.<sup>192</sup> The forms merely state the obvious in addressing abortion alternatives: “Other than abortion, you could choose to continue the pregnancy and either raise the child or make other plans such as legal adoption.”<sup>193</sup> The forms neither provide nor require the provision of contact information regarding pregnancy and childrearing services.

Thus, the evasive language the state employs in its forms contributes directly to the unbalanced nature of the informed consent process. For example, by avoiding any scientifically accurate description of the embryo or fetus, favoring instead the misleadingly vague term “contents,” the state hides material information in a manner that encourages abortion.<sup>194</sup> Imagine a care provider describing a hysterectomy as the emptying of the contents of the abdomen or an amputation of a leg as the removal of tissue. Similarly, imagine if informed consent documents for breast removal referred only to possible physical complications and ignored potential psychological or emotional difficulties in adjusting to a new self-image. In the abortion context, the shielding effect prevents the full consideration of information that many women deem material to their decision about whether or not to bear a child. The failure to mention such information underplays the full ramifications of the choice at stake. Such omissions in the abortion context reinforce the providers’ prevailing bias: there are no bad reasons to have an abortion.<sup>195</sup>

As the foregoing discussion makes clear, abortion counseling is slanted. The state-mandated standard consent forms overlook practical reality by ratifying the imbalance. Through its promulgation of the forms, the state signals to abortion providers a tacit approval for withholding information that is material to the reasonable patient contemplating abortion.

### C. Information Material to Informed Consent

In *Casey*, Justice O’Connor recognized “the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”<sup>196</sup> Central to the idea of informed

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191. MDPH Memorandum, *supra* note 187, enclosures (citing language from enclosed consent forms attached to memorandum).

192. MDPH Memorandum, *supra* note 187, enclosures (citing language from enclosed consent forms attached to memorandum).

193. MDPH Memorandum, *supra* note 187, enclosures (citing language from enclosed consent forms attached to memorandum).

194. MDPH Memorandum, *supra* note 187, enclosures (presenting factual information in vague manner).

195. See Paul, *supra* note 145, at 26-27 (citing former medical director for PPLM).

196. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882 (1992) (O’Connor, J., concurring).

consent is the determination of what information is material to a woman making the decision whether to have an abortion.

### *1. Testimony of Post-Abortive Women*

The negative post abortion effects women suffer when abortion counseling fails to provide certain information demonstrates the materiality of such information.<sup>197</sup> Despite PPFA's claim that abortion opponents "invented" post-abortion stress,<sup>198</sup> post-abortive women who continue to favor abortion rights are nonetheless reporting negative outcomes. For example, a woman who operates an online forum called *afterabortion.com*, geared to women experiencing "Post-Abortion Stress Syndrome," writes:

I am in the middle with my views, as I believe that abortion should remain legal and safe, and that every woman has the right to make her own choices concerning her body and her life. However, people need to know that Post Abortion Stress Syndrome is a real medical issue, and can cause serious emotional or physical complications after an abortion.<sup>199</sup>

The site, which "thousands" use,<sup>200</sup> maintains peer-run public and private chat rooms, online support groups, story sharing, and resource links. According to a press release published on the site:

[The site operator] started the site in June 1998, after her fifth abortion. 'My life really fell apart after the last one' she reports. 'For twenty years I had stayed firm with the mainstream notion that abortion only brought "relief" afterwards, and that if I was having any problems, it was because something was "wrong with me," and it had nothing to do with the abortions. But after

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197. A physician's "duty to disclose in a reasonable manner all significant medical information that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a proposed procedure" exists independently of the question of whether the failure to obtain such informed consent results in post-abortion stress or other injury. *Harnish v. Children's Hosp. Med. Ctr.*, 439 N.E.2d 240, 243 (Mass. 1982); *see also Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (acknowledging "notion of bodily integrity" requires fully informed consent prior to treatment); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1021 (Mass. 1991) (reiterating disclosure duty and acknowledging patient's right to refuse treatment once informed); *Precourt v. Frederick*, 481 N.E.2d 1144, 1145-46 (Mass. 1985) (framing issue as question of whether doctor provided all information material to patient's decision to undergo treatment). *Halley v. Birbiglia* explains the *Harnish* rule as a "dual-tiered requirement for recovery in informed consent actions: (1) the physician must have a duty to disclose the information at issue to the patient, and (2) the breach of that duty must be causally related to the patient's injury." 458 N.E.2d 710, 715 (Mass. 1983). A duty of disclosure exists regardless of whether a breach of that duty results in injury, but an injury must exist in order to recover in tort. *Id.*

198. *See supra* notes 140-141 and accompanying text (describing Planned Parenthood's portrayal of abortion).

199. PASS Foundation, *What is PASS*, at [http://www.afterabortion.com/pass\\_details.html](http://www.afterabortion.com/pass_details.html) (last visited Mar. 25, 2005). "This site is owned by 'jilly', who has overcome her own struggles with PASS. . . . This site is not affiliated with or supported by any political or religious group, and is a neutral place of support, information and healing." PASS Foundation, *About PASS*, at [http://www.afterabortion.com/about\\_pass.html](http://www.afterabortion.com/about_pass.html) (last visited Mar. 25, 2005).

200. PASS Foundation, at <http://www.afterabortion.com>.

having five abortions over a span of twenty years, with my situations varying from a scared teenager who didn't want her parents to find out she had sex with her boyfriend, to an adult rape victim, to a mother of three having to have an abortion for severe maternal health problems, I realized that my reactions and feelings afterwards had been the same, regardless of the circumstance. I began to realize that the way we approach abortion, the way we present it to women, and the way we treat women during and after abortion is flawed. Women are upset, traumatized, and having problems, but are too afraid to discuss it with anyone else. I believe abortion should remain legal, and that every woman has the right to make her own choices concerning her body and her life, but we need to provide more information, counseling and compassionate care for women both before and after an abortion. We need to inform women of the possibility of PASS, and provide help and support for women who experience it. I also would like to see clinics held to stricter standards, or have all abortions performed in hospitals.<sup>201</sup>

The afterabortion.com site operator remains a supporter of the "right to choose," but believes that women exercising this right would benefit if abortion counseling provided more information, including the fact that there is a risk of negative post-abortion consequences.

In 1987, David Reardon published the first comprehensive survey of women who had come to regret their abortions.<sup>202</sup> Based on a polling sample of 252 members of a group called Women Exploited by Abortion (WEBA), Reardon found that nearly all WEBA women complained that abortion clinics failed to provide information necessary to make an informed choice.<sup>203</sup> Nearly eighty percent believed that they were "denied pertinent information or . . . actively misinformed by their counselors."<sup>204</sup> As for the misinformation or omissions the WEBA women felt were most important:

Nearly 50% complained they had not been told about fetal development. The second most common complaint, which approximately one-fourth of those surveyed mentioned, was that they had not been adequately warned about the physical risks of the procedure. Many also complained that they had not been warned about the pain or the nature of the procedure in general. The third most common complaint was that there had been no warning about the "psychological after-effects," or the "emotional pain," which would follow

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201. Press release, PASS Foundation, "Pro-Choice" Website Helps Women Heal from the "Secret Grief" and Stress After an Abortion (Jan. 1, 2000) (on file with MCC).

202. DAVID C. REARDON, *ABORTED WOMEN, SILENT NO MORE* 1-26, 328-337 (1987) [hereinafter REARDON, *ABORTED WOMEN*]. The book is available online, substantially updated with new information, in the form of an affidavit filed in an action Norma McCorvey, the original plaintiff in *Roe*, has brought to revisit the decision. Affidavit of David C. Reardon, Ph.D., *accompanying* Rule 60 Motion for Relief from Judgment, at 2-7, *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 2003) (Nos. 3-3690-B & 3-3691-C), *available at* <http://www.operationoutcry.org/DavidReardonexpertopinion-Roe-Final.pdf> [hereinafter Reardon Affidavit].

203. REARDON, *ABORTED WOMEN*, *supra* note 202, at 15-16.

204. REARDON, *ABORTED WOMEN*, *supra* note 202, at 17.

their abortion.<sup>205</sup>

Reardon analyzed separately the results for the twenty-one percent of WEBA women who obtained their abortions at a Planned Parenthood facility and found that satisfaction with the pre-abortion counseling and informed consent process was slightly higher with respect to counselors describing the abortion procedure or encouraging women to ask questions.<sup>206</sup> With respect to offering information about fetal development or potential health risks, however, the women scored Planned Parenthood counselors no better than the general group.<sup>207</sup> Instead, an overwhelming majority stated that their counselor “had strongly encouraged them to choose abortion as the ‘best’ solution,” believed that the counselor “was strongly biased in favor of the abortion option,” and “felt that they had been misled by their counselors and . . . denied information which might have influenced their final decisions.”<sup>208</sup> Reardon’s research makes clear that a significant number of women who have had abortions believe that they were not given all the information they needed to make their decision. As for the category of information deemed material, Reardon’s research reflects the already-discussed evidence from abortion rights supporters and providers, all of which indicates women’s concern about the status and development of their unborn children.<sup>209</sup>

## 2. *Abortion Providers’ Response to Negative Post-Abortion Reactions*

In spite of the pro-choice movement’s minimization of the negative psychological consequences of abortion, some abortion providers are beginning to recognize both this problem and the importance of providing women with more complete information about abortion. An abortion facility in Louisiana produces an online commentary on post-abortion grief that provides insight on two matters: how abortion providers’ counseling experiences with women prompt them to address certain issues and how providers’ predisposition favoring one choice over the other affects the way they discuss such issues.<sup>210</sup> The commentary states in part:

There are many reasons for feeling grief and loss after an abortion. Even though many women continue to feel that their decision was correct, they grew up picturing themselves as mothers, and they feel sad that their pregnancy came

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205. REARDON, *ABORTED WOMEN*, *supra* note 202, at 17-18.

206. REARDON, *ABORTED WOMEN*, *supra* note 202, at 19.

207. REARDON, *ABORTED WOMEN*, *supra* note 202, at 19.

208. REARDON, *ABORTED WOMEN*, *supra* note 202, at 18-19.

209. See NAF, *Guidelines*, *supra* note 166, at 256; REARDON, *ABORTED WOMEN*, *supra* note 202, at 17-19; Baker, *supra* note 170, at 28; *supra* notes 196-201 and accompanying text (describing womens’ desire and need for specific information relating to abortion decision).

210. Hope Medical Group for Women, *After Your Abortion . . . A Natural Response*, at <http://www.hopemedical.com/5.htm> (last visited Mar. 25, 2005) (introducing website of Shreveport, Louisiana abortion provider).

at a difficult time in their lives. Like these women, you may have formed a picture of your 'fantasy child,' and losing the pregnancy may feel more like losing a real person than a potential child. Some women feel a strong sense of identification or bonding with the embryo, and having an abortion feels like losing part of themselves. . . . If you find yourself thinking about the abortion more than you'd like, you can try a technique called 'thought-stopping.' You can say or yell 'stop' whenever you have disturbing thoughts and immediately do something different. If you find yourself fantasizing too often about what the child might have been like, you should substitute another fantasy: a baby crying because you had not time to give it, or too little money for food and clothes; a picture of yourself feeling angry, resentful or stressed by children you weren't ready to have.<sup>211</sup>

Although the clinic's recommended solution to post-abortion grief amounts to "deliberately practicing stuffing techniques" that reinforce a bias against childbirth, the clinic's decision to address "the strong sense of identification or bonding with the embryo" in the first place buttresses the evidence already referred to in this article indicating that fetal status is relevant for many women who come to the clinic.<sup>212</sup>

In addition, as discussed above, a group of abortion providers that call themselves the November Gang has realized the necessity of broaching fetal status and other topics that abortion providers generally minimize or ignore.<sup>213</sup> The group has published an online workbook for women contemplating an abortion that attempts "to give you a realistic picture of all the choices you can make—abortion, adoption, and being a parent."<sup>214</sup> The group has "also included information on religion and spirituality, fetal development and what can harm a pregnancy, and taking care of yourself."<sup>215</sup> While certainly infused with a moral position imparting its own spin, the workbook and the questions it

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211. *Id.*

212. Affidavit of Theresa Burke, Ph.D. at 42, *accompanying* Rule 60 Motion for Relief from Judgment, *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 2003) (Nos. 3-3690-B & 3-3691-C), *available at* <http://www.operationoutry.org/expertaffidavit{lastfinal}-theresaburke.pdf> [hereinafter *Burke Affidavit*]. Burke comments further that:

in essence, they are telling women that the grief related to abortion can best be assuaged by constantly reminding themselves how horrible life would be if their babies were here with them today. Would you tell someone grieving at a funeral to try and picture how awful his life would be if his loved one had survived? This advice is counterproductive in that, if it is followed, it will actually inhibit and prolong the grieving process.

*Id.*

213. *See supra* notes 155-158 and accompanying text (discussing November Gang counseling techniques).

214. PREGNANT? NEED HELP? PREGNANCY OPTIONS WORKBOOK intro. (Margaret R. Johnston ed., 1998), *available at* <http://www.ferre.org/workbook/index.html> [hereinafter *PREGNANCY WORKBOOK*]. Financial donors included the Allentown Women's Center, PA, Aurora Medical Services, Seattle, WA, Cincinnati Women's Services, OH, Northland Family Planning, Detroit, MI, Center for Choice, Toledo, OH, Aradia Women's Center, Seattle, WA, Volunteer Medical Clinic, Knoxville, TN, Southern Tier Women's Services, Vestal, NY, Alleghany Reproductive Health Services, Pittsburgh, PA, Hope Clinic for Women, Granite City, IL, and Women's Health Center of Duluth, MN. *Id.*

215. *Id.*

covers testify to the range of relevant abortion choice issues.<sup>216</sup> Extensive discussions of childbirth and parenting, adoption, fetal development, pregnancy support options, post-abortion regret and psychological issues, and spiritual questions, reflect that a significant group of abortion providers judge information related to these topics material.<sup>217</sup> The workbook speaks for the need to broaden the circle of information in a way that levels the factual playing field.<sup>218</sup>

### 3. Evidence from the Effects of Woman's Right to Know Laws in Other States

When woman's right to know laws go into effect, such as those requiring full disclosure of information pertaining to fetal development, the annual abortion rate declines immediately afterwards. In Pennsylvania, the annual total decreased thirteen percent the year after such legislation was enacted, and in Mississippi the annual total declined immediately, down fifty-one percent after three years.<sup>219</sup>

While other factors, such as women deciding to travel to neighboring states that lack informed consent requirements, may contribute to the reduction in reported abortions, the laws undoubtedly have an effect on women who remain in-state.<sup>220</sup> According to Dr. Dennis Christensen, who oversees 3,000 abortions

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216. See generally *id.* While acknowledging that “[a]bortion is a kind of killing” since “[t]he embryo or fetus is living within the woman’s body, and it is removed by the abortion,” the workbook loads the equation by focusing on whether an embryo or fetus is a “person,” as if those opposed to abortion necessarily rely on that characterization, instead of asking whether the embryo or fetus is a human life or human being. *Id.* at 35; see also *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325 (Mass. 1984) (defining “person” as synonymous with the “human being” according to ordinary meaning). Elsewhere, the workbook pits religious beliefs that “abortion is wrong” against “what God thinks.” PREGNANCY WORKBOOK, *supra* note 214, at 67-70. Descriptions of various religions’ positions on abortion, drawn only from the writings of dissident organizations such as Catholics for a Free Choice, may not be recognizable to the particular religion’s adherents, providing further evidence of an underlying bias. See *id.*

217. See generally PREGNANCY WORKBOOK, *supra* note 214 (containing information deemed pertinent to abortion decision).

218. See generally PREGNANCY WORKBOOK, *supra* note 214 (demonstrating recognition of women’s need for well-rounded information regarding their pregnancy).

219. PA. VITAL STATISTICS, DEP’T OF HEALTH, INDUCED ABORTION DATA TABLES tbl.D-1 (2003), available at [http://www.dsf.health.state.pa.us/health/lib/health/Vital\\_Stat/2002/2002\\_abort.pdf](http://www.dsf.health.state.pa.us/health/lib/health/Vital_Stat/2002/2002_abort.pdf) (on file with MCC); VITAL STATISTICS REPORTS, MISSISSIPPI STATE DEPARTMENT OF HEALTH, TIME SERIES DATA tbl.27 (2002), <http://www.msdl.state.ms.us/phs/2001/bulletin/bul27.htm> (on file with MCC). In Pennsylvania, 47,926 abortions were performed in 1993 and 41,645 abortions were performed in 1994, the year that state’s woman’s right to know law took effect, representing a thirteen percent decrease. PA. VITAL STATISTICS, *supra*. Similarly, in Mississippi, while 8,184 abortions were performed in 1991, in 1992, when the state’s right to know law took effect, 7,555 abortions were performed, representing a seven percent decrease. VITAL STATISTICS REPORTS, MISSISSIPPI STATE DEPARTMENT OF HEALTH, *supra*. By 1994, the annual number of abortions had fallen to 3,979 abortions, a fifty-one percent decrease from 1991’s annual total. *Id.*; see also Charles Wolfe, *Abortions Decline Since ‘Consent Law’*, CINCINNATI ENQUIRER, Feb. 14, 2002, at B1 (reporting similar effect attributed to enforcement of woman’s right to know law in Kentucky).

220. See Jo Mannies, *Abortion Foes Want U.S. to Adopt a Federal Parental Consent Law*, ST. LOUIS POST-DISPATCH, Jan. 22, 2003, at A8 (discussing federal proposal intended to prevent minors from traveling to states without parental notification requirements). The fact that most Missourians traveling to other states to obtain

a year in Wisconsin, ten percent of the women who come in for counseling do not return for an abortion due to the full disclosure the state's woman's right to know law requires.<sup>221</sup> He also observed that the required reflection period "has made women less nervous on the day of the procedure."<sup>222</sup>

In *McMahon v. Finlayson*,<sup>223</sup> the Massachusetts Appeals Court found that a general risk of complication "between three and four percent" was material and must be disclosed.<sup>224</sup> The fact that up to thirteen percent of women who receive all the information woman's right to know laws require change their minds provides yet another basis for holding that such information is material to the "reasonable woman" considering abortion in Massachusetts, and thus should be offered in every case.

#### IV. THE WOMAN'S RIGHT TO KNOW BILL IS CONSTITUTIONAL

Massachusetts jurisprudence requires that abortion laws be neutral in light of the "practical realities"<sup>225</sup> surrounding women who are deciding whether to have an abortion. The following discussion examines the constitutionality of the woman's right to know bill with respect to the practical realities of a non-neutral consent process and the state's role in subsidizing such a process. Taking into account the strong state interests that the Women's Right to Know Bill would further, the minimal burdens its requirements would involve, the overriding advantages of full disclosure, and the weight that these advantages would carry in any balancing of interests, the bill should pass constitutional muster in Massachusetts.

##### A. *The Current Process is Not Neutral*

In a fact sheet distributed to the legislature, the Massachusetts Coalition for Choice claims that the woman's right to know bill

is at constitutional odds with the Supreme Judicial Court ruling in *Moe v. Secretary of Administration and Finance*: it violates *Moe's* requirement that the state be neutral with regard to abortion and childbirth. Rather than remaining neutral, this bill greatly favors continued pregnancy and childbirth—which are more dangerous to a woman's health than undergoing a legal

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abortions were not minors may have been due to Missouri's informed consent statute. *See id.*; *supra* note 6 and accompanying text (listing informed consent statutes enacted in thirty-two states); *see also* Sarah Schweitzer, *N.H. Nears Historic Abortion Bill*, BOSTON GLOBE, Apr. 7, 2003, at B1 (reporting parental-judicial abortion consent requirements intended to prevent Massachusetts minors from obtaining abortions in New Hampshire).

221. Kate Zernike, *An Abortion Doctor's View*, N.Y. TIMES, Jan. 20, 2003, at A16 (quoting Dr. Dennis Christensen).

222. *Id.*

223. 632 N.E.2d 410 (Mass. App. Ct. 1994).

224. *Id.* at 412-13. The patient sued over the lack of informed consent for a laparoscopy based on the physician's failure to disclose the material risks of the procedure. *Id.*

225. *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 400-01 (Mass. 1981).

abortion.<sup>226</sup>

This charge fails to take into account the unbalanced nature of the current informed consent process. In requiring abortion providers to offer all information material to a woman exercising her abortion choice, the woman's right to know legislation responds to a process that fails to ensure full disclosure. The bill's purpose and effect cannot be evaluated without taking note of the existing practical realities. Women are subjected to counseling techniques that greatly favor abortion. The evidence of the lack of neutrality, much of it abortion providers produce themselves, is compelling. Moreover, complaints that the proposed legislation does not require the divulgence of information about the disadvantages of pregnancy fail to acknowledge what is happening in abortion facilities. Abortion providers are already motivated to share with women all the information they possess that favors a choice for abortion, including any potential risks associated with abortion's alternatives. Wielding the state's regulatory power in this direction is wholly unnecessary considering that ideological, financial, and other forces of institutional self-interest already encourage the disclosure of data that supports a choice for abortion. What is necessary is to even the informational balance in the face of documented pressures to discourage childbirth, not to increase the tilt even further towards abortion.

This debate about neutrality is not new. During oral arguments before the Supreme Court in the *Akron* case, the attorney defending Akron's informed consent ordinance argued that the government had a compelling justification to ensure an equal "choice either to have an abortion or to bear a child."<sup>227</sup> Akron's attorney stated further that:

The abortion clinics in this case, as the record shows, make certain assumptions with respect to this situation, the first of which is that abortion is always the best choice for the pregnant woman; secondly, that the abortion clinics' interests always align in essentially a one-to-one correspondence with the pregnant woman or the minor; and finally, that the interests of the state or the city of Akron in this case or the parents are somehow adverse to that of the pregnant woman or the pregnant minor. This Court has recognized interests in maternal health, potential life, and maintaining medical standards. The city of Akron would submit there is also another important interest involved in this area which this Court has not had to face yet, because it has not come up in any particular fact situation, and that is, the city or the state has an interest in protecting the woman's own constitutional right of her freedom of choice as to whether or not to have an abortion or whether to carry her child, her unborn

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226. MASSACHUSETTS COALITION FOR CHOICE, OPPOSE THE WOMAN'S RIGHT TO KNOW BILL, H.R. 2644, S. 1069 (Mass. 2003) (on file with MCC).

227. Oral Argument of Alan Segedy on behalf of City of Akron, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), in 138 LANDMARK BRIEFS & ARGUMENTS, *supra* note 185, at 807, 809.

child to term.<sup>228</sup>

This argument prompted one Supreme Court Justice to engage in the following exchange during the oral argument of the opposing counsel:

QUESTION: Mr. Landsman, how do you respond to the argument that in the abortion clinic setting, the danger is of one-sided information of the other kind, and the statute is intended to equalize the scales?

MR. LANDSMAN: Your Honor, there is absolutely no evidence in this record that the information provided by the clinic is at all one-sided. Rather, it is an hour-long discussion of the risks and of the procedure and of the options. In fact, in this record, the district court found that where a woman indicates ambivalence, the physician will not proceed with the abortion. The whole process is to help.

QUESTION: Is it not true that at least insofar as people are motivated by economic incentives, that there would be at least arguably a risk of one-sided presentation by the person who has an interest, a financial interest in having the abortion performed?

MR. LANDSMAN: Again, there is simply no evidence in this record that that is the case, Your Honor.<sup>229</sup>

As argued in this Article, the evidence of bias is now clear. The Massachusetts judiciary will have to take this evidence into account. This and other significant factors portend the successful defense of the woman's right to know legislation against any state constitutional challenge. Other factors include the important state interests that the woman's right to know legislation further, the minimal burdens this legislation would impose, and the constitutional balance that weighs decidedly in favor of neutralizing the consent process.

### *B. The Commonwealth Subsidizes the Counseling Process*

The state's role in subsidizing the abortion process is also an important practical reality. Abortion services are reimbursable under MassHealth Standard,<sup>230</sup> Basic,<sup>231</sup> CommonHealth,<sup>232</sup> Family Assistance,<sup>233</sup> and Essential.<sup>234</sup> Public funds will cover abortions throughout pregnancy,<sup>235</sup> and in

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228. *Id.*

229. Oral Argument of Stephan Landsman on behalf of Akron Center for Reproductive Health, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983), in 138 LANDMARK BRIEFS & ARGUMENTS, *supra* note 185, at 820, 824.

230. MASS. REGS. CODE tit. 130, §§ 450.105(A)(1)(a), 450.101 to -.331 (2004).

231. *Id.* § 450.105(B)(1)(a).

232. *Id.* § 450.105(E)(1)(a).

233. *Id.* § 450.105(H)(3)(a).

234. MASS. REGS. CODE tit. 130, § 450.105(I)(1)(a).

235. *Id.* §§ 484.005, 484.001 to -.011.

the first and second trimesters abortion can be performed on demand or for any reason deemed “necessary in light of all factors affecting the mother’s health.”<sup>236</sup> Reimbursable services include “pre-operative evaluation and examination,” and “pre-operative counseling.”<sup>237</sup>

Thus, the Commonwealth plays a financial role in the counseling process for every abortion it funds. If the counseling process is biased towards abortion and omits material information that tends to support childbirth, then under the analysis in *Moe*<sup>238</sup> the Commonwealth is indirectly responsible for obstructing a woman’s constitutionally protected right to choose. Upon entering the arena of choice by subsidizing the counseling that guides choices between abortion and childbirth, the Commonwealth must ensure neutrality, even if private factors the state does not directly control (i.e., the counseling techniques of abortion providers) are at play.<sup>239</sup>

### C. Important State Interests

In *Moe*, the SJC deemed “the right of individual choice to be paramount.”<sup>240</sup> It follows that the state’s intent to facilitate informed choice by ensuring access to all information relevant to that choice furthers a paramount interest. In *Harnish*, the SJC recognized “that a person has a strong interest in being free from nonconsensual invasion of his bodily integrity,” and that the “[k]nowing exercise of this right requires knowledge of the available options and the risks attendant on each.”<sup>241</sup> It follows that the state’s goal of ensuring that a medical decision is informed furthers an equally strong interest. Furthermore, in *Moe* the SJC also identified the state’s responsibility to guarantee neutrality in any medical process that it subsidizes as a paramount constitutional obligation.<sup>242</sup> Thus, the state’s objective of establishing “genuine indifference”<sup>243</sup> in subsidized counseling practices, thereby minimizing private pressures and institutional biases that discourage women from choosing childbirth, is overriding. Finally, the United States Supreme Court has removed federal “constrain[ts]” against “imputing to the State any interest”<sup>244</sup> in protecting

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236. MASS. REGS. CODE tit. 130, § 484.008(A)(4) (2003). Three other eligibility categories include life of the mother would be endangered, severe and long-lasting damage to mother’s health, and victim of rape or incest. *Id.* § 484.008(A)(1)-(3). Third trimester abortions may be funded only when certified as necessary to save the life of the mother or to eliminate substantial risk of grave impairment to her physical or mental health. *Id.* § 484.005(C).

237. *Id.* § 484.007(A)(1)-(2).

238. 417 N.E.2d 387 (Mass. 1981).

239. *See id.* at 402 (requiring genuine counseling indifference in “constitutionally protected area of choice”).

240. *Id.* at 397.

241. *Harnish v. Children’s Hosp. Med. Ctr.*, 439 N.E.2d 240, 242 (Mass. 1982).

242. *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 400-02 (Mass. 1981).

243. *Id.* at 402.

244. *Id.* at 404 n.21.

embryonic or fetal human life throughout pregnancy.<sup>245</sup> Leveling the counseling process to ensure neutrality and full disclosure, thereby making the process more protective of prenatal life than in the past, thus furthers a “substantial” secondary interest.<sup>246</sup>

#### D. Minimal Burdens

The proposed woman’s right to know legislation would require abortion providers to inform women at least twenty-four hours before an abortion is performed that state-produced informed consent materials are available on a website, via a phone recording, and in the provider’s office.<sup>247</sup> All that is required is that the provider offer the materials; women need not accept them. This does not operate as a “waiting period,” because this requirement would actually delay very few abortions, if any. Rather, the legislation would insert the disclosure requirement into the current process that already incorporates natural delays. For example, PPLM, the largest abortion provider in Massachusetts, requires clients to make appointments and usually schedules an appointment “within 7 days.”<sup>248</sup> In addition, “[m]any clinics schedule abortion procedures only one or two days each week.”<sup>249</sup> No one can expect to just walk in without an appointment and obtain an abortion that day. Consequently, abortion providers could give notice of the availability of the state-produced materials at the time the appointment is requested without impacting the timing of the appointment itself.

The proposal’s second requirement obliges a physician to meet with the woman at some point before the abortion is performed to discuss her specific circumstances.<sup>250</sup> The proposed legislation does not dictate when such a meeting should occur. It is difficult to see what meaningful burden this requirement imposes on a right that is broadly touted as a decision between a

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245. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873 (1992) (O’Connor, J., concurring). In her concurrence, Justice O’Connor stated that:

[W]e abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman’s interest; and in practice, it undervalues the State’s interest in potential life . . . .

*Id.* (O’Connor, J., concurring). Chief Justice Rehnquist added that “[o]ne cannot ignore the fact that . . . the decision to abort necessarily involves the destruction of a fetus.” *Id.* at 952 (Rehnquist, C.J., concurring and dissenting).

246. *Id.* at 876 (O’Connor, J., concurring) (recognizing “substantial state interest in potential life throughout pregnancy”).

247. H.B. 2644, 183d Gen. Ct., Reg. Sess. (Mass. 2003); S.B. 1069, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

248. *Planned Parenthood League of Massachusetts, Medical Services*, at <http://www.pplm.org/clinic/pplm2.html> (last visited Mar. 25, 2005).

249. MASSACHUSETTS COALITION FOR CHOICE, *supra* note 226.

250. H.B. 2644, 183d Gen. Ct., Reg. Sess. (Mass. 2003); S.B. 1069, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

woman and her doctor. Meeting with the doctor constitutes a key element of the personal choice at issue. A physician is equipped to provide accurate information about the woman's medical condition, the progress of her pregnancy, and the status of her unborn child. To characterize the physician meeting as a burden is to adopt a dangerous attitude—"don't burden her with the facts"—that is entirely inconsistent with the woman's interest in full disclosure.

The only real difference that the proposed legislation will make is to align abortion patients' right to know material information with that afforded to patients of all other medical practices. The legislation requires physicians to divulge any information "that a reasonable patient in the woman's position would consider material to the decision of whether to undergo the abortion."<sup>251</sup> It eliminates the "unique treatment"<sup>252</sup> of abortions that results when all other medical interventions are conditioned on full disclosure. Thus, whatever burden is experienced as a result of the disclosure requirement is one that any person seeking medical treatment in Massachusetts assumes.<sup>253</sup>

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251. H.B. 2644, 183d Gen. Ct., Reg. Sess. (Mass. 2003); S.B. 1069, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

252. *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 401 (Mass. 1981).

253. Indeed, the legislation would augment an existing array of full disclosure statutes:

*Adoption Proceedings:* Massachusetts General Laws chapter 210, section 2 requires that the consent form relinquishing parental rights at birth for adoption purposes must state that the person signing the form waives any right to notification of future legal proceedings involving the child and that the surrender of parental rights is final and irrevocable. MASS. GEN. LAWS ch. 210, § 2 (2004).

*Breast Cancer Treatments:* Massachusetts General Laws chapter 111, section 70E requires physicians to provide "a patient suffering from any form of breast cancer" with "complete information to all alternative treatments which are medically viable." MASS. GEN. LAWS ch. 111, § 70E (2004).

*Breast Implants:* Section 70E also requires the Department of Public Health (DPH) to "develop a standardized written summary" describing "in layman's language" the "side effects, warnings, and cautions for a breast implantation operation." *Id.* DPH must distribute the summary to all facilities performing breast implants, and physicians must "inform the patient of the disadvantages and risks associated with breast implantation," provide the written summary, and obtain the patient's written acknowledgement that the information was received before the patient consented. *Id.*

*Maternity Care:* Section 70E requires maternity patients to receive at the time of pre-admission "complete information" regarding various rates in the facility relating to procedures such as caesarian sections, deliveries, and epidurals. *Id.*

*Genetic Testing:* Section 70G requires those providing genetic testing to inform the patient about the test's purpose, the reliability of positive or negative test results, levels of certainty, the availability and importance of genetic counseling, suggested genetic counselors or medical geneticists to consult, general description of each disease or condition tested for, and those to whom the results may be disclosed. *Id.* § 70G.

*Door-to-Door Sales and the Like:* Massachusetts General Laws chapter 93, section 48 requires that in certain cases sellers of goods or services inform buyers orally and in writing of their right to cancel the agreement within three days and of other related rights. MASS. GEN. LAWS ch. 93, § 48 (2004).

*Credit Services:* Massachusetts General Laws chapter 93, sections 68C and 68D require credit service organizations to inform customers in writing of their rights to review their files at no charge, to dispute credit reports, and to cancel service agreements within three business days. *Id.* §§ 68C-68D.

*Health Club Memberships:* Massachusetts General Laws chapter 111, sections 81 and 82 require health clubs to include in the written contract for memberships and to post "clearly and conspicuously on the premises of the health club" information about the customer's right to cancel for any reason within three days of the

In sum, the issue is not the “interpos[ing of] material obstacles to the effectuation of a woman’s counselled [sic] decision to terminate her pregnancy.”<sup>254</sup> Instead, the precise concern is whether the woman’s decision was properly counseled through full disclosure in the first place.

*E. A Balancing of Interests Favors Full Disclosure*

Rather than employing a “rigid” scrutiny standard that strikes down state legislation not based on “compelling” public interests, the SJC takes “a more flexible approach.”<sup>255</sup> The court engages in a case-by-case analysis weighing of the respective interests to determine the proper balance between state and private concerns in each case.<sup>256</sup>

When balancing interests within the abortion context, the SJC notes the burdens associated with the experience of pregnancy and “the attachment the experience creates, partly physiological and partly psychological, between mother and child.”<sup>257</sup> The SJC found “it difficult to imagine a clearer case of bodily intrusion.”<sup>258</sup> This concern, however, must be weighed against the post abortion experiences of each woman who “discover[s] later, with devastating psychological consequences, that her decision was not fully informed.”<sup>259</sup> One story is all that is necessary to provide insight into the nature of this burden:

June had an abortion when she was three months pregnant at the age of 19. As her life went on, she thought little about the procedure until she attended nursing school. During her classes she learned about fetal development and

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purchase or for health reasons. MASS. GEN. LAWS ch. 111, §§ 81-82.

*Consumer Leases of Personal Property Under \$25,000*: Massachusetts General Laws chapter 93, section 91 requires rental outlets to provide a detailed “written statement of information” prior to a customer’s consent to the lease “setting out accurately and in a clear and conspicuous manner” ten separate categories of information, including descriptions of all express warranties, guarantees, and cancellation policies. MASS. GEN. LAWS ch. 93, § 91.

*Phone Services*: Massachusetts General Laws chapter 93, section 111 requires phone companies that provide local calling services to prepare and distribute an “information booklet” that the Department of Telecommunications and Energy approves describing all “consumer rights” and legal options available to customers. *Id.* § 111.

*New Car Purchases*: The “Lemon Law” requires car dealers to affix to each new car a “clear and conspicuous” listing, which the Director of Consumer Affairs and Business Regulations drafts, of all the legal rights and options available to customers in the event they discover problems with their new car after the sale. MASS. GEN. LAWS ch. 90, § 7N1/2(6A) (2004).

*Tanning Services*: Massachusetts General Laws chapter 111, section 209 requires tanning parlors to provide customers with a standardized written notice, as set out in the statute, describing the risks of ultraviolet radiation. MASS. GEN. LAWS ch. 111, § 209. Before beginning the tanning process, customers must acknowledge in a signed written statement that they have reviewed and understand such risks. *Id.*

254. *Moe*, 417 N.E.2d at 398.

255. *Id.* at 403.

256. *Id.*

257. *Id.*

258. *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 403 (Mass. 1981).

259. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873 (1992) (O’Connor, J., concurring).

saw her first ultrasound. June was utterly traumatized when she was confronted with this information—the reality that the clinic had intentionally withheld: ‘I remember raising many questions before my abortion. All my questions were brushed aside as “nothing to worry about.” I asked how far my baby had developed. The counselor pressed her pencil on a paper, making a micro-dot. “That’s what the ‘product of conception’ looks like,” she said. I was 12 weeks along in my pregnancy—this was such a lie! As I learned the truth in nursing school, I can’t tell you how betrayed I felt! The new information also made me completely sick. I almost dropped out of nursing school because of my grief. Thinking about that little baby . . . and how . . . how in God’s name I could have destroyed it.’<sup>260</sup>

Unfortunately, post abortion experiences of grief and other psychological and emotional difficulties are not infrequent. Even PPFA admits on its national website that “[u]p to 10 percent of women who have abortions experience depressive symptoms of a lingering nature.”<sup>261</sup> While PPFA claims, based on studies from the 1980s and early 1990s,<sup>262</sup> that this rate of depression is similar to that associated with childbirth, more recent studies provide a more complete and disturbing picture.<sup>263</sup> According to Dr. E. Joanne Angelo, a professor of psychiatry at Tufts Medical School in Massachusetts who has treated many women experiencing depression and other forms of post-abortion stress, “[a] tidal wave of grief is building in our society, an ocean concealed by [and from]

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260. Burke Affidavit, *supra* note 212, at 29-30. Burke is a psychologist with extensive experience in providing clinical care to post-abortive women. *Id.* In the affidavit, she relates numerous actual stories of a similar nature drawn from her meetings with her clients. *Id.*

261. PLANNED PARENTHOOD FEDERATION OF AM., INC., FACT SHEET: THE EMOTIONAL EFFECTS OF INDUCED ABORTION, at [http://www.plannedparenthood.org/library/facts/emoteff\\_010600.html](http://www.plannedparenthood.org/library/facts/emoteff_010600.html) (last visited Mar. 25, 2005).

262. *Id.* The PPFA cited a number of sources in its fact sheet. PAUL SACHDEV, UNLOCKING THE ADOPTION FILES (1989); PAUL SACHDEV, SEX, ABORTION AND UNMARRIED WOMEN (1993); Terra Ziporyn, ‘Rip Van Winkle Period’ Ends for Periperal Psychiatric Problems, 251 J. AM. MED. ASS’N 2061 (1984); G. Zolese & C.V.R. Blacker, *The Psychological Complications of Therapeutic Abortion*, 160 BRIT. J. PSYCHIATRY 742 (1992)).

263. See generally David C. Reardon & Jesse R. Cogle, *Depression and Unintended Pregnancy in the National Longitudinal Survey of Youth: A Cohort Study*, 324 BRIT. MED. J. 151 (2002) [hereinafter Reardon & Cogle, *Cohort Study*] (examining relation between abortion and subsequent depression); David C. Reardon & Jesse R. Cogle, *Depression and Unintended Pregnancy in Young Women: Authors’ Reply*, 324 BRIT. MED. J. 1097 (2002) [hereinafter Reardon & Cogle, *Authors’ Reply*] (examining relation between abortion and subsequent depression). Using extensive data from a federally funded long-term study, the authors found that married women admitting a history of abortion are significantly more likely than married women who carry an unintended pregnancy to term to have subsequent clinical depression as assessed an average of eight years after their pregnancy outcome. Reardon & Cogle, *Cohort Study*, *supra*; Reardon & Cogle, *Authors’ Reply*, *supra*. Rates for unmarried women with previous abortion history or abortion did not differ, but that may be due to unmarried women generally demonstrating a greater rate of depression than married women. Reardon & Cogle, *Cohort Study*, *supra*; Reardon & Cogle, *Authors’ Reply*, *supra*; see also Reardon Affidavit, *supra* note 202, at 36-42 (discussing mental health implications extensively with numerous citations); *Rapid Responses for Reardon and Cogle*, at <http://bmj.bjmmournals.com/cgi/eletters/324/7330/151> (last visited Mar. 25, 2005) (containing full length versions of correspondence and authors’ replies).

women at great personal expense.”<sup>264</sup>

## V. CONCLUSION

Setting up a decisional framework that gives all women access to material, scientifically accurate information not generally offered in Massachusetts furthers both private and state interests. Some women will undoubtedly feel that they have no use for the information, but notice of the information’s availability will not impede their access to abortion. Disclosure will minimize the risk that these women will someday feel betrayed by a process that denied them information they later realize was essential to making a sound decision. Other women will absorb the information and, in choosing to continue their pregnancies, render a decision truer to their self-defined interests. Many women who feel that abortion is their only choice may benefit from data that emboldens them to resist pressures that bear against their innermost desires.

A state-mandated rule of full disclosure will help modulate the ideological, institutional, and financial forces that shape and bias the pre-abortion counseling process today in Massachusetts. In addition, such a rule will keep the state from issuing official consent forms that tip the scales decidedly against full disclosure, thus unconstitutionally endorsing an imbalanced counseling process that, for many, is also subsidized with public funds. In the end, it is the proposed woman’s right to know legislation’s neutralizing effect that tilts the constitutional balance in its favor.

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264. E. Joanne Angelo, Presentation at Boston College Law School Symposium “Roe v. Wade: A Thirty Year Reflection” (Jan. 25, 2003), *quoted in* Mark Sullivan, *Law School Hosts Symposium on Abortion: Speakers Mull Social, Health Effects of Post-Roe v. Wade Era*, BOSTON C. CHRON., Jan. 30, 2003, at 3, available at [http://www.bc.edu/bc\\_org/rvp/pubaf/chronicle/v11/ja30/symposium.html](http://www.bc.edu/bc_org/rvp/pubaf/chronicle/v11/ja30/symposium.html).