Informed Consent Laws

Protecting a Woman’s Right to Know

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It has become all too clear that the unborn child is not the only victim of abortion—the woman is also victimized by the procedure. Studies have revealed that women suffer emotionally and psychologically following abortion. Even the U.S. Supreme Court has recognized that severe depression and lack of esteem may follow.¹

Thus, following Roe v. Wade, states began enacting informed consent laws, aiming to reduce “the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”² Over the last several legislative sessions, states have begun taking further steps to ensure that women fully understand the risks and implications of their decisions before choosing abortion. These steps, which AUL refers to as informed consent enhancements, include providing women with information on fetal pain, the availability of ultrasound, and the link between abortion and breast cancer. States are also addressing the prevalence of instances when a woman is coerced against her will into having an abortion.

ISSUES

Informed Consent

Abortion clinics all too often fail to provide adequate and accurate information to women considering abortion. As a result, many women are physically and psychologically harmed by the abortion process. To better equip women with the knowledge they need before making an abortion decision and to ensure their consent is valid, informed consent laws should require the following information be provided to a woman at least 24 hours before an abortion:

- The name of the doctor who is to perform the abortion;
- A description of the procedure to be used;
- The risks of the abortion procedure as well as of childbirth;
- Scientifically accurate information about the unborn child;
- The possibility of medical benefits;
- The father’s liability for support; and
- A brochure explaining risks of and alternatives to abortion and scientifically accurate information concerning the development of the unborn child.

In 1992, the U.S. Supreme Court ruled that informed consent laws are constitutional.³ In 2007, the Court reaffirmed its approval of in-
formed consent laws, holding that “[t]he state has an interest in ensuring so grave a choice is well-informed.”

AUL has drafted a model bill, entitled the “Women’s Right to Know Act,” which encompasses all of the above provisions and complies with the prevailing U.S. Supreme Court precedent.

**Fetal Pain**

In light of advances in modern medicine and in popular opinion, a few states have realized that traditional informed consent requirements can be enhanced to further ensure informed consent. For example, several states have already enacted legislation requiring women be informed that their unborn children can feel pain. In the medical community, the accepted consensus is that unborn children begin feeling pain by at least 20 weeks gestation. This view is exemplified in the general practice of administering anesthesia during in utero procedures on unborn children who are 20 weeks gestation or more. And popular opinion accords with consensus in the medical community. In a 2004 Zogby poll, 77 percent of those surveyed said they favored laws requiring the provision of information about fetal pain to women who are 20 weeks gestation or more in their pregnancies.

Unfortunately, general public concern over whether the unborn feel pain has, to a large extent, not translated into law. In fact, unborn children currently have less legal protection from pain than do commercial livestock in a slaughterhouse or animals in a laboratory. It is, therefore, crucial that states include fetal pain information into their informed consent statutes.

AUL has included optional information on fetal pain in its “Women’s Right to Know Act” (see above).

**Ultrasound**

States have also begun enacting laws which require that an ultrasound be performed before abortion and that the woman be given the option to see an image of her unborn child and to hear the heartbeat. Ultrasound requirements such as these serve an essential medical purpose in that they diagnose ectopic pregnancies, which if left undiagnosed can result in infertility or even fatal blood loss.

Further, ultrasound requirements ensure a truly informed choice because they allow a woman to see her unborn child as he or she really is, both by seeing his or her form and face on a screen and also by hearing the heartbeat. Medical evidence indicates that women feel bonded to their children after seeing them on the ultrasound screen. Once that bond is established, researchers argue, a woman no longer feels ambivalent toward her pregnancy and actually begins to feel invested in her unborn child.

Thus, ultrasound provisions both promote the woman’s physical and psychological health
and advance the states’ important and legitimate interest in protecting life. To most effectively provide women with this opportunity, ultrasound laws should contain the following provisions:

- A requirement that, for medical reasons, an ultrasound be performed before each abortion;

- A requirement that the physician give the woman the option of viewing the ultrasound image and hearing the heart tones; and

- A requirement that the physician adhere to standard medical practice within the community, which ensures that he or she accurately portrays the presence of external members and internal organs, if present and viewable, of the unborn child.

Each of these provisions is contained in AUL’s model bill, the “Woman’s Ultrasound Right to Know Act.”

**The Link Between Abortion and Breast Cancer**

Currently, at least 29 out of 41 worldwide studies have independently linked induced abortion with breast cancer.

Moreover, certain aspects of the relationship between pregnancy and breast cancer are undisputed. For example, it is scientifically undisputed that full-term pregnancy reduces a woman’s lifetime risk of breast cancer. It is also undisputed that the earlier a woman has a first full-term pregnancy, the lower her risk of breast cancer becomes, because—following a full-term pregnancy—the breast tissue exposed to estrogen through the menstrual cycle is more mature and cancer resistant. In fact, for each year that a woman’s first full-term pregnancy is delayed, her risk of breast cancer rises 3.5 percent.¹¹

The theory that there is a direct link between abortion and breast cancer builds upon this undisputed foundation. During the first and second trimesters of pregnancy the breasts develop merely by duplicating immature tissues. Once a woman passes the thirty-second week of pregnancy (third trimester), the immature cells develop into mature cancer resistant cells.¹² This is where abortion fits into the complex scientific puzzle. When an abortion ends a normal pregnancy, the woman is left with more immature breast tissue than she had before she was pregnant.¹³ In short, the amount of immature breast tissue is increased and this tissue is exposed to significantly greater amounts of estrogen—a known cause of breast cancer.

Women facing an abortion decision have a right to know that such medical data exists. At the very least, women must be informed that it...
is undisputed that pregnancy provides a protective effect against the later development of breast cancer.

**Information on Hospice Care**

For years, pro-abortion activists have spread the false idea that abortion is necessary for unborn children with fetal abnormalities. In many situations, what they deem as necessity is really the choice to abort a child that probably will not survive much longer than birth. For many families, however, aborting their unborn children is not an option, even when it is very likely the baby will die soon after birth. Information about the availability of hospice care for such children opens opportunities for women they might not otherwise have known about. For example, Minnesota requires abortion providers to give women information on hospices that provide perinatal care for children born with fetal abnormalities. Essentially, women carrying a child with a lethal abnormality and considering giving birth (as opposed to undergoing an abortion) receive information about comprehensive care that runs from the diagnosis of the fetal abnormality to the child’s death.

AUL has developed the “Perinatal Hospice Information Act,” model language that can be incorporated into states’ existing informed consent laws, to ensure that a woman facing a diagnosis of a lethal fetal anomaly is given complete information about her options, including the choice of supportive perinatal care.

**Coercion**

Many women who arrive on the doorstep of an abortion clinic are not there of their own free will. They are there because someone else is forcing them to have an abortion. And we can only guess the lengths to which that other person went in order to get her (or take her) to the abortion clinic.

Pro-abortion advocates spend a great deal of time using the language of “freedom” and “choice.” But for many women, abortion is anything but a free choice. A 2004 survey of American and Russian women found that 64 percent of American women who purportedly “chose” abortion reported that they were pressured into their abortions. For these women, abortion is a coerced nightmare justified by legalization and implicitly condoned by an abortion industry that puts profit ahead of women’s health.

It is time to put women’s health and right of conscience ahead of profit and ideology by enacting coercive abuse prevention (CAP) legislation. To effectively prevent coercive abuse, CAP legislation must address the coercion itself, the timely reporting of suspected coercion, and treatment for victims of coercive abuse.

First, coercive abuse must be clearly defined. Coercive abuse takes on many forms. Whether it is actual or threatened physical abuse, a denial of social assistance support, a threat to fire...
a pregnant woman, or blackmail, each form should be met with a penalty.

Second, facilities that provide abortion services should be required to report suspected coercive abuse to the proper authorities. Further, if a pregnant woman is being coerced into an abortion, she should know she has options. She should know that coercing an abortion is illegal and that there are counseling and protective services available.

Third, penalties must be capable of punishing and preventing the coercive abuse of pregnant women. This includes penalties for abortion providers who knowingly violate the requirements of these statutes.

AUL has drafted comprehensive legislation in this area, the “Coercive Abuse Against Mothers Prevention Act,” which encompasses these suggestions and also ensures states do not go too far and infringe on protected First and Fourteenth Amendment conduct.

KEY TERMS

- **Coercive abuse** in the abortion context is committed if a person knows of or suspects the pregnancy of a woman and engages or conspires with another to engage in certain conduct that is intentionally and purposely aimed at directing the woman to have an abortion and solely conditioned upon the pregnant female disregarding or refusing the person’s demand that she seek an abortion.

- **Informed consent** is a legal phrase meaning a person must be fully informed of a medical procedure before giving true consent to that procedure. In the abortion context, it means that a woman is fully informed of the risks, alternatives, and other important medical information concerning the abortion. If a woman is not fully informed of what the procedure or its consequences will or could entail, her consent is not legally valid.

- A **medical emergency** occurs when a patient has a condition which, on the basis of the physician’s good-faith medical judgment, complicates the medical condition of the patient as to necessitate an immediate abortion in order to avert the patient’s death. A medical emergency also exists if a delay will create a serious risk of substantial or irreversible impairment of a major bodily function.

- **Reflection period** refers to the time between the woman’s receipt of information and when the abortion is performed. This time period allows a woman to read the information and reflect upon her decision prior to the abortion.

MYTHS & FACTS

**Myth:** Informed consent laws present an unconstitutional burden on women seeking abortion.

**Fact:** Informed consent laws—including 24-hour reflection periods—are constitutional as an expression of the state’s interest in the health and safety of women. Reflection periods do not increase health risks to women or place an
undue burden on women who have to travel long distances, incur additional costs, etc. Not only has the U.S. Supreme Court rejected such arguments, but most informed consent laws provide medical emergency exceptions and do not require that the information come personally from the abortion provider himself/herself—and thus women need not visit an abortion clinic twice.

**Myth:** Informed consent laws intrude on the normal patient-physician relationship.  
**Fact:** Most women never receive any consultation with the physician performing the abortion. There can be no intrusion on a relationship that does not exist in the first place.

**Myth:** Informed consent laws force women to receive biased and misleading information.  
**Fact:** Such laws simply require a woman be informed of all medical risks and alternatives about which a reasonable patient would want to know.

**Myth:** Women already have access to all the information they need about abortion.  
**Fact:** Researchers have found that 83 percent of women who seek abortion counseling have no prior knowledge about the abortion procedure or fetal development. Thousands of women have testified that they did not receive adequate counseling from abortion providers. Furthermore, access to information is not the same as actually receiving information. A woman’s health is placed in jeopardy when we begin presuming what she does and does not know.

**Myth:** Informed consent laws threaten a woman’s right to choose.  
**Fact:** Informed consent laws do not prevent a woman from choosing abortion. Rather, such laws ensure that a woman makes an informed choice. Those who claim to be pro-choice should want to give women the objective information needed to make true choices.

**Myth:** A woman who might be denied informed consent already has the right to seek redress against the doctor by filing a malpractice action.  
**Fact:** A woman will not be able to bring a successful malpractice action unless it can be shown that the abortion provider violated the community standard of other abortion providers. If all or most abortion providers are failing to relay information—as is generally the case—a woman will be unable to recover damages. Moreover, women suffering post-abortion problems are, because of shame or embarrassment, less likely to bring such claims in the first place.

**Myth:** Abortion is 12 times safer than childbirth, thus informed consent laws do not improve the health of women.  
**Fact:** Numerous medical studies now demonstrate the devastating health risks—both physical and psychological—of elective abortion, placing earlier claims that abortion is safer
than childbirth in serious doubt.\textsuperscript{19} Moreover, when research on the abortion-breast cancer risk is factored in, the risk of dying from an abortion is found to exceed the risk of dying from childbirth by orders of magnitude.\textsuperscript{20}

**Myth:** Informed consent laws unconstitutionally interfere with a doctor’s rights.

**Fact:** The joint opinion in *Casey* concluded that it was constitutional for a state to regulate physician speech as part of its regulation of the practice of medicine.\textsuperscript{21} Moreover, informed consent laws are, in essence, consumer rights laws. Such laws require that patients be informed about not only what the abortion provider believes is relevant, but also what a reasonable patient would believe is relevant. According to the American Civil Liberties Union (ACLU), patients should be informed of every risk in elective procedures, even those risks that are the most remote.\textsuperscript{22} Because the abortion industry is a for-profit industry, its physicians have every financial reason to deceptively urge that very practical information is irrelevant.

**Myth:** Abortions will decrease simply because informed consent requirements are burdensome.

**Fact:** Statistics in Mississippi and Pennsylvania indicate the number of abortions decreases because women are informed, not because informed consent laws are burdensome.\textsuperscript{23}

**Myth:** A new Harvard study unequivocally disproved the ABC link.

**Fact:** The study was so methodologically flawed that it hides the positive association between induced abortion and breast cancer.\textsuperscript{24}

**Myth:** Coerced abortion protection (CAP) legislation is just another way to place a burden between a woman and her right to choose an abortion.

**Fact:** CAP legislation does not place a burden on a pregnant woman known or suspected to be a victim of coercive abuse. She is not legally required to report anything nor is she prohibited from obtaining an abortion whether or not she is a victim of coercive abuse. The reality is that CAP legislation removes burdens from women who want to proceed with their pregnancies and provides them with the potentially vital information necessary to do so.

**Myth:** A 24-hour reflection period for those known or suspected to be victims of coercive abuse is a burden that will increase the likelihood that a woman will be abused.

**Fact:** A 24-hour reflection period allows a woman time to consider her treatment and protection options—options she may not have known about prior to their disclosure by the abortion provider. It also allows time for the proper agency to respond to the abortion provider’s mandatory report. If she decides to pursue an abortion after the reflection period, she may do so. Moreover, seeking protective services will decrease the likelihood that she will be a victim of abuse because she may seek protective aid from the proper authorities. In emergency situations, the 24-hour reflection period can be waived to save a woman’s life or to prevent substantial and irreversible bodily injury.

**Myth:** Most abused women will not pursue treatment or protection services because they are afraid of further reprisals from their abuser.

**Fact:** Even if this is true, it is irrelevant. Some women will choose to pursue treatment or protection services. Further, this is not a valid rea-
son to prevent legislation from being enacted. Simply because some women will not take advantage of a law does not mean that all should be prevented from doing so.

**Myth:** CAP legislation is vague because “coercive abuse” could be inferred from conduct that is motivated by factors independent of the woman’s pregnancy.

**Fact:** CAP legislation specifically targets conduct that is intentionally, willfully, and solely conditioned upon the pregnant female disregarding or refusing the person’s demand that she seek an abortion. The conduct must also be purposely aimed at directing a woman to have an abortion. Like other crimes, the elements of coercive abuse must be proven beyond a reasonable doubt.25

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**Endnotes**

3. See id.
6. Zogby poll (April 15-17, 2004), surveying more than 1,200 people.
9. Id.
16. *Casey*, 505 U.S. at 885-86; see also id. at 966-69 (Rehnquist, J., concurring in the judgment and dissenting in part); *Utah Women’s Clinic v. Leavitt*, 844 F. Supp. 1482, 1490-91 (D. Utah 1994).
18. See, e.g., id. at 16-17, 335 (finding that 85 percent of women surveyed believed they were misinformed or denied relevant information during their pre-abortion counseling).
25. For more information on the topics discussed in this article, please visit AUL’s website at http://www.AUL.org.