



Briefing Paper

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Abortion Consent in Massachusetts: Women are being denied their right to know

Introduction

In 1980 Massachusetts was one of the first states in the country to mandate informed choice on abortion by enacting Mass. Gen. Laws chapter 112, §12S. The statute requires abortion providers to, among other things, describe the development of the unborn child and discuss the availability of agencies and resources providing abortion alternatives. The statute also mandates a 24-hour reflection period.

Even though the U.S. Supreme Court ruled in 1992 that these types of protections for women are constitutional, the Massachusetts Department of Public Health (DPH) continues to advise abortion providers to ignore them in Massachusetts. As discussed below, the Attorney General's Office refuses to enforce the law on the books. Abortion providers are not complying voluntarily with the law either.

As a result, the state is collaborating with abortion providers to circumvent the current law's informed consent and reflection period requirements. Women are being denied their right to know despite the present law's guarantees.

These circumstances have prompted the introduction of Senate Bill 924 & House Bill 3953 (An Act Relative to a Woman's Right to Know, sponsored by Sen. Michael R. Knapik, Rep. Kathleen M. Teahan and others) in the 2001-2002 legislative session. The Woman's Right to Know Bill revives the fetal description and reflection period requirements, and strengthens the informed consent process by identifying more specifically the type of information abortion providers should give to women. Among other things, the Woman's Right to Know Bill directs DPH to produce an extensively researched and accurately illustrated booklet on fetal development. DPH must publish the information on the internet as well. The booklet would include also contact information regarding agencies that provide adoption assistance, housing, and other pregnancy related social services.

This briefing paper will:

- 1) Describe in more detail how the current abortion consent process varies from what the law requires;
- 2) Provide the chronology of events leading to the present situation whereby, with the State's official blessing, abortion providers are ignoring the law and denying women's right to know, thus demonstrating the need for the Woman's Right to Know Bill.

The Massachusetts Catholic Conference represents the Roman Catholic Dioceses of Boston, Fall River, Springfield, and Worcester on public policy matters concerning the protection of human life, the sanctity of marriage and the family, and the dignity of and support for the poor.

The State Ignores Some and Minimizes Other Requirements of the Present Informed Consent Statute

Mass. Gen. Laws chapter 112, §12S sets out several requirements governing consent for abortion by minors and adults. The only portion of §12S currently subject to a court injunction and thus unenforceable as written is the requirement that both parents must consent to an unmarried minor's abortion. In 1997 the Massachusetts Supreme Judicial Court ruled that abortion providers need only rely on the consent of one of the parents and issued an injunction preventing the State from enforcing the statute's two-parent requirement.¹ Since no other part of §12S is enjoined (see chronology below), the rest of the statute is still enforceable.

The statute directs DPH to prescribe a consent form containing various types of information and mandates that a woman must sign the form at least 24 hours before an abortion. As indicated by the following comparisons, there is a significant variance between what the law requires and what the current informed consent process actually entails.

The Current Statute: "This form . . . shall include the following information: a description of the stage of development of the unborn child"; **The Abortion Consent Forms:**² The DPH forms avoid any reference to the unborn child and the stages of fetal development. Instead the forms refer only to "the contents of the womb", such that "In an abortion, the contents of the womb (uterus) are removed, leaving the uterus to return to its non-pregnant state."³

Statute: "the type of procedure which the physician intends to use to perform the abortion"; **Forms:** The DPH forms describe in general terms the types of abortions that may be used, but avoid any reference to fetal demise.

Statute: "the possible complications associated with the use of the procedure and with the performance of the abortion itself;" **Forms:** The DPH forms contain a list of "Possible Medical Problems" that includes physical complications but that excludes any reference to possible psychological or emotional problems associated with abortion.

Statute: "the availability of alternatives to abortion;" **Forms:** The DPH forms merely state the obvious: "Other than abortion, you could choose to continue the pregnancy and either raise the child or make other plans such as legal adoption." The forms provide no information about where a woman can find support to carry her pregnancy to term, such as a listing of public and private agencies providing such resources as housing, childcare, healthcare, and pregnancy related services.

Statute: "and a statement that, under the law of the commonwealth, a person's refusal to undergo an abortion does not constitute grounds for the denial of public assistance"; **Forms:** The DPH forms comply with this requirement and, without providing contact information, refer to the Massachusetts Department of Transitional Assistance as a source of public funds.

Finally, the statute requires that an abortion facility wait twenty-four hours after a woman signs the informed consent form before performing an abortion. As will be explained below, the State is not enforcing this requirement either. Because the reflection period and the other portions of the statute are not being enforced,

¹ Planned Parenthood League of Mass. v. Attorney Gen., 424 Mass. 586, 677 N.E.2d 101 (1997).

²DPH has issued three versions of substantially the same form, with each version applying to one of the trimesters of pregnancy. Mass. Dep't of Public Health, First/Second/Third Trimester Abortion Consent Form [hereinafter "Mass. Abortion Consent Form"] (accompanying DPH Memorandum concerning "Revised Abortion Information and Consent Forms [and] Revised Parental Consent/Judicial Authorization Form", May 1996). The DPH Forms are attached as Appendix A.

³ Mass. Abortion Consent Form at 1. Contrast this description of an abortion with the references found in the definitions section of the abortion code: "Abortion, the knowing destruction of the life of an unborn child or the intentional expulsion or removal or 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". Mass. Gen. Laws chap. 112, §12K.

women in Massachusetts continue to be exposed to increased health risks associated with the lack of appropriate informed consent to abortion.

Why the Law on the Books is Not Being Enforced

The story behind the non-enforcement of the informed consent statute begins in 1980. Planned Parenthood League of Massachusetts and other abortion advocates challenged the statute by filing a class action lawsuit in federal court immediately after the statute became law. On September 2, 1980, Judge A. David Mazzone of the U.S. District Court for the District of Massachusetts denied Planned Parenthood's motion for a preliminary injunction.⁴

1980: Judge Mazzone's Ruling

In his decision, Judge Mazzone made several key factual findings relevant to the fetal description and reflection period requirements:

- 1) The 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."⁵
- 2) Abortion providers avoided giving women truthful information about their unborn children to the point of denying or downplaying medical facts. According to Judge Mazzone, the evidence submitted by Planned Parenthood and other abortion providers revealed that "the 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." 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."
- 3) According to the testimony of one prominent Massachusetts abortion provider, Dr. Philip G. Stubblefield, at least "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." Moreover, "after the [abortion] procedure is completed, some patients may ask the sex, and some may even ask to see the embryo."
- 4) Abortion providers themselves offered a rationale for giving women information about the unborn child. According to the testimony of two doctors, "[t]he 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.*"
- 5) Regarding the 24 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."⁶
- 6) A 24 hour delay imposes no meaningful burden on women 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

⁴ Planned Parenthood League of Mass. v. Bellotti, 499 F. Supp. 215 (D. Mass. 1980).

⁵ The references to Judge Mazzone's findings regarding the fetal description requirement can be found at 499 F. Supp. at 218, 219.

⁶ Judge Mazzone's findings regarding the reflection period requirement can be found at 499 F. Supp. at 221-223.

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.”

1981: 1st Circuit Court of Appeals Ruling

Planned Parenthood appealed. On February 9, 1981, the U.S. Court of Appeals, First Circuit, reversed those parts of Judge Mazzone’s decision upholding the fetal description and reflection period requirements, and ordered the lower court to issue a preliminary injunction against their enforcement.⁷ 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 of probable outcomes.”⁸ At the time of the appeal, the U.S. 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 review by the U.S. Supreme Court.

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”.⁹ Because of this supposed defect, any emotional reactions to learning about the unborn child’s development were not justified, in the court’s opinion, by any state interest in informed consent.¹⁰ 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.”¹¹ “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.” To exclude factual information of this sort as a matter of constitutional dictate “would 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.” As will be made evident below, Judge Campbell, and not the majority, proved in the long run the better constitutional prophet.

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”.¹² Under the then-applicable strict scrutiny test employed by the U.S. Supreme Court in abortion cases, the appellate court felt obliged to rule that both the fetal description and reflection period requirements were “probably unconstitutional”.¹³

1986-1992: Judge Mazzone’s “Judgment”

After the appellate court remanded the case to the district court to begin the trial stage, and after Judge Mazzone issued a preliminary injunction as mandated by the appellate court on April 22, 1981, nothing happened in the case with respect to the fetal description and reflection period requirements for several years.¹⁴ On October 22,

⁷ *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981). The appellate court upheld the statute’s requirements pertaining to minors and to the other informed consent provisions.

⁸ *Id.* at 1009.

⁹ *Id.* at 1021.

¹⁰ *Id.* at 1022.

¹¹ *Id.* at 1028 (Campbell, J., dissenting in part).

¹² The court’s discussion of the reflection period issue can be found *id.* at 1014-16.

¹³ *Id.* at 1023.

¹⁴ A copy of the preliminary injunction was not included in the court records now in storage at the National Archives Waltham (MA) Records Center, but a later document filed by Planned Parenthood 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

1986, Planned Parenthood moved for a final injunction against the two provisions in question without conducting a trial. Planned Parenthood cited two intervening U.S. Supreme Court decisions that struck down similar provisions in other states.¹⁵ The decisions in *City of Akron v. Akron Center for Reproductive Health, Inc.* (1983) and *Thornburgh v. American College of Obstetricians* (1986) marked the zenith in judicial activism on behalf of the abortion license. A majority of the Supreme Court, as then constituted, indeed would, in the words of the Planned Parenthood 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.”¹⁶ In an October 24, 1986, response to Planned Parenthood’s motion, then-Attorney General Francis X. Bellotti was forced to concede that the *Akron* and *Thornburgh* decisions “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 reflection 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.”¹⁷

One year later, on October 27, 1987, Planned Parenthood and new Attorney General James Shannon entered a joint “Stipulation and Agreement for Judgment” whereby both parties stipulated in §2 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”.¹⁸ Judge Mazzone issued a “Judgment” dated November 2, 1987, stating that “Pursuant to §2 of the stipulation of the parties . . . these provisions . . . are unconstitutional on their face”. On February 28, 1992, in what appears to be the final action in litigation spanning 12 years, Judge Mazzone reaffirmed that the 1987 judgment against the fetal description and reflection period provisions “remain[s] in full force and effect”.¹⁹

Three crucial points about Judge Mazzone’s final judgment should be noted. 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 the injunction.²⁰ Second, the 1987 judgment lacks any language implementing a permanent injunction but instead must be classified as a declaratory judgment, advisory in nature, that is based on the now outdated Supreme Court precedents in *Akron* and *Thornburgh*.²¹ Thus, no binding injunction exists that would have to be lifted before the provisions at stake could be enforced.²² Third, Judge Mazzone approved the declaratory judgment *before* the Supreme Court overruled its *Akron* and *Thornburgh* decisions by handing down *Planned Parenthood of Southeastern Pennsylvania v. Casey*²³ on June 29, 1992. By overruling the earlier

3, 4, Planned Parenthood League of Mass. v. Bellotti, No. 80-1166-MA (D. Mass. filed Oct. 21-22, 1986). The Archives has assigned the following identification number to the records: Accession # 21930002, Location C605929, Box 32.

¹⁵ See Plaintiff’s Memorandum of Law at 6-7 (citing and discussing *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) & *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)).

¹⁶ Plaintiff’s Memorandum of Law at 7.

¹⁷ Defendant’s Response to Plaintiffs’ Motion for Partial Summary Judgment at 2, *Planned Parenthood League of Mass. v. Bellotti*, No. 80-1166-MA (D. Mass. docketed Oct. 27, 1986).

¹⁸ Stipulation for Agreement for Judgment, *Planned Parenthood League of Mass. v. Bellotti*, No. 80-1166-MA (D. Mass. docketed Nov. 23, 1987).

¹⁹ Copies of both the 1987 Judgment and the 1992 Judgment are attached as Appendix B.

²⁰ “A preliminary injunction . . . expires on entry of a final judgment in the cause, whether or not the final judgment makes mention of it.” 14A *Cyclopedia of Federal Procedure* §73.70 (1992) (citing cases).

²¹ “In order for an injunction to issue in the first place there must be an existing 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.” *Hesley v. United States*, 312 F.2d 641, 649 (8th Cir. 1963).

²² Rule 65(d) of the Federal Rules of Civil Procedure requires that “Every 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”. See *Gunn v. Univ. Comm. to End the War in Vietnam*, 399 U.S. 383, 389 (1970) (recognizing that the per curiam “opinion” of the lower court, because it lacked specific terms for injunctive relief was, as the parties conceded, a non-binding “advisory opinion” that provided “no relief”); *Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir. 1990) (holding that until a federal district judge issues “a separate [order], with a self-contained statement of what the court directs to be done”, and thereby “enters an injunction”, the state is “under no decree. It need not dance to the judge’s tune”).

²³ 505 U.S. 833 (1992).

cases, and upholding a Pennsylvania law that provided for a 24 hour reflection period and that included a fetal description requirement even more detailed than required by Massachusetts law, the Supreme Court eliminated the precedents upon which the 1987 declaratory judgment was based. Thus, the 1987 judgment no longer accurately reflects constitutional law, as made clear by a reading of the *Casey* decision itself and its progeny.

1992: U.S. Supreme Court Decides Casey

Four of the Supreme Court justices in *Casey* maintained that *Akron* and *Thornburgh* were not controlling because *Roe v. Wade*²⁴ itself was wrongly decided.²⁵ “In light of our rejection of Roe’s ‘fundamental right’ approach to this subject,” these justices considered informed consent and reflection period provisions to be rational means of furthering the state’s interests in “ensuring that the woman’s consent is truly informed” and in protecting life.²⁶ 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 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’”.²⁷

Three other justices voted to uphold the informed consent and reflection period requirements, not on the ground that *Roe v. Wade* should be overturned, but because, in their opinion, *Akron* and *Thornburgh* went beyond what *Roe* required. Specifically, 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.”²⁸ 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.²⁹

These same three justices concluded that a 24 hour reflection period requirement was also constitutional. Abandoning the constitutional framework found in *Akron* and *Thornburgh* and described by the justices as “strict[ly] prohibit[ing] . . . all regulation designed to promote the State’s interest in . . . life”,³⁰ the justices employed a more lenient “undue burden” analysis instead. Only legislation “likely to prevent a significant number of women from obtaining an abortion”³¹ would constitute an undue burden. Even though a reflection period requirement might cause “increased cost and delay,” these burdens alone would not be considered undue in light of the State’s legitimate interest in promoting careful decisionmaking.³²

²⁴ 410 U.S. 113 (1973).

²⁵ 505 U.S. at 953 (Rehnquist, J., joined by White, Scalia, Thomas, JJ., concurring with judgment in part and dissenting in part).

²⁶ *Id.* at 968, 969.

²⁷ *Id.* at 968-69 (citations omitted).

²⁸ *Id.* at 882 (joint opinion by O’Connor, Kennedy & Souter, JJ.)

²⁹ *Id.* at 883.

³⁰ *Id.* at 886.

³¹ *Id.* at 983 (discussing why another provision, a spousal notice requirement, created an undue burden).

³² *Id.* at 886-87.

Thus, seven out of the nine Supreme Court justices in *Casey* 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 (11) states.³³ The Supreme Court itself, with the addition of newly appointed justices not on the Court at the time *Casey* was issued, has thrice declined to review subsequent lower court decisions involving informed consent and reflection period requirements.³⁴

Thus, because the 1987 Judgment dissolved the preliminary injunction, and lacks all force and effect according to federal precedent, it no longer binds the State of Massachusetts from enforcing the fetal description and reflection period requirements of §12S.

1995-2001: Attorneys General Decline to Act

On August 22, 1995, the Pro-Life Legal Defense Fund, a Massachusetts organization of attorneys dedicated to the protection of human life, requested by letter that then-Attorney General L. Scott Harshbarger enforce the parts of §12S at issue. Writing on behalf of the Defense Fund, 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’s Office to “begin enforcing the provisions” of the law.³⁵ In the alternative, “if [the Attorney General] considers [Judge Mazzone’s Judgment] an obstacle,” Duncan and Lahive argued that “it would then be [the Attorney General’s] duty” to move for a relief from judgment on the grounds “that it is no longer equitable that the judgment shall have prospective application.”³⁶

Responding by letter on November 3, 1995, First Assistant Attorney General Thomas H. Green wrote that the Attorney General’s Office had decided to postpone any decision “on further litigation” because legislation to remove the 24-hour waiting period was pending in the Massachusetts legislature. 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.”³⁷ Greene does not refer to any pending bills eliminating the fetal description requirement.

³³ **Indiana:** *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 980 F. Supp. 962 (S.D. Ind. 1997); **Kentucky:** *Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000); **Louisiana:** *Hope Medical Group for Women v. Ieyoub*, No. 95-1979 (E.D. La. 1995); **Michigan:** *Mahaffey v. Attorney Gen.*, 564 N.W.2d 104 (Mich. App. 1997), *rev. denied*, 456 Mich. 944 (1998); **Mississippi:** *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1993) & *Pro-Choice Miss. v. Fordice*, 716 So.2d 645 (Miss. 1998); **North Dakota:** *Fargo Women’s Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994); **Ohio:** *Preterm, Inc. v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), *rev. denied*, 624 N.E.2d 194 (Ohio 1993); **South Dakota:** *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409 (D. S.D. 1994), *aff’d*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied sub nom.* *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); **Utah:** *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), *cert. denied sub nom.* *Leavitt v. Jane L.*, 518 U.S. 1019 (1996); **Wisconsin:** *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). Appellate courts in two other states have struck down reflection periods longer in duration than 24 hours and informed consent provisions requiring the information to be delivered personally by the abortion physician, so ruling on the basis of state constitutional law: **Florida:** *State v. Presidential Women’s Center*, 707 So.2d 1145 (Fla. Dist. Ct. App. 1998) (striking down requirement that referring or abortion physician personally inform woman of abortion risks and alternatives); **Tennessee:** *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (striking down 48 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).

³⁴ *Leavitt v. Jane L.*, 518 U.S. 1019 (1996); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); *Barnes v. Moore*, 506 U.S. 1021 (1993).

³⁵ 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 of the correspondence between the Legal Defense Fund and the office of Attorneys General L. Scott Harshbarger and Thomas Reilly are attached as Appendix C.

³⁶ *Id.* at 2 (quoting Federal Rule of Civil Procedure 60(b)(5)).

³⁷ Letter from Thomas H. Green, First Assistant Attorney General, to Messrs. Duncan and Lahive (Nov. 3, 1995).

Green contended that the 1987 Judgment “is not . . . a nullity, at least not in the sense that it now lacks legal force.” He referred to *GTE Sylvania, Inc. v. Consumers Union*,³⁸ arguing that the 1987 Judgment “remains a presumptively valid judgment until modified or vacated.” Yet, in the part of *Consumers Union* specifically cited by Greene, the U.S. 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.”³⁹ *Consumers Union* did not address the case where as here, because a court has not issued an injunction, but instead has issued only an outdated declaratory judgment in the nature of an advisory opinion, the state is “under no decree. It need not dance to the judge’s tune.”⁴⁰ There is a compelling basis for concluding that the 1987 Judgment lacks legal force.

Nonetheless, Greene 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.” As long as a bill proposing to delete the relevant portions of the informed consent law is filed and pending before the legislature, the Attorney General’s Office, by Greene’s reasoning, would continue to refrain from so moving.

In a reply letter, Duncan and Lahive complained 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.” They concluded that “[i]n effect, your view makes hash of the separation of powers” since it ““it is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit.””⁴¹

After current Attorney General Thomas Reilly took office, representatives of the Pro-Life Legal Defense Fund requested in a March 27, 1999, letter a meeting to discuss the situation and to urge the new attorney general to enforce the provisions in question.⁴² A meeting between representatives of the Legal Defense Fund and Mr. Reilly took place on March 30, 2000.⁴³ On December 6, 2000, Mr. Reilly informed the Legal Defense Fund by letter that “this office has decided against moving to vacate the eight- and thirteen-year old declaratory judgments” by Judge Mazzone.⁴⁴ He 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, as the reasons behind his decision. In sum, the Attorney General’s Office, while unconstrained by any federal decree, has decided apparently as an internal office policy matter not to enforce the law on the books.

Moreover, the current Attorney General has not repudiated the 1995 advisory issued from his predecessor’s staff indicating that the Attorney General’s Office would refuse to enforce the law as long as legislation proposing to eliminate the provisions in question is submitted to the Legislature. Thus, all abortion rights proponents need do to forestall the enforcement of the current law is to file bills each session to change it. Indeed, a bill proposing to eliminate all “laws, ordinances, or regulations” governing abortion is before the Legislature this session,⁴⁵ thereby continuing the threat, however remote, that the current law will be mooted.

This explains why the Woman’s Right to Know Bill is necessary. If and when the Legislature passes the bill to revive and strengthen the current law, it will necessarily repudiate any contrary proposal to eliminate the same

³⁸ 445 U.S. 375, 386 (1980).

³⁹ *Id.* at 386.

⁴⁰ *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 that the per curiam “opinion” of the lower court, because it lacked specific terms for injunctive relief was, as the parties conceded, a non-binding “advisory opinion” that provided “no relief”).

⁴¹ Letter to L. Scott Harshbarger, Massachusetts Attorney General, from Dwight G. Duncan & John A. Lahive, Jr., Pro-Life Legal Defense Fund (Mar. 18, 1996) (quoting from Opinion of the Justices, 375 Mass. 827, 833 (1978)).

⁴² Letter to Thomas Reilly, Massachusetts Attorney General, from Philip D. Moran, Dwight G. Duncan & Luke Stanton, Pro-Life Legal Defense Fund (Mar. 27, 1999).

⁴³ Minutes of the Pro-Life Legal Defense Fund Board of Directors (Apr. 12, 2000).

⁴⁴ Letter to Robert H. Quinn from Thomas F. Reilly (Dec. 6, 2000).

⁴⁵ An Act Relative to Reproductive Choice, H. 3134.

law. Any chance that the current requirements would be mooted by the Legislature of course would evaporate if and when the Woman's Right to Know Bill is enacted. Thus the bill's enactment would remove the Attorney General's excuse for avoiding his duty to defend the law.

This summary of events reveals a persistent and shameful refusal by a succession of constitutional officers to effectuate the will of the people. From 1992 to the present, the Massachusetts Attorney General's Office has thwarted the Legislature's public policy decision in 1980 to protect the right of women to make a fully informed abortion choice. Women in Massachusetts are being denied their right to know as a result. Legislative action to remedy this serious breach of constitutional obligation and, more importantly, to protect women, is therefore necessary.