

“Women’s Right to Know” Informed Consent Informational Materials

As of 2021, twenty-eight US states have informed consent laws for abortion, which is a medical procedure to terminate pregnancy, often called Women’s Right to Know laws. Those laws often require the state government to develop informational materials that healthcare providers must give to women before an abortion. Informational materials generally include information about the process of fetal development, accompanied by illustrations or pictures, risks and effects of abortion, and alternatives to abortion. Supporters of informed consent laws for abortion argue that such information is important for women to make a decision to have an abortion. Individual states author and distribute those informational materials, which are a primary source of information for people who seek an abortion. Medical experts and abortion rights activists have criticized the materials for providing inaccurate information, making misleading statements, and using coercive language to discourage women from choosing abortion.

Informed consent is the idea that patients have the right to know as much information as possible about the risks and benefits of a medical procedure and use that knowledge to decide whether they want to receive the procedure. The term informed consent originated from the court case *Salgo v. Leland Stanford Jr. University Board of Trustees* (1957), in which the judges decided that physicians must not withhold important information from their patients about their rights. In an effort to mitigate the potential risks associated with different treatments, the judges ruled that physicians must also receive informed consent from their patients. Since then, informed consent has become standard in medical practice, which requires physicians to provide general information about the procedure, the risks and benefits of having and not having the procedure, and any other information that may be relevant to a specific procedure or patient.

After the US Supreme Court, in *Roe v. Wade* (1973), ruled that pregnant women have a constitutional right to accessible and safe abortion, organizations and policymakers began to support legislation that set specific requirements for informed consent in regards to abortion. For example, in opposition to abortion, organization Americans United for Life, or AUL, referred to such legislation as enhancements. The informed consent process for abortion does not always require the state to develop informational materials, like pamphlets or booklets, but does require physicians to counsel patients and verbally provide information beyond the risks and benefits of the abortion procedure. That information may include psychological risks of abortion and characteristics of the fetus.

In the two decades after *Roe v. Wade*, the US Supreme Court addressed three state-level enhanced informed consent laws for abortion, voting against two of those cases. In *Planned Parenthood v. Danforth* (1976), the US Supreme Court upheld the idea that women give physicians their informed consent before an abortion as long as no one coerces or wrongly persuades the woman to give her consent. In both *City of Akron v. Akron Center for Reproductive Health* (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), the US Supreme Court decided that the government could not determine what information physicians give their patients. Together, those three decisions meant that states could pass informed consent for abortion laws in the interest of protecting women but could not tell physicians what to say to their patients during the informed consent process.

However, the US Supreme Court case *Planned Parenthood v. Casey* (1992), hereafter *Casey*, ruled in favor of several restrictive standards on the informed consent process for abortion. In that case, the US Supreme Court decided a Pennsylvania informed consent law with enhancements was con-

stitutional, ruling that governments could determine what information physicians must provide to their patients. Casey mandated that individual states can ban abortion after viability, which is the point after which the fetus could reasonably survive outside of the womb. The court's ruling also allowed individual states to determine specific information that physicians must give to their patients to make sure that their consent to abortion was, in the law's words, thoughtful and informed. Although, it states that abortion restrictions should be truthful and non-misleading as to not create an undue burden on women. So, those restrictions should not create significant difficulties for women to access legal abortion. However, those regulations do not need to be unbiased. In other words, Casey ruled that state governments could state that they prefer childbirth rather than abortion, persuading women to not choose abortion. Following that ruling, individual states began to pass Women's Right to Know laws, which mandated that physicians provide their patients with informational pamphlets or booklets that include specific information about abortion.

As an organization, AUL has developed model legislation that individual states have used to influence their own informed consent laws for abortion. AUL formed in 1971 with the intention to help policymakers draft legislation to restrict access to abortion. Annually, AUL publishes an annual compilation of model legislation, called *Defending Life*, and in 2012, the annual issue included an introduction to model legislation for the Women's Right to Know Act. Also, in that issue of *Defending Life*, then AUL staff attorney Mailee Smith notes that individual states had written legislation on informed consent for abortion, thus the AUL formalized their own recommendations for those laws in the model legislation. In the model legislation, AUL recommends that the informed consent process for abortion include scientifically accurate information about fetal development, information about the father's liability for child support, the possible medical benefits of pregnancy, as well as an informational brochure that includes those points. In 2013, Denise Burke, then vice president of legal affairs at AUL, claimed that abortion providers fail to provide that information to women, citing stories of women who claimed that their physicians did not inform them about the procedure, the characteristics of the fetus, or alternative options and who came to regret having an abortion.

In 2013, AUL released the full Women's Right to Know Act model legislation, which recommends that state governments, specifically state health departments, develop written informational materials for physicians to provide to their patients who seek abortions. As of 2021, some states' informational materials are available online. That means that physicians in those states must provide patients with the web address before they can provide informed consent. In some states, the informational materials are not available online, but healthcare providers can purchase and distribute printed copies to their patients. According to AUL, the informational materials should include a comprehensive list of public and private agencies available to assist women through pregnancy, childbirth, and childcare, as well as their locations and phone numbers. The 2013 model legislation mentions that individual states should include remarks that strongly encourage women to contact those agencies prior to their decision to receive an abortion. Also, the 2013 model legislation recommends that individual states should inform women that their physicians must, by law, give them an opportunity to contact those organizations before they can consent to abortion.

AUL states that part of its mission is to establish comprehensive legal precedent for the idea that life begins at conception and that the embryo and fetus are legal persons. In the 2013 model legislation, AUL describes embryos and fetuses as unborn or preborn children, which is language that individual states also use in their informational materials. For example, as of 2021, Texas's informational Women's Right to Know booklet uses the phrase *your baby* 121 times and the terms *fetus* and *embryo* nine times, combined. Also, the informational materials of Kansas, South Dakota, Missouri, and Oklahoma include a statement that personhood begins at conception. In opposition to that, abortion rights activists have criticized the use of such language, calling it a tactic to induce guilt in women who receive an abortion. For example, policy analyst Jodi Jacobson criticized the claim that life begins at conception, arguing that the claim deprives women of their agency and rights as independent beings.

AUL's 2013 model legislation also encourages individual states to include descriptions of the risks of both abortion and childbirth in their informational materials. Some informational materials describe the possible risks of abortion, including short-term and long-term physical and psychological risks, in more detail than the risks of pregnancy and childbirth. AUL lists twenty-five possible complica-

tions for abortion, such as infection, bleeding, and depression, that states could include, but does not list any risks of childbirth. According to the Centers for Disease Control and Prevention, there are several causes of pregnancy-related deaths in the US, including hemorrhage, infection, and amniotic fluid embolism, which is a condition that occurs when the fluid that surrounds a fetus during pregnancy enters the pregnant women's bloodstream. Informational materials may also describe all possible abortion procedures, including second-trimester procedures, and their risks. Most abortions occur during the first trimester, or the first twelve weeks of pregnancy. However, medical experts have found that the risks associated with abortion to be misleading, as childbirth poses equal or more risks, compared to abortion. For example, in 2012, physicians Elizabeth Raymond and David Grimes analyzed government data and found that women are fourteen times more likely to die from complications of childbirth than from complications of an abortion. Further, according to The National Academies of Sciences, Engineering, and Medicine, abortion is a safe medical procedure, major complications rarely occurring.

Because Casey does not require informed consent laws for abortion or informational materials to be unbiased, information may be inaccurate and misleading. In the 2012 issue of *Defending Life*, AUL states that individual states should include that abortion is linked to an increased risk of breast cancer, infertility, and future pregnancy complications, as well as the claim that fetuses are able to feel pain as early as twenty weeks of gestation. However, medical organizations have found those claims to be inaccurate. For example, as of 2021, five states' informational materials include that there is a link between abortion and breast cancer, but the American Cancer Society refuted that claim. According to the American Cancer Society, researchers have not established a causal link between abortion and breast cancer. Also, according to the Guttmacher Institute, which is an organization that researches and promotes reproductive health rights, three states' informational materials inaccurately portray the risks of abortion to future fertility. Further, the Guttmacher Institute reports that one-third of states prohibit abortion after twenty weeks, because those states claim that the fetus may feel pain after that point. However, in 2010, the Royal College of Obstetricians and Gynecologists reported that a fetus is likely unable to feel pain prior to twenty-four weeks.

Informational materials often mention several alternatives to abortion and include information about resources women can access. That includes information about the father's liability for child support, protections for victims of human trafficking, references to laws allowing people to sue abortion providers, and the legal obligations of abortion providers to their patients. The materials include a separate document listing agencies that support women through pregnancy, childbirth, and motherhood, including adoption agencies. Also, some states, such as Texas, Arizona, and Indiana, include information about safe-haven laws, which are laws that allow people to voluntarily and anonymously leave unharmed infants at emergency medical services providers, fire departments, or other designated locations without facing legal consequences.

Abortion rights advocates have criticized the medical accuracy of the information contained in informed consent materials and claimed that biased, misleading, and coercive information can be harmful to women's well-being. For example, in 2016, abortion rights advocate Kryston Skinner spoke out against the Texas informational booklet, *A Woman's Right to Know*, stating that the information linking abortion to breast cancer and infertility and exaggerating the risk of death terrified her. Skinner also recalled that the misleading information led her to seek dangerous methods for ending her own pregnancy, such as a pill that induces stomach ulcers. Ultimately, Skinner received a safe, clinical abortion. Further, physician and director of Advancing New Standards in Reproductive Health Daniel Grossman described the informed consent materials as an attempt to interfere in the relationship and trust between physicians and their patients, trying to dissuade patients from having abortions.

The Informed Consent Project is an organization that formed a panel of embryological and fetal development experts to evaluate the information about fetal development in twenty-three state booklets. In 2013, the organization found that one third of the statements in informational materials were medically inaccurate. The Informed Consent Project also found that most of the inaccurate statements were made about the first trimester of pregnancy, when most abortions occur, and about bodily features that give the embryo or fetus more human-like or baby-like qualities, such as

breathing or crying.

As of 2020, twenty-eight US states have laws that resemble AUL's Women's Right to Know Act model legislation.

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