

Findings

Woman's Right to Know

The Importance of Informed Consent in Abortion Cases

By Christina Sim



I wasn't told that there could be complications which wouldn't be discovered for years. I wasn't told that the strength of the suction machine is such that it can turn a uterus nearly completely inside out. I had to have an early hysterectomy because of it... I wasn't told that after having an abortion an unbelievable self-hatred would consume me and lead to distrust, suspicion, and the utter inability to care about myself, or others—including my four children. I wasn't told that hearing babies cry would trigger such anger that I wouldn't be able to be around babies at all... I wasn't told that I could become suicidal in the fall of every year, when both of my babies should have been born... My abortions were supposed to be a 'quick-fix' for my problems, but they didn't tell me there is no 'quick-fix' for regrets."¹ —Judith Evans, writing about her experience after receiving two abortions.

Too many women decide to have an abortion without having proper information about the procedure, its effects, or its alternatives. In general medical practice, physicians recognize that they are duty-bound to grant patients full disclosure. The abortion debate, however, has lifted this particular issue out of the field of medical informed consent and framed it in highly politicized terms. What should be a basic issue of respecting a woman's right to make an informed medical decision has been lost in the political maelstrom.

In response, states across the nation have passed legislation strengthening informed consent requirements for women considering an abortion. These statutes, known as "Woman's Right to Know" (WRTK) laws, are being implemented

to ensure that women are as adequately instructed about the risks of abortion as patients receiving other medical procedures.

Such laws are certainly constitutional. In 1992, the U.S. Supreme Court handed down an opinion that made it easier for states to pass laws restricting abortion, and specifically upheld informed consent and 24-hour waiting period regulations.² To date, 30 states have passed legislation protecting a woman's right to know.³

These laws are being implemented to ensure that women are as adequately instructed about the risks of abortion as patients receiving other medical procedures.

Such legislation has also been introduced in North Carolina in every legislative session since 1995, though none has yet been passed.⁴ These statutes generally require physicians to disclose specific categories of information to a patient, to give her at least 24 hours to reflect upon this information, and to get a written certification of consent, before performing the abortion. All of this is in the interest of allowing the woman to make a truly informed decision, in which she knows her alternatives and the risks involved in the procedure.

Even some pro-abortion advocates agree with the wisdom of such statutes. The editor-in-chief of the *Journal of Epidemiology and Community Health* once argued that "if you take a view (as I do), which is often called 'pro-choice,' you need at the same time to have a view which might be called 'pro-information.'"⁵ A commitment to full disclosure and truly

informed consent will protect women in this controversial area of medical practice.

Informed Consent

The law of informed consent is based on the principle that a physician has an obligation to disclose information to the patient such that he or she can make a reasonable decision regarding treatment. Healthcare providers must tell their patients of the potential benefits, risks, and alternatives involved in any proposed medical procedure, and must obtain the patient's written consent before proceeding. Under North Carolina law, the informed consent requirement is fulfilled when the disclosures of the physician are "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities," and the patient has "a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments."⁶

With abortion, however, political considerations muddle the clear mandate of informed consent. In practice, under the North Carolina informed consent statute, each medical community determines the information that should be disclosed to its patients. Unlike doctors who treat conditions like cancer or heart disease, abortionists have a conflict of interests in disclosing the risks of abortion, as such information undermines their business. The informed consent statute can thus be loosely interpreted by abortion providers—leaving women without information that is necessary to make an informed decision. An examination of the Woman's Right to Know statutes passed in other states, as well as that proposed in North Carolina, will show that these laws are in place to ensure that women have all of the facts.

Statutory Framework

The basic WRTK statute requires full disclosure of the risks, of the status of the unborn child, and of other services available, as well as a 24-hour waiting period and written consent. Each element is vital to the protection of the patients' rights of women considering an abortion.

Full Disclosure of Risks: As with all other patients, a woman seeking an abortion is entitled to certain basic information. WRTK legislation proposed in North Carolina requires, for example, that the woman be informed of the name of the physician performing the procedure, and of malpractice liability and hospital admitting privileges or lack thereof.⁷ More importantly, the patient is entitled to know the details of the procedure to be performed, as well as the risks associated with it. No patient would submit to an invasive surgical procedure without understanding the process, its risks, and any alternatives to it; the same should be true of abortion.

Opponents to WRTK statutes argue that such full disclosure becomes a scare tactic, harassing women who have decided to go through with an abortion. These laws, however, do not create medical facts, or force abortionists to disclose a specific script to their patients. They merely bring to the woman's attention the facts that are already out there, by mandating certain general categories of information. This leaves the specific content of what the physician actually discloses up to his discretion, but holds him to a general standard of disclosure.

Legislation that has been proposed in North Carolina has no substantive content requirements (for example, a specific warning about the potential link between abortion and breast cancer), but merely requires disclosure of "statistically significant medical risks" and other such categories of information.⁸ Studies have shown many significant risks associated with abortions, and in the interest of full disclosure and the true 'empowerment' of women, patients must be made aware of the potential risks that arise with an abortion. Immediate physical complications can include cervical injury, abnormal bleeding, pelvic infection, perforated uterus, blood clots, incomplete abortion, and even death.⁹ There are also several long-term physical effects associated with abortion: premature births in later pregnancies,¹⁰ placenta previa,¹¹ and possibly breast cancer.¹² More troubling are the psychological effects that many studies

link to abortion: depression,¹³ a specific form of post-traumatic stress disorder known as post-abortion syndrome,¹⁴ substance abuse,¹⁵ and even suicide.¹⁶ A physician who fails to mention the possibility of running these risks to a woman about to have an abortion is forsaking his responsibility as medical caregiver.¹⁷

Disclosure of Status of the Unborn Child: The WRTK statutes also require disclosure of the probable gestational age of the child, complete with pictures or diagrams of the gestational development of a fetus. The woman would also have the right to all relevant information on her unborn child's chance of survival.¹⁸ Such information would certainly be significant in a woman's decision to abort her fetus. Just as a patient undergoing a biopsy is entitled to information on the stage of advancement of the tumor, a woman considering an abortion should have the facts on the 'target' of this medical procedure.

While much of the above could be characterized as advancing the cause of life, it is important to remember that this statute is not specifically a 'pro-life' bill. Included in the list of mandatory medical disclosures are the medical risks associated with carrying the child to term. A woman making the weighty decision of whether or not to abort her child should know the risks associated with all of her potential courses of action. The aim of these statutes is not to promote one political position over another, but to reaffirm a commitment to excellent health care for a medical procedure, which should always include full disclosure of risks, benefits, and alternatives.

Services Available: Included in most WRTK statutes is a requirement that the physician or an otherwise qualified person inform the woman of all services and benefits that may be available to her. This includes a comprehensive list of the agencies and services that are available to assist her through pregnancy, childbirth, and the years while the child is dependent. Most statutes, including legislation that has been proposed in North Carolina, require the inclusion of information about adoption agencies.¹⁹ The woman must also be informed that the father is liable to assist in the support of the child, even if he has offered to pay for an abortion.²⁰

24-Hour Waiting Period: Almost all WRTK statutes include a waiting period requirement of at least 24 hours after physician disclosure, in order to allow the woman the opportunity to reflect upon the information she has received. Such a re-

quirement has been decried as demeaning to women—pro-abortion advocates claim that the underlying "prejudiced assumption" is that "women will not engage in solemn reflection and reasoned decision-making without prompting by the state."²¹ A reasoned examination of the statute, however, shows that it is simply aiming to provide women an opportunity to reflect. Regardless of the decision-making capabilities of the women concerned, they will surely not be able to reflect if not given the time to do so. This requirement is partly a response to evidence that women might be pressured into having an abortion, either by physicians or by family members or the father of the unborn child. No statement about the reasoning ability of the woman is made in this attempt to ensure that she has time to think and make an informed decision.

Nor is the waiting period requirement an undue burden on a woman seeking an abortion. Legally speaking, the U.S. Supreme Court has already made that plain, in specifically holding that the waiting period restriction places no unconstitutional burden on the choice to have an abortion. While the Court found "troubling" the arguments that the two separate trips to the doctor created by this waiting requirement posed an economic burden on women, they pointed to the medical emergency exception in the statute and the lack of hard evidence of actual economic burden in upholding the waiting period requirement.²²

Most WRTK statutes today, including the legislation that has been proposed in North Carolina, add another provision to lessen the economic impact of this requirement, by allowing for the informational meeting with the physician to take place over the phone. While the physician may subsequently discover, in a face-to-face meeting, something specific to the woman that may impact the information he gave her over the phone, the disclosure requirements for such revised information are less stringent. The point of these clauses of the WRTK statutes is not to harass women attempting to get an abortion, but to give them an opportunity to talk to their physicians and then to think through the information given them.

It is also important to note that no payment of any kind can be made until this waiting period is over. Such a provision is also explicitly included in the proposed North Carolina legislation. Many abortionists require an upfront payment, which can have the effect of denying the woman an opportunity to change her mind before

the procedure actually takes place. Such practices are rare in any other medical procedure, and can be used as a means to coerce a woman into having an abortion against her will. Payment should only be for services rendered. If the woman ends up deciding not to go through with an abortion, she would be responsible only for the cost of the counseling appointments to date.

Written Consent: Under the WRTK statutes, a physician is required to obtain written certification of the woman's consent after the 24-hour waiting period and before beginning the abortion. The statutes also provide for the withdrawal of consent at any point before the procedure, including the seconds before it starts.²³ The consent withdrawal provision takes into account the deeply emotional nature of this decision; and "Because even a temporary withdrawal of consent is clearly an indication that the patient is experiencing deep and unresolved conflicts about her decision, continuing an abortion, in such cases, is inappropriate and irresponsible."²⁴

An interesting side question in the issue of written consent involves whether the physician should be held liable for properly screening for actual consent. Generally, there is no mention of this liability issue in the WRTK statutes, but it is worth considering as a possible addition. Holding abortionists accountable for their actions begs the question of actual consent—should it be the abortionist's responsibility to make sure that the woman's consent is not coerced before proceeding with the abortion? Such a requirement could be written so as to not create an "undue burden" on the process of receiving an abortion, thus remaining within the constitutional limits of abortion regulations.

Genuine consent can be ascertained by a physician who actually cares for his patient and asks a few pointed questions prior to beginning the abortion, as well as during the disclosure of the woman's alternatives. Making physicians liable would also help prevent coercion on the part of the physician and his staff. The bottom line here is that a woman's true desires should trump any notions of mere economic efficiency; tort and medical malpractice laws are based on the principle that patients have the final say in any medical decisions. Making the abortionist liable for failing to properly screen his patient for consent would help prevent coerced abortions (which are especially likely to happen in cases of domestic

abuse) and ensure that a woman's rights are truly protected.

Medical Emergency Exception: A medical emergency that would require an abortion is extremely rare. However, the WRTK statutes recognize that there are some circumstances where fulfilling the counseling and waiting period requirements is not possible. But they also note that even the existence of a medical emergency does not exempt an abortionist from accountability. The physician is required to inform the woman, prior to the abortion if possible, of the medical reasons supporting his judgment that an abortion is necessary. In legislation that has been proposed in North Carolina, a medical emergency exists only in cases where an

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abortion is, in the physician's good-faith clinical judgment, necessary to avert the mother's death or where a 24-hour delay would "create a serious risk of substantial and irreversible impairment of a major bodily function."²⁵ Once the procedure has taken place, the physician is additionally required to document in writing the medical indicators upon which he relied. This written documentation is to be placed in the woman's records, and a copy must be given to the woman herself.

This provision demonstrates the neutrality of the WRTK statutes. By recognizing cases in which abortion cannot be avoided, it creates something of a loophole in the informed consent and waiting period requirements. This loophole, however, has a rigorous accountability measure that ensures protection against its misuse. Abortionists are to be held accountable for *all* of their actions, including those made in the heat of a medical emergency—just like all other physicians.

Is This Law Necessary?

One major argument against the enactment of the WRTK statutes is that women seeking abortions are already receiving adequate counseling. Such counseling,

though, is rarely sufficient, given the serious nature of the decision being made. Studies on women after their abortions have found high degrees of misinformation. One major study found that more than 90 percent of women surveyed felt that they did not have enough information to make an informed abortion decision, and that nearly 80 percent of women believed they were misinformed or denied relevant information specifically during their pre-abortion counseling.²⁶

Regardless of the adequacy of existing pre-abortion counseling services, the categories of information required by the WRTK statutes are basic medical and health details that are certainly relevant and significant to a woman's decision-making process. Adequate counseling should include information about the procedure, its risks, and its alternatives. If existing pre-abortion counseling is already adequate, these statutes will do nothing to impact those abortion providers. If not, the statutes are performing a vital service to all women in defending their right to truly informed consent.

No Right to Abortion on Demand

At the heart of the arguments of those opposed to WRTK statutes is the fear that these restrictions will take away from what they understand to be the woman's right to abortion on demand, which they argue was granted to all American women in the 1973 U.S. Supreme Court decision in *Roe v. Wade*. These abortion advocates are either attempting to impose their vision of policy on the law, or are engaged in wishful thinking. In the words of the Supreme Court, "Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand. Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State."²⁷ Note that these words were written in the middle of the U.S. Supreme Court's endorsement of state regulations requiring informed consent prior to an abortion.

States have the constitutional right to regulate abortions, as long as those regulations pass the "undue burden" test created by the U.S. Supreme Court. Never in the history of the abortion debate has any court or state legislature granted a blanket "abortion on demand" right to women. Policy makers must see past the political rhetoric and take the wise course of informing and protecting women as they consider having an abortion, bringing this area of medical practice up to the standards to which we hold all other physicians.

Conclusion

Abortion is a serious decision and should never be entered into lightly. The potential physical and psychological risks must be disclosed to women who are considering having an abortion. Any physician who withholds this vital information does his patient a grave disservice, and denies the woman her right to full disclosure, and in so doing, denies her the right to make an informed medical decision—one that involves not only her own body, but the body of the child she carries. Women have a right to know all of the facts about the abortion procedure, potential after-effects both physical and mental, as well as alternatives to abortion. The WRTK statutes seek to protect this important right, strengthening informed consent laws and truly enabling women to make informed and reasonable decisions about their pregnancies. Full disclosure is not a pro-life or a pro-choice issue—this is a patient's right that all citizens have. Mere political rhetoric should not be allowed to deprive women of this right.

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Endnotes

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2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).
3. Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin all have "right to know" statutes delineating information that an abortionist is required to disclose to a woman. All except Alaska and Maine also include a mandatory waiting/reflection period, usually of 24 hours.
4. N.C. General Assembly. HB 624 and SB 734 (1995). HB 536 (1997). HB 1064 (1999). HB 1280 (2001). HB 998 and SB 571 (2003). HB1488 and SB549 (2005).
5. Donnan, Stuart. Abortion, Breast Cancer, and Impact Factors – in this Number and the Last. 50 *J. Epidemiology & Community Health* 605 (1996).
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17. For a more detailed discussion of the potential effects of abortion, see ElHage, Alysse Michelle and Edgar S. Douglas, "The After-Effects of Abortion: The Physical and Psychological Impact on Women." *Findings*. North Carolina Family Policy Council. January 2003.
18. N.C. General Assembly. HB1488 and SB549 (2005).
19. *Ibid.*
20. *Ibid.*
21. Center for Reproductive Rights. "Crafting an Abortion Law that Respects Women's Rights: Issues to Consider." August 2004. Available online: www.reproductiverights.org/pdf/pub_bp_craftingabortionlaw.pdf.
22. *Casey*, 505 U.S. at 885-887.
23. In one interesting Illinois case, the court allowed a woman to sue her abortion clinic for wrongful death when she changed her mind after a three-day abortion process had begun and the abortionists erroneously informed her that once begun, the process could not be stopped. *Lewis v. Family Planning Management, Inc.*, 306 Ill. App. 3d 918 (1999).
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27. *Casey*, 505 U.S. at 887.

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