

Five-Page Policy Memorandum
Reproductive Freedom in Massachusetts

Assume that upon graduation from the University, you secure a job as a legislative aide to Massachusetts State Representative Margaret Sanger. You received the following memo from your boss when you arrived at your State House office today:

“To: (your name)
From: Representative Sanger
Re: Future Massachusetts abortion policy.
Date: October 7, 2008

As you know, a number of legal scholars and political observers have been suggesting that the U.S. Supreme Court may severely curtail the federal constitutional basis of a woman’s right to abortion in the next year or two. The Court may accomplish this by ruling that a woman’s right to choose is no longer regarded as fundamental under the Constitution, by accepting a state legislative claim that human life begins at conception, or by deciding that the protection of potential life is now regarded as a compelling state interest that a state can assert in order to overcome a woman’s right to choose abortion at any stage of pregnancy. It may happen gradually, case by case; or it may happen all at once.

Either way, if it does happen, abortion policy will become a matter of individual state laws that could protect, criminalize or regulate abortion differently from one state to another. In order to prepare for the possibility that a U.S. Supreme Court decision might leave Massachusetts with no abortion policy at all for some period of time, two very different groups of Massachusetts legislators have gotten together to draft and introduce competing bills for setting up and putting into effect a state policy on reproductive freedom.

Of course, each group of legislators is trying to come up with an abortion law that it can claim will best serve the public interest, secure the health and welfare of women in the Commonwealth, respect human life and potential human life, and not interfere with the moral tone, the religious freedoms, and the values that unite our diverse citizenry. The following two bills have been drafted for introduction in the next legislative session:

HOUSE BILL 1

Every woman in Massachusetts shall have the legal right, in consultation with her physician, to choose to have an abortion at any time during a pregnancy up to the point of fetal “viability” as determined by recognized medical standards at the time of the pregnancy. No specific ‘reasons’ for choosing an abortion shall be required up to the point of viability; but after the point of viability, no abortion shall be performed in Massachusetts except to protect the life of the mother or her physical or mental health. The State shall adopt regulations that ensure that abortion procedures are performed under circumstances that are safe for the woman and that are consistent with the requirements of standard medical care.

HOUSE BILL 2

It shall be illegal to perform an abortion on any woman in Massachusetts, except in the case of rape or incest, or to save the life of the mother or to protect her from grievous deterioration of her physical health. Any physician performing a prohibited abortion shall permanently lose his or her license to practice medicine in Massachusetts. Any non-physician performing a prohibited abortion shall be guilty of a felony punishable by imprisonment of 5-10 years. For those abortions that can legally be performed under the requirements of this statute, the State shall adopt regulations that ensure that those abortion procedures are safe for the woman and are consistent with the requirements of standard medical care.

I want you to prepare a memorandum that will help me to be a well-informed participant in the committee hearings that will begin soon after these bills are introduced. I want to be sure that I really understand the issues at stake here. I am particularly concerned about the effect that abortion policy will have on the liberty and equality of women, on the protection of existing human lives, and on potential human life upon which our future depends. But I do not want to get caught up in the overwrought emotional claims that often have characterized the public debate over abortion during the past thirty or forty years.

Since the two bills are so different, I also want to be able to think about whether there might be some middle ground between them that I might advocate in the hearings. If there were a possible compromise, I imagine that it might deal with whether the law should have any special provisions to deal with pregnant minor females and their parents, with the biological fathers of fetuses, with state funding for poor women who may not have access to good medical care for whatever abortions are legal under the new law, and with the issue of contraceptive availability.

Let me also make clear to you **what I do not want** in your memo. I do not want an analysis of the *political* pressures or consequences that might arise in my district as a result of any position that I might take on these bills or on a compromise between them. I want to do the right thing here, and I want to be able to defend my decision in an honest and well-informed way. If I can do that, I am content to let the political chips fall where they may.

I also do not want an analysis of federal law or constitutional issues or cases. If Roe and/or Casey are overruled, the issue of reproductive rights will be cut loose from the U.S. Constitution; and argument based on constitutional law will be irrelevant and ineffective. But you may, and perhaps should, take into account some of the important *ideas and policies* that lie *behind* the legal discussion (e.g., Don't discuss the constitutional definition of fundamental individual liberty, but you may discuss whether gender equality matters and whether/why it is important that women be able to decide what to do with their bodies and their reproductive lives. Don't discuss the Court's refusal to decide when life begins, or why it determined that a fetus is not a person for purposes of the 14th Amendment, but you may discuss why it is important to protect potential human life and whether deeply held religious or moral values should be part of our state law in this area)."

Here is your assignment:

Using (and citing where appropriate) materials assigned for your Law and Public Policy class, and any research that you may have done already on reproductive freedoms, **prepare a five page memo** giving Representative Sanger your *analysis of two or three of the main arguments, issues or principles* that are at stake in choosing between these two bills. You should not give your personal opinion about which bill is preferable; just help your boss to understand the strengths and weaknesses of each bill, and what arguments will likely be made *by reasonable persons* on each side of the debate. Use the last page of your memo to respond to any one or two of her questions about what a possible compromise bill might contain. You are being asked to discuss ideas about policy; you are not being asked to provide the exact language that a provision of the bill should contain.

Use as much of the material assigned for class (and discovered as a result of research you may have done, if any) as possible to explain the pros and cons of the issue to Representative Sanger. Prepare her to enter into informed discussion with colleagues about the two bills and the possibility of a third way to deal with the problem. Your job is to inform her, **not** to persuade her. Cite materials that are helpful wherever they apply. You may cite language in cases you have read, but *only* to highlight an idea or policy consideration, not to make an argument of constitutional law. You may use footnotes or cites in parenthesis within the text of the memo, but be consistent in their format.

Put your essay in the form of a memorandum, using a heading similar to the one near the top of this assignment (To: Rep Sanger, From: you, etc.). Your essay should be five pages, double-spaced, no more than 1-inch margins on all sides, no bigger than 12-point font. You may discuss this memo with classmates (and we will discuss the issue in class after the test on October 21st), but the writing must be entirely your own.

YOUR MEMO TO REPRESENTATIVE SANGER IS DUE
BY 4PM ON MONDAY, OCTOBER 27
IN THE LEGAL STUDIES OFFICE, 102 GORDON HALL