NEW YORK
CITY BAR

N.Y. Senate Bill 05829 (2007-2008 Sess.)/Governor's Program Bill No. 16
Reproductive Health and Privacy Protection Act

THIS BILL IS APPROVED, WITH COMMENTS

I. Reproductive Rights in New York State: The Need for Reform

The Sex and Law Committee of the New York City Bar Association strongly supports passage of Program Bill No. 16, the Reproductive Health and Privacy Protection Act, with certain suggested modifications discussed herein.

The time has come to modernize the treatment of women's reproductive rights and abortion under New York State law. In 1970, three years before the Supreme Court decided Roe v. Wade, 410 U.S. 113 (1973), New York State led the charge in increasing the rights of women to legally obtain safe abortions. It did this by amending sections of the Penal Law to provide for an exception to the ban on abortion performed within 24 weeks of commencement of the pregnancy, or in cases where the woman's life is at risk.[1] While these exceptions represented an important step in 1970, this model is now outdated and inadequate. Moreover, given recent decisions by the Supreme Court as further discussed herein, it is imperative for New York to enact legislation affirming the right of women to make their own reproductive health care decisions.

To address this need to update the laws of New York State, Program Bill No. 16, known as the Reproductive Health and Privacy Protection Act, S. 05829, 2007-2008 Sess. (N.Y) ("the Act"), was introduced last year. The Act, among other things, removes the reproductive choices of women from the New York State Penal Law and places them in the Public Health Law. Further, the Act confirms that women have a right to privacy and the right to choose to continue or end a pregnancy under New York law.

[1] See N.Y. Penal Law §§125.40, 125.45 (defining crimes of abortion in the first and second degrees, with exceptions for when "such abortional act is justifiable"); 125.05(3) (defining "justifiable" abortion as abortions occurring "(a) under [the physician's] reasonable belief that such is necessary to preserve [the pregnant woman's] life, or, (b) within twenty-four weeks from commencement of her pregnancy").

II. New York City Bar's Prior Support of Reproductive Freedom

The City Bar has a long-standing commitment to upholding the principles of individual liberty and a tradition of supporting the freedom of women to make private health care decisions and reproductive choices.[2] In 1989, the City Bar submitted a brief *amici curiae* in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), arguing that Roe v. Wade should be upheld, and in 1998 several committees of the City Bar joined together to issue a Report on Legislation urging rejection of Assembly Bill 8875, which proposed criminalizing the performance of certain medical procedures, including banning certain constitutionally protected pre-viability abortions.[3]

III. Overview of the Act

As proposed, § 2 of the Act adds a new Article 12 to the New York Public Health Law comprised of four sections. Public Health Law § 1200 contains a statement of policy declaring that every individual has a fundamental right to privacy and the fundamental right to choose or refuse contraception, while every female has the right to determine the course of her pregnancy, which includes the right to bear a child or to terminate a pregnancy within certain parameters. Public Health Law § 1201 states that an abortion by a qualified, licensed health care practitioner is authorized prior to fetal viability[4] or at any time to protect a female's life or health. Public Health Law § 1202 provides that the state cannot restrict or regulate the rights listed in § 1200 unless such law, policy or regulation is narrowly tailored to serve a compelling state interest. Public Health Law § 1202 further provides that the state shall not discriminate against the exercise of the rights listed in § 1200 or the provision of benefits, facilities, services or information. Public Health Law § 1203 defines certain terms used in Article 12 of the Public Health Law. Besides adding Article 12 to New York Public Health Law, the Act also removes the regulation of abortion from New York Penal Law.

IV. The Act's Impact

[2] See City Bar's report, "Anti-Abortion Proposals Before the 97th Congress" (submitted by the Committee on Federal Legislation), The Record, Vol. 37 (1982).

[3] See New York City Bar Association Report on Legislation, Assembly Bill 8875, dated as of June 1998.

[4] The Act replaces the Penal Law's bright-line twenty-four week threshold with a "fetal viability" threshold. The Committee believes, however, that some medical practitioners might prefer the clarity of a bright-line rule. The twenty-four week standard, as opposed to fetal viability, provides women and medical providers a clear and unambiguous limitation on when an abortion may be performed without resort to the life or health exception, and will prevent qualified providers from being second-guessed about determinations regarding whether or not a particular fetus is or could be viable. That being said, the Committee also understands the benefit of bringing the Act into conformity with Supreme Court jurisprudence, which uses a viability threshold. In light of the difficult medical questions involved, the Committee is not taking a position on whether the appropriate threshold is twenty-four weeks or viability, except to say that if twenty-four weeks from the commencement of pregnancy is used as a threshold, then an exception regarding fatal fetal anomalies must be added. The fetal viability standard implicitly encompasses fatal fetal anomalies, while a twenty-four week threshold does not. Such an exception would explicitly address cases in which women receive late diagnoses of fatal fetal anomalies beyond twenty-four weeks of pregnancy.

The Act modernizes New York law by removing the provisions regulating abortion and contraception from the Penal Law. Currently, New York regulates abortion under an outdated, pre-Roe presumption of criminal illegality except under certain circumstances. This has the effect of permitting abortion for any reason until a woman has been pregnant for more than twenty-four weeks, or permitting abortions in cases where, in the reasonable medical judgment of the physician, the abortion is necessary to protect the woman's life.[5] As such, current New York law has the extraordinary effect of subjecting medical providers to risk of prosecution based solely upon the type of medical care they provide rather than the manner in which they provide such care. In addition, the current law contains a criminal ban on the sale of contraceptives to minors that has been held unconstitutional.[6]

The Act removes these outdated provisions and treats the regulation of abortion as an issue of public health and medical practice under the Public Health Law. First, only "qualified licensed health care practitioners" would be authorized to perform abortions within the parameters of the Act.[7] Second, by adding a new section 16-a to Education Law § 6530, the Act ensures that an unauthorized abortion would be treated as a matter of potential professional misconduct. Finally, later abortions would have to be performed in facilities regulated under Article 28 of the Public Health Law, to ensure that necessary health and safety precautions are provided and adequately monitored.[8] Thus, the Act ensures the safe provision of reproductive health services, while removing the chilling effect the previous criminal regulation placed on medical providers.

In addition to modernizing New York law, the Act enacts a fundamental right to privacy with respect to reproductive decisions, including the right to choose or refuse contraception and the right of a woman to determine the course of her pregnancy (*i.e.*, whether to bear a child or terminate a pregnancy) (1) prior to fetal viability, or (2) when necessary to protect the pregnant woman's life or health.[9] Support for the existence of these rights can be found under current Federal and New York State jurisprudence. The U.S. Supreme Court has long recognized a fundamental privacy right in matters "relating

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[5] See n. 1, *supra.*

[6] Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (striking down a ban on the sale of contraceptives to minors as unconstitutional).

[7] The Committee recommends that the term "qualified licensed health care practitioner" be defined to take into account the realities of the provision of health care services in New York, which is often provided by advance practice clinicians. The definition should clarify that qualified licensed health care practitioners, other than doctors (such as physician assistants, nurse practitioners, nurse midwives, and midwives operating under the supervision of or in collaboration with a physician) can provide reproductive health services under the Act so long as those services fall within their scope of practice. The definition could be drawn from Title VII of New York Education Law, which defines the professions and their various licensing requirements, specifically Articles 131 (physicians), 131-B (physician's assistants or special assistants), 139 (registered professional nurses, licensed practical nurses and nurse practitioners) and 140 (midwives).

[8] See Act, § 3(1).

[9] See Act, § 2 at §§ 1200(1) and 1200(2).

to procreation, childbirth, child rearing, and family relationships",[10] which was later held to encompass decisions regarding contraception and whether to continue or terminate a pregnancy.[11] The New York Court of Appeals has also recognized the fundamental right to reproductive choice,[12] and has held that infringements of the right to medical privacy and bodily integrity are subject to strict scrutiny.[13] In affording appropriate protection for these rights, the Act expressly requires that any state regulation denying, regulating or restricting the fundamental rights set forth in the statute be narrowly tailored to serve a compelling state interest.[14] This will protect against future attempts to impose unnecessary and harmful restrictions on the rights to access contraception and abortion.

Finally, the Act brings New York law into line with United States Supreme Court precedent, which requires that states permit termination of a pregnancy even after fetal viability when necessary to protect a woman's health.[15] The current criminal law regulating abortion does not contain such a health exception – instead the Penal Law contains a blanket prohibition against abortions performed after the second trimester, except and only to preserve the woman's life. As such, New York jurisprudence must read a health exception into New York law. Public Health Law § 1201 remedies the current Penal Law's lack of an explicit statutory health exception. Moreover, given the recent shift in U.S. Supreme Court abortion jurisprudence, it is more important than ever that the State of New York update its laws regulating reproductive health, as it is by no

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[10] Zablocki v. Redhail, 434 U.S. 374, 383-386 (1978); see also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing the right to procreate as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."); Carey, 431 U.S. at 685 (recognizing a fundamental right to privacy in matters of marriage and procreation).

[11] See Griswold v. Connecticut, 381 U.S. 479, 485-486 (1965) (recognizing the fundamental right of married persons to purchase and use contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending right to use contraceptives to unmarried persons, and stating that "[i]f the right to privacy means anything, it is the right . . . to be free from unwarranted state intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Roe, 410 U.S. at 153 (recognizing right to privacy encompassed abortion decision); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (upholding core principal of Roe).

[12] Hope v. Perales, 83 N.Y.2d 563, 575 (1994).

[13] See Rivers v. Katz, 67 N.Y.2d 485, 493 (1986) (recognizing right to determine the course of one's own medical treatment); cf. In re Storar, 52 N.Y.2d 363, 376 (1981), superceded on other grounds by statute (recognizing common-law right to determine the course of one's medical treatment).

[14] See Act, § 2 at § 1202(1).

[15] See Roe, 410 U.S. at 163-64 ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life *or health* of the mother.") (emphasis added); Casey, 505 U.S. at 878-79 (affirming "Roe's holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'") (quoting Roe, 410 U.S. at 164-65); Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (same); but c.f. Gonzales v. Carhart, 550 U.S. --, 127 S. Ct. 1610, 1638 (2007) (upholding the federal Partial Birth Abortion Act's ban on a particular abortion procedure, despite the law's lack of a health exception, but relying on the availability of alternative procedures to terminate the pregnancy should the women's health require it).

means certain that the federal health exception will remain sacrosanct.[16] For this reason as well, New York's reproductive health law should be strengthened and updated so it can stand on its own right.[17]

V. Conclusion

The New York City Bar praises and supports the Reproductive Health and Privacy Protection Act and urges its swift passage. Thank you for considering this memorandum.

Respectfully,

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[16] Compare Gonzales, 127 S. Ct. at 1638 (discussed at n. 14) with Stenberg, 530 U.S. at 945-46 (striking down a similar Nebraska "partial-birth" abortion ban for vagueness and for failing to provide a health exception).

[17] Should New York adopt the Act, it will join at least six other states that have adopted reproductive rights laws generally protecting the right of a woman to obtain an abortion either before fetal viability or, in the case of post-fetal viability, to protect the life or health of the pregnant woman. See Appendix A.

Appendix A
Reproductive Rights Law In Other States

CALIFORNIA

Cal. Health and Safety Code §123462.
The legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that:
(a) Every individual has the fundamental right to choose or refuse birth control.
(b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article.
(c) The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.

Health and Safety Code §123466.
The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman.

CONNECTICUT

Conn. Gen. Stat. Ann. § 19a-602.
Termination of pregnancy prior to viability. Abortion after viability prohibited; exception.
(a) The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.
(b) No abortion may be performed upon a pregnant woman after viability of the fetus except when necessary to preserve the life or health of the pregnant woman

MAINE

Me. Rev. Stat. Ann. tit. 22 §1598.
1. *Policy.* It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability except as provided in section 1597-A. After viability an abortion may be performed only when it is necessary to preserve the life or health of the mother. It is also the public policy of the State that all abortions may be performed only by a physician.
2. *Definitions.* As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.
A. "Abortion" means the intentional interruption of a pregnancy by the application of external agents, whether chemical or physical or by the ingestion of chemical agents with an intention other than to produce a live birth or to remove a dead fetus.
B. "Viability" means the state of fetal development when the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-supportive systems.
3. *Persons who may perform abortions; penalties.*
A. Only a person licensed under Title 32, chapter 36 or chapter 48, to practice medicine in Maine as a medical or osteopathic physician, may perform an abortion on another person.

B. Any person not so licensed who knowingly performs an abortion on another person or any person who knowingly assists a nonlicensed person to perform an abortion on another person is guilty of a Class C crime.
4. *Abortions after viability; criminal liability.* A person who performs an abortion after viability is guilty of a Class D crime if:
A. He knowingly disregarded the viability of the fetus; and
B. He knew that the abortion was not necessary for the preservation of the life or health of the mother.

MARYLAND

Md. Code Ann. Health Gen. § 20-209.
(a) *Definition.*- In this section, "viable" means that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb.
(b) *State intervention.*- Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:
(1) Before the fetus is viable; or
(2) At any time during the woman's pregnancy, if:
(i) The termination procedure is necessary to protect the life or health of the woman; or
(ii) The fetus is affected by genetic defect or serious deformity or abnormality.
(c) *Regulations.*- The Department may adopt regulations that:
(1) Are both necessary and the least intrusive method to protect the life or health of the woman; and
(2) Are not inconsistent with established medical practice.
(d) *Liability.*- The physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician's best medical judgment in accordance with accepted standards of medical practice.

NEVADA

Nev. Rev. Stat. Ann. sec. 442.250
1. No abortion may be performed in this state unless the abortion is performed:
(a) By a physician licensed to practice in this state or by a physician in the employ of the government of the United States who:
(1) Exercises his best clinical judgment in the light of all attendant circumstances including the accepted professional standards of medical practice in determining whether to perform an abortion; and
(2) Performs the abortion in a manner consistent with accepted medical practices and procedures in the community.
(b) Within 24 weeks after the commencement of the pregnancy.
(c) After the 24th week of pregnancy only if the physician has reasonable cause to believe that an abortion currently is necessary to preserve the life or health of the pregnant woman.
2. All abortions performed after the 24th week of pregnancy or performed when, in the judgment of the attending physician, there is a reasonable likelihood of the sustained survival of the fetus outside of the womb by natural or artificial supportive systems must be performed in a hospital licensed under chapter 449 of NRS.

3. Before performing an abortion pursuant to subsection 2, the attending physician shall enter in the permanent records of the patient the facts on which he based his best clinical judgment that there is a substantial risk that continuance of the pregnancy would endanger the life of the patient or would gravely impair the physical or mental health of the patient.

WASHINGTON

Wash. Rev. Code Ann. sec. 9.02.100. Reproductive privacy -- Public policy.
The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the state of Washington that:
(1) Every individual has the fundamental right to choose or refuse birth control;
(2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902;
(3) Except as specifically permitted by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902, the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and
(4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.

RCW 9.02.110. Right to have and provide.
The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health. A physician may terminate and a health care provider may assist a physician in terminating a pregnancy as permitted by this section.

RCW 9.02.140. State regulation.
Any regulation promulgated by the state relating to abortion shall be valid only if:
(1) The regulation is medically necessary to protect the life or health of the woman terminating her pregnancy,
(2) The regulation is consistent with established medical practice, and
(3) Of the available alternatives, the regulation imposes the least restrictions on the woman's right to have an abortion as defined by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902.

RCW 9.02.160. State-provided benefits.
If the state provides, directly or by contract, maternity care benefits, services, or information to women through any program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.