

**REPORT ON LEGISLATION BY THE
SEX AND LAW COMMITTEE
AND THE HEALTH LAW COMMITTEE**

**A.21
S.240**

**M. of A. Glick
Sen. Krueger**

The Reproductive Health Act

THIS BILL IS APPROVED

I. REPRODUCTIVE RIGHTS IN NEW YORK STATE: REFORM IS OVERDUE

The Sex and Law and Health Law Committees of the New York City Bar Association support passage of the Reproductive Health Act. In accordance with the City Bar’s long-standing commitment to upholding the principles of individual liberty and tradition of supporting the freedom of women to make private health care decisions and reproductive choices, we urge passage of the bill without delay.¹

New York State was initially at the forefront in protecting women’s health and reproductive freedom. In 1970, three years before the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), New York State amended sections of its Penal Law to provide an exception to the total ban on abortion, permitting abortions performed within 24 weeks of commencement of the pregnancy, or in cases where the woman’s life is at risk.² While these exceptions represented a critical step at the time, New York’s law has not been substantially changed since, and is now outdated and inadequate. It contains archaic provisions that fail to comply with subsequent Supreme Court decisions, prevents health care providers from offering the best reproductive

¹ See City Bar’s report, “Anti-Abortion Proposals Before the 97th Congress” (submitted by the Committee on Federal Legislation), *The Record*, Vol. 37 (1982). City Bar has also submitted amicus briefs in several landmark cases before the Supreme Court, including in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and most recently, *Whole Women’s Health v. Hellerstedt*, 579 U.S. ____ (2016). City Bar has also opposed legislation that would restrict reproductive freedom, including urging rejection of Assembly Bill 8875 in 1998, which proposed criminalizing the performance of certain medical procedures, including banning certain constitutionally protected pre-viability abortions. See New York City Bar Association Report on Legislation, Assembly Bill 8875, dated as of June 1998.

² See N.Y. Penal Law §§ 125.40, 125.45 (defining crimes of abortion in the first and second degrees, with exceptions for when “such abortifacient 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”).

care, impedes women’s ability to make the decisions that are right for themselves and their families, and creates a looming threat of prosecution for women who end their own pregnancies.³ In light of increasing threats to abortion access across the United States and at the federal level, it is imperative that New York once again step up as a leader committed to protecting and affirming women’s ability to effectuate their own reproductive health care decisions.

II. OVERVIEW OF THE ACT

To address this longstanding need to update the laws of New York State and better protect women’s health and reproductive freedom, the Reproductive Health Act (“the Act”) has been introduced. The Act removes provisions governing abortion and self-abortion from the New York State Penal Law and places them where they belong, in the Public Health Law. It further addresses a vexing gap that fails to take into account abortions later in pregnancy that are necessary for women’s health or when the pregnancy is not viable. And finally, it clears the way for advanced practice clinicians acting within the scope of their practice to perform early abortions.

The Act affirmatively recognizes, for the first time in New York State statutory law, “that comprehensive reproductive health care, including contraception and abortion, is a fundamental component of a woman’s health, privacy and equality.” Accordingly, it codifies for the first time as “the public policy of New York State that every individual possesses a fundamental right of privacy and equality with respect to their personal reproductive decisions and should be able to safely effectuate those decisions, including by seeking and obtaining abortion care, free from discrimination in the provision of health care.”⁴ The Act further provides that laws and regulations governing abortion must be in furtherance of a legitimate interest in protecting women’s health, and should not burden abortion access, in accordance with Supreme Court precedent, as set forth most recently in *Whole Women’s Health v. Hellerstedt*.⁵

The Act removes the regulation of abortion from New York Penal Law – and makes it a matter of public health – by repealing sections of the penal law that criminalize abortion and self-abortion as well as sale of contraceptives, and adding Article 25-A to the New York Public Health Law. The new provision of the Public Health Law would provide that a licensed or certified healthcare practitioner acting within the lawful scope of his or her practice may provide an abortion when, in the good faith professional judgment, any of three conditions are met: (1) the patient is within the first 24 weeks of pregnancy, (2) the fetus is not viable, or (3) the abortion is necessary to protect a patient’s life or health. In using this language, the Act preserves the 24-week threshold that providers have become accustomed to, but carves out explicit

³ See N.Y. Penal Law §§ 125.50, 125.55 (defining the crimes of self-abortion in the first and second degrees for a woman who “commits or submits to an abortion act upon herself” unless the abortifacient act is “justifiable”); § 125.05(3) (a woman’s commission of an abortifacient act upon herself is justifiable “when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy,” and submission to an abortifacient act is justifiable when the woman “believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.”)

⁴ See Act, § 1.

⁵ 579 U.S. ____ (2016).

exceptions for health and lack of fetal viability. It further clarifies that advanced practice clinicians (“APCs”) – nurse practitioners, nurse midwives, and physician assistants – are authorized to perform abortions so long as that is within their scope of practice. Finally, as discussed in further detail below, the Act conforms the Public Health Law to current constitutional requirements by repealing archaic provisions analogous to ones that have been struck down by the Supreme Court.

III. THE NEED FOR THE REPRODUCTIVE HEALTH ACT

The U.S. Supreme Court has, of course, long recognized a fundamental privacy right in matters “relating to procreation, childbirth, child rearing, and family relationships,”⁶ which was later held to encompass decisions regarding contraception and whether to continue or terminate a pregnancy.⁷ New York State, too, has long recognized that reproductive choice and the right to bodily integrity are fundamental rights subject to strict scrutiny.⁸

Currently, New York regulates abortion under an outdated, pre-*Roe* presumption that abortion is a criminal act except under certain circumstances. The exception carved out of the penal code effectively permits abortion for any reason until twenty-four weeks of pregnancy, or in cases where, in the reasonable medical judgment of a physician, the abortion is necessary to protect the woman’s life.⁹ The persistence of the regulation of abortion in New York’s Penal Law has the extraordinary effect of targeting not only health care professionals who provide abortions, but women who engage in self-directed care, for risk of prosecution based solely upon the type of medical care at issue --a phenomenon which is otherwise unprecedented in New York law. No New Yorker should fear prosecution for needing an abortion, whatever the circumstances, and no health care provider should fear prosecution for providing it within their best medical judgment.

Although the law includes an exception for performance of an abortion after 24 weeks when a woman’s *life* is at risk, the law currently does not contain an exception for women’s *health*, or for cases of fetal nonviability. Accordingly, it fails to comply with United States Supreme Court precedent requiring that statutes governing abortion permit abortion *at any time* prior to fetal viability or in cases where a woman’s health is at risk.¹⁰ Thus, although the existing

⁶ *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).

⁷ *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 principle of *Roe*).

⁸ *Hope v. Perales*, 83 N.Y.2d 563 (1994); 67; *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986).

⁹ *See* N.Y. Penal Law §§ 125.40, 120.45; 120.25(3).

¹⁰ *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.”)

Penal Law provisions operate with the effect of permitting abortions performed up until 24 weeks of pregnancy, the lack of these explicit exceptions in the context of a criminal provision has a chilling effect when it comes to pregnancies near or beyond 24 weeks. Fearing prosecution, and in the absence of an explicit exception for health or nonviability, most providers will not provide abortions under those circumstances. This has resulted in a significant obstacle for women who find themselves in the tragic circumstances of needing an abortion later in pregnancy due to a severe fetal anomaly or a risk to their own health. Women have had to travel out of state in order to obtain the care they need, often at great financial cost and further risk to their health. The Reproductive Health Act would remedy this by creating an explicit authorization of abortion after 24 weeks when a woman’s health is at risk or a fetus is not viable.

Among the many outdated and harmful facets of New York’s abortion-related penal laws, the continued criminalization of self-abortion stands as an outlier in the nation. At common law, even where abortion was considered a crime, it was not a crime that a woman could commit upon herself. To treat it as such, the Florida Supreme Court warned, would “abrogate willy-nilly a centuries-old principle of the common law—which is grounded in the wisdom of experience and has been adopted by the legislature—and install in its place a contrary rule bristling with red flags and followed by no other court in the nation.”¹¹ New York is one of only seven states that elected to break with that tradition. Even among these outliers, the Ninth Circuit has ruled at least one self-abortion ban unconstitutional,¹² another has been declared unenforceable by the state Attorney General,¹³ and a third has been declared unconstitutional by a federal district court¹⁴ — calling into question the constitutionality of the remaining few. New York’s self-

(emphasis added); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (defining “health” to include “all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient.”); *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. 124, 166-67 (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 noting the availability of alternative procedures to terminate the pregnancy should the women’s health require it).

¹¹ See, e.g., *State v. Ashley*, 701 So. 2d 338, 342-43 (Fla. 1997). See also *Hillman v. State*, 232 Ga. App. 741, 503 S.E.2d 610 (1998) (refusing to extend Georgia’s felony abortion statute to abrogate the common law principle that the woman who had the abortion was neither accomplice nor perpetrator); *State v. Carey*, 76 Conn. 342, 56 A. 632, 636 (1904) (“At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another”).

¹² *McCormack v. Hiedeman*, 694 F.3d 1004, 1015 (9th Cir. 2012) (invalidating Idaho’s law penalizing women who end their own pregnancies as an undue burden on the right to seek abortion, potentially affecting Arizona and Nevada’s similar laws).

¹³ See *Delaware Women’s Health Org. v. Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977); Statement of Policy, Att’y Gen. of Del. (Mar. 24, 1977) (declaring 11 Del. Code § 652, which criminalizes self-abortion, unconstitutional under *Roe* and declaring that it would not be enforced).

¹⁴ *Henrie v. Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973) (declaring 21 Okla. Stat. § 862, which criminalizes women who “solicit” or “submit to” abortions unconstitutional).

abortion provision, though potentially unconstitutional, is not inert: it has led to arrests within the past decade.¹⁵

The current law authorizes abortions performed by a “physician.” However, the law’s enactment predates advances in the intervening decades in the provision of routine medical care by APCs. By only authorizing abortions performed by a “physician” the law has placed an obstacle in the path of APCs acting in their lawful scope of practice in the provision of early, non-surgical abortion. There is no valid medical justification for a physician-only limitation, as leading medical associations have endorsed the provision of abortion by appropriately trained APCs.¹⁶ Clarifying this legal ambiguity is critical, particularly in rural areas of the state where providers are few and far between. The Act accordingly modernizes the language by authorizing provision of abortion by any “health care practitioner licensed, certified, or authorized under [the Education Law], acting within his or her lawful scope of practice.” This will treat provision of abortion consistently with the regulation of the provision of all other forms of health care routinely provided by APCs in accordance with their training and scope of practice.

Finally, New York’s law contains archaic provisions that have since become obsolete or been held unconstitutional by subsequent Supreme Court decisions, including the criminal ban on the sale of contraceptives to minors¹⁷ and the requirement that second trimester abortions be provided in hospitals.¹⁸ The Act conforms New York’s law to current jurisprudence by repealing these obsolete provisions, which are not currently followed in practice.

IV. CONCLUSION

Given the shift in U.S. Supreme Court abortion jurisprudence in recent years, and a possible shift in the composition of the Supreme Court itself, it is more important than ever that the State of New York update its laws regulating reproductive health.¹⁹ For this reason as well,

¹⁵ See, e.g. *NYPD: Manhattan Woman Charged With Performing Self-Abortion*, CBS N.Y., (Dec. 1, 2011, 8:30 PM), <http://cbsloc.al/2pxAnrZ>; Pedro Ramirez III, *Self Abortion: Woman took Tylenol, Motrin*, Syracuse.com, Apr. 12, 2007, <http://bit.ly/2r8Yy3d> (all links last visited June 15, 2017).

¹⁶ The provision of abortion care by appropriately trained clinicians has been endorsed by: American College of Obstetricians and Gynecologists (<http://bit.ly/2s1WM4O>), the American Public Health Association (<http://bit.ly/2rbxzkl>), the International Confederation of Midwives (<http://bit.ly/2r1hFtp>), and Physicians for Reproductive Health (<https://prh.org/abortion/>), among others. See also Nat’l Abortion Federation & Clinicians for Choice, *Role of CNMs, NPs, and PAs in Abortion Care*, <http://bit.ly/2skPx8K> (collecting policy statements).

¹⁷ N.Y. Educ. L. §6811; See *Carey v. Population Serv. Int’l*, 431 U.S. 678 (1977) (striking down a ban on the sale of contraceptives to minors as unconstitutional).

¹⁸ N.Y. Pub. Health L. § 4164; *Akron v. Akron Ctr. for Reproductive Health*, 62 U.S. 416 (1983) (striking down second trimester hospitalization requirement); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 771 (1986) *overruled on other grounds by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

¹⁹ Compare *Gonzales*, 550 U.S. at 166-67 (discussed *supra* at n. 15) 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).

New York's reproductive health law should be strengthened and updated so it can stand on its own right.²⁰

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

Sex and Law Committee
Mirah E. Curzer, Co-Chair
Melissa S. Lee, Co-Chair

Health Law Committee
Brian T. McGovern, Chair

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²⁰ Should New York adopt the Act, it will join at least seven 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 Laws In Other States

CALIFORNIA

Cal. Health and Safety Code § 123462. *Legislative findings and declarations*

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. *Denial or interference with a woman's right*

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*

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

HAWAII

Haw. Rev. Stat. § 453-16.²¹ *Intentional termination of pregnancy; penalties; refusal to perform.*

- (a) No abortion shall be performed in this state unless:
 - 1. The abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and
 - 2. The abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof, or in a clinic or physician's or osteopathic physician's office.
- (b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.
- (c) The State shall not deny or interfere with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion that is necessary to protect the life or health of the female.

²¹ One bill currently being considered would expand the range of practitioners who can provide aspiration abortions to include advanced practice registered nurses. 2017 Hawaii Senate Bill No. 124, Hawaii Twenty-Ninth Legislature.

(d) Any person who knowingly violates subsection (a) shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

(e) Nothing in this section shall require any hospital or any person to participate in an abortion nor shall any hospital or any person be liable for a refusal.

MAINE

Me. Rev. Stat. Ann. tit. 22 § 1598. Abortions

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. State interference with abortions

(a) *Viable defined* - 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) *In general* - 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. § 442.250. *Conditions under which abortion is permitted.*

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:

i. 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

ii. 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. § 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.

Rev. Code Ann. § 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.

Rev. Code Ann. § 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.

Rev. Code Ann. § 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.