CRITICAL CONDITIONS

HOW NEW YORK'S UNCONSTITUTIONAL ABORTION LAW JEOPARDIZES WOMEN'S HEALTH

NYCLU
NEW YORK CIVIL LIBERTIES UNION

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ABOUT THE NEW YORK CIVIL LIBERTIES UNION

The New York Civil Liberties Union (NYCLU) is one of the nation's foremost defenders of civil liberties and civil rights. Founded in 1951 as the New York affiliate of the American Civil Liberties Union, the NYCLU is a not-for-profit, nonpartisan organization with eight chapters and regional offices and more than 80,000 members across the state. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, and the right to privacy, equality and due process of law for all New Yorkers. For more information, please visit www.nyclu.org.

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INTRODUCTION

She found out that she was pregnant late into her second trimester. Her doctors had told her getting pregnant was impossible because of the medications she was taking. She was being treated for five different types of cancer.

Further tests revealed that her cancer treatments had caused numerous, severe anomalies in the fetus , which would not survive. Now, because she was more than 24 weeks into her pregnancy, she was prohibited from receiving an abortion in New York State.

She travelled thousands of miles to receive care in another state, costing her more than $12,000 and requiring an emergency fundraising campaign to cover her bills.

The Supreme Court's 1973 *Roe v. Wade* decision established a woman's constitutional right to abortion at any point during pregnancy when the fetus is not viable or if she needs an abortion to protect her health or her life.[1] But New York's abortion law – drafted three years earlier in 1970 and left unchanged – criminalizes abortion after 24 weeks unless it is needed to save a woman's life. New York's abortion law provides no exception to protect the health of the woman or in the event the fetus is not viable.

Put plainly, New York's abortion law has been unconstitutional for over four decades.

The human body doesn't follow legal timelines. Health risks arise later in pregnancy, such as cancers or aneurysms, and a woman may discover later in pregnancy that the fetus has anomalies incompatible with life. Yet hospitals and health providers in New York are reluctant to provide abortion care to women past 24 weeks of pregnancy because of the threat that they could be criminally prosecuted under state law.

New York's 24-week cutoff results in devastating denials of care. Women jeopardize their wellbeing to travel across the country to another state that provides the care they need – away from their friends, family and health care providers – often facing great financial cost, stress and added health risks. A low-income woman who lacks the means to travel must instead carry her pregnancy to term despite the risks, or wait to access care until her health deteriorates to the point that an abortion is necessary to save her life.

The longstanding need to update New York's abortion law only grows more urgent in the wake of the 2016 elections.

The ascendance of Donald Trump to the presidency and the control of Congress by anti-abortion politicians threaten a wave of federal abortion

restrictions and the prospect of losing the constitutional protections of *Roe v. Wade*. Mr. Trump has suggested women who have abortions should be punished, he promises to appoint anti-abortion justices to the Supreme Court, and he pledges to sign a federal ban on abortion after 20 weeks of pregnancy.[2]

Trump argues that the legality of abortion should be decided by states, and that women living in a state that criminalizes abortion would "have to go to another state."[3] Given this outlook, the failures of New York's abortion law are not simply a concern for women living in the state, but also for women living beyond its borders needing a safe-haven.

This report makes the case for reform of New York's abortion law though the stories of women who were unable to receive constitutionally protected abortion care. Their stories, bravely relayed both by medical providers and by patients to the New York Civil Liberties Union, refer to the women anonymously to protect their privacy and prevent them from being targets of stigma and hate. They include:

- A woman whose cancer worsened with pregnancy, who wanted to spend what remained of her life with the young child she already had.
- A 12-year-old girl whose sexual assault and pregnancy went undiscovered for 26 weeks.
- A woman whose fetus could not survive and who would have to spend more than $25,000 for abortion care.
- A woman who could not receive conclusive medical results before she was forced to make the important medical and personal decision to terminate the pregnancy.

These stories show that complications women face during pregnancy are unpredictable, and the need to receive an abortion after 24 weeks is often accompanied by serious illness or medical complications – the response to which should be medically appropriate care, not criminal penalties. But New York law undermines sound medical practice and deeply personal decisions, making difficult situations even worse. Once a national leader, New York's abortion law has lagged.

It is time for New York to step up and once again lead the effort to protect women's health and women's futures.

Recommendations

New York State must amend its laws to ensure that a woman can access the care she needs when pregnancy places her health at risk or the fetus is not viable. The state law should include an affirmative right to abortion consistent with sound medical practice and current constitutional protections.

In short, New York must codify the constitutional protections established in Roe v. Wade.

To achieve this, the New York State Legislature should:

- Remove the regulation of abortion from the criminal code, and place it in the Public Health Law where it belongs; and
- Ensure that New York's Public Health Law reflects our country's current constitutional protections.

WHY DID SHE WAIT?

THE MEDICAL CONTEXT

WHY DID SHE WAIT? *The Medical Context*

About one in five American women who became pregnant in 2014 had an abortion.[4] Legal induced abortion is extremely safe: A woman's risk of death associated with abortion is approximately 14 times lower than that associated with childbirth.[5] The majority of abortions occur during the first trimester of pregnancy, with 66 percent performed in the first eight weeks.[6]

When a woman needs care after the 21st week of pregnancy (accounting for 1.3 percent of abortions), it is often because health risks arise or medical conditions are discovered in the fetus.[7]

While similar data in the U.S. is scant, statistics collected by the United Kingdom show that nearly all abortions performed later in pregnancy in England and Wales are attributed to risk to a woman's health (63 percent) or the discovery of fetal anomaly (36 percent).[8]

Pregnant women are subject to numerous medical complications.[9] As pregnancy progresses, some pre-existing conditions may worsen and place a woman's health at significant risk. These can include cancer, heart disease, kidney disease and brain aneurysms.[10] In addition, complications in fetal development may arise or be discovered later in pregnancy. It is only then that doctors can screen for major anatomic or genetic anomalies.[11] Comprehensive anatomical testing of a fetus is typically conducted around the 20th week of pregnancy, revealing conditions that can include brain, heart and limb malformation and missing organs.[12]

Some women may decide to continue a pregnancy in these circumstances; others may not. Ultimately, that decision is best made by a woman, her family and her health care provider.

There is broad consensus that politicians should not interfere with a woman's decision making in matters of health care, including later in pregnancy. Leading medical associations oppose bans on abortion after 20 weeks of pregnancy, and more than 60 percent of American voters believe that abortion should be legal after 20 weeks if a fetus is not yet viable and a woman's health and circumstance indicate that she should discontinue the pregnancy.[13] Two out of every three voters believe that abortion should be legal after 20 weeks when a woman faces serious and long-term health risks.[14]

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FROM LEADER TO LAGGARD:

THE HISTORY OF NEW YORK STATE'S ABORTION LAW

FROM LEADER TO LAGGARD:
The History of New York State's Abortion Law

NEARLY FIFTY YEARS AGO, NEW YORK'S ABORTION LAW BECAME THE COUNTRY'S MOST PROGRESSIVE. NOW IT FAILS TO MEET CONSTITUTIONAL STANDARDS.

Criminalizing Care

In 1828, New York revised its penal code to include a provision prohibiting an "abortional act," making intentional miscarriage a crime.[15] Yet, as in other states, New York's criminalization of abortion did not stop women from needing to make the personal decision to end a pregnancy.[16]

In New York City alone, abortions numbered around 50,000 a year in the late 1960s.[17] Barbara Shack, who would become the head of the New York Civil Liberties Union and who was its organizer at the time, recalled that New York's criminalization meant "women with money could get abortions. They could pay doctors to do them, or they could fly to Puerto Rico or to another country. Poor women were dying in droves."[18]

Rallying for Reform

In the 1960s, public health advocates and the medical community started to question the effects of criminalizing abortion.[19] Grave health concerns like staggering maternal mortality rates and loss of fertility spurred a movement to liberalize abortion laws across the country.[20] New York's Republican Governor Nelson Rockefeller appointed a commission to review New York's criminal ban on abortions. The commission recommended that New York reform its law to improve women's access to safe abortion care, particularly low-income women.[21]

In 1970, New York became a national leader for reproductive health rights by passing landmark abortion legislation. It amended the state penal code to include a new clause allowing for a "justifiable abortional act," permitting abortions performed within 24 weeks from the commencement of pregnancy, and at any point during pregnancy when a woman's life

"Women with money could get abortions. They could pay doctors to do them, or they could fly to Puerto Rico or to another country. Poor women were dying in droves."

is in danger.[22] New York State had now effectively allowed regulated abortion – only the second state in the nation to do so.[23] But New York had made this possible only as part of an exception contained within its criminal homicide code, in which abortion as a general matter remained a crime.

Advocate Lawrence Lader, chairman of the National Association for Repeal of Abortion Laws at the time, remembered that for abortion rights advocates, "New York represented our best opportunity, and we knew that other states often looked to New York as setting an example." [24]

National advocates did not have to wait long for a sea change.

Three years later in its landmark decision in *Roe v. Wade*, the U.S. Supreme Court established a woman's fundamental constitutional right to an abortion, recognizing its significance to women's health and lives. As a result of the 1973 decision and subsequent cases, states can no longer constitutionally prohibit abortion care before viability.[25] Importantly, at no point in pregnancy can states constitutionally limit a woman's ability to access abortion care if her life or health is at risk or the fetus is not viable.[26]

A Compromised Right

Today, New York provides access to abortion more broadly than most states – its state Medicaid program covers abortion for women in the lowest income bracket, and pregnant minors who are capable of understanding the risks and benefits may give informed consent when they are unable to involve a parent.[27]

Yet more than four decades after *Roe v. Wade,* New York's laws have failed to keep pace with the U.S. Constitution. The state has no law recognizing a woman's affirmative right to obtain an abortion, and it continues to regulate abortion as part of its penal code rather than its public health code.

New York's medical community provided abortion care consistent with *Roe v. Wade* for decades after the decision, but as the anti-abortion movement gained political traction during the 1990s, hospitals and other providers in New York retreated from providing later abortion care.[28] With New York's antiquated law left standing, medical providers came to fear criminal sanction for providing care consistent with their best medical judgment and the wishes of their patients.[29]

New York's laws have failed to keep pace with the U.S. Constitution. The state has no law recognizing a woman's affirmative right to obtain an abortion, and it continues to regulate abortion as part of its penal code rather than its public health code.

Over the course of the last two decades, the New York Civil Liberties Union has intervened by requesting "non-prosecution" letters as assurances from district attorneys that a physician would not be prosecuted for performing an abortion later in a woman's pregnancy when necessary to protect her health or in cases where a fetus is not viable.[30] In one case, the NYCLU requested assurance from the Bronx District Attorney that a physician would not be prosecuted for providing constitutionally protected abortion care to a 13-year-old girl who had been raped and impregnated by her brother, and whose health was at risk from the pregnancy.[31]

Yet the use of non-prosecution letters improperly places district attorneys in the position of arbitrating what constitutes appropriate medical care. The time-sensitive nature of women's medical needs and their rights should not depend on the disposition and accessibility of an individual district attorney.

In September 2016, New York State Attorney General Eric Schneiderman released a formal legal opinion clarifying that "New York's criminal law cannot penalize reproductive health decisions protected by the U.S. Constitution."[32] The Attorney General stated that in order "to pass constitutional muster," New York's Penal Law must be read to allow for care in instances when a woman's health is at risk or the fetus is not viable.[33] This opinion is a significant recognition of the constitutional flaws in the state's law, and provides guidance to district attorneys.

Despite this, health care providers and risk-averse health care institutions may remain reluctant to provide medically necessary care until New York's law is reformed. Even after the Attorney General's clarification, the NYCLU continues to hear from patients and providers that women cannot access constitutionally protected and medically necessary abortion care in New York State.[34]

UNLAWFUL INTERFERENCE:

WOMEN'S STORIES FROM PROVIDERS AND PATIENTS

UNLAWFUL INTERFERENCE:
Women's Stories from Providers and Patients

New York's abortion law disregards women's health, distorts medical decision-making, warps personal choices and makes already difficult situations even worse – sometimes dangerous. The injustices women face are personal and urgent.

The following stories have been bravely shared by both health providers and patients alike. Family planning professionals bear intimate witness to the impact of New York's abortion law. Women recount trying to make the right decisions for their families and their health. When confronted with New York's limitations, they express bewilderment, anger and pain. Names and identifying information have been concealed when necessary to protect women's privacy.

To receive cancer treatment, she must end her pregnancy

From Dr. Stephen Chasen, professor of obstetrics and gynecology at New York-Presbyterian Hospital/Weill Cornell Medical Center

A Long Island mother was pregnant with her second child at age 28 when she began having seizures around her 24th week of pregnancy. Years earlier she had been treated for melanoma, and now an MRI had found a lesion in her brain. There were signs it had spread elsewhere in her body.

Melanoma is a cancer that can worsen with pregnancy and hers was aggressive. The fetus seemed to be developing normally, but she was quickly deteriorating. If she waited to begin treatment, she would likely live for only a few weeks after giving birth. Treatment now could give her more time, but would be toxic to the fetus.

She and her husband had to consider the needs of their young child at home, to whom they wanted to devote the short time she had left. It was a wrenching decision, but they were certain the best course for their family was treatment for her cancer and a focus on quality of life.

She needed an abortion, but the legal timeline had run out. Despite her condition and the needs of her family, an abortion in New York was no longer possible. The couple had to travel to Kansas.

"She knew she would die from the melanoma, and she was tearful throughout our conversations. Her priority became the child they already had who would now grow up without her and how to maximize the time they had. That she had to travel from New York to Kansas made it that much worse."

Parents did not know their child became pregnant after sexual assault

Lauren Mitchell, co-founder and board member of the Doula Project

The parents of a 12-year-old girl only discovered that their daughter had been sexually assaulted and was pregnant late into her pregnancy. At the hospital, an ultrasound determined that she was in the 26th week and past the threshold under New York law to receive an abortion.

She was a tiny girl with anemia, and she faced health risks if she were forced to carry her pregnancy to term and deliver vaginally. But a C-section would also be a health risk. It would likely weaken her uterus and jeopardize her ability to have children later in life. Termination was the best course, but now it wasn't available to her in New York.

"Children who have been raped may be forced to carry their pregnancies to term if they cannot make it out of New York State."

Her parents couldn't afford to travel far, but tried to get her care in another state.

"In New York, the 24-week cut off makes no exception for women who have been raped. For a number of reasons—including shock and stigma—women and girls who have been raped may seek care later in pregnancy. This means that children who have been raped may be forced to carry their pregnancies to term if they cannot make it out of New York State. This simply compounds the harm that rape inflicts on the lives of women and girls."

Thousands of dollars, thousands of miles for needed medical care

Erika Christensen—Age 35, Brooklyn:

My husband and I were so excited when we found out I was pregnant again. We had already been through one miscarriage. At 13 weeks we went in for a routine CVS test and everything seemed great. We found out our baby was a boy.

"I was never going to be his mother – he wouldn't make it. Even if he came to term, he'd only live a short while before choking to death. I couldn't put him through that."

Then at 16 weeks, a scan showed that his feet were turned inward. Our doctor said we'd keep watching it because he seemed fine. My husband and I reminded ourselves that Kristi Yamaguchi was born with clubfeet and became an Olympian. We decided that it just made him more special.

Shortly after, I got a call from my doctor and she sounded distraught. A blood test suggested he could have muscular dystrophy or spina bifida. But when we did another scan, he seemed normal. My doctor said all we could do was keep monitoring him. At 20 weeks, a scan showed his hands clenched shut, which is a bad sign. But he was still growing. The doctor said that if he made it to 28 weeks, there was a good chance he'd be fine.

But by then, the scans showed his growth had cratered. This was the first moment we realized something was terribly wrong.

I was never going to be his mother – he wouldn't make it. Even if he came to term, he'd only live a short while before choking to death. I couldn't put him through that. But now I was at 31 weeks of pregnancy, well past the 24-week cut off for termination under New York law.

I thought, this is totally crazy. We live in New York, after all and my baby is not viable. Yet, I still can't have this done in a supposedly progressive state. I was going to have to fly to Colorado to get an abortion.

When I told a friend we had to fly to Colorado, he assumed I was doing this under the table, in some kind of shady way. I had to convince him—no, this is just what you have to do in New York. Our top doctor at a top hospital told us it was necessary.

The clinic in Colorado provided excellent medical care and treated me great, but here's the thing—getting an abortion at that late date costs $25,000 cash. And that's not including the cost of last-minute travel and hotel. My mom was looking into how she could help me pay for it.

That would be impossible for most people. They would have to carry to term because they can't afford it.

I was lucky.

She had to make a decision without test results

Dr. Stephen Chasen, professor of obstetrics and gynecology at New York-Presbyterian Hospital/Weill Cornell Medical Center

She already had an 18-month-old and a 4-year old and was excited to welcome another child. But her ultrasound test showed that the fetus was small and parts of its heart and brain were not developing. While the heart could have been fixed, the suspected anomaly affecting the brain could not be.

"Having an artificial deadline does not allow women enough time to receive the medical information that they need to make fully informed decisions."

To understand what was going on would require more tests, like amniocentesis, an MRI and reviews from cardiologists. But by now the woman was in her 23rd week of pregnancy. If she waited for the results, she would not be able to receive abortion care in New York State. As a single parent on Medicaid, she wouldn't be able to afford the cost of later traveling out of state for the procedure, and she also wouldn't be able to get off of work or secure child care.

She decided to terminate the pregnancy before any further test results could come in. She did not want to be unable to later. After her abortion, she asked doctors not to disclose the health of the fetus.

She wouldn't have been able to bear knowing that the fetus might not have been as badly affected.

> *"Having an artificial deadline does not allow women enough time to receive the medical information that they need to make fully informed decisions. Many women will make their decision based on the worst-case scenario, particularly when traveling is not an option."*

It took over 26 weeks to be sure the fetus had a fatal disease

Dr. Adam Jacobs, Medical Director, Division of Family Planning at the Mount Sinai Hospital

She was excitedly expecting her first child when she tested positive as a carrier of a hereditary disease that leads to anomalies in the fetus that are fatal. At 20 weeks, testing indicated that her fetus likely had the disease.

"From a medical standpoint, this is the worst place to be—where waiting for more information actually eliminates the ability to act on it."

She and her partner were distraught. They had been eager to start a family. They wanted more information and agonized over making the wrong decision. They agreed that he should be tested too. When his results confirmed that he also was a carrier, they knew it was even more likely the fetus would have the disease. Still, they did not want to terminate the pregnancy without being certain. They would have to wait weeks more for those test results.

At a little over 26 weeks, testing confirmed the fetus had the disease. Knowing this helped them make the difficult decision to end the pregnancy. But by now it was too late to receive an abortion in New York State. The couple was forced to travel to Maryland.

> *"For some couples it is torture to wait for a diagnosis, but they are willing to make a difficult decision only if they have all available information. This is an impossible situation. You are foreclosing your options if you decide to gather more information and the diagnosis that comes back is severe. You will have waited past the legal limit for a result that you now cannot act on."*

> *"From a medical standpoint, this is the worst place to be—where waiting for more information actually eliminates the ability to act on it. Some patients can go out of state for an abortion if they have the resources and money to manage it, but if you don't, you would have to carry the pregnancy to term."*

A fetal brain hemorrhage late in pregnancy

Melissa—Age 33, Brooklyn

No one could have wanted a baby more than my husband and I. But as the result of a routine ultrasound in the third trimester of my pregnancy, we were devastated to learn that our baby had had a massive brain hemorrhage. It destroyed his cerebral cortex. He would never walk, talk or feed himself. If he even survived delivery, he would be kept alive by machines.

Termination was the only way to prevent his suffering. But because I was in the third trimester, there was no one who could provide this kind of care for me in New York. We were shocked. With the help of our hospital, we found a doctor across the country who would treat us. We flew out for the procedure and returned after 10 days.

Thankfully, my husband and I had the resources to do the right and compassionate thing for our child and our future family. My husband is a physician and I am a teacher. But not everyone is so lucky.

Still, it was absolutely harrowing to be forced to leave our home to get the care we needed during a devastating time. It only added to our sorrow, pain and stress. This care should be available in our state.

Forced to carry a fetus that would not survive

Dr. Jaclyn Roberts, reproductive genetics specialist

She received worrying news when she visited her doctor for a routine sonogram in the 20th week of pregnancy. The doctor became concerned that the fetus had developed polycystic kidney disease and would not survive. She was referred for further testing to confirm the diagnosis.

But that's when Hurricane Sandy hit.

The storm closed her hospital, delaying her appointments and testing. It was weeks before she finally received confirmation that the fetus had the fatal condition.

She did not want to continue the pregnancy, but now it was too late under New York law for her to receive an abortion. She was out of options – unable to get the care she needed and wanted in New York, and unable to afford the great expense of travelling to receive care out of state. She had to continue to carry the fetus even though it was not viable.

Weeks later she delivered a still birth and suffered a life-threatening hemorrhage. She survived, but if New York law allowed her to receive appropriate care when the fetal condition was diagnosed she would not have been put in this kind of danger.

RECOMMENDATIONS

A woman's constitutional right to abortion supersedes New York State laws. Yet the stories in this report make clear that the right to an abortion is not fully meaningful in New York so long as health care providers fear criminal sanctions and refrain from providing care later in pregnancy.[35]

New York State must amend its laws to codify constitutional rights established in the Supreme Court's Roe v. Wade decision.

New York should ensure that a woman can access the care she needs when pregnancy places her health at risk and when the fetus is not viable. State laws should include an affirmative right to abortion consistent with sound medical practice and current constitutional protections. To achieve this, the New York State Legislature should:

- **Remove the regulation of abortion from the criminal code, and place it in the Public Health Law.**

  Abortion is health care – not a crime. Our laws should allow women and their health care providers to make decisions free from fear of criminal sanctions. Other criminal and civil penalties already exist to punish any bad actors who harm pregnant women.

  To accomplish this, the legislature must repeal sections of the penal code criminalizing abortion in the first and second degrees, remove references to abortion in the homicide statute and the Criminal Procedure Law, and amend the Judiciary Law to reflect these changes.

- **Ensure that New York Public Health Law reflects current constitutional protections.**

  New York's public health law should include a woman's right to abortion consistent with rights recognized by the Supreme Court in *Roe v. Wade* and subsequent case law. To accomplish this, the legislature must amend the law to explicitly include a woman's right to abortion at any point during pregnancy if her life or health is at risk, or if the fetus is not viable.

[1] *Roe v. Wade*, 410 U.S. 113, 164-165 (1973). *See also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Hope v. Perales*, 83 N.Y.2d 563 (1994) (the "fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by [the New York] State Constitution, is at least as extensive as the Federal constitutional right").

[2] *See, e.g.*, Matt Flegenheimer and Maggie Haberman, "Donald Trump, Abortion Foe, Eyes 'Punishment' for Women, Then Recants," *The New York Times* 30 Mar. 2016: A1; Peter Sullivan, "Anti-abortion Groups Expect Quick Action from Trump," *The Hill*, 26 Dec. 2016. Available at http://thehill.com/policy/healthcare/311579-anti-abortion-groups-expect-quick-action-from-trump (last visited Jan. 5, 2017).

[3] Christina Cauterucci, "Trump Says Without *Roe v. Wade*, Women Could Just Visit Other States for Abortions," *Slate*, 14 Nov. 2016. Available at http://www.slate.com/blogs/xx_factor/2016/11/14/trump_says_without_roe_v_wade_women_could_just_visit_other_states_for_abortions.html (last visited Jan. 4, 2017).

[4] *See* Jenna Jerman and Rachel K. Jones, "Abortion Incidence and Availability in the United States, 2014," *Perspectives on Sexual and Reproductive Health* 49 (2017).

[5] Elizabeth G. Raymond and David A. Grimes, "The Comparative Safety of Legal Induced Abortion and Childbirth in the United States," *Obstetrics and Gynecology*, 119:215-9 (2012).

[6] Gestational age is calculated from the last normal menstrual period. Tara C. Jatlaoui et al., *Abortion Surveillance — United States*, 2013 (Washington: Centers for Disease Control and Prevention, 2016). Available at https://www.cdc.gov/mmwr/volumes/65/ss/ss6512a1.htm (last visited Jan. 5, 2017) (hereinafter "Abortion Surveillance 2013").

[7] *See id.*; Guttmacher Institute, *Evidence You Can Use: Later Abortion*, Mar. 2016. Available at https://www.guttmacher.org/evidence-you-can-use/later-abortion (last visited Jan. 4, 2017).

[8] Department of Health United Kingdom, "Abortion Statistics, England and Wales: 2015," Nov. 2016. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570040/Updated_Abortion_Statistics_2015.pdf (last visited Jan. 8, 2017).

[9] *See, e.g.*, Office on Women's Health, U.S. Department of Health and Human Services, "You're Pregnant: Now What?" 2010. Available at: https://www.womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (last visited Jan. 4, 2017).

[10] The referenced conditions are featured in this report's anecdotes, or were confirmed by Dr. Stephen Chasen of New York-Presbyterian Hospital.

[11] *See e.g.*, Robert Resnik et al., Creasy and Resnik's Maternal-Fetal Medicine: Principles and Practice Sixth Edition (2009); American Congress of Obstetricians and Gynecologists, "Second-Trimester Abortion," Practice Bulletin 135 (2013).

[12] *See* Christine Kansky, "Basic Obstetric Ultrasound Technique," *Medscape* (2016). Available at http://emedicine.medscape.com/article/2047305-technique#c3 (last visited Jan. 6, 2017); Hilmar H. Bijma et al., "Decision-making after ultrasound diagnosis of fetal abnormality," *European Clinics in Obstetrics and Gynecology*, 3 (2007) 89. Available at http://link.springer.com/article/10.1007/s11296-007-0070-0 (last visited Jan. 4, 2017).

[13] *Letter from Medical Associations to Members of Senate Opposing 20 week Abortion Ban*, September 16, Available at http://www.midwife.org/acnm/files/ccLibraryFiles/Filename/000000005628/Provider-Letter-Opposing-S1553.pdf (last visited January 10, 2017). Medical Associations opposed to a federal 20 week abortion ban include: American Academy of Pediatrics; American College of Nurse-Midwives; American Congress of Obstetricians and Gynecologists; American Medical Student Association; American Medical Women's Association; American Nurses Association; American Psychological Association; American Public Health Association; American Society for Reproductive Medicine; Association of Reproductive Health Professionals; Clinicians for Choice; National Abortion Federation; National Alliance to Advance Adolescent Health; National Association of Nurse Practitioners in Women's Health; National Family Planning & Reproductive Health Association; National Hispanic Medical Association; National Physicians Alliance; North American Society for Pediatric and Adolescent Gynecology; Nursing Students for Choice; Physicians for Reproductive Health; Planned Parenthood Federation of America; Public Health Students for Choice; Society for Adolescent Health and Medicine; Society of Family Planning; Society for Maternal-Fetal Medicine. *See also* Geoff Garin and Molly O'Rourke, "Hart Research Associates Memorandum to Planned Parenthood Federation of America Re A Deeper Look at Voters' Opinion on 20-Week Abortion Bans," 28 August 2013. Available at https://www.plannedparenthood.org/files/4914/2064/2343/FINAL_20_week_ban_polling_memo.pdf (last visited Jan. 4, 2017).

[14] *Id.*

[15] Linda Greenhouse and Reva B. Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate before the Supreme Court's Ruling* (2012) at 131-137. Available at http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf (last visited Jan. 5, 2017).

[16] *Id.* at 3.

[17] Steven Polgar and Ellen S. Fried, "The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law," *Family Planning Perspectives* 8 (1976) 125. Available at http://www.jstor.org/stable/2133634 (last visited Jan. 5, 2017).

[18] Richard Perez-Pena, "'70 Abortion Law: New York Said Yes, Stunning the Nation," *The New York Times*, 9 April 2000. Available at http://www.nytimes.com/2000/04/09/nyregion/70-abortion-law-new-york-said-yes-stunning-the-nation.html (last visited Jan. 5, 2017).

[19] *See generally* Greenhouse and Siegel, *supra* note 15.

[20] *See id.* Health care providers, environmentalists, advocates for sexual freedom, religious and feminist organizations joined the conversation and pressure mounted for legislators to liberalize abortion's legal status.

[21] *See* Alan F. Guttmacher, "The Genesis of Liberalized Abortion in New York: A Personal Insight," Case Western Reserve Law Review, 23, 1972 at 4.

[22] *See* N.Y. Penal Law § 125.05(3)(b) (McKinney 2002). The law criminalizes abortion by third parties and self-abortion. Penalties for violating section 125.05(3) by performing an "abortional act" that is not "justifiable" range in severity depending on the outcome and the point in gestation at which the termination is performed. See N.Y. Penal Law. §§ 125.00,125.45,125.15, 125.20, 125.40.

[23] Hawaii was the first state to allow regulated abortion, but it had a residency requirement. Therefore New York's reform had the greatest impact for the country regarding access. *See* Gail Collins, *When Everything Changed: The Amazing Journey for American Women from 1960 to the Presen*t, Oct. 14, 2009 at 231.

[24] *See* Perez-Pena, *supra* note 18

[25] *Roe*, 410 U.S. at 164-165; Casey, 505 U.S. at 846 (holding that a state has the "power to restrict abortion after fetal viability, if the law contains

exceptions for pregnancies which endanger a woman's life or health") (emphasis added); *Whole Woman's Health v. Hellerstedt*, 579 U.S.___ (2016)(a state may not pose an undue burden on a woman's fundamental right to a pre-viability abortion).

[26] The point at which viability occurs is individual to each pregnancy and must be left to the physician to determine. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 64 (1976) ("[I]t is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestation period...[and] the determination of whether a particular fetus is viable is...a matter for the judgment of the responsible attending physician.") The determination of whether an abortion is necessary to protect the woman's health is left to the sound professional judgment of the treating physician. *Casey*, 505 U.S. at 879 ("We also reaffirm 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 [woman]" (quoting *Roe* at 164-165).

[27] For state law and policy regarding Medicaid coverage for abortion, see e.g., Guttmacher Institute, *State Funding of Abortion Under Medicaid*, Jan. 2017. Available at https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid (last visited Jan. 7, 2017). For state law and policy mandating parental consent, see e.g., Guttmacher Institute, *Minors' Rights as Parents*, Jan. 2017. Available at https://www.guttmacher.org/state-policy/explore/minors-rights-parents (last visited Jan. 7, 2017). New York State law and policy allow minors to consent on their own to the provision of reproductive and sexual health care. Under New York's public health law, minors can consent on their own to abortion services and other health care related to pregnancy without parental consent. See N.Y. Pub. Health Law §§ 2504, 2305 (McKinney 2006). These statutes reflect a recognition of the importance, from a public health perspective, of providing minors with unimpeded access to these critical services and are grounded in data that support the critical connection between confidentiality and improved access to care. Many minors will not seek sexual health care services if confidentiality is compromised. In a nationwide survey of students, the most common reason (35 percent) adolescents gave for failing to obtain needed health care was that they did not want a parent to know. Jonathan D. Klein et al., "Access to medical care for adolescents: Results from the 1997 Commonwealth Fund Survey of the Health of Adolescent Girls," 25 *Journal of Adolescent Health* 120 (1999). Further, a 2002 study in the *Journal of the American Medical Association* showed that almost half of sexually active teens visiting a family planning clinic would stop using clinic services if their parents were notified that they were seeking birth control, and another 11 percent reported that they would delay testing or treatment for STIs, including HIV. Notably, though, virtually all (99 percent) reported that they would continue having sex, and thus remain at risk. Minors who do not wish to disclose to their parents that they are, or will soon become, sexually active often have good reasons. In some circumstances, parental involvement results in harm to individual minors. In one study, 30 percent of teens who did not tell a parent that they were pregnant feared physical violence between themselves and their parents (in many cases because it had already occurred) or being forced to leave home. Among minors whose parents found out about the pregnancy without being told by the minor herself, 58 percent reported one or more adverse consequences. Of those, a minimum of 6 percent suffered serious consequences, including physical violence at home, being beaten or being forced to leave home. Stanley K. Henshaw and Kathryn Kost, "Parental Involvement in Minors' Abortion Decisions," 24 *Family Planning Perspectives* 196, 207 (1992).

[28] This assertion is supported by the contemporaneous professional experience of NYCLU Executive Director Donna Lieberman, who founded the NYCLU's Reproductive Rights Project in 1988.

[29] "A.G. Schneiderman Issues Legal Opinion Clarifying That New York State's Criminal Law Does Not Interfere With Reproductive Health Rights Ensured By *Roe v. Wade* And Later Cases," Attorney General Eric T. Schneiderman, 8 September 2016. Available at https://ag.ny. gov/press-release/ag-schneiderman-issues-legal-opinion-clarifying-new-york-states-criminal-law-does-not (last visited Jan. 7, 2017).

[30] *See, e.g., Letter from Anthony Girese, Counsel to the Bronx District Attorney, to Dr. Cassandra Henderson, Associate Director of Obstetrics and Perinatology at Montefiore Medical Center* (Apr. 17, 1992) (this case involved a physician at Montefiore Hospital in the Bronx who was treating a woman at 29 weeks of pregnancy where the fetus had been "definitively diagnosed as having Trisomy 13 with multiple malformations, including cyclops." In response to the physician's letter, the district attorney wrote: "Based on the facts and professional conclusions set forth in your letter, the treatment you recommend would not be in violation of Article 125 of the New York Penal Law."); *See also Letter from Donna Lieberman, NYCLU, to Anthony Girese, Counsel to the Bronx District Attorney* (Jan. 11, 2001).

[31] *Memo from Donna Lieberman, NYCLU, to Eric Warner, Senior Executive Assistant District Attorney in the Bronx* (Feb. 24, 1999) (this case involved a 13-year-old who was raped and impregnated by her brother. She faced a multitude of possible serious medical and psychological complications if she carried her pregnancy to term, including a risk that the fetus would have severe genetic defects as a result of incest).

[32] Attorney General Eric Schniederman, *Formal Opinion No. 2016-F1*, Sept. 2016 (clarifying that New York State's criminal law does not interfere with reproductive health rights ensured by *Roe v. Wade* and later cases). Available at https://ag.ny.gov/sites/default/files/ abortion_opinion_2016-f1.pdf (last visited Jan. 7, 2017).

[33] *Id.*

[34] For example, in Oct. 2016, a patient contacted the authors of this report to relay her experience of needing to travel out of state for abortion care after discovery of a severe fetal anomaly at 28 weeks of pregnancy.

[35] In addition to those indicated in this section, an important recommendation for the legislature is to ensure that medical practitioners who are licensed, certified and trained to provide abortion services may lawfully do so. At present, because of amendments from 1970, a "justifiable abortion" is an abortion performed by "duly licensed physicians" within 24 weeks from the commencement of pregnancy. While this language does not prohibit other health providers from performing abortions, it has generated confusion among providers, their lawyers and their insurers as to whether advanced practice clinicians (*e.g.*, nurse practitioners, physician assistants, certified nurse midwives) may legally provide abortion services. Advanced practice clinicians with training and expertise to provide early and safe abortion care play an important role in increasing access to this health care, particularly for women in rural and low-income communities. Tracy A. Weitz et al., "Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives and Physician Assistants Under a California Legal Waiver," *American Journal of Public Health*, 103(3) Mar. 2013. The largest, most influential and well-respected medical and health policy organizations in the U.S. have issued statements in support of appropriately trained clinicians providing abortion care, including the American College of Obstetricians and Gynecologists, the American Academy of Physician Assistants, the American College of Nurse-Midwives, the American Medical Women's Association, the American Public Health Association, the Association of Physician Assistants in Obstetrics and Gynecology, the International Confederation of Midwives, the National Association of Nurse Practitioners in Women's Health and Physicians for Reproductive Health.