

The Unintended Consequences of New York State's Reproductive Health Act

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Content warning: The article below contains descriptions of domestic violence, which may be upsetting for some readers. Please read with caution.

Abortion has been legal in New York state for forty-nine years, and its statutory protections originate in the state's penal code.¹ In recent years, some have called for the state to adopt more progressive abortion policies to support pro-choice movements. In 2019, demands for reform were met with the passage of the Reproductive Health Act (RHA),² which decriminalized abortion by removing it from the penal code, thus making abortion exclusively a health issue. Some were content, as the decriminalization of abortion seemed like a sign that the state's abortion laws were becoming less strict, allowing more opportunities for abortion. Others noticed an unintended consequence of the RHA—decriminalizing abortions included decriminalizing nonconsensual, violent terminations of pregnancy via feticide as well.³ In other words, under the RHA, if someone forces a pregnant person to have a nonconsensual abortion or if they are the victim of physical violence and the child dies as a result, the perpetrator of the crime can only be charged for crimes committed against the mother, not the child.⁴ Therefore, in removing abortion from penal law and reclassifying it under public health law, the effects of

¹ N.Y. Penal Law § 125.25 (1970); *see also* Ian Pickus, *New York Votes to Put Abortion Rights in the State Constitution*, NPR (Nov. 2024), <https://www.npr.org/2024/11/05/g-s1-32751/new-york-abortion-election-results>.

² Reproductive Health Act, N.Y. Pub. Health Law §§ 2599-aa–2599-bb (2019).

³ *Id.* In removing abortion from penal law and placing it within public health law, the Reproductive Health Act reframes abortion as a medical issue rather than a criminal offense. As a result, abortion is no longer subject to criminal penalties under New York law. If abortion remained within the penal code with exceptions, the law could distinguish between consensual medical procedures and nonconsensual terminations, allowing for criminal liability in some cases of feticide.

⁴ *Id.*

New York state's Reproductive Health Act are ethically questionable, because if the fetus dies through violence or coercion, the perpetrator of the crime cannot be charged with the killing of a fetus that the pregnant individual theoretically wanted.

When abortion was legalized in New York state in 1970, abortion was permitted during the first twenty-four weeks if performed by a licensed physician; otherwise, unless the pregnant individual's life was at risk, abortion was considered a criminal act.⁵ In the interest of making abortion a universal right, the RHA removed abortion from penal law and placed it into public health law, thus legalizing all abortion regardless of the factors that may distinguish each case of pregnancy termination. Namely, a consensual abortion resulting from a medical procedure is not the same as a termination of pregnancy that resulted from physical violence. A medical procedure that a pregnant individual consented to is not the same as one that an individual was forced into.⁶ A blanket decriminalization of abortion, which is what the RHA entails by making it a public health issue, blurs the distinction between a consensual abortion and feticide, sometimes known as fetal homicide. Decriminalizing abortion makes all abortions the same in the eyes of the law, thus removing criminal punishment in cases where a crime against the fetus was arguably committed.

One victim of feticide and violent abuse in New York whose perpetrator went unpunished for feticide was Jennifer Irigoyen. Irigoyen was a thirty-five-year-old realtor who was a dance and fitness instructor, and she was fourteen weeks pregnant at the time of the crime.⁷

Forty-eight-year-old Anthony Hobson dragged Irigoyen down the stairs of her home, stabbing

⁵ N.Y. Penal Law § 125 (1970); Bill Kovach, *Final Approval of Abortion Bill Voted in Albany*, 1970, at 1, 17.

⁶ See Alison Tsao, *Fetal Homicide Laws: Shield against Domestic Violence or Sword to Pierce Abortion Rights*, 25 Hastings Const. L.Q. 457 (1998). Tsao outlines a helpful definition for feticide, also known as fetal homicide, and a brief history of this offense in the United States at the time.

⁷ *Boyfriend Arrested After Pregnant Woman Fatally Stabbed in Queens*, Eyewitness News ABC 7 (Feb. 2019), <https://abc7ny.com/post/boyfriend-arrested-after-pregnant-woman-fatally-stabbed-in-nyc/5127737/>.

her in the stomach and killing her and her fetus.⁸ Hobson was Irigoyen's ex-boyfriend, and allegedly, he intended to kill the unborn fetus during the attack. A neighbor testified that during the crime, they overheard Irigoyen calling out, "Help! Help! He's trying to kill the baby!"⁹ Hobson originally faced second degree murder and abortion charges for killing Irigoyen and her fetus.¹⁰ However, the second degree abortion charge was dropped, according to the Queens County District Attorney's office; this development could perhaps be due, at least in part, to the passage of the RHA.¹¹ Killing a pregnant person is an act distinct from normal murder, and as such, its perpetrators should face unique criminal charges. Decriminalizing all abortions in the way that the RHA accomplishes does not allow perpetrators of violent acts against pregnant individuals to face the full extent of their crimes. Though the language of the RHA may make it seem like parameters are in place for safe and legal abortions, the decriminalization of abortion has inadvertently blurred the lines between what is considered a "legal" versus an "illegal" abortion. This obfuscation between a consensual and nonconsensual abortion, or feticide, is problematic. Available evidence suggests that Irigoyen's fetus was wanted by its mother and was intended to be carried to term.¹² Anthony Hobson killed a woman and a fetus that night, but New York law only recognizes the murder of one person.

Livia Abreu is another whose unborn child did not receive justice. Abreu was twenty-six weeks pregnant with her child when she was stabbed six times by her fiancé, Oscar Alvarez.¹³

⁸ Ashley Southall, *Murder Case Stirs Debate On Abortion And New Law*, N.Y. Times (Feb. 2019) <https://www.nytimes.com/2019/02/10/nyregion/abortion-murder-queens.html>

⁹ Press Release, Queens Cnty. Dist. Att'y, *Queens Man Sentenced to 26 1/3 Years-to-Life in Prison for 2019 Murder of His Pregnant Girlfriend* (2022), <https://queensda.org/queens-man-sentenced-to-26-1-3-years-to-life-in-prison-for-2019-murder-of-his-pregnant-girlfriend/>.

¹⁰ Southall, *supra* note 8.

¹¹ *Id.*

¹² Queens Cnty. Dist. Att'y, *supra* note 9. When Irigoyen is stabbed to death, she screams for someone to help her baby, according to witnesses.

¹³ Press Release, Bronx Cnty. Dist. Att'y, *Bronx Man Sentenced To 14 Years In Prison For Stabbing Pregnant Girlfriend, Which Led To Death Of Unborn Child* (2022), <https://www.bronxda.nyc.gov/downloads/pdf/pr/2022/31-2022%20Miguel-Bonilla-sentenced-bronx-murder.pdf>.

While Abreu survived the attack, her child did not.¹⁴ Alvarez was charged with second degree attempted murder for his crimes against Livia,¹⁵ yet no charges were brought forth for the murder of her fetus.¹⁶ Abreu publicly expressed a desire for legal accountability for the murder of her unborn child, which New York law does not recognize as a separate victim; in 2019, she spoke out against the RHA before it was passed into law, calling it “extreme and filled with gaps,”¹⁷ clarifying that she is “neither pro-choice nor pro-life.”¹⁸ She feared that her perpetrator “[W]ill likely be convicted of the crimes he committed against me, but the loss of my daughter will be a non-factor to the law because she wasn’t ‘born and alive.’”¹⁹ Alvarez was indeed exonerated of his abortion charges and did not face punishment for the totality of his crimes. She further expresses her concern over the RHA, stating:

I pray that it doesn’t, but what happened to me will likely happen to someone else. I cannot imagine living in a world where harming and/or killing an unborn child as a product of an attack on a pregnant woman is not a crime...A world where mothers have been stripped of & have to bury and mourn their unborn child but the person responsible is not held accountable for it.²⁰

Abreu’s words serve as a reminder that when New York passed the RHA and decriminalized all abortions, it removed the most important condition for a legal abortion in the pregnant individual’s eyes: consent.

Looking to federal legislation as a model, the Unborn Victims of Violence Act of 2004 (UVVA) is a prime example of what states like New York should imitate. The UVVA is a law that recognizes a child in the womb as a victim if killed or injured during the commission of any

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Press Release, John J. Flanagan, *#LetJusticeLivOn: Pregnant DV Victim Who Lost Baby in Brutal NYC Attack Stands With Senate GOP & Unveils Legislation to Protect Pregnant DV Victims*, N.Y. Senate (2019), <https://www.ny.senate.gov/newsroom/press-releases/2019/john-j-flanagan/letjusticelivon-pregnant-dv-victim-who-lost-baby>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

federal crime of violence.²¹ Moreover, the UVVA excludes abortions performed with the consent of the mother or resulting from medical treatment, exempting the mother or medical professional from prosecution.²² Because it is federal legislation, it is only applicable to cases over which the federal government presides, such as those involving members of the military or federal officials.²³ Nonetheless, the UVVA recognizes the case of feticide and, unlike the RHA, does not have a one-size-fits-all approach to abortion. There are different types of abortions,²⁴ and when certain abortions are immoral by any standard, such as feticide, the criminal justice system must respond accordingly. New York state can still protect women's rights while also providing pregnant individuals and their fetuses justice by using the UVVA as an example.

A strong argument in favor of the RHA is that abortion charges are rarely used and do little to increase the severity of punishment for those convicted of such crimes.²⁵ Although it may be true that prior to the RHA, abortion charges were rarely used, the cases of Irigoyen and Abreu demonstrate the necessity of charging perpetrators to the full extent of their crimes. In the event that a pregnant individual wants their fetus, it seems unjust to disregard its murder in the court of law. Further, though it may be true that a perpetrator of a crime against a pregnant individual would face severe punishment without the additional abortion charge, sociologists and criminologists perceive severity of punishment to be less effective in deterring crime than certainty of punishment.²⁶ In other words, if a perpetrator knows that injuring or killing a fetus is

²¹ Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2004).

²² *Id.*

²³ *Id.*

²⁴ *Abortion*, Merriam-Webster Dictionary (last accessed Dec. 2025), <https://www.merriam-webster.com/dictionary/abortion>. This multipart definition includes a medical procedure that the mother wanted (“induced expulsion of a human fetus”) as well as miscarriage (“spontaneous expulsion of a human fetus during the first 12 weeks of gestation”); both are examples of pregnancy terminations after, accompanied by, resulting in, or followed by the death of the fetus. This definition could conceivably include feticide.

²⁵ Southall, *supra* note 8.

²⁶ Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765, 779 (2010) (citing sociologist Jack P. Gibbs in support of the idea that certainty of punishment is a crime deterrent). Certainty of punishment for nonconsensual, violent terminations of pregnancy by a third party individual (i.e., an abuser committing intimate partner violence) could be a more effective deterrent for such crimes

a crime separate from the crime committed against the pregnant individual, a perpetrator will be less likely to commit that crime regardless of the sentence they would receive. Consequently, whether the additional abortion charge would significantly increase the sentence a perpetrator would receive is somewhat irrelevant because certainty of punishment does more to deter crime than severity of punishment does. Lastly, some argue that criminalization of abortion is harmful to women because it can be used by prosecutors as a method of prosecuting the mothers or medical professionals involved in consensual abortions.²⁷ Making abortion part of the penal code ensures that nonconsensual abortions are criminalized. It does not necessarily include consensual abortions.

Though the issue of what constitutes a legal abortion is up for debate, it is clear that a distinction must be drawn between consensual abortion and feticide. Federal courts and the court of public opinion may continue to debate the time period during which an abortion should be legal or who is qualified to terminate a pregnancy, but it is ethically dubious to blur the distinction between a consensual medical procedure and feticide. In doing so, New York does not deter violence against women, which is elevated during pregnancy;²⁸ not criminalizing the murder of a wanted fetus can lead to less crime deterrence,²⁹ which may contribute to fetal homicide and violence against pregnant women by extension. Hence, the Reproductive Health Act raises ethical concerns over its failure to criminalize feticide in the interest of decriminalizing abortion completely.

than severity. Thus, recognizing these instances of feticide as a distinct criminal offense could increase deterrence for such crimes.

²⁷ Southall, *supra* note 8.

²⁸ Maeve Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States, 2018–2019*, 138 *Obstet. Gynecol.* 762, 762 (2021) (the rate of homicides among pregnant women is sixteen percent higher than among nonpregnant women).

²⁹ Paternoster, *supra* note 26, at 5.