

The Road To Proposal One: Gender and Reproductive Rights In New York, and The Proposed Amendment

October 16, 2024

Bernadette Gargano, Esq.

Access to Justice Clinic



Agenda

- I. Overview of Reproductive Controls & Rights in Early American History
- II. History of Reproductive Rights in New York State
- III. Survey of Current New York State Law, responding to Dobbs
- IV. Proposal 1: NY ERA and the Ballot: Why now? What changes?
- V. Q&A

Overview of Reproductive Control in Early American History

- 1619-1865 – Black women who were enslaved had no control over their reproductive lives as they were considered “property.”
- Forced copulation, rape, and forced reproduction during enslavement are well documented.
- Enslaved women treated as cattle under case law, with no rights over their children.
- Virginia Colony, 1662 statute: All children of enslaved women were the property of their enslavers.
- The enslavers used Black women and men to produce children or raped Black women: either way, the resulting children were “property” to increase wealth through labor or sale, especially after 1808 when it became illegal to import human beings as slaves into the U.S.

A Broader View of Reproduction as a Means of Control

- Several cases from the Colonial Era make clear that controlling the bodily autonomy and reproduction of Black women was the right of white enslavers.
 - ❖ M’Vaughters v. Elder, 4 S.C.L. (2 Brev.) 307, 314 (1809)(“the young of slaves . . . stand on the same footing as animals”).
 - ❖ Missouri v. Celia, 1855 (enslaved teen raped repeatedly by white enslaver from age 14-18, pregnant with her third child she fought the enslaver off, hitting him with a large stick. He dies. The court refused to allow self-defense under a statute providing that “homicide shall be deemed justifiable when committed by any person resisting” a felony, such as rape.)
 - ❖ George v. State, 37 Miss. 316, 317 (Miss. Err. & App. 1859)(dismissed a criminal indictment against a man who had raped a 10-year-old girl)(“The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous”).

The Reconstruction Era and Beyond

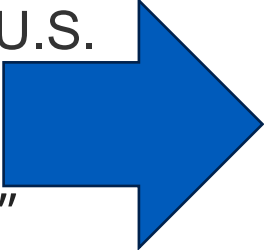
- Emancipation Proclamation, 1863, Thirteenth Amendment, Dec. 6, 1865
- As a backlash to the Reconstruction Amendments, the KKK and other white supremacy groups employed both lynchings and sexual violence.
- “Group” rape was often used as an “uncamouflaged political weapon.”
- In 1866, massacres occurred in Memphis and New Orleans, and white men “raped, singly and in groups, the Black Women whose paths they crossed.”
- In 1871, Congress launched an investigation into this violence where, despite great personal risk, hundreds of Black women testified.
- In the 20th Century, Black women, women and color, and disabled women were subject to forced sterilization, implanted birth control, and more.
- Statistics from as late as 1983 from federally funded programs.
- History of Eugenics and Population Control, both domestic and foreign.

Overview of Reproductive Rights in Early American History For White Women

- 1600s-1800s – Disagreement among scholars about the frequency and illegality of abortions for white women.
- Scholars focused on women’s history tend to unearth materials showing that abortion was used more frequently than might be expected and available through midwives, usually through natural abortifacients. (Compare to Dobbs.)
- Also find a variation of cultures where abortifacients were used rather than just looking at English Common Law or legal scholars at the time.
- In most cases, abortion was not widely criminalized before “quickening.”
- Many scholars point the professionalization of the medical profession as the point when physicians began to wrest OB/GYN services from midwives and women.

Overview of Abortion Rights in Early American History

- In the Mid-to-Late 1800s, the criminalization of abortion became more common.
- However, as late as the 1840s, women were advertising abortion services, as evidenced by this ad from the New York Sun, housed with the U.S. Library of Congress.
- In the first ad, "Mrs. Bird, Female Physician" offers pills for treatment of menstrual irregularity.
- In the second, Madame Costello offers help to women who want to be treated for "obstruction of their monthly periods."



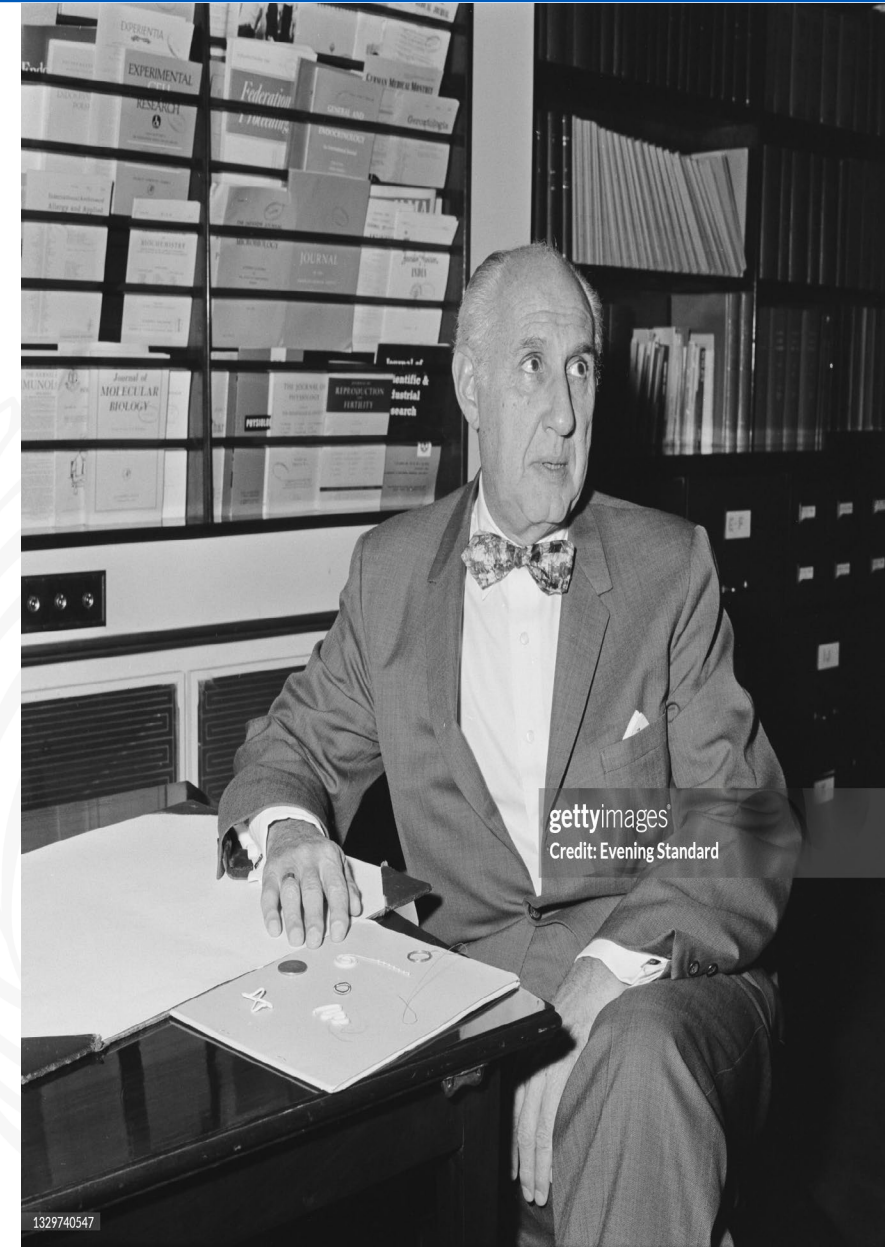
MRS. BIRD, Female Physician, where can be obtained Dr. Vandenburg's Female Renovating Pills, from Germany, an effectual remedy for suppression, irregularity, and all cases where nature has stopped from any cause whatever. Sold only at Mrs. Bird's, 83 Duane st, near Broadway. n24 3m*

TO THE LADIES—Madame Costello, Female Physician, still continues to treat, with astonishing success, all diseases peculiar to females. Suppression, irregularity, obstruction, &c., by whatever cause produced, can be removed by Madame C. in a very short time. Madame C.'s medical establishment having undergone thorough repairs and alterations for the better accommodation of her numerous patients, she is now prepared to receive ladies on the point of confinement, or those who wish to be treated for obstruction of their monthly periods. Madame C. can be consulted at her residence, 34 Lispenard st, at all times.—All communications and letters must be post paid. 2f 1m*

PREPARATIONS TO MOTHERS for the management of their

Abortion Rights in New York State

- Abortion was not criminalized in New York state until 1828.
- Despite criminalization for **142 years**, doctors still performed “therapeutic” abortions.
- Dr. Guttmacher trained from 1925-1929 as a resident:
 - He witnessed three deaths from illegal abortion: a 16-year-old with a multiperforated uterus, a mother of four who died of sepsis, and a patient in early menopause who misinterpreted her condition.
 - Saw a 12-year-old Black child impregnated by a family member. The doctor in charge believed the continuation of the pregnancy would endanger the girl’s life.



Abortion Rights in New York State

- In 1968, Dr. Guttmacher appointed to Committee by Gov. Rockefeller.
- Gov. Rockefeller, convened the Committee, mandating that:
“I am not asking whether NY’s abortion law should be changed, I am asking how it should be changed.”



Abortion Rights in New York State

- **April 10, 1970** – NYS Legislature amended the State Penal Code, allowing licensed physicians to provide abortion services for any **consenting** woman. N.Y. Penal Law § 125.05(3).
- **April 11, 1970** – Governor Nelson A. Rockefeller signed the law amending the penal code:
 - ___/Abortion became legal **within first 24 weeks** of pregnancy **with consent** of the patient.
 - ___/After **24 weeks**, it was legal when a doctor determined it was necessary to **protect the patient's life**.



Abortion Rights in New York State – “Codification of Roe”

➤ Reproductive Health Act – Effective Jan. 22, 2019

■ Public Health Law § 2599-aa: Policy and Purpose

1. Every individual has the fundamental right to choose or refuse contraception or sterilization.
2. Every individual who becomes pregnant **has the fundamental right to choose to carry the pregnancy to term, to give birth to a child, or to have an abortion**, pursuant to this article.

■ Public Health Law § 2599-bb (1): Abortion

Abortion allowed by a “practitioner” when in [their] reasonable and good faith professional judgment based on the facts of the patient's case: **the patient is within twenty-four weeks from the commencement of pregnancy, or there is an absence of fetal viability, or the abortion is necessary to protect the patient's life or health.**

Abortion Rights in New York State – Further Developments

- Reproductive Health Act, amended, eff. April 1, 2024
 - Public Health Law § 2599-bb-1 (2): Reproductive Freedom and Equity Grant Program
 - Established “a reproductive freedom and equity grant program to ensure access to abortion care in the state.”
- NY Civil Rights Law § 70-b: Unlawful Interference with Protected Rights, 2022, as amended 2023
 - **Section 6:** Rights specifically protected under this section shall include lawfully provided medical care including but not limited **to reproductive and/or endocrine health care, and all medical, surgical, counseling or referral services relating to the human reproductive system, including but not limited to services relating to pregnancy, contraception, or the termination of a pregnancy.**

Abortion Rights in New York State – Even More Laws

- NY Crim. Pro. Law § § 570.17 & 570.19 – Extradition Laws (Limited)
- NY CPLR § 4550 – Evidence related to Reproductive Health Services (Prohibited)
- NY General Business Law § 394-e: Report on Request for Abortion Services
(Prohibits reporting of referral for abortion care or inquiries and requests to others.)
- NY Insurance Law § 3436-a: Adverse Action by Insurance Companies
(Prohibits Ins. providers from taking adverse action related to medical malpractice coverage.)
- NY Education Law § 6531-b: Exceptions: Reproductive & Gender Affirming Care
(Protects healthcare providers from misconduct or licensure issues when providing reproductive or gender affirming care.)

New York Constitution:

Article 1 – Bill of Rights, Section 11:

“Equal Protection of Laws; discrimination in civil rights prohibited.”

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

(New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

108--A

2023-2024 Regular Sessions

IN SENATE

(Prefiled)

January 4, 2023

Introduced by Sens. KRUEGER, BROUK, JACKSON, MAYER, RYAN, SEPULVEDA, STEWART-COUSINS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

proposing an amendment to section 11 of article 1 of the constitution, in relation to equal protection

1 Section 1. Resolved (if the Assembly concur), That section 11 of arti-
2 cle 1 of the constitution be amended to read as follows:
3 § 11. a. No person shall be denied the equal protection of the laws of
4 this state or any subdivision thereof. No person shall, because of race,
5 color, ethnicity, national origin, age, disability, creed [or], reli-
6 gion, or sex, including sexual orientation, gender identity, gender
7 expression, pregnancy, pregnancy outcomes, and reproductive healthcare
8 and autonomy, be subjected to any discrimination in [his-or-her] their
9 civil rights by any other person or by any firm, corporation, or insti-
10 tution, or by the state or any agency or subdivision of the state,
11 pursuant to law.
12 b. Nothing in this section shall invalidate or prevent the adoption of
13 any law, regulation, program, or practice that is designed to prevent or
14 dismantle discrimination on the basis of a characteristic listed in this
15 section, nor shall any characteristic listed in this section be inter-
16 preted to interfere with, limit, or deny the civil rights of any person
17 based upon any other characteristic identified in this section.
18 § 2. Resolved (if the Assembly concur), That the foregoing amendment
19 be submitted to the people for approval at the general election to be
20 held in the year 2024 in accordance with the provisions of the election
21 law.



Actual Language on the Ballot – Flip the Ballot

ADDS CERTAIN PROTECTIONS TO THE STATE BILL OF RIGHTS

Adds anti-discrimination provisions to State Constitution. Covers ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity and pregnancy. Also covers reproductive healthcare and autonomy.

A “YES” vote puts these protections against discrimination in the New York State Constitution.

A “NO” vote leaves these protections out of the State Constitution.

Election Law 4-108(4)(a) & (b) – Requires short statement and “plain language.”

NYC Committee Report on Prop 1 – What it Will Do

- **WILL establish constitutional protections against discrimination** based on *ethnicity, national origin, age, disability, and sex*—including *sexual orientation, gender identity, gender expression, pregnancy and pregnancy outcomes, and reproductive healthcare and autonomy*. These protections would be in addition to the current explicit protections against racial and religious discrimination under the State Constitution. When a right is established in the Constitution, it is protected from future legislation that might put it at risk.
- **WILL protect abortion rights and access to reproductive healthcare, including birth control and IVF**, by preventing future State laws banning abortion and/or punishing or prosecuting pregnancy outcomes like miscarriages. Prop 1, which received first passage by the State Legislature in the immediate aftermath of the Supreme Court’s decision overturning *Roe v. Wade*, does not use the term “abortion” specifically, but this protection is unequivocally covered by the language of the amendment.
- **WILL protect LGBTQ+ New Yorkers** by preventing future State laws from rolling back current LGBTQ+ rights to equal treatment.
- **WILL protect older, disabled, pregnant and LGBTQ+ New Yorkers** from government discrimination in hiring, pay, and promotion.
- **WILL ensure that older and disabled New Yorkers have the access** they need to vote and to use public spaces and facilities.
- **WILL prevent discrimination against all individuals** and clarify that the amendment cannot be used as a basis for attacking programs that are battling discrimination.

NYC Committee Report on Prop 1: What it Won't Do

- **WILL NOT impact parental rights.** Prop 1 does not address parental rights, which are governed by other developed areas of State and federal law. Prop 1 does not change existing law with respect to parental consent, or parents' ability to be involved in decision-making about healthcare or medical procedures for their minor children, including gender-affirming care.
- **WILL NOT change current law with respect to participation on sports teams.** Prop 1 prohibits discrimination on the basis of gender identity and gender expression. Prop 1 does not change existing law and has no explicit provision relating to participation on sports teams. Prop 1 is consistent with Title IX, the controlling federal law that has already been interpreted by federal courts to require young people to play on sports teams that match their gender identity and expression.
- **WILL NOT impact or change the qualifications for voting.** A separate part of the State Constitution governs qualifications for voting based on citizenship status. Prop 1 does not enfranchise any new classes of voters.