

**SHOULD WE OBSTRUCT OR FACILITATE A MINOR’S ABORTION?
AN INTERNATIONAL COMPARISON OF JUDICIAL BYPASS AND
CONSENT LAWS REGARDING ACCESSIBILITY TO ABORTION FOR
MINORS IN THE UNITED STATES, CANADA, AND MEXICO**

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I. INTRODUCTION

Throughout the United States’ history, abortions have been completed, allowed, criminalized, and legalized.¹ That order depends greatly on the time period and state; in 1850 many states formally criminalized abortion, making it illegal for women to obtain an abortion.² Today, the right to abortion is available to all adult women and in some instances to girls under the age of 18.³ In 1973, the US Supreme Court ruled that a woman’s right to an abortion was constitutionally protected under the right to privacy, “founded in the Fourteenth Amendment’s concept of personal liberty” and in the “Ninth Amendment’s reservation of rights to the people.”⁴ Abortion is legal in the US, but abortion regulations vary by state, including stages during the pregnancy when an abortion is legal, certification of medical facilities and personnel, and more.⁵

What happens, though, when that woman seeking an abortion is perhaps by definition not a woman, but a fifteen-year-old girl? What if she is younger? Does she have a right to an abortion? Does she need parental consent? If so, does

1. See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today”); *History of Abortion*, NATIONAL ABORTION FEDERATION, <https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/> (last visited Oct. 11, 2019) [hereinafter *History of Abortion*].

2. *Roe*, 410 U.S. at 129 (“It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman’s life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.”); see also *History of Abortion*, *supra* note 1.

3. See *Roe*, 410 U.S. at 165; *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

4. *Roe*, 410 U.S. at 153-54.

5. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

she need consent from one or both parents? What happens when she wants an abortion, but cannot bear to tell her parents? Is her option an illegal, unsafe, or self-induced abortion? Or should she have unimpeded access to a safe and legal abortion? These are complicated questions, but they are not just theoretical; these are real-life questions many young girls face. In the US, Canada, and Mexico, there are laws or case law that govern abortion, but few of those specifically mention minor girls; minors may or may not have an opportunity for a legal abortion depending on judicial bypass or consent laws.⁶ “A judicial bypass abortion is an order from a judge that allows a minor to get an abortion without [parental] notification or consent.”⁷ Minors’ consent laws can require parental notification or consent prior to an abortion.⁸

This Note will explore and compare judicial bypass and consent laws in the US, Canada, and Mexico that enable or hinder minor girls when seeking an abortion. Part II of this Note will cover a patient scenario that will later be applied under each country’s/state’s laws. A reader should keep this scenario in mind when reading through Parts III-V. Part III will discuss and analyze US abortion law specifically focusing on judicial bypass statutes from California, the least restrictive state in the country, and Texas, the most restrictive. Part IV will discuss and analyze abortion laws in Canada, specifically minor consent laws, as Canada does not have judicial bypass statutes, from Quebec, the least restrictive, and New Brunswick, the most restrictive. Part V will discuss and analyze abortion laws in Mexico, specifically Mexico City, the least restrictive district, and Queretaro, the most restrictive state. Part VI will apply the patient scenario to each of the six states. Part VII will then provide an overview and compare abortion laws in the US with Canada and Mexico. Part VII will conclude with a ranking of the countries based on accessibility.

II. PATIENT SCENARIO⁹

Bee just turned 16 and is eight weeks pregnant. She is scared. She does not want to tell her parents about her pregnancy. Bee attends high school and works

6. See *Roe*, 410 U.S. 113 (1973); *Danforth*, 428 U.S. 52 (1976); *R. v. Morgentaler*, [1988] 1 S.C.R. 462 (Can.); *Código Penal Federal (CPF)*, cap. VI, art. 330 *Diario Oficial de la Federación [DOF]* 14-05-1931, últimas reformas *DOF* 24-01-2020 (Mex.).

7. *What is a Judicial Bypass for Abortion?*, JANES DUE PROCESS, <https://janesdueprocess.org/judicial-bypass-abortion/> (last visited Nov. 10, 2019); see also *Bellotti v. Baird*, 443 U.S. 622, 649 (1979).

8. *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476, 491 (1983); see also *J.S.C. v. Wren*, [1986] 35 D.L.R. 4th 419 (Can. Alta. Q.B.).

9. This patient scenario is based on a case that occurred in Arizona in 2003. *In re Matter of B.S.*, 205 Ariz. 611 (2003).

part-time in a retail store. Bee wants an abortion because she knows she cannot afford to raise a child. She does not want the child to have a difficult life. To her knowledge, the only way she can obtain an abortion is with parental consent, but she is unwilling to tell her parents her secret because she knows it will destroy their relationship, and they may even kick her out of the home. She searches online and comes across her local Planned Parenthood or abortion clinic, assuming there is one. There, she receives pregnancy, adoption, and parenting counseling. She still feels an abortion is in her best interest. Is Bee mature enough to make this decision? Considering her age, should she be required to provide notice to her parents? Should she be required to obtain parental consent? Is an abortion really in her best interest, and who decides that: Bee, her parents, or a judge? These questions, and whether Bee can legally obtain an abortion, will vary depending if she lives in the US, Canada, or Mexico.

III. LEGAL BACKGROUND OF ABORTION IN THE UNITED STATES

A. The Right to an Abortion

Historically, motivation for anti-abortion laws differed among states, but at the top of the list were xenophobic views that newly arriving immigrant women were having more children than Anglo-American women.¹⁰ In 1873, Congress passed the Comstock Act, which criminalized the trade of “every article or thing designed, adapted, or intended for producing abortion.”¹¹ These so-called “anti-obscenity” laws prevented legal abortions.¹² Between 1880 and 1973 it is estimated there were as many as 1.2 million illegal abortions per year.¹³ By 1910, almost every state criminalized abortion,¹⁴ primarily to discourage illicit sexual conduct. Abortion as a medical procedure was dangerous to the health of the women, and the state wanted to protect its interest in protecting fetal life.¹⁵

In the US, abortion was legalized in 1973 following the majority decision rendered in *Roe v. Wade*.¹⁶ The US Supreme Court held that a woman’s right to

10. *History of Abortion, supra* note 1.

11. Comstock Act of 1873, 42nd Cong. Sess. III, ch. 258, p. 598-600 (codified as amended at 18 U.S.C.S. § 1461); *see also* NORMAN P. DESMARAIS & JAMES H. MCGOVERN, COMSTOCK LAW OF 1873 (Great Neck Publishing 2017).

12. *History of Abortion, supra* note 1.

13. *Id.*

14. *Id.*

15. *Roe*, 410 U.S. at 113, 147-50.

16. *Id.* (In a 7-2 vote, Justice Blackmun delivered the majority opinion and Justice White and Rehnquist dissented; here the Court found several Texas statutes unconstitutional because they criminalized women for obtaining or attempting to obtain an abortion, when the mother’s life was not endangered).

terminate her pregnancy is within her right of personal privacy.¹⁷ The right of privacy is “founded in the Fourteenth Amendment’s concept of personal liberty” and the “Ninth Amendment’s reservation of rights to the people.”¹⁸ The right to privacy was described as protection for the woman and her doctor,¹⁹ yet, critics argued that the right to an abortion should have been grounded in a woman’s right to bodily autonomy.²⁰ In *Roe*, Justice Blackmun articulated the trimester formulation based on modern medical techniques and data that indicated that an abortion before the first trimester was relatively safe.²¹ Therefore, prior to the end of the first trimester, a pregnant woman and her physician were free to determine if the pregnancy should be terminated, free from interference by the State.²² The Court further agreed that a State has a legitimate interest in the woman’s health when her pregnancy reaches a “compelling point” (end of first trimester) because “until the end of the first trimester mortality [of the mother during an] . . . abortion may be less than mortality [of the mother] in normal childbirth.”²³ The State has an important and legitimate interest in the fetus after viability,²⁴ which is normally from about seven months or twenty-eight weeks but could be as early as twenty-four weeks.²⁵ Today, fetal viability continues to spark discussions as to when exactly a fetus can survive outside the womb.²⁶ A State can regulate abortion

17. *Id.* at 152.

18. *Id.* at 153.

19. *Id.* at 121.

20. Galina Varchena, *If Roe Fails: Whole Woman’s Health Act as a Necessary Stop-Gap on the Way to Full Protection of Bodily Autonomy in Virginia*, 22 RICH. PUB. INT. L. REV. 117, 121 at n.17 (2018).

21. *Roe*, 410 U.S. at 149.

22. *Id.* at 163.

23. *Id.*

24. *Id.* (defining viability as when the fetus can potentially live outside of the mother’s womb).

25. *Id.* at 160.

26. Franklin Foer, *Fetal Viability*, SLATE (May 25, 1997), <https://slate.com/news-and-politics/1997/05/fetal-viability.html> (explaining that some doctors believe that a fetus can become viable at during the 23rd week, but no baby has been delivered before the middle of the 22nd week.); Michelle Ye Hee Lee, *Setting the Record Straight on Measuring Fetal Age and the ‘20-week abortion,’* WASH. POST (May 26, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/05/26/setting-the-record-straight-on-measuring-fetal-age-and-the-20-week-abortion/> (explaining that the age of a fetus is normally determined from the first day of the pregnant woman’s last menstrual period (LMP), *however*, the Pain Capable Unborn Child Protection Act defined “the age of the fetus as ‘post-fertilization,’ calculated from the moment of conception); Bernice Bird, *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws*, 25 HASTINGS WOMEN’S L.J. 39, 47 at n.68 (2014) (“Most fetal pain laws prohibit abortions as early as twenty weeks.”); *See generally An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (detailing

procedures if procedures are reasonably related to the mother's health or promoting the potential human life after viability.²⁷

Although it was not smooth sailing for abortion rights after *Roe*,²⁸ almost two decades later, the US Supreme Court reaffirmed that women have a constitutionally protected liberty interest to obtain an abortion.²⁹ In *Planned Parenthood v. Casey*, the US Supreme Court not only reaffirmed the central holding in *Roe*, but the Court established the measure of constitutionality to which all future legislation would be directly subject.³⁰ First, the *Casey* court rejected the trimester framework set in *Roe* as a "rigid prohibition on all pre-viability regulation aimed at the protection of fetal life."³¹ Women's liberty interest in obtaining an elective abortion turns on fetal viability, which the Court had previously considered anywhere between 23 and 28 weeks or "at some moment slightly earlier in the pregnancy."³² Second, the *Casey* Court agreed with their previous decision that viability occurs no earlier than 23 weeks of gestational age and that the 23 week standard makes it easier for states to regulate abortion, and at the same time provides the pregnant woman with ample time to exercise her fundamental right.³³ Third, the Court concluded that the "undue burden standard . . . [was] the appropriate means of reconciling the State's interests with the woman's constitutionally protected liberty."³⁴ States can regulate abortions, so long as those regulations do not impose an undue burden on a woman's right to make that decision.³⁵ An undue burden exists when the purpose or effect of the provision is to "place a substantial

some States prohibit abortions after 20 weeks of gestation, unless there is a threat to the life or health of the pregnant woman) (last updated Sept. 1, 2020).

27. *Roe*, 410 U.S. at 165.

28. See *Roe v. Wade: The Constitutional Right to Access Safe, Legal Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade> (last visited Dec. 16, 2019) (detailing 424 abortion restrictions enacted from 2011 through 2018; in addition, some states have existing abortion bans that could be triggered if *Roe v. Wade* was overturned); *State Policy Trends 2018: With Roe v. Wade in Jeopardy, States Continued to Add New Abortion Restrictions*, GUTTMACHER INST. (Dec. 11, 2018), <https://www.guttmacher.org/article/2018/12/state-policy-trends-2018-roe-v-wade-jeopardy-states-continued-add-new-abortion> [hereinafter *Abortion State Policy Trends*] (detailing the twenty-three new abortion restrictions enacted in 2018; compared to sixty-three enacted in 2017); See generally *In the 45 Years Since Roe v. Wade, States Have Passed 1,193 Abortion Restrictions*, Pub. Radio Int'l (Jan. 22, 2018), <https://www.pri.org/stories/2018-01-22/45-years-roe-v-wade-states-have-passed-1193-abortion-restrictions>; *Roe v. Wade: The Constitutional Right to Access Safe, Legal Abortion*, *supra* text accompanying note 28.

29. *Casey*, 505 U.S. at 877.

30. *Id.* at 879, 922, 966.

31. *Id.* at 873.

32. *Id.* at 860.

33. *Id.* at 932-33 (Blackmun, J., concurring in part) (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 553-54 (1989) (Blackmun, J., concurring in part)).

34. *Casey*, 505 U.S. at 876.

35. *Id.* at 877.

obstacle in the path of a woman seeking an abortion before the fetus attains viability.”³⁶ The US Supreme Court applied the undue burden standard in 2016,³⁷ and there was uncertainty if the undue burden standard from *Casey* would be applied because the composition of the Court changed with two new justices.³⁸ In 2020, with a 5-4 vote, the United States Supreme Court upheld *Casey* and applied the undue burden standard as the measure of constitutionality.³⁹

1. Abortion Rights for Minor Girls

In the US, the right for a minor girl to obtain an abortion was litigated as early as 1976.⁴⁰ Three years after *Roe*, in *Planned Parenthood of Central Missouri v. Danforth*, the US Supreme Court made it clear that the constitutional right of privacy, which includes the right to an abortion, also applied to minor girls under the age of eighteen years old.⁴¹ The Court reasoned that each person is protected by the Constitution, and such constitutional rights do not magically come into being when a minor girl obtains the age of majority.⁴² There, the Court held that House Bill No. 1211 was unconstitutional because it prevented unmarried minors from obtaining an abortion without parental consent, although the fetus was not viable; on the other hand, the Bill did not require married minors to obtain parental consent for an abortion.⁴³ The Court reiterated that although states may have broader range

36. *Id.* at 878, 901 (holding a Pennsylvania statute requiring spousal notification was an undue burden on a woman's right to an abortion).

37. Margaret Talbot, *The Supreme Court's Just Application of the Undue-Burden Standard for Abortion*, NEW YORKER (Jun. 27, 2016), <https://www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion> (explaining how U.S. Supreme Court reinvigorates the undue burden standard to hold *Whole Woman's Health v. Hellerstedt* unconstitutional).

38. *About the Court: Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 02, 2020) (Justice Gorsuch took his seat in the U.S. Supreme Court on April 10, 2017 and was nominated by President Donald J. Trump. Justice Kavanaugh took his seat in the U.S. Supreme Court on October 6, 2018, and was nominated by President Donald J. Trump).

39. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2132 (2020) (holding that admitting privileges requirement for doctors performing abortions imposed an undue burden on women).

40. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

41. *Id.* at 74 (ruling it unconstitutional for a state to require an unmarried minor to gain consent from her parents or husband in order to have an abortion).

42. *Id.*

43. *Id.* at 56, 73 (“Missouri's 77th General Assembly, in its Second Regular Session, enacted House Committee Substitute for House Bill No. 1211” after Missouri's current abortion legislation (Mo. Rev. Stat. §§ 559.100, 542.380, 563.300) was held unconstitutional).

to regulate minors over adults,⁴⁴ whatever the parents' interests may be do not outweigh the right of privacy of the minor girl.⁴⁵

The US Supreme Court ruled on its first judicial bypass abortion law in 1979.⁴⁶ A judicial bypass abortion is an order from a judge that allows a minor to get an abortion without the notification or consent of her parents.⁴⁷ In *Bellotti v. Baird*, the US Supreme Court concluded that prior to an abortion, states can require a minor girl to obtain parental consent, but only if the state provides a secondary method where the minor can obtain authorization for an abortion.⁴⁸ There, the Court concluded that "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents."⁴⁹ However, during a judicial bypass abortion hearing, a minor must show: "(1) she is mature enough and sufficiently well informed to make her abortion decision, in consultation with her physician, independently from her parents' wishes; or (2) that even if she is not able to make this decision independently, the court can find that the abortion is in the minor's best interest."⁵⁰ In the court proceeding, the minor should have complete anonymity and any appeal that follows should be expedited, so an opportunity for an abortion can be obtained.⁵¹ It is not an undue burden to require a minor girl to obtain parental consent from one or both parents,⁵² so long as the state has an option for judicial bypass.⁵³ Minor girls can petition for a judicial bypass abortion more than once, even after an appeal.⁵⁴

B. Competing Interests

Regardless of age, the US Constitution protects everyone.⁵⁵ Rights in the abortion context mirror other constitutional rights afforded to minors like freedom

44. *Id.* at 74.

45. *See Danforth*, 428 U.S. at 75.

46. *See Bellotti v. Baird*, 443 U.S. 622 (1979).

47. *What is a Judicial Bypass for Abortion?*, *supra* note 7.

48. *Bellotti*, 443 U.S. at 643, 651 (holding that Mass. Gen. Laws. §§ 112, 12S were unconstitutional because prior to a petition for a judicial bypass abortion, the minor was first required to seek consent from her parent(s)).

49. *Id.* at 647.

50. *Id.* at 643-44.

51. *Id.*

52. *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990) (holding that Minn. Stat. §§ 144.343(2)-(7) is constitutional, although it requires both parents to consent to a minor's abortion because a judicial bypass alternative exists).

53. *Id.*

54. *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 364, 370 (6th Cir. 2006) (holding that the Single-Petition Rule per pregnancy in Ohio Rev. Code § 2919.121(C) is unconstitutional because it is an undue burden on a minor girl's right to an abortion).

55. *Danforth*, 428 U.S. at 74.

of speech, association, and procreation.⁵⁶ Girls under nineteen years of age have higher chances of death if they choose to carry the pregnancy to term.⁵⁷

Parents have the right to raise their children.⁵⁸ Many parents believe that judicial bypass statutes prevent them from influencing their children and prevent them from developing family values.⁵⁹ In theory, some would also argue that judicial bypass statutes heavily favor minors at the expense of their parents.⁶⁰ Courts have rejected states' attempts to give parents absolute control over a minor's decision to end her pregnancy.⁶¹ Like Justice Powell explained in *Bellotti*, "young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court."⁶² Becoming a parent before becoming an adult continues to be perceived negatively.⁶³ When a minor elects to parent the child rather than abort or adopt, the laws enable her to do so.⁶⁴ No state has a law that "require[s] the minor to consult with her parents, let alone to obtain parental consent" before she becomes a parent.⁶⁵ In the event that the minor girl has the child, some critics argue that the minor's parents should be able to exercise more rights and have more authority over the minor-parent and the grandchild.⁶⁶ The Supreme Court has recognized that a state can have a special interest in requiring parental consent before a minor obtains an abortion, so the pregnant minor can seek the advice of her parents prior to making such an important decision.⁶⁷

56. Emily Buss, *The Parental Rights of Minors*, 48 *BUFF. L. REV.* 785, 786 (2000) (proposing age-based regulation of parenting).

57. Gilda Sedgh et al., *Adolescent Pregnancy, Birth, Abortion Rates Across Countries: Levels and Recent Trends*, 56 *J. ADOLESCENT HEALTH* 223, 223 n. 7 (2015) ("The risk of death associated with pregnancy is about a third higher among 15 to 19 [year-olds] than among 20 to 24 [year-olds].").

58. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (holding the rights to marry, to establish a home, and to raise children are protected by the Due Process Clause) (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (2015)).

59. Buss, *supra* note 56, at 808.

60. Wade Schueneman, *What do we Have Against Parents? An Assessment of Judicial Bypass Procedures and Parental Involvement in Abortions in Minors*, 43 *GA. L. REV.* 617, 620 (2009).

61. Buss, *supra* note 56, at 814 (explaining that judicial bypass statutes provide the minor with two choices: one, parental consent and open communication with parents or guardians prior to an abortion or, two, requiring the minor to prove to a court she is mature enough to make the decision without her parent's consent).

62. *Bellotti*, 443 U.S. at 647; *see also* Schueneman, *supra* note 60, at 624.

63. Buss, *supra* note 56, at 788-89 (2000) (teen parents can experience severe life losses or struggles in education, employment, relationships with friends and family, and psychological problems).

64. *Id.* at 792.

65. *Id.*

66. *Id.* at 817.

67. *Bellotti*, 443 U.S. at 643-44; *see also* Buss, *supra* note 56, at 807-08.

The right to an abortion is not absolute and it “must be considered against important state interests in regulation.”⁶⁸ The Supreme Court has recognized that the State has broader authority to regulate children than adults.⁶⁹ In *Bellotti*, the Supreme Court gave three reasons for circumscribing the constitutional rights of minors and children: minors/children have special vulnerabilities, they have limited decision making capacity, and the role their parents have controlling their upbringing.⁷⁰ States can promote fetal life, but they cannot place an undue burden on women or minor girls who want to have an abortion.⁷¹ In addition, a state cannot ban abortion at any stage, if carrying the fetus to term endangers the mother, or if the abortion is a necessary procedure for victims of rape.⁷² Funding these abortions will likely fall under the Hyde Amendment which prevents federal Medicaid funds to be used for abortions, except for the previously mentioned exceptions.⁷³ Medicaid provides coverage for 1 in 5 women of reproductive age (15-44), which results in an obstacle for women on Medicaid who normally tend to be of lower-incomes and minorities.⁷⁴ The Hyde Amendment affects 60% of Planned Parenthood patients who rely on Medicaid.⁷⁵ Abortions can be funded by the state, non-profit organizations like Planned Parenthood, or the pregnant woman/minor seeking the abortion.⁷⁶ Planned Parenthood receives some funding through Title X, but those funds are not used for abortions.⁷⁷ Ultimately, any regulation serving a legitimate state interest can be viewed as hindering a woman’s ability to obtain an abortion.⁷⁸

68. *Roe*, 410 U.S. at 154; *see also* Schueneman, *supra* note 60, at 621.

69. *Danforth*, 428 U.S. at 74-75 (explaining that the Court was not convinced that safeguarding the family unit could be accomplished by giving absolute power to parents, who would then prevent their minor daughter to have an abortion).

70. *Bellotti*, 443 U.S. at 634; *see also* Buss, *supra* note 56, at 786; Schueneman, *supra* note 60, at 623.

71. *Casey*, 505 U.S. at 878.

72. *Harris v. McRae*, 448 U.S. 297, 302, 336 (1980) (holding that the Hyde Amendment funding restriction of abortions did not violate the Due Process or the Equal Protection Clauses).

73. *Id.* at 302.

74. Katherine Kubak et al., *Abortion*, 20 *GEO. J. GENDER & L.* 265, 295 (2019).

75. *Hyde Amendment*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment> (last visited Apr. 02, 2020).

76. *Id.*; *see also Public Funding for Abortion*, <https://www.aclu.org/other/public-funding-abortion> (last visited Apr. 02, 2020).

77. Kubak, *supra* note 74, at 296 (“Title X Family Planning was created in 1976 to provide family planning to primarily low-income individuals. . . . 90% of appropriated funds are used for family planning services.”).

78. *Id.* at 283.

Since *Roe*, abortion continues to be a topic in every presidential debate.⁷⁹ Former Vice President Joe Biden, and presidential candidate for 2020, was a longtime supporter of the Hyde Amendment, but changed his position overnight after he came under scrutiny from fellow Democrats.⁸⁰ According to the Pew Research Center, about 77% of conservative Republicans believe that abortion should be illegal in all or almost all circumstances, while 91% of liberal Democrats support legal abortions.⁸¹ Women in politics are more likely than their male counterparts to act for women's interests,⁸² but this is an issue because women only constitute 25% of Congress.⁸³ Anti-abortion policymaking continues to be largely dominated by Republican men.⁸⁴ Abortion politics in the US continue to be extremely polarized, and it is not uncommon for Democrats to accuse Republicans of being anti-abortion.⁸⁵

C. Judicial Bypass Differences Among States

The laws on judicial bypass abortions vary by state, but ultimately, states are required to offer abortion services to minors.⁸⁶ Currently, 37 states require some parental involvement⁸⁷ before a minor girl can obtain an abortion.⁸⁸ Twenty-one of those states require a minor girl to obtain consent from at least one parent or

79. Susan Milligan, *Where the 2020 Candidates Stand on Abortion Rights*, US NEWS (Oct. 11, 2019), <https://www.usnews.com/elections/abortion-2020>.

80. *Id.*

81. *Public Opinion on Abortion*, PEW RSCH. CTR. (Aug. 29, 2019), <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

82. Beth Reingold et al., *Anti-Abortion Policymaking and Women's Representation*, POL. RES. Q., 1. (2020)

83. Drew Desilver, *A Record Number of Women Will be Serving in the New Congress*, PEW RSCH. CTR. (Dec. 18, 2018), <https://www.pewresearch.org/fact-tank/> (detailing that the 116th Congress will have 24% women (106/441) in the House of Representatives and 25% women (25/100) in the Senate).

84. Reingold et al., *supra* note 82.

85. *See generally id.*

86. *Bellotti*, 443 U.S. at 643.

87. *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (last updated Sept. 1, 2020) (explaining that involvement includes: parental consent, parental notification, grandparent or adult relative involvement, and identification requirements establishing that the adult is the parent of the minor).

88. *Id.*

guardian.⁸⁹ Thirty-six states include a judicial bypass alternative.⁹⁰ The following sections will explore judicial bypass statutes in California and Texas.

1. California

California is one of the most progressive states regarding abortion rights.⁹¹ In 2017, California provided 132,680 abortions, which accounted for 15.4% of all abortions in the United States.⁹² California had a judicial bypass statute,⁹³ but it was held unconstitutional by the California Supreme Court based on the right of privacy in the California Constitution.⁹⁴ In *American Academy of Pediatrics v. Lungren*, the California Supreme Court held that even a judicial bypass option was unconstitutional because it “impinge[d] upon a woman’s” right of privacy found in the California Constitution.⁹⁵ Under the statute, a minor girl could obtain an abortion if she provided her informed consent and obtained the consent of at least one parent or guardian.⁹⁶ If a minor girl was unable or unwilling to obtain parental consent, “she [could] file a petition with the juvenile court” (i.e. judicial bypass).⁹⁷ California is one of only a few states where a minor girl can terminate her pregnancy without parental consent, parental notification, or judicial bypass.⁹⁸

89. *An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law> (last updated Sept. 1, 2020).

90. *Parental Involvement in Minors’ Abortions*, *supra* note 87 (noting that Delaware requires parental consent, but in limited circumstances, specific health professionals can waive the parental consent requirement).

91. *State Facts About Abortion: California*, GUTTMACHER INST., <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-california> (last updated Mar. 2020).

92. *Id.*

93. CAL. HEALTH & SAFETY CODE § 123450 (West 2012) (California’s judicial bypass statute was ruled unconstitutional; therefore, the statutory language is used only as an example and for comparison purposes).

94. *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997); *see also* CAL. CONST. art. 1, § 1 (West, Westlaw through Nov. 2019).

95. *Lungren*, 16 Cal. 4th at 334, 359; *see also id.*

96. CAL. HEALTH & SAFETY CODE § 123450(a) (West 2012).

97. *Id.* § 123450(b).

98. *Id.* (providing that minor girls can obtain an abortion without parental involvement (consent/notification) in: AK, CA, CN, HI, ME, NV, NJ, NM, NY, OR, VT, WA, and Washington D.C.); *see also Parental Consent and Notification Laws*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/preventing-pregnancy-stds/parental-consent-and-notification-laws> (last updated Aug. 2020); *What are Teen Abortion Laws in the United States*, The Law Dictionary, <https://thelawdictionary.org/article/teen-abortion-laws-in-the-united-states/> (last visited Nov. 11, 2019).

2. Texas

Unlike California, Texas currently has a judicial bypass statute.⁹⁹ The statute states that a physician must provide notice to the parents of the minor 48 hours before the abortion¹⁰⁰ and obtain written consent from her parent or guardian.¹⁰¹ However, a pregnant minor can file an application for a court authorized abortion (judicial bypass) without first obtaining consent or notifying her parent or guardian.¹⁰² Similar to judicial bypass statutes from other states,¹⁰³ a Texas court can grant a judicial bypass abortion if by clear and convincing evidence it finds that: (1) the “minor is mature and sufficiently well informed”¹⁰⁴ based on her “experience, perspective, and judgment,”¹⁰⁵ or (2) the attempt to notify and obtain consent would not be in her best interest.¹⁰⁶ Relevant factors include but are not limited to: her age; work and life experiences; steps taken to explore options; knowledge of consequences; and other reasons for seeking the abortion.¹⁰⁷ The Texas statute requires the minor girl to appear before a court in person, with no exceptions.¹⁰⁸ Although Texas is one of the states that has been vocal against abortions,¹⁰⁹ appellate courts granted 83% of judicial bypass petitions in 2018.¹¹⁰ In *In re Doe*, the Texas Court of Appeals in Houston re-affirmed the lower court’s ruling and did not grant a seventeen-year-old girl a judicial bypass abortion because she failed to provide clear and convincing evidence that she was aware of the emotional and psychological aspects of undergoing an abortion.¹¹¹ There, the appellate court agreed with the lower court that although the minor girl read *A Woman’s Right to Know*, a state-published informational booklet, she failed to testify and show that she understood the emotional side of an abortion.¹¹² In

99. TEX. FAM. CODE ANN. § 33.003 (West 2016).

100. *Id.* § 33.002.

101. *Id.* § 33.0021; *see, e.g.*, TEX. OCC. CODE ANN. § 164.052(19) (West 2019).

102. TEX. FAM. CODE ANN. § 33.003(a) (West 2016).

103. *Parental Involvement in Minors’ Abortions*, *supra* note 87 (States requiring “clear and convincing evidence” standard: AZ, AR, CO, FL, ID, KA, LA, MS, NE, ND, OH, OK, SD, TX, and WY).

104. TEX. FAM. CODE ANN. § 33.003(i)(1), (2).

105. *Id.* § 33.003(i)(-1).

106. *Id.* § 33.003(i)(1), (2).

107. *Id.* § 33.003(i)(-1).

108. *Id.* § 33.003(g)(-1).

109. *Abortions in Texas*, ACLU Texas, <https://www.aclutx.org/en/know-you-rights/abortion-in-texas> (last visited Dec. 16, 2019).

110. *Judicial Bypass Cases Disposed of By Trial Courts January 1 to December 31, 2018*, <http://www.txcourts.gov/media/1443507/judicial-bypass-report-cy-2018.pdf> [hereinafter TEXAS JUDICIAL BYPASS REPORT] (providing that of 205 total petitions and 179 granted).

111. *In re Doe*, 501 S.W.3d 313, 322-23 (Tex. App. 2016).

112. *Id.* at 321.

addition, the court affirmed that an abortion would not be in her best interest because the “risk of physical abuse . . . no longer existed [or was too remote] because [the minor girl] had not lived with her mother in over six years.”¹¹³ Additionally, the mother-daughter relationship would not be damaged because emotional and financial support was non-existent among the two.¹¹⁴ Although Texas is known to be a pro-life state, and normally at the forefront in the abortion battle, it normally grants judicial bypass abortions.¹¹⁵

IV. LEGAL BACKGROUND OF ABORTION IN CANADA

A. The Right to Abortion

Prior to 1969, abortion was illegal in Canada under Section 251 of the Criminal Code.¹¹⁶ The person performing or assisting in the abortion could face life in prison and the woman could face two years of prison.¹¹⁷ Section 251 of the Criminal Code was amended in 1969 to allow a doctor to perform an abortion if the life or health of the woman was in danger.¹¹⁸ Prior to the abortion, the doctor needed approval from a “therapeutic abortion committee,” which consisted of three doctors.¹¹⁹

In 1982, the Canadian Constitution appended the Charter of Rights and Freedoms (The Charter).¹²⁰ The Charter, which is similar to the Bill of Rights of the United States, guarantees basic fundamental rights like life, liberty, and security

113 *Id.* at 324.

114 *Id.* at 325.

115 *TEXAS JUDICIAL BYPASS REPORT*, *supra* note 110 (Section 33.003 of the Texas Family Code requires a district or county clerk to report judicial bypass cases within 20 days of a judgment to the Office of Court Administration. Also, the report is unclear and does not provide information regarding to the 17% of cases that were not granted judicial bypass at the appellate level: did the minors have the baby, get parental consent, or have an illegal abortion?).

116. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 145 (Can.); *see also* Lin Long, *Abortion in Canada*, *THE CANADIAN ENCYCLOPEDIA* (OCT. 24, 2016), <https://www.thecanadianencyclopedia.ca/en/article/abortion> ; *see also* *Abortion in Canada Timeline*, *ABORTION IN CANADA*, abortionincanada.ca/history/abortion-in-canada-timeline/ (last visited Nov. 11, 2019).

117. Long, *supra* note 116.

118. *Id.*

119. *Id.*

120. *Id.*; *see also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), <https://laws-lois.justice.gc.ca/eng/Const/page-15.html> (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof . . .”).

of the person.¹²¹ Abortion in Canada was legalized in 1988 following the decision rendered in *R. v. Morgentaler*.¹²² In *R. v. Morgentaler*, the Supreme Court of Canada held that Criminal Statute Section 251 was unconstitutional because it limited a woman's access to abortions.¹²³ First, the Court held that Section 251 constituted a breach of the security of the person because it "clearly interfere[d] with a woman's physical and bodily integrity . . . [because it forced] a woman, by threat of criminal sanction, to carry a [fetus] to term unless she . . . [met] certain criteria¹²⁴ unrelated to her own priorities and aspirations."¹²⁵ Even if a therapeutic abortion was granted, the procedure was normally delayed because the statute mandated the hospital have four doctors on duty during the procedure.¹²⁶ Second, the Court held that Section 7 of the Charter "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life."¹²⁷ In *Morgentaler*, the Court did not explain whether a fetus was considered a person,¹²⁸ but later that year, the Supreme Court of British Columbia held that a fetus was not a child because the definition of "'child' meant a person under the age of nineteen" years old.¹²⁹ A year later, the Supreme Court of Canada agreed that a fetus needed to be born alive and viable to be considered a person.¹³⁰ Today, Canada has "no federal laws regulating or restricting abortion access."¹³¹

121. See generally Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

122. See *Morgentaler*, [1988] 1 S.C.R. 30, 32-33 (Can.) (holding that Criminal Statute Section 251 was unconstitutional because it interfered with a woman's right to life, liberty and security).

123. See *id.* at 34.

124. Long, *supra* note 116 (explaining that in order for a woman to meet the "certain criteria" requirement, her life or health had to be in danger; however, the therapeutic abortion needed to be granted by a therapeutic abortion board).

125. *Morgentaler*, [1988] 1 S.C.R. 30, 32-33 (Can.).

126. *Id.* at 34.

127. *Id.* at 36-37.

128. *Id.* at 36.

129. *Baby R (Re)*, [1988] 53 D.L.R. 4th 69 (Can.) (holding that the province could not intervene and protect a fetus from its mother; although the mother, refused medical care and further endangered the fetus).

130. *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 546, 548, 551, 561, 571 (Can.) (holding that the father of a fetus had no legal remedies to prevent his previous partner from having an abortion because a fetus is not considered a person); see also *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925 (Can.) (a province cannot detain a pregnant woman for the purpose of preventing harm to her fetus).

131. Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 2 YALE J. L. FEMINISM 328, 371 (2017).

1. Abortion Rights for Minor Girls

In Canada, minor girls have the ability to obtain an abortion.¹³² Even before Section 251 of the Criminal Code was held unconstitutional,¹³³ in an astonishing case, the determination of minor girl to seek an abortion without her parent's consent was fruitful.¹³⁴ In 1986, a minor girl (16) was granted an abortion by the therapeutic abortion committee without requiring the minor to obtain parental notice or consent.¹³⁵ There, the parents of the minor girl obtained an injunction to prevent their daughter from receiving the abortion.¹³⁶ The minor girl's medical practitioner, the therapeutic abortion committee, and the court found that the minor girl was a mature minor with the capacity to consent because she was of sufficient age and intelligence and understood the nature and consequences of the abortion.¹³⁷

Canadian minors normally do not need parental consent to obtain an abortion.¹³⁸ Canada does not have a judicial bypass option for abortions; in Canada, health care consent laws govern whether or not a minor has the capacity to give consent to any medical procedure, which includes an abortion.¹³⁹ Most provinces follow the mature minor rule regarding consent.¹⁴⁰ Thus, "if a minor is capable of understanding the nature and consequences of a treatment decision, then the minor's consent is both necessary and sufficient."¹⁴¹ However, a minor's consent may be revoked if her life is endangered.¹⁴² In *A.C. v. Manitoba (Dir. Of Child and Welfare Fam. Serv's)*, the Supreme Court of Canada held that under the Child and Family Act, it was in the best interest of a 14-year-old girl for doctors to perform a blood transfusion, though the minor and her parents did not consent; in fact, because of

132. See *J.S.C. v. Wren*, [1986] 35 D.L.R. 4th 419, 422 (Can. Alta. Q.B.).

133. *Morgentaler*, [1988] 1 S.C.R. 30 (Can.) (The Supreme Court of Canada ruled Section 251 of the Criminal Code, which criminalized abortions was unconstitutional).

134. *Wren*, 35 D.L.R. 4th at 422 (explaining that the minor was represented by counsel during the hearing, but the case was nuclear if the minor had any representation during her meeting with her physician and disagreements with her parents).

135. *Id.* at 420.

136. *Id.*

137. *Id.* at 422.

138. *Medical Rights, Legal Rights for Youth in British Columbia*, <https://www.legalrightsforyouth.ca/medical-rights/abortion> (last visited Nov. 11, 2019).

139. See Health Care Consent Act, 1996, S.O. 1996, c 2, Sched. A. s.4 (Can.), <https://www.ontario.ca/laws/statute/96h02#BK55> (last visited Nov. 11, 2019).

140. Jocelyn Downie & Carla Nassar, *Barriers to Access to Abortion Through a Legal Lens*, 15 HEALTH L.J. 143, 158 n.86 (2007); see also *J.S.C. v. Wren*, [1986] 35 D.L.R. 4th 419, 420 (Can. Alta. Q.B.).

141. Downie & Nassar, *supra* note 140 (the age of majority is eighteen years old; therefore, a minor girl would need parental consent to have an abortion); see also *Age of Minority Act*, R.S.P.E.I. 1988, c. A-8 sect. 1., <https://www.princeedwardisland.ca/sites/default/files/legislation/A-08-Age%20Of%20Majority%20Act.pdf>

142. *A.C. v. Manitoba (Dir. Of Child and Welfare Fam. Serv's)*, [2009] 2 S.C.R. 181, 187 (Can.).

the minor's religious beliefs, she strongly opposed the transfusion and prior to the medical procedure the minor girl gave detailed instructions that under no circumstance should she receive a blood transfusion.¹⁴³ Although this case was not in the abortion context, it was quite interesting that the Court sided with medical personnel rather than with the parents and the patient.¹⁴⁴

B. Competing Interests

Many believe that the lack of parental involvement in a minor's abortion disrespects the family and makes minors vulnerable to peer pressure, abuse, and lack of care.¹⁴⁵ Parents or physicians can usually obtain a life-saving procedure, when the minor's health is in great danger.¹⁴⁶ For example, if a physician finds a minor incapable of providing capable consent for her abortion and her parents oppose the abortion, and the physician believes that the abortion will preserve the life or health of the minor, the physician can refer the matter to a child welfare agency and petition for the abortion.¹⁴⁷

In *Morgentaler*, the Court stated that no state would be allowed to trespass into an individual's right to liberty, like abortion.¹⁴⁸ However, that does not mean that the state has to provide all resources.¹⁴⁹ For example, in Prince Edward Island "women's reproductive freedom was threatened not by state interference, but rather by state indifference" because the current abortion policy left many women alone "requiring them to seek and access services without state resources or support."¹⁵⁰ Abortion services are funded under the Canada Health Act, but access to abortions varies among provinces.¹⁵¹ In some provinces, abortions continue to be a divisive

143. *Id.* at 187-88 (the minor girl was found to have capacity to consent).

144. *Id.*

145. *Parental Consent for Abortion in Canada Balanced with Confidentiality*, NATIONAL RIGHT TO LIFE NEWS, <https://www.nationalrighttolifenews.org/2019/04/parental-consent-for-abortion-in-canada-balanced-with-confidentiality/> (last visited Nov. 11, 2019).

146. *Manitoba*, [2009] 2 S.C.R. at 187 (Can.); see also Civil Code of Québec, S.Q. 1991, c. 64, a. 16; I.N. 2014-05-01 (discussing cases of emergency where the life of the minor is in danger, parental consent overrides the consent provided by the minor).

147. Margaret A. Somerville, *The Pregnant Minor: Contraception and Abortion Under Canadian Law*, 8 MEDICOLEGAL NEWS 4, 7 (1980) (explaining that a physician can refer the matter to a child welfare agency; there, the agency may approve the abortion without parental consent).

148. Joanna N. Erdman, *A Constitutional Future for Abortion Rights in Canada*, 54 ALTA. L. REV. 727, 729 (2017).

149. See generally *id.*

150. *Id.*

151. Health Canada, *Canada Health Act Annual Report 2017-2018*, 27 (published Feb. 21, 2019) <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/health-system-services/canada-health-act-annual-report-2017-2018/canada-health-act->

political issue.¹⁵² Some provinces challenged the constitutional obligation to fund abortion clinics because they felt that tax dollars were being used to fund abortions.¹⁵³

Abortion rights, like politics, have been predominantly dominated by two parties on two opposite spectrums; generally, the Liberal Party favors reproductive freedom, and the Conservative Party opposes abortion and aims to limit reproductive freedom.¹⁵⁴ In Canada, the politics of abortion have shifted into the politics of health care because abortions are no longer viewed as a “choice” but a “medical necessity.”¹⁵⁵ However, many provinces like Prince Edward Island have questioned whether abortions are medically necessary services.¹⁵⁶ This debate has not led to any provinces not funding abortions.¹⁵⁷ In 1990, the Federal Health Minister wrote to all the provinces explaining that failure to fund abortions would result in financial penalties.¹⁵⁸ Because abortions are funded like any other medical service, women face detriments like waiting lists, multiple visits, and pending referral approval.¹⁵⁹ Hospital waiting lists and self-referral identification requirements can be minimized if the pregnant minor seeks her abortion in a free-

annual-report-2017-2018-eng.pdf (explaining that in New Brunswick, abortions are free, but only if performed in a hospital); see also *Abortion Law and Policy: Comparison Between the U.S. and Canada*, Abortion Rights Coalition of Canada <http://arcc-cdac.ca/postionpapers/54-US-Canada-Abortion-Law-Policy.pdf> (last visited Nov. 14, 2019) (explaining that although required under the Canada Health Act, New Brunswick refuses to fund surgical abortions performed in private clinics); Long, *supra* note 116.

152. Long, *supra* note 116.

153. See Joanna N. Erdman, *Constitutionalizing Abortion Rights in Canada*, 49 OTTAWA L. REV. 221, 248 (2017).

154. See generally *Canadian Political Parties*, Canada Guide, <https://thecanadaguide.com/government/political-parties/> (last accessed Apr. 07, 2020); see generally *Political Parties and Leaders*, PARLIAMENT OF CANADA https://lop.parl.ca/sites/ParlInfo/default/en_CA/Parties/politicalPartiesLeaders (last accessed Apr. 7, 2020).

155. See Erdman, *Constitutionalizing Abortion Rights in Canada*, *supra* note 153, at 250.

156. Erdman, *A Constitutional Future for Abortion Rights in Canada*, *supra* note 148, at 743 (explaining that in an abortion debate in Prince Edward Island (P.E.I.) “[i]n 2011, Dr. Richard Wedge, then Executive Director of Medical Affairs at Health PEI, asserted that there was no regulatory barrier to abortion services on the Island: “If a physician applied for privileges to do abortions on P.E.I., and they had the skills, the training necessary to do it, then they could get privileges for that on P.E.I. There were no local services, he claimed, because no doctor had ever applied. The government, in other words, denied any hand in a failing free market for local abortion care.”)

157. *Id.*

158. See Erdman, *Constitutionalizing Abortion Rights in Canada*, *supra* note 153, at 251.

159. Downie & Nassar, *supra* note 140, at 145-50 (women that live in rural areas or that have anti-choice medical providers may face higher difficulties in obtaining medical referrals).

standing legal clinic, but not all clinics provide their services free of charge.¹⁶⁰ Ultimately, the absence of federal legislation has introduced new barriers to abortions, like family doctors who refuse to provide referrals for abortion services, limited clinic funding, and gestational constraints among hospitals.¹⁶¹ Despite the Covid-19 (Coronavirus) pandemic, all provinces and territories continue to perform abortions although the country has proposed certain surgery restrictions.¹⁶²

C. Abortion Access Among Provinces

Canada does not require judicial bypass, since under existing law the minor can consent to the medical treatment.¹⁶³ The treating physician must find that the minor understands the nature and the consequences of the desired medical procedure, in this case abortion.¹⁶⁴ However, consent laws may vary among provinces, hospitals, or clinics.¹⁶⁵ In general, a minor does not need to reach the age of majority to consent or deny treatment.¹⁶⁶ The determining factor will be if the minor's mental, physical, and emotional development allows her to fully appreciate the nature and consequences of the desired or lack of treatment.¹⁶⁷ In 2018, minor girls, age 17 and under, accounted for 1,173 of 85,195 reported abortions.¹⁶⁸ Generally, there are no gestational limits for abortion, but in 2018,

160. *Id.* at 150 (explaining that there are no free-standing clinics in Prince Edward Island, Saskatchewan, Nunavut, Northwest Territories, and Nova Scotia).

161. Rimalt, *supra* note 131, at 372 (comparing gestational limitations like twelve weeks limits in N.B. with twenty-four weeks in Ontario; in addition, some provinces do not pay for medical abortions, only surgical abortions).

162. Anthony Murdoch, *Abortion Continues Unimpeded in Canada Despite Coronavirus Lockdown*, LIFESITE (Mar. 30, 2020, 3:35 PM), <https://www.lifesitenews.com/news/abortion-continues-unimpeded-in-canada-despite-coronavirus-lockdown>.

163. *See generally* Downie & Nassar, *supra* note 140, at 158-60.

164. *J.S.C. v. Wren*, [1986] 35 D.L.R. 4th 419, 420 (Can. Alta. Q.B.).

165. Downie & Nassar, *supra* note 140, at 159.

166. *Can a Child Provide Consent?*, CANADIAN MEDICAL PROTECTIVE ASSOCIATION (CMPA) (Mar. 2014), <https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2014/can-a-child-provide-consent> (explaining the CMPA was incorporated by a special Act of Parliament in 1913 (Act of Incorporation for the Canadian Medical Protective Association)). The CMPA emerged from a need for physicians to work and support each other. *Id.* The CMPA provides assistance and advice regarding medical-legal issues; currently, there are 101,872 members (87% are specialists and family medicine practitioners; 13% are residents). *Id.* at *About the CMPA & Annual Report*.

167. *Id.*

168. *Induced Abortions Reported in Canada in 2018*, CANADIAN INSTITUTE FOR HEALTH INFORMATION (CIHI) (Jan. 23, 2020), https://www.cihi.ca/en/search?query=all=abortion&Search_Submit= (explaining that an induced abortion does not mean a miscarriage or self-induced abortion by the minor or woman.).

77% of abortions performed in hospitals were performed when the fetus was 20 weeks or under.¹⁶⁹ Not all Canadian provinces offer the same abortion services because some provinces only perform abortions in hospitals.¹⁷⁰

1. Quebec

In Quebec, a minor aged 14 or over can consent to care and treatment, and an abortion falls under care and treatment, so no parental consent nor notice is required, unless the child is 13 years or younger, she must have parental consent.¹⁷¹ However, in a medical emergency, a court can authorize treatment for a minor who has previously refused treatment.¹⁷² According to the Canadian Institute of Health Information (CIHI), an independent and non-profit organization that provides and gathers essential information regarding Canada's health system, in 2018, Quebec accounted for 26% of reported abortions in Canada.¹⁷³ It is unknown how many of those abortions were performed on minor girls and the number is high because three neighboring provinces—New Brunswick, Prince Edward Island, and Nova Scotia—have one or no clinics that perform abortions.¹⁷⁴ Five hospitals and six clinics provide abortion services in Quebec.¹⁷⁵ Services in either venue are free for residents who live in the province and are enrolled in the provincial healthcare plan.¹⁷⁶ Non-residents will most likely need to pay for their services and visit a clinic.¹⁷⁷ Medicare is available to all children born in Quebec; if they are not born

169. *Id.* (finding that total abortions reported by hospitals (except Quebec) were 19,444 abortions with 14,967 done at or before 20 weeks of gestation.).

170. *Id.*

171. *See* Somerville, *supra* note 147, at 7; *Can a Child Provide Consent?*, *supra* note 167 (explaining that in Canada the concept of maturity has replaced the age of consent, except in Quebec); Civil Code of Quebec, S.Q. 1991, c. 64, art. 14 (explaining that parents or guardians will be notified if a minor age 14 and higher will remain in the hospital or facility for twelve or more hours).

172. Civil Code of Quebec, S.Q. 1991, c. 64, art. 16 (explaining that in cases of emergency where the life of the minor is in danger, parental consent overrides the consent provided by the minor); *see also* A.C. v. Manitoba (Dir. Of Child and Welfare Fam. Serv's), [2009] 2 S.C.R. 181, 187 (Can.).

173. *Induced Abortions Reported in Canada in 2018*, *supra* note 168.

174. *Id.* (explaining that for 2018, the total reported abortions in Canada were 85,195; Quebec reported a total of 22,093 abortions, 15,039 were performed in clinics and only 7,105 were performed in hospitals. Considering neighboring New Brunswick, Prince Edward Island, and Nova Scotia have a limited or no clinics at all, the lack of reported clinic abortions (zero for all three) imply that many women travel to Quebec for their abortions.).

175. *Id.*

176. *Id.* (explaining that abortions are free with a health care insurance card (RAMQ)).

177. Downie & Nassar, *supra* note 140, at 153 n.63, 155 (“women who are not insured by their provincial healthcare plan must pay for their own abortions”).

in the province they can still qualify for healthcare if they are residents of Quebec or qualify under a “temporary stay.”¹⁷⁸

2. New Brunswick

Historically, New Brunswick has been one of the provinces with the strictest restrictions on reproductive rights.¹⁷⁹ Minor girls age 16 and over can consent to an abortion and other medical treatment;¹⁸⁰ on the other hand, a minor girl under 16 years old must convince the medical practitioner (1) that she is capable and understands the consequences of the desired medical treatment, and (2) the desired medical treatment is in her best interest for continuing her health and well-being.¹⁸¹ Like in Quebec, neither parental nor minor's consent is required in the event of an emergency or to preserve the minor's life or health.¹⁸² In New Brunswick, abortions are performed in three hospitals and one free-standing clinic.¹⁸³ For an abortion to be funded under Medicare,¹⁸⁴ the procedure must be

178. *Birth or Adoption: Health Insurance*, REGIE DE L'ASSURANCE MALADIE QUEBEC, <https://www.ramq.gouv.qc.ca/en/life-events/birth-adoption/Pages/health-insurance.aspx> (last visited Apr. 9, 2020) (explaining that registration for healthcare (Medicare) can be done telephonically or by filing out a form. It is unclear if minors can enroll in healthcare without their parents knowing. Normally, minors would already be enrolled in healthcare.)

179. *Morgentaler v. New Brunswick*, [1989] N.B.J. 311 (Can.) (explaining that the New Brunswick law was struck down that recognized that no “abortion[s] will be recognized as an entitled service unless two physicians state that the abortion is medically required and the procedure is rendered in an approved hospital by a specialist in gynecology and obstetrics is invalid with respect to abortions performed outside the Province of New Brunswick.” NB did not want to fund abortion in hospitals, so they placed barriers to minimize the number of abortions they would perform.); see also Julien Gignac, *New Brunswick Becomes First Canada Province to Offer Free Abortion Pill*, THE GUARDIAN (Apr. 5, 2017, 2:12 PM), <https://www.theguardian.com/world/2017/apr/05/canada-free-abortion-pill-new-brunswick>.

180. Medical Consent of Minors Act S.N.B. 1976, c. M-6-1, s. 2 (persons age sixteen and over can consent to medical treatment as if they had attained the age of majority).

181. Medical Consent of Minors Act S.N.B. 1976, c. M-6-1, s. 3(1)(a)-(b) 2000, c.14, s.1; 2002, c.23, s.5.1; 2011, c.26, s.2.

182. *Id.*

183. *List of Abortion Clinics in Canada (and some hospitals)*, ABORTION RIGHTS COALITION OF CANADA, arcc-cdac.ca/list-abortion-clinics-canada.pdf (last updated Jun. 23, 2020) (Bathurst Chaleur Regional Hospital, Dr. Georges-L. Dumont University Hospital Centre, The Moncton Hospital, Clinic 554—aspiration abortions cost from \$700-\$850).

184. *About Medicare*, Government of Canada (Aug. 22, 2016), <https://www.canada.ca/en/health-canada/services/canada-health-care-system.html> (“Medicare is a term that refers to Canada's publicly funded health care system. Instead of having a single national plan . . . [Canada] has 13 provincial and territorial health care insurance plans. Under this system, all Canadian residents have reasonable access to medically necessary hospital and physician services without paying out-of-pocket.”).

approved by two physicians and must be performed in one of the three hospitals.¹⁸⁵ The free-standing clinic provides most of its services free of cost, except for aspiration abortion procedures.¹⁸⁶ Medicare is available to all children born in New Brunswick (parents need to enroll their children); if they were not born in the province they can still qualify for healthcare after three months.¹⁸⁷ Despite past abortion restrictions, in 2017, New Brunswick was the first province to offer free abortion pills.¹⁸⁸

V. LEGAL BACKGROUND OF ABORTION IN MEXICO

A. The Right to Abortion

In general, abortion remains illegal throughout Mexico,¹⁸⁹ except under limited circumstances like a pregnancy being the result of rape.¹⁹⁰ The definition

185. Downie & Nassar, *supra* note 140, at 146; *see also* *Medical Abortion Program*, New Brunswick Canada, https://www2.gnb.ca/content/gnb/en/services/services_renderer.201433.Medical_Abortion_Program.html (last visited Dec. 17, 2019) (free abortion services for New Brunswick residents with a valid Medicare card).

186. Downie & Nassar, *supra* note 140, at 152-53.

187. *Applying for a Card*, NEW BRUNSWICK CANADA, <https://www2.gnb.ca/content/gnb/en/departments/health/MedicarePrescriptionDrugPlan/content/medicare/ApplyingforaCard.html> (last visited Apr. 9, 2020) (explaining that both newborns and adopted children qualify for healthcare—parents or guardians must enroll them by mail or dropping off the eligibility form in the local Medicare office. New residents that move to NB from a different province qualify after their third month (if they apply). Assuming that a pregnant minor has never been enrolled in healthcare or is a new resident, it is unclear if she must have her parents apply for her, she may be able to fill out forms by herself.).

188. Gignac, *supra* note 179; *see also* Aly Thomson, *N.B. to Provide Pill Free of Charge*, THE CHRONICLE HERALD (Apr. 5, 2017), <http://ezproxy.library.arizona.edu/login?url=https://www-proquestcom.ezproxy1.library.arizona.edu/docview/1942800292?accountid=8360>; *New Brunswick Women Will Be Able to Get Abortion Pill Free of Charge*, THE CANADIAN BROADCASTING CORPORATION (CBC) (Apr. 4, 2017), <https://www.cbc.ca/news/canada/new-brunswick/abortion-pill-new-brunswick-1.4054517>; Downie & Nassar, *supra* note 140, at 151-52 (2017) (explaining that abortion pill RU-486 had not been approved by the Canadian government because approval would cost over \$100,000).

189. *Unintended Pregnancy and Induced Abortion in Mexico*, GUTTMACHER INST. (Nov. 2013), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-and-induced-abortion-mexico>; *see also* Hannah Pearson, *The Law, Trials and Imprisonment for Abortion in Mexico*, INTERNATIONAL CAMPAIGN FOR WOMEN'S RIGHT TO SAFE ABORTION (May 2, 2017), <http://www.safeabortionwomensright.org/the-law-trials-and-imprisonment-for-abortion-in-mexico/>.

190. Código Penal Federal (CPF), cap. VI, art. 333, Diario Oficial de la Federación [DOF] 14-05-1931, últimas reformas DOF 24-01-2020 (Mex.) (Articles 265 defines rape as anyone who uses physical or moral violence and copulates with another); *see also* Pearson,

of rape also encompasses marital and statutory rape (*estupro*); however, considering Mexico's anti-abortion stance, it is uncertain whether a pregnancy resulting from marital rape or a consensual relationship between a minor girl and her boyfriend would be recognized as rape to qualify for an abortion.¹⁹¹ Abortion was officially criminalized in 1931.¹⁹² Article IV of the Mexican Federal Constitution guarantees every citizen the right to decide freely and responsibly about the number and *spacing* of their children.¹⁹³ Reproductive freedom advocates argue that Article IV does not explicitly prohibit abortions and even leaves room to interpret *spacing*¹⁹⁴ (as reproductive freedom), yet most states prohibit abortion because they consider the fetus a live human being.¹⁹⁵ Abortion is regulated by 32 federative entities, which consist of 31 states and the Federal District of Mexico City.¹⁹⁶ Mexico's government is a federation; therefore, Mexico does not have any federal abortion laws that apply to all states.¹⁹⁷ Other than a pregnancy that results from rape,¹⁹⁸ some states allow an abortion when there is serious risk to the woman's life,¹⁹⁹ non-

supra note 189; Allison Ford, *Mexico City Legalizes Abortion*, 16 L. & BUS. REV. AM. 119, 120 n. 14 (2010) ("Although though abortion is legal in all of Mexico's thirty-two states for victims of rape, studies show that in practice it is extremely difficult for a rape survivor to exercise her right to terminate her pregnancy, because of an endless list of administrative hurdles and outright obstruction by authorities.").

191. Código Penal Federal (CPF), cap. VI, art. 265-66, Diario Oficial de la Federación [DOF] 14-05-1931, últimas reformas DOF 24-01-2020 (Mex.) (Article 265 codifies marital rape. Article 265 codifies statutory rape as a person copulating, without violence, with a person who does not have capacity to consent (minors do not have capacity to consent).

192. Corene, T. Kendrick, *The Illegality of Abortion in Mexico*, 39 STAN. J. INT'L L. 125, 141 (2003).

193. Constitución Política de los Estados Unidos Mexicanos, CP, Art. IV, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 01-12-2012 (emphasis added) ("Toda persona tiene derecho a decidir de manera libre, responsable e informada sobre el número y el espaciamiento de sus hijos).

194. Kendrick, *supra* note 192, at 125.

195. *See generally id.* (explaining with limited exceptions, most states prohibit abortion).

196. *Unintended Pregnancy and Induced Abortion in Mexico*, *supra* note 189.

197. Ford, *supra* note 190, at 127.

198. Maria Luisa Sanchez Fuentes et al., *The Decriminalization of Abortion in Mexico City: How Did Abortion Rights Become a Political Priority?*, 16 GENDER & DEV. 345, 348 (2000) (explaining that all 31 states and Mexico City allow a legal abortion if the pregnancy was the result of rape).

199. Ford, *supra* note 190, at 120 (explaining that 27 states allow abortion if the pregnancy threatens the mother's life, but the process and hurdles women must go through make the possibility for an abortion almost nonexistent); *see also Pearson*, *supra* note 189.

consensual artificial insemination,²⁰⁰ or financial hardship.²⁰¹ Unsafe and usually illegal abortions remain a leading cause of maternal mortality in Mexico.²⁰² Abortion is legal in only one part of the country.²⁰³

Mexico City is the only place where a woman or minor girl can have a safe and legal abortion.²⁰⁴ On April 2, 2007, Mexico City amended their penal code and health laws and was the first area in the country to legalize abortion.²⁰⁵ The Mexico City Penal Code and health laws will be discussed *infra* Part V, Section C.1. After Mexico City decriminalized abortions, the Federal Attorney General and the Federal Ombudsman of the National Human Rights Commission filed lawsuits in the Mexican Supreme Court challenging the constitutionality of the abortion reform.²⁰⁶ After allowing 80 people to speak and present their arguments, the Court reached its final decision affirming Mexico City's legislation to decriminalize abortions.²⁰⁷ The Court ultimately held that the Mexico City legislature acted within its autonomous powers to regulate abortion because Article 4 of the Constitution²⁰⁸ and the General Health Law²⁰⁹ grant the regulation of women and their pregnancies to the states.²¹⁰ The Court also clarified that the Mexican

200. I was not able to find data of how many pregnancies result from non-consensual insemination.

201. Pearson, *supra* note 189; *see also* Kendrick, *supra* note 192, at 139-140 (the penal code of Yucatan allows abortions if the pregnant woman has a large family and is unable to financially support the child).

202. Sanchez Fuentes et al., *supra* note 198, at 347.

203. Luisa Conesa Labastida, *Making the Best of it: A Conceptual Reconstruction of Abortion Jurisprudence in the United States and Mexico*, 2 MEXICAN L. REV. 31, 56 (2009).

204. *Id.*

205. *Id.*; *see also* Gaceta Oficial Del Distrito Federal, num. 70, 26 de abril de 2007, p. 2-3; Ford, *supra* note 191, at 119-20 (explaining that the Mexico City Penal Code had been previously amended in 2000 and 2003 to decriminalize therapeutic abortions—when the women's health was endangered, fetal or genetic deformity, or nonconsensual artificial insemination).

206. Conesa Labastida, *supra* note 203, at 57 (Accion de Inconstitucionalidad 146/2007 and 147/2007); *see also* *Que Despenalización El Aborto Antes de Las 12 Semanas de Gestacion en el Distrito Federal*, Pleno de la Supreme Corte de Justicia [SCJN], Sesion Publica Vespertina, Agosto de 2008, 146/2007, 147/2007.

207. Conesa Labastida, *supra* note 204, at 57-58 (explaining that eight out of eleven supreme court justices voted in favor to uphold Mexico City's pro-abortion legislation); *see also* Ford, *supra* note 190, at 122 n.37 (explaining the speakers were divided by forty for abortion and forty against abortion).

208. Constitucion Politica de los Estados Unidos Mexicanos, CP, Art. IV, Diario Oficial de la Federacion [DOF] 05-02-1917, ultimas reformas DOF 01-12-2012; *see also* Conesa Labastida, *supra* note 203, at 57-58.

209. *See* Conesa Labastida, *supra* note 204, at 60 (General Health Law establishes the National Health System).

210. *Id.*

Constitution does not recognize a right to life.²¹¹ Mexico City is the only place in Mexico where a woman, even a minor girl, can obtain a legal abortion.²¹²

1. Abortion Rights for Minor Girls

Other than in Mexico City, Mexico does not offer minor girls abortion rights,²¹³ unless the pregnancy is the result of rape²¹⁴ or other very limited circumstances.²¹⁵ During the constitutional battle in the Supreme Court of Mexico, following Mexico City's decriminalization of abortion, the Court rejected the official's²¹⁶ argument that the legislature should have established special abortion procedures for minor girls under the age of 18.²¹⁷ The Court disagreed and acted with judicial constraint affirming the role of a democratically elected legislature,²¹⁸ deciding not to implement nor require special requirements for minor girls if the legislature had not chosen to do so.²¹⁹ A minor girl can obtain an abortion in Mexico City regardless of whether she is a resident or visitor.²²⁰ Another huge win for abortion activists came in 2013, when the Supreme Court of Mexico published

211. *Id.*

212. *Id.* at 62.

213. *Id.*

214. For a broad definition of rape *see generally* Código Penal para el Distrito Federal [CPF], cap. IV, art. 180, Diario Oficial del Distrito Federal [DODF] 16-07-2002, reformas [DODF] 16-07-2016 (Mex.) (Mexico City recognizes statutory rape. In Mexico City, the minor can get an abortion regardless if she becomes pregnant by a partner who is 18 years old or older.). *But see* Código Penal Federal (CPF), cap. VI, art. 265-66, Diario Oficial de la Federación [DOF] 14-05-1931, últimas reformas DOF 24-01-2020 (Mex.) (The Mexico Penal Code also recognizes statutory rape, but the law is read narrowly because in generally the majority of states tend to imply that in a statutory rape case where the relationship is consensual and non-coercive, the minor may not be able to abort legally.).

215. Ford, *supra* note 190, at 120 n.14.

216. Que Despenalización El Aborto Antes de Las 12 Semanas de Gestacion en el Distrito Federal, Pleno de la Supreme Corte de Justicia [SCJN], Sesión Pública Vespertina, Agosto de 2008, 146/2007, 147/2007 (Mex.) (holding the Office of the Attorney General of the Republic and the National Commission on Human Rights filed a petition in the Supreme Court of Mexico to test the constitutionality of Mexico City's Penal Code amendments legalizing abortion).

217. Conesa Labastida, *supra* note 203, at 62; *see also* Que Despenalización El Aborto Antes de Las 12 Semanas de Gestacion en el Distrito Federal, Pleno de la Supreme Corte de Justicia [SCJN], Sesión Pública Vespertina, Agosto de 2008, 146/2007, 147/2007.

218. Conesa Labastida, *supra* note 203, at 62.

219. *Id.* at 62-63. *But see* Aborto Para Menores de 18 Años, [clinicasabortos.mx https://www.clinicasabortos.mx/aborto-para-menores-de-18-anos](https://www.clinicasabortos.mx/aborto-para-menores-de-18-anos) (last visited on Jan. 12, 2019) (stating minor girls under the age of 18 have to be accompanied by an adult when they obtain an abortion).

220. Ford, *supra* note 190, at 120 n. 14; *see also* Sanchez Fuentes et al., *supra* note 198, at 349; *Aborto Para Menores de 18 Años*, *supra* note 219.

an official standard requiring public hospitals across the country to provide abortions to women who were pregnant as the result of a rape.²²¹ Every state allows an abortion in the event a minor girl or a woman is the victim of rape; NOM-046 does not require the victims to file a police report but only sign an affidavit.²²² Under the official standard, a minor under the age of 12 years old is required to receive consent from at least one parent or a guardian before she can have an abortion.²²³ The Supreme Court of Mexico's pro-choice stance may inhibit future anti-abortion legislation in the nation.²²⁴

B. Competing Interests

Mexico City's decriminalization of abortion puts them at the forefront of abortion liberalization in the country, Latin America, and the Caribbean.²²⁵ Some motives to decriminalize abortions were public health concerns related to "illegal back alley abortions," women's rights, freedom of reproductive choices, and ultimately preserving the 12-week barrier, which guarantees the procedure is performed safely.²²⁶

The battle to decriminalize abortion in Mexico dates as early as the twentieth century.²²⁷ Feminists were fighting to decriminalize abortion and voting rights, but abortion rights dissipated by the 1940s.²²⁸ As a result, the GIRE (Grupo de Información en Reproducción Elegida)²²⁹ was formed in 1990 by a group of feminist scholars and activists to fight against the Catholic Church's influence in

221. Norma Oficial Mexicana [NOM], 046-SSA2-2005, Diario Oficial de la Federación [DOF] 16-04-2009, últimas reformas 24-03-2016 (Mex.).

222. *Id.* (It was unclear if marital or statutory rape could fall under this standard); see also Matthew Hoffman, *Mexico Supreme Court refuses to strike down law requiring hospitals to abort babies conceived in rape*, LIFE SITE (Aug. 13, 2019), <https://www.lifesitenews.com/news/mexico-supreme-court-refuses-to-strike-down-law-requiring-hospitals-to-abort-babies-conceived-in-rape>.

223. Norma Oficial Mexicana [NOM], 046-SSA2-2005, *supra* note 221.

224. See *Que Despenalización El Aborto Antes de Las 12 Semanas de Gestacion en el Distrito Federal*, Pleno de la Supreme Corte de Justicia [SCJN], Sesión Pública Vespertina, Agosto de 2008, 146/2007, 147/2007 (Mex.).

225. Sanchez Fuentes et al, *supra* note 198, at 345 ("Only Cuba, Guyana, and Puerto Rico have similar abortion laws").

226. Conesa Labastida, *supra* note 203, at 62.

227. Kendrick, *supra* note 192, at 141.

228. *Id.*

229. Grupo De Información en Reproducción Elegida (GIRE), formato HTML, <https://gire.org.mx/quienes-somos/> (last accessed Apr. 10, 2020); see generally Sanchez Fuentes, *supra* note 198, at 346 ("GIRE has developed into one of the leading organisations [sic] working on reproductive rights in Mexico and Latin America.").

politics.²³⁰ GIRE now strives to create broad awareness to decriminalizing abortion to avoid the ongoing divisive debate seen in the United States.²³¹ Mexico City was able to decriminalize abortion and reform the criminal code because of the supermajority of the PRD (Party of the Democratic Revolution) in the legislature.²³² Abortion reform in Mexico City has influenced half of the states to enact “right to life” measures.²³³ In 2019, lawmakers in the state of Oaxaca voted to continue to decriminalize abortions.²³⁴ Another issue in politics is the low number of female politicians in Mexico who are willing to make abortion a political priority.²³⁵ Politics and religion play vital roles in abortion debates.²³⁶

Although Mexico is a secular country without an official religion, the country is predominantly Catholic.²³⁷ A day before the Supreme Court of Mexico had its final debate concerning Mexico City's legislation decriminalizing abortion, the president of Mexico's bishop conference of the Mexican Episcopal Conference, the organization of Catholic bishops that is the official Catholic Church leadership in Mexico, appeared on television urging the Court to declare amending the penal code unconstitutional.²³⁸ Many people in Mexico believe that the government does not decriminalize abortion because of “ferocious opposition” from the Catholic Church.²³⁹ Other critics also believe that the Catholic Church's influence in government across Latin America creates conflicts between religious and legal obligations.²⁴⁰ Even during times when the government attempted to separate itself from the Church, the Church remained an enormous political, moral, and economic influence.²⁴¹ Catholic clergy have even publicly asked women to bear a child, even

230. Kendrick, *supra* note 192, at 143.

231. *Id.*

232. Conesa Labastida, *supra* note 204, at 56-57.

233. Sarah Faithful, *Mexico's Choice: Abortion Laws and Their Effects Throughout Latin America*, COUNCIL ON HEMISPHERIC AFFAIRS (Sep. 28, 2016), www.coha.org/mexicos-choice-abortion-laws-and-their-effects-throughout-latin-america/.

234. Ruby Mellen, *Mexico is Taking Steps Towards Legalizing Abortion. But Across Latin America, Restrictions Remain Widespread*, WASH. POST (Oct. 4, 2019, 3:00 AM) <https://www.washingtonpost.com/world/2019/10/04/mexico-is-taking-steps-toward-legalizing-abortion-across-latin-america-restrictions-are-widespread/>.

235. Kendrick, *supra* note 192, at 143.

236. *See* Conesa Labastida, *supra* note 203, at 56.

237. *Id.*; *see also* *Panorama de las Religiones en Mexico*, Instituto Nacional de Estadística y Geografía [INEGI], 3 (2010) (INEGI is part of the secretary of governorship—they concluded that 83% of the population is Catholic [92,924,489 ÷ 112,336,538 = 82.7%]).

238. Ford, *supra* note 191, at 122, 124; *see also* *Mexican Bishops: 'Without the Gift of Life, it is Not Possible to Exercise Other Rights'*, CATHOLIC NEWS AGENCY (Aug. 26, 2008, 6:04 PM), https://www.catholicnewsagency.com/news/mexican_bishops_without_the_gift_of_life_it_is_not_possible_to_exercise_other_rights.

239. Kendrick, *supra* note 192, at 129 n. 24.

240. *Id.* at 130.

241. *Id.* at 130-31.

if the pregnancy is the result of rape.²⁴² Most Mexican women would agree that they are good Catholics, although they disagree with the Church's position on abortion.²⁴³

C. Abortion Access Differences Among States and the Federal District

Mexico does not offer a judicial bypass option for minors to obtain an abortion because abortion continues to be mostly illegal.²⁴⁴ Because of this, Mexico has low rates of reported abortion.²⁴⁵ In 2011, it was estimated that Mexico was a country with the highest rate of teen pregnancies.²⁴⁶ It can be inferred that Mexico's high teen pregnancy rates may be the result of restrictive abortion laws and lack of contraceptive access throughout the country.²⁴⁷

1. Mexico City

In Mexico City, a minor girl (under eighteen years old) can legally "interrupt" her pregnancy (i.e. abort) for any reason, up until 12 weeks of gestation.²⁴⁸ In 2007, Mexico City amended their penal code and health laws to legalize abortion.²⁴⁹ Under Article 144, the Mexico City Penal Code even went as far as redefining abortion as the "interruption of a pregnancy after twelve weeks of gestation."²⁵⁰ Meaning, prior to twelve weeks of gestation, terminating the pregnancy is not considered an abortion but only an "interruption."²⁵¹ Article 145 criminalizes a woman who self-induces her abortion or voluntarily consents to an

242. *Id.* at 134 (Mexican Cardinal Noberto Rivera commented in a homily that "Even in the case of a pregnancy that is the result of rape, we must ask the woman to accept the mysterious designs of God.").

243. *Id.* at 136.

244. Pearson, *supra* note 189; *see also* Ford, *supra* note 1901, at 120.

245. Gilda Sedgh et al. *supra* note 57, at 225 (Mexico has low rates of abortions, most likely because abortion is not reported as it remains illegal).

246. *Id.* at 223, 228 (adolescents: girls ages 15 to 19 years old; young adolescents: girls ages 10 to 14 years old).

247. *Id.* 225 (2015) (this study provided no data concerning how many of the minors wanted an abortion).

248. Conesa Labastida, *supra* note 203, at 62-63; *see also* Sanchez Fuentes et al., *supra* note 198, at 349.

249. *Id.* at 56; *see also* Gaceta Oficial Del Distrito Federal, num. 70, 26 de abril de 2007, p. 2-3; Ford, *supra* note 190, at 121.

250. Código Penal Federal [CPF], art. 144, Diario Oficial del Distrito Federal 07-16-2002, últimas reformas 08-03-2012 (Mex.); *see also* Conesa Labastida, *supra* note 204, at 59.

251. *See* Conesa Labastida, *supra* note 203, at 59.

abortion after twelve weeks of gestation.²⁵² Article 146 criminalizes anyone who interrupts a woman's pregnancy without her consent.²⁵³ Lastly, Article 148 excludes abortions from criminal liability when: (1) the pregnancy is the result of rape or non-consensual artificial insemination; (2) the abortion is an unprovoked miscarriage or provoked to preserve the life of the pregnant woman; and (3) a medical board of two doctors diagnose and agree (and have consent from the mother) that the fetus has a high probability of genetic or congenital alterations that may jeopardize its survival.²⁵⁴ Additionally, Mexico City amended its health laws to guarantee women access to abortions²⁵⁵ and ordered that public health institutions funded by the government perform pregnancy interruptions (i.e. abortions) free of charge.²⁵⁶ Some doctors in the public healthcare system²⁵⁷ and private hospitals can refuse to carry out abortions, but these cases are typically referred elsewhere, to other doctors or hospitals who will carry them out.²⁵⁸

Ultimately, minor girls under the age of 18 years old can obtain an abortion without parental consent or judicial bypass.²⁵⁹ In Mexico City, residents may obtain a free abortion from a public hospital; abortions are also provided to non-resident women for a moderate fee.²⁶⁰ In Mexico City, minor girls can obtain an abortion with or without parental consent.²⁶¹ A public hospital requires that a parent or legal

252. Código Penal Federal [CPF], art. 145, Diario Oficial del Distrito Federal 07-16-2002, últimas reformas 08-03-2012 (Mex.) (the pregnant woman and the other person performing the abortion will be punishable after the abortion succeeds); see also Conesa Labastida, *supra* note 203, at 58.

253. Código Penal Federal [CPF], art. 146, Diario Oficial del Distrito Federal 07-16-2002, últimas reformas 08-03-2012 (Mex.); see also Conesa Labastida, *supra* note 203, at 58.

254. Código Penal Federal [CPF], art. 148, Diario Oficial del Distrito Federal 07-16-2002, últimas reformas 08-03-2012 (Mex.).

255. "Ley De Salud del Distrito Federal" Gaceta Oficial del Distrito Federal, art. 58, August 17, 2012; see also Conesa Labastida, *supra* note 203, at 58, 59.

256. *Id.* (explaining that abortions must be free, conducted under proper and safe conditions, so long as the abortion is permitted under the Mexico City Penal Code); see also Ford, *supra* note 190, at 121.

257. Ford, *supra* note 190, at 121, 126 (Doctors can declare themselves "conscientious objectors."). *But see* Sanchez Fuentes et al, *supra* note 198, at 349 (although doctors can declare themselves conscientious objectors, the entire public-health facility cannot; therefore, hospitals must have doctors willing to perform abortions).

258. Ford, *supra* note 190, at 121.

259. Conesa Labastida, *supra* note 203, at 62.

260. Sanchez Fuentes et al., *supra* note 198, at 349.

261. *Aborto Para Menores de 18 Anos*, *supra* note 219 (stating that it is highly recommended to directly call the facility where services will be rendered).

guardian accompany the minor,²⁶² but private clinics only require that the minor girl be accompanied by a person who is at least 18 years old.²⁶³

2. Queretaro

The state of Queretaro has some of the most restrictive abortion laws in Mexico.²⁶⁴ The state has added constitutional clauses to protect the life of the fetus, beginning from its conception.²⁶⁵ Abortion is permitted, but only under strict circumstances.²⁶⁶ Chapter 5, Article 136 of the Queretaro Penal Code criminalizes and defines abortion as the termination of the “product” (i.e., fetus) anytime from conception to birth.²⁶⁷ Article 137 extends criminal liability to anyone whom consensually accepts to help a woman have an abortion.²⁶⁸ Articles 138 and 139 criminalize women who provide consent to an abortion or self-induce their abortions.²⁶⁹ Article 140 criminalizes abortion and will penalize doctors or medical personnel who perform an illegal abortion.²⁷⁰ Article 141 allows doctors and medical personnel to render emergency services to women who have obtained an illegal abortion elsewhere.²⁷¹ Article 124 provides the only exception to a legal abortion in Queretaro, which is in the event the pregnancy is the result of rape and she consents to the abortion.²⁷² The state’s penal code does not allow for any other exceptions, such as a judicial bypass for minors.²⁷³

262. *Id.*

263. *Id.* (explaining that adults who accompany a minor girl who seek an abortion are required to show valid identification, proving they are over eighteen years old; the accompanying adult can be a parent, boyfriend, relative, friend etc.).

264. Fatima Juarez, Akinrinola Bankole & Jose Luis Palma, *Women’s Abortion Seeking Behavior Under Restrictive Abortion Laws in Mexico*, 14 PLOS ONE (Dec. 27, 2019), <https://doi.org/10.1371/journal.pone.0226522>.

265. *Id.*

266. *Abortar en Queretaro, ¿Dónde Abortar en Queretaro?*, AbortarMexico (Jan. 18, 2013), <https://abortar-mexico.mx/donde-abortar-en-queretaro/> (stating that for girls or women who will not be able to obtain a legal abortion, this website recommends travel to Mexico City to be able to obtain a legal abortion.); see also *Código Penal Para el Estado de Queretaro [CP]* art. 136-142, 23-07-1987, últimas reformas CP 07-09-2018 (Mex.).

267. *Código Penal Para el Estado de Queretaro [CP]*, cap. 5 art. 136, 23-07-1987, últimas reformas CP 07-09-2018 (Mex.).

268. *Id.* at art. 137.

269. *Id.* at art. 138-39.

270. *Id.* at 140.

271. *Id.* at 141.

272. *Código Penal Para el Estado de Queretaro [CP]*, *supra* note 267, at art. 142.

273. See generally *id.* at cap. 5.

VI. APPLYING THE PATIENT SCENARIO TO EACH STATE²⁷⁴

If Bee is a resident of or visitor to California, she can obtain an abortion without parental consent, parental notice, or judicial bypass. Considering she is only eight weeks pregnant, the fetus is well under viability. Bee should visit her local abortion clinic or research over the web.

In Texas, Bee should be able to obtain a court ordered (judicial bypass) abortion. Considering she does not want to tell her parents, she must appear in person and file an application with the court for a court-ordered abortion. Bee must prove by clear and convincing evidence that she is mature and well-informed to make the decision, and that parental consent and notification is not in her best interest. To prove maturity, she can speak about her duties and responsibilities in her workplace and any other life experiences she may have. Considering she just turned 16 years old, it will be important that she speaks with confidence.

To avoid some of the problems the minor girl faced in *In re Doe*, Bee must know and show that she is aware of the emotional and psychological burdens an abortion may have on her life in Texas. She can speak about the counseling she received from Planned Parenthood, and it is also highly recommended that she read and understand any state-published material like *A Woman's Right to Know*. She can also present any other research or counseling she obtained prior to the hearing; tell the court that her own research led her to this judicial bypass hearing, and she can explain how she will not be able to financially support a child working part-time. She must also testify about the detrimental effects an unwanted pregnancy will have on her education, her career goals, and relationship with her parents. If she anticipates physical abuse or has history of familial abuse against her, she must share that with the court. Ultimately, Bee should be able to obtain a court ordered abortion at the trial court level, but if she does not, she can appeal her decision.

If Bee is a resident of Quebec, she should be able to obtain an abortion without her parents' consent. Bee is 16 years old, so she can consent to care and treatment. However, she must convince the doctor that she has the capacity to consent. She must show that she is of sufficient age and intelligence and understands the nature and consequences of the abortion. To show capacity, she can speak about her job in retail, any activities she participates in high school, how she cannot afford to raise a child, and share her future goals. She must also acknowledge and understand the consequences of the abortion procedure. Bee has nearly a dozen facilities where she can obtain an abortion. An abortion should be free as long as she is enrolled in the province's healthcare plan. If she was born in Quebec, she is most likely already enrolled, but if she has just moved to Quebec, she must apply for benefits. Normally, it is only a form that needs to be mailed, so she may be able to enroll herself in healthcare. Although this may take some time,

274. For Patient Scenario *see supra* Part II.

generally there is no cut-off at viability, but she must check with the hospital or clinic where the procedure will be done.

If Bee is a resident of New Brunswick, she should be able to obtain an abortion without her parents' consent. Unlike Quebec, New Brunswick does not have a specific age of consent, but Bee must be able to show to her doctor that she is mature enough to consent to an abortion. To prove capacity, she can speak about her job in retail, any activities she participates in high school, how she cannot afford to raise a child, and share her future goals. She must also acknowledge and understand the consequences of an abortion procedure. Bee has two options for venue: she can go to one of three hospitals and obtain a free abortion, or she can go to Clinic 455, but here, she may have to pay depending on the procedure. If Bee was born in New Brunswick, she most likely is already enrolled in the provincial health care plan, if she is a new resident, she can qualify for healthcare after three months. Applications are either mailed or dropped off in person, so Bee may be able to do it by herself.

Bee will most likely be able to get an abortion in Mexico City. As previously discussed, Mexico City allows pregnant women an "interruption" (abortion) up to 12 weeks of gestation. Bee is only eight weeks pregnant, so she is well under the twelve-week mark. If Bee is a resident of Mexico City, she may be able to obtain an abortion free of charge from a public hospital. If she is not a resident, she can still obtain an abortion, but she will need to pay for the procedure. Regardless of her residency status, she must be accompanied by an adult. A public hospital will require she be accompanied by a parent or guardian. Because Bee does not want her parents to learn about her pregnancy and abortion, she must get the procedure in a clinic. The abortion clinic will also require an adult's signature, but any adult over eighteen years old will suffice. Hopefully, Bee can be accompanied by a family member or a good friend. If Bee is not a resident of Mexico City, hopefully she lives nearby and has the financial means to travel there. Bee will be lucky if she lives in or can travel to Mexico City.

In Queretaro, abortion is illegal unless the pregnancy is the result of rape. We doubt that a pregnancy resulting from statutory rape from a consensual relationship would be considered rape under the narrowly read law. The fact pattern does not mention that she was raped, so she will not have any legal recourse for an abortion in Queretaro. However, like many other women and minor girls in her situation, she has three options. First, she can travel to Mexico City²⁷⁵ and pay for a legal abortion. If she can make the trip, this option comes with financial and time burdens, but the procedure will be safe and ultimately legal. Second, although not recommended and unsafe, some women, especially if they are of lower income and

275. Driving Directions from Queretaro, Mex. to Mexico City, Mex., GOOGLE MAPS, <http://maps.google.com> (follow "Directions" hyperlink; then search starting point field for "Queretaro" and search destination field for "Mexico City") (the drive is anywhere from 3½ hours to 5½ hours).

live in rural areas, self-induce their abortion.²⁷⁶ If Bee has some income, she can hire a “back alley doctor or nurse” to conduct a clandestine abortion.²⁷⁷ Third, she can have the baby. If Bee lives in Queretaro, we hope she has the financial stability and an adult who can travel with her to Mexico City to have the abortion there.

VII. INTERNATIONAL COMPARISON AMONG THE COUNTRIES

A. Minor's Access to Abortion in the United States Versus Canada

Abortions are legal in both the United States and Canada.²⁷⁸ Generally, abortion rights are extended to minor girls, but the minor girl must navigate through very distinct paths before obtaining an abortion in each country.²⁷⁹ Both countries are similar in the principle that an abortion can be obtained at any stage, if there is a great threat to the life or health of the mother.²⁸⁰ Finally, in both the US and Canada, a minor girl has a high probability of obtaining an abortion without parental consent nor notice.²⁸¹

There are more differences than similarities between US and Canada. Most US states have a judicial bypass option for minor girls.²⁸² US federal and state laws heavily regulate abortions.²⁸³ Federal law allows an abortion to be performed prior to viability.²⁸⁴ Prior to viability, a minor girl can obtain an abortion if she has parental consent or obtains a judicial bypass.²⁸⁵ After viability (28 weeks to as early as 24 weeks), a state can regulate abortion, but even after fetus viability the minor's

276. Kendrick, *supra* note 192, at 135-36 n.71 (unfortunately, women have and may continue self-induce abortions by using household objects like clothes hangers, ingesting herbs, bleach, or other common household chemicals, or induce trauma to their abdomen.).

277. *Id.* at 136 n.73.

278. *Roe v. Wade*, 410 U.S. 113 (1973); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.).

279. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *J.S.C. v. Wren*, [1986] 35 D.L.R. 4th 419 (Can. Alta. Q.B.); *Health Care Consent Act, 1996*, S.O. 1996, c 2, Sch. A. (Can.).

280. *See generally Roe*, 410 U.S. 113; *Morgentaler*, [1988] 1 S.C.R. 30 (Can.).

281. *See generally Danforth*, 428 U.S. 52; *A.C. v. Manitoba (Dir. Of Child and Welfare Fam. Serv's)*, [2009] 2 S.C.R. 181, 187 (Can.) (explaining that minor girls can be found capable to consent to an abortion without parental interference).

282. *Parental Involvement in Minors' Abortions*, *supra* note 87.

283. *Id.*

284. Bonnie H. Arzuaga & Ben H. Lee, *Limits of Human Viability in the United States: A Medicolegal Review*, 128, *Pediatric Perspectives* 1047 (2011) (concluding general consensus is that a fetus is viable as early as 24 weeks); *see also Colautti v. Franklin*, 439 U.S. 379, 387 (1979). *But see Gonzales v. Carhart*, 550 U.S. 124, 139 (noting fetuses may have some viability at 24 weeks).

285. *See Parental Involvement in Minors' Abortions*, *supra* note 87 (majority of U.S. states require a minor girl to obtain consent or petition the court for an abortion).

health continues to be a priority and abortion can still be available.²⁸⁶ In the United States, it is imperative that a minor obtain her abortion prior to fetus viability.²⁸⁷ In the United States, unlike Canada, the Hyde Amendment prevents the use of federal funds to fund abortions.²⁸⁸ The US does not provide minor girls with funding for abortions, but, if the minor girls' parents are involved, a private healthcare plan may cover it. However, this raises the issue of a paper trail if the minor chooses to use her parents' healthcare plan yet decides not to tell them. If the abortion is granted through judicial bypass, the minor will need to pay for the service or rely on emergency funds sometimes available through a clinic.²⁸⁹

On the other hand, Canada does not have any federal laws regulating abortion.²⁹⁰ Canada does not have judicial bypass because under the current law and in majority of instances, a minor girl does not need parental consent for an abortion.²⁹¹ However, the minor girl must have the capacity to consent, and physicians must decide if the minor girl is of sufficient age and intelligence to understand the nature and consequences of the abortion.²⁹² If the physician finds the minor girl capable of consenting, the abortion will be granted.²⁹³ Unlike the United States, Canada regulates and funds abortion as a health care service.²⁹⁴ There is no uniformity or consensus concerning viability, so facilities, funding, and accessibility depend on where the minor girl lives, travels, or procedure facility.²⁹⁵ Overall, Canada provides minor girls more autonomy and accessibility than the United States.

B. Minor's Access to Abortion in the United States Versus Mexico

The US, like Mexico City, provide minor girls with legal avenues to obtain an abortion without parental consent. The US has either minimal restrictions or

286. *Roe*, 410 U.S. at 165; *see also Casey*, 505 U.S. at 877.

287. *Roe*, 410 U.S. at 163, 165.

288. *State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Nov. 1, 2019) <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid> (the Hyde Amendment does not allow federal funds to be used for abortions, except in limited circumstances like life endangerment, rape, or incest).

289. *Minors & Abortion Law*, PLANNED PARENTHOOD ARIZONA, INC. (Feb. 28, 2020), <https://www.plannedparenthood.org/planned-parenthood-arizona/get-care/minors-abortion-law>.

290. Rimalt, *supra* note 131, at 371.

291. *See id.*

292. Medical Consent of Minors Act S.N.B. 1976, c. M-6-1, s. 1 & 3(1)(a)-(b) 2000, c.14, s.1; 2002, c.23, s.5.1; 2011, c.26, s.2.; *see also* Civil Code of Quebec, S.Q. 1991, c. 64, tit. 2, sect. 14.

293. *Id.*

294. *See* Rimalt, *supra* note 131, at 372.

295. *See id.* at 371-72; *see also* Downie & Nassar, *supra* note 140, at 146-48.

judicial bypass laws that minor girls can utilize to get an abortion; on the other hand, a minor girl can have an abortion in Mexico City regardless of whether she is a resident or visitor so long as she is accompanied by an adult. Mexico City is less restrictive than the US because most American states require minor girls to obtain a judicial bypass when they do not want to obtain parental consent.

A similarity between the United States and Mexico is the political views that affect abortion legislation. Political parties are heavily divided among pro-life and pro-choice views. The two predominant parties are the *Partido Acción Nacional* (PAN), mirroring the Republican Party, and the *Partido de la Revolución Democrática* (PRD), mirroring the Democratic Party.²⁹⁶ The former fights for more restrictions and ultimately a total ban, while the latter wants to promote less regulation and more bodily autonomy.²⁹⁷ Besides the Federal District of Mexico City, Mexico as a country is a complete opposite of the United States.

Unlike in the United States, the National Supreme Court of Mexico (Supreme Court) only has the power to set a trend for other states to follow.²⁹⁸ This presents a difficulty because no binding federal legislation can be directed and forced upon the Mexican states.²⁹⁹ In the majority of states in Mexico, even if the minor girl is legally entitled to an abortion, she may encounter difficulties in finding safe and inexpensive abortions.³⁰⁰ Few women can spend thousands of dollars to travel to the United States or Mexico City to obtain legal and safe abortions.³⁰¹

VIII. CONCLUSION

“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”³⁰² Therefore, as parents we should talk to our daughters and help them. Let us not be too macho, ignorant, or heartless and force them to make difficult decision by themselves. No matter the question, no matter the situation, we can prevent our daughters from jumping

296. Kendrick, *supra* note 192, at 144 n. 124 (the PAN was founded in 1939, is pro-Catholicism, pro-business, and ultraconservative on abortion).

297. Reingold et al, *supra* note 82; see Ford, *supra* note 190, at 119.

298. Ford, *supra* note 190, at 122 n.42 (“Mexico was the first Latin American country to establish constitutionally [the] separation of church and state,” but in 1991, the Mexican government re-established some diplomatic relations with the Vatican).

299. See generally *id.*

300. Kendrick, *supra* note 192, at 149 (Paulina, at the age of fourteen gave birth to a son (she was a victim of rape) because the legal system that entitled her to an abortion failed when even the attorney general of the state visited her in the hospital and reminded her that abortion was a sin.); Ford, *supra* note 190, at 119-20 (a pregnancy interruption (i.e., abortion) is only available in Mexico City).

301. Kendrick, *supra* note 192, at 135 n.68.

302. *Danforth*, 428 U.S. at 74.

through hoops or relying on complete strangers to guide or make the final ruling on their decision. This Note was not about pro-choice or pro-life, but about pro-daughters—whatever their issues and doubts are—they are ours too.

