

## ABORTION RIGHTS IN THE WESTERN HEMISPHERE

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If the twenty-first century can be called the century of Women's Rights, then abortion can certainly be seen as the final frontier of those rights. And the ultimate issue in abortion rights is whether abortion is a crime. Caroline Beer's article, *Abortion Policy in Mexico: A Changing Role for the Supreme Court*, is a welcome addition to the Southwestern Journal of International Law's coverage of abortion issues in the Western Hemisphere.

The Journal has published significant articles on abortion issues beginning with Andrea Noguera's 2019 article *Argentina's Path to Legalizing Abortion: A Comparative Analysis of Ireland, the United States and Argentina*.<sup>1</sup> This was followed in 2023 by Nayla Luz Vacareza's analysis in *Abortion Rights in Uruguay, Chile, and Argentina Movements Shaping Legal and Policy Change*<sup>2</sup> and Donna Guy's comments in *The Long History of Women's Rights Campaigns in Three South American Countries: The Recent Legal History of Abortion Law in Uruguay, Argentina, Chile*.<sup>3</sup> An additional source for analyzing this important issue can be found in Kolber and Kay's helpful book analyzing the way that Ireland dealt with the issue of abortion.<sup>4</sup>

These excellent sources agree that there are three ways for a country to achieve abortion rights for women: through the legislature, through the

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<sup>1</sup> Andrea Noguera, *Argentina's Path to Legalizing Abortion: A Comparative Analysis of Ireland, the United States and Argentina*, 25 SW. J. INT'L L. 356 (2019).

<sup>2</sup> Nayla Luz Vacareza's, *Abortion Rights in Uruguay, Chile, and Argentina Movements Shaping Legal and Policy Change*, SW. J. INT'L L. 309 (2023).

<sup>3</sup> Donna Guy, *The Long History of Women's Rights Campaigns in Three South American Countries: The Recent Legal History of Abortion Law in Uruguay, Argentina, Chile*, 29 SW. J. INT'L L. 348 (2023).

<sup>4</sup> KATHRYN KOLBERT & JULIE F. KAY, *CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM* (2021).

courts, or through direct plebiscite. Each of these routes is analyzed in all the sources. Each of them has its strong points and its weak points. Each avenue presents opportunities for U-turns on the road to progress. United States history shows the perils of the judicial route when the forty-nine-year-old precedent of *Roe v. Wade*<sup>5</sup> was overturned when the Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*.<sup>6</sup> Argentine history is currently showing the perils of the legislative route when in February 2024 six deputies from the new president's coalition presented a bill to overturn the 2020 law which legalized abortion.<sup>7</sup> Even the direct plebiscite, the referendum which succeeded in Ireland in 2018, has current problems. The referendum provides for abortion for only the first twelve weeks of pregnancy, and abortion services are not available to all women in all parts of Ireland.<sup>8</sup>

With all of these questions in mind, we can turn to Professor Caroline Beer's thorough analysis of the situation in Mexico. In her article *Abortion Policy in Mexico: A Changing Role for the Supreme Court*, Professor Beer provides us a comprehensive analysis of Mexico's unique road to the goal of providing abortions to the women of Mexico.<sup>9</sup> She begins with a review of the political and judicial history of Mexico. While we in Los Angeles live only 136 miles from Mexico, most of us are completely ignorant of Mexican history, especially political and judicial history. Professor Beer provides us a concise political history starting at the beginning of the twentieth century. I am grateful to her for giving us this political background, because we can't understand the abortion issue without it. She also schools us in the history of the Mexican judiciary and ties it to the democratization going on in Mexico. The history of women's rights in Mexico took a leap forward in 1974 when an "Equal Rights Amendment" to its constitution was passed.<sup>10</sup>

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<sup>5</sup> *Roe v. Wade*, 419 U.S. 113 (1973).

<sup>6</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

<sup>7</sup> Amy Booth, *Milei's deputies present bill to overturn legalization of abortion*, BUENOS AIRES HERALD (Feb. 8, 2024), <https://buenosairesherald.com/society/mileis-deputies-present-bill-to-overturn-legalization-of-abortion>.

<sup>8</sup> Niamh Kennedy & Emily Blumentha, *Five years after Ireland's historic abortion referendum, access to care is still 'patchy'*, CNN WORLD (May 25, 2023, 10:17 AM), <https://www.cnn.com/2023/05/25/europe/ireland-abortion-referendum-5-years-intl-cmd/index.html>. In nine of Ireland's 26 counties, there are fewer than five general practitioners registered to provide abortions.

<sup>9</sup> Caroline Beer, *Abortion Policy in Mexico: A Changing Role for the Supreme Court*, 30 SW. J. INT'L L. 452 (2024).

<sup>10</sup> Constitución Política de los Estados Unidos Mexicanos, CP, Art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 02-12-2024.

I appreciated her discussion of the Amparo, a writ which provides the only access to judicial review.<sup>11</sup> The final level of judicial review is by the Mexican Supreme Court, which is made up of eleven justices who serve fifteen-year terms. To an American like myself, the idea of a fixed term was intriguing. Later in her article, when Professor Beer analyzes the individual votes of the Mexican justices, she raises a unique issue which can arise with term limits. Could a justice's vote be influenced by her ambitions for a position of power after her service on the Supreme Court was over? Could her vote be swayed by the politics of the person or party that she looks to for a job after her term on the highest court has expired?<sup>12</sup> These questions should be considered by anyone considering term limits.

The Mexican process for appointing justices was also explained. The President submits a list of three names to the Senate. Two-thirds of the senators must vote in favor of the candidate to be confirmed. If this doesn't happen, then the President can select one name from the slate to be confirmed. If this doesn't happen, the President submits a second slate. If this second slate is rejected by the Senate, then the President can appoint anyone to the bench. As an American, I wonder what would have happened to our Court under this system!<sup>13</sup> Only two of our nine current justices have received two-thirds of the votes of our senate.

Again, comparing the United States and Mexico, the US has 50 states plus the District of Columbia, whereas Mexico has 31 states and Mexico City. Like individual American states, each Mexican state has its own courts and criminal codes. Like US states, Mexican states are polarized with, as Professor Beer puts it, “[L]eft and right providing radically different visions for the future of Mexico, setting the stage for intense conflict over abortion policy.”<sup>14</sup>

The PAN (National Action Party) is conservative, and the PRD (Democratic Revolution Party) is more liberal. The current president, Andres Manuel Lopez Obrador, broke with the PRD to start a new party called Morena, which can be described as a populist left party, which has

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<sup>11</sup> Beer, *supra* note 9, at 454.

<sup>12</sup> See Beer, *supra* note 9, at 470-71.

<sup>13</sup> The last American justice on the U.S. Supreme Court to get a two-thirds vote was Justice Sotomayor, who received 68 votes in 2009. The only other currently serving justice to receive a two-thirds vote was Chief Justice Roberts in 2005. No other currently serving justice has received the votes of two-thirds of the United States Senate! The next closest to 2/3's was Justice Kagan in 2010 with 63 votes.

<sup>14</sup> Beer, *supra* note 9, at 456.

“demonized the traditional parties, weakened governing institutions, and centralized power.”<sup>15</sup>

Another powerful catalyst to change the law on abortion has been the rise of the feminist movement throughout the world,<sup>16</sup> and Mexico and the United States have both been affected by this movement. As politics churned over the issue of abortion throughout the world, it is notable that, although in all countries the feminist movement of the late 20<sup>th</sup> century and early 21<sup>st</sup> century was working to liberalize abortion laws, still it took the actual plight of a young woman to galvanize the public, and Mexico was no exception.

In many countries, it took the death of a young woman. In Ireland it was Saita Halappanavar, who had to die in 2021 and become the rallying cry for the abortion rights movement.<sup>17</sup> In Argentina, it was Chiara Paez, a fourteen-year-old girl beaten to death and buried by her boyfriend for being pregnant, who became a symbol.

In Mexico it was not the death of a young girl, but the tragedy of a 13-year-old rape victim, named Paulina, who was denied an abortion and forced to carry a baby to term that forced the public to face abortion, and made abortion a political issue.<sup>18</sup> Paulina became a rallying cry, and in 2000 Mexico City added new exceptions to the general abortion law ban. The Supreme Court of Mexico upheld these reforms.<sup>19</sup>

And who is this rallying cry against? Often, it is the Catholic church. This was true in Argentina, Ireland, and Mexico. But religion is powerful. In the United States, religion fought back. A majority of the current Supreme Court justices are Catholic, and the *Dobbs* opinion closes with Justice Alito, a practicing Catholic, saying that “abortion [is a] profound moral question.”<sup>20</sup> The answer to this moral question in the United States was the overturning of *Roe v. Wade* after forty-nine years. This has resulted

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<sup>15</sup> Beer, *supra* note 9, at 457.

<sup>16</sup> See the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>17</sup> KOLBERT & KAY, *supra* note 4, at 164.

<sup>18</sup> Beer, *supra* note 9, at 459.

<sup>19</sup> *Id.*

<sup>20</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 222 (2022). Of the nine current justices, six are practicing Catholics: Roberts, Thomas, Alito, Kavanaugh, Sotomayor, and Barrett. And Gorsuch attended Catholic schools in Washington, D.C. Justice Alito closing the *Dobbs* opinion by calling abortion a moral question raises First Amendment questions of separation of church and state. Because the Catholic church is so identified as being against abortion, and because Alito is a practicing Catholic, his description of the issue as a moral question comes pretty close to that line of separation, perhaps even crossing it.

in the current spate of state trigger laws and restrictions culminating this week in the Alabama Supreme Court ruling that a frozen embryo was a fetus with protectable rights.<sup>21</sup>

A similar backlash has occurred in Mexico, where twenty-one of thirty-two states enacted laws protecting life from the moment of conception. This follows the same pattern as in the United States where pro-life advocates turned to state legislatures to block abortion.

The most extreme of these measures in Mexico and the United States has been to make abortion a crime. By criminalizing abortion, states put women's lives at risk and terrify doctors and hospitals. Mexico City led the march against criminalization with reforms beginning in 2007 which provided for abortion for any reason, free of charge, during the first twelve weeks of pregnancy. This puts the two sides of the argument in stark relief: criminalization of abortion vs. abortion available for free during the first twelve weeks of pregnancy. The march against criminalization was steady throughout the states of Mexico.

By 2024, twelve Mexican subnational entities decriminalized abortion,<sup>22</sup> following the most significant legal step in Mexican legal history when in September of 2023, the Supreme Court of Mexico struck down criminalization of abortion in the federal penal code. The court stated:

[C]riminalization of abortion constitutes an act of gender-based violence and discrimination, as it perpetuates the stereotype that women and people with the capacity to get pregnant can only freely exercise their sexuality to procreate and reinforces the gender role that imposes motherhood as a compulsory destiny.<sup>23</sup>

This is the gold standard in the protection of women's rights. This is a national court ruling that it has the power to overrule any law on the question of abortion, state or federal. It has not yet been achieved in the United States. How did the Mexican Supreme Court do it? The answer to this profound question is the heart of Professor Beer's incisive article. While other writers have hypothesized that the answer lies in the differences among the Mexican states, the varying influence of the Catholic

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<sup>21</sup> See *LePage v. Ctr. for Reprod. Med.*, No. SC-2022-0515, 2024 WL 656591 at \*1-34 (Ala. Feb. 16, 2024).

<sup>22</sup> Compare this to the fifteen U.S. states which the Guttmacher Institute considers "protective, very protective, or most protective" of abortion rights. [States.Guttmacher.org](https://www.guttmacher.org) (last accessed 2/2/24)

<sup>23</sup> Beer, *supra* note 9, at 463.

Church, the ideology of the party in power, and even the strength of feminist groups across the country, Professor Beer zeroed in on the Supreme Court itself. Simply put, Professor Beer gets behind the critical decisions of the court and counts the votes. She charts these votes, justice by justice, with the name of the president who appointed them listed.<sup>24</sup>

The Mexican constitution provides that a two-thirds supermajority is required to overturn local laws. Professor Beer then gives some possible influences which achieved this supermajority. She notes that courts may be more likely to liberalize abortion laws because they are more elite. They focus on legal arguments, rather than religious or moral arguments that might sway a legislature.<sup>25</sup>

She notes the interplay between federal law and state law in Mexico, and she describes the cycles as the system struggles to balance the rights of pregnant people with the rights of a fetus. She cites the example of *Roe v. Wade*<sup>26</sup> as a case where the Court set a high “floor” for women’s rights, which state legislatures spent years to undermine on behalf of the rights of a fetus. Mexico’s experience was different. The move to protect pregnant people’s rights by decriminalizing abortion bubbled up from the states. The federal supreme court could mold and modify the various state laws.<sup>27</sup> Justice Ruth Bader Ginsburg criticized *Roe* for short circuiting this process in the United States. She felt that it seemed “to have stopped the momentum on the side of change.”<sup>28</sup> She would have preferred that abortion rights be secured more gradually in a process that included state legislatures and the courts.<sup>29</sup> This is exactly what happened in Mexico!

Beer then analyzes other critical influences on the Mexican Supreme Court. She credits feminist activism in many forms as having a decisive effect. This activism included legal and professional feminist activists from

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<sup>24</sup> She also lists justices who were absent from critical votes. It would be interesting to have these absences explained. Beer, *supra* note 9, at 474-90.

<sup>25</sup> Beer, *supra* note 9, at 463. Professor Beer notes that courts are insulated from religious pressure and “less responsive to public opinion than legislatures.” *Id.* “Courts have ruled for greater access to abortion throughout Latin America.” *Id.* at 465.

<sup>26</sup> *Roe v. Wade*, 419 U.S. 113 (1973).

<sup>27</sup> Justice Ginsburg made a similar argument criticizing *Roe* when she spoke at the University of Chicago. Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, THE UNIV. CHIC. L. SCH. (May 11, 2013), <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>.

<sup>28</sup> *Id.*

<sup>29</sup> Significantly, and presciently, she was troubled by the fact that *Roe* focused on the right to privacy rather than on women’s rights. Considering the trouble Justice Alito found in *Dobbs* with the right to privacy, she was correct in her misgivings. *Id.*

the Information Group on Reproductive Choice (GIRE). This group, much like the ACLU's Women's Civil Rights Project in the United States, designed the amparo cases and constitutional challenges which served as strategic litigation to further women's rights. Legal activism also included amicus briefs and, most critically, feminist clerks and legal advisors to the court.

Street protests, and direct-action providing information on abortion, and hotlines joined in the effort. In addition, femicide resulted in street protests -- culminating in Mexico City in 2020 on Women's Day, March 8<sup>th</sup>, when nearly 100,000 people marched in protest of the gruesome femicides of Ingrid Escamilla Vargas and 7-year-old Fatima. The National Human Rights Commission Offices were turned into a shelter for victims of violence. While abortion was not the issue here, the criminalization of abortion linked it to these murders, sexual violence being the key.

In addition to feminism in Mexico, Professor Beer attributes the change in the court's attitude toward abortion to what she calls: The Rise of Left Parties.<sup>30</sup> To evaluate the play between these two important factors, Beer gives three hypotheses to explain Mexico's move to national decriminalization of abortion. All three are fascinating, but to an American, her second one is most intriguing because it involves term limits for justices. Could a sitting justice be influenced by the politics of the current president because that president would be the person who gave the justice their next job?<sup>31</sup>

Beer then gives a detailed analysis of the eleven critical cases, beginning in 2002 when the court reviewed Mexico City's exceptions to the ban on abortions for the health of the mother, fetal malformations and nonconsensual artificial insemination, to 2021 when the court found a doctor's rights to refuse to do an abortion unconstitutional. Beer is describing, in detail, the steps taken by the court as it reviews state court opinions and moves, in baby steps, from a position of a total ban on abortion, to a position where abortion is not a crime, and a woman cannot be prosecuted for having one.

Of these eleven steps, seven are full court reviews of state laws' constitutionality, and four are amparo suits not heard by the full court. This

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<sup>30</sup> Beer, *supra* note 9, at 470.

<sup>31</sup> The other two hypotheses are the ideological makeup of the court and intense feminist mobilization. While these other two hypotheses are important, they are not as fascinating to me as the one involving term limits.

amparo process has no equivalent in American Supreme Court cases.<sup>32</sup> Professor Beer analyzes and charts each of these eleven cases and asks why and how the justices changed Mexican law in such a fundamental way.

Can the votes of the justices be predicted by the politics of the president who appointed them? Is it because the Mexican left has been able to change the ideological makeup of the court by mobilizing to determine the person who is elected president? The conclusion is no. “There appears to be very little relationship between the ideology of the president who appoints a justice and the way the justice votes.”<sup>33</sup> This reminds me of President Eisenhower’s reflections on having appointed Earl Warren as the chief justice of the United States.<sup>34</sup>

Could the change be affected by the person who is the current president? Because of the unique feature of Mexican law that justices have term limits, Beer does find that there is some influence exerted by the sitting president. A justice facing the end of her term could be influenced by a sitting president who might be able to offer her a position after the justice left the court.

But Beer closes her fine article with this conclusion:

“The largest factors affecting the changing behavior of the Court is generational change in the Court and the changes in the broader political climate. These changes are largely a consequence of feminist activism.”<sup>35</sup>

What lessons can we Americans take from Mexico’s experience?

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<sup>32</sup> This amparo law was strengthened, refined and re-enacted in 2013. It has been called a “constitutional protection lawsuit” providing for “extraordinary constitutional appeal.” It can be used for the protection of an individual’s constitutional rights. See Norma Gutierrez, *Mexico: New Amparo Law is Enacted*, LIB. CONG. (April 30, 2013), <https://www.loc.gov/item/global-legal-monitor/2013-04-30/mexico-new-amparo-law-is-enacted/> (last accessed Dec. 12, 2024). In my opinion, it has a somewhat similar effect as a writ of habeas corpus.

<sup>33</sup> Beer, *supra* note 9, at 494.

<sup>34</sup> “I have made two mistakes, and they’re both sitting on the Supreme Court.” See William Fassuliotis, *Ike’s Mistake: The accidental Creation of the Warren Court*, VA. L. WKLY, (Oct. 17, 2018), <https://www.lawweekly.org/col/2018/10/17/ikes-mistake-the-accidental-creation-of-the-warren-court>.

<sup>35</sup> Beer, *supra* note 9, at 494.