Research Protocol for Statutory and Constitutional Right to Abortion

Prepared by the Policy Surveillance Program Staff

December 2019
RESEARCH PROTOCOL
December 2019

Statutory and Constitutional Right to Abortion
Abortion Law Project

I. Date of Protocol Creation: December 2019

II. Scope: Compile state laws, regulations, state constitutional provisions, case law, and attorney general opinions that protect the right to seek an abortion up to viability. This dataset is one of 16 datasets examining laws regulating abortion in the United States.

III. Primary Data Collection


b. Dates Covered in the Dataset: This dataset started out as cross-sectional, analyzing the statutory and constitutional rights to abortion as they were in effect at one point in time, December 1, 2018. The datasets were then updated to be longitudinal, covering changes in the law from December 1, 2018 through December 1, 2019.

c. Data Collection Methods: The Policy Surveillance Program Staff (“Team”) building this dataset consisted of four legal researchers (“Researchers”) and one supervisor (“Supervisor”). WestlawNext was used to identify which states had statutory and constitutional abortion protections. Subject matter experts from Guttmacher Institute, Resources for Abortion Delivery, American Civil Liberties Union, Center for Reproductive Rights, National Abortion Federation, and Planned Parenthood Federation of America were consulted to assist with defining the scope of the laws included in the Abortion Law Project.

d. Databases Used: Research was conducted using WestlawNext and state-specific legislature websites. The Researchers also consulted a combination of secondary sources from the Guttmacher Institute

   i. Full text versions of the laws were collected from each respective state legislature website.
e. Search Terms:
   i. Keyword searches and search strings were supplemented by examination of the table of contents of each relevant section of the state law identified for statues and regulations related to state statutory and constitutional abortion protections:
      a. ("abortion" “viability”)
      b. ("abortion" “right”)
      c. ("abortion" “life”)
      d. ("abortion" “health”)
      e. ("abortion" “constitution”)

f. Inclusion and Exclusion Criteria:
   i. Included laws pertaining to state statutory and constitutional abortion protections:
      • State statutes protecting the right to an abortion up to viability or beyond viability in limited circumstances
      • Explicit state constitutional provisions protecting the right to an abortion up to viability or beyond viability in limited circumstances
      • Case law interpreting existing state constitutional provisions to protect the right to an abortion up to viability or beyond viability in limited circumstances
      • Ballot referendum upholding state statutes protecting the right to an abortion up to viability or beyond viability in limited circumstances (NV)
      • Court decisions and attorney general opinions directly affecting enforceability of state statutes protecting the right to an abortion up to viability or beyond viability in limited circumstances. **Citations for relevant court or attorney general opinions were included in the legal text. However, the text of the opinions was not included in the dataset.** Details of relevant court and/or attorney general opinions were captured in caution notes.
   ii. Excluded laws pertaining specifically to:
      • Limitations on the right to an abortion prior to viability.
      • Case law citing protections for abortion based on Roe v. Wade and/or federal constitutional provisions.
IV. Coding

a. Development of Coding Scheme: The Team conceptualized and created the coding questions, then circulated them to the subject matter experts from Guttmacher Institute, Resources for Abortion Delivery, American Civil Liberties Union, Center for Reproductive Rights, National Abortion Federation, and Planned Parenthood Federation of America to review and finalize. When the questions were finalized, the Team entered the questions into the MonQcle, a web-based software coding platform. As the Team developed the coding scheme they recorded the dataset terminology below:

   i. Dataset terminology:
      - “Abortion” is the induced termination of pregnancy by medical or procedural/surgical means.
      - “Fetal anomaly” means fetal anomaly for which there is not a reasonable likelihood of the fetus's sustained survival outside the uterus without extraordinary medical measures.
      - “Viability” means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus sustained survival outside the uterus without the application of extraordinary medical measures.

b. Coding Methods:

   i. The legal text coded was limited to requirements relating specifically to state statutory and constitutional abortion protections. Statutes and regulations that are cited or cross-referenced in these policies were only coded and included in the legal text if necessary to answer a coding question. External third-party “guidelines” incorporated by reference into policies are referenced but not coded or included in the legal text.

   ii. As stated above, citations for relevant court or attorney general opinions were included in the legal text. However, the text of the opinions was not included in the dataset. Details of relevant court and/or attorney general opinions were captured in caution notes.

Below are specific coding rules used when coding the questions and responses in the Statutory and Constitutional Right to Abortion dataset. Note, that this section only lists questions and responses that required further explanation of the question itself, the responses, or to understand specific coding decisions and rules.

Question 1: “Does a state statute or constitutional provision protect the right to an abortion?”

   - States were coded as “yes” if they had statutes explicitly protecting the right to an abortion up to viability.
   - States were coded as “yes” if they had a constitutional provision explicitly protecting the right to an abortion up to viability, or case law interpreting an existing state constitutional provision as protecting the right to an abortion up to viability.
• States were coded as “no” where case law interpreted protections for abortion up to viability based on Roe v. Wade and/or federal constitutional provisions.

Question 2: “Does the state have a statute protecting the right to an abortion up to viability?”
• This question was coded “yes” where a state had an explicit statute protecting the right to an abortion up to viability, where a jurisdiction stated that an individual has a fundamental right to an abortion, or when necessary to preserve the health or life of the woman.

Question 2.1: “Does the statute protect the right to an abortion beyond viability in certain circumstances?”
• “Protect life” was coded where a statute explicitly permits abortion prior to viability when necessary to protect the woman’s life.
• “Protect health” was coded where a statute explicitly permits abortion prior to viability when necessary to protect the woman’s health.
• “Fetal anomaly” was coded where a statute explicitly permits abortion prior to viability in the event of a fetal anomaly.

Question 2.2: “Has the law been limited in whole or in part?”
• This question was coded “yes” where there was a relevant court opinion or attorney general opinion affecting the enforceability of one or more of the protections coded.

Question 2.2.1: “Has the law been limited by a court decision?”
• This question was coded “yes” where there was a relevant court opinion affecting the enforceability of one or more of the protections coded.
• A brief summary of the opinion’s ruling, including which provisions were affected by the ruling, were captured in a caution note.
• Where related court opinions were not in scope of the dataset, this question was coded as “No.”

Question 2.2.2: “Has the law been limited by an attorney general opinion?”
• This question was coded “yes” where there was a relevant attorney general opinion affecting the enforceability of one or more of the protections coded.
• A brief summary of the opinion’s ruling, including which provisions were affected by the ruling, were captured in a caution note.
• Where related attorney general opinions were not in scope of the dataset, this question was coded as “No.”

Question 3: “Does the state’s constitution protect the right to an abortion?”
• States were coded as “yes” if they had a constitutional provision explicitly protecting the right to an abortion up to viability, or case law interpreting an existing state constitutional provision as protecting the right to an abortion up to viability.
States were coded as “no” where case law interpreted protections for abortion up to viability based on Roe v. Wade and/or federal constitutional provisions.

**Question 3.1:** “Does the state constitution have a provision explicitly protecting the right to an abortion?”

- This question was coded “yes” where a state had a constitutional provision explicitly protecting the right to an abortion up to viability.

**Question 3.2:** “Does the state constitution have a provision that has been interpreted by a court to protect the right to an abortion?”

- This question was coded “yes” where a state had case law interpreting an existing state constitutional provision as protecting the right to an abortion up to viability.

**Question 3.2.1:** “What constitutional provision was interpreted to protect abortion?”

- “Right to privacy” was coded where a court interpreted the state constitution to protect the right to a pre-viability abortion based on the right to privacy.
- “Right to due process” was coded where a court interpreted the state constitution to protect the right to a pre-viability abortion based on the right to due process.
- Citations for relevant court opinions were included in the legal text. However, the text of the opinions was not included in the dataset. Details of the relevant court opinions were captured in caution notes.

**V. Quality Control – 2018**

**a. Quality Control – Background Research:** All 51 jurisdictions were 100% redundantly researched to confirm that all relevant laws were being collected by the Researchers. The Researchers independently recorded the relevant citations on a Master Sheet for each jurisdiction that had state statutory and constitutional abortion protections. The Master Sheet includes the most recent legislative history for the statute, regulation, case and/or attorney general opinion as well as its effective date. The Supervisor reviewed the original Master Sheet against the redundant Master Sheet, and the Team resolved all divergences (differences between research findings) prior to collecting the legal text.

i. The research showed that 14 of 51 jurisdictions [AK, CA, CT, DE, FL, HI, KS, MD, ME, MN, MS, MT, NV, WA] have state statutory or constitutional abortion protections.

**b. Quality Control – Original Coding:** Quality control consisted of the Supervisor exporting the data into a Microsoft Excel document as the Researchers completed coding to examine the data for any missing responses, citations, and caution notes.

**c. Quality Control – Redundant Coding:** Quality control consisted of the Supervisor exporting the data into a Microsoft Excel document after the Researchers coded and redundantly coded to examine the data for divergences (differences between the
coded responses). The Team discussed and resolved all divergences for each Batch of states detailed below.

- **Redundant Coding for Batch One**
  The Supervisor assigned Batch One [AL, AZ, FL, KS, MO, OK, SD, TX, WV, WI] for redundant coding and the rate of divergence was 4.4% on May 21, 2018.

- **Redundant Coding for Batch Two**
  The Supervisor assigned Batch Two [AK, AR, CA, CO, CT, DE, DC, GA, MT, TN, UT, VA, VT, WA, WY] for redundant coding and the rate of divergence was .39% on August 28, 2018.

- **Redundant Coding for Batch Three**
  The Supervisor assigned Batch Three [NE, NV, NH, NJ, NM, NY, NC, ND, PA, RI, SC, OR, OH, KY, IN] for redundant coding and the rate of divergence was 17.6% on October 22, 2018.

- **Redundant Coding for Batch Four**
  The Supervisor assigned Batch Four [HI, ID, IL, IA, LA, ME, MD, MA, MI, MN, MS] for redundant coding and the rate of divergence was 2.94% on December 7, 2018.

- **Quality Control – Post-Production Statistical Quality Control (SQC):** The Supervisor typically runs a statistical quality control procedure after each dataset is completed. However, since this dataset was redundantly coded at 100% and the Team had a subject matter expert repeatedly checking the validity of the coding, there was no post-production statistical quality control check.

- **Quality Control – Final Data Check:** The Team checked the final coding against secondary sources from Guttmacher. Each divergence was discussed as a group and resolved. Prior to publication, the Supervisor downloaded all coding data into Microsoft Excel to do a final review of coding answers, statutory and regulatory citations, and caution notes. All unnecessary caution notes were deleted, and all necessary caution notes were edited for publication.

**VI. Quality Control – 2019 Update**

- **Quality Control – Background Research:** All 51 jurisdictions were researched to collect amendments to existing statutory and constitutional rights to abortion, new case law/AG opinions, and/or newly enacted statutes and constitutional provisions establishing a right to abortion since December 1, 2018. The Researchers consulted a combination of secondary sources (Guttmacher.org, Center for Reproductive Rights, ANSIRH) to verify changes to the law in this domain.

- **Quality Control – Original Coding:** Quality control consisted of the Supervisor exporting the data into a Microsoft Excel document once the Researcher completed coding to examine the data for any missing responses, citations, and caution notes.

- **Quality Control – Redundant Coding:** Quality control consisted of the Supervisor exporting the data into a Microsoft Excel document once the Researchers completed
redundant coding to calculate divergence rates. 100% of the records with substantive updates to the law were redundantly coded.

i. **Redundant Coding**: The Supervisor assigned 7 records for redundant coding and the rate of divergence was 4%. The Team discussed and resolved all divergences.

d. **Quality Control – Final Data Check**: The Team checked the final coding against secondary sources from Guttmacher. Prior to publication, the Supervisor downloaded all coding data into Microsoft Excel to do a final review of coding answers, statutory and regulatory citations, and caution notes. All unnecessary caution notes were deleted, and all necessary caution notes were edited for publication.