

ABORTION IN AMERICA:

How Legislative Overreach
Is Turning Reproductive Rights
Into Criminal Wrongs

NATIONAL
ASSOCIATION
OF CRIMINAL
DEFENSE LAWYERS



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Into Criminal Wrongs

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ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NACDL FOUNDATION FOR CRIMINAL JUSTICE

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal legal system.

NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

NACDL members — and its 90 state, local, and international affiliates — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to promoting fairness in America's criminal legal system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and practices.

The NACDL Foundation for Criminal Justice (NFCJ) is a 501(c)(3) charitable non-profit organized to preserve and promote the core values of the American criminal legal system guaranteed by the Constitution — among them access to effective counsel, due process, freedom from unreasonable search and seizure, the right to a jury trial, and fair sentencing. The NFCJ supports NACDL's efforts to promote its mission through resources, education, training, and advocacy tools for the public, the nation's criminal defense bar, and the clients they serve.



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PREFACE

Over the course of the past 15 years, the National Association of Criminal Defense Lawyers (NACDL) implemented a strategic decision to be proactive in tackling the problems that afflict the U.S. criminal legal system. Rather than merely reacting to harmful laws, decisions, policies, and procedures, NACDL has undertaken careful study of a wide array of issues to expose underlying problems, elevate and influence discourse, and prevent or mitigate harm to the public. This report on abortion overcriminalization is the 43rd major report published by NACDL since 2009. Each of these reports is intended to advance NACDL's vision of a society where all individuals receive fair, rational, and humane treatment within the criminal legal system and its mission to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

Perhaps more so than any of the previous 42 reports, this Report addresses one of the most politically and socially charged subjects in this nation: the right of a woman to lawfully obtain an abortion. The purpose of this Report is not to wade into the maelstrom of fervently held views on the propriety of abortion, nor to suggest that all NACDL members share a common view. Rather it is intended to sound an alarm bell about a wave of expansive prosecutions that will likely follow any significant curtailment or reversal of *Roe v. Wade*. A close analysis of existing and emerging state law belies the common perception that enforcement will be limited to abortion providers and irrefutably shows that erosion of a precedent that has stood for nearly half a century may well open the floodgates to massive overcriminalization. And that is one subject on which NACDL speaks with a united voice. Irrespective of the context, the overly broad use of criminal penalties to regulate all manner of disfavored economic, personal, or social behavior has produced mass incarceration and devastating collateral consequences that have disproportionately impacted minorities and the poor. This Report calls attention to the fact that the nation stands on the precipice of yet another wave of overcriminalization that will exacerbate these problems.

Norman L. Reimer

Executive Director, NACDL

FOREWORD

In the past few years, numerous states have passed laws prohibiting abortions at earlier and earlier stages of pregnancy. In the spring of 2021, Texas banned abortion after six weeks of pregnancy. The Texas governor then signed into law a statute that grants “any person” the right to sue an abortion provider or those who help someone access an abortion, including non-Texas residents and those with no connection to a patient.

While these laws are clearly unconstitutional under current Supreme Court precedent, this may soon change. Indeed, the Supreme Court recently agreed to hear *Dobbs v. Jackson Women’s Health Organization*, challenging Mississippi’s 15-week abortion ban. Now dominated by Justices opposed to abortion, the Supreme Court is poised to significantly narrow, or possibly obliterate *Roe v. Wade*, the 1973 decision recognizing a fundamental right to choose to have an abortion. This is big news to those concerned with the abortion issue. But why does this matter to NACDL?

The answer is that existing criminal laws, many of which include the redefinition of “person” to include the “unborn,” are already fueling arrests of pregnant women and new mothers. NACDL, an organization that has been a leader for more than 15 years in the fight against overcriminalization, recognized that the rash of new laws restricting abortions and the possibility that *Roe* could be overturned has the potential for vastly expanding this trend.

In light of this, NACDL empowered a task force to look beyond the question of access to abortion services and to assess the extent to which anti-abortion measures will impact the phenomenon of overcriminalization. When subjected to the careful analysis provided by the task force, it becomes clear that these measures will open the door to mass criminalization on an unprecedented scale and without the need for new legislative action of the kind that provided the basis for the war on drugs.

President Nixon’s 1971 declaration of the war on drugs opened the door to a new era of mass incarceration, overcriminalization, and an expansion of federal and state law enforcement agencies’ powers of investigation and surveillance. This law enforcement apparatus did not exist in pre-*Roe* America, but it will most certainly be deployed in a post-*Roe* America to target both the abortion providers and the people seeking and having abortions.

According to this Report, there are now more than 4,450 crimes in the federal criminal code, tens of thousands of state criminal provisions — including criminal abortion laws — still on the books, as well as state conspiracy, attempt, and accomplice statutes that could subject a wide range of individuals to criminal penalties if *Roe* is overturned. Moreover, states increasingly have laws narrowly circumscribing what constitutes a legal abortion. These laws limit abortions to certain weeks of gestation and regulate providers in every way possible. They impose requirements that dramatically decrease access to legally approved abortions. And they often include provisions putting into law the fiction that fertilized eggs, embryos, and fetuses, still inside the pregnant woman’s body, are already separate persons with independent rights. In addition, 39 states have criminal laws giving fertilized eggs, embryos, and fetuses the status of separate crime victim. While these laws limit their punitive reach to third parties who attack pregnant women or perform illegal abortions on them, recent arrests of women in Alabama, Indiana, and California make clear that these limitations are easily ignored.

In any event, none of these laws will stop women from having abortions; nor will they stop people from caring about or providing help to the people who get pregnant. All of these people, and especially Black and Brown people who are already disproportionately subject to over-policing in all contexts including those involving pregnancy, are particularly likely to be targeted for arrest and prosecution.

Few people, however, have considered the impact of abortion laws on criminalization. Indeed, this Report's conclusions run counter to the dominant abortion narratives on both sides of the debate. Those defending abortion typically focus on access to abortion services, describing the barriers to care and the significant harms to health and dignity that will result from further limiting or outlawing abortion. Those who oppose abortion characterize it as murder, simultaneously stigmatizing those who have abortions as criminals, and yet claiming that no woman who had an abortion before *Roe* was arrested and none will be after it is overturned.

Shirley Wheeler's arrest and conviction for manslaughter for having an illegal abortion in Florida in 1970 clearly contradicts this narrative.¹ And while many anti-abortion activists continue to claim their purpose is to protect women and not have them arrested, in fact, research shows that "pro-life," often means pro-prosecution.

For example, Texas Congressman Ron Wright has stated that he "**absolutely**" believes women should be punished for having abortions.² Catherine Davis, founder of the anti-abortion Restoration Project, said she wouldn't rule out one day punishing women who **induce their own** abortions. "If she decides to self-abort herself, then she's subjected to the same penalty as the doctor" said Davis who "believes abortion should be treated exactly like murder — up to and including capital punishment."³

It is in this context that the Supreme Court is considering the third abortion case in five years. In the first two cases, *Whole Women's Health v. Hellerstedt* and *June Medical Center v. Gee*, Texas and Louisiana defended their abortion restrictions by arguing that they protected "women's health," an argument even a conservative Supreme Court did not buy. Now, Mississippi is pulling the curtain back and sharing the true intent behind the ban. While continuing to claim that the law "promotes women's health" they are now admitting that its purpose is also to "**protect the unborn.**"⁴ And as my organization, National Advocates for Pregnant Women, has found, "protecting the unborn" is the excuse prosecutors and judges are already using as the basis for judicially expanding criminal laws and permitting prosecutions based on pregnancy and its outcomes, including abortion. *Roe*, however, continues to provide some protection against full-scale criminalization.

As this Report concludes, "the nation stands at the precipice of an extraordinary new wave of criminalization" with states prepared to arrest and prosecute abortion providers, people who have abortions, their family members, and all those who assist them. This vital Report provides compelling reasons to recognize that the abortion issue is also a criminal justice issue and, on that basis, to oppose anti-abortion legislation and any attempt to overturn *Roe v. Wade*.



Lynn M. Paltrow

Executive Director

National Advocates for Pregnant Women

1 NAPW: The Case of Shirley Wheeler <https://www.youtube.com/watch?v=6PSX7XweRaQ>

2 <https://reproaction.org/action/congressmans-racism-and-anti-abortion-views-go-hand-in-hand/>

3 <https://www.npr.org/2020/10/27/927862869/a-world-without-legal-abortion-how-activists-envision-a-post-roe-nation>

4 <https://www.nytimes.com/2021/05/17/us/politics/supreme-court-to-hear-abortion-case-challenging-roe-v-wade.html>

ACKNOWLEDGEMENTS

This timely and critically important Report was an undertaking of a subcommittee of NACDL's Women in Criminal Defense Committee. The members of the subcommittee were Nina J. Ginsberg, Lindsay A. Lewis, and C. Melissa "Missy" Owen. These subcommittee members, together with Nina Ginsberg's Associate Zachary A. Deubler, authored this Report. In addition, NACDL and this subcommittee extend special thanks to Lynn M. Paltrow, Executive Director of the National Advocates for Pregnant Women (NAPW). Paltrow provided significant assistance to the subcommittee as a contributing author and also authored the Foreword to this Report.

An important part of this project was the creation of nine state-level appendices analyzing relevant statutes in the key states of Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Utah. These appendices are available at www.NACDL.org/AbortionCrimReport. NACDL and the subcommittee express their gratitude to the individuals who contributed to these state-level appendices: Erin Atkins, Jessica Carmichael, Zachary A. Deubler, Daniella Gordon, Melissa Madrigal, Lindsay A. Lewis, Veronica O'Grady, C. Melissa "Missy" Owen, Kristina Supler, and Madison Woschkolup.

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NACDL thanks the Foundation for Criminal Justice and various other donors whose financial support helped make this important project possible.

KEY FINDINGS

- ◆ If *Roe v. Wade* is overturned it will result in a near complete ban on abortion in several states, vastly expanding the potential for criminal charges to be brought against those participating in or performing abortions in those states.
- ◆ State laws redefining “personhood,” to include an unborn child within the definition of a “person” or “human being” have been used to dramatically alter the scope of criminal liability in states in which such seemingly minor definitional changes have occurred, expanding the reach of criminal liability for serious offenses such as homicide, feticide, aggravated assault, as well as many other crimes, and in certain states they also threaten to expand the scope of criminal liability for the performance or receipt of an abortion.
- ◆ Although the majority of state statutes make explicit that their laws do not create criminal liability for women who receive abortions, proposed anti-abortion legislation and existing criminal statutes in states across the country will in fact subject women to criminal prosecutions and incarceration for their pregnancy outcomes including abortion.
- ◆ Existing state conspiracy, attempt, and accomplice liability statutes subject a wide range of individuals, beyond the women seeking abortions and the doctors performing them, to criminal penalties; such liability will only further expand if *Roe v. Wade* is overturned.
- ◆ Proposed anti-abortion legislation disproportionately impacts poor women, Black women, and other women of color, highlighting the deeply sexist, racist, and classist nature of the recent and proposed new anti-abortion laws, and the manner in which such laws will contribute to the problem of systemic racism and classism within the criminal legal system.
- ◆ Anti-abortion laws, if permitted to go into effect, and/or a Supreme Court decision overturning *Roe v. Wade* will lead to rampant overcriminalization through regulatory enforcement and to mass incarceration on an unprecedented scale.
- ◆ In many states, additional legislative action is not required for recent abortion legislation to take effect. As such, *Roe v. Wade* may be the only safeguard preventing the vast expansion of criminal liability in relation to pregnancy and the performance of an abortion.

NACDL State Survey and Report on the Criminalization of Abortion: Analyzing the Impact of State Anti-Abortion Legislation, Criminal Statutes, and a Supreme Court Decision Overturning *Roe v. Wade* on Criminal Prosecutions, and the Implications for Overcriminalization

I. Introduction and Overview of the Report

The United States prosecutes and incarcerates on an unprecedented scale. The federal government and the states utilize the criminal law to regulate all manner of disfavored social, personal, and economic behavior. As an organization whose members see the devastating consequences of this misguided public policy on a daily basis, NACDL has long opposed overcriminalization. With over 4,450 crimes scattered throughout the federal criminal code, geometrically increased with untold numbers of federal regulatory criminal provisions, and matched by tens of thousands of state criminal provisions, the nation's addiction to criminalization backlogs the judiciary, overwhelms public defense capacity, and overflows the nation's jails and prisons. The effort to rein in overcriminalization has garnered support from across the ideological spectrum.¹ Yet, largely unrecognized by the general public, the nation stands at the precipice of an extraordinary new wave of criminalization.

With over 4,450 crimes scattered throughout the federal criminal code, geometrically increased with untold numbers of federal regulatory criminal provisions, and matched by tens of thousands of state criminal provisions, the nation's addiction to criminalization backlogs the judiciary, overwhelms public defense capacity, and overflows the nation's jails and prisons.

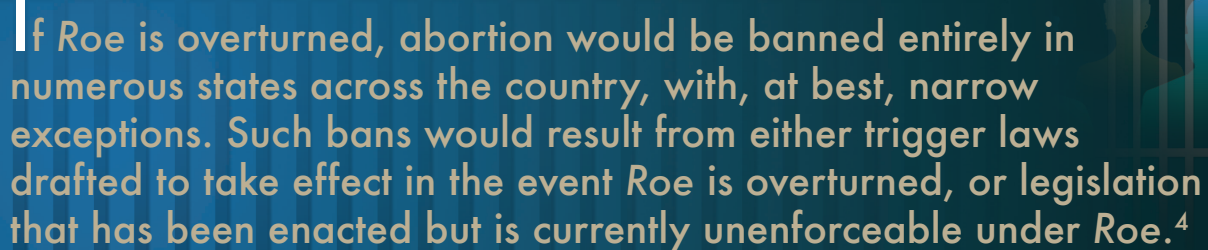
This report examines anti-abortion laws in a number of key states, specifically considering their impact on arrests and prosecutions of people seeking and providing abortions, as well as those who help them. At the outset it must be noted that there is already a significant amount of criminalization in relationship to pregnancy and its outcomes, including abortion, that receives relatively little notice.² As research has already demonstrated, law enforcement officials have a vast array of criminal laws that are already on the books, including murder, manslaughter, feticide, child abuse, child endangerment, chemical endangerment, and delivery of drugs to a minor that have already been employed against women for their pregnancies and pregnancy outcomes including abortion.³ The research presented in this report shows, however, that regardless of one's views on abortion, new anti-abortion laws and the possibility that *Roe v. Wade*, 410 U.S. 113 (1973) will be overturned opens the door to mass criminalization on an unprecedented scale and without even the necessity of new legislative action of the kind that provided the basis for the war on drugs.

II. Report Findings

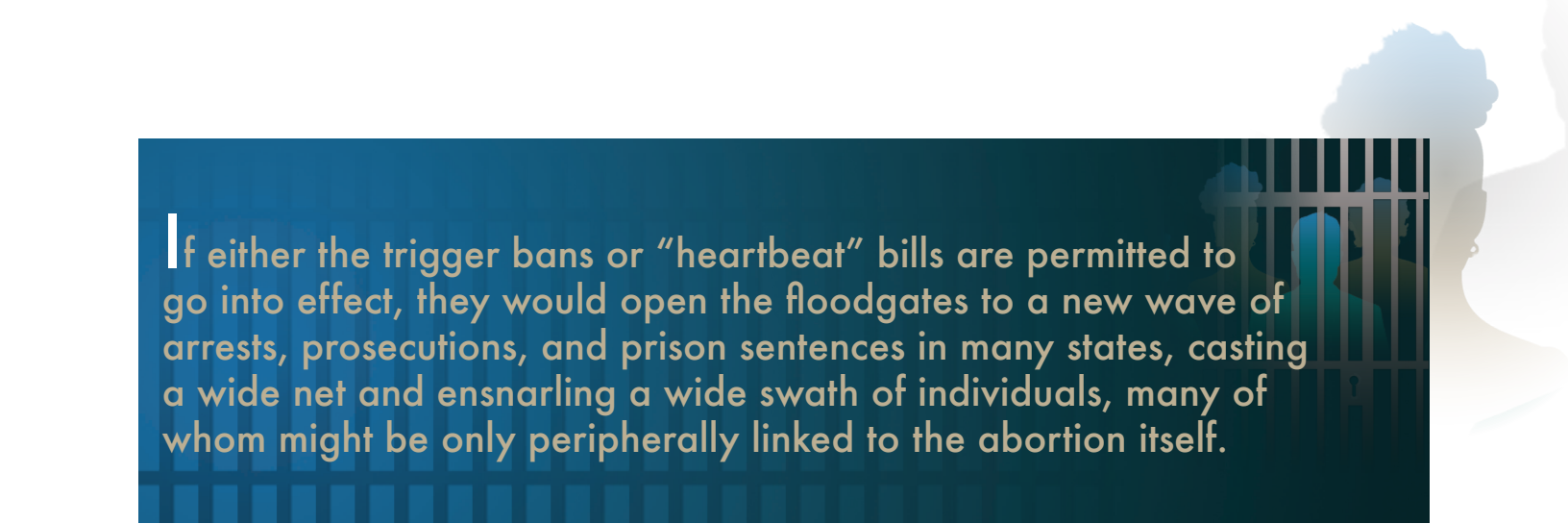
The research conducted in preparing this Report supports the following general findings regarding the impact that recently-enacted abortion legislation, passed as either trigger laws or laws that are currently not being enforced, and a decision overturning *Roe v. Wade* would have on not only those seeking or providing abortions, but on the U.S. criminal legal system generally.

- 1. If *Roe v. Wade* is overturned it will result in a near complete ban on abortion in several states, vastly expanding the potential for criminal charges to be brought against those participating in or performing abortions in those states.**

As discussed in detail below, if *Roe* is overturned, abortion would be banned entirely in numerous states across the country, with, at best, narrow exceptions. Such bans would result from either trigger laws drafted to take effect in the event *Roe* is overturned, or legislation that has been enacted but is currently unenforceable under *Roe*.⁴ Many of these laws have been enjoined and found unconstitutional under existing state law precedent, but that could also change if *Roe* is overruled. A number of other states, such as Georgia, Louisiana, Kentucky, Missouri, Mississippi, and Ohio have also passed legislation outlawing abortion once a fetal heartbeat can be detected, often before a woman would even know she was pregnant. These so-called “heartbeat” bills have been enjoined and found unconstitutional under existing precedent. That could also change if *Roe* is overturned, creating yet another avenue for a near total ban on abortion in affected states. If either the trigger bans or “heartbeat” bills are permitted to go into effect, they would open the floodgates to a new wave of arrests, prosecutions, and prison sentences in many states, casting a wide net and ensnaring a wide swath of individuals, many of whom might be only peripherally linked to the abortion itself.



If *Roe* is overturned, abortion would be banned entirely in numerous states across the country, with, at best, narrow exceptions. Such bans would result from either trigger laws drafted to take effect in the event *Roe* is overturned, or legislation that has been enacted but is currently unenforceable under *Roe*.⁴



If either the trigger bans or “heartbeat” bills are permitted to go into effect, they would open the floodgates to a new wave of arrests, prosecutions, and prison sentences in many states, casting a wide net and ensnaring a wide swath of individuals, many of whom might be only peripherally linked to the abortion itself.

- 2. State laws redefining “personhood,” to include an unborn child within the definition of a “person” or “human being” have been used to dramatically alter the scope of criminal liability in states in which such seemingly minor definitional changes have occurred, expanding the reach of criminal liability for serious offenses such as homicide, feticide, aggravated assault, as well as many other crimes, and in certain states they also threaten to expand the scope of criminal liability for the performance or receipt of an abortion.**


Arkansas, Kentucky, Mississippi, Alabama, and South Carolina are all states that have redefined “personhood”⁵ or such terms as “child”⁶ in the context of existing state statutes, expanding the scope of criminal liability for purposes of the entire state code, and resulting in increased arrests, prosecutions, and prison sentences for crimes related to abortions or purported harm or risk of harm to a fetus. This includes pregnant women even under laws that proscribe the use of the criminal law to prosecute them.

Georgia has also redefined personhood through its “heartbeat” bill to include “an unborn child with a detectible human heartbeat,” with similar intended consequences. The law, which was scheduled to go into effect on January 1, 2020, is currently enjoined.⁷ Were Georgia’s “heartbeat” bill to go into effect and the definition of “personhood” expanded, the state would likely see a large uptick in serious felony prosecutions, as well as an increase in death eligible cases related to pregnant people and the outcomes of their pregnancies.⁸

3. Although the majority of state statutes make explicit that their laws do not create criminal liability for women who receive abortions, proposed anti-abortion legislation and existing criminal statutes in states across the country will in fact subject women to criminal prosecutions and incarceration for their pregnancy outcomes including abortion.

Whether as a result of self-abortion, a miscarriage or stillbirth allegedly caused by some action including alcohol use, drug use, or a physical altercation, an omission, such as lack of prenatal care or hospital-based birth, or the birth of a baby that was exposed to some risk of harm while in utero, pregnant women in states such as Arkansas, Alabama, Utah, Mississippi, and Ohio are being aggressively targeted through state criminal and anti-abortion statutes. Increasingly, pregnant women are subjected to arrest, prosecution, and incarceration for crimes that run the gamut from child and chemical endangerment to First Degree Murder despite the fact that many state statutes criminalizing abortion purport to reach only those who perform the abortion.⁹ For instance, under Mississippi's first degree murder statute, it seems likely that the State could prosecute a woman for a self-induced abortion in the same manner that it would be able to prosecute a doctor performing an abortion.¹⁰ A woman who uses a criminalized drug during her pregnancy and coincidentally experiences a miscarriage or stillbirth could also be charged under the State's second-degree murder and manslaughter statutes.¹¹ Indeed, Mississippi has already prosecuted women for depraved heart murder and manslaughter where their pregnancies resulted in stillbirth allegedly as the result of using a criminalized drug, and another woman was prosecuted for second degree murder after experiencing a stillbirth at home that was thought to have been the result of the use of a medication that can safely and effectively end a pregnancy.¹²

Whether as a result of self-abortion, a miscarriage or stillbirth allegedly caused by some action including alcohol use, drug use, or a physical altercation, an omission, such as lack of prenatal care or hospital-based birth, or the birth of a baby that was exposed to some risk of harm while in utero, pregnant women in states such as Arkansas, Alabama, Utah, Mississippi, and Ohio are being aggressively targeted through state criminal and anti-abortion statutes. Increasingly, pregnant women are subjected to arrest, prosecution, and incarceration for crimes that run the gamut from child and chemical endangerment to First Degree Murder despite the fact that many state statutes criminalizing abortion purport to reach only those who perform the abortion.⁹



Consequently, anyone working at an abortion clinic could be considered to have aided and abetted in the commission of the illegal abortion, and thus could be prosecuted as a principal — from the receptionist who scheduled the appointment to the nurse who assisted the physician. Liability could also extend to the person who drove the pregnant woman to the clinic, the person who paid for the procedure, the friend or loved one who counseled the women to obtain the abortion, and to countless others.

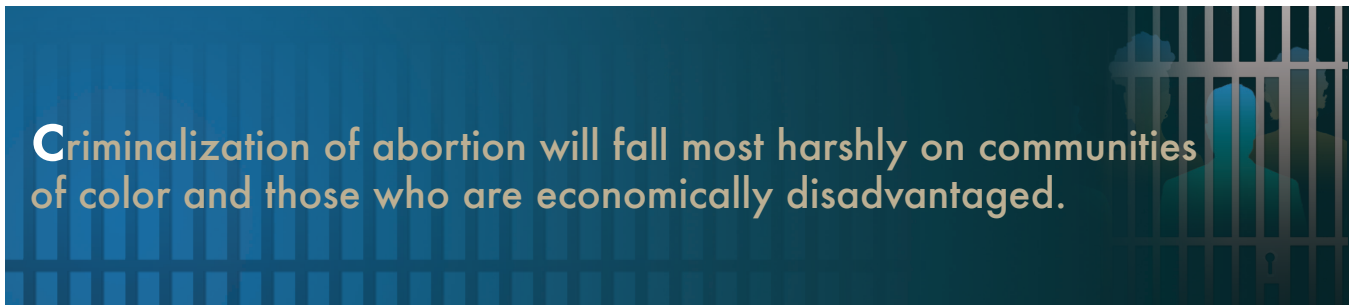
4. Existing state conspiracy, attempt, and accomplice liability statutes subject a wide range of individuals, beyond the women seeking abortions and the doctors performing them, to criminal penalties; such liability will only further expand if *Roe v. Wade* is overturned.

Criminal statutes currently in effect in states across the country already subject a multitude of individuals beyond abortion providers to criminal prosecution and incarceration for crimes related to the performance of an abortion.¹³ Such laws often treat even minor participants no differently than the abortion providers themselves and impose penalties equally as severe.¹⁴ Louisiana law provides a particularly extreme example — though it is far from the only state with such extreme laws on its books. La.Rev.Stat. §14.24, Louisiana’s accomplice liability statute, defines principals to a crime as “all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime,” therefore making it possible for Louisiana state prosecutors to charge anyone even remotely connected to an illegal abortion as a principal to that crime.¹⁵ Consequently, anyone working at an abortion clinic could be considered to have aided and abetted in the commission of the illegal abortion, and thus could be prosecuted as a principal — from the receptionist who scheduled the appointment to the nurse who assisted the physician. Liability could also extend to the person who drove the pregnant woman to the clinic, the person who paid for the procedure, the friend or loved one who counseled the women to obtain the abortion, and to countless others.

Louisiana’s abortion law bans abortions after 20 weeks. Punishment for a violation of that ban could result in up to two years’ imprisonment.¹⁶ If *Roe* were to be overturned and Louisiana’s trigger law permitted to go into effect, abortion would become illegal at any point in a pregnancy, with only the most narrow of exceptions, resulting in a greater number of prosecutions of abortion providers, but also of those individuals in a multitude of other categories, who would fall under the broad scope of the state’s statutes. Should *Roe* be overturned, other states with similar statutes and trigger laws would also see a dramatic increase in criminal prosecutions of minor third-party participants.

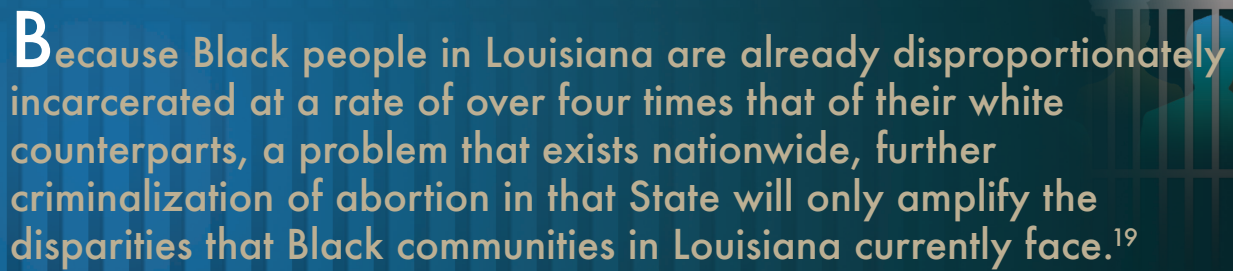
5. Proposed anti-abortion legislation disproportionately impacts poor women, Black women, and other women of color, highlighting the deeply sexist, racist, and classist nature of the recent and proposed new anti-abortion laws, and the manner in which such laws will contribute to the problem of systemic racism and classism within the criminal legal system.

As discussed in this Report, it is well-supported that the effects of further criminalization of abortion will fall most harshly on communities of color and those who are economically disadvantaged. A 2013 study by the National Advocates for Pregnant Women found that women subjected to arrests and detentions related to their pregnancies and pregnancy outcomes were overwhelmingly economically disadvantaged, and that African American women were significantly more likely to be arrested, reported to authorities by hospital staff, and subjected to felony charges.¹⁷



Such findings are likely to be borne out in individual states. In Louisiana, for instance, Black women received more than 62 percent of abortions in 2015, establishing the strong likelihood that Black women will be most severely impacted by any abortion restrictions imposed in that State.¹⁸ Moreover, because Black people in Louisiana are already disproportionately incarcerated at a rate of over four times that of their white counterparts, a problem that exists nationwide, further criminalization of abortion in that State will only amplify the disparities that Black communities in Louisiana currently face.¹⁹

The disproportionate impact that criminalizing abortion will have on economically disadvantaged communities is likely to be similar. Research shows that “[i]n 2011, the rate of unintended pregnancy for women age 15 to 44 with incomes below the poverty level was more than five times that of women with incomes 200 percent or higher above the poverty level.”²⁰ In addition, “[i]n 2014, 49 percent of abortion patients in the United States had incomes below the federal poverty level.”²¹ These disparities in unintended pregnancy and abortion rates based on income are compounded by other barriers that lower income women seeking abortions routinely face. For example, lower income women “are more likely to have to drive more than an hour to reach an abortion provider” and “a majority are also subject to state waiting-period laws” which tend to require multiple trips to the abortion clinic and increase the costs associated with complying with abortion laws and restrictions, including missed income and/or childcare costs.²² These same women would also be less likely to be able to afford to travel out of state to obtain a legal abortion, if necessary. The result would be that greater numbers of lower income women would be forced to seek illegal abortions within their state, subjecting these women, but also those supporting their efforts, to potential criminal liability and increasing the disparity in incarceration rates based on income.



Because Black people in Louisiana are already disproportionately incarcerated at a rate of over four times that of their white counterparts, a problem that exists nationwide, further criminalization of abortion in that State will only amplify the disparities that Black communities in Louisiana currently face.¹⁹

Accordingly, the further over-regulation and criminalization of abortion will exacerbate the already significant inequities that exist within the criminal legal system as they relate to Black, Hispanic, and other economically disadvantaged communities.

6. Anti-abortion laws, if permitted to go into effect, and/or a Supreme Court decision overturning *Roe v. Wade* will lead to rampant overcriminalization through regulatory enforcement and to mass incarceration on an unprecedented scale.

As discussed in this Report, among the categories of legislation which will most dramatically impact the criminal legal system is legislation that does not seek an outright ban on abortion, but rather attempts to end abortion access by imposing medically unnecessary restrictions on abortion providers and the locations where abortions may be performed that would effectively prevent most, if not all, abortion providers in their states from performing abortions. These laws are known as “Targeted Regulations of Abortion Providers,” or “TRAP” laws. If an effective ban on abortion were to be achieved through such legislation in a particular state, it would not only impact the ability of a woman in that state to legally obtain an abortion, but could also prevent women in surrounding states with abortion restrictions from legally obtaining abortions, thus increasing the likelihood these women would instead attempt to obtain illegal abortions in their own states and face criminal prosecutions for illegal abortions in numerous states. In fact, whether anticipating the impact of full bans or the impact of TRAP laws on abortion, it is important to note that during the 1960s, before *Roe v. Wade* was decided, between 200,000 and 1,200,000 illegally induced abortions were performed each year in the United States.²³

Among the categories of legislation which will most dramatically impact the criminal legal system is legislation that does not seek an outright ban on abortion, but rather attempts to end abortion access by imposing medically unnecessary restrictions on abortion providers and the locations where abortions may be performed that would effectively prevent most, if not all, abortion providers in their states from performing abortions.

The Supreme Court put the brakes on targeted regulation of abortion in *Whole Woman's Health v. Hellerstedt*, 36 S. Ct. 2292 (2016), setting the standard for analyzing TRAP laws. Most recently the Supreme Court declined to overturn *Whole Women's Health* in *June Medical Services v. Russo*,²⁴ reversing a Fifth Circuit decision that would have required abortion providers in Louisiana to have admitting privileges at nearby hospitals and would likely have forced all but one abortion clinic in Louisiana to close, making abortion functionally unavailable for most women in Louisiana. Because the clinic bringing suit served patients from Louisiana, as well as neighboring states, Louisiana's licensing law could have also prevented women in Texas, Mississippi, and Oklahoma from obtaining legal abortions. The decision in *June Medical Services* does not lessen the risk that such regulatory statutes pose if *Roe* is overturned or if *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁵ is newly interpreted to permit virtually all regulations by a less hospitable Court.

7. In many states, additional legislative action is not required for recent abortion legislation to take effect. As such, *Roe v. Wade* may be the only safeguard preventing the vast expansion of criminal liability in relation to pregnancy and the performance of an abortion.

As discussed in this Report, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, North Dakota, Missouri, Tennessee, South Dakota, and Utah all have trigger laws that would automatically ban abortion in the first and second trimesters if *Roe v. Wade* were overturned. Indeed, some states, such as Missouri, have gone even further to ensure that laws banning abortion will go into effect without further legislative intervention, enacting fallback provisions which would move the gestational age trigger back incrementally.²⁶ Each of these provisions contain criminalization language identical to that found in Missouri's 8-week abortion ban.²⁷

Still other states that do not have trigger laws, such as Alabama, have instead enacted anti-abortion legislation prohibiting nearly all abortions that remains unenforceable until *Roe* is overturned, as do the often severe criminal penalties that attach to these statutes. In Alabama, a presently unenforceable, near complete ban on abortion, currently regarded as the most restrictive law in the country, would automatically go into effect if *Roe* is overturned.²⁸

Thus, a decision overturning *Roe* would almost immediately alter the landscape of abortion access across the United States and trigger an unprecedented wave of overcriminalization and mass incarceration in relation to abortion and pregnancy outcomes.

III. Legislative Overview of State Abortion-Related Statutes

In recent years, there has been a concerted effort by a substantial number of states to limit a woman's access to abortion. Although one cannot confidently predict how a Supreme Court justice will rule on any issue, recent Supreme Court appointments were made with the express intent of identifying nominees who are believed to be hostile to *Roe*, thereby increasing the likelihood that state legislation to criminalize abortion will succeed and will alter the landscape of abortion access in the foreseeable future. Though each of the states discussed in this Report have legislated their own abortion prohibitions, bans, and regulations, they have all largely enacted versions of the following types of laws: (1) blanket abortion bans triggered by a Supreme Court decision overturning *Roe v. Wade*; (2) fetal heartbeat bills and/or gestational age bans; (3) legislation re-defining the meaning of "personhood"; (4) "anti-discrimination" abortion prohibitions; and (5) procedural/regulatory obstacles to obtaining an abortion.

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If *Roe* is overturned, many of the abortion laws now enjoined by various courts around the country would take immediate effect. The statutes discussed in this Report are not intended to represent an exhaustive list of every "anti-abortion" law throughout the country, but instead were chosen to provide an overview of how states are choosing to proceed with their hostile abortion policy agenda and how these laws will inevitably lead to overcriminalization and mass incarceration, as discussed in the following section.

A. Triggering Legislation

Many states have enacted so called "triggering legislation;" legislation that is not enforceable unless *Roe v. Wade* is overturned. These laws act as a way to ensure abortions automatically become illegal in the event *Roe's* constitutional proscriptions are withdrawn and states are given the right to proscribe the procedure.

A good example of such a triggering law is the Arkansas Human Life Protection Act. The legislative findings section of the Act begins:

- (1) It is time for the United States Supreme Court to redress and correct the grave injustice and the crime against humanity which is being perpetuated by their decisions in *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*.²⁹

The Arkansas Act proscribes the performance of all abortions “except to save the life of a pregnant woman in a medical emergency” in the event *Roe* is overturned.³⁰

Most states with trigger laws that provide a near complete ban on abortion contain a similar exception — allowing for a physician to perform an abortion in order to save the life of the mother, and likewise provide for few, if any, other exceptions. For example, Mississippi has also passed triggering legislation which allows for an abortion, but only when necessary to save the mother’s life or when the pregnancy was caused by rape; and in that case, *only if* formal charges have been filed.³¹

Though not all of the states discussed in this Report have passed triggering legislation, many others have instead enacted all-out bans on the procedure that remain unenforceable until such time as *Roe* is overturned. For instance, Alabama’s abortion statute provides that “any person who willfully [performs] an abortion ... or aids, abets or prescribes for the same, unless the same is necessary to preserve [the life or health of the mother]...may [] be imprisoned in the county jail or sentenced to hard labor for ... not more than 12 months.”³² Until *Roe* is overturned that law remains unenforceable, but as with other trigger bans, if the Supreme Court overturns *Roe*, this law will automatically go into effect.

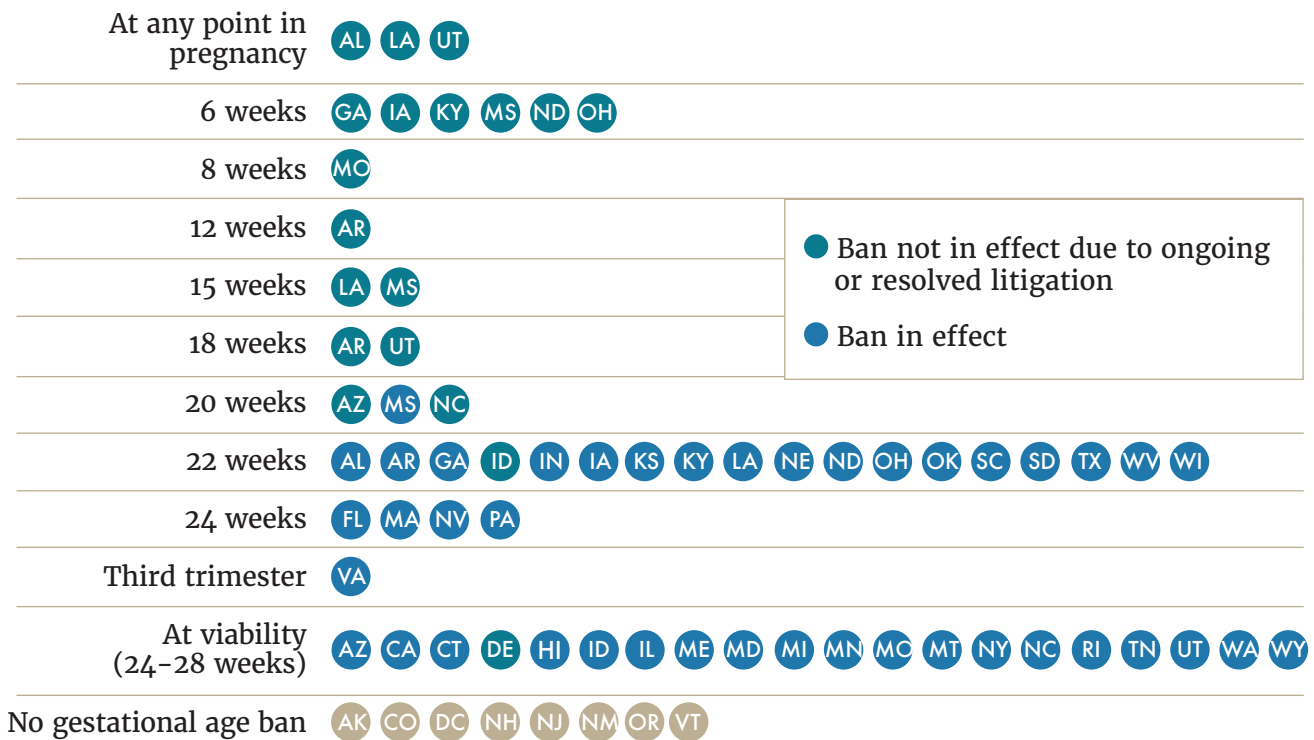
In the United States, at least ten states — Arkansas, Idaho, Kentucky, Louisiana, Mississippi, North Dakota, Missouri, Tennessee, South Dakota, and Utah — have trigger laws that would automatically ban abortion in the first and second trimesters if *Roe* were overturned.³³

B. Fetal Heartbeat Bills & Gestational Age Bans

In recent years, an extremely common legislative tactic employed to restrict abortion has been the enactment of so-called “heartbeat” bills.” Indeed, these “heartbeat” bills are based on model legislation written by one of the nation’s largest pro-life advocacy groups:

“The model legislation says that if a patient is seeking an abortion, the doctor must use ‘standard medical practice’ to determine whether the fetus has a heartbeat. If a heartbeat is present, the doctor is prohibited from performing an abortion, unless it is necessary to save the mother’s life or ‘to prevent a serious risk of the substantial and irreversible impairment of a major bodily function.’”³⁴

State abortion bans by gestational age



Notes: Laws in effect as of 1/1/2020. All gestational age bans are listed using the medical standard for pregnancy dating, which is based on the patient's last menstrual period. Source: Guttmacher Institute.

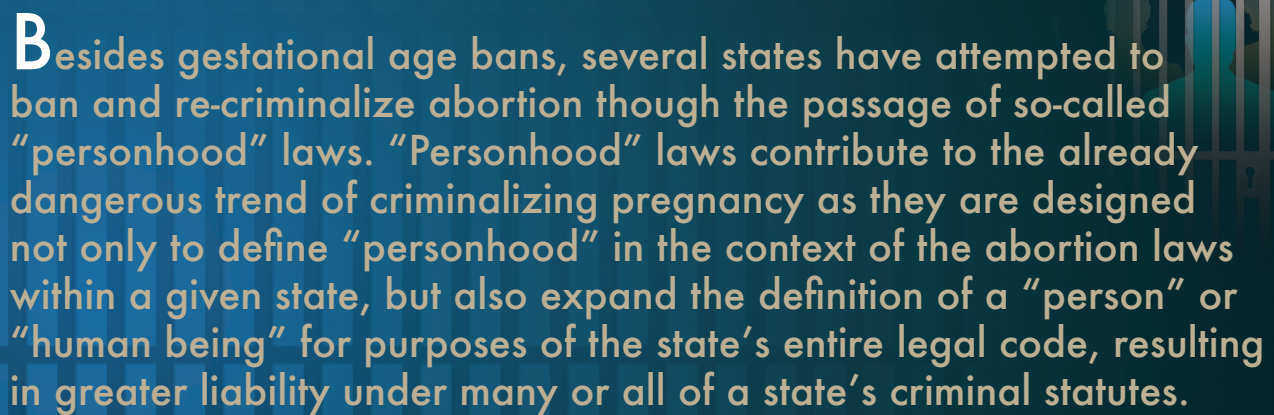
www.guttmacher.org

In 2019, five states passed laws prohibiting abortions once a fetal heartbeat is detected, which can be as early as six weeks into pregnancy — before most women are even aware that they are pregnant.³⁵ Moreover, within the past two years, at least nine states have enacted some type of gestational age ban, laws which strictly prohibit abortion after a specific point in pregnancy.³⁶

Ohio, Louisiana, Mississippi, Georgia, and Kentucky prohibit an abortion the moment a fetal heartbeat can be detected.³⁷ Missouri bans abortion after eight weeks, as well as having created three other gestational age bans in anticipation of litigation.³⁸ In 2013, Arkansas criminalized abortions after 12 weeks of pregnancy if a heartbeat was detected;³⁹ then after the 2013 ban was enjoined, Arkansas passed the “Cherish Act” which proscribed the procedure after 18 weeks.⁴⁰ Utah bans abortions performed after 18 weeks of gestation.⁴¹ Finally, Alabama enacted a total ban on abortion, but in anticipation of litigation also provided for a ban on abortions after 20 weeks of gestation.⁴²

C. “Personhood” Laws

Besides gestational age bans, several states have attempted to ban and re-criminalize abortion through the passage of so-called “personhood” laws. “Personhood” laws contribute to the already dangerous trend of criminalizing pregnancy as they are designed not only to define “personhood” in the context of the abortion laws within a given state, but also expand the definition of a “person” or “human being” for purposes of the state’s entire legal code, resulting in greater liability under many or all of a state’s criminal statutes. “Personhood” laws seek to classify fertilized eggs, zygotes, embryos, and fetuses as “persons,” and to grant them full legal protection under the law, including the right to life from the moment of conception. Such status would simultaneously be used to give fertilized eggs, embryos, and fetuses more rights than any born person and, at the same time, to undermine the constitutional personhood of pregnant women and any person with the capacity for pregnancy.⁴³



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To better understand the scope of this legislation, it is helpful to examine three states that have successfully implemented such legislation: Kentucky, Georgia, and Arkansas.

Under Kentucky’s abortion legislation, a “‘human being’ means any member of the species homo sapiens from fertilization until death” and “‘viability’ means that stage of human development when the life of the unborn child may be continued by natural or life-supportive systems outside the womb of the mother.”⁴⁴ Indeed, it was the clear intention of the legislature that the aforementioned definitions ought to bleed over into other sections of the State code by stating the cited definitions are to be not only in abortion statutes, but in all the “*laws of the Commonwealth unless the context otherwise requires.*”⁴⁵

Georgia’s “heartbeat” bill starts by defining “natural person” as meaning “any human being including an unborn child — “unborn child” is defined as “a member of the species Homo sapiens at any stage of development who is carried in the womb”.⁴⁶ This change was not simply made to Georgia’s abortion law, but was made to the “General Provisions” of the Georgia Code dealing with “Persons and their Rights.” This change, therefore, is not a mere change in definition for just one particular chapter or title of the Code, but rather it is intended to change the definition of “person” and the rights that go along with personhood for the entirety of Georgia’s Code.

Arkansas also made a drastic change to the definitional section of their Criminal Code. In relevant part, the Arkansas Code reads “As used in §§ 5-10-101 — 5-10-105, ‘person’ also includes an unborn child in utero at any stage of development. [An] ‘unborn child’ means offspring of human beings from conception until birth.”⁴⁷ The act purportedly only changed the meaning of “person” as it relates to state’s homicide statutes.⁴⁸

These states are not alone in their quest to redefine the meaning of “personhood.” At last count, both Kansas and Alabama have also passed similar measures — redefining the meaning of a “person” under their respective laws.⁴⁹ At the federal level, the Sanctity of Human Life Act and the Life at Conception Act have been introduced in Congress in an attempt to declare that the “right to life guaranteed by the Constitution is vested in each human being beginning at the moment of fertilization.”⁵⁰ Both measures have failed to be signed into law.

D. “Selective Selection” Bills

Some states have also passed legislation aimed at criminalizing the underlying motivation of women seeking abortions. These laws require abortion providers to question why women are attempting to obtain their services, and thus to guard against abortions being performed due to the fetus’s sex, race, or disability. Several states have enacted legislation banning abortion in cases of genetic anomaly; and in North Dakota’s case, even where the fetus cannot survive outside the womb.⁵¹



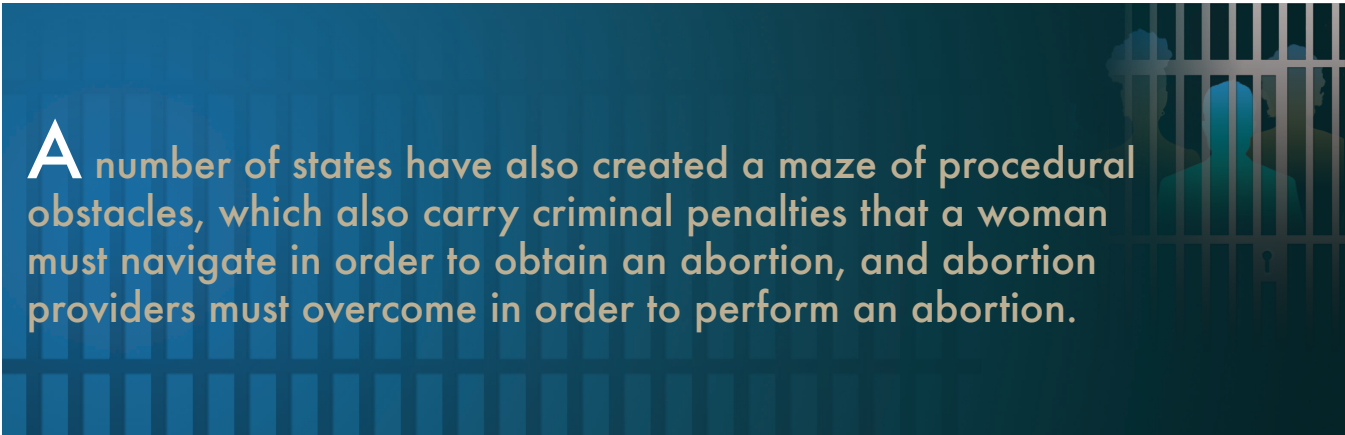
Some states have also passed legislation aimed at criminalizing the underlying motivation of women seeking abortions.

Kentucky’s recently passed Abortion “Discrimination” Bill is a prime example of such legislation. The bill bans physicians from performing an abortion if they have “knowledge” that the patient is seeking the procedure, “in whole or in part,” because of the gender, race, or disability of the fetus.⁵² Importantly, the law is much broader than similar laws found in other states, as the physician need only “know” that the patient’s decision is based in-part on the classifications listed above. Arkansas, for example, only forbids a physician from performing an abortion on a woman when the physician has “knowledge” that the sole basis for the procedure is because the woman believes her fetus suffers from Down Syndrome.⁵³

At last count, there were at least nine states that had enacted some type of “anti-selective selection” abortion ban.⁵⁴

E. Regulations Targeting Abortion Procedures and Providers

In addition to the prohibitions discussed above, a number of states have also created a maze of procedural obstacles, which also carry criminal penalties that a woman must navigate in order to obtain an abortion, and abortion providers must overcome in order to perform an abortion. Again, while not designed to be an exhaustive list, the most common obstacles enacted by states concern the requirements of abortion providers and informed consent laws.



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i. Targeted Regulation of Abortion Providers

There have been a host of rules and regulations passed by states concerning the credentials of abortion providers. One of the most highly publicized was the requirement that doctors performing abortions must have admitting privileges at nearby hospitals.⁵⁵ However, in 2020, the Supreme Court struck down a Louisiana law, very similar to a previously invalidated Texas statute, requiring doctors performing abortions to have admitting privileges at nearby hospitals. In both the Texas and Louisiana cases, the Supreme Court held the admitting privileges requirement placed an undue burden on the constitutional right to the procedure.⁵⁶ The “undue burden” standard, derived from *Planned Parenthood v. Casey*, provides that a state regulation is unconstitutional if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁵⁷

If *Roe v. Wade* and its progeny are overturned, these overly burdensome regulatory statutes may well come back into effect. Indeed, as signified by the graphic below, the admitting privileges requirement was but a single law among many proposed and enacted that govern, and constrain, abortion providers.

Targeted Regulation of Abortion Providers

STATE	REGULATIONS APPLY TO SITES WHERE:*		FACILITY REQUIREMENTS						CLINICIAN REQUIREMENTS		
	Surgical Abortion is Provided Outpatient Clinics	Private Doctor Offices	Medication Abortion is Provided	Structural Standards Comparable to Those for Surgical Centers	Procedure Room Size Specified	Corridor Width Specified	Maximum Distance to Hospital Specified	Transfer Agreement with Hospital	Requires:		OB/GYN Certification or Eligibility
									Hospital Privileges	Hospital Privileges or Alternative Agreement	
Alabama	X	X	X	X		X	§		▼	X	
Arizona	X	X	X	X			30 miles*			X	
Arkansas	X	X	X	X	X		30 miles			X ^Ω	§
Connecticut	X										
Florida	X		X				nearby	X		X	
Indiana	X	X	X	X	X	X	adjacent county			X [†]	
Kansas	§	§	§	§			§		§		
Kentucky	X		X	X				▼			
Louisiana	X	X	X	X	X		§		▼		§
Maryland	X										
Michigan	X		X	X	X	X	30 minutes	X			
Mississippi	X	X	X	X	X	X	▼		▼	X	X
Missouri	X			X		X	X		X		
Nebraska	X	X	X		X						
North Carolina	X		X	X				X			
North Dakota							30 miles		X		
Ohio	X			X			30 miles	X			
Oklahoma	X		X	X	X		§		§	X	
Pennsylvania	X	X		X	X	X		X			
Rhode Island	X	X	X	X							
South Carolina	X	X	X	X		X				X	o
South Dakota	X	X	X	X		X					
Tennessee				▼				▼	▼		
Texas	X	X	X	▼				▼	▼	X	
Utah	X	X	X	X	X						
Wisconsin	X		X				§	X	§		
Total	23	13	18	17	9	8	8	6	2	9	1

§ This law is temporarily enjoined pending a final decision in courts.

▼ This law is permanently enjoined and is not in effect.

* Applies to only surgical abortions.

† Indiana law requires an abortion provider to either have admitting privileges or an agreement with another physician who has admitting privileges at a local hospital.

A court has blocked a requirement that would have required the agreement with another physician who has privileges to be renewed annually and filed in every hospital in the local area.

o Only an obstetrician/gynecologist may provide abortions after 14 weeks of pregnancy.

Ω A medication abortion provider must have an agreement with another provider who has hospital admitting privileges. This law is temporarily enjoined pending a final decision in courts.

This Graphic is courtesy of the Guttmacher Institute⁵⁸

ii. Counseling, Consent, and Waiting Period Laws

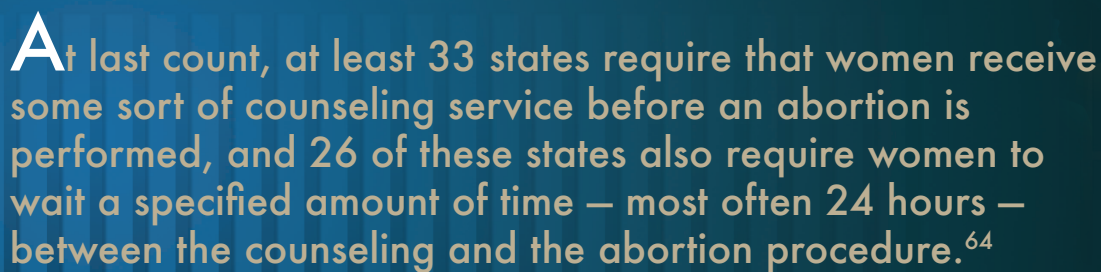
Abortion counseling and informed consent are other areas of the law that remain heavily regulated. Indeed, nearly every state in the country requires healthcare providers to obtain informed consent before performing a medical procedure. However, when it comes to abortion, the informed consent requirements change dramatically. The goal of informed consent laws for abortion is not necessarily to provide medically needed information regarding the procedure, but to discourage women from seeking the procedure altogether.

In Alabama, the legislature enacted an informed consent law with accompanying criminal penalties, requiring that prior to performing an abortion, a physician must provide the woman with state-mandated counseling to discourage the abortion, perform an ultrasound, and then wait 48-hours before the procedure can take place.⁵⁹

Ohio has a similar mandatory notice and waiting provision. First, the abortion provider must inform the pregnant woman that the fetus has a detectable heartbeat (if one is present). Second, the provider must inform the pregnant woman of the statistical probability of bringing the fetus to term. And third, the pregnant woman must sign a form acknowledging she is aware of the probability of bringing the fetus to term. A violation of these notice requirements carries with it a criminal penalty — after the first offense, a violation is classified as a felony.⁶⁰

In Louisiana, a minor seeking an abortion is required to either obtain parental consent or a court order. Moreover, an employee of an abortion provider who knowingly assists a minor with obtaining an abortion, who has not complied with consent requirements, is deemed to have committed a crime.⁶¹ Louisiana, too, imposes a mandatory waiting period (72 hours) before any abortion can be performed and requires that the woman undergo state-directed counseling.⁶² Finally, the State has made it a criminal offense for any employee of the state, or any agency receiving governmental assistance, to recommend an abortion to any woman.⁶³

At last count, at least 33 states require that women receive some sort of counseling service before an abortion is performed, and 26 of these states also require women to wait a specified amount of time — most often 24 hours — between the counseling and the abortion procedure.⁶⁴



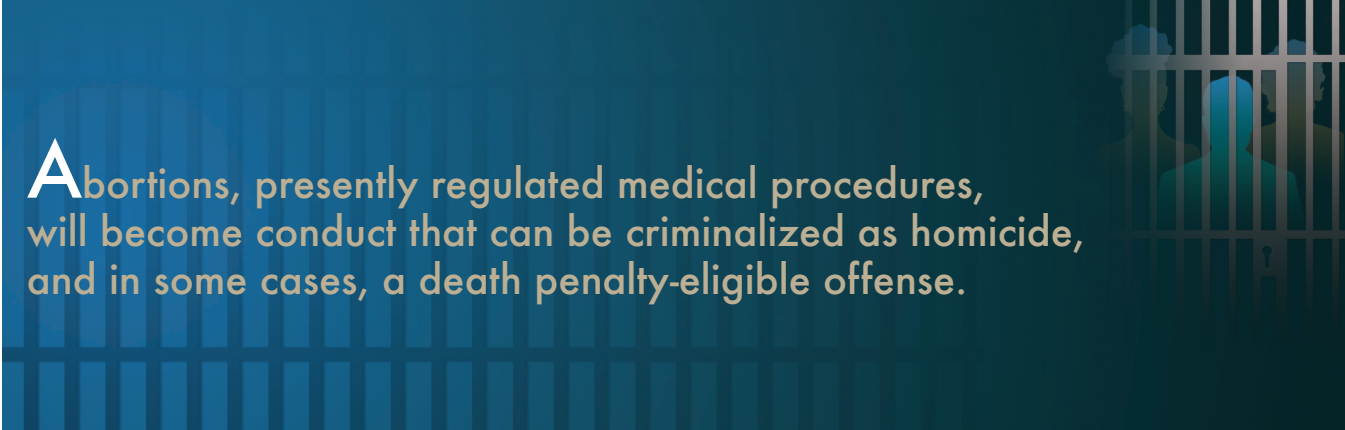
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IV. Affected State Criminal Statutes

The following section analyzes how criminal liability under existing state criminal statutes would be expanded by recently enacted “personhood” statutes, “heartbeat” bills, and trigger legislation if *Roe v. Wade* is overturned.

A. Homicide Statutes

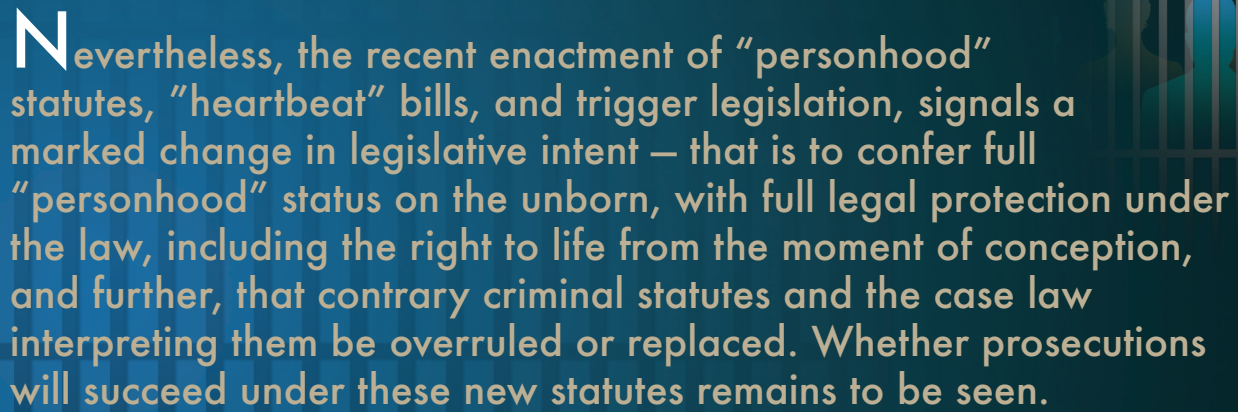
Homicide, by definition, is the unlawful killing of one human being by another. The legislated redefinition of “personhood” will expand homicide to include an entirely new class of victims. Abortions, presently regulated medical procedures, will become conduct that can be criminalized as homicide, and in some cases, a death penalty-eligible offense.



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In Georgia, there are two types of murder (malice murder and felony murder), both punishable by life imprisonment, life without parole, or death.⁶⁵ Georgia has functionally no limitations on what can constitute the predicate felony for felony murder,⁶⁶ but notably, the felony can include cruelty to children for intentionally causing harm to a minor or intentionally depriving a minor of sustenance. Georgia’s felony murder statute also permits felony murder prosecutions for status crimes such as possession of controlled substances.⁶⁷ While it would appear obvious that liability under homicide statutes would be expanded by the conferring of “personhood” status to an unborn child, Georgia courts will have to grapple with the fact that, historically, the death of a fetus was prosecuted under the criminal abortion statutes or the feticide statute (discussed below). Those statutes and the case law interpreting them make it plain that the pregnant woman upon whom an abortion is performed cannot be convicted of either offense.

Nevertheless, the recent enactment of “personhood” statutes, “heartbeat” bills, and trigger legislation, signals a marked change in legislative intent — that is to confer full “personhood” status on the unborn, with full legal protection under the law, including the right to life from the moment of conception, and further, that contrary criminal statutes and the case law interpreting them be overruled or replaced. Whether prosecutions will succeed under these new statutes remains to be seen.




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It is also worth noting that the Georgia homicide statute was recently amended to add the crime of “murder in the second degree” which is defined as causing the death of a human during the commission of cruelty to children in the second degree (i.e., causes a minor under the age of 18 to suffer cruel or excessive mental or physical pain through criminal negligence) and is punishable by 10–30 years imprisonment.⁶⁸ As discussed in more detail below, it would appear that pregnant women and their partners or anyone caring for the pregnant woman (and therefore her “unborn child”) could be prosecuted for second degree murder for performing an abortion or for simply failing to stop the pregnant woman from obtaining an abortion. The possibility of the latter should not be treated as an extreme or unlikely hypothetical considering the sixteen states in which courts have held in the civil context that a father may be found guilty of child neglect for failing to prevent the woman he impregnated from using drugs, or for failing to force her to obtain drug treatment while pregnant.⁶⁹

The expanded definition of “personhood” in the Georgia statute would also eliminate the requirement that the State prove that death occurred following a live birth. Further, because personhood begins once a heartbeat is detected, Georgia’s child abuse statutes would apply if *Roe* is overturned to acts, omissions, and conditions experienced by pregnant women.

B. Feticide Statutes

Although feticide laws have all been passed in the wake of a violent or negligent act against a pregnant woman resulting in a pregnancy loss, those laws are already being used to prosecute pregnant women accused of willfully or recklessly causing their pregnancies to end — whether as a result of miscarriage, stillbirth, or abortion outside of an approved medical context.⁷⁰ These laws do not apply to legally authorized abortions. Recent legislation that is intended to eliminate abortions through absolute bans or by significantly restricting legal abortions raise the specter that criminal liability will extend to individuals, including pregnant women who participate in abortions that are deemed “not legal.”

A silhouette of a woman's head and shoulders is positioned in the upper right corner of the page. Behind her, a set of vertical prison bars is visible, suggesting a theme of incarceration or legal consequences. The background of the text box is a dark blue gradient with vertical stripes.

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Under the current Georgia Criminal Code, a person commits feticide “if he or she willfully and without legal justification causes the death of an unborn child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, or if he or she, when in the commission of a felony, causes the death of an unborn child.”⁷¹ The offense of feticide is punishable by life imprisonment.⁷² The statute makes explicit that it is intended to reach only third parties who cause pregnancy losses and who are not performing a legal abortion with the pregnant woman’s consent.⁷³ However, as with most statutes relating to fetuses, it is unclear whether the last portion of the Georgia “heartbeat” bill repealing all contradictory laws trumps these statutory provisions. In fact, several District Attorneys have already expressed their intention to prosecute women for having an abortion.⁷⁴ Historic prosecutions also demonstrate that legislative changes overcome defenses that saved women from first degree murder convictions in the past.

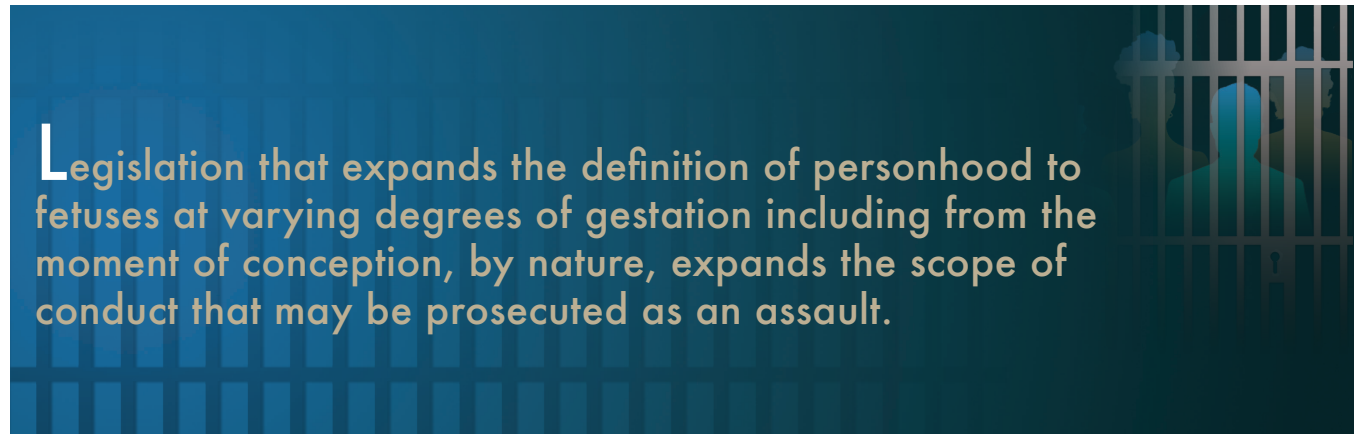
In 2015, Kenlissia Jones, an African American woman, was arrested on the charge of “malice murder,” based on an allegation that she had obtained and used the medication misoprostol to end her pregnancy at home, causing the death of the fetus. Following intense media attention, the Dougherty County prosecutor concluded that there was no legal authority in Georgia for charging a pregnant woman with the crime of murder for having terminated her own pregnancy. She remained threatened with prosecution for the crime of possession of a dangerous drug (misoprostol is listed as such in Georgia) until that charge was also eventually dropped.⁷⁵

If *Roe v. Wade* is overturned and Georgia’s “heartbeat” law is permitted to go into effect, any person performing an abortion with the pregnant woman’s consent, any woman who has an abortion, or any pregnant person whose actions, omissions, or condition are believed to have caused the death of an unborn child would be at risk of criminal prosecution.

C. Assault Statutes

Assault is defined as “[t]he offense of causing a physical injury to another person intentionally, knowingly, recklessly, or with criminal negligence.”⁷⁶ While state statutes vary in language and in degrees of criminal assault, they all require that harm be done to another “person.”

Legislation that expands the definition of personhood to fetuses at varying degrees of gestation including from the moment of conception, by nature, expands the scope of conduct that may be prosecuted as an assault.



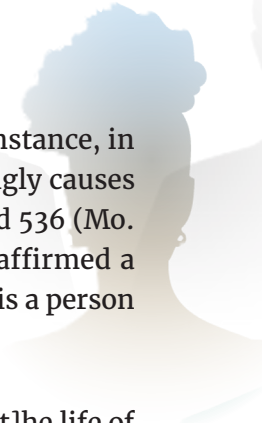
For instance, in Arkansas, aggravated assault is a Class D Felony. Under Ark. Code Ann. § 5-13-204 (a), “[a] person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely: (1) [e]ngages in conduct that creates a substantial danger of death or serious physical injury to another person.”⁷⁷ A person commits assault in the first degree if he or she “[r]ecklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person.”⁷⁸ Assault in the first degree is a Class A misdemeanor.

During the 2019 Legislative session, the Arkansas State Legislature, along with several other states, passed a series of laws aimed at criminalizing certain activities associated with the abortion procedure. Though almost each subchapter has its own definitional section that purportedly only applies to the specific subchapter in which it is found, they all share one of two common definitions:

“‘Unborn child’ means an individual organism of the species *Homo sapiens* from fertilization until live birth.”⁷⁹

“‘Human being’ means an individual member of the species *Homo sapiens* from and after the point of conception.”⁸⁰

These two definitional sections are the controlling language found throughout the Arkansas Code for laws relating to abortion. However, the clear legislative intent in drafting these definitions is to redefine the term “person” for purposes of applying criminal and civil liability statutes against third parties for causing death or injury to an unborn child.



Other states have a history of expanded liability for assaults involving an unborn child. For instance, in Missouri, a person commits the crime of first-degree assault if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.⁸¹ In *State v. Kenney*, 973 S.W.2d 536 (Mo. Ct. App. 1998), *overruled on other grds.*, *State v. Withrow*, 8 S.W.3d 75 (Mo. 1999), the court affirmed a finding of guilt for assault in the first degree of an unborn child, holding that an unborn child is a person for purposes of § 565.050.⁸² *Id.* at 544-45.⁸³

In 1989, the Supreme Court let stand the preamble to MO Ann. Stat. § 1.205, declaring that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and well-being.” The Court upheld the constitutionality of this preamble only after determining that it was “precatory” and had no current specific legal effect.⁸⁴ Nevertheless, Missouri courts have since held that interpreting Section 1.205 to apply to criminal and civil liability statutes where there is the death of an unborn fetus, is *not* contrary to *Roe v. Wade*.⁸⁵

D. Child Abuse Statutes

Child abuse statutes criminalize conduct that causes harm to a child. In Alabama, a viable fetus is included in the term “child,” as that term is used in Ala. Code § 26-15-3.2. When the definition of child is expanded to include a fetus, the scope of conduct that can be criminalized as child abuse expands.⁸⁶

Child Abuse in Alabama is a Class C Felony, unless it is aggravated, in which case it rises to a Class A felony punishable by 10 to 99 years in prison.⁸⁷ The statute defines a child abuser as a responsible person who tortures, willfully abuses, cruelly beats, or otherwise willfully maltreats any child under the age of 18 years.⁸⁸ Child abuse becomes aggravated child abuse if a responsible person violates the provisions of Section 26-15-3 (child abuse generally) which causes serious physical injury to a child under the age of six years.⁸⁹ The statute further provides that a responsible person commits the crime of chemical endangerment if he or she “[k]nowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260.”⁹⁰

In 2013, the Alabama Supreme Court, in two consolidated cases, *Ex parte Hope Elisabeth Ankrom v. Alabama* and *Ex parte Amanda Helaine Kimbrough v. Alabama*, ruled that the word “child” in Alabama Code § 26-15-3.2, the Chemical Endangerment of a Child statute, included the unborn from the moment of fertilization.⁹¹ The Court upheld the prosecutions of Ms. Ankrom and Ms. Kimbrough who both had allegedly used control substances while pregnant. Ms. Kimbrough’s son died shortly after birth. Relying on a legal analysis that purported to be based on the plain language of the statute, the Alabama Supreme Court held that the word “child” was broad enough to encompass all children, born and unborn, including both defendants’ unborn children. By claiming to rely solely on a plain language interpretation of the statute and concluding that the term “child” in § 26-15-3.2 was unambiguous, the Court avoided consideration of the legislative history making clear that the law was only intended to reach adults who took children to dangerous locations such as meth labs and not to address the issue of pregnancy and drug use. Judge Parker, who wrote the majority opinion, also wrote a concurring opinion, arguing that making the chemical endangerment law applicable to unborn children was consistent with numerous Alabama statutes and court decisions protecting the rights of the unborn and arguing that the only inconsistency was *Roe v. Wade*, which he said should be overturned.⁹²

One year later, the Court reaffirmed the *Ankrom* decision in *Ex parte Hicks*, and held that the judicial interpretation of the law making it applicable to the unborn did not violate a pregnant woman’s right to due process notice nor did it make the statute void for vagueness.⁹³ It explained that this holding furthered Alabama’s policy of protecting life from the earliest stages of development.

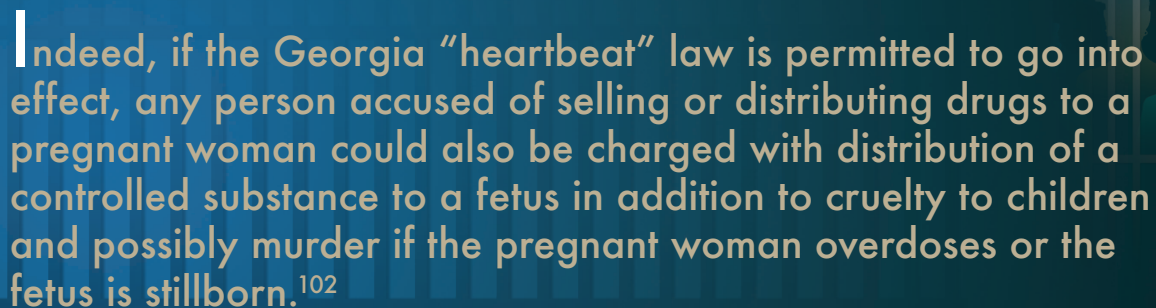
In 2015, Katie Darovitz was prosecuted for chemical endangerment of her fetus. Ms. Darovitz suffered from severe epilepsy and her doctors advised that the medication she took to treat it could cause miscarriages and birth defects. When she became pregnant, she discovered that she was able to treat her epilepsy using marijuana which did not have these same side effects. She gave birth to a healthy baby boy. Hospital staffers, however, turned over her positive marijuana screen to a social worker who turned it over to law enforcement. Police officers appeared at the house Ms. Darovitz shared with her common-law husband and their two-week-old son, handcuffed her, and took her to jail. She was charged with felony chemical endangerment. Ultimately, after sixteen months and the help of national advocacy groups, pro-bono lawyers, and a GoFundMe campaign, the charges were dropped. According to the ProPublica article detailing her story, Ms. Darovitz was one of 500 women who have been charged with chemical endangerment of a child.⁹⁴

Under the Alabama statute, a “responsible person,” and thus one who could be prosecuted for child abuse, is defined in part as “a child’s natural parent.”⁹⁵ This means, that if the father knowingly causes the fetus to be exposed to a controlled substance or chemical substance that causes serious bodily injury, or if he picked up his spouse’s prescription for medication intended to terminate her pregnancy, he could be prosecuted for aggravated child abuse or chemical endangerment.⁹⁶

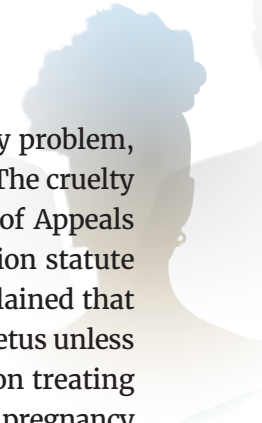
E. Drug-related Offenses

Georgia has an extensive statutory scheme defining and regulating controlled substances.⁹⁷ However, criminal liability for the possession, sale, and distribution of controlled substances will undoubtedly increase dramatically should Georgia’s 2019 “heartbeat” law go into effect, especially for pregnant women. This dramatic increase in drug prosecutions will most likely result from the legislature’s redefining the meaning of “Natural Person” under the general provisions of the Georgia code.⁹⁸

Before the passage of Georgia’s 2019 “heartbeat law,” the state Court of Appeals in *State v. Luster* had made clear that a pregnant woman could not be prosecuted for “distributing” a controlled substance to her fetus.⁹⁹

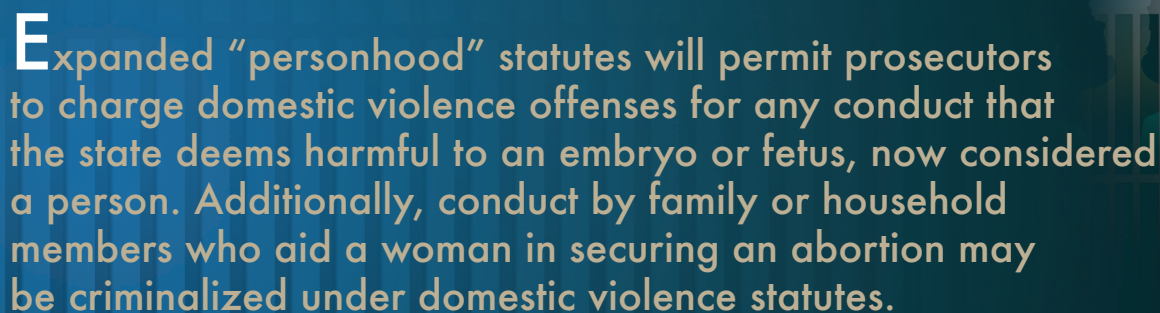


Indeed, if the Georgia “heartbeat” law is permitted to go into effect, any person accused of selling or distributing drugs to a pregnant woman could also be charged with distribution of a controlled substance to a fetus in addition to cruelty to children and possibly murder if the pregnant woman overdoses or the fetus is stillborn.¹⁰²



In *Luster*, a pregnant woman who sought but could not afford help for her cocaine dependency problem, was arrested and charged with possession of cocaine, delivery of cocaine and cruelty to a child. The cruelty to a child and cocaine delivery charges were dismissed by the trial court. The Georgia Court of Appeals unanimously affirmed the dismissal, holding that the unambiguous language of the distribution statute made it clear that the statute did not apply to pregnant women or their fetuses. The court explained that “[u]nder Georgia law, the word ‘person’ in a criminal statute may not be construed to include a fetus unless the legislature has expressly included it[.]”¹⁰⁰ The court also noted that, “by enacting legislation treating addiction during pregnancy as a health problem, the legislature indicated its view that addiction in pregnancy is a disease and signaled its preference for treatment over prosecution, which preference is overwhelmingly in accord with the opinions of local and national experts.”¹⁰¹ The possession charge was allowed to stand.

Arguably, under Georgia’s new definition of “Natural Person,” ingesting drugs while pregnant is not only unlawful possession of a controlled substance, but by virtue of being pregnant, would also result in “distribution” of drugs to another — a separate offense from simple possession that carries a higher sentence regardless of the controlled substance in question. This would effectively reverse key holdings in such cases as *State v. Luster*.



Expanded “personhood” statutes will permit prosecutors to charge domestic violence offenses for any conduct that the state deems harmful to an embryo or fetus, now considered a person. Additionally, conduct by family or household members who aid a woman in securing an abortion may be criminalized under domestic violence statutes.

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F. Domestic Violence Offenses

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For instance, Ohio’s domestic violence statute makes it a crime to knowingly cause or attempt to cause physical harm to a family or household member, or to recklessly cause serious physical harm to a family or household member.¹⁰³ The term “family or household member” includes any “child” who is residing or has resided with the offender.¹⁰⁴ The statute adds enhanced, mandatory penalties if, in the commission of a domestic violence offense, the offender also caused “serious physical harm to the pregnant woman’s unborn, or caused the termination of the pregnant woman’s pregnancy.”¹⁰⁵ A “pregnant woman’s unborn” has the same meaning for purposes of Ohio’s domestic violence statute as O.R.C. § 2903.09 — Ohio’s abortion statute. Section 2903.09(B) defines “another’s unborn” as “a member of the species homo sapiens, who is or was carried in the womb of another, during a period that begins with fertilization and that continues unless and until live birth occurs.” Should Ohio’s expanded definition of personhood go into effect, assisting a pregnant family member in obtaining an abortion would likely satisfy the statutory requirements for domestic violence.

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V. Types of Expanded Criminal Liability

A. Expansion of Death-Eligible Offenses

As states have limited legal abortions and expanded their definition of “personhood” to include embryonic cells past the point of conception, they have also expanded conduct that is now not only criminal, but punished as a capital offense.

In Georgia, by defining personhood as “any human being including an unborn child,” the heartbeat bill expands the number of murder cases for which the State could seek the death penalty.¹⁰⁶ For instance, any doctor or medical professional who was paid to perform an illegal abortion would be death-eligible due to the following statutory aggravating factors; (a) the murder occurred while the accused was engaged in the commission of an aggravated battery or another capital offense — an abortion procedure would constitute an aggravated battery on the “child;” (b) the murder/aggravated battery was done for the purpose of receiving money — as one would pay a doctor or medical professional for their services in performing an abortion; (c) the murder occurred in a public place through use of an instrument that is hazardous to the lives of more than one person — as an abortion procedure could involve the use of tools that could result in death or harm to others; and (d) the murder “was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim” — arguably, a jury would be authorized to find that performing the acts required to accomplish an abortion on a “child” (as defined by the law) are wantonly vile.¹⁰⁷ Given anti-abortion advocates’ extensive use of rhetoric equating abortion with mass murder, genocide and the holocaust, and the use of precisely this kind of language in some of the laws discussed in this report,¹⁰⁸ such charges should not be viewed as out of the realm of possibility. Moreover, any person accused of murdering a woman who

was pregnant at the time of her death would be death-eligible by virtue of the fact that the accused will have killed two people (i.e., committed the killing while in the commission of another capital offense or aggravated battery).¹⁰⁹

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B. Statutory Expansion of Accomplice Liability to Encompass Those Who Conspire, Solicit, Request, Command, Encourage, or Aid and Abet Another Person to Terminate a Pregnancy

All states have inchoate laws that punish not just the primary actor, but those who assist or aid the accused by performing acts that are only tangentially related to the crime. These inchoate offenses include attempt, conspiracy, and aiding and abetting. While all states provide statutory definitions for these inchoate offenses, the following suggests the manner in which criminal liability may expand exponentially under Utah's statutory scheme in a post-Roe world.

If Roe is overturned and Utah's H.B. 136 and 166 take effect, even those tangentially connected to a woman's decision to terminate a pregnancy may become criminally liable under Utah's laws on accomplice/accessorial liability. First, Utah extends aiding and abetting liability to those who solicit, request, command, encourage, or internally aid another person to engage in criminal conduct.¹¹⁰ Notably, an "accomplice is treated the same as a principal would be treated," and he or she is "criminally liable as a party for such conduct."¹¹¹ Second, "all accessories are principals except accessor[ies] after the fact."¹¹² Third, attempted crimes are also prohibited so long as the individual took a substantial step toward the commission of a crime.¹¹³ Fourth, soliciting, requesting, commanding, offering to hire, or importuning another to commit a felony is unlawful.¹¹⁴



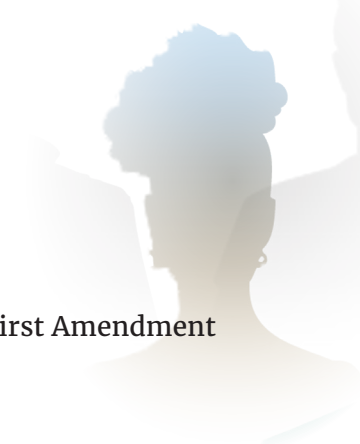
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Criminal liability under Utah's broad conspiracy laws could also be dramatically expanded in connection with the performance of an abortion. Under Utah law, a person who agrees with one or more persons to engage in criminal conduct is guilty of conspiracy so long as one person commits an overt act in furtherance of the conspiracy.¹¹⁵ Moreover, "[W]here the offense is a capital felony [or] a felony against the person ... the overt act is not required for the commission of conspiracy."¹¹⁶ Criminal homicide is an offense against the person.¹¹⁷ Terminating a pregnancy by means not prescribed by law may constitute murder or manslaughter under Utah's statutes, U.C. §§ 76-5-201, 203, 205.¹¹⁸ Murder is a first-degree felony that carries a prison term of 15 years to life, while manslaughter is a second-degree felony, carrying a 1 to 15-year prison term.¹¹⁹ Thus, an individual who assists another person obtain an abortion may be convicted of murder under Utah's conspiracy laws without proof of an overt act in furtherance of the conspiracy. Spouses, romantic partners, parents, friends, or confidants who agree that terminating a pregnancy is the right decision for their families or friends could face long prison sentences and fines, even if they do nothing more than agree to help a loved one terminate a pregnancy.¹²⁰ Utah's existing conspiracy laws and laws on accessorial liability could make it possible to dramatically expand the scope of criminal liability for the performance or receipt of an abortion to a multitude of individuals, including:

- ◆ Women who seek to terminate a pregnancy¹²¹
- ◆ Individuals such as school counselors, mental health professionals, friends, and parents who counsel, advise, or encourage a woman wishing to terminate a pregnancy;
- ◆ Individuals who drive pregnant women to a clinic or assist them in preparing for, scheduling, and/or otherwise obtaining an abortion;
- ◆ Individuals who assist women pay for abortion services;
- ◆ Pharmacists who dispense an abortifacient or other drug used to terminate a pregnancy;
- ◆ Pharmaceutical manufacturers who create abortifacients or other drugs used to terminate unwanted pregnancies;

- ◆ Manufacturers of medical devices used to terminate a pregnancy; and
- ◆ Clinical staff, nurses, and doctors who perform abortion services.

Even advertisements for clinics and their services may become targets, especially if First Amendment protections are also stripped away.¹²²



CONCLUSION

The future is clear, should *Roe v. Wade* be overturned, states across the nation are prepared to arrest and prosecute women, their friends, their providers, and all those who assist them obtain what is presently, a legal medical procedure.

State legislative efforts criminalizing abortion have proliferated. During the preparation of this Report, four states — Tennessee, West Virginia, Louisiana, and Alabama — have passed constitutional amendments declaring that their state constitutions do not protect the right to abortion or allow use of public funds for abortion.¹²³ Fifty-six bills have been introduced in state house and senate chambers advancing the criminalization of presently lawful conduct.¹²⁴

Historic prosecutions related to conduct of pregnant individuals suggests that these prosecutions will impact the poor more than the wealthy, Black people more than white people, and women more than men.

The National Association of Criminal Defense Lawyers (NACDL) strongly opposes this broad over criminalization and voices alarm that the most defenseless members of our society will be at the greatest risk. NACDL will work to oppose the continuing expansion of such legislation by informing legislators and the public about the ill-considered nature, and often unintended impact, of these laws, and will work to educate defense lawyers how to defend these cases in states where prosecutions are brought.

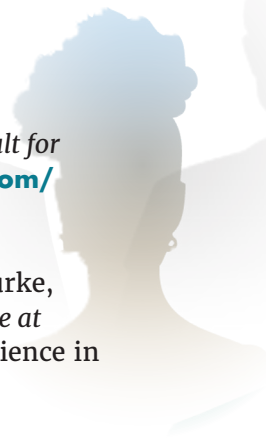
ENDNOTES

1. See, e.g., Jonathan Haggerty, *Tackling Overcriminalization in 2021: The Good, the Bad and the Ugly*, The Crime Report, Feb. 26, 2021, available at <https://thecrimereport.org/2021/02/26/1229823/> (“Overcriminalization is as much a cause of America’s incarceration addiction as it is a symptom. It sows distrust in the legal system, increases the likelihood that an individual will be locked up for something they didn’t know was a crime, and adds fodder for a plea bargaining which coerces defendants into accepting sentences they wouldn’t otherwise take. All of these factors have led to a growing consensus across the ideological spectrum that overcriminalization is a problem worth fixing. . . Addressing overcriminalization is essential to fixing a system that tears families apart, wastes taxpayer dollars and damages public safety. Policymakers should remember the costs of incarceration when considering proposals that criminalize behaviors better suited for other remedies, and actively seek opportunities to reduce the scope of a costly justice system.”)
2. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 334 (2013); Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 842 n.213 (2019); Khiara M. Bridges, *Race, Pregnancy, and Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770 (2020).
3. Editorial Board, *A Woman’s Rights*, N.Y. Times, Dec. 28, 2018, available at <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html>.
4. See Alabama Human Life Protection Act, House Bill 314, codified at Ala. Code §26–23H–1 (completely banning abortion at any stage of pregnancy, except when abortion is necessary in order to prevent a serious health risk to the unborn child’s mother and which is unenforceable unless *Roe* is overturned); Ky. Rev. Stat. Ann. §311.772 (banning abortion in Kentucky if *Roe* is overturned except when necessary in reasonable medical judgment to prevent the death or substantial risk of death ... or to prevent the serious, permanent impairment of a life–sustaining organ of a pregnant woman); La. Rev. Stat. §40:1061 (Louisiana’s trigger ban, also known as the Human Life Protection Act, would take effect if *Roe* were overturned, and would prevent anyone knowingly performing an abortion ... from doing so at any stage of a pregnancy, regardless of the age of the fetus with no exceptions for rape, incest, or a medically futile pregnancy, but only to prevent death or the serious, permanent impairment of a life–sustaining organ of the mother); Arkansas Human Life Protection Act, Senate Bill 149, Ark. Code. Ann. §5–61–302 (banning abortion in Arkansas if *Roe* is overturned except when necessary to save the life of a pregnant woman in a medical emergency); Utah Senate Bill 174 (banning all abortion in the state except in the cases of rape, incest, when the life of the mother is in danger or if the fetus has fatal defects, and which would take effect if *Roe* were to be overturned); Missouri House Bill 126 (triggering a state wide abortion ban if the Court overturns *Roe*, and rendering it a felony to perform or induce an abortion, except in the case of a medical emergency); Miss. Code §41–41–56 (prohibiting all abortions within the state, regardless of gestational age, except when necessary to save the mother’s life, or when the pregnancy was caused by rape, if and only if, a formal charge of rape has been filed, and which would go into effect if *Roe* is overturned); Idaho Senate Bill 1385 (banning abortion if *Roe* is overturned except in the case of reported rape or incest, or to save the life of the mother); North Dakota House Bill 1546 (banning abortion as a felony with only limited exceptions if *Roe* is overturned); Tn. § 39–15–213 (rendering abortion illegal if *Roe* is overturned, except when an abortion is necessary to prevent death or substantial and irreversible impairment of major bodily function); South Dakota House Bill 1249 (banning abortion unless “necessary to preserve the life of the pregnant female” and which becomes “effective on the date that the states are recognized by the United States Supreme Court to have the authority to regulate or prohibit abortions at all stages of pregnancy”).

5. See e.g., Ark. Code. Ann. §§ 5-1-102 (13) (B) (i) (a) and also thus changing the meaning of “person” as it relates to Arkansas’s homicide statutes, which include Capital Murder, Murder in the First and Second Degree, Manslaughter and Negligent Homicide and a wide range of conduct, including death that is caused by an accident); Ky. Rev. Stat. Ann. §311.720 (8) (redefining “human being” as any member of the species homo sapiens from fertilization until death, and expanding the scope of criminal liability to encompass liability in relation to an unborn child for purposes of the entire penal code, despite Kentucky case law indicating reservations that such blanket language could perhaps extend too far, i.e., to encompass actions, omissions, or conditions taken or experienced by women who are pregnant); Mississippi Code §97-3-37 (providing a list of criminal offenses, including capital murder and homicide for which the definition of “human being” is expanded to include an “unborn child at every stage of gestation from conception until live birth.” While the section makes clear that inclusion of an unborn child in the definition of human being does “not apply to any legal medical procedure ... including legal abortions ... or to the lawful dispensing ... of lawfully prescribed medication,” should *Roe* be overturned, abortions would likely no longer be legal in the state of Mississippi, vastly extending criminal liability in relation to the performance of an abortion in the state); Code of Ala. §13A-6-1 (a) (3) (stating that “[t]he term [‘person;’] when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability” though the statute, applicable in the case of death or harm to a fetus, and which has been used to prosecute an Alabama woman for manslaughter in relation to the death of her own fetus, currently contains exceptions to allow for abortion without fear of criminal liability. That safeguard, however, would be formally removed if Alabama’s wholesale ban on abortion, HB 314, which is currently enjoined as unenforceable, is permitted to take effect, thus making it possible for an abortion doctor to face criminal liability under any of Alabama’s murder or assault provisions, including the capital murder statute).
6. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997) (the word “child” in the criminal child endangerment statute and related South Carolina laws included viable fetuses); *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003) (relying on *Whitner* to make homicide by child abuse applicable to pregnant women and stillbirths).
7. See O.C.G.A. § 1-2-1 (defining “Natural Person” to mean “any human being including an unborn child,” and an unborn child is defined as “a member of the species Homo sapiens at any stage of development who is carried in the womb.” This change was made to the “General Provisions” section of the Georgia Code, and thus seeking to change the definition of “personhood” and expand the scope of liability for the entire Code, including in regard to the crimes of homicide, feticide, aggravated battery, aggravated assault, kidnapping, false imprisonment, and many others. The proposed changes would also likely lead to additional death eligible cases).
8. Antiabortion statutes that include statements of separate rights for the unborn, similar to those asserted by personhood measures, are also routinely used to justify arrests, detentions, and forced surgeries on women who had no intention of ending a pregnancy. For example, the 1986 Missouri Abortion Act includes a preamble stating that life begins at conception and that “the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state.” Mo. Ann. Stat. § 1.205 (2) (1986). Although the statute contains an explicit provision protecting pregnant women from punishment, Missouri prosecutors have used the law to justify the arrests of scores of pregnant women, including one who admitted to using marijuana once while she was pregnant and another who drank alcohol. An Illinois abortion law stating that “an unborn child is a human being from the time of conception and is, therefore, a legal person for the purposes of the unborn child’s right to life” was cited as authority in an attempt to forcibly restrain, overpowering, and sedating a pregnant woman in order to carry out a blood transfusion she had refused.” 720 ILCS 510/1 (1996); *In re Brown*, 689 N.E.2d 397, 404 (Ill. App. Ct. 1997)

9. See, e.g., Ark. Code. Ann. §20-16-606 (although the other abortion-related laws passed in Arkansas during the 2019 legislative session make clear that criminal penalties do not apply to women who have abortions, §20-16-606, criminalizes the performance of an abortion when the provider is not a licensed physician who is board eligible or certified in obstetrics and gynecology as a D felony, punishable by up to 6 years in prison and a fine of up to \$10,000, and potential felony criminal liability appears to include the woman on whom the abortion is performed); Alabama Code §26-15-3.2; *Hicks v. State*, 153 So.3d 53 (Ala.2014)(As a result of judicial activism contrary to clear legislative intent, Alabama’s chemical endangerment of a child statute has been judicially expanded to permit prosecution of pregnant women who use any amount of any controlled substance, including ones prescribed to them by physicians. Greater penalties apply where there had been a miscarriage, stillbirth or neonatal death and prenatal exposure to a controlled substance, regardless of the fact that the child was “in utero” at the time of the alleged endangerment.) See Michael Brice-Saddler & Alex Horton, *A Pregnant Woman Was Shot in the Stomach. She Was Charged with the Death of the Fetus*, Wash. Post (June 28, 2019), <https://www.washingtonpost.com/nation/2019/06/27/pregnant-woman-was-shot-stomach-she-was-indicted-her-babys-death> (Similarly, an Alabama women who allegedly initiated an altercation and was shot, resulting in death of her fetus, was prosecuted for manslaughter of her unborn child.); Utah Code §76-5-201(4)(specifically authorizing arrests of women for self-abortion, though notably it is not the only criminal statute in Utah pursuant to which pregnant women have been criminally prosecuted, given that they have also been prosecuted for child abuse and related homicide charges in relation to their own fetuses, on various grounds – including delaying the decision to have cesarean surgery, *State v. Rowland*, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004) (Fuchs, J.)); *State v. Hade*, 6th Dist. Ottawa No. OT-07-037, 2008-Ohio-1859, para. 2 (recognizing that a pregnant woman had pled guilty to child endangerment in Ohio for taking drugs while pregnant, despite case law in Ohio holding that pregnant women who used drugs could not be held liable for birthing allegedly addicted children, and that it is not child endangerment for a pregnant woman to harm her fetus).
10. Miss. Code. Ann. §97-3-19(1)(a).
11. Miss. Code Ann. § 97-3-19(1)(b) and §97-3-47.
12. *State v. Buckhalter*, 119 So. 3d 1015, 1017 (Miss. 2013) (affirming the trial court’s dismissal of Defendant’s indictment for manslaughter, which alleged that she “willfully” caused the death of her stillborn child, and declaring that indictment to be “fatally flawed”); *State v. Gibbs*, 2007-0031-CR1 (Miss. Cir. Ct. 2014) (dismissing depraved heart homicide charge against Ms. Gibbs for experiencing a stillbirth); Press Release, National Advocates for Pregnant Women, *Mississippi Murder Charge Against Pregnant Teen Dismissed* (April 4, 2014) (outlining motivations and ultimate dismissal of the criminal case against Rennie Gibbs), available at <https://www.nationaladvocatesforpregnantwomen.org/mississippi-murder-charge-against-pregnant-teen-dismissed/>; National Advocates for Pregnant Women, *Victory for Latice Fisher in Mississippi* (Sept. 24, 2020) (describing how Latice Fisher was charged with second degree murder after she experienced a pregnancy loss at home and had allegedly researched the abortion medication misoprosotol, although the charges were eventually dropped and a second grand jury declined to indict Ms. Fisher), <https://www.nationaladvocatesforpregnantwomen.org/victory-for-lattice-fisher-in-mississippi/>; Press Release, National Advocates for Pregnant Women, *ACTIVIST UPDATE: NAPW and Justice Ginsburg’s unfinished work* (Sept. 24, 2020) (summarizing the road to victory in the criminal defense of Latice Fisher), available at <https://www.nationaladvocatesforpregnantwomen.org/activist-update-napw-and-justice-ginsburgs-unfinished-work/>.

13. Not all of these laws are specific to abortion. *See, e.g.,* Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. Times Magazine, (Sept. 22, 2014) (Describing Jennifer Whalen, a of three in the rural town of Washingtonville, Pa., who went to jail to begin serving a 9-to-18-month sentence for the felony of offering medical consultation about abortion without a medical license, for having helped her daughter obtain safe medication to end her pregnancy. Whalen had also been charged with three misdemeanors: endangering the welfare of a child, dispensing drugs without being a pharmacist, and assault.)
14. *See, e.g.,* Arkansas (creating a wide array of third party criminal liability for steps taken toward obtaining an abortion where one does not actually occur, via accomplice liability, attempt and conspiracy statutes that are part of Arkansas’s general criminal code); Kentucky (accomplice liability, conspiracy and attempt statutes all vastly expand the scope of criminal liability to punish third parties in relation to an illegal abortion); Georgia (if Georgia’s “Heartbeat” bill, and its change in the definition of “personhood” are permitted to take effect, that definition, in conjunction with existing state laws as to party to crime liability, attempt, conspiracy, and solicitation of a crime, would greatly expand the scope of third party criminal liability); Utah (if *Roe* were to be overturned, Utah’s broad criminal liability provisions in regard to accomplice liability, in particular, but also attempt, conspiracy, and other statutes, would likely render even those tangentially related to the termination of a pregnancy liable, often times as a principal, and even for extremely serious crimes such as murder and manslaughter).
15. La. Rev. Stat. §14.24
16. La. Rev. Stat. § 40:1061.29.
17. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 318 (2013). Although *Roe v. Wade* was in effect throughout this period of time, the study identified eight cases in which “pregnant women were alleged to have self-induced an abortion that the state claimed violated the state’s abortion laws. In two cases state action was used to detain women who expressed an intention to have an abortion, and in one of those the woman’s incarceration prevented her from having an abortion.”
18. *See* Jamille Fields Allsbrook & Nora Ellmann, *June Medical Services v. Russo: The Potential Impact on Abortion, Civil, and Human Rights*, *American Progress*, Center for American Progress, at 3 (Feb. 6, 2020), available at <https://www.americanprogress.org/issues/women/reports/2020/02/06/480156/june-medical-services-v-gee/>.
19. *See generally* Ashley Nellis, Ph.D., *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (2016): available at <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.
20. *Id.* at 11, citing Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, GUTTMACHER POL. REV. 19 (2016): 46B52, available at <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters>.
21. *Id.*, citing Rachel K. Jones and Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008B2014*, AM. J. PUBLIC HEALTH 107 (12) (2017): 1904B1909, available at <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304042>; Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, *New York Times*, July 9, 2019, available at <https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html>.



22. *Id.* at 11, citing Dan Keating, Tim Meko, and Danielle Rindler, *Abortion access is more difficult for women in poverty*, Wash. Post, July 10, 2019, available at <https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/>.
23. Cates, *Legal Abortion: The Public Health Record*, 215 *SCIENCE* 1586 (1982); see, e.g., Sheila Burke, *Doctors Applaud End of Tennessee's Fetal Assault Law*, Associated Press, April 1, 2016, available at <https://apnews.com/article/08ce8448799148bf852babadc33d1aef> (describing experience in Tennessee).
24. *June Medical Services, LLC v. Russo*, 591 U.S. ____, 140 S.Ct. 2103 (2020).
25. 505 U.S. 833 (1993).
26. See Mo. Ann. Stat. § 188.057 (moving gestational age for abortion ban to 14 weeks); Mo. Ann. Stat. §188.058 (moving gestational age for abortion ban to 18 weeks).
27. Mo. Ann. Stat. § 188.056.
28. See Alabama Human Life Protection Act, House Bill 314.
29. See Ark. Code Ann. § 5-61-302(a)(1).
30. Ark. Code Ann. § 5-61-304(a).
31. Miss. Code §41-41-45(2) & (3).
32. Ala. §13A-13-7.
33. The following states have passed explicit “triggering legislation” and can be found at: Arkansas (Ark. Code Ann. § 5-61-304(a)), Idaho (I.C. § 18-622), Kentucky (KRS §311.772), Louisiana (La. Code 40:1061), Mississippi (Miss. Code §41-41-45), North Dakota (NDCC, 14-02.1-04.2), Missouri (H.B. 126), Tennessee (Tn. § 39-15-213), South Dakota (S.D. § 22-17-5.1), and Utah (S.B. 174).
34. Anna North and Catherine Kim, *The “heartbeat” bills that could ban almost all abortions, explained*, Vox News, June 28, 2019, available at <https://www.vox.com/policy-and-politics/2019/4/19/18412384/abortion-heartbeat-bill-georgia-louisiana-ohio-2019>; Abigail Abrams, *Here’s How Conservatives Are Using Civil Rights Law to Restrict Abortion*, Time Magazine, Jan. 1, 2020, available at <https://time.com/5753300/heartbeat-bill-civil-rights-law/>.
35. Georgia, Kentucky, Louisiana, Mississippi, and Ohio banned abortion when a fetal heartbeat can be detected. See *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back*, Guttmacher Institute, Dec. 10, 2019, available at <https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back>.
36. *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, Guttmacher Institute, Jan. 9, 2020, available at <https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy#>.
37. Ohio (O.R.C. 2919.19 et seq.), Louisiana (La. Rev. State. §40:1061.1.3), Mississippi (S.B. 2116), Georgia (Ga. St. § 16-12-141), and Kentucky (Ky. Rev. Stat. Ann. § 311.7706(1)). Both Mississippi and Louisiana have alternative gestational age bans, Mississippi bans abortions after 15 weeks of gestation, and Louisiana bans abortions after 20 weeks of gestation. See Miss. H.B. 1510 and La. Rev. Stat. § 1061.1.

38. Missouri (Mo. Ann. Stat. §188.056, 057, 058).
39. Bassett, Laura, *Arkansas 12-Week Abortion Ban Becomes Law*, HUFFINGTON POST, (March 6, 2013), available at https://www.huffpost.com/entry/arkansas-12-week-abortion-ban_n_2821739.
40. Arkansas (Ark. Code §20-16-2004(b)).
41. Utah (U.C.A. § 76-7-302.5).
42. Alabama (Ala. Code §13A-13-7, and §26-23B-5).
43. See e.g. Lynn M. Paltrow, *PersonhoodUSA: Promoting a Radical, Fetal-Separatist Agenda*, Huffington Post, (Oct 25, 2010), https://www.huffpost.com/entry/personhoodusa-promoting-a_b_773572; Lynn M. Paltrow, *The New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 Am. J. Pub. Health, 17 (2014), available at <https://ajph.aphapublications.org/doi/10.2105/AJPH.2012.301104>.
44. Ky. Rev. Stat. Ann. § 311.720.
45. *Id.* (emphasis added).
46. O.C.G.A. § 1-2-1.
47. Ark. Code Ann. § 5-1-102.
48. Code §§ 5-10-101 — 5-10-105, represent respectively Arkansas’s homicide statutes of: Murder in the First Degree, Murder in the Second degree, Manslaughter, and Negligent homicide.
49. Kansas (HB 2253), Alabama (Ala. §13A-6-1).
50. H.R.23 — Sanctity of Human Life Act, available at <https://www.congress.gov/bill/113th-congress/house-bill/23>; S.583 — Life at Conception Act of 2013, available at <https://www.congress.gov/bill/113th-congress/senate-bill/583>.
51. Arkansas (Ark. Code Ann. § 20-16-2103), Kentucky (Ky. Rev. Stat. Ann. § 311.731(2)), Missouri (V.A.M.S. 188.038), North Dakota (ND ST § 14-02.1-04.1.), Utah (H.B. 166), and Ohio (R.C 2910.10/ H.B. 214).
52. Ky. Rev. Stat. Ann. § 311.731(2).
53. Ark. Code Ann. § 20-16-2103.
54. *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, Guttmacher Institute (Jan. 2020), available at <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly>.
55. Adam Liptak, *Supreme Court Strikes Down Louisiana Abortion Law, With Roberts the Deciding Vote*, N.Y. Times (June 29, 2020), available at <https://www.nytimes.com/2020/06/29/us/supreme-court-abortion-louisiana.html>.
56. (Louisiana Case) *June Medical Services, LLC v. Russo*, 591 U.S. _____, 140 S.Ct. 2103 (2020); (Texas Case) *Whole Woman’s Health v. Hellerstedt*, 36 S. Ct. 2292 (2016).

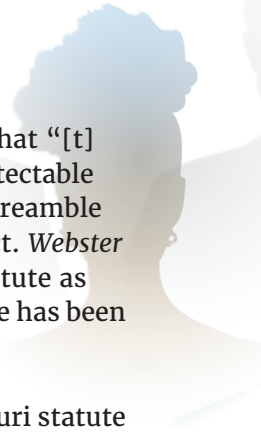


57. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).
58. Targeted Regulation of Abortion Providers, available at <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers>.
59. Ala. Code §26-23A-4.
60. Ohio S.B. 23/ O.R.C 2919.194.
61. La. Rev. Stat §40:1061.14.1.
62. La. Rev. Stat §40:1061.16.
63. La. Rev. Stat §40:1061.5.
64. *Counseling and Waiting Periods for Abortion*, Guttmacher Institute, Oct. 1, 2020, available at <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.
65. O.C.G.A. § 16-5-1(a).
66. In fact, Georgia is one of the few (if not the only) state that allows aggravated assault to be the predicate felony even when the aggravated assault is the act that caused the death.
67. Georgia prosecutors are already testing the limitations of the felony murder rule: the District Attorney in one of Atlanta’s metro counties (DeKalb County) is currently pursuing the prosecution of an alleged drug dealer who sold heroin to a young man who later (outside the defendant’s presence) over- dosed on the drug and died. See J.D. Capelouto, *Alleged drug dealer charged with murder after man, 22, dies from overdose*, Atlanta Journal-Constitution, May 14, 2019, available at <https://www.ajc.com/news/local/after-drug-overdose-death-police-charge-alleged-dealer-with-murder/kexjgW1AUI9CtVGO2QUegK/>.

If this prosecution is successful, it would have implications for the abortion debate as well: If a drug dealer unknowingly sold a woman who was 7 weeks pregnant drugs and she experienced a pregnancy loss blamed (with or without scientific basis) on her drug use, it seems he could be prosecuted for felony murder—whether he knew the woman was pregnant or not (as intentionality is not an element of felony murder).

68. O.C.G.A. § 16-5-1(d).
69. See, e.g., *Matter of Kierra C. [Kevin C.]*, 101 A.D.3d 993, 994, 955 N.Y.S.2d 526 (N.Y. 2d Dep’t 2012) (affirming neglect finding where father knew or should have known of the mother’s drug use and failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy); *Perry T. v. Ariz. Dep’t of Econ. Sec.*, No. 1 CA-JV 13-0298 (Ariz. App. Div. 1, May 13, 2014) (affirming neglect finding and termination of parental rights where father knew or should have known Mother was abusing illegal drugs while pregnant with A.T. and failed to intervene in Mother’s drug use, or take or attempt to take any measures to prevent such drug use, while Mother was pregnant with A.T.); *W.D. v. Tex. Dep’t of Family & Protective Servs.*, No. 03-14-00581-CV, 2015 WL 513267 (Tex. App.-Austin, Feb. 05, 2015) (affirming neglect finding and termination of parental rights for father who “should have known” of mother’s prenatal drug use and failed to prevent “child to remain in conditions or surroundings that endangered the child’s physical and emotional well-being”). Similar cases exist in CA, FL, GA, ID, IN, LA, MI, NJ, OH, OR, TN, VT, and WV.

70. See, e.g., *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016) (overturning feticide conviction of woman who used misoprostol to end her pregnancy); acey Fortin, *California’s Attorney General Condemns Murder Charges Over a Stillbirth*, N.Y. Times (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/us/chelsea-becker-california-stillbirth.html>; Madeleine Schwartz, *Criminalizing a Constitutional Right*, N.Y. Rev. (December 3, 2020), <https://www.nybooks.com/articles/2020/12/03/criminalizing-abortion-constitutional-right/>.
71. O.C.G.A. § 16-5-80(b).
72. O.C.G.A. § 16-5-80(c).
73. O.C.G.A. § 16-5-80(f).
74. See Sudhin Thanawala, *Prosecutors push back on enforcing new state abortion laws*, Associated Press, May 30, 2019, available at <https://apnews.com/article/georgia-health-us-news-ap-top-news-ut-state-wire-20d1230314e04bb19b13dc73ab94d8e1>; Katheryn Tucker, *DA Warns Women They Can Be Charged With Murder Under New Abortion Law*, Daily Report, May 22, 2019, available at <https://www.law.com/dailyreportonline/2019/05/22/da-warns-women-they-can-be-charged-with-murder-under-new-abortion-law/>; Jennifer Bellamy and Adrienne Haney, *Acting Cobb DA compares prosecutors who refuse to enforce ‘heartbeat’ abortion law to Nazis, segregationists*, 11Alive, May 29, 2019, available at <https://www.11alive.com/article/news/politics/acting-cobb-da-compares-prosecutors-who-refuse-to-enforce-heartbeat-abortion-law-to-nazis-segregationists/85-3b5ad261-93e8-4779-a9ac-068a4eed30dc>.
75. Press Release, George W. Edwards, District Attorney, Dougherty Judicial District, Albany GA (June 16, 2015); *State v. Jones*, Order, Nolle Prosequi, State Court of Dougherty County, Georgia, J. Victoria S. Darrisaw, (May 4, 2016).
76. ASSAULT, Black’s Law Dictionary (11th ed. 2019).
77. Ark. Code Ann. § 5-13-204 (a)
78. Ark. Code Ann. § 5-13-205(a)(1).
79. Ark. Code § 5-61-303(4); See also Ark. Code § 20-16-1601(5) (“‘Unborn Child’ means the offspring of human beings from conception until birth.”); Ark. Code § 5-1-102 (B)(i)(a) (“As used in §§ 5-10-101 — 5-10-105, ‘person’ also includes an unborn child in utero at any stage of development. [An] ‘Unborn child’ means offspring of human beings from conception until birth.”).
80. Ark. Code § 20-16-2003.
81. Mo. Ann. Stat. §§ 565.050.1-.2.
82. *State v. Kenney*, 973 S.W.2d 536 (Mo. Ct. App. 1998), *overruled on other grds.*, *State v. Withrow*, 8 S.W.3d 75 (Mo. 1999). *Id.* at 544-45.

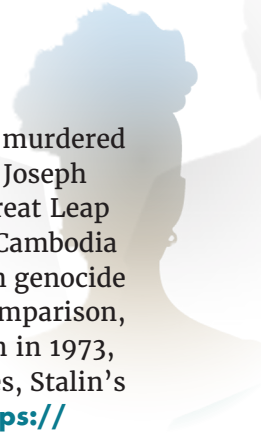


83. In 1989, the U.S. Supreme Court let stand the preamble MO Ann. Stat. § 1.205 declaring that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and well-being.” The Court upheld the constitutionality of this preamble only after determining that it was “precatory” and had no current specific legal effect. *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490, 504–07 (1989) (upholding the Missouri statute as constitutional on its face, and leaving open for later review the question whether the statute has been unconstitutionally interpreted or applied).
84. *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490, 504–07 (1989) (upholding the Missouri statute as constitutional on its face, and leaving open for later review the question of whether the statute has been unconstitutionally interpreted or applied).
85. See, e.g., *McQueen v. Gadberry*, 507 S.W.3d 127, 141 (Mo. Ct. App. 2016); *Bailey v. State*, 191 S.W.3d 52, 55 (Mo. App. E.D. 2005); *State v. Rollen*, 133 S.W.3d 57, 61–63 (Mo. App. E.D. 2003); *State v. Holcomb*, 956 S.W.2d 286, 289–93 (Mo. App. W.D. 1997) (all rejecting defendants’ arguments that interpreting Section 1.205 to mean a fetus in utero is a person for criminal statutes is contrary to *Roe*).
86. *Hicks v. State*, 153 So. 3d 53, 59 (Ala. 2014) (citing *Ankrom v. State*, 152 So.3d 373 (Ala.Crim.App.2011)) (“the plain meaning of the word ‘child’ is broad enough to encompass all children—born and unborn—including [the] unborn children in the cases before us.”)

Historically, courts have held that the usual meaning of the word *child* does not include application prior to an infant’s birth, observing that common usage of the terms *parent* and *child* generally means that pregnant women do not become parents prior to the birth of their children, and that fetuses do not become children prior to birth. See, e.g., *Burns v. Alcala*, 420 U.S. 575, 581 (1975) (ordinarily, “the word ‘child’ ... refer[s] to an individual already born, with an existence separate from its mother”); *State v. Gray*, 584 N.E.2d 710, 711 (Ohio 1992) (holding that a mother could not be prosecuted for child endangerment based on her pregnancy and drug use, finding that “the terms ‘parent’ and ‘child’ within their common usage” do not include pregnant women or the unborn.) Some courts, however, have judicially expanded the meaning of the word “child” to include the unborn. See, e.g., *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (S.C. 1997); *Ex parte Hope Elisabeth Ankrom Petition for Writ of Certiorari*, 152 So.3d 397 (Ala. 2013).

87. Ala. Code § 26-15-3 (Child Abuse Generally); Ala. Code § 26-15-3.1 (Aggravated Child Abuse).
88. Ala. Code § 26-15-3.
89. Ala. Code § 26-15-3.1(b)(2).
90. Ala. Code § 26-15-3.2.
91. *Ex parte Ankrom*, 152 So.3d 397, 400 (Ala. 2013).
92. *Ex parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013) (J. Parker Concurring opinion). See also Nina Martin, *This Alabama Judge Has Figured Out How to Dismantle Roe v. Wade*, ProPublica, Oct. 10, 2014, available at <https://www.propublica.org/article/this-alabama-judge-has-figured-out-how-to-dismantle-roe-v-wade>.
93. *Hicks v. State*, 153 So.3d 53, 63–65 (Ala. 2014).

94. Nina Martin, *Alabama Mom's Charges Are Dropped, But Only After an Arduous Battle*, ProPublica (June 2, 2016), available at <https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle>; see also Rob Culpepper, *Special report: Alabama leads nation in turning pregnant women into felons* (Sept. 23, 2015), available at https://www.al.com/news/2015/09/when_the_womb_is_a_crime_scene.html. See also Alabama Appendix to this Report, available at www.nacdl.org/AbortionCrimReport.
95. Ala. Code § 26-15-2(4)
96. See also *Wallace v. State*, 130 So. 3d 212 (Ala. Crim. App. 2013) (evidence supported a finding that child victim was under the supervision of her mother and defendant, such that defendant was a “responsible person” for purposes of charge of chemical endangerment of a child. Defendant was child’s step-father)
97. See *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992).
98. O.C.G.A. § 1-2-1(b) (“Natural person” means any human being including an unborn child.”)
99. *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992).
100. *Id.*
101. *Id.*
102. See Georgia Appendix to this Report, available at www.nacdl.org/AbortionCrimReport.
103. Ohio Rev. Code Ann. § 2919.25
104. Ohio Rev. Code Ann. § 2919.25 (F)(1)(a)(ii)
105. Ohio Rev. Code Ann. § 2919.25 (D)(6)(e)
106. See generally Ga. Code Ann. § 1-2-1(b) (““Natural person” means any human being including an unborn child.”); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1316 (N.D. Ga. 2020) (finding that § 1-2-1(b) on its own terms amends every appearance of the word “person” or “human being” throughout the Official Code of Georgia)
107. O.C.G.A. § 17-10-30(2-4, 7). See also *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1316 (N.D. Ga. 2020) (“The list goes on. And these are not potential applications, as the State Defendants attempt to characterize them. These would be lawful applications of existing criminal statutes. The only undefined variable is prosecutorial discretion: under which of these amended statutes will the State decide to bring charges? Such uncertainty provides precisely the kind of opportunity for “policemen, prosecutors, and juries to pursue their personal predilections.”) (internal citations omitted).



108. The findings in Alabama’s HB 314 state, “It is estimated that 6,000,000 Jewish people were murdered in German concentration camps during World War II; 3,000,000 people were executed by Joseph Stalin’s regime in Soviet gulags; 2,500,000 people were murdered during the Chinese “Great Leap Forward” in 1958; 1,500,000 to 3,000,000 people were murdered by the Khmer Rouge in Cambodia during the 1970s; and approximately 1,000,000 people were murdered during the Rwandan genocide in 1994. All of these are widely acknowledged to have been crimes against humanity. By comparison, more than 50 million babies have been aborted in the United States since the Roe decision in 1973, more than three times the number who were killed in German death camps, Chinese purges, Stalin’s gulags, Cambodian killing fields, and the Rwandan genocide combined[,]” available at <https://legiscan.com/AL/text/HB314/id/2018876/Alabama-2019-HB314-Enrolled.pdf>.”
109. O.C.G.A. § 17-10-30(2). See also Georgia Appendix to this Report, available at www.nacdl.org/AbortionCrimReport.
110. U.C. § 76-2-202.
111. *State v. Briggs*, 2008 UT 75, ¶ 28, 197 P.3d 628, 635 (citing § 76-2- 202).
112. See *State v. Ervin*, 22 Utah 2d 216, 218, 451 P.2d 372, 373 n.1 (1969).
113. U.C. § 76-4-101.1. When an offense designates and defines an attempt and provides a penalty for it, the specific offense controls over Utah’s general attempt statute. *Id.* § 76-4-301. Utah’s abortion and criminal homicide statutes appear to define attempt as a separate crime, so this exemption may apply. *Id.* § 76-7-302.5 (“Notwithstanding any other provision of this part, a person may not perform or attempt to perform an abortion after the unborn child reaches 18 weeks gestational age unless the abortion is permissible for a reason described in Subsection 76-7-302(3)(b)”).
114. U.C. § 76-4-203. Note that a person cannot be convicted of both an inchoate and principal offense or of both an attempt and conspiracy. *Id.* § 76-4-302.
115. U.C. § 76-4-201
116. *Id.*
117. See generally Title 76. Utah Criminal Code, Chapter 5 (Offenses Against the Person).
118. U.C. §§ 76-5-201, 203, 205.
119. *Id.* §§ 203, 205.
120. See Utah Appendix to this Report, available at www.nacdl.org/AbortionCrimReport.
121. Utah’s abortion statutes do not appear to protect women who seek terminations not permitted by statute, though seeking an abortion permitted under the law should insulate a pregnant woman from criminal liability. U.C. § 76-7-314.5. This protection, however, appears to be nothing more than a tautology, prohibiting criminal liability where a woman obtains a legal abortion. See also If When How, “Self-Managed Abortion, the Law, and Covid-19 Fact Sheet, available at https://www.ifwhenhow.org/wp-content/uploads/2020/04/20_04_Final_SMA_TheLaw_COVID-19_FactSheet_PDF.pdf (“[t]o date, no one has been prosecuted just for ordering abortion pills, obtaining a prescription online, or trying to get a prescription filled at a pharmacy. Nonetheless, evidence of having purchased abortion pills online has been used against people charged with other crimes related to self-managed abortion.”)

122. See *Bigelow v. Virginia*, 421 U.S. 809 (1975).
123. Annie Gowen, Kansas voters to decide abortion question; S.C. Senate approves sweeping ban, Wash. Post, Jan. 28, 2021, available at https://www.washingtonpost.com/national/kansas-abortion-constitutional-amendment/2021/01/28/9f87a8c2-61b0-11eb-9430-e7c77b5b0297_story.html.
124. The following state bills were pending across the country as this report neared completion: Abortion, physicians, duty of care owed to babies born alive after failed abortion, criminal penalties, definitions further provided, AL [R] HB 237 — Updated (Hearing 04/07/2021); Abortion, chemical abortion, doctors required to inform of possibility of reversing chemical abortions, cause of action and criminal penalties provided, AL [R] HB 317 — Updated (New 02/03/2021); To Create The Arkansas Unborn Child Protection Act; To Abolish Abortion In Arkansas And Protect The Lives Of Unborn Children; And To Protect All Human Life, AR [R] SB 6 — Updated (Delivered to Governor .3/04/2021); abortion prohibition; licensure repealed, AZ [R] HB 2650 — Updated (New 01/22/2021); abortion; criminal classifications, AZ [R] HB 2878 — Updated (Status 02/18/2021); abortion; unborn child; genetic abnormality, AZ [R] SB 1457 — Updated (Governor Signed 04/27/2021); Relating To The Termination Of Pregnancy. HI [R] SB 841 — Updated (Status 01/30/2021); Relating To Children, Hi [R] Sb 842 — Updated (Status 01/30/2021); Partial Birth Abortion Ban, IL [R] HB 827 — Updated (Status .03/27/2021); Repeal Reproductive Health Act, IL [R] HB 1893 — Updated (Status 03/22/21); Repeal Reproductive Health Act, IL [R] HB 3043 — Updated (New 02/19/2021); Repeal Reproductive Health Act, IL [R] HB 3046 — Updated (Status 03/27/2021); Repeal Reproductive Health Act, IL [R] HB 3047 — Updated (Status 03/27/2021); Infant Born Alive Protection, IL [R] HB 3050 — Updated (Status 03/27/2021); Repeal Reproductive Health Act, IL [R] HB 3053 — Updated (Status 03/27/2021); Coerced abortions, protection of a fetus, and wrongful death or injury of a child., IN [R] HB 1439 — Updated (New 01/13/2021); Protection of life., IN [R] HB 1539 — Updated (Status 01/26/2021); AN ACT relating to the performance of an abortion upon a minor and declaring an emergency., KY [R] HB 96 — Updated (Status 01/14/2021); AN ACT relating to abortion and declaring an emergency., KY [R] HB 460 — Updated (New 02/11/2021); Crimes: abortion; reference to crime of administering drugs to procure miscarriage; remove to reflect repeal. Amends sec. 16a, ch. XVII of 1927 PA 175 (MCL 777.16a)., MI [R] SB 71 — Updated (Status 02/03/2021); Infants born alive as a result of an abortion medical care protections modifications, MN [R] SF 202 — Updated (New 01/20/2021); Term of imprisonment for first-degree murder of an unborn child specification, MN [R] SF 635 — Updated (Status 02/18/2021); Establishes the “Born-Alive Abortion Survivors Protection Act,” MO [R] HB 155 — Updated (Status 01/07/2021); Establishes the “Born-Alive Survivors Protection Act,” MO [R] HB 672 — Updated (Ancillary 02/03/2021); Establishes the “Born-Alive Abortion Survivors Protection Act,” MO [R] SB 168 — Updated (Status 05/12/2021); Establishes the “Abolition of Abortion in Missouri Act,” MO [R] SB 391 — Updated (Status 05/05/2021); Referendum to adopt the Montana Born-Alive Infant Protection Act MT [R] HB 167 — Updated (Passed 04/29/2021); Adopt the Montana Abortion-Inducing Drug Risk Protocol Act, MT [R] HB 171 — Updated (Signed by Governor 04/26/2021); relative to the right of any infant born alive to medically appropriate and reasonable care and treatment., NH [R] HB 233 — Updated (Status 03/24/2021); protecting nascent human life as a reasonable and valid state interest., NH [R] HB 622 — Updated (Status 02/19/2021); relative to the protection of fetal life., NH [R] HB 625 — Updated (Status 03/24/2021); “Dismemberment Abortion Ban Act”; prohibits dismemberment abortions., NJ [R] A 3725 — Updated (Text 03/18/2020), Repeal Abortion Ban, NM [R] HB 7 — Updated (Status 03/09/2021); Repeal Abortion Ban, NM [R] SB 10 — Updated (Signed by Governor 02/26/2021); Relates to establishing the born alive abortion survivors’ protection act, NY [R] AB 4429 — Updated (New 02/05/2021), Relates to establishing the born alive abortion survivors’ protection act, NY [R] SB 2569 — Updated (New 01/22/2021); Provides that either a person or an unborn child in any stage of gestation may be the victim of an assault, NY [R] SB 2669 — Updated (New 01/23/2021); Oklahoma Abortion-Inducing Drug Risk Protocol Act. Effective date., OK [R] SB 778 — Updated (Status 05/06/2021); Relating to abortion., OR [R] HB 2699 — Updated (Status 01/19/2021); Relating to abortion, OR [R] SB 586 — Updated

(Status 01/20/2021); An Act Relating To Health And Safety — Born-Alive Infant Protection Act (Enacts the Born-Alive Infant Protection Act and provide for the duties and obligations of medical personnel in certain circumstances.), RI [R] H 5037 — Updated (Status 04/09/2021); An Act Relating To Criminal Offenses — Children (Crime for medical personnel to provide reasonable medical care to new born baby.), RI [R] H 5579 — Updated (Status 04/09/2021); An Act Relating To Health And Safety — Born-Alive Infant Protection Act (Enacts the Born-Alive Infant Protection Act and provides for the duties and obligations of medical personnel in certain circumstances.), RI [R] H 5582 — Updated (Status 04/09/2021); Abortion — As introduced, permits a person to petition a court for an injunction to prohibit a woman who is pregnant with the person’s unborn child from obtaining an abortion; requires the petitioner to execute a voluntary acknowledgement of paternity that is not subject to being rescinded or ..., TN [R] HB 1079 — Updated (Status 04/07/2021); Abortion; born alive human infant, treatment and care, penalty, VA [R] HB 227 — Updated (Status 02/12/2020); Unborn child protection from dismemberment abortion; penalties, VA [R] HB 2241 — Updated (Status 02/06/2021); An Act to create 253.109 and 940.01 (1) (c) of the statutes; Relating to: requirements for children born alive following abortion or attempted abortion and providing a penalty, WI [R] AB 6 — Updated (Status 02/16/2021); An Act to create 253.109 and 940.01 (1) (c) of the statutes; Relating to: requirements for children born alive following abortion or attempted abortion and providing a penalty, WI [R] SB 16 — Updated (Status 02/16/2021); An Act to repeal 940.04; and to amend 939.75 (2) (b) 1. and 968.26 (1b) (a) 2. a. of the statutes; Relating to: eliminating certain abortion prohibitions, WI [R] SB 75 — Updated (New 02/06/2021); Rewriting the Criminal Code, WV [R] HB 2017 — Updated (Status 04/08/2021); Creating the Unborn Infants Wrongful Death Act, WV [R] HB 2594 — Updated (New 02/18/2021); Born alive infant-means of care, WY [R] SF 34 — Updated (Signed by Governor 04/06/2021).



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