

NACDL REPORT

ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS: Louisiana Appendix

I. Introduction

Louisiana is, at present, one of the least hospitable states in the country to those seeking and performing abortions. But the climate in Louisiana could imminently become even more inhospitable to abortion providers, women who seek abortions, and others, depending on the outcomes of two highly consequential cases that are now being litigated in the courts.

Louisiana is currently awaiting the United States Supreme Court's decision in *June Medical Services v. Russo*, see 905 F.3d 787, (5th Cir. 2018), *cert. granted*, 140 S.Ct. 35 (U.S. Oct. 4, 2019) (No. 18-1323), regarding Act 620, a Louisiana statute that would require abortion providers to obtain admitting privileges from a hospital within 30 miles of where any abortion is performed. The Supreme Court has granted an emergency stay that prevents Louisiana's law from going into effect pending the Court's decision, which is expected prior to the end of the present Supreme Court term.

On February 20, 2020, the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction of the trial court in *Jackson Women's Health Organization v. Dobbs*,

see 951 F.3d 246 (5th Cir. 2020), finding Mississippi’s Heartbeat Bill unconstitutional.

Louisiana’s Heartbeat Bill is currently on the books but is unenforceable.

While the courts currently prevent the enactment of Act 620 and Louisiana’s Heartbeat Bill, the future of abortion in Louisiana still hangs in the balance. Abortion in Louisiana is currently legal up until 20 weeks post-fertilization. If *Roe v. Wade* were to be overturned, abortion would become illegal in Louisiana except in extremely narrow circumstances. The expansion of criminal liability under such circumstances for those seeking and providing abortions, and even those peripherally involved in an abortion, would be devastating.

This appendix will summarize the current abortion laws in Louisiana, the procedural history and parameters of both the admitting privileges statute, and the Heartbeat Bill, as well as their impact if allowed to go into effect, and will examine the expanded criminal liability that would result if *Roe v. Wade* is overturned and Louisiana’s trigger ban becomes enforceable.

II. Current Abortion Restrictions in Louisiana

Currently, Louisiana prohibits abortions after 20 weeks postfertilization through the Pain-Capable Unborn Child Protection Act., *see* LA. REV. STAT. § 1061.1. The law does not provide exceptions for cases of rape or incest, instead only providing an exception when the pregnancy is medically futile or when the abortion is necessary to prevent death or substantial harm to the mother, *see Id.* The statute does not provide the

mother with immunity and subjects “any person” who intentionally or knowingly violates this statute to the Title 40 penalties provided in LA. REV. STAT. § 40:1061.29, including imprisonment for up to two years, a fine of \$1,000.00, or both.

Louisiana also bans dilation and evacuation abortions, referring to them as “dismemberment abortions,” which is the procedure that accounts for the majority of second trimester abortions in the United States, *see* Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second–Trimester Procedure*, GUTTMACHER INST. (Feb. 21, 2017), <https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure>.

Prior to receiving an abortion, the state imposes a mandatory 72-hour waiting period and requires that the woman seeking the abortion receive state-directed counseling as well as certain printed materials advising her of the risks involved, *see* LA. REV. STAT. § 40:1061.16. However, if the mother certifies that she lives over 150 miles away from the facility, the statute reduces the waiting period to 24 hours.

If the woman seeking an abortion is a minor, Louisiana law requires the woman to obtain either parental consent or a court order authorizing the procedure, *see Id.* § 40:1061.14. In addition, the law makes it a crime for any person providing parental consent to provide false documentation regarding their identity, and any employee of the abortion facility who knowingly assists through either executing the false documents or accepting the false documents is deemed to have committed a crime as

well, *see Id.* § 1061.14.1. While this statute seems to be aimed only at the physician, those giving the parental consent, and employees of the clinic, nothing in the statute specifically exempts the woman seeking the abortion.

Louisiana has laws restricting public insurance coverage of abortions in line with the Hyde Amendment, with public funding only available when the abortion is necessary to prevent the death of the mother or when the pregnancy is from a reported and verified rape or incest, *see Id.* § 40:1061.6. It is a crime in Louisiana for any employee of the state or of any agency receiving governmental assistance to recommend an abortion to any woman, *see Id.* 40:1061.5. The statute makes an exception for physicians who are licensed by the Louisiana State Board of Medical Examiners acting to save or preserve the life of the pregnant woman, *see Id.* This statute not only prohibits the recommendation of an illegal abortion but abortions that are completely legal as well.

Louisiana also prohibits anyone from advertising an abortion, defined as “the placing or carrying of any advertisement of abortion services by the publicizing of the availability of abortion services,” *see Id.* § 14:87.4(A). This statute applies to anyone who advertises, and it carries a sentence of imprisonment for up to one year, a fine of up to \$5,000.00, or both, for those who violate it, *see Id.* § 14:87.4(B).

A separate but related statute, codified at LA. REV. STAT. § 14:88, prohibits the distribution of abortifacients. The statute defines the distribution of abortifacients as the intentional “distribution or advertisement for distribution of any drug, potion,

instrument, or article for the purpose of procuring an abortion” or the “publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing contraception or producing abortion or miscarriage,” *see Id.* Anyone found to be violating this statute could face up to six months in prison, a fine of up to \$500.00, or both, *see Id.* Neither of Louisiana’s abortion statutes provides any exceptions to these advertisement restrictions; they therefore would apply to *anyone* who advertises.

III. Summary of the Most Recent Abortion Legislation in Louisiana and Analysis of the Potential Impact If Such Legislation Is Permitted to Take Effect

A. Act 620

In June 2014, Louisiana passed Act 620, which, among other changes, “requires an abortion provider to have admitting privileges at a hospital within 30 miles of where any abortion is performed,” *see* H.B. 388, Act 620, Reg. Sess. (La. 2014). Prior to the passage of this law, Louisiana required abortion clinics to have transfer agreements with hospitals to ensure easy transfer should patients require hospital attention, *see* Nina Totenberg, *Beginning of the End for Roe? Supreme Court Weighs Louisiana Abortion Law*, NPR (Mar. 4, 2020, 5:06AM),

<https://www.npr.org/2020/03/04/807923122/beginning-of-the-end-for-roe-supreme-court-weighs-louisiana-abortion-law>. Act 620 is problematic for abortion providers

because most hospitals will not grant admitting privileges to doctors who are not providing the hospital with a steady stream of patients, and due to the fact that the total

abortion-related complication rate is only around 2%, abortion providers are unlikely to provide hospitals with a steady stream of patients, *see Id.* Thus, admitting privileges are difficult for abortion providers to obtain.

The admitting privileges requirement contained in Act 620 is identical to the admitting privileges law that was at issue in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), which required, among other things, physicians who provided abortions to have admitting privileges at a hospital within 30 miles of the clinic. The effect of the law was the closure of more than half of Texas facilities that provided abortion care, reducing the number of facilities from 40 to 19 in just two years, *see* Jamille Fields Allsbrook & Nora Ellmann, *June Medical Services v. Russo: The Potential Impact on Abortion, Civil, and Human Rights*, AMERICAN PROGRESS, 3 (Feb. 2020), https://cdn.americanprogress.org/content/uploads/2020/02/0211_3822/JuneMedical-report-RUSSO.pdf. The Supreme Court held that the Texas admitting privilege requirement constituted an undue burden on a woman's right to an abortion, *see Id.*

In August of 2014, the Center for Reproductive Rights brought a legal challenge against Act 620, *see Id.* at 4. In holding that Act 620 constituted an unconstitutional burden on a woman's access to abortion in light of *Whole Woman's Health*, the District Court for the Middle District of Louisiana blocked the law from going into effect, *see Id.* The District Court found that enforcement of the admitting privilege requirement would force all but one abortion provider at one clinic to stop providing care, *see Id.*

Louisiana appealed, and the Court of Appeals overturned the District Court's decision, finding that although the law was identical to the law in *Whole Woman's Health*, it wouldn't impose a substantial burden on abortion access in Louisiana, *see Id.* In determining that only one provider would be unable to obtain admitting privileges, the Court of Appeals allowed the law to go into effect, *see Id.* Plaintiffs requested an emergency stay from the Supreme Court to prevent the law from going into effect while they appealed the Court of Appeals's decision, *see Id.* The stay was granted, and the Supreme Court granted certiorari in October 2019, *see Id.* The Court heard oral argument in *June Medical Services v. Russo* in March 2020, and a decision on the case is expected before the end of this term, *see Id.*

A decision by the Supreme Court that upholds the constitutionality of Act 620 could have far-reaching effects, both on the availability of abortions within the State of Louisiana, and beyond. The additional barriers imposed by the Act would likely force all but one clinic in Louisiana to close, making abortion functionally unavailable for many women in the state, *see Id.* In addition, the one provider that potentially would remain only performs abortions up to 17-weeks' gestation, *see Id.* The enactment of Act 620 would therefore effectively eliminate abortions in Louisiana after 17 weeks, rather than after the currently legal 20-week mark.

Moreover, because the clinic represented in *June Medical Services* serves patients from Louisiana as well as neighboring states such as Texas, Mississippi, and Oklahoma,

the prohibitions resulting from Act 620 would affect women outside of Louisiana as well. It could practically prevent women in those states from obtaining abortions.

The Supreme Court's decision could also have an effect on the future of third-party standing to bring such suits, as the abortion providers in *June Medical Services* brought suit on behalf of their patients — the women seeking abortion care at their clinic, *see Id.* at 14. The concept of third-party standing remains imperative for the representation of women seeking abortions as financial and personal barriers often prevent such them from filing suit on their own. Third-party standing is also important in a broader context, in such areas as education rights, housing rights, and criminal justice, making the potential effects of the Supreme Court's decision in *June Medical Services* expansive, *see Id.* at 14–16.

B. Louisiana's Heartbeat Bill

On May 30, 2019, Louisiana Governor John Bel Edwards signed a Heartbeat Bill into law, making it illegal to perform an abortion once a fetal heartbeat has been detected, *see* LA. REV. STAT. § 40:1061.1.3. If permitted to take effect, the Bill would prevent abortion as early as six weeks into a pregnancy, when fetal cardiac activity can begin to occur, and, perhaps most critically, before most women would even know that they are pregnant.

Because the House rejected an amendment that would have included an exception for women who became pregnant through rape or incest, *see* Doha Madani,

Louisiana Passes Fetal Heartbeat Abortion Ban, Democratic Governor Says He Will Sign into Law, NBC (May 29, 2019, 6:14PM), <https://www.nbcnews.com/news/us-news/louisiana-passes-fetal-heartbeat-abortion-ban-democratic-gov-expected-sign-n1010976> , the only exceptions to the law are to prevent the death or serious harm to the mother, or if the pregnancy is diagnosed as medically futile, *see* LA. REV. STAT. §§ 40:1061.1.3.

Unlike other Title 40 abortion statutes, the Heartbeat Bill does not provide immunity for the mother, *see id.*, and subjects those who violate the law to penalties ranging from a fine of \$1,000.00 to imprisonment for up to two years, or both, *see Id.* § 40:1061.29. Violation of the Heartbeat Bill also provides a basis for a civil malpractice action and for professional disciplinary action, *see Id.* § 1061.1.3.

As noted previously, enforcement of this law is conditioned upon the Court of Appeals for the Fifth Circuit’s decision as to the legality of Mississippi’s Heartbeat Bill, S.B. 2116, *see Id.* Should the Fifth Circuit uphold Mississippi’s law, authority would be given to other states within the Court’s jurisdiction, such as Louisiana, to restrict abortion once a heartbeat has been detected. The law also provides that should *Roe v. Wade* be overturned, or should a constitutional amendment occur that gives power to the states to regulate abortion, the Heartbeat Bill would be replaced in favor of an even more restrictive law — an outright ban on abortion in the state of Louisiana, *see Id.* § 1061.1.3(F).

IV. The Impact in Louisiana if Roe v. Wade Were to Be Overturned

Thus, as devastating as either Act 620 or the Louisiana Heartbeat Bill would be for abortion rights in Louisiana and in terms of its impact on criminal liability, a decision overturning *Roe v. Wade* would be the death knell for abortion rights in the state and would lead to rampant criminal liability and overcriminalization.

A. The Right to Abortion Would be Effectively Eviscerated in the State of Louisiana if Roe v. Wade Is Overturned

As noted previously, the climate in Louisiana is not one conducive to abortions. In 2017, approximately 94% of Louisiana counties had no clinics that provided abortions, despite the fact that 72% of the women living in Louisiana lived in those counties, see *State Facts About Abortion: Louisiana*, GUTTMACHER INST. (Mar. 2020), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-louisiana#>. The percentage of counties without abortion clinics is likely even higher now, given that Louisiana had four abortion clinics in 2017, with only three of those clinics remaining. In a ranking of each U.S. state's support or hostility towards abortion rights based on its policies surrounding abortion access, Louisiana ranked "very hostile" towards abortion, which was the lowest ranking in the study, see Allsbrook & Ellmann, *supra* at 9. Therefore, it is no surprise that while Louisiana has a heartbeat bill pending that would almost certainly become enforceable if *Roe* were overturned, the State has opted for a far more restrictive approach.

If *Roe* were to be overturned, abortion in Louisiana would become illegal, except in the most limited of circumstances, *see* LA. REV. STAT. § 40:1061(A). Under Louisiana's trigger ban, also known as the Human Life Protection Act, which would take effect if *Roe* were to be overturned, anyone knowingly performing an abortion would be prohibited from doing so at any stage of a pregnancy, regardless of the age of the fetus, *see Id.* § 40:1061(C). The ban also prohibits anyone from assisting the woman with obtaining any drugs or medicine to be used with the specific intent of causing an abortion, *see Id.*

The ban contains no exceptions for rape, incest, or a medically futile pregnancy, *see Id.* The only exception provided is when a licensed physician performs an abortion in order to prevent death or the "serious, permanent impairment of a life-sustaining organ" of the mother, *see Id.* § 40:1061(F). Thus, any person who violates the prohibition is subjected to the Title 40 penalties. As noted previously, these include imprisonment for up to two years, a fine of \$1,000.00, or both.

The law ostensibly provides immunity for the mother herself against "any criminal conviction and penalty."

Even if it remains legal for women within Louisiana to travel outside of the state to obtain an abortion, their ability to do so may be jeopardized. Access to abortion is already poor in the South, and the hostility towards abortion would likely increase if *Roe* is overturned. In 2017, in every Southern state, with the exception of Florida, more

than half of women of reproductive age lived in a county with no abortion clinic, *see* Allsbrook & Ellmann, *supra* at 9. In the study mentioned above ranking each state's hostility or support towards abortion, Louisiana's border states, Arkansas and Mississippi, were also ranked "very hostile," *see Id.* Nearby states Texas, Oklahoma, Alabama, and Tennessee also all received the second lowest ranking of "hostile," *see Id.* The overruling of *Roe* would therefore functionally prevent many women all throughout the South, Louisiana included, from obtaining abortions.

B. If Roe v. Wade Is Overturned, It Will Also Lead to the Substantial Expansion of Criminal Liability in Louisiana

Assuming for the sake of this appendix that *Roe* is overturned, and abortion becomes a criminal offense in Louisiana, the implications will be unpredictable and numerous. Anyone even tangentially connected to an illegal abortion could potentially become incarcerated through the use of related criminal statutes in combination with anti-abortion laws. The statutes and implications discussed below are not intended to form an exhaustive analysis of every way prosecutors could seek to expand criminal liability in Louisiana, particularly in a post-*Roe* world, but to provide an idea of the possible reaches of criminal liability.

1. Human Life Protection Act

As discussed above, should *Roe* be overturned, the Human Life Protection Act would become enforceable, banning all abortions except in extremely limited circumstances, *see* LA. REV. STAT. § 40:1061. Any person, including any licensed

physicians, who agrees to perform an abortion that would be unlawful under this section would be subjected to the Title 40 penalties, which include a fine of up to \$1,000.00, imprisonment for up to two years, or both, *see* LA. REV. STAT. § 40:1061.29(A). While the law provides immunity for the mother, *see Id.* § 40:1061(H), in the case of a self-induced abortion, any person who obtains medication for the woman to induce her abortion would face those same penalties, regardless of the fact that the woman who received the abortion does not. Even if the abortion were not self-induced, this provision could implicate any pharmacist or holistic medical practitioner who provides the woman with any abortion medication or substances. Additionally, because the exceptions only apply to licensed physicians, it seems likely that anyone other than a physician who performs an abortion, even when done to save the life of the mother, could face the Title 40 penalties described.

2. Parties to a Crime

Because Louisiana law does not distinguish between principals and accessories before the fact, *see State v. Slaydon*, 177 So. 582, 583 (La., 1937), parties to crimes are classified as principals and accessories after the fact, *see* LA. REV. STAT. § 14:23.

i. Principals

Louisiana law 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,” *see Id.* § 14:24. A principal is as liable as the person who directly commits the crime, *see State v. Franklin*, 142 So.3d 295, 301 (La. Ct. App. 5th Cir., 2014).

Therefore, prosecutors could seek to charge anyone even remotely connected to an illegal abortion as a principal to the crime. Anyone working at the 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. In addition, liability could potentially be extended to anyone who drove the pregnant woman to the clinic, or the person who paid for the procedure. Because Louisiana law considers anyone who “counsels” another to commit the crime to be a principal to the crime, prosecutors could also seek to charge anyone who provided the woman with support regarding the abortion, when knowing that support would help her see the procedure through.

ii. Accessories After the Fact

An accessory after the fact is any person who, after someone has committed a felony, “harbor[s], conceal[s], or aid[s] the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction, or punishment,” *see LA. REV. STAT.* § 14:25. A person guilty of being an accessory after the fact can be imprisoned for up to five

years, but their punishment is also limited to one half of the maximum provided by law for a principal offender, *see Id.*

Prosecutors could seek to extend liability as an accessory after the fact to any person who tries to conceal the activity of any culpable party after an abortion. This could include anyone from a physician at a hospital assisting a woman who sought medical attention for difficulties arising from an illegal abortion to the woman's family, partner, or any friends who knew about the illegal abortion and failed to report her.

3. Conspiracy

In Louisiana, a criminal conspiracy is "the agreement or combination of two or more persons for the specific purpose of committing any crime," *see Id.* § 14:26. In order for a criminal conspiracy to be formed, one or more of the parties involved must commit an act in furtherance of the object of the agreement, *see Id.* Any person charged with conspiracy would be subjected to a sentence of one half of the largest fine, one half the longest term of imprisonment prescribed for such offense, or both, *see Id.* If the underlying crime carries a sentence of death or life imprisonment, a person convicted of conspiracy could face a sentence up to 30 years' imprisonment, *see Id.*

Although the Human Life Protection Act prevents the mother from being charged with "any criminal conviction and penalty," prosecutors could seek to charge the physician with conspiracy in addition to charging them under the Human Life Protection Act. If the intended underlying crime has been consummated, the

conspirators may be tried for either the conspiracy or the completed offense, *see State v. Passaniti*, 144 So.3d 1220 (La. Ct. App. 2d Cir., 2014). Conviction for one shall not bar prosecution for the other, *see Id.*, thus potentially allowing physicians to face two charges. This same rationale would apply if the person performing the abortion was not a licensed physician, even if the abortion was done in an effort to save the mother's life.

4. Inciting a Felony

Louisiana's Criminal Code also contains the crime of inciting a felony, or the "endeavor by one or more persons to incite or procure another person to commit a felony," *see* LA. REV. STAT. § 14:28. This provision allows for prosecution of certain people who have not directly committed the underlying offense as a principal or accessory after the fact. Anyone found to have incited a felony may be fined up to \$1,000.00, imprisoned for up to two years, or both, *see Id.* If the offender is over the age of 17 and is guilty of inciting a person under the age of 17 to commit a felony, the offender could face five years in prison, *see Id.*

It is possible that anyone who encourages a woman to obtain an abortion in violation of Louisiana law could be charged with inciting a felony. This could include a doctor or nurse who advises a woman to seek an abortion, and any parties that assist in paying for the procedure, such as her partner. If the woman is a minor, and her mother convinces the physician to perform an abortion, the mother could be charged with

inciting a felony, facing up to five years in prison. Even under the current state of the law, such criminal liability exists.

5. Manslaughter

In Louisiana, manslaughter is defined as a homicide committed, without any intent to cause death or great bodily harm, when the offender is engaged in the perpetration of any felony not enumerated in the First- and Second-degree murder statutes, or in any intentional misdemeanor directly affecting the person, *see Id.* § 14:31. The penalty for a charge of manslaughter is up to 40 years in prison, *see Id.*

Because a fetus is not considered a human being for purposes of the homicide statutes under Louisiana case law, *see State v. Brown*, 378 So.2d 916 (La., 1979); *State v. Gyles*, 313 So.2d 799 (La. 1975); *State v. Keller*, 592 So. 2d 1365, 1366 (La. Ct. App. 1991), no one can be charged for murder, manslaughter, or negligent homicide for the death of an unborn child. However, nothing seems to prohibit the prosecution of a physician for manslaughter should the mother die due to an illegal abortion. While it seems unlikely that a physician would be charged, it remains a possibility and would not be surprising given Louisiana's already hostile attitude towards abortions. Even under current laws as they now stand, such criminal liability exists.

V. *Possible Legal Challenges to Criminalizing Abortion*

A. Due Process Violations

Abortion is a liberty right as well as an equality right, and thereby conduct protected by the substantive guarantee of liberty found in the Due Process clauses of the Fifth and Fourteenth Amendments, *see Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833 (1992). Abortion restrictions that deny women equality impose an undue burden on a woman's fundamental right to decide whether to become a mother, *see Id.*

1. Unconstitutionally Vague

The Louisiana statutes which criminalize abortion also lack sufficient definiteness with respect to their terminology. Vague language used in the statutes permits prosecutors and courts to use their authority arbitrarily, potentially leading to discriminatory prosecutions as discussed in more detail below. Such statutes do not provide the citizens of Louisiana with fair notice as to what conduct is illegal and could permit extraordinary prosecutions.

For example, "medically futile" as used in the current 20-week prohibition is defined as the unborn child having a "profound and irremediable . . . anomaly that is incompatible with sustaining life at birth," *see* LA. REV. STAT. § 40:1061.1(C)(6). The code does not specify what is "sustained" life after birth, leaving women and physicians without adequate guidance as to how long a fetus must be able to live after birth to constitute sustained life — whether it is a matter of seconds, minutes, hours, days, or longer?

Another phrase that could result in confusion is “performs or induces.” The phrase “performs or induces” includes any act of causing induction, which seems to allow liability to extend well beyond the individual performing the abortion and is arguably overly broad. Such wording raises important questions as to who would be swept under this umbrella, and where the limits would be; for instance, whether a friend who supported a distraught mother, knowing her support would help the woman to see the procedure through, or someone else who counseled her to obtain an abortion could be prosecuted as a result.

A final example can be found in the exceptions to a number of the abortion criminalization statutes. Many allow an exception when the abortion would be necessary to prevent injury to a “major bodily function” or “life sustaining organ” of the mother. Again, the Code does not provide any further guidance as to how to determine whether an injury to a woman’s bodily function would be considered “major,” nor as to which organs are considered to be life sustaining. These statutes do not specify whether courts should use a subjective standard based on the mother’s life circumstances, or an objective standard, and, if it is the latter, what that standard would be.

Louisiana’s use of overly broad and vague language in the abortion criminalization statutes leave many questions unanswered, making it impossible to predict the multitude of ways liability may be extended.

2. Current Laws Are Not Narrowly Tailored to the State's Interest

In addition, many of the laws criminalizing abortion are not narrowly tailored to achieve the state's compelling interest. For example, one of the exceptions that would allow for public funds to be used for an abortion is in the event that the pregnancy resulted from rape. The law, however, requires that the rape must have been reported to, and verified by, law enforcement. If such a law is meant to save the victim from the emotional trauma associated with being forced to carry the child of her rapist, forced reporting to law enforcement should not be necessary. The rape victim should instead be permitted to report her rape to her physician, such that it would be recorded in her patient's medical records. This is a more narrowly tailored way to further the state's compelling interests.

B. Violation of Equal Protection

In the years since the decision in *Roe v. Wade*, the Supreme Court has come to recognize a woman's right to an abortion as an equality right as well as a liberty right, *see* Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. 160 (2013). While the abortion restrictions imposed in Louisiana, both current and conditional, seek to protect both women and the fetus, such restrictions are premised on stereotypical assumptions about a woman's sexual and/or maternal role(s), *see Id.*

The State’s compelling interest in protecting potential human life is not sufficient to justify the criminalization of abortion that is occurring in Louisiana, and which forces women to carry the burden of forced childbirth alone, *see Id.* These laws reflect a stereotypical view that women can simply be forced to accept the “natural” consequences of motherhood, *see Casey* at 928. The legislature premises the criminalization of abortion on protecting human life, but then subsequently fails to provide the woman forced to sustain her pregnancy with any support regarding the physical, emotional, and financial costs of pregnancy, childbirth, and raising the child, *see Siegel & Siegel, supra.* When abortion restrictions both reflect and enforce traditional gender-based stereotypes, such restrictions are likely to violate the Equal Protection Clause of the U.S. Constitution, *see Id.*

VI. Policy-Based Objections

A. Increase in Overcriminalization and Mass Incarceration

The U.S. represents only 5% of the world’s population yet holds 25% of the world’s inmates, *see Mass Incarceration, ACLU LA., <https://www.laclu.org/en/issues/mass-incarceration>.* Louisiana’s numbers are more than double the U.S. average in that Louisiana incarcerates 1,619 individuals per 100,000 residents, *see Id.* In the last four decades, the prison population in Louisiana has more than quadrupled, and the criminalization of abortion will only exacerbate that number, *see Id.*

It is inevitable that women will still require, and therefore still seek, abortions, even if they are criminalized, either through physicians willing to perform them illegally or through self-induced methods. While under current Louisiana law abortions are legal up to 20 weeks, the fact that over 72% of women live in counties without abortion clinics shows that access to abortion, even when it is legal, is far from guaranteed.

If *Roe* is overturned, abortions would be prohibited regardless of the fetus's age, resulting in greater numbers of illegal abortions. Anyone convicted of performing an abortion faces the possibility of serving a prison sentence. Through the use of other Louisiana criminal statutes, any employee of a clinic providing illegal abortions, and the woman's partner, family, and any of her friends could face time in prison as a principal or accessory after the fact. Because the limitations on who exactly liability stemming from illegal abortions could reach are not well defined, the criminalization of abortion will only amplify Louisiana's already existing mass incarceration problem.

B. Disproportionate Impacts on Communities of Color

The effects of abortion criminalization will fall more harshly on vulnerable communities, such as communities of color. Black women received more than 62% of abortions in Louisiana in 2015, meaning they would be disproportionately affected should further restrictions be imposed in Louisiana, *see Allsbrook & Ellmann, supra* at

11. Restrictions on abortion access exist within the broader health care system, in which Black women already bear the burden of systemic racism and bias preventing them from accessing quality health care, see *Id.* Black people are also already overrepresented in Louisiana prison systems, being incarcerated at a rate of over four times that of their white counterparts. The criminalization of abortion combined with the overpolicing of communities of color will only amplify the disparities Black communities already face.

C. Disproportionate Impacts on Lower-Income Communities

Criminalizing abortion will also have a disproportionate impact on economically disadvantaged communities. In 2011, the rate of unintended pregnancy for women with incomes below the poverty level was more than five times that of women with incomes 200% or higher above the poverty level, see *Id.* at 11. Under the current laws, lower income women seeking an abortion in Louisiana already face greater barriers than more affluent women seeking an abortion. Women with low incomes are more likely to have to drive more than an hour to reach a clinic and are less likely to be able to cover the costs associated with the 72-hour waiting period, see *Id.* Should abortion effectively become illegal in Louisiana because *Roe* is overturned, these same women would also be less likely to be able to travel out of state to obtain a legal abortion, thus resulting in more women with lower incomes being forced to seek illegal abortions within the state, and subjecting them and anyone who aids in that process to enhanced criminal liability.

D. Increase in Litigation

Litigation in Louisiana will undoubtedly increase with the criminalization of abortion. As discussed above, because the laws banning abortion are vague as to how they will interact with other criminal provisions and to whom liability can be extended, it is a near certainty that such laws will be challenged in the courts. Indeed, any time an anti-abortion law is construed to extend liability to a third party, such as when the friend who drives a pregnant woman to an abortion clinic is charged as a principal, it will have to be litigated separately, resulting in a massive influx of litigation in Louisiana's courts.

Litigation is also likely in other contexts. For instance, the prohibition on abortion advertisements, even for legal abortions, seems ripe for a First Amendment Challenge. Moreover, LA. REV. STAT. § 1061.29, which outlines the penalties for an unlawful abortion, provides a basis for both a civil malpractice action as well as a basis for a wrongful death action, regardless of whether or not the unborn child was viable at the time of the procedure.

VII. Conclusion

Louisiana's laws, as they currently stand, are hostile to abortion rights, and the future of those rights, if Act 620 and/or the Louisiana Heartbeat Bill are upheld, is even more grim. Nonetheless, if *Roe v. Wade* is overturned, the criminalization of abortion that would result will be devastating on an entirely different level, with both immediate

and long-term impacts. Vulnerable communities, such as communities of color and economically disadvantaged communities, will feel the impacts most harshly.

Moreover, criminalizing abortion in Louisiana runs afoul of Due Process and Equal Protection and is almost certain to result in further overcriminalization, especially in conjunction with Louisiana's existing criminal statutes, even if the constitutional challenges to these laws ultimately prove successful.