

## NACDL REPORT

# **ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS: Utah Appendix**

### *I. Summary*

Utah's criminal code Title 76, Chapter 7, Part 3, Sections §§ 301-331 govern abortions, *see* Utah Code §§ 76-7-301-331. Under Utah law, an abortion only occurs when performed by or at the direction of a physician, § 301(1). The killing or attempted killing of a live unborn child that is not an abortion is criminal homicide, § 301.5(2), and the abortion statutes do not apply to the killing or attempted killing of a live unborn child in any manner that is not an abortion, § 301.5(1). Performing an abortion in violation of § 302(3) (viability provisions) is killing an unborn child, but women who seek abortions as permitted by the statute are not criminally liable for their behavior nor for a physician's failure to comply with the statute, § 314.5. "Viable" means that the unborn child has reached a stage of fetal development when the unborn child is potentially able to live outside the womb, as determined by the attending physician to a reasonable degree of medical certainty, § 302(1).

In addition, Utah recently enacted the Down Syndrome Nondiscrimination Abortion Act (H.B. 166) and the Abortion Amendments (H.B. 136), amending several sections of Utah's abortion statutes. H.B. 166 prohibits abortions when

the sole reason for the abortion is fetal Down syndrome, Utah Code § 76-7-302.4.

The law also mandates informational counseling, requires tissue removed during an abortion to be submitted to a pathologist to report whether the fetus had Down syndrome, and requires the physician who performed the abortion to state whether the abortion was sought solely because the fetus has or may have had Down syndrome, *e.g.* Utah Code § 76-7-309(2).

H.B. 136 bans abortions performed after 18 weeks of gestation, notwithstanding Utah's other related provisions, Utah Code § 76-7-302.5. The statute supersedes Utah's prior abortion ban, which outlawed abortions after fetal viability. *See* § 76-7-302. While banning abortions at 18 weeks gestational age, H.B. 136 maintains the existing exceptions for abortions necessary: (1) to save a patient's life; (2) to prevent "a serious risk" to the patient "of substantial and irreversible impairment of a major bodily function"; (3) to end a pregnancy resulting from rape or incest, but only where the physician "verifies" that the crimes have "been reported to law enforcement;" and (4) to end a pregnancy involving a "uniformly diagnosable" and either "uniformly lethal" fetal anomaly or "severe [fetal] brain abnormality," *id.* § 302(3)(b). That latter exception was added under H.B. 136 but excludes Down syndrome, spina bifida, and cerebral palsy, *id.* § 301(12).

#### *A. Additional Requirements*

Utah law also imposes a reporting mechanism seemingly meant to enforce its abortion statutes. For instance, tissue removed during an abortion must be submitted to a pathologist to report whether the pregnancy was aborted by evacuating the uterus or whether the fetus had Down syndrome, § 309. And physicians must report information to the Utah Department of Health including a pathologist report, affidavits, and certificates, § 313. The pathologist report must include information such as the gestational age of the unborn child, the date of the abortion, the age and marital status of the pregnant woman, whether the abortion was sought because of Down syndrome, and whether the fetus was viable,*id.* Also of note, Utah requires counseling for abortion reversal. Abortion reversal involves the administration of medication to stop, or reverse, an already begun medication abortion. Section 305(2)(d)(iv) requires “counseling of the options and consequences of aborting a medication-induced abortion, if the proposed abortion procedure is a medication-induced abortion.

## ***II. Criminal Penalties in Utah***

Currently, individuals could face penalties from 364 days to life in prison with varying fines based on the classification of the crime committed.

Applicable crimes include:

- Criminal Homicide: The killing or attempted killing of a live unborn child that is not an abortion is punished in the same manner as criminal homicide, *id.* § 301.5(2), and the abortion statutes do not apply to the killing or attempted killing of a live unborn child in any manner that is not an abortion, *id.* § 301.5(1).

Consequently, causing the death of an unborn fetus at any stage of viability is criminal homicide, *id.* § 76-5-201. While not aggravated murder, § 76-5-202(1)(t), terminating a pregnancy by means not prescribed by law may constitute murder or manslaughter under Utah's statutes, *id.* §§ 76-5-203, 205. Murder is a first-degree felony with a prison term from 15 years to life, while manslaughter is a second-degree felony carrying a 1- to 15-year prison sentence, *id.* §§ 203, 205. Thus, violating the 18-week ban could be criminal homicide, though it is also specifically defined as a second degree felony, *see infra*.

- Second Degree Felonies: Killing an unborn child or performing an abortion after 18 weeks (violating H.B. 136) are second degree felonies, *id.* § 314(3).
  - Second degree felonies carry a 1 to 15-year prison sentence, *id.* § 76-3-203(2), and fines up to \$10,000 for individuals, *id.* § 76-3-301(1)(a).
- Third Degree Felonies: Willfully violating §§ 307, 308, 310, 310.5, 311, and 312 or performing a partial birth abortion are third degree felonies, *id.* § 314(1), (2). Third degree felonies carry a prison term of up to five years, *id.* § 76-3-203(3), and fines up to \$5,000.00 for individuals, *id.* § 76-3-301(1)(b).
  - Sections 307 and 308 require a doctor to attempt to save an unborn viable fetus.
  - Section 310 bars experiments on unborn children with the exception of testing for genetic defects.
  - Section 310.5 bans the saline abortion.
  - Section 311 prohibits selling and buying unborn children.
  - Section 312 outlaws intimidating or coercing a woman into obtaining an abortion.
  - A doctor who knowingly performs a partial birth abortion shall be fined or imprisoned or both under Utah's abortion laws, *id.* § 326.
  - Class A Misdemeanors: Violating the 72-hour wait is Class A misdemeanor, *id.* § 314(4).
  - Class A misdemeanors carry a prison term of up to 364 days, *id.* § 76-3-204(1); H.B. 244 § 1, and fines up to \$2,500.00, *id.* § 76-3-301(1)(c).
- Corporations: Corporations may be fined up to \$20,000.00 for felony convictions and \$10,000.00 for Class A misdemeanors, *id.* §§ 76-3-302(1)-(2).

### *III. Expanded Liability in a Post-Roe World*

If *Roe v. Wade* is overturned and Utah's H.B. 136 and 166 take effect, criminal liability may expand in myriad ways. Prosecutions in other jurisdictions provide some insight into the possible indictments Utahans could face.

Should either H.B. 136 or 166 take effect, even those tangentially connected to a termination may be criminally liable under Utah's expansive liability provisions. First, Utah extends aiding and abetting liability to those who solicit, request, command, encourage, or internally aid another person to engage in criminal conduct, *id.* § 76-2-202. 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." *State v. Briggs*, 2008 UT 75, ¶ 28, 197 P.3d 628, 635 (citing § 76-2-202). Second, "all accessories are principals except accessor[ies] after the fact. See *State v. Ervin*, 22 Utah 2d 216, 218, 451 P.2d 372, 373 n.1 (1969). Third, attempted crimes are also prohibited so long as the individual took a substantial step toward the commission of a crime, *id.* § 76-4-101.<sup>1</sup>

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<sup>1</sup> 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)").

Fourth, soliciting, requesting, commanding, offering to hire, or importuning another to commit a felony is unlawful, *id.* § 76-4-203.<sup>2</sup>

These broad provisions suggest expanded liability to all manner of persons, including school counselors, mental health professionals, friends, parents, or those who suggest that a pregnant woman terminate her pregnancy in violation of Utah's statutes. following *Roe's* reversal. Even advertisements for clinics and their services become suspect, especially if First Amendment challenges are also stripped following *Roe's* reversal, *see Bigelow v. Virginia*, 421 U.S. 809 (1975).

These liability theories could permit prosecutors to indict every person whose actions result in an illegal termination, including:

- Women who seek a termination;<sup>3</sup>
- Those who help women obtain terminations, including family members;
- Friends who drive pregnant friends to a clinic or encourage or advise termination, believing that is in the best interests of

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<sup>2</sup> Note that one cannot be convicted of an inchoate and principal offense or both an attempt and conspiracy. *Id.* § 76-4-302.

<sup>3</sup> 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 insulates 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.

- their pregnant friend;
- Drivers or companions who assist women to access clinics;
- The pharmacist who dispenses an abortifacient or other drug used for terminations;
- The pharmaceutical manufacturer who creates abortifacients or other drugs used for terminations;
- The manufacturer of medical devices used in terminations; and
- Clinical staff, nurses, and doctors.

Moreover, Utah's broad conspiratorial liability laws could expand this further.

Under Utah law, those who agree with one or more persons to engage in criminal conduct are guilty of conspiracy, so long as one person commits an overt act in pursuance of the conspiracy, "except where the offense is a capital felony [or] a felony against the person ... the overt act is not required for the commission of conspiracy," Utah Code § 76-4-201. Importantly, criminal homicide is an offense against the person. *See* U.C. § 76-5 (including criminal homicide under "Offenses Against the Person"). In second degree felony, carrying a 1- to 15-year prison sentence, *id.* §§ 203, 205. Both are felonies.

Under either rationale, a termination not permitted by Utah statute could constitute a felony against the person and thereby permit conspiratorial, criminal liability even without an overt act. Thus, individuals who know about an outlawed termination and agreed to it could constitute a felony against the person and thereby permit conspiratorial, criminal liability even without an overt act. Thus, individuals who know about an outlawed termination and agreed to it could face conspiratorial

liability, even if they make no overt act to further the conspiracy. Here, boyfriends, mothers, friends, fathers, or confidants who agree that termination is the right decision for their families or friends could face jail and fines, even if they take no action to carry out the termination. Imagine the best friend who consoles her pregnant friend and agrees that termination is the correct action only to find herself prosecuted for conspiracy.

In addition, an abortion performed for pecuniary gain could amount to aggravated murder, which is a capital felony, *see* UC 76-5-202(1)(g). Capital felonies too can lead to conspiratorial liability even without an overt act, § 76-4-201. Thus, doctors who perform terminations for payment, their clinical staff, and perhaps even the landlord who rents facilities to an abortion clinic could face conspiratorial liability for aggravated murder under a broad reading of the relevant statutes. It should be noted, however, that Utah also provides that a person does not commit aggravated murder if the victim was an unborn child, U.C. § 76-5-202(1)(t)(ii). While this more specific provision may control over the pecuniary gain provision, an aggressive prosecutor may still seek to use § (202)(g) to expand liability.

And because Utah does not distinguish between principals and accessories before the fact, those involved, even on the periphery of a given abortion, could be indicted for second degree felonies or even criminal

homicide.

These broad statutes could even permit extraordinary prosecutions, like those already taking place across the United States. For instance, in Alabama, a woman was recently indicted for manslaughter when her unborn child was shot and killed in a fight. The woman started a fight with another and was shot by that individual, resulting in miscarriage. Because she started the fight, she was indicted for manslaughter as the individual ultimately responsible for the death of her fetus (while the shooter was not indicted). Utah's current statutes—those defining the death of an unborn child outside the statutory definition of abortion as criminal homicide and those expanding liability to aiders and abettors, accessories, and co-conspirators—appear to permit such a prosecution.