

NACDL REPORT

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

I. Introduction

Governor Kay Ivey signed Alabama’s abortion law on May 15, 2019, known as the Human Life Protection Act, or House Bill 314, (“HB 314”). The bill mandates a near total ban on abortions and is known as the most restrictive abortion bill in the country.¹ HB 314 was scheduled to take effect on November 15, 2019, but on October 29, 2019, U.S. District Judge Myron Thompson issued a preliminary injunction halting the bill’s implementation. Judge Thompson found that the bill “directly contravenes clear Supreme Court precedent, violates the right of an individual to privacy, to make choices central to personal dignity and autonomy, diminishes the capacity of women to act in society, and to make reproductive decisions—all in violation of the United States Constitution.”²

II. History of Alabama’s Abortion Laws

Alabama previously enacted Section 13A-13-7, Code of Alabama 1975. This law provided the following:

Any person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids,

abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than \$100.00 nor more than \$1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.³

This law was never repealed. It was simply made unenforceable by *Roe v. Wade*, 410 U.S. 1138 (1973) and its progeny.

On November 6, 2018, prior to the enactment of HB 314, Alabama voters passed an amendment to Alabama's Constitution ("Amendment 2"), adding explicit anti-abortion language:

- (a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
- (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.
- (c) Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion.⁴

Representative, Matt Fridy (R-72), who sponsored the amendment, stated that its purpose was to ensure that nothing in the state Constitution could be used to argue for a right to abortion in the event that *Roe v. Wade* was overturned.⁵

In the wake of the amendment, the Alabama legislature enacted HB 314, a near total ban on abortions, discussed in greater detail *infra* Part IV. The text of HB 314 compares its “benevolence” to the anti-slavery movement, the women’s suffrage movement, the Nuremberg war crimes trials, and the American civil rights movement as embodying “the truth of universal human equality.”⁶ It boldly draws on death tolls of global genocide as a measure of harm caused by *Roe v. Wade*, stating, “...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.”⁷ For the present, the State is enjoined from enforcing HB 314 by the preliminary injunction entered by Judge Thompson.

III. Present Abortion Law in Alabama

i. Timing

Alabama currently prohibits performing an abortion where the probable post-fertilization age of the fetus is 20 weeks or more, except for cases in which the woman’s life is in danger:

(a) No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the unborn child of the woman is 20 or more weeks unless, in reasonable medical judgment, the woman has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(b) When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age of 20 or more weeks is not prohibited by this section, in such a case, the physician shall terminate the pregnancy in the manner which, in reasonable

medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions of the woman, than would another available method. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.⁸

A person who violates Alabama Code § 26-23B-5 is guilty of a Class C felony with the exception that “the woman upon whom the abortion is performed or induced or attempted to be performed or induced” is exempt.⁹

ii. Procedures

The Alabama legislature further enacted a statute with accompanying criminal penalties that prescribes protocols prior to a physician performing an abortion. Except in a medical emergency, this statute largely requires that: 1) the woman have state-mandated counseling to discourage abortion and then wait 48 hours before the procedure; and 2) the woman undergo an ultrasound.¹⁰

The statute details a sliding scale of penalties:

(a) Any person who intentionally, knowingly, or recklessly violates this chapter is guilty on a first offense of a Class B misdemeanor, on a second offense of a Class A misdemeanor, and on a third or subsequent offense of a Class C felony.

(b) After two convictions within a 12-month period of any person or persons at a specific abortion or reproductive health center, the license of such center shall be suspended for a period of 24 months and may be reinstated after that time only on conditions as the Department of Public Health requires to assure compliance with this chapter.¹¹

iii. Criminal Code

The legal status of a fetus is also contemplated in Alabama's current homicide and assault statutes. As used in Article 1 (homicide) and Article 2 (assaults) the term "person" has the following definition:

Person. — The term, 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.¹²

The current criminal statute contains exceptions to permit abortions without fear of criminal liability, as well as exceptions for victims of domestic violence or sexual assault:

(a) Article 1 or Article 2 shall not apply to the death or injury to an unborn child alleged to be caused by medication or medical care or treatment provided to a pregnant woman when performed by a physician or other licensed health care provider.

Mistake, or unintentional error on the part of a licensed physician or other licensed health care provider or his or her employee or agent or any person acting on behalf of the patient shall not subject the licensed physician or other licensed health care provider or person acting on behalf of the patient to any criminal liability under this section.

Medical care or treatment includes, but is not limited to, ordering, dispensation or administration of prescribed medications and medical procedures.

(b) A victim of domestic violence or sexual assault may not be charged under Article 1 or Article 2 for the injury or death of an unborn child caused by a crime of domestic violence or rape perpetrated upon her.

(c) Nothing in Article 1 or Article 2 shall permit the prosecution of (1) any person for conduct relating to an abortion for which the consent of the pregnant woman or a person authorized by law to act on her behalf has been obtained or for which consent is implied by law or (2) any woman with respect to her unborn child.

(d) Nothing in this section shall make it a crime to perform or obtain an abortion that is otherwise legal. Nothing in this section shall be construed to make an abortion legal which is not otherwise authorized by law.¹³

These current statutes are all contravened by HB 314's near total ban on abortion. However, because of the preliminary injunction, the state is enjoined from enforcing HB 314. Therefore, in the interim, the status quo remains.¹⁴

IV. Human Life Protection Act, HB 314

HB 314 provides the following:

(a) It shall be unlawful for any person to intentionally perform or attempt to perform an abortion except as provided for by subsection (b).

(b) An abortion shall be permitted if an attending physician licensed in Alabama determines that an abortion is necessary in order to

prevent a serious health risk to the unborn child's mother. Except in the case of a medical emergency as defined herein, the physician's determination shall be confirmed in writing by a second physician licensed in Alabama. The confirmation shall occur within 180 days after the abortion is completed and shall be prima facie evidence for a permitted abortion.¹⁵

In this bill, "abortion" is defined as:

- (1) The use or prescription of any instrument, medicine, drug, or any other substance or device with the intent to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. The term does not include these activities if done with the intent to save the life or preserve the health of an unborn child, remove a dead unborn child, to deliver the unborn child prematurely to avoid a serious health risk to the unborn child's mother, or to preserve the health of her unborn child. The term does not include a procedure or act to terminate the pregnancy of a woman with an ectopic pregnancy, nor does it include the procedure or act to terminate

the pregnancy of a woman when the unborn child has a lethal anomaly.¹⁶

The other enumerated definitions are:

(2) Ectopic pregnancy. Any pregnancy resulting from either a fertilized egg that has implanted or attached outside the uterus or a fertilized egg implanted inside the cornu of the uterus.

(3) Lethal anomaly. A condition from which an unborn child would die after birth or shortly thereafter or be stillborn.

(4) Medical emergency. A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that her pregnancy must be terminated to avoid a serious health risk as defined in this chapter.

(5) Physician. A person licensed to practice medicine and surgery or osteopathic medicine and surgery in Alabama.

(6) Serious health risk to the unborn child's mother. In reasonable medical judgment, the child's mother has a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function.

This term does not include a condition based on a claim that the

woman is suffering from an emotional condition or a mental illness that will cause her to engage in conduct that intends to result in her death or the death of her unborn child. However, the condition may exist if a second physician who is licensed in Alabama as a psychiatrist, with a minimum of three years of clinical experience, examines the woman and documents that the woman has a diagnosed serious mental illness and because of it, there is reasonable medical judgment that she will engage in conduct that could result in her death or the death of her unborn child. If the mental health diagnosis and likelihood of conduct is confirmed as provided in this chapter, and it is determined that a termination of her pregnancy is medically necessary to avoid the conduct, the termination may be performed and shall be only performed by a physician licensed in Alabama in a hospital as defined in the Alabama Administrative Code, and to which he or she has admitting privileges.

(7) Unborn child, child, or person. A human being, specifically including an unborn child in utero at any stage of development, regardless of viability.

(8) Woman. A female human being, whether or not she has reached the age of majority.¹⁷

HB 314 further provides parameters for civil and criminal liability, stating the following:

No woman upon whom an abortion is performed or attempted to be performed shall be criminally or civilly liable. Furthermore, no physician confirming the serious health risk to the child's mother shall be criminally or civilly liable for those actions.¹⁸

The bill also outlines a "Medical Emergency Exception":

This chapter shall not apply to a physician licensed in Alabama performing a termination of a pregnancy or assisting in performing a termination of a pregnancy due to a medical emergency as defined by this chapter.¹⁹

HB 314 contains no exceptions for rape or incest.

The statute finally contains guidance on conflicts and construction:

The construction of existing statutes and regulations that regulate or recognize abortion in Alabama that are in conflict with or antagonistic to this chapter shall be repealed as null and void and shall recognize the prohibition of abortion as provided in this chapter. If this chapter is challenged and enjoined pending a final

judicial decision, the existing statutes and regulations that regulate or recognize abortion shall remain in effect during that time.²⁰

A violation of HB 314 is a Class A felony, (10 to 99 years imprisonment, fine up to \$60,000) and an attempt is a Class C felony (1 to 10 years, fine up to \$15,000).²¹

V. Criminal Justice Consequences of HB 314

The Alabama criminal code already includes an unborn child in utero at any stage of development in its definition of “person” under the homicide and assault provisions. Critically, however, if HB 314 is permitted to go into effect, there will be virtually no legal abortions, and the current exceptions in Alabama’s homicide and assault statutes exempting otherwise legal abortions, as well as exceptions for victims of domestic violence or sexual assault, will be eliminated.²² Consequently, the reach of the criminal code will be drastically expanded as described below.

i. Crimes involving the principal participant

If HB 314 takes effect, a doctor who is convicted of performing, or attempting to perform, an abortion could be sentenced for to up to 99 years in prison, or up to 10 years for an attempt. However, it also is easy to see how enforcement of the statute will dramatically expand the reach of the State’s criminal code.

First, Alabama’s statutes and related caselaw already define the unborn, often nonviable fetuses, in their definitions of “person” or “child.” If virtually all abortions

become illegal, a physician who performs an abortion could also face criminal liability and more draconian penalty provisions under the State's homicide and assault statutes..²³ Under Alabama Code §13A-5-40, 13A-5-49, the murder of a child under the age of 14 is considered a capital offense, punishable by life without parole or death.

Indeed, capital charges have already been brought against a defendant who caused the death of an unborn child. In *Phillips v. State*, the defendant was convicted of capital murder for causing the death of his wife and their unborn child because an "unborn child" was defined as a "person" under the intentional-murder statute, and the intentional-murder statute was expressly incorporated into the capital-murder statute's definition of what constitutes a "murder." Thus, an "unborn child" was definitionally a "person" under the capital murder statute.²⁴ The Alabama Supreme Court upheld the conviction, expressly finding that the definition of "person" that included "unborn child" was applicable to the capital murder statute.²⁵

Civil liability for wrongful death has attached even in cases in which the fetus is not viable. In *Mack v. Carmack*, a woman who was 12 weeks pregnant miscarried after being in a car accident. She sued the driver for wrongful death of her fetus. The lower court granted summary judgment in favor of the driver, but the Alabama Supreme Court reversed. The Alabama Supreme Court held that the Wrongful Death Act permitted an action for the death of a pre-viable fetus. It explained that the legislature had amended Alabama's homicide statutes to include an unborn child in utero at any stage of

development, regardless of viability, as a victim, and that change constituted clear legislative intent to protect even nonviable fetuses from homicidal acts.²⁶

In *Stinnett v. Kennedy*, the appellate court reversed the trial court's summary judgment, finding in a case against a physician who believed his six-weeks pregnant patient was experiencing an ectopic pregnancy.²⁷ The patient arrived at the emergency room experiencing cramping and a fever. An ultrasound revealed intrauterine fluid in the endometrial cavity that could be a gestational sac, but there was no evident yolk sac, fetal pole, or cardiac activity. Believing his patient was suffering an ectopic pregnancy, the physician performed a dilation and curettage ("D & C") and administered medication intended to terminate the pregnancy. When records later revealed that her pregnancy may not have been ectopic, she sued the physician. The appellate court found that the trial court erred in dismissing the patient's wrongful-death claim based on the death of her pre-viable fetus on the ground that the wrongful-death claim against the doctor was precluded by this section, as the physician exception from criminal liability did not bar recovery for tort-imposed liability under the Wrongful Death Act, Ala. Code § 6-5-391.²⁸

Most recently, in June 2019, an Alabama woman was prosecuted for manslaughter for the death of her own fetus. The woman, who was five months pregnant at the time, allegedly initiated an altercation that resulted in the death of her fetus. She was indicted for manslaughter.²⁹ Though the district attorney ultimately declined to pursue the

prosecution because she determined “it was not in the best interest of justice,” the indictment alone is profoundly troubling.³⁰

Other provisions of the Alabama Code that do not currently list an unborn child in the definition of “person” but could nevertheless be invoked if HB 314 takes effect include:

- §13A-6-43: Kidnapping in the 1st Degree, a Class A felony
 - “abducts another person with the intent to accomplish or aid the commission of any felony or inflict physical injury upon him...”
- §13A-6-45: Interference with Custody, a Class C felony
 - if the person knowingly takes any child under the age of 18 from the lawful custody of its parent

If these criminal codes similarly include the definition of “person” or “child” to include an unborn child, including pre-viable fetuses, coupled with HB 314, they, too, will drastically expand the reach of criminal liability in Alabama if HB 314 is permitted to take effect.

ii. Accomplice liability

Principal actors will not be the only targets of these draconian criminal regimes. Under Alabama law, an aider and abettor is prosecuted in the same manner as a principal.³¹ A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense:

- (1) He procures, induces or causes such other person to commit the offense; or
- (2) He aids or abets such other person in committing the offense; or
- (3) Having a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.³²

Furthermore, Alabama's conspiracy law states in relevant part:

- (a) A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement.³³

Except for conspiracy to commit murder, a conspirator's felony class is downgraded one level from that of the principal:

Criminal Conspiracy is a:

- (1) Class A felony if an object of the conspiracy is murder.
- (2) Class B felony if an object of the conspiracy is a Class A felony.
- (3) Class C felony if an object of the conspiracy is a Class B felony.

(4) Class A misdemeanor if an object of the conspiracy is a Class C felony.

(5) Class B misdemeanor if an object of the conspiracy is a Class A misdemeanor.

(6) Class C misdemeanor if an object of the conspiracy is a Class B misdemeanor.

(7) Violation if an object of the conspiracy is a Class C misdemeanor.³⁴

The floodgates opened by HB 314 combined with accomplice liability rise to unimaginable heights. Under the theory of accomplice liability, any friend or family member who loans a car to a woman undergoing an abortion, drives her to the abortion clinic, pays for gasoline, buys her a meal, provides care or housing, performs internet research, or even makes a phone call in connection with the performance of an abortion could face prosecution for murder, as these individuals are potential co-conspirators. It is particularly important to note that simply because the woman is immune from criminal liability under HB 314, that immunity is not imputed to a co-conspirator. This is established in the clear text of the conspiracy code. Section § 13A-4-3 states: "It is no defense to a prosecution for criminal conspiracy that [t]he person, or persons, with whom defendant is alleged to have conspired ... is immune from prosecution...."³⁵

Furthermore, anyone who assists or conspires with a physician performing the abortion finds him or herself with even greater exposure to criminal liability, as the law expressly provides punishment for conspiring with, or aiding and abetting, the perpetrator of a crime. The clinic staff are the obvious potential targets, but it's also possible that the state could expand liability to individuals like landlords, property managers, medical supply representatives, drug manufacturers, and even cleaning crew under an accomplice theory.

iii. Potential criminal liability for a supportive father

If a couple decides that terminating a pregnancy is the right decision for their family, or reaches this conclusion for separate reasons, the Alabama statute provides immunity for the women undergoing the abortion, but not for the other parent. Instead, if the father in any way tangibly supports the women's decision, he could face, not only accomplice liability discussed *infra*, but also a charge for aggravated child abuse.³⁶

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.³⁷

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.³⁸ The statute further states that a responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does the following:

(1) Knowingly, 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-12-260.³⁹

Child abuse becomes aggravated child abuse if a responsible person violates the provisions of Section 26-15-3, which causes serious physical injury to a child under the age of six years.⁴⁰

A “responsible person,” and thus one who could be prosecuted under the child abuse statute, is defined in part as “a child’s natural parent.”⁴¹ This means, that a father who knowingly causes the fetus to be exposed to a controlled substance or chemical substance that causes serious bodily injury; for example, by driving his partner to the clinic and escorting her in, he could be prosecuted for aggravated child abuse. Similarly, if he picks up his partner’s prescription for medication intended to terminate her pregnancy, he could be criminally prosecuted for aggravated child abuse.

Indeed, in 2013 the Alabama Supreme Court ruled that a “child” under the child endangerment statute includes the unborn from the moment of fertilization (beginning of pregnancy), and, therefore, a responsible person can be criminally liable for a fetus’s death. The case of *Ex parte Hope Elisabeth Ankrom Petition for Writ of Certiorari* consolidated two lower court cases in reaching this holding.⁴² In one case, the defendant tested positive for cocaine prior to giving birth, and the child tested positive

for cocaine after birth. In the other case, the defendant gave birth to a son who died soon thereafter. A medical examiner with the Alabama Department of Forensic Sciences performed an autopsy and determined (without scientific basis) that the child died from acute methamphetamine intoxication. Both defendants were charged with chemical endangerment of a child under Alabama Code § 26-15-3.2. The defendants appealed and had their convictions reversed in the Court of Criminal Appeals. The case was then appealed to the Supreme Court of Alabama, which held that the plain meaning of the word “child” was broad enough to encompass all children, born and unborn, including both defendants’ unborn children. The Court explained that the term “child” in § 26-15-3.2 was unambiguous. As such, the Court was required to interpret the plain language of the statute to mean exactly what it said and not engage in judicial construction of the language in the statute. The Court did not see any rational basis for concluding that the plain and ordinary meaning of the term “child” did not include an unborn child. The Court rejected the lower courts’ reasoning insofar as it limited the application of the chemical-endangerment statute to a viable unborn child. The Court also ignored clear legislative history that made clear the purpose of the law was to reach adults who took children to dangerous places such as meth labs, not to address the issue of pregnancy and drug use — see briefs in the case.

The Alabama Supreme Court reaffirmed this position just a year later in 2014, in another case in which the baby was healthy but had tested positive for prenatal

exposure to cocaine. In *Ex parte Hicks*, the State charged, and Hicks did not dispute, that she ingested cocaine while pregnant with J.D. and that act resulted in J.D. testing positive at the time of his birth. Documents in the record suggested that, since his birth, J.D. was “doing fine.”⁴³ Hick challenged her conviction, arguing that the fetus was not a child under the statute. The Alabama Supreme Court found that the defendant was properly convicted of chemical endangerment of a child for exposing her unborn child to a controlled substance in violation of Ala. Code § 26-15-3.2(a)(1) and that the statute applied to her conduct because the use of the word “child” in the chemical-endangerment statute included all children, born and unborn. The Court opined that Section 26-15-3.2(a)(1) is not void for vagueness under the due process clause of the Fourteenth Amendment because it unambiguously protects all children, born and unborn, from exposure to controlled substances. It explained that this holding furthered Alabama’s policy of protecting life from the earliest stages of development.

Justices Parker and Moore issued concurring opinions in all three of these cases (*Ankrom*, *Kimbrough*, and *Hicks*) to state their view that as a matter of statutory law, state constitutional law, and Biblical law, the unborn are already recognized as separate legal persons and that *Roe v. Wade* stands as an outlier to this principle and should be overturned.⁴⁴

These prosecutions have continued. As an investigative report by Pro Publica and AL.com revealed in 2015 that more than 500 women had been arrested because of

pregnancy and alleged drug use under the state's judicially re-interpreted and expanded chemical endangerment of a child law.⁴⁵

One of these women was Katie Darovitz, who 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, and hospital staffers 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.⁴⁶

VI. Conclusion

Alabama's statutes, precedents, and even its constitution, are perfectly poised for maximum impact if HB 314 takes effect. These statutes and related caselaw embrace unborn, often nonviable fetuses, in their definitions of "person" or "child" across the criminal code. The precedents already hold women criminally responsible for endangering their fetuses, and doctors similarly civilly liable for any wrongful death claims when a fetus dies, even as early as six weeks into a woman's pregnancy. The

corresponding accomplice and conspiracy liability only expand the reach of the criminal code further. If *Roe v. Wade* is overturned, stripping the protection of a woman’s right to choose, and HB 314 takes effect, Alabama’s citizens should prepare themselves for widespread exposure to criminal liability, and a new, increased wave of mass incarceration.

¹ The Act is codified at § 26-23H-1 et seq., Ala. Code 1975; Holly Yan, *Alabama Just Enacted the Country's Most Restrictive Abortion Law. What Happens Now?* CNN (May 16, 2019).

² *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1059 (M.D. Ala. 2019)(internal citations omitted).

³ Code of Ala. § 13A-13-7.

⁴ Alabama Legislature, “House Bill 98,” accessed May 15, 2020, available at <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2017RS/PrintFiles/HB98-int.pdf>.

⁵ Tuscaloosa News, *Alabama Looks to Become Right to Life” state* (March 16, 2017).

⁶ Ala. Code § 26-23H-2 (LexisNexis, Lexis Advance through Acts 2020, No. 20-1 to 20-72 and 20-74 to 20-88).

⁷ *Id.*

⁸ Code of Ala. § 26-23B-5.

⁹ Code of Ala. § 26-23B-6.

¹⁰ Code of Ala. § 26-23A-4.

¹¹ Code of Ala. § 26-23A-9.

¹² Code of Ala. § 13A-6-1.

¹³ *Id.*

¹⁴ Code of Ala. § 26-23H-8.

¹⁵ Code of Ala. § 26-23H-4.

¹⁶ Code of Ala. § 26-23H-3.

¹⁷ *Id.*

¹⁸ Code of Ala. § 26-23H-5.

¹⁹ Code of Ala. § 26-23H-7.

²⁰ Code of Ala. § 26-23H-8.

²¹ Code of Ala. § 26-23H-6; Ala. Code § 13A-5-6.

²² See e.g., Code of Ala. § 13A-6-1.

²³ See Ala. Code §§ 13A-6-2; 13A-6-20.

²⁴ 2015 Ala. Crim. App. LEXIS 117 (Ala. Crim. App. Dec. 18, 2015).

²⁵ *Ex parte Phillips* 2018 Ala. LEXIS 105 (Ala. Oct. 19, 2018), cert. denied, 140 S. Ct. 184 (U.S. 2019).

²⁶ 79 So. 3d 597, 2011 Ala. LEXIS 141 (Ala. 2011).

²⁷ 232 So. 3d 202, 2016 Ala. LEXIS 148 (Ala. 2016).

²⁸ See also *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012)(wrongful death action allowed to proceed for a non-viable fetus).

²⁹ See Holly Yan & Madeline Holcombe, *A Pregnant Woman Shot in the Stomach Is Indicted in her Unborn Child's Death*, CNN (June 28, 2019), available at <https://www.cnn.com/2019/06/27/us/alabama-pregnant-woman-shot-in-stomach-manslaughter-indictment-trnd/index.html>.

³⁰ See Bill Hutchinson, *Prosecutor Will Drop Charges Against Marsha Jones, Who Lost Pregnancy When Shot in Alabama*, ABC News (July 3, 2019).

³¹ *West v. State*, 25 Ala. App. 492, 149 So. 354 (1933); *Harris v. State*, 32 Ala. App. 519, 27 So.2d 794 (1946).

³² Code of Ala. § 13A-2-23.

³³ Code of Ala. § 13A-4-3; See also *Parker v. State*, 136 So. 3d 1092, 1094 (Ala. 2013).

³⁴ *Id.*

³⁵ The law makes clear it does not authorize prosecution of the woman herself for having an abortion. It does not, however, preclude prosecution of the woman pursuant to an accomplice's conspiracy liability. The law is less clear on whether the person who assists a woman in undergoing an abortion could be considered an aider and abettor, primarily because the aider and abettor would be assisting the woman who, if immune, is not committing a criminal offense. See *Chisler v. State*, 553 So. 2d 654 (Ala. Crim. App. 1989), cert. denied, 1989 Ala. LEXIS 978 (Ala. Dec. 1, 1989), cert. denied, 493 U.S. 961 (1990). (Finding that in order for a defendant to be convicted as an accomplice, the guilt of the principal must be shown); *Evans v. State*, 508 So. 2d 1205 (Ala. Crim. App. 1987)(holding that for one to be convicted as an aider and abettor, evidence showing an offense to have been committed by a principal is necessary, although it is not required that the principal be convicted or even his identify established).

³⁶ He could also be prosecuted under accomplice or conspirator liability for other criminal offenses discussed *infra* Part V(ii).

³⁷ Code of Ala. § 26-15-3.

³⁸ *Id.*

³⁹ Code of Ala. § 26-15-3.2.

⁴⁰ Code of Ala. § 26-15-3.1, available at <https://www.propublica.org/article/this-alabama-judge-has-figured-out-how-to-dismantle-roe-v-wade>.

⁴¹ Code of Ala. § 26-15-2.

⁴² 152 So. 3d 397, 400 (Ala. 2013).

⁴³ 153 So. 3d 53, 54 (Ala. 2014).

⁴⁴ See opinions and also: <https://www.propublica.org/article/this-alabama-judge-has-figured-out-how-to-dismantle-roe-v-wade>

⁴⁵ Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, ProPublica (Sept. 23, 2015), available at <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>.

⁴⁶ 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>.