

NACDL REPORT

ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS: Arkansas Appendix¹

I. Introduction

In 1988, Arkansas passed Constitutional Amendment 68, which provides that “[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.” –Ark. Const. amend. LXVIII, §. Since that time, Arkansas has passed numerous laws affecting the ability of women to obtain an abortion within the State. Due to the voluminous nature of these “anti-abortion” laws, this appendix will not address all Arkansas laws concerning abortion, but instead will focus only on recent 2019 laws and pending legislation. However, to provide context, it is useful to provide a brief recap of the current state of the law in Arkansas concerning abortion.

II. Recent History of Abortion in Arkansas

In 2013, Arkansas passed the “Human Heartbeat Protection Act” which criminalized abortions after 12 weeks of pregnancy if a heartbeat was detected.² At the time of its enactment, it was one of the most restrictive abortion bans in the nation. In May of that year, a federal judge issued an injunction against the Arkansas law and in 2015, the Eighth Circuit Court of Appeals affirmed the lower court’s ruling—

permanently blocking the Amendment's enforcement.³ The injunction left intact the portion of the Amendment that required a check for fetal heartbeat for women seeking an abortion, as well as notice to the woman when a heartbeat was detected.⁴ However, the most important change made in 2013 was to the definitional section of the general provisions of Title 5, which is the primary code section dealing with criminal offenses. Relevant part, § 5-1-102, reads: "[a]s 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."⁵ The act purportedly only changed the definition of "person" as it relates to Arkansas's homicide statutes.⁶

In 2015, Governor Asa Hutchinson signed into law a number of abortion-restricting provisions including: (1) the "telemedicine abortion ban" — requiring the physical presence of a physician when a woman takes an abortion-inducing medication;⁷ (2) defunding Planned Parenthood — denying any state funding to Planned Parenthood or any social service agency that refers patients to abortion providers, including grants for programs not related to abortion such as disease prevention;⁸ and (3) a code section that mandates a 48-hour waiting period for women seeking an abortion.⁹

During the 2017 legislative session, Governor Hutchinson signed into law a number of additional abortion restricting provisions including: (1) a bill banning dilation and extraction procedures, a common second-trimester abortion procedure;¹⁰

(2) a “Wrongful Birth” bill—preventing lawyers from suing doctors whose patients give birth to a baby with disabilities;¹¹ (3) an “anti-sex discrimination bill” —which requires doctors to ask if patients know the sex of the fetus and mandates the doctor delay the procedure to ensure the procedure is not related to the sex of the fetus;¹² and (4) an act which requires an immediate penalty for abortion clinics that are found to violate even minor requirements by the Health Department.¹³

In July of 2017, a Federal District Court judge enjoined four anti-abortion laws passed by the Arkansas legislature, including the requirement that medical records be obtained to determine whether a patient knew the sex of the fetus before getting a procedure, the ban on second-trimester abortions, a requirement for women under seventeen to have their parents notified of an abortion, and a mandate that doctors seek input of sexual partners and family members regarding how to dispose of fetal remains.¹⁴

III. 2019 Legislative Session—Abortion Restrictions

During the 2019 legislative session, Arkansas General Assembly 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.”¹⁵

“‘Human being’ means an individual member of the species *Homo sapiens* from and after the point of conception.”¹⁶

These two definitional sections are the controlling language found throughout the Arkansas Code relating to abortion. The clear legislative intent in drafting these definitions is to redefine what a “person” is under the entirety of Arkansas law. Interestingly enough, however, the General Assembly struck a code provision that stated, “a fetus shall be presumed not to be viable prior to the end of the twenty fifth week of the pregnancy[;]” and replaced it with a subjective medical standard.¹⁷ The subjective standard adopted closely tracks the central tenets adopted by the Supreme Court in *Roe v. Wade* and *Planned Parenthood v. Casey*.¹⁸ Specifically, the standard for viability is now based on the judgement of the physician considering “the particular facts of the case before him or her and in the light of the most advanced medical technology and information available to him or her[;]” and if based on that judgement, the physician believes that there is a “reasonable likelihood of sustained survival” outside the womb, then the fetus is considered viable.¹⁹ Though the legislature “corrected” the definition of “viability” to more closely align with the holdings in *Roe*, and its progeny, it in all likelihood will have little to no effect given all of the other “fetal personhood” measures that have passed in Arkansas.

A. SB 149—Arkansas Human Life Protection Act (Codified at Title 5, Chapter 61, Subchapter 3)

The “Human Life Protection Act” begins with the legislative finding that the Supreme Court decision of *Roe v. Wade* has resulted in a “crime against humanity” in the form of abortions.²⁰ In realization of the State’s goal, the Act proscribes the performance of all abortions with the single exception of abortions performed “to save the life of a pregnant woman in a medical emergency.”²¹ A violation of this all-out prohibition is considered a felony punishable by up to ten years imprisonment and up to a \$100,000 fine.²² The Act explicitly exempts from criminal prosecution the woman on whom the procedure is performed.²³

A “medical emergency” is defined as a condition “in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by physical disorder, physical illness, or physical injury...caused by or arising from the pregnancy itself.”²⁴ It is important to note, that unlike the definition of “medical emergency” in the Cherish Act—discussed below—the Human Life Protection Act does not provide for an exemption for those women who might suffer from a “substantial and irreversible impairment of a major bodily function[,]” that might result from carrying the pregnancy to term.

Importantly, The Human Life Protection Act is not effective until the Attorney General of Arkansas certifies that the United States Supreme Court overrules the central

holding of *Roe v. Wade*, 410 U.S. 113 (1973).²⁵ Because the Act is not effective until the aforementioned certification by the Attorney General is given, there have been no legal challenges to this code section to date, presumed for ripeness issues.

B. HB 1439—The Cherish Act (codified at Title 20, Chapter 16, Subchapter 20)

The “Cherish Act” proscribes the performance of all abortions, except in the case of rape, medical emergency, or incest, after eighteen weeks of gestational age.²⁶ A knowing or purposeful violation of the statute is punishable as a Class D felony; however, the woman upon whom the abortion is performed is exempt from prosecution for a violation of the Act.²⁷ In addition to being criminally prosecuted, any physician who violates the act shall have their medical license revoked.²⁸

A “medical emergency” is defined in The Cherish Act as a condition that “necessitates an abortion to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury...or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.”²⁹

If an abortion is performed on a woman whose fetus is older than eighteen weeks of gestational age, the attending physician is required to file a report with the Department of Health listing: the date of the procedure, the specific method used, the probable age of the fetus, and the specific medical criteria used to support the medical emergency.³⁰ The Act also provides the woman on whom the procedure was performed

with a private action for both actual and punitive damages against a physician who violates the statute.³¹

C. SB 2—The Down Syndrome Discrimination by Abortion Prohibition Act (codified at Title 20, Chapter 16, Subchapter 20)

The “Down Syndrome Discrimination by Abortion Prohibition Act” 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.³² Before a physician is allowed to perform an abortion, he or she must first inquire of the woman whether “she is aware of any test results, prenatal diagnosis, or any other evidence that the unborn child may have Down syndrome.”³³ If the woman answers in the affirmative, the physician is required to wait 14 days and attempt to obtain her medical records to see if she has ever received an abortion in the past with knowledge that her fetus suffered from Down syndrome.³⁴

The Act specifically exempts those women from the prohibitions in the Act if their pregnancy is the result of rape or incest.³⁵

Like the two prior statutes, there is an exemption from criminal liability for the woman who undergoes the procedure.³⁶ For all others, the Act reads, “A physician or other person who knowingly performs or attempts to perform an abortion prohibited by this subchapter is guilty of a Class D felony.”³⁷ Additionally, the statute also provides that any physician who violates the Act shall have his or her medical license

revoked and a private cause of action may be had by the woman on whom the procedure was performed if she was not informed of the prohibition beforehand.³⁸

D. Requirements of Physician and Facilities to Perform Abortions

In order to legally perform an abortion in Arkansas, an individual must be a licensed physician with a board certification, or be board eligible for certification in obstetrics and gynecology.³⁹ A violation of these licensure requirements is a Class D felony.⁴⁰ It is important to note, however, unlike the prior three statutes discussed above, there is no criminal exemption for the woman on whom the procedure is performed.

The facility where the abortion is performed must also meet several criteria in order to legally perform the procedure, namely: the facility must provide a 24-hour help line that is answered either by a physician or registered nurse; the facility must have detailed written procedures for the transfer of the patient to an acute care facility; must be within 30 miles of a hospital that provides gynecological or surgical services; must have emergency equipment onsite to stabilize a patient; and all staff at the facility must have documented current competency in cardiopulmonary resuscitation.⁴¹

E. Modification of Waiting Period & Consent Laws

The legislature modified the “Women’s Right to Know Act” by extending the time period between the statutory disclosures a physician must communicate to the patient and the performance of the actual procedure. A physician now must disclose,

among other things: the name of the physician who will perform the procedure, the description of the abortion method, the medical risks that accompany the procedure, the possible gestational age of the fetus, information on reversing the effects of abortion-inducing drugs, the benefits such as prenatal and neonatal care that are available, and the fact that the father of the fetus is required to assist in the support of the fetus, if born.⁴² A woman seeking an surgical abortion must wait seventy-two hours after being informed of the information by her physician.⁴³ The only exemption from the statutory waiting period is for those women suffering from a medical emergency.⁴⁴ A person who violates the “Women Right to Know Act” is guilty of a Class A misdemeanor.⁴⁵

In the case of a medical abortion, after a woman has taken the first dose of the first of two abortion-inducing drugs, her physician is required to give her notice that it might be possible to reverse the “intended effect” of the drug if she does not also take the second medication.⁴⁶ When a fetus has been diagnosed with a lethal anomaly, a woman seeking an abortion must wait at least 72 hours after her physician has informed her of the perinatal palliative care services that are available.⁴⁷

F. Modification of Criminal Penalties

The Arkansas legislature also modified the penalties of certain pre-existing abortion restricting laws that were codified prior to the 2019 session with respect to the following:

- A violation of the “Parental Involvement Enhancement Act” — which proscribes all abortions for women under the age of 18 without one of their parents notarized consent⁴⁸—is a Class A misdemeanor.⁴⁹ The woman on whom the procedure is performed is exempt from criminal prosecution.
- A violation of the “Unborn Child Pain Awareness and Prevention Act” — which mandates that a woman seeking an abortion of a fetus that is 20 weeks of gestational age be told that “[b]y twenty (20) weeks gestation, the unborn child has the physical structures necessary to experience pain...⁵⁰” —is a Class A misdemeanor.⁵¹ The woman on whom the procedure is performed is exempt from criminal prosecution.
- A violation of the “Born-alive Infant Protection Act” — which states that a physician shall not deny nourishment to, or all allow the death of, any fetus expelled from the woman who is breathing, has a heartbeat, or has voluntary muscle movement—is a Class A misdemeanor.⁵²

IV. General Criminal Liability & Homicide Crimes

As noted above, Arkansas has included an unborn fetus within its definition of “person” in the Criminal Code’s general definition section. Importantly however, it is a

qualified inclusion.⁵³ An unborn fetus is only given the status of “person” when the underlying criminal conduct is a type of homicide. Indeed, in 2015, the Arkansas Supreme Court confirmed that an unborn fetus is not considered a person for any other type of offense besides homicide, holding that:

“Significantly, our criminal code expressly limits criminalizing conduct with respect to an unborn child to homicide offenses, and even then, does not allow a mother to be charged or convicted of any homicide offense while her child is in utero. As part of our strict construction, we are guided by the maxim *expressio unius est exclusio alterius*—the express inclusion of an unborn child with regard to homicide offenses excludes a similar inclusion for nonhomicide offenses. *See Bolin v. State*, 2015 Ark. 149 (2015). Accordingly, none of Arms's conduct could offend section 5–13–210 [introduction of a controlled substance into the body of another person] while her child was in utero.”⁵⁴

“The protection of unborn children is likewise found in Arkansas Code Annotated section 5-13-201(a)(5), which states that a person commits first-degree battery if with the purpose of causing serious physical injury to an unborn child or to a woman who is “pregnant with an unborn child,” the person causes serious physical injury to the unborn child. Moreover, in certain circumstances, a pregnant woman is justified in using physical force or deadly physical force against another person to protect her unborn child. *See Ark. Code Ann. § 5–2–615* (Repl. 2013). What is clear from

these enactments is that when the legislature intends to include “unborn child” within the definition of “person,” or it intends to afford protection to unborn children, it expressly does so in the statute.”⁵⁵

However, this does not diminish the substantial impact the change in definition of “person” can be expected to have on prosecutors’ charging decisions in homicide cases. There are five types of homicide crimes impacted by the legislature’s conferring of “personhood” status to an unborn fetus from the moment of conception: capital murder, murder in the first degree, murder in the second degree, manslaughter and negligent homicide.⁵⁶ While it is obvious that homicide prosecutions in general will increase if *Roe v. Wade* is overturned, there are several less obvious ways aggressive prosecutors may also be expected to utilize Arkansas’s homicide statutes to reach third party conduct in the abortion context.

For instance, the Arkansas Criminal Code provides that a person commits negligent homicide when, among other things, he or she “negligently cause[] the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft.”⁵⁷ The simple fact that there were 60,947⁵⁸ accidents reported in Arkansas during the 2014 FY, the last year of published accident data, increases the likelihood that an individual driver who is involved in an accident with a pregnant woman and accidentally causes the death of an “unborn child” fetus will be prosecuted.

Secondly, under Arkansas' Criminal Code, a person who causes the death of another person "with the purpose of causing serious physical injury to another person" is guilty of second degree murder.⁵⁹ The Arkansas Supreme Court has held that "whether a victim has suffered serious physical injury is an issue for the jury to decide."⁶⁰ It can hardly be argued that the death of a fetus does not constitute "serious physical injury." If *Roe* is overturned, an individual accused of committing an aggravated assault or an act of domestic violence could be prosecuted for homicide if the offense results in the "death" of a non-viable fetus, even if the person committing the crime was not aware that his or her victim was pregnant.

V. *Third-Party Criminal Liability*

Though the State Legislature has expressly limited criminalizing conduct with respect to an unborn child, there are a number of criminal statutes that may be implicated by the increased criminalization of abortion within the State. Those statutes place in jeopardy any person involved in a woman's decision to obtain an abortion, even for a *de minimis* violation, including physicians, third parties who perform or induce abortions, third parties who transport a pregnant woman to a facility where abortions are performed, or who otherwise assist a pregnant woman obtain an abortion. Although Arkansas prosecutors do not currently appear to be using these statutes to prosecute the people helping women obtain abortions, it is easily foreseeable in the event that *Roe* is overturned.

A. Accomplice Liability

Arkansas has codified common law accomplice liability to provide for third party liability in sections 5-2-402 and 5-2-403 of its Criminal Code. A person is an accomplice “when he or she solicits, advises, encourages, coerces, aids, agrees to aid or attempts to aid in the commission of an offense.” If *Roe v. Wade* is overturned, there is every reason to suspect that prosecutors will use these criminal statutes to extend third party liability to cases involving abortions. The Arkansas accomplice liability statute reads in part: “(b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:

- 1) *Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result;*
- 2) *Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or...*⁶¹

The particular “result” required in the abortion context is the termination of a woman’s pregnancy and the inevitable “death” of the fetus, regardless of the fact that the pregnant woman cannot be prosecuted.⁶² Indeed, Arkansas case law regarding the issue is quite clear: “when two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both; Arkansas

law makes no distinction between the criminal liability of a principal and an accomplice.”⁶³ Moreover, the Arkansas Criminal Code explicitly states that; “[i]n any prosecution for an offense in which the liability of the defendant is based on conduct of another person, it is no defense that:

3) *[t]he other person has a legal immunity from prosecution based upon the conduct in question.*”⁶⁴

As such, anyone who aids, agrees to aid, or attempts to aid a woman who is planning to have an abortion, or who has an abortion may be criminally liable if the array of statutes not currently being enforced are permitted to go into effect..

It should also be noted that in Arkansas, a person commits the offense of “concealing birth” if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive.⁶⁵ Concealing birth is a Class D felony.⁶⁶ Thus, anyone who aids, agrees to aid, or attempts to aid a woman who has had a miscarriage or a stillbirth and doesn’t immediately report the birth may be prosecuted as an accomplice under the theory of accomplice liability.⁶⁷

VI. Attempts & Criminal Conspiracy

Arkansas, like most states, also criminalizes attempts to commit a crime.⁶⁸ The Arkansas Criminal Code states in part: “A person attempts to commit an offense if, with the purpose of aiding another person in the commission of the offense, the person

engages in conduct that would establish his or her complicity under § 5-2-402 [which lists accomplice liability] if the offense were committed by the other person.”⁶⁹ The Code further provides that a person is criminally liable for the conduct of another if “acting with a culpable mental state sufficient for the commission of the offense, the person causes another person to engage in conduct that would constitute an offense but for a defense available to the other person.”⁷⁰

Those who assist women seeking to terminate non-viable pregnancies will also be subject to prosecution under Arkansas’ conspiracy statute if *Roe* is overturned. Ark. Code Ann. § 5-3-401 provides that “[a] person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense...[when] the person agreed with another [that they] will aid in the planning or commission of that criminal offense; and the person [] does any overt act in pursuance of the conspiracy.” Venue for a conspiracy offense exists in any county within the state where an “overt act in furtherance of the conspiracy” took place.⁷¹ It is easy to envision prosecutions for conspiracy to obtain an unlawful abortion against the family members and friends of a pregnant woman who leaves the State to obtain an abortion that would otherwise be illegal in Arkansas. It is important to note that a conviction for attempt or conspiracy to commit is punished as a lesser included offense; for example, an attempt is punished as a Class B felony if the offense attempted is a Class A felony.⁷²

VII. Conclusion

Arkansas's open hostility to women's choice is evident from the arrests of and interventions forced upon pregnant women in Arkansas, and is predictive of criminal justice outcomes in a post-*Roe* world. The criminal prosecution of Anne Bynum is a case in point.⁷³ In 2015, law enforcement officials in Arkansas suspected that Ms. Bynum had performed an abortion on herself at her home. As a result, she was arrested, sent to jail, and charged with two felonies: "concealing a birth" (carrying a potential six-year prison sentence and \$10,000 fine) and "abuse of a corpse" (carrying a sentence of up to 10 years in prison and a \$10,000 fine.). In fact, Ms. Bynum's offense was charged under a crime that dates to the mid-17th century and "is one of only four that have ever been reported in Arkansas; the three others occurred between 1884 and 1944."⁷⁴

Ms. Bynum was convicted of "concealing a birth" and was sentenced to six years in prison. Fortunately for Ms. Bynum, the National Advocates for Pregnant Women⁷⁵ got involved with her post-conviction appeal and secured a reversal.⁷⁶ On remand, NAPW's advocates were able to secure a plea to a non-criminal "violation."

Ms. Bynum's case highlights just how many additional crimes creative prosecutors will attempt to charge in their attempts to expand criminal liability in the abortion context.⁷⁷ If the current Arkansas statutes survive constitutional challenges to *Roe v. Wade*, the potential consequences for criminal prosecutions and mass incarcerations will be staggering. While legal challenges work their way through the system, hundreds, if not

thousands of individuals in Arkansas will be suffer serious criminal convictions affecting their futures, and those of their families, for decades to come.

¹ Zachary A. Deubler, Esq., DiMuroGinsberg PC (2020).

² Bassett, Laura, *Arkansas 12-Week Abortion Ban Becomes Law*. The Huffington Post (March 6, 2013), available at: https://www.huffpost.com/entry/arkansas-12-week-abortion-ban_n_2821739.

³ See *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015). In January 2016, the U.S. Supreme Court rejected the state's appeal of this ruling, thus making the injunction permanent.

⁴ See *Edwards v. Beck*, 8 F.Supp 3d 1091 (E.D. Ark 2014), *aff'd* 786 F.3d 1113 (8th Cir. 2015), *cert denied*, 136 S.Ct. 895 (2016).

⁵ Ark. Code Ann. § 5-1-102.

⁶ Ark. Code Ann. §§ 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.

⁷ See HB 1076, an Act "To Regulate the Use of Certain Drugs Used to Induce an Abortion..." available at <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=HB1076>.

⁸ See SB 569, an Act "to Bar the Disbursement of Funds by the State to Certain Entities," available at <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=SB569>.

⁹ See HB 1578, an Act "To Repeal and Replace the Woman's Right to Know Act of 2001; and to Provide For Voluntary and Informed Consent for an Abortion," available at <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=HB1578>.

¹⁰ See Ark. Code Ann § 20-16-1803; Zuzanna Sitek, *Governor Signs Bill Banning Second-Trimester Abortion Procedure Into Law*, 5 News (Jan. 26, 2017), available at <https://5newsonline.com/2017/01/26/ark-governor-signs-bill-banning-second-trimester-abortion-procedure-into-law/>.

¹¹ See SB 340, an Act "To Create the Wrongful Birth Civil Liability Protection Act," available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=SB340>.

¹² See HB 1434 an Act "To Create the Sex Discrimination by Abortion Prohibition Act," available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=HB1434>.

¹³ See HB 1428 an Act "...To Amend Laws Concerning the Procedure of Denial, Suspension, or Revocation of a Health Facilities Service License; and To Amend the Laws Regarding Abortion Clinics," available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=HB1428>.

¹⁴ See *Hopkins v. Jegley*, 267 F.Supp.3d 1024 (E.D. Ark. 2017).

¹⁵ Ark. Code § 5-61-303; See also Ark. Code § 20-16-2001 ("Unborn Child' means the offspring of human beings from conception until birth."); Ark. Code § 5-1-102 ("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.")).

¹⁶ Ark. Code Ann. § 20-16-2003.

¹⁷ See SB 448, an act "...To Repeal the Presumption of Viability of a Fetus at the Twenty-Fifth Week of Pregnancy," available at <http://www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation.aspx?measureno=SB448>.

¹⁸ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992) ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy... viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and

nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. *See Roe v. Wade*, 410 U.S., at 163, 93 S.Ct., at 731.”).

¹⁹ Ark. Code Ann. § 20-16-605(3).

²⁰ Ark. Code Ann. § 5-61-302.

²¹ Ark. Code Ann. § 5-61-304(a).

²² Ark. Code Ann. § 5-61-304(b).

²³ Ark. Code Ann. § 5-61-304(c)(1).

²⁴ Ark. Code Ann. § 5-61-303(3) (emphasis added).

²⁵ Ark. Code Ann. § 5-61-304.

²⁶ Ark. Code Ann. § 20-16-2004(b).

²⁷ Ark. Code Ann. § 20-16-2006(a)(1).

²⁸ Ark. Code Ann. § 20-16-2006(b).

²⁹ Ark. Code Ann. § 20-16-2003(5).

³⁰ Ark. Code Ann. § 20-16-2004(c)(1)-(2).

³¹ Ark. Code Ann. § 20-16-2004(d).

³² Ark. Code Ann. § 20-16-2003(a).

³³ Ark. Code Ann. § 20-16-2003(b)(1).

³⁴ Ark. Code Ann. § 20-16-2003(b)(2)(B) & (b)(3).

³⁵ Ark. Code Ann. § 20-16-2003(d).

³⁶ Ark. Code Ann. § 20-16-2006(d).

³⁷ Ark. Code Ann. § 20-16-2004 (emphasis added).

³⁸ Ark. Code Ann. § 20-16-2005.

³⁹ Ark. Code Ann. § 20-16-605(a).

⁴⁰ Ark. Code Ann. § 20-16-605(b).

⁴¹ Ark. Code Ann. § 20-9-302(b)(1).

⁴² Ark. Code Ann. § 20-16-1703(b) and (2).

⁴³ *Id.*

⁴⁴ Ark. Code Ann. § 20-16-1703(b).

⁴⁵ Ark. Code Ann. § 20-16-1709. (The criminal penalties section of the Act was passed in July of 2015.)

⁴⁶ Ark. Code Ann. § 20-16-1703(b).

⁴⁷ Ark. Code Ann. § 20-16-2004.

⁴⁸ Ark. Code Ann. § 20-16-804 and 805.

⁴⁹ Ark. Code Ann. § 20-16-811.

⁵⁰ Ark. Code Ann. § 20-16-1105(a)(1)(A).

⁵¹ Ark. Code Ann. § 20-16-1109.

⁵² Ark. Code Ann. § 20-16-604

⁵³ Ark. Code Ann. § 5-1-102(13)(B)(i)(a).

⁵⁴ *Arms v. State*, 471 S.W.3d 637, 642 (2015) (Holding that Defendant's unborn child was not a “person,” for purposes of statute governing criminal offense of introduction of a controlled substance into the body of another person, and thus none of defendant's actions prior to birth of child violated statute); *see also Smith v. State*, 2020 Ark. 140, 2020 WL7253448 *9 (Ark. Dec. 16, 2020) (Holding that the General Assembly limited the definition of “person” in Ark. Code Ann. § 5-1-102(13)(B) to the homicide statutes and made no provision to extend its definition to the submission of aggravating circumstances in death penalty sentencings.

⁵⁵ *Arms v. State*, 471 S.W.3d 637, 643–44 (Ark. 2015) (Brill, J., Concurrence).

⁵⁶ Ark. Code Ann. §§ 5-10-101–5-10-105.

⁵⁷ Ark. Code Ann. §5-10-105.

⁵⁸ Arkansas 2014 Traffic Crash Statistics, Arkansas State Police, (2014), available at https://static.ark.org/eeuploads/asp/crash_stats_2014.pdf.

⁵⁹ Ark. Code Ann. § 5-10-103(a)(2).

⁶⁰ See *Purifoy v. State*, 307 Ark. 482 (1991); see also *Brown v. State*, 65 S.W.3d 394, 399 (Ark. 2001) (“we affirmed a jury’s finding of serious physical injury where the victim suffered bruises on her forehead and face, two lacerations on her scalp which required staples, and numerous blunt-object injuries to her neck and the back of her head.”)

⁶⁰ Ark. Code Ann. §2-5-403(b)(1).

⁶¹ Ark. Code Ann. § 5-2-403(b)(2) (emphasis added).

⁶² See Ark. Code § 5-61-303.

⁶³ *Wilson v. State*, 2016 Ark. App. 218 (2016).

⁶⁴ Ark. Code Ann. § 5-2-405.

⁶⁵ Ark. Code Ann. § 5-26-203(a)

⁶⁶ Ark. Code Ann. § 5-26-203(b)

⁶⁷ See *United States v. Buchanan*, 985 F.2d 1372, 1376 (8th Cir.1993).

⁶⁸ Ark. Code Ann. § 5-3-201.

⁶⁹ Ark. Code Ann. § 5-3-202.

⁷⁰ Ark. Code Ann. § 5-2-402.

⁷¹ Ark. Code Ann. § 5-3-407.

⁷² Ark. Code. Ann. §§ 5-3-203 and 5-3-404.

⁷³ See *How My Stillbirth Became a Crime*, The New York Times (Dec. 28, 2018), available at: <https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html>

⁷⁴ *Id.*

⁷⁵ National Advocates for Pregnant Women, available at <http://www.advocatesforpregnantwomen.org/>

⁷⁶ See *Bynum v. State*, 546 S.W.3d 533 (Ark. Ct. App. 2018).

⁷⁷ See generally *Bennett v. Collier*, 95 S.W.3d 782, 783 (Ark. 2003) (quoting Judge Collier at hearing) (“I’m holding this lady in contempt of court . . . and she will remain in the custody of the Faulkner County Sheriff, in the Detention Center, until she goes into labor. She’ll be taken immediately to the hospital. The baby will be delivered either dead or alive, and she will be released. . . . I can’t stop her from using drugs, but I can keep her off of them until she has this child and by keeping her locked up”); *State v. Davidson* (Ark. Cir.-Ch. Ct. Washington County Jan. 16, 2001) (Gunn, Ch.) (On January 3, 2001, Ms. Davidson was six months pregnant when she allegedly tested positive for methamphetamine while on probation. The court immediately revoked her bond and issued a warrant for her arrest. The presiding Chancellor told Ms. Davidson, “[w]e are going to have this baby in the Washington County jail . . . I’ve tried everything I can. I’m not going to let you endanger this child.”); *State v. Gilbreth*, No. 35825P (Ark. Cir. Ct. Benton County Aug. 25, 2003) (The Department of Human Services took custody of the defendant’s baby, and, the State issued a criminal citation charging the women with introduction of a controlled substance into the body of another person.); *State v. Spainhour*, No. 05L014804 (Ark. Dist. Ct. Garland County June 7, 2005)(Defendant gave birth to twins. Following the birth, doctors allegedly found that the babies tested positive for methamphetamine. Defendant was arrested at her home and taken into custody on two felony charges of introducing a controlled substance into the body of another person. Charges were eventually dropped).