NACDL REPORT

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

On May 7, 2019 Gov. Kemp signed into law the "Living Infants Fairness and Equality (LIFE) Act"—otherwise known as the "heartbeat" bill[1]—and it is set to go into effect on January 1, 2020. It is a comprehensive statutory scheme that redefines personhood to begin when a fetus has reached 6 weeks of gestation. More fundamentally, the bill explicitly and implicitly provides an over-haul of not just criminal law but also regulatory and civil law.[2] If upheld against constitutional challenges, it will have unprecedented effects on the way criminal abortions and numerous other crimes can and will be prosecuted.

This memo will address the bill's amendments to Georgia's criminal abortion laws, how the new provisions will affect the prosecution of criminal abortion cases, how the new provisions might impact/interact with other criminal laws; and finally, how these changes will result in over-criminalization.

I. The Heartbeat Bill and Explicit Changes to Criminal Laws

A. Changes to the General Statutory Provisions

The "heartbeat" bill starts by redefining personhood to include "any natural person", which includes "any human being including an unborn child." An "unborn child" is further defined as "a member of the species Homo sapiens at any stage of development who is carried in the womb." O.C.G.A. § 1-2-1. This change appears as a change in the "General Provisions" title of the Georgia Code in the chapter dealing with "Persons and their Rights." This change, therefore, is not a mere change in definition for just one particular chapter or title of the Code, but rather it is intended to change the definition of "person" and the rights that go along with personhood for the entirety of the Code. The intent of the statute was manifested in the last provision of the heartbeat bill, which explicitly provides: "All laws and parts of laws in conflict with this Act

[1] https://www.nytimes.com/2019/05/07/us/heartbeat-bill-georgia.html

[2] The bill's full text: http://www.legis.ga.gov/Legislation/20192020/187013.pdf

are repealed." This language, as discussed below, calls into question Georgia courts' historical interpretations of various statutes and creates an opening for expansive new prosecutions that were previously impossible to bring.

B. Changes to the Abortion Statute

Apart from the sweeping change to the definition of personhood, the bill would make significant changes to Georgia's criminal abortion laws.

Georgia has *two* criminal statutes dealing with abortion:

a) O.C.G.A. § 16-12-140 which criminalizes abortions performed outside the limitations set out in O.C.G.A. § 16-12-141[3] and provides a sentencing range of 1–10 years imprisonment for violations of this section; and
b) O.C.G.A. § 16-12-141 which defines the scope and restrictions on the performance of abortions.

The heartbeat bill focuses only on O.C.G.A. § 16-12-141, and does not change O.C.G.A. § 16-12-140. However, as discussed below, the changes to Section 141 are extensive and have the potential to affect Georgia appellate courts' prior interpretation of Section 140.

i. Redefining "Abortion"

The amendments to Section 141 would redefine abortion as an act done with the purpose of terminating a pregnancy thereby causing the death of an "unborn child" as previously defined—unless the act was to remove an ectopic pregnancy or to remove a dead unborn child that resulted from a miscarriage or other natural act. Further, Section 141 proscribes any abortion if "an unborn child has been determined [] to have a detectable human hearbeat." This means that any abortion performed after 6 weeks of gestation would constitute a criminal act.

ii. Exceptions

Next, the statute would prohibit all acts that constitute an abortion except when:

a) a doctor has determined that a "medical emergency" exists;

[3] The statute specifically states that "[a] person commits the offense of criminal abortion when, in violation of Code Section 16-12-141, he or she administers any medicine, drugs, or other substance whatever to any woman or when he or she uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion." O.C.G.A. § 16-12-141. As discussed below, Georgia courts have historically interpreted this language as criminalizing acts performed on women,not women themselves.

b) a doctor has determined that the pregnancy is "medically futile"; or
c) the pregnancy is the result of rape or incest *and* a police report alleging rape or incest has been filed *and* the "unborn child" has a probable gestational period of 20 weeks or less.

The contours of these "exceptions" are narrowly defined and, as a result, would likely prohibit functionally all abortions. Working in reverse order, the exception for rape or incest is particularly problematic as it provides two elements that must be satisfied: First, that the fetus' age be under 20 weeks of gestation (creating its own set of well-known problems). And second, that the woman (or someone on her behalf) actually filed a police report alleging rape or incest—making no exception for those women who choose not to report or who are incapable—because of fear or mental capacity or physical restrictions—of filing a police report. Moreover, the logistics of this requirement are undefined, such as when the report of rape must be made; whether the woman must provide the doctor with a certified copy of the police report; whether she must name her attacker; and the effect of the police refusing to investigate. The bill fails to account for any of these logistical concerns, which means the contours of this requirement will be played out in a courtroom during the course of a criminal prosecution.

Next, the amendment's definition of "medically futile" is likewise problematic and is limited to those situations where the child has some incurable genetic anomaly that is "incompatible with sustaining life after birth." O.C.G.A. § 16-12-141(a)(4). However, the definition of "medically futile" leaves open questions regarding limitations on the phrase "incapable of sustaining life after birth," for example: whether the exception would only permit an abortion where the fetus was suffering from a disorder that would result in death *immediately* after birth, or whether it would include those disorders that would result in death after a somewhat longer period of time. Indeed, the language provides no guidance on whether the disorder must cause death immediately after birth. Additionally, the wording seems to limit "futility" to only those situations caused by genetic defects—excluding diseases or disorders caused by environmental factors (like bacteria, virus, or injury). Interestingly, though, this exception does not have a gestational age limit—seemingly then, this new amendment would permit late term abortions that otherwise meet this criterion.

Finally, the definition of the term "medical emergency" is extraordinarily restrictive, as it encompasses only those situations where an abortion is necessary to prevent the death of the pregnant woman or to prevent "substantial and irreversible physical impairment of a major bodily function of

the pregnant woman." In fact, the explicit definition goes on to state that this definition is limited to physical harm only; the fact that the woman might suffer lasting emotional or mental harm or that the pregnancy might cause her to commit suicide or engage in self-harm does not rise to the level of a "medical emergency." O.C.G.A. § 16-12-141(a)(3). The term "medical emergency" is limited to situations where an abortion is "necessary," but provides no guidance on when or under what circumstances an abortion becomes "necessary," including whether an abortion must be the only option to save the life of the mother or whether can an abortion be performed when there are riskier or less effective options available. The bill's language does say that the decision is to be made by a doctor based on his/her reasonable medical judgment, but doctors frequently disagree on medical diagnoses and methods of treatment. This too presents an opening for criminal litigation in the form of a battle of the experts on the reasonableness of the medical decision. Second, statute contains no guidance on the meaning of the phrases "substantial physical impairment" or "major bodily functions" Once again, due the vagaries in the bill's language, the precise meaning of these phrases will play out in a criminal prosecution. Third and finally, the explicit exclusion of mental health injuries is particularly problematic when considering the bill as a whole. A woman who seeks an abortion because she has a mental illness and a historyof self-harm will be denied access to an abortion. However, if that woman's self-inflicted injuries result in the death of a fetus, she will be subject to prosecution for the death of her fetus. In any case, the reach of the statute will be resolved by prosecutors who will test the boundaries of these "exceptions."

iii. Affirmative Defenses

The amendments also include a list of affirmative defenses, including: (a) if a doctor, PA, pharmacist, or registered nurse provides medical care to a pregnant woman that results in the accidental or unintentional death of the "unborn child"; and (b) if a woman sought the abortion because she reasonably believed that the abortion was the only way to prevent a medical emergency. See O.C.G.A. § 16-12-141(h). While not explicitly stated, the second defense would seem to contemplate the possibility that a pregnant woman could be prosecuted for seeking an abortion (even if the doctor refuses to perform it). The suggestion that women can be prosecuted is in direct conflict with clearly established Georgia caselaw. Georgia courts have steadfastly held that the woman cannot be prosecuted for criminal abortion because the language in O.C.G.A. § 16-12-140 prohibits abortions from being performed *on* women—thereby criminalizing the acts *others* perform, but not acts the woman does to herself. See, e.g., *Hillman v. State*, 232 Ga. App. 741, 741, 503 S.E.2d 610, 611

(1998) (holding that a woman cannot be indicted for criminal abortion after purposefully shooting herself in the abdomen, causing the death of the near-term fetus, because "[b]y it's plain meaning, O.C.G.A. § 16-12-140 does not criminalize a pregnant woman's actions in securing an abortion, regardless of the means utilized.") And while the heartbeat bill does not amended Section 140, the final provision of the bill (repealing laws contrary to the bill's intent) could provide a way for prosecutors to attempt to bring such charges in light of this newly listed "affirmative defense" that seemingly contemplates prosecution of women.

iv. Access to Health Records

Finally, the amendments to O.C.G.A. § 16-12-141 provide that "[h]ealth records shall be available to the district attorney of the judicial circuit in which the act of abortion occurs or the woman upon whom an abortion was performed resides." *Id*. at (F). The bill does not limit what is meant by "health records" nor does it provide any limitation on the prosecutor's ability to obtain such records or the personal private information in those records. Seemingly, a prosecutor could access medical records containing all of a woman's medical history without any limitation (i.e., no warrant or court order required). Moreover, the change permitting a prosecutor to get medical records in the county where the woman resides also seems to be an indication of the prosecutor's ability to prosecute women upon whom the abortion was performed.

II. Other Related Criminal Codes

As with most states, Georgia has an extensive criminal code and an established body of caselaw interpreting those criminal statutes. Although the heartbeat bill does not change or even reference any of the crimes discussed below, all are potentially affected by the heartbeat bill. First, this memo will address statutes regarding general criminal liability—including statutes detailing who canbe a party to the crime and what constitutes attempt or conspiracy. Next, this memo will address various substantive criminal laws and the impact this bill has on prosecutions under those statutes.

A. General Criminal Liability Statutes

Due to the changes to the definition of personhood and to the criminal abortion statute, a number of general criminal liability provisions could be relied on by prosecutions to expand criminal liability.

i. "Party to the Crime" Liability

Georgia's "party to a crime" statute is particularly likely to result in expansive over criminalization as a result of this bill. Georgia Code Section 16-2-20 provides that any party to the commission of the crime can be charged with and convicted of the crime. O.C.G.A. § 16-2-20(a). A person constitutes a "party to the crime" if that person: directly commits the crime; intentionally aids or abets in the commission of the crime; "[i]ntentionally causes some other person to commit the crime *under such circumstances that the otherperson is not guilty of any crime* either in fact or because of legal incapacity"; or "[i]ntentionally advises, encourages, hires, counsels, or procures another to commit the crime." O.C.G.A. § 16-2-20(b). The latter two options are the most likely to be relied in prosecutions for criminal abortions because even if a pregnant woman cannot be prosecuted for criminal abortion, the father of the fetus, the family of the expecting parents of the fetus, the friends of the expecting parents could still be prosecuted as a party to the crime. This is especially true because another Georgia statute provides that even if the defendant did not directly commit the offense, that defendant can still be prosecuted as a party to a crime even where the direct actor is not "amenable to justice." O.C.G.A. § 16-2-21. And so a pregnant woman's partner, family members, or friends could be prosecuted as "parties to the crime" as could any person working at the doctor's office or hospital who knew of and/or participated in the performance of an abortion.

ii. Attempt & Conspiracy

Georgia, like most states, also criminalizes attempts to commit a crime and conspiracies to commit a crime. O.C.G.A. §§ 16-4-1 & 16-4-8. If a pregnant woman were to leave the state to obtain an abortion that would be illegal if performed in Georgia, it seems possible (if not likely) that prosecutions for criminal attempt or conspiracy could be brought against the woman,her partner, family members, or friends and anyone at the doctor's office or hospital who knew about, scheduled, and/or made preparations for an abortion.[4] The punishment for both conspiracy and attempt is capped at one-half the maximum punishmentfor the underlying crime.

iii. Solicitation of a Crime

[4] Georgia also enacted statutes providing that a person can be convicted of attempt or conspiracy, even if the crime was actually committed. O.C.G.A. §§ 16-4-2 & 16-4-8.1. And so even if Georgia did not have venue over an abortion performed out of state, it could establish venue for attempt or conspiracy if any act planning the abortion were performed in Georgia.

The Georgia statute prohibiting the solicitation of a crime could easily be used in relation to abortions because "[i]t is no defense to a prosecution for criminal solicitation that the person solicited could not be guilty of the crime solicited." O.C.G.A. § 16-4-7(c). Because of this final provision, it seems extremely likely that a District Attorney's Office could choose to prosecute a pregnant woman for asking for an abortion, or the father of the "unborn child" should he suggest the pregnant woman get an abortion (or leave the state to obtain an abortion). Conceivably, a doctor or nurse or advisor could be prosecuted under this provision for suggesting an abortion after 6 weeks of gestation. It is worth noting that the punishment for criminal solicitation is 1–3 years' imprisonment (unless the crime in question is one punishable by death or life imprisonment, then the punishment range is 1–5 years).

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Any one of these statutes could likely be relied upon by prosecutors to expand criminal liability related to abortions to anyone involved with the pregnant woman deciding whether to seek an abortion, most particularly medical personnel. Liability under these general statutes could be greatly expanded if combined with Georgia's rules regarding mandatory reporters. Both doctors and nurses are mandatory reporters if there is suspected child abuse and, as discussed in more detail below, due to the change in definition of "personhood" it is likely that any act that threatens the health or safety of a minor would be deemed to constitute child abuse. *See* O.C.G.A. § 19-7-5. As such, criminal liability based on the explicit changes in the heartbeatbill will result in over-criminalization without any clear limitations on may be prosecuted.

B. Substantive Criminal Statutes

As mentioned above, in addition to the explicit changes to the criminal abortion statute itself, the bill's language conferring personhood status and rightsto an "unborn child" could likely expand liability under a great many other criminal statutes. While not intended to be an exhaustive list, each of the offenses discussed below could provide the basis for the prosecution of pregnantwomen, their partners, and their doctors or other medical treatment providers.

i. Homicide

First (and most obviously) the offense of homicide will be impacted. In Georgia, there are two types of murder (malice murder and felony murder), both punishable by life imprisonment, LWOP, or death. O.C.G.A. § 16-5-1(a).

Georgia has functionally no limitations on what can constitute the predicate felony for felony murder,[5] but notably, the felony can include cruelty to children for intentionally causing harm to a minor or intentionally depriving a minor of sustenance. In fact, Georgia's felony murder law permits felony murder prosecutions for status crimes, such as possession of controlled substances. While it would appear obvious that the homicide statute would be affected by the conferring of personhood status to an "unborn child," the confusion for Georgia courts lies in the fact that, historically, the death of a fetus would be controlled by the criminal abortion statutes or the feticide statute (discussed below). However, both of those statutes and the caselaw interpreting them make it plain that the pregnant woman upon whom an abortion is performed cannot be convicted. It is clearly the intention of the legislature that an unborn fetus have personhood status with every right that any other person might have and that all contrary laws or caselaw be repealed. Whether such prosecutions will lie remains to be seen.

It is also worth noting that the homicide statute was recently amended to add the crime of "murder in the second degree" which is defined as causing the death of a human during the commission of cruelty to children in the second degree (i.e., causes a minor under the age of 18 to suffer cruel of excessive mental or physical pain through criminal negligence) and is punishable by 10–30 years imprisonment. O.C.G.A. § 16-5-1(d). As discussed in more detail below, it would appear that pregnant women and their partners or anyone caring for the pregnant woman (and therefore her "unborn child") could be prosecuted for second degree murder for performing an abortion or for simply failing to stop the pregnant woman from obtaining an abortion.

ii. Feticide

The feticide statute will likewise be impacted. Under the Georgia Code, a person commits feticide "if he or she willfully and without legal justification causes the death of an unborn child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, or if he or she, when in the commission of a felony, causes the death of an unborn child."[6]

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[5] In fact, Georgia is one of the few (if not the only) state that allows aggravated assault to be the predicate felony even when the aggravated assault is the act that caused the death.

[6] The statute also defines "unborn child" as a member of the species homo sapiens at any stage of development who is carried in the womb." Given the recent change to the definition of "Natural Person" in Georgia's General Provision, conceivably a prosecutor could argue that this statute is meant to relate to fetuses that have not yet attained personhood status—i.e., a fetus that does not yet have a detectable human heartbeat—and that the homicide statute controls the death of those beings that have achieved

O.C.G.A. § 16-5-80(b). The offense of feticide is punishable by life imprisonment. O.C.G.A. § 16-5-80(c). The statute, however, explicitly exempts a pregnant woman from being prosecuted for causing the death of her fetus and exempts any other person performing an abortion with the pregnant woman's consent. O.C.G.A. § 16-5-80(f). However, as with most of these statutes relating to fetuses, it is unclear whether the last portion of the heartbeat bill repealing all contradictory laws trumps these statutory provisions. In fact, several District Attorneys have already expressed their intention to prosecute women for getting an abortion.[7]

iii. Aggravated Battery & Aggravated Assault

It is also foreseeable that Georgia's proscription against aggravated battery will be used to prosecute pregnant women or medical staff performing an abortion. The medical procedure involved in performing an abortion would certainly satisfy the statutory elements of aggravated battery, the punishment for which is 1–20 years' imprisonment unless the aggravated battery is between a parent and child, in which case the punishment is 3–20 years'imprisonment. O.C.G.A. § 16-5-24. And while Georgia does have two statutes dealing with non-deadly injuries to a fetus— "Assault on an Unborn Child" (O.C.G.A. § 16-5-28) and "Battery on an Unborn Child" (O.C.G.A. § 16-5-29)—it remains unclear whether these statutes would now only relate to fetuses that do not yet have a detectable human heartbeat or if these statutes' definitions of "unborn child" remain intact.

In *State v. Wilkerson*, 348 Ga. App. 190, 192–93 (2018), the defendant was convicted of six counts aggravated assault and other related offenses for pointing a gun at a car containing two adults and three children (age one, two, and three) and verbally threatening to shoot the adults if they did not to return the children to their grandmother. The gun was never fired or used to injure anyone and the children were never called to testify. D espite a complete lack of evidence regarding the one-year old victim, the Court of Appeals ruled that the evidence was sufficient because one adult victim testified she was scared and "the state of mind of one victim [was] evidence of the state of mind of another

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personhood status.

[7] https://www.apnews.com/20d1230314e04bb19b13dc73ab94d8e1 ; https://www.law.com/dailyreportonline/2019/05/22/da-warns-women-they-can-be-charged-with-murder-under-new-abortion-law/?slreturn=20190510104204 ; https://www.11alive.com/article/news/politics/acting-cobb-da-compares-prosecutors-who-refuse-to-enforce-heartbeat-abortion-law-to-nazis-segregationists/85-3b5ad261-93e8-4779-a9ac-068a4eed30dc

when [ ] a weapon is pointed at all of the victims." *Id.* at 196 (internal quotes omitted). Under this standard, it would seem that if a gun is pointed at a pregnant woman carrying a fetus six weeks or older, then two aggravated assault convictions could lie as long as the pregnant woman testifies that she was afraid—regardless of the fetus' ability to be aware of the surrounding circumstances. This could double the length of the sentence from 1–20 years' imprisonment to 2–40 years. O.C.G.A. § 16-5-21(b).

iv. Kidnapping & False Imprisonment

Both the offense of kidnapping and false imprisonment could also be used to expand criminal liability for defendants seeking an abortion across state lines. *See* O.C.G.A. §§ 16-5-40 & 16-5-41. If, for instance, a pregnant woman is the victim of either offense, a defendant could now be accused of two counts of each offense. Additionally, a pregnant woman who denies the biological father access to an "unborn child" by changing locations could be charged with kidnapping. While Georgia does have an "Inference with Custody" statute (O.C.G.A. § 16-5-45) it talks in terms of lawful custody. If "custody" for a 6-week-old fetus has not been determined then it seems that statute would not be applicable. The potential expansion of in criminal liability is particularly problematic because the offense of kidnapping does not merge with any other offense and is punishable by life in prison or a split sentence of at least 25 years' imprisonment and life on probation where the victim is under 14 years of age. And while the offense of false imprisonment can merge with other offenses, it still carries a heavy penalty of 1–10 years' imprisonment.

v. Cruelty to Children

Criminal liability under Georgia's "Cruelty to Children" statute will undoubtedly be expanded. O.C.G.A. § 16-5-70. A person can violate the cruelty to children statute in a number of ways: (1) by willfully depriving a child of necessary sustenance, provided said accused is the parent, guardian, or person supervising the welfare of the child in question; (2) by maliciously causing the child cruel or excessive physical or mental pain—including, by failing to seek medical attention after a child has suffered an injury; (3) by causing, with criminal negligence, a child cruel or excessive physical or mental pain; (4) by intentionally allowing a child to witness the commission of a forcible felony, battery, or family violence battery, provide the accused is the primary aggressor; and (5) by committing a forcible felony, battery, or family violence battery knowing a childis present and can see or hear the act, provided the

accused is the primary aggressor.[8]

This bill will expand criminal liability under literally all of these variants of cruelty to children for women and men. The most obvious would be the prosecution of poor women who cannot afford food and/or women addicted to drugs or alcohol. Under the new bill, if a pregnant woman is malnourished or is addicted to drugs or alcohol she could be charged with cruelty to children in the first degree and so could her partner for failing to provide the "child" with necessary sustenance and/or by harming the child by "giving" it drugs or alcohol. Similarly, failing to seek prenatal care could provide a *separate* count of cruelty to children in the first degree if the expectant mother or father knew that the fetus was impacted by malnourishment or the mother's drug/alcohol addiction, but failed to seek medical attention. A third count of cruelty to children could be added if the malnourishment or drug/alcohol use caused a miscarriage or mental or physical deformity.

Even leaving aside the prosecution of women who are poor and/or are suffering from addictions, criminal liability will undoubtedly markedly expanded. A pregnant woman could be charged with cruelty to children in the first degree for failing to seek medical attention if she (and/or her partner) knew or should have known that the fetus was suffering from some affliction in utero (even if attributable to natural causes rather than actions taken by another), but failed to seek medical attention and, as a result, the child suffered a deformity or was miscarried.

These examples are especially alarming because "criminal negligence" in causing a child pain—including cruelty to children for failing to seek medical attention—would be implicated by the new bill even if the State could not prove that the miscarriage or deformity/pain was knowingly or intentionally caused.

Lastly, domestic violence situations involving a pregnant woman will be implicated by these statutory provisions, permitting prosecutors to charge a minimum three distinct counts of cruelty to children in addition to charges relating to the harm caused to the pregnant victim herself—i.e., cruelty in the first degree for causing pain to the fetus (including additional counts for multiple injuries), cruelty in the first for not seeking medical attention for each

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[8] This list covers cruelty to children in the first, second, and third degree. The first two descriptions define cruelty to children in the first degree and carry a punishment of 5–20 years' imprisonment. The third description defines cruelty to children in the second degree, punishable by 1–10 years' imprisonment. And the fourth and fifth descriptions constitute cruelty to children in the third degree, punish-able by 1–3 years' imprisonment.

injury, and cruelty in the third for committing an act of domestic violence. This would hold true even if the accused is not *aware* that the woman is pregnant. The Georgia Supreme Court recently held that the accused need not even be aware of the presence of a child to sustain a conviction for cruelty to children in the first degree for causing cruel or excessive mental or physical pain: "[T]he statute does not require evidence that the defendant had any specific awareness of a child's presence when committing theact in question. Rather, the statute requires only that the defendant commit an act with malice and, in so doing, cause a child the requisite pain." *Oliphantv. State*, 295 Ga. 597, 600, 759 S.E.2d 821, 825 (2014).

Likewise, liability for "cruelty to children" may be expanded to those outside the household. If a doctor prescribes medication knowing that a potential side effect might be miscarriage or birth defects, he/she would seemingly be liable for cruelty to children.[9] Similarly, if a drug dealer sells drugs to a pregnant woman—whether he knows she is pregnant or not—that could constitute cruelty to children if the child is harmed by the drugs. If a person was accused of any number of forcible felonies with a pregnant woman as the victim, the accused could also be charged with cruelty to children, even if (as discussed above) the accused was not aware that the woman was pregnant.

vi. Child Molestation

Liability for child molestation could easily be expanded as well. Child molestation in Georgia is defined as "any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person" and carries a punishment of 5–20 years' imprisonment for a first offense and 10–30 years' for a second or subsequent offense, and the minimum sentence (whether it is 5 or 10 years) cannot be suspended or probated. O.C.G.A. § 16-6-4. However unlikely, a multitude of sexual acts can constitute an "immoral and indecent act," including the act of sexual intercourse.[10] Theoretically, person could be

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[9] Note: the bill itself does provide a defense for doctors should an abortion result from the use of medication they prescribed or a medical procedure they performed. However, that is a defense to the charge of criminal abortion—it does not provide a separate defense for cruelty to children. And so while it's possible courts could ultimately find that a doctor could not be prosecuted for cruelty to children for causing a miscarriage—based on a lenity argument—this abortion defense would not be implicated if the medication or procedure caused a deformity short of death.

[10] Even more chilling, the reasoning in *Oliphant* (as described above) could theoretically be relied upon to expand to the context of child molestation: Knowledge that the child is present is not specifically required by the statute, just that an act is done "with the intent to satisfy the sexual desires of . . . the

convicted of child molestation if the evidence established that he knowingly had sex with a pregnant woman and engaged in such an act because of a predilection for sex with pregnant women.

However, even if the courts don't go that far, criminal liability will almost certainly be expanded under a recent Georgia Supreme Court opinion. Georgia defines aggravated child molestation as "an offense of child molestation which act physically injures the child or involves an act of sodomy." O.C.G.A. § 16-6-4(c). Aggravated child molestation carries a sentence of life imprisonment or a split sentence of 25 years' imprisonment with lifetime probation. O.C.G.A. § 16-6-4(d). Recently, the Supreme Court's held that the act of childbirth could constitute the necessary "injury" to sustain a conviction for aggravated child molestation. *Daddario v. State*, No. S19A0684, 2019 WL 5655279, at *6 (Ga. Oct. 31, 2019) (holding that "[a]ppellant's act of unprotected sexual intercourse with his 14-year-old daughter S.D. 'in a natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] injury' to S.D. in the form of a childbirth.") In the same opinion, the Court left open the question of whether mere pregnancy itself could constitute an "injury," but seemed to indicate that it would consider pregnancy an injury. *Id.* at *1, n.1. Thus, if a child under the age of 16 is impregnated or gives birth, the person who impregnated her can be charged with aggravated child molestation rather than just child molestation predicated on the act of sexual intercourse. And although Georgia, like most states, provides a "Romeo and Juliet" provision for both child molestation and aggravated child molestation,[11] this provision does *not* apply if the aggravated assault is predicated on an act that injures the child—i.e., results in pregnancy or childbirth. In fact, Justice Blackwell in his concurrence made this point, noting that the opinion suggests that the law might permit a conviction for aggravated child molestation and a sentence of life in prison (or 25 years followed by life on parole) if a 16 year-old impregnates a 15-year-old. *Id.* at *7–*9 (Blackwell, J., concurring).

vii. Drug Related Offenses

Georgia has an extensive statutory scheme defining and regulating controlled substances which will undoubtedly be expanded by redefining the meaning of "Natural Person" should this bill go into effect.

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accused[.]"

[11] If the child victim is 13–16 years old and the accused is 16–18 years old, then the "immoral or indecent act" (if charged as child molestation) or act of sodomy (if charged as aggravated child molestation) will only constitute a *misdemeanor*. O.C.G.A. § 16-6-4(b & d).

Before the passage of Georgia's 2019 "heartbeat law," the state Court of Appeals had made clear that a pregnant woman could not be prosecuted for "distributing" a controlled substance to her fetus. *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992). In *Luster*, a pregnant woman who sought but could not afford help for her cocaine dependency problem, was arrested and charged with possession of cocaine, delivery of cocaine and cruelty to a child. The cruelty to a child and cocaine delivery charges were dismissed by the trial court. The Georgia Court of Appeals unanimously affirmed the dismissal, holding that the unambiguous language of the distribution statute made it clear that the statute did not apply to pregnant women or their fetuses. The court explained that "[u]nder Georgia law, the word 'person' in a criminal statute may not be construed to include a fetus unless the legislature has expressly included it[.]" *Id*. The court also noted that, "by enacting legislation treating addiction during pregnancy as a health problem, the legislature indicated its view that addiction in pregnancy is a disease and signaled its preference for treatment over prosecution, which preference is overwhelmingly in accord with the opinions of local and national experts."[12] The possession charge was allowed to stand.

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

viii. Death Penalty Implications

And finally, by defining personhood as "any human being including an unborn child", this bill expands the number of murder cases for which the State could seek the death penalty. For instance, any doctor or medical professional who was paid to perform an illegal abortion would be death-eligible due to the following statutory aggravating factors; (a) the murder occurred while the accused was in the commission of an aggravated battery or another capital offense—and the physical abortion procedure would constitute an aggravated battery on the "child"; (b) the murder was done for the purpose of money—as one would pay a doctor or medical professional for their services in performing an abortion; (c) the murder occurred in a public place through use of an instrument that is hazardous to the lives of more than one person—as an abortion procedure could involve the use of tools that could result in death or harm to others; and (d) the murder "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery

[12] *Id.*

to the victim"—arguably, a jury would be authorized to find that performing the acts requiredto accomplish certain abortions on a "child" (as defined by the law) are wantonly vile. O.C.G.A. § 17-10-30(2–4, 7). Indeed, under the party to a crime theory, it would seem the pregnant mother who agreed to the abortion and paid for the abortion would likewise be death-eligible for the same reason. And any person accused of murdering a woman who was pregnant at the time of her death would be death-eligible by virtue of the fact that the accused will have killed two people (i.e., committed the killing while in the commissionof another capital offense or aggravated battery). O.C.G.A. § 17-10-30(2).

Ultimately, if this Bill survives the current constitutional challenges and is permitted to take effect, it will trigger an unprecedented expansion of criminal liability in ways that may not have been contemplated by its supporters and that neither the courts nor thelegislature is equipped to resolve.