

## NACDL REPORT

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

### *I. Introduction*

On March 19, 2018, former Mississippi Governor Phil Bryant signed House Bill 1510 (HB 1510) into law. Also known as the “Gestational Age Act,” the bill prohibits abortions after 15 weeks’ gestation with exceptions only for a medical emergency or a severe fetal abnormality. HB 1510 was set to go into effect immediately but was permanently enjoined on November 20, 2018.

On March 21, 2019, less than five months after the 15-week ban was found to be unconstitutional, an even more restrictive bill was signed into law. Senate Bill 2116 (SB 2116), also known as the “Heartbeat Abortion Ban,” prohibits abortions once a fetal heartbeat has been detected, which can occur as early as six weeks into pregnancy. The bill provides an exception only in the case of a medical emergency. A preliminary injunction against SB 2116 was granted by the District Court for the Southern District of Mississippi in May of 2019, and the Court of Appeals for the Fifth Circuit affirmed the injunction in February of 2020.

While abortion is currently legal in Mississippi up to 20 weeks' gestation, Mississippi has two unenforceable statutes criminalizing abortion still codified in its state code. The first, enacted and enforced prior to the decision in *Roe v. Wade*, will be referred to as the "Pre-*Roe* Ban" for the purposes of this appendix. The second, enacted in 2007 as a trigger law, will be referred to as the "Trigger Ban." Both laws ban abortion regardless of gestational age and would likely become enforceable should *Roe* be overturned.

The purpose of this appendix is to summarize the procedural history and requirements of SB 2116. The appendix will further examine the potential for expanded criminal liability to result if SB 2116 goes into effect, or if *Roe v. Wade* is overturned and any of the three statutes criminalizing abortion become enforceable.

## ***II. The Latest Passed Mississippi Legislation***

### *A. House Bill 1510*

On March 19, 2018, the State of Mississippi enacted HB 1510, one of the most restrictive abortion laws in the country, which prohibited abortions after 15 weeks gestation except in a medical emergency or in the case of a severe fetal abnormality, *see* H.B. 1510, 2018, Reg. Sess. (Miss. 2018). HB 1510's exceptions are narrow, with a "medical emergency" existing only when necessary to either save the woman's life or because the woman is facing a "serious risk of substantial and irreversible impairment

of a major bodily function,” and a “severe fetal abnormality” existing only when the fetus cannot survive outside of the womb, regardless of the fetus’s age, *Id.*

HB 1510 would subject any physician who performed an abortion outside of the parameters of the bill to suspension or revocation of their medical license, *Id.* When a physician performs an abortion after the 15-week mark, HB 1510 requires that a report be submitted to the Mississippi State Department of Health containing information such as the probable gestational age of the fetus and specific medical indications supporting the abortion, *Id.* Any physician who knowingly submits a falsified report under HB 1510 would be subject to a civil penalty or a fine of up to \$500.00, *Id.*

On March 19, 2018, the same day HB 1510 was signed into law, Jackson Women’s Health Organization (JWHO), the sole remaining facility providing abortions in Mississippi, and one of its doctors, Dr. Sacheen Carr-Ellis, filed suit challenging the bill and seeking a temporary restraining order (TRO). The next day, following an emergency hearing, Judge Carlton Reeves granted the plaintiffs’ TRO request, *see Jackson Women’s Health Organization v. Currier*, 2018 U.S. Dist. LEXIS 45080 (S.D. Miss. Mar. 20, 2018). Prior to the expiration of the TRO, Judge Reeves permanently enjoined HB 1510 on the grounds that it was a “facially unconstitutional ban on abortions prior to viability,” *see Jackson Women’s Health Organization v. Currier*, 349 F.Supp 3d 536, 545 (S.D. Miss, Nov. 20, 2018).

The Court of Appeals for the Fifth Circuit subsequently affirmed the permanent injunction after concluding HB 1510 was not just a regulation of previability abortions subject to the “undue burden” test of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as the defendants argued, but rather a ban on abortion after 15 weeks, incompatible with *Casey*. *Jackson Women’s Health Organization v. Dobbs*, 945 F.3d 265, 278–79 (5th Cir. 2019). Prior to viability, “it is for the woman, not the state, to weigh any risks . . . and to consider personal values . . . in deciding whether to have an abortion,” *Id.* at 274.

*B. Senate Bill 2116*

SB 2116, which was signed into law less than five months after the 15-week ban was found to be unconstitutional, went further and would prohibit abortions once a fetal heartbeat has been detected, which can occur as early as six weeks into pregnancy, *see* S.B. 2116, Reg. Sess. (Miss. 2019). The bill provides no exception for cases of rape, incest, or fetal abnormality, *Id.* The only exception to SB 2116 is in the case of a medical emergency, again only existing when necessary to either save the woman’s life or because the woman is facing a “serious risk of substantial and irreversible impairment of a major bodily function,” *Id.*

SB 2116 creates a new section in the Mississippi Code making it a misdemeanor to perform an abortion after the detection of a fetal heartbeat, and subjecting those who violate the bill to a fine of up to \$1,000.00, imprisonment for up to six months, or both. MISS. CODE ANN. § 41-41-34.1. The bill also amends §73-25-29 of the Code, making

performance of an abortion after a fetal heartbeat has been detected grounds for the nonissuance, suspension, revocation, or restriction of the performing physician's medical license, *Id.* § 73-25-29(16).

JWHO moved to supplement their original complaint regarding HB 1510 to include a challenge to SB 2116, as well as to seek a preliminary injunction against the bill. Noting that SB 2116 "threatens immediate harm to women's rights," Judge Reeves granted the plaintiffs' motion to supplement as well as their motion for a preliminary injunction against SB 2116 on May 24, 2019, *see Jackson Women's Health Organization v. Dobbs*, 379 F. Supp 3d 549, 553 (S.D. Miss, 2018). Focusing again on the issue of viability, the court concluded that "if a fetus is not viable at 15 weeks . . . it is not viable at 6 weeks." *Id.*

Most recently, the Court of Appeals for the Fifth Circuit affirmed the District Court's preliminary injunction against SB 2116 in February of 2020, *see Jackson Women's Health Organization v. Dobbs*, 951 F.3d 246 (5th Cir. 2020). While the parties disagree about when exactly a fetal heartbeat can be detected, all agree that a fetal heartbeat can be detected prior to viability, which "dooms the law" under *Roe*. *Id.* at 248. Because SB 2116 prohibits abortions, regardless of the reason the abortion is sought, SB 2116 is not a law prohibiting certain methods of abortion, as *Gonzales v. Carhart* would potentially allow, but is instead an outright ban on abortion prior to viability incompatible with long-standing Supreme Court precedent, *Id.*

### *III. The Current Climate in Mississippi*

#### *A. Abortion Under Roe v. Wade*

Currently, Mississippi prohibits abortions if the gestational age of the fetus is determined to be greater than 20 weeks, *see* MISS. CODE ANN. § 41-41-137. The law does not provide exceptions for cases of rape or incest, instead only providing exceptions in the case of a medical emergency or lethal fetal anomaly, *Id.* § 41-41-141. Prior to receiving an abortion, a patient must receive state-directed counseling, occurring at least 24 hours prior to the procedure. Because the use of telemedicine to administer abortion medication is prohibited, all counseling sessions, regardless of the type of procedure, must be done in person. Abortions using dilation and evacuation are permitted only in cases of life endangerment or severely compromised health of the mother. Mississippi also requires that a patient undergo an ultrasound prior to the procedure, and that the provider offer the patient an opportunity to view the image. While Mississippi does not require physicians to have admitting privileges at hospitals, the state does require abortion clinics to meet standards related to their physical plant, equipment, and staffing.

After the passage of the Hyde Amendment in 1976, the decision of funding abortion is effectively left to the states. In Mississippi, public funding is available for abortion only in cases of rape, incest, fetal impairment, or where the mother's life is in danger. Health plans offered under the Affordable Care Act will only cover abortion in

cases of life endangerment, rape, or incest. Finally, under insurance policies provided to public employees, abortion is only covered in cases of life endangerment, rape, incest, or fetal anomaly.

*B. Abortion Should Roe v. Wade be Overturned*

Recent changes to the makeup of the U.S. Supreme Court open the door to the possibility of *Roe v. Wade* becoming severely undermined, or even overturned. If *Roe* were to be overturned, a woman's right to an abortion would be protected in less than half of the U.S. states, and physicians who perform abortions would be subject to various civil and criminal penalties. While some states have enacted laws that would protect a woman's right to abortion should this occur, Mississippi is one of several states who have gone in the opposite direction and would likely severely restrict or even outright ban abortion in one of three ways.

First, in the absence of *Roe*, SB 2116 would likely be found to be constitutional, resulting in the law becoming enforceable and abortions being banned as early as six weeks' gestation. Because six weeks into a pregnancy is before many women know that they are pregnant, SB 2116 amounts to a near-total ban on abortion.

Second, Mississippi also has retained an unenforced ban on abortion that could become enforced were *Roe* to be overturned, *see* MISS. CODE ANN. § 97-3-3. Under the Pre-*Roe* Ban, any person who either attempts or causes a woman to abort or miscarry will be found guilty of a felony, *Id.* The only exceptions are given to duly licensed,

practicing physicians when the abortion is necessary to save the mother's life, or where the pregnancy was caused by rape, *Id.* Under the Pre-*Roe* Ban, any person found guilty is subject to imprisonment for one to ten years, *Id.* The law goes further, providing that if the mother dies from the abortion, the person performing or attempting to perform the abortion will be found guilty of murder, *Id.*

Finally, Mississippi is one of several states who have outlawed abortions through "trigger laws," or laws that are not active or enforceable unless *Roe* is overturned. These laws act as a way to ensure abortion becomes automatically illegal in the event states are given the right to regulate the procedure. Mississippi's Trigger Ban, codified § 41-41-45 of the Mississippi Code, was enacted in 2007 and prohibits all abortions within the state, regardless of gestational age. The only exceptions are when necessary to save the mother's life, or when the pregnancy was caused by rape, if and only if, a formal charge of rape has been filed, *Id.* § The law provides the pregnant woman immunity from the penalties provided in §41-41-45(5) but subjects any other person who performs or attempts to perform an abortion to a prison sentence between one and ten years. The law would become effective ten days following the date that the Attorney General determines that the Supreme Court has overruled *Roe*, and when it is reasonably probable that the Court would not find the law to be unconstitutional.

#### ***IV. Related Criminal Statutes in Mississippi***

Assuming for the sake of this appendix that *Roe* is overturned and one of Mississippi's three discussed anti-abortion statutes takes effect, the implications will be far reaching and devastating. Extraordinary prosecutions could be pursued, with anyone even remotely connected to a woman's abortion facing harsh penalties. While the anti-abortion statutes themselves provide criminal penalties to be implemented in the case of an illegal abortion, it is worrisome that nothing in the statutes prevents a person being charged from being convicted under any additional statute. The statutes analyzed below are not intended to form a comprehensive list of every way prosecutors could seek to expand criminal liability, but instead strive to provide an analysis of some of the ways in which other criminal statutes could provide the basis for the prosecution of anyone involved in an illegal abortion.

Charges like the ones discussed below are not unprecedented. For example, in 2009, a woman named Nina Buckhalter was indicted in Mississippi for manslaughter after she gave birth to a stillborn baby. After an argument by the district attorney alleging that methamphetamine detected in Buckhalter's system caused the unborn child's death, a grand jury found that Buckhalter killed the unborn child by culpable negligence. Although Mississippi lawmakers had previously rejected proposals that would have set specific penalties for damaging a fetus by using illegal drugs during a pregnancy, prosecutors advanced their argument by using a Mississippi statute that extends the definition of "human being" to include an "unborn fetus" in certain

offenses in conjunction with the statute defining manslaughter. While the Supreme Court of Mississippi subsequently dismissed the charge, it is impossible to predict what the outcome would have been in a post-*Roe* world.

#### *A. Murder and Manslaughter*

Mississippi Code § 97-3-37 provides a list of criminal offenses, including capital murder and homicide, in which the definition of “human being” is expanded to include an “unborn child at every stage of gestation from conception until live birth.” While the section makes clear that inclusion of an unborn fetus into the definition of human being does “not apply to any legal medical procedure . . . including legal abortions . . . or to the lawful dispensing . . . of lawfully prescribed medication,” should *Roe* be overturned, abortions would likely no longer be legal in the state of Mississippi. First-degree, second-degree, and capital murder are all defined in Mississippi Code §97-3-19. Pursuant to §97-4-37, the term “human being” as used in § 97-3-19 should be read to include an unborn fetus.

##### *i. First-Degree Murder*

First-degree murder is defined as “the killing of a human being without the authority of law . . . when done with deliberate design to effect the death of the person killed, or of any human being,” *see* MISS. CODE ANN. 97-3-19(1)(a). Mississippi case law confirms that actual malice is not necessary for a finding of murder as the statute only requires deliberate design, *see Hughes v. State*, 42 So.2d 805 (Miss. 1949); *Stokes v. State*,

128 So.2d 341 (Miss. 1961); *Criss v. State*, 30 So.2d 613 (Miss. 1947), which may be inferred through the intentional use of any instrument, which based on its manner of use, is calculated to produce death. See *Wilson v. State*, 936 So.2d 357 (Miss. 2006); *Jones v. State*, 710 So.2d 870 (Miss. 1998). Because abortion would likely be illegal in Mississippi in the absence of *Roe*, prosecutors could charge a physician performing an illegal abortion with first-degree murder, proving the deliberate design requirement by the physician's intentional use of surgical instruments or medication to procure the abortion.

Should the mother die during the abortion, in addition to a charge for the death of the unborn fetus, prosecutors could pursue an additional charge of first-degree murder for the death of the mother. Mississippi's Pre-*Roe* Ban states that if the death of the mother results from an illegal abortion, the person performing the abortion is guilty of murder, *see* MISS. CODE ANN. 97-3-3(1)). While the statute does not specify which degree of murder, based on the language of § 97-3-19(1)(a), stating that it is first degree murder when a human being is killed "with the deliberate design to effect the death . . . of any human being," it seems possible that the physician could face an additional charge of first-degree murder by means of their intent for the abortion to cause the death of the unborn fetus.

Should abortion become illegal, it is almost certain that the incidence of self-induced abortions will increase. In the case of a self-induced abortion, prosecutors

could attempt to indict the woman herself on a charge of first-degree murder using the same rationale as applied to a physician performing an abortion. While the Trigger Ban does provide the woman with immunity in regard to the penalties discussed in § 41-41-45(4), neither the Pre-Roe Ban nor SB 2116 provides immunity for the woman, and none of the statutes seem to prevent the pregnant woman from being charged under additional statutes, such as § 97-3-19(1)(a).

#### ii. Second-Degree Murder or Manslaughter

A woman who ingests illegal drugs during her pregnancy that result in the death of the unborn fetus could be charged with manslaughter or even second-degree murder under the Mississippi code. *See* MISS. CODE ANN. §§ 97-3-47, 97-3-19(1)(b). Depraved-heart murder, constituting second-degree murder, is distinguished from culpable-negligence manslaughter by degree of mental state culpability, with depraved heart murder involving a higher degree of recklessness. *See McCarty v. State*, 247 So.3d 260 (Miss. Ct. App 2017). Although malice is not required for depraved-heart murder, *see Swanagan v. State*, 229 So.3d 698 (Miss. 2017), it can be inferred if a defendant's actions involved a very high degree of carelessness evincing reckless indifference to danger to human life. *See Clark v. State*, 693 So.2d 927 (Miss. 1997). Prosecutors could argue that a pregnant woman ingesting drugs while knowing she was pregnant represents a great indifference to the life of a specific individual, the unborn fetus, thus finding her guilty of second-degree murder.

For purposes of manslaughter, “culpable negligence” is defined as negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life. *See Hawkins v. State*, 101 So.3d 638 (Miss. 2012). Prosecutors could alternatively attempt to charge the pregnant woman who ingested drugs with culpable negligence manslaughter. Because the state is not required to prove that a defendant acted with malice or deliberate design in order to convict them for manslaughter, *see Green v. State* 631 So.2d 167 (Miss. 1994), it seems that a woman could be charged even if she did not know she was pregnant at the time of the drug use.

### iii. Capital Murder

An abortion performed for pecuniary gain could result in the physician being charged with capital murder. Mississippi treats the unlawful killing of a human being as capital murder when the killing is “perpetrated by any person who has been offered or has received anything of value for committing the murder,” making all parties to such a murder guilty as principals, *see* MISS. CODE ANN. § 97-3-19(2)(d). Should the physician receive compensation for performance of an abortion, prosecutors could seek to charge the physician with capital murder as a result of receiving “anything of value” for committing the abortion, which would constitute murder as analyzed above. Prosecutors could also seek to convict the person who paid for the abortion as well as a principle to capital murder, including the woman herself, her partner, or her parents.

Additionally, prosecutors could attempt to charge anyone who worked at the clinic or doctor's office and assisted in the abortion with capital murder as well.

Although the connection seems to be remote, it could be argued that because the employees were receiving compensation for their work assisting in the abortion, they could be treated as principals to the murder. Assuming this argument stands, this could potentially implicate anyone connected to the abortion, from the receptionist who scheduled it to the nurse who assisted in the procedure.

#### *B. Accessory Before the Fact & Aiding and Abetting*

Under Mississippi law, both aiders and abettors as well as accessories before the fact can be charged as principals to the crime. *See Anderson v. State*, 397 So.2d 81, 84 (Miss. 1981) ("One who aids, abets, and assists in the commission of a crime is indictable and subject to the same punishment as a principal"); *State v. Peoples* 481 So. 2d 1069, 1070 (Miss. 1986) ("An accessory to any felony before the fact is a principal and may be convicted as a principal. . ."). This is another broad provision suggesting expanded liability to anyone tangentially connected with the abortion.

The principal difference between an accessory before the fact and an aider and abettor is the actual or constructive presence of the individual. If the individual is present at the offense, they are treated as an aider and abettor. In order to be held criminally liable as an aider and abettor, one must encourage or assist the actual perpetrator in the commission of the crime. *See Johnson v. State*, 89 So. 3d 630, 643 (Ct.

App. Miss. 2011) (“To be held criminally liable as an aider and abettor in the commission of a felony, one must incite, encourage, or assist the actual perpetrator in the commission of the crime.”). Prosecutors could seek to expand criminal liability to anyone working at the clinic, and anyone assisting the physician with the actual procedure. In the case of a self-induced abortion, prosecutors could seek to charge anyone who is with the woman at the time of the abortion who encourages the woman’s choice as a principal to the crime through their status as an aider and abettor.

If the individual was not present but previously encouraged or helped the woman with the abortion, they could be treated as an accessory before the fact. Prosecutors could again seek to charge anyone who may have encouraged the woman before the abortion or anyone who assisted the woman with a self-induced abortion, such as a parent, a partner, or a friend providing encouragement and support or assisting the woman in obtaining medication to procure the abortion.

### *C. Accessory After the Fact*

Mississippi law considers anyone who assists a person who committed a felony after the commission of the crime with the intent to enable that person to avoid conviction to be an accessory after the fact, *see* MISS. CODE ANN. § 97-1-5(1). If the felony committed was a violent crime, such as homicide, the accessory can be sentenced for up to 20 years, *Id.* Prosecutors could attempt to use this provision to extend liability to anyone helping the woman after an abortion, from a physician assisting a woman who

seeks medical attention for difficulties arising from a self-induced abortion to any of the woman's support persons, or her partner who knew about her abortion and failed to report her.

## *V. Possible Legal Challenges*

### *A. Due Process Violations*

Under the due process clause found in both the Fifth and Fourteenth Amendments to the U.S. Constitution, a person may not be "deprived of life, liberty, or property without the due process of law." The criminalization of abortion through the Mississippi statutes discussed above would violate the Due Process Clause of the constitution by depriving citizens of fair notice as to what conduct is punishable, violating women's right to privacy, and placing a burden on the right to travel.

#### *i. Unconstitutionally Vague*

All three Mississippi laws discussed are unconstitutionally vague with respect to how they would interact with various other Mississippi Code sections. The only law providing the pregnant woman immunity from the penalties associated with performing an illegal abortion is the Trigger Ban. However, none of the discussed laws, Trigger Ban included, are clear on whether the pregnant woman could be charged under additional statutes, and to whom liability could be extended to through application of the related criminal codes discussed above. The statutes fail to provide the pregnant woman, her physician, her friends and family, and her partner with fair

notice as to what conduct is punishable. Would physicians in neighboring states who perform an abortion on women from Mississippi be subject to prosecution? Would a friend who remains with the woman during a self-induced abortion be convicted as a principle to first-degree murder? It is impossible to anticipate the multitude of ways the enforcement of the anti-abortion statutes will affect other provisions of the Mississippi code and established case law.

Additionally, enactment of any of the statutes criminalizing abortion would delegate authority to prosecutors and judges in such an extensive manner that it would likely lead to arbitrary and discriminatory prosecutions. As discussed in more detail below, women of color and women in economically disadvantaged communities, as well as anyone connected to their abortion would be disproportionately affected by the criminalization of abortion should the statutes become enforceable.

#### ii. Violate Right to Privacy

The right of privacy must be carefully protected, as an infringement on one's right to privacy cannot be undone once it has occurred, *see Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981). The Supreme Court has repeatedly affirmed that several amendments in the Bill of Rights create a "penumbra" of privacy for certain individual beliefs and conduct. If *Roe* is overturned, and any of the abortion bans discussed become enforceable, violations of a woman's right to privacy will undoubtedly occur. The statutes provide little to no guidance on under which

circumstances a prosecutor can obtain medical records related to pregnancy and/or births. Additionally, should a woman be convicted of an illegal abortion, it becomes public record. This could implicate issues anywhere from bearing the stigma associated with obtaining an abortion to excluding the woman from potential job opportunities. Should abortion become illegal in Mississippi, women attempting to travel out of the state for an abortion will likely need to explain their reason to travel, to seek extended childcare, or request time off from work.

### iii. Burden the Right to Travel

As more states have begun to adopt restrictive abortion laws and the number of abortion clinics decline, it is becoming more difficult for women to obtain an abortion. As a result, women are increasingly making use of interstate travel to obtain abortions in neighboring states. While it currently is not illegal in Mississippi to travel outside the state to obtain an abortion, it is possible that should abortion be outlawed, traveling to procure an abortion could result in criminal charges being brought in the woman's home state. A system that would permit states to allow travel but criminalize and punish the objective would result in the undermining of the long-standing constitutional right to travel.

### *B. Violation of Equal Protection*

The effect of criminalizing abortion would be to deny women the equal protection of the law. Criminalizing abortion would force women to choose between

giving up bodily autonomy to protect the life of another and provide years of maternal care, or to face the potential of the severe criminal penalties discussed above. While under Mississippi law, the father is liable to assist in the support of the child, *see* MISS. CODE ANN. § 41-41-33(1)(b)(ii), should abortion become a criminal offense in Mississippi, unwanted pregnancies become a burden imposed by the state that will only fall on women. A study by the National Advocates for Pregnant Women analyzing the impacts of abortion criminalization laws from 1973-2005 revealed that in 77% of cases, the father or the woman's male partner was never even mentioned in any case document. *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013). The assumption that women can be forced to accept the consequences of an unintended pregnancy appears to rest upon a stereotypical idea of a woman's role that triggers the protection of the Equal Protection Clause. *See Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring).

### *C. Patient–Client Privilege*

Criminalizing abortion will result in an increase in unsafe and self-induced abortions. Facially, the statutes in Mississippi which would criminalize abortion seem to aim to prosecute the doctor rather than the women. However, women who illegally take abortion-inducing drugs make this strategy more complicated. Without a doctor

involved, it would seem the only person left to prosecute is the woman herself. If a woman encounters difficulties while attempting to self-induce an abortion, she could be forced to seek assistance in the emergency room. Doctors will be torn between the decision to protect patient confidentiality or to protect themselves against prosecution and report the woman. Because it is not possible for a healthcare provider to tell the difference between a woman having a miscarriage or an abortion induced by medication, abortion criminalization will result in medical providers being forced to interrogate their patients and work with law enforcement to prosecute women seeking medical attention. Language barriers, misunderstandings, or a physician's unconscious bias could result in innocent women being jailed.

## ***VI. Policy-Based Objections***

### *A. Increase in Overcriminalization and Mass Incarceration*

Should the preliminary injunction on SB 2116 be lifted or *Roe* be overturned, overcriminalization will be the unmistakable result. The U.S. has consistently engaged in efforts to make every part of its criminal justice system more expansive and more punitive, with incarceration becoming the default response to crime. Mississippi's incarceration rates stand out, having the second highest rate of jail admissions per capita in the country, *see* Michelle Liu, *Mississippi Ranks No. 2 in Jailing People*, MISSISSIPPI TODAY, Oct. 1, 2019. While there has been a push for criminal justice reform in the state, criminalizing abortion acts as an impediment to the desired reform.

Criminalizing abortion will not result in a complete cessation of abortions. Rather, it will result in women seeking illegal abortions, often with the help of their partner, friends, and family. The penalties for physicians who violate the abortion ban range anywhere from six months to ten years in prison. As discussed above, should physicians or even the women themselves be charged with criminal homicide, the sentences in Mississippi range anywhere from one year to life in prison. For anyone found to be a principle to the abortion, they could also face up to life in prison. Because the limitations of the anti-abortion laws are not defined and there is no way to predict all the ways in which liability will be expanded, criminalizing abortion will only exacerbate Mississippi's current overcriminalization and mass incarceration issue. Even with the increase of litigation challenging the statutes discussed below, thousands of people would become imprisoned in the meantime.

*B. Disproportionate Impacts on Communities of Color and Economically Disadvantaged Communities*

Communities of color as well as lower income communities will be disproportionately criminalized under abortion bans. As of 2018, while only 37% of Mississippi's total population was Black, that same population made up over 60% of Mississippi's total prison population, *see* Mike McDaniel, *WDAM Investigates: Mississippi's Prison Population*, *WDAM*, Sep. 25, 2018. A study done by the National Advocates for Pregnant Women showed that the women affected by abortion criminalization statutes were overwhelmingly economically disadvantaged, and that

Black women were significantly more likely to be arrested, reported to authorities by hospital staff, and subjected to felony charges. See Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013). The U.S. criminal justice system has a history of unjustly penalizing communities of color for crimes that more affluent white communities receive slight or no punishment for, and statutes criminalizing abortion will procure that same result.

Those same communities will also carry a heavier burden than their wealthy white counterparts in attempting to seek an abortion. Past anti-abortion legislation has been shown to fall more harshly on lower income communities and communities of color, and a ban on abortion would undoubtedly have the same effect. For example, in 1976, the Hyde Amendment, a federal ban which prohibits federal funds from being used for abortions except in limited situations was passed. Studies have shown that the Hyde Amendment had a disproportionate impact on communities of color, as they are more likely to be enrolled in Medicaid and more likely to have trouble affording emergency expenses like an abortion. Additionally, restrictions to abortions found to be constitutional in the wake of *Planned Parenthood v. Casey*, such as Mississippi's current 24-hour waiting period, already disproportionately affect women in lower income communities. Because the waiting period combined with the in-person counseling requirement necessitates two trips to the clinic, women may have to seek hotel

accommodations or childcare. Should abortion become outright illegal, this impact will be exacerbated, as women will have to travel out of state in order to seek an abortion. Lower income women with fewer job opportunities, less access to childcare, and insufficient excess income will be less able to find the means to leave the state to obtain an abortion.

### *C. Increase in Litigation*

As discussed above, the Mississippi laws banning abortion are vague as to how they will interact with other provisions of the Mississippi Code and will permit arbitrary prosecution. It is undoubted that the laws will be challenged, resulting in an influx of litigation in Mississippi courts regarding the issues of vagueness and the limitations associated with the bans. These litigations will be high in number, as the challenges will have to be litigated gradually. Because it is impossible to determine which statutes prosecutors will seek to extend the abortion ban to, no blanket ruling would be able to be applied to all of the above-listed criminal statutes.

In addition to vagueness challenges, countless disparate impact claims will follow as well. For example, women who use illicit drugs and men who use illicit drugs would be treated differently under the criminalization of abortion, as only pregnant women would face the possibility of a charge for second-degree murder or manslaughter. The case of Nina Buckhalter discussed above is an example of this disparity. The burden of the criminalization of abortion will fall heavier on women too

poor to travel to seek an abortion and instead resort to a self-induced abortion, potentially subjecting them to a charge of first-degree murder, as opposed to a wealthier woman who can afford to leave the state for an abortion. Although the government could attempt to argue that their interest in protecting the unborn is a legitimate governmental interest, and any discrimination is incidental to that interest, the interest in protecting potential life does not suffice to explain the criminal abortion statutes at issue. Such statutes impose the entire burden of pregnancy onto the mother and provide little to no support for those same mothers postpartum.

## ***VII. Conclusion***

If abortion becomes illegal in Mississippi, or if SB 2116 is ultimately permitted to take effect, the consequences will be unpredictable and manifold, falling more harshly on communities of color and economically disadvantaged communities. While the government argues that their attempts to criminalize abortion are premised on the interest of protecting the unborn as well as the health of the mother, such statutes ignore the potential for the expanded and arbitrarily imposed liability that is almost certain to come, potentially resulting in the imprisonment of both the mother and the father of the unborn child. Litigation and the costs associated with it will drastically increase, and Mississippi's current overcriminalization crisis will only be exacerbated.