

REPRODUCTIVE RIGHTS JUNE 30, 2025

How Viability Limits End Up Criminalizing Pregnancy

Pregnancy Justice's legal director, Karen Thompson, warns: "We are in dangerous territory. This is our reality now."

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When Karen Thompson became the legal director at Pregnancy Justice a year and a half ago, she was still learning about the reproductive justice issues at the heart of the organization's mission. But after 20 years focused on the criminal justice system, first at the Innocence Project and then at the ACLU of New Jersey, she *did* know a lot about racial profiling, government surveillance, law enforcement overreach, and wrongful convictions. And to her, the parallels between her earlier work and the increasing criminalization of pregnancy and abortion in post-*Roe v. Wade* America could not have been clearer. "We are seeing all the same kinds of issues in the repro space that people in the criminal defense space have been talking about for years," Thompson says.

That criminal defense perspective frames how Thompson has been thinking about another major development of the post-*Roe* era: efforts to enshrine abortion rights into state constitutions. Since 2022, voters in 12 states have passed ballot measures aimed at protecting abortion rights, including seven states in November. But half of those measures restrict or ban abortions after viability—the point when a fetus is capable of living outside the womb, usually at around 22 to 24 weeks' gestation. In Missouri, Ohio, and other states, reproductive rights advocates have rationalized viability limits as a necessary evil to win over voters who might be squeamish about abortions later in pregnancy. The same debate has been playing out in Virginia, where advocates are trying to get a constitutional amendment on the 2026 ballot.

“I get it,” Thompson says. “But my eyes and this organization’s eyes are on *who* is being criminalized.” By creating a constitutional line between acceptable and unacceptable abortions, she says law enforcement is given a powerful weapon it can use against women for any actions that might be seen as harming a viable fetus—drug use in pregnancy, for instance—as well as a rationale to investigate and punish people for miscarriages and stillbirths. “It’s already happening,” she says, “and viability lines just make it easier.”

A new report by Pregnancy Justice and the advocacy group Patient Forward underscores the fact that one of the most insidious things about viability lines is their close relationship to fetal personhood, the once-fringe idea—now increasingly embraced by the Republican mainstream—that embryos and fetuses are entitled to the same constitutional rights as anyone else. Personhood arguments are foundational to the anti-abortion movement, part of its long-term strategy to outlaw all abortions. Reproductive rights groups should be doing everything they can to fight the spread of personhood laws, the report’s authors argue. Instead, Thompson says, by accepting viability limits, abortion advocates are unwittingly legitimizing the idea of fetal rights.

I recently met Thompson at a convening of legal scholars and maternal health advocates at the UCLA School of Law and followed up by Zoom. Our conversation has been edited for length and clarity.

Gestational limits have been a central issue in the abortion debate since 1973, when *Roe v. Wade* held that women had a constitutional right to abortion until viability. When did you first become aware of the dangers that gestational limits pose to abortion rights?

After I graduated from law school in 2003, I got a job at a big private law firm, Morrison & Foerster, that does a lot of pro bono work on reproductive issues. My first pro bono case was against a guy named William Graham, who was holding himself out as an abortion provider in New Orleans. He had a business name, Causeway Center for Women, that was very similar to a real abortion provider, Causeway Medical Clinic. People would go through the Yellow Pages, stumble on his name first, and call. And he would stall them until it was too late in their pregnancy to get an abortion or it was now so expensive they couldn’t afford it.

This sounds like a crisis pregnancy center. But he was one dude doing all this through his phone. So we filed a class-action suit arguing that this was fraud and trademark infringement, which was a very non-repro approach to take. And we shut him down. He’s not allowed to hold himself out in public as an abortion provider. That was my first introduction to the overreach of anti-abortion activists and the real, practical realities around what a viability line does. It also showed me how easily the gestational age and viability line could be manipulated in a way that could cause very severe damage to people’s lives.

Twenty years later, *Roe* has been overturned and gestational and viability limits have become a significant point of conflict among people who support the right to abortion. A lot of mainstream reproductive rights groups rationalize viability limits as nonthreatening, just “restoring *Roe*.”

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I want to be clear, I fully understand why people want viability limits—they believe this is what gets ballot measures passed. They can say, “Look, we’re going to protect access here in Missouri, here in Virginia, but we’re going to put a limit on this.” For legislators who are on the fence, that may seem like a reasonable compromise.

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“Paving the road to hell for people who are experiencing pregnancy criminalization”—that’s some pretty strong language. How do viability limits do this?

What viability limits are saying is that there are good abortions and bad abortions, which is problematic all by itself. But you’re also creating soft fetal personhood because you’re saying: There is a moment when an abortion becomes bad; there is a moment when the government gets to involve itself in someone’s womb; there is a moment where the pregnant person disappears in favor of a governmental interest in the child or the fetus.

It's that simple: If a fetus is considered a separate person under the law, and if you're saying, "Here's the line where that fetus becomes a separate person," there are no limits to what a state can do after that moment under the guise of protecting that fetus. And that is never going to end well for the pregnant person.

Just this month, there was a West Virginia prosecutor who said, "Hey, if you're having a miscarriage, call the police and report it!" What got less attention was the rest of what he said. The kind of criminal jeopardy a woman who miscarries would face would depend on "her intent," which he went on to define as: "What did you do? How late were you in your pregnancy? Were you trying to hide something?" He said, "If you were relieved and you had been telling people, 'I'd rather get ran over by a bus than have this baby,' that may play into law enforcement's thinking." So that artificial viability line was enough to justify criminal charges in his head.

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The idea that viability should determine when fetuses develop certain rights— that started long before *Roe*, right?

Historically, a fetus didn't acquire full legal rights as a person until birth, which I think is the best and most legitimate standard. When a child is born, when there is a baby who is independent of its parent, who is able to breathe and live and be given medical treatment that is going to sustain that life without being dependent on the body of another person—that's when life begins. That's what the law said for a very, very long time. Many religions also believe that that's when life begins.

Then in the 1940s, courts started ruling that a child could sue for fetal injuries that were incurred in the womb after the point of viability. So the idea of a viability line comes from a place of trying to do better and acknowledge harms that can occur to a fetus before it's born. Legislators started passing [fetal homicide and wrongful death] laws to punish people's bad behavior. For example, when somebody was pregnant and they were hit by a car because of someone else's negligence and they lost their pregnancy.

But these kinds of laws only work if they are limited to specific situations, and they never are. They become a foundation for a much bigger legal and political drift, including the spread of the idea that fetal personhood begins not at viability and not at 12 weeks or eight weeks or six weeks, but at fertilization.

Have viability lines become more problematic since *Dobbs* [the Supreme Court ruling that overturned *Roe*]?

They are hugely dangerous now in a way that they weren't necessarily before. Because at the very least, *Roe* put some guardrails down. At the end of the day, it said there was a constitutional right to abortion that was protected by federal law. With *Roe* gone, that federal protection is no longer with us. These issues are now being decided by the state, at the whim of whoever is running things, whoever wants to pass legislation or bring litigation based on their religious or personal beliefs.

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A recent Pregnancy Justice report shows a surge in pregnancy-related prosecutions in the first year after *Dobbs*, mostly involving drug use, but also for miscarriage and stillbirth. Is that a sign of things to come in states that enshrine viability into their constitutions?

Cases are going up. Part of that is because our research is getting tighter, so we're able to find the cases. But what is also happening is that these

are easy cases for prosecutors to bring, low-hanging fruit. If you are a prosecutor and you have certain numbers of convictions that you are getting pressure to hit every year, lest you be perceived as being soft on crime, it's really easy to criminalize someone because of their miscarriage or because they were using substances while they were pregnant. All you have to say is, "Drug exposure to a fetus is a crime, and that crime is felony child abuse." Boom! That's a 10- to 20-year sentence, whether or not there is any harm to the fetus or an actual born child—which, by the way, you don't have to prove—or whether someone has quit using after they found out they were pregnant, and so on. The guardrails are gone and standards to convict someone of a crime based on their pregnancy are so low.

Keep in mind: Something like 70 percent of these pregnancy criminalizations are being done through laws that were not written for this purpose. Women who might have smoked a joint while they're pregnant are being charged with child neglect or domestic violence against themselves, or under laws that were written to protect children from fumes in a meth cookhouse. There's *already* mission creep in these

cases. So, yeah, I'm worried about how viability lines could become a new law enforcement tool. They will make the criminalization process easier and faster.

And with the sweeping cuts that the Trump administration is making to safety net programs like Medicaid and the attacks on Planned Parenthood and the legal fights over emergency medical care...

We're only going to see things get worse. People are going to have more miscarriages and more stillbirths, and that will lead to more criminalization.

The rise in surveillance technology would seem to make that possibility even more concerning.

Criminal justice reform people have been raising the alarm about automatic license-plate readers for years. They've been talking about cellphone tower pings and all of this tracking tech that has been used to throw people in prison. Now we're seeing this tech being used in the reproductive context. In Texas, you have a county sheriff who, under the guise of protecting a woman who they claimed might be bleeding out from a self-managed abortion, proceeds to use the information from 83,000 different license-plate reader reports to track this person down...If she wasn't pregnant or she hadn't had an abortion, would anyone be okay with that? Someone who hadn't committed a crime being tracked down through license-plate readers? I don't think so. But what is happening is that pregnancy is justifying the imposition of law enforcement on people's movements.

How does the reproductive rights side fight this potential deluge of criminal cases?

Part of what we are doing as an organization is incorporating lessons from the wrongful conviction space. So you can't convict someone on bad science. If you see in the placenta or umbilical cord that there was clearly an infection that led to pregnancy loss, you can't blame substance use, because that's not how it works. You can't have snitches—people working in hospitals or homeless shelters—calling child protection services and telling them, with no grounds, that a woman has a mental health issue and then have CPS separate that child from their parent. You can't randomly drug test people when they go in for labor and delivery for no reason other than that they're pregnant.

We're seeing the same kind of issues in these pregnancy-related cases as in other criminal justice cases, but with none of the legal checks. Partly because these cases are very, very unseen. They move really fast. If someone's pregnant, they don't want to be in jail. There is deep judgment in our society about what good mothers are supposed to be, and anyone who is using drugs is immediately a bad mother. And keep in mind who is getting targeted. We're not talking about someone in her very fancy apartment on Fifth Avenue in New York City taking Percocet and drinking wine. No one's sending CPS after the father-to-be who is clearly high. The people being affected are mostly poor women. [In our recent report] white women are the majority in drug cases, Black and brown women in cases involving pregnancy loss like stillbirths and miscarriage.

We know what the history is in this country. We know how criminalization works. And the only thing that is different now is that there is one group of women who the state wants to have more babies because they are in an irrational panic around the demographic shift. And there's another group of women over which the state wants to continue its rampant overcriminalization and overpolicing of bodies.

Even with everything you've talked about, the idea of viability feels very entrenched in how we think about pregnancy and motherhood in our culture. So how do you convince people that viability limits don't protect abortion rights—that they are, in fact, a contraction?

My colleagues at Patient Forward have a lot more data on this, but from what I understand of polling on this issue, viability limits are not popular with voters. What seems to be happening is that voters are approving what is put in front of them. So we believe, based on research data, that they would have supported ballot measures *without* viability limits, too. The polling shows overwhelming rejection of government interference throughout pregnancy.

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I think people understand why patients have later abortions: because they can't get time off work, they can't find folks to watch their other kids, their car is busted, or they don't have money to get enough gas to get care. Maybe they have an abusive partner, or they didn't know they

to have access or we don't. If you want them to have access, let them have access."

were pregnant until they were already at five months, or because they don't want to have a kid, or because they simply cannot afford another kid. People understand these realities. And as a movement about

reproductive justice, we should not be putting ourselves out there supporting this idea of bad and good abortions. Either we want people to have access or we don't. If you want them to have access, let them have access.

People shouldn't have to travel from New York City to Colorado to get the care they need. I don't know how to make it any clearer, any more simple than that. I think that some repro advocates have so internalized these talking points about the political risks of viability lines that they're not able to get past them. And that doesn't mean that you don't say, "Listen, this is complicated." I know people have complicated feelings and that if that's what you have for yourself, okay. But your complicated feelings are not what should be driving legislation.

We've lost. *Roe* is gone. And we have people right now in the federal government who are implementing Project 2025, which wants to provide fetuses with 14th Amendment protections. If that happens, *all* abortion access will be gone. So the repro movement can have its feelings. But we are losing. We can keep woe-is-me-ing our way through what is happening. Or we can step up and fight. Passivity is not going to work. We cannot appease the other side. They're not appeased—they're taking, taking, taking.

Everything is burning down. This is the moment for the repro movement to rebuild in a way that serves everybody.

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