

Emerging Threats

While additional resources and new methods enhanced the research team’s ability to identify pregnancy-related prosecutions, the high number of prosecutions documented in a single year suggests a possible escalation in pregnancy-related prosecutions.

Dobbs unleashed an opportunity for states to further enshrine fetal personhood in statutes, state constitutions, and judicial decisions. The decision offers implicit support for fetal personhood by confirming that the government’s interest in fetal life can override a pregnant person’s bodily autonomy at any point during pregnancy. Further, Justice Alito’s intentional use of the words “unborn human being” and “potential life” throughout the decision gestures toward fetal personhood. The decision invites states to criminalize abortion and enforce new and old criminal laws to do so, and states have taken up the charge.⁶⁰ While it remains true that criminal abortion statutes have so far exempted pregnant people from prosecution, some anti-abortion advocates support amending criminal abortion statutes to include self-managed abortion. In 2023, seventeen states introduced twenty-two bills targeting the practice. None were enacted.⁶¹ Nevertheless, as self-management becomes more common,⁶² there is mounting concern that self-managed abortion may be targeted by the criminal system through the use of existing criminal laws or the enactment of new ones.⁶³

States have also sought to expand the application of criminal laws to reach pregnancy-related conduct by “scheduling” abortion medication. A drug schedule refers to the classification of drugs based on their “abuse or dependency potential.”⁶⁴ “Scheduling” a drug refers to putting it into one of five controlled substance categories, which has the effect of making it a crime to possess or distribute that medication.⁶⁵ Efforts are also underway to expand the tracking and surveillance of pregnant people⁶⁶ and to misuse the federal Comstock Act to impose criminal penalties on anyone transporting any “article or thing designed, adapted, or intended for producing abortion.”⁶⁷ Charging people under this improper application of the Comstock Act would unleash an unprecedented federal criminalization regime targeting pregnant people, healthcare providers, and those who help patients.

Because fetal personhood is generally unpopular, there is a concerted effort to constitutionalize fetal personhood through judicial decisions. Anti-abortion legal scholars and lawmakers have long argued that a fetus is a “person” covered by the language of the Fourteenth Amendment,⁶⁸ which states, in relevant part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁶⁹ These individuals argue that such an interpretation, never before applied by the federal courts, would outlaw abortion nationwide. Prosecutors could then easily argue that such an interpretation makes all abortion murder.⁷⁰