

MARYLAND ABORTION LAW POST-*DOBBS*

By Margaret E. Johnson, Professor of Law and Co-Director, Center on Applied Feminism, The University of Baltimore School of Law and Kathleen Hoke, Law School Professor and Director of the Network for Public Health Law, University of Maryland Carey School of Law

Maryland laws and regulations are relevant to abortion are below. Note that Maryland does not have any pre-*Roe* abortion statutes that would permit prosecution of abortion care prior to viability. In addition, Maryland does not have any trigger laws sprang into effect once *Roe* was overruled. Maryland criminal law specifically excludes any claim of fetal personhood. *See* Md. Code Ann. Crim. Law § 2-103.

I. Maryland Criminal Law

A. Md. Code Ann. Crim. Law § 2-103¹

This law provides for the prosecution for murder or manslaughter of a viable fetus. The statute provides exceptions from criminal liability for (1) a woman who terminates her pregnancy under Md. Code Ann. Health-Gen. § 2-209 (*see below*), (2) a licensed medical professional who was “administering lawful medical care,” and (3) an act or omission by a pregnant woman regarding her own fetus. The statute also qualifies that it should not be “construed to confer personhood or any rights on the fetus.”

Examples:

1. Two doctors were charged with multiple offenses, including first degree murder, based on their performing abortions for patients who were 18-33 weeks pregnant. *See* Jason Tomassini, *Murder charges against doctors test Maryland abortion law*, REUTERS (Jan. 3, 2012) <https://www.reuters.com/article/us-maryland-abortion-law/murder-charges-against-doctors-test-maryland-abortion-law-idUSTRE80211J20120103>. Dr. Nicola Irene Riley’s case information is [here](#). She was charged with “regular” first- and then second- degree murder. She was not charged with violating 2-103. All the murder charges were subsequently nolle prossed.
2. While not citing Crim. Law § 2-103, a woman was charged with murder after fetal remains were discovered under her bathroom sink. The medical examiner believed “the child was stillborn” and estimated Ms. Freeman had been in her 26th week of pregnancy. *See* Associated Press, *Police dig up lot after finding 4 infants’ bodies*, NBC NEWS (July 31, 2007) <https://www.nbcnews.com/id/wbna20052000>. This is an example of how a potential still born child is excluded from the exceptions to Md. Crim. Law § 2-103.

B. Md. Code Ann. Crim. Law § 3-204 (Reckless endangerment)

This section prohibits a person from recklessly engaging in conduct “that creates a substantial risk of death or serious physical injury to another.” In dicta, *Kilmon v. State*, 905 A.2d 306 (Md. 2006), the Court of Appeals stated that Md. Crim. Law § 2-103 would not impose criminal liability on a pregnant woman who “recklessly caused the death of a viable fetus” by using illegal drugs. As seen below, at least one person has been charged with reckless endangerment (towards the pregnant person and not the fetus) for assisting a minor access abortion care.

Example:

¹ Amendments were proposed in 2022 that illustrate how this law could still be used to prosecute pregnant people and others. *See* Pregnant Persons Freedom Act, HB0626/SB0669.

A Maryland woman pled guilty to reckless endangerment after she was charged with second degree child abuse² and reckless endangerment for providing abortion medication to a pregnant 16 year old. Both charges were based on her actions in relation to the 16 year old, not the fetus. *See Pro-choice woman faces jail after giving teen RU486 abortion pill*, SAYNSUMTHN'S BLOG, <https://saynsumthn.wordpress.com/2012/01/12/pro-choice-woman-faces-jail-after-giving-teen-ru486-abortion-pill/>

Although *Kilmon* held that the reckless endangerment statute did not apply to the effect of a pregnant person's actions on a "later-born child," *Kilmon* did not address other pregnancy outcomes, or the effect of a third party's actions on a fetus or pregnant person.

II. Maryland Civil Laws (as amended by 2022 Md. Laws ch. 56 (eff. July 1, 2022))

A. Md. Code Ann. Health-Gen. § 20-209

This section states that "[e]xcept as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy" before viability, or at any time during pregnancy if terminating the pregnancy is necessary to "protect the life or health of the woman" or the fetus has a "genetic defect or serious deformity or abnormality."

Viability is not defined as a precise period of time but is determined based on the "best clinical judgment of the qualified provider based on the particular facts of the case." Qualified providers are not civilly or criminally liable for performing an abortion when their decision was in "good faith" and based on their "best clinical judgment in accordance with accepted standards of clinical practice."

Health Department regulations may be adopted that are "both necessary and the least intrusive method to protect the life or health of the woman" and "not inconsistent with established clinical practice."

B. Md. Code Ann. Health-Gen. § 20-103

This section requires that an abortion performed on an unmarried minor be provided by a "qualified provider." Notice to a parent or guardian is generally required before an "unmarried minor" can receive an abortion. However, the law provides several exceptions to this requirement: (1) the minor does not live with a parent or guardian and the provider's attempt to provide notice is unsuccessful; (2) in the qualified provider's professional judgment, notice may lead to abuse; (3) in the provider's professional judgment, the "minor is mature and capable of giving informed consent;" or (4) in the provider's professional judgment, "[n]otification would not be in the best interest of the minor." A qualified provider "is not liable for civil damages or subject to criminal penalty for a decision under this subsection not to give notice."

² As seen in one Maryland news story, a person might be prosecuted under criminal abuse and neglect laws for assisting with abortion care or failing to provide notice for illegal abortion, even though the statutes reference minors or children and not fetuses. Md. Code Ann. Crim. Law §§ 3-602.2, 3-602.1, and 3-601. In *Kilmon*, the Court noted that the Legislature "has consistently rejected proposals that would have allowed [a pregnant woman's ingestion of drugs] to constitute murder, manslaughter, child abuse, or reckless endangerment."

C. Md. Code Ann. Health-Gen. § 20-207

This section defines “qualified provider” as any person “licensed, certified, or otherwise authorized” to practice in Maryland for whom performing an abortion is within the scope of their license or certification.

D. Md. Code Ann. Health-Gen. § 20-208

This section requires abortions to be performed by a qualified provider.

III. Maryland Regulations

Under Md. Code Reg. 10.35.01.03, a medical examiner examination is required for “criminal abortion.” Under Md. Code Reg 10.35.01.01(5), defines a “medical examiner case” as excluding “[a] stillbirth or a neonatal death ... in which the cause of death has been established by the hospital physician and is due to disease, and free of evidence of criminal or accidental nature.” Neither regulation defines “criminal abortion.” Proposed 2022 Maryland legislation that did not pass included a provision to preclude investigations of stillbirths, perinatal deaths due to failure to act, and miscarriages. *See* Pregnant Persons Freedom Act, HB0626/SB0669.

IV. Maryland Constitution

Maryland courts have construed the due process and equal protection clauses of the Maryland Declaration of Rights consistent with the U.S. Supreme Court’s construction of the related provisions in the federal constitution. Maryland has adopted the Equal Rights Amendment to the state constitution. Scholars³ have suggested that ERAs may serve as a basis for finding abortion rights absent *Roe v. Wade*. There is no case law addressing this question.

Last updated: June 30, 2022

³ Samantha Forman, *Equality of Right Under the Law: State Constitutional Protection for Abortion Rights in Maryland and Beyond*, 6 WIS. WOMEN’S J. 87, 114-16 (1991), <https://repository.law.wisc.edu/s/uwlaw/item/24662>. Pending lawsuits seek declaratory judgments on this point. *See* Chris Marr, *Last-Minute Bid to Save Right to Abortion Comes via ERA Lawsuits*, BLOOMBERG LAW (March 20, 2022), <https://news.bloomberglaw.com/daily-labor-report/last-minute-bid-to-save-right-to-abortion-comes-via-era-lawsuits>.



Criminalization of Pregnancy & Reproductive Health State-by-State Reports

Consistent with our Mission, the National Association of Criminal Defense Lawyers has launched its Criminalization of Pregnancy and Reproductive Health Project (CPRHP) to support attorneys defending individuals and entities at risk of prosecution as a result of the criminalization of abortion and abortion services. Following up on our 2019 report *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs*, NACDL's CPRHP has worked with dozens of law professors and other legal experts to create this overview of relevant state laws including existing abortion laws, trigger laws that are or will soon be in effect, pre-Roe statutes that prosecutors might invoke, and fetal personhood laws. NACDL is committed to developing resources to prepare attorneys to advise clients and defend cases in the face of the criminalization of personal choice and health.

NACDL's Criminalization of Pregnancy & Reproductive Health

This report was made possible by NACDL's Criminalization of Pregnancy & Reproductive Health efforts.

Learn more about this work at <https://www.nacdl.org/protecthealth>.

Acknowledgements

Thank you to all the volunteers who contributed these state reports. See a full list of acknowledgements at <https://www.nacdl.org/protecthealththanks>.

Disclaimer

NACDL is providing resources regarding the Criminalization of Pregnancy and Reproductive Health to the criminal defense community. Resources are provided without warranty or guarantee. Please consult the laws and rules of your state and local authorities.

NATIONAL
ASSOCIATION
OF CRIMINAL
DEFENSE LAWYERS



NACDL
FOUNDATION FOR
CRIMINAL
JUSTICE