

MARYLAND REPRODUCTIVE FREEDOM AND THE FULL PERSONHOOD OF PREGNANT PEOPLE

MARGARET E. JOHNSON[∞]

ABSTRACT

Pregnant and birthing people are inappropriately criminalized. Such criminalization is for behavior during their pregnancy that would not otherwise be criminalized, including when there was no harm to the later born baby, and for birth outcomes like miscarriages and still births. Law supports criminalization in part because of the historic legal significance given to fetal “viability” as a demarcation between full personhood rights for pregnant people and the encroachment of fetal “personhood” on those rights. Focusing on Maryland’s new constitutional amendment for reproductive freedom, this essay examines how the new amendment offers promise in restoring the full personhood rights for pregnant people. Such restoration could diminish the criminalization of pregnant people by minimizing any conflicting state interest in the fetus or claim to fetal “personhood,” increasing state support for pregnant people’s reproductive freedom, and ensuring the equal treatment of pregnant and non-pregnant people in terms of criminalized behavior.

INTRODUCTION	57
I. STATE CRIMINALIZATION OF PREGNANT PEOPLE	58
A. State Criminalization of Pregnant People.....	58
B. How Law Supports Criminalization of Pregnant People.....	59
1. State Interest in “Fetal Viability”	59
2. Pregnancy Criminalization Prior to <i>Dobbs</i>	60
3. Pregnancy Criminalization After <i>Dobbs</i>	60
C. Maryland Law Criminalizes Pregnant People	61
1. Pregnancy Criminalization Causing Loss of Liberty	61
a. Conviction for second-degree murder and first-degree child abuse for alleged still birth overturned after three years of incarceration.....	61
b. Conviction for reckless endangerment for ingesting cocaine while pregnant overturned after one year of incarceration	62
c. Increased prison time due to revoked probation when child tested positive for methamphetamine and heroin overturned.....	62
d. Conviction for criminal abandonment noting mother’s ingesting heroin and/or Suboxone prior to delivery	63

[∞] Professor of Law, Director, Bronfein Family Law Clinic, Co-Director, Center on Applied Feminism, The University of Baltimore School of Law. Part I.C. of this essay incorporates with permission some research by University of Baltimore Bronfein Family Law Clinic student attorneys Alaina Boswell, J.D. '25, Geena Michaelides, J.D. '25, Myka Graves, J.D. '25, and Rosalind Wright, J.D. '25. Thanks to I'Yonah Cartright, Zoe Myers, and Annabelle Patton for their research assistance, Leslie Carson, MPH, MSW, for her guidance on public health research, and Family Law Scholars and Teachers Conference 2025 participants for helpful feedback.

- 2. Laws Vulnerable to Pregnancy Criminalization 63
 - a. Explicit drug-related charges: use, possession, and delivery 63
 - b. Legally unauthorized abortion..... 64
 - c. Tampering with remains or abuse of a corpse..... 64
- 3. Laws Unlikely to Cause Pregnancy Criminalization 65
 - a. Fetal assault, feticide, murder, and manslaughter 65
 - b. Failure to report a birth or death..... 65
- II. MARYLAND CONSTITUTIONAL PROTECTION FOR REPRODUCTIVE FREEDOM 66
 - A. Maryland Constitutional Amendment 66
 - B. Interpretation of Reproductive Freedom Right 66
 - C. Compelling Government Interest and Narrowly Tailored Means Under the Maryland Constitution..... 69
 - D. Affirmative and Negative Rights..... 70
 - E. Equal Treatment of People Exercising Reproductive Freedom and Those Who Are Not 70
- III. MARYLAND’S REPRODUCTIVE FREEDOM RIGHT AND INAPPROPRIATE CRIMINALIZATION OF PREGNANT AND BIRTHING PEOPLE..... 71
 - A. Compelling State Interest 71
 - B. Narrowly Tailored Means..... 72
 - C. Affirmative Right to Reproductive Freedom..... 73
- CONCLUSION 73

INTRODUCTION

Pregnant and birthing people¹ are inappropriately criminalized for behavior that would not otherwise be criminalized, including when there is no harm to the later born baby, and for birth outcomes like miscarriages and still births. This criminalization is supported by the historic legal significance given to “fetal viability” as a demarcation between full personhood rights for pregnant people and its encroachment by fetal “personhood.”² Focusing on Maryland’s new constitutional amendment for reproductive freedom, this essay examines whether and how it offers promise in restoring the full personhood rights for pregnant people and diminishing their criminalization.

This essay proceeds in three parts. The first part examines how states inappropriately criminalize pregnant people, how law supports such criminalization,

¹ For ease of reference, this essay uses “pregnant people” to include “birthing people” and “pregnancy criminalization” to include the criminalization of birthing people as well. I use the term “woman” when it is used by the court or law.

² “Fetal viability” has contested meaning in medical practice. *Facts are Important: Understanding and Navigating Viability*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/understanding-and-navigating-viability> [https://perma.cc/83SR-7BYK]. The terms “fetal personhood” and “unborn” human being (for example) are used by anti-abortion policymakers and some courts to impinge on personhood rights of pregnant people. *E.g.*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). There is no federal recognition of a fetus as a person with constitutional rights. *Id.* at 263.

and specific examples in Maryland. The second part examines the 2024 Maryland constitutional amendment for reproductive freedom (hereafter “constitutional amendment” or “Right”).³ The third part analyzes whether and how the new Right could reduce criminalization of pregnant people.

I. STATE CRIMINALIZATION OF PREGNANT PEOPLE

Full personhood of pregnant people is essential to achieve reproductive freedom. Full personhood requires equal access for pregnant people to exercise their reproductive freedom and superior rights to the state’s interest in the fetus.⁴

A. *State Criminalization of Pregnant People*

Criminalization of pregnant people undermines their full personhood in significant and harmful ways. Pregnancy criminalization is when a pregnant person faces “certain punishment[s that] would not have happened without the pregnancy” for their behavior.⁵ The punishment includes criminal and civil punishment where the baby is removed from their parents (family separation).⁶ The punishment could be arrest, heightened terms of their bail, sentencing, or probation (when they became pregnant after arrest).⁷ The criminalization of pregnancy, therefore, results in heightened punishment for actions that would not be penalized, or would be penalized less severely, if committed by a non-pregnant person. And often there is no proof of harm to the fetus, effectively criminalizing the pregnancy itself.

³ MD. CONST. DECLARATION OF RTS., art. 48.

⁴ See Terry Gross, *Personhood in the Womb: A Constitutional Question*, NPR (Nov. 21, 2013), <https://www.npr.org/transcripts/246534132?storyId=246534132?storyId=246534132> [<https://perma.cc/WME8-T3MN>] (discussing how prosecutors use abortion and feticide laws to claim that fetuses have separate rights from the pregnant person and justify arresting them under child endangerment and feticide laws, for example, if they delay a Cesarean surgery or have a miscarriage or still birth).

For concision, I use “fetus” to include “embryo” and “zygote.” At times, I use fetus to correct inaccurate terms used by courts and anti-abortion policymakers such as “potentiality of future life” and “unborn human being.” See *infra* text accompanying notes Part I.B.

⁵ Sarah E. Burns & Sarah S. Wheeler, *A Review and Look Ahead at Criminalizing Pregnancy in the Name of State Interest in Fetal Life*, 76 SMU L. REV. 369, 376 (2023).

⁶ One estimate is that 13% of all substance exposed newborns are investigated by state child welfare agencies. Christine Piette Durrance & Danielle N. Atkins, *Estimating the Incidence of Substance Exposed Newborns with Child Welfare System Involvement*, 149 CHILD ABUSE & NEGLECT 106629, at 10 (2024).

⁷ PURVAJA S. KAVATTUR, SOMJEN FRAZER, ABBY EL-SHAFEI, KAYT TISKUS, LAURA LADERMAN, FIKAYO WALTER-JOHNSON, DANA SUSSMAN & LYNN M. PALTROW, THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 2–3 (Pregnancy Justice 2023), www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf; WENDY A. BACH & MADALYN K. WASILCZUK, PREGNANCY AS A CRIME: A PRELIMINARY REPORT ON THE FIRST YEAR AFTER DOBBS 2, 6 (Pregnancy Justice 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf>.

B. *How Law Supports Criminalization of Pregnant People*

1. *State Interest in “Fetal Viability”*

The legal significance of “fetal viability” supports the growing recognition of fetal personhood rights that diminish the personhood of pregnant people.⁸ *Roe* and *Casey* used a fetal viability line to restrict abortion. The *Roe* court held that during the first trimester of her pregnancy, a woman had a privacy right to terminate her pregnancy without state interference. But, as the pregnancy progressed, the Court held that “[t]he privacy right involved . . . cannot be said to be absolute”⁹ because “[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus.”¹⁰ The *Roe* Court held that at fetal viability the state may regulate the abortion decision because its interest in “potential life” is sufficiently compelling.¹¹ *Roe* permitted criminalization of pregnant people through the beginning recognition of fetal personhood, the “grant[ing of] full legal rights to an embryo or fetus, turning them into victims of crimes perpetrated by pregnant women.”¹²

The Supreme Court’s decision in *Casey* continued the diminishment of the pregnant person rights and support for fetal personhood. It held that the government may regulate the woman’s right to terminate a pregnancy in the first trimester because the state has a compelling interest in the “potentiality of human life” as long as the regulation does not create an undue burden on the woman’s ability to decide to terminate her pregnancy.¹³ After viability, the *Casey* Court held, the state may limit or proscribe abortion because it would be promoting its interest in “potentiality of human life.”¹⁴

⁸ Kimberly Mutcherson, *Fetal Rights in the Trump Era*, 95 TEX. L. REV. 214, 214–215 (2017); see also Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEXAS L. REV. 1189, 1232–35 (2017); Meghan M. Boone & Benjamin J. McMichael, *Reproductive Objectification*, 108 MINN. L. REV. 2493 (2024); Meghan M. Boone & Benjamin J. McMichael, *State Created Fetal Harm*, 109 GEO. L.J. 475, 485–86 (2021); PREGNANCY JUSTICE & PATIENT FORWARD, THE ROLE OF THE VIABILITY LINE IN PREGNANCY CRIMINALIZATION 7–8 (2025), <https://www.pregnancyjusticeus.org/wp-content/uploads/2025/05/Viability-Line-Report.pdf>; Laurie Penny, *The Criminalization of Women’s Bodies Is All About Conservative Male Power*, NEW REPUBLIC (May 17, 2019), <https://newrepublic.com/article/153942/criminalization-womens-bodies-conservative-male-power> [<https://perma.cc/SA8M-7UBB>] (“Two distinct legal persons with absolute rights to self-sovereignty cannot occupy the same body.”).

⁹ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

¹⁰ *Id.* at 159.

¹¹ *Id.* at 163. This regulation was subject to strict scrutiny, a compelling government interest and narrowly tailored means. *Id.*

¹² Press Release, Pregnancy Justice, New Pregnancy Justice Report Shows High Number of Pregnancy-Related Prosecutions in the Year After Dobbs (Sept. 24, 2024), <https://www.pregnancyjusticeus.org/press/new-pregnancy-justice-report-shows-high-number-of-pregnancy-related-prosecutions-in-the-year-after-dobbs/> [<https://perma.cc/KSB3-WXGM>]. See generally BACH & WASILCZUK, *supra* note 7.

¹³ *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992) (stating that the state intervention is narrowly tailored by not creating an undue burden on the woman’s ability to decide to terminate her pregnancy).

¹⁴ *Id.* at 879.

2. *Pregnancy Criminalization Prior to Dobbs*

Under *Roe* and *Casey*, there was some legal recognition for the personhood of a pregnant person prior to fetal viability. Nonetheless, the state inappropriately criminalized pregnant and birthing people.¹⁵ There were “more than 1,800 cases across the country . . . because of [the] state’s interest in protecting “unborn life.”¹⁶ The state mostly prosecuted people for being pregnant *and* alleged substance use—not for the crime alone, but for being pregnant while doing the crime.¹⁷

Many harms result from this pregnancy criminalization. First, pregnant people are deterred from seeking prenatal care and/or treatment for substance use disorder.¹⁸ Second, family separation may occur causing psychological, physical and family integrity harm.¹⁹ Third, poor Black and white pregnant people are disproportionately targeted causing the harms of racism and classism.²⁰ The state inflicts these harms even though two out of three cases involved *no* report of harm to the infant,²¹ and around one in ten arrests occurred *during* pregnancy without any detected harm.²²

3. *Pregnancy Criminalization After Dobbs*

Since *Dobbs* overruled *Roe* and *Casey* and overturned the federal constitutional right to an abortion, twelve states have banned abortion care and seven have severely restricted it.²³ Seventeen states have maintained the viability line for legal abortions, and five states have restrictions around the viability line.²⁴ These extensive restrictions on the full personhood of pregnant people have resulted in the highest frequency of criminalization of pregnant people in a single year.²⁵

¹⁵ KAVATTUR ET AL., *supra* note 7.

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ See, e.g., Erin C. Work, Serra Muftu, Kathryn Dee L. MacMillan, Jessica R. Gray, Nicole Bell, Mishka Terplan, Hendree E. Jones, Julia Reddy, Timothy E. Wilens, Shelly F. Greenfield, Judith Bernstein & Davida M. Schiff, *Prescribed and Penalized: The Detrimental Impact of Mandated Reporting for Prenatal Utilization of Medication for Opioid Use Disorder*, 27 MATERNAL & CHILD HEALTH J. 105, 110 (2023).

¹⁹ Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–52 (2019); Work et al., *supra* note 18, at 110 (discussing the emotional harm of mandatory reporting).

²⁰ KAVATTUR ET AL., *supra* note 7, at 4. See also Davida M. Schiff, William Z.M. Li, Erin C. Work, Latisha Goullaud, Julyvete Vazquez, Tabhata Paulet, Sarah Dorfman, Sabrina Selk, Bettina B. Hoepfner, Timothy Wilens, Judith A. Bernstein & Hafsatou Diop, *Multiple Marginalized Identities: A Qualitative Exploration of Intersectional Perinatal Experiences of Birthing People of Color with Substance Use Disorder in Massachusetts*, 163 J. SUBSTANCE USE & ADDICTION TREATMENT 209346, at 6–7 (2024).

²¹ 14.9% of cases involved a live birth and baby with health problems at birth, but 15.5% of cases were silent as to pregnancy outcome. KAVATTUR ET AL., *supra* note 7, at 4.

²² *Id.*

²³ Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Laws Across the Country*, N.Y. TIMES (Sept. 8, 2025), <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/2X9K-G9DX>].

²⁴ *Id.* According to the New York Times, ten states have no limitation on abortion access. *Id.*

²⁵ BACH & WASILCZUK, *supra* note 7 (“210 pregnant people faced criminal charges for conduct

C. *Maryland Law Criminalizes Pregnant People*

Maryland Law permits criminalization of pregnant and birthing people. Maryland prosecutors have convicted pregnant and birthing women under such statutes as second-degree murder,²⁶ first-degree child abuse,²⁷ second-degree child abuse,²⁸ reckless endangerment,²⁹ possession of a controlled dangerous substance,³⁰ and criminal neglect of a minor.³¹ In addition, a court revoked the probation of a pregnant person who used substances while pregnant under the Maryland’s Justice Reinvestment Act of 2016.³²

1. *Pregnancy Criminalization Causing Loss of Liberty*

a. *Conviction for second-degree murder and first-degree child abuse for alleged still birth overturned after three years of incarceration*

Before *Dobbs*, Moira Akers was convicted in a Maryland court and sentenced to thirty years for second-degree murder and first-degree child abuse despite her insistence the baby was still born.³³ The prosecution relied on her internet searches about terminating a pregnancy and her lack of prenatal care.³⁴ The Appellate Court of Maryland upheld her conviction.³⁵

On February 19, 2025, after Ms. Akers had spent almost three years in prison, the Supreme Court of Maryland reversed Ms. Akers’ conviction, holding that the internet searches and lack of prenatal care were not relevant to whether she had the intent to kill a newborn. Importantly the court stated, “Maryland law recognizes the fundamental difference between a fetus and a baby and rejects the concept of fetal personhood.”³⁶

While the reversal of the conviction is important, the opinion did not represent full personhood rights for pregnant and birthing people. The court left two doors open for fetal personhood. First, it stated, “Consistent with the recognition *that non-*

associated with pregnancy, pregnancy loss or birth.”).

²⁶ Akers v. State, 490 Md. 1, 8 (2025).

²⁷ *Id.*

²⁸ See generally State v. Kilmon, No. 20-K-04-008022 (Cir. Ct. Talbot Cnty. Aug. 18, 2004) (illustrating that women such as Regina Kilmon have been charged and convicted under Maryland law of crimes such as child abuse, reckless endangerment, and possession of controlled substance), *rev’d*, 394 Md. 168, 183 (2006).

²⁹ *Id.*

³⁰ *Id.*

³¹ Thodos v. State, No. 907, 2019 WL 2207527, at *2–9 (Md. Ct. Spec. App. 2019). Infant removal from parents due to civil child protective service investigations and cases also occur but are not publicly reported. Legal provider interview notes on file with author.

³² MD. CODE ANN., CRIM. PROC. §§ 6-223–6-224 (West 2018); State v. Jester, No. 09-K-15-015698 (Cir. Ct. Dorchester Cnty. May 17, 2018), *vacated*, No. 706, 2019 WL 3236039, at *1 (Md. Ct. Spec. App. July 18, 2019).

³³ State v. Akers, No. C-13-CR-19-000367 (Cir. Ct. Howard Cnty. July 29, 2022).

³⁴ *Id.*

³⁵ Akers v. State, No. 0925, 2024 WL 338958, at *1 (Md. App. Jan. 30, 2024).

³⁶ Akers v. State, 490 Md. 1, 30 (2025).

viable fetuses are not persons, all women in Maryland have a statutory and constitutional right to freely decide whether to terminate a pregnancy.³⁷ This ambiguous statement could be interpreted to recognize a legal viability line in Maryland after which the state could interfere in a pregnant person's reproductive freedom. Second, despite recognizing the pregnant person's right to *not* seek prenatal care, the Court stated it was uncomfortable holding that disparate prenatal care (seeking prenatal care during one pregnancy but not another) "would never be relevant."³⁸

b. *Conviction for reckless endangerment for ingesting cocaine while pregnant overturned after one year of incarceration*

Similarly, Regina Kilmon spent a year in Maryland's prison before her wrongful conviction was overturned.³⁹ In *Kilmon v. State*, the prosecutor charged her with second degree child abuse, contributing to conditions rendering a child delinquent, reckless endangerment, and possession of a controlled dangerous substance for ingesting cocaine while pregnant even though there was no proof of harm to the baby after the birth.⁴⁰ The Maryland Supreme Court overturned her conviction based on a plea to reckless endangerment reasoning that the legislature did not intend the criminal statute at issue to apply "to prenatal drug ingestion by a pregnant woman."⁴¹

c. *Increased prison time due to revoked probation when child tested positive for methamphetamine and heroin overturned*

A Maryland court subjected Amber Nicole Jester to increased prison time under the Maryland's Justice Reinvestment Act of 2016 ("JRA").⁴² In *Jester v. State*, Ms. Jester pleaded guilty to violating her probation condition of completing drug treatment.⁴³ Citing that she had previously given birth to a child who tested positive for methamphetamine and heroin, the court decided that she presented a danger to others, "not only to '[he]r newborn,' but to a 'prospective newborn' as well," by using such drugs.⁴⁴ Using the JRA, the court revoked her probation and sentenced her to prison for the balance of her suspended sentence of 9.5 years.⁴⁵ Referring to *Kilmon*, the Maryland Appellate Court overturned the lower court's decision by reasoning that "[t]here is no reason to think that the General Assembly intended to establish more draconian punishments for drug use while pregnant via the Justice

³⁷ *Id.* at 31 (emphasis added).

³⁸ *Id.* at 49. The court also acknowledged this issue had not been raised at trial. *Id.*

³⁹ *Kilmon v. State*, 394 Md. 168, 170 (2006).

⁴⁰ *Id.*

⁴¹ *Id.* at 183.

⁴² MD. CODE ANN., CRIM. PROC. §§ 6-223–6-224 (West 2018) (punishing a first technical probation violation only up to fifteen days imprisonment unless a court finds the defendant poses a risk to public safety, victim, or a witness); see also *Jester v. State*, No. 706, 2019 WL 3236039, at *1 (Md. Ct. Spec. App. July 18, 2019).

⁴³ *Jester*, 2019 WL 3236039, at *1.

⁴⁴ *Id.* at *2.

⁴⁵ *Id.* at *3.

Reinvestment Act than through the rest of the criminal code,” which the General Assembly has refused to amend with additional criminal penalties for a pregnant person’s substance use that affects a subsequently born child.⁴⁶ The Court further reasoned that Ms. Jester’s child was not a “victim . . . merely due to [her] drug use while pregnant. Nor do we believe that a parent’s own child would fit within the JRA’s exception for risk posed to the ‘public safety.’”⁴⁷

d. *Conviction for criminal abandonment noting mother’s ingesting heroin and/or Suboxone prior to delivery*

The Maryland Appellate Court affirmed a conviction under criminal neglect of a minor of a defendant who admitted to ingesting heroin and/or Suboxone in *Thodos v. State*.⁴⁸ While the defendant argued the state had not proved criminal neglect, the state argued on appeal the conviction was based on abandonment as neglect because defendant had failed to continue to contact the hospital after many days of separation from her baby.⁴⁹ The Court affirmed the conviction on abandonment and emphasized its consideration of the mother’s ingestion of heroin and/or Suboxone prior to delivering her child.⁵⁰ Although unreported, *Thodos* supports state prosecution of pregnant people for criminal neglect for substance use, including opioid use disorder medication.

2. *Laws Vulnerable to Pregnancy Criminalization*

a. *Explicit drug-related charges: use, possession, and delivery*

From January 2006 to June 2022, 10% of pregnancy-related arrests in the United States included criminal drug use, possession and delivery.⁵¹ For instance, Ohio law permits criminalizing use or possession of a harmful intoxicant to charge pregnant people for “distributing controlled substances to a fetus in utero, or . . . to the newborn via the umbilical cord after delivering the baby, but before the cord was cut or via breastmilk.”⁵² Because Maryland has a statute focused on protocol for dealing with newborns that test positive for controlled substances, there is the potential for similar criminal charges to be brought against pregnant people in Maryland.⁵³

Maryland courts have permitted evidence of a pregnant person’s substance use to support removal of a child for abuse or neglect, even without the requisite harm or substantial risk of harm.⁵⁴ For example, in *Dustin T.*, the state removed Dustin

⁴⁶ *Id.*

⁴⁷ *Id.* at *4.

⁴⁸ *Thodos v. State*, No. 907, 2019 WL 2207527, at *8 (Md. Ct. Spec. App. May 22, 2019).

⁴⁹ *Id.* at *1.

⁵⁰ *Id.* at *8.

⁵¹ KAVATTUR ET AL., *supra* note 7, at 29.

⁵² *See id.*; OHIO REV. CODE ANN. § 2925.31 (West 2016).

⁵³ *See* MD. CODE ANN., FAM. LAW §5-704.2 (West 2024).

⁵⁴ *See In re Dustin T.*, 93 Md. App. 726, 735–37 (1992); MD. CODE ANN., FAM. LAW §§ 5-704.1, 5-701(b) (West 2024).

because he and his mother both tested positive for cocaine at his birth, his mother had a history of substance use disorder, she was using substances just prior to his birth and she “associated with people who were ‘involved with drugs . . .’” and stayed in her house.⁵⁵ Even though there was no evidence of harm to Dustin, the appellate court affirmed the child’s removal finding that Dustin would be at risk of harm should he return home given all these circumstances.⁵⁶

b. *Legally unauthorized abortion*

Prior to *Dobbs*, other states prosecuted individuals for obtaining abortions through means such as procedures by unlicensed medical professionals, using abortion pills outside approved protocols, or attempting to induce miscarriage with herbal remedies.⁵⁷ Even prior to the constitutional amendment, Maryland law explicitly prohibited any State interference with pregnancy termination up until viability.⁵⁸ Maryland law also prevented the state from regulating termination of pregnancy regardless of viability if: (1) the procedure was necessary to protect the life or health of the pregnant person; or (2) the fetus suffered from a genetic defect or serious deformity/abnormality.⁵⁹ Maryland law has not enacted any specific statute or regulation that impedes a pregnant person’s termination of their pregnancy; therefore, there is no restriction on abortion care throughout pregnancy in Maryland. But as discussed above, that has not stopped the state from prosecuting people for behavior during pregnancy, such as Moira Akers’ research of self-managed abortion.

c. *Tampering with remains or abuse of a corpse*

Some states could criminalize individuals for abuse of a corpse when they have experienced pregnancy loss outside the hospital setting.⁶⁰ Under Arkansas law, the state may prosecute an individual who “[p]hysically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities.”⁶¹ Maryland has no analogous general prohibition on corpse mistreatment or concealment, instead criminalizing only specific conduct tied to burial sites and cemeteries, such as unauthorized removal of remains, commercial trafficking in unlawfully removed remains, and destruction of cemetery property.⁶² A new Maryland law, however, makes it a felony to “knowingly and willfully dismember, destroy, remove, bury, dispose of, or obliterate by any means any portion of human remains” with the

⁵⁵ In re Dustin T., 93 Md. App. at 728–29.

⁵⁶ *Id.* at 735–36.

⁵⁷ KAVATTUR ET AL., *supra* note 7, at 32.

⁵⁸ MD. CODE ANN., HEALTH-GEN. § 20-209(b) (West 2010).

⁵⁹ *Id.*

⁶⁰ See Lux’s Law, ARK. CODE ANN. § 5-60-101 (2025); MD. CODE ANN., CRIM. LAW §§ 10-401–10-404 (2025).

⁶¹ Lux’s Law, ARK. CODE ANN. § 5-60-101(a)(3)(A) (2025).

⁶² MD. CODE ANN., CRIM. LAW §§ 10-401–10-404 (West 2025). In *Akers*, interestingly, the court noted how Ms. Akers dealt with her stillbirth at home. *Akers v. State*, 490 Md. 1, 13 (2025).

“intent to conceal a crime.”⁶³ While this law could be used to prosecute individuals experiencing miscarriages, live births, or abortions, its legislative history in which concealing “the death of another” was replaced with “conceal a crime” shows an intent to limit its scope.⁶⁴

3. *Laws Unlikely to Cause Pregnancy Criminalization*

a. *Fetal assault, feticide, murder, and manslaughter*

7.3% of cases criminalizing pregnant persons were brought under fetal assault laws from January 2006 to June 2022.⁶⁵ All of the cases were under Tennessee's S.B. 1391 Fetal Assault Law, which permitted the arrest of pregnant people if the newborn “was born exposed to or harmed by a drug.”⁶⁶ Maryland does not have such a law. And while it has a law criminalizing the perpetration of violence against another when the person knows or believes the other is pregnant, it does not apply to acts by the pregnant person.⁶⁷ Similarly, Maryland law criminalizing the murder or manslaughter of a viable fetus specifies that “[n]othing in this section applies to or infringes on a woman’s right to terminate a pregnancy.”⁶⁸ Accordingly, neither law makes the state’s interest in the fetus equal to or supreme to the pregnant person’s liberty rights nor is likely to aid the criminalization of pregnant people.

b. *Failure to report a birth or death*

Other states have criminalized individuals who attempt to deal with fetal or stillbirth remains if they failed to report a “birth.”⁶⁹ In *Akers*, the court noted the Arkansas birth concealment cases in considering Ms. Akers’ behavior surrounding her stillbirth.⁷⁰

Even prior to the constitutional amendment, Maryland law protected the right to terminate a pregnancy, but this protection has not fully shielded pregnant people from criminalization. Maryland’s new constitutional right to reproductive freedom offers promise in eradicating such criminalization.

⁶³ H.B. 674, 2025 Reg. Sess. (Md. 2025).

⁶⁴ *See id.*

⁶⁵ KAVATTUR ET AL., *supra* note 7, at 17, 30.

⁶⁶ *Id.* at 30.

⁶⁷ MD. CODE ANN., CRIM. LAW § 14-104(a) (West 2024).

⁶⁸ *Id.* § 2-103. *See* MD. CODE ANN., HEALTH-GEN. § 20-209(a) (West 2010) (defining viable as the “stage when, in the best clinical judgment of the qualified provider based on the particular facts of the case before the qualified provider, there is a reasonable likelihood of the fetus’s sustained survival outside the womb”).

⁶⁹ KAVATTUR ET AL., *supra* note 7, at 34.

⁷⁰ *Akers v. State*, 490 Md. 1, 43 (2025).

II. MARYLAND CONSTITUTIONAL PROTECTION FOR REPRODUCTIVE FREEDOM

This part examines Maryland's new constitutional amendment that protects the right to reproductive freedom.

A. *Maryland Constitutional Amendment*

On May 3, 2023, Maryland Governor Wes Moore signed into law S.B. 798 and H.B. 705, sending the question of a reproductive freedom constitutional amendment to the voters.⁷¹ On November 5, 2024, Maryland voters voted favorably on the amendment.⁷² The amended Maryland Constitution provides:

That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy. The State may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling State interest achieved by the least restrictive means.⁷³

I argue this Right not only secures a right to abortion but also provides legal support for the realization of the full personhood of pregnant people including the protection from their criminalization. To date, courts have not yet interpreted this right. Accordingly, this part discusses potential interpretations of the Right.

B. *Interpretation of Reproductive Freedom Right*

Maryland law aids in interpreting the Right. Courts prioritize using a statute's "plain language" to determine the legislature's intent unless the language is ambiguous or inconsistent with the statute's purpose.⁷⁴ In those cases, courts may use other indicia of legislative intent, including legislative history.⁷⁵

There is a strong argument that the Right's language is unambiguous and consistent with the statute's purpose to provide pregnant people autonomy to determine their pregnancy's course and not inferior to any state interest in protecting "potential life." There is *no* mention of any fundamental right for fetuses. Moreover, under Maryland law, the many definitions of "person" do not include "zygote," "embryo," or "fetus."⁷⁶ Similarly, in *Akers*, the Supreme Court of Maryland

⁷¹ S.B. 798, 2023 Reg. Sess. (Md. 2023); H.B. 705, 2023 Reg. Sess. (Md. 2023).

⁷² *Maryland Question 1, Right to Reproductive Freedom Amendment (2024)*, BALLOTPEdia, [https://ballotpedia.org/Maryland_Question_1_Right_to_Reproductive_Freedom_Amendment_\(2024\)](https://ballotpedia.org/Maryland_Question_1_Right_to_Reproductive_Freedom_Amendment_(2024)) [<https://perma.cc/K3MC-MJMR>] (last visited Mar. 8, 2026) (passing with 76.06% of the 2,891,538 votes).

⁷³ MD. CONST. DECLARATION OF RTS., art. 48 (West, Westlaw through 2025).

⁷⁴ Eric C. Surette, *Extrinsic Aids to Construction of Statutes*, in MARYLAND LAW ENCYCLOPEDIA § 68, Westlaw (database updated Mar. 2026); *Blackstone v. Sharma*, 191 A.3d 1188, 1203 (Md. 2018).

⁷⁵ Surette, *supra* note 74; *Blackstone*, 191 A.3d at 1203.

⁷⁶ MD. CODE ANN., GEN. PROVISIONS §1-114 (West 2026).

recognized the distinction between a fetus and a baby, rejecting “the concept of fetal personhood.”⁷⁷

Despite this proclamation, Maryland law is not so clear. For instance, in stating that non-viable fetuses are not persons, the Supreme Court of Maryland in *Akers* invited ambiguity about whether viable fetuses *could be* persons.⁷⁸ Similarly, while not controlling, the *Akers* dissent by Justice Gould promoted a theory of legal significance of fetal viability stating “Ms. Akers and every other woman in Maryland will remain free to terminate a pregnancy without the State’s interference before viability”⁷⁹

The Right adds clarity to this issue. The legislative history of the Right shows it does not recognize fetal personhood. During debate, legislators rejected a proposal to amend the statute to ban abortion with some exceptions after viability.⁸⁰ This proposal would have made the state’s interest in a post-viability fetus supreme over the pregnant person’s liberty and equality. Legislators also rejected amendment proposals to provide rights to “preborn” and ban abortion after viability even with a minor exception.⁸¹ Legislators rejected proposed changes to ensure the bills would not eradicate the personhood of the unborn⁸² or remove any viability line.⁸³ Accordingly, the Right should be interpreted as being held only by the pregnant person throughout her pregnancy and supreme to any state interest in “potential life.”

The Right’s “reproductive freedom” language is also unambiguously broader than abortion making it arguably applicable to criminalization of pregnant people. The language includes the right to “make and effectuate” decisions “including” to “prevent, continue, or end.” The use of “including” shows that the right to make

⁷⁷ *Akers v. State*, 490 Md. 1, 30 (2025). In support of this assertion, the Court in *Akers* cites Maryland criminal law, MD. CODE ANN., CRIM. LAW § 2-103(g), which states that “nothing in this section shall be construed to confer personhood or any rights on the fetus.”

⁷⁸ *Akers*, 490 Md. at 32.

⁷⁹ *Id.* at 57 n.2 (Gould J., dissenting).

⁸⁰ S.B. 798, 273829/1, 2023 Reg. Sess. (Md. 2023), https://mgaleg.maryland.gov/2023RS/amds/bil_0008/SB0798_27382901.pdf (amendment offered by Sen. Simonaire) (rejected).

⁸¹ H.B. 705, 283723/1, 2023 Reg. Sess. (Md. 2023), https://mgaleg.maryland.gov/2023RS/amds/bil_0005/HB0705_28372301.pdf (amendment offered by Del. Wivell) (rejected); S.B. 798, 973426/1, 2023 Reg. Sess. (Md. 2023), https://mgaleg.maryland.gov/2023RS/amds/bil_0008/SB0798_97342601.pdf (amendment offered by Sen. Simonaire) (rejected).

⁸² See generally *Declaration of Rights – Right to Reproductive Freedom: Hearing on S.B. 798 Before the S. Fin. Comm.*, 2023 Reg. Sess. (Md. 2023) [hereinafter *S.B. 798 Hearing Record*], <https://mgaleg.maryland.gov/mgawebsite/Legislation/WitnessSignup/SB0798?ys=2023RS> (last visited May 24, 2026); *id.* (written testimony of Laura Bogley, Maryland Right to Life, against legislation), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1LEjaPuZ8mT4unn0wAZZgEAFpYQCKaFLI.pdf.

⁸³ See, e.g., *id.* (written testimony of Dr. Francis Arlinghaus against legislation), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1Rk9XtkfJu45NINuJZ61R8MLGruTK-mfO.pdf; *id.* (written testimony of Mary Beaudoin against legislation), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1Rk9XtkfJu45NINuJZ61R8MLGruTK-mfO.pdf.

decisions is not limited to pregnancy, or abortion, alone and could include substance use decisions. In addition, the language “directly or indirectly” “deny, burden, or abridge” goes beyond limiting state interventions to include limiting consequences of state actions.

If this language were deemed ambiguous or inconsistent with legislative intent, however, the legislative history confirms the above interpretations. For instance, legislators rejected proposed amendments to limit the right to only “coercive” or safety-minded decision making, or to “reproductive health care decisions” rather than “reproductive freedom.”⁸⁴ Similarly, they rejected proposed amendments that would have changed “reproductive freedom” to “abortion.”⁸⁵

Testimony before the relevant legislative committees also evidence an understanding of the Right’s breadth of “reproductive freedom.” For instance, legislators rejected warnings that the constitutional amendment was too broad and would restrict state regulation of abortion at any time during pregnancy,⁸⁶ require state funding for abortion care,⁸⁷ permit gender affirming care,⁸⁸ and require taxpayer support for sterilization and contraception.⁸⁹ It is consistent to interpret the Right, therefore, to give primacy to the full personhood and autonomy of the person exercising the Right over any state interest in the fetus.

Importantly, none of the legislative history of the Right makes criminalization of pregnancy permissible. The legislative intent favors broad bodily autonomy and equality as seen in the Right’s language.

⁸⁴ S.B. 798, 223629/1, 2023 Reg. Sess., (Md. 2023), https://mgaleg.maryland.gov/2023RS/amds/bil_0008/SB0798_22362901.pdf (amendment offered by Sen. Mautz) (rejected); S.B. 798, 203721/1, 2023 Reg. Sess., (Md. 2023), https://mgaleg.maryland.gov/2023RS/amds/bil_0008/SB0798_20372101.pdf (amendment offered by Sen. Ready) (rejected).

⁸⁵ H.B. 705, 373529/1, 2023 Reg. Sess., (Md. 2023), https://mgaleg.maryland.gov/2023RS/amds/bil_0005/HB0705_37352901.pdf (amendment offered by Del. Wivell) (rejected).

⁸⁶ *S.B. 798 Hearing Record, supra* note 82 (written testimony of Laura Bogley, Maryland Right to Life, against legislation).

⁸⁷ *See, e.g., id.* (written testimony of Kathleen Kollman Birch against legislation) (courts could use the amendment to mandate funding for abortion), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1PRb1MI31Tg-z1xzfSF7FB_IYF35YSvg4.pdf; *id.* (written testimony of Deborah Brocato against legislation) (too broad and permits taxpayer funding of abortion), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1uN2BYhxXMIWoSi5ZLV9rgy1Bdk0qWR4p.pdf; *id.* (written testimony of Jennifer Brown against legislation) (prohibits limitation on abortion), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1PaYjqyUzSb1oP-36gQrlKILoQEs4XikN.pdf; *id.* (written testimony of Mary Beaudoin against legislation) (amendment would be used to strike down limits on abortion), https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1yX4cV924BOwL5kAITJzoN-LGG--pWj-J.pdf.

⁸⁸ *Id.* at 01:13:12–01:15:18 (oral testimony of Deborah Brocato against legislation), https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=fin&ys=2023RS&clip=FIN_3_1_2023_meeting_1&billNumber=sb0798.

⁸⁹ *Id.*

C. Compelling Government Interest and Narrowly Tailored Means Under the Maryland Constitution

The Right incorporates a specific liberty interest and protected classification of reproductive freedom. It requires courts to review any state action interfering with the Right under the strict scrutiny standard, which permits only state actions that are narrowly tailored to serve a compelling governmental interest. This language mimics the federal constitutional strict scrutiny review. In general, Maryland’s courts interpret Maryland’s due process provision, with its strict scrutiny requirement, in conformity with the U.S. Constitution’s.⁹⁰ Because the Right is a specific enumerated right that does not exist in the federal constitution and is separate from a general “liberty” interest, I argue that state actions that would satisfy strict scrutiny would be different under the Right than under the U.S. Constitution. Such a diverging interpretation is not unheard of.⁹¹ Importantly, the Right’s text does not incorporate the *Roe* and *Casey* standards regarding viability and undue burden that would weigh the pregnant person’s rights against the state’s interest in “potential life,” nor does it incorporate the *Dobbs* standard of rational basis.⁹² And as discussed above, the Right’s legislative history rejected a legally significant viability line and the recognition of a “preborn’s” rights. Moreover, given its adoption after *Dobbs*, Maryland voters may have approved it in response to states’ new ability to further control pregnant people.⁹³ Therefore, the Right is a strong statement in favor of full personhood rights of pregnant people.

Such an interpretation of the Right is consistent with Maryland law, which has never incorporated a legally significant viability line. Under Md. Health General § 20-209, the statute indicates that the State may not interfere with a woman’s right to terminate her pregnancy prior to viability or anytime, including after viability, if the procedure is “necessary to protect the life or health of the woman” or “the fetus is affected by a genetic defect or serious deformity or abnormality.”⁹⁴ In addition, the Department may only adopt regulations 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.”⁹⁵ The state and the Department of Health have

⁹⁰ *Robles v. Prince George's Cnty.*, 302 F.3d 262, 272 (4th Cir. 2002); *Graham v. Maryland*, 738 F.Supp.3d 644, 653 (D. Md. 2024).

⁹¹ *E.g.*, Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1214 (1985) (discussing the new independent jurisprudence the Washington Supreme Court created for the state constitution’s Equal Rights Amendment).

⁹² This contrasts with Michigan’s constitutional amendment for reproductive freedom incorporating the viability line. MICH. CONST. art. I, § 28.

⁹³ *See, e.g.*, Adam Thompson, *What Is Maryland Ballot Question 1? Reproductive Rights Up for Vote in 2024 Election*, CBS BALTIMORE (Nov. 4, 2024), <https://www.cbsnews.com/baltimore/news/maryland-reproductive-freedom-amendment-abortion-ballot-2024-roe-wade-baltimore/> [https://perma.cc/KK8Y-Y7BW].

⁹⁴ MD. CODE ANN., HEALTH-GEN. § 20-209(b) (West 2024). Viability is defined as the “stage when, in the best clinical judgment of the qualified provider based on the particular facts of the case before the qualified provider, there is a reasonable likelihood of the fetus’s sustained survival outside the womb.” *Id.* § 20-209(a).

⁹⁵ *Id.* § 20-209(c).

never created any law that imposes this viability law or limits access to termination of one's pregnancy during the entirety of the pregnancy.

Accordingly, there is a strong argument that there is not a compelling state interest in the fetus that would override a pregnant person's reproductive freedom in Maryland.

D. *Affirmative and Negative Rights*

Negative constitutional rights protect an individual against government interference while affirmative rights obligate the government to support the individual's rights.⁹⁶ Most of the rights in Maryland's Constitution's Declaration of Rights are negative rights, but there are a few affirmative rights, including the right to free public education.⁹⁷ One commentator pointed to Maryland's constitutional language, statutory laws and court cases as evidence of an affirmative right to free public education.⁹⁸

Article 48, which contains the Right, provides negative rights, as discussed above, and could be interpreted to provide some affirmative rights to an individual exercising "reproductive freedom." The prohibition on the state *indirectly* denying, burdening or abridging the Right could be interpreted as requiring state funding to support reproductive freedom. Indeed, the legislative history shows that opponents raised this concern, which the legislature rejected. Also, Maryland has laws that provide for state funding to support reproductive freedom, including laws requiring state-funded abortion care grants,⁹⁹ and requiring free menstrual products in state schools.¹⁰⁰

E. *Equal Treatment of People Exercising Reproductive Freedom and Those Who Are Not*

The Right requires equal treatment between people exercising their reproductive freedom and those who are not, meaning the state may not treat a pregnant person differently from a non-pregnant person for their behavior when the only difference is the pregnancy. Under the Right, any state discriminatory action must meet strict scrutiny. The Right's specificity leads to a different result than the U.S. Supreme Court's recent interpretation of the U.S. Constitution's equal protection clause in

⁹⁶ Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 3 UTAH L. REV. 389, 402-03 (2014) (arguing against the inevitability of the lack of affirmative rights under the U.S. Constitution's due process clause while citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005)).

⁹⁷ Charles A. Rees, *State Constitutional Law for Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299, 321-22 (1978) (citing MD. CONST. DECLARATION OF RTS., art. 43).

⁹⁸ *Id.* (citing MD. CONST. DECLARATION OF RTS., art. 43 ("the Legislature ought to encourage the diffusion of knowledge and virtue . . ."); MD. CONST. art. VIII, § 1 ("The General Assembly . . . shall by Law establish . . . Free Public Schools . . ."); MD. CODE ANN. art. 77, §§ 1, 40, 73; *State ex rel. Clark v. Md. Inst. for Promotion of Mech. Arts*, 87 Md. 643 (1898)).

⁹⁹ MD. CODE ANN., HEALTH-GEN. §§ 13-5501, 13-5502 (West 2025).

¹⁰⁰ MD. CODE ANN., EDUC. § 7-449 (West 2021).

Dobbs, where the Court held that state regulation of abortion is not a sex-based classification requiring heightened scrutiny,¹⁰¹ and *United States v. Skrametti*, where the Court held that state regulation of gender-affirming care did not interfere with a protected classification and therefore was not subject to heightened review.¹⁰²

III. MARYLAND’S REPRODUCTIVE FREEDOM RIGHT AND INAPPROPRIATE CRIMINALIZATION OF PREGNANT AND BIRTHING PEOPLE

Given the specific constitutional protection of reproductive freedom in Maryland, this part examines whether state criminalization of pregnant people should be found to be unconstitutional.

A. *Compelling State Interest*

Maryland’s courts and policymakers should interpret the Right and declare that there is no compelling state interest in protecting a fetus before or after “viability” that could interfere with the pregnant person’s right to reproductive freedom. Such statements would be consistent with the Supreme Court of Maryland’s affirmation that Maryland rejects the fetal personhood concept and other Maryland law.¹⁰³ They should also determine that any criminalization of a pregnant person cannot be simply because they are pregnant, because that would recognize fetal personhood rights or a state’s interest in protecting a fetus before or after viability.¹⁰⁴

The state would need to show a compelling government interest if it discriminated against an individual for exercising their reproductive freedom. If the state were to criminalize a pregnant person, it would need to show a compelling state interest if it did not similarly criminalize a non-pregnant person. For example, the government would have the burden to show that incarcerating the birthing parent or removing their newborn because that parent tested positive for substances during pregnancy is based on a compelling state interest. The state may argue that the interest is in protecting the health of the newborn who could be substance exposed. Such an argument for compelling government interest should only be successful if there is *actual* harm to the newborn.¹⁰⁵ This means that unlike the cases discussed in Part I.C., there would have to be documented harm to the newborn.¹⁰⁶ In addition,

¹⁰¹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 235–36 (2022).

¹⁰² *United States v. Skrametti*, 605 U.S. 495, 510 (2025).

¹⁰³ See *supra* text accompanying note 77.

¹⁰⁴ On the other hand, perhaps it could be argued that the Right’s “compelling government interest” includes post-viability state intrusion based on its interest in the fetus following *Roe* and *Casey*. This argument could be supported by the absence of specific language in the Right that any compelling state interest must be limited to issues related to the pregnant person, such as Missouri’s reproductive freedom amendment, which explains that promoting the health of the person seeking care is a compelling interest. Such an argument in the end should not be persuasive, however, given the legislative intent refusing to adopt fetal personhood in the Right.

¹⁰⁵ The state also would need to show that family separation was “narrowly tailored” as discussed *infra* Part III.B.

¹⁰⁶ E.g., Rohan Khazanchi, Elisha M. Wachman, Davida M. Schiff, Anna Modest, Kelley A. Saia & Heather E. Hsu, *Mandatory Child Protective Services Reporting for Substance-Exposed Newborns*

the harm would need to be based on widely accepted science and not “junk” science.¹⁰⁷

B. *Narrowly Tailored Means*

Even if the state is found to have a compelling government interest, under the Right, the state also would need to prove that the criminalization is narrowly tailored to accomplishing its goal. For instance, when criminalizing a pregnant person for substance use, the government often relies on drug testing. Under the Right, state reliance on drug testing results should only satisfy the narrowly tailored means requirement if they were gathered through informed consent,¹⁰⁸ without reliance on race-based discrimination,¹⁰⁹ based on validated testing instruments,¹¹⁰ excluded prescribed medications,¹¹¹ and were similar to methods used on persons whether or not pregnant, such as on employees in the workplace.¹¹² In addition, to satisfy the narrowly tailored means standard, the state should show that action taken after a positive test result, such as removal of the newborn, is the least restrictive means for caring for the newborn as opposed to such research-supported healing action as kangaroo care, 24/7 skin-to-skin contact with the parent.¹¹³ The state should also be unable to satisfy the narrowly tailored means requirement if it acts to “protect potential life,” if permitted, when there is no harm to the after-born baby. Further, the state should not satisfy the narrowly tailored means requirement if it aggressively

and Peripartum Outcomes: A Difference-in-Differences Analysis, 178 JAMA PEDIATRICS 719, 719–22 (2024) (requiring medical practitioners to include specific protective concerns in reports to child protective services reduced overall reports).

¹⁰⁷ As an example of “junk” science, in convicting Moira Akers, the prosecution used the debunked lung float test. Duaa Eldeib, *A Lab Test That Experts Liken to a Witch Trial Is Helping Send Women to Prison for Murder*, PRO PUBLICA (Oct. 7, 2023), <https://www.propublica.org/article/is-lung-float-test-reliable-stillbirth-medical-examiners-murder> [<https://perma.cc/J3F2-UHYK>].

¹⁰⁸ See Catherine Miller, Amy Lanham, Christopher Welsh, Shaalini Ramanadhan & Mishka Terplan, *Screening, Testing, and Reporting for Drug and Alcohol Use on Labor and Delivery: A Survey of Maryland Birthing Hospitals*, 53 SOC. WORK HEALTH CARE 659, 659–69 (2014) (finding that a lack of maternal consent to drug testing is common).

¹⁰⁹ See, e.g., Carol Shetty, Lauren Oshman, Amanda Costa, Victoria Waidley, Emily Madlambayan, Madgean Joassaint, Katharine McCabe, Courtney Townsel, Justine P. Wu, Christopher J. Frank & P. Paul Chandanabhumma, *Structural Racism in Newborn Drug Testing: Perspectives of Health Care and Child Protective Services Professionals*, 22 ANNALS FAM. MED., 271, 271–78 (2024).

¹¹⁰ E.g., Miller et al., *supra* note 108, at 659 (“Although 97% of hospitals reported universal screening, only 6% used a validated instrument.”).

¹¹¹ See, e.g., Jennifer J. Carroll, Taled El-Sabawi & Bayla Ostrach, *The Harms of Punishing Substance Use During Pregnancy*, 98 INT’L J. DRUG POL’Y 103433 (2021) (advocating against punitive responses to substance use in pregnancy, and discussing access to MOUD prescriptions).

¹¹² Burns & Wheeler, *supra* note 5, at 394.

¹¹³ Kangaroo care can be more healing than separation for a substance-exposed newborn. Ronald R. Abrahams, Marion H. MacKay-Dunn, Victoria Nevmerjitskaia, G. Scott MacRae, Sarah P. Payne & Zoë G. Hodgson, *An Evaluation of Rooming-in Among Substance-Exposed Newborns in British Columbia*, 32 J. OBSTETRICS & GYNAECOLOGY CAN. 866, 866–71 (2010); Lily Lan Chang, *Kangaroo Care in the Neonatal Intensive Care Unit* 6 (Jan. 13, 2023), JOHNS HOPKINS ALL CHILDREN’S HOSP., <https://www.hopkinsmedicine.org/-/media/files/allchildrens/clinical-pathways/kangaroo-care-clinical-pathway-final-jan-2023.pdf>.

criminalizes a pregnant person rather than undertaking less punitive options, leaving it to appellate courts to correct any errors despite causing the harms of family separation and needless incarceration in the interim.

C. *Affirmative Right to Reproductive Freedom*

There is an argument that the Amendment provides some affirmative rights to reproductive freedom along with negative rights curbing state interference. Under the affirmative, the state should be obligated to provide various support to pregnant and birthing women and their choices and behaviors while pregnant. For instance, the state could be obligated to provide all forms of prenatal care for pregnant people, including anything specifically tailored to those who may be experiencing substance abuse or use. In addition, an affirmative right could require the state to provide kangaroo care for newborns.

CONCLUSION

In Maryland, pregnant people are and have the potential to be inappropriately criminalized. Such criminalization is for behavior during their pregnancy that would not otherwise be criminalized, including when there is no harm to the later born baby, and for birth outcomes like miscarriages and still births. Law has supported the criminalization in part because of the historic legal significance given to pregnancy viability as a demarcation between full personhood rights for pregnant people and the encroachment of fetal personhood on those rights. Focusing on Maryland’s new constitutional amendment for reproductive freedom, this essay argues that the new state constitutional amendments for reproductive freedom resets the balance of rights between the pregnant person and the state interest in the fetus. The specificity of the reproductive freedom right and the legislature’s rejection of amendments to include any rights for the fetus show that this Right gives primacy to the full personhood of the pregnant person—their liberty interests and their right to equality. As such, future attempts at criminalization of pregnant people must survive strict scrutiny and cannot be satisfied by merely stating a state interest in fetal life. Moreover, the narrowly tailored means requirement under the Right should further limit criminalization or enhanced penalties. In addition, the state should provide affirmative support for pregnant people to fulfill their reproductive freedom. Early Maryland courts and policymakers’ interpretation of the Right can serve as a leading example for the other states that adopted similar constitutional amendments, namely California, Michigan, Missouri, Montana, Ohio and Vermont.¹¹⁴

¹¹⁴ CAL. CONST. art. I, § 1.1; MICH. CONST. art. I, § 28; MO. CONST. art. I, § 36; MONT. CONST. art. II, § 36; OHIO CONST. art. I, § 22; VT. CONST. ch. I, art. 22.