

## **Foetal Protection Laws: paving the way for the criminalisation of abortion**

**Emma Milne\***

The overturn of *Roe v Wade* is a tragedy for women's rights and ability to control their own bodies. However, it is a tragedy that was foreseen and predicted by feminist scholars long ago, in part, due to the creation and then expansion of foetal protection laws.

### **'Protecting' the foetus through the criminal law**

Foetal protection laws provide the foetus with legal rights and protection under the criminal law. The first state in the USA to introduce criminal protection for the foetus was California. In 1970, following the attack of Teresa Keeler, while she was pregnant, by her ex-husband, resulting in her baby being stillborn, the state legislature changed the [penal code](#) to include a foetus as a possible victim of unlawful killing. Prior to this change to homicide, only people who have been born alive could be victims of crimes, so excluding a foetus who dies before being born.

Today, at least [38 states have foetal protection laws](#), with at least 29 states applying their laws to the earliest stages of pregnancy. Across US states, foetuses are now included in [homicide laws](#), are protected through specific 'feticide' laws, through [child protection laws](#), including child neglect, and through other offences such 'chemical endangerment of a child' – exposing a 'child' to a controlled substance, including [prescription medication](#).

### **The road to hell is paved with good intentions**

Protecting a foetus may seem like a good idea, particularly in situations such as that faced by Teresa Keeler. Many foetal protection laws across the US were enacted to protect pregnant women and their unborn babies from attack by third parties, often abusive male partners, or ex-partners. However, the consequences of considering foetuses as victim under the criminal law have been devastating for women. Women across the US have faced imprisonment and

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criminal investigation because they are pregnant. For example, [Christine Taylor](#) was arrested after she fell down the stairs while pregnant, as the hospital were concerned she had attempted to 'kill' her foetus. [Marshae Jones](#) was charged with manslaughter after she was shot in the abdomen by another woman, resulting in her foetus dying. [Melissa Ann Rowland](#) was charged with murder after one of her twins was stillborn following her refusal to undergo a caesarean section. [Bei Bei Shuai](#) was initially prosecuted for murder, and then convicted of a lesser crime, after her attempt to die by suicide failed, but did result in the death of her foetus. [Tammy Loertscher](#) was imprisoned after she informed medical professionals providing her prenatal care that she had previously used drugs.

The [National Advocates for Pregnant Women](#) estimate that at least 1,700 women have been criminalised since 1973 due to being pregnant; they believe that this number will increase now *Roe v Wade* has been overturned. Women who are most likely to face criminalisation are incredibly vulnerable, living in poverty and hardship. Women from [minoritised ethnic communities](#) are also far more likely to be criminalised than white women; thus these laws represent multiple levels of discrimination.

The irony is that all evidence suggests that foetal protection laws actually hurt foetuses, rather than providing great protection. Pregnant women who fear they will be reported to the police [avoid accessing medical care](#). Lack of prenatal care is a leading factor in [poor pregnancy outcomes](#). There is also evidence that women have sought legal abortions to [escape prosecution](#) under foetal protection laws.

We can also see a direct line between the creation of foetal homicide laws and the overturning of *Roe v Wade*. Feminists warned that recognising the foetus as a legal 'person' through foetal protection laws opened the door to the end of abortion rights: presenting the foetus as an autonomous entity with [rights equivalent to that of the pregnant woman and so adverse to her](#). Furthermore, if it is deemed a third party commits a crime by harming or killing a foetus, it is easier to argue that a woman '[murders' a foetus](#) if she has an abortion.

**Is England & Wales next?**

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In contrast to the US, in England and Wales a foetus is not considered a legal person and so does not have the same level of protection under the criminal law. However, in England and Wales women can and do face criminal prosecution for self-abortions. The criminal offence of [procuring a miscarriage](#) criminalises abortion at any stage of gestation. Abortion is only legal if it is conducted in line with the [Abortion Act 1967](#). However, the Abortion Act only provides a legal defence to doctors who adhere to the requirements of the legislation. Women who self-abort have no legal defence and are always committing a crime, regardless of the stage of gestational development of her pregnancy. Therefore, a woman who orders abortion pills illegally via the internet, or who takes abortion medication she has obtained legally in ways other than as directed (for example, she takes the medication a month after it has been proscribed) may face life imprisonment, the maximum sentence for the offence. Women have been [imprisoned for illegally ending their pregnancies](#), and [two further women](#) are currently facing prosecution. The archaic criminal law that makes abortion illegal in England and Wales needs to be repealed to give women the right to [control their own bodies](#).

However, in England and Wales the threat to women's rights goes beyond the continued criminalisation of abortion. [My research](#) illustrates there is evidence that offences such as procuring a miscarriage are being used as [proxies for foetal homicide laws](#). Officially a foetus has limited protection under the criminal law, in reality, pregnant women are being criminalised using archaic offences for perceived 'poor' mothering. Such use of the criminal law challenges not only women's rights while pregnant, but also the legality of abortion, as illustrated by developments of law across US states. If we continue on this path in England and Wales, then it is a matter of when, not if, we lose access to legal abortion. *Roe v Wade* needs to be seen as a warning to the world: underestimate the impact of giving the foetus legal protection through the criminal law at the peril of women's rights.