

# Foetal Protection Laws: A Dangerous Future for British Women



## The dangers of foetal protection laws

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Across Great Britain, fetuses have limited legal protection. The criminal offence of child destruction makes it a crime to intentionally end the life of a “child capable of being born alive”. Durham University research indicates that two other offences – procuring a miscarriage and concealment of birth – are also being applied to cases where it is suspected that a woman has “killed” her foetus. These three offences are being used as proxies for foetal homicide laws. Application of these offences indicates a misuse of the criminal law. The result is injustices for accused women, particularly those who are vulnerable and experiencing “crisis pregnancies”.

Evidence from the United States of America, where foetal protection laws have been implemented in most states, indicates that criminalising women for conduct during pregnancy has had disastrous outcomes for fetuses and babies as well as women.

There are understandable reasons why the criminal law should protect pregnant women and their unborn babies from harm, and punish third parties who attack women, while pregnant, resulting in the stillbirth of the baby. Pregnancy is a period when violence by a male current or former partner may begin or escalate. It is not necessary to create foetal homicide offences to offer protection to pregnant women and their unborn children. Instead, the creation of a specific aggravating factor for sentencing – knowledge of a pregnancy and hostility to the victim because she is pregnant – could result in the perpetrator’s assault being considered more serious.

### We recommend:

- the Infant Life (Preservation) Act 1929 is repealed to remove the offence of child destruction.
- sections 58 and 59 of the Offences Against the Person Act 1861 are repealed to remove abortion from the criminal law.
- section 60 of the Offences Against the Person Act 1861 is repealed to remove the offence of concealment of birth.
- introducing a new mitigating factor into the Sentencing Guidelines to recognise the further harm to women who are attacked by third parties while pregnant, resulting in the stillbirth of their babies.



## Parliament's intent

Today, the offence of child destruction is used as an extension of abortion laws: to criminalise third parties or pregnant women who illegally end a pregnancy. However, this was not the purpose of the legislation when enacted in 1929. Instead, Parliament created the law to close a legal loophole. Prior to enactment of the statute, if an infant was killed in the process of spontaneous labour, but prior to being born alive, then no criminal offence had been committed. Parliament envisaged the law being used in this very specific way, and so, currently, child destruction is being applied to cases outside of the intention of Parliament. [1]

When creating the offence of procuring a miscarriage, Parliament was primarily concerned with preventing and condemning harm to women due to the risk of an abortion resulting in the death of the woman. [2] Abortion used to be a dangerous surgical procedure, which was of great risk to women, as were all operations prior to the development of antibiotics. It was not the intent of Parliament, when enacting the offence, to protect foetuses, which is how the law is used today. [1]

Concealment of birth was enacted in 1803 to tackle the difficulty seen to be created by unmarried women who were suspected to have murdered their illegitimate newborn children immediately following birth, but who could not be convicted due to lack of evidence. The offence created a "convenient stop-gap" to allow women to be convicted of an offence in instances where there would otherwise be no crime committed. [3]



## The "born alive rule"

In the legal jurisdictions of England and Wales, and Scotland, a foetus does not have equivalent legal protection to people who have been born; legally this is known as the "born alive rule". Consequently, a foetus cannot be a victim of a homicide offence, nor an offence against the person. However, as soon as an infant is born, they acquire the same levels of rights and legal protection, including full protection under the criminal law, as provided to any other living person.

Limited legal protection is provided to foetuses through the criminal law. The Infant Life (Preservation) Act, s1, makes it an offence to intentionally end the life of a "child capable of being born alive": the crime of child destruction. This offence can be committed by third parties who harm a pregnant woman through a violent assault, for example, as well as by pregnant women who take steps to end the life of their viable foetus. This offence can be very difficult to prove due to the need for the prosecution to provide evidence that the accused *intended* to end the life of the viable foetus. Research by [Dr Emma Milne](#), Durham University, illustrates that other offences which are easier to prove, are also being applied to cases where it is suspected that a woman has "killed" her foetus. [1]

The offence of procuring a miscarriage (Offences Against the Person Act 1861, s58) criminalises the "unlawful" ending of a pregnancy at any point in gestation. In recent cases, the offence has been used where it is believed that a woman has harmed or ended the life of her foetus, and the woman's act of ending her pregnancy has been equated with committing a homicide offence. [1] See briefing [Abortion and the Criminal Law: The Need for Decriminalisation](#) for further details.

Further evidence demonstrates that the offence of concealment of birth is being used to obtain convictions in cases where women are suspected to have caused the death of an infant before or after birth, but a conviction for murder or child destruction cannot be obtained due to lack of evidence. [1] Concealment of birth criminalises the secret disposal of the dead body of an infant to conceal knowledge of that infant's birth. It is very easy to prove, as the only evidence required is that an infant's body has been hidden to prevent others from discovering the birth. As a result, concealment of birth can be used to punish a woman for her behaviour while pregnant – deemed to have fallen below expectations society holds for pregnant women – if she later hides the body. See briefing [Concealment of Birth: A Case for Repeal](#) for further details.

Consequently, the offences of concealment of birth, child destruction and procuring a miscarriage are being used as proxies for foetal homicide laws. [1] Application of these offences, as outlined, indicates a misuse of the criminal law. The result is injustices for accused women, particularly those who are vulnerable and experiencing crisis pregnancies.

## Consequences of protecting fetuses through the criminal law

Whether we, as a society, should criminalise women who harm their fetuses (intentionally or unintentionally) is a complex issue, and one that is, ultimately, for Parliament to decide. Evidence from the United States of America, where foetal protection laws have been implemented in most states, indicates that criminalising women for conduct during pregnancy has had disastrous outcomes for fetuses and babies as well as women.

At least 38 states in the USA now have laws protecting fetuses; of those, at least 29 states apply their laws to the early stages of pregnancy. In almost half of all states, the pregnant woman is specifically exempt from prosecution under foetal protection laws. In four further states, it is unlikely that pregnant women could be prosecuted for causing the death of their own foetus due to the wording of the legislation. However, other states are silent on whether or not a pregnant woman could be held liable, allowing prosecutors to interpret the law and bring criminal proceedings against women, which, evidence would suggest, there is a willingness to do. [4]

Women have been arrested, and sometimes imprisoned following a belief that a stillbirth or miscarriage occurred due to her intentionally acting to end the pregnancy: considered a case of foeticide. For example, Christine Taylor was arrested after she fell down the stairs while pregnant; hospital staff called the police because they believed she had intentionally fallen. [5] There have also been reported cases of women facing criminal investigation after they declined to follow medical advice and there have subsequently been adverse outcomes for their pregnancy. Melissa Ann Rowland was arrested for murder after one of her twins was stillborn following her refusal to consent to a caesarean section. [6] Women have also faced criminal convictions for homicide in instances where injury inflicted on their body (either by themselves or by a third party) resulted in their survival but the death of their foetus. For example, Bei Bei Shuai attempted to end her own life: she survived, but the foetus did not. She was charged with murder and eventually convicted of criminal recklessness. [7]

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## Harming fetuses and babies

The stated aim of foetal protection laws is to prevent harm to unborn children. However, evidence from the USA indicates that often this is not the outcome. The threat of legal sanctions against pregnant women has resulted in women actively avoiding medical care during their pregnancy due to a fear that they will be reported to the police. Lack of antenatal care is a leading factor in poor pregnancy outcomes. [8] Healthcare bodies have declared foetal protection laws to have limited positive impact. For example, a report by the American College of Obstetricians and Gynecologists (reaffirmed in 2022) [9] concluded that,

Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and the threat of incarceration have proved to be ineffective in reducing the incidence of alcohol or drug abuse.

There is also evidence that women in the USA have sought legal abortions to escape prosecution under foetal protection laws. [4] Thus, attempts to “protect” fetuses are, in some instances, resulting in worse health outcomes for them, or even death.



## Harming women and their rights

As well as providing limited protection to foetuses, foetal protection laws in the USA have had detrimental impacts on women's rights. Such laws are discriminatory to women, as to sanction a woman for behaviour because she is pregnant is depriving her of her rights because of her pregnancy status. For example, taking controlled substances, such as cocaine, is often not illegal (the selling and possession often are, but the actual use is not). Laws in states such as Alabama have made it a criminal offence to ingest a controlled substance if pregnant. [10] The sanction, however, would not be imposed if the woman was not pregnant. Consequently, this is a distinct form of sex-based discrimination, based on women's bodily functions as women: their capacity to become pregnant and to carry a foetus. [11]

Women of colour have been reported to the police, and convicted of foetal protection offences at a far higher rate than white women. [12] Women of lower socio-economic status have also been disproportionately criminalised under these laws. Thus, the application of these laws is also discriminatory to groups of women due to their race and class.

## Protecting pregnant women and their unborn children from harm

There are clear reasons why the criminal law should protect pregnant women and their unborn babies from harm. Pregnancy is a period when violence by a male current or former partner may begin or escalate. [15] In too many tragic cases, an assault of a woman while she is pregnant can result not only in injury to her, but also in the death of her unborn child. It is, therefore understandable that women and their families wish the loss of their unborn babies to be recognised by the criminal law, and for the perpetrator to be punished for this wrongdoing.

**However, as outlined in this briefing, recognising the foetus as a specific victim of crimes has had negative outcomes for foetuses, babies, and women.**

One way that recognition could be given to the harm done by a third party, who kills a foetus due to their attack of a woman who is pregnant, is through the creation of a specific aggravating factor for sentencing. Aggravating factors increase the seriousness of the crime committed, and thus the length of sentence handed down to the convicted perpetrator. [16] Knowledge of a pregnancy, and hostility to the victim because she is pregnant could result in a perpetrator's assault of her being considered more serious. Use of aggravating factors in sentencing, rather than using substantive criminal law to characterise the foetus as a victim of crime, allows pregnant women justice if the attack results in them losing their baby, whilst also keeping the focus of the crime committed on the person who has been attacked – the pregnant woman.



### Foetal protection laws and abortion

A direct line can be drawn between foetal protection laws and the overturning of *Roe v Wade*, the Supreme Court case that provided women in the USA with a legal right to abortion. Foetal protection laws have provided the foetus with "legal personhood", so giving foetuses rights equivalent to, and in some states surpassing the rights of pregnant women. [13]

Furthermore, offering legal protection to the foetus contributes to anti-abortion sentiments, which portrays abortion as immoral and the equivalent to killing a person. [14]



Briefing based on research findings published in **Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother** (Emerald Publishing, 2021). The research analysed court transcripts from 15 criminal cases of women heard in England and Wales between 2010 and 2019. These represent almost a complete sample of cases from the period. In each case, the woman's fetus/newborn child died in suspicious circumstances, and the mother of the child was convicted of an offence connected to its death. Cases were assessed to evaluate the nature of the death and the women's experiences.

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[1] Milne E (2021) *Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother*. Bingley: Emerald Publishing Limited.

[2] Williams GL (1958) *The Sanctity of Life and the Criminal Law*. London: Faber and Faber.

[3] Davies DS (1937) Child-Killing in English Law. *Modern Law Review*. 1(3): 203-23.

[4] Murphy AS (2014) A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses. *Indiana University Maurer School of Law*. 89(2): 847-3.

[5] Hayes K (2010) **Did Christine Taylor Take Abortion into Her Own Hands?** *CBS News*. 2 March.

[6] Goldenberg S (2004) **"Caesarean Refusal" Mother in Jail**. *The Guardian*. 13 March.

[7] Pilkington E (2012) **Indiana Prosecuting Chinese Woman for Suicide Attempt That Killed Her Foetus**. *The Guardian*. 30 May.

[8] Boudreaux JM and Thompson JW (2015) Maternal-Fetal Rights and Substance Abuse: Gestation without Representation. *Journal of the American Academy of Psychiatry and the Law Online*. 43(2): 137-40.

[9] American College of Obstetricians and Gynecologists (2011) **Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist**. 473 (Reaffirmed 2022).

[10] Ala. Code 1975, § 26-15-3.2 Chemical Endangerment of a Child.

[11] Johnsen D (1989) From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives after Webster. *University of Pennsylvania Law Review*. 138(1): 179-215.

[12] Goodwin M (2020) *Policing the Womb: Invisible Women and the Criminal Costs of Motherhood*. Cambridge and New York: Cambridge University Press.

[13] For example, see: Paltrow LM (1999) Pregnant Drug Users, Fetal Persons, and the Threat to Roe V. Wade. *Albany Law Review*. 62(3): 999-1056; MacKinnon CA (1991) Reflections on Sex Equality Under Law. *Yale Law Journal*. 100(5): 1281-328.

[14] Sanger C (2006) Infant Safe Haven Laws: Legislating in the Culture of Life. *Columbia Law Review*. 106(4): 753-829.

[15] Tuerkheimer D (2006) Conceptualizing Violence against Pregnant Women. *Indiana Law Journal*. 81(2): 667-712.

[16] Sentencing Council (2023) **Aggravating and Mitigating Factors**.

# CRIMINAL JUSTICE RESPONSES TO MATERNAL FILICIDE

*Judging the Failed Mother*



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## Help and support

If you are pregnant and you need help and support, including advice about abortion, contact the British Pregnancy Advisory Service ([www.bpas.org](http://www.bpas.org)) or MSI Reproductive Choices UK ([www.msichoice.org.uk](http://www.msichoice.org.uk)).



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