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## Dying in Original Sin Vis-à-vis Living in Disgrace—In Defense of the Right to Socio-Eugenic Abortion as Personal Liberty

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**DYING IN ORIGINAL SIN<sup>1</sup> VIS-À-VIS LIVING IN  
DISGRACE<sup>2</sup>—IN DEFENSE OF THE RIGHT TO SOCIO-  
EUGENIC ABORTION AS PERSONAL LIBERTY**

*V.R. Jayadevan\**

<b>I.</b>	<b>INTRODUCTION</b>	86
<b>II.</b>	<b>UNBORN AND THE RIGHT TO ABORTION</b>	86
<b>III.</b>	<b>RIGHT TO ABORTION IN THE UNITED KINGDOM— BEGINNING WITH THE ORIGINAL COMMON LAW VERSION</b>	87
	<i>A. MIDDLE AGES AND THE EARLY MODERN AGE: THE INFLUENCE OF CHRISTIAN RELIGION</i>	87
	<i>B. AGE OF STATUTORY REGULATION</i>	88
	<i>C. TWENTIETH CENTURY ENGLAND—THE DAWN OF ABORTION AS HUMAN RIGHT</i>	91
<b>IV.</b>	<b>ABORTION LAW IN AMERICA</b>	94
	<i>A. THE 20TH CENTURY SCENARIO</i>	95
	<i>B. ATTEMPTS TO OVERTURN ROE AND THE JUDICIAL SUSPICION</i>	98
	<i>C. ROE DESTABILIZED</i>	100
	<i>1. RIGHT TO AUTONOMY V. CONSENT OF THIRD PARTIES</i>	100
	<i>2. CASEY—STRUT OR STRIDE?</i>	104
	<i>D. DOES THE RIGHT TO ABORTION INCLUDE ‘PROCEDURAL RIGHTS’?</i>	108
	<i>1. THE DUTY OF THE STATE TO FACILITATE AND FUND ABORTION</i>	108
	<i>E. WHETHER THE RIGHT TO ABORTION INCLUDES THE RIGHT TO CHOOSE THE METHOD</i>	112
	<i>F. RIGHT TO ABORTION POST-ROE—A CRITIQUE</i>	116

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<sup>1</sup> GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1958).  
See also WILLIAM LECKY, *HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF  
RATIONALISM IN EUROPE* 362 (London, Longmans, Green & Co., 1897) (quoting St.  
Fulgentius in *De Fide*, §70 who observed, “Be assured, and doubt not, that even little children  
who have begun to live in their mother’s womb and have there died, or who, having just been  
born, have passed away from the world without the sacrament of holy baptism, must be  
punished by the eternal torture of undying fire.”).

<sup>2</sup> “When a woman is faced with the prospect of having a child that will tend to  
impoverish her existing family, or that will disgrace her in the eyes of others, she does not  
generally regard an early termination of pregnancy as wrongful . . . .” WILLIAMS, *supra* note 1,  
at 189.

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<b>V. THE INDIAN SCENARIO</b>	118
A. <i>EVOLUTION OF INDIAN ABORTION LAW</i>	118
B. <i>RIGHT OF THE LIVING AND THE RIGHT TO SEX SELECTION</i>	121
<b>VI. LOOKING FORWARD—ABORTION IN THE POST-HUMAN RIGHTS ERA</b>	122

“Nothing is more devastating than a life without liberty. A life in which one can be forced into parenthood is just such a life.”<sup>3</sup>

## I. INTRODUCTION

Law, unlike morals, is significant only to the living, though in many situations it refers to or binds the non-living, both the unborn and the dead. The law vests rights on the unborn and imposes duties on the dead, though neither of them is treated as person under law.<sup>4</sup> The legal rights of the unborn are reckoned in view of the possibility of their future arrival and those of the dead to enable the dead to discharge duties and liabilities incurred whilst they were alive.<sup>5</sup> Legal protection of the rights of the unborn and the dead undoubtedly caters to the interests of the living.<sup>6</sup> Nevertheless, at times law cannot totally ignore the interests of those not alive, leading to conflict. Unlike in the case of the dead, all the rights of the unborn, including the right to be born, depend exclusively upon the mercy of the living. It is against such a backdrop that the right of the mother to abort the unborn demands close scrutiny.

## II. UNBORN AND THE RIGHT TO ABORTION

Abortion may be the oldest of the issues touching the rights of the unborn. The term abortion in law is used to denote purposeful and deliberate expulsion of the fetus i.e. induced abortion.<sup>7</sup> Practiced from time immemorial

<sup>3</sup> Laurence A. Tribe, *ABORTION: THE CLASS OF ABSOLUTES* 3 (1992)

<sup>4</sup> See R.M.W. DIAS, *JURISPRUDENCE* 360 (5<sup>th</sup> ed. 1985); See, e.g., s. 1, Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5 c 41, § 1(Eng.). “Once a child has been born it is a ‘person’ and becomes the focus of a host of jural relation.” See DIAS *supra* at 261.

<sup>5</sup> G.W. PATON, *A TEXTBOOK OF JURISPRUDENCE*, 398–99 (1972).

<sup>6</sup> For example, a child can succeed in an action for damages for the pre-natal injury to its mother after birth. See DIAS, *supra* note 4 at 260. Similarly, the law of criminal libel is operative for the dead only if it affects living persons. *R v. Ensor* (1887) 3 TLR 366 (K.B).

<sup>7</sup> The term, in general, denotes both spontaneous and induced ones till viability of the fetus which takes place by the 28<sup>th</sup> week of pregnancy. See JAISING P. MODI, *A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY* 581 (B. V. Subrahmanyam, ed., 22<sup>nd</sup> ed. 2001). In this article, the term is used specifically to “any untimely delivery voluntarily procured with intent to destroy the fetus.” WILLIAMS, *supra* note 1, at 139. Expulsion of the fetus spontaneously and without human intervention is distinguishingly called miscarriage. See, 1 *ENCYCLOPEDIA BRITANNICA, MICROPAEDIA* 35 (2005)

down to the modern age, abortion was to “reduce the burdens of maternity,” “to escape the burden of rearing offspring, to preserve a youthful figure, to avert the disgrace of extramarital motherhood, [and] to avoid death.”<sup>8</sup> Such a right was recognized from the ancient civilizations in which the legal concepts were at their rudimentary stage.<sup>9</sup> Abortion was accepted in ancient Greece as evidenced from the recommendations of Plato and Aristotle.<sup>10</sup> Even the morality ridden, mystic legal system of ancient India, which despised abortion, considered it as of lesser gravity than even usury.<sup>11</sup> Similar views prevailed in other civilizations in various parts of the world.<sup>12</sup> As the views across the world evidence, abortion restriction on grounds such as the right of the unborn and the sanctity of life that were prevalent beginning in the Middle Ages and the early modern age, did not prevail with the ancient civilizations.

### III. RIGHT TO ABORTION IN THE UNITED KINGDOM— BEGINNING WITH THE ORIGINAL COMMON LAW VERSION

#### A. *Middle Ages and the early Modern Age: The Influence of Christian Religion*

The lack of abortion prohibitions that existed in ancient Greece and Rome<sup>13</sup> continued only until the age of Ulpian.<sup>14</sup> The accession of Christianity to a pivotal place as the theological and social force in the Middle Ages changed the abortion landscape. Christianity, which believes that God created humans in his form and that every biological change such as birth, growth, disease, and death was according to God’s grand design, objected to human interference with that design.<sup>15</sup> Unsurprisingly, apart from homicide in any context and form, methods of contraception and abortion

<sup>8</sup> 1 WILL DURRANT, *THE STORY OF CIVILIZATION* 49 (26<sup>th</sup> ed. 1954). *See also* WILLIAMS, *supra* note 1, at 139.

<sup>9</sup> *See, e.g.*, S. CHANDRASEKHAR, *ABORTION IN A CROWDED WORLD* 22 (1974).

<sup>10</sup> Plato, *THE REPUBLIC*, bk. V, ch. 461. (A.P. Lindsay ed. trans., J.M. Dent & Sons). “When couples have children in excess, let abortion be procured before sense and life have begun. . . .” Aristotle, *THE POLITICS*, bk. VII, Ch.16 (Benjamin Jowett trans.) *reprinted in* 9 *GREAT BOOKS OF THE WESTERN WORLD*, (Robert Maynard Hutchinson ed., 1952) (c. 384 B.C.E.).

<sup>11</sup> *See the* VASISTHA DHARMASUTRA, 1:2.42. For the text, *see* PATRICK OLIVELLE, *DHARMASUTRAS: THE LAW CODES OF APASTAMBA, GAUTAMA, BAUDHAYANA, AND VASISTHA* 361 *et seq.* (Patrick Olivelle trs., 2000)

<sup>12</sup> *See, e.g.*, KONSTANTINOS KAPPRIS, *ABORTION IN THE ANCIENT WORLD*, 11 (2002).

<sup>13</sup> *See* Gravina, *De Ortu et Progressu Juris Civilis* lib 1. 44.

<sup>14</sup> *See* LECKY, *supra* note 1, at 92.

<sup>15</sup> *See* *Genesis*, 1:26 (“And God said, ‘Let us make man in our image, in our likeness . . .’”).

were considered as antagonistic to Christian faith.<sup>16</sup> This was confirmed by the encyclical of Pope Pius XI in 1930, which accepting the view that innocent life and its sanctity began from the very moment of conception, proclaimed that the destruction of life at conception, being anti-god, was avenged by God.<sup>17</sup> The Church later explained that abortion, even for therapeutic reasons, was not permissible.<sup>18</sup> The Christian faith reinforced the anti-abortion view by proclaiming that one who dies unbaptized dies in original sin and is condemned to eternal punishment.<sup>19</sup>

Common law being an heir to the Christian theology, considered abortion an offense equal to homicide (not murder).<sup>20</sup> The common law, however, modified the theological view by distinguishing *embryo formatus* i.e. fetus that has begun to quicken from *embryo informatus* and limited the same to fetus in the stage of quickening.<sup>21</sup> The common law so modified the canonical law that killing of fetus was to be only “a great misprision” and not felony.<sup>22</sup>

### B. Age of Statutory Regulation

One finds that the impact of religion on the English legal system steadily increased such that successive law reforms during the age of renaissance imposed restrictions on the act of abortion on a progressive

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<sup>16</sup> For discussion on this topic, see, Darren Mitchell, *An Argument for Christian Conservatism in the Abortion Debate within a Contemporary Secular Society* (1999) UCL Jurisprudence Review, 220 at 221–222.

<sup>17</sup> See WILLIAM LECKY, HISTORY OF EUROPEAN MORALS FROM AUGUSTUS TO CHARLEMAGNE, 94 (1913) [hereinafter HISTORY OF EUROPEAN MORALS] (stating, “[t]hus, again the question of the criminality of abortion has been considerably affected by physiological speculations as to the time when the foetus in the womb acquires the nature, . . . In the modern legislations it is treated as a distinct being from the moment of conception.”); *Casti Connubii, The Encyclical of Pope Pius XI* ¶ 67 (December 31, 1939) (“Among whom we must mention in the first place infants hidden in the mother’s womb. And if the public magistrates not only do not defend them, but by their laws and ordinances betray them to death at the hands of doctors or of others, let them remember that God is the Judge and Avenger of innocent blood which cried from earth to Heaven.”).

<sup>18</sup> “We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children.” See *Humanae Vitae*, Para 14.

<sup>19</sup> WILLIAMS, *supra* note 1, at 178. He observes, “Dying in original sin, without the sacrament of baptism, the child is condemned to eternal punishment.”

<sup>20</sup> GEORGE E. WOODBINE, BRACON DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, I.3.c.21. (New Haven: Yale University Press, 1940).

<sup>21</sup> Seaborne Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126, 131 (1938). See also WILLIAMS, *supra* note 1, at 143; Shelley Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20, 35–36 (1984).

<sup>22</sup> The term “great misprision implies misdemeanor. See E. Coke, Institutes III at 50.

scale.<sup>23</sup> Thus, the English common law at the dawn of the modern age punished any abortion that occurred after the stage of quickening. The first comprehensive legislative venture in this respect was the Ellenborough Act of 1803, which penalized abortion even in pre-quickening stage, with imprisonment for a term up to fourteen years irrespective of whether continuance of the pregnancy is dangerous to her life or not.<sup>24</sup> Thus, the Ellenborough Act took away the two-fold liberty women had enjoyed before its enactment, viz., the absolute right to abortion in the pre-quickening stage and the right to abortion as a therapeutic measure thereafter.<sup>25</sup> Thus, a comparison of the nineteenth century law with the laws of civilizations of the previous centuries reveals a dramatic change in the law of abortion insofar as it prohibited and punished abortion of a fetus in the pre-quickening stage.<sup>26</sup> A pregnant woman in the earlier Middle Ages enjoyed much more freedom and liberty over her fetus than what was allotted under subsequent English common law insofar as a woman in the early Middle Ages was absolutely free to procure abortion before quickening. It is observed that such a change in the law “was of great significance because nearly all women who procure their own abortion do so in the early months of pregnancy before quickening.”<sup>27</sup> This regressive contrast continued through the general revisions of the law in 1828<sup>28</sup> and 1837,<sup>29</sup> to the extent that they punished abortion irrespective of the stage of pregnancy and the condition of the pregnant woman.<sup>30</sup> This position was left unchanged even after the Offences Against the Person Act, which also considered abortion as punishable irrespective of the stage of pregnancy and the life or health of the mother.<sup>31</sup> Such a position also implies that abortions, even in cases like ectopic or such

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<sup>23</sup> Thus, by the arrival of the Lord Elleborough’s Act in 1803, the English law though of abortion of the child before and after quickening as offences. See WILLIAM BIRKET, REPORT OF THE INTER-DEPARTMENTAL COMMITTEE ON ABORTION, 27 (1939).

<sup>24</sup> 43 Geo.3 c.58 § II (Eng. 1803).

<sup>25</sup> *Id.*

<sup>26</sup> See *supra* notes 14–22 and accompanying text.

<sup>27</sup> WILLIAMS, *supra* note 1, at 144.

<sup>28</sup> 9 Geo 4, c. 31, § 13. (Eng. 1828)

<sup>29</sup> 7 Will 4 & 1 Vict., c. 85 § 6 (Eng. 1837)

<sup>30</sup> *Id.* (changing § 13 of the 1828 act in two ways; on one hand took away the distinction between the pre and post quickening and on the other hand repealed the death penalty for abortion which the 1828 Act had introduced); See also Seaborne Davies, *Child-killing in English Law*, 2 MOD. L. REV. 203, 214. (1937). See also, Loren G. Stern, *Abortion: Reform and the Law*, 59 CRIM L. CRIMINOLOGY & POLICE SCI. 84, 85 (1968)

<sup>31</sup> Offences against the Person Act, 24 & 25 Vict., c. 100 §§ 58–59 (Eng.). The statute reads, “Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent shall be guilty of felony, and being convicted thereof shall be liable ...to be kept in penal servitude for life...”; 12(1) HARLSBURY’S STATUTES 128 (2008)

other abnormal pregnancies dangerous to one's life, were not exempted from criminal liability.<sup>32</sup> Under English law it was not even necessary that one should be pregnant to receive a punishment for abortion, as even an attempt to perform an abortion of a non-pregnant woman invited penalty.<sup>33</sup> Additionally, the law did not favor abortion on socio-eugenic grounds.<sup>34</sup>

In England, this outworn position continued until the enactment of Infant Life (Preservation) Act in 1929, which, carved out an exception to § 58 of the Offences against Persons Act of 1861, and, in effect, introduced the liberty to procure abortion.<sup>35</sup> The Infant Act provided that the liability for destroying the life of a child capable of being born alive was limited to abortions made “not in good faith for the purpose only of preserving the life of the mother.”<sup>36</sup> Nevertheless, the Infant Act did not differentiate a fetus in the pre-quickening stage from that in the post-quickening, implying that abortion in any stage of pregnancy would invite penalty if it fell outside the parameters of the proviso. In other words, the liberty of a woman to procure abortion even after the enactment of the Act was still limited as compared to that of a woman in ancient and early medieval Europe.<sup>37</sup>

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<sup>32</sup> Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 393 (1978–1979) (observing that the only limitation on the criminality of abortion was that a woman could not be punished if she were not actually pregnant); cf. Gavigan, *supra* note 21, at 36 (observing, “[t]he twentieth century reform of the abortion legislation has been focused by yet another medical concept, that of the ‘therapeutic abortion’.” It is an interesting paradox that (on one view of the original prohibition) the first anti-abortion statute was enacted to protect the maternal life and health from the dangers of the abortion procedure; in this century, concern to protect the woman’s lives from the dangers of criminal abortion have led to movements for repeal, or at least calls for reform of the law, through legal recognition of therapeutic abortions.”).

<sup>33</sup> See, e.g., *R. v. Whitchurch*, [1890] 24 Q.B.D. 420 (1890). In this case, the first accused, believing that the second accused was pregnant from the third accused, conspired to procure abortion. Distinguishing the case of procuring abortion of for a woman who was not pregnant from the present one where they conspired to procure miscarriage, which amount to felony, Lord Coleridge C.J., held the accused liable under the Offences against the Person Act, 1861.

<sup>34</sup> The expression socio-eugenic grounds in relation to abortion connotes a very wide spectrum of situations leading to delivering a child with mental incapacity or congenital or hereditarily acquired incurable diseases like amaurotic idiocy, microcephalis, hemophilia, Down’s Syndrome etc. See WILLIAMS, *supra* note 1 at 160–163.

<sup>35</sup> The Infant Act, 19 & 20 Geo. 5, c. 34 (Eng.) (hereinafter “the Infant Act”).

<sup>36</sup> *Id.* at § 1. It reads, “ Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life; Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.”

<sup>37</sup> Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?*, 17 N.Y.L.F. 335, 336 (1971–1972) (“English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III. This common-law liberty endured, in

### C. 20th Century England—the Dawn of Abortion as a Human Right

The anti-abortion attitude of the theology ridden English common law system continued in the twentieth century.<sup>38</sup> The scenario of such an undesirable plight gradually began to change after the 1930s.<sup>39</sup> The changing note was, in part, engendered by the fervor of feminine equality developed in the communist society of the Soviet Union in the second decade of the last century.<sup>40</sup>

In England it was the judiciary that sounded the changing note in a case involving the legality of an abortion in which a highly skilled surgeon dared to perform a procedure on a girl of 15 years to terminate a pregnancy caused by rape.<sup>41</sup> He was charged under § 58 of the Offences against the Person Act of 1861.<sup>42</sup> While directing the jury about the case, Macnaghten, Judge of the Central Criminal Court, laboriously dealt with the law relating to abortion.<sup>43</sup> Distinguishing a previous case that came before him in which an abortion was performed by an unskilled and unqualified person, he said that the accused in the present case performed “the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it.”<sup>44</sup> Judge Macnaghten further explained that the prohibition against “procur[ing] the miscarriage” in § 58 of the Offences against the Person Act of 1861, must be read in conjunction with the proviso to § 1 of the Infant Act, which stipulated that the destruction of child life “in good faith for the purpose only of preserving the life of the mother” was not an offence under

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England, from 1327 to 1803; in America, from 1607 to 1830.” Abortion in the ancient and medieval ages was not treated as despicable but at times as desirable.); see HISTORY OF EUROPEAN MORALS, *supra* note 17, at 20–21 (“The influence of Christianity in this respect began with the very earliest stage of human life. The practice of abortion was one to which few persons in antiquity attached any deep feeling of condemnation . . . . The death of an unborn child does not appeal very powerfully to the feeling of compassion, and men who had not yet attained any strong sense of the sanctity of human life, who believed that they might regulate their conduct on these matters by utilitarian views, according to the general interest of the community, might very readily conclude that the prevention of birth was in many cases an act of mercy. In Greece, Aristotle not only countenanced the practice, but even desired that it should be enforced by law, when population had exceeded certain assigned limits. No law in Greece, or in the Roman Republic, or during the greater part of the Empire, condemned it.”)

<sup>38</sup> See Anthony N. Cabot, *History of Abortion Law*, ARIZ. ST. L.J. 73, 85–93 (1980).

<sup>39</sup> It was Soviet Russia that began liberalization of abortion by 1917. This was followed by Iceland in 1935, Sweden in 1938, and Denmark in 1939 while Finland and Norway passed similar laws in 1950 and 1960 respectively. See, Chandrasekhar, *supra* note 9 at 49–51; Dellapenna, *supra* note 32 at 407–08.

<sup>40</sup> See, e.g., Chandrasekhar, *supra* note 9 at 49.

<sup>41</sup> Rex v. Bourne, [1938] 3 All E.R. 615 (Cent. Crim. Ct.)

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 616



the Act.<sup>45</sup> Explaining the clause “in good faith for the purpose only of *preserving the life* of the mother” in § 1 of the Infant Act, he expressed doubt whether there was a real distinction between “danger to life and danger to health” and observed:

As I say, you have heard a great deal of discussion as to the difference between danger to life and danger to health. It may be that you are more fortunate than I am, but I confess that I have felt great difficulty in understanding what the discussion really meant. Life depends upon health, and it may be that health is so gravely impaired that death results . . . . But is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life. For, so far as danger to life is concerned, you cannot, of course, be certain of the result unless you wait until a person is dead. Nobody suggests that the operation only becomes legal when a patient is dead. . . . The surgeon is justified in cutting off an arm or a leg, or taking out an eye, if, in his honest opinion, he thinks it is desirable to do so for the sake of the patient’s health. The difficulty that arises in the case of abortion is that by the operation the potential life of the unborn child is destroyed. The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.<sup>46</sup>

Explaining the position further, the judge said that unless the doctor, “basing his opinion upon the experience and knowledge of the profession, [is of the opinion] that the child cannot be delivered without the death of the mother,” the doctor is justified in performing abortion if he believes “on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck.”<sup>47</sup> Giving a very wide and liberal interpretation to the words “for the purpose of preservation of life of the mother” in § 1 of the Infant Act, the judge held that a doctor was entitled and duty bound to

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<sup>45</sup> *Id.* at 691 (quoting Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5, c. 34, § 1 (Eng.)).

<sup>46</sup> *Id.* at 617, 619–20.

<sup>47</sup> *Bourne*, 3 All E.R at 618–19, 694 .

“destroy the unborn child in the womb. . . for the purpose of preserving *the yet more precious life of the mother.*”<sup>48</sup>

*Bourne* tempered the interpretation of the scope of the 1861 Act provision that prohibited abortion and provided no exception, by dovetailing the contents of the clauses of “good faith” and “preserving the life of the mother” in the Infant Act into the 1861 Act.<sup>49</sup> Additionally, by interpreting the Act broadly to include “preservation of the life of the mother” the *Bourne* court was able to avoid limiting its ruling to the instances of imminent loss of life by including cases of gradual ending of life that may take place as a result of mental stress and emotional trauma.<sup>50</sup>

Needless to say, the Infant Act was a springboard that enabled the judiciary to take a meaningful dive into the right to abortion so as to swim forward toward legalization. The *Bourne* case was a ‘test case’ in an era which did not approve even therapeutic abortion.<sup>51</sup> It could be said that the directions to the jury in *Bourne* were legendary in that they opened new vistas of abortion law and that *Bourne*’s case is to abortion what *Donoghue*’s is to the law of consumer protection.<sup>52</sup> The concept of therapeutic abortion formulated in *Bourne*’s case raised new questions regarding its scope.<sup>53</sup>

Despite the breakthrough in abortion law proposed by *Bourne*, comprehensive evaluation of the questions relating to abortion and

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<sup>48</sup> *Bourne*, 1 K.B. at 620 (emphasis added). The judge in that context reminded the jury that while deciding the legality of abortion the fact that Parliament had raised the age of marriage to 16 presumably because, it was undesirable for a child below that age to go through the state of pregnancy and labor at such a tender age as it would cause terrible mental anguish. *Id.* at 619. See also WILLIAMS *supra* note 1, at 152. “Apparently the interest of the mother in living a single extra day is preferred to the life of the child.”

<sup>49</sup> *Bourne*, 1 K.B. at 616–18.

<sup>50</sup> “The effect of his ruling is to read into the abortion statute the same exception as that in the child destruction statute, and to interpret ‘preserving the life of the mother’ in an extended sense to include preserving the longevity of the mother.” See WILLIAMS, *supra* note 1, at 151.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., Caroline M de Costa, *The King Versus Aleck Bourne*, 191 (4) MED. J. AUST. 230, 231 (2009). In *Donoghue v. Stevenson*, [1932] A.C. 562 (Eng.) the House of Lords held that a manufacturer of a product that reaches the ultimate consumer without the possibility of intermediary examination and with the knowledge that absence of reasonable care in the preparation or putting up of the product would result in the injury to the consumer owes a duty to the latter to take reasonable care, albeit there is no contractual relationship between them. The holding in that case – the neighbor principle – “[y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor” has been considered to be milestone in English law of consumer protection. See W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT, 68–72 (1979).

<sup>53</sup> Williams has observed that there are as many as six questions relating to therapeutic abortions. (1) Is the performance of the operation limited for the purpose of preventing the mother from having her days cut short? (2) Is the exception limited to the somatic illness of the mother? (3) Is the defense of necessity objective? (4) Whether the necessity must always be known to the surgeon? (5) Should the therapeutic abortions be without charging fee? (6) With whom lies the burden of proof? See WILLIAMS, *supra* note 1 at 153–70.

legalization in the modern context did not take place in England until the enactment of the Abortion Act of 1967.<sup>54</sup> In the Abortion Act of 1967, as Lord Denning observed, the “approach to the subject was revolutionized.”<sup>55</sup> The significance of the Abortion Act is that it laid down clear grounds on which women would be able to procure abortions. The Act provided that a pregnancy not beyond the 24th week could be terminated if its continuance would involve risk “greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.”<sup>56</sup> Or that “if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”<sup>57</sup> Thus, while the Ellenborough’s Act of 1803 and the Offences against Person Act of 1861 prohibited abortion, the Infant Act and the Abortion Act of 1967 recognized the reality that abortion has become necessary in the modern life to enable people to lead a peaceful human life.<sup>58</sup>

The Abortion Act is different from the previous Acts in two respects. First, duration of pregnancy is not a relevant factor in deciding its termination, provided the conditions laid down in the Act for the same are satisfied.<sup>59</sup> Second, and more importantly, unlike its predecessors, the law recognizes abortion as an instance of individual right of women on certain socio-economic grounds.<sup>60</sup> Undoubtedly, in all respects, the 1967 abortion law signals an era of gender equality and liberty of women to have self-determination over her body and family. In this sense, an individual woman’s liberty is placed in front of her yet to be born child.

#### IV. ABORTION LAW IN AMERICA

Across the Atlantic, the individual states of the United States of America, with exception of a few, followed the common law tradition formed out of Christian principles prohibiting abortion.<sup>61</sup> Initially, the states that enacted statutes distinguished abortion in the pre-quickening stage from the post-quickening stage with increased penalty for the latter, but by the end of the nineteenth century, the distinction was obliterated by providing increased penalties for abortion from the moment of conception.<sup>62</sup> Thus, one

<sup>54</sup> EMILY JACKSON, *MEDICAL LAW, TEXT, CASES AND MATERIALS*, 666 (2010); *The Abortion Act, 1967* c. 87 (Eng.).

<sup>55</sup> *See Royal College of Nursing of the United Kingdom v. Department of Health and Social Security*, [1981] 1 All E.R. 545, 554.

<sup>56</sup> *The Abortion Act, 1967* c. 87, at § 1(a)–(d).

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g., Harry J. Gensler, A Kantian Argument Against Abortion*, 49 *Phil. Studies* 83, 85 (1986); *cf. FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES* 66 (Beverly Baines et.al. eds. 2012).

<sup>59</sup> *Cf. Infant Act* at § 1 (2).

<sup>60</sup> *See supra* notes 54–57 and accompanying text.

<sup>61</sup> CHANDRASEKHAR, *supra* note 9, at 53

<sup>62</sup> *See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection* 44 *STAN. L. REV.* 261, 282; *See also*

finds the influence of Christianity in the law relating to abortion across the Atlantic.<sup>63</sup> It has been aptly observed:

“There appears to be a twofold reason why most of the states in the United States and why Great Britain prior to 1967 had highly restrictive abortion laws on the statute books. Their implicit cultural purpose was primarily that of embodying the Judeo-Christian belief in the right to life and the necessity of preserving human life even when the existence of ‘human life’ was problematic to some degree.”<sup>64</sup>

### A. *The 20th Century Scenario*

Abortion law continued on the basis of Christian principals in the United States until 1973 with the decision in *Roe v. Wade*.<sup>65</sup> In *Roe v. Wade*, the Supreme Court examined whether a Texas law prohibiting abortion abridged the right to privacy of the petitioner as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution.<sup>66</sup> Examining the history of abortion law in England and America, the Court found that the blanket prohibition of abortion was, in part, a result of the influence of religion.<sup>67</sup> The Court also deduced that women of the 19th century had more freedoms than those of the 20th century to resort to abortion.<sup>68</sup> The State of Texas defended the law on three grounds: (1) the law discouraged illicit sexual conduct, (2) the law reduced the medical procedure of abortion, thus protecting the state’s interest in the life of the mother; and (3) the law protected the life of the fetus, which from the moment of conception is a person under law.<sup>69</sup> Observing that the opinions as to the commencement of life were divergent (implying that commencement of life cannot be an index for determining the right of the unborn), the Court held that the concept of the right to privacy entrenched by the Constitution was

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*Roe v. Wade*, 410 U.S. 113, 140–141 (1972). “It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.”

<sup>63</sup> See also Jennifer Strickler & Nicholas L. Danigelis, *Changing Frameworks in Attitudes Toward Abortion*, 17(2) SOC. F. 187, 190 (2002)(discussing the positive correlation between active participation in the Catholic religion and negative views of abortion).

<sup>64</sup> DANIEL CALLAHAN, *ABORTION: LAW, CHOICE AND MORALITY*, 126 (1970). But, unlike England, most of the American states expressly provided that abortion was lawful if necessary to preserve the life of the woman. See also WILLIAMS, *supra* note 1, at 150.

<sup>65</sup> *Roe*, 410 U.S. at 113 (holding unconstitutional a law that prohibited an unmarried pregnant woman who desired terminate her pregnancy from terminating her pregnancy).

<sup>66</sup> *Id.* at 119.

<sup>67</sup> *Roe*, 410 U.S. at 133–34, 138.

<sup>68</sup> *Id.* at 158.

<sup>69</sup> *Id.* at 148–50, 160.

wide enough to include the right of women to procure abortion.<sup>70</sup> Though not absolute and unqualified, the Court held:

[The] right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>71</sup>

One of the main arguments for the law raised by the State was that the term 'person' in the Fourteenth Amendment should be extended to the unborn fetus. Rejecting the contention, the Court held that the term "person" in the Fourteenth Amendment did not include unborn fetuses and that life did not commence until live birth.<sup>72</sup> "Person" is traditionally used in jurisprudence to denote living persons, and the term "person" is extended to unborn and dead persons for the benefit of the living or only when violation of the rights of such persons affect the interests of the living.<sup>73</sup> Legal systems exist for the protection of the interests of those *in vivo*, thus, actions for the death of the fetus due to prenatal injuries vindicate the interests of its parents

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<sup>70</sup> See Norman Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 872 (1974) ("The dominant issue in *Roe* was whether there is a constitutional right to terminate a pregnancy.").

<sup>71</sup> *Roe*, 410 U.S. 113 at 154. ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute."); See also *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of constitutionally protected choices. That decision holds a particularly important place in the history of privacy.").

<sup>72</sup> *Id.* at 158–61. ("In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."). For a discussion on this count see, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 337–40 (2007).

<sup>73</sup> See PATON, *supra* note 5, at 395. He observes, "Most systems lay down the rule that, in cases where legal personality is granted to human beings, personality begins at birth and ends with death." *Id.*

and not to protect the rights of the fetus.<sup>74</sup> Even if the unborn is considered a “person”, no one is expected to cater to its interests at their own cost.<sup>75</sup>

In a concurring opinion, Justice Douglas explained that the concept of personal liberty in the Fourteenth Amendment was of such a wide import that it included: “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality;” “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children;” and “the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.”<sup>76</sup> Hence the right to abortion formed part of the concept of personal liberty of the mother to decide whether to bear an unwanted child.<sup>77</sup> Agreeing with the majority, he succinctly observed:

Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.<sup>78</sup>

The significance of *Roe* lies in the directive force of the decision that examined the problems relating to abortion from the individual and private point of view of women instead of explaining them from the broad male ridden social milieu as was done in the past. This aspect is clear from the

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<sup>74</sup> *Roe*, 410 U.S. at 162. Observing on the rights against pre-natal injuries, the court observed that the same was only “to vindicate the parents’ interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem.” Cf. WILLIAMS *supra* note 1, at 199 & 208; *see also* Judith Jarvis Thomson, *A Defense of Abortion*, 1 (1) PHIL. & PUB. AFF. 47–66 (1971).

<sup>75</sup> *See, e.g.*, MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962). Glanville Williams observes that commutation of the sentence by the Crown in *R v. Dudley Stephens* 14 Q.B.D. 273 (Eng.) implies that the accused, a crew cast away in a ship wreck, were not expected to die rather than to kill the cabin-boy of the ship and sustain on his body. *See* GLANVILLE WILLIAMS, A TEXTBOOK OF CRIMINAL LAW, 606 (1983). For a beautiful philosophical discussion of the issue *see generally*, Thompson, *supra* note 74.

<sup>76</sup> *Roe*, 410 U.S. at 211, 213 (Douglas J., concurring).

<sup>77</sup> *Id.* at 211–14.

<sup>78</sup> *Id.* at 214–15.

declaration of Justice Douglas who, instead of examining the issue from a purely religious point of view, considered it as one relating to the problems of childbearing women. Without question, *Roe* revolutionized the American law of abortion.

### ***B. Attempts to Overturn Roe and the Judicial Suspicion***

Perhaps unsurprisingly, *Roe* was a rude shock to many people, jolting their conscience and causing an unprecedented outcry in America.<sup>79</sup> “Objections came from all points of the political spectrum. To most conservatives, the decision appeared utterly without moral foundation; many moderates found it lacking in constitutional justifications; [and] the [liberal] left complained that the Court offered the wrong justifications.”<sup>80</sup> Meanwhile the lawyers condemned the decision as undemocratic and the reasoning as not envisaged by the Constitution.<sup>81</sup> Small wonder, from the very moment of the decision, there were legal and constitutional attempts, as well as political campaigning to upset the decision.<sup>82</sup> The battle surrounded both the constitutional methodology adopted by the Court and the moral and ethical aspects of abortion. Disapproval of *Roe* resulted in the adoption of new strategies by Congress and state legislatures,<sup>83</sup> which instead of making a

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<sup>79</sup> See Ronald Dworkin, *The Great Abortion Case*, 36 N.Y. REV. BOOKS (June 29, 1989) [hereinafter *The Great Abortion Case*] (stating “[n]o judicial decision in our time has aroused as much sustained public outrage, emotion, and physical violence, or as much intemperate professional criticism, as the Supreme Court’s 1973 decision in *Roe v. Wade*, which declared, by a seven to two majority, that women have a constitutionally protected right to abortion in the early stages of pregnancy.”).

<sup>80</sup> See DEBORAH L. RHODE, *Reproductive Freedom in FEMINIST JURISPRUDENCE* 305, 310 (Patricia Smith ed., 1993).

<sup>81</sup> RICHARD A. POSNER, *LAW PRAGMATISM AND DEMOCRACY* 124 (2005); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935 (1973) (“What is unusual about *Roe* is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus’s existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment. What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution.”).

<sup>82</sup> From 1973–1989, 49 States passed 306 anti-abortion measures to tide over *Roe v. Wade*. See Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L. J. 1318, 1326 (2009); See also RONALD DWORIN, *FREEDOM’S LAW THE MORAL READING OF THE AMERICAN CONSTITUTION* 44 *et seq.* (1996) [hereinafter *FREEDOM’S LAW*].

<sup>83</sup> Brenda D. Hofman, *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, 28 J. CHURCH & STATE 225, 239 (1986) (“Having failed to elect a presidential sympathizer to its cause in 1976, the pro-life movement sought alternative means of undercutting, if not altogether reversing, the *Roe v. Wade* decision. For one thing, the movement shifted from an electoral to a legislative focus, concentrating its efforts on getting pro-life legislation introduced in Congress. The movement scored its first big victory in the House of Representatives in 1977 with the passage of the Hyde Amendment.”)

direct affront to the right to privacy<sup>84</sup> “tried merely to pull one thread,”<sup>85</sup> each of which in result would denude the right of its content, warranting more judicial discussion on the topic.<sup>86</sup> Thus, instead of crippling the right as such, the attempts have been directed to restricting certain attendant rights, “the boundary or ‘edge’ issues,” without which the right to abortion cannot be meaningfully exercised by women.<sup>87</sup>

However, it is doubtful whether the critics of *Roe* have correctly appreciated the socio-economic factors that necessitated recognition of abortion as an ingredient of the right to privacy. The objections of the critics of abortion have religio-moral bases and are not directed at the problems of women who seek abortion, as is clear from *Doe v. Bolton*.<sup>88</sup> In *Doe*, the petitioner demanded an abortion, due to her “poverty and inability” and the medical advice that “an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying.”<sup>89</sup> The request was denied, as Georgia law prohibited abortion except for protecting the life or health of the mother, mental or physical defect of the fetus or in the case of pregnancies resulted from forcible or statutory rape.<sup>90</sup> She challenged the law as vague, violative of due process, and denied her the “right to decide when and how many children she will bear” which invaded her “rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children.”<sup>91</sup> Justice Blackmun, speaking for the Court, held that the medical judgment to abortion “may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—*relevant to the well-being of the patient*.”<sup>92</sup> He therefore held that the impugned provisions did not stand

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<sup>84</sup> The burden of pregnancy is so great that the court was justified in including in it the right to abortion within the ambit of right to privacy. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 924 (1978).

<sup>85</sup> Transcript of Oral Arguments before Court on Abortion Case available at <http://www.nytimes.com/1989/04/27/us/transcript-of-oral-arguments-before-court-on-abortion-case.html> (last visited Jan. 19, 2013).

<sup>86</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 858 (2005).

<sup>87</sup> Thus, there have been federal and state restrictions on welfare payment for abortions, enactment of the Hyde Amendment, insistence on consent of the spouse, and parents of minors and the alternative of judicial bypass virtually restricted the liberty of women to procure abortion. See David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 *ALB. L. REV.* 833, 842–43 (1998).

<sup>88</sup> *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>89</sup> *Id.* at 185.

<sup>90</sup> Ga. Criminal Code § 26-1202(a) (1973). The law modeled on the Model Penal Code of the American Penal Institute, apart from limiting the scope of right to abortion, provided that abortion shall be performed only in the hospitals accredited by the Joint Commission on the Accreditation that, performance of abortion shall have to be approved by a committee of the medical staff of the hospital and that two other physicians shall certify that for the reasons enumerated abortion is necessary.

<sup>91</sup> *Doe*, 410 U.S. at 186.

<sup>92</sup> *Id.* at 192. (emphasis added)



constitutional scrutiny and therefore violated the Fourteenth Amendment of the Constitution.

### *C. Roe Destabilized*

With the establishment of the right to abortion as an element of the right of the woman to self-autonomy in *Roe*,<sup>93</sup> administrative attempts, influenced by theological and religious thought, began to be directed at regulating some rights, which in effect would disable women to procure abortion freely.<sup>94</sup> Such attempts can broadly be classified as (a) those insisting on consent of third parties for procuring abortion, (b) restriction on the right to choose the method of abortion, and (c) withdrawal of the State from rendering public hospitals as well as financial support from non-therapeutic abortions.<sup>95</sup> The above measures discourage pregnant women from freely procuring abortion, which consequently amounts to trampling personal liberty.

#### *1. Right to Autonomy v. Consent of Third Parties*

There are two situations in which third party consent to abortion comes into play: abortion by minors and adults. In the cases of adult married women, laws began to insist on spousal consent and in the cases of unmarried minors, on the consent of the minor's parents. Some laws even provided for judicial substitute as an alternative. Immediately after *Roe* a prominent case examined the validity of a legislative attempt to require third party consent to abortion—*Planned Parenthood of Central Missouri v. Danforth*.<sup>96</sup> *Danforth* examined the constitutionality of a Missouri law that controlled abortion in all stages of pregnancy, and, among other things, provided that no abortion be performed during the first twelve weeks of pregnancy without the consent of the spouse of the pregnant woman, and without the consent of the parents in the case of an unmarried woman below the age of 18.<sup>97</sup>

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<sup>93</sup> Marjorie M. Shultz, *Abortion and Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. WOMEN'S STUD., 80 (1992)

<sup>94</sup> Religious groups, particularly Catholic Church, believing that "only God, as the author of human life, has absolute dominion over it" have stood in favour of the laws restrictive of abortion in US. See DANIEL CALLAHAN, *ABORTION: LAW, CHOICE & MORALITY*, 433–438 (Macmillan Pub. Co., 1972); see also N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE—THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY*, 185–92. (2001). There have been instances of direct opposition from the Church against liberalization of abortion. See, e.g., *A Statement on Abortion*, 15 CATH. LAW. 259, 260 (1969).

<sup>95</sup> See, e.g., *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Doe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

<sup>96</sup> *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976).

<sup>97</sup> *Danforth*, 428 U.S. at 68–69, 72.

Reiterating *Roe*, the Court held that the provisions requiring the spousal and parental consent infringed upon the right of privacy.<sup>98</sup> Although from the familial point of view both the father and the mother have an interest in the fetus, the biological proximity that the mother enjoys over the fetus confers on her a claim over the socially created interest that the father has over the fetus thus enabling her to decide abortion unilaterally. Hence, in striking down the impugned provision of spousal consent, the Court held:

The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.<sup>99</sup>

The right to abortion had attained another dimension in the wake of increasing unmarried pregnancies among the teenagers in the west, which by the 1980's was a problem for America.<sup>100</sup> The Court in *Danforth* specifically examined the question of the scope and extent of the liberty of minors' vis-à-vis the right of their parents to control. Referring to the issue of parental consent, Justice Blackmun remarked:

Just as with the requirement of consent from the spouse . . . the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent. Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.<sup>101</sup>

Dealing with the restrictions imposed on abortion by the stipulation for spousal and parental consent and examining the consequential problems, *Danforth* inimitably carries the torch lit by *Roe*.<sup>102</sup>

Later, in *Bellotti v. Baird*, the Court had to deal with a new dimension of the right to abortion.<sup>103</sup> In *Bellotti*, the Court examined the

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<sup>98</sup> *Id.* at 60, 69–71, 75. (Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.)

<sup>99</sup> *Id.* at 71.

<sup>100</sup> RHODE, *supra* note 80, at 315.

<sup>101</sup> *Danforth*, 428 U.S. at 74.

<sup>102</sup> *Id.* at 67–75.

<sup>103</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979) (finding the law enacted by the State of Massachusetts prohibiting abortions of an unmarried woman below the age of 18 years

validity of a Massachusetts law that stipulated that an abortion on a person below the age of 18 could be performed only with the consent of both the parents and if one of them refused, required judicial approval.<sup>104</sup> The Court made four initial observations on how the law treats children. First, while children and adults are afforded similar constitutional protections, the State is “entitled to adjust its legal system to account for children’s vulnerability.”<sup>105</sup> Second, states may limit the ability of children to make decisions with serious consequences.<sup>106</sup> Third, the role parents play in the upbringing of their children “justifies limitations on the freedoms of minors.”<sup>107</sup> And fourth, the Court noted that a “child, merely on account of his minority, is not beyond the protection of the Constitution.”<sup>108</sup>

Moreover, a “pregnant minor’s options are much different from those facing a minor in other situations, such as deciding whether to marry.”<sup>109</sup> Therefore, the state requirement that a parent’s consent must be obtained before a minor’s abortion will be valid only if qualified by an alternative procedure enabling the minor to prove she is “mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes.”<sup>110</sup> The Court extended this alternative procedure by finding that the minor is entitled to show that abortion is in her best interest.<sup>111</sup> Against this backdrop, the Court held that the Massachusetts statute requiring parental consent without providing an opportunity to establish that the minor was mature and fully competent to assess the implications of the choice she has made imposed an undue burden on the minor.<sup>112</sup>

It was in a tenor of consistency with the above view that the Court in *H.L. v. Matheson*, examining the provision in a Utah statute, held that unlike in *Bellotti*, the provision in *Matheson* did not allow parents or the court to overrule or veto the minor’s choice to have an abortion.<sup>113</sup> Pointing out that though the requirement of notice to parents “may inhibit some minors from

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without obtaining the consent of both the parents, and requiring judicial approval if the parents withheld consent is unconstitutional.)

<sup>104</sup> MASS GEN. LAWS ANN. ch.112, §12S (West 1979).

<sup>105</sup> *Bellotti*, 443 U.S. at 635.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 637.

<sup>108</sup> *Id.* at 633; *see also*, *In re Gault*, 387 U.S. 1, 13 (1967).

<sup>109</sup> *Belotti*, 443 U.S. at 642.

<sup>110</sup> *Id.* at 643–644. For, “many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court.” *Id.* at 647.

<sup>111</sup> *Id.* at 643–44.

<sup>112</sup> *Id.* at 647, 650.

<sup>113</sup> *H.L. v. Matheson*, 450 U.S. 398, 408, 411 (1980) (reviewing UTAH CODE ANN. §§ 76-7-314(3), 76-3-204(1), 76-3-301(3) (1978) (requiring a physician before performing abortion on a dependent, unmarried, minor female to “notify, [her parents] if possible”).

seeking abortions [it] is not a valid basis to void the statute” and hence cannot be considered to be too overbroad in scope so as to violate the right to privacy of the petitioner.<sup>114</sup>

Later, the Court, in *City of Akron v. Akron Center for Reproductive Health* (“*Akron-I*”), examined the constitutionality of an ordinance enacted by the city of Akron, Ohio regulating abortions which, among other things, provided that abortion on women below the age of fifteen shall not be performed without the informed written consent of one of the parents or guardians.<sup>115</sup> In spite of the rulings in *Danforth* and *Bellotti* to the contrary, the challenged ordinance denied the right to abortion to all minors below the age of fifteen without parental approval and also without providing an alternative procedure.<sup>116</sup> Reiterating its views in *Danforth* and *Bellotti*, the Court observed that there should not be blanket regulation of abortion in the case of all minors, irrespective of their maturity.<sup>117</sup> Therefore, “the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself, or that, despite her immaturity, an abortion would be in her best interests.”<sup>118</sup> The Court found the provision unconstitutional.<sup>119</sup>

Yet another dimension of abortions by minors was given judicial consideration in *Hodgson v. Minnesota*.<sup>120</sup> The Court examined the validity of a Minnesota law that provided that no abortion was to be performed on an un-emancipated minor below the age of 18 years until at least 48 hours after written notification of both the minor’s parents.<sup>121</sup> Exceptions within the Minnesota statute provided that notification was not required if the physician certified that an immediate abortion was needed to save the minor from death and there was not sufficient time for serving notice to her parents; if the minor was a victim of parental abuse; or if both the parents had already

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<sup>114</sup> *Id.* at 413.

<sup>115</sup> *City of Akron v. Akron Centr. for Reprod. Health, Inc. (Akron-I)*, 462 U.S. 416 (1983); AKRON, OHIO CODIFIED ORDINANCES ch. 1870 §§ 1870.01-.19, 1870.05(B) (1978). §§ 1870.03-.16 also provided that abortions after the first trimester of pregnancy be performed in hospitals only; that the physician shall make statements to the patient to ensure that her consent is informed consent; that there shall be a twenty-four hour gap between the consent and the abortion and that the fetal remains be disposed in a humane and sanitary manner.

<sup>116</sup> *Akron-I*, 462 U.S. at 422 n. 4.

<sup>117</sup> *Id.* at 439–40.

<sup>118</sup> *Id.* This was accepted and followed in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983).

<sup>119</sup> *Akron-I*, 462 U.S. at 442.

<sup>120</sup> *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

<sup>121</sup> MINN. STAT. ANN. §§ 144.343(2)–(7) (1990). The law with certain exceptions provided that no abortion shall be performed on a woman below the age of 18 until the expiry of 48 hours of notice to her parents, unless the physician certifies that immediate abortion was necessary to prevent her death within which time notice could not be served to them, or that both of her parents have consented to the abortion given in writing or that she declares that she was a victim of parental abuse. The law did not provide for giving the minor an opportunity to apply to the court to avoid the consent of the parents.

consented to the abortion.<sup>122</sup> The Court observed that the requirement for “two-parent notification” failed to serve any state interest in protecting the minor or providing them with the benefit of parental advice.<sup>123</sup> Further, absence of the provision that enabled the minor to avoid the consent of parents by a judicial bypass was “not related to legitimate state goals,” and hence the Court held the challenged provisions unconstitutional.<sup>124</sup>

Conversely, the Court held a similar Ohio law constitutional in *Ohio v. Akron Center for Reproductive Health*.<sup>125</sup> While examining the validity of a similar enactment that criminalized abortion of “unmarried [women], under eighteen years of age, and unemancipated” the Court held that statute did not “impose an undue, or otherwise unconstitutional, burden on the minor seeking an abortion,” and hence was constitutional.<sup>126</sup> Unlike *Hodgson*, the stipulation in the impugned law was only to seek the consent of one of the parents for 24 hours, which could be judicially bypassed.<sup>127</sup>

The scope of the reproductive decision of minors, though forming part of their right to personal liberty, cannot be identical with that of adults. Minors have the right to privacy, but the right to abortion will be available to a minor only if she is found to be mature enough to exercise the same. Even though the right to bear or beget a child without unwarranted governmental intrusion is an aspect of the right to privacy, it is in the interest of the state that there be more restrictions on abortions by minors.<sup>128</sup> It is taking these aspects into consideration that the Court in *Danforth*, *Bellotti*, and *Akron* accepted the power of state to “regulate a child’s right to make reproductive decisions more extensively than an adult’s right.”<sup>129</sup>

## 2. *Casey—Strut or Stride?*

Questions relating to third party consent for abortion by adult woman came up for judicial reconsideration in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>130</sup> In *Casey*, a decision that has

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<sup>122</sup> *Id.*

<sup>123</sup> *Hodgson*, 497 U.S. at 450–51. The Court observed, “Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family.” *Id.* at 457.

<sup>124</sup> *Id.* at 423, 457.

<sup>125</sup> *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990).

<sup>126</sup> OHIO REV. CODE ANN. §§ 2151.85 & 2505.073 (Supp 1988). Unlike *Hodgson*, here the Ohio Statute stipulated for seeking the consent of one of the parents with a provision for judicial bypass; *Ohio*, 497 US at 519–20.

<sup>127</sup> *Id.*

<sup>128</sup> Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1666 (1978).

<sup>129</sup> *Id.*

<sup>130</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

received much accolade for protecting the right of women to abortion,<sup>131</sup> the Court examined provisions dealing with the right of third parties to consent.<sup>132</sup> The Court noted the moral and spiritual disagreements surrounding the issue of termination of pregnancy and cautioned that morality should not control the trajectory of judicial decisions.<sup>133</sup> The Court stated that its role is “to define the liberty of all, not to mandate our own moral code”.<sup>134</sup> The Court doubted whether the State could solve such philosophic questions at the cost of the choice of women in this matter and warned that the accepted constitutional doctrine was that such individual choices should “not intrude upon a protected liberty” on matters of personal decisions which include those relating to marriage, procreation, contraception, family relationship and child rearing.<sup>135</sup> Additionally, the Court doubted whether “the State can resolve these philosophic issues in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.”<sup>136</sup> Moreover, the Court noted that:

For matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning,

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<sup>131</sup> FREEDOM’S LAW, *supra* note 82, at 117; *see also* Devins *supra* note 82, at 132. (“*Casey* settled the abortion wars in two ways. First, the decision helped create an environment in which the Supreme Court is unlikely either to overturn *Roe* or to return the *Roe* trimester test. Second, the decision helped create an environment in which state lawmakers—if and when *Roe* were overturned—would be unlikely to outlaw abortion or pass more stringent restrictions (than those enacted by Pennsylvania and approved by the Supreme Court in *Casey*).”

<sup>132</sup> *Casey*, 505 U.S. at 833; PA. CONS. STAT. §§ 3203–3220 (1990). It *inter alia* provided that a married woman seeking abortion shall declare that her husband has been notified of the decision; that abortion services are subject to keeping of record-keeping requirements including non-notifying of the intended abortion to her husband and that a minor seeking abortion shall obtain the consent of one of her parents/guardians unless judicially bypassed.

<sup>133</sup> *Casey*, 505 U.S. at 850.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 851. The Court observed, “Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.” *Id.* at 850–51

<sup>136</sup> *Id.*

of the universe, and of the mystery of human life.<sup>137</sup>

Reiterating and reaffirming the principles laid down in *Roe*, the Court held that there were limitations on the power of the State to interfere with the freedom of a woman to make a decision to get an abortion.<sup>138</sup> While examining the requirement for spousal notification, the Court found that the requirement was “likely to prevent a significant number of women from obtaining an abortion.”<sup>139</sup> The Court held:

[I]t does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as *if the Commonwealth had outlawed abortion in all cases.*<sup>140</sup>

Thus, the Court held that the provision empowering the husband to have authority over “the life of the child his wife is carrying”, necessitating a woman to seek his advice before an abortion, was unconstitutional because the “husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”<sup>141</sup>

The Court has correctly perceived the crux of the issue as the role of the Constitution in this respect is only to facilitate the freedom of choice of the individual in matters involving dignity and decency and should not trample upon one’s freedom in the name of moral code or gender superiority. Apart from upholding a woman’s right to abortion, *Casey* gives the message that matters of personal choice shall not be controlled by a moral reading of the Constitution.<sup>142</sup> *Casey*, which astonished many, has been considered “one of the most important decisions of this generation.”<sup>143</sup>

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<sup>137</sup> *Id.* at 851.

<sup>138</sup> *Casey*, 505 U.S. at 846. The Court summarized the three principles enunciated in *Roe*: “First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” *Id.*

<sup>139</sup> *Id.* at 893

<sup>140</sup> *Id.* at 893–94 (emphasis added).

<sup>141</sup> *Id.* at 898.

<sup>142</sup> *Id.* at 850; *Cf. Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as applied to adult males who had engaged in consensual

However, the decision in *Casey* partially overruled *Roe* by rejecting the trimester framework and accepting viability of the fetus as the true criterion for State regulation of pregnancy.<sup>144</sup> By discarding the trimester framework, *Casey* continued the trend of increased restrictions on the right to abortion, thereby enabling states to impose more restrictions on the right.<sup>145</sup>

Recently, the Court, in *Ayotte v. Planned Parenthood of Northern New England*, examined the validity of a law enacted by the State of New Hampshire that did not allow physicians to perform immediate abortions on pregnant minors even on the ground of danger to health.<sup>146</sup> The Court held that “it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.”<sup>147</sup> Both the U.S. District Court of New Hampshire and the First Circuit Court of Appeals invalidated the law.<sup>148</sup> Reversing the decisions and remanding the case, the Supreme Court observed that the lower courts should not nullify or rewrite a law unless absolutely necessary.<sup>149</sup> Thus, after the turn of the new century, the judiciary, while balancing the rights of the individuals as against the state interests, began to be influenced by the moral and religious concepts thereby diluting the right to abortion as developed by *Roe*.<sup>150</sup>

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act of sodomy in privacy of home. “The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the questions before us, however.”)

<sup>143</sup> FREEDOM’S LAW, *supra* note 82, at 117.

<sup>144</sup> *Casey*, 505 U.S. at 872–73.

<sup>145</sup> See Daniel J. Zirim, Case Note *Planned Parenthood of Southeast Pennsylvania v. Casey: Chipping Away at Roe v. Wade*, 1 J. PHARMACY & L. 259 (1992) (discussing the aftermath of *Casey* as it pertains to the *Roe* decision); see also Devins, *supra* note 82, at 1322.

<sup>146</sup> *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006). In this case, the validity of a 2003 enactment by New Hampshire, which *inter alia* provided regulations for abortion of pregnant minors without an exception for immediate abortion on the ground of health of the minor was challenged. See Parental Notification Prior to Abortion Act. N.H. REV. STAT. ANN. §§ 132:24–132 (2005). The Act prohibited physicians from performing abortion on a pregnant minor until 48 hours after written notice of abortion to her parent/guardian, unless required to prevent her death, where the guardian certified that notice was already served or where notice was judicially bypassed. *Id.* at § 132:26 (I)(a), (II).

<sup>147</sup> *Ayotte*, 546 U.S. at 328.

<sup>148</sup> *Planned Parenthood of N. New England v. Heed*, 296 F.Supp.2d 59 (D.N.H. 2003), *aff’d*, 390 F.3d 53 (1st Cir. 2003).

<sup>149</sup> *Ayotte*, 546 U.S. at 331.

<sup>150</sup> Stacy A. Scaldo, *Life, Death & the God Complex: Effectiveness of Incorporating Religion-Based Arguments into the Pro-choice Perspective on Abortion*, 39 N. KY. L. REV. 421, 422 (2012) (“True, the Court does not identify religion as the backbone of its stated reasoning. However, when viewed in a responsorial context, the language of the opinions demonstrates that religion, and religious beliefs about abortion, are at the heart of these decisions.”)



### ***D. Does the Right to Abortion Include ‘Procedural Rights’?***

Another issue the Supreme Court has had to address in considering the right to abortion is what procedural rights are due to women who choose to have an abortion. These issues include the withdrawal of state provided financial aid, professional support which the State extends to therapeutics, and State intervention in the freedom of the woman to choose the method of abortion.

#### ***1. The Duty of the State to Facilitate and Fund Abortion***

Exercise of a right which the State refuses to actively support is a serious issue.<sup>151</sup> A right becomes meaningful not merely when the state recognizes it, but when the state positively assists people to exercise the same.<sup>152</sup> Leaving people to find the wherewithal and technical assistance without help is tantamount to denial of right.<sup>153</sup> Such an issue arose when various states, in the guise of regulating abortion, enacted laws prohibiting the use and services of public hospitals and public doctors in procuring abortion.<sup>154</sup> Additionally, various states decided not to extend financial support to non-therapeutic abortions.<sup>155</sup>

In *Beal v. Doe*, the Court examined the constitutionality of a state regulation that denied medical aid for non-therapeutic abortions.<sup>156</sup> Title XIX of the federally approved Social Security Act, popularly known as Medicaid, required States to provide qualified individuals with financial assistance.<sup>157</sup> Examining whether the state regulation that limited financial assistance to therapeutic abortions was valid under Medicaid, the Court held that although the assumptions of the respondents about the economic and health aspects were true, *Roe* had accepted that the state had a more “valid and important

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<sup>151</sup> The person on whom a right is vested. *See*, SALMOND ON JURISPRUDENCE 221 (P.J. Fitzgerald ed., 12th ed. 1966).

<sup>152</sup> *Id.* at 233.

<sup>153</sup> *See, e.g.*, *Rhem v. Malcolm*, 377 F. Supp. 995, 999 (1974); *Khatri (II) v. State of Bihar*, 1 SCC 627, 631 (1981).

<sup>154</sup> Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1301 n. 97 (1991).

<sup>155</sup> *See, e.g.*, *Beal v. Doe*, 432 U.S. 438 (1977) (challenging § 3 of the Pennsylvania Medicaid program which restricts medical aid to abortions that are medically necessary.) *Maher v. Roe*, 432 U.S. 464 (1977) (challenging § 275 of the regulation of the Connecticut Welfare Department which restrict medical aid to abortions that are medically necessary).

<sup>156</sup> *Beal*, 432 U.S. 438 (1977). The State of Pennsylvania limited the Medicaid assistance to abortions that were medically necessary. An abortion is deemed medically necessary if the continuance of the pregnancy would threaten the health of the mother; if there is evidence that the child would be born with an incapacitating deformity or mental deficiency; or if the pregnancy is from rape or incest relationship. *Id.* at 441 n. 3. Medical necessity needs to be confirmed by two additional physicians. *Id.*

<sup>157</sup> 42 U.S.C. § 1396 (1970).

interest in encouraging childbirth.”<sup>158</sup> This interest was not limited to the third trimester, but existed “throughout the course of the woman’s pregnancy.”<sup>159</sup> Observing that respondents could not point out any unreasonableness of the impugned measure as against the federal law, the Court upheld the decision of the state of Pennsylvania to deny medical aid to non-therapeutic abortions.<sup>160</sup>

In *Maier v. Roe*, dealing with a similar regulation of the Connecticut Welfare Department, Justice Powell speaking for the Court was more vociferous in holding that limiting state financial aid to medically necessary abortions did not violate the fundamental right recognized in *Roe*, though it impinged upon the right of indigent women.<sup>161</sup> Justice Powell further observed that the “indigency that may make it difficult, and in some cases, perhaps impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.”<sup>162</sup> The Court went to the extent of holding that the “Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the expenses of the indigents.”<sup>163</sup>

Three years later, in *Harris v. McRae*, examining whether the Hyde Amendment, which denied public funding for certain medically necessary abortions, violated a woman’s right to privacy, the Court held that the fundamental right of the woman to choose to have an abortion simply does not carry “with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”<sup>164</sup> Furthermore, the Court noted:

[A]lthough government may not place obstacles in the path

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<sup>158</sup> *Beal*, 432 U.S. at 445. The respondents pointed out that where the State denied abortion, it would be confronted with a greater liability associated with childbirth. Similarly, abortion at an early stage is safer than childbirth.

<sup>159</sup> *Id.* at 446.

<sup>160</sup> *Id.* It has been criticized that such steps on the part of the State would only delay the procuring of an abortion and also that such measures would only help increase unlawful abortions but not abortions as such. Cf. Frances Olsen, Comment *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989), reprinted as *Unraveling Compromise*, in FEMINIST JURISPRUDENCE, 335–53 (Patricia Smith ed., 1992).

<sup>161</sup> *Maier*, 432 U.S. at 474. In addition to right to abortion challenge, the regulation was also challenged on the ground that it violated due process of law and equal protection under the Fourteenth Amendment as it affected the right of the indigent women to procure an abortion. *Id.* at 475–78. Justice Powell observed, “The Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.” *Id.* at 474. For a critique on indigency and violation of the equal right to abortion, see Note, *The Right of Equal Access to Abortions*, 56 IOWA L. REV. 1015 (1970).

<sup>162</sup> *Maier*, 432 U.S. at 474.

<sup>163</sup> *Id.* at 470.

<sup>164</sup> *Harris v. McRae*, 448 U.S. 297, 303, 316 (1980).

of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. . . . The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions but rather of her indigency.<sup>165</sup>

The Court also held that the Hyde Amendment, by its policy of encouraging child birth, was rationally related to the legitimate objective of protecting potential life.<sup>166</sup> Thus, the holdings in *Beal*, *Maher*, and *McRae* indicate that the right to abortion, embedded in the right to privacy in the Constitution, did not encompass the right to seek financial support for the indigent woman, and considerably circumscribed the scope of the right.<sup>167</sup> It is true that in these cases, the Court was not directly restricting the right of a woman to seek abortion. Nevertheless, acceptance of the proposition that the right does not include the right to seek financial aid from the government is virtually a denial of the right for an indigent woman.<sup>168</sup> A close reading of the judgments reveals that the Court, while examining the issue, has been influenced by the theological concept of "sanctity of life".<sup>169</sup>

There was a comprehensive reconsideration of the right to state assistance for abortion in *Webster v. Reproductive Health Services* that began a new and undesirable trend in the history of the rights of women.<sup>170</sup> The case arose out of a class action challenging a Missouri law as violative of the First, Fourth, Ninth and Fourteenth Amendments of the Constitution.<sup>171</sup> The Supreme Court reversed the decision of the Eighth Circuit Court of Appeals that invalidated certain provisions of a law dealing with the unborn and abortion.<sup>172</sup> The impugned law, among other things, provided that the life of human beings "begins at conception," that "unborn children have protectable interests in life, health and well-being," with equal rights with other human beings, and required physicians performing abortion

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<sup>165</sup> *Id.* (quotation omitted).

<sup>166</sup> *Id.* at 325.

<sup>167</sup> For an evaluation as to how the Act would affect indigent women, see Marjorie R. Sable, *The Hyde Amendment: Its Impact on Low Income Women with Unwanted Pregnancies*, 9 W. MICH. J. SOC. & SOC. WELFARE 475 (1982).

<sup>168</sup> *Harris*, 448 US at 316.

<sup>169</sup> *Id.* at 319–20 ("The Hyde Amendment . . . is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." (citations omitted)).

<sup>170</sup> *Webster v. Reprod. Health Servcs*, 492 U.S. 490 (1989). In 1989 the Governor of Missouri signed a law, which substituted the Missouri Senate Committee Substitute for House Bill No, 1596 that amended the then existing law relating to unborn children and abortion.

<sup>171</sup> *Id.* at 501.

<sup>172</sup> *Id.* at 503.

of a pregnancy beyond 20 weeks to ascertain whether the fetus was viable.<sup>173</sup> Additionally, the Act prohibited the use of public employees and facilities to perform or assist abortions not necessary to save mother's life, and prohibited the use of public funds and employees or facilities for the purpose of "encouraging or counseling" a woman to have abortion not necessary to save her life.<sup>174</sup>

The Court observed that what is contained in the preamble of the Act was merely the "findings" of the Missouri legislature and was to be interpreted by the state courts and examined by the federal courts only when it was applied to restrict the activities of persons.<sup>175</sup> Rationalizing from a perspective different from that of the previous cases, the Court observed that the prohibition of the use of public funds, employees, and facilities placed no obstacles on a woman seeking abortion, and therefore, the restrictions imposed by the Missouri statute were constitutional.<sup>176</sup> The Court reasoned that having "held [in *McRae* and *Maher*] that the State's refusal to fund abortions does not violate *Roe v. Wade*, it strains logic to reach a contrary result for the use of public facilities and employees."<sup>177</sup> Similarly, the Court also stated that although the requirement of viability testing to ascertain the "gestational age, weight, and lung maturity" of a fetus older than twenty weeks by the physician performing the abortion increased costs, it also "furthers the State's interest in protecting potential human life" and is therefore constitutionally valid.<sup>178</sup> This decision has been condemned as a denial of the right to "abortions to many women too poor or otherwise unable to find a doctor and hospital with no state connections."<sup>179</sup> Though stopping short of overruling *Roe*, the decision in *Webster* reveals a clandestine attempt to destroy the conceptual structure of *Roe* facilitating future attempts by legislatures to disregard the *Roe* decision.<sup>180</sup>

The rationale of *Webster* that the Due Process Clause "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests" was extended further

<sup>173</sup> MO. REV. STAT. §§1.205.1(1),(2). (Preamble) (1986); *Webster*, 492 U.S. at 501.

<sup>174</sup> MO. REV. STAT. §§ 188.205, .210, .215 (1986).

<sup>175</sup> *Webster*, 492 U.S. at 506.

<sup>176</sup> *Id.* at 510

<sup>177</sup> *Id.* at 509–10. The Court justified the viability testing provision as promoting the interest of the State in potential human life. *Id.* at 515. It repelled the arguments relating to the preamble that declared that life begins at conception, holding that "the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice." *Id.* at 506.

<sup>178</sup> *Webster*, 492 U.S. at 519–20 (citations omitted).

<sup>179</sup> *The Great Abortion Case*, *supra* note 79, at 60. It is a truism that even in the wake of prohibition of abortion, rich were able to keep such restrictions limited to statute books while it was the poor who suffered from such prohibitions. See Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFF. L. REV. 107, 118–19 (1982).

<sup>180</sup> *The Great Abortion Case*, *supra* note 79, at 63. "The conclusion is irresistible that he had determined in advance somehow to damage *Roe v. Wade* without explicitly overruling it . . ."

in *Rust v. Sullivan*.<sup>181</sup> In *Rust*, while examining the validity of the Department of Health and Human Services regulations that excluded abortion from the purview of funding for family-planning services, the Court distinguished the right to an abortion from the right to receive aid for an abortion.<sup>182</sup> The Court held that the government had “no constitutional duty to subsidize an activity merely because the activity is constitutionally protected” and that the government “may validly choose to fund childbirth over abortion” by funding childbirth and excluding abortion.<sup>183</sup>

***E. Whether the Right to Abortion Includes the Right to Choose the Method***

Does the right to abortion include the right to adopt the method of abortion the woman prefers? This question came up before the Supreme Court a few times particularly in relation to the mode of exercising the right in tune with the existing socially and scientifically accepted procedure.<sup>184</sup> It is generally accepted that conferment of a right is bereft of its meaningful content unless its holder is given the freedom of choice for exercising it.<sup>185</sup> This is all the more so in the case of liberty which, unlike a right, denotes the total freedom of a person of enjoying it.<sup>186</sup> Such a proposition implies that the right of a person not to be interfered with includes the right to decide how liberty is to be exercised.<sup>187</sup> The right to abortion being an instance of liberty becomes meaningless if the woman is denied the freedom to choose the method for performing it.

Such an issue came up as early as 1976 in *Danforth* which examined the validity of § 9 of the impugned law that prohibited using of saline amniocentesis as a method for abortion.<sup>188</sup> The provision was incorporated as a measure to protect maternal health. Reversing the decision of a three-judge panel out of District Court of Eastern Missouri and observing that the

<sup>181</sup> See *Webster*, 492 U.S. at 491; *Rust v. Sullivan*, 500 U.S. 173, 201 (1991).

<sup>182</sup> *Rust*, 500 U.S. at 201.

<sup>183</sup> *Id.*

<sup>184</sup> See, e.g., *Danforth*, 428 U.S. at 52; *Akron-I*, 462 U.S. at 416; *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists* 476 U.S. 747 (1985); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>185</sup> ALF ROSS, ON LAW AND JUSTICE, 177 (1959) (“Summing up we may say that the concept of rights is typically used to indicate a situation in which the legal order has desired to assure to a person liberty and power to behave—within a specified sphere—as he chooses with a view to protecting his own interests.”)

<sup>186</sup> See *Quinn v. Leatham*, [1901] AC 495, 534 (Eng.) Referring to the right to liberty, Lord Lindley observed, “This *liberty* is a *right* recognized by law; its *correlative* is the general *duty* of every one not to prevent the free exercise of this *liberty* except so far as his own liberty of action may justify him in so doing.” (emphasis in original).

<sup>187</sup> WESTLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 43 (Walter Wheeler Cook ed., 1920).

<sup>188</sup> *Danforth*, 428 U.S. at 75–79. Saline amniocentesis is a method by which the “amniotic fluid is withdrawn and ‘a saline or other fluid’ is inserted into the amniotic sac.” *Id.* at 75.

impugned restrictions force women and physicians to resort to more dangerous methods of abortion, the Court held that the restriction did not withstand constitutional challenge in the wake of the unavailability of safer alternative methods.<sup>189</sup>

New dimensions regarding the scope of State power to restrict the right to select the mode of abortion came up for judicial examination in *City of Akron v. Akron Center for Reproductive Health*.<sup>190</sup> Analyzing the provisions of the statute under challenge, the Court held that the right of the unborn could be said to be a matter of state interest only from the stage of viability, and the state should therefore not interfere with the right to abortion during the pre-viability stage.<sup>191</sup> The Court found that the provisions requiring hospitalization for abortions after the end of the first trimester amounted to “a significant obstacle in the path of a woman seeking abortion” and hence infringed her constitutional right to abortion, as such abortions could be performed through the method of D&E on an outpatient basis at a lesser expense.<sup>192</sup> The Court also observed that the statutory requirement of a physician personally discussing matters relating to abortion would not serve any state interest.<sup>193</sup> Similarly, the insistence on a 24-hour waiting period after signing the consent letter increases the costs, and in some cases the risk, of abortion without serving any state interest and hence was unconstitutional.<sup>194</sup> Evidently, the Court determined that the procedural formalities which denied medical benefits to women without any demonstrable state interest created “a significant obstacle in the path of woman seeking an abortion.”<sup>195</sup>

Later, in *Thornburgh v. American College of Obstetricians and Gynecologists*, examining the validity of Pennsylvania’s Abortion Control Act of 1982, the Court determined that the requirement to inform the pregnant woman before abortion about the “detrimental physical and psychological effects” and the medical risks involved would only increase

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<sup>189</sup> *Id.* at 76–79; See also, D.V. Glass, *The Effectiveness of Abortion Legislation in Six Countries*, 2 MOD. L. REV. 97, 123 (1938) (“...in cases of necessity, women will have recourse to any method, no matter how dangerous the consequences, to prevent the birth of children they do not want.”)

<sup>190</sup> *Akron-I*, 462 U.S. 416 (1983). An Akron, Ohio city ordinance, “The Regulation of Abortions” stipulated that abortions performed after the first trimester be done in hospitals, abortions on unmarried minors below 15 years could be conducted only with the consent of her parents, that the physician should confirm that the woman has given informed consent, that there is a gap of 24 hours between the consent and the abortion and finally, that the fetal remains be disposed of in a humane and sanitary manner. Violation of the ordinance was considered a penal misdemeanor. Both the District Court and the US Court of Appeals held that some provisions of the ordinance were violative of the Constitution, and this appeal was filed.

<sup>191</sup> *Id.* at 428–30.

<sup>192</sup> *Id.* at 434, 36, 39.

<sup>193</sup> *Id.* at 448.

<sup>194</sup> *Id.* at 450.

<sup>195</sup> *Id.* at 434.

the anxiety of the patient, and interfere with the professional judgment of the physician.<sup>196</sup> The Court stated, “[t]his type of compelled information is the antithesis of informed consent.”<sup>197</sup> Referring to the provision in the Act that enabled the public to have access to the records of abortions, the Court warned that the government could not be allowed to “chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities,” that a “woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly” and held that the provision for making the details of abortion available for public inspection was invalid.<sup>198</sup> Similarly, the stipulation in the Act requiring the presence of a second physician to take care of the child during abortion of a likely viable fetus was found unconstitutional.<sup>199</sup>

The issue relating to the method for choosing abortion came up for a serious judicial debate in *Stenberg v. Carhart*.<sup>200</sup> In *Stenberg* the Court examined the validity of a Nebraska statute that criminalized “partial birth abortion,”—also called the D & X method—except to save the life of the mother “endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”<sup>201</sup> The Court found that the Nebraska Act shows concern for the life of the unborn and prevents cruelty to partially born children.<sup>202</sup> Observing that the application of the statute both to pre-viability and post-viability abortions alike aggravated the constitutional problem, the Court held that absence of an exception in the statute for the protection of the health of the mother, which according to the Court included the risk that “happens to arise from regulating a particular method of abortion” imposed an undue burden upon the woman’s right to terminate her pregnancy.<sup>203</sup> The Court reiterated that the health of the woman is the interest of the State not only in pregnancy, but also in regulating the methods of abortion, and hence women could not be forced to use riskier methods of abortion.<sup>204</sup> On the above grounds, the Court held the impugned law unconstitutional.<sup>205</sup> In a small but pithy concurring opinion Justice Stevens observed:

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<sup>196</sup> *Thornburgh*, 476 U.S. at 764 (citing 18 PA. CONS. STAT. § 3205(a)(1)(ii–iii) (1982)).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 766–68 (the court held so even though the chances for revealing the identity of the woman were very remote).

<sup>199</sup> *Id.* at 771.

<sup>200</sup> *Stenberg*, 530 U.S. 914.

<sup>201</sup> *Id.* at 921–22 (quoting Neb. Rev. Stat. § 28-328(1) (Supp. 1999)). Nebraska law defines “partial birth abortion” as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” NEB. REV. STAT. § 28-326(9) (Supp. 1999).

<sup>202</sup> *Stenberg*, 530 U.S. at 930.

<sup>203</sup> *Id.* at 930, 931, 938.

<sup>204</sup> *Id.* at 530 U.S. at 931.

<sup>205</sup> *Id.* at 530 U.S. at 922.

[T]he word “liberty” in the Fourteenth Amendment includes a woman’s right to make this difficult and extremely personal decision—makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.<sup>206</sup>

However, the holding in *Stenberg* got a not-so-gleeful reconsideration in *Gonzales v. Carhart*, in which the constitutionality of the Partial Birth Abortion Ban Act of 2003 was addressed by the Court.<sup>207</sup> The Partial Birth Abortion Ban Act was challenged on the ground that the Act was overbroad and vague and imposed an undue burden on women seeking abortions, and hence, was invalid on its face.<sup>208</sup> Unlike the law struck down by the Supreme Court in *Stenberg*, the impugned statute in *Gonzales* did not proscribe the other prevailing methods of abortion medically accepted in the first trimester of pregnancy.<sup>209</sup> Intact D&E is a method in which a doctor extracts the fetus intact or largely intact with only a few passes, pulling out its entire body instead of ripping it apart.<sup>210</sup> Though the law applied to both pre-viability and post-viability pregnancies alike, and thus was contrary to the decision of *Roe*, the Court, falling back upon the rights of the unborn and the sanctity of life which the impugned Act tried to uphold, held that the law did not suffer from any constitutional infirmity.<sup>211</sup> The Court additionally explained that “by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”<sup>212</sup> The Court ultimately rejected the petitioners’ contention, holding that the law was not “void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.”<sup>213</sup>

From the observation of the Court, it is clear that it was attempting to impart moral instruction about the bond of love of the mother for the child

<sup>206</sup> *Id.* at 946 (Stevens J. concurring).

<sup>207</sup> *Gonzales v. Carhart*, 550 U.S. 124, 136 (2006).

<sup>208</sup> *Id.* at 144–45.

<sup>209</sup> Compare NEB REV. STAT. §§ 28–326(9), 328(1) with Partial Birth Abortion Act, 18 U.S.C. § 1531 (2014).

<sup>210</sup> Katia Desrouleaux, *Banning Partial-Birth Abortion at All Costs-Gonzales v. Carhart: Three Decades of Supreme Court Precedent “Down the Drain”*, 35 S.U. L. REV. 543, 548 (2008)

<sup>211</sup> *Gonzales*, 550 U.S. at 146, 158, 168. The Court observed, “Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” *Id.* at 158. The Court observed, “No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life.” *Id.*

<sup>212</sup> *Id.* at 147 (quoting *Casey*, 505 U.S. at 877).

<sup>213</sup> *Id.* at 147.



embedded in the respect for human life, which cannot be reconciled with the right to abortion.<sup>214</sup> It appears that the Supreme Court, quite contrary to its holding in *Lawrence v. Texas*, was giving an emphatic endorsement of a moral reading of the Constitution.<sup>215</sup> The dissenting view of Justice Ginsberg however, lamented that the decision was alarming. She observed that, on the one hand, the decision was contrary to *Casey* and *Stenberg*, in that those cases recognized the right to abortion not only as part of the right of a woman to privacy but also “on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>216</sup> Moreover, Justice Ginsburg opined that the Court neglected the widening spectrum of roles of women which once centered on “home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution.”<sup>217</sup> In the present state of gender equality, women enjoy “autonomy to determine her life’s course, and thus to enjoy equal citizenship stature,” which does not allow undue restrictions on abortion procedure.<sup>218</sup>

#### ***F. Right to Abortion Post-Roe—A Critique***

*Roe v. Wade* opened a new era in the jurisprudence of human liberty. Obviously, the rude shock from *Roe* paved the way for the religion-ridden America to prefer the rights of women over the interests of fetus.<sup>219</sup> Though it opened the pathway for revolt against religious and traditional thinking, it also spurred reaffirmation of the theological version of life.<sup>220</sup> This reaffirmation is evident from the different laws enacted for limiting the right of the minors to abortion, 24-hour waiting time, informed consent, spousal consent, restrictions on the place and methods of abortion.

The whirlwind of objection to *Roe* was so intense that even the Supreme Court began reconsidering the right to abortion, indicating a paradigm shift in the attitude of the judiciary. In *Roe*, other aspects relating to abortion, including restrictions on the right, were dealt with from the

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<sup>214</sup> *Id.* at 159. The Court observed, “Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision”. For an illuminating critique of the case, see, Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

<sup>215</sup> See *Lawrence*, 539 U.S. at 577–78 (reasoning that the view of the governing majority that a practice as immoral was not sufficient to uphold a law and that moral disapproval could not be recognized as a ground for legitimate governmental interest).

<sup>216</sup> *Gonzales*, 550 U.S. at 171–72 (Ginsberg J., dissenting).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 172.

<sup>219</sup> Cf. FREEDOM’S LAW, *supra* note 82 at 49. He observes: “The best historical evidence shows, moreover, that even anti-abortion laws, which were not prevalent in the United States before the middle of the nineteenth century, were adopted to protect the health of the mother and privileges of the medical profession, *not out of any recognition of a fetus’s rights.*” (emphasis added).

<sup>220</sup> See *supra* notes 71–75 and accompanying text.

perspective of the interest of the mother.<sup>221</sup> But subsequently in *Akron, Danforth, Thornburgh, Webster* and *Casey*, the Court viewed the right to abortion as an interest at least in some context as in conflict with that of the fetus.

Though originating as a feature of the right to privacy as protected by the Fourteenth Amendment, the right to abortion has since gained importance as a right to self-determination.<sup>222</sup> In the wake of the “increasing interest in the gender dimension of abortion”, the right to privacy, apart from anonymity, includes the freedom to do things without being interfered with by another.<sup>223</sup> Though regulation of abortion is more of an issue of morality than law, in the twentieth century scenario, apart from an issue of social justice, it has turned to be one of human rights and gender equality and above all, of “the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of [her] liberty.”<sup>224</sup> Abortion is not merely a matter of women’s right to life and health, but their “ability to realize their full potential” which is “intimately connected to ‘their ability to control their reproductive lives’” enabling them “to participate equally in the economic and social life of the Nation.”<sup>225</sup> In other words, “the capacity to become pregnant” shall not be “a lever to subordinate” women denying them the full and equal rights as citizens.<sup>226</sup> Though, in some

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<sup>221</sup> *Roe*, 410 U.S. at 163 (“With respect to the State’s important and legitimate interest in the health of the mother the “compelling” point, in the light of the present medical knowledge, is at approximately at the end of the first trimester. This is to because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”).

<sup>222</sup> See, e.g., *Roe*, 410 U.S. 113; *Carey v. Population Services Int’l.*, 431 U.S. 678, 685 (1977), *Casey*, 505 U.S. at 851–52 (“The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society”), *Stenberg*, 530 U.S. at 914; *Gonzales*, 550 U.S. at 172 (Ginsberg J., dissenting); See also, Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women’s Interests in Motherhood*, 17 J. L. & POL’Y 97, 100 (2008).

<sup>223</sup> Olsen, *supra* note 160 at 348.

<sup>224</sup> *Casey*, 505 U.S. at 869; see Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN’S RTS. L. REP. 77 (2008) (disusing how the right to abortion as a human right is important for the dignity of women). “Nature demands that women alone bear the physical burdens of pregnancy, but society, through the law, can either mitigate or exaggerate the cost of these burdens. When the state denies women access to abortion, both nature and the state impose upon women burdens of unwanted pregnancy that men do not bear.” Sylvia A. Law, *Rethinking Sex and the Constitution in FEMINIST JURISPRUDENCE* 352, 365 (Patricia Smith ed., 1993).

<sup>225</sup> *Gonzales*, 550 U.S. at 171 (Ginsberg, J., dissenting); *Casey*, 505 U.S. at 856; see Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action* 1 VA. J. SOC. POL’Y & L. 309, 318–21 (1994) (finding that statistics reveal that regulation of abortion would only help increase illicit abortions, risking serious injury or death).

<sup>226</sup> “When the state uses women’s capacity to become pregnant as a lever to subordinate women, assign them a second class status in society, or deny them full and equal enjoyment of their rights of citizenship, it violates the equal citizenship principle. It may not

instances, the American judiciary also stood by the moral point of the legislatures, in a majority of the cases, accepting the human right aspect favored the rights of human beings, the equality of gender, and women's right to self-determination.<sup>227</sup>

## V. THE INDIAN SCENARIO

### A. Evolution of Indian Abortion Law

Unlike the west, ancient India, which was not under the influence of Semitic religions, did not consider abortion as a serious offense. Abortion in ancient India was rated as a lesser evil than usurious practice, which was punishable by excommunication from the cast and denial of the right to libation by water.<sup>228</sup> This position continued until the introduction of the Indian Penal Code by the British in 1860.<sup>229</sup> The Indian Penal Code, in which permeates the Christian morality of the Common Law, brought severity to abortion law in India.<sup>230</sup>

The Penal Code comprehensively dealt with abortion and provided penalties for abortion in various forms. Nevertheless, unlike Britain, the Code only regulated abortion but did not prohibit it.<sup>231</sup> The Code imposed different penalties for causing miscarriage of a 'woman with child' and woman 'quick with a child', and treated the death of a quick unborn child as amounting to culpable homicide.<sup>232</sup> This position, rudimentary in all respects, punishing abortion of unhealthy or undesirable fetus and abortion on therapeutic grounds, continued until the enactment of a special law on the subject viz., Medical Termination of Pregnancy Act, 1971.<sup>233</sup> Such an inattentive response of the rulers was not because abortion was not practiced

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use pregnancy as a device to deny women equal citizenship or subordinate women precisely because only women can get pregnant." See, Balkin, *supra* note 72 at 322–23.

<sup>227</sup> See, e.g., *supra* notes 71, 76, 78, 92, 99, 101, 110, 119, 135, 137, 141, 206 and accompanying text.

<sup>228</sup> BAUDHAYANA DHARMASUTRA, 1.10.23; APASTHAMB DHARMASUTRA, 1.21.8; MANUSMRITHI V., *The Sacred Books of the East*, 25, 89, 184 (Max Muller ed., George Buhler trs., Motilal Banarsidas 1963) (1885).

<sup>229</sup> PEN. CODE §§ 315–316 (1860).

<sup>230</sup> CALLAHAN, *supra* note 64, at 150; see PEN. CODE § 312 (causing miscarriage without consent); § 313 (death caused by act done with intent to cause miscarriage); § 314 (act done with intent to prevent child being born alive or to cause it to be die after birth); § 315 (causing death of unborn child amounting to culpable homicide). Section 312 is the most important among them. It reads, "Whoever voluntarily causes a woman with child to miscarry shall, if miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both, and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

<sup>231</sup> PEN. CODE § 312

<sup>232</sup> *Id.* at § 316.

<sup>233</sup> Act 34 of 1971 ("MTP").

in India—for it was widely prevalent due to a variety of social and moral conditions specific to India—but because, unlike the west, it was not religiously tabooed.<sup>234</sup> The Act, which attempts to reconcile the issues inherent in abortion, is, as evident from its objectives, forward looking.<sup>235</sup> The Act provides that pregnancy can be terminated within 12 weeks<sup>236</sup> and in extreme cases not beyond 20 weeks.<sup>237</sup> Nevertheless, the Indian law of abortion is in its nascent stage as far as the right of the woman to abortion is concerned. Unlike the laws of abortion in the west, the MTP Act does not classify abortion on the basis of viability, but instead allows abortion only if the medical practitioners are of the opinion that “continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health” or “that there is a substantial risk that if the child were born, it would suffer from such physical mental abnormalities as to be seriously handicapped.”<sup>238</sup> Moreover, it is clear from the statute that no pregnancy beyond 20 weeks can be legally aborted except to save the life of the woman.<sup>239</sup> To some extent, the MTP Act registers advancement from the Indian Penal Code insofar as it allows abortion to avoid grave mental injury of the woman and substantial risk of the child.

A notable lacuna of the Act is that it does not permit abortion in a case where it is needed for the protection of the health of the pregnant woman or to avoid the disabilities of the child if the abortion is advanced beyond 20 weeks.<sup>240</sup> Denial of the right to abortion of a fetus with disability propensities detected after 20 weeks undoubtedly is a violation of a woman’s right to life, liberty and choice.<sup>241</sup> To that extent, the Act does not envisage

<sup>234</sup> See *supra* note 228 and accompanying text.

<sup>235</sup> See *Nand Kishore Sharma v. Union of India*, A.I.R. 166 (Raj.) 93 (2006). The objectives of the Act state that it “seeks to liberalize certain existing provisions relating to the termination of pregnancy...” as a health measure—to save the life or health of the mother, on humanitarian grounds—when pregnancy results from rape or intercourse with a lunatic woman; and on eugenic grounds—when there is the risk that the child, if born, would suffer from certain deformities or diseases. The Act hence, has been opined to be in consonance with the constitutional mandate under Article 21.

<sup>236</sup> The Medical Termination of Pregnancy Act, No. 34 of 1971 § 3(2)(a), 33 A.I.R. MANUAL.

<sup>237</sup> *Id.* at § 3(2)(b).

<sup>238</sup> *Id.* at § 3(2)(b)(i–ii).

<sup>239</sup> *Id.*

<sup>240</sup> See, e.g., *Nikhil D. Dattar v. Union of India*, (2008) 110 Bom. L. R. 3293. After 20 weeks, medical termination of pregnancy is allowed only if “termination of such pregnancy is immediately necessary to save the life of the pregnant woman.” MTP Act, *supra* note 233 § 5. It is also pointed out that the Act grants very wide discretion to the doctors as to procuring abortion. See *Sai Abhipsa Gochayat, Understanding the Right to Abortion Under Indian Constitution* at 3 (January 30, 2011) available at <http://manupatra.com/roundup/373/Articles/PRESENTATION.pdf>.

<sup>241</sup> MEDICAL TERMINATION OF PREGNANCY—A USER’S GUIDE TO THE LAW 18, 45 (Indira Jaising ed., 2004). See also *Siddhivinayak S. Hirve, Abortion Law, Policy and Services in India*, 12(24) REPROD. HEALTH MATTERS 114, 114 (2004). The provisions of the Act have been construed to deny abortion unless the husband consents to it.

abortion on socio-eugenic grounds.<sup>242</sup> The inability of the statute to provide protection of the rights of women in the feminist era was revealed with the decision of *Suchita Srivastava & Anr. v. Chandigarh Administration*<sup>243</sup> The underlying controversy in *Suchita Srivastava & Anr.* involved a mentally retarded woman who, while an inmate in a government run institute, became pregnant as a result of rape.<sup>244</sup> On detection of pregnancy, the Chandigarh Administration approached the High Court of Punjab seeking permission for termination of the pregnancy. The High Court granted permission despite the mother's willingness to deliver the child and contrary to the statute, as her pregnancy had progressed beyond 19 weeks.<sup>245</sup> The Supreme Court of India overturned the High Court.<sup>246</sup> Quoting *Roe* with approval, the Court observed that a woman's right to reproductive choice is a dimension of the rights to personal liberty, privacy and dignity under Article 21, and extending the logic further, reasoned that "reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children."<sup>247</sup> However, in the case of pregnant woman there is also a 'compelling state interest' in protecting the life of the prospective child."<sup>248</sup>

Despite the possibility that the mother did not fully understand the pregnancy's implications and her responsibilities as a mother, the Court did not accept these facts as sufficient justification for judicial intervention imposing abortion.<sup>249</sup> Giving a very narrow interpretation to § 3(4)(a) of the MTP, the Court held that the State must respect the autonomy of a mentally retarded person, as the MTP did not empower the State to make decisions on behalf of such a person in exercise of the *parens patriae* jurisdiction.<sup>250</sup>

It is submitted that while so holding, the Court did not consider the fact that the woman perhaps did not understand the potential for disgrace to herself and the child, as well as her duty as a mother as intended by the MTP Act.<sup>251</sup> It appears that instead of being guided by the considerations of

<sup>242</sup> MTP at § 3(2)(b)(ii). See also Lily Srivastava, LAW AND MEDICINE, 116 (2013).

<sup>243</sup> A.I.R. 2010 S.C. 235 (India).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 237.

<sup>246</sup> *Id.* at 248–49.

<sup>247</sup> *Id.* at 242. The court held, "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. it is important to [recognize] that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods....."

<sup>248</sup> *Id.*

<sup>249</sup> *Suchita Srivastava & Anr.*, A.I.R. 2010 S.C. at 245–46.

<sup>250</sup> A.I.R. 2010 S.C. at 244.

<sup>251</sup> MTP at § 3(2) (b) Explanation 1 provides that anguish caused by pregnancy by rape shall be presumed to constitute grave injury to the mental health of the woman.

‘best interest of the patient’ as is usual in the cases of mentally incompetent persons and minors,<sup>252</sup> the Court in *Suchitha Srivastava*, refused to exercise its inherent power.<sup>253</sup> Viewed against such a backdrop it cannot be accepted that a decision like *Suchitha Srivastava* in the post-*West Berkshire* and *Stenberg* era, is very regressive.<sup>254</sup>

### ***B. Right of the Living and the Right to Sex Selection***

An issue allied to the right of women to abortions that got legal attention in India is the right to select the sex of the fetus. This right became much debated, in part due to the Indian culture, which gives importance to male offspring to the extent of discriminating against female children from time immemorial.<sup>255</sup> Advancement of science and technology was used in a gender discriminatory style, causing a sharp decline in the number of female fetuses.<sup>256</sup> Small wonder, this became one of the burning issues in the era of feminist rights.<sup>257</sup> Hence, to prohibit such a trend of gender-based abortion of fetuses, Parliament enacted the Pre-Conception & Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994, which prohibits both sex-selection through artificial reproductive techniques and sex determination during pregnancy.<sup>258</sup> The Act, as is evident from the objectives, preamble, and provisions, addresses the issue raised by the human rights activists that determination of fetal sex and consequential abortion infringe the rights of female fetuses.<sup>259</sup> But, the law suffers from the defect

<sup>252</sup> See, e.g., *Re B*, [1981] 3 All E.R. (C.A.) 927 (appeal taken from Eng.). See also *F v. West Berkshire Health Authority*, [1989] 2 All E.R. (H.L.) 545, 548, 52, 62, 68.

<sup>253</sup> In *re B*, allowing the application of the local authority for permission to sterilizing a mentally incompetent minor girl, it was held that decision was to be taken in such cases “in the best interests of ...young woman and how best she can be given protection which is essential to her future well-being so that she may lead a full life as her intellectual capacity allows.” [1987] 2 All E.R. (H.L.) 206, 219 (Lord Oliver). Later, in *West Berkshire*, while dealing with the judicial power of allowing sterilization of a mentally disabled woman, held that even when the *parens patriae* jurisdiction is lacking, courts can interfere “in the best interests of the patient concerned”, for protecting the mentally incompetent persons as the “law must not convert incompetent into second class citizens for the purpose of health care.” [1989] 2 All E.R. (H.L.) 545, 571 (Lord Jauncey).

<sup>254</sup> *Stenberg*, 530 US 914 (2000); See also, *F v. West Berkshire Health Authority*, [1989] 2 All E.R. (H.L.) 545.

<sup>255</sup> See I PANDURANG VAMAN KANE, *HISTORY OF DHARMASTRAS* 623 (1993). See also RASHMI KAPOOR, *ADOPTION: BORN TO LIVE*, IN *SEX SELECTIVE ABORTION IN INDIA GENDER, SOCIETY AND NEW REPRODUCTIVE TECHNOLOGIES*, 232, 255–256 (Tulsi Patel ed., 2007).

<sup>256</sup> Fred Arnold et al., *Sex Selective Abortions in India*, 28(4) *POPULATION AND DEV. REV.* 759, 762–64, 770, 782 (2002); see also Robert D. Retherford and T. K. Roy *Factors Affecting Sex-Selective Abortion In India*, 17 *NAT’L FAMILY HEALTH SURVEY BULLETIN*, 1 (2003)

<sup>257</sup> P. ISWARA BHAT, *LAW AND SOCIAL TRANSFORMATION* 567 (1st ed. 2009).

<sup>258</sup> See Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, No. 57 of 1994, INDIA CODE § 3A (2003).

<sup>259</sup> *Id.*

that it deals with the problem without addressing the issues which instigate people to opt for it.<sup>260</sup> In such a context, by prohibiting the right of a woman to know the gender of the fetus she bears, the Act virtually denies her the right to decide whether to beget the child.<sup>261</sup> Thus, there is an apparent conflict between Medical Termination of Pregnancy Act and the Pre-Conception Act.<sup>262</sup> Classification of the abortee as married, unmarried, minor, and mentally ill,<sup>263</sup> to prohibit abortion on the basis of the fetal gender and ban of abortion after twentieth week of pregnancy except to save the life of the mother amount to denial of the right of the woman to self-determination. With this in mind, it may not be wrong to conclude that the trend of the Indian legal system fails to maintain an even balance between the rights of the woman and the unborn child and has a long way to go before it parallels the English or American law.<sup>264</sup>

## VI. LOOKING FORWARD—ABORTION IN THE POST HUMAN RIGHTS ERA

The history of abortion and its regulation is astounding. The socially and biologically necessitated practice that initially emerged as an individual issue in the ancient age<sup>265</sup> was later viewed as a moral and metaphysical issue by theologians and moralists who, with their belief in sanctity of life and the consequent recognition of the unborn as “persons,” have taken it beyond the right of the woman to health and even to her life.<sup>266</sup> Such pro-life advocates ignored the fact that fetal claims to life, not included in the concept of human life, have always remained merely “a statement of religious faith.”<sup>267</sup> Therefore, its protection has to be “for reasons relating to

<sup>260</sup> BHAT, *supra* note 257.

<sup>261</sup> It is pertinent to note that though such gender based rights have been much discussed in Europe and America, no law has been enacted to that effect so far. See EUR. PARL. ASS. REPORT., *Prenatal Sex Selection*, available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=13158&lang=en> (Dec. 16, 2011). For an analysis of the procreative, personal, and parental rights of the woman to selective abortion in the context of genetic and chromosomal conditions, see Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2 (2012).

<sup>262</sup> See PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, A USERS GUIDE TO THE LAW 64 (Indira Jaising ed., 2004) [hereinafter DIAGNOSTIC TECHNIQUES ACT]. But, such a conflict was ruled out and the Act was held constitutionally valid in *Vinod Soni v. Union of India*, (2005) 3408 Crim. L.J. (Bom. H.C) (13.6.2005); *Vijay Sharma v. Union of India*, (2008) 95 A.I.R. 29, 30 (2005) (Bom).

<sup>263</sup> DIAGNOSTIC TECHNIQUES ACT, *supra*, note 262, at 18.

<sup>264</sup> *Id.* at 45.

<sup>265</sup> HULL & HOFFER, *supra* note 94, at 13.

<sup>266</sup> *Supra* notes 30, 32, 34, 37 and accompanying text.

<sup>267</sup> “Historical analyses of the Universal Declaration of Human Rights 1948 (UDHR),<sup>85</sup> ICCPR and ICRC—the major international human rights treaties conferring the right to life—confirm that that right does not extend to fetuses. As the first pronouncement of the right to life, Article 3 of the UDHR specifically limits that right to those who have been

the well-being of existing human beings”.<sup>268</sup> There are views that prohibition of abortion has been for the protection of the interest of the mother.<sup>269</sup> Nevertheless:

[T]here are harms that are more certain to result from the banning of abortion than from unrestricted legalization of it. In particular one risks the harm of ignoring the clear interests of actual persons to live in accordance with their own liberty of conscience in the absence of comprehensive moral and religious oppression. In hedging one’s bets to protect the fetus, one is necessarily acting to oppress the physical and mental freedom of pregnant women, who unlike fetuses, are not in a state of moral ambiguity.<sup>270</sup>

The Anglo-American law on abortion, influenced by theologians in the beginning, has been unethical, as well as non-eugenic and non-social.<sup>271</sup> The law has, at times, even denied therapeutic abortions.<sup>272</sup> Prohibition of abortion assiduously advocated by the theologians in the Middle Ages on the ground of religious views of sanctity of life, was later substituted by “the less vulnerable doctrine of natural rights” in the Age of Reason that followed Renaissance.<sup>273</sup> Not surprisingly, the history of abortion law in the modern age is one of diminishing regulation. It was only with the emergence of the era of liberalism, engendered and necessitated by, the development of science and technology that there was a reexamination of mystified status

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‘born’. In fact, the term ‘born’ was intentionally used to exclude the foetus or any other antenatal application of human rights. This is confirmed by the fact that a proposed amendment to remove the term and protect the right to life from the moment of conception, was denied.” See H.R.L. REV. 262–63; Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 21 (1973); See also WILLIAMS, *supra* note 1, at 202.

<sup>268</sup> “[I]f we protect the fetus by law, it should be for reasons relating to the well-being of existing of human beings.” See WILLIAMS, *supra* note 1, at 208.

<sup>269</sup> Cf. the observations of the Court of Criminal Appeal in *R v. Tate*, that it “is because the unskillful attentions of ignorant people in cases of this kind often result in death that attempts to produce abortion are regarded by the law as very serious offences.” WILLIAMS, *supra* note 1, at 146–47, 152, 154.

<sup>270</sup> Lawrence Torcello, *A Precautionary Tale: Separating the Infant from the Fetus*, 15 RES PUBLICA 17, 27 (2009).

<sup>271</sup> WILLIAMS, *supra* note 1, at 160 where he observes, “So far there has been no indication in the American or English cases that abortion would be legally justified on the ethical ground that the mother was raped or the intercourse obtained by threat or fraud, or on the eugenic ground that the father or mother is feeble-minded or affected with a transmissible disease, or that the intercourse was incestuous; or on the economic ground that the parents cannot well support another child, or that the mother is unmarried and to have the child would result in her losing her employment or would interrupt an expensive course of training.”

<sup>272</sup> *Id.* at 151.

<sup>273</sup> *Id.* at 180.



rights so as to recognize abortion as an individual right.<sup>274</sup> The *Bourne's* case in England, followed by the legislative changes with the enactment of the Infant Act and the Abortion Act 1967, as well as *Roe* and *Casey*, succeeded by some state legislation in America stand testimony to this new judicial outlook.<sup>275</sup> This trend was given a further impetus with the arrival of the concept of the right of a person to self-determination with reference to body.<sup>276</sup> But it was the emergence of feminism that has explained why the right to abortion should continue with wider scope.<sup>277</sup>

Nevertheless, two questions were left unattended by the judiciaries and legislatures that allowed abortion. First, is not the restriction on the rights of pregnant woman in the post-viability stage, a violation of her human rights as many cases exist of “gross fetal defects that cannot be diagnosed prior to viability?”<sup>278</sup> Second, in spite of the detailed examination of the right to abortion it is doubtful whether there has been a meaningful judicial or legislative discussion on abortion vis-à-vis the plight of the child unwanted and undesired by its mother.<sup>279</sup> Is not the unborn entitled *not* to be born than to be born handicapped<sup>280</sup> or, in extreme cases, to be subjected to

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<sup>274</sup> Cf. Betty Wolf, *Abortion Law Reform At a Crossroads?*, 46 CHI-KENT L. REV. 102 (1969).

<sup>275</sup> Undoubtedly, the response of the Supreme Court in *Roe* and *Casey* has influenced the legislatures. Devins, *supra* note 82 at 1338–43.

<sup>276</sup> *Casey*, 505 U.S. at 852–53.

<sup>277</sup> The “abortion question was not merely a ‘women versus fetuses’ issue; it was also a feminist issue, an issue going to women’s position in society. . . .”; see Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977); see also *Morgentaler v. R.*, [1988] 1 S.C.R. 30, 172. (Can.) (Wilson J., concurring) (observing that, “[t]he right to reproduce . . . is properly perceived as an integral part of modern woman’s struggle to assert her dignity and worth as a human being.”; Gayle Binion, *Feminist Theory Confronts US Supreme Court Rhetoric: The Case of Abortion Rights*, 11 INT’L J. POL’Y & FAM. 63 (1997).

<sup>278</sup> RHODE, *supra* note, 80, at 312. The civil law system appears to be far advanced than the common law systems in this respect. Many of the civil law systems like that of Greece, Netherlands and Portugal allow abortions on the ground of fetal abnormality up to the 24<sup>th</sup> week of pregnancy. See, e.g., Shaun Pattinson, *INFLUENCING TRAITS BEFORE BIRTH*, (2002) (cited in Shaun D. Pattinson, *MEDICAL LAW AND ETHICS*, 213 (2006)).

<sup>279</sup> “Lack of parental love for the unwanted child is not merely a tragedy in the child’s early youth; it is one of the major predisposing factors to juvenile delinquency, and so can lead to a ruined career.” WILLIAMS, *supra* note 1, at 199.

<sup>280</sup> “Beyond danger to life and health, an open recognition of the defence on the grounds given in the Scandinavian laws or the Model Penal Code, for humanitarian or eugenic reasons, should raise no serious problem. Threatened with many other disasters, mankind has no interest in the multiplication of defective children who will be a burden to themselves and to others, nor is there moral justification to compel mothers to have children in the circumstances of *Bourne’s* case.” See W. FRIEDMANN, *LAW IN A CHANGING SOCIETY*, 267 (2nd ed. 1972); see also H.B. Munson, *Abortion in Modern Times: Thoughts and Comments*, *Renewal* 9 (Feb. 1967) (observing, “[s]hould we not allow fetuses their right to die if there is a strong likelihood of their being handicapped physically or mentally? Perhaps we are not big enough or wise enough to make that decision, but there seems to be solid grounds for allowing the unborn’s parents to decide this, since it is they who will be the most encumbered and troubled in caring for the child.” See also CALLAHAN, *supra* note 64, at 453 (quoting same).

euthanasia?<sup>281</sup> Whenever legislators advocate regulation of abortion, it would be better to remember that “laws against abortion do not save fetal life, but merely make abortions less safe and make women criminals.”<sup>282</sup> Indiscriminate attempts to saving fetal life only:

[O]bscures the active role mothers play in procreation and is yet another example of society’s tendency to devalue the work that women do. Prohibiting abortion denigrates women as moral decision makers, and it reinforces their role as sexual objects by undermining their ability to act as sexual agents. It further reduces the limited power that women are allowed to exercise over their bodies and their sexuality in our society.<sup>283</sup>

The observation that “ultimately, this is a question of values, of the balancing between the interests in the safety and vigor of the community, and the consideration of the individual as a person” is true of abortion also.<sup>284</sup> Considering the multiplicity of issues involved, it is better that procuring of abortions is left to the domain of private moral judgment which the state may not encourage, discourage or prohibit.<sup>285</sup>

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<sup>281</sup> It is pertinent to note that as a post-world war measure, Japan passed the Eugenic Abortion Law in 1948 giving liberty to mothers to resort to abortion on eugenic grounds. See M. Yokoyama, *Abortion Policy in Japan: Analysis from the Framework of Interest Groups*, 29 KOKUGAUI J. OF L. & POLITICS 1 (1991). It is heartening to note that of late more people have been considering abortion on fetal abnormality as eugenic. See JACKSON, *supra* note 54, at 655.

<sup>282</sup> Olsen, *supra* note 160, at 132.

<sup>283</sup> *Id.* at 120–21.

<sup>284</sup> See FREIDMANN, *supra* note 280, at 213.

<sup>285</sup> See CHEMERINSKY, *supra* note 179, at 141–43.