

FROM *ROE V. WADE* TO FETAL PAIN LEGISLATION: A REFLECTION OF AMERICAN JURISPRUDENCE ON THE INDIAN MILIEU OF LIBERALISED ABORTION POLICIES

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*Abortion laws originated in the United Kingdom as early as 1803, but the credit for revolutionizing abortion laws and recognizing the inherent, perhaps inextricable right and liberty of women over their bodies can only be given to the United States - more specifically to the American judiciary. From as early as **Roe v. Wade**, the American judiciary has been reiterating the inherent right of a woman as a constitutional person, to terminate her pregnancy in the earlier stages and thereafter giving the State a role to play, hence making abortion legal for the first time in the United States in 1973. Even though senators and other policy-makers in several, if not all, states of the United States have tried to whittle down the basic premise of **Roe v. Wade**, it has been emphatically upheld in subsequent cases. After more than thirty years of the pro-abortion movement in the West taking firm root, anti-abortion groups have again taken a radical stand by trying to control abortions through the introduction of the Unborn Child Pain Awareness Bill, 2005 (commonly known as Fetal Pain Legislation) and as many as twenty-three states in the USA have passed it to be an Act, which would require that abortionists disclose to women the reality that killing an unborn baby by abortion causes pain to the child. It would also require that women who were pregnant for more than twenty weeks be given the choice of adopting anaesthesia for their fetuses. Interestingly this move by the legislature was said to find its basis in the judgment of **Gonzales v. Carhart** where the Supreme Court held that the federal legislation banning partial-birth*

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*abortion was constitutional on its face. The issue of fetal pain arose amidst the partial-birth abortion debate. Supporters of the federal legislation argued that partial-birth abortion was excruciatingly painful for the fetus and that banning this abortion procedure would further the state's legitimate interest in protecting the unborn child. Opponents of the federal ban argued that there was no conclusive scientific evidence to support the hypothesis that a fetus is even capable of feeling pain. As a result of this partial-birth abortion controversy, legislations aimed at acknowledging and assuaging fetal pain during abortion came into being. In India, the debate on abortion laws as embodied in the Medical Termination of Pregnancy Act, 1971 has been swirling since the Bombay High Court's decision in **Dr. Nikhil Dattar & Ors. v. Union of India**, where the Court by a strict interpretation of the provisions in the statute, refused to give a lady pregnant with a malformed fetus the right to abort since she was already in her twenty-fourth week of pregnancy. Since then there have been urgent calls to amend the statute as long-standing criticisms of the policy have been brought to the forefront again. It has become critical at this juncture to look at the development of abortion law and policies in the West, particularly in the United States, to gauge where India stands at this moment and whether, if at all, India should be inspired by the western counterpoint or should take caution from the developments therein to further its own interests in striking the perfect balance between liberty, autonomy and freedom of the individual on the one hand and the State's right to interfere, on the other.*

I. INTRODUCTION

The issue of abortion presents itself to the modern sensibility and understanding as a perplexing cocktail of moral, spiritual and legal questions. Indeed, the problem of regulating abortion is inherently an exercise in seeking out the equilibrium between an ever-increasing degree of medical empiricism that time and technology continually bring into the fluid domains of moral, religious and legal normativeness. Some of the several facets of the question, by their very nature, would fail to turn up with any one answer under the scrutiny of any court – normative questions of when life truly begins, whose life is more valuable and the relative “sanctity” of human life, potential and existing, are, as the courts themselves have recognized¹ - complex considerations of such a personal nature

¹ Justice Blackmun's opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

that courts had better leave them off their consideration list and if absolutely required to deal with such questions, then exercise the highest possible degree of sensitivity in dealing with them. The application of lenses as varied as the feminist, the medical, the bioethical and moral, the religious² and the legal (and more specifically constitutional) yield many resultant views to the issue. Any lasting resolution, legal or otherwise, then must come from a nuanced, holistic view of the multiple facets of the problem. Indeed, the founding notions of the larger abortion debate - personhood, bodily integrity and autonomy, and the relative significance of rights (individual, fetal and of the putative father) and their holders - are issues of interdisciplinary concern.

On the central issue of personhood, for instance, which has found resonance in the Courts specifically in context of the fetal status, it has been remarked that the law and society ignores the personhood of the woman³, who in that regard at least should be granted full and unquestioned constitutional standing at par with other women and men. Conversely, when the question of fetal personhood is detached from a moral or spiritual context and is viewed under the medical and bioethical lens in measurable and empirical terms, it is defeated.⁴ While the debate rages on with passionate voices and legitimate concerns on either side of the divide and the groundswell of reason and rhetoric shows no sign of ebbing, it has been recognized that the entire compass of the debate boils down to only the lesser of two difficult tragedies.⁵ In this article, we shall seek to address the extensive analysis and documentation of the evolution of the abortion jurisprudence as has evolved in the United States of America and then compare where India with its fledgling abortion laws stands in perspective. Above all, however, even as we take the reader through the rhetoric as it deepens into more specific concerns, such as those dealt with in the latter part of this article, the exercise brings home the sobering realization that the law, as a tool, can take us only so far in settling the fundamentals of and the issues surrounding the abortion debate⁶.

² See for e.g., (Encyclical letter of) John Paul II, *Evangelium Vitae* (The Gospel of Life), March 25, 1995 as cited in JANET DOLGIN & LOIS SHEPHERD, *BIOETHICS & THE LAW* 117-18 (2009).

³ Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 379-380 (1992) (“Restrictions on abortion reflect the kind of bias that is at the root of the most invidious forms of stereotyping: a failure to consider...that women are persons, too”).

⁴ Mary Ann Warren, *On the Moral and Legal Status of Abortion*, 57 *THE MONIST* 43 (1973).

⁵ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

⁶ Charity Scott, *Why Law Pervades Medicine: An Essay on Ethics in Health Care*, 14 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 245 (2000) (“The law sets the legal minimums...it does not address the ethical maximums”).

II. ABORTION: THE PAST AND THE PRESENT

A. THE PRE-ROE LANDSCAPE

Attitudes towards abortion in the ancient world were, on the whole, accepting of abortion, with few qualms about its practice. Ancient religion placed no bar on abortion and fetal rights were largely unrecognized.⁷ Interestingly, however, one of the basic requirements of the Hippocratic Oath is to refrain from the practice of abortion in any form.⁸ Early common law, influenced as it was by the philosophical and theological debates on when the fetus was to be considered “alive”, recognized abortion as a crime only after “quickening”, that is the point in time at which the fetus becomes capable of discernable and independent movement *in utero*.⁹ This was usually considered to occur between the time frame of 16 and 18 weeks into pregnancy, although no entirely empirical basis for this was offered. When England adopted its first legislation in 1803 –Lord Ellenborough’s Act¹⁰ – as it was known, it retained the notion of “quickening”, using it to mark the distinction between a simple felony, before the incidence of quickening and a capital offence once the fetus is quick.

Compare this with the scenario eighteen years after the passage of Ellenborough’s Act. Across the Atlantic in 1821, the US state of Connecticut became the first to adopt an abortion legislation which read much like Ellenborough’s Act. Meanwhile, the state of New York in 1828 passed laws recognizing abortion as an offence (which were to become the prototypical model for early legislation across the United States), albeit of different degrees, both before and after quickening. Further, it recognized and included “therapeutic abortion” as valid and excusable, thereby guaranteeing some safety measures to expectant mothers in cases where their physicians had reason to believe the mother’s own life was at risk.¹¹ Within the span of a hundred years, however, by the middle of the 20th century, the majority of US states had enacted a complete ban on abortion, save for cases in which the mother’s life was at risk. The notion of quickening, a pervasive concept forming the fundamental basis for abortion laws in the not very distant past, came to vanish entirely from the rulebook.

In the 1960’s and 70’s, many US states were beginning to adopt some version or variation of the American Law Institute’s Model Penal Code,¹²

⁷ BBC, *Religion and Ethics—Ethical Issues*, available at http://www.bbc.co.uk/ethics/abortion/legal/history_1.shtml (Last visited on August 21, 2009).

⁸ Britannica Online Encyclopedia, *Hippocratic Oath*, available at <http://www.britannica.com/EBchecked/topic/266652/Hippocratic-oath> (“...I will not give to a woman a pessary to produce abortion...”) (Last visited on August 21, 2009).

⁹ William Blackstone, *Commentaries on the Laws Of England*, Originally published in 1765.

¹⁰ See Malicious Shooting or Stabbing Act 1803 (43 GEO.3 c.58).

¹¹ N.Y. REV. STAT., pt. 4, c. 1, Tit. 2, 1828.

¹² Model Penal Code, 1962.

(*hereinafter* ALI Model) in which the abortion laws were decisively less stringent than before. In a very broad sense and in only very small measure, women's right to abortion began to reclaim some of its early efficacy. The laws, however, despite their new form, allowed far less opportunity to procure a medical termination of pregnancy than in the past. It was only in 1967 that Colorado became the first state to legalize abortion.¹³ This movement towards the ALI Model and more liberalized laws in general was however, a growing but not universal trend of the time. The state of Texas, which enacted its first abortion legislation in 1840,¹⁴ was among the majority which made no movement toward liberalizing their abortion laws. Laws banning abortion, except in the case of tangible risks to the mother, remained in place in the majority of US States. Thus before even the rise of an opportunity for a stand-off between the legislature and the judiciary as we shall see in the forthcoming part, there were slow and decisive vacillations in abortion laws which sometimes favored the pro-choice and sometimes favored the pro-life with varying degrees over time.

B. ROE V. WADE: THE CONTEXT, CRITICISMS, CONCLUSIONS AND CONSEQUENT DECISIONS

Against the backcloth elucidated above, it might be pertinent to look into the landmark judgment and decision of *Roe v. Wade*¹⁵ (*hereinafter* *Roe*). Herein, an unmarried, pregnant woman, under the pseudonym of Jane Roe, instituted a federal action "on behalf of herself and all other women" in March 1970 against the District Attorney of Dallas County, Texas, where she resided, challenging the very constitutionality of the Texas Criminal Abortion Laws. She stated her intent to procure a 'legal' abortion "performed by a competent, licensed physician, under safe, clinical conditions"¹⁶ and that she would not be able to travel to a jurisdiction which would allow her to obtain an abortion of the aforementioned nature. The case came in federal appeal to the Supreme Court of the United States in December 1971, and on the January 22, 1973, the Court's historic seven-two judgment was enunciated by Justice Blackmun. This decision has since then taken the shape of a veritable cornerstone in any commentary on the protracted history of abortion debates in the United States.

Justice Blackmun gave on behalf of the majority the Court's opinion.¹⁷ The Court recognized, following the decision in *Griswold v. Connecticut*,¹⁸ that a general right to privacy exists, although nowhere explicitly stated, in the US Constitution, and that it is protected by the Fourteenth Amendment's Due Process

¹³ See COLO. REV. STAT. ANN 1967.

¹⁴ Act of January 20, 1840.

¹⁵ 410 U.S. 113 (1973).

¹⁶ *Supra* note 1.

¹⁷ Justice Rehnquist and Justice White respectfully, but very briefly, dissented.

¹⁸ 381 U.S. 479 (1965).

Clause. It read the said right as a “fundamental” one, being “broad enough” to cover a woman’s right to choose whether or not to abort and only subject to government regulation in the face of some “compelling” interest of the state (both the life of the mother and the “potential life” of the fetus were recognized as “legitimate” interests). The Court held that state interference in pregnancy is justifiable in the second trimester only to protect maternal health, since at this point, the risks of abortion are greater than those associated with childbirth itself. However, it is only once fetal viability is reached that the state is granted a “compelling” interest. At this stage, the complete prohibition of abortion, other than in cases of risk to the expectant mother’s health or life, is permissible. The dissenting opinion, given by Justice Rehnquist, however lays down certain criticisms of the judgment, firstly, the Court went too far in formulating and applying constitutional rules in terms which were significantly broader than the precise facts of the case warranted. Secondly, the application of the right to privacy in this case was seen as difficult to justify and thirdly, he conceded the applicability of the Fourteenth Amendment’s Due Process clause to legislations such as the one at hand but goes on to find troubling the Court’s “sweeping invalidation” of restrictions in the first trimester. Further, he stated that the Court had perhaps taken its task too far, leaving the boundaries of judicial judgment and entering legislative turf.

The resolution of this and other cases by no means signalled the end of the pro-choice journey. As recognized by the courts, safe abortions remain a function of such considerations as race and income. The United States has seen violent attacks against abortion clinics and stigma remains a very real challenge. In spite of it being touted as a landmark judgment, *Roe* continues to attract criticism from all quarters. Drawing their main premises from the Rehnquist dissent, many, both proponents and opponents of abortion alike, have questioned the sound basis of the judgment and the consequences of its overly broad and vague contentions.¹⁹ The construction of the doctor-patient relationship and the rights and roles of the two parties (the woman seeking abortion and the medical practitioner) as depicted by the Court was also criticized. There have also been several attempts to overturn the *Roe* decision. In fact in the decade leading up to 1992, the United States approached the Court as *amicus curiae* in five separate cases, to overrule *Roe*, but the judgment was resoundingly upheld in what would be touted as another landmark: the *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁰ (*hereinafter Casey*). The Court’s decision was given, in this case, by a triad of judges. This case is one among a very small group to hold that distinction. Justices O’Connor, Kennedy and Souter, in their joint opinion, had the following to say: “After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity and the rule of

¹⁹ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) and Ruth Bader Ginsburg, *Some Thoughts On Autonomy And Equality In Relation To Roe v Wade*, 63 N.C.L. REV. 375 (1985).

²⁰ 505 U.S. 833 (1992).

stare decisis, we are led to conclude this: the essential holding of *Roe* should be retained and once again reaffirmed.²¹ *Casey*, as is evident from the above, upheld the fundamental grounds of the majority decision in *Roe*. It has even been said that the (joint) opinion has definitively and decidedly put aside all doubts about the “basic constitutional question of abortion”.²² After *Casey*, the constitutional basis of the woman’s (qualified) right to abort was no longer negotiable, and no likelihood remained of the Court reconsidering or overturning *Roe* while, for example, in another, earlier case, the consideration of *Roe*’s constitutional merits were only left off for another day.²³ It must be noted, however, that the judges in *Casey* made clear that they were by no means offering an unqualified affirmation of *Roe*. The Court denounced the prescriptive medical trimester system laid down in *Roe* and, in its place, enunciated the test of “undue burden”. Under this test, the state may justifiably place regulations on the procurement of abortion pre-viability as well, in furtherance of its interest in the life (or potential life) of the foetus, provided that the regulations imposed lay down no undue burden on the woman’s right to procure the abortion, if she so chooses. This right exists even in spite of the fact that the state’s interests were deemed in *Roe* to become compelling only in the third, last trimester of pregnancy, when the court could prohibit abortion, other than when the woman’s life was in danger. The Court’s decision in *Casey* came in the context of Pennsylvania’s state laws which required parental or spousal notification if a woman desired to procure an abortion. The provisions regarding the former were upheld on the grounds that they did not impose an undue burden on the pregnant woman and her rights, while the latter was declared unconstitutional by the Court.

The broad constitutional questions surrounding the abortion having been addressed in *Roe* and settled in *Casey*, more specific issues began to appear before the courts. In *Stenberg v. Carhart*²⁴ (*hereinafter Carhart I*), at issue was a Nebraska state statute²⁵ criminalizing the performance of partial-birth abortions, a particular form of abortion in which the living fetus is delivered partially into the vagina, aborted and then delivery is completed. The statute afforded no exception for cases in which the woman’s life is at risk. Dr. Leroy Carhart, a medical doctor in the state of Nebraska who performed abortions, brought this suit contending that the provisions of the statute violate the US Federal Constitution. The case came in appeal before the Supreme Court. The Court, in its opinion delivered by Justice Breyer on June 28, 2000, found that the statutes were unconstitutional firstly, because the requisite exception in respect of grave risks to maternal life was entirely absent and secondly, because, in its complete restriction of access to a particular method of abortion, the statute was seen to place an undue burden on

²¹ *Id.*

²² David J. Garrow, *Abortion Before and After Roe v. Wade: A Historical Perspective*, 62 ALB. L. REV. 834 (1998-1999).

²³ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

²⁴ 530 U.S. 914 (2000).

²⁵ Neb. Rev. Stat. Ann. (Supp. 1999).

the woman's right to choose abortion itself. The breadth of the judgment spans a consideration of the various abortion methods available, partial birth abortion being only one among them, and the validity of the ban on partial birth abortion under the statute, referring, as the District Court before it had, to medical definition and policy of the American Medical Association. The judgment also contained a further restatement of the Court's as affirmation of the principles in *Roe* and *Casey*. The decision in *Carhart I* derives much of its value from the fact that the substance of the decision invalidated, for all intents and purposes, similar bans which were at the time in force in the majority of US states.

But, subsequently, on the November 5, 2003 the United States Congress passed the Partial Birth Abortion Ban Act²⁶(*hereinafter* Partial Birth Act) criminalizing the performance of partial birth abortions. In spite of the decision in *Carhart I*, this piece of legislation contained, as did the Nebraska statute which was the subject of the dispute, no exception for the health of the woman. It has also been noted that the language of the Partial Birth Act was very similar to the Nebraska statute.²⁷The validity of the Partial Birth Act came up for question in yet another case brought to the courts by Dr. Carhart (and others) challenging its constitutional validity and seeking a permanent injunction against its enforcement, this decision we now call *Carhart II*.²⁸ In this instance, *Carhart II* on appeal from the Eighth Circuit Court and another case, also involving US Attorney General Gonzales and the question of the validity of the Partial Birth Act (such cases were referred to as "facial" attacks or challenges to the statute),²⁹ with specific reference to the requirement of an exception for cases involving maternal health, *Gonzales v. Planned Parenthood Federation Of America, Inc.*,³⁰ on appeal from the Ninth Circuit, were consolidated and heard by the Court. The case was closely fought, and the opinion deeply divided. With a majority of five against four,³¹ the judgement went in favour of Attorney General Gonzales – the Act was upheld.

As in *Carhart I*, Justice Kennedy in his statement of the Court's opinion for the majority began with an exposition on the various methods of abortion. The plurality opinion in *Casey* in relation to state interest was resurrected, but Justice Kennedy made a clear distinction: the Act merely regulated one method of abortion. It placed restrictions on the procurement of abortion itself and, therefore: "The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."³²The specific statement of the validity of the Act was

²⁶ 18 U.S.C.A. § 1531.

²⁷ Cynthia D. Lockett, *The Beginning Of The End: The Diminished Abortion Right Following Carhart And Planned Parenthood*, 11 J. GENDER RACE & JUST. 337 (2008).

²⁸ Alberto R. Gonzales, Attorney General v. Carhart et al, 550 U.S. 124 (2007).

²⁹ Fallon, *Making Sense of Overbreadth*, 100 YALE L. J. 853 (1991).

³⁰ 550 U.S. (2007, April 18), available at <http://www.supremecourtus.gov/opinions/06pdf/05-380.pdf>. (Last visited on March 7, 2010).

³¹ Chief Justice Roberts and Justices Kennedy, Alito, Scalia and Thomas forming the majority.

³² See Justice Kennedy's Opinion in Alberto R. Gonzales, Attorney General v. Carhart et al, 550 U.S. 124 (2007) (Emphasis supplied).

justified by Justice Kennedy. He held that the Act was “not void for vagueness, does not impose an undue burden from any over breadth and is not invalid on its face.”³³ Justice Thomas and Justice Scalia concurred and the former in his concurrence states, crucially, that: “I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, has *no basis* in the Constitution.”³⁴ Justice Ginsburg with whom Justice Stevens, Justice Souter, and Justice Breyer joined, in an emphatic dissent was in her words “alarmed”³⁵ by the Court’s decision. She further recognised the weight of the precedent which, in upholding the Act, the Court was ignoring and could not find any fathomable justification for the same. Thirdly, she pointed out the Court’s complete and unjustifiable terms, which showed no regard for or recognition, express or implied, of the hitherto firmly entrenched notion of viability and the distinction and consequences of pre and post-viability abortion decisions. Lastly, she expressed complete disagreement with what amounted to an absolute sanction of federal intervention and legislation contrary to a specialist body’s, the American College of Obstetricians and Gynaecologists (ACOG), professional view that such a procedure was, in specific cases, required and necessary.

Notwithstanding Justice Ginsburg’s specific premises of dissent, several others exist. One strong objection to *Carhart II* is this: thirty four years after Justice Blackmun’s decision in *Roe*, Justice Kennedy’s enunciation of the majority opinion in *Carhart II* marked a return of the Court to its initial stance on the relationship of the woman vis-à-vis medical practitioners. The construction of the woman slid from casting her as the primary stakeholder and decision maker regarding termination of pregnancy, as explicitly established in *Casey* among several other decisions of the Court, to one in which the she acted as her doctor chose. It seems that *Carhart II* is, by its statements with respect to the woman’s status and their implications at least, a return to Myra Bradwell³⁶-esque rhetoric and reasoning,³⁷ where the woman’s status and function in society and societal interaction is reduced to a narrow definition, accounting for only her ability to procreate and her role in maternity and child rearing. Another (related) criticism also stems from Justice Kennedy’s statement as regards the consequences for the prospective mother upon the actual performance of a medical abortion: “Severe depression and loss of esteem can follow.”³⁸ No empirical foundation is offered for such an inference; indeed, doubts surrounding the very question of existence of a scientific basis are admitted: the absence of “reliable data to measure the

³³ See Justice Thomas’ Concurrence in *Alberto R. Gonzales, Attorney General v. Carhart et al.*, 550 U.S. 124 (2007).

³⁴ *Id.*

³⁵ See Justice Ginsburg’s Dissent in *Alberto R. Gonzales, Attorney General v. Carhart et al.*, 550 U.S. 124 (2007).

³⁶ *Bradwell v. State*, 83 U.S. 130, 141 (1873).

³⁷ Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42(1) SUFFOLK UNIVERSITY LAW REVIEW 41(2008).

³⁸ See Justice Kennedy’s opinion in *Alberto R. Gonzales, Attorney General v. Carhart et al.*, 550 U.S. 124 (2007).

phenomenon” is explicitly conceded.

Roe, since its passage three and a half decades ago, has been a touchstone in the evolution of the body of laws that governed medical termination of pregnancy. Its full scope was whittled down early in its existence, most visibly and explicitly in *Casey*. But, despite that, its basic premises, its spirit unambiguously prevailed in all of the US Supreme Court’s deliberations and pronouncements on the subject. It is a foreseeable consequence, however, that, after *Carhart II*, movements, especially pro-life advocacy, and their founding impetus will grow in favor of overthrowing *Roe* or circumventing it, most likely through legislation, as is already beginning to emerge in several US states.³⁹ The question of whether the vast body of abortion jurisprudence in the United States Courts system will finally at all, let alone conclusively, amount to “progress” in the field of gender rights and, more particularly, for the cause of female reproductive autonomy has, now, especially after *Carhart II* and *Casey* taken on a significantly diametric range of possible answers as compared to those that were presumed likely prior to the resolution of these cases. The precise answer is, at this juncture at least, only a product of time.

III. FETAL PAIN LEGISLATION – CONTRACTION OF AUTONOMY FOR PREGNANT WOMEN

“The essence of civilization is this: The strong have a duty to protect the weak. We know that in a culture that does not protect the most dependent, the handicapped, the elderly, the unloved, or simply inconvenient become increasingly vulnerable.”

—George W. Bush⁴⁰

A. A SHORT ANALYSIS OF THE PROVISIONS OF THE UNBORN CHILD PAIN AWARENESS ACT OF 2005 AND THE NEED FOR SUCH A LEGISLATION

Though the then Governor Bush who would later become the President of the United States of America was not talking of abortion at all, he was perhaps

³⁹ The New York Times, *South Dakota Governor Signs Abortion Ban*, available at www.nytimes.com/2006/03/06/politics/06cnd-abort.html?ex=1299301200&en=6bfae1957bc1dc1a&ei=5088 (Last visited on August 27, 2009) and MSNBC, *Louisiana Senate Approves Abortion Ban*, available at <http://www.msnbc.msn.com/id/13154788> (Last visited on August 27, 2009) (for specific instances of the passage of legislation contrary to the spirit of *Roe* & *Casey*).

⁴⁰ The Los Angeles Times, *The U.S. Supreme Court dismisses a claim by Florida Gov. Bush, clearing the way for the removal of Terri Schiavo’s feeding tube*, January 25, 2005, available at http://www.newsday.com/news/nationworld/world/la-031805schiavo-supreme_lat,0,3853253.story?coll=ny-nationworld-world-utility. (Last visited on August 14, 2009).

echoing the sentiments of another President of a by-gone era: Ronald Reagan. The latter in an address had famously said that: “*Medical science doctors confirm that when the lives of the unborn are snuffed out, they often feel pain, pain that is long and agonizing.*”⁴¹ With such lofty intentions in mind, to protect the vulnerable perhaps, the Fetal Pain Legislation was introduced in the Senate.

The Unborn Child Pain Awareness Act of 2005 (*hereinafter* the Act) was introduced by Senator Sam Brownback of Kansas in the US Senate on January 24, 2005, being Senate Bill no. 51.⁴² This Act aims to punish physicians heavily should they fail to advise women of the potential for fetal pain after 20 weeks’ gestation. This is done by amending by adding a new chapter titled “Title XXIX – Unborn Child Pain Awareness” to the Public Health Service Act, first enacted in 1946. There has been a considerable furor over this particular provision in the Act as the medical fraternity is continuously making itself heard that at this stage of gestation, the fetus does not develop the necessary biological mechanism to feel pain as such. Case in point would be a wing of physicians, specialized in embryology and neuro-anatomy, who assert that pain fibers do not start penetrating the cortex before the fetus is 26 weeks old and the sensation of pain would not begin before the 29th week.⁴³ Nevertheless the Congress ignoring well-proven ideas on the same issue, state in the Findings which are a part of the Act that at 20 weeks after fertilization, fetuses have the capability to feel pain and to make the ambit even wider – since the concept of what the fetuses might be ‘feeling’ might not be ‘pain’ at all – the Congress in its Findings mentioned that such fetuses might show such stimuli as may be interpreted to show feelings of pain if observed in infants or adults.⁴⁴

The requirement of informed consent as laid down in Section 2902 of the Act provides for some very stringent and conformist ideas about intimating the pregnant woman of the consequences of her action. The provision states the abortion-provider or an agent must provide to the pregnant lady, information that after however many weeks her fetus is into gestation (provided it is more than 20

⁴¹ *American Rhetoric*, Ronald Reagan: Address to the National Religious Broadcasters, January 30, 1984, available at <http://www.americanrhetoric.com/speeches/ronaldreaganrbroadcasters.htm>. (Last visited on August 12, 2009).

⁴² *The Library of Congress*, Unborn Child Pain Awareness Act of 2005 (Introduced in Senate), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:S.51>: (Last visited on August 14, 2009).

⁴³ *Medscape Today*, Politics, Power, and Procreation: Example 6 - Fetal Pain and Protecting the Vulnerable, June 15, 2005, available at <http://www.medscape.com/viewarticle/505887> (Last visited on August 14, 2009). *See also Daily News Central*, Analysis Fuels Debate over Fetal Pain, available at <http://health.dailynewscentral.com/content/view/0001552/40/> (Last visited on August 17, 2009). *But see, National Right to Life*, Gullible Treatment of Trumped Up “Study” On Fetal Pain Issue Should Embarrass J.A.M.A. And Some Journalists, available at http://www.nrlc.org/abortion/fetal_pain/NRLC rebuttal JAMA.html (Last visited on August 18, 2009).

⁴⁴ *Supra* note 3.

weeks), such fetus has the necessary physical structures present to feel pain and that such fetus shall feel pain irrespective of whether the pregnant lady has been given pain-averting drugs or general anesthesia. The pregnant lady is to be then given a brochure to be designed by the Department of Health and Human Services and also made to necessarily sign a decision form whereby her decision as to whether or not pain-alleviating drugs shall be administered to the fetus directly are recorded for official purposes. This step-by-step method is not only to be compulsorily followed but the provision also mentions what exactly the abortion-provider or the agent must say in such situations. The only exception provided to this is in case of Medical Emergencies and such situations which would fall under this exception have also been defined in the Act. As such Medical Emergencies are to mean such situations in the reasonable medical opinion of an abortion-provider of imposing a "serious risk of causing grave and irreversible physical health damage entailing substantial impairment of a major bodily function" if abortion is delayed.⁴⁵ Penalties for not substantially following the mandates of these provisions have also been laid down in the Act itself and range from monetary fines to cancellation of licenses.⁴⁶ The Act also grants a private right of action to the woman on whom an abortion is performed in violation of the provisions of this Act or her legal guardians in case of a minor or unemancipated woman, to commence a civil action against such abortion-provider who has acted recklessly or knowingly, for actual and punitive damages.⁴⁷

If we were to adopt a simple assumption that given a choice between a procedure which would result in inflicting pain upon a fetus and another maybe more expensive procedure which might alleviate the pain a fetus may feel, most women would prefer the latter procedure. If that were to be true, then physicians would regularly administer pain relieving medicines to fetuses as a part of late term abortion procedures. However there is at present no such indication that it happens.⁴⁸ Doctors however have been found to routinely provide fetal pain relief drugs quite routinely while performing in-utero surgeries.⁴⁹ And here lies precisely the need for a fetal legislation.

To explain more elaborately, we can pinpoint the reasons for physicians not administering fetal relief medicines due to broadly three reasons. The first and very pertinent reason would be that physicians do not look at fetuses as their patients and hence do not bother themselves with the problem of alleviating their pain. Secondly, physicians and patients would not be willing to venture into pain-relieving methods which would involve higher costs as well as

⁴⁵ *Id.*, § 2903(b) (1).

⁴⁶ *Id.*, § 2904.

⁴⁷ *Id.*, § 2902(g).

⁴⁸ *Note: The Science, Law, and Politics of Fetal Pain Legislation*, 115(7) *HARVARD LAW REVIEW* 2010 (2002).

⁴⁹ Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 *BRIT. J. OBSTETRICS & GYNAECOLOGY* 881 (1999).

some health risks associated with longer periods of sedation.⁵⁰ Also because discussing fetal pain before an abortion might be uncomfortable, even for a physician accustomed to having conversations about sensitive matters with patients, as such abortion has as its purpose the destruction of the fetus, and physicians naturally prefer to discuss matters that patients find reassuring, the default arrangement seems to be that physicians provide no information on fetal pain or fetal pain relief.

Thirdly and perhaps a disconnected reason from the other two, is the fact that most women did not have enough awareness to realize that there is a possibility, albeit a minor one, that the fetus she is aborting might feel pain during the procedure, much less ask for means to alleviate that pain. However if perhaps women could be provided with the required information that their fetuses may and in all probability do suffer fetal pain while undergoing abortion⁵¹ then they would in most circumstances be persuaded to administer drugs to the fetus. This is assuming that such women would not be indifferent as to whether their fetuses feel pain or not. This would in fact be in line with the testimony of most women who opted for late-term abortions saying that they had to opt for a tragic end to much-wanted pregnancies due to other considerations.⁵² Even with such factors for women to want administration of pain-relieving drugs to the fetus, it has been suggested that they might not be in a position to actively seek out information about the issue of fetal pain, keeping in mind that they have innumerable such considerations clamoring for attention in their minds.⁵³ Thus, legislation requiring the abortion-providers to necessarily supply pregnant women with such information and seek their informed consent to administer pain-alleviating drugs might right the current skew in the society.

C. HOW THE LEGISLATION COULD PASS CONSTITUTIONAL MUSTER

The Act is an informed-consent legislation, quite similar to the informed-consent provisions upheld by the Supreme Court of America in *Casey*, whereby the Court had discarded the trimester system of *Roe* while reaffirming what it held to be the “essential holding”⁵⁴ of *Roe*. In *Casey*, the courts were called upon to

⁵⁰ *Supra* note 10.

⁵¹ *C.f. Effects of Anesthesia during a Partial-Birth Abortion: Hearing before the Subcommittee on the Constitution of the House Comm. on the Judiciary*, 104th CONG. 147-48 (1996) (Statement of Dr. Jean A. Wright, Medical Dir., Egleson Children’s Hospital, Emory University, reviewing the scientific evidence indicating that “preterm neonates have greater pain sensitivity than term neonates or older infants”).

⁵² *Id.*

⁵³ See generally Joseph Losco, *Fetal Abuse: An Exploration of Emerging Philosophic, Legal, and Policy Issues*, 42(2) THE WESTERN POLITICAL QUARTERLY 265 (1989).

⁵⁴ This essential holding had three elements: first is the recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference

decide the constitutionality of the Pennsylvania Statute which required that “at least 24 hours before performing an abortion a physician inform the woman, of the nature of the procedure, the health risks of the abortion and of childbirth and the ‘probable gestational age of the unborn child’.”⁵⁵ The statute also required the physician or another qualified person to “inform the woman of the availability of printed materials published by the state describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”⁵⁶ This waiting period and informed consent were not applicable in case of emergencies when the life or major bodily functions of the pregnant woman were at stake.⁵⁷

Analyzing the provisions of the Act in the light of *Casey*, which till date, is the last and final authoritative ground for abortion-related policies in the United States, the answer we must arrive at would be quite clear and precise. In this case the Court had said that if the state were to legitimately pursue protection of any of its interests, it would be obliged to do so without making an undue intrusion on the individual right of privacy.⁵⁸ While neither banning any procedure nor imposing restrictions upon the power of women to choose abortion, the Act lets women to take into consideration an additional factor, i.e., fetal pain and whether they want to choose a method to alleviate such pain or not. Given that the Act does not unduly burden the individual’s right to privacy, the Act would pass constitutional muster if we can provide sufficient legitimate interests of the State which need to be protected.

This discussion must necessarily start with the third essential holding of *Roe* as upheld in *Casey*, whereby the Court stated that the state has a legitimate interest in the upholding the potential human life of the fetus. This can be most pertinently accrued to the constitutional duty of the state to assert itself in protecting the rights of sentient persons. Most notable in this regard is the protection afforded by the state to animals for over a century in the United States.

from the state. 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. Thirdly was 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. *Supra* note 16 at 846.

⁵⁵ *Id.* at 881 (Describing the Pennsylvania statute, 18 Pa. Cons. Stat. Ann., § 3205 (West 2000)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 879-80; *See also* 18 Pa. Cons. Stat. Ann., § 3203 (West 2000).

⁵⁸ As the Court said in *Casey*: “The fact that a law which serves a valid purpose, *one not designed to strike at the right itself*, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an *undue burden on a woman’s ability to make this decision* does the power of the state reach into the heart of the liberty protected by the Due Process Clause”; *Id.* at 874 (Emphasis supplied).

⁵⁹ *The Massachusetts Anti-Cruelty Statute: A Real Dog—A Proposal for a Re-draft of the*

All fifty states have recognized some sort of a law which criminalizes wilful cruelty to animals.⁵⁹ Laws forbidding cruelty to animals should not be considered unconstitutional as violating the liberty or property rights of persons because no person has a legitimate interest in harming a sentient creature unnecessarily or being cruel to it. Yet the state has no constitutional obligation to necessarily protect non-human animals in any manner or give them legal standing for any purpose.⁶⁰ Courts in their turn have also upheld the constitutionality of such statutes and repeatedly rejected claims that they were vague.⁶¹ A case in point would be the federal Endangered Species Act which protects certain groups of living, non-human entities (both sentient and non-sentient) from extinction. Congress' findings note that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."⁶² This Act has been upheld as a valid exercise of Commerce Clause power of the Federal Congress.⁶³

Similarly there might be certain considerations which the Congress might have had to weigh while deciding to further the interests of the pre-natal humans, especially against violence perpetrated by third parties. These same considerations might be taken to be a moral obligation of sorts on the state to provide such protection. The first of these considerations would be that these fetuses would actually become humans in the due course of time, if given the opportunity to develop.⁶⁴ Pre-natal humans undeniably are alive, genetically human, and have potential to grow and be born as constitutional persons, although this potential cannot be realized in the absence of the particular women who gestate them.⁶⁵ It would make no sense for the state to have the highest constitutional regard for persons once they have been born and none whatsoever for those who are in the process of becoming a human, especially when they are

Current Law, 35 NEW ENG. L. REV. 1003 (2001). See also David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. L. REV. 333 (2005).

⁶⁰ See generally Lawrence J. Nelson, *Of Persons and Pre-natal Humans: Why the Constitution is not Silent on Abortion*, 13 LEWIS & CLARK LAW REVIEW 155 (2009).

⁶¹ *People v. Rogers*, 703 N.Y.S.2d 891, 893 (N.Y. Watertown City Ct. 2000). See also *Moore v. State*, 107 N.E. 1 (Ind. 1914) (conviction upheld for starving a horse and keeping it in filthy conditions) and *State v. Hafle*, 367 N.E.2d 1226 (Ohio Ct. App. 1977) (conviction upheld for failure to feed and care for cattle, sheep, and a horse). But see *Cinadr v. State*, 300 S.W. 64 (Tex. Crim. App. 1927) (statute prohibiting "needlessly killing" an animal unconstitutionally vague).

⁶² Endangered Species Act, 1973, (US) §1531(a) (3).

⁶³ *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

⁶⁴ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (pre-natal humans are defined as "those who will be citizens [and persons] if their lives are not ended in the womb").

⁶⁵ Lawrence J. Nelson & Michael J. Meyer, *Confronting Deep Moral Disagreement: The President's Council on Bioethics, Moral Status, and Human Embryos*, 5 AM. J. BIOETHICS 33 (2005).

at the later stages of gestation towards the approaching birth.⁶⁶ Secondly, it is undeniable that there is a certain sect and quite an impressive number at that, of people who sincerely and incessantly believe that pre-natal humans have the moral rights of persons and that abortion ought to be proscribed or allowed only in strictly limited circumstances by the state.⁶⁷ The right of the fetus shall be supposed to have existed from the moment of its conception till the informed consent of its parents, especially mothers, to terminate the pregnancy and no third party would be allowed to interfere in such decisions.⁶⁸ Thirdly, it is undoubted that human fetuses are highly regarded by the men and women who create them. Many, if not all, consider them to be their children though they are to be so only in the near future. The fetus is present only in the body of the gestational woman and her relationship with the fetus cannot be compared to any other. So regardless of whether a particular gestational mother or particular father may wish the pre-natal human to be born, the assumption of all others, including the state, ought to be that the pregnancy is wanted prior to actual termination following informed consent and that no third party ought to wrongfully interfere with or terminate the pregnancy.⁶⁹

If these considerations are taken to be the basis for the state to offer pre-natal humans, protection from violence perpetrated against them by third parties, then twenty five states have statutes which make the unborn at any stage of development, victims of criminal homicide while one extends its murder statute to include only fetuses of 8 weeks gestation; one state brings fetuses of 12 weeks or greater gestation under the protection of its criminal homicide laws, while three protect the unborn only at quickening and five only at viability.⁷⁰ Even the Congress has enacted the Unborn Victims of Violence Act which criminalizes the killing of pre-natal human beings.⁷¹ When it has come up for

⁶⁶ *Supra* note 28 at 779 (“[I]f distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection... it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences”).

⁶⁷ *See generally* Susan Sherwin, *The concept of a person in the context of abortion*, 3(1) JOURNAL OF MEDICAL HUMANITIES 21 (1981).

⁶⁸ *See generally* George W. Harris, *Fathers and Fetuses*, 96 ETHICS 594 (1986). *See also* Joseph Losco, *Fetal Abuse: An Exploration of Emerging Philosophic, Legal, and Policy Issues*, 42(2) THE WESTERN POLITICAL QUARTERLY 265 (1989).

⁶⁹ *See generally* Pamela D. Harvey & C. Mark Smith, *The Mercury's Falling: the Massachusetts Approach to Reducing Mercury in the Environment*, 30 AM. J.L. & MED. 245 (2004) (Exposure to mercury poses risk of neurological toxicity to the unborn and hence the State has a duty to prevent such untoward incidents happening which interferes with the parents' rights to continue with the pregnancy).

⁷⁰ National Right to Life, *State Homicide Laws That Recognize Unborn Victims*, available at http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (Last visited on August 3, 2009).

⁷¹ Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2006).

discussion before the courts, they have also upheld the legitimate interest of the state to protect unborn human beings,⁷² even though they are not considered to be constitutional persons.⁷³ Recently *Carhart II* upheld the state's regulatory interest "in protecting the life of the fetus that may become a child" and permitted the state to "use its regulatory power to bar certain [abortion] 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."⁷⁴

Apart from the interest in protecting potential human life, the Act serves a number of other state interests. It is helpful in analyzing these state interests to distinguish between "derivative" and "detached" interests, a distinction most forcefully advanced in the context of abortion by Ronald Dworkin.⁷⁵ A derivative interest is one derived from particular interests of individuals, whereas a detached interest is a general societal value that does not depend on or presuppose any particular individual interests.⁷⁶ Applying this distinction provides a useful classification of the interests that the state can advance through the Act. These interests include promoting the woman's right to privacy (derivative), shielding the fetus's interest in being free from unnecessary pain (derivative), maintaining the responsibility of doctors as care-givers (detached), and promoting a more empathetic approach to human life by minimizing the pointless infliction of pain on human fetuses (detached).

Proponents of the Act can put forth the argument that the legislation actually augments the pregnant woman's exercise of her privacy right to choose abortion by ensuring that the physician fully informs her of all consequences that she would find significant.⁷⁷ If the premise of this legal discussion is to be followed,⁷⁸ most women seeking late-term abortions would have a preference to be informed whether the procedure will inflict pain on the fetus, so that the physician could curtail that pain, rather than to be kept in the dark due to

⁷² See generally SAM VAKNIN, ISSUES IN POPULATION AND BIOETHICS, 2005 as referred to in Susan Sherwin, *The concept of a person in the context of abortion*, 3(1) JOURNAL OF MEDICAL HUMANITIES 21 (1981).

⁷³ "We are persuaded that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn", as observed in *Roe v. Wade*, 410 U.S. 113, 158 (1973) (Emphasis supplied).

⁷⁴ See *Carhart II*, 127 S. Ct. 1610, 1633 (2007).

⁷⁵ See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 11 (1993).

⁷⁶ *Id.*

⁷⁷ *Supra* note 20 ("Most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the state furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed").

⁷⁸ *Supra* note 13.

paternalistic notions of emotional susceptibility.⁷⁹ One might object that the Act interferes with, rather than promotes, a pregnant woman's interest in exercising her privacy right by forcing on her state-approved information regarding fetal pain. But the opponents to this argument would state that this objection derives from an individualistic conception of autonomous choice that finds its foundation in political theory rather than the Constitution.⁸⁰

States have an undisputed and legitimate interest in regulating the practice of medicine to protect the role of the doctor as a caregiver.⁸¹ The physician performing a late-term abortion is unlikely to be the woman's regular physician because the relative rarity of such procedures makes it impractical for most physicians who specialize in women's well-being to develop proficiency in performing late-term abortions. Given that the fetus is not the doctor's patient in any conventional sense – at least during an abortion – the doctor is unlikely to view himself as having a duty to inform the pregnant woman about consequences of the procedure for the fetus, other than the obvious consequence of fetal death. The Act would promote the role of the doctor as care-giver to the fetus as well as the pregnant lady by ensuring that the doctor provides the lady with such information that she would deem relevant but that the doctor might not otherwise provide. Offering the option of administering targeted pain-relief to the fetus promotes an understanding of the late-term fetus that appropriately demands more civilized a treatment than under the present regime of abortion jurisprudence. The ultimate effect of such legislation may be to produce a more considerate body of politics, though as a practical matter, this is far from certain.

D. THE PROBLEM OF CONSTITUTIONAL LOOPHOLES IF PRE-NATAL HUMANS ARE ACCORDED THE STATUS OF CONSTITUTIONAL PERSONS UNDER THE AMERICAN CONSTITUTION.

This part of the discussion shall attempt to prove that the ascription of constitutional personhood to pre-natal humans creates an idiosyncratic conflict of constitutional principles and ideals. This *sui generis* conflict is so fundamental, so insupportable, and so detrimental to the integrity of other settled parts of the law that the only conclusion of constitutional law worthy of approval or acceptance is that pre-natal humans cannot be constitutional persons. This shall be done by

⁷⁹ *Supra* note 10.

⁸⁰ Joseph Losco, *Fetal Abuse: An Exploration of Emerging Philosophic, Legal, and Policy Issues*, 42(2) THE WESTERN POLITICAL QUARTERLY 265 (1989).

⁸¹ *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (“A state may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others”).

presuming that fetuses do have the status of being a constitutional person⁸² under the American Constitution; thereafter three arguments shall be advanced which shall strive to show that such a presumption results in the loss of a pregnant woman's autonomy and in the loss of her fundamental rights under the Constitution and ultimately the domino effect of both would be the loss of immunity from subordination for the benefit of others, in this case the fetus that she carries in her womb.

1. Loss of Autonomy

If a fetus were to be granted the status of a constitutional person, the first and foremost impact would be on the autonomy of the woman who carries such fetus in her womb. If that were to be, then from the moment that she conceived the fetus irrespective of whether she wanted it or not, she would not be able to hide from the state's eyes which would then be trained on her every move, watching her mistakes and applying swift retribution if she failed to conform in the slightest degree to the accepted norm of behavior in such situations. It would necessarily mean that from the moment a woman became pregnant her body would cease to be under her control alone. Then the only hope and solution that would offer itself before her would be a spontaneous abortion or in lay terms – a miscarriage. Women would then not be able to “walk away from the fetus and thereby avoid any restrictions or liabilities that the law might impose.”⁸³ That would only mean to return to the ‘dark ages’ of state control over women, with women's rights and liberties finding no sanctuary within the framework of the state. Not only that, but once child endangerment laws and tort laws started applying to pregnant women, a whole new standard of care would need to be devised for the laws to be enforceable in courts of law. In fact, in such an arrangement she would end up owing a far stricter standard than a parent in any other circumstances.⁸⁴ Also if fetuses were to be constitutional persons, a pregnant woman would be subject to criminal prosecutions in an unprecedented and intrusive manner dependant on how she carried herself daily. Besides, the Due Process Clause prohibits the enforcement of criminal laws that “fail to establish guidelines to prevent ‘arbitrary and discriminatory enforcement’ of the law.”⁸⁵

⁸² To be noted that ‘human life’ and ‘person’ are not synonymous terms, and personhood need not logically be defined as an attribute of human life. Thus someone might say that a fetus (or even an infant) is a human being but not a person-i.e., a creature entitled to legal or moral rights, in particular, a right to life. See, e.g., Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37 (1972).

⁸³ Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992). See also Leslie Cannold, *Understanding and Responding to Anti-Choice Women-Centred Strategies*, 10(19) REPRODUCTIVE HEALTH MATTERS, 171(2002).

⁸⁴ See generally Martin J. Rooney and Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW. ENG. L.R. 1161 (1991).

⁸⁵ *City of Chicago v. Morales*, 527 U.S. 41 (1999) (Quoting *Kolender v. Lawson*, 461 U.S. 352 (1983)).

Acts like drinking alcohol, eating fish, or working at a job that exposes them to toxic substances fatal to their fetuses could readily be found criminal although otherwise legal for all other persons, including the parents of born children.⁸⁶ In such a case, given the wide variety of acts which would be termed to be injurious to the fetus, tort laws or other statutes might well be called into question as so vague as to violate the Due Process Clause for it would not provide a “person of ordinary intelligence...to know what is prohibited, so that he may act accordingly.”⁸⁷ While it is unquestionable that a woman should be morally obliged to think about the gestational processes that she is undergoing in her body, she should be allowed a choice among the other values as well. While the case of abortion is very different⁸⁸ and there cannot be a parallel to the same, but if for the purposes of our academic discussion we were to compare state’s control over a woman’s body to state conscription into the armed services which is constitutionally allowed⁸⁹ for “public purposes”⁹⁰ and not for the benefit of any particular individual, it can hardly be thought that the American Constitution would be interpreted to allow the state to “transform a pregnant woman into an ideal baby-making machine”.⁹¹

2. Infringement upon a woman’s Constitutional Rights

If a fetus were to be granted the rank of a constitutional person, it would mean that in the eyes of the state, a fetus would be equated with the rank of child and would hence require state intervention. The conferring of personhood status on the fetus itself makes its existence in the womb extraneous for purposes of constitutional analysis because a fetus cannot exist elsewhere until they are born alive, for it is only at this point that its status as a constitutional person is as indisputable as that of its mother. The presence of pre-natal persons in the womb of another person cannot limit their fundamental rights or somehow be partially fatal to their status as constitutional persons because personhood is an unqualified notion.⁹² A distinction cannot be hoped to be created among persons not yet born and children if the former were granted constitutional status, for the state would not be allowed to distinguish between the two any less than it could hope to distinguish between infants and their older counterparts⁹³ -it would be capricious,

⁸⁶ *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (occupational exposure to lead involves risk of harm to fetuses).

⁸⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁸⁸ *Carhart I*, 530 U.S. 914 (2000) (“Abortion is a unique act”).

⁸⁹ *See* U.S. CONST. Art. I, § 8.

⁹⁰ *Gillette v. United States*, 401 U.S. 437 (1971).

⁹¹ *Supra* note 47.

⁹² Jed Rubenfeld, *On the Legal Status of the Proposition That “Life Begins at Conception”*, 43(3) STANFORD LAW REVIEW 599 (1991).

⁹³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (“the Constitution neither knows nor tolerates classes among citizens”). *See also* *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985) (“All persons similarly situated should be treated alike”).

arbitrary and constitutionally invalid. But if it did create such a distinction, it would be deeply unjust for the state to protect the born but not the similarly situated unborn. The state would not be according unborn children the same value if it did not protect them from death or serious harm occasioned by the behavior of a parent on an equal basis with other children. The only legally and constitutionally permissible solution to this dilemma would then be to repeal all laws dealing with child endangerment which essentially authorizes the state to protect children from mischief.⁹⁴ In the absence of such laws, the state would lack the authority to prevent parents from depriving vulnerable and defenseless children of life or from seriously harming them by neglect or acting on values inimical to the child's welfare.⁹⁵ The state could, as always, impose penalties and bring such parents into account via criminal prosecutions but by that time it would be too late to prevent such injury from actually taking place on powerless children. Their equal worth as persons would be nothing but an inconsequential rhetoric. If the state wants to enforce the equal right of fetuses, say under certain medical neglect laws, it would then be required that such fetuses receive the needed treatment even over the negation of a pregnant woman just as it would impose the treatment over the objections of the parent(s) of a child.

However, in the case of a fetus, there arises a complication, for the state would necessarily have to violate the woman's fundamental constitutional rights to refuse medical interference with her body, to maintain her bodily integrity and to be free of the risk of the treatment of her unborn child which would ultimately have to be borne by her. When the fundamental right of a competent adult to refuse medical treatment and maintain her bodily integrity is at stake, the Fourteenth Amendment forbids the state from interfering with that interest "unless the infringement is narrowly tailored to serve a compelling state interest."⁹⁶ This however would seem to be inapplicable in case of pregnant women since it is the duty of the state to ensure the well-being of the unborn fetus. And herein lies a deep and irreconcilable dichotomy in the reading of the Constitution for the upholding of one right would lead to the infringement of the other and this would mean an internal war within the Fourteenth Amendment of the American Constitution.⁹⁷

3. Loss of Invulnerability from Subordination

The American Constitution has traditionally offered little powers, if

⁹⁴ Lawrence J. Nelson, *Of Persons and Pre-natal Humans: Why the Constitution is not Silent on Abortion*, 13 LEWIS & CLARK LAW REVIEW 155 (2009).

⁹⁵ See, e.g., *Custody of a Minor*, 393 N.E.2d 836 (Mass. 1979).

⁹⁶ *Reno v. Flores*, 507 U.S. 292, 302 (1993).

⁹⁷ The Equal Protection Clause requires the state to protect unborn children from medical neglect like it protects born children while the Due Process Clause simultaneously requires the state to protect the fundamental right of pregnant women to refuse physical invasion unless the infringement is narrowly tailored to serve a compelling state interest (The latter being utterly incompatible with the former).

any, to the state to interfere in the body and will of a constitutional person for the benefit of another person, for this would mean the subordination of interests of one person to those of another – which would directly amount to the state actually choosing which person is ‘worthier’ for the state. The sanctity of this principle has been upheld time and again by the courts in America. In this regard, the Supreme Court has observed that the Constitution protects the “right of every individual to the possession and control of his own person”.⁹⁸ In fact the courts have specifically rejected the supposed discretion of the state to interfere in the bodily decisions of an individual in several cases though none of the cases were decided essentially on constitutional grounds.⁹⁹ In *Fetus Brown*,¹⁰⁰ an Illinois appellate court held that a state may not override a competent, pregnant woman’s right to refuse blood transfusions to save the life of a viable fetus. Consequently, the Court concluded that, the state interest did not override Brown’s right to refuse the transfusions. It is a deep-rooted American principle that a person need not volunteer his body for the aid of another when the other is in need of such assistance – hence there is even less justification for the state to intervene.¹⁰¹ If pre-natal humans were to be considered as constitutional persons, then there would arise occasions which would require the state to subordinate some of the basic rights and interests of pregnant women for the protection of the basic rights of the persons they gestate.¹⁰² A pregnant woman’s refusal to be subordinated and physically invaded would be irrelevant to the determination that the pre-natal person has claims to the State enforcing that subordination and invasion. In

⁹⁸ *Supra* note 20 (Fourteenth Amendment privacy and bodily integrity as applicable to abortion). See also *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment liberty and bodily integrity when refusing medical treatment).

⁹⁹ *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941) (“the very nature of rights of personality is freedom to dispose of one’s own person as one pleases”). See also *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978) (legally enforceable duty to undergo the bodily invasion of tissue compatibility testing and bone marrow “donation” for the benefit of a dying relative “would defeat the sanctity of the individual, and would impose a rule which would know no limits”).

¹⁰⁰ *In re: Fetus Brown*, 689 N.E.2d 397 (III. App. Ct. 1997) (The Court noted that the Illinois Constitution and the lower courts had been silent on the issue of state interference to save a viable fetus but stated that the state may not invade the bodily integrity of a pregnant woman for the benefit of her pre-natal human, even by a blood transfusion as it is “an invasive medical procedure that interrupts a competent adult’s bodily integrity”). See also *In re: Baby Boy Doe*, 632 N.E.2d 326 (III. App. Ct. 1994). *But see Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (Holding that a pregnant woman’s rights were not violated after a court-ordered caesarean section) and *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 460 (Ga. 1981) (Any intrusion the pregnant woman faced was held to be “outweighed by the duty of the state to protect a living, unborn human being from meeting his or her death before being given the opportunity to live”).

¹⁰¹ Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

¹⁰² Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647 (1979) (“When the interests of a mature, born person conflict directly with those of an unborn human, it is impossible to resolve the conflict satisfactorily without subordinating the interests of one of the parties”).

Carhart II, Justice Ginsberg in her dissenting opinion articulated that: “Legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course and thus to enjoy equal citizenship stature.”¹⁰³ An understanding of the conflicting ideologies can be gleaned from Professor Finer who in his work analogized between compelled medical treatment and the novel, *The Handmaid’s Tale*.¹⁰⁴ In *The Handmaid’s Tale*, Margaret Atwood depicts a society, set years in the future, in which toxins and pollutants have made reproduction so difficult that humanity is beginning to become extinct. The narrator, a female who is now valued only for her womb, mourns her loss of freedom by saying: “I used to think of my body as an instrument, of pleasure, or a means of transportation, or an implement for the accomplishment of my will... Now the flesh arranges itself differently. I’m a cloud, congealed around a central object, the shape of a pear, which is hard and more real than I am and glows red within its translucent wrapping”.¹⁰⁵ Admittedly Atwood’s work of fiction is a severe illustration of valuing women for just one of their many roles in society; however its theme illustrates a danger that becomes more real when viewed in the context of compelled medical treatment. The traditional constitutional values would be perceived to have a chance at preservation only if fetuses were not to be considered as constitutional persons; otherwise the whole system is thrown in disarray.

IV. ABORTION POLICY IN INDIA: A DISCOURSE ON THE PAST AND THE FUTURE

The United States has moved quite ahead and is grappling with the various issues of constitutionality versus individuals’ rights which seem to be heralding the beginning of a new era of debates. In India there is a completely different scenario that we are faced with today. The entire issue of pro-life and pro-choice debates was avoided here due to the active involvement of the state in curbing the burgeoning population rates. It is only recently that the debates are emerging in the context of abortion. It is not as if the law makers were insensitive to the needs of women – for the recognition of the need to regulate abortion happened as far back as in 1971 – but it has not yielded the expected results. The Shantilal Shah Committee, which was formed for this purpose, deliberated for more than two years before submitting its report to the Government in 1966.¹⁰⁶ Following this, The Medical Termination of Pregnancy Act (*hereinafter* MTP

¹⁰³ *Supra* note 38.

¹⁰⁴ Joel Jay Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239 (1991).

¹⁰⁵ MARGARET ATWOOD, *THE HANDMAID’S TALE*, (Houghton Mifflin, 1986) as cited in Melissa C. Hunter, *A Contraction of Autonomy Pregnant Women and Compelled Medical Treatment*, 1(1) BAKER CENTER JOURNAL OF APPLIED PUBLIC POLICY 45 (2007).

¹⁰⁶ Amar Jesani & Aditi Iyer, *Abortion: Who is responsible for our Rights?*, CEHAT REPORTS, available at http://www.healthlibrary.com/book24_chapter277.htm (Last visited on August 24, 2009).

Act) came into force from April 1, 1972. Provisions regarding abortion date back even earlier with incorporation of provisions regarding abortion law in the Indian Penal Code¹⁰⁷ which was enacted more than a century ago. These were drafted at that time, keeping with the then existing sensibilities of societal requirements and in consonance with the British Law on abortion.¹⁰⁸

Abortion originally was trumpeted as a way to control the country's rapidly expanding population (now about 1.1 billion people, making it the second most populous country in the world, after China).¹⁰⁹ India is on the same plane as Zambia as both of them are often cited as examples of countries where legal reforms have not been able to guarantee access to safe abortion. In both countries the practice of unsafe abortion remains widespread and abortion-related maternal mortality remains high, even though abortion is legally permitted on broad indications.¹¹⁰ This can be blamed on the low levels of awareness of the legality of abortion among women and a large number of misconceptions about the law among providers. The most important piece of legislation in this regard would be the MTP Act. The MTP Act, though appears to have been enacted for control of population in India, actually provides for the termination of certain pregnancies by Registered Medical Practitioners (RMP) for protection and preservation of the lives of women. Abortion policy in India is consistent with safeguarding reproductive rights as envisaged by International Conference on Population and Development (ICPD) and similar other international agreements. It does not advocate abortion as a family-planning measure. Rather, it encourages the promotion of family planning services to prevent unwanted pregnancies and at the same time recognizes the importance of providing safe, affordable, accessible and acceptable abortion services to women who need to terminate an unwanted pregnancy.

A. RECENT CONTROVERSIES AND ISSUES ARISING IN THE COUNTRY

The validity of the MTP Act was challenged as late as 2005 in the case of *Nand Kishore Sharma v. Union of India*.¹¹¹ It was argued that the Act, particularly

¹⁰⁷ The Indian Penal Code, 1860, §§ 312.313, 314, 315.

¹⁰⁸ RATANLAL & DHIRAJLAL, THE INDIAN PENAL CODE, 1860, 448-450 (Justice Y.V.Chandrachud & V.R.Manohar eds., 2007). See also Varsha Chitnis & Danaya Wright, *The Legacy of Colonialism: Law and Women's Rights in India*, 64(4) WASHINGTON AND LEE LAW REVIEW 1315 (2007).

¹⁰⁹ *The Washington Post*, Abortion in India: Selecting by Gender, May 20, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/19/AR2006051901219.html> (Last visited on August 24, 2009).

¹¹⁰ M. Berer, *Making Abortions Safe: A Matter of Good Public Health Policy and Practice*, 78(5) BULL. WORLD HEALTH ORGANIZATION 580 (2000). (In India, there continues to be a ratio of approximately 6:1 clandestine to legal abortions, contributing to over 15 per cent of the maternal death rate).

¹¹¹ AIR 2006 Raj. 166.

Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act were unethical and violative of Article 21 of the Constitution of India. The Court in the case had to determine when the fetus actually comes to life and hence if his or her right to life is violated by the said provisions. But the Court refused to enter upon a debate as to when fetus comes to life or the larger question touching upon the ethics of abortion, stating that they were “merely concerned with the validity of the relevant provisions of the Act”.¹¹² The Court refused to comment on the attribution of the status of a “person” to the fetus and declared the MTP Act to be valid as it was in consonance with the aims and objectives of Article 21 of the Constitution rather than against it. However, the Court took an ambivalent stance when it came to the question of whether the MTP Act would be violative of Article 21 with regard to a fetus, saying that it was difficult to determine exactly when a fetus comes to life and hence avoided a closure on the matter.

The recent *Nikita Mehta* case¹¹³ has given rise to an intense debate on abortion laws in the country. The key issue herein is whether the statutory time limit for abortion must be increased from the currently permitted twenty weeks of gestation to twenty four weeks or above.¹¹⁴ The answer of course is not easy to arrive at. The issue involves complex questions of law, medical technologies and morality. The MTP Act permits abortion to be performed only when the pregnancy poses a risk to the life of the pregnant woman, or, of grave injury to her physical or mental health, or, when there is a substantial risk of the child being born with physical or mental abnormalities so as to be seriously handicapped.¹¹⁵ A registered medical practitioner may terminate the pregnancy up to twelve weeks of gestation but where the period is between twelve to twenty weeks, the opinion of two registered medical practitioners is required. The limit of twenty weeks may be crossed only when the procedure is performed to save the life of the woman. Importantly, pregnancy that results from rape or failure of a contraceptive device between husband and wife is viewed as causing grave injury to the mental health of the woman and hence abortion is allowed legally. In the *Nikita Mehta* case the gestational period had progressed much beyond the prescribed period and was past twenty five weeks. The petitioners (who were a married couple along with their medical practitioner) pleaded that the congenital heart blockage in the heart of the fetus was detected at a late stage and also expressed their inability to bear the emotional stress and monetary burden of giving birth to a child that may suffer from such severe health problems. These concerns are understandable in the socio-economic context of India where the existing mechanism of state support is negligible for such parents and individuals and the burden of providing special care falls largely on the immediate family. As mentioned earlier, India has chosen

¹¹² *Id.*

¹¹³ *Dr. Nikhil Dattar & Ors. v. Union of India*, (2008) 110 Bom. L. R. 3293.

¹¹⁴ It might be noted here that for a pregnancy to run to its full course, the gestational period may stretch to forty weeks.

¹¹⁵ The Medical Termination of Pregnancy Act, 1971, § 3.

a middle path instead of choosing outright a pro-life or pro-choice approach and this is perhaps rightly so, given the sensitivity of the issue. A balanced approach appears sensible: a balance between the respective interests of the woman, the unborn and the state. The Mumbai High Court held that no categorical opinion of experts had emerged to state that the child would be born with serious handicaps and it thus denied recourse to medical termination of the pregnancy. It might be interesting to note here that an opinion emerged that terminating the life of a viable unborn on grounds of possible handicap is akin to mercy killing. It might be suggested here that the adverse ramifications of giving birth to handicapped children may be minimized by creating effective state mechanisms for adequate support to such children and families, both financial and otherwise. Instead of giving a blanket cover to all cases, expert committees may be constituted to evaluate cases beyond twenty weeks on merit so that selective sanction for abortion at this stage is given. In this case, the Court categorically stated that even if this petition had been made before the 20 weeks had elapsed, the Court would still not have found in favor of the petitioners as the requirements of provisions of law under Section 3(2)(ii) read with Section 3(2)(b) are not satisfied.

An even more recent case is that of *Chandigarh Administration v. Nemo*,¹¹⁶ where the judgment was delivered by the Punjab and Haryana High Court on July 17, 2009, which was subsequently appealed against in the Supreme Court and the latter ordered a stay on the decision of the High Court without delivering a speaking judgment giving rise to many debates different from those currently on hand. The noteworthy point in the High Court's decision was that the Court took on the role of *parens-patriae* to protect the interests of the orphan girl with the mental age of 7-9 years (though her actual age was suggested to be around 19 years) who conceived due to rape by the security guards at the institution she was admitted to. The High Court was guided by the opinion of two panels of doctors, including psychiatrists and gynecologists, who expressed concern over her ability to undertake pre-natal and post-natal precautions and care, though they were unanimous that she was physically fit to carry the pregnancy and deliver the child. But the High Court went through the expert reports to say that the victim had no idea about sexual intercourse and her consent or "happiness" at keeping the baby was not consent which could exclude the *parens-patriae* jurisdiction of the court to decide what would be in the best interest of the guardee. This judgment has stoked a hornet's nest of debates as far as the role of the judiciary in the very private sphere of pregnancy is concerned as the judiciary appointed itself the guardian of a major person. Also as the Supreme Court ordered a stay on the High Court's decision offering to give reasons later, it is certainly pointing towards disenchantment within the ranks of the judiciary itself which implies serious problems for a smooth functioning of a democracy like India. The High Court relied on the decision of a Division Bench of the Madras High Court¹¹⁷ which held that "a minor girl has the right to bear a child". No doubt

¹¹⁶ MANU/PH/0397/2009.

¹¹⁷ V. Krishnan v. G. Rajanalia Madipu Rajan, (1994) 113 MAD. L.W. 89.

the Court is bound to presume, as the expression used is “shall be presumed”. But such presumption can be rebutted on the facts. Even if it is presumed that the pregnancy is caused by rape, there is no question of anguish caused by such pregnancy in the pregnant woman particularly when the girl was very keen to continue the pregnancy and bear the child. Hence, the continuance of the pregnancy was held to not have the potential to cause any injury to her mental health. Though the High Court chose to take a holistic approach as opposed to the doubtful consent of the pregnant woman, the Supreme Court gave a major boost to the pro-life campaign in staying the order.

B. A CRITIQUE OF THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

In the context of all the controversies and questions leveled at the MTP Act it would be pertinent at this juncture to analyze the provisions of the said Act and suggest some much required changes. While defining punitive measures to deter abortion facilities that provide unsafe abortion care, the MTP Act offers complete protection to registered providers from any legal proceedings for any injury caused to a woman seeking abortion. The MTP Act, The Medical Termination of Pregnancy Rules, 1975 (*hereinafter* MTP Rules) and The Medical Termination of Pregnancy Regulations, 2003 define when (gestation limits etc.), under what conditions, by whom and where an unwanted pregnancy can be legally terminated. The Act offers full protection to a registered medical practitioner against any criminal proceedings for any harm or injury caused to a woman seeking abortion, provided that the abortion has been or intended to be done in good faith under the provisions of the MTP Act.¹¹⁸ The law is liberal enough in its scope to allow termination of an unwanted pregnancy under any condition which may be presumed to construe a grave risk to the physical or mental health of the woman in her actual or foreseeable milieu – for example when pregnancy results from contraceptive failure, or on humanitarian grounds such as when pregnancy results from a sex crime as in rape or intercourse with a mentally challenged woman, or on eugenic grounds where there is reason to suspect substantial risk to the child, if born, to suffer from malformation or disease. The Act allows medical termination of pregnancy up to 20 weeks gestation. In the event of a termination which is imperative to save the life of pregnant woman, the law makes some notably generous exceptions. The doctor need not have the necessary experience or training criteria stipulated in the MTP Rules but still needs to be a registered allopathic medical practitioner, a second opinion is not necessary for abortions beyond 12 weeks and the facility may not have prior certification.¹¹⁹ In such situations the provider is required to report an abortion done to save a woman’s life within one working day. The law however is unclear about an abortion beyond 20 weeks done to save a woman’s life.

¹¹⁸ *Supra* note 111.

¹¹⁹ Paige Passano, *Legal but Not Available: The Paradox of Abortion in India*, *Manushi*, 2001 Sep-Oct (126):19-21, 23-6, available at <http://www.indiatogether.org/manushi/issue126/abortion.htm> (Last visited on September 3, 2009).

The first question that would logically arise is why the cut-off is marked at twenty weeks. The answer lies in the fact that the baby becomes viable at this stage. In other words, the baby is no longer indispensably dependant on its mother's body and stands a chance of survival upon delivery, albeit with suitable aids at this pre-mature stage. As it grows, it becomes more and more capable of independent survival. Thus, in addition to state interest, the interests of the fully formed unborn child at this stage become noteworthy. The unborn finds explicit or implicit protection through many international and national laws. The Convention on the Rights of the Child recognized the need for special protection of children before and after birth on account of their physical and mental immaturity.¹²⁰ The Convention on Elimination of Discrimination against Women (CEDAW) views maternity as a social function thereby ratifying the idea that apart from individual rights like right to privacy, we also have corresponding duties that must be performed to sustain and nurture society.¹²¹ One of the grim realities that must be faced is that the MTP Act is being rampantly misused to carry out sex-selective abortions as is evident from the highly skewed sex ratios in the country. It is surprising that affluent and relatively educated parts of the country, including the capital have persistently shown a bias against the girl child.¹²² Whether it would be justified under such circumstances to give further time to parents to consider gender-based termination of pregnancy and provide an enlarged legal umbrella towards acts that are detrimental to the society is a question definitely to be pondered upon.

A major critique of the MTP Act is its apparent over-emphasis on medical technicalities and its physicians-only policy, which clearly shows a strong medical bias and ignores the socio-political aspects of abortion. The need for two doctors' certified opinion for a second trimester termination of pregnancy is an unnecessary restriction imposed by law.¹²³ Abortion policy within the rights-framework emphasizes not only the woman's right to seek safe abortion, but also her right to access safe abortion services as well as information about the availability of such services and the consequent responsibility of the state to provide these services. Though abortion law allows for termination of pregnancy for a wide range of reasons construed to affect the mental and physical health of the woman, it remains with the doctor (and not the woman) to opine in good faith, the need for such a termination. Such a provider-dependent policy might result in denial of abortion care to women in need, especially the more vulnerable amongst

¹²⁰ See generally Abby F. Janoff, *Rights Of The Pregnant Child vs. Rights Of The Unborn Under The Convention On The Rights Of The Child*, 22 B.U. INT'L L.J. 163 (2004).

¹²¹ Siddhivinayak Hirve, *Abortion Policy In India: Lacunae and Future Challenges*, Abortion Assessment Project India, CEHAT REPORT, available at <http://www.cehat.org/aap1/policyreview.pdf> (Last visited on September 2, 2009).

¹²² *Id.*

¹²³ Kristi Lemoine & John Tanagho, *Gender Discrimination Fuels Sex Selective Abortion: The Impact Of The Indian Supreme Court On The Implementation And Enforcement Of The PNMT Act*, 15 U. MIAMI INT'L & COMP. L. REV. 203 (2007).

them. It may also be argued that it may compel a woman to lie about the situation surrounding her unwanted pregnancy. Moreover, while the MTP Act permits women to seek legal termination of an unwanted pregnancy for a wide range of reasons, the clause about contraceptive failure applies only to married woman. The critique in this perspective would be that the focus of safe abortion care has been traditionally for women who are married, implying a denial of such care to an unmarried woman in need of termination of an unwanted pregnancy. It is as if unmarried women do not become pregnant outside of wedlock in 'our society'. Such a gross discrepancy needs to be corrected, as the latter category of women perhaps requires a significant amount of attention to their dilemma.

Another very disturbing aspect is that of quality control under the MTP Rules. While it allows for monitoring of quality of abortion care in the private sector, its recognition of all public health institutions as abortion facilities by default exempts the public sector from certification. The assumption that a health institution by virtue of being in the public sector is accountable to the public at large, has regulatory processes and does not need extra checks on their functioning, is not valid as such accountability is often only in theory and not in practice. This leads to a substantial discrepancy between the abortion facilities offered by the public sector and the private sector.¹²⁴ In the larger interests of an equitable policy for a larger number of women, abortion policies need to apply the same exacting standards to the public and private sectors and specifically subject the former to the same audit process that it expects of the private sector.

For all these critiques an amendment to the MTP Act was brought about in 2002 which made changes in three broad areas.¹²⁵ The first was a replacement of the term 'lunatic' by 'mentally ill' person. Another change sought to decentralize the administrative and legislative process from the state to the district level. This amendment stipulates the creation of a district committee comprising of representatives from government and NGOs, empowered to approve abortion facilities and ensure provision of safe abortion care. Though well-intended, a critique would be that it has the potential of abuse as well as varying interpretations and misinterpretations of abortion law by district authorities. The third change has been to provide punitive measures of 2 to 7 years of rigorous imprisonment to a provider/owner of a place not approved or maintained by the government. There were amendments brought about in the MTP Rules in 2003 as well to mirror these changes. The amended MTP Rules had the directive that the district level committee was to inspect the abortion facility within two months of receiving an application for registration and in the absence of or after rectification of any noted deficiency in the

¹²⁴ Dr. Mukesh Yadav & Dr. Alok Kumar, *Medical Termination Of Pregnancy (Amendment) Act, 2002: An Answer To Mother's Health & 'Female Foeticide'*, 27(1) JIAFM 46 (2005), available at <http://medind.nic.in/jal/t05/i1/jalt05i1p46.pdf> (Last visited on September 1, 2009).

¹²⁵ Med India, *Medical Termination of Pregnancy Amendment Act, 2002*, available at http://www.medindia.net/indian_health_act/medical-termination-of-pregnancy-amendment-act-2002-introduction.htm (Last visited on September 3, 2009).

abortion facility, for the approval to be processed within a couple of months. However, the amended MTP Rules do not specify measures or redress mechanisms if certification procedures are not completed in the stipulated time frame.

The MTP Act does not in fact confer upon or recognize the right of any person to carry out an abortion except under the circumstances mentioned in the Act. Even during the first trimester, a pregnant woman cannot abort at her will and pleasure. Hence there is no question of “abortion on demand”. Section 3 of the MTP Act is only an enabling provision to save the resident Medical Practitioner from the purview of the IPC. It has also been stated by the Indian Courts that “termination of pregnancy under the provision of the Act, is not the rule and it is only an exception”.¹²⁶ Thus the MTP Act does not actually legalize abortion but only lays down certain circumstances in which it is permitted – that is merely liberalizing in that sense.

V. CONCLUSION

For a liberalized law like the MTP Act to deliver on its promise of safe and humane abortions, it needs to be accompanied by other social inputs like superior empowerment of women – especially in the matter of the degree of control exercised over their bodies and sexuality. In situations where women have relatively better control in decision making and access to contraception (for example, countries in Eastern Europe which provide extensive and reliable data) liberalization is accompanied first by a rising trend in the incidence of induced abortions which stabilizes after a point and finally declines once women improve their skills in avoiding unwanted pregnancies.¹²⁷ This, however, has not happened in India. This understanding that the much touted liberalization has in fact failed to bring down the incidence of illegal abortions and to improve the health of women, especially since it was an important component of the population programme, has bred a fair deal of skepticism in the Indian milieu. Legalization of abortions in India has neither given rise to the exercise of free choice within the time gap afforded under the Indian laws like those exercised by their American contemporaries nor has it gone the entire way in improving women’s health in the sub-continent. Historical and contemporary evidence demonstrates that it is not possible for the state to achieve complete control over the women’s bodies through its employment of technology, legal prohibitions and repression.¹²⁸ This dilemma highlights the limitation of treating

¹²⁶ *Supra* note 119.

¹²⁷ Amar Jesani & Aditi Iyer, *Abortion: Who is responsible for our Rights?*, CEHAT REPORTS, available at http://www.healthlibrary.com/book24_chapter277.htm (Last visited August 24, 2009).

¹²⁸ Jacobson Jodi, *The Global Politics of Abortion*, World Watch Institute, World Watch paper No.97, Washington DC (July 1990), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/22/c4/b6.pdf (In Romania, for example, Ceausescu proscribed abortions for 14 years and augmented that policy with severe repressive measures. Yet, in the 1980s, Romania beat virtually all other European nations in the rates of abortion and abortion related mortality).

the right to abortion as a civil right for individual freedom and privacy. Legality provides only a thin cover, a political legitimacy that is necessary but not sufficient to change the material conditions of women's lives, because it makes it possible for anti-abortionists, under a conservative political climate, to juxtapose the rights of the unborn child with the right of choice of the pregnant woman. This can be gauged from what we have seen earlier in the case of the United States of America where occurrences since 1973 shows that Americans are fundamentally ambivalent towards the issue of abortion. Pro-life proponents attempt to translate the conviction that abortions constitute 'an act of immorality' into government sanctioned legal restrictions and have been fairly successful as can be seen from the Fetal Pain legislation. It must also be kept in mind in the Indian social context a mere legal right to abortion cannot and does not amount to a social right which is accompanied by all the necessary enabling conditions that makes it even remotely realizable and universally available. Moreover, abortion is not merely an issue of political and legal conflict as has primarily been the case in the American milieu but more of a social, cultural and moral conflict in India. In conclusion, it might be said that no vital change can be brought about by measures aimed at women alone, rather the division of functions between sexes must be changed in such a way that men and women have the same opportunities, such that women's emancipation is not merely a women's question but a function of the general drive for greater equality which affects everyone.

