*CHAPTER-7*

# *PRIVACY AND INVIOLABILITY OF PERSON*

**A. Permissible and Imposed Abortion**

**B. Dignity, Modesty and Self-Respect**

**C. Sexual Autonomy**

## *CHAPTER-7*

## *PRIVACY AND INVIOLABILITY OF PERSON*

The application of the right to privacy has been larger in the area of abortion and sexual autonomy than in any other sphere. A large number of petitions cropped up before the American Supreme Court since the development of the right to abortion. Although the right has been attacked on many grounds including public interest, the right to privacy as part of the right to privacy of women still prevails. The important judicial decisions in this respect and other developments in the United States are discussed below. The problem and the prospect of dignity, modesty and self respect are different in the Indian context. The sexual autonomy to the extent permissible under our laws has been regarded as part of the right to privacy. At the same time it has not been allowed to operate in the area wherein it interferes with other's rights or public policy. The relevant provisions and the judicial decisions have been discussed in the following pages.

## A. Permissible and Imposed Abortion

The landmark case on the question of permissible and imposed abortion which came before the Supreme Court of the United States was *Jane Roe* vs. *Henry Wade*.[1] In this case an unmarried pregnant woman who wished to terminate her pregnancy by abortion instituted an action in the United States District Court for the Northern District of Texas, seeking a declaratory judgment that the Texas criminal abortion statutes, which prohibited abortions except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother, were unconstitutional. She also sought an injunction against their continued enforcement. A physician, who alleged that he had been previously arrested for violations of the Texas statutes and that two prosecutions were presently pending against him in the state courts, sought and was granted permission to intervene. A separate action, similar to that filed by the unmarried pregnant woman, was filed by a married childless couple, who alleged that should the wife become pregnant at some future date, they would wish to terminate the pregnancy by abortion. The two actions were consolidated and heard together by a three judge District Court, which held that (1) the unmarried pregnant woman and the physician had standing to sue, (2) the married, childless couple's complaint should be dismissed because they lack standing to sue, (3) abstention was not warranted with respect. to a declaratory judgment, (4) the right to choose whether to have children was protected by the Ninth Amendment, through the

---

1. 35 L. Ed. 2d 147.

Fourteenth Amendment, (5) the Texas criminal abortion statutes were void on their face, because they were unconstitutionally vague and overbroad, and (6) the application for injunctive relief should be denied under the abstention doctrine. All parties took protective appeals to the United States Court of Appeals for the Fifth Circuit, which court ordered the appeals held in abeyance pending decision on the appeal taken by all parties to the United States Supreme Court, from the District Courts denial of injunctive relief.

On appeal, the United States Supreme Court reversed the District Courts judgment as to the physician-intervenor, dismissing his complaint in intervention, but affirmed the District Courts judgment in all other respects. In an opinion by Blackmun, J., expressing the views of seven members of the Court, it was held that (1) the pregnant, unmarried woman had standing to sue, (2) the complaint of the childless married couple presented no actual justifiable case or controversy and had been properly dismissed, (3) states have legitimate interest in seeing to it that abortions are performed under circumstances that insure maximum safety for the patient, (4) the right to privacy encompasses a woman's decision whether or not to terminate her pregnancy, (5) a woman's right to terminate her pregnancy is not absolute, and may to some extent be limited by the state's legitimate interests in safeguarding the woman's health, in maintaining proper medical standards, and in protecting potential human life, (6) the unborn are not included within the definition of a "person" as used in the Fourteenth Amendment, (7) prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated, (8) from and after the end of

the first trimester and until the point in time when the foetus becomes viable the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health, (9) from and after the point in time when the foetus becomes viable the state may prohibit abortions altogether, except those necessary to preserve the life or health of the mother, and (10) the state may proscribe the performance of all abortions except those performed by physicians currently licensed by the state; and expressing the view of six members of the court, it was held that the physician's complaint should be dismissed and he should be remitted to his remedies in the pending state court proceedings.

The court noticed that the restrictive criminal abortion statutes in effect in a majority of states then were of relatively recent vintage. Those laws generally proscribing abortion or its attempt any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead they derive from statutory changes effected, for the most part, in the latter half of the 19th century. Evidence and materials regarding the following aspects were before the Court and considered:

(1) *Ancient attitudes:* The court was told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. On a survey of the law prevailing in Greece, Rome, etc., it was found that ancient religion did not bar abortion.

(2) *The Hippocratic Oath:* Though the oath varies somewhat according to the particular translation, the content is clear : "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like

manner I will not give to a woman a pessary to produce abortion". The Oath became the nucleus of all medical ethics and was applauded as the embodiment of truth, though it was not the expression of an absolute standard of medical conduct.

(3) *The Common Law:* It was undisputed that at common law abortion performed before "quickening" - the first recognizable movement of the foetus in uterus, appearing usually from the 16th to the 18th week of pregnancy - was not an indictable offence. Although Christian theology and the cannon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. Whether abortion of a quick foetus was a felony at common law, or even a lesser crime, was still disputed. Bracton writing early in the 13th century thought it homicide. But the later and predominant view, following the great common law scholars, has been that it was, at most, a lesser offence. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder". Blackstone followed, saying that abortion after quickening had once been considered manslaughter (though not murder).

(4) *The English Statutory Law:* England's first criminal abortion statute, Lord Ellenborough's Act, came in 1803. It made abortion of a quick foetus a capital crime; but it provided lesser penalties for the felony of abortion before quickening and thus preserved the quickening distinction. A seemingly notable development in the English law was

the case of *Rex* vs. *Bourne* [2] which held that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the mother. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.

Thereafter, British Parliament enacted the new abortion law, the Abortion Act of 1967 which provides for abortion when a physician makes the determination: (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman, or any existing children of her family, greater than if the pregnancy was terminated, or (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. The above Act also provides that, in making this determination, account may be taken of the pregnant woman's actual or reasonably foreseeable environment. It also permits a physician, without the concurrence of others, where he is of the good faith opinion that the abortion is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

(5) *The American Law:* In the United States the law in effect in all but a few states until mid-19$^{th}$ century was the pre-existing English common

---

2. [1983] 3 All E. R. 615.

law. By 1840, when Texas had received the common law, only eight American states had statutes dealing with abortion. It was not until after the war between the states that legislation began generally to replace the common law. Most of those initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in that country well into the 19th century. Even later, the law continued for sometime to treat less punitively an abortion procured in early pregnancy.

(6) *The position of the American Medical Association (AMA):* The anti-abortion mood prevalent in that country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period. The AMA Committee on Criminal Abortion offered and the Association adopted, resolutions protesting against unwarrantable destruction of human life, calling upon state legislatures to revise their abortion laws, and requesting the co-operation of state medical societies in pressing the subject.

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967, when the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is documented medical evidence of a threat to the health or life of the mother, or that the child may be born with incapacitating physical deformity or mental deficiency, or that a pregnancy resulting from legally established

statutory forcible rape or incest may constitute a threat to the mental or physical health of the patient and two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing, and the procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. On June 25th 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee.

(7) *The position of the American Public Health Association*: In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number. It was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay is probably the safest practice. An abortion in an extramural facility, however, is an acceptable alternative provided arrangements exist in advance to admit patients promptly if unforeseen complications develop. Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have adequate training.

(8) *The position of the American Bar Association:* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. Three reasons have been advanced to explain

historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence: (i) that these laws were the product of a Victorian social concern to discourage illicit sexual conduct, though Texas, did not advance this justification in the present case; (ii) that when most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman, so that a state's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy, though modern medical techniques have altered this situation; and (iii) that the state's interest – some phrase it in terms of duty - in protecting prenatal life, on the theory that a new human life is present from the moment of conception. [3]

The Court then considered the constitutional basis of the problem The US Constitution (as also the Constitution of India) does not explicitly mention any right of privacy. In a line of decisions the US Supreme Court had recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty", are included in this guarantee of personal privacy. They also made it clear that the right has some extension to activities relating to marriage, procreation contraception, family relationships, and child rearing and education. This right of privacy, the Court observed, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as the Court felt it was, or in the Ninth Amendment's reservation of rights to

---

3. *See, Ibid*, note 1, at 164-175.

the people, was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the state would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician will consider in consultation. [4]

On the basis of elements such as these, appellant and some amici argued that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this the court did not agree. The courts decision recognizing a right of privacy also acknowledged that some State regulation in areas protected by that right was appropriate. A state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The Court held that the

---

4. S. James Vincent, Unwanted Pregnancy and the Unremitted Row Over 'Roe vs. Wade' 32 *JILI* (1990) 246, at251.

privacy right involved, therefore could not be said to be absolute. The court had refused to recognize an unlimited right of this kind in the past, e.g., vaccination and sterilization and, therefore, concluded that the right of personal privacy included the abortion decision, but that this right was not unqualified and must be considered against important state interests in regulation.

The court summarized the conclusion as follows:

(i) A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved is violative of the Due Process Clause of the Fourteenth Amendment.

(ii) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(iii) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interests in the health of the mother, may, if it chooses regulate the abortion procedure in ways that are reasonably related to maternal health.

(iv) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

(v) The State may define the term "physician" to mean only a physician currently licensed by the State and may proscribe any

abortion by a person who is not a physician as so defined. [5]

The above majority opinion was delivered by Justice Blackmun in which six others concurred. However, the minority opinion of Justices White and Rehnquist dissented, saying that nothing in the language or history of the Constitution supported the court's judgment, and that the court had simply fashioned and announced a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, had invested that right with sufficient substance to override most existing state abortion statutes, whereas the issue of abortion should actually have been left with the people and the political processes they have devised to govern their affairs. [6]

To tell a woman that she must bear a child conceived as a consequence of voluntary intercourse may possibly be a little less intrusive, but it is still a major interference with freedom to shape one's own life. Here, perhaps, no precedent is needed to show that the values of Western civilization. But no liberty is absolute; and the question remains whether the invasion is justified by a "compelling public purpose". Sometimes, it is asserted that the unborn child is a "person"; that its life begins on conception; and protecting that person's life is a compelling public purpose. The argument depends upon the meaning of "person" and of "life". It is important not to tuck the conclusion into the definition. However, in *Roe* vs. *Wade* the Court found it unnecessary to decide when "life" begins. The precedents available in *Roe* did nothing to affirm or deny that the purpose in protecting "near-life" or "becoming life" is "compelling" when measured against the

---

5. *See, ibid*, note 1, at 183 – 84.

6. *See, ibid*, note 4, at 253.

value of the woman's freedom of choice. [7]

A question arises as to where the judges should look for the law. The ideal of law would require them to search outside themselves in both history and contemporary life for expressions of the basic ideals and values of the American people. The first stage of such a search in the abortion case would lead one to the conclusion that the basic values of American society have not given the woman an absolute right to freedom of choice ranking above the interests served by anti-abortion laws. Sustaining the claim would override the laws of all fifty states some more than a century old, others quite recently liberalized and re-enacted. Sustaining the claim would also run counter to the moral code prevailing in the previous century. To quote Archibald Cox:

> Any law requiring a woman who has conceived to carry the unborn to birth denies her equal liberty and opportunity with men. Could conscientious and open-minded Judges conclude with equal assurance either that the anti-abortion laws were all too easily enacted, without compelling or even important justification, because of indifference to the resulting inequalities of liberty and opportunity? Or did the nearly unanimous acceptance of such laws for many decades rest to an important degree on the belief that they helped to preserve the special sanctity of human life (however broadly or narrowly the word be defined)? If the latter, can we as Judges say with assurance that modern science and medicine have undermined the old reasons for confidently believing that the prohibition does help to preserve the special sanctity of a human life? The right answer is

---

7. *Ibid.*, at 254.

far from obvious. My own judgment is that the people's belief in anti-abortion laws rested for the most part on belief in their role in preserving our respect for the special sanctity of human life, and that the people ranked that interest as compelling. And even though science and technology have dispelled much of the mystery of creation and birth, just as they have clouded the line and protracted the time between life and death, I cannot say that prohibiting abortions can no longer be said to serve the compelling public purpose once underlying the anti-abortion laws. [8]

Again in *Planned Parenthood of Missouri* vs. *Danforth* [9] in litigation instituted in the United States District Court for the Eastern District of Missouri, a challenge was made to the validity, under the United States Constitution, of a Missouri statute setting forth conditions and limitations on abortions and establishing criminal offences for non-compliance with the various conditions and limitations. The specific provisions of the statute attacked were (1) a viability definition provision defining "viability", for purposes of a provision that no abortion not necessary to preserve the life or health of the mother should be performed unless the attending physician would certify with reasonable medical certainty that the foetus is not viable, as that stage of foetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems, (2) a pregnant woman's consent provision requiring that a woman prior to submitting to an abortion during the

---

8. *See,* Archibald Cox, *The Court and the Constitution,* Indian ed., Asian Books 333 (1989).

9. 49 L.Ed. 2d 788.

first 12 weeds of pregnancy must certify in writing her consent to the procedure and that her consent is informed, freely given, and not the result of coercion, (3) a spousal consent provision, requiring the prior written consent of the spouse of a woman seeking an abortion during the first 12 weeks of pregnancy, unless the abortion were certified by a physician to be necessary for preservation of the mother's life, (4) a parental consent provision, requiring, with respect to the first 12 weeks of pregnancy whereas the pregnant woman is unmarried and under 18 years of age, the written consent of a parent or person in *loco parentis* unless the abortion were certified by a physician as necessary for preservation of the mother's life, (5) a saline amniocentesis prohibition provision, describing the saline amniocentesis technique of abortion as one whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac, and prohibiting such method of abortion after the first 12 weeks of pregnancy, (6) record keeping and reporting provisions, imposing requirements upon health facilities and physicians concerned with abortions irrespective of the pregnancy stage, and (7) a standard of care provision, declaring, in its first sentence, that no person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the foetus which such person would be required to exercise in order to preserve the life and health of any foetus intended to be born and not aborted, and providing, in its second sentence, that any physician or person assisting in an abortion who failed to take such measures to encourage or sustain the life of the child would be deemed guilty of manslaughter if the child's death resulted. The District Court upheld the constitutionality of the several challenged

provisions of the statute with the exception of the first sentence of the standard of care provision.

On direct appeals from the decision of the three-judge District Court, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Blackmun, J., it was held: expressing the unanimous view of the Court, that (1) the viability definition provision, which reflected the fact that the determination of viability, varying with each pregnancy, was a matter for the judgment of the responsible attending physician, was not unconstitutional, since it did not circumvent the permissible limitations on state regulation of abortions (2) the pregnant woman's consent provision was not unconstitutional since the state could validly require a pregnant woman's prior written consent for an abortion to assure awareness of the abortion decision and its significance, and (3) the recordkeeping and reporting provisions were not constitutionally offensive in themselves and imposed no legally significant impact or consequence on the abortion decision or on the physician-patient relationship; expressing the view of six members of the court, that (4) the spousal consent provision was unconstitutional, since the state, being unable to regulate or proscribe abortions during the first stage of pregnancy when a physician and patient make such decision, could not delegate authority to any particular person, even a pregnant woman's spouse to prevent abortion during the first stage of pregnancy, (5) the first sentence of the standard of care provision was unconstitutional, since it impermissively required a physician to preserve the life and health of a foetus, whatever the stage of the pregnancy, such unconstitutional first sentence not being severable from the second sentence establishing manslaughter for violation of the standard of care, notwithstanding that

the Missouri statute contained a severability provision; and expressing the view of five members of the court, that (6) the parental consent provision was unconstitutional, since the state did not have the constitutional authority to give a third party an absolute and possibly arbitrary , veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent and (7) the saline amniocentesis prohibition provision was unconstitutional since it failed as a reasonable regulation for the protection of maternal health, being instead an unreasonable or arbitrary regulation designed to inhibit the vast majority of abortions after the first 12 weeds of pregnancy.

In 1992, in *Planned Parenthood vs. Casey* [10] the Pennsylvania abortion legislation were held valid, except for the spousal-notice provisions, under the due process clause of the Fourteenth Amendment. In this case, the Pennsylvania abortion statute was challenged. In 1988 and 1989, the said statute was amended to provide that (1) a woman seeking a divorce is required to give her informed consent prior to the abortion procedure and to be provided, at least 24 hours before the abortion is performed, with certain information concerning her decision whether to undergo an abortion, (2) a minor seeking an abortion is required to obtain the informed consent of one of her parents or guardians, but has available a judicial bypass option if the minor does not wish to or cannot obtain such consent, (3) unless certain exceptions apply, a married woman seeking an abortion is required to sign a statement indicating that she has notified her husband of her intended abortion, (4) compliance with the foregoing requirements is exempted

---

10. 120 L Ed. 2d 674.

in the event of a "medical emergency", which term is defined in another statutory provision as a pregnant woman's medical condition that on the basis of a physicians good-faith clinical judgment, necessitates an immediate abortion to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function, and (5) facilities providing abortion services are subject to certain reporting and record-keeping requirements, which do not include the disclosure of the identities of women who have undergone abortions, but which include a requirement of reporting of a married woman's failure to provide notice to her husband of her intended abortion. Before any of these provisions took effect five abortion clinics and one physician representing himself as well as a class of physicians who provided abortion services brought suit seeking declaratory and injunctive relief on the basis of the allegation that each provision was unconstitutional on its face. The United States District Court for the Eastern District of Pennsylvania, after entering a preliminary injunction against enforcement of the provisions held that all the provisions were unconstitutional and entered a permanent injunction against the state's enforcement of the provisions. The US Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all the provisions except for the spousal-notice requirement.

On *certiorari*, the United States Supreme Court affirmed in part, reversed in part, and remanded. A majority of the members of the Court joined portions of an opinion holding that (1) the statutory provision defining a medical emergency did not violate the due process clause, (2) the provision requiring spousal notice violated the due process clause, and (3) the essential holding of *Roe vs. Wade* which

held that (a) a woman has the right to choose to have an abortion before her foetus is viable and to obtain an abortion without undue interference from a state, (b) a state has the power to restrict abortions after foetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman's life or health, and (c) a state has legitimate interest from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the foetus that may become a child - should be retained and reaffirmed. Although unable to agree on an opinion as to the other statutory provisions, (1) seven members of the court (O' Connor, Kennedy, and Souter, JJ., Rehnquist, Ch. J., and White, Scalia and Thomas, JJ.) agreed that the provisions requiring informed consent, the 24-hour waiting period, and parental consent did not violate the due process clause, (2) eight members (O' Connor, Kennedy, Souter and Stevens, JJ., Rehnquist, Ch. J., and White, Scalia and Thomas, JJ.) agreed that the provisions requiring record keeping and reporting at least, except for the provision requiring reporting of failure to provide spousal notice, did not violate the due process clause, and (3) five members (O' Connor, Kennedy, Souter, Stevens, and Blackmun, JJ.) agreed that the provision requiring reporting of failure to provide spousal notice violated the due process clause.

A related issue is the issue of foetal wrongs and foetal abuse. In October, 1986, Pamela Roe Stewart was charged with child abuse for willfully omitting to furnish medical services. The "child" she allegedly abused was the foetus she was carrying in her womb. According to police reports, Ms. Stewart abused the foetus by disregarding a physician's advice to discontinue amphetamine use during her pregnancy, to abstain from sexual intercourse because her placenta had

detached, and to seek immediate medical attention if she began to hemorrhage. Her child was born with brain damage and died less than two months later as a result of prenatal injury. [11]

On February 26, 1987, a California state judge dismissed the charge against Ms. Stewart reasoning that the statute under which she had been charged was intended not to penalize women for conduct during pregnancy but rather to enforce child support arrangements: the inclusion of foetuses within the statute's definition of "child" was aimed only at husbands who abandon their pregnant wives and refuse to pay their own share of pregnancy expenses. Consequently, the court in *People* vs. *Stewart* did not reach the issue of the constitutionality of criminalizing maternal prenatal conduct, nor has any other court. No state has yet passed a statute that explicitly criminalizes "foetal abuse", but several commentators have called for such laws, and the *Stewart* case reflects pressure for movement in this direction. The constitutionality of foetal abuse legislation, like that of abortion law, requires consideration of both maternal rights and state interests. *Roe vs. Wade* [12] and later abortion cases offer a good starting point for a discussion of foetal abuse, because they provide an analytical framework for resolving the conflicts between these rights and interests. The abortion cases make clear that a statute that infringes upon a constitutionally protected privacy right must undergo strict scrutiny; it will be upheld only if it is narrowly tailored to achieve a

---

11. *See,* Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse", 101 *HLR* 994 (1988).

12. 110 U.S. 113 (1973).

compelling state interest. [13]

*Roe* provides the framework in which to analyze conflicts between maternal privacy rights and the state interest in protecting foetuses, weighing the two to determine when the latter becomes compelling. One need not, however, assume that *Roe's* result – the trimester system – provides a solution to the problems raised by foetal abuse legislation. The state and maternal interests implicated by foetal abuse statutes are different from those in the abortion context. The maternal privacy right at issue in foetal abuse cases focuses not on a woman's decision whether to continue her pregnancy – the abortion question – but rather on her decisions regarding how to conduct her life during her pregnancy. In the foetal abuse context, the state's interest are not preservation of the mother's health and the protection of potential life against intentional termination, but the enhancement of the born child's quality of life through protection of the foetus from reckless or negligent harm. *Roe's* holding that the state's interest in the birth of a foetus does not become compelling during the first two trimesters of pregnancy does not rule out the existence of a compelling state interest in ensuring that foetuses that will be carried to term are born unharmed. States may have a greater interest in preventing future suffering of those who will be born than in ensuring that any particular foetus will be born. Conversely, *Roe's* holding that states are allowed to protect foetuses from abortion in the third trimester does not necessarily imply that states have an equally compelling interest in protecting foetuses from all other harms during that period. Furthermore, R*oe's* trimester framework may be simply illogical in the context of foetal abuse

---

13. *See, Ibid,* note 11, at 995- 996.

because it permits increasing regulation as pregnancy progresses, whereas foetuses are most vulnerable in the earliest stages of pregnancy. Despite these important differences, however, the US Supreme Court's abortion jurisprudence provides an appropriate approach to the task of balancing maternal rights against state interest. [14]

Foetal abuse statutes should be subject to strict scrutiny because they infringe upon a woman's constitutionally protected right to privacy. These statutes implicate two different aspects of the right to privacy; the right to make decisions that affect the spheres of family, marriage, and procreation and the right to control one's own body.

**The Right to Reproductive and Familial Privacy**

Statutes designed to prevent foetal harm could affect a wide range of personal decisions. Almost any decision that pregnant woman makes with respect to her own body – decisions regarding eating, drinking, taking medication, or not seeing a doctor – may injure a foetus and thus take on legal significance if foetal abuse is criminalized. The *Stewart* case itself provides a telling example, the police report cited taking drugs, refraining from seeing a doctor, and engaging in sexual intercourse as reasons for Ms. Stewart's arrest – unwise activities but arguably not analytically distinct from drinking wine, missing a doctor's appointment, or carrying heavy groceries. Regulation of such activities implicates the right to privacy in reproductive decision making first articulated in *Griswold* vs. *Connecticut.* [15] Writing for the

---

14. *Ibid,* at 997-98.

15. 381 U.S. 479 (1965).

Court, Justice Douglas stated that various constitutional guarantees – those located in the language and "penumbras" of the First Third, Fourth, Fifth and Ninth Amendments – create "zones of privacy". The *Griswold* Court, in striking down a Connecticut law that prohibited married couples from using contraceptive devices, recognized that certain intimate decisions observe constitutional protection. Later cases built on *Griswold* to reinforce an understanding of this privacy right as the right to make decisions within the familial and procreative spheres, free from state interference. In *Eisenstadt* vs. *Baird,* [16] for example, the Court struck down a statutory prohibition against distributing contraceptives to unmarried persons, declaring the right of privacy to be "the right of the *individual*, married or single. To be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child". *Roe* itself strengthened this understanding of privacy as a right to make personal decisions: *Roe* represents less a decision in favour of abortion than a decision in favour of leaving the matter, however it might come out in particular cases, to women rather than to legislative majorities. [17]

This recognition that privacy rights encompass the decision whether to begin a pregnancy or carry it to term is part of a larger body of law that recognizes decisional privacy rights in matters related to the family. For example, the Court has upheld the right of persons to determine the family group with which they live and the right of parents to decide how their children will be educated. In general, courts have accorded much weight to the parental right to raise a child in the

---

16. 405 U.S. 438 (1972).

17. *See, ibid,* note 11, at 998-99

way the parent sees fit - a right bounded only by child abuse statutes directed at the most egregious conduct. Although the Court restricted the expansion of privacy rights in personal sexual decision making in *Bowers* vs. *Hardwick,*[18] which upheld the criminalization of homosexual sodomy, the court explicitly preserved "family, marriage and procreation" as spheres in which decisional rights of privacy exist. Furthermore Justice White's majority opinion in *Hardwick* identified "rights qualifying for heightened judicial protection" as those "deeply rooted in this Nation's history and tradition" [19]

This right of the individual to control procreative and familial decisions should also apply to the maternal decisions potentially infringed upon by foetal abuse legislation. The decisions in question here - what to eat or drink, when to go to the doctor, whether to have sex and so forth - have both procreative and nonprocreative aspects. Indeed, regulating such decisions for all people – for example, banning all alcohol consumption – has no procreative significance. If states limit consumption only for pregnant woman, however, they would be regulating the procreative aspect of the decision whether to drink. Such laws seek to control the incidents of procreation, infringing on a woman's power to make decisions about how she will live her life during her pregnancy. [20]

The two rationales behind protecting the decision whether to procreate apply equally to the decisions about the manner in which one procreates. First, in both contexts, women are more affected than the

---

18. 106 S.Ct. 2814 (1986).

19. *See, ibid,* note 11, at 999 -1000.

20. *Ibid,* at 1000.

state by the consequences of the decision. Second, women have better knowledge of their individual circumstances and thus are in a better position than the state to decide how to act. Although the state may at times have more scientific information, women know more about their particular life circumstances - for example, whether they can afford extensive parental care. Of course, in the foetal abuse context unlike the abortion context, women may not have full information with which to make their decisions - as a practical matter they may *not* know that they are harming their foetuses. Although the state can and should educate women about the effects on foetuses of certain activities during pregnancy, constitutional protection of procreative decisions should not hinge on whether women have such information. The state's belief that a woman has made an ill-considered choice does not entitle it to criminalize her procreative decision. The abortion cases show that the Constitution puts a value on personal autonomy the state cannot abridge this autonomy simply because it finds that approach easier than education. [21]

**The Right of Bodily Integrity**

Another privacy right implicated by foetal abuse statutes is the mother's right of bodily integrity. Courts and commentators have recognized, in a variety of contexts, that an individual has a right to make decisions that affect her body. As in the procreative choice area, cases delineating the right to bodily integrity can be viewed as protecting an aspect of an individual's life traditionally respected as

---

21. *Ibid*, at 1000-01.

private the right to control over one's own physical self. Foetal abuse statutes wrest from competent pregnant women the power to make decisions that affect their own bodies, placing it instead in the hands of the state. [22]

The recognition that government regulation of maternal or foetal relations infringes upon maternal privacy rights represents only one side of the constitutional balance. Under strict scrutiny, courts must also determine whether and when the state interests that lie on the other side become compelling. Among the broad state interests that could be offered to justify criminal foetal abuse statutes are the protection of foetuses from the risk of birth defect caused by prenatal injury. These state interests could be legitimate either as an outgrowth of the states power to protect potential life, discussed in *Roe*, or as an extension of its ability to protect born persons. The fact that a born child may suffer as a result of foetal abuse adds to the state's interest. As a logical matter, the strength of the state interest in preventing any particular maternal activity depends on the likelihood that the activity will lead to harm and the significance of such harm to the foetus or the born child [23]. Given the strength of the maternal privacy interests at stake, foetal abuse statutes should be subject to strict scrutiny. In order to pass constitutional muster under this standard, the harm that the statute prevents must be likely to occur and severe in nature, and the statute must utilize the least restrictive means of preventing such harm [24].

---

22. *Ibid*, at 1001-02.

23. *Ibid*, at 1003.

24. *Ibid*, at 1005.

Broad foetal abuse statutes that are patterned on child abuse statutes those that make neglecting or abusing a foetus a crime without specifying what constitutes neglect or abuse- would be unconstitutional for two reasons. First, such statutes would be void for vagueness because they do not define the specific forms of abuse that constitute crimes and thus would not give notice to mothers of the scope of their duties towards their foetuses. Second, such statutes could be interpreted to require a degree of infringement on maternal rights not justified by the extent of foetal protection they offer; thus they would be narrowly tailored enough to survive strict scrutiny. For example, a child abuse statute that included foetuses could be interpreted to punish the taking of drugs that are essential to the mother's health but harmful to the foetus. This result stands in opposition to the standard articulated in the abortion cases – that concerns for maternal health constitutionally outweigh concerns for foetal health throughout pregnancy. [25]

When applied to narrower statutes targeted at specific conduct, strict scrutiny yields less obvious results. Statutes banning specific types of conduct by pregnant women would not fail for vagueness as would the broad statutes. Under a strict scrutiny standard, the state has the burden of establishing that the banned maternal activity bears a clear relation to significant foetal harm and that banning the activity is not an over encompassing means of protecting the foetus from that harm. The following factors should bear on how much weight courts should assign to both the maternal and state interests. First, because the rights of both procreative privacy and bodily integrity are justified by

---

25. *Ibid*, at 1006.

reference to tradition, the maternal right to decide should be given more weight when the decision is one traditionally accorded to the individual. Second, the state's interest becomes stronger as the likelihood increases that the banned activity will lead to harm as the harm becomes more significant .[26]

It might seem that foetal abuse statutes that cover only a narrow range of activities resulting in harm to fetuses will always survive strict scrutiny. A court might view the woman's "fundamental right" as trivial - a right to drink alcohol or to eat junk food. Throughout the inquiry, however, it is essential to understand that more is a stake – the state in these situations is seeking to regulate the procreative aspects of particular decisions and thus the procreative process. In considering the constitutionality of foetal rights legislation, therefore, courts should assign greater weight to maternal decisional rights than they might at first perceive as appropriate, in order to protect the woman's right of procreative autonomy.[27]

Even if some foetal abuse statutes could pass constitutional muster, legislatures and courts should consider the negative social effects of such statutes and the possibility that there may be a better approach to solving the problem of foetal abuse. In advocating protection of foetal rights through the imposition of criminal liability, commentators focus on the problem of the injured foetus. They discuss the harms that mothers can cause to foetuses, as well as the constitutionality of the proposed maternal liability. What these commentators ignore, however, are the detrimental effects of their

---

26. *Ibid,* at 1006-07.

27. *Ibid,* at 1007.

solution and the promising prospects of other solutions. They mistake the conclusion that criminal liability is *a* solution for the conclusion that it is *the* solution [28].

Imposing criminal liability on pregnant women for conduct harmful to their foetuses is detrimental in two ways: it discourages maternal-foetal bonding and it encourages a system in which women are deprived of control over their own bodies and pregnancies. The recognition of opposing foetal rights emphasizes the antagonistic dimension of maternal-foetal relations. In essence, foetal abuse legislation forces women to see their foetuses as things that curtail their legal rights. Whereas abortion law allows women to define their relationship with their foetuses; foetal abuse laws can threaten pregnant women by making pregnancy a legally precarious situation, and thus can foster hostility between mother and child. A second negative effect of criminalizing foetal abuse is the removal of women's control of their own lives in favour of control by doctors. This effect is destructive because it reinforces an understanding of women as persons deserving less than full autonomy criminalizing foetal abuse also emphasizes an instrumentalist view of pregnancy that sees women as "foetal containers" rather than thinking and feeling beings. In the final analysis, these negative effects may not be sufficient to preclude enacting foetal abuse statutes if such statutes are truly effective and if no better approach is available. However, there are alternatives that do not create negative conceptions of women and that avoid infringing on maternal privacy rights. These are government expansion of educational efforts aimed at pregnant women and promotion of the

---

28. *Ibid,* at 1009.

availability and quality of prenatal care.[29] This approach encourages bonding between mother and child as a way of curbing foetal harm. Moreover, whereas criminal liability would foster an inferior conception of women, increased funding of and education about prenatal care would represent a social commitment to benefiting women and would emphasize the humanistic aspects of pregnancy .[30]

As far as the situation in India is concerned, we find that the Medical Termination of Pregnancy Act,1971 liberalized the law relating to abortion to a great extent and achieved the stage of present US position by the enactment in 1971. The MTP Rules as revised by the Government of India in 1975 have made it competent for a woman to have her unwanted pregnancy terminated under the Act, on the certificates of a physician. She can avail herself of this legal protection in any Government hospital or a government-approved Medical termination of pregnancy centre by filling a form under her signature, in case her pregnancy posed a threat to her physical or mental health. Under the rules, only the consent of pregnant woman is mandatory. The consent of her guardian is required only in those cases where she is a minor or a lunatic. The Rules also enjoin a duty upon the doctor performing the operation of observing complete secrecy and confidentiality to his patient, even the husband of the patient is not to be informed of the fact of abortion .[31] The MTP Act, along with the revised Rules was, therefore, envisaged as a milestone in the modernization of the Indian society through the instrumentality of law.

---

29. *Ibid*, at 1009-10.

30. *Ibid*, at 1012.

31. The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)

Sec 3 : "*when pregnancies may be terminated by registered medical practitioners*" -

(1) Notwithstanding anything containing in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), pregnancy may be terminated by a registered medical practitioner –

(a) Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two medical practitioner are, of opinion, formed in good faith, that –

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental heath; or

(ii) there is substantial risk that if the children were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

*Explanation I* – where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

*Explanation II* – where any pregnancy occurs as c result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-sec (2) account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in cl (a) no pregnancy shall be terminated except with the consent of the pregnant woman.

Sec 4 : "*place where pregnancy may be terminated*" -

No termination of pregnancy shall be made in accordance with this Act at any place other than –

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government.

Sec 5 : "*Sections 3 and 4 when not to apply*"-

(1) the provisions of sec 4 and so much of the provisions of sub-sec (2) of sec 3 as relate to the length of pregnancy to the termination of a pregnancy by a registered medical practitioner, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in any good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that code, and that code shall, to this extent, stand modified.

*Explanation* – For the purposes of this section, so much of the provisions of cl. (d) of sec 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

## B. Dignity, Modesty and Self-respect

Privacy is the guarantor of individual moral autonomy, a basic value in a democratic system of government. Privacy can be defined as the right to control one's information system and one's physical being. The latter right has been traditionally conceived in American society as the right to be secure against unauthorised entries and seizures. Both rights are closely related to the principle of respect for persons. Both must be reinterpreted in the light of changing technological and social contexts. Privacy is violated whenever a person's moral autonomy or self-image are impinged upon, even without affecting his conduct. Altering an individual's self-perception against his will offends human dignity. If we are able to regulate a person's conduct or keep it under surveillance, we are, in fact curtailing his responsibility as a moral agent making free choice. This limits the option open to persons regarding relationship with others, their physical mobility and their own self-perception. Privacy, the control of one's own person and of the extension of one's person in the form of information, is at the basis of man's claim for human dignity.[1]

Clinton Rossiter has said that privacy is a special kind of independence which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary, in defiance of all pressures of modern society. Privacy according to him, seeks to erect an unbreakable wall of dignity and reserve against the entire world. The free man is the private man, who keeps some of his thoughts and

---

1. S. K. Sharma, *Privacy Law-A Comparative Study*, Atlantic publishers and Distributors, New Delhi, 1994, at 211.

judgments entirely to himself, who feels no overriding compulsion to share everything of value with others, not even with those he loves and trusts.[2] Some of the Justices of the Supreme Court of America, who have spoken about it, have attempted to define privacy as an aspect of the pursuit of happiness.[3] Pursuit of happiness required certain amount of liberty to do as one likes. Privacy requires a private enclave as it were where an individual is at liberty to do what he wants. An intrusion on privacy threatens that liberty just as assault, battery or imprisonment. It is really an offence "to the reasonable sense of personal dignity". There can perhaps be no objection in regarding intrusion into our privacy as a dignity tort. The harm caused by this intrusion is incapable of being repaired and the loss suffered in dignity is not susceptible of being made good in damages. The injury is to the spiritual element in our otherwise mundane composition.[4]

One may desire to live a life of seclusion, another life of publicity. Still another life of publicity concerning certain matters and privacy as respects other matters of life. Neither an individual nor the public has a right arbitrarily to take away from him that liberty. It is difficult to find words adequate to express the mental conditions resulting from the pain on the violation of the right of privacy. We speak without sufficient discrimination of it as distress, anguish, anxiety, mental illness, indignity and mental suffering. The common interest involved in all these conditions resulting from violation of privacy is spiritual in character

---

2. *Ibid*, at 211-212.

3. *See*, *Poe* vs. *Ullman*, 367 U.S. 497; *Goldman* vs. *United States*, 316 U.S. 129; *Public Utility Commissioner* vs. *Pollock*, 343 U.S. 451.

4. *See*, *Ibid*, note 1, at 212.

rather than any interest in reputation or property.[5]

What distinguishes the invasion of privacy as a tort from other torts which involves insult to human dignity and individuality is merely the means used to perpetuate the wrong. The woman who is petted indecently suffers the same indignity as the woman whose birth pangs are overseen. The woman whose photograph is exhibited for advertisement is degraded and demeaned as surely as the woman who is kept aboard in a pleasure yacht against her will. This is an example of intrusion upon personal intimacy and using techniques of publicity to make a public spectacle of an otherwise private life.[6]

The right of privacy attempts to preserve individuality by placing sanction upon outrageous or unreasonable violations of conditions for its sustenance. This then is the social value to be served by the law of privacy. It is served not only in the law of tort but in other areas. Protection of privacy is the central purpose of the privilege against self-incrimination in Article 20(3).[7] The privilege reflects the respect which we accord to the inviolability of human personality and the right of each individual to a private zone where he may have his private life. It reflects the private inner sanctions of the individual feeling and thought and prescribes state intrusion to extract self condemnation.[8]

We are all of necessity subject to some minimum amount of scrutiny by our neighbours as a condition of civilized life in a society.

---

5. *Ibid.*

6. *Ibid*, at 212-13.

7. Art. 20(3) of the Constitution of India reads "No person accused of any offence shall be compelled to be a witness against himself.".

8. *Ibid*, at 213.

Man has always relished the knowledge of the intimate details of lives and doings of others especially his neighbours. The most obvious and conflicting value is the public interest in news and information which much of necessity run counter to the individual interest of privacy. Even if the nature of the interest involved in privacy is understood it will not resolve this conflict of values, except perhaps to make it clear that one of the values to be weighed is that interest. All tort privacy cases involve the same interest in preserving human dignity and individuality will have important consequences for this development of tort.[9]

Society has a strong interest in protecting the sanctity, the dignity and the integrity of the human person. John Stuart Mill once wrote:

> "There is a circle around every individual human being, which no government, be it that of one of a few, or of the many, ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question ."[10]

The American judiciary has generally acknowledged that there is such a societal interest – an "*inherent right* of *bodily integrity*". Furthermore the privacy of the individual from assault upon his person by

---

9. *Ibid*, at 213-14.

10. J. S. Mill, *Principles of Political Economy* (1848) Vol. II, at 560,561.

officers of the state is a right so basic and fundamental that it is binding upon the states under the due process clause of the Fourteenth Amendment .[11]

One of the most important societal interests is that of safeguarding and protecting the public health and it can be expected that this interest will prevail over most other interests. Perhaps a majority of our people feel that society has a legitimate interest in preventing the propagation of congenital mental defectives. Such interest, according to the US Supreme Court justifies a state in exposing such defectives to compulsory sterilization.[12] In *Skinner* vs. *Oklahoma* [13] the US Supreme Court has referred to the right to enter into the marriage relation and procreate children as 'fundamental" among "the basic civil rights of man" truly a basic liberty. In areas involving interests less precious than the sanctity of the person, the court has demanded that the state explore reasonable alternatives that will as adequately protect the interest of society without infringing upon the person. Here reasonable alternatives seem to be available to a state concerned with the perpetuation of congenital mental defectives – these unfortunate individuals can be institutionalized and segregated from members of the other sex without prohibitive costs to society.

The United States Supreme Court has invalidated a state sterilization Act which authorized the sterilization of those convicted for the third time of larceny but made no similar assault upon the bodies of those for the third time convicted of such crimes as embezzlement. The

---

11. *Rochin* vs. *California*, (1952) 342 U.S. 165.

12. *See*, *Buck* vs. *Bell*, (1927) 274 U.S. 200.

13. (1942) 316 U.S. 535.

Supreme Court stated that when the law lays an unequal hand on those who have committed intrinsically the same quality of offence and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[14] Under equal protection of the laws any resemblance of unreasonable differentiation in sterilization statutes or their practice will invalidate the same. Sterilization cannot be imposed upon a person as punishment for crime; courts rather generally agreeing that such is cruel and unusual punishment .[15]

Society has a legitimate interest in suppressing crime and detecting criminals. However, it is established by an abundance of authority that the officers of the state cannot degrade the individual in their search for proof of crime and the identity of criminals. The Court in *Breithaupt* vs. *Abram* [16] observed:

> "As against the right of an individual that his person be held inviolable, even against so light an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly everyday must be set the interests of the society in the scientific determination of intoxicant, one of the great causes of the mortal hazards of the road."

The Supreme Court in *Schemerber* vs. *California*[17] noted that the overriding function of the Fourth Amendment is to protect personal

---

14. *Ibid.*

15. *See, Davis* vs. *Berry*, (1914) D. C. Iowa, 216 F. 413 ; *Mickle* vs. *Henrichs*, (1918) D. C. Nev. 262 F. 687.

16. (1957) 352 U.S. 432.

17. (1966) 384 U.S. 757.

privacy and dignity against unwarranted intrusion by the state. It added:

> "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the state's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions".

Justice Fortran in his dissenting opinion said:

> "As prosecutor, the state has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest is an act of violence".

Society has a worthy interest in attempting to prevent anti-social conduct, and it is sometimes thought that physically punishing those convicted of crime deters them and others from wayward behaviour. The Eight Amendment in the case of the Federal Government and the Fourteenth in the case of the States, prevent the imposition of cruel and unusual punishment even upon those convicted in the most heinous offences. Another way of protecting society's interest in the dignity of the individual notwithstanding his anti-social behaviour is the free exercise of religion guarantee of the First Amendment. [18]

Article 21 of the Constitution of India prevents the state from treating the human life as that of any other animal. It is now well established by the decisions of the Supreme Court that the word "life" occurring in Article 21 has spiritual significance as the word "life" occurring in the famous Fifth and Fourteenth Amendments to the American Constitution. In those constitutional provisions of the American

---

18. *See*, *Ibid* note 1, at 216.

Constitution "life" is interpreted by Justice Field in *Munn* vs. *Illinois* [19] to mean and signify more than a person's right to lead animal or vegetative existence. He said, "By the term life as here used something more is meant than mere animal existence". The contrast drawn by Field, J., emphasizing the difference between existence of a free willing human and that of an unfree animal was accepted by Indian Supreme Court in *Kharak Singh* vs. *State of UP* [20] and next in *Govind* vs. *State of MP* [21] transforming Article 21 of Indian Constitution into a charter for civilization.

In *Govind* vs. *State of MP* [22], Mathew, J., taking the lead given by the minority judgment of Subba Rao, J., in *Kharak Singh's* case and adverting to the American legal and philosophical literature on right to privacy and to the American cases reported in *Griswold* vs. *Connecticut* [23] and *Jane Roe* vs. *Henry Wade* [24] ruled that Article 21 of Indian Constitution embraces the right to privacy and human dignity. The centerpiece of the judgment in *Govind's* case is to hold that right to privacy is part of our Constitution and to stress its constitutional importance and to call for its protection. The learned judge then examined the content of the right to privacy and observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing". The learned

---

19. (1877) 24 L Ed. 17.

20. AIR 1963 SC 1295.

21. AIR 1975 SC 1379.

22. *Ibid.*

23. (1965) 14 L Ed. 510.

24. (1973) 35 L Ed. 2d. 147.

judge stressed the primordial importance of the right to privacy for human happiness and directed the courts not to reject the privacy-dignity claims brought before them except where the countervailing state interests are shown to have overweighing importance meaning thereby that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. *Govind's* case thus firmly laid it down that Article 21 protects the right to privacy and promotes the individual dignity mentioned in the Preamble to our Constitution.

The question of individual dignity and the right to privacy came up before the Andhra Pradesh High Court in *T. Sareetha* vs. *T. Venkata Subbaiah.* [25] In this case the petition was filed against an order of the subordinate judge under Section 9 of the Hindu Marriage Act for restitution of conjugal rights mainly on the ground that the said judge had no jurisdiction to pass the order. The claim of the petitioner was rejected by the High Court. In the mean time, she filed another petition challenging the constitutional validity of Section 9 on the ground that it was violative of right to 'life, personal liberty and human dignity and decency' under Article 21 of the Constitution.The Court held that the right to privacy was a fundamental right under Article 21. Justice Chaudhary extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation. The Court struck down Section 9 of the Hindu Marriage Act. In the opinion of the Court the matrimonial remedy

---

25. AIR 1983 AP 356.

provided therein during a moment's duration would not only alter the entire life style but also would destroy the same. This situation was treated as a violation of individual dignity and right to privacy. It is, however, submitted that in view of American experiences it may create complex problem in relation to family law in India. [26]

The right to privacy was extended to protect the modesty and self-respect of woman in *Neera Mathur* vs. *Life Insurance Corporation of India.* [27] In this case the petitioner, a lady candidate, applied for the post of Assistant in the Life Insurance Corporation of India. She was successful in written test and interview. She was asked to fill a declaration form. On the same day, she was also examined by a lady doctor and found medically fit for the job. The doctor who examined the petitioner was in the approved panel of the Corporation. The petitioner was directed to undergo a short term training programme. After successful completion of the training she was appointed as Assistant in the Corporation. She was put on probation for a period of six months. Meanwhile she took leave for about three months and delivered a full term baby. Subsequently she was discharged from service. There was nothing on record to indicate that the petitioner's work during the period of probation was not satisfactory. It was alleged that she gave a false declaration regarding the last menstruation period with a view to suppress her pregnancy at the stage of entering the service. The Court held that the petitioner could not be

---

26. *See*, Sampath, B.N., 19 ASIL (1983) 295, in *Saroj Rani* vs. *Sudarshan Kumar*, AIR 1984 SC 1562, the court rightly rejected the claim of right to privacy in relation to family law,*see* also, Dwivedi, B.P., *The Changing Dimension of Personal Liberty in India*, 1998, Wadhwa & Co.,Allahabad.

27. AIR 1992 SC 392.

blamed for giving false declaration when she was medically examined by the doctor who was in the panel approved by the Corporation and was found medically fit to join the post. It said that the petitioner would therefore be entitled to reinstatement.

The court also observed that the real mischief though unintended is about the nature of the declaration required from a lady candidate. The particulars to be furnished under clauses in the declaration are indeed embarrassing if not humiliating. The modesty and self respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term etc. The corporation would do well to delete such columns in the declaration.

In a landmark judgment in *Vishaka* vs. *State of Rajasthan,*[28] the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working woman. The court held that it is the duty of the employer or other responsible person in work places or other institutions whether public or private, to prevent sexual harassment of working woman.

The judgment of the court was delivered by J. S. Verma, C. J., on behalf of Sujata V. Manohar and B. N. Kirpal, JJ., on a writ petition filed by Vishaka, a non-governmental organization working for gender equality by way of Public Interest Litigation, seeking enforcement of fundamental rights of working woman under Article 14, 19 and 21 of the Constitution. In holding so the Court relied on international conventions and norms which are significant in interpretation of guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1) (a) and 21 of

---

28. AIR 1997 SC 3011

the Constitution and the safeguards against sexual harassment implicit therein. The immediate cause for filing the petition was alleged brutal gang rape of a social worker in Rajasthan. The Supreme Court, in absence of enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment, laid down the following guidelines.

(1) All employers or other responsible persons in charge of workplaces whether in the public or private sector, should take appropriate steps to prevent sexual harassment without prejudice to the generality of his obligation; he should take the following steps.

a) Express prohibition of sexual harassment which include physical favours; sexually coloured remarks; showing pornographic or any other unwelcome physical, verbal or non-verbal conduct of sexual nature should be noticed, published and circulated in appropriate ways.

b) The rule or regulation of Government and Public sector bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards woman at workplace and no woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

(2) Where such conduct amounts to specific offences under the Indian Penal Code or under any other law, the employer shall initiate appropriate

action in accordance with law by making a complaint with the appropriate authority.

(3) The victims of sexual harassment should have the option to seek transfer of perpetrator or their own transfer.

Verma, C.J., said, "The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When instances of sexual harassment resulting in violation of fundamental rights of woman workers under Articles 14, 19 and 21 are brought before for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum". This decision of the court will go a long way in increasing a sense of security in the minds of working woman that their honour and dignity will be safe in their place of work.

*Apparel Export Promotion Council* vs. *A. K. Chopra* [29] is the first case in which the Supreme Court applied the law laid down in *Vishaka* vs. *State of Rajasthan* and upheld the dismissal from service of a superior officer who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article 21 of the Constitution. The respondent was working as a private secretary to the Chairman of the Apparel Export Promotion Council, a private company. He tried to molest a woman employee of the Council who was working as a clerk-

---

29. AIR 1999 SC 625.

cum typist. She was not trained to take dictations. The respondent, however, insisted that she go with him to the business centre at Taj Palace Hotel for taking dictation from the chairman and type out the matter. Under the pressure of the respondent, she went to Taj Hotel to take the dictation from the chairman. While she was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. After taking the dictation, the respondent told her to type it at the Business Centre of the Taj Hotel which was located in the Basement of the Hotel. He volunteered to show her the Business Centre and taking advantage of the isolated place again tried to sit close to her and touch her despite her objections. The Chairman corrected the draft matter and asked her to retype it. The respondent again went with her to the Business Centre and repeated his overtures. According to her, the respondent had tried to molest her physically in the lift but she saved herself by pressing the emergency buttons. She orally narrated the whole incident to the Director and submitted a written complaint also. The respondent was suspended and a charge sheet was served on him. The respondent denied the allegations and said that they were imaginary and motivated. He contended that he merely attempted to molest her but had not actually molested her. The inquiry officer found the charges levelled against the respondent to be proved. The Disciplinary Authority agreed with the report of inquiry officer and imposed the punishment of removing him from service.

The Supreme Court held that the act of the respondent was wholly against moral sanctions, decency and was offensive to female subordinate's modesty and undoubtedly amounted to sexual harassment and hence the punishment of dismissal from service imposed on him was commensurate with the gravity of his objectionable behaviour and valid.

The Court held that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine broader probabilities of the case and not swayed by significant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation" or "physical assault". They must examine the entire material to determine the graveness of the complaint. The statement of the victim must be appreciated in the background of the entire case. The entire episode reveals that the respondent had harassed her by a conduct which was against moral sanctions and decency and modesty and amounted to sexual harassment.

The court said that each attempt of sexual harassment of female at the place of work results in violation of the fundamental right to gender equality in Article 14 and the right to life and liberty in Article 21 of the Constitution and courts are under constitutional obligation to protect and preserve those fundamental rights. In cases involving human rights, the courts must be alive to the international conventions and instruments and as far as possible to give effect to the principles contained in those international instruments. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Woman, 1979 (CEDAW) and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against woman besides taking steps to protect the honour and dignity of woman is clear and loud.

The mother's right of bodily integrity, a privacy right, is implicated by foetal abuse statutes. Courts and commentators have recognised, in a variety of contexts, that an individual has a right to make decisions that affect her body. Deriving a right of bodily integrity from the Fourth Amendment's prohibition of unreasonable searches, courts have refused to

grant the government permission to pump the stomach of suspects to force civilly committed patients to take antipsychotic drugs, or to compel competent patients to undergo treatment for their own health or to provide for their families. As in the procreative choice area, case delineating the right to bodily integrity can be viewed as protecting an aspect of an individual's life traditionally respected as private – the right to control over one's physical self. Foetal abuse statutes wrest from competent pregnant woman the power to make decisions that affect their own bodies, placing it instead in the hands of the state.[30]

30. *See*, Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of 'Fetal Abuse', 101 *HLR* 994 (1988) at 1001-02.

## C. Sexual Autonomy

It cannot be denied that among the few points that distinguish human existence from that of animals, sexual autonomy an individual enjoys to choose his or her partner to a sexual act, is of primary importance. Sexual expression is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation of the opposite sexes. No relationship between man and woman is more rested on mutual consent and freewill and is more intimately and personally forged than sexual relationship. The famous legal definition of marriage given by Lord Penzace in *Hyde vs. Hyde,* [1] as a voluntary union between man and woman only highlights this aspect of free association. The ennobling quality of sex of which Mavelock Ellis wrote in his *Studies on the Psychology of Sex* ensues out of this freedom of choice. He wrote that "the man experiences the highest unfolding of his creative powers not through asceticism but through sexual happiness". Bertrand Russel declared that: "I have sought love, first, because it brings ecstasy - ecstasy so great that I would often have sacrificed all the rest of life for few hours of this joy". Forced sex, like all forced things, is a denial of all joy. Yet in conceivable cases, sex may statutorily be denied and even forbidden by law between specified groups of persons. But no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the

---

1. (1866) LRIP & D 130 (Divorce Court).

law to a positive sex act. [2]

In India, the right to sexual autonomy came up before the Andhra Pradesh High Court in *T. Sareetha* vs. *T. Venkata Subbaiah* .[3] In this case the petition was filed against an order of the subordinate judge under Section 9 of the Hindu Marriage Act for restitution of conjugal rights mainly on the ground that the said judge had no jurisdiction to pass the order. The claim of the petitioner was rejected by the High Court. In the meantime, she filed another petition challenging the constitutional validity of section 9 on the ground that it was violative of right to 'life, personal liberty and human dignity and decency' under Article 21. The court held the right to privacy as a fundamental right under Article 21. Justice Chaudhary extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation. Relying on western sexologists the court upheld the sexual autonomy of wife and struck down Section 9 of the Hindu Marriage Act, which provides for restitution of conjugal rights. In the opinion of the court:

> "The remedy of restitution of conjugal rights provided for by Section 9 is savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Section 9 is constitutionally void. Any statutory provision that abridges any of the right guaranteed by Part III of the Constitution will have to be declared void in terms of Article 13 of the Constitution."[4]

The Court added that the decree for restitution of conjugal rights

---

2.*See, T. Sareetha* vs. *T. Venkata Subbaiah,* AIR 1983 AP 356, at 365-66.

3.*Ibid.*

4. *Ibid.*

constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. The woman loses her control over her most intimate decisions. Clearly, therefore, the right to privacy guaranteed by Article 21 is flagrantly violated by a decree of restitution of conjugal rights. A wife who is keeping away from her husband because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she is probably contemplating an action for divorce, the use and enforcement of Section 9 against the estranged wife can irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. During a moment's duration the entire life style would be altered and would even be destroyed without her consent. If that situation made possible by this matrimonial remedy is not a violation of individual dignity and right to privacy guaranteed by the Constitution and more particularly Article 21, it is not conceivable what else could be a violation of Article 21. [5]

The Court said that a court decree enforcing restitution of conjugal rights constitutes the starkest form of governmental invasion of personal identity and individual's zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be

---

5. *Ibid.*

used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity. Above all, the decree for restitution of conjugal rights makes an unwilling victim's body a soulless and a joyless vehicle for bringing into existence another human being. In other words, pregnancy would be foisted on her by the State and against her will. There can therefore be little doubt that such a law violates the right to privacy and human dignity guaranteed by and contained in Article 21. It is of constitutional significance to note that the ancient Hindu society and its culture never approved such a forcible marital intercourse. Our ancient law-givers refused to recognize any state interests in forcing unwilling sexual cohabitation between the husband and wife although they held the duty of the wife to surrender to the husband almost absolute. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither State coercion can soften the ruffled feelings nor clear the misunderstandings between the parties. Force can only beget force as action can only produce counter-action. It is only after considering the various factors that the Scarman Commission recommended for the abolition of this matrimonial remedy in England and the British Parliament enacted a law abolishing it. It is, therefore, legitimate to conclude that there are no overwhelming state interests that would justify the sacrificing of the individual's precious constitutional right to privacy.[6]

The decision of the Andhra Pradesh High Court in *T. Sareetha's* case was, however, not followed in subsequent cases.[7] It is submitted that

---

6. *Ibid.*

7. *See, Harvinder Kaur* vs. *Harmander Singh*, AIR 1984 Del 66, *Saroj Rani* vs. *Sudarshan Kumar*, AIR 1984, SC 1562.

in view of American experiences, the decision in *T. Sareetha's* case may create complex problem in relation to family law in India.

The right to privacy was extended to protect a prostitute from sexual assault in *State of Maharashtra* vs. *Madhukar Narayan Mardikar*.[8] In this case, a police inspector was dismissed from service on his proved involvement in an act of rape. The Bombay High Court quashed his dismissal on the ground that the woman, whom he was alleged to have raped was a woman of easy virtue. The Supreme Court on appeal held that a woman even of so-called easy virtue was entitled to protect herself against unwilling sexual assault. This was part of her personal liberty which was included in the right to privacy, Ahmedi, J., as he then was, aptly observed:

> "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when ones likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law." [9]

Another related issue in this respect is whether the right to privacy protects consensual homosexual relations between adults. Some cases came up before the American Supreme Court on this issue.

In *Bowers* vs. *Hardwick*,[10] the Supreme Court of the United States upheld, against a constitutional challenge, the application of Georgia's sodomy statute to consensual same-sex sodomy. Justice White, framing

---

8. AIR 1991 SC 207.

9. *Ibid*, at 211.

10. 478 U.S. 186 (1986).

the issue in terms of the existence of a fundamental privacy right to engage in homosexual sodomy, found that no such right existed. Justice White read *Griswold* vs. *Connecticut*[11] and its progeny [12] as encompassing only those privacy rights integral to procreative choice and family autonomy and concluded that the recognition of a fundamental right requires that the right be either deeply rooted in this nation's history and tradition or implicit in the concept of ordered liberty. Finding homosexual sodomy unprotected under either standard, the court engaged in a highly differential analysis of the state's interest involved, and found a rational relationship between the statute and the state's interest in regulating morality. [13]

Justice Blackmun and Stevens each filed a dissenting opinion. Justice Blackmun criticized the majority opinion's focus on the particular act rather than the underlying right to freedom from government intrusion. Justice Blackmun found that private consensual sodomy is protected under the right to privacy as a decision properly left to individuals and as involving places afforded privacy regardless of the particular activities taking place there. According to Justice Blackmun, a fair reading of the Court's prior privacy cases discloses a commitment to individual autonomy in matters of personal choice - a principle that should apply with full force to the decision to engage in sodomy. Justice Blackmun also

---

11. 381 U.S. 476 (1965).

12. *See, Eisenstadt* vs. *Baird,* 405 U.S. 438 (1972). The Court held that the right to privacy protects the distribution of contraceptives to unmarried couples. *Roe* vs. *Wade,*410 U.S. 113 (1973). held that the right to privacy protects a woman's right to decide to have an abortion in the first trimester of pregnancy.

13. 478 U.S. 186 (1986).

criticized the majority's state interest analysis and concluded that Georgia's interest in enforcing private morality could not sustain the statute. Both Justice Blackmun and Stevens criticized the majority for analyzing the Georgia statute as if it applied only to homosexuals.[14] The majority's analysis of the right at stake in *Hardwick* solely in terms of marriage, procreation, and the family departs from the privacy doctrine established in the Court's prior cases. Had the majority examined the regulated conduct in *Hardwick* at the same level of generality employed in previous privacy decisions, it would have found constitutional protection for private, consensual, same sex sodomy. Although *Griswold* and *Eisenstadt* involved procreative freedom, these decisions cannot be limited to procreative matters. If constitutional protection extended only to procreative decisions the government could constitutionally restrict the use of contraceptives because couples could simply abstain from sexual relations. The constitutional protection of private, consensual, nonprocreative sex established by the right to privacy does not depend on any relation to marriage, procreation and the family. *Stanley* vs. *Georgia* [15] ruled that the right to privacy allows an individual to view pornography in the privacy of his home. *Roe* vs. *Wade* [16] held that the right to privacy encompasses a woman's right to decide not to use her body to procreate. In both cases the court protected a person's conduct regardless of his or her family status because of the centrality of sexual freedom to individual autonomy and identity.

---

14. *Ibid.*

15. 394 U.S. 557 (1969).

16. *See, Ibid,* note 12.

The majority in *Hardwick* applied its "history and tradition" test in an arbitrary manner to conclude that privacy protection should not encompass same-sex sodomy. First, the majority, choosing the eighteenth and nineteenth centuries as its historical benchmark, selectively examined history to find condemnation of homosexuality. Had the Court explored earlier or later periods, it would have found ambiguity or social tolerance. Second, requiring that the specific activity confirm to traditional values and historical teachings in order to receive constitutional protection is inconsistent with the court's privacy jurisprudence. For example, had such an approach been taken in *Griswold* and *Eisenstadt,* the Court likely would have found the use of contraceptive (even within marriage) condemned historically and therefore unprotected. The only distinction between the activity protected in the Court's previous privacy cases and the behavior found unprotected in *Hardwick* is an unpersuasive one – a majoritarian consensus against homosexual sodomy. Moreover, the Court's previous privacy cases do not rely entirely on history and tradition but also consider the burden on individuals and the strength of the state interests involved. The burden imposed on individuals by sodomy statutes is comparable to that imposed on pregnant woman in *Roe* vs. *Wade,* and the state interests justifying the regulation of abortion are far more compelling than those justifying the regulation of sodomy.

If the court had, consistent with its privacy jurisprudence, framed the issue at stake in *Hardwick* more broadly, it would have concluded that Georgia's sodomy statute implicated the right to privacy. Had the court recognized that the criminalization of private, consensual, adult intimacy between persons of the same sex implicates a fundamental right to privacy, the state interest in advancing morality would not have supported the statute. Giving its reliance on history, *Hardwick* should not extend

beyond its facts to apply to other types of same-sex sexual activity that have not been the subject of historical prohibitions. However, in *State* vs. *Walsh* [17] the Missouri Supreme court has involved *Hardwick's* privacy rationale to uphold a Missouri statute prohibiting contact between the genitals of one person and the hand of another person of the same sex. This sweeping prohibition of "deviate sexual misconduct" exceeds the offence of sodomy as defined by the historic condemnation considered so important by Justice White in *Hardwick*. Moreover, because the historical prohibitions relied on only condemn male homosexual sodomy; *Hardwick* should not apply to sodomy between lesbians.[18]

In *Commonwealth* vs. *Wasson,*[19] the Kentucky Supreme Court expanded homosexual rights and struck down a state statute that criminalized homosexual sodomy, despite the United States Supreme Court's refused to do so in *Bowers* vs. *Hardwick*. In *Wasson,* the state charged the defendant with solicitation to commit sodomy. The district court held that the sodomy law infringed upon the defendant's state constitutional rights to privacy and dismissed the claim. On appeal, the Circuit Court affirmed and further held that the law denied the defendant equal protection under the State Constitution. The Supreme Court of Kentucky affirmed. In a 4-3 decision, the Court held that the criminalization of homosexual sodomy violated the defendant's right to privacy and to equal protection under Kentucky's Constitution. Disposing

---

17. 713 S.W. 2d 508 (Mo. 1986). However, another lower Court has limited *Hardwick* to sodomy. *See, High Tech Gays* vs. *Defense Indus. Sec. Clearance Office,* 668 F. Supp. 1361, 1368 – 69 (N. D. Cal. 1987).

18. *See,* Sexual Orientation and the Law, 102 *HLR* 1508 (1989), at 1521-25.

19. 842 S.W. 2d 487 (Ky. 1992)

of the state's contention that Kentucky had to adhere to the Supreme Court's decision in *Bowers* vs. *Hardwick*, the Court declared that it is not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution so long as state constitutional protection does not fall below the federal floor.

The Court then considered the state right to privacy in the light of the unique text of the Kentucky Constitution and the common law at the time of the Constitution's adoption. The Court stated that, unlike the Federal Constitution, the Kentucky Constitution of 1891 made repeated references to positive liberty and imposed upon Kentucky an affirmative duty to protect individual liberties. The *Wasson* court thus concluded that long before the United States Supreme Court first took notice of whether there were any rights of privacy inherent in the Federal Bill of Rights, Kentucky had recognized a right of privacy in the Kentucky Constitution – a right broad enough to encompass consensual homosexual sexual behaviour.

Turning to the defendant's equal protection claims, the court stated that regardless of the status of homosexual under federal equal protection law, homosexuals constituted a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution. The state failed to meet its burden of demonstrating a legitimate governmental interest justifying a distinction based on sexual preference, and the Court held that a belief by a majority of the public in the immorality of homosexual conduct does not provide a rational basis for criminalizing the sexual preference of homosexuals.

The majority opinion met a vigorous dissent. Justice Lambert criticized the majority's refusal to adhere to *Bowers* and its embrace of "state constitutionalism", a practice in vogue among many state courts as a means of rejecting the leadership of the Supreme Court of the United States. He argued that the majority opinion had failed to find any textual support for a right to privacy in the 1891 Constitution, and that its reading of the contemporaneous case law was flawed. In 1909, for example, the Supreme Court of Kentucky had declared that oral sex is "as much a crime against nature as if done in the manner sodomy is usually committed", and urged the legislature to add "such an infamous act" as homosexual sex to the statute criminalizing anal intercourse. Justice Lambert argued that morality must and will remain a part of the criminal law, and that constitutional protection of all private conduct that is not "harmful to another" would result in the invalidation of many other criminals statutes. Rejecting the majority's equal protection analysis Justice Lambert asserted that homosexuals do not constitute a suspect class, and that the Kentucky sodomy statute need only satisfy the lowest level of judicial scrutiny and demonstrate that it bears a rational relationship to a legitimate legislative objective.

With *Wasson,* the Kentucky Supreme Court became the highest state court to extend the privacy protection to homosexual sodomy since *Bowers* vs. *Hardwick. Wasson's* value will come in its ability to transcend the state of Kentucky and inspire other states to follow.[20]

In India, the protection of privacy of homosexuals even between consenting adults, has hardly any scope in view of the facts that neither it has been regarded as moral nor legal. Moreover, such acts even if

---

20. *See,* 106 *HLR* 1370 (1993)

practised privately have been condemned as immoral and have been declared as specific offence punishable under the law. [21]

The fundamental underlying assumption here is that the homosexual acts are "unnatural" and a person's right to personal liberty or his right to privacy is not wide enough to cover such acts. The right to privacy, it is submitted, cannot be extended to protect such immoral acts and nonetheless it cannot give a licence to commit any offence.

---

21. Sec. 377 of the Indian Penal Code says: " Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punishable with imprisonment for life or ten years and fine".