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The "Right" to Abortion

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U.S. v. Bear Runner, 574 F.2d 966 (8th Cir. 1978), represents the first instance in which a federal court specifically rejects the corroboration requirement for an incest conviction in favor of the normal "beyond a reasonable doubt" standard. The defendant in this case was convicted of incest under both federal and South Dakota law. The evidence against him rested primarily on the uncorroborated testimony of the victim, his twelve year old daughter. On review, the United States Court of Appeals for the Eighth Circuit held that no corroboration of the complaining witness' testimony is required to establish guilt beyond a reasonable doubt in incest cases. In so ruling, the Eighth Circuit expressly rejected the position of *U.S. v. Ashe,* 138 U.S.App.D.C. 356, 427 F.2d 626 (D.C. Cir. 1970), wherein the Court held incest cases especially appropriate for the application of the corroboration rule as distortions, misrepresentations, and ordinary mistakes may occur more frequently among people who are forced to live together and deal with one another on a day-to-day basis.

Bear Runner follows the approach adopted by the Fourth Circuit in *U.S. v. Shipp,* 409 F.2d 33 (4th Cir.), cert. denied, 396 U.S. 864 (1969), in which the Court upheld defendant's conviction for having carnal knowledge of his stepdaughter. The Court stated that:

> "The triers of fact are to determine credibility, and if they accept her testimony, the jury may convict on it alone, if after considering any and all evidence to the contrary they believe beyond a reasonable doubt that the defendant committed the alleged crime . . . " *Id.* at 36.

Even though the Eighth Circuit cited *Shipp* as precedent for an incest case, the *Shipp* conviction was actually obtained on the ground that he had carnal knowledge of a female under 16 years of age. Therefore, the *Shipp* ruling that corroboration of the victim's testimony was not necessary for conviction did not apply specifically to incest cases until *Bear Runner.*

There has been little agreement as to what factors or general characteristics contribute to the incidence of incestuous activity. However, regardless of what factors are ultimately the cause of the incestuous act, there appears to be unanimous agreement that such occurrences cause deep and long-lasting psychological scars and have a very disruptive effect upon the familial structure and its members.

THE "RIGHT" TO ABORTION

by Nancy Kabara Dowling

Murphy's Law Book II defines a conclusion as "the place where you got tired of thinking."[1] Apparently the Supreme Court, Congress, and legislatures and courts around the world have not yet tired of thinking about the whole abortion issue: the West German Supreme Court has concluded that a fetus is a "person" protected by its Constitution.[2] Israel's Knesut has voted to restrict its liberal abortion laws.[3] Australia's Senate is now considering an anti-abortion bill passed by its House. Abortion was legalized in Canada in 1969, but today is a more divisive political issue than ever before. The United States House of Representatives Joint Resolution for a Constitutional Amendment that would extend protection to the unborn was sent to the Judiciary Committee in January. Commentators have described the Supreme Court's holding in *Harris v. McRae*[4] as going in precisely the opposite direction as *Roe v. Wade.*[5]

Roe, the 1973 landmark decision that struck down local anti-abortion laws, provided no real conclusion to the abortion controversy. Though hailed by many pro-abortionists as granting a right to abortion, what it did in fact create was the theory that the state's legitimate interest in protecting "potential" human life was to be weighed and balanced against the mother's right to "privacy" — at least during the first trimester.[6]

Roe has been attacked — even by such eminent pro-abortionists as Professor John Hart Ely of the Harvard Law School — on constitutional grounds. Ely described *Roe* as a "frightening" precedent and states that "[t]he problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question that the Constitution has not made the Court's business."[7]

> Ely notes problems with Constitutional interpretations:
> "The Court does not seem entirely certain about which provision protects the right to privacy and its included right to abortion . . . 'This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to terminate her pregnancy. *Wade* (93 S. Ct. at 727).' This inability to pigeonhole confidently the right involved is not important in and of itself. It might however, have alerted the Court to what is an important question: *Whether the Constitution speaks to the matter at all.* (emphasis added)".[8]

The Court in *Roe* announces that the right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy and then

proceeds to describe the detriment that the state would impose by denying this choice "in terms of the psychological harm that might result from an unwanted child."[9] But, Professor Ely notes that if the right is indeed based on the presentation of such a detriment, the same arguments would apply to the inconvenience of having an unwanted two-year old or a senile parent around:

"Would the Court find the constitutional right of privacy invaded in those situations too? Even if it did, of course, it would not find a constitutional right to 'terminate' the annoyance — presumably, because 'real' persons are now involved."[10]

In *Roe,* the Court liberalized access to abortion. But since 1976, Congress has, in effect, restricted access by prohibiting the use of federal funds to reimburse the cost of most abortions under the Medicaid program. The 1980 version of this funding restriction, known as the Hyde Amendment, provides:

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported *promptly* to a law enforcement agency or a public health service.[11] (Emphasis added)

In the recent decision of *Harris v. McRae,*[12] the majority of the Supreme Court rejects the appellees conclusions that the Hyde Amendment (1) does not relieve a State of its duty under Title XIX (Medical) to fund abortions, (2) impinges on the constitutionally protected freedom of choice recognized in *Roe v. Wade,* (3) contravenes rights secured by the religion clause of the First Amendment, and (4) creates a selective subsidizaton which violates the constitutional guarantee of equal protection.

The Court looked to the legislative intent of Title XIX to discern that while its purpose was to provide federal financial assistance to all legitimate state expenditures under an approved Medicaid plan, participating states were not obligated to pay for those medical services for which federal reimbursement is unavailable.[13]

Concerning the "freedom of choice" guaranteed by *Roe* the Court said, "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[14]

A prior decision, *Maher v. Roe,*[15] declared that the personal constitutional freedom recognized in *Roe v. Wade* did not include an entitlement to Medicaid payments for abortions that are not medically necessary. The Court stated that although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Therefore, there is no absolute right to abortion.

The appellee's religion clause argument was rejected in *Harris* on the grounds that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion and it it does not foster an excessive governmental tangle with religion."[16] The Court concludes that the Hyde Amendment is "as much a reflection of traditionalists' values toward abortion as it is an embodiment of the views of any particular religion.[17] The Court found it unnecessary to address the plaintiffs' arguments concerning the Free Exercise Clause of the First Amendment because it found that the plaintiffs lacked standing to raise such a challenge to the Hyde Amendment.

Finally, the *Harris* Court held that the Hyde Amendment does not violate the Equal Protection component of the Fifth Amendment because Hyde is rationally related to a legitimate governmental objective. Congress may differentiate between medically necessary services and medically necessary abortions since "[a]bortion is inherently different from other medical procedures because no other procedure involves the purposeful termination of a potential life."[18]

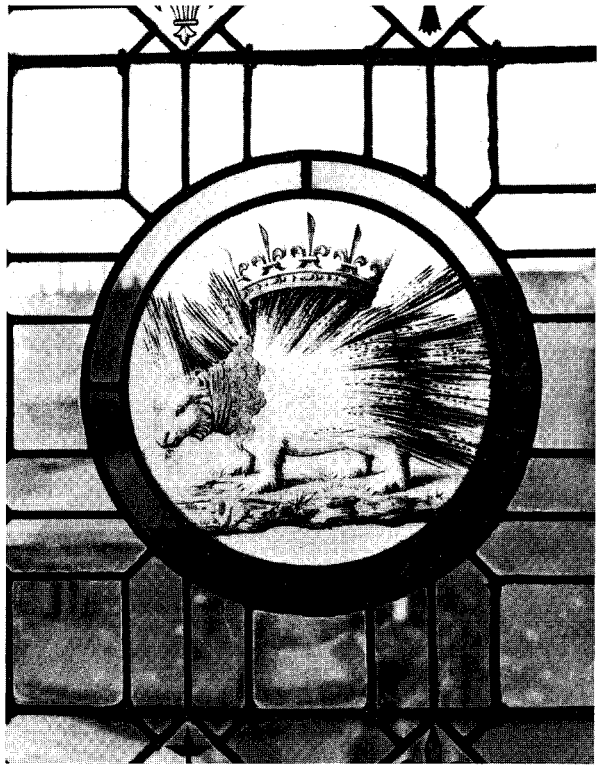
One could say that the policy basis of the *Harris* decision in June of 1980 seemed to rest on the prediction that the intellectually unsound *Roe* would also become politically unsound. As early as *Maher,* the Court withdrew from those politics: "[w]hen an issue involves policy changes as sensitive as those implicated here . . . the appropriate forum for their resolution in a democracy is

the legislature."[19] It would seem that the November, 1980 elections, which tilted that legislature to the right, will provide a forum that will go much further than *Harris* in restricting abortions.

Justice Marshall makes an eloquent dissent in *Harris* — social arguments that would be more appropriate on the floor of the House. But Marshall can't vote on the floor of the House. Those who can are being increasingly pressured by their constituents to vote conservatively and traditionally — against inflationary liberalism. The Republicans in their platform asked for judges who hold values similar to their own; some groups frankly work as advocates for unborn children; others question whether many abortions for reasons of "mental health" are not simply abortions of convenience; and still others are motivated by a simple weariness with all give-away programs that foster dependency.[20]

As early as 1974, Professor John T. Noonan, Professor of Law at the University of California, Berkeley, in his testimony before the Subcommittee on Constitutional Amendments of the U.S. Senate Judiciary Committee, advocated a constitutional amendment that would restore common law restrictions on abortion. The passage of such an amendment would reflect the realization that criticisms of *Roe v. Wade* are based on sound policy considerations. Until and unless such an amendment is passed, the letter of the law in *Roe v. Wade* is not dead; although the spirit that produced it seems to be.[21]

[1] A. BLOCH, MURPHY'S LAW BOOK II: MORE REASONS WHY THINGS GO WRONG (1980).
[2] *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 JOHN MARSHALL JOUR. PRAC & PROC. 605 (1976).
[3] Hatsacothok no. ____, December 1979 (Abortions will still be allowed for unmarried minor children, aging women, cases of rape, and for psychiatric reasons).
[4] 445 U.S. 924 (1980).
[5] 410 U.S. 113 (1973).
[6] *Id.* at 163.
[7] J. Ely, *The Wages of Crying Wolf*, 82 YALE L. J. 920 (1973).
[8] *Id.* at 928, n.58.
[9] 410 U.S. at 153.
[10] 82 YALE L. J. at 932, n.81.
[11] Pub. L. No. 96-123, §109, 93 Stat. 926.
[12] 445 U.S. 924 (1980).
[13] *Id.* at 2685.
[14] *Id.* at 2688.
[15] 432 U.S. 464 (1977).
[16] *Id.*
[17] 445 U.S. 924, 943 (1980).
[18] *Id.* at 2692.
[19] *Maher v. Roe, supra* at 479.
[20] *E.g.*, Right to Like, Americans United for LIFE Legal Defense Fund Human Life Foundation, Inc.
[21] SEE J. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES. (1975).



Homosexuals - Will Sexual Harassment Remedies Ever Be Available To Them?

Susan B. Stern

Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of, among other things, sex.[1] There is little legislative history regarding this particular classification. During floor debate, an opponent of the Civil Rights Act, in an effort to sabotage the bill, included sex in the list of proscribed categories.[2] Courts have indicated subsequently that the intent of Congress was to prevent disparate treatment of female employees and to equalize employment opportunities afforded each sex.[3] It has been held that the word "sex" is commonly understood and, therefore, requires no judicial construction.[4]

[1] 42 U.S.C.S. §§ 2000 e et seq.
[2] *See* ANNOTATION, 12 A.L.R.Fed. 15, 22; Barnes v. Costle, 561 F.2d 983, 46 A.L.R.Fed. 198, 203 (1977).
[3] 12 A.R.L.Fed, at 22. *See also* Diaz v. Pan American World Airways, Inc., 442 F.2d 385, cert. denied, 404 U.S. 950 (1971); ANNOTATION, 42 A.L.R.Fed. 189, 200.
[4] Rosen v. Public Service Electric & Gas Co., 328 F. Supp. 454 (1970).