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The "Right" to Abortion

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have a very disruptive effect upon the familial structure. It seems to be unanimous agreement that such occurrences are ultimately the cause of the incestuous act, there apparently is agreement that incest activity. However, regardless of what factors generally contribute to the incidence of incest cases until was not necessary for conviction did not apply specifically for an incest case, 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.

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.

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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." 19 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 subsidization 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, "[T]he 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 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

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the legislature." 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.

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.

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1 A. BLOCH, MURPHY'S LAW BOOK II: MORE REASONS WHY THINGS GO WRONG (1980).
3 Hatascothok no. ____ December 1979 (Abortions will still be allowed for unmarried minor children, aging women, cases of rape, and for psychiatric reasons).
5 410 U.S. 113 (1973).
6 Id. at 163.
8 Id. at 928, n.58.
9 410 U.S. at 153.
10 82 YALE L. J. at 932, n.81.
13 Id. at 2685.
14 Id. at 2688.
16 Id.
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.