STATI UNITI D'AMERICA

Alcuni stati americani hanno provveduto a modificare la disciplina relativa all'aborto, rendendolo legale, tra il 1969 e il 1970. Si veda a questo proposito, riprodotta in allegato, la nuova disciplina prevista dal Codice penale dello Stato di New York, introdotta il 1° luglio 1970, che autorizza l'aborto fino alla ventiquattresima settimana di gravidanza.

Una recente sentenza della Corte Suprema, emanata nel 1973, ha dichiarato contrarie alla costituzione la maggior parte delle restrizioni all'aborto procurato poste dalle leggi degli Stati che non avevano ancora provveduto a modificare la normativa in materia.

ALLEGATI

1) Testo, con traduzione italiana, dell'articolo 125 del Codice penale dello Stato di New York (modificato con legge 1° luglio 1970)
2) Sintesi, in italiano e in inglese, delle sentenze della Corte Suprema del 22 gennaio 1973
3) Bognetti - Esperienze straniere: la libertà di abortire, diritto della donna costituzionalmente garantito (dalla Riv.it. dr.proc.pen., 1974)
4) Hermann - La suprema corte degli USA e la liberalizzazione dell'aborto (Riv.it.dir.proc.pen. 1974)

CODICE PENALE DELLO STATO DI NEW YORK

ART. 125 (MODIFICATO CON L. 1 LUGLIO 1970)

Paragrafo 125.05, n.3. Aborto consentito. L'atto diretto a procurare l'aborto è consentito quando è praticato nei confronti di una donna consenziente da parte di un medico debitamente abilitato nei casi seguenti: a) se vi sono ragionevoli motivi per ritenere che è necessario a salvaguardare la vita della donna, oppure: b) entro 24 settimane dall'inizio della gravidanza. L'atto diretto a procurare l'aborto praticato dalla donna incinta è consentito qualora essa agisca su prescrizione di un medico debitamente abilitato nei casi seguenti: 1) se tale atto è necessario a salvaguardare la vita della donna, oppure: 2) entro 24 settimane dall'inizio della gravidanza. Il fatto, da parte della donna di sottoporsi ad atti diretti a procurare l'aborto è consentito qualora essa ritenga che essi siano compiuti da un medico debitamente abilitato il quale agisce avendo ragione di ritenere che tali atti sono necessari a salvaguardare la vita della donna, ovvero entro 24 settimane dall'inizio della gravidanza.

in the pool was not supported by the evidence. People v Lansing Terrace Apartments, Inc. 70 M2d 44, 332 S2d 705 (1972).

¶ 5. In action in which estranged wife charged husband with incessant harassment, menacing and reckless conduct, such charges were not established in light of proof that husband's actions were motivated by a desire to maintain a normal father-daughter relationship with his daughters and to prevent his marriage from completely disintegrating. Di Donna v D Donna, 72 M2d 231, 339 S2d 592 (1972).

§ 120.30. Promoting a suicide attempt.—

REFERENCES: This section referred to in CPL § 700.05(8)(b). Eavesdropping warrants in cases of promoting suicide attempt, CPL §§ 700.05(8), 700.10-700.70.

ARTICLE 125

Homicide, Abortion and Related Offenses

REFERENCES: Former § 10 43 referred to in Correct Law § 212-a. Geographical jurisdiction of offenses, CPL §§ 20.10 et seq.; examination for narcotic addiction of persons charged with felony or misdemeanor, Men Hyg Law § 81.19.

§ 125.00. Homicide defined.—

ANNOTATIONS: Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 ALR3d 1296.

Homicide based on killing of unborn child. 40 ALR3d 444.

Homicide predicated on improper treatment of disease or injury. 45 ALR3d 114.

§ 125.05. Homicide, abortion and related offenses; definitions of terms.—

. . . . . .

3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female *with her consent* by a duly licensed physician acting *(a)* under a reasonable belief that such is necessary to preserve[1] *her* life,[2] *or, (b) within twenty-four weeks from the commencement of her pregnancy.* A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician *(1)* that such *act* is necessary to preserve her life, *or, (2) within twenty-four weeks from the commencement of her pregnancy.* The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician,[3] *acting under a reasonable belief* that such *act* is necessary to preserve her life, *or, within twenty-four weeks from the commencement of her pregnancy.*

HISTORY: Sub 3, amd, L 1970, ch 127, eff July 1, 1970.

The 1970 act deleted at fig 1 "the", at fig 2 "of such female" and at fig 3 "and when she acts upon the advice of a duly licensed physician".

REFERENCES: This section referred to in §§ 125.15, 125.20, 125.40, 125.45, 125.50, 125.55.

ANNOTATIONS: Right of action for injury to or death of woman who consented to illegal abortion. 36 ALR3d 630.

Right of minor to have abortion performed without parental consent. 42 ALR3d 1406.

Homicide predicated on improper treatment of disease or injury. 45 ALR3d 114.

Validity, under Federal Constitution, of abortion laws. 28 L Ed 2d 1053.

CASE NOTES

¶ 0.5. The abortion liberalization statute is constitutional, since embryos are not recognized as legal persons and have no right to life under the state and Federal Constitutions. Byrn v New York City Health & Hospitals Corp. 31 NY2d 194, 335 S2d 390, 286 NE2d 887 (1972).

¶ 1. A directive of the Commissioner of Social Services, limiting Medicaid reimbursement for abortions to those "medically indicated," was only permissible interpretation of present statutory provisions and was constitutionally inviolate. New York v Wyman, 30 NY2d 537, 330 S2d 385, 281 NE2d 180 (1972).

¶ 2. A town ordinance requiring the performance of justifiable abortional acts in a licensed and duly accredited hospital or related facility, is unconstitutional because the State has preempted this area of legislation, that is, the State has evidenced a purpose and design to occupy the field so as to prohibit additional regulation by local authorities in the same area. Kim v Orangetown, 66 M2d 364, 321 S2d 724 (1971).

¶ 3. A village ordinance providing that a justifiable abortion must be performed only in a hospital duly licensed and accredited by the New York State Department of Health and having equipment and facilities acceptable to the State Hospital Review and Planning Council was outside the scope of the powers of the village. Robin v Hempstead, 38 AD2d 758, 329 S2d 678 (1972), affd 30 NY2d 347, 334 S2d 129, 285 NE2d 285.

¶ 4. New York City Department of Health requirement that fetal death certificate following abortion contain the name of the patient on whom the abortion was performed was an abuse of discretion and was arbitrary and capricious as it constituted an unlawful invasion of the patient's right to privacy and would violate the physician-patient relationship. Schulman v New York City Health & Hospitals Corp. 70 M2d, 1093, 335 S2d 343 (1972).

¶ 5. Administrative matter of New York Commissioner of Social Services ruling that elective abortions not medically indicated are not under the policy embodied in the New York Social Services Law, the rules of the board of social welfare, and the regulations of the department of social services would not be given effect as it would deny indigent women the equal protection of the laws. Klein v Nassau County Medical Center, 347 F Supp 496 (1972, DC NY).

§ 125.10. Criminally negligent homicide.—

REFERENCES: This section referred to in CPL §§ 30.30, 700.05(8)(b). Eavesdropping warrants in criminally negligent homicide cases, CPL §§ 700.05(8), 700.10-700.70. Reckless and negligent operation of vessel, see 54 NY Jur 496-498, Ships and Shipping §§ 100, 101.

ANNOTATIONS: Homicide predicated on improper treatment of disease or injury. 45 ALR3d 114.

CASE NOTES

¶ 1. Evidence of negligence and carelessness on the part of the defendant in the operation of an automobile is not alone the test for conviction under the statutes. People v Taylor, 31 AD2d 852, 297 S2d 192 (1969).

¶ 1.5. The distinction between manslaughter second degree, and criminally negligent homicide lies in whether there is conscious disregard of the result or only a failure to perceive the risk of death. People v Usher, 39 AD2d 459, 336 S2d 935 (1972).

¶ 2. The proof required for a criminal conviction under the statutes arises when the actor has knowledge of the highly dangerous nature of his actions or knowledge of such facts as under the circumstances would disclose to a reasonable man the dangerous character of his action and despite this knowledge he so acts. People v Taylor, 31 AD2d 852, 297 S2d 192 (1969).

¶ 3. Failure to stop at a traffic light will not sustain a conviction under the statute. People v Taylor, 31 AD2d 852, 297 S2d 192 (1969).

¶ 4. A CPLR Article 78 proceeding was not available to prohibit the court from proceeding against petitioner under an indictment charg-

EUR-66

EXCERPTS: SUPREME COURT DECISION ON ABORTION (3000)

WASHINGTON, JAN. 22--FOLLOWING ARE EXCERPTS FROM THE SUPREME COURT'S MAJORITY OPINION ON ABORTION AS DELIVERED BY JUSTICE BLACKMUN ON JAN. 22.

(BEGIN EXCERPTS)

THE TEXAS STATUTES UNDER ATTACK HERE ARE TYPICAL OF THOSE THAT HAVE BEEN IN EFFECT IN MANY STATES FOR APPROXIMATELY A CENTURY.. ....

WE FORTHWITH ACKNOWLEDGE OUR AWARENESS OF THE SENSITIVE AND EMOTIONAL NATURE OF THE ABORTION CONTROVERSY, OF THE VIGOROUS OPPOSING VIEWS, EVEN AMONG PHYSICIANS, AND OF THE DEEP AND SEEMINGLY ABSOLUTE CONVICTIONS THAT THE SUBJECT INSPIRES. ONE'S PHILOSOPHY, ONE'S EXPERIENCES, ONE'S EXPOSURE TO THE RAW EDGES OF HUMAN EXISTENCE, ONE'S RELIGIOUS TRAINING, ONE'S ATTITUDES TOWARD LIFE AND FAMILY AND THEIR VALUES, AND THE MORAL STANDARDS ONE ESTABLISHES AND SEEKS TO OBSERVE, ARE LIKELY TO INFLUENCE AND TO COLOR ONE'S THINKING AND CONCLUSIONS ABOUT ABORTION.

IN ADDITION, POPULATION GROWTH, POLLUTION, POVERTY, AND RACIAL OVERTONES TEND TO COMPLICATE AND NOT TO SIMPLIFY THE PROBLEM...

(TEXAS STATUE)

H TVEUZPVARE IT A CRIME TO "PROCURE AN ABORTION," AS THEREIN DEFINED, OR TO ATTEMPT ONE, EXCEPT WITH RESPECT TO "AN ABORTION PROCURED OR ATTEMPTED BY MEDICAL ADVICE FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER." SIMILAR STATUTES ARE IN EXISTENCE IN A MAJORITY OF THE STATES. ....

IT PERHAPS IS NOT GENERALLY APPRECIATED THAT THE RESTRICTIVE CRIMINAL ABORTION LAWS IN EFFECT IN A MAJORITY OF STATES TODAY ARE OF RELATIVELY RECENT VINTAGE. THOSE LAWS, GENERALLY PROUCYP3PFXLZ94589, OR ITS ATTEMPT AT 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 DRIVE FROM STATUTORY CHANGES EFFECTED, FOR THE MOST PART, IN THE LATTER HALF OF THE 19TH CENTURY....

IT IS ...APPARENT THAT A COMMON-LAW, AT THE TIME OF THE ADOPTION OF OUR CONSTITUTION, AND THROUGHOUT THE MAJOR PORTION OF THE 19TH CENTURY, ABORTION WAS VIEWED WITH LESS DISFAVOR THAN UNDER MOST AMERICAN STATUES CURRENTLY IN EFFECT. PHRASING IT ANOTHER WAY, A WOMAN ENJOYED A SUBSTANTIALLY BROADER RIGHT TO TERMINATE A PREGNANCY THAN SHE DOES IN MOST STATES TODAY. AT LEAST WITH RESPECT TO THE EARLY STAGE OF PREGNANCY, AND VERY POSSIBLE WITHOUT SUCH A LOMITATION, THE OPPORTUNITY TO MAKE THIS CHOICE WAS PRESENT IN THIS COUNTRY WELL INTO THE 19TH CENTURY. EVEN LATER, THE LAW CONTINUED FOR SOME TIME TO TREAT LESS PUNITIVELY AN ABORTION PROCURED IN EARLY PREGNANCY...

THREE REASONS HAVE BEEN ADVANCED TO EXPLAIN HISTORICALLY THE ENACTMENT OF CRIMINAL ABORTION LAWS IN THE 19TH CENTURY AND TO JUSTIFY THEIR CONTINUED EXISTENCE.

IT HAS BEEN ARGUED OCCASIONALLY THAT THESE LAWS WERE THE PRODUCT OF A VICTORIAN SOCIAL CONCERN TO DISCOURAGE ILLICIT SEXUAL CONDUCT. TEXAS, HOWEVER, DOES NOT ADVANCE THIS JUSTIFICATON IN THE PRSENT CASE, AND IT APPEARS THAT NO COURT OR COMMENTATOR HAS TAKEN THE ARGUMENT SERIOUSLY. THE APPELLANTS AND AMICI CONTEND, MOREOVER, THAT THIS IS NOT A PROPER STATE PURPOYE AT ALL AND SUGGEST THAT, IF IT WERE, THE TEXAS STATUES ARE OVERBROAD IIN PROTECTING IT SINCE THE LAW FAILS TO DISTINGUISH BETWEEN MARRIED AND UNWED MOTHERS.

A SECOND REASON IS CONCERNED WITH ABORTION AS A MEDICAL PROCEDURE. WHEN MOST CRIMINAL ABORTION LAWS WERE FIRST ENACTED, THE PROCEDURE WAS A HAZARDOUS ONE FOR THE WOMAN. ....

THUS IS HAS BEEN ARGUED 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.

MODERN MEDICAL TECHNIQUES HAVE ALTERED THIS SITUATION. APPELLANTS AND VARIOUS AMICI REFER TO MEDICAL DATA INDICATING THAT ABORTION IN EARLY PREGNANCY, THAT IS, PRIOR TO THE END OF FIRST TRIMESTER, ALTHOUGH NOT WITHOUT ITS RISK, IS NOW RELATIVELY SAFE. MORTALITY RATES FOR WOMEN UNDERGOING EARLY ABORTIONS, WHERE THE PROCEDURE IS LEGAL, APPEAR TO BE AS LOW AS OR LOWER THAN THE RATES FOR NORMAL CHILDBIRTH. CONSEQUENTLY, ANY INTEREST OF THE STATE IN PROTECTING THE WOMAN FROM AN INHERENTLY HAZARDOUS PROCEDURE, EXCEPT WHEN IT WOULD BE EQUALLY DANGEROUS FOR HER TO FORGO IT, HAS LARGELY DISAPPEARED. OF COURSE, IMPORTANT STATE INTERESTS IN THE AREA OF HEALTH AND MEDICAL STANDARDS DO REMAIN. THE STATE HAS A LEGITIMATE INTEREST IN SEEING TO IT THAT ABORTION, LIKE ANY OTHER MEDICAL PROCEDURE, IS PERFORMED UNDER CIRCUMSTANCES THAT INSURE MAXIMUM SAFETY FOR THE PATIENT. THIS INTEREST OBVIOUSLY EXTENDS AT LEAST TO THE PERFORMING PHYSICIAN AND HIS STAFF, TO THE FACILITIES INVOLVED, TO THE AVAILABILITY OF AFTER-CARE, AND TO ADEQUATE PROVISION FOR ANY COMPLICATION OR EMERGENCY THAT MIGHT ARISE. THE PREVALENCE OF HIGH MORTALITY RATES AT ILLEGAL "ABORTION MILLS" STRENGTHENS, RATHER THAN WEAKENS, THE STATE'S INTEREST IN REGULATING THE CONDITIONS UNDER WHICH ABORTIONS ARE PERFORMED. MOREOVER, THE RISK TO THE WOMAN INCREASES AS HER PREGNANCY CONTINUES. THUS THE STATE RETAINS A DEFINITE INTEREST IN PROTECTING THE WOMAN'S OWN HEALTH AND SAFETY WHEN AN ABORTION IS PROPOSED AT A LATE STAGE OF PREGNANCY.

THE THIRD REASON IS THE STATE'S INTEREST--SOME PHRASE IT IS TERMS OF DUTY--IN PROTECTING PRENATAL LIFE. ...

THE CONSTITUTION DOES NOT EXPLICITY MENTION ANY RIGHT OF PRIVACY. IN A LINE OF DECISIONS, HOWEVER, ..., THE COURT HAS RECOGNIZED THAT A RIGHT OF PERSONAL PRIVACY, OR A GUARANTEE OF CERTAIN AREAS OR ZONES OF PRIVACY, DOES EXIST UNDER THE CONSTITUTION.

THIS RIGHT OF PRIVACY, WHETHER IT BE FOUNDED IN THE FOURTEENTH AMENDMENT'S CONCEPT OF PERSONAL LIBERTY AND RESTRICTIONS UPON STATE ACION, AS WE FEEL IT IS, OR AS THE DISTRICT COURT DETERMINED, IN THE NINTH AMENDMENT'S RESERVATION OF RIGHTS TO THE PEOPLE, IS BROAD ENOUGH TO ENCOMPASS A WOMAN'S DECISION WHETHER OR NOT TO TERMINATE HER PREGNACY. THE DEIRIMENT THAT THE STATE WOULD IMPOSE UPON THE PREGNANT WOMAN BY DENYING THIS CHOICE ALTHOUGHSH 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 PHSICAL HEALTH MAY BE TAXED BY CHILD CARE. THERE IS ALSO THE DISTRESS, FOR ALL CONCERNED, ASSOCIATED WITH THE UNWATNED 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 NECESSARILY WILL CONSIDER IN CONSULTATION.

ON THE BASIS OF ELEMENTS SUCH AS THESE, APPELLANTS AND SOME AMICI ARGUE THAT THE WOMAN'S RIGHT IS ABSOLUTE AND THAT SHE IS ENTIGLED TO TERMINATE HER PREGNANCY AT WHATEVER TIME, IN WHATEVER WAY, AND FOR WHATEVER REASON SHE ALONE CHOOSES. WITH THIS WE DO NOT AGREE. APPELLANTS' ARGUMENTS THAT TEXAS EITHER HAS NO VALID INTEREST AT ALL IN REGULATING THE ABORTION DECISION, OR NO INTEREST STRONG ENOUGH TO SUPPORT ANY LIMITATIOCO UPON THE WOMAN'S SOLE DETEGWMNATION, IS UNPERSUASIVE. THE COURT'S DECISIONS RECOGNIZING A RIGHT OF PRIVACY ALSO ACKNOWLEDGE THAT SOME STATE REGULATION IN AREAS PROTECTED BY THAT RIGHT IS APPROPRIATE. AS NOTED ABOVE, A STATE MAY PROPERLY ASSERT IMPORTANT INTERESTS IN SAFE-GUARDING 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 VOERN THE ABORTION DECISION. THE PRIVACY RIGHTWVPOLVED, THEREFORE,

CANNOT BE SAID TO BE ABSOLUTE. IN FACT, IT IS NOT CLEAR TO US LTHAT THE CLAIM ASSERTED BY SOME AMICI THAT ONE HAS AN UNLIMITED RIGHT TO DO WITH ONE'S BODY AS ONE PLEASES BEAR A CLOSE A RELATIONSHIP TO THE RIGHT OF PRIVACY PREVIOUSLY ARTICULATED IN THE COURT'S DECISIONS. THE COURT HAS REFUSED TO RECOGNIZE AN UNLIMITED RIGHT OF THIS KIND IN THE PAST. ....

W THEREFOYE VONCLUDE THAT THE RIGHT OF PERSONAL PRIVACY INCLUDES THE ABORTION DECISION, BUT THAT THIS RIGHT IS NOT UNQUALIFIED AND MUST BE CONSIDERED AGAINST IMPORTANT STATE INTERESTS IN REGULATION....

THE APPELLEE AND CERTAIN AMICI ARGUE THAT THE FETUS IS A "PERSON" WITHIN THE LANGUAGE AND MEANING OF THE FOURTEENTH AMENDMENT. IN SUPPORT OF THIS THEY OUTLINE AT LENGTH AND IN DETAIL THE WELL-KNOWN FACTS OF FETAL DEVELOPMENT. IF THIS SUGGESTION OF PERSONHOOD IS ESTABLISHED, THE APPELLANT'S CASE, OF COURSE, COLLAPSES, FOR THE FETUS' RIGHT TO LIFE IS THEN GUARANTEED SPECIFICALLY BY THE AMENDMENT. THE APPELLANT CONCEDED N AS MUCH ON REARGUMENT. ONE THE OTHER HAND, THE APPELLEE CONCEDED ON REARGUMENT THAT NO CAUSE COULD BE CITED THAT HOLDS THAT A FETUS IS A PERSON WITHIN THE MEANIAG OF THE FOURTEENTH AMENDMENT.

THE CONSTITUTION DOES NOT DEFINE "PERSON" IN SM MANY WORDS. .... THE USE OF THE WORD IS SUCH THAT IT HAS APPLICATION ONLY POSTNATALLY. NONE INDICATES, WITH ANY ASSURANCE, THAT IT HAS ANY POSSIBLE PRE-NATAL APPLICATION.

ALL THIS, TOGTHER WITH OUR OBSERVATION, SUPRA, THAT THROUGHOUT THELMAJOR PORTION OF THE 19TH CENTU
Y PREVAILING LEGAL ABORTION PRACTICES WERE FAR FAGER THAN THEY ARE TODAY, PERSUADES US THAT THE WORD "PERSON," AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN.....

WE NEED NOT RESOLVE THE DIFFICULT QUESTION OF WHEN LIFE BEGINS. WHEN THOSE TRAINED IN THE RESPECTIVE DISCIPLINES OF MEDICINE, PHILOSPHY, AND THEOLOGY ARE UNABLE TO ARRIVE AT ANY CONSENSUS, THE JUDICIARY, AT THIS POINT IN THE DEVELOPMENT OF MAN'S KNOWLEDGE, IS NOT IN A POSITION TO SPECULATE AS TO THE ANSWER.

IT SHOULD BE SUFFICIENT TO NOTE BRIEFLY THE WIDE DIVERGENCE OF THINKING ON THIS MOST SENSITIVE AND DIFFICULT QUESTION. THERE HAS ALWAYS BEEN STRONG SUPPORT FOR THE VIEW THAT LIFE DOES NOT BEGIN UNTIL LIVE BIRTH. THIS WAS THE BELIEF OF THE STOICS. IT APPEARS TO BE THE PREDOMINANT, THOUGH NOT THE UNANIMOUS, ATTITUDE OF THE JEWISH FAITH. IT MAY BE TAKEN TO REPRESENT ALSO THE POSITION OF A LARGE SEGMENT OF THE PROTESTANT COMMUNITY, INSOFAR AS THAT CAN BE ASCERTAINED. ORGANIZED GROUPS THAT HAVE TAKEN A FORMAL POSITION ON THE ABORTION ISSUE HAVE GENERALLY REGARDED ABORTION AS A MATTER FOR THE CONSCIENCE OF THE INDIVIDUAL AND HER FAMILY. AS WE HAVE NOTED, THE COMMON LAW FOUND GREATER SIGNIFICANCE IN QUICKENING. PHYSICIANS AND THEIR SCIENTIFIC COLLEAGUES HAVE REGARDED THAT EVENT WITH LESS INTEREST AND HAVE TENDED TO FOCUS EITHER UPON CONCEPTION OR UPON LIVE BIRTH OR UPON THE INTERIM POINT AT WHICH THE FETUS BECOMES "VIABLE," THAT IS, POTENTIALLY ABLE TO LIVE OUTSIDE THE MOTHER'S WOMB, ALBEIT WITH ARTIFICIAL AID. VIABILITY IS USUALLY PLACED AT CONCCURRIENT MONTHS BWI WEEKS) BUT MAY OCCUR EARLIER, EVEN AT 24 WEEKS. THE ARISTOTELIAN THEORY OF "MEDIATE ANIMATION," THAT HELD SWAY THROUGHOUT THE MIDDLE AGES AND THE RENAISSANCE IN EUROPE, CONTINUED TO BE OFFICIAL ROMAN CATHOLIC DOGMA UNTIL THE 19TH CENTURY, DESPITE OPPOSITION TO THIS "ENSOULMENT" THEORY FROM THOSEFZEAJILZ;4:F WHO WOULD RECOGNIZE THE EXISTENCEPMF LIFE FROM THE MOMENT OF CONCEPTION. THE LATTER IS NOW, OF COURSE, THE OFFICIAL BELIEF OF THE CATHOLIC CHURCH. AS ONE OF THE BRIEFS AMICUS DISCLOSES, THIS IS A VIEW STRONGLY HELDBYMANY NONCATHOLICS AS WELL, AND BY MANY PHYSICIANS. SUBSTANTIAL PROBLEMS FOR PRECISE DEFINITION OF THIS VIEW ARE POSED, HOWEVER, BY NEW EMBRYOLOGICAL DATA THAT PURPORT TO INDICATE THAT CONCEPTION IS A "PROCESS" OVER TIME, RATHER THAN AN EVENT, AND BY NEW MEDICAL TECHNIQUES SUCH AS MENSTRUAL EXTRACTION, THE "MORNING-AFTER" PILL, IMPLANTATION OF EMBRYOS, ARTIFICIAL INSEMINATION, AND EVEN ARTIFICIAL WOMBS.

IN AREAS OTHER THAN CRIMINAL ABORTION THE LAW HAS BEEN RELUCTANT TO ENDORSE ANY THEORY THAT LIFE, AS WE RECOGNIZE IT, BEGINS BEFORE LIVE BIRTH OR TO ACCORD LEGAL RIGHTS TO THE UNBORN EXCEPT IN NARROWLY DEFINED SITUATIONS AND EXCEPT WHEN THE RIGHTS ARE CON-

WE DO NOT AGREE THAT, BY ADOPTING ONE THEORY OF LIFE, TEXAS MAY OVERRIDE THE RIGHTS OF THE PREGNANT WOMAN THAT ARE AT STAKE. WE REPEAT, HOWEVER, THAT THE STATE DOES HAVE AN IMPORTANT AND LEGITIMATE INTEREST IN PRESERVING AND PROTECTING THE HEALTH OF THE PREGNANT WOMAN, WHETHER SHE BE A RESIDENT OF THE STATE OR A NONRESIDENT WHO SEEKS MEDICAL CONSULTATION AND TREATMENT THERE, AND THAT IT HAS STILL ANOTHER IMPORTANT AND LEGITIMATE INTEREST IN PROTECTING THE POTENTIALITY OF HUMAN LIFE. THESE INTERESTS ARE SEPARATE AND DISTINCT. EACH GROWS IN SUBSTANTIALITY AS THE WOMAN APPROACHES TERM AND, AT A POINT DURING PREGNANCY, EACH BECOMES "COMPELLING."

WITH RESPECT TO THE STATE'S IMPORTANT AND LEGITIMATE INTEREST IN THE HEALTH OF THE MOTHER, THE "COMPELLING" POINT, IN THE LIGHT OF PRESENT MEDICAL KNOWLEDGE, IS AT APPROXIMATELY THE END OF THE FIRST TRIMESTER. THIS IS SO BECAUSE OF THE NOW ESTABLISHED MEDICAL FACT, . M NTHAT UNTIL THE END OF THE FIRST TRIMESTER MORTALITY IN ABORTION IS LESS THAN MORTALITY IN NORMAL CHILDBIRTH. IT FOLLOWS THAT, FROM AND AFTER THIS POINT, A STATE MAY REGULATE THE ABORTION PROCEDURE TO THE EXTENT THAT THE REGULATION REASONABLY RELATES TO THE PRESERVATION AND PROTECTION OF MATERNAL HEALTH. EXAMPLES OF PERMISSIBLE STATE REGULATION IN THIS AREA ARE REQUIREMENTS AS TO THE QUALIFICATIONS OF THE PERSON WHO IS TO PERFORM THE ABORTION; AS TO THE LICENSURE OF THAT PERSON; AS TO THE FACILITY IN WHICH THE PROCEDURE IS TO BE PERFORMED, THAT IS, WHETHER IT MUST BE A HOSPITAL OR MAY BE A CLINIC OR SOME OTHER PLACE OF LESS-THAN-HOSPITAL STATUS; AS TO THE LICENSING OF THE FACILITY; AND THE LIKE.;

THIS MEANS, ON THE OTHER HAND, THAT, FOR THE PERIOD OF PREGNANCY PRIOR TO THIS "COMPELLING" POINT, THE ATTENDING PHYSICIAN, IN CONSULTATION WITH HIS PATIENT, IS FREE TO DETERMINE, WITHOUT REGULATION BY THE STATE, THAT IN HIS MEDICAL JUDGMENT THE PATIENT'S PREGNANCY SHOULD BE TERMINATED. IF THAT DECISION IS REACHED, THE JUDGMENT MAY BE EFFECTUATED BY AN ABORTION FREE OF INTERFERENCE BY THE STATE.

BY THE STATE.

WITH RESPECT TO THE STATE'S IMPORTANT AND LEGITIMATE INTEREST IN POTENTIAL LIFE, THE "COMPELLING" POINT IS AT VIABILITY. THIS IS SO BECAUSE THE FETUS THAT PRESUMABLY HAS THE CAPABILITY OF MEANINGFUL LIFE OUTSIDE THE MOTHER'S WOMB. STATE REGULATION PROTECTIVE OF FETAL LIFE AFTER VIABILITY THUS HAS BOTH LOGICAL AND BIOLOGICAL JUSTIFICATIONS. IF THE STATE IS INTERESTED IN PROTECTING FETAL LIFE AFTER VIABILITY, IT MAY GO SO FAR AS TO PROSCRIBE ABORTION DURING THAT PERIOD EXCEPT WHEN IT IS NECESSARY TO PRESERVE THE LIFE OR HEALTH OF THE MOTHER. M M M

TO SUMMARIZE AND TO REPEAT:

1. 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.

(A) FOR THE STATE 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.

(B) FOR THE STAGE SUBSEQUENT TO APPROXIMATELY THE END OF THE FIRST TRIMESTER, THE STATE, IN PROMOTING ITS INTEREST IN THE HEALTH OF THE MOTHER, MAY, IF IT CHOOSES, REGULATE THE ABORTION PROCEDURE IN WAYS THAT ARE REASONABLY RELATED TO MATERNAL HEALTH.

(C) 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.

2. THE STATE MAY DEFINE THE TERM "PHYSICIAN," AS IT HAS BEEN EMPLOYED, SO AS 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....

PHYSICIAN AS SO DEFINED....

THIS HOLDING, WE FEEL, IS CONSISTENT WITH THE RELATIVE WEIGHTS OF THE RESPECTIVE INTERESTS INVOLVED, WITH THE LESSONS AND EXAMPLE OF MEDICAL AND LEGAL HISTORY, WITH THE LENITY OF THE COMMON LAW, AND WITH THE DEMANDS OF THE PROFOUND PROBLEMS OF THE PRESENT DAY. THE DECISION LEAVES THE STATE FREE TO PLACE INCREASING RESTRICTIONS ON ABORTION AS THE PERIOD OF PREGNANCY LENGTHENS, SO LONG AS THOSE RESTRICTIONS ARE TAILORED TO THE RECOGNIZED STATE INTERESTS. THE DECISION VINDICATES THE RIGHT OF THE PHYSICIAN TO ADMINISTER MEDICAL TREATMENT ACCORDING TO HIS PROFESSIONAL JUDGMENT UP TO THE POINTS WHERE IMPORTANT STATE INTERESTS PROVIDE COMPELLING JUSTIFICATIONS FOR INTERVENTION. UP TO THOSE POINTS THE ABORTION DECISION IN ALL ITS ASPECTS IS INHERENTLY, AND PRIMARILY, A MEDICAL DECISION, AND BASIC RESPONSIBILITY FOR IT MUST REST WITH THE PHYSICIAN. IF AN INDIVIDUAL PRACTITIONER ABUSES THE PRIVILEGE OF EXERCISING PROPER MEDICAL JUDGMENT, THE USUAL REMEDIES, JUDICIAL AND INTRA-PROFESSIONAL, ARE AVAILABLE.

(END BLACKMUN EXCERPTS)



G1273

LA SENTENZA DELLA CORTE SUPREMA SULL'ABORTO

WASHINGTON, gennaio - La recente sentenza della Corte Suprema degli Stati Uniti sul problema dell'aborto procurato ha chiarito finalmente, sotto il profilo giuridico, una materia che era divenuta estremamente confusa e controversa. Cio' non toglie, ovviamente, che le discussioni continueranno sotto il profilo etico e filosofico.

Com'e' noto, la sentenza ha abrogato le leggi dei vari Stati della Confederazione americana che imponevano certe restrizioni legali all'aborto procurato. Cio' implichera' una riforma della legislazione di 46 dei 50 Stati, dato che in quattro Stati e nel Distretto di Columbia (il territorio ove ha sede la capitale) l'aborto e' gia' legale.

La Corte Suprema ha stabilito che le legislazioni statali possono imporre alcune restrizioni all'aborto procurato ma che tali restrizioni non dovranno contraddire le seguenti norme basilari:

- Nei primi tre mesi di gravidanza, la decisione del procurato aborto dovra' restare di competenza esclusiva della donna e del suo medico, senza che lo Stato abbia alcun diritto d'interferire.

- Durante i mesi successivi, "le autorita' dello Stato potranno regolare le procedure medico-legali dell'aborto procurato nella misura in cui tale regolamentazione abbia qualche ragionevole rapporto con la difesa della salute materna" (per usare le parole con cui il giudice Harry A.Blackmun ha riferito l'opinione della maggioranza della Corte).

- Nelle ultime dieci settimane di gravidanza, e cioe' a partire da quando il feto, se nato, potrebbe sopravvivere all'esterno dell'utero, lo Stato avra' la facolta' di proibire l'aborto, salvo pero' quando esso sia necessario per salvare la vita o la salute della madre.

Com'e' noto, la decisione della Corte Suprema e' stata presa con una maggioranza di 7 voti contro 2: quelli dei giudici Byron White e William Rehnquist. L'opinione di minoranza, resa nota dal giudice White, era contraria "ad interporre una barriera di carattere costituzionale agli sforzi condotti dai singoli Stati per proteggere la vita umana".

Commentando la decisione della Corte, il giudice Blackmun ha ricordato che le legislazioni statali che proibivano l'aborto salvo in caso di estremo pericolo per la vita o per la salute della madre erano d'origine relativamente recente. Si trattava di leggi varate in gran parte nella seconda meta' del XIX secolo, cioe' in un'epoca in cui la chirurgia abortiva comportava gravi rischi per la donna. La realizzazione di nuove tecniche chirurgiche e di nuovi presidi farmacologici ha reso l'aborto nei primi tre mesi di gravidanza assai meno pericoloso del parto per la salute e la vita della donna.

Blackmun ha infine sottolineato che la sentenza della Corte si e' basata sul principio che il concetto di "persona" non puo' essere riferito alla vita umana se non dopo la nascita e che

i tutori della Costituzione debbono sforzarsi in ogni modo di difendere il diritto fondamentale del cittadino (e quindi anche della donna) degli Stati Uniti alla liberta' privata.

L'aborto era stato oggetto di vivaci dibattiti in molti Stati americani, durante gli ultimi anni. Il Michigan e il North Dakota, nelle elezioni del novembre 1972, si erano pronunciati contro una revisione dei vecchi divieti legali al procurato aborto,che dovranno ora,invece,essere abrogati.

Lo Stato di New York, ove vigeva una legge sull'aborto largamente permissivo, da alcuni anni, aveva visto vari tentativi di reintrodurre norme molto restrittive: questi tentativi saranno ora inattuabili.

Per quanto controverso resti il problema, l'atteggiamento dell'opinione pubblica americana va orientandosi chiaramente a favore della legalizzazione dell'aborto procurato.

Un'inchiesta Gallup del giugno 1972 ha constatato infatti che il 64% degli intervistati concordavano con l'affermazione che "la decisione del procurato aborto dev'essere lasciata esclusivamente alla donna e al suo medico". Un'analoga inchiesta di sei mesi prima aveva rilevato una maggioranza d'appena il 57% intorno a quella stessa affermazione mentre, nel novembre 1969, solo il 40% degli intervistati si erano dichiarati favorevoli a "una legge che consentisse alla donna di farsi fare un aborto dal medico in qualsiasi momento del primo trimestre di gravidanza".

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