

THE DAILY RECORD

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Legal Currents

Whose morals must we enforce?

This column, featured every Monday, tackles timely issues important to the local legal community.

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Two weeks ago the Appellate Division, Fourth Department, issued its decision in *In re Bobbijeane P.*, 2007 WL 2812608.

At issue in the case was the legality of Monroe County Family Court Judge Marilyn O'Connor's order requiring the appellant, a homeless African-American struggling with drug addiction, to refrain from becoming pregnant "until she has actually obtained custody and care of (her child) Bobbijeane P. and every other child of hers who is in foster care or has not been adopted or institutionalized."

This case garnered national media attention and an *amicus curiae* brief was filed by the New York Civil Liberties Union and the National Advocates for Pregnant Women on behalf of more than 40 leading medical professionals and child welfare and public health organizations. The brief alleged, in part, that the order violated public policy considerations and infringed on the appellant's fundamental constitutional right to privacy.

In mid-August I wrote about this case ("No pregnancy for you," Aug. 13) and at the conclusion of my article, I wondered: "Will the court conclude that the right to procreate without interference from the state is a constitutional guarantee, or simply a guideline that can be altered with the stroke of a pen?"

"Will the court's decision take us one step closer to making governmental regulation of procreation as perceived by Margaret Atwood in the novel 'The Handmaid's Tale' a reality? I certainly hope not."

Much to my satisfaction the appellants, represented by the Monroe County Public Defender's Office, Eric Dolan of counsel, prevailed. To my disappointment, however, the court

specifically declined to address the important constitutional issues presented, instead concluding Judge O'Connor had no authority under family court rules set forth in 22 NYCRR 205.83(a) and (b) to impose the condition.

Basic and critical constitutional rights were at stake. The case revolved around issues of self-determination and self-control. Does the government or the individual decide when, where and how a person may or may not procreate?

Do our federal and state constitutions permit the government to prevent drug addicts from engaging in one of the most intimate and personal acts in order to avoid the risk of a governmentally mandated abortion should birth control fail?

Is a person under the influence of drugs capable of making rational decisions regarding sexual activity and birth control? If not, then is forced sterilization the only option available to relieve them of making such a choice?

Is forced sterilization an alternative that we, as a civilized and democratic society, should consider even if it turns out to be constitutionally permissible?

Another important and difficult to answer question at stake in this case is just what makes a "good" parent? How do we, as a society, come to an agreement as to what qualities a "good" parent should exhibit?

Some might argue that single mothers on welfare are bad parents since they set a poor example for their child. Others would say single mothers or parents who are employed are bad parents since they allow other people raise their child. Still others might argue that parents who send children to be educated outside the home are bad, since home schooling is the best way to teach children.

It doesn't end there. People of certain faiths believe parents who drink any amount of coffee or alcohol set a poor example for their children since those substances are harmful to the body and spirit. Others believe blood trans-

Continued ...

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fusions are forbidden by God, and they refuse to allow their dying children to undergo the procedure.

There are certain cultures that condone the infanticide of female infants and a parent who engages in this conduct is not deemed to be a bad one.

America is a melting pot of cultures, religions and beliefs. Absent a consensus as to which ideals are "correct," I simply don't see how governmental interference

with an individual's ability to procreate would be constitutionally permissible.

This was a constitutional issue ripe for judicial determination. It's unfortunate the Fourth Department declined to address it.

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