

The Linacre Quarterly

Volume 53 | Number 3

Article 6

August 1986

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Recommended Citation

Riga, Peter J. (1986) "Eisenstadt, The New Reproductive Technologies and the Single Parent," *The Linacre Quarterly*: Vol. 53 : No. 3 , Article 6.

Available at: <https://epublications.marquette.edu/lmq/vol53/iss3/6>

Eisenstadt, The New Reproductive Technologies and the Single Parent

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Two cases of great importance show the evolution of court philosophy on the mores of the American people. It is often argued that the court has little to do with such influence and that the argument is *e contrario*, that is, the court's ethical standards are determined by American mores - not vice versa.

The following case study will attempt to show the opposite: people's mores are basically influenced by a moral choice of the court which tends to legitimize forms of behavior in society under the rubric of "privacy." This has been particularly true in the area of sexual morality which is particularly susceptible to every expansion of its exercise. There has never been any society which has not mandated sexual restraint for a whole variety of reasons: religious, economic, patriarchal, etc. Our society, of course, is no exception. We have tended in the past 20 years to expand its

exercise to a whole variety of groups traditionally not of concern to the state: minors, homosexuals, the unmarried in general, the elderly and the handicapped. While there has been some controversy on the direction of this unfettering trend, the result of this has been the abortion decisions. Since many kinds of people now have a right to privacy in this intimate area (to have children or not), the consequence of this new sexual freedom had to end in the abortion movement because the ultimate assurance of this sexual right-privacy, is the ability to cut short the possible result of this activity (the child) which can interfere with the right (whether to have children or not while exercising the sexual right to privacy).

Thus there is a whole network of inter-related rights which have flowed from what the court has determined to be a fundamental right: the right to engage in sexual activity (whether for married or unmarried, adults or minors) and its concomitant right whether to have children or not as a consequence of this activity (contraception, abortion).

The real philosophical turn of events came with *Eisenstadt v. Baird* and not *Roe v. Wade*. *Roe* simply was the logical expansion of a sexual freedom given to each individual, whether to have a child or not (*Eisenstadt*). Logically, if contraceptives were to fail, then this right of privacy (whether to bear children or not) would be in imminent danger. To preserve the privacy right established in *Eisenstadt*, *Roe* had to find its own place in the penumbras of the Constitution which would solidify the more basic right of sexual choice. For, "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike." Why is this so? "If the right of privacy means anything, it is 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."

In other words, the decision whether to give birth or not, belongs to the individual and this, whether the person is married or not. Each individual has an inherent right of sexual privacy to control one's fertility in such a way that he or she may exercise it via contraceptives. This privacy right is then extended by *Roe* to the consequences of that sexual activity, either when contraceptives fail or indeed, when no contraceptives were used. The privacy right remains even then, so that a woman has an unfettered right almost throughout gestation, to destroy incipient life which came into existence by the exercise of that privacy right. The logic of the two cases of *Eisenstadt* and *Roe* seems indisputable.

Right Extended

This right has now been extended into a positive dimension with the introduction of new reproductive techniques. By that I mean that heretofore, the argument of the courts and commentators around *Eisenstadt* and *Roe* has been negative. That is, the individual has the right to avoid (by the privacy right guaranteed to each individual by the Constitution) the consequences of personal sexual activity (contraception,

abortion). The new reproductive methods have now permitted that same individual to constitutionally claim a positive right, that is, the right to have a child as an individual, whether married or not. The implication is that each individual has, as equal protection, equal access to these reproductive techniques whether that individual is married or not. The regulations of various sperm banks and reproductive clinics restricting its services to quasi sterile couples, may well be an unconstitutional infringement on the individual's positive right to beget a child under *Eisenstadt*.

Many clinics have already gone beyond such strictures. Already there is a significant trend among certain "women's clinics" to make donor sperm available to any woman who presents herself, whether married or not. Already, a significant group of women have made the logical connection with the philosophy of *Eisenstadt* and have simply chosen artificial insemination to have their children without husbands or live-in boyfriends. Such a choice seems to be amply and constitutionally justified by *Eisenstadt* as the above analysis will attest. Yet, this view of the relationship of man-woman is disturbing. In fact, it puts into question the whole notion of paternity-maternity, marriage, family, man-woman relationship, which has not happened before in the history of our society.

Such is the consequence of the philosophy of the *Eisenstadt* decision. It revolves around the notions of individual freedom and protection of his or her rights by government (or court decree). The decision clearly implements a positive right of the individual — whether married or single — to have and beget a child. It guarantees to each individual the *right* not just to avoid the begetting of a child, but the positive right to beget a child.

This seems to be an expansive right, at first glance. It seems to expand rights given to the unmarried, the handicapped, aliens, illegitimates, gender, homosexuals - and a whole other group of people traditionally discriminated against in traditional society. While the 1973 decision of *Roe* has met with fierce resistance and has not abated, the fact is that, as we have seen, *Roe* rises or falls with the philosophy of *Eisenstadt* because both cases are cut of the same piece of cloth.

Implications of *Eisenstadt*

Eisenstadt implies the right of the individual, every individual, to beget, to give life by choosing those means by which to give life. If I have a constitutional right to choose to have or not to have a child, by implication, I have the right to the means necessary to produce that right — or the right itself becomes an empty promise. It seems clear, at least to me, that *Eisenstadt* implies that right of access of every individual to the artificial modern techniques of reproduction presently available only to certain quasi-sterile couples, heterosexual or homosexual.

This right which flows from *Eisenstadt* is independent of matrimonial status and of every relation to a sexual partner, according to the preferences of the individual. This right is exercised in the name of privacy of the individual who alone has an absolute privacy right to determine his

or her own begetting power. This in turn implies for society an obligation-duty to help the individual attain this right. While such a duty will not be constitutionally extended to financial help (the court has made it clear that the state has no positive duty to fund, e.g., non-therapeutic abortions), it can be extended to strike down all institutional barriers and prohibitions of access by single individuals to these new reproductive techniques. In a certain true sense, each individual has an inherent right to those sexual cells (e.g., sperm, ova) which will permit him or her to exercise this right of individual choice to beget — independent of any relationship with someone of the opposite sex. This would clearly be the case for sperm banks for unmarried as well as married women, as well as the newer reproductive technique of *in vitro* fertilization. For men, the application of the right would be more difficult because it implies the voluntary cooperation of a woman acting as a surrogate mother. This poses special problems of law reform concerning adoption, contracts, “payments-child selling” and other problems. Already, model legislation is being proposed in many jurisdictions concerning these problems for men in a surrogate situation.

But for many women, there are no such problems. In fact, a significant number of women are already exercising this right given in *Eisenstadt* as single mothers *ab initio* (from the very beginning). The only thing that matters here is the positive desire of the individual to have a child.

Such is the logical result of *Eisenstadt's* philosophy of individual right of privacy and procreation. Logically, it must, as a right which inheres in the individual, apply to both men and women, the married and the unmarried, homosexuals and heterosexuals.

II

Our first observation is the almost absolute character of the right of the *individual* in the area of procreation. Nowhere in any of these cases is there any mention of societal responsibility or above all, of the child to be born of this absolute choice of the individual. This should be seen in the light of the right to an abortion. Initially, there can be no real appeal to the rights of a child because he-she has no formal-legal rights under *Roe* until he-she is born. Since it can be aborted at almost anytime during gestation, it is useless to speak of bringing the interests of the child into the amalgam of individual choice. Society itself seldom intervenes in such a choice, even when the individual is an alcoholic or has defective genes. There has been some talk of intervention in these areas but so far, the only times courts have intervened is when the person is hopelessly insane or retarded and then only with the severest procedural safeguards (e.g., *In re Grady*). As to the child, society will intervene only after birth in cases of neglect, abuse or abandonment. In other words, society will intervene only when it absolutely has to intervene. More intervention would tend to endanger family life and the penumbra of rightful privacy surrounding the family

and its independence. This is indispensable if we are to avoid the state totalitarianism so much in evidence in the Eastern bloc countries.

But isn't it better for a child to be born wanted by a woman who consciously and lovingly conceives such a child for its own sake? Isn't such a situation better than what so often happens in "normal" families, among traditional couples where, in fact, so much child abuse factually takes place? Would this not, in fact, cut down on actual child abuse? This argument is often heard and it is mostly a "pro-child" type of argument. One must, of course, have a certain distrust of such an argument, coming as it does from a society which kills almost two million of these unborn children each year.

Argument Deserves Consideration

But the argument deserves some consideration. In fact, the child gets the short shrift in the arguments about the new reproductive techniques. What is emphasized is the right of the individual or of the couple to have a child — irrespective of its effects on the child and its future. In our laudable endeavor to help infertile couples and fertile single (sometimes lesbian) women achieve motherhood, we have neglected the child. In reality, motherhood and fatherhood exist for the child, not vice-versa and it perverts the argument to lay undue emphasis on individual rights. In this area, the purpose of reproduction is not and cannot be individual fulfillment or even rights. Such rights exist for a further end: the existence and well being of the child who has the infinite dignity of person to be respected for himself. Already, the inordinate emphasis of *Eisenstadt* on the absolute right of the individual to choose in this area of privacy is not absolute; this right must be weighed in function of a further morally good end — the good and the dignity of the child which is the fulfillment of motherhood-fatherhood. We must not reverse these ends. In this sense, there is an inseparable solidarity of man and woman vis-a-vis the child they bring into existence. The reason is quite simple and traditional; the child has need of masculine and feminine role models equally shared by a mother and a father. We have come too far in psychiatric knowledge and experience to deny this elementary necessity of child development. This alone would seem to negate any legal approbation of the new reproductive techniques utilized for single parents *ab initio*.

It is quite true that society cannot guarantee to each child the right to know and to have two parents and to be raised by them both together. But it can certainly legally demand and guarantee such conditions when it approves the licensing of clinics which perform new reproductive technologies or sperm banks. Society has every right by law to see to it that such technologies are applied to married couples and not to single individuals of either sex. Society may refuse to recognize any contract involving surrogate motherhood as a matter of public policy. Such public policy considerations would be based on the needs of any present or future child, as we have outlined, who need *supra*. In fact, such a policy may well

be compelling even if it were to be held that via *Eisenstadt*, every individual has a constitutional right to decide to beget a child. The *parens patriae* power of the state would most probably overcome any invocation of private constitutional right in this area. Every politician and legislator should seriously consider the symbolic and material import of these decisions on the type of future society he or she will want to bring about via such legislation.

Eisenstadt has impliedly (and now factually) given us the beginning of a society which is profoundly individualistic in the area of sexuality and procreation. These intimate areas of human life are no longer considered the privileged place for the inter-relationship of man and woman where they meet in mutual responsibility for an essential task vital for the future of any society - but as the prerogative of isolated individuals. Man and woman in *Eisenstadt* are reduced to individuals, literally disconnected from the tissue of human relationships which factually sustain individuals. Its philosophy completely ignores this vital human inter-relatedness and becomes reductionist. It is impossible to reconcile *Eisenstadt* with societal solidarity as well as with the solidarity of man-woman with the child. *Eisenstadt* can only result in human disaster for all concerned.

The illusory dimension of sexual and procreational individualism as espoused by *Eisenstadt* lies in the fact that quite simply each human being does not have total power over his procreation but is related essentially *to the other*, man or woman. To separate the inseparable is to do violence to the relationship and finally to the individual himself in whose name individualism was first invoked. Recourse to the new reproductive technologies cannot remake human relatedness.

To speak of an *individual's* right to procreate (or not) makes no human sense. In this sense, separating procreation from traditional man-woman relationship and responsibility is not only to denaturalize the relationship but to destroy that which is the foundation of any healthy child-rearing product, not of technology but of human relatedness. To replace the latter with the former is to regress and is not a true "progress in science." There are certain forms of sterility (e.g., the single state) which have no human solution either for the individual or for the prospective child. They must accept this suffering of alone-ness because its solution would only result in far greater social and individual harm which no society can accept.

This is a hard saying for a society taught to reach out and "have it all." In fact, there are certain things we cannot have and still remain properly human. One of them is planned single parenthood which is destructive for the individuals who do it and the children they bring into the world.

Society has a serious and compelling interest in forbidding this recent phenomenon, as destructive of societal and individual good. The philosophical implications of *Eisenstadt* must be curtailed by law.