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Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant

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COMPULSORY CONTRACEPTION AS A CONDITION OF PROBATION: THE USE AND ABUSE OF NORPLANT

INTRODUCTION

On December 2, 1990 Tulare County Superior Court Judge Howard Broadman convicted Darlene Johnson of three counts of child abuse in violation of California Penal Code section 273(d).[1] At the time of her conviction, Ms. Johnson had four children and was pregnant with a fifth.[2] The court granted her petition for a suspended sentence on January 2, 1991 and placed her on

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[1] Text of Judgment Proceedings, People v. Darlene Johnson, No. 29390 (Jan. 2, 1991).

The *Johnson* case gained instant notoriety and continues to be controversial. Within days of Judge Broadman's decision dozens of articles and letters appeared in various newspapers around the country and continued to appear throughout the month. *See, e.g.*, Rachel Pine, *Don't Force Birth Control on Women*, USA TODAY, Feb. 4, 1991, at 8A; *Judge Orders Birth Control for Abusive Mother*, L.A. TIMES, Jan. 30, 1991, at 6B; Albert Kaupas, *An Eye for an Eye*, CHI. TRIB., Feb. 12, 1991, at 14; *The Norplant Sentence*, WASH. POST, Jan. 24, 1991, at A20. A great deal of the writing was critical, as women's and civil liberties' groups decried this "totalitarian" measure. Mary Cantwell, *Coercion and Contraception*, N. Y. TIMES, Jan. 27, 1991, § 4, at 16. Another extreme critic of Darlene Johnson's probation condition was Harry Brodine, an anti-abortion activist. Brodine attempted to shoot Judge Broadman in court several weeks later to protest the judge's order. Following his surrender Brodine was heard to mutter "Norplant kills babies." Bill Ainsworth, *Tulare's Target of Controversy*, THE RECORDER, Mar. 28, 1991, at 1. The *Johnson* case continued to be written about and discussed while the appeal was pending in the California Court of Appeals. Both national network news and *60 Minutes* addressed the topic. *See 60 Minutes: Norplant* (CBS television broadcast, Nov. 10, 1991) (hereinafter *60 Minutes*). It even reached the popular audience, airing as a feature on *L.A. Law* on November 14, 1991. Darlene Johnson's case was rendered moot in March, 1992 when she was sentenced to prison for violating another condition of probation. *Birth Curb Order is Declared Moot*, N.Y. TIMES, Apr. 15, 1992, at A23. In fact, a recent California Court of Appeals decision indicates that the condition imposed on Darlene Johnson would have been held unconstitutional had it too reached the court of appeals. People v. Zaring, 10 Cal. Rptr. 2d 263 (Ct. App. 1992) (invalidating a probation condition, also imposed by Judge Broadman, forbidding defendant from becoming pregnant). The continuing battle over fetal rights and reproductive freedom, however, indicates that the issue of compulsory contraception is far from being resolved.

[2] Michael Lev, *Judge is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. TIMES, Jan. 11, 1991, at A17. Johnson was convicted of striking her five- and six-year-old daughters. There was no charge that she had hit her other children, nor had she ever before been convicted of child abuse.

probation for a term of three years.[3] Among the conditions of her probation were that Ms. Johnson serve a jail term of one year, that she not discipline her children by striking them, that she undergo parental counseling and that she be implanted with the contraceptive device Norplant for the entire period of her probation.[4] Norplant was a new drug approved by the United States Food and Drug Administration ("FDA") less than a month before Ms. Johnson's probation was to begin.[5] Under these terms, Ms. Johnson would have become the first woman ever to be implanted with Norplant by court order.

A prescription drug developed in the United States, Norplant consists of six silicon tubes containing the synthetic hormone levonorgestill. The tubes are surgically implanted under the skin of a woman's arm and prevent conception for up to five years, or until removed by a doctor.[6] Norplant is highly effective, requires no care or effort on the part of the woman and can be removed only by a licensed practitioner.[7] Developers of the drug also claim that it does not cause many of the same side effects as other contraceptive devices, such as the birth control pill or the intrauterine device ("IUD").[8] Norplant can, however, cause irregular menstrual periods, nausea, acne and hair loss.[9] It can also endanger women with conditions such as diabetes, depression or high cholesterol.[10] While the medical community is aware of Norplant's short-term dangers, little is known about its long-term effects.

Although the use of Norplant may be novel, the concept of "compulsory contraception" as a condition of probation for women convicted of child abuse and other crimes is not new.[11]

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[3] *Id.*

[4] *Judgment Proceedings, supra* note 1, at 2. Johnson was also ordered to abstain from the use of alcohol, tobacco or drugs during her pregnancy. She did not challenge these conditions on appeal.

[5] Lev, *supra* note 1, at A17.

[6] Appellant's Opening Brief at 4-5, People v. Johnson (Cal. Sup. Ct. 1991) (No. 29390) [hereinafter *Appellant's Opening Brief*].

[7] *Id.*

[8] *Id.* at 5 (citing R. Hatcher, et. al, *Implants, Injections & Other Progestin-only Contraceptives, in* CONTRACEPTIVE TECHNOLOGY 303 (1988)).

[9] *Appellant's Opening Brief, supra* note 6, at 6.

[10] *Id.* at 5-6.

[11] *See, e.g.*, Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App., 1979) (invalidating a condition prohibiting pregnancy and marriage); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (invalidating a condition prohibiting pregnancy during five-year

Indeed, throughout the history of the United States, some social theorists have argued that many social ills are the result of genetic defects and can best be addressed by "prevent[ing] the manifestly unfit from continuing their kind."[12] Over time, many lower courts have been receptive to the idea of ordering sterilization, temporary or otherwise, as a condition of probation or a term for plea bargaining. However, no court has ever upheld on appeal compulsory contraception as a condition of probation.[13]

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probation period); People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967) (invalidating a condition prohibiting pregnancy for woman convicted of robbery). Compulsory contraception has also been used as a condition of probation for men convicted of crimes. *See* State v. Brown, 326 S.E.2d 410 (S.C. 1985) (invalidating an order of castration for defendants convicted of first-degree criminal sexual conduct); Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982) (invalidating a probation condition prohibiting a man convicted of child abuse from fathering a child).

In a recent case, which has not yet been appealed, a Tennessee judge agreed to probation for a husband and wife convicted of child molestation on the condition that the woman be sterilized permanently. Critics of the order argue that the condition violated not only constitutional rights of procreation and privacy, but also of equal protection, since the judge's order did not require the man to be sterilized as well. *Woman Who Molested Sons Agrees to Sterilization*, N.Y. TIMES, Jan. 31, 1993, at A29.

For further information on court-ordered sterilization, temporary or permanent, see Colleen M. Coyle, *Sterilization: A "Remedy for the Malady" of Child Abuse?*, 5 J. CONTEMP. HEALTH L. & POL'Y 245 (1989). *See also* Susan Stefan, *Whose Egg is it Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L.J. 405 (1989).

[12] Buck v. Bell, 274 U.S. 200 (1927). For a brief description of the American Eugenics movement, see *infra* notes 143-154 and accompanying text.

[13] *See* People v. Zaring, 10 Cal. Rptr. 2d 263 (Ct. App. 1992) (holding invalid and unconstitutional a probation condition ordering woman to refrain from becoming pregnant); State v. Mosburg, 768 P.2d 313 (Kan. App. 1989) (same); Thomas v. State, 519 So.2d 1113 (Fla. Dist. Ct. App. 1988) (striking condition prohibiting defendant from becoming pregnant while unmarried); State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986) (striking condition prohibiting defendant from becoming pregnant unless married); Smith v. Superior Court, 726 P.2d 1101 (Ariz. 1986) (striking sterilization as a condition of reduced sentence for child abuser); People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984) (striking condition prohibiting defendant from becoming pregnant); Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982) (holding invalid probation condition forbidding child abuser from "fathering" any children); Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (same); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (same); People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967) (striking condition prohibiting defendant from becoming pregnant); Davis v. Berry, 216 F. Supp. 413 (S.D. Iowa), *rev'd on other grounds*, 242 U.S. 468 (1914) (invalidating a state statute requiring all criminals convicted twice of felonies to have vasectomies performed). A later decision, People v. Blankenship, 161 Cal.2d. 606 (1936), in which a man convicted of statutory rape was given a suspended sentence on the condition that he submit to sterilization, was overruled by subsequent cases. *See also* South Carolina v. Williams, Indictment No. 86-187, July 7, 1986.

A number of state laws continue to allow for compulsory sterilization of criminals or

From the early part of the century to the present day, courts have thought little of ordering permanent forms of sterilization, such as tubal ligations, performed on women convicted of crimes, or seen as generally "unfit."[14] As time progressed, courts began to offer compulsory contraception as an alternative to incarceration, but did not specify the form of birth control to be used. Rather, these courts let the woman decide among various existing devices, such as the pill, the IUD or the diaphragm. The understanding existed, however, as it did with all terms of probation, that failure to obey those terms, *i.e.*, getting pregnant, would lead to a prison sentence.[15] These alternative methods are not completely effective and require care and responsibility on the part of the woman. Norplant, on the other hand, presents to the courts an unprecedented means of enforcing temporary birth control as a condition of probation. Given its uncertain effect on women's health[16] and its potential use as a tool for social engineering,[17] it also raises the specter of great judicial abuse.

Some commentators have discounted the threat of Norplant and other evolving reproductive technologies being used for eugenics purposes.[18] Since the approval of Norplant by the FDA, however, a number of controversial measures have been proposed which can only add to the fear that Norplant will be used to restrict reproduction by those deemed "unfit." The Governor of Maryland recently announced a plan to offer free Norplant to

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the mentally incompetent. *See, e.g.*, MISS. CODE ANN. § 41-45-1 (Supp. 1987); N.C. CEN. STAT. § 35-36 (1984); W. VA. CODE § 27-16-1 (1986).

[14] Statutes allowing for compulsory sterilization, *see supra* note 13, have been applied exclusively to the mentally incompetent. Courts have justified this use, however, not on the traditional rationale of *parens patriae* (the state's responsibility toward juveniles and the insane), but rather on the individual's "best interests." *See In re* Grady, 426 A.2d 467, 481 n.8 (N.J. 1981); *In re* Guardianship of Hayes, 608 P.2d 635, 640 (Wash. 1980).

[15] *See* NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE (1987).

[16] *See supra* notes 8-10 and accompanying text.

[17] *See infra* notes 23-26, 143-154 and accompanying text. The developers of Norplant, including the drug's creator, Dr. Sheldon Segal, have expressed concern over unorthodox uses of Norplant. Dr. Segal has taken a stand against forced or coerced use of Norplant, claiming that he is "shocked that these draconian measures are coming from the conservative right in this country." Stephanie Denmark, *Birth-Control Tyranny*, N.Y. TIMES, Oct. 19, 1991, at A23. *See also* Sheldon J. Segal, *Norplant Developed for all Women, Not Just the Well-to-do*, N.Y. TIMES, Jan. 6, 1991, at A18.

[18] *See, e.g*, Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control or Crime Control?*, 40 UCLA L. REV. 1 (1992).

women on welfare and has suggested that it should be made mandatory. He has already begun distributing it to teenagers in an inner-city high school in Baltimore.[19] Other state measures, arguably coercive, include offering money as an incentive for women on welfare to have Norplant implanted or to put their children up for adoption.[20] Still others have suggested the mandatory use of Norplant for women who use drugs or carry the HIV virus.[21]

Some have argued that these proposals and the imposition of birth control as a condition of probation are a beneficial means of decreasing poverty and family violence.[22] Others, however, have expressed legitimate concern that these measures will be used disproportionately against minority women.[23] To undervalue this concern is to ignore a historical reality and an ever present danger.

The tragedy of child abuse in the United States cannot be minimized. Government and society must direct their attention toward helping present victims and preventing further abuse. The answer, however, does not lie in state-imposed contracep-

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[19] *Maryland Governor Weighs Mandatory Birth Control*, CHI. TRIB., Jan. 17, 1993, at C22. The Governor also wants to offer free vasectomies for men being released from prison.

[20] Martha Davis, *War on Poverty, War on Women*, N.Y. TIMES, Aug. 3, 1991, at A19 (discussing recent proposals in New Jersey and Wisconsin that would increase AFDC benefits contingent on the mothers' agreement not to have more children).

[21] Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

[22] *See* Thomas E. Bartrum, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L. J. 1037 (1991/1992); *Poverty and Norplant: Can Contraception Reduce the Underclass?* PHIL. INQUIRER, Dec. 12, 1990, at A18 (editorial) (hereinafter *Poverty and Norplant*).

[23] This concern is by no means unfounded. In 1979 15 African-American and Hispanic women in California were sterilized without their consent or knowledge. *See* Madrigal v. Quilligan, 639 F.2d 789 (9th Cir. 1979). In fact, black and Hispanic women are disproportionately sterilized, often without their consent. Roberts, *supra* note 21, at 1419; *see also* Note, *Sterilization Abuse: Current State of the Law and Remedies for Abuse*, 10 GOLDEN GATE U. L. REV. 1147 (1980); HAMET B. PRESSER, STERILIZATION AND FERTILITY DECLINE IN PUERTO RICO 6 n.2 (1973) (compulsory sterilization was permitted in Puerto Rico until 1960 for purely eugenic reasons).

Within days after the FDA had approved Norplant, an editorial appeared in the *Philadelphia Inquirer* that urged the use of this new contraceptive device for poor African-American women. *Poverty and Norplant*, *supra* note 22, at A18. In the wake of the uproar that followed, the newspaper published an apology for the racist undertones of the editorial. Despite this recantation, concern remains that Norplant has provided a simpler means for social engineering.

tion.[24] Forced contraception assumes that child abuse is caused by the bearing of children and ignores the myriad underlying factors that can be addressed in ways more productive and less intrusive of individual rights.[25] Certainly the state has an interest—and a duty—to prevent future abuse and punish past offenses. Intuitively, compulsory contraception would seem to provide an answer for both. However, allowing courts to make decisions about reproduction would set a dangerous precedent for control over who is, and is not, fit to bear children.

This Note argues that compulsory contraception is an unconstitutional and irrational response to the problem of child abuse and that Norplant itself creates potential dangers of governmental intrusion into reproductive rights. In addition to presenting common law and constitutional criticisms of compulsory contraception, this Note argues that the imposition of Norplant as a probation condition for women convicted of child abuse is poor public policy where alternatives exist that could more effectively address the problem of child abuse. Part I outlines the history and nature of probation and discusses the advent of "creative sentencing." Part II sets forth the standards of review presently employed by courts to determine the validity of conditions of probation and analyzes the use of compulsory contraception under these validity tests. Part III argues that courts should not only apply common law probation standards but, because a woman's reproductive rights are concerned, must also safeguard against unconstitutional governmental intrusion. Finally, this Note concludes with a discussion of the policy implications of compulsory contraception and the advent of Norplant.

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[24] *See*, Helen Neuborne, *In the Norplant Case, Good Intentions Make Bad Law*, L.A. TIMES, Mar. 3, 1991, at M1 (criticizing Judge Broadman's imposition of Norplant as a condition of probation in People v. Darlene Johnson).

[25] Studies of child abuse, for example, indicate that abuse is most prevalent in families that have experienced recurrent patterns of violence, substance abuse and poverty. These studies suggest that no meaningful solution to child abuse can be found until these sociological problems are addressed. *See, e.g.*, Anne Cohn Donnelly, *Home Visits Can Reduce Child Abuse*, CHI. TRIB., Oct. 24, 1991, at 26; Sandra Evans, *Guiding Parents Away From Abuse*, WASH. POST, Nov. 10, 1990, at B1.

I. BACKGROUND

A. *History and Nature of Probation*

Probation is the suspension of a sentence of a convicted criminal, subject to court-ordered conditions, supervision by officers assigned by the court and provisions for revocation should any of the conditions be violated.[26] Derived from the common-law notion of recognizance, probation became accepted as an alternative to imprisonment in the United States in the middle of the nineteenth century.[27] Traditionally, courts did not view probation as a sentence, even though it served similar purposes of rehabilitation, retribution and deterrence.[28] Rather, probation was viewed as a means of assisting convicted criminals to reintegrate into society and encouraging them to lead "law-abiding" lives.[29] The primary purpose of probation, unlike that of a prison sentence, is the rehabilitation of the offender not punishment or deterrence of another crime.[30] Present state and federal statutes stress that conditions of probation which do not serve this end are beyond the scope of judicial authority.[31]

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[26] *See* COHEN & GOBERT, *supra* note 15, at 245.

[27] *Id.* at 7.

[28] There is tension between courts that view probation as a sentence and those that do not. *See, e.g.*, U.S. v. Fortner, 549 F. Supp. 657, 660 (D.S.C. 1982) ("probation is a sentence like any other sentence"); Addison v. State, 452 So.2d 955 (Fla. Dist. Ct. App. 1984) ("probation does not constitute a sentence"); People v. Gilchrist, 183 Cal. Rptr. 709, 712 (Ct. App. 1982) (probation is not a form of punishment, but rather an act of clemency within the sound discretion of the trial court and its primary purpose is rehabilitation, not punishment).

The distinction between viewing probation as a sentence or not becomes significant when determining society's goals in granting probation. A sentence is intended, in part, to punish the offender's criminal actions, whereas probation, according to its statutory definition, is not.

[29] *See* N.Y. PENAL LAW § 65.10 (McKinney 1987) ("The conditions of probation . . . shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.").

[30] *See, e.g.*, Higdon v. United States, 627 F.2d 893 (9th Cir. 1980) (primary purpose of probation is to rehabilitate the offender); Freeman v. State, 382 So. 2d 1307, 1308 (Fla. Dist. Ct. App. 1980) ("There is a clear distinction between a sentence and a condition of probation (citation omitted). A sentence may be imposed for one or more of the following purposes: (a) to punish; (b) to deter similar criminal acts; (c) to protect society; or (d) to rehabilitate. [Probation's] underlying concept is rehabilitation."); Coulson v. State, 342 So. 2d 1042 (Fla. Dist. Ct. App. 1977) ("if special condition of probation is so punitive as to be unrelated to rehabilitation, it cannot be imposed"); Kominsky v. State, 330 So. 2d 800, 802 (Fla. Dist. Ct. App. 1976) ("special condition of probation which is so punitive that it is unrelated to rehabilitation cannot be imposed in lieu of a sentence").

[31] *See infra* notes 49-51.

In recent decades, developments in the penal system have led to an expanded view of the use of probation. Noting the benefits it would carry both for society and the individuals involved, penal reform advocates and legal experts have pushed for a broader use of probation as an alternative to imprisonment.[32] More significantly, the crisis of prison overcrowding during the 1980s was reflected in a change of attitude toward the use of probation in lieu of a sentence.[33] Today, every state,[34] as well as

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[32] In 1970 the American Bar Association ("ABA") endorsed the increased use of probation as an alternative to incarceration. Among the reasons cited were:

1. to maximize the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of the law;
2. to promote rehabilitation by continuing normal community contacts;
3. to reduce financial costs to the public treasury; and
4. to minimize the impact of conviction upon innocent dependents of the offender.

ABA STANDARD RELATING TO PROBATION 27 (Approved Draft 1970).

[33] As of December 31, 1989 426 out of every 100,000 Americans were incarcerated, giving the United States the world record for the rate of incarcerated individuals *per capita*. This figure represents twice that of the number incarcerated ten years before, at a cost of approximately $16 billion a year. Carolyn Schurr, *Crime and Punishment: No Other Country Has Higher Rate of Incarceration Than U.S.*, 91 A.B.A. J. 23 (May 1991) (citing statistics from the U.S. Justice Department's Bureau of Statistics).

[34] ALA. CODE § 15-22-50 (1982 & Supp. 1988); ALASKA STAT. § 12.55.090 (1984); ARIZ. REV. STAT. ANN. § 13-901 (1978 & Supp. 1988); ARK. CODE. ANN. § 5-4-301 (1987); CAL. PENAL CODE § 1203 (West 1982 & Supp. 1989); COLO. REV. STAT. § 16-11-201 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. § 53a-29 (West 1985 & Supp. 1988); DEN. CODE ANN. tit. 11, § 4301 (1987); FLA. STAT. ANN. § 948.001 (West 1985 & Supp. 1989); GA. CODE ANN. § 42-8-1 (1985 & Supp. 1988); HAW. REV. STAT. § 706-620 (1985 & Supp. 1987); IDAHO CODE § 19-2601 (1987 & Supp. 1988); ILL. ANN. STAT. ch. 38, para. 1005-6-1 (Smith-Hurd 1982 & Supp. 1988); IND. CODE ANN. § 35-38-2-1 (Burns 1985 & Supp. 1988); IOWA CODE ANN. § 907.1 (West 1979 & Supp. 1988); KAN. CRIM. CODE ANN. § 21-4601 (Vernon 1971 & Supp. 1989); KY. REV. STAT. ANN. § 533.010 (Michie/Bobbs-Merrill 1985 & Supp. 1988); LA. CODE CRIM. PROC. ANN. art. 893 (West 1969 & Supp. 1989); ME. REV. STAT. ANN. tit. 17-A, § 1201 (1983 & Supp. 1988); MD. ANN. CODE § 27-641 (1988 & Supp.); MASS. ANN. LAWS ch. 279, §§ 1-1A (Law. Co-op. 1980 & Supp. 1988); MICH. COMP. LAWS ANN. § 771.1 (West 1982 & Supp. 1988); MINN. STAT. ANN. § 609.135 (West 1987 & Supp. 1989); MISS. CODE ANN. § 47-7-1 (1981 & Supp. 1988); MO. ANN. STAT. § 599.012 (Vernon 1979 & Supp. 1989); MONT. CODE ANN. § 46-18-201 (1985); NEB. REV. STAT. § 29-2250 (1985); NEV. REV. STAT. § 176.175 (1987); N.H. REV. STAT. ANN. § 651:2 (1986 & Supp. 1988); N.J. STAT. ANN. § 2C:43-2(b)(2) (West 1982 & Supp. 1988); N.M. STAT. ANN. § 31-20-5 (1987); N.Y. PENAL LAW § 65.00 (Consol. 1984 & Supp. 1988); N.C. GEN. STAT. § 15A-1341 (1988); N.D. CENT. CODE § 12.1-32-02 (1985); OHIO REV. CODE ANN. § 2951.01 (Anderson 1987 & Supp. 1988); OKLA. STAT. ANN. tit. 22, § 991a (West 1987 & Supp. 1989); OR. REV. STAT. ANN. § 137.520 (1984); 42 PA. CONS. STAT. ANN. § 9721 (Purdon 1982 & Supp. 1988); R.I. GEN. LAWS § 12-19-2 (1981 & Supp. 1988); S.C. CODE ANN. § 24-21-410 (Law. Co-op. 1988); S.D. CODIFIED LAWS ANN. § 23A-27-12 (1988); TENN. CODE ANN. § 40-28-101 (1982 & Supp. 1988); TEX. CRIM. PROC. CODE ANN. § 42.12 (Vernon 1979 &

the federal government,[35] has a statute authorizing courts to impose probation instead of a sentence in appropriate circumstances and setting guidelines for conditions.

B. *Creative Sentencing*

In light of the expanding need for, and acceptance of, alternatives to incarceration, courts have increasingly sought to tailor probation conditions to the particular crimes committed.[36] To this end, courts have started to impose more individualized conditions, such as those ordered for Darlene Johnson. Some "creative sentences" have included: requiring convicted child molesters to post signs on their houses reading "Dangerous Sex Offender—No Children Allowed";[37] requiring a thief to wear taps on the bottoms of his shoes to warn others of his approach;[38] ordering white collar criminals to perform a set number of hours of community service;[39] requiring a drunk driver to put bumper stickers on his car reading "Convicted

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Supp. 1989); UTAH CODE ANN. § 77-18-1 (1982 & Supp. 1988); VT. STAT. ANN. tit. 28, s 201 (1986); VA. CODE ANN. § 19.2-303 (1983 & Supp. 1988); WASH. REV. CODE ANN. § 9.95.200 (West 1988); W.VA. CODE § 62-12-1 (1989); WIS. STAT. ANN. § 973.09 (West 1985 & Supp. 1988); WYO. STAT. § 7-13-201 (1987).

[35] The Comprehensive Crime Control Act of 1984 first allowed federal courts to grant probation in lieu of incarceration. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified at 18 U.S.C. §§ 3551-59, 3561-66, 3571-3672, 28 U.S.C. §§ 991-98 (Supp. III 1985). Since then, the Federal Sentencing Guidelines have restricted somewhat the use of probation.

[36] This inclination has increased over the past few years. *See* Stephanie B. Goldberg, *No Baby, No Jail*, 78 A.B.A. J. 90 (Oct. 1992) (discussing creative sentencing and its critics); Nancy Blodgett, *Alternative Sentencing: Overcrowded Prisons Prompt New Responses*, 73 A.B.A. J. 32 (Nov. 1987) (describing critics and proponents of alternative sentencing); Faye Silas, *Doing Time Outside Prison: Alternative Sentencing is Gaining, But Slowly*, 69 A.B.A. J. 1813 (Dec. 1983) (discussing the increase of alternative sentencing as an outgrowth of overcrowding in the United States prison system).

A judge in Memphis, Tennessee received publicity for imposing such controversial conditions as: ordering a defendant to stand in front of a gorilla cage in a zoo to see how it felt to be locked up; making offenders read *The Autobiography of Malcolm X* and turn in a report on it; and allowing burglary victims to visit offenders' homes (accompanied by law enforcement officials) and take goods of equal value to that stolen from them. Michael Finger, *Judge Devises Instructional Penalties*, N.Y. TIMES, Feb. 26, 1993, at B16.

For more information on "creative sentencing," see Jeffrey C. Filcik, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 291 (1990).

[37] State v. Bateman, 765 P.2d 249 (Or. Ct. App. 1987).

[38] People v. McDowell, 130 Cal. Rptr. 839 (Ct. App. 1976).

[39] United States v. William Anderson Co., Inc., 698 F.2d 911 (8th Cir. 1980).

D.U.I.—Restricted License";[40] and prohibiting a prostitute from entering a particular area of the city known for solicitation.[41] The general objective of these probation conditions is to avoid future criminality by placing the offender beyond temptation's reach.[42] Given the nature of some of the conditions, the line between probation and a criminal sentence has blurred somewhat and many of the "creative" probation conditions ordered have come to look like modes of punishment.[43]

The use of creative sentencing has raised a whole host of new issues concerning appropriate conditions for various crimes. Proponents of "alternative" sentencing argue that in addition to alleviating prison overcrowding and reducing costs, alternative probation terms also allow courts to punish those traditionally difficult to penalize, such as corporations.[44] Opponents of alternative sentencing, on the other hand, have expressed concern that liberalized probation sets free convicted criminals who should be behind bars.[45] These opponents also argue that many of the conditions ordered do not comply with statutory or con-

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[40] Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App.), *rev. denied*, 496 So. 2d 142 (Fla. 1986).

[41] *In re* White, 148 Cal. Rptr. 562 (Ct. App. 1979).

[42] In Gilliam v. Los Angeles Municipal Court, 159 Cal. Rptr. 74 (Ct. App. 1979), *cert. denied*, 445 U.S. 907 (1980), for example, a defendant convicted of drunk driving was prohibited, as a condition of probation, from shopping in stores with alcohol as the main item sold. *See infra* notes 61-63 and accompanying text. In *Gilliam*, as in State v. Bateman, 765 P.2d 249 (Or. Ct. App. 1987), *supra* note 37 and accompanying text, the idea seems to be that the crime committed is one which could be avoided simply by making the "cause" of the crime more inaccessible.

[43] One commentator argues that prison overcrowding and penal reform movements have led to the increased use of probation as a means of punishment. Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988). She analogizes certain conditions, such as that of posting signs on houses and cars, to the colonial punishments of scarlet letters and stockades. Tavill criticizes their use as a step backward toward punishment that society rejected as degrading and humiliating. Many states, in fact, treat probation as a sentence. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4302(13) (1987) ("probation" means sentencing an offender, without imprisonment); NEB. REV. STAT. § 29-2246(4) (1985) ("Probation shall mean a sentence under which a person found guilty of a crime . . . is released by a court subject to conditions imposed by the court."); N.J. STAT. ANN. § 2C:43-2(b) (West 1982 & Supp. 1988) (except where prohibited, a court may sentence a person convicted of an offense to go on probation or face imprisonment) (cited in Filcik, *supra* note 36, at 17 n.20). *See also* Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357.

[44] Tavill, *supra* note 43, at 619. *See also supra* note 32 (on the ABA's endorsement for the use of probation).

[45] Tavill, *supra* note 43, at 619.

stitutional restrictions regarding probation and thus amount to abuse of discretion by the courts.[46]

Offenders themselves are also involved in the debate over alternative sentencing.[47] While most convicted criminals are too thankful to have avoided a jail sentence to question the fairness of their probation conditions, an increasing number of probationers are challenging them—with varying degrees of success.[48] To analyze these challenges as they pertain to the use of compulsory contraception, one needs a clear understanding of the distinction between legitimate and invalid probation conditions.

II. STANDARD OF REVIEW TO DETERMINE VALIDITY

Courts are afforded a great deal of discretion in determining the appropriate probation conditions for convicted criminals.[49] As well as the usual conditions, such as the length of the term, visitation by probation officers and the general requirement to observe the law, many state statutes also provide the courts with the opportunity to attach "special" conditions.[50] While judicial discretion is broad, however, it is not boundless.[51] Rather, courts

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[46] *See supra* notes 13-17, 33-37.

[47] *See* Polonsky, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466 (1974).

[48] *Id.* at 478.

[49] *See* State v. Evans, 506 A.2d 695, 698 (N.H. 1985) (trial court has broad discretion to grant probation in order to achieve goals of punishment, deterrence, safety and rehabilitation); People v. Lent, 124 Cal. Rptr. 905 (Cal. 1975) (trial court has broad discretion in the sentencing process, including the determination of whether probation is appropriate and, if so, the conditions thereof). *See also supra* notes 34-35 and accompanying text (noting the variety of state and federal statutes).

[50] *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9754(c)(13) (1982) (on top of general probation conditions, the defendant must "satisfy any other conditions reasonably related to rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience"); VT. STAT. ANN. tit. 28, § 252(b)(13) (1986) (defendant must "satisfy any other conditions reasonably related to his rehabilitation"); OR. REV. STAT. § 137.540(2) (1984) ("In addition to . . . general conditions, the court may impose special conditions of probation.").

[51] State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985) (judges are allowed wide, but not unlimited, discretion in imposing conditions of suspension of sentence or probation and they cannot impose conditions that are illegal and void as against public policy); People v. Keller, 143 Cal. Rptr. 184 (Ct. App. 1978) (court's discretion to impose conditions of probation as granted by statute is circumscribed not only by terms of statute, but by constitutional safeguards, including prisoner's right to enjoy a significant degree of privacy or liberty); People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967). For a more detailed description of the *Dominguez* case, see *infra* notes 68-72 and accompanying text.

are held to a standard of reasonableness in framing conditions of probation.[52] The "reasonableness" concept, however, is an amorphous and subjective one. Courts have struggled to define a standard by which to determine a probation's validity. The court in *Sweeney v. United States*,[53] for example, held that a condition's reasonableness was premised on the probationer's ability to comply with it. Therefore, the court found that a probation condition that a chronic alcoholic refrain from drinking was impossible and therefore unreasonable. Adopting a considerably less stringent standard, the court in *Loving v. Commonwealth*[54] invalidated a condition of probation requiring two codefendants convicted of miscegenation to leave the state and not return together or at the same time for twenty-five years. The court held that this condition was excessive, as the probationers could have simply been ordered not to cohabitate, and was therefore unreasonable.[55]

The standard of reasonableness that has emerged can best be viewed as a two-pronged standard. The first prong, generally referred to as the "reasonable relationship test," is the basic common law standard for a condition's validity. It is applied in some form by most courts reviewing probation conditions. The standard dictates that any condition imposed by courts must be reasonably related to the crime for which the probationer was convicted, to rehabilitation or to the public safety.[56] The second prong of the reasonableness standard is the constitutionality test. Conditions of probation are subject to constitutional safeguards to ensure that they are not excessive and that they are narrowly drawn to meet the goals of probation as set forth in the

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[52] *See, e.g.*, State v. Macy, 403 N.W.2d 743, 745 (S.D. 1087) ("The test is one of reasonableness."); People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984) ("the condition of probation with which we are here concerned must first be assessed in terms of its reasonableness"); *In re* White, 158 Cal. Rptr. 562, 565 (Ct. App. 1979) ("There is an overall requirement of reasonableness in relation to the seriousness of the offense for which the defendant is convicted.").

[53] 353 F.2d 10 (7th Cir. 1965).

[54] 147 S.E.2d 78 (Va. 1966). The challenged Virginia anti-miscegenation statute, although upheld in this decision, was later struck down as unconstitutional by the United States Supreme Court. Loving v. Virginia, 388 U.S. 1 (1967).

[55] 147 S.E.2d at 82-83.

[56] *See, e.g.*, Higdon v. United States, 627 F.2d 893 (9th Cir. 1980); Rodriguez v. State, 378 So.2d 7 (Fla. Dist. Ct. App.1979); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976); People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967).

first prong of the validity standard.[57]

The reasonableness limitations have boiled down to the point that the primary purpose of probation is rehabilitation of the offender. "[T]he only factors which the trial court should consider . . . are the appropriateness and attainability of rehabilitation and the need to protect the public by imposing conditions which control the probationer's activities."[58] To meet these ends, the condition must be narrowly drawn to achieve rehabilitation "without unnecessarily restricting the probationer's otherwise lawful activities."[59]

The "reasonable relationship" test and the constitutionality restrictions have not been applied uniformly by courts. Some courts that have addressed the issue of a condition's validity have used the prongs in conjunction with each other, balancing the probationary goals against the offender's constitutional rights.[60] Other courts have placed a greater emphasis on one of the prongs, even to the exclusion of the other. In *Gilliam v. Los Angeles Municipal Court*,[61] for example, a man was convicted of drunk driving and ordered not to enter stores where alcohol was a main item of sale.[62] The court held that "[i]n evaluating the validity of a condition of probation the issue is not the impact of the condition on the defendant's constitutional rights but its ability to meet the standard set forth in People v. Dominguez [the reasonable relationship test]."[63] Similarly, the court in *Rodriguez v. State*[64] did not reach the constitutional issue. The

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[57] *See, e.g.*, United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989); *In re* White, 158 Cal. Rptr. 562 (Ct. App. 1979). Both of these prongs will be discussed at length at a later point in this Note.

[58] Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980) (invalidating condition of probation that required defendant to forfeit all of his assets, including his home, to the government and to work full-time for three years without pay for a charity).

[59] *Id.* at 898.

[60] *See* People v. Beach, 195 Cal. Rptr. 381 (Ct. App. 1983) (invalidating condition requiring a woman convicted of involuntary manslaughter to move from community where she had lived for 24 years); *In re* White, 158 Cal. Rptr. 562 (Ct. App. 1979) (invalidating condition prohibiting woman convicted of prostitution from entering specified area of city where soliciting occurred).

[61] 159 Cal. Rptr. 74 (Ct. App. 1979), *cert. denied*, 445 U.S. 907 (1980).

[62] *Id. See supra* note 42.

[63] 159 Cal. Rptr. at 77.

[64] 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (invalidating a condition of probation prohibiting woman convicted of child abuse from bearing children or marrying without the court's consent).

court in *Rodriguez*, as in *Gilliam*, determined that since a probationer's constitutional rights are limited by the objectives of rehabilitation, there is no constitutional issue if the condition passes the reasonable relationship test. Here, the court held, it did not.[65]

The court in *People v. Pointer*,[66] on the other hand, placed more emphasis on the issue of constitutional abridgments. In this case, significantly, a condition of compulsory contraception was held to meet the requirements of the reasonable relationship test, but was invalidated as an unreasonable infringement on constitutional rights. The *Pointer* court indicated that certain rights, such as that of procreation, are so fundamental that the common law standard is not, by itself, sufficiently stringent to be dispositive of the court's ability to abridge those rights.[67] As probation conditions become more draconian—the forced imposition of Norplant being a most vivid example—and the potential dangers of judicial abuse become more clear, courts must ensure, as the *Pointer* court did, that the probationer's constitutional rights are protected.

A. *The Common Law Reasonable Relationship Standard*

People v. Dominguez[68] is the leading case that articulates the reasonable relationship standard. In *Dominguez* a twenty-year-old unmarried woman was convicted of second degree robbery and placed on probation. The trial court ordered, as part of her probation, that she was neither to live with any man to whom she was not married nor to become pregnant until she was married.[69] The California Court of Appeals in the Second District voided these probation conditions on the grounds that they were not reasonably related to the crime of robbery.[70] The

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[65] *Id.* at 9-10.

[66] 199 Cal. Rptr. 357 (Ct. App. 1984); *see infra* notes 194-97 and accompanying text.

[67] *Id.* at 365.

[68] 64 Cal. Rptr. 290 (Ct. App. 1967).

[69] *Id.* at 292.

> The third condition is that you are not to live with any man to whom you are not married and you are not to become pregnant until after you become married. Now this will develop by just becoming pregnant. You are going to prison unless you are married first. You already have too many of those.

Id.

[70] *Id.* at 293.

Dominiquez court set forth the following factors that would render a probation condition invalid: if it (1) forbids or requires conduct that is not reasonably related to future criminality; (2) relates to conduct that is not in itself criminal; and (3) has no relationship to the crime for which the offender was convicted.[71] Many other courts have adopted this test, upholding or invalidating probation conditions under the *Dominguez* factors.[72]

There is also a federal court version of the *Dominiquez* test, although it is worded slightly differently. In the leading case, *United States v. Consuelo-Gonzalez*,[73] the court invalidated a condition of probation that required a defendant convicted of heroin possession to submit to a search at any time when requested by a law enforcement officer. The court set forth the following factors to be examined as part of the reasonable relationship test: (1) the purposes sought to be served by probation; (2) the extent to which the full constitutional guarantees available to citizens at large should be accorded to probationers; and (3) the legitimate needs of law enforcement.[74] Although the federal test appears to incorporate some element of the constitutionality standard in the second prong of the reasonableness test, federal courts applying the test have, in fact, tended to stress the first and third prong. As with the *Dominguez* test applied in state courts, federal courts are primarily concerned that a condition of probation serve the probationary functions of public safety and, more important, rehabilitation.

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[71] *Id.*

[72] Wiggins v. State, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980) (holding invalid a condition of probation prohibiting sexual intercourse with individuals other than defendant's lawfully married spouse); State v. Means, 257 N.W.2d 595 (S.D. 1977) (holding valid a condition of defendant's bail, analogized to probation, that he not participate in any American Indian Movement activities except fundraising); State v. Livingston, 372 N.E.2d 1335 (Ohio 1976) (invalidating probation condition prohibiting a man convicted of child abuse from fathering a child).

[73] 521 F.2d 259 (9th Cir. 1975).

[74] *Id.* at 262. In Higdon v. United States, 627 F.2d 893 (9th Cir. 1980), the court modified this test somewhat by applying it in a two-part analysis. The court wrote:

> First, we consider the purposes for which the judge imposed the conditions. If the purposes are permissible [*i.e.*, for rehabilitation of the offender], the second step is to determine whether the conditions are reasonably related to the purposes. In conducting the latter inquiry, the court examines the impact which the conditions have on the probationer's rights. If the impact is substantially greater than is necessary to carry out the purpose, the conditions are impermissible.

Id. at 897.

Dominguez, of course, was a relatively easy case: the crime was completely unrelated to the woman's pregnancies and the condition was therefore a ludicrous one. Proponents of forced contraception for child abusers note, however, that child abuse is more closely connected to the bearing of a child. They argue that child abuse offenders would be effectively prevented from committing such a crime again had they no other children to abuse.[75] Linked to this rationale is the strong and understandable emotional reaction brought on by the tragic incidence of child abuse reported in the United States in recent years.[76] These arguments are compelling and difficult to refute. Moreover, the addition of another child may well compound the stress of an already turbulent household and add to the number of children in foster care.

The above arguments notwithstanding, compulsory contraception will, in most cases, fail the reasonable relationship test. In fact, most courts that have addressed the issue have determined that a probation condition prohibiting an offender from becoming pregnant or fathering children does not meet the requirements of the *Dominguez* test.[77] First, a condition of probation requiring an offender convicted of child abuse to refrain from having children does not sufficiently relate to future criminality. A condition of probation must relate to the deterrence of a *similar* crime and must not be overbroad in its effort to provide such deterrence. Preventing a child abuse offender from bearing more children will not ensure that she will refrain from abusing her existing children nor will it help her acquire better parenting skills or cope with the economic and sociological factors many feel are at the root of child abuse.[78] Although some of the conditions ordered by Judge Broadman in *People v. Darlene Johnson*[79] were aimed at preventing future child abuse—such as

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[75] *See* Albert Kaupas, *An Eye for an Eye*, CHI. TRIB., Feb. 12, 1991, at 14.

[76] Approximately 2.5 million cases of suspected child abuse or neglect are reported each year in the United States. Donnelly, *supra* note 25, at 26.

[77] *See supra* notes 11, 13 & 68-72 and accompanying text. In People v. Pointer the court held that compulsory contraception *did* meet the requirements of the *Dominguez* reasonable relationship test for a woman whose "abuse" would have harmed her fetus. 199 Cal. Rptr. 357 (Ct. App. 1984); *see infra* notes 85-93. The court invalidated the condition, however, on the grounds that the condition was an unreasonable burden on her constitutional rights.

[78] *See* Coyle, *supra* note 11. *See also Pointer*, 199 Cal. Rptr. at 359.

[79] *See supra* notes 1-10 and accompanying text.

parental counseling and the prohibition against using corporal punishment on her children—the Norplant condition does not, by itself, address the rehabilitative objectives of probation and is therefore unreasonable.

Second, pregnancy and childbirth are not, in and of themselves, crimes. As such, the requirement that a woman refrain from these activities is outside the scope of a court's discretion in setting conditions of probation. Such a condition deals only with the symptoms of the tragedy of child abuse, rather than the disease.

The third prong of the *Dominguez* test, the reasonable relationship prong, is the most analytically troublesome. Thus far, courts have held that compulsory contraception has only a tangential relationship to the crime of child abuse.[80] For example, in *Rodriguez v. State*[81] the court prohibited a woman convicted of aggravated child abuse from marrying, becoming pregnant or retaining custody of her children. On appeal, the Florida District Court, Second Division, held that although the custody condition has a clear relationship to child abuse, the marriage and pregnancy conditions do not, and are therefore invalid.[82] In a case factually very similar, *State v. Livingston*,[83] the Ohio Court of Appeals held that marriage and pregnancy conditions of probation were invalid because they bore little relationship to the crime of child abuse. Neither court, however, delved into the reasonable relationship prong in any detail, as they had more fully with the other parts of the *Dominguez* test, but rather stated this proposition succinctly and conclusively.[84]

The reasonable relationship test was given an interesting and significant twist as it applies to court-ordered contraception by the California Court of Appeals in *People v. Pointer*.[85] In *Pointer* a mother of two children was convicted of child endangerment. A strict adherent to a rigorous macrobiotic diet, Ms.

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[80] State v. Mosburg, 768 P.2d 313 (Kan. App. 1989); *Pointer*, 199 Cal. Rptr. at 357; Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

[81] 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

[82] *Id.* at 10.

[83] 372 N.E.2d 1335 (Ohio Ct. App. 1976).

[84] In *Rodriguez*, for example, the court merely stated that "[t]he conditions relating to marriage and pregnancy have no relationship to the crime of child abuse" without examining it any further. *See* 378 So. 2d at 10. The *Livingston* court was just as brief. 372 N.E.2d at 1335.

[85] 199 Cal. Rptr. 357 (Ct. App. 1984).

Pointer continued on this diet while breast-feeding her children and imposed the diet on them despite repeated warnings by her doctor.[86] At the ages of two and four years old, the children were significantly malnourished;[87] Ms. Pointer was brought up on charges when her younger child, Jamal, was hospitalized in an emaciated and nearly comatose condition.[88] Jamal suffered from severe growth retardation and brain damage as a result of the macrobiotic diet forced upon him.[89] Ms. Pointer was found guilty by a jury and placed on probation. Among the conditions of her probation were the denial of custody of her children without prior court approval and the requirement that she not conceive during the term of her probation.[90] Unlike previous courts, the California Court of Appeals, applying the *Dominguez* reasonable relationship test, held that this latter condition *was* reasonable.[91] The *Pointer* court distinguished its previous holdings and similar cases in other jurisdictions by stating that

> those cases relied heavily upon the fact that the abuse could be entirely avoided by removal of any children from the custody of the defendant. This case is distinguishable, however, because of evidence that the harm sought to be prevented . . . may occur before birth . . . Since the record fully supports the trial court's belief that appellant would continue to adhere to a strict macrobiotic diet despite the danger it presents to any child she might conceive, we cannot say that the condition of probation prohibiting conception is completely unrelated to the crime. . . .[92]

Significantly, the court ultimately invalidated the probation condition on the grounds that *even if it met the requirements of the Dominguez test* it was unconstitutionally overbroad and invasive of a woman's fundamental right to procreate.[93]

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[86] Macrobiotics is a diet composed almost exclusively of legumes, vegetables and grains. Fish, meat, poultry and dairy products are forbidden, as is fruit and most salads. *See id.* at 359 n.2.

[87] *Id.* at 359.

[88] *Id.* at 360.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 364.

[92] *Id.* (footnote omitted)

[93] *Id.* at 365. The recent trend of prosecuting pregnant women who use drugs or alcohol highlights the importance of the *Pointer* decision. Despite the raging battle over fetal rights, no court has yet convicted a woman of child abuse for her conduct while pregnant, although one court in Florida convicted a woman of delivering cocaine to a minor child—through her umbilical cord at birth. State v. Johnson, No. 89-890-CFA

All told, the imposition of Norplant as a condition of probation can only be seen as punitive and is therefore not permissible under statutory definitions of probation. The court in *Higdon v. United States*[94] stressed that "punishment of an offender may not be the primary purpose of the judge's imposition of probation."[95] This theme is mirrored in the history of probation and the numerous statutes and cases that have arisen in recent decades.[96] Other courts have taken this notion a step further, insisting that *any* motivation other than rehabilitation or reformation of the probationer is beyond the statutory scope of the

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(Seminole County, Fla. 1989). This court was ultimately overruled by Florida's highest court. *See* Johnson v. State, 602 So. 2d 1288 (Fla. 1992). *See also In re* Valerie D., 613 A.2d 748 (Conn. 1992). However, courts have begun actively to scrutinize the conduct of pregnant women and have sought to restrict, or direct, their actions in the name of fetal protection. To this end, pregnant women have been forced to undergo medical treatment (including blood transfusions and caesareans). *See, e.g., In re* A.C., 533 A.2d 611 (D.C. App. 1987), *reh'g denied*, 539 A.2d 203 (D.C. App. 1988), *vacated*, 573 A.2d 1235 (D.C. App. 1988); *In re* Maydun, 114 Daily Wash. Rptr. 2233 (D.C. Super. Ct. 1986); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964); *In re* Jamaica Hosp., 128 Misc. 2d 1006 (N.Y. 1985). Pregnant women have also been incarcerated. Stallman v. Youngquist, 473 N.E.2d 400 (Ill. Ct. App. 1984), *rev'd*, 531 N.E.2d 355 (Ill. Ct. App. 1988). *See also D.C. Judge Jails Woman as Protection for Fetus*, WASH. POST, July 23, 1988, at A1. Over 160 women throughout the United States have been prosecuted for exposing their newborn children to drugs. Mark Hansen, *Courts Side with Moms in Drug Cases: Florida Woman's Conviction Overturned for Delivering Cocaine via Umbilical Cord*, 78 A.B.A. J. 18 (1992). Studies indicate, moreover, that these measures are having a disproportionate impact on minority and low-income women. Deborah J. Krauss, *Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523 (1991).

The *Pointer* decision, on the other hand, supports the conclusion that women do not, by becoming pregnant, forfeit their constitutional rights to privacy and bodily integrity. *See also* International Union v. Johnson Controls, 111 S. Ct. 1196 (1991) (holding as discriminatory an employer's policy barring all women, except those whose infertility could be documented, from jobs involving actual or potential exposure to lead, a substance possibly harmful to fetuses). This conclusion is particularly significant in light of recent studies which suggest that the use of drugs and alcohol by women during pregnancy may have less of an impact on fetal and child development than other factors such as income, access to health care and similar characteristics of the father. *See* Joan E. Bertin, *Fetal Attraction: Controlling Women to Protect Fetuses*, BIOLAW, vol. II, No. 48 (1991); Ricardo Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956 (1991); Nesrin Bingol et al., *The Influence of Socioeconomic Factors on the Occurrence of Fetal Alcohol Syndrome, in* ADVANCES IN ALCOHOL AND SUBSTANCE ABUSE 105 (1987).

[94] 627 F.2d 893 (9th Cir. 1980).

[95] *Id.* at 898.

[96] *See supra* notes 28-30 and accompanying text.

courts' authority.[97] In *Dominguez* and *State v. Livingston*, the courts emphasized that a judge may not be motivated by his or her desire to attain other social goals, such as alleviating the taxpayers' burden of maintaining illegitimate children.[98]

In prohibiting Ms. Johnson from bearing any more children, the court asserted its own utilitarian—and highly subjective—opinion that, aside from her crime, society would be better off if Ms. Johnson were prevented from having any more children.[99] Such social utility concerns are beyond the scope of the

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[97] State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1977); People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967).

[98] The *Dominguez* court, in analogizing the condition of compulsory contraception to that of banishment, stated that "[a] court is not permitted to shift the public burden of taking care of persons who the court believes are undesirable by ostracizing an offender in the guise of granting him probation." 64 Cal. Rptr. at 294. Similarly, the court went on to say, "[t]he burden upon taxpayers to maintain illegitimate children at the public expense is a grave problem, but a court cannot use its awesome power in imposing conditions of probation to vindicate the public interest in reducing the welfare rolls by applying unreasonable conditions of probation." *Id.* The *Livingston* court quoted this language in invalidating compulsory contraception as a condition of probation. 372 N.E.2d at 1337.

[99] In an interview with *60 Minutes* Judge Broadman denied that his probation order in People v. Darlene Johnson was motivated by any economic or social concerns other than Ms. Johnson's own best interests and that of her children. *See 60 Minutes*, *supra* note 1. However, in a case similar to the *Johnson* case, Judge Broadman stated to the defendant:

> I want to make [sic] to make it clear that one of the reasons I am making this order is you've got five children. You're thirty years old. None of your children are in your custody or control. Two of them on AFDC. And I'm afraid that if you get pregnant we're going to get a cocaine or heroin addicted baby.

People v. Zaring, 10 Cal. Rptr.2d 263, 267 (Ct. App. 1992). The court in *Zaring*, in declaring Judge Broadman's probation condition unconstitutional, noted that "[t]here are other disturbing aspects of this case upon which we should comment. Specifically, we note the apparent imposition of personal social values in the sentencing decision." *Id.* at 373. The court added that

> the morality of having children while on public assistance, and the imposing of any constitutionally permissible legal deterrences to such a practice, are matters properly left to the wisdom and judgment of the legislature elected by the people, and not to the morality of individual judges. The comments by the trial court imply consideration of inappropriate factors in the sentencing process under the facts of this case.

Id. at 374. One cannot discount the fact that proposals for coerced contraception have thus far been directed mainly at poor, minority women.

The *Johnson* case was not the first in which Judge Broadman has come under fire for ordering an unorthodox condition of probation. He has gained some notoriety for a number of cases, including: ordering a child molester to remain under house arrest and to attach a sign to his house publicizing his conviction; ordering an alcoholic to swallow Antabuse (a drug that causes violent illness if alcohol is subsequently consumed); and

court's discretion and are proscribed by statutes granting courts the power to set probation.[100] Moreover, this "solution" to child abuse skirts many of the real issues surrounding family violence, such as poverty, inability to cope with stress and substance abuse.

The *Dominguez* reasonable relationship test is a malleable one and, despite previous rulings, proponents of compulsory contraception have a strong argument that court-ordered birth control may protect future children and benefit public safety. The inquiry does not stop there, however. Since fundamental rights are at risk and because there are dangers inherent in allowing the government to make decisions regarding reproduction, courts must make a very strong showing that conditions restricting reproduction are reasonable. An examination of the constitutionality standard—the second prong of the reasonableness test—reveals that this burden is a difficult one to meet.

B. *Constitutional Standard*

Along with the common law reasonable relationship requirement, courts are limited by certain constitutional safeguards in setting probation conditions.[101] Probation conditions that infringe on fundamental rights are held up to special scrutiny, particularly where the condition is an unusual one,[102] or the infringement is particularly onerous.[103] While courts have upheld

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imprisoning a woman for appearing a half hour late for a court hearing because she had taken her children to school. John Hurst, *Controversial Judge Dodges Not Only Critics, But Bullets*, L.A. TIMES, Apr. 29, 1991, at A3.

[100] *See supra* notes 49-59 and accompanying text.

[101] *See, e.g.*, U.S. v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) ("Any search made pursuant to condition included in terms of probation must necessarily meet Fourth Amendment standards of reasonableness."); People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984) ("[W]here a condition of probation impinges upon exercise of a fundamental right and is challenged on constitutional grounds, we must additionally determine whether the condition is impermissibly overbroad."); People v. Keller, 143 Cal. Rptr. 184 (Ct. App. 1978); *see supra* note 57 and accompanying text.

[102] In U.S. v. Pastore, 537 F.2d 675 (2d Cir. 1976), the court held invalid a condition requiring a man convicted of filing false income tax returns to resign from the bar stating that "careful scrutiny of an unusual and severe probation condition is appropriate." *Id.* at 681. The court did not define the term "unusual," but did imply that special conditions beyond those listed in 18 U.S.C. section 3651—such as fines, restitution and participation in a community treatment center—may be subject to strict appellate review.

[103] U.S. v. Consuelo-Gonzalez, 521 F.2d at 265 ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scru-

certain reasonable restrictions in the interest of public safety and rehabilitation,[104] many courts have also recognized the need to protect probationers' fundamental rights to privacy and liberty.[105] Probation conditions may not be excessively harsh,[106] or place unreasonable burdens on the probationer's constitutional rights.[107] Furthermore, the condition must be narrowly drawn to meet the primary goal of probation statutes, which is the rehabilitation of the offender.[108] Thus, as the *Pointer* court pointed out, even if the condition *is* reasonably related to the crime committed and rehabilitation, it may still be inappropriate if it burdens a constitutional right.[109]

In *In re White*[110] the California Court of Appeals articulated the rational and balanced criteria that should be applied to determine whether probation conditions impermissibly infringe on constitutional rights. The criteria adequately incorporate the common law and constitutional standards for validity. In *White* a woman convicted of soliciting an act of prostitution was forbidden as a condition of her probation to enter a designated area of the city of Fresno where prostitution was prevalent.[111] This restriction was voided on appeal as being too broad and an unreasonable infringement of the defendant's constitutional right to travel, a right "implicit in the concept of a democratic society and . . . one of the attributes of personal liberty under common law."[112] The court set forth the following test for determining a condition's reasonableness: (1) whether the condition is reasonably related to the intended purpose of the legislation conferring the benefit [in this case, that of probation]; (2) whether the value to the public of the imposition of this condition manifestly

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tiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety.").

[104] People v. Beach, 195 Cal. Rptr. 381 (Ct. App. 1983).

[105] People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984); *In re* White, 158 Cal. Rptr. 562 (Ct. App. 1979); People v. Keller, 143 Cal. Rptr. 184 (Ct. App. 1978).

[106] Higdon v. United States, 627 F.2d 893, 898 (9th Cir. 1980).

[107] People v. Beach, 195 Cal. Rptr. at 386.

[108] Wiggins v. State, 386 So. 2d 46, 47 (Fla. Ct. App. 1980); Kominsky v. State, 330 So. 2d 800 (Fla. Ct. App. 1976). For a discussion of rehabilitation, see *supra* notes 58-59 and accompanying text.

[109] *See supra* note 67.

[110] 158 Cal. Rptr. 562 (Ct. App. 1979).

[111] *Id.* at 564.

[112] *Id.* at 567.

outweighs any impairment of constitutional rights; and (3) whether there are any alternative means less subversive of the constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.[113] An examination of the nature of the rights being infringed by the forced imposition of Norplant indicates that this condition places an unreasonable and overbroad burden on fundamental rights and does not meet the constitutional standards set by probation statutes and the *White* test.

1. The General Nature of Constitutional Rights to Privacy, Procreation and Bodily Integrity

The United States Supreme Court has long recognized that individuals have a fundamental right, protected by the Fourteenth Amendment's safeguards of human dignity and autonomy, to make personal decisions about issues surrounding childbearing[114] and contraception.[115] Over twenty-five years ago, the Supreme Court held in *Griswold v. Connecticut*[116] that a state statute prohibiting the use of contraception implicates the Due Process Clause of the Fourteenth Amendment.[117] The Court reasoned that the penumbras of the specific protections listed in the Bill of Rights—such as the First, Third, Fourth, Fifth and Ninth Amendments—overlapped to form a "zone of privacy" into which the government may not intrude.[118] Marriage—and by extension the marital bedroom—falls within that "zone of privacy."

The Court later extended the right to privacy to include unmarried individuals, holding in *Eisenstadt v. Baird*[119] that a Massachusetts law prohibiting only single persons from obtaining birth control violates the Equal Protection Clause. Justice Brennan, writing for the Court, said "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into

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[113] *Id.* at 568.

[114] Carey v. Population Services Int'l, 431 U.S. 678 (1977).

[115] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[116] 381 U.S. 479 (1965).

[117] *Id.* at 485.

[118] *Id.* at 486.

[119] 405 U.S. 438 (1972).

matters so fundamentally affecting a person as the decision whether to bear or beget a child."[120]

Since *Eisenstadt*, the Court has repeatedly emphasized that a woman's fundamental right to reproductive freedom is protected by the federal Constitution.[121] Furthermore, this right applies not only to a woman's right *not* to bear a child, but also to her right to bear one.[122] In its most recent abortion decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[123] the Court reaffirmed its prior holdings that a woman's right to terminate a pregnancy is a fundamental liberty interest, even while it substantially restricted access to abortion for many women. In upholding *Roe v. Wade* the Court recognized its extension to other aspects of decisions regarding procreation:

> If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions.[124]

The Supreme Court has recognized that the constitutional right to bodily integrity encompasses not only reproductive autonomy, but also the right to make one's own decisions about medical treatment.[125] This right has evolved out of the common law doctrine of informed consent[126] and the constitutional guar-

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[120] *Id.* at 453 (emphasis in original).

[121] Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[122] *See supra* note 115. *See also* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[123] 112 S. Ct. 2791 (1992).

[124] *Id.* at 2811 (citations omitted). *See also* Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding the right to procreate to be a fundamental right protected by the Constitution); Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) (holding that *Roe* supports right not to be wrongfully sterilized).

[125] Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841 (1990); *see also In re* Quinlan, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976).

[126] *See, e.g., In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (Ct. App. 1981). "Informed consent" is the principle of law that requires a physician to make a full disclosure of facts—including the risks involved and the alternatives—so that a patient may make an intelligent decision about whether to pursue a particular course of treatment. While actions against doctors are usually brought on grounds of negligence, the failure of a doctor to get a patient's fully informed consent has also been held to be a battery. *Id.* at 376, 420 N.E.2d at 70, 438 N.Y.S.2d at 276.

antee of privacy.[127] The notion of bodily integrity and informed consent have long been established principles of our legal system and of constitutional interpretation. In 1891 the Supreme Court wrote in *Union Pacific R. Co. v. Botsford*[128] that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . ." The right of an individual to decide on medical treatment has been held to include the right to *refuse* medical treatment.[129] Yet the right to refuse medical treatment is not absolute. In *Cruzan v. Director, Missouri Department of Health*[130] the Court acknowledged that individuals have a significant liberty interest under the Due Process Clause of the Fourteenth Amendment to refuse medical treatment, but held that this interest must be balanced against any legitimate state interests. In *Cruzan*, where the patient in question was incompetent, these interests included the need to determine by "clear and convincing evidence" whether the person, if competent, would have chosen to refuse such treatment. Had Cruzan been competent, the Court stressed, the right to decline the life support system would have been assumed.[131]

Thus, the Supreme Court has firmly established that the Constitution protects the rights of individuals to make personal decisions about childbearing and medical treatment. As a result, it would appear on the surface that the imposition of compulsory contraception is an unreasonable infringement of a woman's fundamental right to procreative choice and bodily integrity.

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[127] *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977).

[128] 141 U.S. 250, 251 (1891). *See also* Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. Ct. App. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault.").

[129] Cruzan v. Director, Nission Dept. of Health, 110 S. Ct. 2841 (1990). *But see* Jacobson v. Massachusetts, 197 U.S. 11 (1905). In *Jacobson* the Supreme Court held that an individual has no right under the Due Process Clause to reject an unwanted smallpox vaccination over the state's interest in administering it.

[130] 110 S. Ct. at 2841. In *Cruzan* a young woman was being kept alive—but in a persistent, and permanent, vegetative state—following a car accident. When the doctors determined that she would never recover, her parents sought to have her removed from a life-sustaining hydration and nutrition apparatus.

[131] *Id.* at 2852. *But see infra* notes 157-61 (discussion of prisoners' rights to refuse medical treatment).

Just as the state may not prohibit an individual from using contraception, it may not force her to do so. Similarly, the state cannot require a competent adult to accept unwanted medical treatment. This is particularly significant where the treatment is a procedure that is intrusive and potentially detrimental to one's health, as is Norplant.[132] Were Darlene Johnson not on probation, such a government order would clearly be unconstitutional.[133] Nor does the status of the individual as a probationer validate such infringements.[134] While the constitutional rights of convicted criminals in prison are subject to some restrictions, probationers' rights are not similarly curtailed.

2. Constitutional Rights in the Prison Context

Incarcerated individuals are not afforded the same constitutional protections as other citizens. This is true even where the constitutional infringement is not expressly imposed, but rather arises out of the context in which criminals are placed. That is, imprisonment itself carries with it the inevitable loss or limitation of many significant rights, particularly liberty interests.[135] Given the nature of prison and the institutional concerns of security, maintenance and discipline, the Supreme Court has held that incarcerated individuals can have no reasonable expectation of privacy or freedom from unreasonable searches.[136] Similarly, they do not enjoy the same degree of protection of freedom of association and speech.[137] It is important to recognize, however,

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[132] *See Cruzan*, 110 S. Ct. at 2856 (O'Connor, J., concurring). *See also* Washington v. Harper, 494 U.S. 210 (1990).

[133] *But see* Martha Davis, *War on Poverty, War on Women*, N.Y. TIMES, Aug. 3, 1991, at A19 (discussing recent proposals in New Jersey and Wisconsin that would increase Aid to Families with Dependent Children ("AFDC") benefits contingent on the mothers' agreement not to bear any more children); Jim Simon, *Heavy Hand of Welfare Reform—Legislators Planning to Get Tough*, SEATTLE TIMES, Jan. 31, 1992, at B1; *Governor's Welfare Plan Pushes Free Birth Control*, N.Y. TIMES, Jan. 17, 1993, at 27.

[134] *See, e.g.*, State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989); Thomas v. State, 519 So.2d 1113 (Fla. Dist. Ct. App. 1988); People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984).

[135] Bell v. Wolfish, 441 U.S. 520, 545 (1979) (prison regulation restricting mailing of books to prisoners did not violate First Amendment).

[136] Hudson v. Palmer, 468 U.S. 517, 526 (1984) (unauthorized search of prison cell and deprivation of property did not violate Fourth or Fourteenth Amendments).

[137] Thornburgh v. Abbott, 490 U.S. 401 (1989) (prison regulation restricting the sending of publications to inmates is valid if reasonably related to legitimate penological interests); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (refusing to apply a "least

that these restrictions are based not on some notion that convicts lose rights as part of their punishment, but rather on the more practical needs and nature of prison confinement.[138] Indeed, the Supreme Court has consistently held that prisoners do not lose all of their constitutional rights when they enter jail.[139]

In *Procunier v. Martinez*,[140] the first case in which the Supreme Court addressed the issue of First Amendment rights for prisoners, the Court struck down a California regulation that restricted the personal correspondence of prisoners as an unconstitutional violation of First Amendment rights. The Court attempted to strike a balance between the protection of the fundamental rights of prisoners and the legitimate penological interests of internal order, institutional security and rehabilitation of the inmates.[141] *Martinez* was substantially narrowed by *Thornburgh v. Abbott*,[142] in which the Court applied a "more deferential" approach than the *Martinez* reasonableness standard. Now, prison officials have a great deal of discretion in determining which regulations are in the best interests of the safe and efficient running of penal institutions. Still, *Martinez* and the cases that followed illustrate the notion that the restriction of prisoners' constitutional rights is a result of the prison context, not of criminal status *per se*. Some of these constitutional restrictions have extended to the right to make personal decisions about childbearing, conception and medical treatment.

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restrictive alternative" standard for regulation of prison rules affecting religious observation); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (upholding regulations by North Carolina Department of Correction prohibiting inmates from soliciting other inmates to join union).

[138] This has not always been the case. Until the twentieth century prisoners were not held to be covered at all by the Bill of Rights. *See* Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275 (1985). In Ruffin v. Commonwealth, 62 Va. 790, 796 (1871), the Supreme Court said that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him."

[139] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (holding that no "iron curtain" separates prison from the Constitution and that prisoners enjoy the protection of due process); Pell v. Procunier, 417 U.S. 817, 822 (1974) (prisoners retain those First Amendment rights of speech not "inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system").

[140] 416 U.S. 396 (1974).

[141] *Id.* at 413.

[142] 490 U.S. 401 (1989).

The history of restrictions on incarcerated women's procreative rights is a long and complex one, more so even than for other women. The 1920s saw an upsurge of the Eugenics movement in the United States.[143] Influenced by the theories of Gregor Mendel, eugenicists believed that individuals who were seen as genetically defective or socially unfit—*e.g.*, criminals and the mentally incompetent—should be sterilized as a means of improving society.[144] The movement was a powerful one. During the first half of this century, approximately 60,000 incarcerated or mentally handicapped women were sterilized in the United States.[145] Women were not the only ones affected. Men convicted of sexual assault or child molestation were also offered sterilization as a term of plea.[146] Moreover, the movement's influence was far-reaching. Adolph Hitler, for example, founded his notions of the "Master Race" and the improvement of German society on the ideas of the American Eugenics movement.[147]

The Eugenics movement reached its culmination in 1927 with the Supreme Court's decision in *Buck v. Bell*.[148] In *Buck*, the first reproductive rights case in the United States, the Supreme Court held that the sterilization of mentally retarded women was constitutional and necessary for the elimination of those considered socially unfit.[149] Since the *Buck* decision, however, the Supreme Court has repeatedly determined that the rights to marry and procreate are fundamental and survive incarceration. Thus, the Court has narrowed the circumstances

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[143] *See* Coyle, *supra* note 11, at 247.

[144] *Id.* at 254.

[145] Stefan, *supra* note 11, at 413.

[146] *See, e.g.*, Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1914); People v. Gauntlett, 352 N.W.2d 310 (Mich. Ct. App. 1984); State v. Feilin, 126 P. 75 (Wash. 1912).

[147] Coyle, *supra* note 11, at 247. In a rather telling example of history repeating itself, David Duke, a former Grand Wizard of the Ku Klux Klan and member of the neo-Nazi party, included as part of his platform in the 1991 Louisiana gubernatorial race a plan to "encourage" mothers receiving welfare benefits (a large percentage of whom are African-American) to have Norplant implanted. *See* Stephanie Denmark, *Birth Control Tyranny*, N.Y. TIMES, Oct. 19, 1991, at A23.

[148] 274 U.S. 200 (1927).

[149] *Id.* This case gave rise to Justice Holmes's famous quotation that "three generations of imbeciles are enough." *Id.* at 207. In fact, later evidence indicated that Carrie Buck, the Virginia woman whose sterilization was upheld, was not mentally retarded. Her child, who died at the age of eight, was a member of her school's honor roll. Stefan, *supra* note 11, at 413-14 n.35.

under which an incarcerated individual's right to procreate could be curtailed by the state. In *Skinner v. Oklahoma*[150] the Court struck down an Oklahoma statute that provided for automatic sterilization of criminals convicted of three felonies as a violation of the Equal Protection Clause.[151] Justice Douglas, writing for the Court, determined that a criminal offender's right to procreate was a "basic civil right" that is "fundamental to the very survival of the race."[152] The Court later held in *Turner v. Safley*[153] that a Missouri Division of Corrections regulation permitting inmates to marry only with the prison superintendent's permission unconstitutionally burdened prisoners' fundamental right to marry.[154]

Of course, the very nature of criminal confinement requires some restrictions on the right to privacy and procreation. Prison administrators are granted wide discretion to impose regulations they deem necessary for the safe and efficient maintenance of penal institutions.[155] Many of these regulations—such as those concerning conjugal visitation—have effectively curtailed the ability of incarcerated individuals to enjoy privacy rights.[156] Thus, the Supreme Court's determination that these rights are

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[150] 316 U.S. 535 (1942).

[151] *Id.* at 538.

[152] *Id.* at 541. Despite the *Skinner* decision several states continue to have laws allowing for the compulsory sterilization of criminals or the mentally incompetent. *See, e.g.*, MISS. CODE ANN. § 41-45-1 (1991); N.C. GEN. STAT. § 35-36 (1990); W. VA. CODE § 27-16-1 (1986). It is unlikely that these laws, if challenged, would withstand constitutional scrutiny.

[153] 482 U.S. 78 (1986).

[154] *Id.* at 95-96 ("Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life. . . . Taken together, we conclude that these elements are sufficient to form a constitutionally protected marital relationship in the prison context.").

[155] *See* Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Pell v. Procunier, 417 U.S. 817 (1974).

[156] In Cromwell v. Coughlin, for example, a prisoner was denied conjugal visits while serving a term of 18 years to life. He argued that this denial deprived him of his fundamental right to marital relations. Judge Leonard Sand of the Southern District of New York held that incarcerated individuals do indeed have such a right, but that more factual information was required before he could rule on whether legitimate state interests justified a limitation of that right. 773 F. Supp. 606, 612 (S.D.N.Y. 1991). *See also* Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (assuming that the fundamental right to procreation survives incarceration, regulation of the Bureau of Prisons restricting inmate procreation, including artificial insemination of wives by male inmates, is valid as reasonably related to legitimate penological interests); *but see* Rigsby v. Lewis, 884 F.2d 1395 (9th Cir. 1989) (prisoner is constitutionally entitled to conjugal visits while in prison).

not automatically voided in the prison context appears to conflict with the realities of the prison environment.

The prison context also imposes limits on the prisoners' rights to bodily integrity and autonomy. As with the right to privacy and procreation, the right to refuse medical treatment technically survives conviction and incarceration. A number of courts have addressed this issue in the context of the administration of anti-psychotic or tranquilizing drugs to prisoners against their will.[157] In *Vitek v. Jones*[158] the Supreme Court held that, while criminal conviction inevitably leads to certain curtailments of freedom, it does not authorize a state to subject an inmate to involuntary treatment with psychotropic drugs. The Court narrowed this holding in *Washington v. Harper*.[159] In *Washington* the Court recognized inmates' significant liberty interest in refusing medical treatment, but held that "[t]he extent of a prisoner's right under the Due Process Clause to avoid the unwanted administration of anti-psychotic drugs must be defined in the context of the inmate's confinement."[160] The Court held that given the realities of the prison environment, the Due Process Clause permits the state to treat prisoners against their wills when (1) they present a danger to themselves or others in the institution and (2) it is in the prisoners' best medical interests.[161]

Although the Supreme Court has not yet addressed the issue of a prisoner's right to refuse medical treatment other than

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[157] *See, e.g.*, Washington v. Harper, 494 U.S. 210 (1990), *infra* notes 159-61 and accompanying text; Vitek v. Jones, 445 U.S. 480 (1980), *infra* note 158 and accompanying text; Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984) (forced injection of anti-psychotic drugs is unconstitutional where the state cannot show adequate evidence that its interests are significant enough to outweigh prisoner's liberty interest); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973) (finding that the forcible administration of drugs which have frightening or painful side effects can, in and of itself, constitute cruel and unusual punishment in violation of the Eighth Amendment); Large v. Superior Court, 714 P.2d 399 (Ariz. 1986) (forcible medication of an inmate with anti-psychotic drugs is prohibited by the Fourteenth Amendment in the absence of compelling state interests).

Some courts have argued that the forcible medication of inmates with mind-altering or behavior-modifying drugs also implicates the defendant's First Amendment right to be free of governmental control over thought processes, as well as the right to a fair trial if the medication is administered beforehand. *See Bee*, 744 F.2d at 1395.

[158] 445 U.S. 480 (1980).

[159] 494 U.S. 210 (1990).

[160] *Id.* at 222.

[161] *Id.* at 227.

that necessitated by a severe mental disorder, it is unlikely that a correctional institution would be able to enforce a regulation requiring compulsory contraception of inmates.[162] Such a regulation would have difficulty passing the *Washington* test for a valid infringement of a prisoner's right to refuse medical treatment. First, state-imposed contraception has little bearing on the state's concerns for a safe institution. While society would understandably want to discourage children being born into the prison environment, a pregnant woman hardly presents the same degree of danger as a schizophrenic or violent inmate. Second, forced administration of birth control will rarely be in the woman's best medical interest. Many contraceptive devices, particularly the birth control pill, IUD and Norplant—which are the most easily enforced and most effective—cause unpleasant, even dangerous side effects. Still, it is important to understand the extent to which inmates' rights to bodily integrity may be limited by being imprisoned.

3. Constitutional Rights in the Context of Probation

Probationers, although not incarcerated, are still convicted criminals and as such are subject to certain limitations on their liberty.[163] Indeed, the constitutional protections afforded a probationer lie somewhere between those afforded an incarcerated criminal and a law-abiding citizen, raising the question of which standard of rights applies.[164] A number of courts have denied constitutional challenges on behalf of probationers to state actions that would have been unconstitutional if applied to ordinary citizens. For example, courts have validated restrictions on a probationer's right to travel,[165] freedom of speech and associa-

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[162] For a discussion of prisoners' constitutional rights to procreation and privacy, see *supra* notes 139-54 and accompanying text.

[163] Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("State properly subjects probationer to many restrictions not applicable to other citizens."); People v. Ison, 346 N.W.2d 894, 896 (Mich. Ct. App. 1984) ("[C]riminal conviction constitutionally deprives the defendant of much of his liberty; convicts retain some constitutional rights, but those rights are subject to restrictions imposed by nature of the regime to which they have been lawfully committed."); Gilliam v. Los Angeles Mun. Court, 159 Cal. Rptr. 74, 77 (Ct. App. 1979) ("A condition of probation which requires a defendant to give up a constitutional right is not *per se* unconstitutional.").

[164] *See infra* notes 165-69 and accompanying text.

[165] *Ison*, 346 N.W.2d 894.

tion,[166] and freedom from warrantless searches.[167] Courts throughout the country, both state and federal, vary widely in the extent to which they will allow abridgements of constitutional rights of probationers. For the most part, however, because of probationers' diminished rights, constitutional challenges to probation conditions often fail.[168]

Traditionally, the restrictions on probationers' constitutional rights have rested on three theories: "constructive custody," "explicit waiver" and "act of grace." Although commonly used to justify limitations on probationers' Fourth and First Amendment rights, examination of these theories will also help to illustrate why the imposition of compulsory contraception is an unreasonable burden on a woman's right to reproductive autonomy.[169]

a. *Constructive Custody*

The "constructive custody" theory is premised on the legal fiction that probationers, while not actually physically confined, are technically still within the custody of the penal system and therefore can be subject to the same restrictions as an incarcerated criminal.[170] A California court in *People v. Hernandez*,[171] for example, used this theory to uphold a warrantless search of a

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[166] Malone v. United States, 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975) (prohibiting membership in lawful social and political organization); State v. Means, 257 N.W.2d 595 (S.D. 1977) (same). *See also* Commonwealth v. Kuhn, 475 A.2d 103 (Pa. Super. 1984). In *Kuhn* the defendant was sentenced to 15 years of probation for robbery and was ordered as a condition of probation to attend church regularly. The defendant did not appeal this condition, although the court of appeals addressed a warning to the lower courts that such a condition might, if challenged, be found to violate the First Amendment.

[167] State v. Gawron, 736 P.2d 1295 (Idaho 1987); State v. Lingle, 308 N.W.2d 531 (Neb. 1981). This condition is one of the more controversial. Although some courts have upheld it, a number of others have found that it violates the Fourth Amendment guarantee of protection against "unreasonable searches and seizures." *See* U.S. v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975), *see supra* note 57; Grubbs v. State, 373 So. 2d 905 (Fla. 1979).

[168] *See* Tavill, *supra* note 43, at 624.

[169] For a concise study of restrictions on probationers' Fourth Amendment rights, see Sunny A.M. Koshy, Note, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449 (1988).

[170] Thus, some courts have justified prohibiting probationers from joining lawful political and social groups. *See supra* note 166.

[171] 40 Cal. Rptr. 100 (Ct. App. 1964), *cert. denied*, 381 U.S. 953 (1965).

probationer by a parole officer, even though the officer had no probable cause. As illustrated previously, these limitations have included, although not explicitly, the right to procreate, since confinement may effectively curtail an individual's ability to conceive a child and the right to refuse medical treatment. Since the very nature of prison is such that an inmate has no privacy in his or her jail cell, it is argued, a probationer can have no expectation of privacy or bodily integrity even within her own home. However, assuming that the state may have legitimate interests in restricting prisoners' reproductive rights and rights to refuse medical treatment, these interests do not apply to probationers. Prisoners are not deprived of these rights merely because they are in custody, but rather because the nature of that custody—the preservation of the prison as an institution—requires such restrictions. In a probation situation, the compelling interests of prison security and order are not present, nor would the imposition of compulsory contraception satisfy any legitimate penological goals.[172] Thus, the need to supervise probationers does not justify stripping them of rights even incarcerated individuals are held to possess absent compelling institutional needs.[173]

b. *Explicit Waiver*

The "explicit waiver" theory is based on the notion that an individual may waive constitutional rights, as probationers often

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[172] Ironically, such a condition could even work to the contrary of penological and societal goals. Probation carries with it the assumption that breach of any condition will result in incarceration. Thus, any woman who does not adhere to her probation condition not to conceive, either accidentally or otherwise, may well end up pregnant in prison. In fact, People v. Dominquez, 64 Cal. Rptr. 290 (Ct. App. 1967), the seminal case on probation conditions, came before the California Court of Appeals because the defendant was imprisoned when she became pregnant despite her use of birth control. This situation not only implicates compulsory contraception as a condition of probation, but also carries grave due process concerns. The alternatives are no better; a woman who gets pregnant on probation may try to hide her pregnancy, in which case she will most likely not receive necessary prenatal health care, or she will be forced to obtain an abortion. Clearly, the condition of compulsory contraception is not only difficult to enforce, but may also work unintended damage.

[173] *See* People v. Keller, 143 Cal. Rptr. 184, 187 (Ct. App. 1978) ("As a matter of constitutional principle, the scope of constitutionally permissible invasion of a prisoner's Fourth Amendment rights is not coterminous with those that may be taken from a probationer."). *See also* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (a parolee's [or probationer's] "condition is very different from that of confinement in a prison").

do when they agree to search conditions.[174] The assumption is that such a waiver is voluntarily made with a full understanding of the circumstances.[175] However, the "waiver theory" does not apply comfortably to probation conditions.

First, it is doubtful whether the probationer is really making the decision to accept the conditions of probation freely. The court in *People v. Keller*[176] stated:

> The "waiver" theory presumes consent. However, it is a "hypothetical" or a "nominal" rather than a real consent. The overhanging Damoclean sword of imprisonment prevents a true consent. The "waiver" concept also fails to take into account the duty, the authority, nondelegable, of the trial court to imprison or grant probation on lawful terms. That power does not, cannot, rest on either real or nominal "waiver" or "consent" by the to-be-sentenced defendant.[177]

The line between competent decisionmaking and state coercion is an exceedingly thin one. Care must be taken to ensure that individuals like Darlene Johnson are not railroaded, with no judicial recourse, into excessive, albeit "voluntary," infringements of constitutional rights.

Second, consent itself is a farce unless it is founded on a well-informed understanding of all that is involved in a particular condition of probation. This is especially true where, as in the case of Norplant, the condition poses known and unknown risks to a probationer's health and welfare.[178] In fact, Darlene

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[174] *See Keller*, 143 Cal. Rptr. at 187.

[175] *See In re* Mannino, 92 Cal. Rptr. 880 (Ct. App. 1971).

[176] 143 Cal. Rptr. 184 (Ct. App. 1978).

[177] *Id.* at 188 n.2.

[178] A similar issue has arisen in the context of whether sex offenders may be required to undergo medical treatment as part of their sentence, probation or parole. The Upjohn Company has developed the drug medroxyprogesterone acetate ("MPA"), a hormone that diminishes the compulsive sex drive of a class of offenders known as paraphiliacs. This MPA treatment, which has been termed "chemical castration," has elicited a great deal of controversy amongst legal and medical scholars. Much of the debate, as with compulsory contraception, has focused on the unknown health risks associated with such a condition, and the questionable validity and constitutionality of the treatment as a condition of probation. *See* People v. Gauntlett, 352 N.W.2d 310 (Mich. Ct. App. 1984) (holding that MPA treatment as a condition of probation for man convicted of statutory rape was unlawful and invalid due to the experimental nature of the drug and practical problems); *see also* William Green, *Depo-Privera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 13 (1986).

Advocates and opponents of chemical castration have also focused on the issue of informed consent. *See supra* note 126. Courts have recognized the grave risk of coercion

Johnson had never heard of the procedure before and Judge Broadman knew only about the general nature of the device. He did not, for example, know that Norplant is contraindicated for women with certain diseases. Nor did the judge know that Ms. Johnson suffered from diabetes and may have been put at great risk by implantation of the drug.[179]

Finally, there can be no waiver of a constitutional right or consent to a condition that is, in and of itself, detrimental to society. As the *Dominguez* court wrote:

> Appellant did not waive the right to urge the invalidity of the condition of probation [prohibiting her from becoming pregnant] by accepting the benefit of probation. "We are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual."[180]

Thus, rights cannot be waived for a condition that is in and of itself void as against public policy. State-imposed contraception, which carries with it the dangers of social engineering, embodies such a condition.

c. *Act of Grace (or "Implied Consent")*

The "act of grace" rationale assumes that probation, in lieu of incarceration, is a privilege, rather than a right, which the offender is free to turn down if she or he feels that the terms im-

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involved, for example, in inmate participation in drug experimentation programs, Kaimowitz v. Michigan Dept. of Mental Health, 1 MENTAL DISABILITY L. REP. 147, 150 (1976), while others have supported the right of incarcerated individuals to consent to medical experimentation, Bailey v. Lally, 481 F. Supp. 203 (D. Md. 1979). Currently 12 states and the District of Columbia have statutes allowing for MPA treatment of convicted sexual psychopaths. *See* Joseph F. Grahowski V, Comment, *The Illinois Sexually Dangerous Person Act: An Examination of a Statute in Need of Change*, 12 S. ILL. U. L. J. 437 (1988). For an argument supporting the use of MPA treatment, see Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1 (1990).

[179] *Appellant's Opening Brief*, *supra* note 6, at 9-11.

[180] 64 Cal. Rptr. at 294 (quoting People v. Blakeman, 339 P.2d 202, 203 (Cal. Ct. App. 1959)); *see supra* notes 68-72 and accompanying text. *See also* State v. Braxton, 326 S.E.2d 410, 411-12 (S.C. 1985) (holding void as against public policy a condition of probation and suspended sentence requiring defendants convicted of first-degree criminal sexual conduct to submit to castration).

posed are too harsh.[181] It has been suggested that by accepting this privilege, probationers lose the power to question the fairness, validity or constitutionality of these terms.[182] However, both the state's power to grant probation and its discretion to impose conditions are limited by statutory and constitutional restrictions. Although probation might be viewed as an "act of grace" or a privilege, this does not mean that courts are free to bootstrap unconstitutional conditions without independent justifications.

III. The Constitutionality of Compulsory Contraception as a Condition of Probation

As discussed, higher courts thus far have generally taken a dim view of compulsory contraception because it bears an insufficient relationship to both the crime of child abuse and the deterrence of it.[183] The *Pointer* decision, however, makes it clear that the reasonable relationship standard is a malleable one. Thus, it is uncertain whether future courts will determine that compulsory contraception meets the reasonable relationship standard of *People v. Dominguez*.[184] Even if the compulsory implantation of Norplant were found to be within the statutory boundaries of valid probation conditions, however, it cannot be upheld as a valid condition of probation because it constitutes an unreasonable infringement of an individual's constitutional rights to privacy, procreation and bodily integrity.[185]

The court in *United States v. Pastore*[186] held that "unusual" conditions of probation necessitate heightened constitutional scrutiny.[187] The nature and novelty of the drug Norplant, with its uncertain health risks, creates such an "unusual" condition. Heightened scrutiny is also appropriate because of the potential for governmental abuse that Norplant presents; it is es-

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[181] *See In re* Mannino, 92 Cal. Rptr. 880, 882 (Ct. App. 1971).

[182] *Id.*

[183] *See supra* notes 13 & 77 and accompanying text.

[184] 64 Cal. Rptr. 290 (Ct. App. 1967). *See* People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984); *see also supra* notes 77-98 and accompanying text.

[185] *But see* Arthur, *supra* note 18 (arguing that birth control as a condition of probation does not infringe the constitutional right to privacy but may violate procedural due process rights under the Fourteenth Amendment).

[186] 537 F.2d 675 (2d Cir. 1976).

[187] *Id.* at 681; *see supra* note 102.

sential that courts pay particularly close attention to the constitutional issues raised by this condition of probation to ensure that fundamental rights are not trampled in the state's desire to address the tragedy of child abuse. Applying the *White* test for the constitutionality of probation conditions to compulsory contraception, it becomes evident that the status of probationer does not justify the government's infringement of these constitutional rights.

First, as mentioned, the condition of compulsory contraception does not "reasonably relate to the intended purpose of the legislation conferring the benefit." The primary objective of the Comprehensive Crime Control Act and of state probation statutes is that of rehabilitation. There is nothing to indicate that implanting a hormonal contraceptive in a woman would rehabilitate her.[188] Rather, such an action is so excessive and irrational as to be merely punitive and thus infringes unreasonably on the probationer's constitutional rights.

Second, the impairment of fundamental rights created by this condition vastly outweighs the benefit to the public. As discussed, compulsory contraception by means of Norplant will not sufficiently address or solve the problem of child abuse.[189] Instead, it impinges significantly on the constitutional rights of privacy and bodily integrity and opens the door to state-coerced contraception of the *Buck v. Bell* variety.[190] An ordered, civilized society that honors individual liberty cannot tolerate such a system. To allow the government to make decisions about who may or may not bear children can lead only to frightening abuses of power and societal control.[191]

Third, a condition of compulsory contraception is unreasonably overbroad and therefore does not justify the constitutional infringement. As the *White* court noted, prohibiting the defendant from entering a certain area of the city where prostitution is prevalent will not deter future solicitation—the defendant could simply solicit elsewhere.[192] Furthermore, the condition is over-

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[188] *See supra* note 57 and accompanying text.

[189] *See supra* notes 11, 25 & 77-78 and accompanying text.

[190] 274 U.S. 200 (1927); *see supra* notes 148-49 and accompanying text.

[191] One must not forget that our society allegedly decries the methods used by Hitler in Nazi Germany to eliminate "undesirables" and coercive measures of population control in China.

[192] 158 Cal. Rptr. at 566; *see supra* notes 110-13 and accompanying text.

broad because the probationer may be carrying on legitimate business in the prohibited area. As such, the "condition in question is so sweeping and punitive that it becomes unrelated to rehabilitation."[193] *People v. Pointer*[194] is illustrative of a similarly overbroad condition.[195] In invalidating compulsory contraception, the *Pointer* court emphasized that the "salutory purpose" of preventing injuries to future children "can adequately be served by alternative restrictions less subversive of [the probationer's] fundamental right to procreate."[196] The court indicated a number of less restrictive alternative conditions that would be more effective in preventing future criminality and less violative of the offender's rights. Examples of these alternatives include parental counseling, substance abuse treatment, parenting classes, vocational training and withdrawal of custody.[197]

Finally, the right to refuse medical treatment, like that of reproductive freedom, applies not only to the general public, but also to individuals convicted of crimes.[198] Norplant is a surgical procedure associated with a number of painful or debilitating side effects. It is also highly dangerous to women with certain ailments, such as high blood pressure and diabetes.[199] Furthermore, as a newly approved drug, little is known about the long-term effects on a user's health or future ability to conceive healthy children.

By ordering a woman to have a chemical implanted into her body, the court not only violates a woman's fundamental right to decide whether and when to bear a child, but also takes away any choice she may have to use other, less drastic and often more suitable methods of birth control. Proponents of Norplant as a condition of probation argue that the device is not forced upon the probationer, but is offered as an alternative to incarceration, and that the individual is free to make her own informed choice.[200] As illustrated, however, serious doubts exist as

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[193] *Id.*

[194] 199 Cal. Rptr. 357 (Ct. App. 1984).

[195] *Id.*; *see supra* notes 66-67, 85-93 & 109 and accompanying text.

[196] 199 Cal. Rptr. at 365.

[197] *Id.*

[198] *See* Washington v. Harper, 494 U.S. 210 (1990); Vitek v. Jones, 445 U.S. 480 (1980); *see supra* notes 157-162 and accompanying text.

[199] *Appellant's Opening Brief*, *supra* note 6, at 5.

[200] For a discussion of the "explicit waiver" and "implied consent" theories that justify restricting the constitutional rights of people on probation, see *supra* notes 174-

to whether one can really make an informed and voluntary decision when one is faced with the choice between prison and an unknown danger. The *Johnson* case stands as testimony that the Norplant probation condition involves great medical uncertainty. Most clearly, the condition violates a woman's right to make informed decisions about her own body without government interference.

Many of the arguments addressing the unconstitutionality of compulsory contraception as a condition of probation may not satisfy those who contend that children's rights not to be abused must prevail over the rights of those who might abuse them.[201] Indeed, the issue is not an easy one. The most adamant advocate of reproductive freedom cannot fail to acknowledge that in particularly egregious circumstances some curtailment of this freedom may appear to be the only feasible solution for preventing child abuse. Where fundamental rights are infringed, however, courts have a responsibility to ensure that the conditions imposed are narrowly tailored to meet the objectives of probation. An order of sterilization, temporary or otherwise, relates only superficially to the crime of child abuse and cannot be justified where less restrictive alternatives exist that would more directly address the problem of child abuse.[202]

Courts have available a number of such alternatives that are less intrusive of constitutional rights. Parental counseling, which teaches important parenting skills and helps alleviate stress, has been shown to be an effective method of reducing child abuse.[203] Vocational training can help the parent learn the skills needed to ease economic pressures and gain self-esteem. Substance abuse treatment, where necessary, can help eliminate a serious contributing factor to child abuse. Finally, the children can be withdrawn from custody until the parent is better able to cope with the responsibilities of parenthood.

These alternatives are by no means perfect. Social services

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180 and accompanying text.

[201] *See* Bartrum, *supra* note 22, at 1037.

[202] *But see* Arthur, *supra* note 18 (suggesting that while compulsory contraception violates procedural due process, it may not violate the right to privacy for women already convicted of child abuse).

[203] Coyle, *supra* note 11, at 245; Michael S. Wald & Sophia Cohen, *Preventing Child Abuse—What Will It Take?*, 20 FAM. L. Q. 281 (Summer 1986); Donnelly, *supra* note 25, at 26.

and foster care are expensive to society and child welfare agencies responsible for recognizing and preventing child abuse are highly fallible.[204] The answer, however, cannot lie in allowing the government to disregard fundamental constitutional rights. Rather, federal, state and local authorities must work to enhance the financial and administrative resources for addressing the problem of child abuse at its roots. There is little question that child abuse most often arises in circumstances more tragic than evil. Courts should and must focus more on these circumstances themselves as a means to rehabilitate the offender and prevent further abuse. To do otherwise is not only an unacceptable violation of constitutional and statutory proscription, but also a futile attempt to solve a problem by ignoring its very causes.

CONCLUSION

Because the rights to reproductive freedom and bodily integrity are fundamental, they can be restricted only when the court can show a compelling need to do so. Furthermore, the state may not infringe upon these rights if alternatives exist that are less violative of those constitutional protections. Although the state has a legitimate interest in protecting present victims of child abuse and preventing harm to future ones, the imposition of compulsory contraception as a condition of probation is an unreasonable burden on an individual's constitutional rights and is not narrowly tailored to meet the objectives of probation.

Even though the Supreme Court has upheld the rights of incarcerated and convicted people to procreate and to make per-

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[204] Foster care was designed to provide a home for children temporarily unable to live with their own parents because of abuse, neglect or parental incapacity. *See* Daniel L. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 PEPP. L. REV. 353 (1991). A record number of children—almost 340,000—are currently in foster homes, costing state and federal governments almost $1 billion annually. HOUSE SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. No. 395, 102nd Cong., 1st Sess. 17-19, 123 (1990). The rapid growth in foster care needs over the past decade has been characterized by: an increase in placements attributable to alcohol or drug use at home; a disproportionately large number of minority children in foster care; a supply of foster family homes that is inadequate to meet the demand; and a lack of resources in foster care agencies to handle the growing caseload. *Id.* at 5-9. Some studies suggest that the rate of abuse and neglect of children in foster homes is greater than that in the general population. P. RYAN & E. MCFADDEN, NATIONAL FOSTER CARE EDUCATION PROJECT: PREVENTING ABUSE IN FAMILY FOSTER CARE 11 (1986). For a good discussion of the welfare system's difficulty in coping with the burden of foster care, see Skoler, *supra*, at 353.

sonal medical decisions, the remnants of the Eugenics movement have not completely disappeared. With the advent of Norplant has come a resurgence of this movement. Darlene Johnson's probation condition and recent proposals by political figures to force women on welfare to have Norplant implanted indicate that the government continues to participate in social engineering. Compulsory contraception for women on probation not only violates the constitutional safeguards designed to protect a woman's fundamental right to procreate, but also sets a dangerous precedent of state-imposed contraception. As the Court wrote in *Skinner v. Oklahoma*,[205] "[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."[206] The dangers evident in 1942 are no less threatening now. The lessons we have learned from the past must be applied to the present to ensure that promising and important technology not be used in an unconstitutional and unethical manner.

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[205] 316 U.S. 535 (1942); *see supra* notes 150-52 and accompanying text.
[206] *Id.* at 541.