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Birth Control as a Condition of Probation--A New Weapon in the War against Child Abuse

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NOTES

Birth Control as a Condition of Probation—A New Weapon in the War against Child Abuse

INTRODUCTION

"Childhood is the kingdom where nobody dies."[1]

Estimates indicate that between 1000 and 2000 children are fatally abused each year, and these numbers are increasing.[2] The true horror of these statistics is that often a child's death is the result of abuse or neglect perpetrated by the child's parents.[3] Due to recent media coverage of some particularly offensive instances of abuse,[4] public outrage and demand for prevention have significantly intensified.[5] As a result, courts have exhibited increasing

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[1] EDNA ST. VINCENT MILLAY, *Childhood is the Kingdom Where Nobody Dies*, *in* WINE FROM THESE GRAPES 20 (1934).

[2] A study by the United States Department of Health and Human Services indicates that 1100 children died of abuse in 1986. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988, at 3-10 (1988) [hereinafter NATIONAL STUDY]. The study, however, recognizes that these statistics are minimum estimates. *See id.* at 7-2. Anne Cohn, Executive Director of the National Committee for the Prevention of Child Abuse, has stated that as many as 2000 children die each year from abuse, and that the numbers are on the rise. *See Child Abuse: What We Know About Prevention Strategies: Hearing Before the House Select Comm. on Children, Youth and Families*, 98th Cong., 2d Sess. 5, 10 (1984) (statement of Anne Cohn).

[3] A study of age-related violent deaths of children in Cook County, Illinois, found that if the child was younger than five years old, the perpetrator was usually a parent of the victim. *See* Katherine K. Christoffel et al., *Age-Related Patterns of Violent Death, Cook County, Illinois, 1977 Through 1982*, 143 AM. J. DISEASES CHILDREN 1403, 1406 (1989). Moreover, of the 437 cases studied, approximately one third of the victims were under one year and almost half were younger than two years. *See id.* Although the study analyzed only violent death of children in Cook County, its results correspond to contemporary patterns of violence. *See* Katherine K. Christoffel, *Child Homicide in the United States: The Road to Prevention*, *in* COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 310, 312 (Gerald T. Hotaling et al. eds., 1988); NATIONAL STUDY, *supra* note 2, at 5-15.

[4] *See, e.g.*, George Hacket et al., *A Tale of Abuse*, NEWSWEEK, Dec. 12, 1988, at 56-61 (discussing the beating death of Lisa Steinberg).

[5] *See, e.g.*, Marlene Cimons, *Panel Calls Child Abuse A National Emergency*, L.A. TIMES, June 27, 1990, at A12.

readiness to prevent child abuse and protect the victims of abuse.[6] One novel response is the imposition of birth control[7] as a condition of probation for parents found guilty of abusing their children.[8]

The California case *People v. Johnson*,[9] also known as the "Norplant case," has brought the imposition of birth control as a condition of probation to national attention.[10] Although no appellate court has upheld the validity of imposing birth control as a condition of probation,[11] the requirement is constitutionally defensible.[12]

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[6] *See, e.g.*, E.Z. v. Coler, 603 F. Supp. 1546, 1560 (N.D. Ill. 1985) ("The strong governmental interest in taking immediate action to protect the child justifies the immediate investigation and points up the fact that other delayed methods [meeting a probable cause standard for obtaining a search warrant] will likely hinder the government purpose—protection of the dependent child."), *aff'd*, 801 F.2d 893 (7th Cir. 1986); State v. Boggess, 340 N.W.2d 516, 526 (Wis. 1983) (Day, J., concurring) ("We should not permit the Bill of Rights to be twisted into becoming a 'Bill of Wrongs' in the perception of the victims of crime. The shield protecting our civil liberties should not be refabricated into a cloak to hide and protect the child abuser in this case.").

[7] "Birth control" as used in this Note refers generally to prohibiting procreation regardless of the specific method, if any, prescribed.

[8] *See, e.g.*, State v. Mosburg, 768 P.2d 313 (Kan. 1989) (holding that parole condition prohibiting defendant from becoming pregnant unduly infringed on her right to privacy).

[9] No. 29390 (Super. Ct., Tulare Cty., Jan. 2, 1991), *appeal docketed*, No. F015316 (Cal. App. Dep't Super. Ct., Jan. 23, 1991) (scheduled for oral argument Apr. 17, 1992). Darlene Johnson, a single mother of five children, was convicted of child abuse. The trial judge conditioned probation on her consenting to a surgical implant of the Norplant birth control device.

[10] *See, e.g.*, William Booth, *Judge Orders Birth Control Implant in Defendant*, WASH. POST, Jan. 5, 1991, § 1, at A1; *Judge: Birth Control Implant Ruling Stands*, CHI. TRIB., Jan. 11, 1991, at 4; Desda Moss, *Court-Ordered Birth Control Draws Fire*, USA TODAY, Jan. 10, 1991, at 2A; Mark A. Stein, *Judge Stirs Debate with Ordering of Birth Control*, L.A. TIMES, Jan. 10, 1991, at A3; *Woman in Abuse Case Agrees to Birth Control*, N.Y. TIMES, Jan. 5, 1991, at A12.

[11] *See* People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984) (invalidating condition because less restrictive means not violative of defendant's constitutional rights were available); Howland v. State, 420 So. 2d 918, 920 (Fla. Dist. Ct. App. 1982) (vacating condition because future instances of child abuse had been foreclosed by other conditions of probation); Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (holding condition prohibiting marriage and pregnancy not reasonably related to future criminality because custody of minor children was prohibited); *Mosburg*, 768 P.2d 313, 315 (finding condition an intrusion on privacy); State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (invalidating condition as unconstitutional). Trial courts have also attempted to impose birth control as a condition of probation for a variety of other offenses. *See* People v. Dominguez, 64 Cal. Rptr 290 (Ct. App. 1967) (second degree robbery); Thomas v. State, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988) (grand theft and battery); State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986) (forgery).

[12] *Contra* Jack P. Lipton & Colin F. Campbell, *The Constitutionality of Court-Imposed Birth Control as a Condition of Probation*, 16 N.Y.L. SCH. J. HUM. RTS. 271 (1989) (contending that court-imposed birth control as a condition of probation is unconstitutional).

Part I of this Note lays the framework for determining the validity of probationary conditions that implicate constitutional liberties. Part II sets out the manner in which appellate courts have treated the imposition of birth control as a condition of probation. Part III compares the probationer's interest in procreative liberty with the state's interest in conditioning probation. The Note concludes that the imposition of birth control as a condition of probation can represent a legitimate balance between a state's interest in the protection of society and a probationer's right of procreative liberty.

I. AN APPROACH TO CONDITIONING PROBATION

The trial judge has broad discretion to condition the terms of probation.[13] Several sources, however, offer guidance[14] and limitations[15] on the exercise of this discretion. Generally, the conditions of probation will not be overturned unless an appellate court determines that the condition is not reasonably related to the crime committed and to the prevention of future criminality.[16] Traditionally, the primary purpose of probation has been the defendant's rehabilitation.[17] There are indications, however, that the trend is toward expanding the permissible goals of probation.[18] It is important to clarify the legitimate aims of probation because such goals

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[13] *See, e.g.*, United States v. Consuelo-Gonzalez, 521 F.2d 259, 262 (9th Cir. 1975) ("the trial judge has very broad discretion in fixing the terms and conditions of probation"); State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985) ("[trial judges] are allowed a wide, but not unlimited, discretion").

[14] *See* MODEL PENAL CODE § 7.01 (Proposed Official Draft 1962); STANDARDS FOR CRIMINAL JUSTICE § 2.3(e) (1980).

[15] Legislation may limit a court's discretion to impose probational conditions. *See generally* Jeffery C. Filcik, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 291, 301-04 (1990) (listing the probation legislation of all 50 states). For the purposes of this Note, only jurisdictions that allow a trial court to impose conditions in addition to statutory mandates are considered. *See, e.g.*, 18 U.S.C. § 3563(b)(20) (1988) (stating that a federal court has discretion to impose condition of remaining at home during non-working hours only as an alternative to incarceration); COLO. REV. STAT. § 16-11-204(1) to (2) (1986) (giving the court discretion to impose conditions besides statutorily mandated ones).

[16] *See generally* People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967) (establishing an analytical test to determine if a condition of probation is reasonably related to rehabilitation).

[17] *See, e.g.*, Bernhardt v. State, 288 So. 2d 490, 495 (Fla. Dist. Ct. App. 1974) (explaining trial court's discretion to grant probation when offender is not likely to repeat conduct if allowed to pursue rehabilitation while at liberty).

[18] *See generally* Filcik, *supra* note 15, at 300 (noting that probation is evolving into "a broad, flexible means of dispensing justice").

ultimately affect whether a condition restricting constitutional liberties is valid.

A. The "Reasonably Related" Standard

Although courts have utilized different tests to determine whether a condition of probation is reasonably related to the goals of probation,[19] this Note will focus on the test set forth in *People v. Dominguez*.[20] In *Dominguez*, the trial court imposed upon the defendant, an unmarried female with two children, who was convicted of second-degree robbery, the probational condition that she "not . . . become pregnant without being married."[21] To determine the validity of the condition, the court established the following test:

> A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid.[22]

Using this test, the court resolved that the condition involved was void because pregnancy is legal conduct bearing no relation to either the crime committed or future criminality.[23] Application of the *Dominguez* test has caused considerable confusion.[24] As a result,

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[19] *See generally* Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 63-77 (1981). Greenberg classifies these approaches into two categories: (1) facial reasonableness and (2) analytical reasonableness. *See id.* The term "reasonableness" refers to what this Note labels "reasonably related." Actually, the courts do not use any set nomenclature for this analysis. *Id.* at 63. One commentator has termed the "reasonably related" test a "non-constitutional" limitation on judicial discretion. *See* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 191 (1967).

[20] 64 Cal. Rptr. 290 (Ct. App. 1967). The *Dominguez* test has been adopted by other jurisdictions. *See* Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976); State v. Means, 257 N.W.2d 595, 600 (S.D. 1977). Focusing on the *Dominguez* test is appropriate here because all of the cases determining the validity of birth control as a condition of probation have, either explicitly or implicitly, adopted that test. *See supra* note 11.

[21] *Dominguez*, 64 Cal. Rptr. at 291.

[22] *Id.* at 293. The probationer in *Dominguez* did not challenge the constitutionality of the condition.

[23] *See id.*

[24] People v. Bauer, 260 Cal. Rptr. 62, 64 (Ct. App. 1989). *Bauer* contends that the confusion is the result of the California Supreme Court twice quoting the test in the disjunctive, instead of the conjunctive. *See id.* at 65. Stated in the disjunctive, the test results

the California Supreme Court modified the *Dominguez* test.[25] Under the modified test, a condition of probation that relates to legal conduct is reasonably related if the condition *either* relates to the previously committed crime *or* to future criminality.[26] In addition to satisfying a reasonably related test, a condition of probation that implicates a constitutional[27] liberty should be subjected to additional scrutiny.

B. Additional Scrutiny—What Level?

It is generally held that a condition of probation may limit the constitutional rights of a probationer.[28] Courts and commentators differ, however, regarding what level of additional scrutiny is required when constitutional liberties are involved.[29] In such a scenario, California courts have explicitly stated that a decision utilizing the modified *Dominguez* analysis requires a "second level of scrutiny,"[30] imposing the additional requirement that the condition be reasonable.[31]

1. *The "Reasonableness" Standard*

The "reasonably related" test and the "reasonableness" test differ in focus. In a reasonably related test, the focus is on the

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in valid conditions only when the conditions either relate to the crime, or relate to criminal conduct, or require conduct or prohibit conduct that is, in and of itself, related to future criminality. Stated in the conjunctive, a court could invalidate a condition that was related to the crime and to future criminality, but not related to criminal conduct. *Bauer*, 260 Cal. Rptr. at 65.

[25] *See* People v. Lent, 541 P.2d 545, 548 (Cal. 1975).

[26] *Lent*, 541 P.2d at 548; *Bauer*, 260 Cal. Rptr. at 65.

[27] For the purposes of this Note, "constitutional" refers to validity under the U.S. Constitution.

[28] *See, e.g.*, United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981) (restricting right to travel); Young v. State, 692 S.W.2d 752, 755 (Ark. 1985) (restricting freedom of expression). *But see* State v. Simpson, 212 S.E.2d 566, 569 (N.C. Ct. App. 1975) (declaring that a condition of probation infringing a constitutional right is *per se* unreasonable).

[29] *See, e.g.*, Filcik, *supra* note 15, at 311-18. In analyzing basically the same set of cases presented here, the author concludes that "courts do not consider the constitutional aspects of an imposed condition to determine its validity. Rather, courts employ a reasonableness test." *Id.* at 318.

[30] *Bauer*, 260 Cal. Rptr. at 65.

[31] *See* People v. Keller, 143 Cal. Rptr. 184, 192 (Ct. App. 1978) ("Finally, the constitution, the statute, all case law, demand and authorize 'reasonable' conditions, not just conditions 'reasonably related' to the crime committed."). In *Keller*, the defendant's probation was conditioned on the defendant submitting to a search without a search warrant. *See id.* at 186. The court held the condition unreasonable because the defendant was only convicted of theft of a ball point pen. *See id.* at 193.

relationship between the condition imposed and the crime committed.[32] However, in a reasonableness test, the question is whether the condition is a reasonable means of achieving the ends of probation.[33] The judiciary, in effect, determines whether the condition "does in fact serve the dual objectives of rehabilitation and public safety."[34] Thus, after a condition is found to satisfy a reasonably related test, it should be "narrowly tailored to interfere as little as possible with [constitutional liberties]."[35] "Reasonable means" have been defined as "moderate, not excessive, not extreme, not demanding too much, well balanced."[36]

2. *The "Necessary" Standard*

Some courts apply even more demanding scrutiny when a condition of probation threatens a right deemed fundamental.[37] In *People v. Pointer*,[38] a California court subjected a condition of probation imposing birth control to a "necessary" standard.[39] A necessary standard requires not only that the condition be a reasonable way to facilitate the objectives of probation, but that it must also be the least restrictive alternative to reach those ends.[40]

3. *Balancing Competing Interests*

Another possible approach is to balance the state's interest in conditioning probation against the probationer's liberty interest. In *United States v. Lowe*,[41] the Ninth Circuit reviewed a condition of probation prohibiting the defendants from entering upon public or private property within 250 feet of a naval base.[42] The majority held that the condition satisfied a "reasonably related" test because

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[32] *See supra* notes 19-27 and accompanying text.

[33] *Bauer*, 260 Cal. Rptr. at 65.

[34] *Consuelo-Gonzalez*, 521 F.2d at 265.

[35] *Bauer*, 260 Cal. Rptr. at 67.

[36] *Keller*, 143 Cal. Rptr. at 193.

[37] *See, e.g.*, People v. Arvanites, 95 Cal. Rptr. 493, 500 (Ct. App. 1971) (noting that if a constitutional right is infringed, the court must determine that no viable alternative to the probation condition exists).

[38] 199 Cal. Rptr. 357 (Ct. App. 1984).

[39] *See* People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984).

[40] *Id.*

[41] 654 F.2d 562, 564 (9th Cir. 1981). In *Lowe*, the defendants were convicted of trespassing on a naval base during an anti-nuclear weapons demonstration.

[42] *See id.* at 565.

the defendants had been convicted of trespass at a nuclear facility.[43] The dissent, however, stated that in addition to finding the condition reasonable, the court should have more narrowly construed the permissible relationship between the condition and the purpose of probation.[44] The dissent proposed a balancing test. The purposes of probation are rehabilitation and protection of the public;[45] because the offense was trespass, a condition restricting freedom of speech and association to a particular area would provide only marginal protection for society.[46] Likewise, the condition would have no bearing on rehabilitation.[47] When balanced against the freedoms of speech and association, the condition, according to the dissent, should have been found invalid.[48] Although more exacting than a reasonableness standard, this approach is less demanding than a necessary standard.

Another appellate court has adopted a balancing test similar to the one proposed by the dissent in *Lowe*. In *Oyoghok v. Municipality of Anchorage*,[49] the court considered the validity of a condition of probation restricting the permissible area of travel for a convicted prostitute.[50] After balancing the defendant's constitutional rights against the objectives of probation, the majority upheld the condition.[51] However, Justice Singleton, in a concurring opinion, suggested a less demanding standard: "I fear that the approach taken unduly dignifies Ms. Oyoghok's constitutional arguments and

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[43] *See id.* at 567-68. The court adopted what may be called the *Tonry* test. In *United States v. Tonry*, the Fifth Circuit examined the following factors in determining whether probation conditions are "unduly intrusive on constitutionally protected freedoms: . . . (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." United States v. Tonry, 605 F.2d 144, 150 (5th Cir. 1979) (quoting United States v. Pierce, 561 F.2d 735, 739 (9th Cir.), *cert. denied*, 435 U.S. 923 (1978)).

[44] *Lowe*, 654 F.2d at 569 (Boochever, J., dissenting) ("Here we must balance the probational benefits against the restriction on the exercise of First Amendment rights."); *see also* Consuelo-Gonzales, 521 F.2d at 265 (disallowing as a condition of probation that defendant submit to searches without a warrant). According to the terminology used in this Note, the majority test would be a reasonableness standard.

[45] *Lowe*, 654 F.2d at 569.

[46] *Id.*

[47] *Id.*

[48] *See id.*

[49] 641 P.2d 1267 (Alaska Ct. App. 1982).

[50] *See* Oyoghok v. Municipality of Anchorage, 641 P.2d 1267, 1268 (Alaska Ct. App. 1982).

[51] *See id.* at 1270.

in so doing, obscures the issue in this case. . . . I believe these principles [the 'reasonably related' test] dispose of the case."[52]

4. *A Proposal for a More Coherent Approach*

The confusion in imposing conditions on probation is apparent. Considering the importance of the subject area, a more coherent approach is desirable. For the purposes of this Note, the specific "reasonably related" test adopted by each jurisdiction is irrelevant because the more demanding analysis is the additional level of scrutiny afforded in situations involving constitutional rights.[53] Therefore, the validity of a condition of probation truly hinges on the additional level of scrutiny imposed.

The Supreme Court has recognized that a probationer has a reduced liberty interest.[54] In *Griffin v. Wisconsin*,[55] the Court, in dicta, stated: "To a greater or lesser degree, it is always true of probationers . . . that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly depending on the observance of special [probation] restrictions.'"[56]

Griffin involved a Fourth Amendment challenge to a statutory probation condition that required the probationer to subject his home to warrantless searches by a probation officer.[57] The Court held that the condition did not violate the reasonable grounds standard of the Fourth Amendment because it was conducted pursuant to a valid rule regulating probationers.[58] This holding was premised on the probationer being convicted of a crime and the probation officer's discretion being curtailed.[59] In a dissenting opinion, Justice Blackmun suggested that such a condition be subjected to a "necessary" standard.[60] The majority, however, did not adopt this standard.[61]

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[52] *Id.* at 1271.

[53] *See* Greenberg, *supra* note 19, at 85.

[54] *See* Griffin v. Wisconsin, 483 U.S. 868, 874 (1979).

[55] 483 U.S. 868 (1979).

[56] *Id.* at 874 (alteration in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

[57] *See id.* at 872.

[58] *See id.* at 872-73.

[59] *See id.* at 874. The Court noted: "A State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." *Id.* at 873-74.

[60] *See id.* at 884-85 (Blackmun, J., dissenting).

[61] *See id.* at 879-80.

Based upon the Supreme Court's recognition that probationers are not entitled to the full liberties of ordinary citizens,[62] the correct test for determining the validity of a condition of probation that implicates a constitutional right is a balancing test.[63] Determining validity based exclusively on a "reasonably related" test is erroneous because *Griffin* recognized that probationers do have a liberty interest, reduced but not extinguished. Failing to subject conditions of probation to any additional scrutiny is to ignore the continued vitality of probationers' constitutional rights.

Likewise, the "reasonableness" standard fails to safeguard adequately the probationer's remaining liberty interests. The standard does not take into account that the Supreme Court values some rights more highly than others.[64] The balancing test allows for this by specifically focusing on the right impinged by the condition of probation. A right deemed fundamental, e.g., the right to procreative liberty, would require that the state's interest be more weighty. Therefore, the balance reflects the nature of the right.

Furthermore, *Pointer* is wrongly decided. To require that the condition of probation be the least restrictive alternative errs in the opposite direction by ignoring the fact that probationers' liberty interests are diminished.[65] A condition of probation should be subjected to a level of scrutiny that reflects this reduced interest. A least restrictive alternative analysis subjects the condition to the same level of scrutiny that would be applied if the condition were imposed on an innocent citizen.[66]

II. APPELLATE TREATMENT OF THE IMPOSITION OF BIRTH CONTROL AS A CONDITION OF PROBATION

A. People v. Pointer

Appellate decisions[67] evaluating the validity of court imposed birth control reflect the confusion that has developed in the area

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[62] *See id.* at 874.

[63] *See also supra* note 44 and accompanying text. For a related view, see Greenberg, *supra* note 19, at 93, which proposes the same approach.

[64] *See infra* note 94.

[65] *See Griffin*, 483 U.S. at 874.

[66] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1964) ("'[G]overnment purpose . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'") (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1958)).

[67] *See supra* note 11.

of probational conditions.[68] All of the decisions, however, adopt the *Dominguez* test to determine whether a condition is reasonably related to the crime committed or future criminality.[69] In *People v. Pointer*,[70] a mother of two children was convicted of the felony of child endangerment. The defendant, a strict adherent of a macrobiotic diet,[71] imposed that course on her children. Despite repeated advice from her doctors that such a diet was hazardous to her children, the defendant refused to change it. When the mother was forced to take the youngest child, two years old, to the hospital, the child was "emaciated, semicomatose, and in a state of shock, . . . dying."[72]

The defendant was convicted of child endangerment, and a condition of probation was that she not conceive.[73] Applying the modified *Dominguez* test, the court concluded that this condition satisfied the "reasonably related" standard.[74] The court based this finding on the premise that the condition bore a reasonable relation to the crime for which the defendant was convicted, or future criminality, because "the harm sought to be prevented by the trial court may occur before birth."[75] The court, however, struck down the condition as invalid because "less restrictive alternatives [were] available."[76]

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[68] *See supra* note 29 and accompanying text.

[69] Two Florida cases applied the unmodified *Dominguez* test, resulting in an inordinate emphasis on the fact that parenthood is a noncriminal activity. *See* Howland v. State, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (footnote omitted) ("We find that the condition of probation prohibiting appellant from fathering a child does not reasonably relate to the crime of child abuse and relates to noncriminal conduct."); Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) ("The conditions relating to marriage and pregnancy have no relationship to the crime of child abuse, and relate to noncriminal conduct.").

[70] 199 Cal. Rptr. 357 (Ct. App. 1984). The *Pointer* case will serve as the primary vehicle to analyze the area of law, as the decision is well reasoned and raises several relevant issues.

[71] A macrobiotic diet is described as "pretty much exclusively grains, beans and vegetables, . . . excluding fruits, deemphasizing salads, deemphasizing or eliminating milk products of all form[s] . . . and no fish, meat, poultry or eggs." *Pointer*, 199 Cal. Rptr. at 359 n.2.

[72] *Id.* at 360.

[73] *See id.* at 359.

[74] *See id.* at 364. Usually, the harms of child abuse can be prevented sufficiently by removing the child from the parent. Yet, in *Pointer*, a child could be harmed by the macrobiotic diet before birth.

[75] *Id.* This reasoning distinguishes *Pointer* from the rest of the cases imposing birth control. Other decisions conclude that a condition imposing birth control bears no reasonable relation to the crime of child abuse or future criminality. *See, e.g., Rodriguez*, 378 So. 2d 7; State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1979).

[76] *Pointer*, 199 Cal. Rptr. at 366. For a discussion of this "necessary" standard, see *supra* notes 37-40 and accompanying text.

B. *Other Decisions*

In *State v. Mosburg*,[77] the defendant was found guilty of child endangerment for abandoning her child shortly after birth.[78] As a condition of probation, the trial court ordered the defendant to refrain from becoming pregnant during the probation period.[79] The appeals court, implicitly relying on a balancing test, concluded that the condition of probation unduly intruded on the probationer's right of privacy.[80]

The Florida District Court of Appeal considered the validity of a condition of probation prohibiting marriage, pregnancy, and custody of children in *Rodriguez v. State*.[81] The court in *Rodriguez* relied exclusively on a "reasonably related" test to determine the validity of the condition.[82] The court stated: "We thus have no constitutional difficulty with the conditions imposed, if they are otherwise valid conditions."[83] The Florida court confirmed its position in *Howland v. State*.[84] Both *Rodriguez* and *Howland* suggest that imposing birth control as a condition of probation may be reasonably related to future criminality.[85]

III. EXAMINING THE COMPETING INTERESTS

Before an inquiry into the "constitutional limitations"[86] on a condition of probation can be made, the condition must satisfy the "reasonably related" test.[87] A child abuser acts in a manner that society deems reprehensible. The object of this action is a child. Although the act of conceiving a child is not related to the offensive

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[77] 768 P.2d 313 (Kan. Ct. App. 1989).

[78] *See* State v. Mosburg, 768 P.2d 313, 313-14 (Kan. Ct. App. 1989).

[79] *Id.* at 314.

[80] *See id.* at 315. The court's decision implied that a balance was struck between Mosburg's right of privacy and the state's interest in conditioning probation. For an analysis of the "balancing test," see *supra* notes 41-52 and accompanying text.

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

[82] *See id.* at 9-10.

[83] *Id.* at 9; *see also Livingston*, 372 N.E.2d at 1337 (citations omitted) ("Reasonableness is the test of the propriety of the conditions of probation.").

[84] 420 So. 2d 918, 920 (Fla. Dist. Ct. App. 1982) (finding that condition of probation of not fathering a child could relate to future criminality, the crime of child abuse, but would not be valid in this case because defendant was prohibited from having contact with his child or from residing with a child under the age of sixteen).

[85] However, both decisions found that future criminality was sufficiently precluded by preventing the defendant involved from having custody of the child.

[86] *See* Note, *supra* note 19, at 181.

[87] *See supra* notes 19-27 and accompanying text.

conduct, the result, the newborn, is related as a potential victim. Prohibiting a convicted armed robber from owning firearms has been a condition of probation and has been found to be reasonably related to the prevention of future criminality.[88] Yet in those instances, the crime was armed robbery, not purchasing a gun. The objective is to remove the probationer from conditions likely to result in future criminal behavior, thus protecting society and the victim.

Imposing a condition of birth control on a convicted child abuser is analogous. The condition may prevent the convicted child abuser from being in a position where abuse is possible, and therefore, may prevent future criminality.[89] Under a modified *Dominguez* analysis, the condition is reasonably related to society's goal.[90] The next level of inquiry is to weigh the child abuser's interest against the benefits derived from imposing birth control as a condition of probation.

A. The Probationer's Interest

A condition of probation that prohibits a defendant from having a child during the term of probation implicates at least two constitutional guaranties—procreative liberty[91] and personal autonomy.[92] Additionally, a court may consider whether the condition is

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[88] *See, e.g.*, State v. Jameson, 541 P.2d 912 (Ariz. 1975) (requiring convicted armed robber to refrain from possessing firearms as a condition of probation not questioned by court). In fact, courts regularly validate conditions of probation restricting access to firearms. *See, e.g.*, State v. Parker, 286 S.E.2d 366 (N.C. Ct. App. 1982) (upholding a condition that defendant refrain from possessing firearms after defendant was found guilty of sawing down a light pole).

[89] *See* Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) ("Moreover, we find that although this condition of probation could reasonably relate to future criminality—i.e., child abuse—it could do so only if appellant had custody of the child or was permitted to have contact with the child.").

[90] *See supra* note 26 and accompanying text.

[91] The Supreme Court has declared the right to bear offspring to be "one of the basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Specifically, Justice Brennan has stated, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (plurality opinion).

[92] In Cruzan v. Director, Missouri Department of Health, ____ U.S. ____, 110 S. Ct. 2841 (1990), the majority opinion, in dicta, found a liberty interest in avoiding unwanted life-sustaining medical treatment. *See id.* at ____, 110 S. Ct. at 2851. Likewise, Justice O'Connor acknowledged that "the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." *Id.* at ____, 110 S. Ct. at 2856 (concurring opinion). The Court, however, refused to label this right fundamental. *Id.*

cruel and unusual punishment.[93] This Note's analysis will focus on the right of procreative liberty because restrictions on this interest are subjected to a more stringent level of scrutiny.[94]

The Supreme Court has recognized that there is a fundamental right of procreative liberty.[95] The realm of procreative liberties is not, however, completely free of state intervention. Speaking for the Court, Justice Blackmun stated in *Roe v. Wade*:[96]

> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.[97]

In determining whether a state's intrusion is appropriate, the government must meet two standards. First, the state's interest must be compelling, and second, the intrusion "must be narrowly drawn to express only the legitimate state interests at stake."[98] The Supreme Court's recognition of a reduced privacy expectation for probationers,[99] however, suggests that a less stringent analysis may

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at ____, 110 S. Ct. at 2864 (Brennan, J., dissenting). The significance of failing to label such a right fundamental is that the state's intrusion is subjected to a less demanding test: the Court merely balances the individual's constitutional rights against the relevant state interests.

[93] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Supreme Court has stated that the Eighth Amendment draws its meaning from "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). However, in Stanford v. Kentucky, 492 U.S. 361, 378 (1989), the Court stated: "The punishment is either 'cruel *and* unusual' . . . or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States." This statement suggests that the political process is the appropriate arena for such a determination.

[94] Because procreative liberty is deemed a fundamental right, *see infra* note 95 and accompanying text, courts impose a very high level of scrutiny on state action interfering with it. *See infra* note 98 and accompanying text. Courts, however, impose a less demanding standard when a state intrudes on a lesser right, such as an individual's right of bodily integrity. *See supra* note 92 and accompanying text.

[95] The origin of this right is unclear. In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court held that the liberty guaranty of the Fourteenth Amendment "[w]ithout doubt . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." Recently, the right of procreative liberty has been associated more with the right of privacy. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[96] 410 U.S. 113 (1973).

[97] Roe v. Wade, 410 U.S. 113, 153-54 (1973). Likewise, the Court rejected the argument "that the woman's right [of privacy] is absolute." *Id.* at 153.

[98] *Id.* at 155.

[99] *See* Griffin v. Wisconsin, 483 U.S. 868, 875 (1979); *supra* notes 54-63 and accompanying text.

be appropriate when a state limits probationers' procreative liberties.

In addition, a persuasive argument has been made by one author that the right to procreate, even regarding non-probationers, is a limited right.[100] Onora O'Neill suggests that the right to procreate means more than the right to bear children; it means a right to become a parent, "where being a parent includes rearing as well as begetting or bearing children, and is sometimes confined to rearing without biological reproduction."[101] O'Neill concludes "that the right to beget or bear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others."[102] Therefore, the interest in protecting the child from harm qualifies the right to procreate.[103]

Moreover, O'Neill's argument is even more persuasive when a parent has previously abused a child. Then, the parent has not only failed to raise the child adequately but also has affirmatively harmed the child. It may therefore be argued that the parent should not be allowed to bear another child until the influences that contributed to the abuse have been remedied.

B. The State's Interest

The Supreme Court has recognized that probation conditions are "meant to assure that . . . probation serves as a period of rehabilitation and that the community is not harmed by the probationer's being at large."[104] Requiring a probationer found guilty of child abuse to practice contraception serves the purpose of rehabilitation by preventing the abuser from having access to po-

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[100] *See* Onora O'Neill, *Begetting, Bearing and Rearing, in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 25, 25-26 (Onora O'Neill & William Ruddick eds., 1979).

[101] *Id.* at 25.

[102] *Id.*

[103] This theory of a limited right to procreate is not unique to O'Neill. *See* Michael D. Bayles, *Limits to a Right to Procreate, in* ETHICS AND POPULATION 42 (Michael D. Bayles ed., 1976) ("But since human rights are claims, they can be outweighed by other claims."); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 412 (1983) ("Such a person's interest in conceiving and bearing does not create a right to procreate because it can be justifiably overridden by the need to prevent harm to the child."). Robertson, however, criticizes O'Neill's restrictions because society readily provides alternative caregivers, thus, in effect, eliminating any restrictions on the right to procreate absent potential harm to the child. *See id.*

[104] *Griffin*, 483 U.S. at 875.

tential victims while social workers counsel the family.[105] Likewise, the treatment program may be more successful if the pressures of parenthood are removed.[106] Furthermore, increasingly, abusive parents are young and suffer from substance abuse;[107] removal of the pressures of parenthood may allow the abusive parents time to mature and resolve chemical dependence.

Another interest of the state in conditioning probation is societal protection. Society receives multiple benefits from safeguarding its children.[108] However, the focus of the state should be in preventing child abuse, not simply intervening after the abuse has occurred.[109] Studies suggest high recidivism in child abuse cases.[110] Therefore, if a child abuser has another child, the new offspring may also be abused. In addition, if the existing child should be returned to the abusive parent, statistics suggest that imposing birth control may benefit that child.[111]

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[105] Robert W. ten Bensel, *The Scope of the Problem*, JUV. & FAM. CT. J., Winter 1984-85, at 1, 5 ("The goal of this process [intervention and prevention] is to protect the child and improve the parents' capacity for responsible child care and thereby meet the basic needs of the child.").

[106] Many studies indicate a correlation between stress and child abuse. *See, e.g.*, Mindy S. Rosenberg & N. Dickon Reppucci, *Abusive Mothers: Perceptions of Their Own and Their Children's Behavior*, 51 J. OF CONSULTING & CLINICAL PSYCHOL. 674, 675 (1983) (citations omitted) ("It appears that the accumulation of many stressors, rather than isolated stressful incidents, can precipitate abusive behavior."); Michael S. Wald & Sophia Cohen, *Preventing Child Abuse—What Will It Take?*, 20 FAM. L.Q. 281, 286 (1986-87) (citation omitted) ("In general, stress seems to increase the risk of maltreatment among individuals whom we might already consider to be at risk based upon personal history, or personality traits.").

[107] *See* Suzanne Salzinger et al., *Risk for Physical Child Abuse and the Personal Consequences for its Victims*, 18 CRIM. JUST. & BEHAV. 64, 67 (1991).

[108] One commentator has expressed this interest as follows: "More generally, the public has a legitimate concern with the selection of child rearers and with the way in which children are reared, because a society's children are its future citizens and the future contributors to its material, cultural, and moral advancement. Collectively, children are a social asset." Jeffery Blustein, *Child Rearing and Family Interests*, *in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD, *supra* note 100, at 115, 119. In addition, child abuse is a costly problem. For fiscal year 1991, the Orange County, California, child abuse prevention budget was 35.8 million dollars. Carla Rivera, *What's Best for the Children?*, L.A. TIMES, Oct. 26, 1991, at B1.

[109] This tendency has been summarized as follows:

> With respect to child abuse, intervention by courts and child protection agencies after the fact often is an inadequate response: the child may have suffered significant harm, and it is much more difficult to alter the parent's behavior once a pattern of abuse has begun. Not surprisingly, this has led many commentators to seek ways of preventing child maltreatment.

Michael J. Sandmire & Michael S. Wald, *Licensing Parents—A Response to Claudia Mangel's Proposal*, 24 FAM. L.Q. 53, 53 (1990-91).

[110] One commentator suggests a "conservative estimate is that reabuse occurs in at least half of all cases." Wald & Cohen, *supra* note 106, at 281 n.1.

[111] Additional children increase time demands and pressures, thus increasing the possi-

CONCLUSION

In balancing the state's concerns against the probationer's interest in procreative liberty, it is beneficial to consider the state's alternative means of achieving the goals of probation. If we consider the alternative proposed by *People v. Pointer*,[112] namely, removal of the child from the mother's custody after birth, the cost of rearing the child becomes society's burden.[113] This alternative also expects the probationer to "periodically submit to pregnancy testing; and . . . upon becoming pregnant . . . require[s her] to follow an intensive prenatal and neonatal treatment program monitored by both the probation officer and by a supervising physician."[114] In *Pointer*, the court concluded that this alternative is less onerous than court-imposed contraception. Careful consideration, however, reveals that these conditions would be a greater intrusion on the probationer's liberty than imposing birth control for the term of probation. In addition, it may be more difficult for the probationer to give up a child than not to have a child at all.

It is also beneficial to consider the success of more traditional methods of preventing child abuse. Douglas Besharov, a leading expert, estimates that approximately twenty-five percent of all child deaths resulting from abuse or neglect involve children whose situa-

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bility of abuse. United States Department of Health and Human Services statistics indicate that children in families with four or more children "showed higher rates of maltreatment" and were "more likely to be . . . endangered." NATIONAL STUDY, *supra* note 2, at 5-35. Moreover, instances of maltreatment in families with four or more children "were localized in the areas of *physical* abuse and *physical* neglect." *Id.* This may be the result of additional stress resulting from more children. For a discussion of the correlation between stress and child abuse, see *supra* note 106.

[112] 199 Cal. Rptr. 357 (Ct. App. 1984). In *Pointer*, the court observed that if the defendant becomes pregnant her options are (1) to reveal the pregnancy and be imprisoned, (2) to conceal the condition and forgo prenatal care, or (3) to seek an abortion. *See id.* at 366. This is a valid concern. Although the defendant has the right to choose abortion, the condition forbids conception, not birth. Therefore, the defendant would be subject to imprisonment even without termination of pregnancy. This diminishes the positive effect of choosing abortion. From a practical aspect, however, it is highly unlikely that the court would discover the abortion. Likewise, periodic visitation by a probation officer diminishes the possibility that the pregnancy would remain undetected for a significant amount of time. *See id.* at 365.

[113] This proposal also deforms the concept of procreative liberty. O'Neill offers the following illustration: "Jean-Jacques Rousseau and his mistress had five children, whom they took as infants to the foundling hospital and abandoned there. If we believe that persons have an unrestricted right to procreate, then Jean-Jacques and Therese acted within their rights." O'Neill, *supra* note 100, at 25.

[114] *Pointer*, 199 Cal. Rptr. at 365.

tions were already known to a child protection agency.[115] This study and the high rate of recidivism[116] suggest that the current system is not working.

Considering the lack of success of traditional methods of preventing child abuse, and the alternatives available, the balance must be struck in favor of imposing contraception as a condition of probation. Although procreative liberty is deemed a "fundamental right," this probation condition is defensible in light of a probationer's reduced expectancy of liberty and the state's interest in rehabilitating the offender while protecting society. In addition, conditioning probation by imposing birth control on a convicted child abuser informs all abusers that child abuse is a serious crime that will not be tolerated.[117]

In short, something must be done about child abuse. Current methods have proved ineffectual, requiring novel approaches. Imposing birth control as a condition of probation is one such approach.

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[115] *See* Douglas J. Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAM. L.Q. 151, 163 (1983-84).

[116] *See supra* note 110.

[117] One study indicates that child abuse is more likely to occur

> when it results in low probability of negative consequences or leads to positive ones. Child maltreatment has been seen as being fostered by societal views regarding childrearing. The use of physical punishment by parents is sanctioned by societal values and the majority of parents at some time engage in physical punishment as a means of handling their children's behavior. The maltreating parent may, therefore, see his or her behavior as being within culturally approved limits, despite its being extreme in nature. In addition, since physical punishment often terminates an aversive child behavior (at least in the short run), it also may be seen as increasing a parent's sense of self-efficacy (e.g., reinforcing). Aggression is most persistent when it is reinforced intermittently, which is usually the case in childrearing situations.

Sandra T. Azar, *A Framework for Understanding Child Maltreatment: An Integration of Cognitive Behavioral and Developmental Perspectives*, 18 CANADIAN J. OF BEHAV. SCIENCE 340, 348-49 (1986).