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CONDITIONING A WOMAN'S PROBATION ON HER USING NORPLANT: NEW WEAPON AGAINST CHILD ABUSE BACKFIRES

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Several courts have required female child abusers to choose between either going to prison or accepting the surgical implantation of Norplant as a condition of probation. In this Article, Mr. Jebson argues that a Norplant probation condition is invalid because it is both unreasonable and the probationer cannot give her informed consent to the procedure. Mr. Jebson argues that requiring a woman to choose between using Norplant and going to prison may violate her fundamental right to procreate, her right to be free from cruel and unusual punishment, and her right to freely exercise her religion. Further, the Author also contends that requiring the use of Norplant may violate the Equal Protection Clause because similarly situated male and female child abusers are treated differently. As an alternative to Norplant, Mr. Jebson recommends a rehabilitative procedure which both male and female child abusers could receive as a condition of probation without infringing on fundamental rights.

I. INTRODUCTION

The United States incarcerates hundreds of thousands of convicted criminals each year. Punishing criminals by incarcerating them, however, has come under heavy criticism because of its high costs and because incarcerating criminals does little to rehabilitate them. As a result, judges have attempted to design alternative methods of sentencing criminals. One such alternative is to place the criminal on probation, accompanied with restrictive conditions designed to rehabilitate the criminal. Probation is often a desirable alternative to incarceration because judges have wide discretion in designing and imposing conditions of probation. Therefore, judges can tailor the probation conditions in a way that

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best serves the needs of the offender and the public at large. Many judges, however, have recently imposed a number of controversial probation conditions. Arguably, one of the most controversial probation conditions ever imposed by a judge occurred in *People v. Johnson*.[1]

In *Johnson*, a California Superior Court judge sentenced Darlene Johnson, a convicted child abuser, to use Norplant for three years while on probation.[2] Norplant is a contraceptive device that is surgically implanted beneath the skin of a woman's arm. Ms. Johnson appealed the judge's probation order, claiming that such a probation condition was unconstitutional. Johnson's appeal, however, became moot when she was sent to prison for violating other probation conditions. Many judges have praised the Norplant probation condition, which strongly suggests that more judges will impose this probation condition in the future.[3] It is for this reason that I wrote this Article.

This Article establishes that a judge cannot order a woman to use Norplant as a condition of probation. First, Part II describes Norplant and how it works. Part III discusses the non-constitutional grounds on which a defendant can challenge Norplant as a condition of probation. This section argues that this condition of probation is invalid because it is unreasonable and because a probationer cannot give her informed consent. Additionally, this section discusses the potential civil liability to a state which forces a woman to use Norplant as a condition of probation. Part IV of this Article analyzes the constitutional implications of conditioning a woman's probation on her using Norplant. Specifically, this section shows that forcing a woman to use Norplant as a condition of probation is invalid because such a condition violates a probationer's fundamental right to procreate, violates a probationer's fundamental right to be free from cruel and unusual punishment, may violate a probationer's fundamental right to freely exercise her religion, and violates the Equal Protection Clause of the Fourteenth Amendment. Part V proposes an alternative probation

1. No. 29390 (Super. Ct., Tulare County, Ca., Jan. 2, 1991).

2. In *Johnson*, the judge imposed the Norplant probation condition less than a month after the federal government approved Norplant. Tamar Lewin, *Implanted Birth Control Device Renews Debate Over Forced Contraception*, L.A. TIMES, Jan. 10, 1991, at 3.

3. *See, e.g.*, State v. Carlton (Neb. County Ct., Lincoln County (1991) (CR90-1937)).

condition that is reasonable, involves no informed consent problem, and does not violate a probationer's constitutional rights.

II. WHAT IS NORPLANT

Norplant is a new contraceptive device that the Food and Drug Administration approved in 1990.[4] The Norplant device consists of six rubber tubes, containing synthetic hormones, which are surgically inserted beneath the skin of a woman's arm.[5] Once inserted, the tubes release the synthetic hormones that prevent conception for up to five years.[6] If a woman decides that she no longer wants to use Norplant, a physician must surgically remove the Norplant device.[7] Norplant may seem appealing to use as a probation condition because it is effective for a long period of time, and a probationer's compliance with probation would be practically guaranteed since Norplant can only be removed by surgery.[8] However, even though Norplant is an appealing probation condition, there are constitutional and non-constitutional reasons why a judge cannot order a woman to use Norplant as a condition of probation.

III. NON-CONSTITUTIONAL GROUNDS FOR CHALLENGING THE NORPLANT PROBATION CONDITION

This section sets out the non-constitutional reasons why a judge cannot order a woman to use Norplant as a condition of probation. Part A argues that Norplant as a condition of probation is invalid because such use is not reasonable. Part B argues that using Norplant is invalid because a probationer cannot give her informed consent. Part C discusses the potential civil liability to a state that uses the Norplant probation condition.

4. *Lewin, supra* note 2, at A20.
5. *Id.*
6. *Id.*
7. *See id.*
8. *See id.*

A. *The Norplant Probation Condition is Not a "Reasonable" Probation Condition*

The authority of a federal or state judge to impose probation[9] is based on statutes.[10] Although probation statutes may differ in their particulars, they generally give the sentencing judge broad discretion in determining and imposing probation conditions.[11] This discretion, however, is not limitless.[12] Probation conditions must be reasonable.[13] The California Appellate Court in *People v. Dominguez*[14] set out a widely accepted three-part test to determine if a probation condition is reasonable.[15] According to the

9. "Probation" is defined as the "[s]entence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration." BLACK'S LAW DICTIONARY 1202 (6th ed. 1990). In United States v. Murray, 275 U.S. 347, 358 (1928), the Supreme Court described probation as "the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from burning at the time of the imposition of the sentence."

10. The statutory basis for probation in the federal courts is the Federal Probation Act. United States v. Tonry, 605 F.2d 144, 147 (5th Cir. 1979). For a list of the probation statutes in each of the 50 states, see Jeffrey C. Filcik, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & COMTEM. L. 291, 301 (1990).

11. There are generally three types of probation statutes. Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 621 (1988). The first type of probation statute sets forth no specific conditions of probation. *Id.* Instead, the statute allows the court to impose conditions of probation that the court deems appropriate. *Id.* The second type of probation statute sets forth some mandatory conditions of probation, yet allows a court to impose other conditions the court deems suitable. *Id.* The third type of probation statute lists a number of specific conditions that a court may impose. *Id.* This type of statute allows a court to impose additional conditions as long as they are reasonable. *Id.*

12. *Id.*

13. *E.g.*, People v. Dominguez, 64 Cal. Rptr. 290, 293 (Cal. Ct. App. 1967) (holding that in order for probation conditions to be valid, they must reasonably relate to the purpose of probation).

14. *Id.*

15. *Id.* In addition to California, a number of other states have adopted the *Dominguez* test. *See* Rodridguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); Russell v. State, 342 So. 2d 96, 97 (Fla. Dist. Ct. App. 1977); State v. Perbix, 331 N.W.2d 14, 18 (N.D. 1983); State v. Schlosser, 202 N.W.2d 136, 139 (N.D. 1972); State v. Taylor, 717 P.2d 64, 72 (N.M. Ct. App. 1986); State v. Jones, 550 N.E.2d 469, 470 (Ohio 1990); 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); Simpson v. State, 772 S.W.2d 276, 280 (Tex. Ct. App. 1989); State v. Emery, 593 A.2d 77, 79 (Vt. 1991); State v. Whitchurch, 577 A.2d 690, 691 (Vt. 1990); Lancing v. State, 669 P.2d 923, 928 (Wyo. 1983); State v. Garner, 194 N.W.2d 649, 652,

Dominguez test, a probation condition is not reasonable if the condition:

> (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.[16]

If the probation condition meets all three criteria of the *Dominguez* test, the condition is held not to be reasonable, and is therefore invalid.[17] A case which applied the *Dominguez* test and which is directly on point with the "Norplant" scenairo is *Rodriguez v. State*.[18]

In *Rodriguez*, the defendant was convicted of child abuse.[19] The judge placed the defendant on probation with the condition that she not become pregnant during the probationary period.[20] The *Rodriguez* court applied the *Dominguez* test to determine if the probation condition was reasonable.[21] In applying the first part of the *Dominguez* test, the *Rodriguez* court found the probation condition did not relate to the crime of which the defendant was convicted because the defendant's pregnancy did not relate to the crime of child abuse, i.e., pregnancy was not the cause of the

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(Wis. 1972); State v. Mizzles, 485 N.W.2d 839, 842 (Wis. Ct. App. 1992). Accepting probation does not waive the probationer's right to later challenge the conditions of probation on appeal. People v. Bauer, 260 Cal. Rptr. 62, 64 (Cal. Ct. App. 1989).

16. *Dominguez*, 64 Cal. Rptr. at 293. In *Dominguez*, a 20 year-old unmarried female was convicted of second-degree robbery. *Id.* at 292. One of the conditions of the defendant's probation was that she not become pregnant without first getting married. *Id.* In applying the first part of the *Dominguez* test, the court stated that the probation condition had no relationship to the crime of which the defendant committed because the defendant's future pregnancy had no relationship to the crime of robbery. *Id.* at 293. In applying the second part of the *Dominguez* test, the court held the probation condition related to conduct which was not in itself criminal because becoming pregnant was not a crime. *Id.* In applying the third part of the *Dominguez* test, the court held the probation condition forbid conduct which was not reasonably related to future criminality because the defendant's future pregnancy did not reasonably relate to future robberies. *Id.* The court held that since the condition of probation did not reasonably relate to the purpose of probation (i.e., was not reasonable) under its test, the condition was invalid. *Id.* at 294.

17. *Id.*

18. 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979).

19. *Id.* at 8.

20. *Id.*

21. *Id.* at 9.

child abuse.[22] In applying the second part of the *Dominguez* test, the court held the probation condition related to conduct that was not itself criminal because becoming pregnant was not a crime.[23] In applying the third part of the *Dominguez* test, the court held the probation condition forbid conduct which was not reasonably related to future criminality, i.e., future child abuse, because if the defendant became pregnant, the court could protect the newborn child by taking the child out of the custody of the defendant.[24] The court concluded that since the probation condition met the three criteria of the *Dominguez* test, the condition was not reasonable, and therefore invalid.[25]

Similarly, like *Rodriguez*, the Norplant probation condition meets all three criteria of the *Dominguez* test. First, forced birth control has no relationship to the crime of child abuse.[26] Child abuse is generally caused by lack of parenting skills and stresses, not by having too many babies.[27] Second, the Norplant probation condition relates to conduct which is not itself criminal because becoming pregnant and bearing children are not crimes.[28] Third, the Norplant probation condition forbids conduct which is not reasonably related to future criminality because a court can avoid any abuse toward a newborn child by taking the child out of the abuser's custody until the child abuser can control her abusive behavior.[29] Thus, under the *Dominguez* test, the Norplant probation condition is not a reasonable condition of probation, and therefore is invalid.

B. A Probationer Cannot Give Her Informed Consent to Use Norplant as a Condition of Probation

If probation involves the use of medical treatment, the probationer must give his or her informed consent to the use of such

22. *Id.* at 10.
23. *Id.*
24. *Id.*
25. *Id. See also* State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (holding a probation condition which prohibits a woman convicted of child abuse from becoming pregnant is invalid under the *Dominguez* test); Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (holding a probation condition which prohibited a man convicted of child abuse from begetting children was invalid under the *Dominguez* test).
26. *See Rodriguez*, 378 So. 2d at 10.
27. *See* YER FERNANDEZ-ALDANA, CHILD ABUSE: AN OVERVIEW 163 (1991).
28. *See Rodriguez*, 378 So. 2d at 10.
29. *See id.*

medical treatment.[30] Informed consent[31] involves two elements. First, a physician must disclose to the individual all the relevant information about the medical treatment.[32] This includes any known dangers associated with the treatment, the advantages of the treatment, the disadvantages of foregoing the treatment, and any alternative treatment that may be available.[33] Second, once a physician informs the individual of all the relevant information about the medical treatment, the individual must freely and voluntarily decide whether to go through with the treatment.[34]

Since Norplant is a medical treatment, a probationer must give her informed consent to the use of Norplant as a condition of her probation.[35] The first element of informed consent, which requires a physician to disclose to the individual all the relevant information about the medical treatment, cannot be met. This problem occurs because when a judge offers a probationer the choice between going to prison and using Norplant, the probationer must make an on-the-spot decision whether to accept the Norplant probation condition. A physician is not present in court when a judge offers a convicted child abuser probation which is conditioned on the use of Norplant. Thus, a probationer will have to choose whether to use Norplant without being informed of all the relevant medical information concerning Norplant.[36]

Furthermore, the Norplant probation condition does not satisfy the second element of informed consent, which requires an individual to freely and voluntarily decide whether to go through with the treatment.[37] An individual cannot freely and voluntarily consent to medical treatment if there is an element of coercion

30. *See* People v. Gauntlett, 352 N.W.2d 310, 316 (Mich. Ct. App. 1984). *See also* William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 15, (1986).

31. The underlying premise of informed consent is that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his [or her] own body . . . ." Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972).

32. *Id.* at 786.

33. *Id.* at 787. "True consent to what happens to one's self is the informed exercise of choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." *Id.* at 780.

34. *Id.*

35. *See Gauntlett*, 352 N.W.2d at 316.

36. *See Canterbury*, 464 F.2d at 780.

37. *Id.*

involved in the giving of such consent.[38] For example, in *People v. Gauntlett*,[39] the Michigan Appellate Court held a judge could not condition a convicted rapist's probation on the rapist using the drug Depo-Provera.[40] Depo-Provera is a drug which essentially destroys a person's sex drive.[41] A factor contributing to the court's holding was the inability of the convicted offender to give his informed consent to the use of Depo-Provera as a condition of his probation.[42] The court inferred that because of the coerciveness of probation, the defendant could not freely and voluntarily consent to the use of Depo-Provera as a condition of probation.[43]

Similarly, like *Gauntlett*, because of the coerciveness of probation, a probationer will not be able to freely and voluntarily consent to use Norplant as a condition of probation. Probation conditioned on Norplant use is coercive because a woman is given a choice between using Norplant and going to prison. Clearly, a woman cannot freely and voluntarily consent to use Norplant when her only alternative is going to prison.[44] Thus, a probationer cannot give informed consent to use Norplant.

C. *Liability to a State Which Uses The Norplant Probation Condition*

A state which uses the Norplant probation condition leaves itself open to a civil lawsuit brought by a probationer. For instance, the probationer may be injured if a physician does not properly insert the Norplant device. Since it is the state who ordered the medical treatment, the probationer inevitably will sue

38. *See generally* People v. Gauntlett, 352 N.W.2d 310 (Mich. Ct. App. 1984); Kaimowitz v. Michigan Dep't of Mental Health, No. 73-194-AW (Cir. Ct., Wayne County, Mich., July 10, 1973).

39. 352 N.W.2d 310 (Mich. Ct. App. 1984).

40. *Id.* at 314.

41. *Id.* at 315.

42. *Id.* at 317.

43. *Id.* at 316. The *Gauntlett* court did not explicitly state the probationer could not freely and voluntarily consent to the use of Depo-Provera as a condition of probation because of the coerciveness of probation. Instead, the *Gauntlett* court listed the elements needed for informed consent and then, without stating why, held that one of the reasons the condition was invalid was because the probationer could not give his informed consent to use the drug Depo-Provera as a condition of probation. *See id.*

44. *See Gauntlett*, 352 N.W.2d 317. *See also* Green, *supra* note 30, at 17 (stating that it is impossible for a convicted offender to choose freely and voluntarily between using the drug Depo-Provera as a condition of probation and going to jail).

the state. The cost to defend these lawsuits, as well as any damage awards, will come out of the taxpayers' pockets.

Furthermore, it may be discovered in the future that Norplant causes severe medical problems, as for example with breast implants. In the breast implant situation, thousands of women who experienced problems brought civil suits against manufacturers of the implants. A similar situation would likely happen if it is determined that Norplant causes severe medical problems. Not only would the probationer sue the manufacturer of Norplant, but she also would likely sue the state which ordered her to use Norplant.

Additionally, it is a judge who orders the probationer to use Norplant, not a physician. Thus, a judge who orders a woman to use Norplant is practicing medicine without a license. Therefore, because the Norplant probation condition may cost taxpayers millions of dollars in civil suits brought by probationers, the Norplant probation condition should not be used.

IV. CONSTITUTIONAL IMPLICATIONS OF USING NORPLANT AS A PROBATION CONDITION

A. *The Norplant Probation Condition Violates a Probationer's Fundamental Right to Procreate*

Although the United States Constitution does not specifically mention the right to procreate, the Supreme Court recognizes the right to procreate as a fundamental right,[45] and one that grew out of the right to privacy.[46] One of the main aspects of the right to

45. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

46. The Justices on the Supreme Court have disagreed on the origin of the right to privacy. *See generally Griswold*, 381 U.S. 479. Justice Douglas, writing for the Court in *Griswold*, believed the right to privacy is not found in the Due Process Clause of the Fourteenth Amendment. *Id.* at 482. Rather, Douglas stated the right to privacy is found in the penumbras of the various guarantees of the Bill of Rights. *Id.* According to Douglas, the "[v]arious guarantees create zones of privacy." *Id.*

Commentators argue the reason Douglas refused to base the right to privacy on the Due Process Clause of the Fourteenth Amendment was because he did not want to follow the highly criticized case, Lochner v. New York, 198 U.S. 45 (1905). *See generally* Brett J. Williamson, *The Constitutional Privacy Doctrine After Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297 (1987). In *Lochner*, the Court held unconstitutional a law which limited the number of hours a baker could work each week. *Lochner*, 198 U.S. at 53. The *Lochner* Court stated the law was unconstitutional because it unjustifiably interfered with the liberty to contract in

privacy includes the right to make certain personal decisions without unjustified governmental interference.[47] The personal decisions that come under the protection of the right to privacy are

an employer/employee relationship. *Id.* According to the *Lochner* court, the liberty to contract was protected by the Due Process Clause of the Fourteenth Amendment. *Id.* For a more detailed discussion of *Lochner,* see generally Helen Garfield, *Privacy, Abortion, and Judicial Review; Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986).

Justice Goldberg, concurring in *Griswold*, argued the textual source of the right to privacy comes from the Ninth Amendment. *Griswold*, 381 U.S. at 487. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Justice Goldberg argued the Court is not limited to protecting only fundamental rights that are specifically in the text of the Constitution. *Griswold*, 381 U.S. at 487. He stated that an examination of the Ninth Amendment shows the framers of the Constitution intended for the government not to infringe upon certain fundamental rights that were not specifically named in the Constitution. *Id.* at 488. According to Justice Goldberg, the fundamental right to privacy was one of the rights retained in the Ninth Amendment. *Id.* at 499. The more common rationale for the right to privacy, however, is the right to privacy is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *See* Williamson, *supra*, at 1310.

47. Carey v. Population Serv. Int'l, 431 U.S. 678, 684 (1977). The right to make certain personal decisions without unjustified government interference has also been called the right to personal autonomy. Tiffany M. Romney, *Prosecuting Mothers of Drug-Exposed Babies: The State's Interest in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection*, 17 J. CONTEMP. L. 325, 329 (1991).

usually decisions that concern child-rearing,[48] marital relations,[49] and procreation.[50]

While Supreme Court decisions regarding child-rearing and marital relations formed the basis for recognition of a fundamental right to privacy, the decisions most pertinent to evaluating Norplant's use as a condition of probation are those involving procreation. *Griswold v. Connecticut*[51] was the first Supreme Court decision to recognize the right to procreate as part of an individual's fundamental right to privacy.[52] In *Griswold*, the Court struck down a statute[53] which restricted the right of married per-

48. *See* Pierce v. Society of Sisters of Holy Names of Jesus and Mary, 268 U.S. 510 (1925). In *Pierce*, Oregon enacted a statute which required every parent to send their children, aged eight to sixteen, to public school. *Id.* at 530. The Supreme Court struck down the statute as unconstitutional, holding the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534. The Court held the decision whether to send a child to public or private school is strictly a private decision with which the government may not interfere because parents have a fundamental right to control their children's education. *Id. See also* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding a statute which prohibited the teaching of any language other than English in school was unconstitutional because it interferes with a parent's fundamental right to control his/her children's education). Both *Pierce* and *Meyer* acknowledge that decisions in private family matters are inherent in the concept of liberty that is protected by the Due Process Clause of the Fourteenth Amendment. Although *Pierce* and *Meyer* did not specifically state the statute violated an individual's right to privacy, both are continually cited as being "right to privacy" cases. *E.g., Carey*, 431 U.S. at 685.

49. *See* Loving v. Virginia, 388 U.S. 1 (1967). In *Loving*, the Court held unconstitutional a statute which prohibited interracial marriages. *Id.* at 12. The Court stated the decision of whom to marry is an individual decision that could not be interfered with by the government because the right to decide whom to marry is a fundamental right. *Id.* The *Loving* court also struck down the statute on Equal Protection grounds. *Id.*

50. *Griswold*, 381 U.S. at 484.

51. 381 U.S. 479 (1965).

52. Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE L.J. & FEMINISM 327, 333 (1991). *Griswold* was responsible for laying the foundation for privacy law. *Id.*

53. Section 53-32 of the General Statutes of Connecticut read: "Any person who uses any drug, mechanical article or instrument for the purpose of preventing conception shall be fined no less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Griswold*, 381 U.S. at 480. Further, section 54-196 read: "Any person who assists, abets, counsels, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.*

sons to use contraceptives.[54] The Court held the statute unconstitutional because it unjustifiably interfered with a married couple's right to decide whether to procreate.[55] In *Eisenstadt v. Baird*,[56] the Supreme Court extended this holding to unmarried persons as well,[57] stressing the right to procreate is an individual right.[58] Therefore, it cannot be reserved only to married couples.[59] The Court stated that "[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 matters so fundamentally affecting a person as the decision whether to bear or beget a child."[60]

Through decisions such as *Griswold* and *Eisenstadt*, the Court has established the right to procreate is a fundamental right.[61] A court applies "strict scrutiny" when evaluating state actions that infringe on fundamental rights.[62] Therefore, state infringement on a person's fundamental right to procreate must be subjected to strict scrutiny.[63] Under the strict scrutiny analysis, a state can infringe on a fundamental right only if: (1) the state has a compelling interest in doing so, and (2) the means chosen are necessary to achieve the state's compelling interest.[64]

Conditioning a woman's probation on her using Norplant infringes on a woman's fundamental right to procreate. As the *Eisenstadt* court held, the Constitution protects "the [fundamental] right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child."[65] Clearly, a state intrudes on a woman's decision whether to bear a child when it orders her to use Norplant as a condition of

54. *Id.* at 486. In *Griswold*, a physician was convicted of violating the birth control statute because he gave information and medical advice to individuals about the different methods available to prevent pregnancy. *Id.* at 480. The physician also examined individuals and gave advice on what contraceptive device he believed the individuals should use. *Id.*

55. *Id.*

56. 405 U.S. 438 (1972).

57. In *Eisenstadt*, the Court struck down a statute which prohibited the distribution of contraceptive devices to unmarried people. *Id.* at 453.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* Carey v. Population Serv. Int'l, 431 U.S. 678, 688 (1976).

63. *Id.*

64. *See* Graham v. Richardson, 403 U.S. 365, 375-76 (1971)

65. *Eisenstadt*, 405 U.S. at 453.

probation. Courts reviewing such state action therefore, must apply strict scrutiny; i.e., a state must have a compelling interest to justify its infringement on a probationer's fundamental right to procreate and the Norplant probation condition must be necessary to achieve the state's compelling interests.[66]

This writer does not argue the proposition that a state has a compelling interest to justify its infringement on a probationer's fundamental right to procreate. Indeed, numerous courts have held a state's interest in rehabilitating the probationer and protecting the public from the probationer committing future crimes are compelling state interests for restricting a probationer's fundamental rights.[67] It is the second part of the strict scrutiny test which the Norplant probation condition cannot satisfy.

As previously noted, in order to survive the strict scrutiny analysis, the probation condition must be necessary to achieve the state's compelling interest.[68] A probation condition is not necessary to rehabilitate the probationer and protect the public if alternative probation conditions are available which are less restrictive of the probationer's fundamental rights and will adequately serve the state's interest in rehabilitation and public safety.[69] If a

66. *See* People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (labeling the standard of review which is applied when probation conditions implicate a probationer's fundamental rights, "special scrutiny").

67. Owens v. Kelly, 681 F.2d 1362, 1367 (11th Cir. 1982) (holding states have a compelling interest in rehabilitating probationers and protecting the public from the probationer). *See also* United States v. Cothran, 855 F.2d 749, 751 (11th Cir. 1988); People v. Zaring, 10 Cal. Rptr. 263, 268 (Cal. Ct. App. 1992); People v. Bauer, 260 Cal. Rptr. 2d 62, 65 (Cal. Ct. App. 1989); People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984).

68. *See Pointer*, 199 Cal. Rptr. at 365.

69. *Id. See also Zaring*, 10 Cal. Rptr. 2d at 269 (holding a condition of probation, which prohibits a woman convicted of drug possession from becoming pregnant, is invalid because there were other conditions, less drastic than an outright ban on pregnancy that could be used to rehabilitate the probationer and protect the public); People v. Bauer, 260 Cal. Rptr. 62, 67 (Cal. Ct. App. 1989); People v. Watkins, 239 Cal. Rptr. 255, 256 (Cal. Ct. App. 1987); People v. Arvanites, 95 Cal. Rptr. 493, 500 (Cal. Ct. App. 1971); State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989); Edwards v. State, 246 N.W.2d 109, 112 (Wis. 1976) (Abrahamson, J., dissenting) (arguing the condition of probation in question should have been held invalid because there were less restrictive conditions available that would adequately rehabilitate the probationer and would have protected the public).

Some courts do not require probation conditions which infringe on a probationer's fundamental rights to be the least restrictive condition available to rehabilitate the probationer and protect the public. *See* Oyoghok v. Anchorage,

reviewing court finds the probation condition is not necessary to rehabilitate the probationer and protect the public, the court will

641 P.2d 1267, 1270 (Alaska Ct. App. 1982). Instead, these courts invoke a "balancing test," balancing the state's interest in rehabilitating the probationer and protecting the public against the probationer's liberty interest. Thomas E. Bartrum, Comment, *Birth Control as a Condition of Probation: A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037, 1042 (1992). Under this standard, if the state's interest outweighs the impairment of the probationer's fundamental right's, the condition is valid. *Id.* The court in Oyoghok applied this "balancing test" to determine the validity of a probation condition which infringed on the probationer's fundamental rights. *Oyoghok*, 641 P.2d at 1270. In *Oyoghok*, the defendant was convicted for soliciting prostitution. *Id.* at 1268. As a condition of probation, the defendant was prohibited from going within two blocks of a certain street in downtown Anchorage, where a number of prostitutes gathered. *Id.* The defendant challenged the probation condition as being unconstitutional. *Id.* In balancing the state's interest in rehabilitation and public safety against the probationer's First Amendment rights, the court held the probation condition was valid. *Id.* at 1269. The court acknowledged the condition could have been more narrowly drawn. *Id.* at 1268. Nevertheless, the court stated the condition was not per se invalid because the condition did not create a "chilling" effect on the probationer's exercise of her First Amendment rights and because regulating the probationer's conduct this way "falls within the realm of the municipality's legitimate interest . . . ." *Id.*

Furthermore, some courts apply what has been called the *Tonry* test. *See* United States v. Tonry, 605 F.2d 144 (5th Cir. 1979). Under the *Tonry* test, when determining the validity of probation conditions which infringe on a probationer's fundamental rights, the court weighs three factors: "(1) rehabilitating the probationer and protecting the public; (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." *Id.* at 150. This test does not require the condition to be the least restrictive condition available. *See id.*

In *Tonry*, the defendant, a congressman, plead guilty to receiving over $1000 in political contributions, violating the Federal Election Campaign Act. *Id.* at 146. As a condition of probation, the defendant was "not to run for political office nor engage in political activity during the period of probation." *Id.* The defendant challenged the condition, claiming that it was invalid because it infringed on his constitutional rights. *Id.* at 150. In weighing the three factors, the court stated the condition would deprive the defendant of some of his constitutional rights, but stated the condition would sufficiently rehabilitate the probationer and protect the public. *Id.* at 151. The court noted, under the circumstances, depriving the defendant of some of his constitutional rights was appropriate. *Id.* A number of commentators have criticized the standards used in *Oyoghok* and *Tonry*, which do not require the probation condition to be the least restrictive probation condition available to further a state's interest in rehabilitation and public safety. *See generally* Sunny A.M. Koshy, *The Right of All the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449 (1980).

hold the condition invalid for unnecessarily restricting a probationer's fundamental rights.[70]

For example, in *People v. Pointer*,[71] the defendant, a mother of two children, was convicted of child endangerment.[72] The judge placed the defendant on probation. One of the conditions of probation was "she not conceive during the probationary period."[73] The defendant challenged the condition as an unconstitutional restriction on her fundamental right to procreate.[74]

The *Pointer* court, in recognizing the probation condition infringed on the defendant's fundamental right to procreate, subjected the probation condition to the strict scrutiny analysis.[75] The court acknowledged the state had a compelling interest to justify its infringement on the defendant's fundamental right to procreate.[76] The court then moved to the second part of the strict scrutiny analysis and stated the probation condition must be entirely necessary to achieve the state's compelling interest.[77] The *Pointer* court held the condition was invalid because the condition was not entirely necessary to rehabilitate the probationer and protect the public.[78] In fact, the *Pointer* court noted the condition did nothing at all to rehabilitate the probationer.[79]

In terms of protecting the public, the *Pointer* court believed the condition was intended to protect the public by preventing injury to an unborn child.[80] The *Pointer* court stated, however, the purpose of preventing injury to an unborn child could be achieved by alternative, less restrictive, probation conditions.[81]

For instance, the *Pointer* court stated the state could require the defendant to take pregnancy tests throughout probation.[82] Further, if the defendant became pregnant, the court stated the

70. *Pointer*, 199 Cal. Rptr. at 365 (stating "[i]f available means exists which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used").
71. 199 Cal. Rptr. 357 (Cal. Ct. App. 1984).
72. *Id.* at 365.
73. *Id.* at 360.
74. *Id.*
75. *See id.*
76. *Id.*
77. *Pointer*, 199 Cal. Rptr. at 365.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Pointer*, 199 Cal. Rptr. at 365.
82. *Id.*

state could require the defendant to follow prenatal and neonatal treatment.[83] Moreover, the court found the state could protect an infant born during the probationary period by placing the infant in a foster home.[84] Thus, because there were alternative, less restrictive, probation conditions that would adequately rehabilitate the probationer and protect the public, the court held the probation condition invalid.[85]

Similarly, a state cannot force a woman convicted of child abuse to use Norplant as a condition of her probation because such a condition is not necessary to rehabilitate the child abuser[86] and protect the public. In fact, Norplant is not even conducive to these objectives.[87] Child abuse[88] is caused by lack of parenting skills and stresses of everyday life.[89] Norplant will not rehabilitate a child abuser because Norplant does not alter a child abuser's destructive behavior, nor will it teach proper parenting skills or ways to channel everyday stresses in non-abusive directions. Furthermore, Norplant does not protect the public from the effects of child abuse because Norplant does nothing to stop the convicted child abuser from abusing her existing children. Additionally, Norplant does nothing to protect future children of the child abuser since the woman may bear and abuse children after the probationary term.

Even assuming, arguendo, the Norplant probation condition does rehabilitate the child abuser and protect the public, it would still be an invalid probation condition because, like *Pointer*, less restrictive probation conditions are available that would adequately serve these interests. For instance, a court could require convicted child abusers to attend counselling programs designed to treat the problems of child abuse. Proper counselling programs will rehabilitate the probationer by teaching the child abuser parenting skills that will enable her to channel her anger and

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83. *Id.*

84. *Id.*

85. *Id.*

86. Because this Article focuses on women who are convicted on child abuse, "child abuser" refers to the female child abuser.

87. *See Pointer*, 199 Cal. Rptr. at 365 (holding a condition of probation which prohibits a woman convicted of child endangerment from conceiving any children does not rehabilitate the child abuser).

88. Child abuse includes, among other things, physical abuse, as well as emotional abuse. YER FERNANDEZ-ALDANA, *supra* note 27, at 164.

89. *See generally* YER FERNANDEZ-ALDANA, *supra* note 27.

frustration in non-abusive directions.[90] Counselling programs also will protect the public because the child abuser will be monitored constantly by trained professionals who will be able to detect if the child abuser is continuing her abusive behavior.

A number of courts have used a similar probation condition for individuals convicted of drunk driving. In those cases, the various judges ordered the defendants to attend Alcoholics Anonymous meetings as part of their probation. This probation condition has proven very successful. Many individuals who have been ordered to attend Alcoholics Anonymous meetings have stated the meetings have helped them with their drinking problem.[91]

Court-ordered counselling programs for convicted child abusers should have similar success. At the very least, such a probation condition is clearly less restrictive than the Norplant probation condition. Therefore, because there is a less restrictive probation condition available that would adequately serve a state's interest in rehabilitating the probationer and protecting the public, forcing a woman to use Norplant as a condition of probation is an unconstitutional infringement on her fundamental right to procreate. As a result, the use of Norplant as a condition of probation is invalid.

B. *The Norplant Probation Condition Violates a Probationer's Fundamental Right to be Free From Cruel and Unusual Punishment*

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment.[92] The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[93] The Supreme Court's interpretation of the Eighth Amendment has changed over the years.[94] Originally, the Court interpreted the Eighth Amendment to prohibit only barbaric pun-

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90. *See id.*

91. *See, e.g.*, Scott Miller, *Clean and Sober, Back and Playing: After the Year He Threw Away, SDSU's Tracey Mao Returns*, L.A. TIMES, Aug. 26, 1992, at A5.

92. U.S. CONST. amend. VIII.

93. *Id.*

94. *See generally* Licia A. Esposito, *The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Presidential Analysis and Proposal For Reconsideration*, 31 B.C. L. REV. 901, 913 (1990).

ishments because the Court felt this was the intent of the framers of the Eighth Amendment.[95]

The Supreme Court, however, has long since rejected that interpretation. The Supreme Court has held the cruel and unusual punishment clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[96] Consequently, the Eighth Amendment prohibits all punishments that modern society would consider to be "cruel" and "unusual."[97]

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95. *See* Wilkerson v. Utah, 99 U.S. 130 (1878).

96. Trop v. Dulles, 356 U.S. 86, 101 (1958).

97. *Trop*, 356 U.S. at 101. Courts generally use two approaches to determine how contemporary society view a particular punishment. Esposito, *supra* note 94, at 910. One approach is called the "Contemporary Consensus Approach." *Id.* at 912. This approach is generally used when the court is deciding if a punishment is grossly disproportionate to the crime. *See generally id.* Under this approach, the court looks at certain objective factors to determine how contemporary society views a particular punishment. *Id.* at 912. Some of the objective factors that courts look at include jury behavior and legislative enactments. *Id.* This approach is based on empirical data. *Id.* at 913. The Court in Enmund v. Florida, 458 U.S. 782, 788-89 (1982), used this approach to determine if a particular punishment was prohibited by the Eighth Amendment.

In *Enmund*, the defendant was convicted of murder under the felony murder rule. *Id.* at 785. The defendant, however, did not actually do the killing. *Id.* The defendant also did not attempt to kill the victim, nor did the defendant intend for the victim to die. *Id.* at 784. The jury sentenced the defendant to death. *Id.* at 785. The defendant appealed, claiming that it would be cruel and unusual punishment to sentence him to death since he did not actually do the killing, did not attempt to kill the victim, and did not intend for the victim to die. *Id.* at 786.

The Court, in order to ascertain society's view on imposing the death penalty in such a situation, looked at jury practices and legislative judgments. *Id.* at 789. The Court noted that "eleven states require some culpable mental state with respect to the homicide as a prerequisite to conviction of a crime for which the death penalty is authorized." *Id.* at 789-90. The Court then found "[only] eight [states] allow the death penalty to be imposed solely because the defendant somehow participated in a robbery, in the course of which a murder was committed." *Id.* at 792. The Court also stated "[s]ociety's rejection of the death penalty . . . in felony murder rule cases is also indicated by the sentencing decisions that juries have made." *Id.* at 794. The Court stated "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976)). From these objective factors, the Court held contemporary societies would view sentencing the defendant to death for the crime he committed as cruel and unusual punishment. *Id.* at 801.

In addition to using the "Contemporary Consensus Approach," some courts state it is the job of the Justices to decide if a punishment is cruel and unusual.

The use of Norplant as a probation condition is governmentally forced medical treatment, and a number of courts have held such medical treatment to be cruel and unusual punishment.[98] For example, in *Knecht v. Gillman*,[99] the Eighth Circuit Court of Appeals held it was cruel and unusual punishment to inject prisoners with the drug apomorphine because the drug had no therapeutic value.[100] The court rejected the state's argument that the drug was administered for the purpose of treating behavior problems of prisoners because there was inconclusive evidence that such a drug did in fact treat behavior problems.[101] Just as apomorphine has no therapeutic value for a prisoner with behavior problems, Norplant has no therapeutic value for a child abuser. As previously stated, Norplant does not address the root causes of child abuse,[102] but is instead administered simply for the purpose of temporarily sterilizing a woman.

Further, a United States District Court in Indiana, in *Nelson v. Heyne*,[103] held it was cruel and unusual punishment to inject juveniles in a correctional institute with tranquilizing drugs because the drugs had significant side effects.[104] Norplant also has a number of significant side effects including breast discharge, irregular menstrual bleeding, headaches, acne, and significant skin reactions.[105] Additionally, Norplant is a new medical treat-

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Commentators argue this approach is inadequate to determine the evolving standards of decency because often what the Justices believe to be the evolving standards of decency is contrary to what jury decisions show. *See* Esposito, *supra* note 94, at 916.

Other courts determine the evolving standards of decency by determining if the particular punishment violates a person's dignity. *See Trop*, 356 U.S. at 100. Under this standard, if a punishment strips a person of their dignity, the punishment is contrary to the evolving standards of decency. *See id.*

98. The Eighth Amendment cruel and unusual punishment clause applies to probation conditions. *See* State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985). *See also* Green, *supra* note 30, at 20.

99. 488 F.2d 1136, 1138 (8th Cir. 1973).

100. *Id.* at 1140. Apomorphine, which causes vomiting, is administered as an "adverse stimuli." *Id.* at 1137.

101. *Id.* at 1138.

102. *See supra* notes 86-88 and accompanying text for a discussion on why Norplant has no therapeutic value.

103. 355 F. Supp. 451 (N.D. Ind. 1972).

104. *Id.* at 455.

105. For a list of common side affects associated with Norplant use, see Ridgely Ochs, *The Latest in Birth Control Methods*, NEWSDAY, Apr. 28, 1992, at 61; Zuber, *Skin Damage Associated With The Norplant Contraceptive*, J. FAM. PRAC., May 1992, at 613-16.

ment and history has shown that many new medical treatments which physicians have claimed to be safe have turned out to be extremely hazardous to one's health.[106] Similarly, since Norplant is such a new medical treatment, more serious side effects may be discovered in the future.

Other courts have held that punishing an individual by forcing him or her to use a medical treatment which has the effect of destroying the individual's power to procreate is cruel and unusual punishment.[107] For example, in *Mickle v. Henrichs*[108] the United States District Court in Nevada held that punishing a man by forcing him to have a vasectomy is cruel and unusual punishment because it would strip him of his dignity.[109] The court found it extremely degrading and humiliating for a man to subject himself to a vasectomy as punishment because it would take away his power to procreate,[110] which is considered "fundamental to the very existence and survival of the [human] race.[111] The Supreme Court also has held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[112]

Forcing a woman to use Norplant as a condition of probation strips a woman of her dignity in much the same way a vasectomy strips a man of his dignity. Norplant temporarily destroys a woman's ability to procreate. Unfortunately, since society often associates womanhood with a woman's ability to bear a child much the same way society associates manhood with the ability to beget a child, it would be extremely humiliating for a woman to have her ability to procreate taken away. The probationer, and the people around her, will be constantly reminded of her inability to procreate since the Norplant device protrudes from a woman's arm. Further, the fact a vasectomy permanently destroys a man's power to procreate while the use of Norplant only temporarily destroys a woman's power to procreate does not mean forcing a woman to use Norplant is any less cruel or unusual. A woman will not feel any less humiliated or feel any less degraded during

106. It was not long ago that most physicians claimed breast implants were safe. Now, however, breast implants are known to pose serious health risks to women. *See* Marilyn Elias, *Transferring Fat to Breasts Pose Risk*, USA TODAY, Oct. 6, 1992, at 1D.

107. *See, e.g.*, Davis v. Berry, 216 F. 413 (S.D. Iowa 1914).

108. 262 F. 687 (D. Nev. 1918).

109. *Id.* at 690.

110. *Id.* at 690.

111. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

112. *See Trop*, 356 U.S. at 100.

the period the Norplant device is in her arm simply because she knows the device will eventually be removed. Moreover, a woman's period of fertility is not indefinite, and ordering a woman over age thirty to use Norplant for three years would significantly reduce, or possibly eliminate, her opportunity to have children. Therefore, as shown above under *Knecht*, *Nelson*, and *Mickle*, forcing a probationer to use Norplant as a condition of probation is cruel and unusual punishment.

C. *The Norplant Probation Condition May Violate a Probationer's Fundamental Right to Freely Exercise Her Religion*

Certain religious denominations, most notably the Roman Catholic Church, are opposed to birth control.[113] For this reason, the Norplant probation condition may violate a probationer's fundamental right to freedom of religion. Freedom of religion is protected by two distinct clauses in the First Amendment to the United States Constitution.[114] The first is the Establishment Clause, which prohibits the government from making any "law respecting an establishment of religion . . . ."[115] The second clause, which is pertinent in evaluating Norplant as a probation condition, is the Free Exercise Clause of the First Amendment.[116]

The Free Exercise Clause bars the government from enacting any law which prohibits an individual from freely exercising his or her religion.[117] Freely exercising one's religion includes the right

113. *See Aids Can't Justify Condoms, Pope Says*, CHI. TRIB., Nov. 13, 1988, at C25.

114. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

115. *Id.* For an interesting discussion on the Establishment Clause, see generally Steve Grey, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981).

116. U.S. CONST. amend. I. For a discussion on the historical development of the Free Exercise Clause, see generally Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992).

117. Employment Div. v. Smith, 494 U.S. 872, 876-77 (1990). A question arises as to what constitutes a "religion" under the Free Exercise Clause. Although the Supreme Court has not identified specifically what religions are covered by the Free Exercise Clause, the Court has held a religion need not be one that believes in God. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (holding a government may not require an individual to profess his or her belief in God in order to hold public

to believe in whatever religion one desires.[118] It also includes the right to act in accordance with one's religion, or abstaining from some act (for example, abstaining from using contraceptives) because one's religion forbids such action.[119]

Early Supreme Court decisions took the view that, under the Free Exercise Clause, the government is prohibited from enacting laws which regulate religious beliefs, but is free to enact laws which would simply burden an individual's ability to act in accordance with his or her religion.[120] In 1963, however, the Supreme Court in *Sherbert v. Verner*[121] rejected this narrow view of the Free Exercise Clause. In *Sherbert*, the Court held if a state burdens an individual's ability to act in accordance with his or her religion, the state must show it has a compelling interest and the means chosen to protect this interest are necessary.[122]

In *Sherbert*, the appellant was fired from her employment because she refused to work on Saturdays, in observance of her religious beliefs.[123] The State denied the appellant's claim for unemployment compensation because the State considered the appellant to be in violation of a state statute.[124] According to the

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office, for such a requirement would violate an individual's First Amendment right to freedom of religion). Furthermore, a religious belief does not have to result from a tenet or teaching of an established religion, as long as it is a sincerely held religious belief. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989).

118. Sherbert v. Verner, 374 U.S. 398, 402 (1963) (stating "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs . . . .").

119. *Cf. id.*

120. *See* Reynolds v. United States, 98 U.S. 145, 165 (1878). *Reynolds* was the first Supreme Court decision to interpret the Free Exercise Clause. In *Reynolds*, a Mormon challenged a federal statute which prohibited polygamy, claiming such a statute violated his right to freely exercise his religion. *Id.* at 160. The Mormon claimed polygamy was a required practice of his religion. *Id.* Since the statute did not regulate religious beliefs, but only regulated a person's ability to act in accordance with his or her religion, the Court upheld the statute. *Id.* at 168. The Court reasoned there would be ludicrous consequences if the government was not permitted to regulate a person's ability to act in accordance with his or her religion. *See id.* The Court stated, "[s]uppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that civil government under which he lived could not interfere to prevent a sacrifice?" *Id.* at 166.

121. 374 U.S. 398 (1963).

122. *Id.* at 403. The *Sherbert* Court applied the strict scrutiny standard.

123. *Id.* at 399. The appellant was a Seventh-day Adventist. *Id.*

124. *Id.*

statute, individuals who failed to accept suitable work were not eligible for unemployment compensation.[125] The State believed because the appellant was unwilling to work on Saturdays, she fell into the category of persons who failed "to accept suitable work."[126]

The Court found the statute burdened the appellant's freedom to act in accordance with her religion because it had the coercive effect of forcing the appellant to choose between acting in accordance with her religious beliefs and receiving a state benefit.[127] The State claimed its compelling interest for the statute was to prevent persons from fraudulently claiming they can not work on Saturdays because of religious reasons in an effort to qualify for unemployment compensation.[128] The Court, however, found there to be no evidence that such fraudulent actions would occur.[129] Furthermore, the Court stated there were less restrictive means that could adequately serve the state's interest.[130] Thus, the Court held the statute as applied to the appellant violated the Free Exercise Clause, and therefore, it was unconstitutional.[131]

In 1990, the Supreme Court in *Employment Division v. Smith*[132] drastically narrowed the protection afforded by the Free

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125. *Id.*

126. *Id.*

127. *Id.* at 404. The Court acknowledged the appellant's free exercise of her religious beliefs was only indirectly burdened. *Id.* at 403. Nevertheless, the Court held "if the purpose or effect of a law is to impede the observance of one or all religions, the law is constitutionally invalid even though the burden may be characterized as being only indirect." *Id.* at 404 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

128. *Sherbert*, 374 U.S. at 407. The State was afraid these fraudulent claims would have the effect of diluting the unemployment compensation funds. *Id.* The State also found that fraudulent claims of inability to work on Saturdays for religious reasons would have a detrimental effect on employers because employers might have problems finding employees to work on Saturdays. *Id.*

129. *Id.* The Court also found it need not determine whether such a state interest is in fact compelling because the State did not raise such a claim in the state supreme court. *Id.*

130. *Id.* This is the "means" evaluation of the strict scrutiny analysis. *See Carey*, 431 U.S. at 686. Under the strict scrutiny standard, even if a state has a compelling interest in restricting an individual's fundamental rights, such state action will be held invalid if the state could achieve its interest through less restrictive means. *Id.*

131. *Sherbert*, 374 U.S. at 409. Another way to say the statute is unconstitutional, as applied to the appellant, is to say the appellant is granted an "exemption" from the statute. *Smith*, 494 U.S. at 896.

132. 494 U.S. 872 (1990).

Exercise Clause which was enumerated in *Sherbert*.[133] The issue in *Smith* was whether a state could enforce a criminal law, which prohibited the use of the drug peyote, against an individual where the enforcement of such criminal law would burden the individual's ability to act in accordance with his or her religion.[134] The Court in *Smith* refused to apply the strict scrutiny test used in *Sherbert*.[135] Instead, the *Smith* Court held that, under the Free Exercise Clause, a criminal law can be enforced against individuals even if such enforcement would burden the individual's ability to act in accordance with his or her religion as long as the criminal law is not targeted at suppressing religious practices.[136]

It may seem the *Smith* decision supports the contention that, outside the unemployment compensation setting, the strict scru-

133. *See id.* at 884 (refusing to apply the strict scrutiny standard to determine if the state action burdened the respondent's ability to act in accordance with their religion).

134. *Id.* at 874. In *Smith*, the respondents, members of the Native American Church, claimed it was part of their religion to ingest peyote. *Id.* at 872.

135. *Id.* at 884. The Court stated, "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is 'compelling,' [would permit] him, by virtue of his beliefs, 'to become a law unto himself' . . . ." *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 169 (1878)). Furthermore, the Court stated if it did apply the strict scrutiny standard, "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct" would "depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 885 (quoting Ling v. Northwest Indian Cemetery Ass'n., 485 U.S. 439, 451 (1988)). Moreover, in addition to *Smith*, the Supreme Court has also refused to apply the strict scrutiny standard used in *Sherbert* in other Free Exercise cases. *See Smith*, 494 U.S. at 883. However, the cases in which the Court has refused to apply the strict scrutiny standard were cases that dealt with a "particularized" governmental interest. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986). In *Goldman*, a Jewish Air Force captain claimed his right to freely exercise his religious beliefs was violated by an Air Force regulation which prohibited him from wearing his yarmulke while on duty. *Id.* at 505. Without applying the strict scrutiny standard, the Court held the Air Force regulation reasonably related to the military interest of uniformity. *Id.* at 510. The respondent, therefore, was not entitled to an exemption from the regulation. *Id.* The Court stressed that a different standard of review should be applied in the military context. *Id.* This is illustrated in the Court's statement, "[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507. The Court further stated, "[t]he Military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment." *Id.*

136. *See Smith*, 494 U.S. at 884.

tiny standard used in *Sherbert* no longer applies when a state burdens an individual's ability to act in accordance with his or her religion.[137] However, the *Smith* holding can be read to apply only to cases where there is a criminal prohibition against the particular conduct.[138] This is exemplified by the Court's statement that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[139] This statement strongly implies the Court may be willing to apply the strict scrutiny standard used in *Sherbert* in cases where there is no criminal prohibition against the particular conduct. Thus, under this reading of *Smith*, if a state burdens an individual's ability to act in accordance with his or her religion, and there is no criminal prohibition against such conduct, a court would apply the strict scrutiny standard used in *Sherbert*.[140]

Conditioning a woman's probation on her using Norplant may burden her ability to act in accordance with her religion because there are certain religions that strictly prohibit the use of contraceptives.[141] Thus, if the probationer follows one of these religions, conditioning her probation on her using Norplant will burden her ability to act in accordance with her religion because she will be forced to choose between the offer of probation and exercising her religious beliefs.[142] If she exercises her religious beliefs and refuses the Norplant probation condition, she will have to go to prison.[143] The threat of going to prison is a significant burden on

137. *See id.* This was the view the Supreme Court cases took before *Sherbert*. *See* Reynolds v. United States, 98 U.S. 145, 165 (1878).

138. *See Smith,* 494 U.S. at 876. The Supreme Court, in Church of Lukumi Babalu Aya, Inc. v. Hialeah, 113 S.Ct. 2217 (1993), did not resolve this issue.

139. *Smith*, 494 U.S. at 804.

140. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

141. For example, the Catholic religion prohibits the use of contraceptives. *See Aids Can't Justify Condoms, Pope Says*, CHI. TRIB., Nov. 13, 1988, at C25.

142. The fact that probation may be seen as a privilege does not diminish the fact a probation condition violates an individual's right to freely exercise his or her religion. *See Sherbert*, 374 U.S. at 404. The *Sherbert* Court held "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* Further, the Court stated "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment Freedoms." *Id.* at 405.

143. This is analogous to *Sherbert*, where, if the appellant exercised her religious beliefs, she would not be able to collect unemployment compensation. *Id.* at 404.

a woman's right to freely exercise her religious beliefs against contraceptives.

Since Norplant may burden a woman's ability to freely exercise her religious beliefs, the next question is what level of scrutiny will a court apply in evaluating the constitutionality of the Norplant probation condition. The level of scrutiny depends on whether a court applies *Smith* or *Sherbert*.[144] Because there is no criminal prohibition against a woman refusing to use contraceptives, *Smith* is inapplicable. Thus, under *Sherbert*, a state must show: (1) it has a compelling interest for conditioning a woman's probation on her using Norplant, and (2) Norplant is the least restrictive condition available to achieve the compelling interest.[145]

As previously noted, the state's compelling interest in conditioning a woman's probation on her using Norplant is to rehabilitate the child abuser and protect the public from future child

144. Under the *Sherbert* standard, if a state burdens an individual's ability to act in accordance with his or her religion, the state must show it has a compelling interest in doing so, and the means chosen to further the state's interest must be the least restrictive means available. *Sherbert*, 374 U.S. at 403. Under the *Smith* standard, a criminal law can be enforced against individuals even if such enforcement would burden the individual's ability to act in accordance with his or her religion as long as the criminal law was not targeted at suppressing religious practices. *Smith*, 494 U.S. at 884. The Supreme Court has not ruled on a case where a probationer has challenged a probation condition for violating his or her right to freedom of religion. A number of lower courts, however, have held probation conditions should not be "incompatible with [an individual's] freedom of religion." *See* State v. Evans, 796 P.2d 178 (Kan. Ct. App. 1990).

In *Evans*, the defendant was convicted of rape. *Id.* As part of his probation, the defendant was ordered to attend a specific church throughout the duration of his probation. *Id.* The defendant claimed the probation condition denied him the free exercise of his religious faith. *Id.* The court applied the strict scrutiny standard and held that a probation condition which forces a probationer to attend a specific church is invalid as an unconstitutional infringement on a probationers fundamental right to freely exercise his religion. *Id.* at 180.

Furthermore, in Jones v. Commonwealth, 38 S.E.2d 444, 448 (Va. 1946) the court held a probation condition which required a probationer to attend Sunday school and church was invalid for violating the probationer's right to freedom of religion. *Evans* and *Jones* based their holdings on the fact that there were less restrictive means available which could have adequately served the state's interest in rehabilitating the probationer and protecting the public. *See, e.g., Evans*, 769 P.2d at 180. Because this standard of review is the same one applied in *Sherbert,* both *Evans* and *Jones* lend support to applying the *Sherbert*, instead of the *Smith*, standard when a state conditions a woman's probation on her using Norplant.

145. *Sherbert*, 374 U.S. at 402.

abuse.[146] However, as previously noted, there is a less restrictive probation condition, counselling programs, that can achieve this interest. Therefore, because the Norplant probation condition fails the *Sherbert* test, Norplant is an unconstitutional probation condition as applied to followers of religions which prohibit the use of contraceptives.

D. *The Norplant Probation Condition Violates the Equal Protection Clause*

The Equal Protection Clause guarantees that people who are similarly situated will be treated similarly.[147] Courts employ three different standards of review in Equal Protection cases: (1) the "mere rationality" standard, (2) the "intermediate-level" scrutiny standard, and (3) the "strict scrutiny" standard.

The "mere rationality" standard is the lowest-level standard of review used in Equal Protection cases. Under this standard a court will hold a classification invalid if there is no rational relation between the classification and a legitimate legislative objective.[148] A court applies this standard when the classification is not based on a suspect class, or quasi-suspect class.[149]

The "intermediate-level" scrutiny standard is the next level of scrutiny a court applies in Equal Protection cases. This standard is more probing than the "mere rationality" standard. A court applies the "intermediate-level" scrutiny standard when a classifi-

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

147. U.S. CONST. amend. XIV.

148. Railway Express Agency v. New York, 336 U.S. 106 (1949). In *Railway Express*, a New York law prohibited individuals from placing advertising on vehicles, except that an owner of the vehicle could place advertising of his own product on his vehicle. *Id.* at 108. The purpose behind the law was to reduce traffic hazards. *Id.* at 109. The law was challenged on the basis that a vehicle with advertising of an owner's product is no less distracting than the same vehicle with advertising of other products. *Id.* The Court applied the "mere rationality" standard and upheld the New York law. *Id.* at 110. The Court first noted that reducing traffic hazards was a legitimate state interest. *Id.* The Court then found the means chosen were rationally related to reducing traffic hazards. *Id.* The Court stated "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Id.*

149. The Supreme Court has identified three quasi-suspect classes: gender, illegitimacy, and alienage. *See* JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 574 (4th ed. 1991). *See also* Mississippi University for Woman v. Hogan, 458 U.S. 718, 724 (1982); Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

cation is based on a quasi-suspect class, such as gender.[150] Under this standard, a classification based on gender violates the Equal Protection Clause unless the classification is substantially related to an important state interest.[151] A case in which the Supreme Court applied the "intermediate-level" scrutiny standard to a gender-based classification is *Craig v. Boren*.[152]

In *Craig*, an Oklahoma statute prohibited the sale of beer to males under the age of twenty-one, and to females under the age eighteen.[153] The statute was challenged as a violation of the Equal Protection Clause because the statute treated males and females differently. Oklahoma defended its statute by claiming the law promoted an important state interest, traffic safety.[154] It also claimed the classification was substantially related to the achievement of traffic safety because more males than females between the ages of eighteen and twenty-one were convicted of drunk driving.[155]

Although the Court found traffic safety was an important state interest, it struck down the statute because the classification was not substantially related to traffic safety.[156] The Court focused on the fact that the difference between the number of drunk driving convictions of males and females, ages eighteen to twenty, was minuscule.[157]

The most demanding standard of review which a court uses in Equal Protection cases is the strict scrutiny standard.[158] A court applies the strict scrutiny standard when a classification is based on a suspect class, or when the classification impairs the exercise of a fundamental right.[159] Under the strict scrutiny standard, the

150. *See* NOWAK & ROTUNDA, *supra* note 149, at 574.

151. *See* DAVID CRUMP et al., CASES AND MATERIALS ON CONSTITUTIONAL LAW 595 (1989).

152. 429 U.S. 190 (1976).

153. *Id.* at 192.

154. *Id.* at 199.

155. *Id.*

156. *Id.* at 200.

157. *Id.* at 201.

158. *See also* Palmore v. Sidoti, 466 U.S. 429 (1984).

159. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down a San Francisco law which prohibited individuals from operating hand laundries in wooden buildings, except with consent of the Board of Supervisors, because the law was being administered in a discriminatory fashion).

classification must be necessary to further a compelling state interest.[160]

Furthermore, in the criminal law setting, classifications based on wealth have triggered strict scrutiny. For example, *Griffin v. Illinois*[161] dealt with an Illinois law which stated if an individual was convicted of a crime, such individual could appeal only if he or she presented to the appellate court a transcript of proceedings in the lower court.[162] The transcript, however, cost money and the defendant in *Griffin* could not afford it.[163] Thus, he could not appeal his conviction.

The Supreme Court applied the strict scrutiny standard and struck down the Illinois law. The Court stated that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."[164] The Court further stated:

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.[165]

The reasoning applied in *Griffin* can be used to strike down the Norplant probation condition on Equal Protection grounds. If a defendant decides she would rather use Norplant than go to jail, she will have to pay for the Norplant device. The cost of the actual Norplant device is between three and four hundred dollars.[166] A defendant will also have to pay the cost of surgically inserting and removing the Norplant device.[167] Thus, unless the defendant can afford the cost of Norplant, she will have to go to prison. Just as the defendant in *Griffin* could not obtain an appeal because he could not afford a court transcript, a defendant who is poor (in the Norplant probation context) will not be able to receive probation because she will be unable to pay for Norplant. As a result, the judicial system is putting a price on freedom. Therefore, under

160. *Id.*
161. 351 U.S. 12 (1956).
162. *Id.* at 13.
163. *Id.*
164. *Id.* at 17.
165. *Id.* at 18-19 (citations omitted).
166. Reshma Menon, *The Double-Edged Sword of Norplant*, CHI. TRIB., Jan. 24, 1993, at 11.
167. *Id.*

Griffin, the Norplant probation condition violates the Equal Protection Clause.

The Norplant probation condition also violates the Equal Protection Clause because it affects similarly situated male and female defendants differently. For instance, when a male defendant is convicted of child abuse, he is offered a much less restrictive probation condition. A judge may place a male defendant convicted of child abuse on probation with the condition he does not come into contact with the child he abused, or may require the defendant to attend counselling programs. He is free to beget children during this probation period. However, a woman convicted of the same crime may be offered only the much more restrictive probation condition, Norplant, which eliminates her ability to procreate.

Since men and women, who are similarly situated, are being treated differently, a court would apply the "intermediate-level" scrutiny standard.[168] Under this standard, a classification based on gender violates the Equal Protection Clause unless the classification is substantially related to an important state interest.[169] A state will likely argue its important interest in implementing the Norplant probation condition is to reduce the number of child abuse cases. However, a probation scheme which treats male and female child abusers differently is not substantially related to the achievement of fewer child abuse cases.[170]

As this Article has established, Norplant should not be ordered as a condition of probation because such a condition violates the *Dominguez* test as being unreasonable as a condition of probation. Furthermore, a woman cannot give her informed consent to use Norplant as a condition of probation. Moreover, the Norplant probation condition violates a number of fundamental constitutional rights. As a result, an alternative probation condition is needed to rehabilitate child abusers and protect the public from future child abuse.

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168. *See* Craig v. Boren, 429 U.S. 190 (1976).

169. *See id.*

170. In fact, as previously stated, preventing an individual (whether male or female) from bearing or begetting children does nothing at all to prevent future child abuse. *See Pointer*, 199 Cal Rptr. at 365. *See also Skinner*, 316 U.S. at 541 (holding "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment"). *But see* Gudulig v. Alallo, 417 U.S. 484 (1974).

V. PROPOSAL

Instead of conditioning a child abuser's probation on her using Norplant, a judge sentencing a child abuser should require him or her to attend Parents Anonymous meetings. Parents Anonymous is a nonprofit group that offers free support programs to parents who feel overwhelmed with the stresses and pressures of parenting.[171] Parents meet, usually once a week for two hours, to talk about the stresses and problems of parenting.[172]

The goal of Parents Anonymous, unlike Norplant, is to end child abuse through rehabilitating the abuser. Parents Anonymous teaches parents how to properly discipline their children and helps parents develop coping skills.[173] Parents Anonymous also helps break the cycle of child abuse because the child abuser will learn how to become a better parent, and thus, her children will learn how to be good parents rather than learn to abuse their own children.[174] Furthermore, because these meetings receive such positive feedback from the parents who attend them, the probationer is likely to continue to attend these meetings after the probationary period. Thus, unlike Norplant, Parents Anonymous could become an on-going treatment for child abusers. Also, the child abuser's friend, husband or wife may get involved in the meetings, and thus, reinforce what the child abuser learns. This is an added bonus over Norplant. Moreover, the Parents Anonymous probation condition does not suffer the shortcomings which accompanies the use of Norplant as a condition of probation. The Parents Anonymous probation condition is a reasonable probation condition under the *Dominguez* test. There is no informed consent problem because Parents Anonymous does not involve the use of a medical treatment. This condition clearly does not violate a probationer's fundamental right to procreate because it does not interfere with a woman's decision whether to bear a child. It will not violate a probationer's fundamental right to be free from cruel and unusual punishment because forcing a convicted child abuser to attend Parents Anonymous meetings is not cruel and unusual. It will not violate a probationer's fundamental right to freely exer-

171. Judi Light, *Coping With Parental Burnout*, CHI. TRIB., Sept. 23, 1992, at C7.

172. *Id.*

173. Linda W.Y. Parrish, *Trying to be a Better Parent; Frustrated, or Fighting the Cycle of Abuse, Parents Seeking a More Positive Approach Find Help From Others Who Have Been There*, SEATTLE TIMES, Apr. 23, 1992, at F1.

174. *Id.*

cise her religion because such a condition does not burden the probationer's ability to act in accordance with his or her religious beliefs. Finally, it does not violate the Equal Protection Clause because attendance at these meetings is free, and men and women are not treated differently. Therefore, court-ordered Parents Anonymous meetings are clearly a more appropriate probation condition for child abusers than Norplant.