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# RETHINKING THE LAWS: NORPLANT AS A CONDITION OF PROBATION FOR FEMALE CHILD ABUSERS

*With improved methods of birth control and with increasing child abuse, is it now time to rethink what the laws should be?*<sup>1</sup>

by R. Feikema Karachuk\*

\* The author, a graduate of Yale College, has taken a leave of absence after two years of study at Tulane Law School to pursue a Master of Arts degree in history at the University of New Orleans. The author thanks Susan L. Krinsky, Kirsten H. Engel, Janet P. Peyton, Anthony S. Niedwicki, and Rebecca Tiger as well as Mimi C. Meng, Sylvia D.L. Wagner, and the staff of *In the Public Interest*. This article originated as a paper presented in the Bioethics Seminar led by Associate Dean Susan L. Krinsky at Tulane Law School in the spring of 1994. The author dedicates this article to D. Karachuk Feikema.

## INTRODUCTION

On December 10, 1990, the United States Food & Drug Administration announced its approval of a new contraceptive called Norplant.<sup>2</sup> Less than one month later, a California state trial judge ordered a woman convicted of child abuse to use Norplant as a condition of probation.<sup>3</sup>

This article examines some of the constitutional and ethical implications of the imposition of Norplant as a condition of probation for female child abusers.<sup>4</sup> Section I describes the nature and extent

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<sup>1</sup> Ruth Tucker, *Judge Orders Contraception*, L.A. TIMES, Mar. 15, 1991, at B6 (letter to the editor).

<sup>2</sup> Philip J. Hilts, *U.S. Approves Contraceptives Planted in Skin*, N.Y. TIMES, Dec. 11, 1990, at A1, B10.

<sup>3</sup> Mark A. Stein, *Judge Stirs Debate with Ordering of Birth Control*, L.A. TIMES, Jan. 10, 1991, at A3, A31.

<sup>4</sup> The constitutional issues examined in this paper are those that arise in any instance in which a court orders a woman convicted of child abuse to use Norplant as a condition of probation. Constitutional issues not examined in this paper are those that arise only as a result of the particular circumstances of individual cases. Constitutional issues not examined in this paper include the

of child abuse and child neglect in the United States today.<sup>5</sup> Section II describes the contraceptive Norplant and the advantages and risks associated with its use. Section III reviews the right to privacy and the right to procreation and discusses how the imposition of Norplant as a condition of probation for a female child abuser conflicts with them. Section IV reviews the rights to liberty, to bodily integrity, and to medical self-determination and discusses how the imposition of Norplant as a condition of probation for a female child abuser conflicts with them. Section V reviews the permissibility of state limitations on fundamental rights and argues that the imposition of Norplant as a condition of probation for a female child abuser is a permissible limitation. Section VI reviews the right to be free from cruel and unusual punishment and argues that the imposition of Norplant as a condition of probation for a female child abuser is not cruel and unusual punishment. Section VII reviews the right to equal protection of the laws where a state-created classification discriminates on the basis of gender and argues that the imposition of Norplant as a condition of probation for a female child abuser denies women equal protection of the laws. This article concludes that the imposition of Norplant as a condition of probation for female child abusers is not constitutionally permissible at the present time, but will become so in the near future, upon the development and approval of a birth-control method for men comparable to Norplant and the imposition of that comparable birth-control method for men as a condition of probation for male child abusers.

## I. Child Abuse: The Problem

The term "child abuse" encompasses any situation in which a child suffers serious harm by the act of a parent, guardian, or caretaker. The United States Congress, in The Child Abuse Prevention and Treatment Act, defined "child abuse and neglect" as "the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by a person who is responsible for the child's welfare, under circumstances which indicate that the

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right to free exercise of religion, and the right to equal protection of the laws where the imposition of Norplant discriminates on the basis of race or on the basis of wealth.

<sup>5</sup> Hereafter, the term "child abuse" will subsume the term "child neglect." See *infra* notes 6-12 and accompanying text.

child's health or welfare is harmed or threatened thereby . . . ."<sup>6</sup>

Cases of child abuse can be separated into four categories: physical abuse, neglect, sexual abuse, and psychological abuse.<sup>7</sup> The term "physical abuse" refers to the infliction of physical injury upon a child through such methods as beating, punching, kicking, bruising, and burning.<sup>8</sup> The term "neglect" refers to the failure to meet the basic physical, emotional, and educational needs of a child.<sup>9</sup> The term "sexual abuse" refers to the sexual exploitation of a child through such acts as fondling, intercourse, incest, and sodomy.<sup>10</sup> The term "psychological abuse" refers to the infliction of any injury that "cause[s] or could potentially cause . . ." a child to suffer "serious behavioral, emotional, cognitive, or mental disorders . . . ."<sup>11</sup> Almost all cases of child abuse incorporate more than one category of maltreatment.<sup>12</sup>

Child abuse is a problem of horrific proportions in the United States today. An estimated 2,936,000 children were reported to have been abused in this country in 1992.<sup>13</sup> Forty-five percent of those children suffered primarily neglect.<sup>14</sup> Twenty-seven percent suffered primarily physical abuse.<sup>15</sup> Seventeen percent suffered primarily

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<sup>6</sup> 42 U.S.C. § 5106g(4) (1994).

<sup>7</sup> R. BARRI FLOWERS, *THE VICTIMIZATION AND EXPLOITATION OF WOMEN AND CHILDREN: A STUDY OF PHYSICAL, MENTAL, AND SEXUAL MALTREATMENT IN THE UNITED STATES* 6 (1994).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 6-7.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.*

<sup>13</sup> Karen McCurdy & Deborah Daro, The National Committee for Prevention of Child Abuse, *Child Maltreatment: A National Survey of Reports and Fatalities*, 9 J. INTERPERSONAL VIOLENCE 75, 77-81 (Mar. 1994).

<sup>14</sup> *Id.* at 84.

<sup>15</sup> *Id.*

sexual abuse.<sup>16</sup> Seven percent suffered primarily psychological abuse.<sup>17</sup> An estimated 1,261 of the nearly three-million children abused in the United States in 1992 died as a result of maltreatment.<sup>18</sup> "A conservative estimate is that reabuse occurs in at least half of all cases."<sup>19</sup>

Child abuse is a symptom of a parent's inability to endure the pressures of life. "[A]busive attacks tend to be triggered by stress and frustration which may cause reduction or loss of self control."<sup>20</sup> The stressors that incite a parent to abuse or neglect her child are varied. Child abuse often results from "an intergenerational cycle . . ." in which a child who suffers abuse becomes a parent who inflicts abuse.<sup>21</sup> In fact, "[m]ost child abusers were themselves the victims of abuse."<sup>22</sup> A parent's dependence on alcohol or drugs also contributes to child abuse. "In most cases of maltreatment, alcohol or drugs have been shown to be a factor."<sup>23</sup> A family's economic distress increases the likelihood of child abuse. Children from low-income families face significantly higher rates of victimization than children from higher-income families.<sup>24</sup> A family's social isolation is another risk factor associated with child abuse.<sup>25</sup> The lack of personal and physical support denies to parents and children alike access to

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 86.

<sup>19</sup> Michael S. Wald & Sophia Cohen, *Preventing Child Abuse -- What Will It Take?*, 20 FAM. L.Q. 281 n.1 (1986-87) (citing Magura, *Are Services to Prevent Foster Care Effective*, 3 CHILDREN AND YOUTH SERVICES REV. 193 (1981)).

<sup>20</sup> David G. Gil, *Unraveling Child Abuse*, in CHILD ABUSE AND VIOLENCE 12 (David G. Gil ed., 1979).

<sup>21</sup> FLOWERS, *supra* note 7, at 17.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 45.

resources that could alleviate some of their problems.<sup>26</sup>

Despite the variety of contributory stressors, child abuse is ultimately viewed as a symptom of a parent's inability to endure the pressures of parenthood. Rearing children induces stress. Pregnancy, childbirth, and parenting are all highly stressful undertakings. The risk of child abuse increases as the number of children for which a parent is responsible increases. The average size of families in which abuse takes place "substantially exceeds the national average."<sup>27</sup> Abused children come from families with four or more children approximately twice as often as the population as a whole.<sup>28</sup> "Mothers with large families[,] . . . who at the same time either (1) were not employed fulltime, (2) had a traditional gender role orientation, or (3) received little help from the father in child caregiving responsibilities, would seem to be prime candidates for a high level of frustration or stress . . . . [S]uch mothers [are] substantially more likely to resort to severe physical violence toward their children than [are] other mothers."<sup>29</sup>

Child abuse, a symptom of the inability of parents to cope with the stress of life in general and of parenthood in particular, can be curtailed through the reduction or elimination of such stress. A fundamental part of the process of stress reduction and elimination is the prevention of additional stress. Additional stress includes additional children.

## II. Norplant: A Part of the Solution?

Norplant, a contraceptive device available only by physician's prescription., consists of six silicone capsules, each the size of a

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<sup>26</sup> VERNON R. WIEHE, *WORKING WITH CHILD ABUSE AND NEGLECT* 40 (1992).

<sup>27</sup> Richard J. Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, 43 HARV. EDUC. REV. 574 (1973).

<sup>28</sup> DAVID G. GIL, *VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES* 110 (1970).

<sup>29</sup> Boyd C. Rollins & Yaw Oheneba-Sakyi, *Physical Violence in Utah Households*, 5 J. OF FAM. VIOLENCE 301, 308 (1990) ("The rate of severe physical violence toward children was about twice as high . . . when four or more children were in the home . . .").

matchstick, which are implanted under the skin of a woman's upper arm in a minor surgical procedure under local anesthetic.<sup>30</sup> The capsules, which can be felt and sometimes seen through the skin, contain levonorgestrel, a synthetic form of the hormone progestin.<sup>31</sup> The levonorgestrel diffuses into the bloodstream continuously over a period of about five years, achieving contraception throughout that time by suppressing ovulation, by thickening cervical mucus to impede sperm motility and penetration into the uterus, and by reducing the thickness of the endometrial lining of the uterus to prevent implantation of any fertilized eggs.<sup>32</sup>

As a contraceptive, Norplant carries a number of advantages. First, it is highly effective. Pregnancy rates associated with the use of contraceptive methods indicate that during the first year of use, Norplant is twice as effective a form of contraception as female sterilization.<sup>33</sup> Second, Norplant is very convenient. After implantation of the capsules, a woman and her sexual partner do not need to take any further measures to prevent pregnancy for up to five years.<sup>34</sup> Third, Norplant minimizes the use of potentially harmful hormones. Norplant contains only one-quarter to one-half of the progestin in oral contraceptives and none of the estrogen.<sup>35</sup> Because both of these hormones prompt adverse side effects, any reduction in their use is advantageous.<sup>36</sup> Fourth, Norplant is easily reversible. Removal of the capsules, again through minor surgery,<sup>37</sup> quickly

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<sup>30</sup> ROBERT A. HATCHER ET AL., *CONTRACEPTIVE TECHNOLOGY*, 1990-1992, at 303 (15th ed. 1990).

<sup>31</sup> Jan Flattum-Riemers, M.D., *Norplant: A New Contraceptive*, 44 AM. FAM. PHYSICIAN 103, 110, 103 (July 1991).

<sup>32</sup> *Id.* at 103 (citations omitted).

<sup>33</sup> Physicians' Desk Reference 2565 (48th ed. 1994).

<sup>34</sup> Hatcher et al., *supra* note 30, at 306.

<sup>35</sup> Flattum-Riemers, *supra* note 31, at 103.

<sup>36</sup> *Id.*

<sup>37</sup> Physician's Desk Reference *supra* note 33, at 2568. While thirteen percent of Norplant implant removals involve some difficulties, "[l]ess than half of these removal difficulties...cause[] inconvenience to the patient." *Id.* However, in September of 1993, an unidentified woman, claiming that she suffered injury from the removal of Norplant capsules, filed suit in Cook County,

results in the restoration of fertility.<sup>38</sup> Effective, convenient, relatively safe, and reversible, Norplant has been hailed as “the dream method” of contraception.<sup>39</sup>

Norplant, however, is not the dream method of contraception for all women. Some women are not able to use Norplant safely. Due to the risks associated with hormonal therapy in general, Norplant is contraindicated for women having hypertension, diabetes, breast cancer, cardiovascular disease, liver dysfunction, or thrombotic disease.<sup>40</sup> Norplant might also be inadvisable for women with histories of depression, migraine or other headaches, high blood pressure, elevated cholesterol or triglycerides, epilepsy, gallbladder disease, or kidney disease.<sup>41</sup>

Women who do choose to use Norplant are likely to suffer unpleasant and sometimes serious adverse side effects, the most common of which is excessive or irregular menstrual bleeding.<sup>42</sup> Other common side effects include acne, dermatitis, breast tenderness, dizziness, headache, nervousness, nausea, abnormal hair growth, hair loss, and weight gain.<sup>43</sup> Less common complaints include breast discharge, inflammation of the cervix, hypertension, itching, depression, mood change, general malaise, and weight loss.<sup>44</sup>

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Illinois, against Wyeth-Ayerst Laboratories, the distributor of the Norplant device in the United States. In June of 1994, that suit was certified as a class action. Tamar Lewin, ‘*Dream*’ Contraceptive’s Nightmare, N.Y. TIMES, July 8, 1994, at A10.

<sup>38</sup> Flattum-Riemers, *supra* note 31, at 104. “Of women attempting pregnancy after removal of the device, 20 percent are pregnant the first month, 49 percent are pregnant the fourth month, 73 percent are pregnant after the sixth month, and 86 percent are pregnant by the end of the first year.” *Id.* (citations omitted).

<sup>39</sup> Daniel Callahan, M.D. (Director, The Hastings Center), *quoted in* Hilts, *supra* note 2, at A1.

<sup>40</sup> *Requirements or Incentives by Government for the Use of Long-acting Contraceptives*, 267 JAMA 1818 (1992) [hereinafter *Requirements*].

<sup>41</sup> HATCHER ET AL., *supra* note 30, at 308.

<sup>42</sup> *Id.* at 309.

<sup>43</sup> *Id.* at 313.

<sup>44</sup> *Id.* at 313-14.



Ninety-five percent of women using Norplant report suffering at least one side effect.<sup>45</sup> Sixty-one percent suffer two or more.<sup>46</sup> Fifteen percent discontinue their use of Norplant during the first year due to adverse experiences.<sup>47</sup> Twenty-five percent discontinue their use by the end of the contraceptive's five-year period of effectiveness due to menstrual irregularities alone.<sup>48</sup> All told, seventy percent of women using Norplant discontinue their use by the end of the contraceptive's five-year period of effectiveness.<sup>49</sup> While the short-term side effects of Norplant are well known, the long-term risks are not.<sup>50</sup> The scientific data necessary for understanding and appreciating the long-term risks associated with the use of Norplant is simply not yet available.<sup>51</sup>

Despite Norplant's adverse side effects and its unknown risks, its users find the device a highly satisfactory form of contraception. Eighty-eight percent of women currently using Norplant claim to be "very satisfied . . ." with the device.<sup>52</sup> Seventy-four percent indicate that they would use Norplant again in the future.<sup>53</sup> Even women who discontinue their use of Norplant express great satisfaction with the device. Sixty-one percent of former Norplant users indicate that they would use Norplant again in the future.<sup>54</sup>

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<sup>45</sup> Philip D. Darney et al., *Acceptance and Perceptions of Norplant among Users in San Francisco, USA*, 21 *STUD. FAM. PLAN.* 152, 156 (1990).

<sup>46</sup> *Id.* at 157.

<sup>47</sup> *PHYSICIAN'S DESK REFERENCE*, *supra* note 36, at 2565.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* This figure should be viewed critically, as it includes not only those women who discontinue their use of Norplant due to adverse experiences, but also those who do so for other reasons, such as the desire to become pregnant.

<sup>50</sup> *Requirements*, *supra* note 41, at 1818.

<sup>51</sup> *Id.*

<sup>52</sup> Darney et al., *supra* note 42, at 157.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 158.

### III. The Right to Privacy and the Right to Procreation

The United States Supreme Court has held that the United States Constitution guarantees to individuals a right to privacy.<sup>55</sup> In *Griswold v. Connecticut*,<sup>56</sup> the Court observed that the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>57</sup> Those guarantees and their penumbras overlap to create “zones of privacy,” which may be impaired by the state only in accordance with the requirements of the Due Process Clause of the Fourteenth Amendment.<sup>58</sup>

The right to privacy protects the freedom of individuals to make personal decisions.<sup>59</sup> Personal decisions require protection from unjustified state interference because they are “basic to individual dignity and autonomy.”<sup>60</sup> Among the personal decisions protected under the right to privacy are those concerning contraception, abortion, and procreation. In *Griswold v. Connecticut*, the Supreme Court held that the right to privacy encompasses a married couple's decision to use contraception.<sup>61</sup> In *Eisenstadt v. Baird*, the Court held that the right to privacy protects a single person's decision to use contraception as well.<sup>62</sup> In *Roe v. Wade*, the Court held that the right to privacy extends to a woman's decision to

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<sup>55</sup> *Griswold v. Conn.*, 381 U.S. 479, 486 (1965). *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). This right to privacy is not explicitly stated in the constitution. Rather, it has been derived by the court from the First, Fourth, Ninth and Fourteenth Amendments. *U.S. Const.* amend. I, IV, IX and XIV.

<sup>56</sup> *Griswold*, 381 U.S. at 486 (1965).

<sup>57</sup> *Id.* at 484.

<sup>58</sup> *Id.* at 484.

<sup>59</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977).

<sup>60</sup> *Thornburgh*, 476 U.S. at 772.

<sup>61</sup> *Griswold*, 381 U.S. at 485.

<sup>62</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).

abort a pregnancy.<sup>63</sup> In protecting an individual's freedom to prevent and to terminate a pregnancy, the right to privacy encompasses the right to procreation.<sup>64</sup> If an individual may choose *not* to conceive and bear a child, then the individual may also choose *to* conceive and bear a child.<sup>65</sup> As the *Eisenstadt* Court declared, "If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>66</sup>

The imposition of Norplant as a condition of probation for a female child abuser conflicts with both the right to privacy and the right to procreation. When a judge orders a woman to use Norplant, the judge usurps the woman's freedom to make personal decisions regarding contraception and procreation. Opponents of the imposition of Norplant insist that such a "judge . . . gets an 'F' for abusing the woman's most basic human right."<sup>67</sup> They emphasize that "[c]hildbearing is an intimate decision that the state has no business making."<sup>68</sup> Opponents of the imposition of Norplant also argue that no one is better situated to decide for an individual whether to use contraceptives and whether to procreate than the individual herself. "As worthwhile as it may be for this woman to avoid childbirth for five years and maybe longer, who is a mere mortal to say so?"<sup>69</sup> For opponents of the imposition of Norplant, condoning its use as a condition of probation propels the right to privacy and the right to

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<sup>63</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973). A woman's right to abort a pregnancy continues only until the fetus is viable. *Id.* at 163.

<sup>64</sup> *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977).

<sup>65</sup> Elizabeth Wylie, *Birth Control for Child Abusers: Statutory Concerns and Privacy Issues in Court-Enforced Contraception*, 12 REV. OF LITIG. 489, 508 (Spring 1993).

<sup>66</sup> *Eisenstadt*, 405 U.S. at 453 (emphasis omitted).

<sup>67</sup> Suzanne Fields, *The Birth Injunction: Frustration from the Bench*, WASH. TIMES, Jan. 10, 1991, at G1 (commentary).

<sup>68</sup> Howard Broadman, *Prophylactic Punishment: It's OK to Jail People or Fine Them, but Ordering Birth Control Implants Goes Too Far*, NEWSDAY, Jan. 11, 1991, at 14 (editorial).

<sup>69</sup> Fields, *supra* note 67, at G1.

procreation down a slippery slope. "If abusive mothers are targets today, will teenagers and welfare recipients be added to the list tomorrow? The specter of judges . . . dictating the circumstances of pregnancy gives ominous new meaning to the term birth control."<sup>70</sup>

#### **IV. The Right to Liberty, the Right to Bodily Integrity, and the Right to Medical Self-Determination**

The Fourteenth Amendment of the Constitution guarantees to individuals the right to liberty.<sup>71</sup> The right to liberty encompasses "the right of an individual [to have] his person be held inviolable."<sup>72</sup> The inviolability of the person, also known as the right to bodily integrity, is defined in the common law as "the right of every individual to the possession and control of his own person, free from all restraint or interference of others."<sup>73</sup> In *Cruzan v. Director, Missouri Department of Health*, the Court observed that "[t]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."<sup>74</sup> Also a common-law doctrine, the right to make an informed consent requires a physician to provide a patient with all available information regarding a proposed course of treatment, including the risks and the alternatives, so that the patient can make an informed consent to undergo the treatment.<sup>75</sup> The *Cruzan* Court remarked that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is to refuse

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<sup>70</sup> Marilyn Gardner, *Birth Control by Law*, CHRISTIAN SCI. MONITOR, Jan. 15, 1991, at 15 (commentary).

<sup>71</sup> "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV § 1.

<sup>72</sup> *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (plurality opinion citing *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

<sup>73</sup> *Cruzan*, 497 U.S. at 269 (quoting *Union Pacific Ry, Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>74</sup> *Cruzan*, 497 U.S. at 269.

<sup>75</sup> Janet F. Ginzberg, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 1002 n.126 (1992) (citing *In re Storar*, 420 N.E.2d 64, 70 (N.Y. 1981)).

treatment.”<sup>76</sup> The Court endorsed “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.”<sup>77</sup>

The imposition of Norplant as a condition of probation for a female child abuser is contrary to the right to bodily integrity. A woman who receives Norplant under a judicial order suffers the violation of her person twice. First, the implant itself violates her physical person. The implantation procedure requires surgery that, although minor, is invasive nonetheless. Physical violation continues throughout the time during which the woman is forced to carry Norplant inside her body. It ends only after a second surgical procedure, again minor but invasive nonetheless, to remove the implant. In her concurring opinion in *Cruzan*, Justice O'Connor noted, “Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”<sup>78</sup> Second, the imposition of Norplant violates the woman's sovereignty over her own person. A judge who orders a woman to use Norplant usurps the woman's right to control her own body. Opponents of the imposition of Norplant worry that, “[w]hen the long arm of the law reaches as far as the womb, forbidding pregnancy, the concept of autonomy over one's body is dangerously compromised.”<sup>79</sup>

The imposition of Norplant as a condition of probation for a female child abuser is also contrary to the right to medical self-determination. Norplant, like all medical treatments, has both benefits and risks, which different individuals weigh differently.<sup>80</sup> Opponents of the imposition of Norplant insist that, because the individual must bear the burden of the risks of Norplant, the decision whether to use the contraceptive ought to be hers alone.<sup>81</sup> “Norplant should be prescribed pursuant only to a woman's informed choice

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<sup>76</sup> *Cruzan*, 497 U.S. at 270.

<sup>77</sup> *Id.* at 278.

<sup>78</sup> *Id.* at 287 (O'CONNOR, J., concurring).

<sup>79</sup> Gardner, *supra* note 70, at 15.

<sup>80</sup> *Requirements*, *supra* note 40, at 1818.

<sup>81</sup> *Id.*

after consultation with her physician.”<sup>82</sup> A judge's order requiring a woman to use Norplant effectively pre-empts the woman's right to make an informed choice regarding medical treatment. Opponents of the imposition of Norplant charge that such an order “flatly ignores [the woman's] constitutional right to refuse physically intrusive medical treatment, especially where . . . the treatment may actually harm her health.”<sup>83</sup>

## V. The Individual's Fundamental Rights versus the State's Compelling Interests

Opponents of the imposition of Norplant as a condition of probation for a female child abuser are correct in noting that the imposition of Norplant conflicts with the woman's right to privacy, procreation, liberty, bodily integrity, and medical self-determination. However, the Supreme Court has repeatedly cautioned that the fundamental rights of individuals under the Constitution are not absolute. The right to privacy, the right to procreation, the right to liberty, the right to bodily integrity, and the right to medical self-determination all implicate the right to liberty guaranteed by the Fourteenth Amendment. All may thus be limited in accordance with the requirements of the Due Process Clause of the Fourteenth Amendment. In *Cruzan v. Director, Missouri Department of Health*, the Court explained that “determining that a person has a ‘liberty interest’ under the due process clause does not end the inquiry; ‘whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.’”<sup>84</sup> The balancing test to determine whether an individual's fundamental rights may be impaired by the state was described in *Roe v. Wade*: “[R]egulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and . . . [a state action] must be narrowly drawn to express only the legitimate state

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<sup>82</sup> Wylie, *supra* note 65, at 493.

<sup>83</sup> Rachel N. Pine, *Don't Force Birth Control on Women*, USA TODAY, Feb. 4, 1991, at 8A (commentary).

<sup>84</sup> *Cruzan*, 497 U.S. at 279 (citing *Youngberg v. Romero*, 457 U.S. 307, 321 (1982)).

interests at stake.”<sup>85</sup> If the state's goals can be achieved through other means which do not impair or are less restrictive of the individual's fundamental rights, the state action will not be upheld.<sup>86</sup> Such other means must be currently available and “obviously workable.”<sup>87</sup> They must promise to advance the state's interests as effectively as the challenged state action.<sup>88</sup> A state action which impairs an individual's fundamental rights must follow a compelling state interest through means least restrictive of those rights.

With regard to the judicial imposition of a condition of probation, the compelling interests of the state embrace the rehabilitation of the offender and the protection of the public. In *Frank v. United States*, the Supreme Court noted that “probation's basic purpose [is to] provid[e] ‘an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement’ . . .”<sup>89</sup> In *Griffin v. Wisconsin*, the Court confirmed that probation “restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large.”<sup>90</sup>

“The ultimate goal of rehabilitation in a child abuse case” -- and the state's compelling interest -- “is to improve the woman's mothering skills.”<sup>91</sup> The imposition of Norplant as a condition of probation for a female child abuser does advance the rehabilitation of the offender. Opponents of the imposition of Norplant are correct in

<sup>85</sup> *Roe*, 410 U.S. at 155 (citing *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Griswold*, 381 U.S. at 485; *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Conn.*, 310 U.S. 296, 307-08 (1940); *Eisenstadt*, 405 U.S. at 460, 463-64).

<sup>86</sup> See *Schneider v. State*, 308 U.S. 147 (1939).

<sup>87</sup> *Maine v. Taylor*, 477 U.S. 131, 143 n.15 (1986).

<sup>88</sup> *Id.* at 146 (citing *Hughes v. Okla.*, 441 U.S. 322, 336 (1979)).

<sup>89</sup> *Frank v. United States*, 395 U.S. 147, 157-58 (1969) (quoting *Roberts v. United States*, 320 U.S. 264, 272 (1943)).

<sup>90</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

<sup>91</sup> Julie Mertus & Simon Heller, *Norplant Meets the New Eugenacists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS. U. PUB. L. REV. 359, 373 (1992).

noting that "Norplant prevents pregnancy, not abusive behavior."<sup>92</sup> They are also correct in noting that "there is simply no indication that a woman with Norplant implanted in her arm will become a better mother as a consequence of using Norplant."<sup>93</sup> They are wrong, however, in urging that "[t]emporary sterilization [*sic*] cannot be justified by the mere speculation by the Court that[,] if [a child abuser] does not have children for [the duration of her probation], she would handle family stress better and would be less likely to improperly discipline her children."<sup>94</sup> The imposition of Norplant as a condition of probation for a female child abuser "buy[s] time."<sup>95</sup> By preventing a child abuser from becoming pregnant during her probation, Norplant postpones her suffering the additional stresses that come with pregnancy, with childbirth, and with responsibility for another child. With this respite, "a convicted child abuser stands a better chance of confronting her destructive tendencies and learning to be a better parent if she does not simultaneously have to cope with the emotional and financial stresses of additional children."<sup>96</sup> A reprieve from "the pressures of parenthood may allow the abusive parent[] time to mature and resolve chemical dependence."<sup>97</sup> It might also "give the mother a better chance to profit from her counseling and to rebuild a wholesome relationship with her present children."<sup>98</sup> The imposition of Norplant as a condition of probation for a female child abuser serves the state's compelling interest in the rehabilitation of the offender by affording the child abuser time to learn how to bear

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<sup>92</sup> Beverly F. Baker, *Sentenced to Norplant: Woman Convicted of Child Abuse Sentenced to Have Contraceptive Implanted for Three Years*, NETWORK NEWS (National Women's Health Network), Jan. 1991, at 6 (letter to the editor).

<sup>93</sup> Mertus & Heller, *supra* note 91, at 373.

<sup>94</sup> Maharukh (Monica) Mubarak, *The Constitutionality of Court Imposed Contraception as a Condition of Probation*, 14 CRIM. JUST. J. 385, 391 (Fall 1992).

<sup>95</sup> Tucker, *supra* note 1, at B6.

<sup>96</sup> Stacey L. Arthur, *The Norplant Prescription: Birth Control, Women Control, or Crime Control?* 40 UCLA L. REV. 1, 38 (1992).

<sup>97</sup> Thomas E. Bartrum, *Birth Control as a Condition of Probation -- A New Weapon in the War against Child Abuse*, 80 KY. L.J. 1037, 1051 (1991-1992).

<sup>98</sup> Tucker, *supra* note 1, at B6.



the stresses of parenthood and of life.

A condition of probation can also be justified if it serves the state's compelling interest in the protection of the public. The portion of the public most in need of protection from child abusers is the children who are abused. As noted above, an estimated 2,936,000 children were reported to have been abused in this country in 1992.<sup>99</sup> An estimated 1,261 of those children died as a result of maltreatment.<sup>100</sup> "A conservative estimate ..." of the rate of recidivism has reabuse occurring "in at least half of all cases."<sup>101</sup> The Supreme Court has upheld the broad exercise of state authority when that authority is wielded to protect children.<sup>102</sup> "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given the opportunities for growth into free and independent well-developed men and citizens."<sup>103</sup>

The imposition of Norplant as a condition of probation for a female child abuser serves the state's compelling interest in the protection of children. Opponents of the imposition of Norplant contend that Norplant fails to protect a child abuser's existing children from continuing abuse. "Preventing [a child abuser] from having additional children does absolutely nothing to prevent her from abusing the . . . children she has already conceived, and it does nothing to build a safe home for those children with their mother."<sup>104</sup> However, as argued above, the imposition of Norplant as a condition of probation for a female child abuser "buy[s] time."<sup>105</sup> By preventing a child abuser from becoming pregnant during her probation, Norplant assures the child abuser's existing children that their parent's efforts to learn how to bear the stresses of parenthood and of life will not be disrupted by the additional stresses of

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<sup>99</sup> McCurdy & Daro, *supra* note 13, at 77-81.

<sup>100</sup> *Id.* at 86.

<sup>101</sup> Wald & Cohen, *supra* note 19, at 281 n.1.

<sup>102</sup> *See, e.g.,* Prince v. Mass., 321 U.S. 158 (1944).

<sup>103</sup> *Id.* at 165.

<sup>104</sup> Helen R. Neuborne, *In the Norplant Case, Good Intentions Make Bad Law*, L.A. TIMES, Mar. 3, 1991, at M1 (commentary).

<sup>105</sup> Tucker, *supra* note 1, at B6.

pregnancy, of childbirth, and of responsibility for another child. The imposition of Norplant as a condition of probation for a female child abuser serves the state's compelling interest in the protection of the child abuser's existing children.

Opponents of the imposition of Norplant as a condition of probation for a female child abuser argue that the state's interest in the protection of future children cannot be considered compelling.<sup>106</sup> In *Roe v. Wade*, the Supreme Court held,

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.<sup>107</sup>

A future child who has not even been conceived, like a fetus that has not reached the point of viability, is not recognized as having "the capability of meaningful life outside the mother's womb."<sup>108</sup> The protection of unconceived children is therefore not a compelling state interest and may not be relied on to justify the imposition of Norplant as a condition of probation for a child abuser.<sup>109</sup>

However, existing law offers some support for the proposition that the state may act to protect unconceived children.<sup>110</sup> In fact, the state may take "the extreme course of banning future children as a means of protecting them."<sup>111</sup> The sterilization of mentally deficient adults is permitted "where such mental deficiency is hereditary and

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<sup>106</sup> Wylie, *supra* note 65, at 510.

<sup>107</sup> *Roe*, 410 U.S. at 163.

<sup>108</sup> *Id.*

<sup>109</sup> Wylie, *supra* note 65, at 510.

<sup>110</sup> Arthur, *supra* note 96, at 47.

<sup>111</sup> Pine, *supra* note 83, at 8A.

would probably be inherited by children . . .” born to such adults.<sup>112</sup> Incest is prohibited to “promote the well-being of the unborn by preventing the biological mutations that might occur in the issue of incestuous relationships.”<sup>113</sup> Surrogacy contracts are prohibited to prevent unconceived children from becoming victims of child bartering.<sup>114</sup> Children who might be born with genetic defects or whose births would result from surrogacy contracts<sup>115</sup> are “endangered by their very conception. [I]t is impossible to protect children from the dangers of genetic defects or child bartering once they are conceived . . .”<sup>116</sup> Therefore, the state may act to prevent the conception of children who might be born with genetic defects or whose births would result from surrogacy contracts.<sup>117</sup> In contrast, children whose parents might abuse them are not endangered as a direct consequence of their conception. Such children can be protected from child abuse after they are conceived.<sup>118</sup> Therefore, the

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<sup>112</sup> *In re Cavitt*, 157 N.W.2d 171, 174 (Neb. 1968), *appeal dismissed*, 396 U.S. 996 (1970) (citing *In re Clayton*, 234 N.W. 630 (1931)); *Buck v. Bell*, 274 U.S. 200 (1927). *But see*, *Matter of Truesdale*, 313 N.C. 421, 329 S.E.2d 630 (1985) (upholding decision on appeal that the state had not met the requisite burden of proof that the mentally retarded subject of the sterilization procedure was likely to engage in sexual activity that would result in a pregnancy).

<sup>113</sup> Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 291 (1982) (citing *Bailey & McCabe, Reforming the Law of Incest*, CRIM. L. REV. 749, 757-58 (1979)); *Developments in the Law -- The Family*, 93 HARV. L. REV. 1156, 1265-66 (1980).

<sup>114</sup> Hutton Brown et al., *Special Project, Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 653-654 (1986).

<sup>115</sup> Surrogacy contracts are agreements made for the artificial insemination of a woman -- the surrogate mother -- by the semen of another woman's husband -- the birth father. Subsequently, parental rights are assigned to the birth father and his wife. The court has invalidated surrogacy contracts where the surrogate has received money and thus, in essence sold her parental rights to her child. *Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227. *See also*, BLACK'S LAW DICTIONARY 1445 (6th ed. 1990).

<sup>116</sup> Wylie, *supra* note 65, at 511.

<sup>117</sup> Arthur, *supra* note 96, at 47.

<sup>118</sup> *See infra* notes 120-121 and accompanying text.

state may not act to prevent the conception of children whose parents might abuse them. With regard to the imposition of Norplant as a condition of probation for a female child abuser, the state's interest in the protection of future children is not compelling.

But, as argued above, the state's interests in the rehabilitation of a child abuser and the protection of existing children are compelling. The question then is whether the imposition of Norplant as a condition of probation for a female child abuser is narrowly drawn so as to serve only those interests. Opponents of the imposition of Norplant assert that the rehabilitation of a female child abuser and the protection of the child abuser's existing children can be achieved through conditions of probation less restrictive of the child abuser's fundamental rights than the imposition of Norplant.<sup>119</sup>

Less restrictive steps that would actually further rehabilitation include: forbidding a woman from disciplining her children by striking them, counseling, parenting classes, prenatal care, job assistance, and monitoring family relationships, including, if necessary, periodic examinations of the children by a physician or social worker trained in identifying child abuse.<sup>120</sup>

Opponents of the imposition of Norplant have gone so far as to argue that the complete denial of a child abuser's parental rights is less restrictive than the imposition of Norplant. "[A] less restrictive means of achieving the state's interests in rehabilitating [a child abuser] and protecting the public would be to deny [the child abuser] custody of existing and future children rather than imposing mandatory birth control as a probationary condition."<sup>121</sup> That such traditional conditions of probation restrict a child abuser's fundamental rights less than the imposition of Norplant is a proposition open to argument. Parenting classes, counseling, prohibition of corporal punishment, monitoring of family

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<sup>119</sup> Mubaraki, *supra* note 94, at 385.

<sup>120</sup> Mertus & Heller, *supra* note 91, at 376.

<sup>121</sup> Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation* 78 IOWA L. REV. 779, 807 (Mar. 1993).

relationships, physical examinations of children, and especially termination of custody all infringe upon an individual's right to parent, another of the many incarnations of the right to privacy.<sup>122</sup> All usurp the freedom of the individual to make personal decisions regarding child rearing. All oblige the individual -- and her children -- to suffer invasions of "the private realm of family life."<sup>123</sup> The enforcement of such traditional conditions of probation for a child abuser requires probation officers, social workers, and other agents of the state to repeatedly intrude in the private affairs of the individual and of the family. Enforcement of the use of Norplant, on the other hand, requires less frequent, less intrusive interference with the individual's right to privacy. A probation officer would confirm the continuing use of Norplant by a probationer during the regularly-scheduled, state-mandated meetings between the probation officer and the probationer. The probation "officer . . . just ha[s] to look for a telltale little bulge on [the probationer's] arm."<sup>124</sup> In some ways, traditional conditions of probation are more restrictive of a female child abuser's fundamental rights than the imposition of Norplant.

Even assuming that traditional conditions of probation do restrict a child abuser's fundamental rights less than the imposition of Norplant, the imposition of Norplant as a condition of probation for a female child abuser survives constitutional scrutiny. Traditional conditions of probation fail to achieve their intended ends with alarming frequency. The high rate of recidivism in cases of child abuse demonstrates that traditional conditions of probation cannot be relied upon to effect the rehabilitation of a child abuser and the protection of a child abuser's existing children. "[I]t is ludicrous to think that our present methods are adequate to protect children from

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<sup>122</sup> The right to parent has been recognized by the Supreme Court. In *Prince v. Massachusetts*, the Court confirmed that personal decisions regarding the rearing of children are protected under the right to privacy. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that . . . decisions [of the Court] have respected the private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166.

<sup>123</sup> *Id.*

<sup>124</sup> Mary Cantwell, *Coercion and Contraception*, N.Y. TIMES, Jan. 27, 1991, Section 4, at 16 (commentary).

abuse and neglect.”<sup>125</sup> It is “now time to rethink what the laws should be.”<sup>126</sup> This is not to suggest that traditional conditions of probation for a child abuser should be abandoned. Although such conditions often fail, they also often succeed. Instead, new conditions of probation for a child abuser that heighten the effectiveness of traditional conditions of probation need to be imposed. Norplant, for example, reinforces the rehabilitative and protective functions of parenting classes and family counseling. By postponing a female child abuser's suffering the additional stresses of pregnancy, of child birth, and of responsibility for another child, Norplant “buy[s] time[,] . . . giv[ing] the mother a better chance to profit from her counseling . . . .”<sup>127</sup> No other condition of probation can perform this function as effectively. Other approved forms of female contraception are not suitable alternatives, as the enforcement of their use would be impracticable.<sup>128</sup> Sterilization is not an appropriate substitute, as its irreversibility would not just impair, but destroy, the woman's right to procreation. Abstinence is not an adequate option, as it forbids sexual intercourse, a legal activity too far removed from the offense of child abuse to be limited constitutionally under the Due Process Clause of the Fourteenth Amendment. Also, the enforcement of abstinence would be impracticable. The imposition of Norplant as a condition of probation for a female child abuser is a constitutionally permissible limitation on the individual's rights to privacy, procreation, parent, liberty, bodily integrity, and medical self-determination under the Due Process Clause of the Fourteenth Amendment because the less restrictive means currently available for advancing the state's interests in the rehabilitation of the child abuser and the protection of the child abuser's children do not advance those interests as effectively as the imposition of Norplant allows.

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<sup>125</sup> Ronald Dozier, J. (McLean County, Ill., Cir. Ct.), *quoted in* William Grady & Erik Christianson, *Judge Says Birth Curb Order Holds*, CHH. TRIB., Apr. 30, 1993, at 1.

<sup>126</sup> Tucker, *supra* note 1, at B6.

<sup>127</sup> *Id.*

<sup>128</sup> Arthur, *supra* note 96, at 88-89.

## VI. The Right to Be Free from Cruel and Unusual Punishment

The Eighth Amendment of the Constitution guarantees to individuals the right to be free from cruel and unusual punishment.<sup>129</sup> The term “cruel and unusual punishment” is defined according to “the evolving standards of decency that mark the progress of a maturing society.”<sup>130</sup> Today, it encompasses any punishment that “offends fundamental notions of human dignity.”<sup>131</sup> The right to be free from cruel and unusual punishment proscribes not only methods of punishment that cause severe physical pain, such as mutilation of the body, but also those that cause severe emotional pain, such as divestment of citizenship.<sup>132</sup>

Proportionality analysis aims to balance the harshness of the punishment against the gravity of the offense.<sup>133</sup> As a guide, proportionality analysis looks to the sentences imposed for other crimes in the same jurisdiction and to the sentences imposed for the same crime in other jurisdictions.<sup>134</sup> If a punishment is excessive in relation to the crime, then proportionality analysis deems it cruel and unusual.<sup>135</sup>

The imposition of Norplant as a condition of probation for a female child abuser does not conflict with the right to be free from cruel and unusual punishment. Opponents of the imposition of Norplant protest that “forced sterilization, even if it is temporary, cheapens our respect for human dignity.”<sup>136</sup> Respect for human dignity, however, can be defined in many ways. To opponents of the imposition of Norplant, respect for human dignity demands the

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<sup>129</sup> “[N]or [shall] cruel and unusual punishments [be] inflicted.” U.S. CONST. amend VIII.

<sup>130</sup> *Trop v. Dulles*, 356 U.S. 86, 99, 101 (1958).

<sup>131</sup> *Furman v. Georgia*, 408 U.S. 238, 270 (1972).

<sup>132</sup> *Trop*, 356 U.S. at 101-102.

<sup>133</sup> *Solem v. Helm*, 463 U.S. 277, 284, 290 (1983).

<sup>134</sup> *Id.* at 292.

<sup>135</sup> *Id.* at 284, 290.

<sup>136</sup> *Neuborne*, *supra* note 104, at M1.

preservation of the rights of the convicted. "We have to be careful that...we do not [tread] on people's Constitutional rights."<sup>137</sup> To supporters of the imposition of Norplant, respect for human dignity mandates the protection of the victimized and the endangered. "I ask, what is more just, allowing [a child abuser] to bear children and abuse them in the name of protecting her rights, or thinking of and defending the unspoken rights of the abused children?"<sup>138</sup> Respect for human dignity favors a societal morality dedicated to the protection of those individuals who are unable to protect themselves. Because it serves to protect a child abuser's existing children, the imposition of Norplant as a condition of probation for a female child abuser cannot be deemed cruel and unusual punishment.

Opponents of the imposition of Norplant assert that such a condition of probation causes a child abuser to suffer severe emotional pain. The Norplant implant, recognizable under the woman's skin, humiliates the child abuser by calling attention to her wrongdoing.

Because Norplant is not invisible once implanted under the skin, if forced to use Norplant, [a child abuser] would wear a constant badge reminding the world of her deviant, criminal behavior. Like Hawthorne's Hester Prynne [*sic*], the adulteress forced to wear a letter 'A' on her chest to inform the world of her sins, [the child abuser] will be subjected to society's use of punishment by humiliation because of the patch on her arm.<sup>139</sup>

Unlike Hester Prynne, a child abuser bearing a Norplant implant is not the sole individual in her community to bear the scarlet letter. She is joined by the nearly one-million other women in the United States who use Norplant voluntarily.<sup>140</sup> As one of nearly one-million similarly marked women, a child abuser bearing a Norplant implant

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<sup>137</sup> Ellen Barry, *quoted in* Bill Ainsworth, *Tulare's Target of Controversy*, *Recorder*, Mar. 28, 1991, at 1 (alteration in original).

<sup>138</sup> Carolyn Hendricks, *The Norplant Sentence*, *WASH. POST*, Jan. 24, 1991, at A20 (letter to the editor).

<sup>139</sup> Walker, *supra* note 121, at 806 (citations omitted).

<sup>140</sup> Lewin, *supra* note 37, at A10.



is not likely to be singled out for “punishment by humiliation because of the patch on her arm.”<sup>141</sup> The imposition of Norplant as a condition of probation for a female child abuser does not result in the kind of severe emotional pain that would render it cruel and unusual punishment.

The imposition of Norplant could, however, result in the kind of severe physical pain that would render it cruel and unusual punishment. It can cause a variety of adverse side effects. As such, Norplant is inadvisable for women with a variety of medical histories. Moreover, the use of Norplant is contraindicated in the presence of a variety of medical conditions. Opponents of the imposition of Norplant properly ask what a court would do if a child abuser the court orders to use Norplant has a medical reason not to have the device implanted or to have the device removed. “If her body does not tolerate the birth-control implant, should she be compelled to try another method?”<sup>142</sup> In such circumstances, a court should “[e]ave] to doctors the final determination as to whether the woman's health ma[kes] her a safe candidate for the procedure.”<sup>143</sup> “[I]f doctors certif[y] that the procedure would endanger [the woman's] health,” the court should “rescind [its] order.”<sup>144</sup> The court should not compel the child abuser to try another method of birth control, as no other method is comparable. As argued above, neither other approved forms of female contraception nor sterilization nor abstinence is a suitable alternative. For a child abuser whose health is endangered by the use of Norplant, the imposition of Norplant as a condition of probation results in severe physical pain that renders such a condition of probation cruel and unusual punishment and thus unconstitutional as applied to that individual. However, the imposition of Norplant as a condition of probation for a female child abuser is not categorically unconstitutional. Rather, the constitutionality of the imposition must be reviewed in light of the particular medical circumstances of each individual who receives a judicial order to use Norplant as a condition of probation.

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<sup>141</sup> Walker, *supra* note 121, at 806.

<sup>142</sup> Fields, *supra* note 67, at G1.

<sup>143</sup> Michael Lev, *Judge Is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. TIMES, Jan. 11, 1991, at A17 (quoting Judge Howard Broadman, Cal. Super. Ct.).

<sup>144</sup> *Id.*

The imposition of Norplant as a condition of probation for a female child abuser is a punishment proportional to the offense. Opponents of the imposition of Norplant object that it is not statutorily authorized. "Lack of legislative approval . . . raises concerns about whether the severity of the sanction in relation to the offense has been fully considered . . . ."<sup>145</sup> The imposition of Norplant, however, is a legitimate exercise of the "broad discretion in crafting conditions of probation"<sup>146</sup> that probation codes routinely grant to courts. As argued above, it serves the recognized purposes of probation -- the rehabilitation of the offender and the protection of the public. Trial courts in a number of states, including California,<sup>147</sup> Indiana,<sup>148</sup> Texas,<sup>149</sup> Illinois,<sup>150</sup> Florida,<sup>151</sup> and Pennsylvania,<sup>152</sup> have embraced the imposition of Norplant as a legitimate condition of probation for a female child abuser. The imposition of Norplant as a condition of probation for a female child abuser cannot be deemed cruel and unusual punishment under proportionality analysis.

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<sup>145</sup> Melissa Burke, *The Constitutionality of the Use of the Norplant Contraceptive Device as a Condition of Probation*, 20 HAST. CONST. L.Q. 207, 239 (Fall 1992).

<sup>146</sup> *Id.*

<sup>147</sup> Stein, *supra* note 3, at A3, A31.

<sup>148</sup> Order of Probation at 2, *State v. Carlton*, No. CR90-1937 (Lincoln County, Neb., Ct. 1991); *see* Arthur, *supra* note 95, at 6.

<sup>149</sup> *State v. Knighton*, No. 601619 (Harris County, Tex., 262d Dist. Ct. 1991), *see* Elyse Ravel Rosenblum, *The Irony of Norplant*, 1 TEX. J. WOMEN & L., 275, 276 (Spring 1992); John Makeig, *Surgical Deterrent: Mom Convicted of Child Abuse Picks Birth-control Implant over Prison*, HOUS. CHRON., Mar. 6, 1992, at A1; *Woman's Probation Includes Birth Control Implant*, DALLAS MORNING NEWS, Oct. 7, 1993, at 36A.

<sup>150</sup> *Abusive Mother Accepts Contraceptive Implant*, CHI. TRIB., Feb. 10, 1993, at 3.

<sup>151</sup> *Sentence Includes Birth Control Implant*, ST. PETERSBURG TIMES, July 22, 1993, at 4B.

<sup>152</sup> *Woman to Use Norplant; Avoid Child Abuse Charge*, ORLANDO SENTINEL, Feb. 18, 1994, at A8.

## VII. The Right to Equal Protection of the Laws

The Fourteenth Amendment of the Constitution guarantees to individuals the right to equal protection of the laws.<sup>153</sup> The right to equal protection of the laws requires the state to treat similarly situated individuals similarly.<sup>154</sup> The state may not distinguish between two classes of similarly situated individuals and treat them differently, unless the state can justify its discrimination.

As reviewed above, under the Due Process Clause of the Fourteenth Amendment, constitutional scrutiny of a state action focuses on the state action itself. Under the Equal Protection Clause of the Fourteenth Amendment, constitutional scrutiny focuses not on the state action itself, but on the discriminatory classification created by the state action. A state-created classification that discriminates on the basis of gender will be subject to intermediate scrutiny by the Supreme Court.<sup>155</sup> The Court first put forth the standards of intermediate scrutiny in *Craig v. Boren*: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>156</sup> Before the Court will apply the standards of intermediate scrutiny to a state-created gender classification, the creation of that classification must be shown to be motivated by gender bias.<sup>157</sup> In *Personnel Administrator of Massachusetts v. Feeney*, the Court declared that "purposeful discrimination is 'the condition that offends the Constitution.'"<sup>158</sup> The Court explained that discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse

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<sup>153</sup> "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

<sup>154</sup> LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 438 (2d ed. 1988).

<sup>155</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>156</sup> *Id.*

<sup>157</sup> *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-74 (1979).

<sup>158</sup> *Id.* at 274 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16).

effects upon an identifiable group.”<sup>159</sup> The necessary gender-based discriminatory purpose may be express, as when a statute refers to gender on its face.<sup>160</sup> It may also be implied, as when the adverse effects of a statute gender-neutral on its face fall disproportionately upon women. In the latter case,

a twofold inquiry is . . . appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.<sup>161</sup>

A state-created gender classification, the creation of which is motivated by gender bias, will be subject to judicial review under the standards of intermediate scrutiny.

The imposition of Norplant as a condition of probation for female child abusers creates a classification that discriminates on the basis of gender. Opponents of the imposition of Norplant note that courts do not treat female child abusers and male child abusers similarly. Courts ordering the use of Norplant as a condition of probation for female child abusers do not impose a like requirement on male child abusers. “[I]t is problematic that only women are affected by these decisions. It is especially disconcerting . . . because comparable probation conditions could be imposed on men pleading guilty to child abuse charges, but no judge has done so thus far.”<sup>162</sup> The imposition of Norplant on female child abusers without the imposition of a similar condition of probation on male child abusers creates a discriminatory classification based on gender.

The motivation of courts in imposing Norplant and creating the consequent gender-based discriminatory classification is purposeful gender-based discrimination. The adverse effects of the imposition of Norplant as a condition of probation for child abusers

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<sup>159</sup> *Feeney*, 442 U.S. at 279.

<sup>160</sup> *See Craig*, 429 U.S. 190.

<sup>161</sup> *Feeney*, 442 U.S. at 274.

<sup>162</sup> Rosenblum, *supra* note 156, at 277.

fall not merely disproportionately, but exclusively, upon women. That only women suffer the adverse effects of the imposition of Norplant renders the imposition of Norplant a "case[] in which impact alone can unmask an invidious discrimination."<sup>163</sup> Courts do not order male child abusers to suffer a condition of probation comparable to the imposition of Norplant because they cannot: there is no birth-control method for men comparable to Norplant. Norplant is effective and long-lasting, but relatively safe and reversible. Enforcement of its use is easy. "Because Norplant is a highly effective method of birth control that does not depend upon a woman's cooperation for its effectiveness, it provides those who wish to control a woman's fertility with a relatively simple means to do so."<sup>164</sup> No such birth-control method for men exists. Enforcement of the use of condoms is impracticable. Sterilization, because it is irreversible, does not just impair, but destroys, a man's right to procreation. Abstinence forbids sexual intercourse, a legal activity too far removed from the offense of child abuse to be limited constitutionally under the Due Process Clause of the Fourteenth Amendment. Also, the enforcement of abstinence is impracticable. The lack of a birth-control method for men comparable to Norplant guarantees that only female child abusers will be subject to the adverse effects of the imposition of Norplant. The courts' creation of a discriminatory classification that subjects only women to the adverse effects of the imposition of Norplant "reflects invidious gender-based discrimination."<sup>165</sup>

As argued above, with regard to the judicial imposition of a condition of probation, the compelling interests of the state embrace the rehabilitation of the offender and the protection of the public. With regard to the imposition of Norplant as a condition of probation for a female child abuser, the compelling interests of the state embrace the rehabilitation of the child abuser and the protection of the child abuser's existing children.

The gender-based classification created as a consequence of the imposition of Norplant as a condition of probation for female child abusers is not substantially related to the achievement of the

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<sup>163</sup> *Feeney*, 442 U.S. at 275 (comparing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>164</sup> *Rosenblum*, *supra* note 149, at 275.

<sup>165</sup> *Feeney*, 442 U.S. at 274.

state's important interests in the rehabilitation of child abusers and in the protection of the existing children of child abusers. Opponents of the imposition of Norplant rightly emphasize that the rationale on which courts rely to justify the imposition of Norplant "applies with equal force to male child abusers."<sup>166</sup> Postponement of the additional stresses of pregnancy, of childbirth, and of responsibility for another child would promote the rehabilitation of a male child abuser, just as it promotes the rehabilitation of a female child abuser. Postponement of such stresses would promote the protection of the existing children of a male child abuser, just as it promotes the protection of the existing children of a female child abuser. The gender of a child abuser and his or her rehabilitation are simply not related. Nor are the gender of a child abuser and the protection of his or her existing children. Because the gender-based classification created as a consequence of the imposition of Norplant is not related, substantially or otherwise, to the rehabilitation of child abusers and the protection of the existing children of child abusers, the imposition of Norplant as a condition of probation for female child abusers does not survive constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

The development and approval of a birth-control method for men comparable to Norplant and the imposition of that comparable birth-control method for men as a condition of probation for male child abusers would render the imposition of Norplant as a condition of probation for female child abusers impervious to an equal protection challenge grounded in gender-based discrimination. Obliging male child abusers and female child abusers alike to postpone the additional stresses of pregnancy, of childbirth, and of responsibility for more children would eliminate the gender-based discriminatory classification presently created as a consequence of the imposition of Norplant. A contraceptive device for men comparable to Norplant is presently being developed.<sup>167</sup> The device consists of two plastic capsules which are implanted in a man's body.<sup>168</sup> The first capsule contains a hormone which, released over time, suppresses the

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<sup>166</sup> Burke, *supra* note 145, at 241-42.

<sup>167</sup> Rachel Tan, *Contraceptive Implants for Men Being Developed*, STRAITS TIMES, Feb. 19, 1993, at 31.

<sup>168</sup> *Id.*

production of sperm.<sup>169</sup> Because that hormone incidentally and undesirably suppresses the production of testosterone, the male sex hormone, the second capsule contains a second hormone which, also released over time, reverses the first hormone's suppression of testosterone production.<sup>170</sup> The device is highly effective.<sup>171</sup> Its contraceptive effect is long-lasting,<sup>172</sup> but "reversible almost immediately."<sup>173</sup> The device is expected to be available within ten years.<sup>174</sup> Once the device is available and courts order its use as a condition of probation for male child abusers, the imposition of Norplant as a condition of probation for female child abusers will no longer be susceptible to an equal protection challenge grounded in gender-based discrimination.

## Conclusion

The high rate of recidivism in cases of child abuse demonstrates that traditional conditions of probation for child abusers cannot be relied upon to achieve either the rehabilitation of child abusers or the protection of abused children. New conditions of probation for child abusers are desperately needed. The imposition of Norplant as a condition of probation for female child abusers promises to promote both the rehabilitation of child abusers and the protection of abused children. By postponing a female child abuser's suffering the additional stresses of pregnancy, of childbirth, and of responsibility for another child, the imposition of Norplant affords the child abuser time to learn how to bear the stresses of parenthood and of life. It assures the child abuser's existing children that their parent's efforts to learn will not be disrupted.

Norplant is a technological advancement which

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

society would be foolish not to consider given the extent of the problems involved. Proper use of such devices can't solve the problem, but it can surely help.

Our society needs a similar device for irresponsible fathers as well.<sup>175</sup>

Until our society obtains a similar device for irresponsible fathers, the right of women to equal protection of the laws precludes the imposition of Norplant as a condition of probation for female child abusers. Once a birth-control method for men comparable to Norplant becomes available, the imposition of Norplant as a condition of probation for female child abusers and the imposition of the comparable birth-control method for men as a condition of probation for male child abusers will be constitutionally permissible, despite the consequent impairment of the fundamental rights of individual child abusers. The less restrictive means available for advancing the state interests in the rehabilitation of child abusers and the protection of abused children do not advance those interests as effectively as the imposition of Norplant and its counterpart for men will allow.

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<sup>175</sup> Dozier, J., *supra* note 125, *quoted in* Grady & Christianson, *supra* note 125, at 1.



