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Probation Restrictions Impacting the Right to Procreate: The Oakley Error

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INTRODUCTION

In *State v. Oakley*,[1] the all-male four-justice[2] majority held that a probation condition restricting David Oakley's right to have children passed constitutional muster. Writing for the all-female, three-justice dissent, Justice Bradley of the Wisconsin Supreme Court sounded a clarion call that the decision made theirs "the only court in the country"[3] to uphold such limits on a probationer's right to procreate. She is nearly correct in her conclusion. Only one other reported decision,[4] another case involving a male defendant's right to procreate, affirms a probation condition limiting a probationer's right to have children.[5] Every other reported decision reviewing a restriction on a probationer's right to have children, primarily involving female probationers, has struck down the condition.[6]

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1. 629 N.W.2d 200 (Wis. 2001).

2. While arguably not always relevant, the gendered composition of the majority and dissent bears mention in light of the gender-based analysis herein.

3. *Oakley*, 629 N.W.2d at 216.

4. State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998) (after violating his probation for criminal mistreatment of a child, the defendant was prohibited from fathering more children until he completed counseling).

5. Two other decisions affirm a less strict restriction relating to procreation. *See* State v. Talty, 2003 WL 21396835, at *2, 7-9 (Ohio Ct. App. June 18, 2003) (citing *Oakley*) (upholding (community control condition that defendant convicted of non-support of dependents take reasonable steps to avoid conceiving another child); Krebs v. Schwartz, 568 N.W.2d 26, 28 (Wis. Ct. App. 1997) (probation condition requiring probationer "to discuss and obtain permission from probation agent" before beginning sexual relationship was held constitutional).

6. *See, e.g.*, People v. Zaring, 10 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 1992) (holding "no pregnancy condition . . . improper because it is impermissibly overbroad."); People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (noting the existence of

Concerned about this departure from the national majority position, Justice Bradley criticizes the majority for its application of a reasonableness test to the probation condition and advocates vociferously for heightened scrutiny of probation conditions that impinge on fundamental rights.[7] Based on a review of the analysis in comparable cases across the country, her focus is misplaced. Despite *Oakley*'s departure in outcome from the dominant national trend, the majority's analysis is all but doctrinally routine with respect to the degree of scrutiny it affords the probation condition.

Academics may argue about the right standard for evaluating the constitutionality of probation conditions as a normative matter.[8] However, there is little question about the standard that courts do apply in reviewing restrictions on liberty interests of probationers. As articulated by the *Oakley* majority, "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation."[9] In other words, while generally there must be a rational relationship between the restriction and the underlying criminal act, there is less scrutiny of the restriction of a liberty interest for a probationer than there is for a non-probationer.[10] This is in recognition of the fact that if the probationer were not on probation he or

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"alternative restrictions less subversive of appellant's fundamental right to procreate."); Trammel v. State, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001) (order to refrain from becoming pregnant held to serve "no rehabilitative purpose whatsoever.").

7. *Oakley*, 629 N.W.2d at 217.

8. *See generally* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 166 (1993) (advocating for strict scrutiny analysis of probation condition mandating use of long-term contraception that suppresses ovulation in light of its promise "to have a severely disparate impact on women of color."); Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 161 (2000) (advocating for appellate courts to "abandon the incredibly deferential abuse of discretion standard . . . ."); Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1359 (1989) (reasoning that "punitive probation conditions" should merit "an eighth amendment analysis."); Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet Letter Probation Conditions*,77 N.C. L. REV. 783, 786 (1999) (proposing "a standard that requires the trial courts to explain their reasons for imposing special probation conditions and that requires reviewing courts to consider the probationer's liberty interest in their analysis of probate conditions."); Jaimy M. Levine, Comment, *"Join the Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1848 (1994) (suggesting "heightened constitutional scrutiny" for "probation conditions that impose an ideology . . . .").

9. *Oakley*, 629 N.W.2d at 210 (citing Edwards v. State, 246 N.W.2d 109 (1976)).

10. As the *Oakley* majority explained, "a convicted felon does not stand in the same position as someone who has not been convicted of a crime." *Id.* at 210. In sup-

she would be incarcerated, a near total curtailment of the individual's liberty interest.

This essay makes a modest point about the *Oakley* decision which is simply the case's jurisprudential ordinariness. The majority accurately identifies the established test for evaluating the constitutionality of probation restrictions and applies it. In an abundance of caution, the majority goes even further in analyzing the constitutionality of the condition and supporting the outcome in the case. In addition to applying the test it articulates as the controlling one, the majority also applies the heightened scrutiny test supported by the dissent. Applying that test, the majority concludes that the "condition is narrowly tailored to serve the State's compelling interest of having parents support their children."[11]

Recognizing that it is the court's ultimate duty to engage in balancing, it is hard to fault the majority for the outcome. Despite that cold conclusion, this author shares the dissent's concern about the slippery slope created by the *Oakley* decision as well as the challenges it creates for marginalized groups.[12] Nevertheless, this author also acknowledges that slippery slopes can slope both ways depending on the placement of the fulcrum.[13] In other words, the dissent is rightfully concerned that this decision allows courts to effectively curtail the fundamental right of poor, convicted persons to have children[14] and, ultimately, threatens to make one's ability to support one's children a limit on having additional children.[15] Of

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port of this observation, the court explained, convicted felons may lawfully be deprived their right to vote even after serving a full sentence. *Id.* at 210 n.26.

11. *Id.* at 212.

12. *Id.* at 220 (Bradley, J., dissenting).

13. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003) (remarking on cases "where the slope seems slippery both ways . . . .").

14. This essay says little about the jurisprudence establishing the fundamental right at issue, the right to have children, because it is so firmly established. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536 (1942) (calling "the right to have offspring" . . . "a right . . . basic to the perpetuation of a race . . ."); Matter of Guardianship of Eberhardy, 307 N.W.2d 881, 892 (Wis. 1981) (describing "the right to procreate" as "a protected, fundamental personal decisional choice . . . ."). Other authors have addressed the dissent's concern about the slippery slope to eradicating this right, particularly in the context of welfare legislation. *See* Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 How. L.J. 473, 474-86 (1995) (arguing Norplant welfare laws infringe the constitutional right to procreate); Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15, 22 (1994) (asserting that "[l]egislation that links Norplant to welfare benefits infringes upon the protected fundamental rights of mothers.").

15. While there are some who might support this position as a policy matter, it

course, the slippery slope traversed in the other direction and its effect on existing children is the majority's concern. The majority is on record as emphatically rejecting, "the novel idea that Oakley has an absolute right to refuse to support his current nine children and any future children that he procreates . . . ."[16] The majority sees David Oakley's constitutional rights as appropriately infringed in the interest of protecting children.

Notwithstanding the dissent's alarm over the ramifications of the decision for every citizen of Wisconsin (and presumably every citizen of this country), "man or woman, rich or poor,"[17] in the end, the majority opinion situates itself securely within established probation jurisprudence. As a result, the case should either cause no alarm or, in the alternative, should turn a spotlight on the incorrectness of courts' analytical approach to evaluating probation conditions rather than on the degree of scrutiny applied.

In order to advance some thinking on the question of the appropriate approach to evaluating the constitutionality of probation conditions, Section I unpacks the disagreement (or lack of it) between the majority and the dissent. This sets up the groundwork for a discussion in Section II that compares the Wisconsin Supreme Court's approach to that of other courts in cases involving, in some way, decisions limiting a probationer's right to have children. Section II concludes that regardless of what constitutional standard or degree of scrutiny courts apply, cases can (and do) go both ways with respect to upholding or striking down probation restrictions on fundamental rights. However, the dominant trend despite the *Oakley* decision has been to strike down procreation restrictions. Section III details an alternative approach to the evaluation of probation conditions under the unconstitutional conditions doctrine that was revitalized in the 2001 Supreme Court term and argues that, in the end, probationers should have at least the same protections for constitutional rights as do incarcerated felons. Accordingly, no absolute curtailment of probationers' procreation rights, which the *Oakley* restriction is, should survive constitutional review.

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clearly violates established constitutional law. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (finding that inability to pay child support may not compromise fundamental right).

16. *Oakley*, 629 N.W.2d at 208.

17. *Id.* at 216 (Bradley, J., dissenting).

I. THE MAJORITY AND DISSENT VEHEMENTLY DISAGREE—OR DO THEY?

The rhetoric adopted by both the majority and dissent suggests that they vehemently disagree with one another about the approach to reviewing the probation condition at issue in the case. However, a closer look at each side's analysis reveals that the more serious disagreement is in the outcome, not in the approach.

A. *The Majority Approach*

Justice Wilcox wrote the decision for the court. After detailing the facts of the case, including Oakley's having nine children with four different women and his subsequent refusal to provide support for them,[18] Justice Wilcox zeroes in on the constitutional issue. As he articulates it, the issue is one of the constitutionality of a condition of probation[19] that prohibits Oakley from fathering any additional children "unless he shows that he can support that child and his current children."[20]

Before addressing the constitutional standard for reviewing probation conditions, Justice Wilcox cites the probation statute and explains a justification for its use. As the Wisconsin Supreme Court has said, "[t]he theory of the probation statute is to rehabilitate the defendant and protect society without placing the defendant in prison."[21] Picking up on the two-part concern of the statute, rehabilitation and protection of society, the majority focuses on the role of the probation-issuing judge. "[W]hen a judge allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing."[22] While such judges are admonished against imposing probation conditions that reflect the judge's personal idiosyncrasies,[23] they should use their discretion in order to set probation conditions that further the dual purposes of the statute. This exercise of discretion ac-

18. The facts of this case have been addressed in detail in other articles in this Symposium and, while interesting, are not as relevant to this essay. *See* Taylor Flynn, *Introduction: What Does* Oakley *Tell Us About the Failures of Constitutional Decision-Making?*, 26 W. NEW ENG. L. REV. 1 (2004); David Papke, State v. Oakley, *Deadbeat Dads, and American Poverty*, 26 W. NEW ENG. L. REV. 9, 10-16 (2004).

19. *Oakley*, 629 N.W.2d at 203 (stating the basis of Oakley's challenge).

20. *Id.* at 201.

21. *Id.* at 205 (citing State v. Gray, 590 N.W.2d 918, 933 (Wis. 1999)).

22. *Id.* at 206.

23. *Id.* at 206 n.20 (citing Horwitz, *supra* note 8; Brilliant, *supra* note 8 (noting some of the more bizarre probation conditions judges have imposed)).

knowledges an inconsistency of probation conditions that may be imposed by different judges, even for probationers charged with similar crimes based on comparable sets of facts.

Having laid the factual predicates for the case and identified the legal issues, Justice Wilcox addresses Oakley's contention that because the probation restriction impinges on the fundamental right to procreate it warrants strict scrutiny.[24] At this point, Justice Wilcox's analysis takes an interesting turn that is somewhat hard to follow. He concedes, as he must, that procreation is a fundamental right and ordinarily its infringement by the government would be subject to strict scrutiny.[25] However, before distinguishing Oakley, a convicted felon, from an ordinary person, as he does later in the opinion,[26] he grants Oakley his position and seems to apply strict scrutiny by noting Oakley's concession that the State's interest in requiring parents to support their children is a compelling one.[27] Justice Wilcox then hones in on Oakley's argument which seems to be that, although the government identifies a compelling interest in support of the restriction, the condition is not sufficiently narrowly tailored because it categorically denies Oakley the right to procreate. Oakley argues that the condition categorically denies him the right to procreate because he "'probably never will have the ability to support his children."[28]

Interestingly, rather than returning to the rational relationship standard Justice Wilcox later determines applicable, he instead concedes that "Oakley's argument might well carry the day if he had not intentionally refused to pay child support . . . ."[29] What Justice Wilcox seems to be saying is that the restriction is narrowly tailored because it contains a safety valve – as soon as Oakley "decides"[30] to provide for his children, the procreation restriction may be lifted. By engaging Oakley's argument, Justice Wilcox implies that strict

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24. *Id.* at 207.

25. *Id.* (citing Eberhardy v. Circuit Court for Wood County, 307 N.W.2d 881 (1981); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

26. *Id.* at 208 (citing State v. Evans, 252 N.W.2d 664 (Wis. 1977); Von Arx v. Schwarz, 517 N.W.2d 540 (Wis. Ct. App. 1994)).

27. *Id.*

28. *Id.*

29. *Id.*

30. The word here is in quotes to identify that it is the author's and not the court's. There is a significant dispute between the majority and dissent about Oakley's ability ever to support his children. Regardless of the reality of either side's position, the majority focuses on Oakley's willful failure to support, suggesting that he could have "decided" to take steps otherwise.

scrutiny might apply. But, he explains, even if it does, it is satisfied in this case.

From this position, Justice Wilcox moves to more secure ground. Though he engages Oakley's position, he swiftly rejects it.[31] The majority then shifts its focus to Oakley's position as a convicted felon rather than as an ordinary citizen. It compares this case to one from Oregon in which an intermediate appellate court upheld a similar restriction imposed upon a convicted child abuser.[32] In that case, "[t]he court rejected the defendant's argument that strict scrutiny applied to the probation condition at issue."[33] The *Oakley* court does as well. The majority explains that incarceration, "by its very nature," deprives prisoners of numerous fundamental rights, including the "right to be free from physical restraint" and other rights implicated by such a broad scale restraint, "such as the right to procreate."[34] Therefore, explains the court, convicted felons do not stand in the same position as free people.[35] As a result, the majority determines that the appropriate standard of review is that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation."[36] Justice Wilcox then speeds through the test, concluding that the condition imposed is not overly broad. As suggested earlier in the decision, Oakley's fundamental right to procreate is not extinguished.[37] He can procreate, if he chooses, as soon as he makes "efforts" to support his children.[38]

Justice Wilcox next addresses the relationship between the condition and an effort to rehabilitate Oakley. Justice Wilcox explains that any alternative, such as allowing Oakley to have additional children, would further victimize his existing children (and

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31. *Oakley*, 629 N.W.2d at 208 n.23 (holding "that probation conditions—like prison regulations—are not subject to strict scrutiny analysis . . . . ").

32. *Id.* at 208 (citing State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998)).

33. *Id.* at 209.

34. *Id.* at 210-12 (elaborating on all fundamental rights).

35. *Id.* at 210.

36. *Id.* (citing Edwards v. State, 246 N.W.2d 109, 111 (Wis. 1976)).

37. *See supra* note 30 and accompanying text.

38. *Oakley*, 629 N.W.2d at 212. There is a serious discrepancy here between the court's language, which states that Oakley need only demonstrate that he is "making efforts" to support his children and the language of the probation condition that requires him to "support his present and any future children." *Id.* (This discrepancy seems to highlight the court's earlier suggestion that the reason the condition is narrowly tailored is because of the perceived safety valve—Oakley's choice to pay support.)

any future ones) and detract from efforts to conform Oakley's conduct to a lawful obligation to support his children.[39] Oddly, though he rejected a strict scrutiny test, Justice Wilcox speaks of the restriction as being "narrowly tailored to serve the State's compelling interest"[40] in rehabilitation even as he applies the reasonable relationship test he has espoused.

In the end, Justice Wilcox seems to leave no real room for dispute about the analysis of this case, at least as to outcome.[41] Even if one disagrees with the test being applied, a test of strictest scrutiny does not change the result of the balancing in the majority's view. Justice Wilcox asserts a low-level scrutiny test for probation conditions, but, in an abundance of caution, also applies a high level scrutiny.[42] He demonstrates that regardless of which test applies, in the end, the probation restriction survives.[43]

Before analyzing the dissent's position, it bears mentioning that the majority opinion is followed by two concurring opinions. Closer scrutiny of the concurrences is warranted because it further reveals that the real disagreement between the two sides is the outcome and not the constitutional approach. Neither concurrence takes issue with Justice Wilcox' articulation of the appropriate degree of scrutiny imposed on probation conditions. In fact, Justice Crooks' concurrence in part states his rejection of the strict scrutiny standard: "[t]he appropriate test is not the strict scrutiny test . . . ."[44] Interestingly, though, the rest of his concurrence focuses on the compelling interest behind the probation restriction. As Justice Crooks explains, "Oakley's nine children, rather than Oakley himself, are the real victims in this case."[45]

Justice Bablitch's concurrence picks up the second part of a strict scrutiny test: whether the restriction is narrowly tailored to the governmental interest. Because he joined the court's articulation of the appropriate constitutional standard of review, Justice Bablitch ignores the question of what scrutiny applies and focuses on the factual difficulties presented by the case.[46] He restates that there is a compelling governmental interest in preventing the harm

39. *Id.* at 213.
40. *Id.* at 212.
41. *Id.* at 208-14.
42. *Id.* at 207 (noting that "[w]hile the condition here survives strict scrutiny," it is "not subject to strict scrutiny analysis . . . .").
43. *Id.*
44. *Id.* at 215 (Crooks, J., concurring).
45. *Id.*
46. *Id.* at 214 (Bablitch, J., concurring).

to children who cannot otherwise protect themselves.[47] Ultimately, despite his unhappiness with the results of the case, Justice Bablitch's concurrence emphasizes the dissent's failure "to advance any realistic alternative solution to what they concede is a compelling state interest."[48] According to Justice Bablitch, the probation restriction is narrowly tailored to the governmental interest because no other restriction can be articulated which would achieve the same degree of protection for Oakley's born, and potential unborn, children.

In the end, it does not matter to the majority, including the authors of the concurring opinions, which test applies. Under either a reasonable relationship or strict scrutiny test, the probation condition survives. Although the majority spends a significant portion of the opinion criticizing the dissent's analysis of the applicable standard, it is legal wrangling without a difference.[49] The outcome, for the majority, is the same.

B. *The Dissents*

There are two dissenting opinions. One was written by Justice Bradley and joined by Justices Abrahamson and Sykes. The other was written by Justice Sykes and joined by Justices Abrahamson and Bradley. It is particularly notable that Justices Bradley and Sikes joined each other's dissent though each seem to state a different standard of review for the probation condition. This proves one point of this essay: regardless of the standard articulated, the real disagreement between the majority and the dissent is the outcome, not the degree of scrutiny.

Justice Bradley begins her dissent with blazing rhetoric. She clearly takes offense at the majority's seeming disregard for the fundamental right at issue in the case, the right to have children. She is seriously alarmed that this type of case might set a precedent for the curtailment of poor people's right to procreate. And, finally, she emphasizes that though she has a substantive disagreement with the majority, she is no less concerned than the four majority justices about the protection of children.[50]

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47. *Id.* at 215.

48. *Id. See also* Richard P. Cole, *Liberation and Empowerment: A Jubilean Alternative for* Wisconsin v. Oakley, 26 W. NEW ENG. L. REV. 27, 27-28 (2004) (discussing "Justice Bablitch's lamentation").

49. *See Oakley*, 629 N.W.2d at 205 n.18, 297-09 nn. 22-24 (using firm language to describe the majority's view of the dissenting opinions).

50. *Id.* at 220 (Bradley, J., dissenting) (indicating her concern "about children

However, a technical look at Justice Bradley's opinion reveals an interesting twist to the applicable scrutiny for probation conditions. She forthrightly states at the outset of her opinion that "[b]ecause the right implicated by the condition of probation in this case is one that is central to the concept of fundamental liberty, the state action infringing upon that right is subject to heightened scrutiny."[51] Because she has departed from the language of established Wisconsin precedent on just this issue, Justice Bradley must explain how she arrives at such a conclusion.

Justice Bradley examines the same language the majority cites from the *Edwards* decision to illustrate the effect that probation conditions may not be "overly broad" and must be "reasonably related" to a probationer's rehabilitation.[52] Then she analyzes the appropriate standard of review for governmental conditions on liberty interests in non-probation contexts. All would concede that, in such a context, state action infringing on a fundamental liberty interest can be justified only by a compelling state interest and where "narrowly drawn" to protect only those legitimate state interests at stake.[53] Her next move is slightly tricky. At this point, Justice Bradley equates a "means-ends inquiry" which is "not overly broad" with one which must be "narrowly drawn."[54] She concludes "the essence of [either] inquiry is the same."[55]

Unsurprisingly, the rest of her opinion focuses on the application of the relevant test; it concludes that the restriction is essentially a wholesale prohibition on Oakley's right to have children, despite the safety valve the majority discussed.[56] In analyzing whether the restriction is narrowly tailored to the government's interest in protecting children, Justice Bradley looks at alternatives available to the state to achieve the same protective outcomes. She explains that if that is government's true concern (as all of the court seems to concede) then Wisconsin has a panoply of statutes available to ensure that goal. Included within the state's arsenal are wage assignment and garnishment, liens on personal property, and civil

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raised in poverty," Justice Bradley articulates that she too is "troubled by the societal problem caused by 'deadbeat' parents . . . .").

51. *Id.* at 217 (Bradley, J., dissenting).

52. *Id.* (Bradley, J., dissenting) (citing Edwards v. State, 246 N.W.2d 109, 111 (Wis. 1976)).

53. *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 688-89 (1977)).

54. *Id.* at 217.

55. *Id.*

56. *Id.* at 217-18 (noting the circuit court's recognition of Oakley's inability to fulfill the financial requirements of the condition).

contempt.[57] Justice Bradley explains that at sentencing, Oakley presented numerous alternative means of advancing the interests of his children, including conditioning probation on his maintaining two full-time jobs, supporting his children with the proceeds, taking parenting classes, and undergoing drug and alcohol counseling.[58] In the end, because there are less draconian means of achieving the same ends, Justice Bradley finds the probation restriction cannot survive constitutional scrutiny.[59]

Justice Sykes basically agrees, as she must, given that she joined Justice Bradley's opinion. She writes separately, it seems, to underscore the point and identify several other means of securing the same protections for Oakley's children that may be obtained from the more restrictive probation condition. Doctrinally, however, Justice Sykes' analysis is closer to that of the majority. She agrees with the majority on the relevant degree of scrutiny of probation conditions, and that infringements on a probationer's constitutional rights are "evaluated differently" from others.[60] She concedes that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to [the probationer's] rehabilitation."[61] She does not manipulate language to convert this into a strict scrutiny standard as does Justice Bradley. Rather, she finds that the court-ordered procreation restriction is overly broad, cites many of the reasons pointed to by Justice Bradley, and adds a few of her own. Justice Sykes explains that in addition to being required to maintain two jobs and face property liens, Oakley could have his tax refunds intercepted and redirected to child support and be criminally prosecuted for any future failure to pay.[62]

Just as we learned from the three majority opinions, what we learn from the interplay of these two dissenting justices is that it does not matter which level of scrutiny applies. In the majority view, regardless of the applicable level of scrutiny, the probation

57. *Id.* at 218 (citing Zablocki v. Redhail, 434 U.S. 374, 388-90 (1978) (holding unconstitutional a Wisconsin statute prohibiting marriage until both people had established that their child support obligations had been met)).

58. *Id.* at 218 n.3. According to Justice Bradley, "at sentencing Oakley requested an opportunity to maintain full employment, provide for his children, and make serious payments towards his child support arrearages." *Id.*

59. *Id.* at 219.

60. *Id.* at 221 (Sykes, J., dissenting).

61. *Id.* (quoting Edwards v. State, 246 N.W. 2d 109 (Wis. 1976)).

62. *Id.* at 222.

condition stands. In the dissent's view, regardless of the applicable level of scrutiny, the probation condition fails.

II. SITUATING *OAKLEY* IN A NATIONAL CONTEXT

If trends are defined by case outcomes, the *Oakley* decision defies the overwhelmingly dominant trend in cases involving probation restrictions on procreation. Of all reported cases challenging procreation restrictions in a probation context, only one other decision affirming the restrictions exists.[63] In the case of *State v. Kline*,[64] an Oregon intermediate appellate court upheld a probation restriction imposed upon a defendant convicted of criminally mistreating a child until he completed drug and anger management counseling.[65] That case, upon which the *Oakley* majority heavily relied in support of its application of rational basis review, is, as characterized by the dissent, "a single appellate court case from the state of Oregon . . . ."[66]

A. *The National Precedent Supports a Rule Striking Probation Restrictions on Procreation*

In at least eleven other reported cases, courts held procreation restrictions to be void as inconsistent with constitutional rights of privacy guaranteed by state and federal constitutions.[67] An analysis

63. *See supra* notes 4-6 and accompanying text.

64. 963 P.2d 697 (Or. Ct. App. 1998).

65. *Id.* at 699.

66. *Oakley*, 629 N.W.2d at 220 n.4 (Bradley, J., dissenting).

67. *See* U.S. v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) (procreation restriction imposed on defendant convicted of heroin possession invalid); People v. Zaring, 10 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 1992) (condition that defendant convicted for heroin possession not become pregnant during probation invalid); People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (procreation restriction imposed on defendant convicted of child endangerment overly broad where less restrictive means existed to provide safety for children); People v. Dominguez, 64 Cal. Rptr. 290, 293-94 (Cal. Ct. App. 1967) (probation restriction that defendant convicted of robbery not become pregnant unless married found void); Thomas v. State, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (condition that defendant convicted of grand theft and battery not become pregnant during probation unless married invalid); Howland v. State, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (condition prohibiting defendant from fathering a child not reasonably related to crime of child abuse where other less restrictive means existed to protect future children); People v. Ferrell, 659 N.E.2d 992, 995 (Ill. App. Ct. 1995) ("no-pregnancy" condition for defendant convicted of battery of a two-month-old child struck); Trammell v. State, 751 N.E.2d 283, 290-91 (Ind. Ct. App. 2001) (condition prohibiting defendant convicted of child neglect from becoming pregnant while on probation violated right of privacy); State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) (probation condition that defendant convicted of child endangerment refrain from getting pregnant violated right to privacy); State v. Norman, 484 So. 2d 952, 953

of these opinions reveals little about the majority jurisprudential position as to the degree of scrutiny applicable to probation restrictions. As one commentator has said, "[t]he myriad of tests applied is nothing short of a 'chaotic hodgepodge.'"[68] Moreover, there is not even any textual support in *Kline* itself for the position the *Oakley* majority takes as to the applicable degree of scrutiny. The only conclusion to be drawn from the reported cases is that in the overwhelming majority of cases, courts strike down probation restrictions against procreation. One can derive no categorical rule either as to the applicability of heightened review for probation conditions or how good a predictor heightened review is as to case outcome.[69]

Ignoring these obvious conclusions to be drawn from the reported cases, the *Oakley* majority, with little or no empirical support, derives an alternative meaning. The majority believes the trend reflects the "lack of mettle" that criminal defendants have for challenging probation restrictions given the "more punitive alternative" they face to probation—incarceration.[70] Neither the dissent nor this author is persuaded by the majority's conclusion.

The majority concludes that "the particular condition at issue here," a prohibition against the defendant having more children, is reserved for "the most egregious circumstances."[71] A comparison between *Oakley*, *Kline*, and those identified as part of the dominant trend helps shed some light on the relative egregiousness of this case as compared to others in which procreation restrictions have been struck. In doing so, it reveals no direct correlation between egregiousness and affirmation of probation conditions restrictive of procreative ability. Such a comparison is also helpful in underscoring that the degree of scrutiny applied by courts is immaterial to the outcome; and, the Justices' disagreement about the applicable level of scrutiny in *Oakley* notwithstanding, the only assistance precedent provides in this area is the revelation of a majority position as

(La. Ct. App. 1986) (restriction that convicted forgery defendant may not "give birth to any children outside of wedlock" during two year probationary period not reasonably related to curtailing defendant's criminality); State v. Livingston, 372 N.E.2d 1335, 1338 (Ohio Ct. App. 1976) (probation restriction that defendant who pled guilty to charge of child abuse not have a child for five year period held unconstitutional).

68. Devon A. Corneal, Comment, *Limiting the Right to Procreate:* State v.Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 464 (2003) (citation omitted).

69. *See infra* Part II.C.

70. *Oakley*, 629 N.W.2d at 209 n.24.

71. *Id.*

to outcome, not analysis.[72]

The factual backdrop grounding the comparison is, of course, *Oakley* itself. Recall that Oakley was charged with violating a Wisconsin statute that makes it a felony to refuse to support one's children. In response to the crisis children face as a result of non-custodial parents' refusal to pay child support, Wisconsin passed a law imposing severe criminal sanctions on so-called "deadbeat parents."[73] Section 939.50(3)(e) makes it a class E felony for any person who "intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide . . . ." The sentence for violation of the provision is a fine not to exceed $10,000 or imprisonment of up to two years, or both. In the case of intentional refusal to pay, imprisonment can be for up to five years.[74]

B. *The Case for Upholding Restrictions on Procreation*

The only other case in which a probation restriction on procreation was upheld involved a father convicted of serious physical abuse of his children.[75] The facts of the case are easily characterized as "egregious." The defendant in the case, Tad Kline, regularly abused his son until his parental rights were eventually terminated. After the termination of his parental rights to his son, Kline abused

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72. This conclusion should not be surprising given a trend in federal and state constitutional jurisprudence away from an older presumption that the degree of scrutiny is outcome determinative. For example, it used to be presumed that nearly without exception, strict scrutiny meant a law based on governmental classification could not survive and that rational (or reasonable) basis scrutiny meant doom for a challenge to a law that reflected a particular classification. Recent case law suggests otherwise. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (race-based admissions criterion survive strict scrutiny); Lawrence v. Texas, 539 U.S. 558 (2003) (striking sodomy laws without explicit mention of fundamental right or strict scrutiny); Romer v. Evans, 517 U.S. 620 (1996) (striking a sexual orientation classification despite no mention of strict scrutiny); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (a state-level decision determining that rational basis means real scrutiny). An in-depth discussion of this recent jurisprudential shift is beyond the scope of this essay but has been taken up insightfully elsewhere. *Compare* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (characterizing the Warren Court's strict scrutiny as "'strict' in theory and fatal in fact . . ."), *with* Libby Huskey, Case Note, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?* Grutter v. Bollinger, *123 S. Ct. 2325 (2003)*, 4 WYOMING L. REV. 439, 442 (2004) (describing the "weakening [of] the strict scrutiny test.").

73. *Oakley*, 629 N.W.2d. at 203.

74. WIS. STAT. § 939.50(3)(e) (1999-2000).

75. *See* State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998).

a daughter later born to him and his wife. His abuse of his daughter resulted in a spiral fracture to her leg as well as bruising to her chest and back when she was just eleven months old.[76] Kline testified that he had harmed his daughter because he did not know his own strength and stated that his conduct resulted from the fact that "babies are so hard to understand."[77] He was convicted of criminal mistreatment of children and, as a condition of his probation, required to complete a drug and anger management program.[78] As a further condition of probation, the court required him to obtain written approval of having met these underlying requirements before fathering any additional children.[79]

Kline challenged the restriction on his procreative ability as violative of his fundamental right to procreate.[80] The Oregon court disagreed. Confirming the analysis of the trial court, the appeals court explained that in light of the defendant's background and the appropriate interest in the safety of any children the defendant might conceive in the future, the condition could withstand constitutional scrutiny.[81] In so holding, the court emphasized that the restriction was not a total ban because it could be modified or eliminated simply on the defendant's demonstration that he had completed treatment. On balance, the court said the "condition provides potential victims with protection from future injury and interferes with defendant's fundamental rights to a permissible degree."[82]

Interestingly, the *Oakley* court focuses on *Kline* to determine the degree of scrutiny to be applied even though the *Kline* decision reveals very little as to the degree of scrutiny imposed. The decision reflects that Kline argued for strict scrutiny, conceding that the state interest in protecting children is compelling, but contesting that the infringement was not "narrowly tailored to achieve the state's legitimate goals."[83] The *Oakley* court states that the *Kline* court "rejected the defendant's argument that strict scrutiny applied . . . ."[84] Yet, a search of the *Kline* decision reveals no clear

76. *Id.* at 698-99.
77. *Id.* at 699.
78. *Id.* at 698.
79. *Id.* at 699.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. State v. Oakley, 629 N.W.2d 200, 209 (Wis. 2001).

rejection of the defendant's argument as to anything except outcome.

While the *Kline* court did say it disagreed with the defendant's position, it is not clear that the point it disagreed with is the applicable level of scrutiny. The *Kline* court disagreed with defendant's argument that "the court was required to perform a less restrictive means analysis before imposing the condition, that it failed to do so, and that the record does not support the imposition of such a condition."[85] The analysis that follows the rejection of the defendant's position does not reveal whether the court disagreed that it was required to perform a less restrictive means analysis (which would be required to support the *Oakley* majority's characterization of the *Kline* decision), whether the court disagreed that the lower court failed to do the less restrictive means analysis, or whether the court disagreed that the record did not support imposition of the condition. In other words, the analysis does not reveal whether the court rejected the defendant's argument for strict scrutiny, or whether it accepted it but concluded that the probation condition passed constitutional muster even under that heightened standard. In sum, there is no way to determine from its language what degree of scrutiny the *Kline* court imposed.[86] In the end, as with the *Oakley* case, it does not matter. The outcome in both cases could be supported by application of either a strict scrutiny or reasonable basis test.

C. *The Case Against Upholding Restrictions on Procreation*

Obviously, the *Kline* facts are egregious. And, if egregiousness of facts were the test for reviewing procreation restrictions, one could understand how that might distinguish outcomes in *Kline* and the case of *People v. Zaring*,[87] for example, in which a California court struck a procreation restriction imposed on a heroin abuser. However, cases striking procreation restrictions in the probation context are not without egregious facts comparable to those present in *Kline*. Admitting that there is no precise egregiousness measure,

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85. *Kline*, 963 P.2d at 699.

86. Indeed, the one citation the *Kline* court cited as controlling supports Defendant's claim for heightened scrutiny. *Id.* (citing State v. Martin, 580 P.2d 536, 540 (Or. 1978) ("when fundamental right is involved, sentencing court has less discretion to impose conditions in conflict with the right")).

87. 10 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 1992) (holding "no pregnancy condition . . . improper because it is impermissibly overbroad.").

it is nonetheless hard to argue that the facts of *People v. Pointer*[88] are not similarly egregious as those in *Kline*. *Pointer* involved a challenge to a probation restriction waged by a mother of two infant children who was convicted of felony endangerment. Against the advice of her physician and over the objections of one of the children's father, Ruby Pointer imposed a strict macrobiotic diet regime on her children. Over time, the children suffered severe physical consequences as a result of the food restrictions.[89] When Pointer finally brought one of her children to a doctor, he was diagnosed as "emaciated, semi-comatose, and in a state of shock, was dying and in need of immediate hospitalization."[90] Pointer responded, in effect, that she would think about it. She "resisted hospitalization because she felt [her son] might intravenously be fed 'preservatives' and suffer a rash."[91] The doctor who had first diagnosed her son contacted officials who ordered the child hospitalized immediately. Even during her son's hospitalization, Pointer continued to feed him macrobiotic food despite her doctor's warnings not to do so. She also continued to breastfeed her son after being told not to because her milk contained dangerously high levels of sodium for the child.[92]

Once discharged from the hospital, Pointer's son was placed in a foster home. During an otherwise lawful visit with her son, Pointer abducted him and fled to Puerto Rico.[93] After her eventual arrest in Puerto Rico, she admitted to having abducted her son from the foster home. She justified the kidnapping by explaining that the foster parent fed her son "eggs and sugar and did not respect his dietary habits."[94] She said the child was "getting fat" and

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88. 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (noting the existence of "alternative restrictions less subversive of appellant's fundamental right to procreate.").

89. *Id.* at 359-60.

> A [macrobiotic] diet is followed for spiritual and philosophical reasons. [The diet] [a]ims to maintain a balance between foods seen as ying (positive) or yang (negative). The diet progresses through ten levels, becoming increasingly restrictive. Not all levels are vegetarian, though each level gradually eliminates animal products. The highest levels eliminate fruit and vegetables, eventually reaching the level of a brown rice diet.

The Fruitarian Found., *Definitions of Nutrition Systems at www.fruitarian.com/ay/DefinitionsNutritionSystems.htm (last visited July. 21, 2004).*

90. *Pointer*, 199 Cal. Rptr. at 360.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

that "she did not like it."[95] As a result of the diet and Pointer's neglect, both of her children suffered physical damage including "severe growth retardation and permanent neurological damage."[96] Ruby Pointer was convicted of felony child endangerment under a statute similar to the one under which Kline was charged. The court sentenced her to five years probation on certain conditions including that she not conceive any children within the probationary period.[97]

Expressing deep understanding of the trial court's motivation behind imposing the condition, nevertheless, the appellate court struck the condition.[98] After concluding first that the procreation restriction was reasonable in light of Pointer's history of child abuse and endangerment, the court focused on the range of options available to protect future unborn children.[99] The court concluded that "less onerous conditions" could adequately serve the intended purpose of the restriction—protecting the public, including preventing injury to any future unborn children.[100] The court suggested that the defendant could submit to pregnancy testing, and if she became pregnant could "be required to follow an intensive prenatal and neonatal treatment program monitored by both the probation officer and by a supervising physician."[101] The court further pointed out that any child born during the probationary period could be removed from her custody and placed in foster care. Interestingly, and arguably inconsistent with the legal conclusion it draws, the court pointed out these alternative conditions despite its acknowledgement that "the record fully supports the trial court's belief that appellant would continue to adhere to a strict macrobiotic diet despite the dangers it presents to any children she might conceive," and the potential for irrevocable harm to a future child despite later intervention by the state.[102]

Understandably, the *Oakley* majority ignored the *Pointer* case not just because of its outcome but likely also because of its clear articulation of the applicable test for reviewing probation restrictions that implicate fundamental rights. Although the *Pointer* court

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 366.
99. *Id.* at 365.
100. *Id.*
101. *Id.*
102. *Id.* at 364.

explained that "[t]he validity of the condition of probation . . . must first be assessed in terms of its reasonableness,"[103] it emphasized that satisfaction of a reasonableness standard did not end the inquiry. In circumstances where a probation condition "impinges upon the exercise of a fundamental right," the court said it "must additionally determine whether the condition is impermissibly overbroad."[104] Resolving any ambiguity about the applicable level of review resulting from the "impermissibly overbroad" language, the court explained that, in light of the infringement the condition placed on the defendant's fundamental right to privacy, it must be subjected to "special scrutiny" to determine whether it is "entirely necessary" to serve "the purposes of rehabilitation and public safety."[105] In the end, in light of the availability of less restrictive alternatives, the *Pointer* court unanimously reversed the part of the trial court's judgment prohibiting procreation as a probation condition. Although it never used the language of strict scrutiny, leaving some question as to the applicable level of inquiry and some room for the debate engaged in by the *Oakley* justices as to the meaning of "overly broad," the outcome is without doubt. As long as there is any possible alternative (even one that is arguably not failsafe)[106] available for protecting future children, a procreation restriction, no matter how egregious the facts of the case, must fall in the eyes of the California court.

A case also involving child abuse, decided nearly seventeen years after *Pointer*, applied a low level of scrutiny yet concurred with the outcome in *Pointer*.[107] In *State v. Trammell*, the defendant was charged and convicted of neglect of a dependent following her son's death from malnutrition and dehydration.[108] The facts of the case are, arguably, egregious. Kristie Trammell's son was consuming reasonable amounts of formula but vomiting and suffering from severe diarrhea for several months.[109] Trammell, without any re-

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103. *Id.* at 363.

104. *Id.* at 364.

105. *Id.* at 365. This characterization of the level of scrutiny as "special" tracks black letter law as defined in LAFAVE, ISRAEL, AND KING, CRIMINAL PROCEDURE, § 26.9(a), 834. Departing, though, somewhat from the *Pointer* articulation of special scrutiny, LaFave et. al define this special scrutiny to mean a condition is impermissible if "the impact upon the probationer's rights is 'substantially greater than is necessary to carry out the purposes' of probation." *Id.*

106. *See supra* text accompanying notes 99-102.

107. State v. Trammell, 751 N.E.2d 283 (Ind. Ct. App. 2001).

108. *Id.* at 285-86.

109. *Id.* at 285.

ported explanation, ignored her mother's direction to take the child to a hospital for care.[110] The record showed that on the day the child died, Trammell fed the child once shortly after midnight whereupon he vomited most of what he consumed.[111] Except for peeking into his room the next morning, Trammell failed to either check on or feed the child until the next evening.[112] By that time, he had been dead for hours.[113] The facts demonstrate that the child had been starving for a long period of time, weighing less than ten pounds when he was almost five months old.[114] At Trammell's sentencing for the charge of neglect, the trial court gave her an eighteen year sentence with eight years to be served on probation.[115] One of the conditions of her probation was that she not become pregnant.[116]

In reviewing a challenge to the probation condition, the Indiana court addressed the issue as one of first impression in the state court. The applicable test articulated by the court for review of probation conditions that impinge upon a probationer's exercise of a constitutional right was one of reasonableness. In the court's words, "the condition must 'have a reasonable relationship to the treatment of the accused and the protection of the public.'"[117] The court created a balancing test for instances when a probation condition intrudes on a constitutional right by taking into account: "(1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement."[118] Nowhere does the opinion refer to strict scrutiny or heightened review. Interestingly, the *Trammell* court pointed to the *Pointer* analysis without adopting the same degree of scrutiny. The *Trammell* court was persuaded that the restriction had no relationship to rehabilitation.[119] They also felt that the condition would give rise to significant enforcement problems by forcing Trammell

110. *Id.*
111. *Id.* at 286.
112. *Id.*
113. *Id.*
114. *Id.* at 287.
115. *Id.* at 286.
116. *Id.*
117. *Id.* at 288 (quoting Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999)).
118. *Id.*
119. *Id.* at 288-89 (citing People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984)).

to choose among concealing the pregnancy, abortion, or incarceration.[120] Based on these two factors, the Indiana Court struck the condition.[121]

In the end, a comparison of cases provides no support for the *Oakley* majority's conclusion either that the applicable test is one of reasonableness (or, alternately stated, not strict scrutiny) or egregiousness of facts. As demonstrated above, the opinions interchangeably talk of reasonableness, special, and strict scrutiny. At least one case using the language of reasonableness struck a probation condition.[122] Another court, arguably accepting a defendant's argument for strict scrutiny, upheld a similar condition.[123] Many of the cases involve egregious facts, including demonstrated harm to children. Neither the level of scrutiny applied nor the egregiousness of facts is predictive of outcomes. Looking to precedent, the only reliable prediction that can be made is that, in the vast majority of cases, restrictions on procreation as a condition of probation fail. *Oakley* and *Kline* are exceptions proving an otherwise hard, fast, longstanding rule – a rule as to outcome.

III. AN ALTERNATIVE RULE—UNCONSTITUTIONAL CONDITIONS

Despite the existence of a hard and fast rule as to outcome, the Wisconsin court did not hold to it. The court had an obligation only to identify the legal rule applicable to probation conditions and apply it to the facts before it.[124] Whether applying a strict scrutiny, special scrutiny, or rational basis test, the court was charged with weighing the degree to which the probation restriction impinged on a fundamental right against the asserted state interest. It did so dutifully. Despite the court's faithfulness to its duty, the dissenting justices, and this author, remain unsettled by the outcome—both by the serious departure from established case law, at least as to out-

120. *Id.* at 290 (citing State v. Mosburg, 768P.2d 313 (1989)). *See* Jennifer Martin, *Coercive Abortions and Criminalizing the Birth of Children: Some Thoughts on the Impact on Women of State v. Oakley*, 26 W. NEW ENG. L. REV. 65 (2004).

121. *Trammell*, 751 N.E.2d at 290-91.

122. *Id.* at 291.

123. State v. Kline, 963 P.2d 697, 698-99 (Or. Ct. App. 1998) (upholding a condition that the defendant, convicted of mistreating and physically abusing an infant daughter, refrain from fathering additional children before completing anger management and drug treatment programs).

124. Elizabeth F. McCright, *Prohibiting Deadbeat Dads From Fathering More Children . . . What's Next? The Wisconsin Supreme Court's Decision in* State v. Oakley, 86 MARQ. L. REV. 153, 165 (2002).

come, and by the implications for poor people's fundamental right to have children.

One other reason the outcome of *Oakley* is so unsettling is the extent to which it conflicts with established law as to the degree of protection for the fundamental rights of incarcerated felons, a condition which David Oakley avoided by probation. *Oakley* stands in stark contrast to *Turner v. Safley*,[125] in which the United States Supreme Court affirmed that incarcerated prisoners may not be denied the fundamental right to marry.[126] In *Turner*, the Court considered a challenge brought by a class of incarcerated prisoners to a Missouri regulation that denied prisoners the right to marry without the approval of the superintendent which would be ordinarily withheld absent a compelling reason.[127] In analyzing the restriction, the Court acknowledged that the right to marry is a fundamental one. It further acknowledged that, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[128] Granting that, "the problems of prisons in America are complex and intractable," and that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform,"[129] the Court identified a unique test for balancing the constitutional rights of prisoners with the administrative exigencies of running a prison. The test it formulated was not a standard of heightened scrutiny, but "instead inquired whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."[130] Concluding that the marriage restriction in the case was the latter, it struck the provision. Notably, in *Turner*, a restriction on a fundamental right fell under a test applying the lowest degree of scrutiny.[131]

A second fundamental rights case implicated by the *Oakley* de-

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125. 482 U.S. 78 (1987).

126. *Id.* at 96.

127. *Id.* at 82. While not contained within the regulation, Missouri officials testified that "generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason." *Id.* Absent such a scenario, ordinarily, no prisoner could marry. *Id.*

128. *Id.* at 84.

129. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)).

130. *Id.* at 87

131. *Id.* at 89 (quoting Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 128 (1977)) (noting "such a standard is necessary if 'prison administrators . . . , and not the courts [are] to make difficult the judgments concerning institutional operations'.").

cision is that of *Zablocki v. Redhail*.[132] In *Zablocki*, the United State Supreme Court struck down a Wisconsin ban on marriage imposed on a father who was not up-to-date on child support where his children's caretaker was on public assistance. As the Court explained, a statutory prohibition on the right to marry could not be justified by the state's interest in providing support for children.[133] Together, what *Zablocki* and *Turner* mean for David Oakley is that he could not have been denied his fundamental right to marry, whether he was in jail or not, as a result of his failure to pay child support. It is, therefore, somewhat surprising to learn that, as a probationer, he could be denied the equally fundamental right of procreation.

The *Oakley* majority ignores the jurisprudential result of the confluence of *Turner* and *Zablocki*.[134] Instead it takes an alternative approach to the deprivation of David Oakley's fundamental right to procreate. Justice Wilcox explains that, "[s]imply stated, [the trial judge] preserved much of Oakley's liberty by imposing probation with conditions rather than the more punitive option of imprisonment."[135] Put another way, since the trial judge could have sentenced Oakley to prison, a near total curtailment of his liberty interests, he surely could impose upon him a less restrictive result—no incarceration but a "voluntary"[136] restriction on a liberty interest less severe than that which might have resulted upon incarceration. Explained this way, an unconstitutional conditions problem with the probation condition becomes obvious.

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132. 434 U.S. 374 (1978).

133. *Id.* at 389-90.

134. The majority does not exactly ignore *Zablocki* as it does *Turner*. However, it seriously minimizes its significance, noting that while its facts are interesting because it was a Wisconsin case, it is inapposite because the Court applied strict scrutiny. State v. Oakley, 629 N.W.2d 200, 208 n.23 (Wis. 2001).

135. *Id.* at 212-13.

136. The word voluntary is in quotes to highlight the fact that in choosing probation and voluntarily accepting the conditions that attach, convicted defendants have very little real choice in the matter. *See* U.S. v. Knights, 534 U.S. 112, 118 (2001) (government argued that probation condition allowing warrantless and limitless searches of probationer was voluntary because probationer "had the option of rejecting probation and going to prison instead"). *See also* Sunny A. M. Koshy, Note, *The Right of [All] the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 466-68 (1988) (questioning the "voluntariness" of probationers' and parolees' choice considering that the alternative is incarceration); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 33-35 (1991) (discussing the voluntary choice of a black South Carolina man to be castrated in exchange for a commutation of his prison sentence) (citing State v. Brown, 326 S.E. 2d 410 (S.C. 1985)).

Stated broadly, the unconstitutional conditions doctrine "prohibits conditions on allocations in which the government indirectly impinges on a protected activity or choice in a way that would be unconstitutional if the same result had been achieved through a direct governmental command."[137] Although until recently its vitality has been in some question in the area of governmental benefits,[138] there is no real question about the unconstitutional conditions doctrine's relevance and life in the area of probation conditions. Most recently, the United States Supreme Court considered a challenge to a probation condition by which the probationer agreed to "[s]ubmit his . . . person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."[139] As the Court notes, the government conceded that the unconstitutional conditions doctrine applied.[140] As the government explained in its brief, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government . . . ."[141] What the doctrine means for Oakley is that to the extent probation may be viewed as a governmental allocation or "benefit," the government may not condition it on Oakley's giving up his right to procreation, voluntary or otherwise. Viewed this way, the condition clearly fails.

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137. There are numerous articulations of the doctrine. This one comes from Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1193-94 (1990). The foundational article on the topic is considered to be Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). Other authors have also expounded on and criticized the doctrine in numerous contexts. *See also* Richard A. Epstein, *The Supreme Court, 1987 Term – Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); John H. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209 (1989); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

138. The unconstitutional conditions doctrine suffered a decline after *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court limited the reach of the doctrine in programs funding governmental speech. Despite the Court's limitation on the doctrine set in *Rust*, it was revitalized after the 2001 Term in which the Court applied the doctrine to the legal services program in *Velazquez v. Legal Services Corp.*, 531 U.S. 533 (2001). In that case, the Court held unconstitutional a restriction on legal services aid recipients' use of aid to attempt to amend or challenge welfare laws. *Id.* at 548-49.

139. U.S. v. Knights, 534 U.S. 112, 114 (2001).

140. *Id.* at 118 n.4.

141. Brief for the Petitioner at 21-22, U.S. v. Knights, 534 U.S. 112 (2001) (No. 00-1260), *available at* 2001 WL 799254 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

Arguably, Wisconsin could respond that the correct comparison is not whether the government could have deprived Oakley of the right to procreate if he were a free man, but rather, whether the government could have deprived Oakley of the right to have children if he were incarcerated. However, this position goes against the great weight of unconstitutional conditions cases, of which there are admittedly few, in the probation context.[142] Moreover, it is inconsistent with the general approach of the part of the doctrine that explains that simply because government can through one action restrict a liberty interest of an individual, it does not mean it can automatically do so in a different context just because the governmental largess being offered in the second scenario can be categorized somehow as lesser. As Kathleen Sullivan has explained, the unconstitutional conditions problem implicates the question whether the "greater power to deny a benefit [in Oakley's case probation] includes the lesser power to impose a condition on its receipt."[143]

Nevertheless, taking the point on directly *arguendo*, reveals the serious flaw in the *Oakley* outcome. Even if Wisconsin could be heard to argue that the correct point of comparison is whether the government could restrict Oakley's right to procreate as an incarcerated felon, the restriction on Oakley's right to procreate, without the legitimate penological concerns that arise in a prison context, would still fail.

In *Goodwin v. Turner*,[144] inmate Steven Goodwin requested authorization from prison officials to ejaculate into a container so that his semen could be used to impregnate his wife artificially.[145]

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142. *See, e.g.*, Knights, 534 U.S. at 118; U.S. v. Cranley, 350 F.3d 617, 620-22 (7th Cir. 2003) (no unconstitutional conditions problem where probationer required to give full accounting of his criminal activity as condition of probation); U.S. v. Jimenez, 600 F.2d 1172, 1175 (5th Cir. 1979) (unconstitutional condition of probation to require repayment of cost of appointed counsel where no exception for indigence); State v. Eccles, 877 P.2d 779, 800-02 (Ariz. 1994) (unconstitutional to require waiver of Fifth Amendment privilege against self-incrimination as condition of probation); State v. Franklin, 604 N.W.2d 79, 83-84 (Minn. 2000) (geographical exclusion held invalid under unconstitutional conditions review).

143. Sullivan, *supra* note 137, at 1415. As many commentators have explained, this "greater includes the lesser" argument has run headlong into unconstitutional conditions creating a confusing mix of case law. *See, e.g.*, Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 374 (1995) (noting that "[t]he problem of conditioned benefits is 'the basic structural issue that for over a hundred years has bedeviled court and commentators.'") (citation omitted).

144. 908 F.2d 1395 (8th Cir. 1990).

145. *Id.* at 1396.

Goodwin and his wife were concerned that if they were forced to wait until Goodwin's release date to begin to have children, they would be at an increased risk for giving birth to a child with birth defects "as a result of increased maternal age."[146] Officials denied the request. The Eighth Circuit affirmed the District Court's denial of the inmate's request for relief.[147] Despite this outcome, the court's analysis is informative for purposes of evaluating an unconstitutional conditions argument on behalf of Oakley.

In *Goodwin*, the Eighth Circuit assumed that Goodwin's right to procreate survives incarceration.[148] The standard for evaluating the prison restriction on a prisoner's fundamental right, explained the court, is "to ask whether the regulation is 'reasonably related to legitimate penological interests.'"[149] Finding that there were legitimate penological interests that might be undermined by allowing male prisoners to procreate while in prison, the court upheld the restriction.[150] Although this outcome reveals the compromised nature of the constitutional right to procreate while one is incarcerated, the applicable rule reveals the limitations on the compromise.

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146. *Id.*

147. *Id.* at 1400.

148. The Ninth Circuit has taken a different approach. *See* Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002) (en banc) (right to procreate does not survive incarceration) *rev'g* 264 F.3d 882. The Ninth Circuit panel decision affirming the inmate's right to procreate engendered a significant amount of scholarship, most of which argued that the decision was correctly decided and reversed the previous trend of striking prison regulations restricting the right of inmates to procreate as supported by legitimate penological interests. *See, e.g.*, Jaime Escuder, Comment, *Prisoner Parents: An Argument for Extending the Right to Procreate to Incarcerated Men and Women*, 2002 U. CHI. LEGAL F. 271 (2002); Richard Guidice, Jr., Note, *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, 29 FORDHAM URB. L.J. 2277 (2002).

149. *Goodwin*, 908 F.2d at 1398 (quoting Washington v. Harper, 494 U.S. 210, 223 (1990)).

150. Oddly, the legitimate penological interest that supported the restriction in the court's eyes was rooted in gender equity. The Eighth Circuit explained that if male prisoners' rights to procreate were protected, female prisoners' rights would also have to be. That would result in hardship for the prison because the method for protecting the procreative right would be so different, and labor intensive, in the instance of female prisoners. *Id.* at 1400. Evaluating the strength of the court's reasoning is beyond the scope of this essay. However, this author questions the legitimacy of the prison officials' concerns given the gender inequities in prison *See, e.g.*, Voncile B. Gowdy, *Women in Criminal Justice: A Twenty Year Update*, *available at* www.ojp.usdoj.gov/reports/98Guides/wcjs98/execsumm.htm (last visited July 21, 2004) (noting that the "increase in the number of female offenders has not been matched by enhanced attention to specialized programs geared particularly for women – such as medical care and counseling for prior victimization from battering or sexual assault, health care, drug treatment, and parenting skills training.")

That is, in order to justify the restriction on even a prisoner's constitutional right to procreate, a prison must demonstrate that legitimate penological interests support the restriction. Those penological interests that justify the restriction in the prison context simply do not transfer to the probationer context. Therefore, taking away legitimate prison-based penological interests from the analysis, a prisoner ends up with more rights than David Oakley does as a probationer.

Deprived of the fundamental right to procreate solely because he is a probationer, Oakley ultimately enjoys fewer protections than he would as an incarcerated felon. Both logic and the unconstitutional conditions doctrine decry this result. While it is true, as the *Oakley* court recognized, that Oakley might, as a practical matter, be deprived the right to procreate had the court simply sentenced him to prison, that does not mean that he would have no legal recourse to challenge such a restriction on a fundamental liberty and privacy interest. Nor does it mean, as a doctrinal matter, that the state could condition the benefit—probation as an alternative to incarceration – on his voluntary agreement to relinquish a constitutional right.

CONCLUSION

David Oakley did a bad thing. He should have financially supported his children. Few people, and certainly not this author, would quarrel with the *Oakley* court's concern for the welfare of children.[151] On the level of doctrine, the court balanced the competing concerns and ruled that the state's interest in protecting children defeated Oakley's right to procreate. The court acted in its traditional capacity and applied a straightforward rule of law. Despite that, the result conflicts with nearly all reported decisions involving analogous facts. No matter, that is the messy business of judicial balancing.

Of greater concern, however, is that in the end, the result puts Oakley in a worse position with respect to his right to procreate than he would have been in had he been ordered to the more severe punishment, incarceration rather than probation. Moreover, the court justified the incursion on Oakley's constitutional right on the fact that he received the governmental benefit of probation. The precedent this sets threatens to undermine the constitutional

151. State v. Oakley, 629 N.W.2d 200, 204 (Wis. 2001) (describing the "effects of the nonpayment of child support on our children" as "particularly troubling.").

rights of marginalized people, including the poor and racial minorities.[152] In the end, society is harmed when constitutional rights are denied or conditioned on benefits. While the case may result in some ephemeral protections for David Oakley's yet unborn or, more likely, never-to-be-born children, the risk of harm to the constitutional liberties of existing citizens is far greater than that posed to potential ones.

152. See Albiston & Neilson, *supra* note 14; Ballard, *supra* note 8, WILLIAMS, *supra* note 136.