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I. Introduction

When people make irresponsible choices, courts customarily hold them accountable for their actions through civil or criminal sanctions. However, occasionally courts punish criminal defendants who have made irresponsible choices by removing or restricting their ability to choose again. Operating

* Candidate for Juris Doctor, Washington and Lee University School of Law, May 2003. I am deeply grateful to Professor Quince Hopkins for her inspiration and guidance in writing this Note. I could not have written it without the invaluable editorial advice of Christy McQuality and a last-minute rescue by Patrick Bryant.

pursuant to probation statutes, courts occasionally have burdened probation sentences with conditions that restrict the probationers' most personal decisionmaking.[1] Since the late 1960s, appellate courts in the United States have decided sixteen cases involving probation conditions that restricted an extremely private choice: whether or not to have children.[2]

By 1998, the invalidity of a probation condition commanding the defendant not to bear or beget children (hereinafter a "procreation condition") appeared to be a settled matter. Courts had struck down procreation conditions in all thirteen cases in which they had appeared.[3] Nevertheless, in 1998, an Oregon appellate court affirmed the validity of a procreation condition.[4] When the Supreme Court of Wisconsin addressed a procreation condition three years later, it agreed with the Oregon court's reasoning and upheld the condition.[5]

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1. *See infra* Parts II, IV (describing and discussing cases in which courts considered probation conditions that restricted probationers' reproductive decisions).

2. United States v. Smith, 972 F.2d 960 (8th Cir. 1992); People v. Zaring, 10 Cal. Rptr. 2d 263 (Cal. Ct. App. 1992); People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984); People v. Dominguez, 64 Cal. Rptr. 290 (Cal. Ct. App. 1967); Thomas v. State, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); Burchell v. State, 419 So. 2d 358 (Fla. Dist. Ct. App. 1982); Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); People v. Ferrell, 659 N.E.2d 992 (Ill. App. Ct. 1995); Trammell v. State, 751 N.E.2d 283 (Ind. Ct. App. 2001); State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989); State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986); State v. Richard, 680 N.E.2d 667 (Ohio Ct. App. 1996); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976); State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998); State v. Oakley, 629 N.W.2d 200 (Wis. 2001), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002).

3. *See* United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) (striking down procreation condition); People v. Zaring, 10 Cal. Rptr. 2d 263, 271 (Cal. Ct. App. 1992) (same); People v. Pointer, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984) (same); People v. Dominguez, 64 Cal. Rptr. 290, 294 (Cal. Ct. App. 1967) (same); Thomas v. State, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (same); Howland v. State, 420 So. 2d 918, 920 (Fla. Dist. Ct. App. 1982) (same); Burchell v. State, 419 So. 2d 358, 358 (Fla. Dist. Ct. App. 1982) (same); Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (same); People v. Ferrell, 659 N.E.2d 992, 996 (Ill. App. Ct. 1995) (same); State v. Mosburg, 768 P.2d 313, 316 (Kan. Ct. App. 1989) (same); State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986) (same); State v. Richard, 680 N.E.2d 667, 670 (Ohio Ct. App. 1996) (same); State v. Livingston, 372 N.E.2d 1335, 1338 (Ohio Ct. App. 1976) (same). See *infra* notes 4-5 for citations to the three applicable cases that courts have decided since 1998.

4. *See* State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998) (upholding procreation condition).

5. *See* State v. Oakley, 629 N.W.2d 200, 214 (Wis. 2001) (upholding procreation condition), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002). The only other court since *Kline* to address a procreation condition considered and rejected *Kline*'s conclusion and chose instead to follow *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989). *See* Trammell v. State, 751 N.E.2d 283, 289 n.9, 290-91 (Ind. Ct. App. 2001) (striking down procreation condition).

The Oregon and Wisconsin decisions illustrate that the propriety of limiting a probationer's right to procreate is anything but a settled matter. Given the publicity surrounding Wisconsin's *State v. Oakley*[6] decision,[7] the most recent approval of a procreation condition, the question whether such a condition is within the power of the courts is most urgent. The right to decide whether to have children, which the Supreme Court has characterized as being "at the very heart of [a] cluster of constitutionally protected choices,"[8] may hang in the balance for the more than two million Americans placed on probation each year.[9]

Part II of this Note will discuss *State v. Oakley* and *State v. Kline*,[10] the two cases in which courts have upheld procreation conditions. Part II then will

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6. 629 N.W.2d 200 (Wis. 2001), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002); *see infra* Part II (describing case).

7. National coverage of the *Oakley* decision included news and editorial items in *The Washington Post, The Chicago Tribune, USA Today*, National Public Radio's "All Things Considered," network news programs on ABC, NBC, CBS, and FOX, and an article in *Time* magazine. Joan Biskupic, *"Deadbeat Dad" Told: No More Kids, Wis. Court Backs Threat of Prison*, USA TODAY, July 11, 2001, at A1, *available at* 2001 WL 5466543; Glenda Cooper, *Wisconsin Deadbeat Dad Case Tests the Rights to Parenthood; Ruling Sets Conditions on Having More Children, Stirs Debate*, WASH. POST, July 15, 2001, at A2, *available at* 2001 WL 23180643; Leonard Greene, *Critics Rip Kid Ban on Deadbeat Serial Dad*, N.Y. POST, July 16, 2001, at 13, *available at* 2001 WL 4094532; Leonard Pitts, *Commentary: Deadbeat Dad's Punishment Is Troubling*, CHI. TRIB., July 17, 2001, at 17, *available at* 2001 WL 4094532; David Van Biema, *When Father Equals Convict, Can Judges Jail Problem Dads Just for Procreating?*, TIME, July 23, 2001, at 64, *available at* 2001 WL 22574717; *The Evening News with Dan Rather: Deadbeat Dad Gets Stern Warning from Wisconsin Supreme Court* (CBS television broadcast, July 11, 2001), *available at* 2001 WL 6115707; *Good Morning America: Wisconsin Supreme Court Rules Deadbeat Dad Cannot Father More Children While on Probation* (ABC television broadcast, July 12, 2001), *available at* 2001 WL 21723731; *Hannity & Colmes: One on One with Jeffrey Leving* (Fox News Channel cable broadcast, July 18, 2001), *available at* 2001 WL 23409064; *The O'Reilly Factor: Unresolved Problem: How to Handle Fathers Who Will Not Support Their Children* (Fox News Channel cable broadcast, July 12, 2001), *available at* 2001 WL 5081416; *Today: Wisconsin Court Orders Deadbeat Dad Not to Have More Children or Face Jail* (NBC television broadcast, July 12, 2001), *available at* 2001 WL 23801419; *Weekend All Things Considered: Dennis Chapman Discusses a Wisconsin Judge's Decision to Put a Deadbeat Father on Probation with the Stipulation that He Cannot Father More Children Unless He Can Provide Support* (NPR radio broadcast, July 14, 2001), *available at* 2001 WL 7766251.

8. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

9. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CORRECTIONAL POPULATION REACHES NEW HIGH: GROWS BY 126,400 DURING 2000 TO TOTAL 6.5 MILLION ADULTS 4 tbl. 3 (Aug. 26, 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus00.pdf. In 2000, the most recent year for which statistics are available, courts sentenced an estimated 2,032,089 adults to probation in the United States. *Id.* This number reflects an increase of 1.6% over the previous year. *Id.*

10. 963 P.2d 697 (Or. Ct. App. 1998).

discuss the reasons that each court gave for its decision. Part III will explain the constitutional protection of individuals' decisions whether to have children. In a line of cases stretching back to the 1940s, the Supreme Court has recognized this fundamental right as a component of the right of privacy.[11] Part III also will explain why courts often consider the procreative rights of probationers to be less compelling than those of ordinary people.[12]

Part IV will discuss the cases in which appellate courts have invalidated procreation conditions. Although these cases come from several different jurisdictions, they share some important characteristics.[13] For example, many courts have stated similar goals of probation, goals that in turn have provided a basis for striking down the procreation conditions.[14] Many cases also have involved the same underlying crime: child abuse.[15] Finally, several reviewing courts have acknowledged the enforcement problems inherent in procreation conditions.[16]

Part V will consider the validity and practicality of procreation conditions.[17] Considerations include drafting the conditions to be sufficiently narrow, realistically enforceable, and logical. Although the purposes of probation vary among jurisdictions, any condition should fulfill a few basic common goals – for example, rehabilitation of the offender and protection of society. Procreation conditions cannot realistically be narrow enough to meet those goals. In addition, Part V will discuss some of the numerous and troubling problems of enforcing procreation conditions.[18] Among the reasons the *Oakley* court gave for its decision was the assertion that criminals necessarily lose their procreative rights when they are imprisoned. Therefore, Part V will discuss the case of *Gerber v. Hickman*,[19] decided by the Court of Appeals for the Ninth Circuit, in which a number of dissenters suggested that

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11. *See infra* Part III.A (discussing Supreme Court jurisprudence surrounding right of privacy).

12. *See infra* Part III.B (discussing lower standard of review for probationers' claims of right to privacy in reproductive decisionmaking).

13. *See infra* Part IV (discussing common characteristics of cases striking down procreation conditions).

14. *See infra* Part IV.A (discussing goals of probation).

15. *See infra* Part IV.B (discussing crimes underlying probation sentences with procreation conditions).

16. *See infra* Part IV.C (discussing enforcement problems with procreation conditions).

17. *See infra* Part V (relating further policy problems with procreation conditions).

18. *See infra* Part V.C (discussing additional enforcement difficulties presented by procreation conditions).

19. 291 F.3d 617 (9th Cir. 2002).

courts may not suspend a convicted criminal's fundamental right to procreate, even during his incarceration.[20]

Part VI will conclude that procreation conditions are invalid because they are unconstitutional as well as impractical and even counterproductive.[21] In making such decisions in the future, courts should decline to follow the two recent cases upholding procreation conditions and thereby avert what otherwise could become an ominous trend.

II. Two Courts Uphold Procreation Conditions

Despite the fairly consistent line of cases that voided procreation conditions,[22] two courts recently upheld such conditions.[23] The two cases that upheld procreation conditions share many characteristics with those that struck down procreation conditions.[24] One such common characteristic is child abuse, with which one case upholding a procreation condition dealt directly[25] and which the other addressed by analogy in its reasoning.[26]

In 1998, an Oregon court of appeals became the first court to uphold a procreation condition when it handed down *State v. Kline*.[27] In a separate case

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20. *See infra* Part V.A (discussing *Gerber*).

21. *See infra* Part VI (stating conclusions of Note).

22. *See infra* Part IV (describing cases invalidating procreation conditions and examining common elements).

23. *See infra* notes 27, 36, and accompanying text (describing *Kline* and *Oakley* cases and their outcomes).

24. *See infra* Part IV (describing cases invalidating procreation conditions and examining common elements).

25. *See* State v. Kline, 963 P.2d 697, 698-99 (Or. Ct. App. 1998) (describing defendant's prior and recent abuse of children).

26. *See* State v. Oakley, 629 N.W.2d 200, 208-09 (Wis. 2001) (likening facts of case to those of *Kline*), *cert. denied*, 537 U.S. __, 123 S. Ct. 74 (2002).

27. *See* State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998) (finding no error in trial court's imposition of procreation condition). In *Kline*, defendant Tad Kline had a history of child abuse. *Id.* at 698. In this case, Kline had been abusive toward his daughter and his wife Krista, particularly while he was high on methamphetamines. *Id.* Krista testified that Kline had mistreated the child on several occasions. *Id.* After one incident, Krista finally took the baby to a physician, where she learned that the child's leg had a spiral fracture. *Id.* Thereafter, Krista removed the child from Kline's home and reported the incident to the Children's Services Division. *Id.* at 699. After an investigation had commenced, Kline admitted to Krista that he had caused the spiral fracture and other injuries to the baby. *Id.* Upon his arrest, Kline admitted to his problems with drug abuse and anger management. *Id.* Kline was convicted of criminal mistreatment and sentenced to probation, with conditions including the following: "You may not[,] without prior written approval by the Court [and] following the successful completion of a drug treatment program and anger management program and any other program directly related to counseling related to [] your conduct towards children[,] father any child."

several years earlier, a court had terminated the parental rights of defendant Tad Kline, who had a history of drug abuse, had broken his infant son's arm, and had inflicted numerous additional minor injuries on the infant.[28] Kline and his wife later had a baby daughter, and Kline admitted to causing a spiral fracture in the baby's leg and bruising her chest and head.[29] Kline's wife testified that she also was aware of other injuries to the baby, such as an apparent concussion for which she did not seek medical treatment because Kline threatened her life and the baby's.[30] The court convicted Kline, who admitted to having drug and anger management problems, of criminal mistreatment.[31] The trial court, in sentencing Kline to probation, ordered him not to father any children until he successfully completed drug-treatment and anger-management programs.[32] The Court of Appeals of Oregon found that the trial court, in setting the procreation condition, had duly considered the case history, Kline's history of abuse and noncompliance with probation conditions, and the unavailability of viable alternatives.[33] Furthermore, the court found that the procreation condition, "in the light of [Kline's] potential for violence associated with his anger and drug abuse problems," would protect any children that Kline might father.[34] Because it determined that the infringement upon Kline's procreative rights was temporary and that the lower court could modify the condition when Kline completed treatment, the appellate court upheld the condition.[35]

Three years after *Kline*, the Wisconsin Supreme Court considered a procreation condition in *State v. Oakley*, a case in which the lower court convicted the defendant of willfully refusing to pay child support.[36] David

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Id. On appeal, Kline claimed that such a probation condition impinged on his fundamental right to procreate and that the trial court should have performed a "less restrictive means analysis" to ensure the condition's validity. *Id.* Kline argued in favor of the less restrictive means test to ensure that the court narrowly tailored the probation condition to achieve a legitimate state goal. *Id.* The appellate court disagreed, finding that the procreation condition did not completely remove Kline's fundamental liberty. *Id.* Because the procreation condition protected Kline's potential victims and interfered with his procreative rights only "to a permissible degree," the court upheld the condition. *Id.*

28. *Id.* at 698.

29. *Id.* at 699.

30. *Id.* at 698.

31. *Id.* at 698-99.

32. *Id.* at 699.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* State v. Oakley, 629 N.W.2d 200, 202 (Wis. 2001) (describing background of case), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002). In *Oakley*, the Wisconsin Supreme

Oakley had nine children borne by four different women and had not paid any child support for 120 days when the state charged him with willful nonpayment of child support – a crime with felony status in Wisconsin.[37] At the time of Oakley's arrest, his payments in arrears exceeded $25,000.[38] Sentencing Oakley to three years in prison followed by five years on probation, the trial judge imposed the following procreation condition: "Defendant is ordered not to have any further children while on probation unless it can be shown to the Court that he is meeting the needs of his other children and can meet the needs of this one."[39] The case proceeded on appeal to the Wisconsin Supreme

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Court upheld a procreation condition for a defendant convicted of felony refusal to pay child support. *Id.* at 213. At the time of his arrest, David Oakley had failed to pay any child support for 120 days and was in arrears more than $25,000. *Id.* at 202. Four different women bore Oakley's nine children. *Id.* The trial judge sentenced Oakley to three years in prison, followed by five years of probation that included the following condition: "Defendant is ordered not to have any further children while on probation unless it can be shown to the Court that he is meeting the needs of his other children and can meet the needs of this one." *Id.* at 217 (Bradley, J., dissenting). The Wisconsin Supreme Court began its analysis by noting that "[e]nforcing child support orders . . . has surfaced as a major policy directive in our society." *Id.* at 204. In Wisconsin, the court explained, trial judges have broad discretion in imposing probation conditions, but the following considerations limit their discretion: the conditions must promote the rehabilitation of the probationer and must protect society and potential victims from any future crimes by the probationer. *Id.* at 206. The trial judge had imposed Oakley's procreation condition after suggesting that it might convince Oakley to "stop victimizing his children." *Id.* at 207. The court interpreted this imposition as an attempt to rehabilitate Oakley from his crime of willful nonpayment as well as an attempt to protect Oakley's potential victims – his children – from future unpaid support orders. *Id.* The court then addressed Oakley's constitutional argument, which centered on his fundamental right to procreate. *Id.* at 207-08; *see also infra* Part III.A (explaining basis of constitutional claim for right to privacy in reproductive decisionmaking). Oakley argued that the lower court failed to narrowly tailor the procreation condition because it removed, rather than merely restricted, his right to procreate during his probation. *Oakley*, 629 N.W.2d at 207-08. Oakley supported his argument by pointing out that he likely would never be able to support his children. *Id.* at 208. The Wisconsin Supreme Court responded by stating that Oakley did not enjoy the fundamental right to procreate to the same degree as those not convicted of crimes. *Id.* Likening the case to *State v. Kline*, 963 P.2d 697 (Ore. Ct. App. 1998), the court determined that Oakley merited not a "narrowly tailored" test but instead a less rigorous one. *Oakley*, 629 N.W.2d at 210. A probation condition that infringed on a probationer's fundamental rights was permissible, the court determined, as long as the condition was not overly broad and had a reasonable relationship to the probationer's rehabilitation. *Id.* Because the procreation condition did not actually eliminate Oakley's fundamental right, because it would help Oakley conform his conduct to the law, and because the condition was less restrictive than imprisoning Oakley for his full term (which, the court noted, would necessarily suspend Oakley's procreative rights entirely), the court upheld the condition. *Id.* at 212-13.

37. *See id.* at 201-02 (describing case background).

38. *Id.*

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

Court. After discussing the troublesome state of child support nonpayment on a national scale, the court examined Oakley's procreation condition to determine whether it was appropriate.[40] As the court explained, the discretion of the trial judge who sentenced Oakley and created the probation condition was subject only to the goals of probation: rehabilitating the probationer and protecting society and potential victims from future crimes.[41] The trial judge had determined that the sentence would convince Oakley to stop willfully refusing to pay child support; the appellate court interpreted this determination to mean that the procreation condition would rehabilitate Oakley from his criminal behavior and protect his children, who also were his potential victims, from future nonsupport.[42]

Conceding the facial appropriateness of his procreation condition, Oakley argued that it infringed on his fundamental right to choose whether to procreate.[43] On the grounds that the condition actually *removed* his right to procreate during probation because he never would be able to support his children, Oakley asked the court to protect his fundamental right by invalidating the condition under a "strict scrutiny" test.[44] However, because Oakley was a convicted felon, the court instead applied a lower level of scrutiny by examining the condition to ensure that it was not overbroad and that it was reasonably related to Oakley's rehabilitation.[45] In support of this reduced scrutiny, the *Oakley* court recited the facts and holding of *Kline*.[46] The court analogized Oakley's crimes to Kline's by likening Oakley's chronic nonsupport of his

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40. *See id.* at 203-13 (describing child support nonpayment as "a crisis with devastating implications for our [nation's] children" and reviewing validity of Oakley's procreation condition).

41. *See id.* at 206 (discussing trial judge's process of sentencing Oakley).

42. *See id.* at 206-07 (concluding that Oakley's sentence satisfied goals of probation in Wisconsin).

43. *See id.* at 207-08 (discussing Oakley's constitutional claim); *see also infra* Part III.A (describing constitutional basis for fundamental right to make procreation decisions).

44. *See Oakley*, 629 N.W.2d. at 202 (describing Oakley's argument for strict scrutiny of his procreation condition). Oakley argued that the procreation condition in reality would eliminate his right to decide whether to have more children during probation. *Id.* He based this assertion on the Supreme Court's decision in *Zablocki v. Redhail*, 434 U.S. 374, 376 (1978), which commanded strict scrutiny for state action that infringed on a related fundamental right – that of marriage. *Oakley*, 629 N.W. 2d at 208.

45. *See id.* at 210 ("[G]iven that a convicted felon does not stand in the same position as someone who has not been convicted of a crime, . . . '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.'" (quoting Edwards v. State, 246 N.W.2d 79, 84-85 (Wis. 1976))).

46. *See id.* at 208-09 (describing *Kline* and citing its rationale and holding with approval).

children to Kline's continuing physical abuse of his own.[47] The court found that Oakley's procreation condition was not overly broad because it did not actually eliminate his fundamental right; instead, it allowed him to satisfy the condition by supporting his children and demonstrating his ability to support another.[48] Because the procreation condition encouraged Oakley to conform his conduct to the law, the court determined that the condition was reasonably related to Oakley's rehabilitation.[49] Therefore, the court upheld the procreation condition.[50]

III. Constitutional Considerations

The outcomes of *Kline* and *Oakley* contradict almost thirty years of case law in which appellate courts consistently invalidated procreation conditions.[51] To begin its exploration of how the decisions in *Kline* and *Oakley* potentially set an undesirable precedent, this Note will explain the constitutional basis of an individual's right to make private reproductive decisions.

A. The Right to Privacy in Reproductive Decisionmaking

As courts have considered whether they could restrict probationers from having children, many specifically have mentioned the constitutional infringement that accompanies a procreation condition.[52] The constitutional right at

47. *Id.*

48. *See id.* at 212 (upholding procreation condition).

49. *Id.* at 213.

50. *Id.*

51. *See infra* Part IV (describing cases that overturned procreation conditions and exploring their common elements).

52. *See* People v. Zaring, 10 Cal. Rptr. 2d 263, 268 (Cal. Ct. App. 1992) (quoting *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984), for proposition that condition infringed defendant's fundamental right to privacy); People v. Pointer, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984) ("There is, of course, no question that the [procreation] condition imposed in this case infringes the exercise of a fundamental right to privacy protected by both the federal and state constitutions."); Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (responding to defendant's assertions that procreation condition "impermissibly restricted his fundamental rights to . . . procreation" with assertion that "constitutionally protected rights can be abridged by conditions of probation if they are reasonably related . . . to the rehabilitative purposes of probation"); State v. Negrete, 629 N.E.2d 687, 690 (Ill. Ct. App. 1994) (stating that "[a] woman's right to procreate is protected by the federal constitution"); State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) ("The probation condition regarding pregnancy unduly intrudes on Mosburg's right to privacy."); State v. Richard, 680 N.E.2d 667, 670 (Ohio Ct. App. 1996) (calling procreation condition "an unreasonable burden" on already pregnant woman and additionally finding it unconstitutional); State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (same).

stake is the right to privacy,[53] a fundamental liberty interest that permits citizens to make individual decisions regarding reproductive matters.[54] Although the Supreme Court has not settled upon the precise constitutional origins of the right to privacy, the Court has attributed the right to the "penumbras" surrounding rights defined by the First, Third, Fourth and Fifth Amendments to the Constitution.[55] Elsewhere, the Court has located the origins of the right in the Fourteenth Amendment's Equal Protection Clause,[56] while concurring Justices have claimed that the right more properly originated within the Fourteenth Amendment's Due Process Clause.[57]

The Court first suggested that a right to privacy concerning reproductive matters might exist in *Skinner v. Oklahoma*,[58] a decision that overturned a state statute allowing the sterilization of repeat criminals.[59] The Court specifi-

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53. *See* People v. Pointer, 199 Cal. Rptr. 357, 363 (Cal. Ct. App. 1984) ("[T]he discretion to impose conditions of probation . . . [is] circumscribed by constitutional safeguards. Human liberty is involved. A probationer has the right to enjoy a significant degree of privacy, or liberty, under . . . the federal Constitution.") (internal quotations omitted).

54. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.26 (6th ed. 2000). The right to privacy, which can have several meanings, "currently relates to certain rights of freedom of choice in marital, sexual and reproductive matters." *Id.*

55. *See* Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965) (concluding that "[t]he present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

56. *See* Skinner v. Oklahoma, 316 U.S. 535, 538 (1942) (describing challenged statute as failing "to meet the requirements of the equal protection clause of the Fourteenth Amendment").

57. *See id.* at 545 (Stone, C.J., concurring) (disagreeing with majority's equal protection rationale and asserting instead that "[a] law which condemns, without hearing, all the individuals of a class to so harsh a measure . . . because some . . . may merit condemnation, is lacking in the first principles of due process").

58. 316 U.S. 535 (1942).

59. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that "the instant legislation runs afoul of the equal protection clause"). In *Skinner*, the Court struck down as unconstitutional under the Fourteenth Amendment an Oklahoma statute that authorized the sterilization of repeat criminals. *Id.* The statute permitted the state-instigated procedure on any criminal who was convicted three times of crimes evincing "moral turpitude." *Id.* at 536. The lower court had convicted the defendant of stealing chickens. *Id.* The defendant had two previous convictions for robbery with firearms. *Id.* at 537. In its analysis, the Court highlighted the serious nature of the consequences that Oklahoma sought to impose: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. The Court focused on the statute's exemptions, crimes that the Oklahoma legislature had determined did not evince moral turpitude. *Id.* at 538-39. Such crimes included embezzlement. *Id.* The Court discussed the obvious similarities between the non-exempt crime of larceny and the exempt crime of embezzlement, including their similar punishment by fine and imprisonment. *Id.* Because the statute afforded different treatment to criminals convicted of the two crimes, the Court found

cally addressed the question as one of equal protection because the statute contained exceptions for certain crimes, such as embezzlement, that the state legislature deemed not to evince the "moral turpitude" of crimes such as larceny.[60] Furthermore, the Court subjected the statute to heightened scrutiny because it concerned "one of the basic civil rights of man . . . . Marriage and procreation are fundamental to the very existence and survival of the race."[61]

Nearly twenty years later, Justice Harlan, in a dissenting opinion in *Poe v. Ullman*,[62] specifically recommended that the Court recognize a right to privacy.[63] *Poe* involved a statute that made the use of contraceptives illegal, and Justice Harlan argued that the application of the statute to married persons invaded their marital privacy.[64] Such an invasion, he suggested, violated the Due Process Clause because the decisions of married people regarding reproductive matters are intensely private.[65]

When *Griswold v. Connecticut*,[66] a case nearly identical to *Poe*, reached the Supreme Court four years later, the majority found that a statute banning

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that the statute invidiously discriminated against criminals convicted of larceny. *Id.* at 541. Finding it unnecessary to discuss other ways in which the statute violated the Equal Protection Clause, the Court expressly declined to consider any other questions of constitutionality. *Id.* at 538.

60. *See id.* at 541 (finding equal protection violation by statute).

61. *Id.*

62. 367 U.S. 497 (1961).

63. *See* Poe v. Ullman, 367 U.S. 497, 551-54 (1961) (Harlan, J., dissenting) (arguing that citizens' constitutional rights against invasions of "privacy" should extend not only to physical searches and seizures but also to unwarranted intrusions into marital sexual relations). In *Poe*, the Court upheld the dismissal of suits (by two married women and a doctor) seeking injunctions against enforcement of Connecticut's long-unenforced laws criminalizing the use of contraceptives. *Id.* at 508-09. The two women each sought to receive instruction from the doctor on the proper use of contraception because a pregnancy would have endangered their lives or health. *Id.* at 498-500. If the doctor had instructed the women as requested, he would have been liable under the Connecticut statutes as an accessory. *Id.* at 500. When the parties sought the opinion of the state attorney regarding prosecution under the statutes, the state attorney answered that he would enforce the statutes. *Id.* at 500-01. The suits challenged the constitutionality of the statutes. *Id.* The Court found that the state's prosecuting officials had not prosecuted anyone (with the exception of two doctors and a nurse charged with running a birth control clinic in 1940) for violating the statute, despite the fact that it had been in force for nearly eighty years. *Id.* at 501-02. Because the threat of enforcement by state prosecutors was not imminent and because the three plaintiffs were not in immediate danger of sustaining direct injury as a result of enforcement, the Court found that no justiciable controversy existed to warrant constitutional examination of the statutes. *Id.* at 508-09. It therefore upheld the dismissal of the actions. *Id.*

64. *Id.* at 551-52 (Harlan, J., dissenting).

65. *Id.* (Harlan, J., dissenting).

66. 381 U.S. 479 (1965).

contraceptive use was an unacceptable infringement on married individuals' right to privacy.[67] The Court found the idea of enforcing laws against marital reproductive decisionmaking "repulsive to the notions of privacy surrounding the marriage relationship."[68] In a subsequent case, *Eisenstadt v. Baird*,[69] the Court invoked the Equal Protection Clause to invalidate a contraception statute that treated unmarried persons differently from married persons.[70] The

67. *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding that statutory ban on contraception unacceptably infringed right of married persons to privacy). In *Griswold*, the Supreme Court declared unconstitutional a Connecticut statute forbidding the use of contraceptives because the statute impermissibly invaded married persons' privacy. *Id.* The state successfully prosecuted the executive director and medical director of a Planned Parenthood clinic in New Haven under the same law challenged in *Poe v. Ullman*, 367 U.S. 497 (1961). *Griswold*, 381 U.S. at 480. In considering the constitutional challenge, the Court stated that the case invited "a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment." *Id.* at 481. The Court considered previous case law surrounding the First Amendment and found that it "has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. Other enumerated rights contained in the Bill of Rights had penumbras as well, the Court found, such as the Third Amendment prohibition against mandatory quartering of soldiers, the Fourth Amendment protection against search and seizure of personal items within the home, and the Fifth Amendment shield against forced self-incrimination. *Id.* at 484. These examples invoked a right of privacy, secured by the Ninth Amendment provision that enumerated rights did not preclude or limit other rights retained by the people. *Id.* The Court therefore found that the Connecticut statute concerned matters that fell within the zone of privacy that the Constitution indirectly created. *Id.* at 485. Because the statute swept more broadly than necessary in restricting contraception (by limiting the use, rather than the manufacture, of contraceptives), the Court found that the statute could not stand. *Id.*

68. *Id.* at 486.

69. 405 U.S. 438 (1972).

70. *See* Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (holding that Massachusetts laws banning distribution of contraceptives to unmarried persons or by anyone other than physicians or pharmacists violated Equal Protection Clause). In *Eisenstadt*, the Supreme Court struck down as unconstitutional two Massachusetts statutes controlling the dispensation of contraceptives. *Id.* The state convicted William Baird, who was neither a physician nor a pharmacist, for giving away contraceptive foam to a young woman after a lecture at Boston University. *Id.* at 440. The statutes declared that only married individuals could obtain contraceptives and then only from a licensed pharmacist upon a doctor's prescription. *Id.* at 440-41. The Court noted that the statutes created three "classes" of persons: "*first*, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; *second*, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, *third*, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease." *Id.* at 442. The issue, the Court declared, was "whether there [was] some ground of difference that rationally explain[ed] the different treatment accorded married and unmarried persons." *Id.* The Court found the statutes so "riddled with exceptions" that Massachusetts could not reasonably have intended to use them to deter premarital sex. *Id.* If the Massachusetts legislature instead had intended that the statutes promote public health, the Court continued, then the statutes "invidiously discriminate[d] against the unmarried . . . [and were] overbroad with respect to the married."

Court stated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[71] As a result, the right to privacy that included the freedom to make procreative decisions appeared to extend to all adults. A year later, the Court further elaborated on the right and its breadth:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however[,] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. [Previous cases] also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education . . . .[72]

The standard of review that the Court established to determine the legitimacy of contraception legislation in *Carey v. Population Services International*[73] reinforces the importance of the right to privacy, particularly with respect to reproductive decisions.[74] Because legislation regulating reproduction burdens

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Id. at 451. Finally, if the statutes prohibited contraception for unmarried people on moral grounds, then it improperly discriminated against such persons under *Griswold*. *Id.* at 453. On the scope of *Griswold*'s right to privacy, the Court said:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet[,] [i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. The Court therefore held the statutes void for violating the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 454-55.

71. *Id.* at 453.

72. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

73. 431 U.S. 678 (1977).

74. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) (explaining that privacy right is one aspect of "liberty" that Due Process Clause of Fourteenth Amendment protects). In *Carey*, the Court struck down those parts of a New York statute that allowed only pharmacists to sell contraceptives and that banned the advertisement or display of contraceptives to the extent that they provided information about contraceptive availability and price. *Id.* at 681-82. The plaintiff corporation, Population Planning Services, regularly advertised and conducted mail-order sales of contraceptives to New York residents. *Id.* The Court began its analysis by acknowledging the right to privacy as described in *Roe v. Wade* and further explained that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Id.* at 685. The Court then described the appropriate standard of review – any regulations that imposed a burden on such a fundamental decision were justifiable only by compelling state interests and needed to be narrow in scope so as to further only those interests. *Id.* at 686. As to the first challenged part of the statute

an adult's right to privacy, a statute must satisfy "strict scrutiny" review to justify such impingement.[75] Specifically, this test commands that when "a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[76] The Court has made clear its suspicious view of any legislation affecting personal decisions of whether to conceive.[77]

Because legislation must satisfy such strict standards, courts tread carefully when their decisions will affect the right to privacy in reproductive decisionmaking.[78] In all the procreation condition cases, state or federal statutes authorized the probation conditions that the trial courts imposed.[79] By acting in accordance with such laws, the trial judges imposed a condition that would have been impermissible had they imposed the condition on persons without criminal convictions;[80] however, the defendants in these cases were convicted criminals. Thus, the question in the probation context is whether,

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(permitting only pharmacists to distribute nonmedical contraceptives to persons sixteen years old or older), the state asserted such interests as the protection of public health, safety, and potential life and the maintenance of quality control. *Id.* at 690. The Court found none of those interests to be sufficiently compelling. *Id.* at 691. Likewise, for the second challenged section of the statute (prohibiting the display or advertisement of contraceptives), the state asserted interests in protecting sensitive customers from embarrassment and in avoiding the legitimization of sexual activity for young people. *Id.* at 700-01. Again, the Court found neither of the asserted interests to be compelling, particularly when held against the plaintiff's First Amendment interest in truthful product availability and pricing information. *Id.* at 701. Because the Court did not find these interests compelling, it struck down the challenged sections of the statute. *Id.*

75. *See id.* at 686 (discussing proper standard of review for state regulation that affects right of privacy).

76. *Id.*

77. *Id.*

78. *See* People v. Pointer, 199 Cal. Rptr. 357, 363 (Cal. Ct. App. 1984) ("The discretion to impose conditions of probation [under state law] is . . . circumscribed by constitutional safeguards. Human liberty is involved. A probationer has the right to enjoy a significant degree of privacy . . . under the Fourth, Fifth and Fourteenth Amendments to the federal Constitution.") (internal quotation marks omitted); State v. Mosburg, 768 P.2d 313, 314-15 (Kan. Ct. App. 1989) (noting that "[t]here are . . . limitations on probation conditions that infringe on constitutionally protected rights" and finding that contested procreation condition "unduly intrudes on Mosburg's right to privacy").

79. *See* State v. Oakley, 629 N.W.2d 200, 205 (Wis. 2001) (noting that Wisconsin law permitted trial judge to impose probation with conditions in lieu of authorized prison term), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002).

80. *See id.* at 208 (conceding that Oakley's right to privacy argument "might well carry the day" were he not convicted felon).

and to what degree, *probationers* have a reduced right to privacy, such that procreation conditions are constitutionally permissible.

B. Diminished Right for Probationers?

Although the United States Supreme Court has addressed the question of Fourteenth Amendment procedural due process for probationers,[81] the Court has left to the lower courts the task of determining the appropriate standard of review for probationers' substantive due process.[82] Probationers who appeal their procreation conditions often ask appellate courts to subject the conditions to strict scrutiny.[83] Courts respond that probationers, by virtue of being convicts, merit less protection of their fundamental rights.[84] Although the courts differ on the level of scrutiny that they will give to a temporary restriction on a probationer's procreative rights, they agree that the presence of a fundamental right affects their analysis of a probation condition that impinges upon that right.[85]

In appealing his procreation condition, David Oakley asked the Wisconsin Supreme Court to apply strict scrutiny, an issue that the justices discussed at length in the majority, concurring, and dissenting opinions.[86] The majority ultimately determined that the correct test in Wisconsin was whether the condition was reasonably related to the probationer's rehabilitation and was not overbroad.[87] Although the majority conceded that Oakley's assertion of

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81. *See* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 83-84 (1992) (discussing procedural due process for probationers under *Morrisey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in context of probation conditions ordering use of specific type of birth control).

82. *See Oakley*, 629 N.W.2d at 208-12 (citing state case law as precedent for different standard of review for probationer's fundamental rights).

83. *See id.* at 207 ("Oakley argues that the condition here warrants strict scrutiny.").

84. *See* Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) ("Under Florida law, constitutionally protected rights can be abridged by conditions of probation if they are reasonably related to the probationer's past or future criminality or to the rehabilitative purposes of probation.").

85. *See* United States v. Smith, 972 F.2d 960, 961 (8th Cir. 1992) ("Conditions that restrict a probationer's freedom must be especially fine-tuned." (quoting United States v. Tolla, 781 F.2d 29, 34 (2d Cir. 1986))); People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) ("Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn . . . ." (quoting People v. Mason, 5 Cal. 3d 759, 768 (1971))).

86. *See* State v. Oakley, 629 N.W.2d 200, 208-12 (Wis. 2001) (discussing appropriate standard of review), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002); *id.* at 214-15 (Bablitch, J., concurring) (same); *id.* at 215 (Crooks, J., concurring) (same); *id.* at 217 (Bradley, J., dissenting) (same); *id.* at 221-22 (Sykes, J., dissenting) (same).

87. *See id.* at 210 ("[G]iven that a convicted felon does not stand in the same position as

a constitutional right might "carry the day"[88] if he were not a convict, the fact that he was a convict required a lower standard of review.[89]

California courts have stated that procreation conditions unquestionably infringe on a probationer's constitutional right to make reproductive decisions.[90] As one court explained, although California law allows judges broad discretion in imposing probation conditions, constitutional guarantees "circumscribe" such discretion.[91] That court analyzed the procreation condition under "special scrutiny," inquiring whether the condition was necessary to serve probation's goals of rehabilitation and public safety.[92]

An Indiana appellate court has stated that some level of infringement upon a probationer's fundamental rights is acceptable.[93] However, because procreation conditions involve fundamental rights, the court declared that the infringing condition "must be designed to accomplish the explicit goals of protecting the community and promoting the probationer's rehabilitation process."[94]

Florida courts have agreed that probation conditions can abridge constitutionally protected rights in some circumstances.[95] However, Florida courts' level of review appears to be lower than that applied in California.[96] One Florida district court of appeals has explained that a probationer's procreation condition would be constitutionally valid if it bore a reasonable relationship to his past criminality, his future criminality, or probation's rehabilitative purposes.[97]

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someone who has not been convicted of a crime . . . '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.'" (quoting Edwards v. State, 246 N.W.2d 79, 84-85 (Wis. 1976))).

88. *Id.* at 208.

89. *See id.* at 208-10 (discussing standard of review).

90. *See Pointer*, 199 Cal. Rptr. at 365 ("There is, of course, no question that the [probation] condition imposed in this case infringes the exercise of a fundamental right to privacy protected by both the federal and state constitutions.").

91. *See id.* at 367 (determining validity of procreation condition).

92. *See id.* at 369 (discussing appropriate standard of review).

93. *See* Trammell v. State, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001) ("Within certain parameters, the [probation] condition may impinge upon the probationer's exercise of an otherwise constitutionally protected right." (quoting Smith v. State, 727 N.E.2d 763, 767 (Ind. Ct. App. 2000))).

94. *Id.* (quoting Purdy v. State, 708 N.E.2d 20, 23 (Ind. Ct. App. 1999)).

95. *See* Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) ("[T]he constitutional rights of probationers are limited by conditions of probation which are desirable for the purposes of rehabilitation.").

96. *Compare id.* (declaring standard as "reasonably related") *with* People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (applying "special scrutiny").

97. *See* Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) ("Under Florida

The less rigorous constitutional standard has not meant that Florida courts uphold procreation conditions.[98] On the contrary, Florida courts consistently have applied an analytical tool called the *Dominguez* test[99] to determine whether a reasonable relationship exists between the procreation condition and the goals of probation.[100] The case law is so set against the validity of procreation conditions that in the most recent case involving a procreation condition, the court ignored the fact that the defendant had neglected to preserve her argument for appeal.[101] Instead, the court called her procreation condition "grossly erroneous on its face" and overturned it in a two-paragraph opinion.[102] In a different case, a Florida court vacated a procreation condition in a three-sentence opinion.[103] These cases demonstrate that the validity of procreation conditions does not turn only on the constitutional question.[104] In the next Part, this Note will discuss some additional important aspects of the decisions that have struck down procreation conditions.

IV. Courts Strike Down Procreation Conditions as Invalid

Ever since a California court first considered a procreation condition in 1967,[105] appellate courts almost uniformly have struck down procreation

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law, constitutionally protected rights can be abridged by conditions of probation if they are reasonably related to the probationer's past or future criminality or to the rehabilitative purposes of probation.").

98. *See* Thomas v. State, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (overturning procreation condition using *Dominguez* test as adopted in *Rodriguez*); *Howland*, 420 So. 2d at 919-20 (same); Burchell v. State, 419 So. 2d 358, 358 (Fla. Dist. Ct. App. 1982) (striking down procreation condition and relying on *Rodriguez*'s precedent); *Rodriguez*, 378 So. 2d at 9-10 (overturning procreation condition using *Dominguez* test as adopted by California Supreme Court in *People v. Lent*, 541 P.2d 545 (1975)). See *infra* Part IV for an explanation of the *Dominguez* test for reasonableness of probation conditions.

99. *See infra* Part IV (describing *Dominguez* test, which courts use to evaluate probation conditions).

100. *See supra* note 98 (listing relevant Florida cases and their use of *Dominguez* test as adopted in *Rodriguez*).

101. *See* Thomas v. State, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (evaluating condition despite failure of defendant to preserve issue for appeal because court deemed condition "grossly erroneous on its face").

102. *Id.*

103. *See* Burchell v. State, 419 So. 2d 358, 358 (Fla. Dist. Ct. App. 1982) (striking down procreation condition in three-sentence opinion that included following sentence: "See Rodriguez v. State.").

104. *See supra* note 97 (relating Florida court's determination that procreation condition was not necessarily constitutionally infirm).

105. *See* People v. Dominguez, 64 Cal. Rptr. 290, 294 (Cal. Ct. App. 1967) (overturning probation condition that barred unmarried woman convicted of robbery from becoming

conditions.[106] In a substantial number of these cases, the courts stated similar goals of probation, discussed child abuse as the underlying crime, and expressed concern over the enforcement problems inherent in procreation conditions. The following three subparts of this Note will describe the common elements of the cases in which courts overturned procreation conditions.

A. Common Goals of Probation

The first common factor among cases striking down procreation conditions is the requirement that judges tailor probation to satisfy certain goals; specifically, a probation condition is reasonable only if it helps to rehabilitate the defendant and to protect society against the commission of future crimes.[107] Because of differences in state and federal case law and statutes, the language of probationary goals can vary widely.[108] However, two common goals that emerge as a pattern are rehabilitation and societal protection.[109]

A significant case addressing procreation conditions is *People v. Dominguez*,[110] in which a California court struck down a procreation condition for a woman who was convicted as an accessory to a robbery.[111] The court

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pregnant again while unmarried). The California appellate courts have struck down every procreation condition that has come before them since *Dominguez*. For examples, see *People v. Zaring*, 10 Cal. Rptr. 2d 263, 274 (Cal. Ct. App. 1992), and *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984).

106. *See supra* note 3 (listing appellate decisions striking down procreation conditions).

107. *See, e.g.*, United States v. Smith, 972 F.2d 960, 961 (8th Cir. 1992) ("The test for determining the validity of a special probation condition [in a case subject to federal law] is 'whether it fosters rehabilitation of the defendant and protection of the public.'" (quoting United States v. Schoenrock, 868 F.2d 289, 291 (3d Cir. 1989))); Trammell v. State, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001) (stating that Indiana law allowed probation conditions "reasonably related to the person's rehabilitation" and interpreting probation conditions to be valid if they "will produce a law abiding citizen and protect the public"); State v. Mosburg, 768 P.2d 313, 314 (Kan. Ct. App. 1989) (stating that requirement that conditions "serve the accused and the community" limited otherwise broad discretion of trial courts in Kansas in setting probation conditions); State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (citing Ohio statute that limited special probation conditions to those serving "the interests of doing justice, rehabilitating the offender, and insuring his good behavior").

108. *Compare* State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986) (stating only that "probation conditions, to be valid, must be reasonably related to the rehabilitation of the defendant") *with* State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (citing state code to assert that purpose of probation was to do "justice, rehabilitat[e] the offender, and insur[e] his good behavior").

109. *Supra* note 107 and accompanying text.

110. 64 Cal. Rptr. 290 (Cal. Ct. App. 1967).

111. *See* People v. Dominguez, 64 Cal. Rptr. 290, 292 (Cal. Ct. App. 1967) (describing

examined the controlling section of the California Penal Code, which addressed what courts refer to as "special" probation conditions – those that go beyond simply restricting illegal conduct.[112] Special conditions, according to the *Dominguez* court, should serve the ends of justice, make amends to society and to any victim for the injury and breach of law, and assist in the rehabilitation and reformation of the probationer.[113] By reducing the statutory language to the two underlying principles of criminal rehabilitation and public protection, the court formulated the test that many other state courts use to evaluate procreation conditions:[114]

> A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in

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background of case). In *Dominguez*, a California appellate court struck down a probation condition ordering a young woman not to become pregnant while unmarried. *Id.* at 294. Mercedes Dominguez was the driver for two women who robbed a liquor store. *Id.* at 292. Her sentence for second-degree robbery included probation on the condition that she not live with any man to whom she was not married and not become pregnant unless married. *Id.* The trial judge explained Dominguez's probation condition by warning her that he would revoke her probation for "just becoming pregnant. You are going to prison unless you are married first." *Id.* Dominguez lost her probationary status when she became pregnant after a birth control failure. *Id.* at 293. Noting that the California probation statute instructed courts to impose "reasonable" probation conditions, the appellate court elucidated a three-part test for reasonableness. *Id.* The court proceeded to evaluate Dominguez's procreation condition under the test and found that future pregnancy was unrelated to robbery and that pregnancy outside marriage was "a misfortune" but not criminal. *Id.* Finally, the court found that no reasonable relationship between pregnancy and the future commission of crime existed, noting: "Contraceptive failure is not an indicium of criminality." *Id.* The court finished its analysis by criticizing the trial judge for attempting to serve the public interest by imposing unreasonable probation conditions. *Id.* at 294. Finding evidence in the record that the judge meant the procreation condition to prevent having additional children on welfare rolls, the court stated that "[p]robation orders are not merely bookkeeping arrangements." *Id.* Overturning Dominguez's procreation condition, the court stated that she should have had her probation reinstated unless she had violated a valid probation condition. *Id.* The *Dominguez* test is the same as the *Dominguez/Lent* test, adopted by the California Supreme Court in *People v. Lent*, 541 P.2d 545 (Cal. 1975). For discussion of California courts' use of the *Dominguez/Lent* test, see *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984) (identifying origin of *Dominguez/Lent* test and applying it to case *sub judice*).

112. *See Dominguez*, 64 Cal. Rptr. at 293 (discussing validity of procreation condition).

113. *See id.*

114. *See, e.g.*, People v. Zaring, 10 Cal. Rptr. 2d 263, 267-68 (Cal. Ct. App. 1992) (quoting and citing *Dominguez* test); Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (using *Dominguez* test as adopted in Florida by *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979)); State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986) (using *Dominguez* test without expressly citing or quoting *Dominguez*); State v. Richard, 680 N.E.2d 667, 670 (Ohio Ct. App. 1996) (using *Dominguez* test as adopted in Ohio by *State v. Livingston*, 372 N.E. 2d 1335 (Ohio Ct. App. 1976)).

> itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid.[115]

The *Dominguez* court went on to evaluate the procreation condition according to this three-part test.[116] Because nonmarital pregnancy was not a crime, had no relationship to robbery, and was unlikely to lead to future crimes, the court struck down the procreation condition as invalid.[117] The condition did not meet California's stated goals of probation.[118]

Other courts also have addressed the goals of probation in procreation condition cases. An Indiana court of appeals, like the California courts, indicated that the goals of probation primarily are to rehabilitate the defendant and to protect the public from future crimes.[119] In *Trammell v. State*,[120] the court examined the applicable state statute and found that special conditions must relate reasonably to the probationer's rehabilitation.[121] Prior Indiana

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115. *Dominguez*, 64 Cal. Rptr. at 293.

116. *See id.* at 293-94 (using three-part test to find procreation condition invalid).

117. *Id.* at 294.

118. *See id.* at 293 ("Some unusual probation conditions have been upheld in California, but none of them is comparable to the challenged condition.").

119. *See* Trammell v. State, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001) (stating goals of probation).

120. 751 N.E.2d 283 (Ind. Ct. App. 2001).

121. *See* Trammell v. State, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001) (discussing standard of review for special probation conditions). In *Trammell*, an Indiana appellate court vacated the procreation condition of a woman convicted of felony neglect of a dependent. *Id.* at 291. Trammell, a mildly mentally retarded woman, failed to seek medical attention when her infant son suffered from chronic vomiting and severe diarrhea. *Id.* at 285. Despite the fact that she had an older child who suffered from an esophageal disorder requiring surgical correction, Trammell ignored her son's failing health. *Id.* at 285-86. The infant died early one morning from malnutrition, but Trammell did not try to awaken or feed him until approximately twelve hours later, at which time she realized that he had died. *Id.* at 286. One of the conditions of Trammell's eight-year probation was that she not become pregnant. *Id.* Because of the constitutional liberty involved, the appellate court declared that the following three factors were necessary to consider: "(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." *Id.* at 288. The court found that the procreation condition accomplished nothing toward Trammell's rehabilitation because it would not improve her parenting skills or help her care for a child born after her probation ended. *Id.* at 288-89. The court found the argument that Trammell enjoyed a significant right to privacy under the Constitution, as explained in *Carey v. Population Services International*, 431 U.S. 678 (1977), to be persuasive. *Id.* at 290. The court remanded the case with instructions that the trial court vacate the procreation condition and instead impose conditions that would rehabilitate Trammell, avoid excessive infringement of her constitutional rights, and protect the public. *Id.* at 291.

case law had interpreted this statute to mean that a special condition was valid if it would "produce a law abiding citizen and protect the public."[122] The *Trammell* court considered these practical goals alongside Trammell's constitutionally protected interests and found that the procreation condition was invalid.[123] Specifically, the procreation condition would not serve to rehabilitate Trammell because she would not learn how to be a better or more skilled parent as a result of the restriction.[124] The condition also would fail to protect the public.[125] In addition, the condition would impinge excessively on Trammell's constitutional rights.[126] Those factors outweighed the court's third consideration – the legitimate needs of law enforcement.[127] For this reason, the court ordered the trial court to vacate the procreation condition.[128] The Indiana court, like the California court in *Dominguez*, considered the goals of rehabilitation and public protection to be significant in probation questions.[129]

The Court of Appeals for the Eighth Circuit and Florida, Kansas, and Ohio courts have struck down procreation conditions citing similar concerns regarding the goals of probation.[130] The constitutional concern, while criti-

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122. *Id.* at 288.

123. *See id.* at 288, 291 (elucidating three factors to balance in considering procreation condition and finding that Trammell's case warranted removal of procreation condition).

124. *See id.* at 289 ("[The condition] does nothing to improve [Trammell's] parenting skills or educate her regarding perinatal care or child nutrition and development should she choose to become pregnant after her probationary period expires or even happen to become pregnant while on probation.").

125. *See id.* at 288 (criticizing procreation condition as lacking value for rehabilitative or public-protection purposes). Presumably, the court considered the "public" to be Trammell's future children.

126. *See id.* at 290-91 (noting that decision "whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices" (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977))).

127. *Id.* at 288 (identifying three factors to balance in evaluating whether probation condition unduly intruded on constitutional rights).

128. *See id.* at 291 (remanding case for imposition of new probation conditions that would sufficiently account for goals of probation and defendant's constitutional rights).

129. *See id.* (instructing trial court to modify conditions so that they "protect the community, reasonably relate to Trammell's rehabilitation, and do not excessively impinge upon her privacy rights").

130. *See* United States v. Smith, 972 F.2d 960, 961 (8th Cir. 1992) ("The test for determining the validity of a special probation condition [under federal law] is 'whether it fosters rehabilitation of the defendant and protection of the public.'" (quoting United States v. Schoenrock, 868 F.2d 289, 291 (8th Cir. 1988))); Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (explaining that under Florida law probation conditions are valid if they serve "useful rehabilitative purpose"); State v. Mosburg, 768 P.2d 313, 314 (Kan. Ct. App. 1989)

cally important, has not been the sole concern for appellate courts that have addressed procreation conditions.[131] Regardless of the jurisdiction where a procreation condition case originated, courts consistently have examined whether the condition meets the goals of probation in determining its validity.[132] Even if an appellate court finds a procreation condition constitutionally valid, it still likely will need to address the dual primary goals of probation conditions.[133]

B. Child Abuse

The second common concern in the procreation condition cases is child abuse.[134] Eight of the fourteen cases that overturned procreation conditions involved convictions for child abuse, often of heartbreaking dimensions that sometimes included the abused child's death.[135] The significance of this commonality is that the courts in the two cases upholding procreation conditions used child abuse, or an offense that the court deemed analogous to it, to justify upholding the procreation conditions in question. However, as the

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(stating that requirement that conditions "serve the accused and the community" limited broad discretion of Kansas trial courts to set probation conditions); State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (citing Ohio state statute that limited special probation conditions to those serving "the interests of doing justice, rehabilitating the offender, and insuring his good behavior").

131. *Cf. supra* Part III (discussing constitutional basis for asserting probationers' procreative rights and explaining that conviction may diminish those rights).

132. *See* Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (finding no constitutional infirmity with procreation condition that court nevertheless struck down as invalid).

133. *See id.* at 9-10 (finding "no constitutional invalidity" with procreation condition yet subsequently finding condition invalid under *Dominguez* test).

134. *See* People v. Pointer, 199 Cal. Rptr. 357, 359 (Cal. Ct. App. 1984) (identifying issue as one that concerned "a woman convicted of the felony of child endangerment"); Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (noting that defendant "stands convicted of the crime of negligent child abuse"); Burchell v. State, 419 So. 2d 358, 358 (Fla. Dist. Ct. App. 1982) (overturning defendant's probation condition without discussion; background obtained from *Mother in Abuse Case Given Three Years in Prison*, HOUST. CHRON., Mar. 1, 1985, at 1, *available at* 1985 WL 3639718); *Rodriguez*, 378 So. 2d at 8 (identifying defendant's crime as "aggravated child abuse"); People v. Ferrell, 659 N.E.2d 992, 993 (Ill. App. Ct. 1995) (identifying defendant's crime as "aggravated battery of a child"); Trammell v. State, 751 N.E.2d 283, 286 (Ind. Ct. App. 2001) (describing defendant's crime as "neglect of a dependent" and "a Class B felony"); State v. Mosburg, 768 P.2d 313, 313 (Kan. Ct. App. 1989) (describing defendant's crime as "endangering a child"); State v. Livingston, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976) (describing defendant's crime as "cruel abuse of a child resulting in serious physical harm").

135. *See supra* note 134 (identifying cases with child abuse as underlying crime).

following cases illustrate, many courts have considered and rejected child abuse as a basis for restricting the abuser's right to reproduce.

A fairly representative case from the line of cases striking down procreation conditions is the Florida case of *Rodriguez v. State*,[136] in which the court found defendant Kathy Rodriguez guilty of aggravated child abuse after she hit her nine-year-old child in the face and slammed the child against a car.[137] The trial court granted Rodriguez probation on several "special" conditions.[138] Those conditions included not having custody of any children, not marrying without the court's consent (which the court would withhold if the prospective groom had young children), and not becoming pregnant.[139]

Applying California's *Dominguez* test to Rodriguez's probation conditions, the appellate court determined that the condition barring Rodriguez from having custody of any children was valid; the condition was related to her crime of physically abusing her child, addressed conduct that was criminal, and was an attempt to prevent future child abuse.[140] The court then evaluated the other two special probation conditions, one requiring the court's consent to get married and the other forbidding Rodriguez from becoming

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136. 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

137. *See* Rodriguez v. State, 378 So. 2d 7, 8 (Fla. Dist. Ct. App. 1979) (providing background facts of case). In *Rodriguez*, a Florida appellate court invalidated probation conditions that restricted Rodriguez's ability to marry or to have children. *Id.* at 10. The trial court had placed the defendant on ten years' probation. *Id.* at 8. Among the special conditions of probation were conditions that Rodriguez not possess or drink alcohol, not have custody of any children, and not become pregnant again. *Id.* The final special condition was that Rodriguez not marry without the express consent of the court. *Id.* The court would not grant consent if Rodriguez desired to marry a man with young children. *Id.* Rodriguez challenged the conditions based on her fundamental privacy rights, such as the right to marry and the right to procreate. *Id.* Although the appellate court acknowledged that Rodriguez's constitutional rights were indeed at stake, it also stated that rehabilitative probation conditions could limit these rights. *Id.* at 9. The court considered guidelines from the ABA as well as the test first elucidated in *People v. Dominguez*, 64 Cal. Rptr. 290, 293 (Cal. Ct. App. 1967): "[A] condition [of probation] is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." *Rodriguez*, 378 So. 2d at 9. However, the condition barring Rodriguez from having custody of any children was valid because it directly related to child abuse and thus avoided all three pitfalls of the *Dominguez* test. *Id.* at 10. The conditions regarding marriage and childbearing did not relate directly to her crime of child abuse, were not crimes themselves, and did not reasonably relate to future criminality as long as the first condition prevented her from having custody of any children. *Id.* The probation conditions regarding pregnancy and marriage were therefore invalid, while the remaining conditions were valid. *Id.*

138. *See id.* at 8 (summarizing probation conditions that trial court imposed).

139. *Id.*

140. *See id.* at 10 (evaluating special probation conditions).

pregnant.[141] The court reasoned that marriage and procreation could relate to further criminal behavior only if Rodriguez, as a result thereof, gained custody of a minor child.[142] This result was precisely what the first condition prevented.[143] The court therefore found that the two latter conditions did not reasonably relate to Rodriguez's crime, and thus it struck down those conditions of her probation.[144] Thus, despite the child-endangering nature of Rodriguez's crime, the court acknowledged that forcing her to refrain from bearing children was not a sufficiently narrow means of achieving the goals of probation.[145]

A second case, *People v. Pointer*,[146] illustrates how appellate courts strike down procreation conditions even in cases of child abuse that involve the near death of a child.[147] In *Pointer*, the Court of Appeal of California considered

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141. *See id.* (holding such conditions invalid).

142. *See id.* (evaluating validity of second and third special probation conditions under *Dominguez* test).

143. *See id.* (identifying reasoning in evaluation of special probation conditions).

144. *See id.* (striking down invalid probation conditions).

145. *See id.* (stating that conditions "add nothing to decrease the possibility of further child abuse or other criminality").

146. 199 Cal. Rptr. 357 (Cal. Ct. App. 1984).

147. *See* People v. Pointer, 199 Cal. Rptr. 357, 359-60 (Cal. Ct. App. 1984) (describing background of case). In *Pointer*, the defendant adhered to a very strict "macrobiotic" diet that included mainly grains, vegetables, and beans. *Id.* at 359 n.2. Despite repeated warnings from her physician that the diet was unhealthy and inappropriate for young children, Pointer imposed it on her young sons, Jamal and Barron. *Id.* at 359. After Barron's father contacted Children's Protective Services, the agency instructed Pointer to take her children to a pediatrician. *Id.* Two different doctors advised Pointer during the next two months that both of her sons, Jamal in particular, were severely undernourished. *Id.* When she took Jamal to the recommended pediatrician for an appointment, the child was "emaciated, semicomatose, and in a state of shock," and the doctor contacted the police. *Id.* at 360. Over Pointer's objections, officials hospitalized the child. *Id.* Upon Jamal's release, a court placed him in a foster home, but during a visit with him, Pointer abducted Jamal and took both sons with her to Puerto Rico. *Id.* An FBI agent located and arrested Pointer in Puerto Rico, where Pointer had continued to force the diet on the children. *Id.* A court convicted Pointer of felony child endangerment. *Id.* at 359. The court sentenced Pointer to five years probation, the conditions of which included Pointer spending a year in jail, participating in a counseling program, remaining ignorant of the whereabouts of Jamal, not having custody of any children (including her own), and not conceiving during the probationary period. *Id.* at 360. On appeal, the court considered the validity of the procreation condition, acknowledging its infringement on Pointer's right to privacy and balancing that against the *Dominguez* factors. *Id.* at 364. Finding that the probation condition bore some relationship to the crime, the court next determined whether less restrictive means were available to achieve the goals of probation. *Id.* The court observed that the procreation condition "was apparently not intended to serve any rehabilitative purpose but rather to protect the public by preventing injury to an unborn child." *Id.* at 365. On that basis, the court found that pregnancy testing, followed by careful prenatal monitoring, if needed, and

a procreation condition for a young mother who nearly starved both of her young sons to death.[148] Ruby Pointer, who followed a strict "macrobiotic" diet that consisted mainly of grains and beans, also forced her two- and four-year-old sons to follow the diet despite its obviously detrimental effect on their health.[149] Pointer disregarded repeated medical advice to stop restricting the children's diet in this manner.[150] The diet severely stunted both boys' mental and physical growth, and the younger son, Jamal, was semi-comatose and near death when Pointer was arrested.[151] After her release, Pointer abducted Jamal, whom the court had placed in foster care, and took both children to Puerto Rico.[152] When authorities again arrested Pointer and returned her to California, they discovered that she had continued to feed the children strictly according to her macrobiotic diet.[153] Medical workers in California described both children as seriously underdeveloped and determined that Jamal in particular suffered from permanent neurological damage.[154]

Pointer's sentence for felony child endangerment included probation on the condition that she not have custody of any children, including her own, and that she not conceive any more children during the probationary period.[155] On appeal, the court acknowledged that the trial judge had been correct in his grave assessment of Pointer's situation.[156] Not only had Pointer harmed her children continually over a long period of time, but she also showed no

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removal of any child from Pointer's custody upon birth, would satisfy the goals of probation while infringing on Pointer's constitutional rights to the least extent practicable. *Id.* Because the procreation condition was not the least restrictive method to achieve the goals of Pointer's probation, the court invalidated that condition and remanded the case to the trial court. *Id.* at 366.

148. *See id.* at 360-61 (describing background of case).

149. *See id.* at 359 (describing child as "malnourished and significantly underdeveloped").

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* at 362 (observing trial judge's reasoning in imposing procreation condition). The court noted that the condition

> was imposed only after thoughtful consideration by the trial judge, who fully appreciated the extraordinary nature of his action. As he stated at the sentencing hearing, "I have never considered imposing as a condition of probation the requirement that someone not conceive during the period of probation . . . but that's certainly what I intend to do in this case. This is an extremely serious case." . . . This assessment is supported by the record.

Id.

remorse or acknowledgment of wrongdoing.[157] It appeared likely that she would behave the same way in the future toward any children in her custody.[158]

Using the *Dominguez* test, the court evaluated the relationship between the probation condition and Pointer's crime and rehabilitation.[159] The *Pointer* court noted that earlier procreation condition cases had lacked a convincing correspondence between child abuse and future crime; however, the relationship was more direct in this case.[160] Based on trial evidence that Pointer's dietary habits could affect a developing fetus, the court concluded that any harm that Pointer might cause to future children might very well occur *in utero*.[161] To address this concern, the court first noted that because Pointer's probation barred her from having custody of any children, any child to whom she gave birth during her probation could find safety immediately through placement in a foster home.[162] Next, the court noted that courts could reduce the chance of Pointer injuring future children *in utero* by testing Pointer regularly for pregnancy; in the court's opinion, this prenatal monitoring condition was no more difficult than monitoring Pointer for probation violations.[163] Finally, the court noted that forcing Pointer to choose between continuing a pregnancy and staying out of jail might be "coercive of abortion," an "improper" position for the court to take.[164] The appellate court in *Pointer* arrived at the same conclusion as the court in *Rodriguez* – conviction for child abuse does not warrant a procreation condition, even though the condition might at first glance seem appropriately rehabilitative.[165]

C. Enforcement Problems

The final commonality among many of the cases that struck down procreation conditions is the courts' acknowledgment that procreation conditions have inherent enforcement difficulties.[166] Several courts have pointed out that

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157. *See id.* (evaluating Pointer's individual likelihood of future criminality).

158. *Id.*

159. *See id.* at 363-66 (evaluating validity of defendant's probation condition).

160. *Id.* at 364.

161. *Id.*

162. *Id.* at 365.

163. *Id.*

164. *Id.* at 366.

165. *See id.* (striking down Pointer's procreation condition as undue infringement on constitutional rights because narrower means were available).

166. *See* United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) ("Moreover, the condition is unworkable. Short of having a probation officer follow Smith twenty-four hours

procreation conditions could entail unreasonable demands on probation officials, could coerce a probationer or a probationer's partner into aborting or jeopardizing a fetus, or could duplicate unnecessarily the effect of valid probation conditions.[167] Each of these possible consequences merits closer examination.

The Court of Appeals for the Eighth Circuit, in striking down the procreation condition of a man convicted on federal drug charges, explained why the condition was "unworkable": "Short of having a probation officer follow [defendant] Smith twenty-four hours a day, there is no way to prevent Smith from fathering more children."[168] Likewise, the *Pointer* court mentioned a discussion that occurred during Pointer's sentencing hearing.[169] The prosecutor in that case had argued that probation and children's services personnel, already strained in their resources, would be unable to monitor Pointer for pregnancy.[170] Although the *Pointer* court declined to address the issue because it lacked evidence on the record, the court's acknowledgment reinforces the practical impossibility of charging probation officers with the duty of ensuring that their probationers do not conceive.[171] The very notion calls to mind Justice Douglas's question in *Griswold v. Connecticut*: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[172] His question reminds us that this use of law enforcement resources would be nearly as unacceptable as the invasion of privacy in the field of contraception.

Courts invalidating procreation conditions have repeatedly expressed concern over what might result if a probationer or a probationer's partner were to become pregnant while the condition was in effect.[173] In *State v.*

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a day, there is no way to prevent Smith from fathering more children."); People v. Pointer, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984) (relating psychologist's trial testimony that cast doubt upon whether Pointer willingly would use birth-control pills and discussing danger that procreation might be "coercive of abortion").

167. *See infra* notes 168-97 and accompanying text (discussing various courts' analyses of enforcement problems of procreation conditions).

168. *Smith*, 972 F.2d at 962.

169. *Pointer*, 199 Cal. Rptr. at 365.

170. *See id.* (mentioning discussion from sentencing hearing).

171. *See id.* at 365-66 (declining to address strain of monitoring defendant's pregnancy status on resources of probation officials and Children's Protective Services).

172. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

173. *See* People v. Pointer, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984) (noting that Pointer, in event that she became pregnant, might avoid prison only by abortion and thus probation condition would be "coercive of abortion, [which is] in our view improper"); State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) (characterizing Mosburg's choices, should she become pregnant while on probation, as concealing her pregnancy, having abortion, or going to prison).

Mosburg,[174] for example, the court stated that Mosburg, who had abandoned a two-hour-old baby in a parking lot, would have an untenable choice should she become pregnant while subject to a procreation condition.[175] Mosburg would have to choose among three options: conceal her pregnancy (and therefore obtain no prenatal care for the expected child), have an abortion, or go to prison.[176] The *Mosburg* court quoted the California court in *Pointer*, which had noted that procreation conditions amount to judicial coercion of abortion on pain of imprisonment.[177] Similarly, in *Oakley*, a case that *upheld* a procreation condition,[178] a dissenting justice voiced similar concerns about imposing such a condition on a man.[179] The justice argued that the threat of imprisonment upon the birth of any new child created a "strong incentive" for the defendant to persuade the pregnant woman to obtain an abortion.[180] Given a strong incentive to have his partner end the pregnancy, the defendant presumably would also have a motive to try to make her conceal the pregnancy.[181] Again, these incentives would jeopardize the viability of the fetus by reducing the chance that the woman would obtain proper prenatal care.[182]

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174. 768 P.2d 313 (Kan. Ct. App. 1989).

175. *See* State v. Mosburg, 768 P.2d 313, 313, 315 (Kan. Ct. App. 1989) (describing underlying crime and discussing enforcement difficulties). In *Mosburg*, the defendant pleaded no contest to the charge of endangering a child. *Id.* at 313. The recently divorced mother of three children, Mosburg abandoned her two-hour-old baby in an unlocked truck that she found in a restaurant parking lot. *Id.* Her sentence included a year in jail and subsequent parole with conditions that included a procreation condition. *Id.* at 314. The appellate court stated that parole conditions in Kansas "are governed by the same law that controls probation conditions." *Id.* A state statute gave broad discretion to trial courts in imposing probation conditions. *Id.* However, because the procreation condition interfered with Mosburg's right to privacy, the court surveyed case law from other states and found that other courts uniformly had invalidated procreation conditions. *Id.* Agreeing that the procreation condition unduly infringed on Mosburg's right to privacy and expressing concern over the choices that Mosburg would have to make if she became pregnant during probation, the court ordered the trial court on remand to invalidate the condition. *Id.* at 315-316.

176. *Id.* at 315.

177. *Id.*

178. See *supra* notes 36-50 and accompanying text for a discussion of *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002), one of two cases in which a court upheld a procreation condition.

179. *See* State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) ("Because the [procreation] condition is triggered only upon the birth of a child, the risk of imprisonment creates a strong incentive for a man in Oakley's position to demand from the woman the termination of her pregnancy."), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002).

180. *See id.* at 220 (Bradley, J., dissenting) (discussing possible implications of upholding procreation condition).

181. *Id.* (Bradley, J., dissenting).

182. *See* State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) (hypothesizing female

A third concern that courts have raised in connection with procreation conditions is that such conditions are unnecessarily duplicative of valid probation conditions.[183] Courts have approved conditions barring defendants from having custody of any children when their crimes potentially endanger any children in their custody.[184] For example, in *Rodriguez*,[185] the same court that found no *constitutional* bar to procreation conditions discussed these conditions' *lack of a reasonable relationship to probationary goals*.[186] Rodriguez's other probation conditions included one that forbade her custody of any child, including her own.[187] Therefore, the court held that the procreation condition could not reasonably relate to future criminality because the first condition effectively prevented Rodriguez from having custody of – and therefore abusing – any child that she might bear during probation.[188] Similarly, in *Howland v. State*,[189] a Florida court invalidated the procreation condition of a child abuser whose other probation conditions forbade him to have contact with his child or to live with any other minor children.[190]

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probationer's actions should she become pregnant while subject to procreation condition).

183. *See* Howland v. State, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (finding that procreation condition upon defendant convicted of negligent child abuse was unnecessary for protection of children because his other probation conditions forbade him from having any contact with child that he had abused or from residing with any minor children); Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (holding that procreation condition, in addition to restricting marriage, did not reasonably relate to future criminality because another probation condition specifically forbade defendant from having custody of any children).

184. *See Rodriguez*, 378 So. 2d at 10 (permitting probation condition that prohibited defendant from having custody of any children).

185. See *supra* note 137 for a discussion of *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

186. *See Rodriguez*, 378 So. 2d at 10 (applying *Dominguez* test discussed in *supra* Part IV.A).

187. *See id.* at 8 (providing background of case).

188. *See id.* at 10 (holding that procreation condition did not reasonably relate to future criminality under *Dominguez* test).

189. 420 So. 2d 918 (Fla. Dist. Ct. App. 1982).

190. *See* Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (providing background of case). In *Howland*, the probationer's conditions included not having contact with the victim that he had abused (who also was his own child), as well as not living with any child under the age of sixteen. *Id.* The procreation condition forbade him from "fathering" any children while on probation; the court read "fathering" to mean begetting children. *Id.* The court found that the procreation condition, although it might have related to future criminality by preventing Howland from abusing any additional children, was unnecessary. *Id.* at 920. The condition could have prevented future criminality "only if appellant had custody of the child or was permitted to have contact with the child," possibilities already prevented by the other conditions. *Id.* Also finding that Howland's sentence exceeded the statutory maximum time limit, the court reversed the sentence and remanded the case to the trial court for resentencing.

Courts have identified other enforcement problems in addition to the unnecessary duplication of other probation conditions. For example, in *United States v. Smith*,[191] the Court of Appeals for the Eighth Circuit noted that a procreation condition could be counterproductive.[192] In imposing the condition, the trial court had expressed concern over the defendant's inadequate support of the several children that he already had.[193] On appeal, the reviewing court opined that a violation of the procreation condition would result in his imprisonment, rendering him even less likely to support the existing or new children.[194] A Kansas court identified another enforcement problem in *State v. Mosburg*:[195] the fallibility of birth control.[196] Citing language from the *Pointer* case suggesting that "even the best contraceptive methods sometimes fail" and questioning "the wisdom of attaching criminal status to such failure," the *Mosburg* court concluded that punishing a probationer for using a contraceptive method that fails is beyond a state's power.[197] Procreation conditions, in addition to not serving the goals of probation, have inherent enforceability problems that render them impractical, undesirable, and unnecessary.

Id.

191. 972 F.2d 960 (8th Cir. 1992).

192. *See* United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) (examining and rejecting procreation condition as undue infringement on Smith's constitutional rights, then characterizing condition as "unworkable" as well). In *Smith*, the Court of Appeals for the Eighth Circuit struck down the procreation condition of a drug convict who had fathered as many as five children, all with different mothers. *Id.* at 961. The court determined that special probation conditions may deprive a probationer's liberty only if "fine tuned" to be rehabilitative for the defendant and protective of the public. *Id.* The court did not believe that preventing Smith from fathering more children would rehabilitate him from dealing heroin. *Id.* at 962. Other, narrower conditions could have served the purpose of rehabilitation more effectively while not infringing Smith's fundamental rights. *Id.* In addition, the court determined that the procreation condition was "unworkable" because enforcement would require such extraordinary means as constant supervision. *Id.* The court also noted that enforcing the condition would have prevented Smith from supporting *any* of his children, including the one or more whose birth resulted in his probation revocation. *Id.* The court therefore remanded Smith's case for resentencing. *Id.*

193. *See id.* at 961 (citing statement of sentencing judge, who indicated that "[t]he court gets concerned whether [it is] a revolving door" for children in need of support).

194. *See id.* at 962 (characterizing procreation condition as "unworkable").

195. See *supra* note 175 for a discussion of *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989).

196. *See* State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) (finding Mosburg's procreation condition invalid).

197. *Id.*

V. Kline *and* Oakley *Revisited: Unconstitutional and Impractical*

The constitutional considerations for probationers with procreation conditions are certainly paramount.[198] Many courts have subjected procreation conditions to close scrutiny or have found them unconstitutional altogether.[199] Moreover, a dissent in a recent case from the Court of Appeals for the Ninth Circuit suggested that even incarcerated criminals retain some procreative and privacy rights.[200] However, even a court that finds a procreation condition constitutionally permissible still will face the practical considerations of tailoring the condition sufficiently to meet the goals of probation and overcoming the condition's enforcement problems.[201] These considerations cast doubt upon the propriety of the decisions in *Oakley* and *Kline*.[202]

A. The Right to Privacy and the Gerber *Question*

An assumption that the *Oakley* court stated explicitly, and that perhaps underlay the *Kline* court's decision as well, was that the defendants would completely lack procreative rights if they were prisoners instead of probationers.[203] Other courts that have decided procreation condition questions apparently did not subscribe to this assumption, but rather gave significant constitu-

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198. *See supra* Part III.A (describing constitutional protection of right to privacy in individual reproductive decisionmaking).

199. *See* People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (subjecting condition to "special scrutiny" and demanding that it be "narrowly drawn" because it involved "a waiver of precious constitutional rights"); State v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (finding procreation condition unconstitutional).

200. *See* Gerber v. Hickman, 291 F.3d 617, 624-25 (9th Cir. 2002) (Tashima, J., dissenting) (acknowledging that prisoners must give up some privacy rights due to security concerns, but stating that those conditions did not exist in current case, and therefore implying that some privacy rights may survive incarceration).

201. *See* Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (finding no constitutional infirmity in procreation condition, but subjecting it to *Dominguez* test for reasonableness and relationship to goals of probation).

202. *See* State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) (disagreeing with majority's decision to uphold Oakley's procreation condition), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002). The dissent stated:

> In addition to the obvious constitutional infirmities of the majority's decision [to uphold the procreation condition], upholding a term of probation that prohibits a probationer from fathering a child without first establishing the financial wherewithal to support his children carries unacceptable collateral consequences and practical problems.

Id. (Bradley, J., dissenting).

203. *See id.* at 209 n.25 ("If Oakley were incarcerated, he would be unable to exercise his constitutional right to procreate.").

tional protection to probationers.[204] The issue of prisoners' procreative rights generated strong arguments in the case of *Gerber v. Hickman*.[205] In *Gerber*,

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204. *See Pointer*, 199 Cal. Rptr. at 365 (subjecting condition to "special scrutiny" and demanding that it be "narrowly drawn" because it involved "a waiver of precious constitutional rights"); *Livingston*, 372 N.E.2d at 1337 (finding procreation condition unconstitutional).

205. *See* Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (finding procreation inconsistent with incarceration and thus upholding warden's decision to prohibit prisoner from arranging for sperm shipment). In *Gerber*, the Court of Appeals for the Ninth Circuit en banc upheld the dismissal of prisoner William Gerber's action, which Gerber brought to compel California prison authorities to allow Gerber to provide sperm for the artificial insemination of his wife. *Id.* at 619. Gerber asked prison authorities to allow him, at his own expense, to collect semen in a medical container and mail it to a Chicago laboratory where Gerber's wife could retrieve it for use in insemination attempts. *Id.* Prison authorities refused Gerber's request. *Id.* Under *Turner v. Safley*, 482 U.S. 78 (1987), the court determined that it needed to make two inquiries: (1) whether a right to procreation was consistent with a person's incarcerated status, and if so, (2) whether the state had legitimate penological interests to justify infringing on Gerber's fundamental rights. *Gerber*, 291 F.3d at 620. The court discussed Gerber's procreative rights as inextricably bound up with the right to marry, which in itself was not incompatible with incarceration. *Id.* at 621. However, the majority reasoned that incarceration naturally restricted the marital benefits of intimate association and that "[t]he loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime." *Id.* Grouping procreation with other physical attributes of marriage that an incarcerated individual surrenders while imprisoned, the majority went on to find that procreation is fundamentally inconsistent with incarceration. *Id.* at 623. Regardless of such considerations as reproductive technology, the majority found that a restriction on procreation flowed naturally from the "nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation." *Id.* at 622. Because Gerber's assertion of a right to procreation did not meet the first prong of the *Turner* analysis, the court did not proceed to the second question – whether the state served legitimate penological interests in denying that right. *Id.* at 623. In dissent, Judge Tashima called into question the logic of the majority's reasoning. *Id.* at 624 (Tashima, J., dissenting). If procreation were indeed fundamentally inconsistent with incarceration, then the dissent questioned why California allowed many prisoners to have conjugal visits, during which conception easily could occur. *Id.* at 626-27 (Tashima, J., dissenting). While the dissent agreed that some attributes of the right to privacy were inconsistent with incarceration, the dissent argued that security concerns, not punishment, could justify the infringement of such attributes. *Id.* at 624-25 (Tashima, J., dissenting). "If, in fact, the purpose behind prohibiting procreation is to punish offenders, this is a determination that should be made by the legislature, not the Warden." *Id.* at 626 (Tashima, J., dissenting). Because the California legislature had made no such determination, the dissent argued that Gerber's right of procreation was not fundamentally inconsistent with incarceration and that the court therefore should have addressed the second prong of the *Turner* test before making a decision. *Id.* at 629 (Tashima, J., dissenting).

Cf. Gerber v. Hickman, 264 F.3d 882 (9th Cir. 2001), *superseded by* Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (hereinafter *Gerber (superseded)*). The *Gerber (superseded)* decision, which the *Gerber* decision replaces for all legal purposes, contained far stronger assertions of Gerber's procreative rights while imprisoned. *See Gerber (superseded)*, 264 F.3d at 888 ("[W]e hold that the right to procreate does indeed survive incarceration."). The three-judge panel observed that *Turner* established that prisoners have a fundamental right to marry,

although a Ninth Circuit panel agreed with the *Oakley* court that a prisoner had no procreative rights while incarcerated, several judges wrote strong opinions to the contrary – both in the original hearing and in the rehearing.[206] Their arguments call into question the Wisconsin court's assertion that Oakley necessarily would have lost his procreative rights if he went to prison and that he therefore had no cause to complain if a probation condition also denied him those rights.[207]

As a prisoner serving a life sentence in California, William Gerber had no right under state law to conjugal visits, so he and his wife could not achieve conception through traditional means.[208] However, they hoped to conceive through artificial insemination.[209] The procedure required that Gerber send his semen in a special mailer to a laboratory at the Chicago Medical Center.[210] When Gerber requested that the prison accommodate this procedure, prison officials refused, so Gerber filed a lawsuit.[211] When the case first reached the Ninth Circuit, the original panel determined that Gerber's fundamental right to procreate existed even during his incarceration;[212] in addition, it found that the state had asserted no penological interests that justified its restriction of Gerber's right.[213] After a rehearing *en*

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even though they cannot enjoy all of marriage's benefits. *Id.* In addition, the court observed that *Skinner v. Oklahoma*, 316 U.S. 535 (1942) stood for a prisoner's right to procreate once he was out of prison. *Gerber (superseded)*, 264 F.3d at 888. In looking at these cases together, the court determined that they "suggest that the fundamental right of procreation may exist in some form while a prisoner is incarcerated, despite the fact that a prisoner necessarily will not be able to exercise that right in the same manner or to the same extent as he would if he were not incarcerated." *Id.* at 889. The court asserted that its finding was consistent with its holding in other cases that prisoners had no fundamental right to conjugal visits. *Id.* at 890. Having found that incarcerated criminals have a fundamental right to procreate, the *Gerber (superseded)* court proceeded to find that the state had shown no valid penological reasons to deny Gerber's rights in this case. *Id.* at 892.

206. *See supra* note 205 (describing *Gerber*, its dissent, and original decision that it superseded).

207. *See* State v. Oakley, 629 N.W.2d 200, 209-10 (Wis. 2001) (comparing Oakley's constitutional status as probationer to constitutional status of prisoner), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002).

208. *See Gerber*, 291 F.3d at 619 (describing insemination procedure and Gerber's plan to use it).

209. *Id.*

210. *Id.*

211. *Id.* (describing insemomplaint).

212. *See* Gerber v. Hickman, 264 F.3d 882, 890 (9th Cir. 2001) ("In sum, we conclude that the fundamental right to procreate survives incarceration."), *superseded by* Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002).

213. *Id.* at 891-92 (finding that state had failed to offer legitimate government interest

banc, the new holding was six-to-five against Gerber's assertions of his rights.[214] One dissenter, Judge Tashima, criticized the majority's finding that procreation was fundamentally inconsistent with incarceration.[215] Judge Tashima argued that the majority unjustly characterized procreative rights as physical and likened the right of procreation to the right of physical intimacy.[216] In Gerber's case, were the prisoner allowed conjugal visits, his wife might conceive.[217] Therefore, procreative rights must not be *fundamentally* inconsistent with incarceration, or the legislature would not allow conjugal visitation for prisoners at all.[218] Judge Tashima expressed a desire to hear the prison's reasons for denying Gerber his procreative rights; like the judges in the superseded opinion, he also may have found that the denial furthered no valid penological objective.[219]

The superseded and dissenting opinions generated by *Gerber* contradict *Oakley*'s assertion – and *Kline*'s apparent assumption – that prisoners retain no fundamental right to procreation.[220] The *Oakley* majority prominently noted that Oakley would have had no right to procreate if the trial judge instead had imprisoned him for the last five years of his sentence.[221] The court

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justifying denial of Gerber's right to procreate).

214. *See* Gerber v. Hickman, 291 F.3d 617, 624 (9th Cir. 2002) (affirming district court's dismissal of appellant's complaint and listing five dissenting judges).

215. *Id.* at 624-29 (Tashima, J., dissenting).

216. *See id.* at 625 (Tashima, J., dissenting) ("Procreation through artificial insemination . . . implicates none of the restrictions on privacy and association that are necessary attributes of incarceration . . . . None of the rights that are necessarily curtailed by incarceration are at issue here.").

217. *See id.* at 626-27 (Tashima, J., dissenting) (discussing conjugal visitation as it relates to prisoners' ability to procreate).

218. *See id.* at 626 (Tashima, J., dissenting) ("If, in fact, the purpose behind prohibiting procreation is to punish offenders, this is a determination that should be made by the legislature, not the Warden.").

219. *See id.* at 629 (Tashima, J., dissenting) (arguing to "vacate the [dismissal] and remand for further proceedings, including an evidentiary hearing to determine whether legitimate penological concerns justify this restriction").

220. *Compare* State v. Oakley, 629 N.W.2d 200, 209 n. 25 (Wis. 2001) ("If Oakley were incarcerated, he would be unable to exercise his constitutional right to procreate.") *with* Gerber v. Hickman, 291 F.3d 617, 632 (9th Cir. 2002) (Kozinski, J., dissenting) (stating that prison authorities "cut[ ] off Gerber's fundamental right to procreate"), *and* Gerber v. Hickman, 264 F.3d 882, 884 (9th Cir. 2001) ("We conclude that the right to procreate survives incarceration . . . ."), *superseded by* Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002).

221. *Oakley*, 629 N.W.2d at 201-02. The opening paragraph of the majority opinion stated:

> [B]ecause Oakley was convicted of intentionally refusing to pay child support . . . and could have been imprisoned for six years, *which would have eliminated his*

included this assertion in the introduction to the majority opinion.[222] If the reasoning of the *Gerber* dissent is correct, however, then Oakley might have been able to procreate while in prison by using reproductive technologies. Therefore, a probation condition that restricted Oakley's right to have children could have been an even greater restriction on his fundamental right to individual reproductive decisionmaking than a prison sentence.[223]

B. Meeting the Goals of Probation

The procreation condition cases present a few very basic goals of probation: the rehabilitation of the probationer and the protection of society and potential victims.[224] Tailoring procreation conditions to meet these goals is difficult – perhaps impossible.[225] First, probation conditions that restrict the probationer's right to privacy in reproductive matters are of questionable rehabilitative value, regardless of whether the underlying crime is child abuse or a different type of crime; second, they are not the best means available to protect society or future victims.[226]

Procreation conditions cannot rehabilitate if they do not help probationers stop committing the crimes that led to their convictions.[227] As the *Trammell* court noted, a procreation condition does not rehabilitate a child-abusing probationer.[228] However, a person convicted of child abuse may be

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> *right to procreate altogether* during those six years, this probation condition, which infringes on his right to procreate during his term of probation, is not invalid under these facts.

Id. (emphasis added).

222. *Id.*

223. The strange procedural history of *Gerber* and its rehearing may lead the reader to believe that the question of prisoners' procreative rights is so tangential that it might not arise again. However, the issue is not an anomaly; a recent Pennsylvania criminal case involving a prisoner who smuggled semen to his wife so that she could become pregnant illustrates the fact that reproductive technologies will continue to press the question. *See* Marc Levy, *Return Semen, Wife Demands: Government Opposes Giving Back Reputed Mobster's Smuggled Sperm*, HARRISBURG PATRIOT, Feb. 12, 2002, at B1 (describing case of Maria Parlavecchio, who is serving probation for smuggling her husband's sperm out of minimum-security prison).

224. *See supra* Part IV.A (discussing common goals of probation).

225. *See supra* Part IV.A (discussing common goals of probation).

226. *See* Trammell v. State, 751 N.E.2d 283, 288-89 (Ind. Ct. App. 2001) (expressing concern that procreation condition did not assist child-abusing mother to become better parent and stating that probation condition served no rehabilitative purpose).

227. *See id.* at 289 (stating that procreation condition for child abuser "does nothing to improve her parenting skills or educate her regarding perinatal care or child . . . development should she choose to become pregnant after her probationary period expires").

228. *See id.* at 288 ("The trial court's order that Trammel not become pregnant while on

able to obtain help from counseling, parenting classes, or supervision by child welfare workers.[229] The Oregon court took this approach in setting Tad Kline's probation condition: the court ordered him to obtain counseling for his abusive habits and drug dependency.[230]

Furthermore, procreation conditions do not protect potential victims against future crimes.[231] For example, a condition that bars the probationer from bearing or begetting more children is not as protective of potential victims as one that simply restricts the probationer's contact with children. A Florida court upheld such a probation condition in *Howland*.[232] Howland's probation condition barred him from having custody of *any* children or from living in a home with young children.[233] The court reasoned that probation conditions that include rehabilitative treatment for child abusers, coupled with an order not to have custody of or live with any children, could be more effective than a procreation condition.[234] Probation conditions that restrict a probationer's custody of children under any circumstance better serve to protect potential victims.[235]

In *Oakley*, the court expressed a belief that Oakley's sentence would "rehabilitate" him from his persistent failure to pay child support.[236] The court also defended the procreation condition as protective of potential future victims – Oakley's current children and any additional children that he might

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probation . . . serves no rehabilitative purpose whatsoever.").

229. *See* State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998) (affirming condition that ordered defendant to complete drug treatment and anger management programs successfully before fathering any more children).

230. *Id.*

231. *See* Howland v. State, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (finding procreation condition redundant because another condition met probationary goals). The court stated:

> [A]lthough this [procreation] condition . . . could reasonably relate to future criminality – i.e., child abuse – it could do so only if appellant had custody of the child or was permitted to have contact with the child. In this case, however, those possibilities have already been foreclosed, since appellant is prohibited from having contact with his child or from residing with minor children . . . by the other valid condition of probation.

Id. at 920.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *See* State v. Oakley, 629 N.W.2d 200, 207 (Wis. 2001) (discussing with approval trial court's judgment that Oakley's sentence would "rehabilitate Oakley while protecting society and potential victims . . . from future wrongdoing"), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002).

beget.[237] If the court's goal was to force Oakley to pay child support, both for his current children and for any future children, then the court could have achieved that probationary goal by making payment of child support a condition of his probation.[238] Conditioning Oakley's right to procreate upon payment of child support achieved nothing for Oakley's current children if Oakley chose not to have additional offspring.[239] As the probation condition specified, if Oakley failed to pay further child support and then had another child, he would go to prison, which would render him unable to support any of his children.[240]

C. Enforcement Problems Revisited

A procreation condition should be unenforceable if the probationer is unsure how to comply.[241] Because courts generally consider bans on sexual activity to be invalid,[242] a procreation condition actually demands that the probationer use birth control.[243] This demand makes procreation conditions difficult to enforce because no birth control methods are one hundred percent effective.[244]

Although the effectiveness of birth control methods varies, probationers face criminal sanctions if the birth control fails.[245] In order to tailor a procre-

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237. *See id.* at 208 (identifying Oakley's current and future children as "child victims").

238. *See id.* at 218 (Bradley, J., dissenting) ("Under Wisconsin law, . . . court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties." (quoting Zablocki v. Redhail, 434 U.S. 374, 389-90 (1978))).

239. *See id.* at 217 (Bradley, J., dissenting) (noting that "the condition of probation is not triggered until Oakley's next child is born").

240. *Cf.* United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) ("If Smith were to violate this [procreation] condition . . . , he may well be returned to prison, leaving him no way to provide for his dependents.").

241. *See* Arthur, *supra* note 81, at 84 (arguing that "[p]rocedural due process . . . is violated when a court imposes a condition that is vague or indefinite").

242. *See* State v. Pilcher, 242 N.W.2d 348, 358-59 (Iowa 1976) (finding that "State may not interfere with the private sexual relations of consenting adults"); State v. Saunders, 381 A.2d 333, 340 (N.J. 1977) ("[S]exual activities between adults are protected by the right of privacy.").

243. *See* People v. Pointer, 199 Cal. Rptr. 357, 366 n.12 (Cal. Ct. App. 1984) (noting that trial judge had not attempted to impose ban on sexual intercourse: "I would never require somebody to have no sexual activity; I don't think that's even suggested") (internal quotations omitted).

244. *See* DEP'T OF HEALTH & HUMAN SERVS., U.S. FOOD AND DRUG ADMIN., BIRTH CONTROL GUIDE (1997) (summarizing effectiveness of birth-control devices), *available at* http://www.fda.gov/fdac/features/1997/babytabl.html.

245. *See* State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) (criticizing procreation condition because "[t]he State should not have the power to penalize Mosburg if she uses

ation condition narrowly, a court might consider specifying the method of birth control that the probationer should use. However, such an order creates other problems. In the early 1990s, a few trial courts directed probationers to employ a specific method of birth control, Norplant, in order to comply with procreation conditions.[246] In addition to engendering public and academic criticism, the orders failed to take into account the fact that Norplant was a prescription form of birth control and was not appropriate for all women.[247] Further complicating the matter, no corresponding option was available for male probationers, who had to choose among using a condom (with its relatively low rate of effectiveness[248]), obtaining a vasectomy, or trusting partners to employ female methods of birth control effectively.[249]

Another enforcement problem existed in *Oakley* that is unique to child support cases.[250] The *Oakley* opinion left unresolved the troublesome issue of exactly what amount of money Oakley needed to pay in order to satisfy his condition.[251] The opinion stated that Wisconsin courts usually issue support orders based on a percentage of income; if that is true, then Oakley would have needed only a small income to satisfy his condition.[252] However, the probation condition that the court upheld phrased the requirement differently: in order to exercise his right to procreation, Oakley must "*meet[] the needs* of his other children and [show that he] can meet the needs of" a new child.[253]

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contraceptives which for some reason fail to prevent pregnancy").

246. *See* Jim Persels, *The Norplant Condition: Protecting the Unborn or Violating Fundamental Rights?*, 13 J. LEGAL MED. 237, 238 (1992) (describing California trial-court case in which defendant's probation conditions included order to use Norplant, prescription birth control that lasts five years).

247. *See* Arthur, *supra* note 81, at 97-99 (discussing difficulties with courts ordering defendants to use Norplant because it requires prescription).

248. *See* DEP'T OF HEALTH & HUMAN SERVS., U.S. FOOD AND DRUG ADMIN., BIRTH CONTROL GUIDE (1997) (summarizing effectiveness of birth-control devices, including condoms at 86% effective), *available at* http://www.fda.gov/fdac/features/1997/babytabl.html.

249. *See* DEP'T OF HEALTH & HUMAN SERVS., U.S. FOOD AND DRUG ADMIN., WHAT KIND OF BIRTH CONTROL IS BEST FOR YOU? (Mar. 2000) (describing available birth control methods for men and women, but including only vasectomy and condoms as available methods for men), *available at* http://www.fda.gov/opacom/lowlit/brthcon.html.

250. *See* State v. Oakley, 629 N.W.2d 200, 217 (Wis. 2001) (Bradley, J., dissenting) (discussing improbability that David Oakley will ever be able to support his children fully), *cert. denied*, 537 U.S. ___, 123 S. Ct. 74 (2002).

251. *See id.* at 201, 205 n.19 (stating that Oakley's condition required him not to have another child unless he demonstrated "that he can support that child and his current children" and noting that support orders in Wisconsin generally use percentage of income).

252. *See id.* at 205 n.19 ("In Wisconsin, a circuit court typically orders support payments as a percentage of a parent's income, not as an invariable dollar amount.").

253. *Id.* at 217 (Bradley, J., dissenting) (emphasis added).

A dissenting justice called this condition an award of constitutional reproductive rights according to a "sliding scale of wealth."[254] The majority never resolved the question of exactly how much Oakley needed to pay in order to satisfy his condition.

VI. Conclusion

Since the late 1960s, appellate courts in the United States have decided sixteen cases involving procreation conditions.[255] In 1998, although case law suggested that the state courts universally considered procreation conditions invalid, an Oregon court upheld a procreation condition in *Kline*.[256] Three years later, the Wisconsin Supreme Court upheld another such condition in *Oakley*.[257] The precedent that *Kline* and *Oakley* may establish warrants a close examination of the rights and consequences involved in a procreation condition.[258]

Courts that have examined procreation conditions for validity have stated that a special probation condition is subject to close examination when it infringes upon a fundamental right.[259] A line of Supreme Court decisions establishes choice in reproductive decisionmaking as a fundamental right.[260] Courts therefore should tailor procreation conditions closely to meet the goals of probation: the rehabilitation of the probationer and the protection of society and potential victims.[261] However, procreation conditions do not rehabilitate probationers and are not the most effective means of protecting society or future victims.[262]

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254. *See id.* at 219 (Bradley, J., dissenting) ("[B]y allowing the right to procreate to be subjected to financial qualifications, the majority imbues a fundamental liberty interest with a sliding scale of wealth.").

255. *See supra* note 2 (listing appellate cases that have examined procreation conditions).

256. *See supra* note 3 (listing cases that had struck down procreation conditions as of 1998); *supra* note 27 (discussing *Kline* and its holding).

257. *See supra* note 36 (discussing *Oakley* and its holding).

258. *See supra* Part V (discussing unconstitutionality and impracticality of *Kline* and *Oakley* conditions).

259. *See supra* Part III.B (examining constitutional right to privacy in reproductive decisionmaking for probationers).

260. *See supra* Part III.A (explaining constitutional basis for fundamental right to procreation under Supreme Court case law).

261. *See supra* Part IV.A (describing common goals of probation).

262. *See supra* Part IV, V.B (examining procreation conditions in light of goals of probation).

In addition, procreation conditions are unenforceable.[263] Law enforcement cannot, in practical terms, supervise probationers closely enough to prevent conception, and courts cannot order the most effective prescription birth control methods.[264] Moreover, probationers who conscientiously practice birth control may still experience an unwanted pregnancy.[265] In such a case, a probationer faces imprisonment upon the birth of a child, and therefore the probationer must choose among concealing the pregnancy (thereby reducing the chance of proper prenatal medical care), obtaining an abortion, or going to prison after the child's birth.[266] Such choices are untenable for courts to impose upon probationers.

Courts have wide discretion in setting special probation conditions to be sure that convicted criminals can function safely in society.[267] Procreation conditions are neither a valid nor a viable exercise of that discretion.[268] Courts therefore should disregard the precedent of *Kline* and *Oakley* and impose conditions, such as prohibiting custody of children, that are more effective and that are less restrictive of fundamental rights.

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263. *See supra* Part IV.C (discussing enforcement problems of procreation conditions); *supra* Part V.C (same).

264. *See supra* notes 168-72 and accompanying test (questioning practicality of having probation officers enforce procreation conditions).

265. *See* DEP'T OF HEALTH & HUMAN SERVS., U.S. FOOD AND DRUG ADMIN., BIRTH CONTROL GUIDE (1997) (summarizing effectiveness of birth-control devices), *available at* http://www.fda.gov/fdac/features/1997/babytabl.html.

266. State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989) (characterizing Mosburg's choices, should she become pregnant while on probation, as concealing her pregnancy, having abortion, or going to prison).

267. *See supra* notes 227-35 and accompanying text (giving examples of other means available to achieve goals of probation).

268. *See supra* Parts IV, V (discussing impracticality and invalidity of procreation conditions).