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Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse

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COURT-ORDERED CONTRACEPTION: NORPLANT AS A PROBATION CONDITION IN CHILD ABUSE*

When the Food and Drug Administration approved the Norplant contraceptive for use in the United States in December 1990, commentators hailed it as the greatest advance in contraceptive technology since the pill.[1] Once implanted under the skin of a woman's upper arm, the Norplant device provides up to five years of contraception without any further effort on the woman's part.[2] Upon removal of the device, fertility generally returns within months.[3] Given its convenience and effectiveness,[4] Norplant appears to be the contraceptive of the future.

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*Dedicated to my grandparents, James and Pauline Austin, and Sam Taylor. Dedicated, as well, to the memory of Willa Taylor.

1. *See* Steven Findlay, *News You Can Use: Birth Control*, U.S. NEWS & WORLD REP., Dec. 24, 1990, at 58; Andrew Purvis, *A Pill that Gets Under the Skin*, TIME, Dec. 24, 1990, at 66.
2. Findlay, *supra* note 1, at 58-59.
3. *Id.*
4. *See* text accompanying *supra* note 2; *infra* notes 31-33.

Norplant also may be the newest weapon of courts and prosecutors in their effort to stop child abuse. Barely a month after FDA approval, a California case sparked a national debate over requiring Norplant as a probation condition for a child abusing mother.[5] In September 1990, twenty-seven year-old Darlene Johnson pleaded guilty in Tulare County Superior Court to three felony counts of child abuse after beating her two children with a belt and extension cord.[6] According to Judge Howard Broadman, Johnson "beat the tar" out of her children leaving scars on their backs and necks.[7] When sentencing Johnson in January 1991, Judge Broadman offered her a choice: four years in jail or one year in jail and three years on probation with the condition that she use Norplant.[8] Johnson chose probation and Norplant, but later appealed the sentence.[9] In defending his sentence, Judge Broadman claimed Norplant was necessary to protect future children from Johnson's abusive behavior.[10] A California appeals court eventually

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5. *See, e.g.*, Billy Allstetter, *Compulsory Contraception; Does the Punishment Fit the Crime?*, AM. HEALTH: FITNESS OF BODY AND MIND, May 1991, at 32; Beverly F. Baker, *Sentenced to Norplant*, NETWORK NEWS, Jan.-Feb. 1991, at 6; Mary Cantwell, *Editorial Notebook: Coercion and Contraception*, N.Y. TIMES, Jan. 27, 1991, § 4, at 16; Stephanie Denmark, *Birth-Control Tyranny*, N.Y. TIMES, Oct. 19, 1991, at 23; John P. MacKenzie, *Editorial Notebook: Whose Choice Is It, Anyway?*, N.Y. TIMES, Jan. 28, 1991, at A22; Helen R. Neuborne, *In the Norplant Case, Good Intentions Make Bad Law*, L.A. TIMES, Mar. 3, 1991, at M1; Tim Rutten, *Norplanting or Supplanting Private Rights*, L.A. TIMES, May 31, 1991, at E1; *When a Mother Beats Her Children; Why Coerced Birth Control Is Not the Way to Deal with Child Abuse*, L.A. TIMES, Jan. 17, 1991, at B6.

6. Michael Lev, *Judge Is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. TIMES, Jan. 11, 1991, at A17; Mark Stein, *Judge Stirs Debate with Ordering of Birth Control*, L.A. TIMES, Jan. 10, 1991, at A3 [hereinafter Stein, *Judge Stirs Debate*]; Mark Stein, *Judge to Let Birth Control Order Stand*, L.A. TIMES, Jan. 11, 1991, at A3.

7. Stein, *Judge Stirs Debate*, *supra* note 6, at A3.

8. Lev, *supra* note 6, at A17. Judge Broadman is known for his creative sentences. *See id.* In one case, he offered probation to a thief who stole two six packs of beer on the condition that the man wear a T-shirt reading on the front, "MY RECORD AND TWO SIX PACKS EQUAL FOUR YEARS," and on the back, "I AM ON FELONY PROBATION FOR THEFT." Johná Hurst, *Controversial Judge Dodges Not Only Critics, but Bullet*, L.A. TIMES, Apr. 29, 1991, at A3 (summarizing Judge Broadman's background, and his propensity for creative sentencing). Later, the man was arrested for another theft because a witness identified him by the T-shirt. *Id.*

9. *Birth Control Order Is Appealed*, L.A. TIMES, Feb. 1, 1991, at B8; Lev, *supra* note 6, at A17.

10. Lev, *supra* note 6, at A17.

dismissed Johnson's appeal as moot in April 1992, after she was imprisoned for an unrelated violation of her probation conditions.[11]

Unfortunately, child abuse similar to what occurred in the Johnson case is a recurring tragedy in our society. In 1989 alone, approximately 2.4 million reports of suspected child maltreatment were filed in the United States.[12] More than 900,000 of these cases were officially substantiated.[13] Indeed, the 1980s saw steady increases in the aggregate number of children abused and in the rate of child abuse in the United States.[14] In addition to these discouraging statistics, a new form of abuse has emerged: women who harm their unborn children by using drugs during pregnancy.[15] As one U.S. government report stated, these trends represent "an extremely serious social problem requiring a major societal response."[16] Stopping child abuse calls for creative solutions from all sectors of government — including the courts.[17] In this regard, Judge Broadman's Norplant condition in the *Johnson* case is a new approach to preventing child abuse, and courts in other jurisdictions may adopt his solution in the future.

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11. Karen Southwick, *Use Norplant, Don't Go to Jail: Judges, Social Workers and Medical Professionals Debate the Ethic*, S.F. CHRON., Aug. 2, 1992, at 13. After Planned Parenthood and the California chapter of the American College of Obstetricians and Gynecologists filed briefs in the ACLU-sponsored appeal, Johnson tested positive for cocaine and was sentenced to prison. *Id.*

12. U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 15 (1990) [hereinafter CHILD ABUSE AND NEGLECT].

13. *Id.*

14. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT 3-1 to -15 (1988). Between 1980 and 1986, the rate of child abuse in the United States went up from 5.3 out of every 1000 children to 9.2 out of every 1000 children. *Id.* at 3-5. In 1980, the total number of children abused in the United States was 336,600. *Id.* By 1986, this number had climbed to 580,400. *Id.*

15. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). Although maternal drug and alcohol abuse is not typically classified as child abuse, for the purposes of this note it is included as a form of child abuse. The legislature of at least one state, Ohio, has termed this conduct "prenatal child neglect." *See* Ohio S.B. No. 324, 118th Gen. Assemb., Reg. Sess. (1989-90), *discussed in* Roberts, *supra*, at 1463 n.217.

16. CHILD ABUSE AND NEGLECT, *supra* note 12, at 15.

17. *See id.* at 46-95. At least two studies include the courts as part of their solutions to the problem of child abuse. *See id.* at 87-89; U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 33-45 (1984).

The *Johnson* case, however, raises several intriguing issues. Critics of Judge Broadman's sentence have complained that forcing Johnson to use Norplant violates her constitutional right to privacy and, in particular, her right to procreate.[18] On the other hand, supporters of Judge Broadman's sentence have noted that courts have great discretion when setting probationary conditions.[19] Because probationers are convicted criminals, they do not enjoy the same liberties as other citizens.[20] Accordingly, courts may, and do, impose probation conditions which impinge upon the constitutional rights of the convicted.[21]

This note assesses the validity of requiring Norplant as a probation condition in child abuse cases. The analysis will include typical child abuse cases like the *Johnson* case where the abuse occurs post-birth. This note will also examine situations where the mother harms her child in utero by using drugs like cocaine while pregnant. Although a Norplant condition may burden several constitutional rights of a probationer,[22] this note only addresses the probationer's right to procreate. While the *Johnson* case and its Norplant condition frame the inquiry of this note, the analysis applies equally to probation conditions which prohibit conception or pregnancy without specifying a particular contraceptive.

After a more detailed description of Norplant in part I of this note, part II examines the right to procreate as defined in United States Supreme Court cases. Part III examines the power courts have to fashion probationary conditions and how a "reasonableness" requirement and the Constitution limit a court's power. Part IV reviews three state appellate court decisions involving probation conditions similar to Johnson's — conditions prohibiting conception or pregnancy without specifying a particular contraceptive. These decisions suggest that Judge Broadman's Norplant condition is invalid. Part V analyzes the Norplant condition in light of the constitutional and reasonableness

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18. *See, e.g.*, Neuborne, *supra* note 5.

19. *See infra* note 131 and accompanying text.

20. *See infra* note 153 and accompanying text.

21. *See infra* note 162 and accompanying text.

22. *See* Jack P. Lipton & Colin F. Campbell, *The Constitutionality of Court-Imposed Birth Control as a Condition of Probation*, 6 N.Y.L. SCH. J. HUM. RTS. 271, 272 (1989). In addition to burdening the right to procreate, a Norplant condition also may violate the Eighth Amendment's prohibition of cruel and unusual punishment. *See id.* Furthermore, a condition mandating the use of contraception may violate the probationer's First Amendment freedom of religion. *See id.* If the probationer is Catholic, then forcing her to use contraception would contradict the tenets of her church. *See id.* at 279-82.

tests and concludes that a Norplant condition fails one or both tests in all child abuse cases. Part VI suggests an alternative to a Norplant condition which meets the reasonableness test and respects the probationer's right to procreate. This note concludes that because an alternative exists, courts may not impose Norplant as a probation condition in child abuse cases.

I. NORPLANT: USE, EFFICIENCY, AND SIDE EFFECTS

The Norplant device consists of six silicone rubber tubes, each the size of a match stick, containing synthetic progestin hormone.[23] The tubes are implanted in a fan-like array under the skin of a woman's upper arm.[24] The implant procedure is simple.[25] The procedure lasts only ten to fifteen minutes and is conducted under local anesthetic.[26] Once implanted, Norplant is barely visible under the skin.[27] The Norplant tubes release a measured amount of progestin into the woman's blood stream for up to five years.[28] At any time during the five years, the device can be removed in a procedure almost as simple and painless as the implantation.[29]

Norplant is the most effective, reversible contraceptive on the market in the United States.[30] During the first year of use, Norplant's

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23. Marian Segal, *Norplant: Birth Control at Arm's Reach*, FDA CONSUMER, May 1991, at 9. The synthetic hormone used in Norplant is levonorgestrel. *Id.* Progestin has long been used in birth control pills. *Id.* For a more thorough discussion of Norplant, see generally Jan Flattum-Riemers, *Norplant: A New Contraceptive*, AM. FAM. PHYSICIAN, July 1991, at 103 (discussing Norplant, its efficiency and side effects, with some technical language and cited sources); Tamar Lewin, *5-Year Contraceptive Implant Seems Headed for Wide Use*, N.Y. TIMES, Nov. 29, 1991, at A1 (interviewing individuals who are now using Norplant); *Menstrual Patterns in Women Using Contraceptive Implants*, AM. FAM. PHYSICIAN, May 1991, at 1826 [hereinafter *Menstrual Patterns*] (discussing unusual menstrual patterns among Norplant users); and *Norplant: Satisfaction and Side-Effects*, SPECIAL DELIVERY, Summer 1991, at 3 [hereinafter *Satisfaction and Side-Effects*] (discussing side-effects exhibited by and satisfaction of Norplant users). The textual discussion of Norplant which follows is drawn primarily from these sources.

24. Segal, *supra* note 23, at 9.

25. *See id.* at 11.

26. *Id.*

27. *See* Lewin, *supra* note 23, at A1.

28. Flattum-Riemers, *supra* note 23, at 103. An average of 50 to 80 micrograms of levenorgestrel is released daily into the blood stream during the first year of use. *Id.* This level decreases to between 30 and 50 micrograms a day over the remaining four years. *Id.*

29. Segal, *supra* note 23, at 11. One woman compared the soreness in her arm the day after she had the device implanted to the pain she feels after having worked out too much. Lewin, *supra* note 23, at A1.

30. Flattum-Riemers, *supra* note 23, at 103.

efficiency in preventing conception approaches that of sterilization.[31] According to various studies, the pregnancy rate for Norplant users is between .2 and .6 per 100 women during the first year.[32] The rate rises to 1.5 pregnancies per 100 women per year at the end of five years.[33] For comparison, oral contraceptives have a typical pregnancy rate of 3 per 100 users per year, and condoms without spermicide have an annual pregnancy rate of 12 per 100 users.[34] Although highly effective when in use, Norplant is reversible and fertility returns within months after its removal.[35]

Because Norplant uses a low dose hormone, side effects which plague certain forms of the pill are rare.[36] One side effect, however, is common among Norplant users: abnormal menstrual patterns and bleeding.[37] In one study, eighty-four percent of the women using Norplant reported menstrual changes including irregular and prolonged bleeding in their first year.[38] These numbers drop significantly, however, by the fourth and fifth years of use.[39]

Although it is an attractive device, not every woman can use Norplant.[40] The device is less effective in women weighing over 154 pounds.[41] Women suffering from liver disease, breast cancer, or blood

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31. Segal, *supra* note 23, at 9-10. Even sterilization in both males and females is not completely effective. *See id.* The typical pregnancy rate is .15 per 100 women during the first year after male sterilization. *Id.* at 10. When the female is sterilized, the pregnancy rate is typically .4 per 100 women during the first year. *Id.*

32. *Compare id.* at 10 *with* Flattum-Riemers, *supra* note 23, at 104.

33. Flattum-Riemers, *supra* note 23, at 104.

34. *See* Segal, *supra* note 23, at 10, tbl.

35. *See* Flattum-Riemers, *supra* note 23, at 104. When attempting pregnancy after the removal of Norplant, 20% of the women are pregnant within a month; 49% by the fourth month; 73% by the sixth month; and 86% by the end of the first year. *Id.*

36. *See id.* at 105. Some of the less common side effects of Norplant are weight gain or loss, nausea, headache, nervousness, acne, depression, and anemia. *Id.*

37. *Id.* at 104; *Menstrual Patterns*, *supra* note 23, at 1826; *Satisfaction and Side-Effects*, *supra* note 23, at 3; Segal, *supra* note 23, at 10.

38. *Satisfaction and Side-Effects*, *supra* note 23, at 3. The study included interviews of 200 women in clinical trials in San Francisco in 1988. *Id.* Another study conducted by Shoupe et al., is discussed in *Menstrual Patterns*, *supra* note 23, at 1826.

39. *Menstrual Patterns*, *supra* note 23, at 1826. In one study, only 37.5% of the women still using Norplant during the fifth year reported irregular bleeding cycles. *Id.*

40. *See* Flattum-Riemers, *supra* note 23, at 104.

41. *Id.* In women weighing over 154 pounds, Norplant's effectiveness in preventing conception drops to about 1 pregnancy per 100 users in the second year, 4 pregnancies per 100 users by the third year, and 7 pregnancies per 100 users by the fifth year. *Id.*

clots in the legs or lungs should not use the implant at all.[42] Moreover, women who have heart problems or diabetes are warned away from Norplant.[43] Finally, Norplant's cost may be prohibitive for some women. While physician fees vary, the device itself costs $350;[44] and the total cost for using Norplant may be as much as $600.[45] Still, this is less than the cost of oral contraceptives over a five-year period.[46]

Despite its drawbacks, Norplant has been well received by American women.[47] By the end of November 1991, 100,000 women in the United States were using Norplant.[48] About sixty to sixty-five percent of the women who have tried Norplant continue to use it for more than two years.[49] In comparison, fifty percent of those taking oral contraceptives stop using them after the first year.[50] Many women endure the irregular bleeding and continue to use Norplant because it is easy to use and reversible.[51] Indeed, it is because Norplant does not require the patient's cooperation to be effective that some people view its use as an attractive solution to the problem of child abuse.[52]

II. THE RIGHT TO PROCREATE AND ITS LIMITS

As noted earlier, critics argue Judge Broadman's Norplant sentence violates Darlene Johnson's right to procreate.[53] These critics claim the Constitution implicitly protects a person's right to conceive a child.[54] The Supreme Court, however, has never decided a case based on this right. Instead, the right to procreate relies on dicta in several of the Court's contraception cases. To evaluate the validity of a Norplant probation condition, it is necessary to first sketch how the Court has defined the right to procreate and to what extent this right protects a person's freedom to conceive a child.

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42. Segal, *supra* note 23, at 11.
43. Findlay, *supra* note 1, at 59.
44. Segal, *supra* note 23, at 11.
45. Findlay, *supra* note 1, at 60.
46. *Id.* One source states that the pill would cost between $200 and $250 per year. *Id.*
47. *See* Lewin, *supra* note 23, at A1.
48. *Id.*
49. Segal, *supra* note 23, at 11.
50. Flattum-Riemers, *supra* note 23, at 104. This statistic is based on international studies. *Id.*
51. *See* Lewin, *supra* note 23, at A1.
52. *See* Denmark, *supra* note 5, at 23.
53. *See supra* note 18 and accompanying text.
54. *See, e.g.*, Neuborne, *supra* note 5.

A. *The Right to Procreate in Supreme Court Cases*

The Court first articulated the right to procreate in the 1942 case, *Skinner v. Oklahoma ex rel. Willamson.*[55] In *Skinner*, the Court struck down Oklahoma's Habitual Criminal Sterilization Act.[56] Under this Act, the state could sterilize persons convicted two or more times of crimes "involving moral turpitude."[57] The Act excepted, however, violations of the prohibatory laws, revenue acts, embezzlement, and political offenses.[58] The Court, in an opinion by Justice Douglas, reasoned that because the Act treated certain crimes differently from others, the law laid "an unequal hand on those who have committed intrinsically the same quality of offense."[59] Therefore, the Court held that the Act was unconstitutional under the Equal Protection Clause.[60]

While the Court's decision rested on the Equal Protection Clause, Justice Douglas characterized the case as involving "a right which is basic to the perpetuation of a race — the right to have offspring."[61] Later, Justice Douglas claimed that marriage and procreation were among the "basic civil rights of man."[62] Although only dicta, Justice Douglas' words in *Skinner* supported the Court's later statements regarding the right to procreate.

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55. 316 U.S. 535 (1942).

56. *Id.* at 538. Under the Act, males were to be sterilized by a vasectomy and females by a salpingectomy. *Id.* at 537.

57. *Id.* at 536.

58. *Id.* at 537.

59. *Id.* at 541. The petitioner in this case was convicted once of stealing chickens and twice of armed robbery. *Id.* at 537. Following his second armed robbery conviction, the state sought to have him sterilized under the Act. *Id.* Justice Douglas illustrated the constitutional infirmity of the Act by noting that under the Oklahoma law:

> A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Hence no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. Thus the nature of the two crimes is intrinsically the same and they are punishable in the same manner.

Id. at 539 (citations omitted).

60. *Id.* at 541-42.

61. *Id.* at 536.

62. *Id.* at 541. Under international law, the right to procreate is considered a human right. *See* Universal Declaration of Human Rights, art. 16, § I, G.A. Res. 217 (III), U.N. Doc. A/811 (1948), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 21, 24 (I. Brownlie ed., 2d ed., 1981) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.").

In 1965, the Court decided the landmark case of *Griswold v. Connecticut*.[63] In *Griswold*, the Court struck down a Connecticut law prohibiting the use of contraceptives by married couples.[64] In doing so, the Court held the Constitution protected a right to privacy.[65] While *Griswold* does not specifically address the right to procreate, the issue in *Griswold* — whether a married couple has the freedom to use contraception — is related to such a right.[66] If the right to privacy protects a married couple's freedom to use contraception, then the same right to privacy protects a couple's decision not to use contraception and to conceive a child.[67] In this fashion, the *Griswold* Court

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63. 381 U.S. 479 (1965).

64. *Id.* at 485.

65. *Id.* at 484-85. Although Justice Douglas delivered the opinion of the Court, only three other Justices, Goldberg, Warren, and Brennan, joined in his opinion. *Id.* at 486. Justice Douglas argued that the rights listed in the Bill of Rights had "penumbras" which encompass a right to privacy. *Id.* at 484-86. Justice Goldberg wrote a concurring opinion in which he grounded the right to privacy in the Ninth Amendment. *Id.* at 490-91 (Goldberg, J., concurring). Justices Warren and Brennan joined Justice Goldberg's opinion. *Id.* at 486 (Goldberg, J. concurring). Justices Harlan and White filed separate concurring opinions. *Id.* at 499 (Harlan, J., concurring); *id.* at 502 (White, J., concurring). Justices Black and Stewart joined each other's dissenting opinions. *Id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

66. *See id.* at 496-97 (Goldberg, J., concurring). In his *Griswold* concurrence, Justice Goldberg addressed the issue which is the topic of this note. In answering the arguments of the *Griswold* dissenters, Justice Goldberg stated:

> The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

Id. (Goldberg, J., concurring).

67. *Id.*

linked the right to procreate to the broader constitutional right to privacy.[68]

In the 1972 case of *Eisenstadt v. Baird*,[69] the Court again confronted a state law restricting access to contraception.[70] The Massachusetts statute in *Eisenstadt* mandated that only married couples could obtain contraceptives for the sole purpose of preventing pregnancy.[71] Single persons could procure contraceptives, but only to protect against disease, not to prevent pregnancy.[72] To the Court, this disparate treatment of married and single persons appeared to violate the Equal Protection Clause and therefore the Court held that the statute was unconstitutional.[73]

Like *Skinner*, *Eisenstadt* was an equal protection case.[74] Justice Brennan's opinion for the Court, however, contained forceful dicta on the right to procreate.[75] While the *Griswold* decision framed the right to privacy in the context of a marital relationship,[76] in *Eisenstadt*, Justice Brennan argued that this was an individual right.[77] Marriage, according to Justice Brennan, was "an association of two individuals each with a separate intellectual and emotional makeup."[78] Accordingly, "[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."[79]

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68. James Bolner & Robert Jacobsen, *The Right to Procreate: The Dilemma of Overpopulation and the United States Judiciary*, 25 LOY. L. REV. 235, 250-51 (1979).

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

70. *Id.* at 440-42.

71. *Id.* at 441-42.

72. *Id.*

73. *Id.* at 454-55.

74. *Id.*; *see supra* note 60 and accompanying text.

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

76. *See supra* notes 63-68 and accompanying text.

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

78. *Id.*

79. *Id.* Justice Brennan cited three cases in support of this statement. *Id.* at 453-54. In addition to *Skinner*, Justice Brennan cited Stanley v. Georgia, 394 U.S. 557 (1969) and Jacobson v. Massachusetts, 197 U.S. 11 (1905). In *Stanley*, the Court struck down, as violative of the First Amendment, a Georgia law making it crime for an individual to possess obscene material in his own home. *Stanley*, 394 U.S. at 568; *see id.* at 558-59, n.1 (text of Georgia law). In *Eisenstadt*, Justice Brennan noted this language from *Stanley*:

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

In *Eisenstadt*, Justice Brennan refined the right to procreate in two respects. First, procreation means "to bear or beget a child."[80] Second, single persons as well as married couples enjoy this right.[81] Because of Justice Brennan's statement, *Eisenstadt* stands as the landmark case in defining the right to procreate.

Justice Brennan revisited his *Eisenstadt* statement in the 1977 case, *Carey v. Population Services International*.[82] In *Carey*, the Court reviewed a New York statute prohibiting the sale of contraceptives to minors under the age of sixteen and mandating that only licensed pharmacists could sell contraceptives.[83] The Court struck down these provisions because they unduly burdened the right to privacy.[84]

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized man."

Eisenstadt, 405 U.S. at 453 n.10 (first alteration in original) (quoting *Stanley*, 394 U.S. at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

In *Jacobson*, the Court upheld a Massachusetts law allowing municipalities to order the vaccination of inhabitants against diseases when deemed necessary to protect public health. *Jacobson*, 197 U.S. at 12, 39. In doing so, the Court noted that "[t]here is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." *Id.* at 29.

80. *See Eisenstadt*, 405 U.S. at 453.

81. *See id.*

82. 431 U.S. 678 (1977).

83. *Id.* at 681.

84. *Id.* at 691. Regarding the provision limiting distribution of contraceptives to licensed pharmacists, the Court argued this "clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so." *Id.* at 689. The Court concluded the state could not justify this invasion of a fundamental right. *See id.* at 691. In striking down the prohibition of the sale of contraceptives to minors, the Court was less united. Only Justices Stewart, Marshall, and Blackmun joined Justice Brennan's opinion on this point. *Id.* at 691 n.12. Justices Powell and Stevens concurred in part and concurred in the judgment of the Court. *Id.* at 703 (Powell, J., concurring); *id.* at 712 (Stevens, J., concurring). Justice White concurred in part and concurred in the result reached in regard to the prohibition on the sale of contraceptives to minors. *Id.* at 702 (White, J., concurring). Thus, while seven Justices voted to strike down the three provisions of the New York statute, there was no majority reasoning for invalidating the prohibition on the sale to minors.

A third provision in the statute prohibited advertising contraceptives. *Id.* at 681. The Court reasoned that although the advertisement and display of contraceptives was commercial speech, it was protected by the First Amendment. *See id.* at 700. Accordingly, this provision was also unconstitutional. *Id.*

In his opinion for the Court, Justice Brennan reasoned that "decisions whether to accomplish or to prevent conception are among the most private and sensitive."[85] Justice Brennan reiterated that *Eisenstadt* protected an individual's decision to bear or beget a child.[86] Justice Brennan concluded: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[87]

Thus, the right to procreate, which Justice Douglas first articulated in *Skinner*, finds its fullest expression in Justice Brennan's opinions in *Carey* and *Eisenstadt*. None of these cases, however, dealt directly with the right to conceive a child. As noted earlier, *Skinner* and *Eisenstadt* were equal protection cases.[88] *Griswold* and *Carey*, while addressing more directly the right to privacy, did so in the context of state restrictions on access to contraception.[89] While Justice Brennan's language in *Eisenstadt* and *Carey* seems plain enough, the limits on the right to procreate, particularly the right to conceive a child, are not well defined.

B. *Limits on the Right to Procreate*

Since the Court has only spelled out a right to procreate in dicta,[90] predicting how the Court would decide a case turning upon the right to conceive a child is a troublesome task.[91] Nonetheless, the Court's

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85. *Id.* at 685.

86. *Id.* at 687.

87. *Id.*

88. *See supra* notes 60, 74 and accompanying text.

89. *See supra* notes 64, 83 and accompanying text.

90. Gayle Binion, *Reproductive Freedom and the Constitution: The Limits of Choice*, 4 BERKELEY WOMEN'S L.J. 12, 24 (1988-89) (noting that the right to procreate is weakly grounded in constitutional dicta); Roberts, *supra* note 15, at 1466 n.231; John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 415 (1983) (arguing that "except for *Skinner v. Oklahoma*, which examines involuntary sterilization in an equal protection context, none of the Court's cases asserting a right to procreate directly address restrictions on reproduction or questions of genetic transfer and gestation"); *see* Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1883-84 (1971).

91. Some commentators contend that the current conservative majority on the Court is hostile to the right to privacy in the area of reproductive freedom. *See* Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom, in* WOMEN AND THE LAW 10E-1 (Carol H. Lefcourt ed., 1984). Professor Copelon goes so far as to state that "[i]t is highly unlikely that the Constitution will be a source of protection for reproductive and sexual rights for many years to come, unless the devastating impact of the Court's cutbacks on these rights . . . generates a sufficiently powerful movement to turn the Court around." *Id.* at 10E-31.

language in *Carey* and *Eisenstadt* is definitive enough to conclude that the Constitution protects a right to conceive a child.[92] In *Eisenstadt*, Justice Brennan stated the right to privacy protects an individual's decision to "bear or beget" a child.[93] As these terms are normally used, this includes the right to conceive a child.[94] Some commentators, however, believe this right may be circumscribed by two conditions: marriage and adulthood.

Several authors have argued the right to procreate is limited to the marital relationship.[95] Single persons, while enjoying the same rights as married couples to use contraceptives and obtain abortions, do not have a coextensive right to procreate.[96] This is because the

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92. *See Carey*, 431 U.S. at 678, 687; *Eisenstadt*, 405 U.S. at 453; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1339-40 (2d ed. 1988) (arguing that the Court's decisions in *Griswold* and *Skinner* stand for the rule that "whether one person's body shall be the source of another life must be left to that person and that person alone to decide") (footnote omitted); Robertson, *supra* note 90, at 416 (arguing that the right to procreate can be inferred from the Court's decisions in the contraceptive cases). *But see* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 530-31 (1983). Professor Hafen argues that the contraceptive cases — *Griswold*, *Eisenstadt*, and *Carey* — cannot be stretched to find a broad "right of procreative autonomy." *Id.* at 531. The only laws addressed in these cases were laws restricting a person's right to prevent conception, and nothing more. *Id.* Professor Hafen notes that while *Skinner* addressed a person's "ability to cause conception," it did so in the context of permanent sterilization. *Id.* Thus, the Court's decision merely "preserved *Skinner*'s reproductive capacity" without articulating a more general right to procreate. *See id.*

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

94. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1966). As defined by Webster's, "bear" means "to give birth to," *id.* at 191, and "beget" means "to procreate as the father," *id.* at 198.

95. Hafen, *supra* note 92, at 537; Robertson, *supra* note 90, at 417-18; *see* J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 579 (1977).

96. *See* Robertson, *supra* note 90, at 417. Professor Robertson contends that one can derive a right to procreate for married couples, but not single persons, from cases recognizing a right not to conceive or bear children and from cases finding a right to rear children. *Id.* According to Robertson:

> The distinctions between avoiding procreation and procreating . . . serve no purpose when applied to married persons . . . because those activities fall within the scope of the familial autonomy traditionally extended to married couples. The distinctions are more tenable when they are applied to . . . single persons, because the legal protection of decisions to conceive and bear a child has traditionally been confined to marriage. Although denying unmarried persons the freedom to avoid procreation by denying them contraceptives and abortions may be wrong because that would impose physical burdens on them, forbidding them to procreate outside of marriage would not impose such burdens.

Id. at 417-18.

Court has protected the right to procreate — to conceive and raise a child — as part of an over-arching right to privacy grounded in the familial relationship.[97] Because single persons "do not live in recognized intimate relationships,"[98] they do not have a right to procreate.[99]

This argument, however, ignores Justice Brennan's clear statement in *Eisenstadt*.[100] According to Justice Brennan, the right to privacy includes "the right of the *individual*, married or single" to decide whether to "bear or beget a child."[101] Moreover, the Court has recognized that the same privacy right protects a single person's decision to have an abortion or use contraception.[102] Consequently, the Court would likely hold that a single person has the same right to conceive a child as a married couple does.[103]

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97. *Id.* at 418; *see* Griswold v. Connecticut, 381 U.S. 479, 486, 491 (1965) (Goldberg, J., concurring).

98. Hafen, *supra* note 92, at 537.

99. *Id.* Professor Hafen argues that "[i]t is one thing to protect permanent procreative capacity as *Skinner* does. But it is quite another to speak of 'procreation choices' for unmarried persons and promiscuous teenagers." *Id.*

100. *See Eisenstadt*, 405 U.S. at 453.

101. *Id.* (citations omitted).

102. *See id.*; Roe v. Wade, 410 U.S. 113, 153 (1973).

103. Even Professor Robertson admits that he could make a "strong argument" for extending the right to procreate to single persons as well. Robertson, *supra* note 90, at 418. Professor Tribe comments that "[o]ne cannot avoid the conclusion that the stereotypical 'family unit' that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality." TRIBE, *supra* note 92, at 1416-17.

It should be noted, however, that the right to procreate outside of marriage may be legally foreclosed, in most circumstances, by state laws which prohibit fornication and adultery. *See, e.g.*, ALA. CODE § 13A-13-2 (1975) (adultery); GA. CODE ANN. §§ 16-6-18, -19 (Michie 1982 & Supp. I 1991) (fornication and adultery); ILL. ANN. STAT. ch. 38, paras. 11-7, -8 (Smith-Hurd 1991) (adultery and fornication); MASS. GEN. LAWS ANN. ch. 272, §§ 14, 18 (West 1991) (adultery and fornication); N.D. CENT. CODE § 12.1-20-08 (Michie 1987 & Supp. 1991) (fornication). The constitutionality of these statutes appears secure. John A. Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333, 340 (1982). In his dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), Justice Harlan wrote, "I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry." *Poe*, 367 U.S. at 552 (Harlan, J., dissenting). In his *Griswold* concurrence (joined by Justices Warren and Brennan), Justice Goldberg remarked that the constitutionality of Connecticut's statutes forbidding fornication and adultery was "beyond doubt." Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring); *see also* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia statute which criminalized sodomy even when practiced by consenting adults).

As one commentator has noted, however, these statutes are honored more in the breach than in the observance. *See* Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 253, 254 (1978).

Adolescents, however, may not enjoy the same right to procreate as adults.[104] In *Carey*, the Court confronted, and ultimately struck down, New York's prohibition[105] on the sale of contraceptives to minors.[106] Yet *Carey* did not produce an exact standard for evaluating state restrictions on a minor's right to privacy and procreation. Justice Brennan, joined by three other Justices, argued that a state may burden a minor's right to privacy if there is a "significant state interest . . . that is not present in the case of an adult."[107] In most cases, the Court requires that a statute restricting a person's constitutional rights be narrowly drafted to serve a compelling state interest.[108] Compared to the traditional "compelling interest" standard, Justice Brennan's "significant interest" standard is an easier requirement for the state to meet.[109]

Although Justice Powell concurred in the *Carey* judgment, he criticized Justice Brennan's ambiguous "significant interest" standard.[110] Arguing that states have "broad latitude to legislate with respect to adolescents,"[111] Justice Powell concluded that a state only has to show that a restriction on a minor's right to privacy was rationally related to a valid state interest.[112] While the resulting standard is

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104. *See* Hafen, *supra* note 92, at 537; Robertson, *supra* note 103, at 340.

105. See *Carey*, 431 U.S. at 681 n.1, for the exact wording of the New York statute. This statute included an apparent exception for distribution of contraceptives by physicians in the course of their practice. *See id.* at 691-99.

106. *Id.* at 681-82. Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun, found this provision unconstitutional. *See id.* at 691-99. Justices White, Powell, and Stevens joined in this result, but filed separate opinions containing different rationale. *See id.* at 702-17 (White, Powell, Stevens, JJ., concurring). Thus, seven of the nine Justices voted to strike down the provision prohibiting sales of contraceptives to minors.

107. *Id.* at 693 (alteration in original) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976)).

108. *Id.* at 686.

109. *Id.* at 693 n.15. In this footnote, Justice Brennan provided two rationales for this less demanding standard. *See id.* First, states have greater latitude in regulating the conduct of children. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944), and Ginsberg v. New York, 390 U.S. 629 (1968)). Second, the right of privacy implicated here involves the interest in making "certain kinds of important decisions," and the law has generally regarded minors as less capable than adults in making such decisions. *Id.* (citing *Danforth*, 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part)).

110. *Carey*, 431 U.S. at 703 (Powell, J., concurring).

111. *Id.* at 705 (Powell, J., concurring).

112. *Id.* at 707 (Powell, J., concurring). Under the rational relation standard, a state must only prove that its action is rationally related to a valid state interest. *Id.* (Powell, J., concurring).

unclear, five Justices in *Carey* agreed that a state does not have to meet the rigorous "compelling interest" standard to restrict a minor's right to privacy. Therefore, the Court would probably allow greater restriction on a minor's right to conceive a child than it would on an adult's right.[113]

Thus, while the Court has recognized a right to conceive a child, it is not a well-defined right. The right exists for both single and married persons.[114] Minors, however, may not have as much freedom to conceive a child as do adults.[115] Moreover, no right is absolute.[116] A state may restrict a fundamental right if the state has a "compelling interest" and the restriction is narrowly-tailored to serve that interest.[117]

In Darlene Johnson's case, having Norplant implanted for three years would preclude any decision by her to conceive a child during that period.[118] This significantly burdens her right to procreate.[119] If Johnson were a minor, then under *Carey*, Judge Broadman would have an easier time justifying this condition.[120] Johnson, however, is an adult and therefore should be afforded the protection of the "compelling interest" standard.[121] In practice, the test which courts have fashioned for evaluating probation conditions impinging upon constitutional rights parallels the "compelling interest" standard.[122] Moreover, any probation condition, whether or not it burdens a constitutional right, must be reasonably related to the goals of probation.[123]

III. PROBATION CONDITIONS

Though probation can take many forms, it has "three characteristic elements: (1) release of the offender into the community (2) with certain

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113. *See supra* notes 107, 112 and accompanying text.

114. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

115. *See supra* notes 104-13 and accompanying text.

116. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

117. *Carey*, 431 U.S. at 686.

118. *See supra* notes 31-33 and accompanying text.

119. *See Eisenstadt*, 405 U.S. at 453.

120. *See supra* notes 104-13 and accompanying text. In a 1969 article in the American Bar Association Journal, three authors suggested that courts had sufficient authority to order promiscuous teenagers to use contraception in order to prevent future pregnancies. *See* Don J. Young et al., *Court-Ordered Contraception*, 55 A.B.A. J. 223, 223-26 (1969). The article drew critical fire from other commentators. *See* Note, *Court-Ordered Contraception — A Reasonable Alternative to Institutionalization for Juvenile Unwed Mothers*, 1970 WIS. L. REV. 899.

121. *See supra* note 108 and accompanying text

122. *See infra* notes 155-62 and accompanying text.

123. *See infra* note 140 and accompanying text.

conditions imposed upon him (3) under the supervision of the probation department."[124] Judges generally impose probation in lieu of jail time.[125] In this sense, it is seen as a more lenient sentence.[126] Because probation is a statutory construct, judges in all fifty states and the federal system rely upon probation statutes to guide their sentencing.[127] Both statutes and case law identify two goals[128] of probation: rehabilitation of the offender[129] and protection of society against future harm.[130] To accomplish these goals, judges normally have broad authority under the statutes to fashion conditions to fit the needs of specific cases.[131]

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124. Richard Gray, *Probation: An Exploration in Meaning*, FED. PROBATION, Dec. 1986, at 26, 27.

125. NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE 4 (1983). A short jail term may also be included as a condition of an offender's probation. *Id.*

126. *See id.* at 23.

127. *See id.* at 6-8, 32-33.

128. Some commentators argue a third goal — punishment — is implicit in certain probationary conditions. *See* Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1359-68 (arguing that certain "scarlet letter" conditions cross the line from rehabilitation to punishment); Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 632-33 (1988) (noting that some courts have considered whether conditions of probation may constitute cruel and unusual punishment).

Courts are divided on the issue. *Compare* Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945) (stating that "[c]onditions of probation are not punitive in character") *with* Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937) (stating that probation is a mild form of punishment) *and* Scheidt v. Meredith, 307 F. Supp. 63, 66 (D. Colo. 1970) (noting that probation contains punitive elements). *See also In re* Buehrer, 236 A.2d 592, 596 (N.J. 1967) (stating that "[p]robation has an inherent sting, and restrictions upon the freedom of the probationer are realistically punitive in quality").

129. *See, e.g.*, IOWA CODE ANN. § 907.6 (West 1991 & Supp. 1992); LA. CODE CRIM. PROC. ANN. art. 895 (West 1991 & Supp. 1992); OHIO REV. CODE ANN. § 2951.02(c) (Anderson 1991); Burns v. United States, 287 U.S. 216 (1932); Higdon v. United States, 627 F.2d 893 (9th Cir. 1980); United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); People v. Keller, 143 Cal. Rptr. 184 (Ct. App. 1978); Hines v. State, 358 So. 2d 183 (Fla. 1978).

130. *See, e.g.*, IOWA CODE ANN. § 907.6 (West 1991 & Supp. 1992); OHIO REV. CODE ANN. § 2951.02(a) (Anderson 1991); *Higdon*, 627 F.2d 893; United States v. Graham, 575 F.2d 739 (9th Cir.), *cert. denied*, 439 U.S. 853 (1978); Malone v. United States, 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975); Grubbs v. State, 373 So. 2d 905 (Fla. 1979); State v. Davis, 375 So. 2d 69 (La. 1979).

131. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-901 (1991) (stating that courts may impose such terms and conditions "as the law requires and the court deems appropriate"); MO. ANN. STAT. § 559.021 (Vernon 1979 & Supp. 1992) ("The conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will not again violate the law."); NEV. REV. STAT. ANN. § 176.1853(1) (Michie 1986 & Supp. 1991) ("In issuing an order granting probation, the court may fix the terms and conditions thereof. . . ."). *See also Burns*, 287 U.S. at 220 (finding that courts have broad authority to impose conditions);

Historically, probationers rarely challenged the conditions of their release.[132] In part, offenders were so pleased to avoid jail, they did not think to question their probation conditions.[133] More importantly, three judicial theories protected trial judges and prosecutors from appellate challenges to probation conditions. Under the "act of grace" theory, probation was viewed as a privilege which the state could withhold from the offender.[134] Thus, the state could attach whatever conditions it desired to the offender's release.[135] Under the "contract/waiver" theory, probationers could not challenge conditions to which they had "voluntarily" agreed when accepting probation in lieu of jail.[136] Finally, under the "constructive custody" theory, probationers enjoyed no more liberty than they would have enjoyed had they been incarcerated.[137] However, courts and commentators have thoroughly

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United States v. Chapel, 428 F.2d 472, 474 (9th Cir. 1970) (noting that judges have flexibility in imposing probationary terms); Louis K. Polonsky, Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 467 (explaining that trial judges traditionally have been allowed "broad discretion" in imposing probationary conditions).

132. *See* COHEN & GOBERT, *supra* note 125, at 207-08.

133. *See id.*

134. The origins of this theory lie in the Supreme Court's case of Escoe v. Zerbst, 295 U.S. 490 (1935). In *Escoe*, the Court stated that "[p]robation . . . comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." *Id.* at 492-93. The broader rationale behind this doctrine is that anyone who seeks benefits bestowed by the government must submit to any terms the government deems desirable. Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 190 (1967). The assumption is that the government's right to withhold the benefit entirely necessarily encompasses the power to grant the benefit conditionally. *Id.* Accordingly, the citizens' inability to force the government to give them the benefit unconditionally likewise precludes the right to challenge the conditions on which the benefit is offered. *Id.*

135. *See supra* note 134 and accompanying text.

136. *See, e.g.*, Lee v. Superior Court, 201 P.2d 882 (Cal. Dist. Ct. App. 1949); State v. Smith, 62 S.E.2d 495 (N.C. 1950). This theory views probation as a contractual relationship between the court and the offender. Note, *supra* note 134, at 191. The court agrees to release the offender, and the offender agrees in return to submit to the court's conditions. *Id.* Thus, by agreeing to the conditions, the offender has waived any right to later challenge them in court. *Id.*

137. For cases describing this theory in the context of parolees, see, e.g., Rose v. Haskins, 388 F.2d 91, 95 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); People v. Hernandez, 40 Cal. Rptr. 100, 101 (Cal. Dist. Ct. App. 1964), *cert. denied*, 381 U.S. 953 (1965); and People v. Denne, 297 P.2d 451, 456 (Cal. Dist. Ct. App. 1956). Under this approach, the court could impose conditions which dramatically restricted the probationer's liberties. Because the Court could have sentenced the probationer to prison, it necessarily has the power to restrict the probationer's liberties up to a point similar to the restrictions found in the prison environment.

discredited these three theories.[138] Today, two factors limit the discretion trial judges have in fashioning probation terms: the "reasonableness" requirement and the Constitution.

A. *Reasonableness*

As noted above, the goals of probation are to rehabilitate the offender and to protect society against future harm.[139] As a general rule, probationary conditions must be reasonably related to these goals.[140] The source of the reasonableness requirement varies among jurisdictions. Several state statutes expressly require probation conditions to be reasonably related to the goals of probation.[141] In other jurisdictions, courts have read this requirement into the statutes.[142]

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138. The "act of grace" theory was finally rejected by the Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973). Both courts and commentators argue the Supreme Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972), implicitly rejected the "contract" theory as well. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.15 (9th Cir. 1975); Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness Is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 59 (1981); *see The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 96 n.7 (1972). The primary fallacy of the "contract" theory was the inequality of bargaining power between the court and the convicted. Note, *supra* note 134, at 192. A probationer, faced with a jail term, could hardly be said to have voluntarily assented to the conditions of his release. *Id.* In these circumstances, the probationer's waiver of his right to challenge his conditions is coerced, not voluntary. *Id. But see* Michael H. Shapiro, *Forced Contraception Raises Difficult Issues*, L.A. DAILY J., Feb. 19, 1991, at 7. Professor Shapiro, in commenting on the Darlene Johnson case, counters:

> Just because a decision is difficult doesn't mean that any given choice is "involuntary," coerced, or the product of undue influence. Where the difficult choice arises out of constraints fairly imposed, . . . a flat refusal to honor such choices leaves the decision makers — here, everyone at risk for incarceration — subject to state fiat, with no choices at all except in minor matters.

Id.

The "constructive custody" theory, like the "contract" and "act of grace" theories, has been dismissed by courts and commentators. *Consuelo-Gonzalez*, 521 F.2d at 265 n.15; *see* Comment, *Fourth Amendment Rights of Probationers and Parolees*, 7 WM. MITCHELL L. REV. 535, 544-46 (1981).

139. *See supra* notes 128-30 and accompanying text.

140. *See* COHEN & GOBERT, *supra* note 125, at 209.

141. *See, e.g.*, ARK. CODE ANN. § 5-4-303(a) (Michie 1987 & Supp. 1991); HAW. REV. STAT. § 706-624(2) (1988 & Supp. I 1991).

142. *See, e.g.*, Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971); Watson v. State, 301 A.2d 26, 31 (Md. Ct. Spec. App. 1973); Louk v. Haynes, 223 S.E.2d 780 (W. Va. 1976). Several commentators claim the reasonableness requirement also is supported by the "unconstitutional conditions" doctrine. *See* James C. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. ON PRISON L. 367, 371-73 (1982); Comment, *supra* note 138, at

The Supreme Court has never defined a test for reasonableness in probation conditions. Courts[143] and commentators,[144] however, have frequently cited the California case of *People v. Dominguez*[145] for the standard to judge reasonableness. In *Dominguez*, the court reasoned:

> A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid.[146]

If a condition fails all three prongs of this test, then it is unreasonable and therefore invalid.[147] But if a condition meets just one prong of the *Dominguez* test, then it is reasonable and valid.[148] In addition, courts also will find a probation condition unreasonable if it would be impossible or extremely difficult for a probationer to comply with it.[149] In one example, a court found that a condition which required the probationer, a hard-core alcoholic, to refrain from drinking, was unreasonable.[150]

543-44; Note, *supra* note 134, at 190-91. Under this approach, probation is considered a privilege as under the "act of grace" theory. Weissman, *supra*, at 371. While the government has no duty to grant such privileges, once it does so, constitutional protections attach. Comment, *supra* note 138, at 543. As Justice Brennan wrote in Speiser v. Randall, 357 U.S. 513 (1958), "conditions imposed upon the granting of privileges or gratuities must be 'reasonable.'" *Speiser*, 357 U.S. at 518. Thus, even if probation must be considered a privilege granted by the court, "this does not give courts the power to arbitrarily condition the grant upon a waiver of constitutional rights which is not reasonably related to the purposes of probation." Note, *supra* note 134, at 191.

143. *See, e.g.*, Rodriguez v. State, 378 So. 2d 7 (Fla. 2d DCA 1979); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

144. *See, e.g.*, COHEN & GOBERT, *supra* note 125, at 209; Tavill, *supra* note 128, at 622-23.

145. 64 Cal. Rptr. 290 (Dist. Ct. App. 1967).

146. *Id.* at 293 (construing then CAL. PENAL CODE § 1203.1 which required that all conditions of probation be "reasonable"). Interestingly, *Dominguez* involved a probationary condition similar to the one at issue in Darlene Johnson's case. *See id.* at 292. In *Dominguez*, the court reviewed a condition which forbade the female probationer from having a child outside of marriage. *Id.* The probationer was convicted of robbery. *Id.* The court, applying its new test, found the condition unreasonable. *Id.* at 293. The probationer's future pregnancy was unrelated to the crime of robbery and any future criminality. *Id.* Moreover, having a child outside of marriage was not in itself a crime. *Id.*

147. *See id.* at 293.

148. *See id.*

149. COHEN & GOBERT, *supra* note 125, at 209-10.

150. Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965).

B. *Constitutional Limits*

To be valid, any probation condition must be reasonable.[151] But when a condition burdens a constitutional right, courts go beyond the reasonableness test in order to protect the rights of probationers.[152] The status of probationers makes them susceptible to restrictions on their liberty from which other persons are free.[153] However, probationers are not devoid of constitutional rights.[154]

When confronted by a condition burdening a constitutional right, courts will require the condition to be narrowly drawn to further the legitimate goals of probation.[155] This test parallels the "compelling interest" standard the Supreme Court requires for statutes burdening constitutional rights.[156] Generally, courts will balance the right at issue against the purpose the probation condition is to serve.[157] As part of this inquiry, several courts have asked, either explicitly or implicitly, whether there exists an alternative condition less restrictive of the probationer's constitutional rights.[158] If such an alternative exists, then it should be employed.[159] As the Ninth Circuit Court of Appeals stated in *United States v. Consuelo-Gonzalez*[160]:

> Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety.

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151. *See supra* note 140 and accompanying text.

152. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 264-65 (9th Cir. 1975).

153. *Id.* at 265; COHEN & GOBERT, *supra* note 125, at 213; *see* People v. Keller, 143 Cal. Rptr. 184, 191 (Ct. App. 1978).

154. *Consuelo-Gonzalez*, 521 F.2d at 264-65.

155. People v. Mason, 488 P.2d 630, 635 (Cal. 1971), *cert. denied*, 405 U.S. 1016 (1972); COHEN & GOBERT, *supra* note 125, at 213.

156. *Compare Mason*, 488 P.2d at 635 *with* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

157. COHEN & GOBERT, *supra* note 125, at 213; Polonsky, *supra* note 131, at 480; Weissman, *supra* note 142, at 373.

158. For cases explicitly citing this requirement, see People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984), and People v. Arvanites, 95 Cal. Rptr. 493, 500 (Ct. App. 1971). *See also* Higdon v. United States, 627 F.2d 893, 898 (9th Cir. 1980) ("If the impact of the conditions is needlessly harsh, the conditions are impermissible."). For cases where this question is implicit in the court's argument, see Rodriguez v. State, 378 So. 2d 7, 10 (Fla. 2d DCA 1979); State v. Mosberg, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

159. *See supra* note 158.

160. 521 F.2d 259 (9th Cir. 1975).

> But this is not to say that there is any presumption, however weak, that such limitations are impermissible. Rather, it is necessary to recognize that when fundamental rights are curbed it must be done sensitively and with a keen appreciation that the infringement must serve the broad purposes of [probation].[161]

Thus, courts may, and have, successfully imposed conditions which impinge upon the constitutional rights of probationers.[162]

IV. CASES PROHIBITING CONCEPTION OR PREGNANCY AS A CONDITION OF PROBATION

Although Judge Broadman is the first judge to specifically order the use of Norplant, Darlene Johnson's case is not unique. In the past, courts have tried to impose similar probation conditions on women convicted of child abuse.[163] In form, these conditions prohibited the offenders from conceiving a child during the probationary period.[164] The courts, however, did not specify the use of a particular contraceptive.[165] Three state appellate cases assessing the validity of this type of condition illustrate the legal infirmities of a Norplant probation condition.[166] In each of these cases, an appellate court struck down a

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161. *Id.* at 265 (footnote omitted).

162. Courts have upheld numerous conditions impinging upon rights enumerated in the Bill of Rights. For example, several courts have affirmed conditions restricting First Amendment speech and association rights. *See, e.g.*, United States v. Albanese, 554 F.2d 543 (2d Cir. 1977) (upholding a condition requiring a probationer to associate only with law-abiding persons); Malone v. United States, 502 F.2d 554 (9th Cir. 1974) (upholding a condition prohibiting probationer from participating in American Irish Republican movement), *cert. denied*, 419 U.S. 1124 (1975); Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970) (issuing a permanent injunction restricting public speech); *In re* Mannino, 92 Cal. Rptr. 880 (Ct. App. 1971) (upholding a condition prohibiting active participation in a demonstration). Probation conditions impinging upon the Fourth Amendment's prohibition of unreasonable searches and seizures has also generated much litigation. For commentary on this issue, see Sunny A.M. Kushy, Note, *The Right of [All] the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449 (1988); Comment, *supra* note 138.

163. *See infra* notes 172, 190, 213 and accompanying text.

164. *See infra* notes 172, 190, 213 and accompanying text.

165. *See infra* notes 172, 190, 213 and accompanying text.

166. *See infra* notes 168-225 and accompanying text. Other cases involving no-conception or no-pregnancy conditions include State v. Forster, No. CR-87-10445 (Ariz. Super. Ct., Maricopa County, Sept. 2, 1988) (ordering probationer to use birth control for the rest of her life); Burchell v. State, 419 So. 2d 358 (Fla. 1st DCA 1982) (invalidating a condition which prohibited a male probationer from fathering a child); Howland v. State, 420 So. 2d 918 (Fla. 1st DCA 1982)

condition prohibiting conception or pregnancy as being either unreasonable or unduly burdensome on the probationer's constitutional rights.[167]

A. Rodriguez v. State

In 1979, a Florida appellate court reviewed a probation condition which prohibited the probationer from becoming pregnant for ten years. In *Rodriguez v. State*,[168] the defendant, Kathy Rodriguez, pleaded nolo contendre to a charge of aggravated child abuse.[169] Rodriguez had hit her nine year-old child in the face and shoved the child against an automobile.[170] At the time, Rodriguez was experiencing psychological and alcohol-induced problems.[171] After her plea, the trial court sentenced her to ten years of probation — under the conditions that she not have custody of any children, marry without the court's consent, or become pregnant.[172] Rodriguez challenged the marriage and pregnancy conditions as violating her constitutional rights.[173]

The appellate court in *Rodriguez* ultimately struck down the marriage and pregnancy conditions.[174] The court began by noting, however, that the constitutional rights of probationers may be limited in order to further rehabilitation.[175] Therefore, the court had "no constitutional difficulty with the conditions imposed," so long as they were "otherwise valid conditions of probation."[176] Yet, after applying the *Dominguez* test,[177] the court concluded that the conditions were not reasonable.[178]

(invalidating a condition which prohibited male probationer from fathering a child); State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986) (striking down a condition forbidding female probationer from giving birth to children out of wedlock); and State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (invalidating a condition which prohibited female probationer from having a child during five year probationary period). The *Forster* case is commented upon in Lipton & Campbell, *supra* note 22.

167. *See infra* notes 181, 209, 222 and accompanying text.
168. 378 So. 2d 7 (Fla. 2d DCA 1979).
169. *Id.* at 8.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 10.
175. *Id.* at 9.
176. *Id.*
177. *See* text accompanying *supra* note 146.
178. *Rodriguez*, 378 So. 2d at 9-10.

Marriage and pregnancy were unrelated to the crime of child abuse and were not in themselves criminal acts.[179] Although the conditions could relate to future criminality, they were unnecessary because the probationer could not have custody of any children.[180] Hence, the *Rodriguez* court found the marriage and no-pregnancy conditions unreasonable and therefore invalid.[181]

B. People v. Pointer

Like the *Rodriguez* court, a California appellate court in the 1984 case of *People v. Pointer*[182] reviewed a probation condition prohibiting a woman from conceiving a child.[183] In *Pointer*, the defendant, Ruby Pointer, was convicted of child endangerment.[184] Pointer strictly adhered to a rigorous macrobiotic diet.[185] She imposed this diet on her two sons — ages two and four at the time of the trial — over the objections of their father and several doctors.[186] As a result of this diet, the children became critically malnourished.[187] Her older son was seriously underdeveloped and the diet reduced her two-year old to an emaciated, semicomatose state which left him with permanent neurological damage.[188] Upon her conviction, the trial court sentenced her to five years on probation.[189] As a condition of probation, the court

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179. *Id.* at 10.

180. *Id.* Although the court earlier dismissed constitutional limitations on the no-conception condition, this argument parallels the constitutional test courts apply to probation conditions. *See supra* note 161 and accompanying text. The *Rodriguez* court implied that the condition preventing conception was invalid because a less restrictive alternative — removing any child from Rodriguez's custody after birth — was available. *See Rodriguez*, 378 So. 2d at 10. The requirement that no "less restrictive alternative" exist is a constitutional limitation on probation conditions affecting constitutional rights. *See supra* note 161 and accompanying text.

181. *Rodriguez*, 378 So. 2d at 10.

182. 199 Cal. Rptr. 357 (Ct. App. 1984).

183. *Id.* at 359.

184. *Id.*

185. *Id.* A macrobiotic diet consists almost entirely of grains, beans, and vegetables. *Id.* at 359 n.2. Such a diet de-emphasizes milk products in all forms, and excludes fish, meat, poultry, and eggs. *Id.*

186. *Id.* at 359.

187. *Id.* at 359-60.

188. *Id.* at 360.

189. *Id.* Pointer also was prohibited from having custody of any children without court approval during the probationary period. *Id.*

prohibited her from conceiving a child during the probation period.[190] Pointer challenged this condition as an unconstitutional restriction of her right to procreate.[191]

The appellate court in *Pointer* evaluated the condition in light of the reasonableness test and the constitutional right to procreate. The court concluded the condition was reasonable.[192] Citing the *Dominguez* test, the *Pointer* court held that Pointer's future pregnancy was related to future criminality.[193] Should she become pregnant, Pointer's devotion to a macrobiotic diet could harm a fetus in utero.[194] Consequently, the no-conception condition was related to future criminality and thus satisfied *Dominguez*'s third prong.[195] Finding this condition reasonable, the court next considered the condition's impact on Pointer's right to procreate.[196]

Citing *Griswold*[197] and *Roe v. Wade*,[198] the court concluded that the condition prohibiting conception burdened the exercise of "a fundamental right to privacy."[199] The court, relying on *Consuelo-Gonzalez*,[200] subjected the probation condition to special scrutiny.[201] The test the court applied questioned whether the condition was narrowly-drawn so that there were no alternatives less restrictive of the constitutional right.[202] The court reasoned that the no-conception condition was not rehabilitative, but instead was intended to protect against future criminality.[203] The court struck down the condition because a less restrictive

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190. *Id.*
191. *Id.*
192. *Id.* at 364.
193. *Id.*
194. *Id.* In this manner, the court distinguished the instant case from *Rodriguez* and State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976), another case involving a no-conception condition. *Pointer*, 199 Cal. Rptr. at 364. In the court's analysis, these cases relied considerably upon the fact that the abuse could be prevented entirely by removing any children from the custody of the defendant. *Id.* Given Pointer's strict adherence to a macrobiotic diet, however, action after birth would not prevent in utero harm to the child caused by Pointer's diet. *See id.*
195. *Pointer*, 199 Cal. Rptr. at 364.
196. *Id.*
197. Griswold v. Connecticut, 381 U.S. 479 (1965).
198. 410 U.S. 113 (1973).
199. *Pointer*, 199 Cal. Rptr. at 364-65 (citations omitted).
200. *See supra* note 161 and accompanying text.
201. *Pointer*, 199 Cal. Rptr. at 365.
202. *Id.*
203. *Id.*

alternative could achieve this goal.[204] According to the court, the state could monitor Pointer's health during probation.[205] If she became pregnant, the state could require her to undergo intensive prenatal and neonatal care.[206] After birth, the state could remove the child from Pointer's custody if necessary to protect the child.[207] Because this alternative respected Pointer's right to procreate, the no-conception condition unnecessarily burdened Pointer's constitutional right.[208] As a result, the court held that the no-conception condition was invalid.[209]

C. State v. Mosberg

In 1989, a Kansas court reached a similar conclusion in *State v. Mosberg*.[210] In *Mosberg*, Diana Mosberg pleaded no contest to a charge of child endangerment.[211] Mosberg had given birth to a baby girl and two hours later abandoned the baby in a stranger's truck.[212] The trial court placed Mosberg on two years probation — with one of the conditions being that she not become pregnant during the probation period.[213] On appeal, Mosberg challenged the constitutionality of this no-pregnancy condition.[214]

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204. *Id.* at 366. The court also noted two other problems created by the no-conception condition. *Id.* at 362, 366. First, it would be difficult to monitor and supervise Pointer's use of contraception. *Id.* at 362. Second, such a condition might force Pointer to have an abortion to cover up a pregnancy. *Id.* at 366. Indeed, the trial judge warned: "If she violates probation in this case, I would be sending her to prison; I can assure you of that. I expect her to live up to every single, solitary term and condition of probation." *Id.* (quoting the trial judge, Christopher C. Cottle). The appellate court reasoned that such a "stern admonition" made it clear to Pointer that if she did become pregnant, the only way to avoid jail would be to get an abortion. *Id.* Such a condition would be "coercive of abortion" and therefore "improper." *Id.* The appellate court further reasoned: "Less restrictive conditions aimed at protecting the child in utero and after birth would not so clearly induce resistance to the disclosure of pregnancy. To this extent, less restrictive alternative conditions would be easier to monitor and enforce . . . ." *Id.*

205. *Id.* at 365. The court brushed aside the state's argument that the local children's protective services agency did not have the resources to provide for such intensive monitoring *Id.*

206. *Id.*

207. *Id.*

208. *See id.* at 366.

209. *Id.*

210. 768 P.2d 313 (Kan. Ct. App. 1989).

211. *Id.* at 313.

212. *Id.* at 313-14.

213. *Id.* at 314.

214. *Id.*

The appellate court in *Mosberg* noted that while trial courts have broad powers in fashioning probation conditions, there were limits on conditions which burdened constitutional rights.[215] The court quoted extensively from *Carey* to establish Mosberg's right to procreate.[216] Relying on the reasoning of *Pointer* and *Rodriguez*, the *Mosberg* court concluded that the no-pregnancy condition "unduly intrudes on Mosberg's right to privacy."[217] The court further concluded that there would be "significant enforcement problems" with the no-pregnancy condition.[218] The state, according to the court, "should not have the power to penalize Mosberg if she uses contraceptives which for some reason fail to prevent pregnancy."[219] Moreover, should Mosberg become pregnant, the probation condition would force her to choose between concealing her pregnancy, abortion, or incarceration.[220] For the court, such a choice was unacceptable.[221] Accordingly, the court struck down the probation condition prohibiting pregnancy.[222]

Although neither *Rodriguez*, *Pointer*, nor *Mosberg* involved Norplant, the conditions at issue in those cases are in form the same as the Norplant condition in the *Johnson* case.[223] Using Norplant for three years would prevent Johnson from conceiving a child and becoming pregnant for the entire three year period.[224] This was Judge Broadman's intent when he imposed the sentence.[225] Therefore, the decisions in *Rodriguez*, *Pointer*, and *Mosberg* suggest that Judge Broadman's Norplant condition is, like the no-conception/no-pregnancy conditions, invalid.

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215. *Id.*
216. *Id.*
217. *Id.* at 315.
218. *Id.*
219. *Id.*
220. *Id.* Here, the *Mosberg* court echoed a concern voiced earlier by the court in *Pointer*. *See supra* note 204.
221. *Mosberg*, 768 P.2d at 315.
222. *Id.*
223. *Compare Mosberg*, 768 P.2d at 314 (no-pregnancy condition) *and Pointer*, 199 Cal. Rptr. at 359 (no-conception condition) *and Rodriguez*, 378 So. 2d at 8 (no-pregnancy condition) *with supra* notes 30-33 and accompanying text (summarizing how Norplant prevents pregnancy).
224. *See supra* notes 30-33 and accompanying text.
225. *See* Lev, *supra* note 6, at A17.

V. REASONABLENESS AND CONSTITUTIONALITY OF THE NORPLANT CONDITION

A. *Reasonableness*

Assessing the reasonableness of a Norplant condition depends upon the particular facts of a case.[226] In a typical child abuse case like Darlene Johnson's, where the abuse occurs after birth, a Norplant condition does not pass the *Dominguez* test. Yet in cases where the mother abuses drugs while pregnant, a Norplant condition may be reasonable. Even in drug abuse cases, however, a Norplant condition may be unreasonable if the woman cannot use the device for health reasons.

In typical child-abuse cases (where the abuse occurs post-birth), a Norplant condition fails all three prongs of the *Dominguez* test.[227] According to *Rodriguez*, a condition prohibiting pregnancy is not related to the crime of child abuse.[228] Like Darlene Johnson, the defendants in *Rodriguez*, *Mosberg*, and *Pointer* were convicted for abusive acts occurring after conception and pregnancy.[229] A Norplant condition, however, focuses on preventing conception and pregnancy.[230] Johnson was not convicted for conceiving and bearing a child but, instead, for beating her children after they were born.[231] Thus, a Norplant condition is not related to the crime. Moreover, the Norplant condition does not prevent conduct which is itself criminal. Conceiving a child and being pregnant are not crimes in our society.[232] Therefore, in a typical child-abuse case, a Norplant condition fails the first two prongs of the *Dominguez* test.

At first glance, a Norplant condition appears to satisfy *Dominguez*'s third prong: a probation condition which is related to future criminality.[233] If child abusers cannot conceive a child, then it is less likely

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226. *See* People v. Dominguez, 64 Cal. Rptr. 290, 293 (Ct. App. 1967).

227. *See id.* at 293.

228. *Rodriguez*, 378 So. 2d at 10.

229. *See id.* at 8; *Pointer*, 199 Cal. Rptr. at 359-60; *Mosberg*, 768 P.2d at 314; Lev, *supra* note 6, at A17.

230. *See* Lev, *supra* note 6, at A17.

231. *Id.*

232. As noted earlier, however, the act of conceiving may itself be illegal because of fornication or adultery statutes. *See supra* note 103. Still, the condition of being pregnant is not a crime in our society.

233. *See Dominguez*, 64 Cal. Rptr. at 293.

they will have custody of a child to abuse in the future.[234] As the *Rodriguez* court noted, however, a condition prohibiting pregnancy is not "reasonably related" to future child abuse because any children born to the probationer could be removed from her custody.[235] Indeed, a no-custody condition would be more effective than Norplant in preventing future child abuse. A Norplant condition only prevents the probationer from abusing her own future offspring, not other peoples' children who are in her custody. Given the availability of a no-custody condition, a Norplant condition is unnecessary and therefore not "reasonably related" to future criminality.[236] Since a Norplant condition fails *Dominguez*'s third prong as well, it is unreasonable and invalid in a typical child-abuse case.

The court in *Pointer*, however, found a no-conception condition reasonable under *Dominguez*.[237] *Pointer* suggests a scenario where a Norplant condition may be reasonable: women who harm their children while they are pregnant by using dangerous drugs like cocaine.[238] In finding the no-conception condition reasonable, the *Pointer* court stressed the unique facts of that case.[239] Because the defendant strictly adhered to a macrobiotic diet that could harm a fetus in utero, a no-conception condition would prevent her from injuring an unborn child in the future.[240] Thus, the condition was related to future criminality and valid under *Dominguez*.[241]

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234. Michael H. Shapiro, *Was the Norplant Ruling Unconstitutional?*, L.A. DAILY J., Feb. 20, 1991, at 7.

235. *See Rodriguez*, 378 So. 2d at 10.

236. *Cf. id.* (finding that a condition prohibiting pregnancy would "add nothing to decrease the possibility of further child abuse" and thus holding such a condition unreasonable under *Dominguez*'s third prong).

237. *Pointer*, 199 Cal. Rptr. at 364.

238. In Ohio, the state senate has debated a bill which would create a new crime of "prenatal child neglect" directed at women who abused drugs while pregnant. *See* Ohio S.B. No. 324, 118th Gen. Assemb., Reg. Sess. (1989-1990) (proposing § 2919.221(B)). A repeat offender has the choice of either undergoing sterilization or participating in a five-year contraceptive program. *See* proposed § 2919.221(B)(2)(c) *in* Ohio S.B. No. 324. If the offender fails to remain drug-free for the five years, then the judge must sentence her to be sterilized. *See id.* Should the offender fail to make the election mandated in the statute, then she would be guilty of "aggravated prenatal child neglect" and sentenced to a possible 25 years in prison. *Id.* §§ 2919.221(E), 2929.11(B). Similar legislation has been proposed in Kansas and Washington. *See* Southwick, *supra* note 11.

239. *See Pointer*, 199 Cal. Rptr. at 364.

240. *Id.* at 364 & n.9.

241. *Id.* at 364.

Like adhering to a macrobiotic diet, ingesting cocaine during pregnancy also harms the fetus.[242] In the case of a woman who abuses drugs while pregnant, a Norplant condition would probably meet all three prongs of the *Dominguez* test.[243] Because the harm occurred during pregnancy, preventing conception and pregnancy would relate more directly to the crime. A Norplant condition also would target conduct which itself may be criminal: the transfer of drugs to fetuses.[244] Finally, by preventing conception, a Norplant condition would preclude a probationer from harming an unborn child in the future. Consequently, in the case of a drug-abusing mother, a Norplant condition may pass the *Dominguez* test. In more typical child-abuse cases, however, a Norplant condition would be unreasonable and invalid under *Dominguez*.[245]

Even in the case of a drug-abusing mother, a Norplant condition may be unreasonable if it would be impossible for the woman to adhere to it. As noted earlier, a probation condition which would be impossible or extremely difficult for the probationer to follow is unreasonable.[246] Some women cannot use Norplant because of medical conditions.[247] Women who are diabetic, suffer from blood clots, or have heart or liver problems should not use Norplant.[248] In these cases, even if a

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242. *See generally* Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. OF MED. 666, 669 (1985) (concluding that infants exposed to cocaine in utero "are at risk for a higher rate of congenital malformations and perinatal mortality").

243. *Cf. Pointer*, 199 Cal. Rptr. at 364 (holding that a probation condition prohibiting conception was reasonable under the *Dominguez* test for a woman whose diet would harm an unborn child).

244. *See* Ohio S.B. No. 324, 118th Gen. Assemb., Reg. Sess. (1989-90). Since the late 1980s, more and more mothers who used drugs while pregnant and delivered drug-exposed babies are being charged with various crimes including criminal neglect. Doretta M. McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505 (1990). *But see* Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (holding that a mother could not be prosecuted under Florida Statutes § 893.13(1)(c)(1) for delivering cocaine to a minor when she ingested the drug while pregnant). *See also* Roberts, *supra* note 90 (arguing against criminalizing fetal drug abuse); James Dennison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103 (1991) (outlining the various commentaries on this subject and arguing against criminalizing maternal substance abuse).

245. *See supra* notes 227-32 and accompanying text.

246. *See supra* note 149 and accompanying text.

247. *See supra* notes 42-43 and accompanying text.

248. *See supra* notes 42-43 and accompanying text. This may, in the end, have rendered the Norplant condition in the *Johnson* case unreasonable; Darlene Johnson has a heart murmur and is diabetic. Matthew Rees, *Shot in the Arm*, THE NEW REPUBLIC, Dec. 9, 1991, at 16.

Norplant condition survives the *Dominguez* test, it would be unreasonable because it would endanger the probationer's health.[249]

B. *Constitutionality*

With the possible exception of cases involving drug-abusing mothers, a Norplant condition fails the reasonableness test.[250] Yet even in drug-abuse cases, such a condition fails for constitutional reasons.[251] As the courts in *Pointer*, *Mosberg*, and *Rodriguez* noted, a probation condition prohibiting conception or pregnancy burdens a probationer's constitutional right to procreate.[252] A Norplant condition also burdens this right.[253] Consequently, a Norplant condition must be specially scrutinized to see whether it is narrowly-drawn to serve the legitimate goals of probation.[254] In making this determination, the probationer's right to procreate should be balanced against the need for requiring Norplant.[255] In the end, the right to procreate outweighs the need for Norplant.[256]

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249. *See supra* note 149 and accompanying text. It should be noted, however, that in at least two respects, a Norplant condition would be easier to administer and monitor than the no-conception/no-pregnancy conditions invalidated in *Pointer* and *Mosberg*. First, in both cases the courts were concerned that those conditions would be difficult to monitor and enforce. *Pointer*, 199 Cal. Rptr. at 366; State v. Mosberg, 768 P.2d 313, 315 (Kan. Ct. App. 1989). Most contraceptives, like the pill, require the user to take regular actions to make the contraceptive effective. *See* Findlay, *supra* note 1, at 62. Not only could the probationer fail to properly administer such contraceptives, but probation officers would have difficulty monitoring the probationer's use of the contraceptive. *See Pointer*, 199 Cal. Rptr. at 362. Once implanted, however, Norplant does not require the probationer's cooperation to be effective. *See supra* notes 23-35 and accompanying text. Moreover, probation officers would have little difficulty monitoring a Norplant condition: they need only check the probationer's arm to make sure the device is in place. *See* Allstetter, *supra* note 5, at 32.

Second, in *Pointer* and *Mosberg*, the courts were concerned that a no-conception/no-pregnancy condition could force the probationer to choose between abortion, concealing the pregnancy, or jail should the probationer become pregnant. *See Pointer*, 199 Cal. Rptr. at 366; *Mosberg*, 768 P.2d at 315. Because of its convenience and high effectiveness rate, Norplant minimizes the risk that a probationer would accidentally become pregnant and face this disturbing choice. *See* Findlay, *supra* note 1, at 59.

250. *See supra* notes 226-49 and accompanying text.

251. *See* People v. Zaring, 10 Cal. Rptr. 2d 263, 268-69 (App. Ct. 1992); discussion *supra* Part IV.

252. *Pointer*, 199 Cal. Rptr. at 364-65; Rodriguez v. State, 378 So. 2d 7, 9 (Fla. 2d DCA 1979); *Mosberg*, 768 P.2d at 314.

253. *See supra* notes 118-19 and accompanying text.

254. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975).

255. *See supra* note 157 and accompanying text.

256. *See infra* notes 276-98 and accompanying text.

Several arguments favor a Norplant condition in child abuse cases. Child abuse is a singularly reprehensible crime.[257] Young children are normally defenseless against the physical and psychological torments of adults. Moreover, child abuse can scar a person emotionally and physically for life.[258] Since the state has a strong interest in protecting children from these injuries,[259] a Norplant condition may be a valid means of accomplishing this goal.

In addition, the idea that a person unfit to raise a child should not have the right to bring more children into this world further supports a Norplant condition.[260] Philosopher Onora O'Neill argues that if one cannot fulfill his or her parental obligations or transfer these obligations to others, then that person has no right to procreate.[261] The presumption is that someone who cannot raise a child or transfer this task to another actually harms the child.[262] In child-abuse cases, the

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257. In their study of child abuse and neglect, William Stacey and Anson Shupe noted that this subject "aroused extraordinary, vindictive anger in otherwise respectable citizens whose backgrounds ranged across a broad spectrum." WILLIAM STACEY & ANSON SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA 61 (1983). According to the authors, some people condemned child abusers as subhumans. *Id.*

258. *See Pointer*, 199 Cal. Rptr. at 360. Aside from the obvious physical harm a child may suffer from abuse, there are an array of psychological harms which could prove even more damaging in the long run. For example, an abused child can suffer from low self-esteem, difficulty in trusting others, and sexual and interpersonal problems. *See generally* FRANK G. BOLTON & SUSAN R. BOLTON, WORKING WITH VIOLENT FAMILIES 93-114 (1987) (detailing the psychological trauma suffered by child maltreatment victims).

259. New York v. Ferber, 458 U.S. 747, 756-57 (1982) ("[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

260. *See* Lev, *supra* note 6, at A17. This reasoning is implicit in Judge Broadman's defense of his sentence in the Darlene Johnson case. According to Broadman: "In the present case [Johnson] has been convicted of brutally beating her children. It is in the defendant's best interest and certainly in any unconceived child's interest that she not have any more children until she is mentally and emotionally prepared to do so." *Id.*

261. Onora O'Neill, *Begetting, Bearing, and Rearing*, *in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 25 (Onora O'Neill & William Ruddick eds., 1979). According to O'Neill: "If decisions to procreate create parental obligations, then those who realize (or should realize, given the information available to them) that they can neither discharge nor transfer such obligations have no right to procreate at that time." *Id.* at 29.

262. Robertson, *supra* note 90, at 412 (interpreting O'Neill's argument); *see* O'Neill, *supra* note 261, at 29.

parent's past conduct evinces a glaring inability to parent.[263] Any interest a child abuser may have in conceiving and bearing a child could be overridden by the need to prevent harm to the offspring.[264] Accordingly, a condition requiring the use of Norplant for convicted child abusers may not unduly burden their rights.[265]

. O'Neill's argument, however, contains a qualification making a Norplant condition unnecessary.[266] Although a person may not have the capacity to parent, if that person can transfer this obligation to others, then that person retains a right to procreate.[267] A no-custody condition combined with social mechanisms like foster care and adoption would assure a transfer of parental duties in child-abuse cases.[268] Thus, even under O'Neill's argument, child abusers have a right to procreate and a Norplant condition would unnecessarily burden this right.[269]

More importantly, the ability to conceive and bear a child may be central to a woman's identity.[270] The biological experience of conceiving and giving birth may be an important part of a woman's life.[271] Some women find enormous satisfaction and gratification in pregnancy and childbirth.[272] For them, procreation is a means of discovering and expressing their identity.[273] In this respect, the right to bear a child "goes to the heart of what it means to be human"[274] and represents a "basic civil right."[275]

While there are arguments supporting a Norplant condition in child-abuse cases, they do not justify burdening the constitutional and human right to procreate. Conceiving and bearing a child is a uniquely

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263. *See* O'Neill, *supra* note 261, at 29.

264. Robertson, *supra* note 90, at 412; *see* O'Neill, *supra* note 261, at 29.

265. A Norplant condition may also allow mothers in Johnson's situation an opportunity to regain their capacity to parent and thus reassert their right to have children. Lev, *supra* note 6, at A17. In Johnson's case, Judge Broadman also sentenced her to mental health counseling and parenting classes. *Id.* If she had completed these terms, Johnson then may have had the capacity to conceive and raise more children. *See id.*

266. Robertson, *supra* note 90, at 412; *see* O'Neill, *supra* note 261.

267. Robertson, *supra* note 90, at 412; *see* O'Neill, *supra* note 261.

268. *See* Robertson, *supra* note 90, at 412.

269. *See id.*

270. *See* Roberts, *supra* note 15, at 1472.

271. *See id.*; Robertson, *supra* note 90, at 409.

272. *See* Robertson, *supra* note 90, at 409. This is one reason why some women are willing to be surrogates for infertile couples. *Id.* at 409 n.13.

273. *See* Roberts, *supra* note 15, at 1472; Robertson, *supra* note 90, at 409.

274. Roberts, *supra* note 15, at 1472.

275. Skinner v. Oklahoma *ex rel.* Williamson, 315 U.S. 535, 541 (1942).

personal experience for a woman.[276] Consequently, the right to procreate deserves the utmost respect. Because there is an alternative to a Norplant condition in child abuse cases, the need for Norplant does not outweigh the probationer's right to procreate.[277]

VI. AN ALTERNATIVE

As stated earlier, a probation condition burdening a constitutional right must be narrowly drawn.[278] If an alternative condition less restrictive of a probationer's constitutional rights exists, then it should be employed.[279] Fortunately, there is such an alternative to the Norplant condition Judge Broadman imposed in the *Johnson* case. In *Pointer*, the court suggested that instead of a no-conception condition, the trial court could require the probationer to submit to regular pregnancy testing.[280] If the probationer became pregnant, she would have to follow a program of prenatal and neonatal care monitored by both a probation officer and a supervising physician.[281] If the probationer gave birth to a child while on probation, then the court could remove the child from the mother's custody if this was necessary to protect the infant.[282]

The last condition mentioned by the *Pointer* court — removing any newborn from the probationer's custody[283] — is the most important. In a typical child abuse case where the abuse occurs after birth, a no-custody condition would prevent future child abuse as well as Norplant could. But even in maternal drug abuse cases, the *Pointer* alternative would protect against future criminality.[284] Should the probationer become pregnant, she would have to submit to a program of prenatal care.[285] As part of this program, probation officers and physi-

276. *See supra* notes 271-75 and accompanying text.

277. *See* Robertson, *supra* note 90, at 433.

278. People v. Mason, 488 P.2d 630, 635 (Cal. 1971), *cert. denied*, 405 U.S. 1016 (1972); COHEN & GOBERT, *supra* note 125, at 213.

279. People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984); *see* People v. Arvanites, 95 Cal. Rptr. 493, 499 (Ct. App. 1971).

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

281. *Id.*

282. *Id.*

283. *Id.*

284. *Pointer*, 199 Cal. Rptr. at 365-66; *see* People v. Zaring, 10 Cal. Rptr. 2d 263, 268-69 (Ct. App. 1992) (implying that the alternatives discussed by the *Pointer* court would apply in cases of maternal drug abuse as well).

285. *Id.* at 365.

cians could monitor her for signs of drug abuse.[286] If the probationer used drugs while pregnant, then social workers and physicians could treat her for her addiction and take other steps necessary to prevent the probationer from harming her unborn child. In this manner, the alternative conditions prescribed in *Pointer* would serve well in any child abuse case.

Concededly, the *Pointer* alternative has its disadvantages. First, a program of testing, monitoring, and prenatal care might be expensive[287] — probably more so than using Norplant.[288] Second, the testing and monitoring would intrude into a probationer's privacy.[289] Finally, this alternative would further strain social services like foster care which are already overburdened.[290]

While these are valid criticisms, the *Pointer* alternative has several advantages over Norplant. Foremost among these advantages is that the *Pointer* alternative preserves a probationer's right to conceive a child.[291] The probationer can experience the rewards of pregnancy and childbirth.[292] In this respect, the *Pointer* alternative may further the rehabilitation of a child abuser. Under the supervision of social workers during and after pregnancy, a former child abuser can better appreciate the rewards and obligations of parenting. Whereas a Norplant condition only protects against future child abuse,[293] the *Pointer* alter-

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286. *See id.*

287. *See id.* In *Pointer*, the prosecutor claimed that the local social service agencies lacked the resources for such supervision. *Id.*

288. *See supra* notes 44-45 and accompanying text.

289. *Pointer*, 199 Cal. Rptr. at 364. In commenting upon the *Johnson* case, Professor Shapiro questioned whether taking a child away from the mother might be no less intrusive than requiring the use of Norplant. Shapiro, *supra* note 234.

290. *See* HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, 101 CONG., 1ST SESS., NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA (Comm. Print 1989). There were an estimated 276,300 children in foster care nationwide in 1985, and this number increased to 340,300 by 1988. *Id.* at 5. In 1989, the House committee concluded:

> [T]he reality of today's foster care system falls short of [the] ideal in almost every way. The number of available foster parents is inadequate and shrinking . . . . In addition, there has been insufficient assistance to foster parents to enable them to support and properly care for these children, many of whom have special needs.

Id. at 51.

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

292. *See supra* text accompanying notes 271-75.

293. *Cf. Pointer*, 199 Cal. Rptr. at 365 (concluding that a no-conception condition was "apparently not intended to serve any rehabilitative purpose but rather to protect the public by preventing injury to an unborn child"). Judge Broadman, however, in defending his order

native would advance both goals of probation: rehabilitation and protecting society against future harm.

The *Pointer* alternative has other advantages as well. First, it would not require an invasion of the probationer's body. Like the right to procreate, the integrity of a person's body is a constitutionally protected privacy interest.[294] Although implanting Norplant requires a relatively minor surgical procedure, it necessitates anesthesia and involves the insertion of tubes under the patient's skin.[295] Moreover, the probationer must carry this device in her body for a period of years.[296] This goes beyond a simple blood test or vaccination — two temporary procedures which the Supreme Court has upheld as permissible intrusions of bodily integrity.[297] Second, the *Pointer* alternative avoids exposing the probationer to the unknown risks of using Norplant. While Norplant has few side effects, it is dangerous to people with certain health conditions.[298] Thus, the *Pointer* alternative shows greater respect for the probationer's health and body than does the Norplant condition.

Though the *Pointer* alternative has its drawbacks, it would be more effective than Norplant in meeting the goals of probation. In child abuse cases, a Norplant condition attempts only to prevent future child abuse.[299] The *Pointer* alternative, however, would not only pre-

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requiring Johnson to have Norplant implanted, stated that the order was "reasonably related" to the goal of rehabilitating Johnson. Lev, *supra* note 6, at A17.

294. In several cases concerning searches and seizures in the criminal context, the Supreme Court has implicitly recognized a right to bodily autonomy. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (invalidating an order to pump a suspect's stomach to discover drugs). In another case, the Court unanimously invalidated a court order requiring the surgical removal of a bullet from a suspect's body. Winston v. Lee, 470 U.S. 753 (1985). In *Winston*, the Court argued that such an invasive procedure "involves a virtually total divestment of [one's] ordinary control over surgical probing beneath [one's] skin." *Id.* at 765. Furthermore, in Schmerber v. California, 384 U.S. 757 (1966), the Court stated that "[t]he integrity of an individual's person is a cherished value of our society." *Schmerber*, 384 U.S. at 772.

In *Schmerber*, however, the Court held that the Constitution does not forbid authorities from making "minor intrusions into an individual's body under stringently limited conditions." *Id.* The *Schmerber* Court upheld administering a blood test to a suspect in order to determine the suspect's blood alcohol level. *Id.*; *see also* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding a compulsory vaccination program). *See generally* TRIBE, *supra* note 92, at 1333-34 (outlining the circumstances under which the state may intrude upon a person's body).

295. *See supra* notes 23-27 and accompanying text.

296. *See supra* notes 2, 8 and accompanying text.

297. *See Schmerber*, 384 U.S. 757 (1966); *Jacobson*, 197 U.S. 11 (1905).

298. *See* Segal, *supra* note 23, at 10; Findlay, *supra* note 1, at 59.

299. *See Pointer*, 199 Cal. Rptr. at 365 (arguing that a no-conception condition focuses on future criminality, not rehabilitation).

vent future abuse, but rehabilitate the probationer as well.[300] Moreover, the *Pointer* alternative furthers these goals while preserving the probationer's constitutional right to procreate.[301] Because this alternative avoids burdening the probationer's constitutional rights, it is more narrowly drawn than a Norplant condition.[302] Since the *Pointer* alternative is available to courts, a Norplant condition unnecessarily burdens a probationer's right to procreate and is therefore invalid.[303]

VII. CONCLUSION

Child abuse is an enduring problem in our society and judges naturally feel pressured to find innovative ways to stop it.[304] In this regard, Norplant is an enticing option for judges who must sentence convicted child abusers. A Norplant condition would be easy to monitor[305] and would reduce the offender's opportunity to abuse children in the future. Given Norplant's unique qualities as a contraceptive, it is not surprising that a judge incorporated it into a probationary sentence.[306] Judge Broadman was the first to require a child abuser to use Norplant,[307] and other courts may be tempted to follow his lead.

While there is latitude for creative sentencing,[308] forcing a child abuser to have Norplant implanted into her body is judicial overkill. Some may argue that Judge Broadman never "forced" the Norplant condition on Johnson: she had the option of declining probation. But when the alternative is jail, this decision is hardly uncoerced.[309] People will do almost anything to avoid jail.[310] Courts have recognized this, and that is why the "contract/waiver" theory of probation conditions and the idea that offenders "assent" to their conditions are no longer valid.[311]

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300. *See supra* note 293 and accompanying text.

301. *See supra* notes 291-92 and accompanying text.

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

303. *Id.*

304. *See supra* notes 12-17 and accompanying text.

305. *See* Alstetter, *supra* note 5, at 32. All the probation officer would have to do is check the woman's upper arm to make certain the Norplant device was in place. *See id.*

306. *See supra* notes 6-10 and accompanying text.

307. Stein, *Judge Stirs Debate*, *supra* note 6, at A3.

308. *See supra* notes 19-21 and accompanying text.

309. *See* Cantwell, *supra* note 5, § 4, at 16.

310. Johnson originally agreed to the Norplant condition because she feared serving three additional years in jail. Lev, *supra* note 6, at A17.

311. *See supra* notes 136, 138 and accompanying text.

More importantly, a Norplant condition is simply unreasonable and unconstitutional in child abuse cases.[312] The right to procreate is a human right and is protected by the Constitution.[313] In a typical child abuse case like Darlene Johnson's, a probation condition preventing the offender from conceiving a child bears no relationship to the crime or future criminality.[314] Even in cases where a Norplant condition may pass the reasonableness test, there is an alternative more humane than Norplant.[315] A program of pregnancy testing and prenatal care combined with a no-custody condition would be more effective than Norplant in meeting the goals of probation.[316] Because this alternative exists, a Norplant condition is not only unreasonable, it is unconstitutional as well.[317]

According to the originator of implantable birth-control technology, Sheldon Segal of the Rockefeller Foundation, Judge Broadman's sentence was "a gross misuse" of Norplant.[318] Indeed, the Darlene Johnson case illustrates how advancing technology can sometimes jeopardize cherished individual rights. With its convenience and effectiveness, Norplant may some day be the preferred contraceptive method for American women. A court should not, however, force this choice on a woman in an attempt to find a technological quick fix to the problem of child abuse.

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312. *See* discussion *supra* Parts IV, V.
313. *See* discussion *supra* Part II.
314. *See supra* notes 227-32 and accompanying text.
315. *See* discussion *supra* Part VI.
316. *See supra* notes 293 and accompanying text.
317. *See supra* note 299-303 and accompanying text.
318. Stein, *Judge Stirs Debate*, *supra* note 6, at A3.