SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 56 | Issue 2 Article 6

2005

Conditional Liberty: Restricting Procreation of Convicted Child Abusers and Dead Beat Dads

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NOTES

CONDITIONAL LIBERTY: RESTRICTING PROCREATION OF CONVICTED CHILD ABUSERS AND DEAD BEAT DADS

"This is a practical, social, economic and moral reality."[1]

- Judge Marilyn L. O'Connor, Monroe County Family Court

One of the most sacred privileges and vital aspects of human existence is having a child. Fortunately, for most Americans, the Supreme Court has protected the right to have a child for nearly a century.[2] The guarantee of liberty granted by the Fourteenth Amendment Due Process Clause "denotes . . . the right of the individual . . . to marry, establish a home and bring up children."[3] A state cannot deprive its citizens of "a right which is basic to the perpetuation of a race—the right to have offspring."[4]

In the 1970s, the Court reinforced the conviction that the Constitution protects a fundamental right to procreate, this time manifesting itself within the fundamental right of privacy: "If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[5] As a fundamental right, therefore, any state infringement on procreative freedom must withstand strict scrutiny.[6]

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[1] Marc Santora, *Negligent Upstate Couple Is Told Not To Procreate*, N.Y. TIMES, May 11, 2004, at B6.

[2] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (describing procreation as "fundamental to the very existence and survival of the race" and a "basic liberty"); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (listing fundamental rights guaranteed by the Constitution).

[3] *Meyer*, 262 U.S. at 399-400.

[4] *Skinner*, 316 U.S. at 536.

[5] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[6] Strict scrutiny analysis permits a state to infringe on a fundamental right only if it advances a compelling interest that is narrowly tailored to achieve the state objective. Roe v.

Thus, if a case regarding state infringement on an individual's right to procreate came before the Court, the state's basis for and interest in restricting the right would be crucial to a constitutional analysis. Federal circuit courts have found restrictions on procreative freedom of incarcerated offenders to be necessary and justifiable for various reasons; however, the Supreme Court has not issued any essential holding that is widely applicable to all cases of state infringement on an criminal's right to procreate, but has expressly limited any ruling to the specific facts of the case.[7]

This Note unravels the law and policy surrounding antiprocreation restrictions to assess the objectives states have in placing such restrictions on criminals, specifically probationers. Emotions that Americans attach to the notion of family and childbearing (manifest in the fact that it is a fundamental right) concededly triggers reservations toward restrictions for fear of a slippery slope of regulations that would first impact prisoners, then probationers, then the American public. Judicially imposed limitations, however, ensure that restrictions remain confined to criminals, and even then only the most severe cases. Thus, unconvinced that a slippery slope is an issue, this Note argues that procreation restrictions as conditions of probation are not only legally justifiable but a practical necessity for implementing established policy.

I. INTRODUCTION

Following this introduction, Part II presents an overview of the probation system and examines case law imposing antiprocreation conditions of probation on nonsupport and child abuse offenders. Part III explains why antiprocreation issues are justifiable and necessary as a means to rehabilitate offenders and protect existing and future children of offenders. Antiprocreation conditions are only appropriate, however, when they can be lifted upon the occurrence of a defined event or at a specific time. Part IV examines the tests established by the Supreme Court for infringing on fundamental rights of probationers and for infringing on the fundamental rights of criminals in prison. This Part also examines circuit court applications of the Supreme Court's test for infringing on the procreative freedom of incarcerated

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Wade, 410 U.S. 113, 155 (1973).

[7] For example, in the past, the Court deemed a statute unconstitutional that allowed a jury to impose permanent sterilization as part of the sentence for a habitual offender of crimes such as theft or robbery. *Skinner*, 316 U.S. at 535. The Court has permitted a state to sterilize individuals confined to a mental institution who suffer from hereditary forms of "insanity" or "imbecility." Buck v. Bell, 274 U.S. 200 (1927). The Supreme Court specifically limits its holding in this case to mental institution patients. *Id.* at 208.

offenders as a means of analogizing to state court restrictions on probationers' right to procreate.

Arguing that antiprocreation conditions of probation are justifiable and necessary in certain circumstances when the condition is rehabilitative and protects children, Part V proposes a test for courts to apply if antiprocreation conditions are at issue during sentencing. This proposed test differs from the test applied to procreation restrictions of prisoners because of inherent differences between probation and prison—namely, that prison officials must manage security concerns. This test also differs from those used by state courts when imposing other conditions of probation, primarily because, in antiprocreation cases, those tests have failed to produce outcomes that are predictable or consistent with the goals and practical necessities of probation. Finally, Part VI addresses counterarguments of enforcement and gender equality and illustrates that these issues are not so problematic as to outweigh the justification and necessity of antiprocreation conditions.

II. PROBATION

Judges sentence offenders to probation more frequently than any other criminal sanction.[8] The Supreme Court has defined probation as "simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum security facility to a few hours of mandatory community service."[9] The American Bar Association provides a working definition of probation as "a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if he violates the conditions."[10] Like the Supreme Court, the American Bar Association supports the theory that probation is not a suspension of the execution of a sentence, but a sentence itself.[11]

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[8] Rachel Roth, *"No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER SOC. POL'Y & L. 391, 395 (2004).

[9] Griffin v. Wisconsin, 483 U.S. 868, 874 (1987).

[10] STANDARDS RELATING TO PROBATION 2, 9 (Approved Draft 1970) [hereinafter ABA STANDARDS].

[11] *Id.* Suspension of the execution of a sentence, as the phrase itself indicates, occurs when the judge imposes a sentence but the defendant is not incarcerated. *See* GEORGE G. KILLINGER ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 17-18 (1976). The distinction between probation as a sentence and probation as the suspension of the execution of a sentence is legally significant in some cases. *Id.* It is relevant for this discussion, however, only to understand that because probation is considered to be a legitimate sentence on its own, it does not require the suspension of any other sentence and can have independent justifications.

Throughout the probationary period, a probation officer supervises the offender to ensure compliance with the terms and conditions of the probation.[12] If the offender fails to abide by the conditions of his probation, he may be subject to incarceration.[13] The offender's freedom from prison, therefore, depends on his adherence to the stipulated conditions.[14]

A. Conditions of Probation

Probation is a sentence imposed for a period of time and according to a series of conditions.[15] These conditions may include restrictions on association, location, and employment, but can also require probationers to attend counseling programs or participate in activities that promote rehabilitation.[16] In many cases, courts retain the right to alter these conditions as the situation merits.[17] The Supreme Court has held that "it is always true of probationers . . . that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'"[18]

Both federal and state legislatures allow judges to use discretion in tailoring conditions of probation to a particular defendant.[19] The Federal Sentencing Guidelines advise mandatory probation conditions and provide examples of discretionary probation conditions that judges may choose to impose.[20] These discretionary conditions include requirements that the probationer support his dependents, make restitution to the victim of the offense, maintain gainful employment or pursue education, abstain from excessive use of alcohol, and refrain from possessing a firearm.[21] The list of discretionary conditions are "examples," because judges have latitude to impose additional or more creative probationary conditions.[22]

As mentioned above, however, discretionary conditions are part of a probationary sentence and must be reasonably related to "the nature and circumstances of the offense and the history and characteristics of

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[12] 21A AM. JUR. 2D *Criminal Law* § 904 (1964).

[13] *Id.*

[14] NEIL COHEN, THE LAW OF PROBATION AND PAROLE §§ 1:6, 2:1 (2d ed. 1999).

[15] *Id.* § 1:1.

[16] *Id.* § 1:23.

[17] *Id.* (collecting cases).

[18] Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

[19] Michael George Smith, Note, *The Propriety and Usefulness of Geographical Restrictions Imposed as Conditions of Probation*, 47 BAYLOR L. REV. 571, 579 (1995).

[20] 18 U.S.C. § 3563 (2004).

[21] *Id.* § 3563(b).

[22] *Id.* § 3563(b)(22).

the defendant"; the condition may deprive the probationer of liberty only to the extent necessary to fulfill the purposes of a sentence—rehabilitation, deterrence, retribution, or incapacitation.[23] If a trial judge oversteps these restrictions on his discretion, the condition may be overruled on appeal.[24]

Most states grant trial judges extraordinary deference in crafting conditions of probation based on the specific facts of each case. In California, for example, though statute requires that an individual convicted of a nonviolent drug offense receive probation with the mandatory condition of participation in an education or community service program the "trial court is not otherwise limited in the type of probation conditions it may impose."[25] Similarly, Pennsylvania law lists specific conditions that courts may impose on probationers (i.e., meeting family responsibilities, maintaining employment, participating in community service, or remaining within the jurisdiction of the court), but the state allows the court freedom to impose any other condition of probation as long as it is "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty."[26]

B. Goals of Probation—Fulfilling Basic Theories of Punishment

It is ultimately the job of legislatures to define the goals of probation, and these goals play a key role in appellate court determinations of whether to uphold probationary conditions.[27] There are four main purposes of criminal sentences or theories of punishment: rehabilitation, deterrence, retribution, and incapacitation. The goal of punishment fulfilled by probation is primarily a function of the probationary conditions and the possibility of incarceration.[28]

The Federal Sentencing Guidelines explicitly list retribution, deterrence, incapacitation, and rehabilitation as purposes of probation.[29]

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[23] *Id.* § 3563(b) (noting the discretionary conditions a court may consider and referring to § 3553(a)(1)-(2)); *id.* § 3553(a)(1)-(2) (setting forth the factors).

[24] Examples of conditions that appeals courts have overruled include: banishment, KILLINGER ET AL., *supra* note 11, at 72 (citing People v. Dominguez, 64 Cal. Rptr. 290 (Cal. Ct. App. 1967)), mandating attendance at Sunday school, *id.* at 73 (citing Jones v. Commonwealth, 38 S.E.2d 444 (Va. 1946)), and requiring donation of blood, *id.* (citing Springer v. United States, 148 F.2d 411 (9th Cir. 1945)).

[25] CAL. PENAL CODE § 1210.1 (Deering 2004).

[26] 42 PA. CONS. STAT. ANN. § 9754 (West 1998).

[27] Smith, *supra* note 19, at 574.

[28] *See* COHEN, *supra* note 14, § 1:25 ("By the use of appropriate conditions, probation can serve such legitimate goals as retribution, deterrence, and incapacitation.").

[29] 18 U.S.C. § 3553(a)(2) (2004).

States, judges, and commentators commonly support the use of probation for rehabilitation, although it may also implicate other purposes. COHEN, *supra* note 14, § 1:5. Assuming that probation is less severe than incarceration, society may conclude that the sentence imposes insufficient retribution on an offender, or that the judge did not view the offense as serious

Prior to the Sentencing Guidelines, the Supreme Court analogized probation to parole, the purpose of which is to rehabilitate—to "help individuals reintegrate into society as constructive individuals as soon as they are able."[30] Similarly, according to the American Bar Association,

> [t]he basic idea underlying a sentence to probation is very simple. Sentencing is in a large part concerned with avoiding future crimes by helping the defendant learn to live productively in the community which he has offended against. Probation proceeds on the theory that the best way to pursue this goal is to orient the criminal sanction toward the community setting in those cases where it is compatible with the other objectives of sentencing.[31]

It is a common belief that an offender is more likely to be rehabilitated if he remains in the company of family and community while taking advantage of treatment centers as opposed to living in prisons that lack such treatment facilities and where the offender may network with other criminals.[32] "Banishment from society . . . is not the way to integrate someone into society."[33]

Accordingly, most states explicitly list rehabilitation as the purpose of probation.[34] If a state defines rehabilitation as the purpose of probation, then judges should impose conditions on probation that further this interest and guide probationers to lead law abiding lives, encouraging them to be responsible and productive members of society. At the same time, however, probation conditions may not unduly restrict the liberty of probationers.[35]

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enough; however, if the offender's sentence involves harsh probationary conditions or includes some incarceration, this perception may be unfounded. *Id.* § 1:6.

Similarly, critics of probation may believe that the sentence is not harsh enough to be specifically or generally deterrent. *Id.* § 1:7. Certainly the idea of probation (and the conditions that go along with it) might deter potential offenders and one term of probation may specifically deter further crime by that probationer, thus preventing future criminality. *Id.*

Probation can also serve to incapacitate an offender by imposing specific conditions such as restricting the offender's movement or prohibiting him from carrying a weapon. *Id.* § 1.8.

[30] Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973) (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)).

[31] ABA STANDARDS, *supra* note 10, at 1.

[32] *See id.* (arguing that the odds of successfully rehabilitating an offender are better if he remains in the community).

[33] *Id.*

[34] *See, e.g.*, FLA. STAT. ANN. § 948.01(3)(b) (West Supp. 2004) (granting the court authority to determine what community sanctions may include, including those for rehabilitative purposes); 42 PA. CONS. STAT. ANN. § 9754 (West 1998) (permitting courts to impose any condition as long as it fulfills the rehabilitative purpose of probation).

[35] *See* Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (holding that it is unlaw-

Although the cases involving antiprocreation conditions of probation differ as to outcome, what they share is a general support for the idea that in some specific situations an antiprocreation condition might be beneficial for a defendant's rehabilitation. Thus, the case law reveals that, in the minds of at least some judges, antiprocreation conditions of probation may in some way assist a defendant in becoming a more responsible, productive member of society. The question that remains is: what factors are crucial to determining if the situation warrants an antiprocreation condition and makes the condition necessary and justifiable for the probationer's rehabilitation?

C. Antiprocreation Conditions of Probation: The Case Law

The many common forms of contraception available to both men and women today allow judges to impose antiprocreation conditions on probationers with some hope that the offender will follow the order. The precise frequency with which judges have imposed these conditions remains unclear as the orders are typically unpublished.[36] The press, however, has reported cases in nearly half of the states.[37] It is unlikely that most defendants have representation during probation hearings,[38] and evidence suggests that defendants rarely appeal.[39] *American Law Reports* cites only eleven instances of antiprocreation condition appeals.[40]

The following sections explore two offenses for which sentencing judges have imposed antiprocreation conditions of probation: nonsupport and child abuse. Analysis of case law reveals that most appellate courts are concerned with (a) the rehabilitative nature of the con-

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ful to prohibit defendant abusive mother from getting married or pregnant because those restrictions were not reasonably related to rehabilitation and therefore unduly restrictive on the liberty of the probationer).

[36] Roth, *supra* note 8, at 405-06.

[37] *Id.* at 406 (finding that antiprocreation conditions have been reported by the media in Arizona, California, Florida, Illinois, Indiana, Louisiana, Michigan, Missouri, Montana, Kansas, Kentucky, Nebraska, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin).

[38] *See, e.g.*, Santora, *supra* note 1, at B6 (describing a drug abusing couple whose four children were removed from their care almost immediately after birth and whom the court instructed, as a condition of their probation, to refrain from having another child until they could prove that they could care for their existing children after regaining their custody). In this case, the mother waived her right to an attorney and neither she nor her husband showed up for the probation hearing. *Id.*

[39] *See* Roth, *supra* note 8, at 405-06 (pointing out that, though it is not known how many antiprocreation orders courts have imposed, very few have ever been appealed).

[40] *Id.* at 405 (citing John C. Williams, *Propriety of Conditioning Probation on Defendant's Remaining Childless or Having No Additional Children During Probationary Period*, 94 A.L.R. 3d 1218 (2004)).

dition, (b) public protection in the form of caring for extant and future children of the defendant, and (c) the inclusion of a time limit on the procreation restriction.

1. Nonsupportive Parents

This Section reviews cases in which trial courts have imposed antiprocreation conditions of probation on parents (primarily fathers) who have failed to pay child support (so-called deadbeat dads) and explores how appellate courts have dealt with the reasonableness of the condition, including whether it is narrowly tailored or overly broad in fulfilling the state's interest in rehabilitating offenders during probation.

The Wisconsin Supreme Court faced the question of whether a court may restrict an offender's right to procreate as a condition of probation in *State v. Oakley*.[41] In this case, Mr. Oakley fathered nine children (ages three, four, five, ten, twelve, twelve, thirteen, thirteen, and sixteen) with four different women.[42] Mr. Oakley was found guilty of the Class E felony of intentionally refusing to pay child support.[43] Although Wisconsin law permits a judge to impose an onerous prison sentence on nonsupport offenders, the law also allows judges, when imposing a sentence, to take into account other factors, including criminal record, character and personality, culpability, age, education and employment, remorse, repentance and cooperativeness, need for rehabilitative control, and the rights of the public.[44]

If a judge chooses to place an offender on probation, he may impose "any conditions which appear to be reasonable and appropriate."[45] Wisconsin courts, however, have not interpreted this statute to grant judges absolute authority: judges must "fashion the terms of probation to meet the rehabilitative needs of the defendant" as well as take into account the needs of society and potential victims.[46] Accordingly, the trial court in *Oakley* determined that the defendant could

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[41] 629 N.W.2d 200 (Wis. 2001).

[42] Dennis Chaptman, *High Court Limits Dad's Procreation*, MILWAUKEE J. SENTINEL, July 11, 2001, at 1A.

[43] *Oakley*, 629 N.W.2d at 201. Wisconsin has since changed the statutes at issue. Today, the statute provides that "[a]ny person who intentionally fails for 120 or more consecutive days to provide . . . child support[,] which the person knows or reasonably should know the person is legally obligated to provide[,] is guilty of a Class I felony." WIS. STAT. ANN. § 948.22(2) (West 2005). Class I felonies are the lowest felony classification in Wisconsin and carry a maximum punishment of $10,000 fine and/or three and one-half years in prison (changed from two years at the time of this case). *Id.* § 939.50(3)(i).

[44] *Oakley*, 629 N.W.2d at 205 (citing State v. Guzman, 480 N.W.2d 446 (Wis. 1992)).

[45] § 973.09(1)(a).

[46] *Oakley*, 629 N.W.2d at 205-06 (quoting State v. Gray, 590 N.W.2d 918 (Wis. 1999)).

provide no help to his children in prison[47] and sentenced him to a five-year term of probation.[48] As one condition of his probation, the judge instructed Oakley to avoid having children until he could prove that he could support his nine children as well as an additional child.[49]

On appeal, the Wisconsin Supreme Court supported the antiprocreation condition of Oakley's probation.[50] The court began by emphasizing the importance of tailoring probation conditions to the individual defendant.[51] Believing that conditional probation would rehabilitate the defendant, teach him to respect the law, and protect the needs of his children, the court rejected Oakley's argument that the antiprocreation condition violated his fundamental right to procreate.[52] The court held that as a convicted felon, Oakley must relinquish some fundamental rights, including his right to procreate, and payment of child support as well as the rehabilitation of an offender both constitute compelling governmental interests.[53]

Furthermore, the antiprocreation condition was not limitless or overbroad but narrowly tailored to expire either when Oakley paid his child support or at the end of the five-year probation period, whichever came first.[54] The court also added that if the trial judge had chosen to incarcerate Oakley, he would have had no right to procreate in prison.[55]

When presented with a condition of probation similar to that in the *Oakley* case, Ohio courts took a different position. Ohio law grants trial courts broad discretion in imposing probationary sanctions.[56] Specifically, for a felony offender, the "court may impose any other conditions of release under a community control sanction that the court considers appropriate."[57] For a misdemeanor offender, in "the interests of doing justice, rehabilitating the offender, and ensuring the

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[47] *Id.* at 203. A neighboring county had already sentenced Oakley to a three-year prison sentence, so any sentence imposed here would be additional. *Id.*

[48] *Id.*

[49] *Id.* at 201.

[50] *Id.* at 206-07.

[51] *Id.*

[52] *Id.* at 212.

[53] *Id.* at 212-13.

[54] *Id.* at 212.

[55] *Id.* at 209 n.25.

[56] State v. Talty, 814 N.E.2d 1201, 1203 (Ohio 2004). The Ohio Revised Code provides that a trial court may impose "community sanctions" for up to five years when sentencing an offender for a felony. OHIO REV. CODE ANN. § 2929.15(A)(1) (LexisNexis 2004). These sanctions can include residential sanctions, nonresidential sanctions, or financial sanctions. *Id.* If the offender fulfills the condition of the community control sanction, the court can reduce the length of the sanction. *Id.*

[57] § 2929.15(A)(1). In Ohio, "community control is the functional equivalent of probation." *Talty*, 814 N.E.2d at 1205.

offender's good behavior, the court may impose additional requirements."[58]

In *State v. Talty*,[59] the defendant pled no contest to "unlawfully and recklessly failing to provide adequate support for three of his seven minor children."[60] Mr. Talty's two counts of nonsupport amounted to a fifth-degree felony.[61] He owed nearly $38,000 in child support.[62] As part of his five-year probation sentence, the trial court required Talty to "make all reasonable efforts to avoid conceiving another child while under the supervision of the . . . Probation Department"; the judge continued: "What those efforts are are up to him, that is not for me to say, I am not mandating what he does, only that he has to make reasonable efforts to do so."[63]

The Supreme Court of Ohio vacated the antiprocreation condition in Talty's sentence. In Ohio, any condition of probation must relate to the three statutory goals of probation: "doing justice, rehabilitating the offender, and insuring good behavior."[64] A probation condition is valid in Ohio if it is "reasonably related to the statutory ends of probation and [is] not . . . overbroad."[65] The trial court believed that the antiprocreation condition would serve to rehabilitate Talty but did not include a means to lift the antiprocreation condition if he showed signs of rehabilitation.[66] As a result, the Ohio Supreme Court held that the antiprocreation condition of probation over broadly infringed on Talty's liberty, and the condition was not reasonable.[67]

The court rejected the state's argument that the order was not limitless because it could have been changed if Talty exhibited signs of rehabilitation by making child support payments.[68] And, the court expressly refused to determine whether they would have upheld the antiprocreation condition had it included a time limit.[69] Thus, Ohio law remains unresolved as to whether all antiprocreation conditions of probation are per se invalid. As a result of *Talty*, in any future case,

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[58] § 2929.25(B)(2).

[59] 814 N.E.2d 1201 (Ohio 2004).

[60] State v. Talty, No. 02-CR-0075, 2003-Ohio-3161, ¶2, 2003 WL 21396835, at *1 (Ohio Ct. App. June 18, 2003), *rev'd*, 814 N.E.2d 1201 (Ohio 2004).

[61] *Talty*, 814 N.E.2d at 1202. Pursuant to Ohio law, nonsupport is the failure to provide adequate support to a minor child. § 2919.21(A)(2).

[62] Editorial, *Paternity Rights: Lower Court's Order that Man Stop Fathering Kids Raises Questions*, COLUMBUS DISPATCH, May 20, 2004, at 14A.

[63] *Talty*, 2003-Ohio-3161, ¶4.

[64] *Talty*, 814 N.E.2d at 1204 (quoting OHIO REV. CODE ANN. § 2929.25(B)(2) (LexisNexis 2003) (formerly § 2951.02(C)).

[65] *Id.* at 1205.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1206.

[69] *Id.* at 1205.

the state would at least have to prove that restricting reproduction would serve the penological goal of rehabilitation and include a reasonable time limit.

These two cases illustrate that state courts are open to the idea of antiprocreation conditions of probation; at least some judges believe that a parent who fails to pay child support for several children after numerous court orders may be more likely to be rehabilitated and become a productive member of society if he does not father additional children until he either pays his child support or pays his debt to society by serving his sentence of probation.

2. Abusive Parents

There are more than three million reported cases of child abuse each year in America and three children die each day from abuse or neglect.[70] Abused children more often suffer from depression, alcoholism, drug abuse, and severe obesity as well as require special education or become involved in criminal activity.[71] The size and scope of the child abuse problem may be a contributing factor to why judges, especially those who hear child abuse cases daily, feel the need to take steps that they believe would help curb the problem. One such solution includes antiprocreation conditions of probation on child abusing parents; this section summarizes a sampling of these cases.

In the Oregon case *State v. Kline*,[72] a court sentenced the defendant to three years probation for criminally mistreating his daughter.[73] Mr. Kline admitted to bruising the two-month-old baby's chest and back and fracturing her leg; he also admitted to anger and frustration problems as well as drug abuse.[74] Four years earlier, the defendant had been stripped of parental rights to his two-year-old son for abusing him in a similar manner.[75] As a condition of the defendant's probation, the trial judge imposed the following condition: "You may not without prior written approval by the Court following the successful completion of a drug treatment program and anger management pro-

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[70] Suzette Fromm, *Total Estimated Cost of Child Abuse and Neglect in the United States* (2001), http://www.preventchildabuse.org/learn_more/research_docs/cost_analysis.pdf.

[71] *Id.*

[72] 963 P.2d 697 (Or. Ct. App. 1998).

[73] *Id.* at 698. Criminal mistreatment involves intentionally or knowingly causing physical injury to a dependant child, to whom an individual owes a familial duty. OR. REV. STAT. § 163.205 (2003) (amended 2005).

[74] *Id.* at 699.

[75] *Id.*

gram and any other program directly related to counseling related to . . . your conduct towards children[,] father any child." [76]

An Oregon appellate court affirmed this antiprocreation condition, arguing that the defendant's recidivism and pattern of abuse, combined with the court's fear for the safety of any child the defendant has or would father, warranted the condition.[77] The court emphasized that the restriction on his reproductive rights was temporary and not a total ban.[78] By requiring the defendant to undergo drug and anger management treatment,[79] the court hoped to make Klein a law abiding and socially functioning citizen. And, based on the defendant's pattern of behavior towards children, the court required him to attend counseling related to his conduct towards children so that he could safely interact with children in the future.[80] Thus, the Oregon court justified the restriction based on the possibility of rehabilitation and held that it "interfere[d] with [the] defendant's fundamental rights to a permissible degree."[81]

A California court placed a similar restriction on a mother who abused her children in *People v. Pointer*.[82] In this case, the defendant mother of two was devoted to a rigorous macrobiotic diet, eating mostly grains, beans, and vegetables with no fruit, dairy, or meats.[83] The defendant imposed her diet on her two- and four-year-old sons despite their doctor's insistence that it was unhealthy and particularly "hazardous" for the youngest boy who she was breastfeeding.[84] When she finally brought the youngest child to a pediatrician, the "child who was emaciated, semicomatose, and in a state of shock, was dying and in need of immediate hospitalization."[85] The defendant, however, took the child home because she feared the hospital would feed him preservatives that would give him a rash.[86] The doctor then called the police who took the child to the hospital; and even then the defendant would sneak him macrobiotic food and continued to breastfeed him.[87] Eventually, after she abducted her son from foster care and fled to Puerto Rico, a court found her guilty of abandonment and neglect.[88]

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[76] *Id.* (alterations in original).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] 199 Cal. Rptr. 357 (Cal. Ct. App. 1984).
[83] *Id.* at 359.
[84] *Id.*
[85] *Id.* at 360.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 361. The older son was seriously underdeveloped, and the younger boy suffered

Her sentence included five years probation during which time she was to have no custody of any children and was not to conceive a child.[89]

The California appellate court recognized that trial courts have broad statutory authority when imposing conditions of probation that foster rehabilitation and protect the public; however, the appellate court also acknowledged the limits on this discretion.[90] According to California jurisprudence, any infringement on a fundamental right must be reasonably related to a compelling state interest and not be overbroad.[91] Because the antiprocreation condition related to the defendant's recidivism of child endangerment and specifically because her diet would harm even an unborn child she might conceive, the court found the restrictions on the defendant's procreation to be reasonable.[92]

However, the court found that the antiprocreation condition was overbroad and not closely correlated to the state's interest because the trial judge intended the condition only to protect society (via preventing injury to a child) and not to rehabilitate the defendant.[93] Thus, since the appellate court believed that other conceivable means existed to protect the defendant's potential unborn children, such as requiring her to follow intensive prenatal treatment if she were to conceive, it held the antiprocreation condition was too broad, did not serve the state's interest in rehabilitation, and therefore constituted an unconstitutional imposition on the defendant's fundamental right.[94] Consequently, it remains unclear how a California court would rule in a case where a trial court imposed a more narrow antiprocreation condition that served the rehabilitative goal of probation.

Florida has also faced the question of antiprocreation conditions of probation. In *Rodriguez v. State*,[95] the defendant entered a plea of nolo contendere to a charge of aggravated child abuse after she bruised her nine-year-old by hitting the child in the face and against an automobile.[96] She received a sentence of ten years probation with a "special condition" that she not have custody of a child or become pregnant during that time.[97] The appellate court began by stressing that a trial court may impose any conditions of probation that are not

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from "severe growth retardation and permanent neurological damage." *Id.* at 360.

[89] *Id.*

[90] *Id.* at 363.

[91] *Id.* at 365.

[92] *Id.* at 364.

[93] *Id.*

[94] *Id.* at 366.

[95] 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

[96] *Id.*

[97] *Id.* at 8. It is unclear whether this was her first offense. *Id.*

so punitive as to obscure the rehabilitative purpose of probation.[98] The court found, however, that the condition prohibiting Rodriguez from getting pregnant during the ten-year period of her probation related to a noncriminal act that bore no relationship to the crime of child abuse. Therefore, the antiprocreation condition did not reasonably relate to future criminality in light of a probation condition forbidding her from having custody of a minor child. Thus, it did not fulfill the rehabilitative purpose of probation.[99]

To summarize: in two of the five cases above, appellate courts upheld an antiprocreation condition of probation, *Oakley*, a nonsupport case, and *Klein*, an abuse case; in the three other cases, *Talty*, a nonsupport case, and *Pointer* and *Rodriguez*, both child abuse cases, appellate courts invalidated the antiprocreation condition for various reasons. It is obvious that state courts are far from agreeing on when, if ever, an antiprocreation condition of probation is appropriate. State courts have also not reached a consensus on how to determine when an antiprocreation condition would unduly restrict the liberty of a probationer.

III. ANTIPROCREATION CONDITIONS ARE NECESSARY AND JUSTIFIABLE IN CERTAIN CIRCUMSTANCES BUT MUST BE LIMITED IN TIME

As the above case law illustrates, situations arise with egregious facts or defendants who have a history of ignoring or consistently violating the law, leading judges to believe that sometimes it is necessary and justifiable to restrict the reproductive rights of probationers. This Section argues that antiprocreation conditions are justifiable under some circumstances as a means to rehabilitate offenders and are necessary to protect existing and future children of offenders. However, antiprocreation conditions are only appropriate when they can be lifted upon the occurrence of a defined event or at a specific time.

A. Circumstances that Justify Imposing Antiprocreation Conditions

This Section will compare the reasoning courts used to either uphold or invalidate antiprocreation conditions of probation in the cases summarized above. This comparison will establish a basis for determining under what circumstances antiprocreation conditions are necessary and justifiable.

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[98] *Id.* at 9.
[99] *Id.* at 10.

1. Encouraging Offenders to Become Responsible Members of Society

Oakley and *Klein* expressly provide that an antiprocreation condition can rehabilitate an offender in nonsupport and child abuse cases. The *Klein* court believed the antiprocreation condition would rehabilitate the defendant because of his *history* of drug and violence problems and his *pattern* of abuse to his children.[100] The *Oakley* court provided much detail in explaining exactly why it believed the antiprocreation condition is reasonably related to the state's goal of rehabilitation:[101] The judge spoke in a tone of frustration when he described the defendant's repeated refusal to pay child support despite numerous support orders from the court and with nothing hindering him from working.[102] The judge observed that Oakley had a blatant disregard for the law and needed to be "rehabilitated from his perception that one may flout valid court orders and the judicial process with impunity and suffer no real consequence."[103] Therefore, the judge crafted a sentence that included an antiprocreation condition because he believed it would focus specifically on the defendant's rebuff of prior court orders while forcing him to face his child support responsibility and "convince him to stop victimizing his children."[104] The judge explained:

> Oakley was convicted of intentionally refusing to support his children. The condition at bar will prevent him from adding victims if he continues to intentionally refuse to support his children. As the State argues, the condition essentially bans Oakley from violating the law again. Future violations of the law would be detrimental to Oakley's rehabilitation, which necessitates preventing him from continuing to disregard its dictates. Accordingly, this condition is reasonably related to his rehabilitation because it will assist Oakley in conforming his conduct to the law.[105]

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[100] State v. Klein, 963 P.2d 697, 699 (Or. Ct. App. 1998).

[101] State v. Oakley, 629 N.W.2d 200, 213 (Wis. 2001).

[102] *Id.* at 206.

[103] *Id.* at 206-07 (quoting State v. Oakley, 594 N.W.2d 827, 829 (Wis. Ct. App. 1999), *rev'd*, 609 N.W.2d at 786 (Wis. 2000)).

[104] *Id.* at 207.

[105] *Id.* at 213.

2. *Furthering the Rehabilitative Purpose of Other Specific Conditions of Probation*

In child abuse cases, as a term of probation, judges typically remove a child from the custody of the abuser. As a practical result of this established condition, any children born to the offender during the probationary period will be removed from her custody immediately. How then can an offender be rehabilitated (change her behavior and act responsibly) if she is permitted to have children merely to hand them over to state custody? More generally, how can the custody condition of probation operate effectively absent a concurrent antiprocreation condition?

For example, in the *Rodriguez* case, the court invalidated the antiprocreation condition of the defendant's sentence claiming that it did not relate to child abuse because she was not permitted to have custody of a minor child anyway. So presumably, if she got pregnant and had a child, the court would take the child away. Continually having children and handing them over to the state does not promote responsible behavior, which is the rehabilitative goal of probation. Absent an antiprocreation condition, the custody condition less effectively serves the intended rehabilitative end, suggesting, therefore, that a child abuser should have to prove she can first responsibly take care of her existing children before having more children.

In one New York case, a judge instructed a cocaine-abusing couple not to conceive a child until they could prove that they could care for their four babies currently in foster care. The judge observed:

> It is painfully obvious that a parent who has already lost to foster care all four of her children born over a six-year period, with the last one having been taken from her even before she could leave the hospital, should not get pregnant again soon, if ever . . . . This is a practical, social, economic and moral reality.[106]

This judge saw first hand that allowing women or couples to have babies, who they continually have to hand over to the state because of another probation condition, does not facilitate rehabilitation or teach probationers responsibility. Thus, the one condition, absent the other, does not fulfill the goal in totality.

In *Klein*, though the court did not expressly use the word rehabilitate when ruling to uphold the antiprocreation condition, it did focus

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[106] Santora, *supra* note 1.

on "treatment" of the defendant.[107] Because the defendant had a history of drug problems and violence toward his existing children, the court required him to attend treatment or to otherwise become rehabilitated before having more children.[108] In other words, the court implied that the antiprocreation condition augments the defendant's ability to meet the primary condition of successfully completing treatment.

In *Rodriguez*, the appellate court overturned the antiprocreation condition because the state failed to prove the condition was rehabilitative in light of the fact that past child abuse is not necessarily indicative of future child abuse. After the antiprocreation condition was overturned, in response to a Motion for Clarification by the defendant concerning the child expected from her pregnancy, the court per curium explained the seemingly inconsistent sentence:

> We held the condition prohibiting custody of *any* children by petitioner to be a valid condition of probation and thus the condition applies to custody of *any* children by petitioner, regardless of when the child was or will be born. Consequently, the prohibition applies to custody of appellant's expected child during the term of probation.[109]

This seemingly absurd result occurs because a court cannot fulfill one clearly rehabilitative antiprocreation condition—that of removing an abusive mother from her children—without adding the clarification that she cannot have legal custody of expected children during her probation. Upholding the antiprocreation condition would eliminate the confusion presented by the defendant in her motion for clarification.

3. Protecting the Offender's Existing and Future Children

In specific circumstances like nonsupport and child abuse cases, sound public interest in protecting children justifies antiprocreation conditions. Without an antiprocreation condition, existing and future children of probationers, as well as society, will be forced to bear the cost of consistently irresponsible individuals. These individuals should be rehabilitated and thereby guided to become responsible and productive members of society rather than be allowed to produce children who will become wards of the state or victims of poverty and

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[107] State v. Klein, 963 P.2d 697, 699 (Or. Ct. App. 1998).

[108] *Id.*

[109] Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979).

abuse. At the same time, if the state has no interest in protecting a child, then a judge should not impose an antiprocreation condition.

Limitations must be in place, however to ensure that judges will not have unfettered discretion to impose antiprocreation conditions on offenders for crimes other than nonsupport or child abuse for several reasons: First, an offender must have existing children that he is directly affecting with his criminal actions. In addition, there must be a chance that the welfare or safety of future children would be directly affected if the offender continued his conduct. Thus, although one could argue that an offender who was guilty of petty theft, for example, might be harming his existing children and continued violations might continue to affect these and any future children, the effect would be indirect rather than directly related to the physical welfare of his children.

A comparison of *Oakley* and *Klein* to *Pointer* reveals the importance of the antiprocreation condition acting as a means to protect the existing and future children of the probationer. The *Oakley* court determined that the antiprocreation condition was narrowly tailored to the specific crime, especially in light of the defendant's *intentional* refusal to abide by the law and pay his child support. The judge expected that his probationary conditions would protect the public interest by aiding the nine child victims of Oakley's continued crimes.[110]

Similarly, when determining that an antiprocreation condition best fulfilled the court's concern for the safety of any future children, the *Klein* court considered the defendant's recidivism, his past failure to comply with probation conditions, and his patterns of behavior in addition to potential alternative conditions.[111] In this case, the antiprocreation condition could prove to be especially important to protect any future children conceived by the defendant in light of the fact that the defendant only abused his own children. If the defendant conceived another child prior to completing his treatment, he may ultimately victimize that baby.

On the other hand, in *Pointer*, the court believed that the antiprocreation condition was overbroad and therefore invalid because reasonable alternatives existed to protect future children, such as prenatal care.[112] However, judges have discretion to consider the circumstances and the nature of the defendant. In this case, the judge could consider the likelihood that Ms. Pointer would refuse to submit to the necessary prenatal care for the health of her unborn children, suggest-

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[110] *Oakley*, 629 N.W.2d at 206-08.

[111] *Klein*, 963 P.2d at 699.

[112] People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984).

ing the appropriateness of the antiprocreation condition. This Note supports allowing judges such discretion for cases like *Pointer*, believing that this type of child abuser should be rehabilitated before having additional children and perpetuating the cycle of abuse.

B. Limiting Judicial Authority to Protect a Probationer's Fundamental Right to Procreate: The Importance of a Time Limit

The above cases illustrate how the goal of rehabilitation justifies antiprocreation conditions of probation in certain instances. Concededly, judges should not be able to impose the condition in situations that would unduly or inappropriately limit an offender's fundamental right to have children.

Though most legislatures grant judges a degree of freedom in imposing restrictions on probationers, state appellate courts have established tests to determine whether sentencing judges have overstepped their authority or have infringed on a probationer's constitutional rights. The Supreme Court, however, has not established a standard for addressing the constitutionality of probation conditions.

As the antiprocreation cases illustrate, in determining whether a trial judge has imposed an impermissible condition of probation, most state appellate courts employ a rule that involves determining if the condition of probation is reasonable and relates to the statutory goal of probation.[113] Some states also add a requirement that the condition not be overly broad.[114]

As indicated above, appellate courts confronting an antiprocreation condition of probation have focused on time limits as a means to control overly broad restrictions on a probationer's constitutional liberty. Comparing the condition in *Oakley* and *Talty* illustrates this issue: Mr. Oakley's antiprocreation restriction was drafted to end either when he paid his child support or when the five-year probation term ended. Mr. Talty's antiprocreation condition, however, did not include a time limit and as a result restricted his right to procreate for the entire length of his probation regardless of whether he paid his child support or not.

The *Talty* appellate court expressly distinguished *Talty* from *Oakley* because Talty's sentence lacked a provision to lift the antiprocreation condition after a defined period of time or at the occurrence of a

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[113] Williams, *supra* note 40, at 218; State v. Friberg, 435 N.W.2d 509, 515 (Minn. 1989).

[114] Hughes v. State, 667 So. 2d 910, 912 (Fla. Dist. Ct. App. 1996); Williams v. State, 661 So. 2d 59, 61 (Fla. Dist. Ct. App. 1995); *Oakley*, 629 N.W.2d at 210 (citing Edwards v. State, 246 N.W.2d 109 (Wis. 1976)).

specific event, such as paying off his child support debts.[115] This lack of limitation prompted the court to invalidate the condition. Thus, without a time limit, the antiprocreation condition amounts to an overly broad infringement on a probationer's constitutional liberties.

IV. SUPREME COURT PRECEDENT ON RESTRICTING CONSTITUTIONAL RIGHTS OF PROBATIONERS AND PROCREATION RIGHTS OF PRISONERS

The tests developed by the Supreme Court and applied by the circuit courts in analogous situations reveal that antiprocreation conditions of probation do not drastically expand current precedent. First, the Supreme Court has already restricted other constitutional rights of probationers. Second, circuit courts have used Supreme Court precedent on restricting prisoners' constitutional rights to determine that prison regulations restricting the fundamental right to procreate are valid; such restrictions are comparable to restricting procreative rights of offenders with a different type of sentence—probation. Thus, restricting probationers' fundamental right to procreate is justifiable because the rationale for doing so is analogous to that developed by the Supreme Court and applied by lower courts.

A. Constitutional Rights of Probationers Are Not Immune from Restrictions

Federal courts have upheld conditions of probation that restrict constitutional rights including freedom of speech, association, and religion as well as the right to counsel.[116] In *Griffin v. Wisconsin*,[117] the Supreme Court addressed the issue of a probationer's constitutional rights in the context of the Fourth Amendment. In *Griffin*, probation officers conducted a warrantless search of a probationer's home.[118] The Supreme Court held that a warrantless search does not violate a probationer's Fourth Amendment right because probation "diminishes a probationer's reasonable expectation of privacy—so that a probation officer may . . . search a probationer's home without a warrant."[119]

The Supreme Court did not find it necessary to establish a new principle of law but ruled that because the probationer was under the

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[115] State v. Talty, 814 N.E.2d 1201, 1205 (Ohio 2004).

[116] Evan D. Alexander, *Thirtieth Annual Review of Criminal Procedure, Introduction and Guide for Users: IV. Sentencing: Probation*, 89 GEO. L.J. 1713, 1718-20 (2001) (citing a number of circuit court decisions upholding these conditions of probation).

[117] 483 U.S. 868 (1987).

[118] *Id.* at 871.

[119] *Id.* at 872 (agreeing with the holding of the Wisconsin Supreme Court).

control of the Department of Health and Social Services he is subject to its rules and regulations.[120] Because the probation officers carried out the search of the probationer's home pursuant to regulations that do not violate the Fourth Amendment, then the search itself cannot violate the Fourth Amendment.[121]

The Court emphasized that operating a probation system presents "special needs" beyond those of normal law enforcement, thus justifying the infringement on a constitutional right beyond what would be constitutionally permissible if the regulation were applied to the general public.[122] Yet, any restriction of a constitutional right on a probationer must still fulfill the legislatively defined purposes of probation.[123]

This case is useful to consider in an analysis of antiprocreation conditions to the extent that it speaks to an infringement on a fundamental right. Although restricting procreation does not deal with the "special needs" of running a regulatory system, rather a judge imposes the antiprocreation condition as part of a sentence, the *Griffin* case confirms that the Supreme Court is not adverse to restricting constitutional rights of probationers. In a particularly relevant footnote in the *Griffin* case, the majority wrote:

> We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are "reasonably related to legitimate penological interests." We have no occasion in this case to decide whether, as a general matter, that test applies to probation regulations as well.[124]

Thus, the Court refused to use this case to accept a test for state infringement on a probationer's constitutional rights during probation.

In a footnote responding to the majority's footnote, the dissent recognized that there is no reason to automatically analyze probation regulations using the same standard of review as prison regulations, especially considering that an important reason for the standard established for infringing on fundamental rights of prisoners is to maintain the security and order of the prison.[125] Therefore, the dissent implied

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[120] *Id.*

[121] *Id.* at 873.

[122] *Id.* at 875.

[123] *Id.* (citing Wisconsin law where probation restrictions are "meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large").

[124] *Id.* at 874 n.2 (citation omitted).

[125] *Id.* at 882 n.2 (Blackmun, J., dissenting).

that in future cases, the Supreme Court should develop an entirely new test for probation regulations, unrelated to the rational basis analysis it employs for prison regulations when a state infringes on fundamental rights because probation does not have the added goal of maintaining order and security of a prison.

An understanding of the existing test created by the Supreme Court for restricting fundamental rights in prison is in order before determining whether a new test is necessary, as the dissent has suggested, or whether the test used for prisoners will suffice for probationers.

B. Permissible Infringement on Incarcerated Offenders' Right to Procreate

Bell v. Wolfish[126] is the seminal case regarding prisoners' rights in which the Court established that prisoners do not automatically forgo their constitutional rights merely as a result of incarceration but retain many freedoms such as speech and religion under the First and Fourteenth Amendments respectively.[127]A prison may, however, institute reasonable regulations that restrict or limit constitutional rights of prisoners to fulfill goals and policies of a prison institution, to maintain security and order within the prison, and to remedy day-to-day problems as prison officials see fit using their "professional expertise" with some latitude, discretion, and "wide-ranging deference" to institute policies that maintain order in the prison.[128] In other words, a regulation may infringe on a prisoner's right if the right in question is inherently inconsistent with incarceration.[129]

In *Turner v. Safley*,[130] the Court ruled that any prison regulation infringing on the constitutional rights of prisoners must be "reasonably related to legitimate penological interests."[131] To determine whether a prison regulation is reasonable, the Court developed a four factor analysis now known as the "*Turner* test." First, there must be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it" [132] and the

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[126] 441 U.S. 520 (1979) (upholding a restriction that bans shipment of hardback books from any source other than the publisher for security reasons).

[127] *Id.* at 521 (noting additionally that the Fourteenth Amendment Equal Protection Clause guards prisoners against invidious racial discrimination; and, the Due Process Clause allows prisoners to "claim" protection against additional deprivations of life, liberty, or property).

[128] *Id.* at 547-48.

[129] Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (en banc) (ruling on a prisoner's right to procreate from prison using artificial insemination).

[130] 482 U.S. 78 (1987).

[131] *Id.* at 89.

[132] *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

regulation cannot be "arbitrary or irrational."[133] The second factor asks whether the inmate has alternative means of exercising his constitutional right.[134] The third factor determines what impact allowing the inmate to exercise his right has on guards, other inmates, and prison resources.[135] And finally, the regulation must be facially reasonable. The absence of alternative measures is evidence of a reasonable prison regulation whereas the existence of "ready alternatives" that impose mere de minimus costs on the prison is evidence that the regulation constitutes an "exaggerated response" to goals of the prison.[136]

In weighing the four factors of the *Turner* test, courts routinely consider the basic penological goals of imprisonment: incapacitation, deterrence, retribution, and rehabilitation.[137] In *Turner*, the Court concluded that an inmate-to-inmate correspondence prohibition was reasonably related to a legitimate security interest while a marriage restriction was not reasonable but constituted an exaggerated response to legitimate penological interests and security concerns.[138] The Supreme Court has not yet heard a case relating to a prisoner's right to procreate.[139] However, in the landmark cases of *Goodwin v. Turner*[140] and *Gerber v. Hickman*,[141] the Eighth and Ninth Circuits respectfully

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[133] *Id.* at 90.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Rachel Michael Kirkley, Note, *Prisoners and Procreation: What Happened Between* Goodwin *and* Gerber*?* 30 PEPP. L. REV. 93, 100 (2002) (quoting State v. Baker, 38 P.3d 614, 615 (Idaho 2001)).

[138] 482 U.S. at 91.

[139] Kirkley, *supra* note 137, at 93. Because an inherent factor of imprisonment involves isolation from society, it is not immediately apparent how prisoners can procreate. The most obvious means of procreating would be through conjugal visits; however, prisoners have no inherent right to conjugal visits. States generally consider conjugal visits to be a privilege that prison officials may grant to some inmates; therefore, courts do not consider conjugal visits to be relevant to the *right* to procreate. Gerber v. Hickman, 291 F.3d 617, 622 (9th Cir. 2002) (en banc). Prisons generally prohibit or strictly limit conjugal visits, citing reasons of order, discipline, security, rehabilitation, and financial burdens. Kirkley, *supra* note 137, at 101.

In *Hernandez v. Coughlin*, the Second Circuit held that "[t]he Constitution . . . does not create any protected guarantee to conjugal visitation privileges while incarcerated." 18 F.3d 133, 137 (2d Cir. 1994). Every circuit agrees that there is no constitutional right to conjugal visits. Toussaint v. McCarthy, 801 F.2d 1080, 1113 (9th Cir. 1986) (listing cases supporting the proposition that there is no constitutional right to conjugal visits, for example, Feeley v. Sampson, 570 F.2d 364, 372-73 (1st Cir. 1978); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 758-60 (3d Cir. 1979); Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); Lynott v. Henderson, 610 F.2d 340, 342 (5th Cir. 1980); O'Bryan v. County of Saginan, 741 F.2d 283, 284-85 (6th Cir. 1984); Ramos v. Lamm, 639 F.2d 559, 580 n.26 (10th Cir. 1980)). Therefore, the case law in this area deals primarily with inmates who have attempted to procreate through assisted reproductive technologies.

[140] 908 F.2d 1395 (8th Cir. 1990).

[141] 291 F.3d 617 (9th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 1039 (2002). The prior history of *Gerber* is worth mentioning. In an earlier decision on this case, *Gerber I*, the Ninth

have addressed the issue of a prisoner's request to artificially inseminate[142] his wife.

In *Goodwin*, the defendant inmate was married; he and his wife wished to have a child through artificial insemination. Mr. Goodwin asked prison officials to allow several doctors and a medical assistant to come to the prison to ensure proper collection of the semen, and to perform certain tests.[143] As prison officials refused to accommodate Mr. Goodwin's request because the prison had no provisions in place to carry out his request, he petitioned the court to uphold his right to procreate.[144] The Eighth Circuit refused, upholding the prison regulation and concluding that, under *Turner*, the prison regulation was reasonably related to a legitimate penological interest of retribution.[145]

In *Gerber v. Hickman*,[146] to facilitate artificial insemination, the defendant wanted a laboratory to mail him a plastic collection container as well as a return mailer to be shipped back overnight; or in the alternative, Mr. Gerber requested that his attorney personally return the plastic container to the laboratory.[147] Despite Gerber's offer

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Circuit held that the right to procreate survives incarceration. Gerber v. Hickman, 264 F.3d 882 (9th Cir. 2001). After the release of this decision, commentators jumped to explore the circuit split between this case in the Ninth Circuit in *Gerber I* and the Eighth Circuit in *Goodwin*. *E.g.*, Kirkley, *supra* note 137. However, the Ninth Circuit voted to vacate that opinion and rehear the case en banc, Gerber v. Hickman, 273 F.3d 843 (9th Cir. 2001), thus producing *Gerber II* and eliminating the circuit split. 291 F.3d 617 (9th Cir. 2002) (en banc). The case cited in this Note is *Gerber II*, the en banc opinion issued after the rehearing that affirms the district court holding that the right to procreate does not survive incarceration. *Id.*

[142] Artificial insemination has existed for nearly a century. Judith Randal, *Trying To Outsmart Infertility*, 25 FDA CONSUMER 22 (1991), *available at* http://www.fda.gov/bbs/topics/CONSUMER/CN00012a.html. The process involves collecting and treating a man's semen and then, most commonly, placing it into the woman's uterus. *Id.* Though some women have a successful pregnancy after only one procedure, often repeat inseminations over the course of four to five months are necessary. *Id.* The success rate is between 50 and 65 percent. *Id.*

[143] *Goodwin*, 908 F.2d at 1397. Mr. Goodwin's wife was thirty-years-old and would be thirty-five at the latest date of his release. She would, however, be thirty-one when he would become eligible for parole. The couple wished to use artificial insemination to conceive a child considering the increased risks of Down's syndrome and chromosomal abnormalities possible in a child born from a thirty-five-year-old mother. *Id.* The case does not provide the reason for Mr. Goodwin's incarceration. *Id.*

[144] *Id.*

[145] *Id.* at 1399. The court expressly chose not to address the question of whether the right to procreate using artificial insemination itself actually survives incarceration. *Id.*

[146] 291 F.3d 617 (9th Cir. 2002) (en banc).

[147] *Id.* at 619. Because California prohibits conjugal visits to inmates serving a life sentence and Mr. Gerber and his wife wished to have a child, Mr. Gerber sought to provide his wife with a sperm specimen to use for artificial insemination. *Id.* The main difference between the two cases is that, in *Goodwin*, the inmate's wife was thirty-years-old and would be as old as thirty-five at the time of her husband's release, *Goodwin*, 908 F.2d at 1396, whereas in *Gerber*, the inmate's wife was forty-four-years-old and her husband was sentenced to one hundred years to life plus eleven years, *Gerber*, 291 F.3d at 619. Thus, in *Goodwin*, the couple would still have an opportunity to have children after the inmate's release and, in *Gerber*, artificial insemination would be the couple's only means to conceive.

to bear all expenses, the prison warden refused to accommodate his requests. Although it ultimately reached the same conclusion as the Eighth Circuit, the Ninth Circuit never reached a *Turner* analysis because, based on Supreme Court precedent and constitutional interpretation, it simply held "the right to procreate while in prison is fundamentally inconsistent with incarceration."[148]

1. Restricting Procreation in Prison to Fulfill Penological Goals

In particular, the majority opinion in *Gerber* based its decision on retribution, deterrence, and rehabilitation.[149] The *Gerber* court's finding that the right to procreate is fundamentally inconsistent with incarceration embodies the retributive nature of the restriction.[150] Retribution has been a widely regarded theory of punishment since the 1970s;[151] it is also known as "just desserts" for wrongful conduct.[152] This theory is based on the idea that it is "fitting" and "just" that an individual who has harmed society should suffer harm himself.[153] Retribution does not deal with preventing or maintaining social order or gaining revenge but instead focuses on punishing those who deserve it based on the view of a majority of citizens.[154]

The *Gerber* court's explanation of "technology" reveals the retributive nature of the holding: if "science progressed to the point where [an inmate] could artificially inseminate his wife as easily as write her a letter . . . [our analysis] would not [change]."[155] Such advances in technology would likely allow a prisoner to procreate under the *Turner* test because the mail would provide an alternative means of exercising a constitutional right that would have little or no impact on the guards, inmates, or prison resources.[156] The court avoided the *Turner* test and instead focused on the isolation of prisoners and the removal of certain rights as a matter of deterrence and retribution.[157]

The dissenting judges openly criticized the majority's retributive motives and pointed out that Gerber was not asking to rear a child or supersede normal prison security, he merely wanted to mail his semen

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[148] *Gerber*, 291 F.3d at 623.

[149] *Id.* at 622.

[150] *Id.* at 620.

[151] COHEN, *supra* note 14, § 1:6.

[152] WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(a)(6) (4th ed. 2003) (quoting other secondary sources).

[153] *Id.*

[154] Michael S. Moore, *A Taxonomy of Purposes of Punishment*, *in* FOUNDATIONS OF CRIMINAL LAW 64, 66 (Leo Katz et al. eds., 1999).

[155] *Gerber*, 291 F.3d at 622.

[156] *Id.* at 629-30 (Kozinski, J., dissenting).

[157] *Id.* at 622 (majority opinion).

to his wife.[158] Thus, viewing this issue in a narrower sense, the dissent argued that retribution wrongly remains the sole reason to support the prevention of procreation in prison.[159] If the purpose of prohibiting procreation is to punish offenders, then, according to the dissent, the legislature should make such a decision.[160]

Finally, the *Gerber* court believed that restricting procreation serves to rehabilitate the offender. The court explained that "by quarantining criminal offenders for a given period of time . . . the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity."[161] The theory of rehabilitation stems from the idea that there are underlying causes for a criminal's behavior, and an offender's behavior can be altered by identifying and changing these underlying causes; through treatment, an offender can be reformed and returned to society without the desire to commit additional crimes.[162]

2. *Restricting Procreation to Maintain Security and Order in Prisons*

Courts have historically taken a "hands-off approach" to prison regulations because of the difficulty of effective prison administration, the nature of problems in prisons, and the inefficiency of judicial intervention.[163] Courts have found that "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible to resolution by decree . . . courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform" that are primarily the responsibility of the legislature.[164] At the same time, however, the Supreme Court has recognized that courts have a duty to protect the fundamental rights of prisoners.[165]

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[158] *Id.* at 629-30 (Kozinski, J., dissenting).

[159] *Id.* at 626 (Tashima J., dissenting).

[160] *Id.*

[161] *Id.* at 621 (majority opinion) (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).

[162] LAFAVE, *supra* note 152, § 1.5(a)(3). The *Gerber* court's analysis is questionable considering that the American Bar Association has likened prison gates to a "revolving door rather than a barrier to crime" and observed that "it is almost a guarantee that the defendant will emerge a more dangerous man than when he entered." ABA STANDARDS, *supra* note 10, at 9.

[163] Procunier v. Martinez, 416 U.S. 396, 404 (1974) (challenging mail censorship regulations and the ban prohibiting law students and paralegals from conducting attorney-client interviews of inmates).

[164] *Id.* at 404-05.

[165] *Id.* at 405-06. "But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* (citing Johnson v. Avery, 393 U.S. 483 (1969)).

In addition to justifying the procreation restriction using penological theories, according to the *Gerber* court, institutional needs of the prison warranted such a restriction. Yet, the court all but wrote out this justification for a prison restriction on procreation by asserting that if reproducing were as easy as mailing a letter, an act not prohibited by prisons, the ruling to support the regulation would not change.

The *Goodwin* opinion included a statement by the Bureau of Prisons explaining the problems with allowing the defendant to facilitate the artificial insemination of his wife.[166] The Bureau believed that if artificial insemination were allowed in one case, all of the Bureau's institutions would be forced to develop procedures to facilitate artificial insemination and this would either drain resources or create security risks "especially in connection with inmates with a high security classification."[167]

The previous section showed that federal courts will support a procreation restriction for an offender (in prison) if it fulfills the theories of punishment and if it also serves some practical policy goal based on the offender's situation (i.e., as an inmate). Therefore, states should and can impose procreation restrictions on probationers without violating the Constitution if the restriction is justifiable for analogous reasons.

As the discussions in the *Griffin* footnotes suggest, one cannot assume that the test for restricting a constitutional right during prison automatically applies to restricting that same right during probation. If the policy ends are analogous, however, then the means to achieve those ends can be analogous. In the case of prisoners, the ends are to fulfill the theories of punishment and to enforce a policy of maintaining security and order in the prison. For probation, the ends are to fulfill the theories of punishment and to further a policy of protecting children. Therefore, because the ends are analogous, to achieve those ends states should be able to impose analogous means—restricting procreation.

V. A NEW TEST FOR RESTRICTING PROCREATION OF PROBATIONERS

This Note has shown through existing case law that there are specific times and circumstances that justify and necessitate restricting

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[166] Promoting fairness between male and female inmates was the primary justification that the Eighth Circuit used in *Goodwin* to support its decision to uphold the antiprocreation restriction at issue. Goodwin v. Turner, 908 F.2d 1395, 1400 (8th Cir. 1990). The court found that the Bureau of Prisons had a legitimate interest in treating all prisoners, both male and female, equally. *Id.* Permitting female inmates to procreate would create a significant financial burden in both medical and child care costs. *Id.*

[167] *Id.* at 1397-98.

procreation of certain offenders. In addition, this Note has shown that procreation restrictions are an acceptable means of achieving certain policy goals: to fulfill the penological goal of rehabilitation and to implement the additional practical policy goal of protecting existing and future children of an offender.

Based on the test used by federal courts to restrict procreation in prison combined with existing tests states use to determine when sentencing judges overstep their authority, this Note proposes that trial courts use an ad hoc balancing test to determine when and whether to impose an antiprocreation condition of probation because it is supported by public policies and it is not overly restrictive on the fundamental rights of the probationer.

First, the antiprocreation condition shall not be arbitrary or irrational but shall be reasonably related to the rehabilitation of the probationer either by encouraging the probationer to be a more responsible and functioning member of society or by facilitating the probationer's ability to meet or not frustrate other clearly rehabilitative conditions of probation.

Second, the antiprocreation condition must directly relate to the protection of the probationer's existing and future children, taking into account the probationer's history and character. Although there may be other less restrictive means of achieving the same end, a judge may choose to favor the antiprocreation condition if it is most likely to succeed in protecting existing and future children in light of the probationer's particular circumstances.

Third, the antiprocreation condition shall contain a time limit in the form of a provision that the condition can be lifted if the probationer meets certain other conditions of his probation or remedies specific behavior as the court in its discretion would require.

This test not only meets the judicial limitations set by courts, but it still allows judges the discretion granted to them by legislatures in probation statutes whereby they can impose conditions tailored to the probationer and his or her rehabilitative needs. This test also allows judges to impose antiprocreation conditions of probation when and only in those cases where they are justifiable and necessary according to existing precedent. Applying this test to the facts of *Talty*, *Pointer*, *Oakley*, *Rodriguez*, and *Klein* could all support imposing an antiprocreation condition (as long as the judge included a time restriction).

One commentator views *Klein* and *Oakley* as exceptions to what could be considered a "hard, fast, longstanding rule" that antiprocreation conditions of probation fail and nothing seems to make the outcomes predictable, not the tests applied or the egregiousness of the

facts.[168] The balancing test proposed above aims to do just that—create a means of predictably imposing antiprocreation conditions.

This Note does not argue that all child abuser and nonsupport offenders on probation need antiprocreation conditions—far from it. This Note pointedly argues that certain situations are so egregious that public policy supports antiprocreation conditions when the state can prove and the judge believes that the condition will aid in the offender's rehabilitation, will protect the existing and future children of an offender, and will be imposed only for a finite or defined period. Such an ad hoc balancing test is a means by which judges can determine when an antiprocreation condition is both justified and necessary.

VI. PRACTICAL OBSTACLES AND POLICY CONSTRAINTS ON THE USE OF ANTIPROCREATION CONDITIONS: THE COUNTERARGUMENTS

A. Enforcement Problems

As this Note describes, the probation system is founded on the principle that certain types of offenders may become productive members of society if they can be rehabilitated and reintegrated into society by adhering to conditions of behavior set by a court. Enforcement of probation conditions is a key element in serving both deterrent and rehabilitative purposes. The deterrent factor operates when an offender obeys a condition because of the threat of incarceration upon violation of the condition.[169] On the other hand, the rehabilitative purpose of probation involves actions taken to help the offender become productive and responsible or to treat him for specific problems, such as requiring employment or an anger management program.

Critics of antiprocreation conditions cite the difficulty of enforcement to emphasize what they believe is the preposterousness of the condition. For example, in *State v. Talty*, Justice Evelyn Lundberg Stratton of Ohio asked from the bench: "How in the world would a judge enforce this?"[170] Critics might argue that if judges routinely impose conditions on probation that are unenforceable, the institution of probation could be seriously undermined. Others could argue that enforcing an antiprocreation condition could be so costly that it would leave little resources to enforce other probation conditions.

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[168] Jennifer Levi, *Probation Restrictions Impacting the Right To Procreate: The* Oakley *Error*, 26 W. NEW ENG. L. REV. 81, 101 (2004).

[169] *See* COHEN, *supra* note 14, § 1:7.

[170] Editorial, *supra* note 62, at 14A.

Many conditions on probation suffer enforcement problems, however, because a probation officer cannot know the location and actions of every probationer at every moment. For example, a condition that restricts a probationer from entering certain neighborhoods or associating with certain individuals might prove equally as difficult for a probation officer to monitor as an antiprocreation condition. States rely on the fact that at least some probationers will obey the conditions because they are deterred by knowing that they will be incarcerated if the state discovers a violation.

B. Gender Equality

Some commentators believe forced birth control has a disproportionate impact on minorities and women.[171] Even in cases involving an antiprocreation condition on male probationers, these commentators explain that the ultimate onus still rests on the woman.[172] One dissenting judge in *Oakley* recognized the fact that "the risk of imprisonment creates a strong incentive for a man in Oakley's position to demand from the woman the termination of her pregnancy. It places the woman in an untenable position: have an abortion or be responsible for Oakley going to prison for eight years."[173] Also considering *Oakley*, one commentator illustrates the irony involved in the case: whereas women are generally victims of a failure to pay child support, they will also be victims should they become pregnant and have to make this choice.[174]

This Note is sympathetic to the concerns of these commentators and does not aim to promote a policy that disproportionately impacts women and minorities. It does not support a general condition of forced birth control in all child abuse and nonsupport cases. Instead, this Note supports antiprocreation conditions only in certain types of cases that meet specific criteria subject to an ad hoc balancing determination by the sentencing judge.

However, it is the reality of any procreation restriction that women will be impacted differently and potentially disproportionately.[175] The question of fairness to women was also an issue in antiprocreation

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[171] *E.g.*, Janet F. Ginzberg, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 983 (1992) (discussing implications of government distribution of Norplant).

[172] *E.g.*, Roth, *supra* note 8, at 411 (discussing State v. Oakley, 629 N.W.2d 200 (Wis. 2001)).

[173] *Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting).

[174] *See* Roth, *supra* note 8, at 412-13 (exploring how reproductive policies, including antiprocreation conditions, burden women).

[175] Equal protection issues are beyond the scope of this Note.

restrictions in prison. The *Goodwin* court expressly refused to review the issue under strict scrutiny, despite the fact that the prison regulation affects Goodwin's wife's fundamental right to procreate.[176]

Thus, both enforcement issues and gender inequalities exist in other situations, either during probation or in prison, and do not outweigh a state's interest in enforcing policies in those situations. Therefore, these same arguments alone should not and cannot defeat the interests in imposing antiprocreation conditions.

VII. CONCLUSION

Policies or laws that infringe on fundamental rights constitute no trivial matter and require serious deliberation. This Note has shown that restricting fundamental rights of criminals is not a new concept. This Note has also shown that federal courts of appeals have already restricted procreative rights of incarcerated offenders according to Supreme Court precedent. Therefore, restricting the reproductive rights of offenders who have committed certain crimes such as child abuse or nonsupport and are sentenced to probation is not a radical extension of either existing policy or law and in specific situations is necessary and justifiable as a matter of reality.

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[176] Goodwin v. Turner, 908 F.2d 1395, 1399 (8th Cir. 1990).

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