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The Right Responsibility: Does the Right to Procreate Include the Responsibility to Parent?

A. FELECIA EPPS*

I. INTRODUCTION: MEET NELL

Nell gave birth to her first child, Joyce, in 1988.1 Nell received no prenatal care while pregnant with Joyce.2 Joyce was born with cocaine in her system.3 A social worker from Child Protective Services (CPS) reviewed the case carefully before determining that Joyce could leave the hospital with Nell.4 The next year, Nell had another child, Beth.5 Like Joyce, Beth was exposed to cocaine while in her mother's womb.6 Beth too was allowed to go home with Nell after a social worker from CPS investigated the case.7 Nell's third child, Crystal, was born in 1990.8 Like both of her sisters, she had been exposed to cocaine prior to birth.9 Once again, following an investigation by a CPS worker, Crystal was allowed to go home with Nell.10 In 1991, CPS received an anonymous report that Nell was using crack cocaine and leaving her children unattended.11 The social worker who investigated the report found that Nell had a messy home.12 She never found Nell and the case was closed.13 In 1992, Nell gave birth to Patrick. He too was born with cocaine in his system.14 The social worker called to investigate the case removed Patrick from Nell's home.15

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1. ELIZABETH BARTHOLET, NOBODY'S CHILDREN 79, (Beacon Press 1999) [hereinafter NOBODY'S CHILDREN].
2. Id.
3. Id.
4. Id.
5. Id.
6. NOBODY'S CHILDREN, supra note 1, at 79.
7. Id.
8. Id.
9. Id.
10. Id.
11. NOBODY'S CHILDREN, supra note 1, at 79.
12. Id.
13. Id. at 80.
14. Id.
15. Id.
Nell’s story is becoming more common in the world of those who work for agencies charged with protecting our children. It presents a difficult challenge to those who want to protect the children and reunite the family. What role the courts should play in accomplishing these objectives is still in question. Is imposing a condition on a mother, like Nell, that she give birth to no more children until she can care for Patrick and his siblings a legally permissible action?

Proponents of such action might argue from a common sense standpoint that since Nell is not capable of caring for the children she already has, she should give birth to no more. Allowing Nell to continue to have children only jeopardizes the welfare of all of Nell’s children and places an additional financial burden on society. Nell will never “get herself together” and be able to care for her children until she stops having more children. But those who would take steps to curb Nell’s procreation rights will immediately encounter a major obstacle—the right to freedom in procreation decisions.

The United States Supreme Court has held that the fundamental right to privacy includes the right to freedom in procreation decisions.16 Does the right to freedom in procreation decisions include the right to have children you cannot or will not provide for physically, financially, and emotionally? In two recent cases, a New York family court answered “no” to this question. Both cases involved parents who had a history of substance abuse and child neglect resulting in the removal of another child from their custody.17 Among the conditions the court imposed as part of the plan to protect the children and reunite them with their parents, was that the parents have no additional children until they regained custody of those already in the care of others.18 According to the New York Family Court, the United States Supreme Court cases dealing with the rights of families and parents support the conclusion that the right to bring children into this world includes the corresponding responsibility to take care of them. The decisions in New York appear to make sense under the circumstances presented in each case. They do, however, raise three questions. First, do Stanley v. Illinois19 and other cases

16. Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to privacy protects a woman’s right to choose to have an abortion); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that unmarried persons have a right to privacy in deciding whether to use birth control). See also Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the right to privacy includes the right of married persons to make procreation decisions); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (preventing involuntary sterilization of a criminal on equal protection grounds). See infra notes 195-213 and accompanying text.
19. See infra notes 124-191 and accompanying text.
dealing with family rights support the conclusion that the ability to care for a child is a condition precedent to procreation? Second, what impact do cases dealing with the right to privacy in procreation have on the issue? Finally, in the face of Supreme Court precedent dealing with the right to privacy, is it legally permissible for a court to impose a “no more kids” condition on parents as part of a case plan focused on protecting the child and reuniting the family?

This article will explore these questions. It will start by discussing the process by which children are removed from a home due to maltreatment as background for a discussion of the two New York cases. Next, the two cases will be discussed and the analysis used in each case will be compared. The history of the right to privacy as it relates to freedom in procreation decisions, parental rights, and family rights will provide additional background. I will demonstrate that cases dealing with the right to privacy in procreation decisions are applicable to the “no more kids” condition, while parental right and family rights cases miss the point. Consequently, parental and family rights cases are not adequate support for the New York court’s decisions.

This article argues that United States Supreme Court precedent in the area of procreation rights should be considered when evaluating the “no more kids” condition. Such precedent does not support the position that the freedom to make procreation decisions is somehow conditioned on the ability or desire to care for a child. Restrictions on the right to make procreation decisions, like all restrictions on fundamental freedoms, are subject to strict scrutiny. Thus, they are permissible only if they are narrowly tailored to meet a compelling government interest and are not overly broad. Additionally, such restrictions must be effective to accomplish the stated goal. The government clearly has at least one compelling interest at stake in this situation—protecting the children involved. Arguably, it has a second compelling interest in protecting society from the dangers of parents who give birth to children but lack the means or desire to care for them. Faced with children in jeopardy and increasing state budgets, the state must somehow respond. However, we must consider whether the imposition of a “no more kids” condition is a narrowly tailored means to further those interests.

This article will argue that adding the “no more kids” condition is not only ineffective, it is unnecessary. Consequently, the condition does not pass the constitutional test and cannot be lawfully imposed. Instead, a carefully developed case plan, that includes support services necessary to protect the child and help the parent resolve their issues, is a more narrowly tailored and more effective way to address the compelling state interests involved. Even in situations involving parents who cannot or will not care for a child, the right to procreate should be treated as fundamental and be entitled to constitutional protection. To do otherwise places us on a slippery slope towards further
procreation limitations on those who are deemed by others in our society to be unfit to procreate.

II. HOW THE CHILD WELFARE SYSTEM WORKS

The Federal government provides funding for state efforts to protect the welfare of children. With this funding comes a requirement that states adopt certain procedures to deal with child abuse and neglect. Although the specific procedures for dealing with situations in which children are alleged to be abused or neglected differ from state to state, the basics remain the same. Abuse and neglect are both covered by the term "maltreatment." The term includes situations where a parent or primary caregiver causes or allows serious harm to happen to the child. Normally the process starts with a report of suspected child abuse or neglect to the state agency charged with administering child protective programs. In Nell's case, the report was made by the hospital where her children were born. Once the report is received, a caseworker is assigned to investigate the report. The report is "screened in" if there is enough evidence to conclude that further investigation should be conducted or "screened out" if there is not enough evidence to suggest that further investigation is warranted. If the Child Protective Services (CPS) worker determines that the child is in immediate danger, they may move the child to a shelter, foster care, the home of a relative, or another appropriate placement. The worker may also gather information to determine what services the family needs to help provide a safe environment for the child. In Nell's case, each worker concluded after a brief investigation that each child, except Patrick, should not be removed from her custody.

Following removal of a child from the home, an initial hearing is held. The court determines whether a temporary order should be entered. This order may temporarily place the child in foster care, mandate other services for the family or child, or even forbid contact pending an adjudication hearing. At the adjudication hearing, the court determines whether any

23. Id.
24. Id.
25. Id.
26. Id.
27. CHILD WELFARE SYSTEM, supra note 22.
28. Id.
29. Id.
30. Id.
maltreatment occurred and whether the child should be under the continuing jurisdiction of the court. If the court determines that the child has been subject to maltreatment, it moves on to the disposition phase of the process.

Disposition may happen directly after adjudication or may take place sometime later. During this phase, the court may order the parent to obtain certain services in order to ameliorate the maltreatment. The order entered by the court may include a visitation schedule. It may also specify services to be provided to the child and family, and it may detail the agency’s obligation to assist the family. A key part of disposition is a case plan proposed by CPS. The case plan provides the steps that will be taken to ensure the child’s safety, lists the services the state will provide to protect the child and help reunite the family, and sets out the steps the parent must go through to regain custody of the child. The plan may include requirements for substance abuse treatment, parenting classes, employment, and housing. If the plan is approved by the court, it becomes a part of the court’s order. The status of a child in foster care must be reviewed every six months to make sure that the child is safe and that the placement is appropriate and necessary. During the review, the court or administrative liaison also evaluates the extent of compliance with the case plan, the progress towards alleviating the causes necessitating placement in foster care, and when the child can be returned to the home or placed for adoption.

Federal law requires that a “permanency hearing” take place within twelve months after the child enters foster care. At this hearing, CPS is required to present a “permanency plan” for the child. The plan addresses where the child will live after foster care. Usually, the goal of the plan is to reunite the child with the parent. The goal may however be adoption,

31. Id.
32. CHILD WELFARE SYSTEM, supra note 22.
33. Id.
34. Id.
36. Id.
37. Id. See also In re Bobbijeann P., 2004 WL 8344480, at *3, and In re V.R., 2004 WL 3029874, at *11-13 for examples of court orders approving case plans.
38. CHILD WELFARE SYSTEM, supra note 22.
40. Id. § 675(5)(C).
41. Id.
42. Id. § 671(a)(15)(B). In most cases, the state must make reasonable efforts to preserve and reunify the family. The case plan must provide that reasonable efforts be made to preserve and reunify families. This includes efforts to avoid removing the child from the family and efforts to make it possible for the child to return home.
custody by a relative, or transition to independent living\textsuperscript{43}. Once the plan is approved by the court, it must be reviewed every twelve months thereafter.\textsuperscript{44} The parent must be able to provide a suitable home for the child within fifteen months of placement in foster care or she risks having her parental rights terminated.\textsuperscript{45}

\textbf{A. Georgia Procedures}

The procedures followed by Georgia juvenile courts provide an example of how the process works in a typical state. In Georgia, the agency charged with providing child protective services is the Department of Family and Children Services (DFCS) within the Department of Human Resources. A DFCS worker may remove a child from his or her home if there are reasonable grounds to believe that the child is suffering from illness or injury, the child is in immediate danger, or removal is necessary to protect the child.\textsuperscript{46} The child is then placed in a foster home or another home approved by the court. Placement may also be in a shelter, hospital, or with a relative.\textsuperscript{47}

A detention hearing must take place within seventy-two hours of the time a child is removed from his or her home due to maltreatment.\textsuperscript{48} The parent or guardian is entitled to reasonable notice of the time, place, and purpose of the hearing.\textsuperscript{49} At this hearing the court determines whether it is more likely than not that the child is deprived due to maltreatment. The child will be released to either his or her parents or guardian, or the child will be detained.\textsuperscript{50} The child will be detained if detention is necessary to protect the child, to prevent the child from being removed from the jurisdiction, or to provide for the child’s care until there is a full hearing.\textsuperscript{51} Within five days of the detention hearing, a petition alleging that the child has been abused or neglected must be filed.\textsuperscript{52} If the child is removed from the home at the detention hearing, an adjudication hearing must occur within ten days. If the child remains in the home, the adjudication hearing must take place within sixty days of the detention hearing.\textsuperscript{53} At the adjudication hearing the court determines whether

\begin{footnotes}
\item[43] \textit{Id.}
\item[45] \textit{Id.} § 675(5)(E). If a child is in foster care for fifteen of the most recent twenty-two months, absent certain special situations, the state must petition for a termination of parental rights.
\item[47] \textit{Id.} § 15-11-48 (f).
\item[48] \textit{Id.} § 15-11-49 (c)(3).
\item[49] \textit{Id.} § 15-11-49 (c)(4).
\item[50] \textit{Id.} § 15-11-49 (d).
\item[52] \textit{Id.} at § 15-11-49 (e) (2007).
\item[53] \textit{Id.} at § 15-11-39 (a) (2007).
\end{footnotes}
there is clear and convincing evidence to support a finding that a child is
deprived. The focus is on present conditions, not past circumstances or
potential future deprivation. The court has broad discretion in making this
determination. If the court determines that the child is deprived, a disposition
hearing must take place to determine the steps that should be taken to improve
the situation for the child and the family. The court may proceed
immediately with disposition or postpone disposition for a later hearing.6

DFCS must develop a case plan within thirty days of the child being
removed from the home. The plan is reviewed each time the court reviews the
disposition order. The plan must be best suited to the protection and
physical, mental, and moral welfare of the child. In most cases, reasonable
efforts must be made to reunite the family. The court may approve,
disapprove or recommend modification of the plan. Once the court approves
the plan, it becomes part of a court order. The plan must be reviewed ninety
days after disposition and every six months thereafter. The court’s order
expires twelve months after removal.

If the plan proposes that the family not be reunited, a permanency
hearing must be held within thirty days of the time DFCS submits the plan. In
every case DFCS must submit a permanency plan and there must be a
permanency hearing for every child within one year of the date the child enters
foster care. The permanency plan must be reviewed every twelve months
during the time the child remains in DFCS custody. If a child has been in
foster care for fifteen of the most recent twenty-two months, DFCS must
petition the court to terminate the parental rights of the parents so that a
permanent placement can be found for the child. The Georgia procedure
follows the mandates of Federal law.

B. Foster Care and Child Maltreatment Statistics

Information available from the Adoption and Foster Care Analysis and
Reporting System (AFCARS) indicates that as of September 30, 2005 there

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54. Id. at § 15-11-54 (a) (2007).
55. Id. § 15-11-55 (a).
56. GA. CODE ANN. §15-11-54 (c) (2007).
57. Id. § 15-11-58 (b).
58. Id. § 15-11-58 (a)(1).
59. Id. § 15-11-58 (a)(2).
60. Id. § 15-11-58(c).
62. Id. § 15-11-58(o)(1).
63. Id.
64. Id.
65. Id. § 15-11-58(m).
were 513,000 children in foster care.66 The majority of these children had been in foster care for seventeen months or less.67 Most lived in foster care homes.68 The goal for 51% of these children was reunification with their parent or principal caretaker.69 Approximately 311,000 children entered foster care during fiscal year 200570 and 287,000 left foster care in 2005.71 Of those leaving foster care, 54% were reunified with their parent or principal caretaker.72 Most had been in foster care for less than seventeen months.73

The National Child Abuse and Neglect Data System (NCANDIS) was created in 1988 in order to establish a system to collect and analyze data relating to child maltreatment and to publish an annual report on child maltreatment. According to its most recent report, during 2004 there were approximately 3 million referrals to child protection agencies of suspected child abuse or neglect, involving 5.5 million children.74 Of this number, 62.7% of the referrals were screened in and 37.3% were screened out.75 Based on the number of referrals screened in, 60.7% were found to be unsubstantiated after investigation.76 The cases of 3,503,000 children were investigated and 872,000 of those children were determined to be victims of abuse or neglect.77 The majority were victims of neglect.78 A small percentage of these child victims (14.5%) were also categorized as victims of


67. Id. at 1. Five percent had been in foster care less than one month; 20% for one to five months; 17% for six to eleven months; and 12% for twelve to seventeen months. Id.

68. Id. Twenty-four percent lived in a foster family home with a relative and 46% lived in a foster family home of with a non-relative. Id.

69. AFCARS REPORT, supra note 66, at 2. The goal for 20% of these children was adoption. Id.

70. Id.

71. Id.

72. Id. at 4. Fifty-four were reunified, 11% were living with a relative, and 18% were adopted. AFCARS REPORT, supra note 66, at 4.

73. Id. Seventeen percent had been in foster care for less than one month, 16% for one to five months, 17% for six to eleven months, and 13% for twelve to seventeen months. Id.


75. Id.

76. Id. at 10.

77. Id. at 23.

78. Id. at 24 (62.4% experienced neglect).
other types of maltreatment, including congenital drug addiction. Most of the child victims had no history of prior victimization.\textsuperscript{80}

The report also addresses the rate of recurrence of maltreatment. In 42.2\% of the states reporting, 6.1\% or fewer of the children who were victims of abuse or neglect during the first six months of the period under review had another substantiated or indicated report within six months.\textsuperscript{81} This was an increase from 29.4\% of states reporting in 2000.\textsuperscript{82} The recurrence statistics indicate that prior victims are 84\% more likely to be victimized multiple times.\textsuperscript{83} Maltreatment of children while in foster care is another important concern. The percentage of children subjected to substantiated or indicated abuse by a foster parent or facility staff was 57\% or less in 84.2\% of the states providing data.\textsuperscript{84} This was an improvement from 57.1\% of states reporting in 2000.\textsuperscript{85} It is estimated that the federal government spent approximately $5 billion on foster care during fiscal year 2006.\textsuperscript{86}

The goal in taking a child from the parent is first and foremost to protect the child. The secondary goal is to allow the parent to get his or her life in order and ultimately to be reunited with the child. If the parent is successful and regains custody, there is a possibility that the child will be victimized by the same parent again. If the parent is not successful in remedying the problem that caused the child to be removed in the first place, the child can be placed for adoption within twenty-two months. Despite this time limit, many children remain in foster homes for long periods of time, in some cases suffering further abuse and neglect, and sometimes being passed from home to home.\textsuperscript{87}

III. DO NOT HAVE CHILDREN UNTIL YOU CAN PARENT THEM

This is in essence what the Family Court of Monroe County, New York said to parents who lost custody of children due to neglect in the two cases mentioned previously. In each case the court decided, as part of a disposition order to impose a condition on the parents that they have no additional children while subject to the court's jurisdiction. The first case involved an

\textsuperscript{79.} CHILD MALTREATMENT 2004, supra note 74 at 24. This number would include children like Bobbijean and V.R., discussed infra notes 62-101 and accompanying text.
\textsuperscript{80.} CHILD MALTREATMENT 2004, supra note 74, at 24 (74.3\% had no history of victimization).
\textsuperscript{81.} Id. at 27.
\textsuperscript{82.} Id.
\textsuperscript{83.} Id. at 28.
\textsuperscript{84.} Id.
\textsuperscript{85.} CHILD MALTREATMENT 2004, supra note 74, at 28.
\textsuperscript{86.} U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, PAYMENTS TO STATES FOR FOSTER CARE AND ADOPTION ASSISTANCE 274 (2007).
\textsuperscript{87.} NOBODY'S CHILDREN, supra note 1 at 81-86 (discussing problems in the foster care system).
infant, Bobbijean, who was removed from her mother Stephanie’s custody shortly after her birth. Due to the presence of cocaine in Bobbijean’s system at birth, she was not even allowed to leave the hospital with Stephanie.

A. In re Bobbijean

Stephanie was not new to the child welfare system. Her other three children were previously removed from her custody by DHHS as a result of neglect proceedings. Both Stephanie and Rodney, Bobbijean’s father, were drug addicts. Stephanie appeared in court at only one of the court proceedings dealing with Bobbijean. Rodney never appeared.

At trial, the DHHS caseworker testified about the facts surrounding Bobbijean’s removal as well as the facts surrounding the removal of the other children. Both parents had serious drug problems and had failed to comply with court orders relating to their other children. These orders required that the parents obtain mental health counseling, substance abuse treatment, and parenting classes. Neither parent showed up at the trial so the caseworker’s testimony was not rebutted. The court found by clear and convincing evidence that Bobbijean had been neglected by her parents and was in imminent physical danger. It based this conclusion on several facts. First, despite being ordered to obtain certain services as part of prior neglect proceedings, the parents failed to act. In addition, they failed to attend meetings scheduled with DHHS workers. The mother neglected her

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89. Id. at *1.
90. Id.
91. Id. at *2.
92. Id. at *1.
94. Id.
95. Id.
96. Id. at *2. Under New York law, family courts have the authority to order that the parents take various steps including to “cooperate in obtaining and accepting medical treatment, psychiatric diagnosis and treatment, alcoholism and drug abuse treatment, employment or counseling services, or child guidance.” N.Y. CT. RULES § 205.83(a)(5) (McKinney 2005). A court may also order the parent to “do or refrain from doing any other specified act of omission or commission that, in the judgment of the court is necessary to protect the child from injury or mistreatment, and to help safeguard the physical, mental and emotional well-being of the child.” Id. § 205.83(b)(5). The court referred to this provision in support of its decision to impose the “no more kids” condition. This provision gives the court authority to order and enforce other conditions as well.
98. Id. at *2.
99. Id.
100. Id.
responsibilities to Bobbijean by testing positive for cocaine during her pregnancy and at the time Bobbijean was born. The court took the unusual step of ordering as part of the disposition plan that Bobbijean's parents have no more children until all of their children were being raised by a natural parent and no longer cared for at the public's expense. The court described its action as requiring Bobbijean's parents "to act like responsible parents and . . . have no more children unless they could parent them." The court noted that Bobbijean was motherless and fatherless—in essence born into a "no parent" family. The court expressed doubt that Stephanie should become pregnant again. The Court opined that "babies deserve more than to be born to parents who have proven that they cannot possibly raise or parent a child." The court rejected the argument that the right to privacy includes the right to have an unlimited number of children. It cited Griswold v. Connecticut, Roe v. Wade, and Lawrence v. Texas as the possible source of such a right. The court moved on, however, to note that another case, Stanley v. Illinois, impliedly rejects the idea that there is a right to have an unlimited number of children. The court gleaned from the holding in Stanley that it is not the right to conceive a child that is protected but rather the right to conceive and raise a child. Next, the court cited several Supreme Court cases that emphasized the "precious" nature of family rights. Based on these cases, it concluded that "there is absolutely nothing precious about giving birth to repeated children, only to immediately require friends,
relatives, or strangers, as well as society as a whole, to raise those children at
its expense."\(^{117}\)

The court continued its analysis by balancing the right of the individual
against the right of the child to be protected and the rights of society not to be
saddled with the physical and financial burden of caring for the child.\(^ {118}\) It
went on to discuss the current foster care burden to illustrate the financial cost
of caring for children born into "no parent" families.\(^ {119}\) The ultimate goal of
the disposition plan was to help the parents become adequate.\(^ {120}\) This goal
would be more difficult to achieve, the court reasoned, if the parents were
allowed to have additional children.\(^ {121}\) The court declined to specify what
steps the parents should take to avoid having another child.\(^ {122}\) It
noted that there are many methods of birth control, including sterilization, available to
the parents.\(^ {123}\) If they chose sterilization, it would be available at no cost.\(^ {124}\)
The court was careful to specify that is was not encouraging the mother to get
an abortion if she got pregnant.\(^ {125}\) It ended its decision by stating that "[t]he
generosity and kindness of society has been abused enough . . . existing
children have been neglected enough, and this court will do all it can to end
this pattern of behavior."\(^ {126}\)

A few months later, in a similar case, *In re V.R.*,\(^ {127}\) the court expanded upon the analysis it had begun in *BobbiJean*.\(^ {128}\)

\[B. \textit{In re V.R.}\]

V.R.'s mother, J.W., was a homeless, unemployed, drug abuser and
prostitute.\(^ {129}\) She had given birth to seven children by seven different
fathers.\(^ {130}\) All of J.W.'s children had been removed from her custody.\(^ {131}\) V.R.,

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id. at *5*. The court discussed the details of the county foster care budget. It noted that the most
recent county foster care budget was $32 million. In 2001, the average cost of DSS family foster care per
child per year was $22,931; "purchased family care" was $27,753; "residential care" was $84,013. *In re BobbiJean P.*, 2004 WL 834480, at *5.

\(^{120}\) Id. at *6.

\(^{121}\) Id.

\(^{122}\) Id. at *5.

\(^{123}\) Id.

\(^{124}\) In re BobbiJean P.*, 2004 WL 834480, at *6.

\(^{125}\) Id.

\(^{126}\) Id. (footnote omitted).


\(^{128}\) See, e.g., id.

\(^{129}\) Id. at *1.

\(^{130}\) Id.

\(^{131}\) Id.
the youngest child, was born with cocaine in her system.\textsuperscript{132} She was removed from J.W.'s custody when J.W. left the hospital.\textsuperscript{133} Although J.W. was given visitation rights, she never visited V.R.\textsuperscript{134} At the disposition hearing, the court notified the parties of its intent to impose a special condition that must be met by J.W. if she was to regain custody of V.R.\textsuperscript{135} She was to conceive no more children while subject to the court's jurisdiction until she reclaimed all of her children from foster care and other caretakers.\textsuperscript{136} J.W. objected to the condition and requested time to submit an argument in opposition.\textsuperscript{137} DHHS presented a case plan with the stated permanency goal of reunification as required under New York law.\textsuperscript{138}

J.W. did not attend the final hearing.\textsuperscript{139} As in Bobbijean, the case worker's testimony was not rebutted.\textsuperscript{140} The case worker testified to prior referrals.\textsuperscript{141} Although J.W. had been ordered to participate in substance abuse treatment, mental health counseling, and parenting services, she had not cooperated with DHHS efforts to provide her those services.\textsuperscript{142} The court found that J.W. had completed none of the programs ordered by the court and that V.R.'s health and safety were at imminent risk.\textsuperscript{143} In addition, the court found that J.W. had neglected her responsibility to V.R. by testing positive for cocaine during her pregnancy and causing V.R. to be born with cocaine in her system.\textsuperscript{144} The court found by a preponderance of the evidence that J.W. had neglected J.R.\textsuperscript{145} Next, the court discussed provisions in New York law regarding dispositional orders that allowed the court to impose various conditions that a parent must meet in order to reclaim his or her child from foster care.\textsuperscript{146} Under state law, it could require that J.W. cooperate with the supervising agency in remediying specified acts or omissions found to have

\begin{thebibliography}{99}
\bibitem{132} In re V.R., 2004 WL 3029874, at *1.
\bibitem{133} Id.
\bibitem{134} Id. at *1 n.7.
\bibitem{135} Id at *2.
\bibitem{136} Id.
\bibitem{137} In re V.R., 2004 WL 3029874, at *2.
\bibitem{138} Id. at *2.
\bibitem{139} Id. at *3.
\bibitem{140} Id.
\bibitem{141} Id.
\bibitem{142} In re V.R., 2004 WL 3029874, at *3.
\bibitem{143} Id.
\bibitem{144} Id.
\bibitem{145} Id.
\bibitem{146} Id. at *4.
\end{thebibliography}
caused the neglect.\textsuperscript{147} It could also order J.W. to do or not do certain things that the court deemed necessary to protect the child.\textsuperscript{148}

As it had done in \textit{Bobbijean}, the court emphasized the United States Supreme Court cases that focused on the fundamental nature of family rights.\textsuperscript{149} It stressed that the constitutional rights involving parents and children are about relationships.\textsuperscript{150} Although there is a right to family integrity, there is not a right to give birth to children who must be raised by society and the welfare system.\textsuperscript{151} According to the court, to do so was equivalent to a crime—endangering the welfare of a child.\textsuperscript{152} The sole focus should not be on the reproductive freedom of the parent to the exclusion of the rights of a child who has already been born. The court found no law promoting as "precious," the right of parents to have babies without the responsibility of raising them.\textsuperscript{153}

In \textit{V.R.}, unlike \textit{Bobbijean}, when the court turned to the constitutional right to privacy, it actually addressed the issue and attempted to demonstrate how imposition of the "no more kids" condition met the strict scrutiny standard.\textsuperscript{154} It considered the specific facts of the case.\textsuperscript{155} First, J.W. had a neglect case pending for V.R. and her other children were already in foster care.\textsuperscript{156} Second, J.W. was not able to care for V.R. physically or financially for the reasonably foreseeable future.\textsuperscript{157} In this situation a "no more kids" order was a legitimate means to meet the state's interests.\textsuperscript{158} The state's objective was to protect children and avoid the additional physical, social, emotional, and financial burden placed on the state by parents unable to care for their children.\textsuperscript{159} The "no more kids" order avoided irreparable harm to children who had yet to be conceived as well as to V.R.\textsuperscript{160} The condition would also aid J.W. in getting her life under control so that she could get V.R. and her siblings back from state custody.\textsuperscript{161} The court concluded that the order was not overly broad because it was not a permanent restriction on

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} \textit{In re V.R.}, 2004 WL 3029874, at *4.
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Id. at *5.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{In re V.R.}, 2004 WL 3029874, at *5.
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id. at *8.}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{In re V.R.}, 2004 WL 3029874, at *8.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id. at *9.}
\item \textsuperscript{161} \textit{Id.}
\end{enumerate}
\end{footnotesize}
J.W.’s right to have children. J.W. would be able to have more children once she regained custody of V.R. and V.R’s siblings or if she was no longer under court supervision.

C. Legal Analysis: Bobbijean and V.R.

The Family Court of Monroe County, New York did not have clear legal support for its decision to impose a “no more kids” condition as part of its orders. The court looked to United States Supreme Court precedent dealing with family rights in support of its conclusions. The cases it relied upon provide tangential support at best. Familial integrity rights, like the right to freedom in procreation decisions, are part of the right to privacy. However, the right to freedom in procreation decisions exists apart from the family rights on which the court focused. In both V.R. and Bobbijean, the court relied on Stanley v. Illinois and included a quote from Stanley referencing several other prominent Supreme Court cases in the area of family rights. Neither Stanley, nor the cases cited in Stanley, clearly support the court’s decisions to impose such a condition.

The court in Bobbijean and V.R. gave little consideration to cases such as Griswold v. Connecticut that are at the heart of the matter. In V.R., the court cited Carey v. Population Services and Roe v. Wade in support of the assertion that the right to privacy relating to marriage, procreation, contraception, family relationships, child rearing, and education is not absolute. Although May v. Anderson had nothing to do with the right to freedom in procreation decisions, the New York court seized upon language in May describing as precious the right of parents to custody of their children.

163. Id.
164. 405 U.S. 645 (1972).
166. See infra notes 155-160 and accompanying text.
167. 381 U.S. 471 (1965) (holding that marital privacy includes decisions regarding birth control).
168. 431 U.S. 678 (1977) (holding that a law prohibiting distribution of contraceptives to those under sixteen and allowing only a pharmacist to distribute them to those over sixteen violated the constitutionally protected right to privacy).
169. 410 U.S. 113, (1973) (holding that the right to privacy includes a woman’s right to chose to have an abortion).
171. 345 U.S. 528 (1953).
172. Id. at 533. This case dealt with whether a state where the mother was not domiciled had sufficient personal jurisdiction over her to cut off her right to custody of her children. Her right to conceive a child was not at issue.
explaining that "[t]his court knows of no case law promoting as 'precious' the right of parents to conceive and give birth to babies with no possibility of the parent fulfilling the corollary responsibility to care for and nurture them." 173

The court also cited various New York cases in support of its holdings. 174 Again, the cases cited do not clearly support the conclusions reached by the court. 175 In Bennett v. Jeffreys, 176 a fifteen-year-old girl's parents voluntarily gave her child to an older friend of the family. 177 At age twenty-three, when the mother was better equipped to raise her child, she sought to regain custody. 178 The issue presented in the case was whether the mother could be deprived of custody of her child solely because of the long separation. 179 In addressing this issue the court stated that, "[t]he parent has the right to rear its child, and the child has a 'right' to be reared by its parent." 180 The court noted that there were exceptions to this general rule including surrender, abandonment, persistent neglect, unfitness, and unfortunate or involuntary disruption of custody for a prolonged time. 181 The court in Bennett ultimately reversed a lower court decision giving custody of the child to the mother and remanded the case to the lower court for consideration of what was in the child's best interest. 182 Although the case provides some support for the notion that the child involved has an interest in these cases, it is a bit of a stretch to say that this interest supports the imposition of a "no more kids" condition on the parent.

Another New York case, In re Guardianship of Jones v. Cardinal McCloskey Children & Family Services, 183 involved a dispute over whether DHHS had established the need for a mother to be referred to family planning counseling. 184 The mother involved had given birth to four children in four years. 185 Two of the children had been given up for adoption and another was in foster care. 186 The court held that these facts were sufficient to establish the

177. ld. at 544.
178. ld. at 545.
179. ld. at 544.
180. ld at 546.
181. Bennett, 40 N.Y.2d at 546.
182. ld. at 551.
184. ld. at 391.
185. ld.
186. ld.
mother's need for family planning counseling. The court in V.R. cited a case which holds that a biological father's connection to his child was insufficient in and of itself to create a protected interest in the child. This conclusion does not mean that the father had no right to create the child in the first place. The V.R. Court also cited a series of cases holding that children have certain protected rights in the legal system. Not included in the group of cases the court discussed was any case holding that a child has the right to be raised by his or her natural parents. In addition, neither group of cases provides a clear answer to the question before the court. This leaves the ultimate question—the question that is

187. See id.

188. Indeed, the court in Bobbijean acknowledges the need for family planning counseling in that case stating: "As with Jones the facts of this case and the reality of parenthood cry out for family planning education." In the court's opinion, however, counseling was not enough. It continues stating "this court has gone one step further, by adding the practical condition prohibiting the respondents from conceiving more children." In re Bobbijean P., 2004 WL 834480, at *4.


190. In re V.R., 2004 WL 3029874, at *7. The court cites Application of Gault, 387 U.S. 1 (1966) (holding that juvenile delinquency proceedings must meet procedural due process requirements including notice of the charges, notice of the right to an attorney, and notice of the right to remain silent), In re Winship, 397 U.S. 358 (1970) (holding that due process requires that the burden of proof in juvenile proceedings in which the juvenile is charged with an adult offense be beyond a reasonable doubt), Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (holding that the first amendment protects the rights of high school and junior high public school students to wear black arm bands to protest the war in Vietnam), and Goss v. Lopez, 419 U.S. 565 (1975) (holding that students must be provided the minimal procedural due process safeguards of notice and opportunity to be heard when suspended from school for ten days).

191. The issue of whether a child has the right to be raised by its natural parents has not been dealt with directly by the United States Supreme Court. At least one scholar is of the opinion that the Court has acknowledged a preservationist approach to children's rights. A preservationist view focuses on preserving the family. This view is drawn in part from Santosky v. Kramer, 455 U.S. 745 (1982), in which the Court, when dealing with a challenge to the termination of parental rights, stated that "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." Id. at 760. See Clare Huntington, Rights Myopia in Child Welfare, 53 UCLA L. REV. 637, 649 (2006).

This may mean that the child has a right to be with his biological parent. It may also mean that this right ends when the welfare and safety of the child is at issue. As the welfare of both Bobbijean and V.R. was in jeopardy, neither one had the right to remain with their biological parents. See also Bennett, 40 N.Y.2d at 546, where the court states "[t]he parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent. However, there are exceptions created by extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time." Id. at 546.
actually in front of the court—unanswered. This question is whether the ability or desire to parent a child is a condition precedent to the right to procreate.

The cases the court used to support its decision to impose the "no more kids" condition are discussed below along with other cases addressing issues raised by the court. A Supreme Court of Wisconsin case cited in V.R. strongly supports the conclusion that a parent who intentionally fails to financially support his or her children can be temporarily restricted from having additional children.192

Careful consideration of the facts and analysis used by the United States Supreme Court in the cases it has decided reveals that precedent does not provide a clear answer to the question of whether the right to procreate is conditioned on the ability to care for a child.

D. Right to Privacy in Family Relations

The court in Bobbije an and V.R. indicated that the rights protected by the Constitution are family rights which arise from some type of familial relationship. The Supreme Court has long recognized that families have certain liberty interests protected by the Due Process Clause of the Fourteenth Amendment. These interests include the basic rights parents have to custody and control of their children. The cases discussed below provide a basic outline of the Court's approach to situations in which state law comes into conflict with parental control of children. These cases highlight the special rights accorded to parents with respect to their children. None of these cases address the right of a person to become a parent in the first place.

Meyer v. Nebraska, 193 one of the first cases to deal with parents' rights, was a challenge to the Nebraska legislature's attempt to combat the "baneful effects of permitting foreigners, who had taken up residency in this country, to rear and educate their children in the language of their native land."194 The legislature enacted a law that prohibited teaching languages other than English to children who had not graduated from eighth grade.195 In Meyer, a teacher charged with violating the law challenged it arguing that the law violated his right to pursue his chosen occupation.196 The Court agreed, holding that the Fourteenth Amendment includes the right to marry, establish a home, and

193. 262 U.S. 390 (1923).
194. Id. at 397-98.
195. Id. at 397
196. Id.
raise children. 197 Although the state's desire to create a homogeneous people was legitimate, the means it chose exceeded the limits of state power and conflicted with parents' rights to control the education of their own children. 198

A few years later in Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 199 two private schools challenged the constitutionality of an Oregon law that required children to attend public schools until age sixteen. 200 Under the law, students could not lawfully attend private schools and parents faced criminal prosecution if they failed to send their children to public schools. 201 Consequently, the private schools faced declining enrollment. 202 The Court held that this law "unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control." 203 The Court concluded that the state had no general power to standardize children's learning experience by forcing public school education. Parents have the right, coupled with the high duty, to direct the destiny of children and to prepare them for additional obligations. 204

Although the parent did not ultimately prevail in Prince v. Massachusetts, 205 the Court once again acknowledged the special significance of parents' rights to control the upbringing of their children. 206 In that case, a mother who allowed her daughter to distribute Jehovah Witness literature challenged a Massachusetts' law that prohibited girls under eighteen from selling items on the street. 207 Among other objections she claimed this law unlawfully interfered with her parental rights. 208 Even though the Court upheld the law, it also stated: "[i]t is cardinal with us that the custody . . . and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 209 The Court acknowledged that there is a private realm of family life which the state cannot lawfully enter. 210

197. Id. at 399.
199. 268 U.S. 510 (1925).
200. Id. at 530.
201.
202. Id. at 532.
203. Id. at 397.
204. Id. at 535.
206. Id. at 166.
207. Id. at 160-161.
208. Id. at 164.
209. Id. at 166.
Amish parents in *Wisconsin v. Yoder*\(^{211}\) refused to comply with a state law requiring their children to attend school until age sixteen.\(^{212}\) The parents desired to educate their children consistent with Amish beliefs.\(^{213}\) They believed that high school attendance was contrary to the Amish religion and would jeopardize their children’s salvation.\(^{214}\) In its decision, the Court again acknowledged the high value our society places on parental direction of religious upbringing and the education of one’s children during their formative years.\(^{215}\) In this case, the state’s interest was not totally free from a balancing process because the state impinged on fundamental rights and interests.\(^{216}\) The rights at issue were those protected by the Free Exercise Clause and the traditional interest of parents with respect to the religious upbringing of their children.\(^{217}\) The Court ruled in favor of the Amish parents.\(^{218}\)

The right of family members to live together was at issue in *Moore v. City of East Cleveland*.\(^{219}\) Mrs. Moore lived with her son Dale and her two grandsons, Dale Jr. and John Jr.\(^{220}\) The two grandsons were first cousins.\(^{221}\) A city ordinance defined “family” and provided that only those included within the definition could lawfully live together.\(^{222}\) Under the ordinance, John Jr. was an illegal resident of his grandmother’s house.\(^{223}\) Mrs. Moore challenged the constitutionality of the ordinance.\(^{224}\) In dealing with the challenge, the Court reiterated that the Due Process Clause protects freedom of personal choice in matters of marriage and family life.\(^{225}\) The Court concluded that the individual liberty interests involved had to be balanced against the demands of organized society.\(^{226}\) In this balancing process,

\(^{211}\) 406 U.S. 205 (1972).
\(^{212}\) *Id.* at 207.
\(^{213}\) *Id.* at 209.
\(^{214}\) *Id.*
\(^{215}\) *Id.* at 233.
\(^{216}\) *Yoder*, 406 U.S. at 233.
\(^{217}\) *Id.* at 235.
\(^{218}\) *Id.* at 236.
\(^{220}\) *Id.* at 498.
\(^{221}\)
\(^{222}\) The ordinance provided that “a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child.” *Id.* at 496 n.2. Consequently, Dale Sr. and Dale Jr. were lawful residents of Mrs. Moore’s home because Dale Sr. was Mrs. Moore’s dependent child and Dale Jr. was Dale Sr.’s dependent child. John however, as a Mrs. Moore’s grandson by another of her children, did not fall within the definition of “family” provided by the ordinance. *Id.* at 497.
\(^{223}\) *Moore*, 431 U.S. at 497.
\(^{224}\) *Id.* at 497-98.
\(^{225}\) *Id.* at 499.
\(^{226}\) *Id.* at 501 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).
tradition was a factor and any sound decision was likely to be consistent with tradition.\textsuperscript{227} The Court noted that the family is deeply rooted in the nation’s history and traditions and thus the sanctity of the family must receive constitutional protection.\textsuperscript{228} The family traditionally includes uncles, aunts, cousins, and grandparents living together.\textsuperscript{229} The Court concluded that the ordinance chipped away at the definition of a family by limiting which relatives could live together.\textsuperscript{230} Consequently, the Constitution prevented East Cleveland from forcing individuals to live in certain defined family patterns.\textsuperscript{231} In Moore, the Court extended constitutional protection to the choice of family members who could live together.\textsuperscript{232}

In Troxel v. Granville,\textsuperscript{233} grandparents sought visitation rights with their grandchildren. The children’s father (the grandparents’ son) was deceased.\textsuperscript{234} The children’s mother was married and desired to limit the grandparents’ visitation rights.\textsuperscript{235} A Washington trial court granted the grandparents extensive visitation rights with the children concluding that visitation with their grandparents was in the children’s best interest.\textsuperscript{236} A state statute allowed third parties to be granted visitation if the court concluded that visitation was in the best interest of the child regardless of the parent’s wishes.\textsuperscript{237} In evaluating the statute, the Court noted that the rights of parents “in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Court.”\textsuperscript{238} In light of the extensive precedent regarding parental rights, it was clear to the Court that the Due Process Clause protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.\textsuperscript{239} The Court held that it was a violation of the Fourteenth Amendment to allow a court to decide what is in the best interest of the child at the request of any third party, and in spite of and in opposition to the wishes of a fit parent.\textsuperscript{240}

The cases discussed above involved parental rights to control the destiny of their children. Parents clearly have a fundamental right to determine what

\textsuperscript{227} Id. at 503.
\textsuperscript{228} Moore, 431 U.S. at 504.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at 506.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 501.
\textsuperscript{233} 530 U.S. 57 (2000).
\textsuperscript{234} Id. at 60.
\textsuperscript{235} Id. at 60-61.
\textsuperscript{236} Id. at 61-62.
\textsuperscript{237} Id. at 61.
\textsuperscript{238} Troxel, 530 U.S. at 65.
\textsuperscript{239} Id. at 72.
\textsuperscript{240} Id. at 72-73.
type of education their children will receive, to have custody of their children, and to decide about family living arrangements. The Court has concluded that these rights are fundamental because they are rooted in the customs and traditions of our country. In one sense these cases could answer the question being considered. The right to have a child you have no desire or ability to care for is not rooted in the traditions of our society. On the other hand, these cases do not directly address whether a parent has the right to create the child in the first place. Cases dealing with the parental rights of unwed fathers come closer to providing an answer than cases discussed thus far. The V.R. and Bobbijn court suggests that these cases, particularly Stanley v. Illinois,241 support the "no more kids" condition.

E. Parental Rights of Unwed Fathers

The Court has grappled with the nature of unwed fathers' rights to children born out of wedlock. These cases are helpful because of the Court's consistent return to the conclusion that the father's right to involvement in the child's life is conditioned on the nature of his relationship with the child prior to his attempt to assert the right to be involved. Stanley was the first of several cases in which unwed fathers challenged actions that affected their right of access to their children.242

Peter and Joan Stanley lived together on and off for eighteen years and had three children.243 They never married.244 Peter lived with the children all their lives and supported them financially.245 When Joan died, the State of Illinois took custody of the children without a hearing and without any showing that Peter was an unfit parent.246 Under Illinois law, as an unwed father, Peter had no right to a hearing before the children could be removed from his custody.247 Unwed mothers, married persons, and divorced persons were entitled to such a hearing.248 Peter asserted that this procedure violated his right to equal protection under the law.249 The State argued that it was legally permissible for an unwed father to be presumed to be an unfit parent.250

242. Id. at 647.
243. Id. at 646.
244. Id.
245. Id.
246. Stanley, 405 U.S. at 646.
247. Id. at 647.
248. Id. at 646.
249. Id. at 647.
250. Id.
The Court considered whether Peter was entitled to a hearing, like any other parent would receive, when the state challenged his right to custody of his children. In reaching a decision,

the Court reviewed cases in which it had emphasized the importance of “family integrity.” It cited *Meyer v. Nebraska* and *Prince v. Massachusetts* as cases supporting the rights to conceive and to raise one’s children. In *Stanley*, the Court held that due process required that the father be entitled to a hearing on his fitness as a parent before his children could be taken away. It concluded that denying Mr. Stanley a hearing while extending it to all other parents was a denial of equal protection. The Court rejected the argument that convenience to the state was enough to justify destruction of a family.

*Quilloin v. Walcott* involved an unwed father, Quilloin, who tried to prevent the child’s stepfather, Walcott, from adopting the child. Under Georgia law, in order to have standing to prevent his biological child from being adopted, an unwed father had to go through a formal court procedure to legitimize the child. Until the legitimation was official, the child’s mother had sole authority to make decisions regarding the child. This authority included the right to veto an adoption.

The child was born in 1964. Quilloin and Mrs. Walcott, the child’s mother, never married or lived together. The Walcotts married in 1967 and in 1976, with Mrs. Walcott’s consent, Mr. Walcott petitioned for adoption. In response to the adoption petition, Quilloin petitioned the court for legitimation of the child and for visitation rights. The trial court consolidated the petitions and allowed Quilloin to be heard on all issues. The trial court found that Quilloin gave the child gifts, visited on many special occasions, and

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251.  *Stanley*, 405 U.S. at 646.
252.  *Id.* at 658.
253.  *Id.* at 651. “The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed ‘essential[,]’” *Id.*
254.  *Id.* at 658.
256.  *Id.* at 657.
258.  *Id.* at 247.
259.  *Id.* at 249.
260.  *Id.*
261.  *Id.* at 248.
263.  *Id.*
264.  *Id.*
265.  *Id.* at 249-250.
266.  *Id.* at 250.
provided financial support irregularly. Ultimately, the court concluded that legitimation and visitation were not in the child’s best interest and that step-parent adoption was in the child’s best interest. The adoption was granted. Quilloin appealed to the Supreme Court arguing that he, like the biological mother, should have the right to veto the adoption. Failure to give him this right, he argued, violated the Equal Protection Clause of the Fourteenth Amendment.

In rejecting his claim, the Court emphasized the importance of the family unit citing again cases like Yoder, Stanley, Meyer, and Prince. It noted that Quilloin was not seeking to protect a family but rather to prevent recognition of an existing family unit. The court also noted that Quilloin had never before sought custody and that the child would not be going into an entirely new family but rather into a pre-existing family unit with which he was already familiar. Consequently, allowing the adoption and denying the legitimation could lawfully be based on the best interests of the child. Quilloin could be treated differently than a divorced or separated father because at some point, unlike Quillon, each had a responsibility for the child.

In Caban v. Mohammed, the Court came to a different conclusion based mainly on the fact that the unwed father, Caban, had a substantial relationship with his children. Mr. Caban lived with the mother and the children for several years, he was listed as the father on their birth certificates, and he supported them financially. Under New York law, the children could not be adopted without the natural mother’s consent and only she could veto an adoption. The father had no say in the matter, even if he did have a substantial parental relationship with the children. Mrs. Mohammad

267. Quilloin, 434 U.S. at 251.
268. Id. at 257.
269. Id. at 251.
270. Id. at 253.
271. Id. at 252.
272. Quilloin, 434 U.S. at 255. “We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” Id.
273. Id.
274. Id.
275. Id.
276. Quilloin, 434 U.S. at 256.
278. Id.
279. Id. at 382.
280. Id. at 386.
281. Id. at 386-87.
consented to her husband adopting the children. Based on state law, a New York court allowed Mr. Mohammed to adopt the children, despite Caban’s objection.

The Mohammeds argued that the distinction between fathers and mothers was justified by the fundamental difference between maternal and paternal relationships—the mother normally has a closer relationship with the child than does the father. In addition, the distinction was substantially related to the state’s interest in promoting adoption of illegitimate children.

The Court rejected both arguments and concluded that the presumption that mothers were closer to their children was not necessarily correct as illustrated by Caban’s relationship with his children. It held that the distinction made between unwed mothers and fathers was not substantially related to the state’s interest in promoting the adoption of illegitimate children. In a footnote the Court noted the importance in cases like Caban of the fact that a strong, ongoing, and durable relationship existed between the father and child.

In Lehr v. Robertson, the Court made a distinction between a developed family relationship and a potential relationship. Mr. Lehr failed to follow the methods set out by New York law to establish his right to notice of the proposed adoption of his child. Under New York law, had he registered on the putative father register he would have been entitled to notice. Lehr did not register. Emphasizing once again the protected nature of family rights, the Court discussed the distinction between a biological relationship and an actual relationship of parental responsibility.

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283. Id.
284. Id. at 388.
285. Id. at 389-90.
286. Id. at 389.
287. Caban, 441 U.S. at 391.
288. Id. at 393 n.14. “In Quilloin v. Walcott, we noted the importance in cases of this kind of the relationship that in fact exists between the parent and the child.” Id. (citation omitted).
290. Id.
291. Id. at 251.
292. Id.
293. Id. at 251-52.
294. Lehr, 463 U.S. at 257.
295. Id. at 259-60.

In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases . . . the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of parents are a counterpart of the responsibilities they have assumed.
The Court held that Lehr had only the opportunity to develop a relationship with his child.\textsuperscript{296} Had he grasped that opportunity and accepted some responsibility for the child, the Constitution would have protected that relationship.\textsuperscript{297} The putative father registry set up by New York law was adequate to protect Lehr's potential relationship.\textsuperscript{298} Consequently, the adoption of Lehr's biological child could go forward without him receiving notice or a hearing.\textsuperscript{299}

Finally, in \textit{Michael H. and Victoria D. v. Gerald D.},\textsuperscript{300} the Court declined to give constitutional protection to an unwed father as a parent, despite his pre-existing relationship with his child. The child's legal parents, Carole and Gerald, married in 1976.\textsuperscript{301} In 1978, Carole had an affair with Michael and later discovered that she was pregnant. Carole gave birth to Victoria in 1981.\textsuperscript{302} Gerald was listed as Victoria's father on her birth certificate and he always held Victoria out as his daughter.\textsuperscript{303} After a DNA test revealed that Michael was in fact Victoria's biological father, Michael established a relationship with Victoria and held her out as his daughter.\textsuperscript{304}

Despite marital problems, Gerald and Carole decided to remain together and raise Victoria as their daughter.\textsuperscript{305} After being denied visitation with Victoria, Michael filed an action seeking visitation rights and a declaration that he was her father. However, Michael was not successful because of a California statute that created a presumption that the mother's husband was the father of any child born during the marriage so long as the husband was not impotent or sterile.\textsuperscript{306} This presumption could only be challenged by one of the spouses.\textsuperscript{307} Based on this statute, the California courts denied Michael's

\textsuperscript{296} \textit{id}. at 264.
\textsuperscript{297} \textit{id}. at 260-61.

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

\textit{Lehr}, 463 U.S. at 262.
\textsuperscript{298} \textit{id}. at 262.
\textsuperscript{299} \textit{id}. at 264-65.
\textsuperscript{300} 491 U.S. 110 (1989).
\textsuperscript{301} \textit{id}. at 113.
\textsuperscript{302} \textit{id}.
\textsuperscript{303} \textit{id}. at 113-114.
\textsuperscript{304} \textit{id}. at 114.
\textsuperscript{305} \textit{Michael H.}, 491 U.S. at 114.
\textsuperscript{306} \textit{id}. at 119.
\textsuperscript{307} \textit{id}.
petition. He appealed to the Supreme Court arguing that he was being deprived of a relationship with Victoria without being given a chance to demonstrate his paternity.

The Court, speaking through Justice Scalia, rejected this claim, holding that Michael had no constitutionally protected interest in his parental relationship with Victoria. Once again, the Court returned to its holdings in the family rights cases. The liberty interests protected by the Constitution are based on history and tradition. They are rights “so deeply imbedded within the society’s traditions as to be a fundamental right.” Michael’s relationship with Victoria did not fall into this category. In fact, society has never protected such an interest. On the other hand, society has always protected marriages from claims such as those made by Michael which could disrupt family unity.

Even though Michael was Victoria’s biological father and had a relationship with her, neither he nor Victoria had a fundamental right to that relationship. Such a right has never been recognized and protected by society and therefore it was not entitled to constitutional protection in this case. The biological relationship plus his continued contact with Victoria did not result in a fundamental liberty interest. Instead, the fundamental liberty interest must be based in history and tradition.

The court in Bobbijeann and V.R. is partially correct when it suggests that the holding in Stanley implies that the responsibility to raise a child is part of the right to father a child. Certainly, the facts of the case indicate that Stanley, the father, was in fact caring for his children. This supported the conclusion that he had a relationship with them that due process should protect. It does not necessarily follow from this conclusion that in order to have the right to procreate, one must have the ability or desire to care for a child. It is possible that the Court would have reached a different conclusion had Stanley not been

308. Id.
309. Id. at 120.
310. Michael H., 491 U.S. at 121.
311. Id. at 119-21. “It is an established part of our constitutional jurisprudence that the term ‘liberty’ in the Due Process Clause extends beyond freedom from physical restraint.” Id. (citing Pierce v. Society of Sisters, 268 U.S. 510; Meyer, 262 U.S. 390).
312. Id. at 123.
313. Id. at 111. “In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, hard to objectify), but also that it be an interest traditionally protected by our society.” Id. at 122.
314. Michael H., 491 U.S. at 123.
315. Id. at 124.
316. Id. In a footnote to the Court’s opinion, Justice Scalia discusses extensively the role of societal tradition in determining protected rights. Id. at 127 n.6.
317. See supra note 156 and accompanying text.
involved with his children. This factual difference would have only led to the conclusion that Stanley could not object to the presumption that he was an unfit parent. It would only affect his right to have a relationship with his children. However, it would not mean that he had no right to become a biological father in the first place.

The cases discussed above that address the rights of unwed fathers hold that the rights protected are those that rise out of a relationship. In each the Court emphasized the importance of family-like relationships when dealing with the rights of unwed fathers. Taken together these cases point to one conclusion: biological parents only have protected constitutional rights to children with whom they have a relationship. This clearly means that in the absence of a relationship, parental rights can be terminated and adoption by another adult can be permitted. By analogy, perhaps this means that individuals do not have a right to bring children into the world with whom they cannot have or do not want to have a parental relationship. This conclusion, however, is far from clear.

Similar to other unwed father cases, Michael H. does not deal directly with the right of an unwed father to create a child, rather it deals with the unwed father’s right to have a relationship with a child he has already created. The rule stated in Michael H. could be applied to a “no more kids” condition. Just as there is no historical protection for a father in Michael H.’s position, there is no historical protection of the right to have children for whom you cannot or will not provide. In fact, history and tradition favor parents caring for their own children. If there is no such right, nothing prevents a state from imposing a “no more kids” condition on those who are unable or unwilling to provide for their own children.

The unwed father cases deal with a father’s right to custody or his right to a relationship with his biological child. These cases do not deal with his right to father the child in the first place. Consequently, although they shed some light on the question being considered, these cases do not provide a

318. This is the conclusion the Court reached in later cases involving fathers who sought to assert protected rights but had not developed relationships with their children. See Lehr, 463 U.S. at 249; Quilloin, 434 U.S. at 252. See also supra notes 161-180 and accompanying text.

319. Id.

320. Id.

321. Michael H., 491 U.S. at 121.

322. This is clearly seen in the area of child support. To many people, the idea that any parent should escape a requirement to provide some level of financial support to offspring despite the parent’s disability or poverty is difficult to accept. See Angela F. Epps, To Pay or Not to Pay, That Is the Question: Should SSI Recipients Be Exempt from Child Support Obligations?, 34 RUT. L.J. 63, 70 (2002). This rationale supports the decision in State v. Oakley, 629 N.W.2d 200 (Wis. 2001) (imposing a “no more kids” condition on a father who failed to pay child support).
definitive answer. On the other hand, cases involving the right to freedom in procreation decisions deal with procreation rather than parental rights to children, and thus come closer to answering the initial question presented.323

IV. THE RIGHT TO FREEDOM IN PROCREATION DECISIONS: ORIGINS AND HISTORY

*Skinner v. Oklahoma*324 was the first case to recognize the existence of a right to freedom in procreation decisions. The Court struck down an Oklahoma statute that allowed for the involuntary sterilization of habitual criminals. Under the statute, a person who committed larceny could be sterilized. On the other hand, someone who embezzled, regardless of how much was stolen, was not subjected to sterilization. The Court applied strict scrutiny to the classification made by the statute because of the “basic liberty” involved.325 Although *Skinner* is often cited as the basis for the right to freedom in procreation decisions, the Court did not specifically state that this was a constitutional right. Rather, it decided the case on equal protection grounds, focusing on the irrational classification made by the statute. It applied strict scrutiny and thereby acknowledged the fundamental nature of the right to procreate. In subsequent cases, the Court found what appears to be a permanent home, as part of the to privacy, for the right to freedom in procreation decisions.326

*Griswold v. Connecticut*327 was the first case in which the Court recognized a right to privacy. The petitioners in *Griswold* challenged a state law that prohibited the distribution of contraceptives to married couples. The Court struck down the law, concluding that there is a zone of privacy created by several fundamental guarantees found in the Bill of Rights.328 The Court

323. Cases involving fathers who assume a parental relationship believing that they are the child's biological father, and later discover they are not, provide an interesting contrast. One such case illustrates the approach taken by some courts. In *Paternity of Cheryl*, 746 N.E.2d 488, 495-96 (Mass. 2001), the court refused to set aside a paternity order as requested by a legal father who developed a parental relationship with his child over a period of eleven years only to learn that the child had no biological link to him. The court concluded that he had waited so long to challenge the paternity determination that it was not in the child's best interest to set aside the paternity order. Thus the relationship he had developed over the years was more significant than the biological connection. See Elizabeth Barthalet, *Celebration 50 Article and Guiding Principles for Picking Parents*, 27 Harv. women's L.J. 323 (2004) for additional discussion of this issue. Professor Barthalet argues that such results are appropriate: "[O]nce a child-parent relationship has been created, we should not let it be destroyed simply because there is no DNA match. Parenting, once undertaken, is or should be a lifetime responsibility." Id. at 324.
324. 316 U.S. 535 (1942).
325. Id. at 541.
326. Id.
327. 381 U.S. 479 (1965).
328. Id. at 485-86. Justice Douglas suggested several possible constitutional sources for the right to
described the right to marital privacy as penumbral to other constitutional rights but did not find a specific place for it in the Constitution. The Court’s decision in *Griswold* was based in large part on history and tradition. The Court cited the family rights cases in support of its conclusions.

Subsequently, in *Eisenstadt v. Baird*, a case which challenged a state prohibition on the distribution of contraceptives to unmarried individuals, the Court concluded that: “If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” The prohibition in *Baird* was struck down on equal protection grounds because the law at issue treated single persons differently than it treated married persons.

The landmark abortion case of *Roe v. Wade* provided the opportunity for the Court to clearly explain the constitutional basis for the right to privacy. In *Roe*, the Court held that the right to an abortion is a personal right implicit in the concept of ordered liberty included in the guarantee of personal privacy. In discussing the nature of the right to an abortion, the Court noted that the rights to marriage, procreation, contraception, family relationships, child rearing, and education are all within the Fourteenth Amendment’s concept of liberty and restriction on state action. Once again, in *Carey v. Population Services*, the Court discussed the nature of the right to privacy. It struck down a state law that prohibited the distribution of contraceptives to those under the age of sixteen and provided that only a pharmacist could distribute contraceptives to those over the age of sixteen. The Court reiterated its holding in *Roe* that one aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment is a right of personal privacy. Included in this zone of privacy is the independence to make important

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The possible sources listed were the First Amendment with its right of association, the Third Amendment prohibition against quartering soldiers in private homes, the Fourth Amendment protection from unreasonable search and seizure, the Fifth Amendment privilege to be free from forced self-incrimination, and finally, the Ninth Amendment which provides that other rights not specifically mentioned by the Constitution are still retained by the people. *Id. at 484.* Justice Douglas concluded that the right to privacy was among “penumbral” rights of “privacy and repose.” *Id. at 485.*

330. *Id.* at 453.
331. *Id.* at 454-55.
333. *Id.* at 152-53.
334. *Id.*
336. *Id.* at 681-82.
337. *Id.* at 684.
decisions regarding marriage, procreation, contraception, family relationships, child rearing, and education.\textsuperscript{338} Twenty years later, in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{339} the Court revisited the issues raised in \textit{Roe}. In \textit{Casey}, the Court reaffirmed its basic holding in \textit{Roe} that a woman has a fundamental right to an abortion.\textsuperscript{340} The Court, however, modified its holding in \textit{Roe} by rejecting the trimester framework.\textsuperscript{341} In its place, the Court adopted an approach that examines whether the state has placed an undue burden on the right to obtain an abortion.\textsuperscript{342} The Court stated that “[i]t is settled now, as it was when the Court heard arguments in \textit{Roe v. Wade}, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.”\textsuperscript{343}

\textit{Lawrence v. Taylor}\textsuperscript{344} provides a summary of the cases involving the right to privacy in procreation decisions. The holding in \textit{Lawrence} may in fact support imposition of the “no more kids” condition. In a 5-4 decision, the \textit{Lawrence} Court held that the liberty interest protected by the Constitution includes protection from unwarranted government intrusion into a private dwelling and self autonomy in certain intimate conduct. One of the issues raised in the \textit{Lawrence} case was whether the Due Process Clause of the Fourteenth Amendment prevented a state from criminalizing adult consensual sexual intimacy in the home.\textsuperscript{345}

Justice Kennedy’s majority opinion traced the history of the right to privacy. It noted that broad statements regarding the liberties protected by the Due Process Clause were made in \textit{Pierce}, \textit{Meyer}, and \textit{Griswold}. Justice Kennedy began the analysis with a review of \textit{Griswold}, which emphasized the protected space of the marital bedroom. Next, he moved to \textit{Eisenstadt} which made it clear that the interest protected in \textit{Griswold} extended to unmarried persons.\textsuperscript{346} Justice Kennedy quoted the \textit{Eisenstadt} Court: “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child.”\textsuperscript{347} After examining \textit{Eisenstadt}, Justice Kennedy moved to \textit{Roe}, which

\begin{enumerate}
\item[338.] \textit{Id}. at 684-85.
\item[340.] \textit{Id}. at 846.
\item[341.] \textit{Id}. at 873.
\item[342.] \textit{Id}. at 877.
\item[343.] \textit{Id}. at 849.
\item[344.] 539 U.S. 558 (2003).
\item[345.] \textit{Id}. at 564.
\item[346.] \textit{Id}. at 564-65.
\item[347.] \textit{Id}. at 565.
established the right of a woman to make fundamental decisions affecting her pregnancy. This right is protected as a liberty interest under the Due Process Clause. Finally, he discussed Carey, which extended the protection of privacy interests by holding that the state could not prohibit distribution of contraceptives to those under sixteen.348

The Lawrence majority framed the issue as whether the petitioners were free as adults to engage in private consensual homosexual conduct.349 It also considered whether the majority of society could use the criminal law to enforce its moral views on society as a whole.350 The Court concluded that the moral views of the majority do not provide a legitimate state interest and that adults have a protected liberty interest in deciding how to conduct their private lives in sexual matters. The Court emphasized that the case did not involve minors, injury, coercion, or abuse of a superior relationship. As a result, the state had no legitimate interest in prohibiting this type of conduct.351

In his dissent, Justice Scalia argued that any fundamental liberty must be rooted in this nation's history and traditions. The liberty interest being considered by the Court was not rooted in tradition. As no fundamental liberty was involved, the challenged law need only promote a legitimate state interest.352 Justice Scalia considered moral beliefs to be a legitimate interest.353 He noted that the majority's rationale would protect all sorts of conduct including bigamy, fornication, adultery, and bestiality.354 He charged that majority had signed on to the homosexual agenda.355

These decisions demonstrate that there is a right to privacy in procreation decisions that is distinct from the family integrity rights discussed in other cases. Skinner involved involuntary sterilization.356 Although Griswold dealt specifically with marital privacy and the right of married people to make decisions about procreation, Baird extended the right to unmarried individuals. The latter appears to have nothing to do with "family integrity" or relationships. Instead, it deals with the right of an individual to decide whether or not he or she will become a parent.

348. Id. at 565-66.
349. Lawrence, 539 U.S. at 564.
350. Id. at 571.
351. Id. at 578.
352. Id. at 593.
353. Id. at 599.
354. Lawrence, 539 U.S. at 600.
355. Id. at 602.
356. 316 U.S. 535, 541. The Court refers to the rights of marriage and procreation. This could mean that right to procreation is only protected within the bounds of marriage. Such a view would be consistent with the social mores at the time Skinner was decided. However, at the core of the Skinner decision is the right to create a child. Sterilization ends that right but would not end the right to marry.
Lawrence seems to support both sides of the issue. It gives protection to conduct that takes place in private between two consenting adults. Such protection is provided to parents who wish to engage in sexual conduct in order to become pregnant. On the other hand, the conduct protected affects no one other than the adults who have decided to engage in the relationship. Creation of a child brings the interest of third parties into the picture. The children that have been and have yet to be created, as well as the society that will be called on to protect and care for the children, are all potential victims.

The Court in Lawrence held that there is a right for adults to engage in private consensual homosexual conduct. It seems that this right would end when the conduct adversely impacts innocent children. The conclusion that could be drawn from Lawrence is that parents have the liberty to engage in private sexual conduct but no liberty to create a child who may be the victim of abuse. The existence of victims and potential victims may be enough for the Court to conclude that a "no more kids" condition is permissible under Lawrence. Thus, Lawrence may actually support the "no more kids" condition if the condition in fact protects innocent children. Such a conclusion would be inconsistent with the decisions in Roe and Casey, that protect a woman's right to choose an abortion despite the obvious negative impact on the child. It would also call into question Skinner, which prohibited involuntary sterilization.

The court in Bobbijean and V.R. concluded that the right to freedom in procreation decisions is somehow affected by the cases involving family integrity. In fact, the family integrity decisions address a different concern. If the right to freedom in procreation fits within the right to privacy discussed in Baird, Roe, and Casey, then any restriction on that right must pass the strict scrutiny test. Instead of using cases dealing with the right to freedom in procreation to analyze the "no more kids" condition, the court focused on cases from other areas, including those dealing with family integrity and cases dealing with the rights of unwed fathers. The key to analyzing the situation presented by Bobbijean and V.R. is not the protected nature of the parent-child relationship, but rather under what circumstances the state may interfere with the exercise of the fundamental right to freedom in procreation decisions. As with any other constitutional right, the state may interfere if it has a compelling interest and does so using a narrowly tailored means.

A possible answer to the question of whether a "no more kids" condition is lawfully permissible is found in the approach taken by some courts dealing

357. See supra notes 219-30 and the accompanying text.
358. See supra notes 207-18 and the accompanying text.
359. See supra notes 323 and the accompanying text.
360. See supra notes 262-301 and the accompanying text.
with the use of probation conditions that restrict the right to freedom in procreation decisions.

V. PROBATION CONDITIONS: A COMPARISON

Some courts have sought to impose a "no more kids" condition on probationers who have been convicted of child abuse. In one case, the court imposed the condition on a man convicted of failure to pay child support. Although cases decided by state courts addressing the parameters of a right protected by the federal Constitution are not final authority, the analysis used by the courts in these cases suggests a possible framework for the analysis of the condition imposed as part of a case plan.

A. Probation Restrictions on Procreation: Child Abuse Cases

In some situations, criminal prosecution is an option available to the state in dealing with child maltreatment. If the state chooses this option, a similar issue may arise if the trial court dealing with a criminal offense (child endangerment, battery, etc.) attempts to impose a "no more kids" condition as part of a criminal sentence. The majority of attempts to impose "no more kids" conditions as part of a sentence to probation have been unsuccessful. Discussion of cases in which courts have attempted to impose such a condition demonstrates a possible analysis and provides an interesting contrast.361

The majority of cases in which courts have attempted to impose a probation condition restricting procreation involve offenders convicted of child abuse. People v. Pointer362 is one of those cases. Ruby Pointer was devoted to a macrobiotic diet. The diet did not include fruits, milk products, meat, fish, poultry, or eggs.363 Pointer put her two children on the diet and as a result, they were seriously injured. Pointer was convicted of felony child endangerment and placed on probation for five years. One condition of her probation was that she not conceive a child while on probation.364 In choosing to impose the condition, the trial court considered testimony from a psychologist, who indicated that if the children were ever returned to Pointer, she would put them back on the diet. In addition, she would treat any subsequent children the same way. Finally, because of her fear of chemicals,

363. Id. at 1131-32, n.2.
364. Id. at 1133.
she would not take birth control pills. Pointer challenged the probation condition as a violation of her freedom to make procreation decisions.

In analyzing the probation condition, the appellate court noted that the objective of a probation condition is to foster rehabilitation and protect the public. Any probation condition must be reasonably related to this goal. The court determined that the probation condition directly related to the crime Pointer had committed. Her crime was child endangerment and the condition related to her ability to procreate. The condition forbade conduct that was reasonably related to future criminal acts because, as a result of her commitment to the diet, Pointer would endanger any child she had in the future. Indeed, due to her belief in the macrobiotic diet, a child could be endangered by her conduct before its birth.

Next the court considered whether the condition was too broad, noting that such a heightened level of scrutiny requires that the condition be narrowly drawn. If there is an alternative to the restriction on procreation, the alternative must be used. To the extent such a condition is overly broad, it is not reasonably related to the compelling state interest of reforming and rehabilitating the defendant. The court concluded that there was indeed an alternative to restricting Pointer’s right to procreate. Instead of using the procreation restriction, Pointer could be required to submit to pregnancy testing periodically. If pregnant, she could be required to follow an intensive prenatal and neonatal program monitored by a physician. If necessary for the child’s safety, the child could be removed from her custody at birth. The court was concerned that Pointer, fearing that the judge would throw her in jail should she become pregnant, would be coerced into having an abortion. Because there were alternatives to the probation condition, it was not the least restrictive alternative and was therefore invalid.

Courts in other child abuse cases have followed an analysis similar to that used in Pointer and have reached the same conclusion. Probation

365. Id. at 1136.
366. Id. at 1133.
368. Id.
369. Id. at 1139.
370. Id. at 1140.
371. Id. at 1140-41.
372. See State v. Howland, 420 So.2d 918 (Fla. Ct. App. 1982); Rodriguez v. Florida, 378 So.2d 7 (Fla. Ct. App. 1979); State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976). Livingston involved a twenty-year-old unmarried woman convicted of child abuse for placing an infant on a space heater. She was ordered not to have children while on a five-year probation. The court held that the condition was invalid. Livingston, 372 N.E.2d at 1337-38. In Howland, the defendant was convicted of negligent child abuse. He was sentenced to five years of probation, during which time he was prohibited from fathering any other children. Howland, 420 So.2d
conditions that restrict freedom in procreation decisions have been determined to be invalid despite legitimate concerns about the physical danger the offender poses to other children.

One notable exception is Oregon v. Kline. In that case, the defendant Mr. Kline was convicted of first-degree criminal mistreatment. While on thirty-six months probation for this offense, he abused his two and a half year old daughter by breaking her leg, throwing her in a crib, and cursing at her. Prior to this conviction, Mr. Kline and his wife had their parental rights to their first child terminated as a result of child abuse. During the hearing to determine whether his probation should revoked, the court added a condition to Kline’s probation. He was not to father additional children until he completed drug counseling and anger management treatment. On appeal, the court upheld this condition because of concern for the children’s safety. It noted that the condition was not a total ban on Mr. Kline’s reproductive rights.

B. Probation Conditions Restricting Procreation: Child Support Cases

Despite the holdings in cases involving child abuse which seem to indicate that probation conditions will not be permitted if a reasonable alternative exists, the Wisconsin Supreme Court allowed such a condition to be imposed on a father who had a history of failing to pay child support. In State v. Oakley the defendant fathered nine children by four different women. Oakley was able to work. He had worked in the past, yet he refused to pay his court-ordered child support.

Rodriguez, the defendant pled nolo contendere to charge of aggravated child abuse for hitting her nine-year-old daughter. She was ordered not to marry, become pregnant, or have custody of her children while on probation. The restriction on having custody of children was permitted, but the others were removed. Rodriguez, 378 So.2d at 10. The court in Mosburg cited Pointer, Rodriguez, and Livingston in support of its decision to remove a probation condition requiring that Ms. Mosburg not become pregnant during her two years of probation. Mosburg was charged with child endangerment for abandoning her newborn child. Mosburg, 768 P.2d at 315.
effort to get him to pay. Oakley had not paid. Oakley pled no-contest to three counts of intentionally refusing to support his children in violation of Wisconsin law. The judge rejected the state's request that Oakley be sentenced to six years in prison, choosing instead to place him on probation to allow him the opportunity to work and support his children. The trial judge conditioned Oakley's probation on him not fathering additional children until he could show that he was supporting the nine he already had.

Oakley argued that this condition was an unconstitutional restriction on his right to procreate. On appeal, the Wisconsin Supreme Court concluded that this condition passed constitutional muster because of Oakley's status as a convicted felon. The court discussed the problems with failure to pay child support and its serious long-term consequences to children: poor health, behavioral problems, delinquency, and low educational advancement. Declining to apply the strict scrutiny test, which is traditionally applied in cases involving fundamental rights, the court instead considered whether the condition was overly broad and whether it was reasonably related to the goal of rehabilitating Oakley.

The court concluded that the condition was narrowly tailored to serve the state's compelling interest of having parents support their children and rehabilitating Oakley through probation rather than prison. The condition was not overly broad because it did not eliminate Oakley's right to procreate. He could have more children, without court approval, once he completed his probation or met his obligation to support his children. The condition was reasonably related to his rehabilitation because it prevented him from violating the law by intentionally failing to support additional children. The only alternative the court considered was incarceration, which it noted would eliminate Oakley's right to procreate.
C. Probation Cases vs. Child Deprivation Cases

Applying the analysis used by the courts in these cases suggests how the same type of condition in disposition plans should be analyzed. Ms. Pointer is very similar to the parents in BobbieJean and V.R. Her children were removed from her custody due to maltreatment. In addition, the Pointer Court concluded that a pattern of maltreatment had begun and would likely continue. In BobbieJean and V.R., the parents had already established a continuing pattern of maltreatment. Following the Pointer analysis, the condition would not pass muster.

The question boils down to whether there was a reasonable alternative available that would not impinge on the right to freedom in procreation decisions. The court in Pointer concluded that there was a reasonable alternative. Likewise in BobbieJean and V.R., the same types of reasonable alternatives exist. The court or a CPS worker could monitor the mother while pregnant and remove the child from her custody should that become necessary for the child’s safety. In addition, there is an issue of coerced abortions in both situations. The Pointer Court was concerned that Ms. Pointer, should she become pregnant, would have an abortion in order to avoid going to jail for violating a condition of her probation.395 BobbieJean and V.R. raise the same concern. Although the court states that contempt and six months in jail is possible,396 it also says it is not encouraging the women involved to have an abortion should they become pregnant.397 Yet its order could very well place the women in the position of having to choose between aborting a child and spending time in jail. It could also create the odd situation of the women choosing to sacrifice the life of one child for the possibility of regaining custody of another child.

Under the Kline analysis, the result would be different. Mr. Kline also had an established pattern of child maltreatment. The court imposed a "no more kids" condition in addition to other requirements that were geared towards rehabilitating Kline. The ban was temporary and only lasted until probation expired or Kline completed anger management training, drug rehabilitation, and parenting classes. This is very similar to the "no more kids" condition in a case plan. The plan, like Kline's probation order, contains other requirements that, if fulfilled, will ensure the safety of the child and help the parent to become competent. It is temporary and only lasts for the period of probation or court supervision. Under this approach, the condition is acceptable.

Finally, using the Oakley analysis, the same conclusion would be reached and the condition would be permissible; it is a temporary prohibition aimed at rehabilitating the parent and protecting the child. The same can be said of the condition in a disposition plan. 

Pointer, Kline, and Oakley provide two ways of looking at the same problem. Each court was forced to decide what it could do to protect a child while rehabilitating the parent offender. The problem is not, however, with creating the child; it is failing to take proper care of the child. Using the "no more kids" condition is not the only option that can be used to protect the child and rehabilitate the parent. Because a fundamental right is at stake, courts should be forced to apply strict scrutiny and to consider these alternatives.

VI. STRICT SCRUTINY: PROPER ANALYSIS OF THE NO MORE CHILDREN CONDITION

To properly analyze the condition, we should ask the questions normally asked when dealing with alleged infringements upon what may be a fundamental right. First, we need to ask whether a fundamental right is involved. Based on Skinner, Griswold, Baird, and Roe, there is a fundamental right to freedom in procreation decisions. The court in V.R. seems to acknowledge as much by its attempt to explain how the imposition of the "no more kids" condition meets the strict scrutiny test. After finding a fundamental right, the next question to ask is whether the challenged action impinges on that right. The condition is involuntarily imposed by a state actor and restricts a person's right to make procreation decisions.

The next consideration deals with the state's interest. First, we must ask if there is a compelling state interest involved. If so, we must determine whether the challenged action actually furthers the state interest. Finally, we must consider whether there is a less restrictive alternative to the challenged state action. Each of these questions will be discussed below.

A. What Is the Compelling State Interest?

The state may seek to further a compelling interest by restricting the exercise of a fundamental right. It is therefore important to identify the compelling interests at stake in order to determine whether the restriction

398. The fundamental nature of the right to freedom in procreation decisions is explored above and will not be considered further. See supra notes 195-213 and accompanying text.

399. "In reaching the decision to order the respondent to conceive no more children, ... this court has considered the following factors. The court offers theses factors as a 4-prong test narrowly tailored to meet the 'strict scrutiny test' for impinging on constitutional rights." In re V.R., 2004 WL 3029874, at *8.
furthers that interest. Part of this determination involves considering whether the restriction is effective to accomplish the stated goal and whether the goal can be accomplished by using another means that does not infringe upon a fundamental right. The court in *V.R.* and *Bobbijean* identified two interests at stake. First, there is the interest of the children in being raised by their own parents in a safe environment. In addition, there is the right of society not to be burdened with caring for the children of parents who cannot or will not care for them. Are these compelling state interests actually furthered by the "no more kids" condition?

Protecting children from further danger is clearly a compelling state interest. That goal has been accomplished by removing the children from the home and placing them in a foster home or some other alternative placement. This is an adequate solution to the problem of keeping the children physically safe unless foster care or other alternatives available to the state do not provide a safe environment for the children. Children have the right to be raised by their own parents and parents have the right to the care and custody of their children unless and until the state demonstrates by clear and convincing evidence that the parent is unfit. Children have a right to be raised in a safe and secure environment. Ideally, it should be provided by the parents, but this is not necessary or required. Other adults can provide this safe environment when the biological parents cannot.

The interests of unborn children raise a different issue. A child has no express right to be born to fit and competent parents. It is difficult to argue that a child has a right not be born unless it will be born to parents who have the ability and the desire to care for him or her. The essence of such an argument is that it would be better for the child to have no life at all rather than a life that involves being cared for by someone other than his or her biological parents. The absence of the right is illustrated by the fact that those born with physical conditions, not properly diagnosed prior to birth, who seek tort damages in wrongful life actions are normally met with the response that such claims are not recognized by the law. The refusal to recognize such a claim is based on policy concerns raised by allowing someone to argue that they would be better off had they never been born in the first place. In essence, one would be arguing that non-existence would have been better than life with an impairment.

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400. *Id.* at *7.
402. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L.L. REV. 141 (2005). This article discusses the psychological costs to disabled persons, the disabled community, and society from allowing tort actions based on the idea that one was wrongfully born or that one’s life is wrongful. The author discusses the history of wrongful death and wrongful life actions. She found that only three states allowed actions for wrongful life. *Id.* at 161. She concludes that neither
The real interest the court seeks to protect is the interest of society not to be burdened with the financial and moral responsibility of caring for the children involved. The court emphasized the financial cost of foster care as well as the problems society encounters because of imperfect outcomes for children raised in foster care. There are poor outcomes for foster care children but there are also positive outcomes. This makes it even more objectionable for a court to determine that due to the bad outcomes it is better for children not to be born then to end up in foster care. Even those raised in foster care or in other placements go on to live healthy and productive lives and make great contributions to society. The bottom line seems to be the financial cost involved in providing for children whose parents will not provide for them.

The expenditure involved is not sufficient to create a compelling state interest. First, the percentage of children who will spend some amount of time

action should be allowed because recovery on such claims negates rather than affirms the value of the plaintiff’s life. “This effect is most apparent in the wrongful life context, where recovery turns on the jury’s conclusion that life with impairments is objectively worse than non-existence.” Id. at 176. Although the focus of Professor Hensel’s article is individuals born with impairments of a different type, an analogy can be made to those born whose destiny may be foster care. Imposition of a “no more kids” condition says to children living in foster care and to society that life in foster care or in the care of others is worse than non-existence.


There are shortcomings to life in the foster care system. See NOBODY’S CHILDREN, supra note 1, at 81-97. Foster care often does not provide the nurturing environment that a child needs to flourish. Due to this deficiency, in many cases it serves to compound rather than remedy the problems the child already has as a result of physical abuse or neglect. Id. at 96. In addition, there is a lack of quality foster homes for children in need. Consequently, some are subject to further abuse or neglect in the foster care system. Id. at 86.

In their book, ON THEIR OWN: WHAT HAPPENS TO KIDS WHEN THEY AGE OUT OF THE FOSTER CARE SYSTEM? (Westview Press 2004) [hereinafter ON THEIR OWN], Martha Shirk and Gary Stangler tell the stories of children who grew up in the foster care system. These stories reveal both success and failure. Consider the story of three brothers who ended up in foster care because their home was abusive. Id. at 17. The three, Jermaine, Jeffrey, and Lamar were born just one year apart. Id. After bouncing from foster home to foster home, they were placed in Children’s Village. Id. Lamar settled in, but Jermaine and Jeffrey did not. Id. When the boys became teenagers, Jermaine and Jeffrey ran away several times. Id. They returned to their old neighborhood and began selling drugs. Id. By the time they aged out of foster care, both were in prison. Id. at 18. The youngest brother, Lamar, stayed at the Village and benefited from the programs offered there. He became a star athlete in high school and was awarded a partial scholarship to college. Id. When he graduated from college in 1999, he obtained a job with a major national firm earning $72,000 a year. Id. By 2002, he was happily married and looking forward to building a new home. Id. Unfortunately, by 2002 Jermaine was dead while Jeffrey remained in prison. Id. Despite being in prison, Jeffrey was looking forward to being released from prison and going into business with his baby brother at the end of 2005. Id. at 42.

Who could look at this situation and say that it would have been better had these children not been born? One is living the “American Dream,” thanks in part to the right foster care environment. Another may yet achieve the dream.
in foster care is small. For instance, on September 30, 2005 there were 513,000 children in foster care. That same year, there were an estimated 73.5 million children under eighteen in the United States. In addition, the rate of victimization and the number of victims has been decreasing. The rate was 11.9 per one thousand children in 2004, resulting in 872,000 victims. The rate was 12.4 victims per one thousand children in 2003, resulting in 906,000 victims. Finally, although foster care and child protective services cost a considerable amount each year, the cost is minuscule in comparison to other items in the federal budget. The total budget proposed for fiscal year 2007 was $2.7 billion and only about $5 billion is being spent on foster care services. Society should be concerned about the expenditure of tax dollars no matter how much or how little is involved. However, the money is being spent for a good purpose—protecting the nation’s children. The amount is not so burdensome to society that it risks causing a financial crisis. As illustrated by spending for the Global War on Terror—if the interest is great enough, no monetary cost is too high. This factor should be considered in determining whether or not saving tax dollars is a compelling interest sufficient to justify restrictions on fundamental rights.

B. Will the Condition Be Effective?

The moral force of the court’s condition may be enough to lead the parent to take steps not to have another child. If the parent complies with the condition and all other steps laid out in the case plan, the parent should be able

405. AFCARS REPORT, supra note 66, at 1.
407. CHILD MALTREATMENT 2004 supra note 74, at xiv.
408. Id.
411. The amount budgeted by the Federal government is $4,593,000. The Federal government matches 50% to 83% of the amount spent by states on foster care. This means that the total amount spent on foster care is approximately $10 billion dollars. Children’s Bureau, Title IV-E Foster Care Program Description, http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/fostercare.htm.
to regain custody of his or her children. This seems to be the best result for everyone.413

The answer to whether the condition will be effective or not depends in part on what happens if the parent becomes pregnant or fathers a child while subject to the condition. The court in V.R. states that under New York law willful violation of the disposition plan could result in six months in jail.414 This result not only seems to be inconsistent with our commitment to liberty, but also seems to be inconsistent with Supreme Court precedent.415 In addition, it is possible that someone will be negligent in becoming pregnant. If so, the condition could not be enforced by a contempt of court.

The real consequence of failure to comply with the condition may be that the parents would not be able to successfully fulfill their obligations under the disposition plan, and for that reason be unable to regain custody of the children already in foster care. This would not be appropriate if the parents have turned their lives around in other ways—their only shortcoming being that they had another child. On the other hand, if they remain unsuitable parents, not only will they not get the other children back, the newborn child would be removed from their custody and placed in foster care. The ultimate result would be the very thing the court was trying to prevent—another child being placed into the foster care system. The condition would have had no effect at all and it would not have furthered the compelling state interest.416

If the “no more kids” condition impinges upon a fundamental right, and the state has a compelling interest in protecting the country’s children, it may further that interest by a narrowly tailored means. The means chosen should be the least restrictive alternative.

C. Are There Less Restrictive Alternatives?

There are alternatives to imposition of the “no more kids” condition that will be effective to protect children and provide them with a stable and secure

413. See Adrienne McKay, Termination of Parental Rights in California: Why a Temporary Prohibition on Conception Would Have Better Served Ethan N., 35 S.W. U. L. REV. 61 (2005) for a discussion of how such a condition may have helped to avoid termination of parental rights. Ethan N.'s mother, Carrie, had an assortment of issues as a result of a persistent drug problem. Reunification services ordered included drug rehabilitation and parenting classes, but did not include a “no more kids” condition. Id. at 64. The author argues that California should adopt a statute that allows imposition of such a condition. Id. at 67.


416. Bobbijean's mother was pregnant again shortly after the court imposed the “no more kids” condition. See JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 29 (Cambridge University Press 2006).
environment while the parent takes steps to regain competence. The problem in *Bobbijean* and *V.R.* was drug addiction. In both cases, the court noted this background and also noted that other children had been removed from the parent’s custody due to the same problem.\(^{417}\) It specifically mentioned that drug treatment was part of prior case plans and that willful violations of the terms in the case plan that become a court order could subject the parent to contempt of court.\(^{418}\) In fact, such willful failure to follow the plan was actually a criminal offense under New York law punishable by up to six months in jail.\(^{419}\)

This raises the question of why the pre-existing conditions were not enforced using the contempt power available to the court. It would seem easier in one sense to force someone into drug treatment than to prevent them from becoming pregnant or fathering a child. The same powers the court seems willing to use to enforce the “no more kids” condition could be used to enforce a requirement that the parent get drug treatment or attend parenting classes. These steps had not been taken in *Bobbijean* and *V.R.* Had the requirements imposed by other case plans been enforced, there may have been no need for another child to be removed and another case plan to be created. Compliance with conditions requiring parents to complete substance abuse treatment and attend parenting classes are more likely to help parents become competent and perhaps help them recognize for themselves that they are not ready to have additional children. The imposition of a “no more kids” condition would then not be necessary. The court chose to treat the symptom—exposure of the child to drugs—rather than the underlying problem.

There are two promising alternatives to the imposition of the “no more kids” condition. Both are programs that focus on providing individual treatment plans for parents with substance abuse problems. Both have demonstrated success in getting parents the help they need to overcome drug and alcohol addiction and in reuniting parents with their children.

One program, Family Dependency Treatment Courts (FDTC), was first implemented in Reno, Nevada in 1995.\(^{420}\) The goal of FDTCs is to provide a safe environment for the child while aggressively seeking to resolve the parent’s substance abuse problem as well as other problems that prevent reunification of the family.\(^{421}\) FDTCs bring together a team of professionals.

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419. *Id.*
420. MEGHAN M. WHEELER & CARSON FOX, JR., NATIONAL DRUG COURT INSTITUTE, DRUG COURT PRACTITIONER FACT SHEET I (2006). The number of FDTCs grew to 198 by 2005. At that time, 188 more were in the planning stages.
421. *Id.* at 3. The other problems addressed include housing, physical and mental health, transportation, child care, education and employment. *Id.* at 5.
with expertise in substance abuse recovery and child welfare issues. This team, under judicial leadership, works together to assess the problem and develop a plan that will best address the family’s situation. FDTCs involve frequent court appearances by the parents and frequent meetings with the treatment team to review and adjust the plan as appropriate. The judge provides encouragement, rewards, and also sanctions as needed to help the parent successfully complete the treatment plan. A review of FDTCs in four jurisdictions indicates that they increase the parent’s chances of being reunited with his or her child.

The second program, implemented in Illinois in April 2000 for a five-year test period, provides the parent with a Recovery Coach (RC). The RC becomes involved in the case within ninety days of the temporary hearing and provides proactive case management aimed at getting the parent into treatment quickly and keeping the parent in treatment. Coaches engage in a number of activities including comprehensive clinical assessments, advocacy, service planning, outreach, and case management. The results of the Illinois project indicate that parents who had RCs accessed substance abuse treatment programs earlier and successfully completed the programs at a higher rate than those without RCs. There was also a modest increase in the number of families reunified and a shorter time period to reunification.

The Illinois program reduced the amount spent on child welfare services. FDTC should result in a savings by reducing the number of children entering

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422. Id. at 3.
423. Id.
424. WHEELER & FOX, supra note 419, at 4.
425. Id.
426. NPC RESEARCH, FAMILY TREATMENT DRUG COURT EVALUATION FINAL PHASE I STUDY REPORT 54 (2006). This report notes that as of April 2006 there were 183 FDTCs operating in forty-three states while 100 more were in development. Id. at 2. Although the statistics varied in the individual jurisdictions reviewed, the overall evaluation of FDTC indicated that they improved results in key areas. Significantly, parents in FDTC were significantly more likely to be reunified with their children and less likely to have their parental rights terminated. Children of parents in FDTCs experienced significantly shorter times to permanent placement. Id. Parents were also more likely to enter treatment, remain in treatment and complete treatment. Id.
428. Id. at 1-5.
429. Id. at 1-3.
430. Parents with coaches accessed treatment in 74 days while those without coaches accessed treatment in 108 days. Forty-three percent of those with coaches completed treatment. Twenty-three percent of those without coaches completed treatment. Id. at 2-11 to 2-12.
431. 15.5% of families with coaches were likely to be reunified compared to 11.6% of those without coaches. Id. at 3-3.
foster care and reducing the amount of the time those children spend in foster care.\textsuperscript{432} A collateral benefit of these programs is that children born to parents who complete the programs are born into safe environments. Both of these programs provide a less restrictive alternative to the “no more kids” condition. In addition, they target the root of the problem, which is substance abuse.

Once individualized services have been made available to the parents through recovery coaches or family drug treatment courts, judges should not be reluctant to terminate the parental rights of parents who have not been successful in such programs. Use of programs in providing individualized services tailored to the parent’s needs would meet the requirement that states use reasonable efforts to reunify the family.\textsuperscript{433} In addition, by failing to complete an individualized program focused on their needs the parent would have clearly demonstrated that he or she is not capable of providing a safe and secure environment for his or her children. This would allow plans for permanent placements to be implemented more quickly. Placement while the child is young may be the key to success.\textsuperscript{434} Even in the cases of \textit{V.R.} and \textit{Bobbijean}, reunification was the final goal of the case plan.\textsuperscript{435} Perhaps this should not have been the case.\textsuperscript{436}

A more radical approach is suggested by Professor James Dwyer.\textsuperscript{437} Parents of a newborn child who have certain characteristics would be required to petition a court for custody that child.\textsuperscript{438} In \textit{Bobbijean’s} case, for instance, Rodney and Stephanie would not automatically have the right to custody of their biological children. They would be required to petition the court for custody of their biological children rather than the state petitioning to remove the children from Stephanie and Rodney.\textsuperscript{439} This approach is child-centered and would protect the child from danger. It is questionable whether such a

\textsuperscript{432} It was estimated that the program saved the state $5,615,534.57 as of September 2005. \textit{ILLINOIS WAIVER REPORT}, \textit{supra} note 426, at 3-13.

\textsuperscript{433} \textit{See supra} note 19 and accompanying text.

\textsuperscript{434} This may explain why Lamar was successful while his brothers were not. Lamar was placed in a supportive environment at a young age. His brothers, both older, had a difficult time adjusting. \textit{See supra} note 403.

\textsuperscript{435} \textit{In re Bobbijean}, 2004 WL 834480, at *3; \textit{In re V.R.}, 2004 WL 3029874, at *11.

\textsuperscript{436} Professor James Dwyer seems to question the wisdom of the courts decision. He notes that despite its tough talk, the court in \textit{Bobbijean} ordered reunification as the goal for Bobbijean and her parents feeling that it was obligated to do so under New York law. Dwyer, \textit{supra} note 415 at 29.


\textsuperscript{438} \textit{Id.} at 848.

\textsuperscript{439} \textit{Id.} Characteristics include parents imprisoned at the time of birth, parents who had harmed the child before birth by ingesting illegal drugs, and parents who had been previously found to have abused, neglected, or committed a crime against any child.
In addition, such a plan would likely draw public outrage rather than support. However, serious consideration of such a procedure would perhaps draw attention to the need for additional resources to combat the drug epidemic. Society would be forced to look at the problem and seek solutions.

Although Professor Dwyer's suggestion sounds both intriguing and offensive, in the final analysis, it may not represent much of a change in the status quo. As seen in Bobbijean and V.R., although the biological mother has a legal tie to the child upon birth, the child may be taken out of her custody immediately after birth in certain situations. The difference between this procedure and requiring that certain biological parents meet special criteria before becoming the child's legal parent may not be all that significant. In either case, the parent must meet certain conditions in order to regain custody of their biological child. The burden is on the parent to demonstrate his or her competence. The current system may take fifteen months or longer to free the child from his biological parent so that he may be permanently placed in a stable environment. Professor Dwyer's suggested system may streamline the process and thus lead to the permanent placement of children at earlier intervals. This would be good for the child and good for society as it would reduce the possibility that the child would be shuffled around in the foster care system before finding a suitable home. However, if both systems result in a long process for the child, there is not much need to change.

Finally, additional resources should be used to improve the foster care system. Foster care children experience struggles that children raised in stable homes with their own families do not experience. This seems to be an

440. The unwed fathers' cases give some support to such a system. The Court has held that a biological connection does not automatically create a constitutionally protected right to a relationship with a child. As the Court held in Lehr v. Robertson, 436 U.S. 248, a biological father has the potential to have a constitutionally protected interest in a relationship with his child only if he takes steps to develop a relationship in additional to the biological connection. Id. at 260. This is a concept that is more difficult to apply to a mother because normally at birth the mother obtains a protected legal right to her biological child even if she never develops a relationship with the child. The holding in Michael H. and Victoria D. v. Gerald D., 491 U.S. 110, suggests that even a preexisting relationship may not be enough to give the unwed father a constitutionally protected right to a continuing relationship with his child. Taken together, these cases may mean that Professor Dwyer's suggestion may be constitutionally permissible.

441. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, (Harvard University Press 2005). Professor Guggenheim suggests that our society would find repugnant a system that required that those wanting to become parents obtain a state "parenting license" in order to be a parent and then parceled out children to those licensed by some government arranged system, due to our notion of the natural right to children. Id. at 19. Our society is uncomfortable with government having the power to allocate children, although this may be in the best interest of the children. Id. at 20.

442. Under current law, the state must petition to terminate parental right is a child has been in foster care for fifteen of the twenty-two most recent month absent special circumstances. See supra note 45 and accompanying text.
inescapable fact for most foster children." Foster care is necessary and we should do all we can to make sure that it is a positive experience for the children who must go through the system.

VII. CONCLUSION

_Bobbije_ and V.R. may be just the beginning of the use of "no more kids" conditions in case plans developed to address child maltreatment. With increased efforts to protect children and reduce government spending, there are likely to be more courts who will attempt to impose such conditions, unless steps are taken to prevent this result. Court efforts at forcing parents with children already in the foster care system to not give birth to additional children may be motivated by valid concerns, but may lead down a treacherous path. The end of this path could easily lead to coerced sterilization presented in the form of voluntary compliance with a court-imposed case plan. Those likely to be subject to such coercion are those who are unable to fight back. Imposition of the condition would be justified as a means to protect parents from the consequences of their actions and to protect their potential children from the danger of maltreatment. Imposition of such a condition says to many foster care children that things would be better if they had not been born at all even though many of these children overcome their problems and go on to be productive members of society.

Because of the danger that imposition in one case would lead to imposition in more and more cases, the condition should not be imposed even if it is legally permissible. It is better to channel additional resources into

443. See Martha Shirk & Gary Stangler, _supra_ note 403, and Jennifer TOTH, _Orphans of the Living_, (Simon & Shuster 1997) for stories of children who have lived in the foster care system. All had troubles. Some were successful despite these troubles.

444. The reality of concerns about tacit coercion to be sterilized is illustrated by the actions taken by a family court judge in Kentucky to deal with the problem of "dead beat" dads. Judge Michael Foellger, a family court judge in Campbell County, Kentucky, considered implementing a payment plan for those who "voluntarily" elected to have a vasectomy rather than face thirty days in jail. Judge Foellger reported having already given some "dead beat" dads the option of thirty days in jail or a vasectomy. Six out of seven selected the vasectomy. The payment plan would be a new step in Judge Foellger's efforts to deal with dead beat dads. See Andrea W. Fancher, _Thinking Outside the Box—A Constitutional Analysis of the Option to Choose Between Jail and Procreation_, 19 QUINNIPIAC PROB. L.J. 328 (2006) for a discussion and analysis of Judge Foellger's unique approach to child support cases.

445. See Epps, _supra_ note 414. This article discusses the use of this condition in probation cases involving child abuse, which has generally not been allowed, and two cases involving failure to pay child support in which the court allowed the condition to be imposed. _Id._ at 623-627. The article argues that there are more effective ways to ensure that children are supported and to rehabilitate parents, as demonstrated by the majority of cases involving child abuse. _Id._ at 653-660. The alternatives suggested do not impinge on protected rights or place us on a slippery slope headed towards further restrictions on procreation. _Id._ at 646-655. The dangers posed by the condition in probation cases are the same as those
foster care and other programs to make success a reality for all foster children. Money should not be a concern when it comes to securing the future of the most helpless, dependent members of our society—our children. Our commitment to the next generation should inspire us to do at least that much.