Unacceptable Collateral Damage: The Danger of Probation Conditions Restricting the Right to Have Children

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UNACCEPTABLE COLLATERAL DAMAGE: THE DANGER OF PROBATION CONDITIONS RESTRICTING THE RIGHT TO HAVE CHILDREN

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I. INTRODUCTION

You have the right to have as many children as you desire. You can have seven like the Waltons, six like the Brady Bunch, or none at all like Oprah. It is all left to your discretion—unless you fail to pay child support, and as a result end up facing criminal charges. The United States Constitution protects the right to freedom in procreation decisions. Generally, this means that the government cannot interfere with such decisions unless it has a compelling reason to do so. Even then, such interference must be narrowly tailored to meet government interests.¹

In two recent cases, State v. Oakley² and State v. Talty,³ courts have found limits on freedom in procreation decisions constitutional when such limits were used as probation conditions for defendants

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¹ See infra notes 9-26 and accompanying text.

² 629 N.W.2d 200 (Wis. 2001).

³ No. 02CA0087-M, 2003 Ohio LEXIS 2907 (Ohio App. June 18, 2003), rev’d, 103 Ohio St. 3d 177 (2004). The Ohio Supreme Court’s decision in Talty’s appeal adds little to consideration of the issue discussed in this article and therefore is not addressed. Talty raised two issues in his appeal: (1) that the condition did not comply with Ohio law regarding probation conditions as stated in State v. Jones, 550 N.E.2d 469 (1990) and (2) that the condition was an unconstitutional infringement on his right to procreate. The court decided the case based on Ohio case law, thereby avoiding the State and Federal constitutional issues raised by the condition. Talty, 103 Ohio St. 3d at 179. According to the court, the three-part test it established in Jones included a requirement that a condition not be overbroad. Id. at 180. The anti-procreation condition at issue was overbroad because there was no provision for it to be modified if Talty became current on his child support. Id. at 181. The court was careful to say that inclusion of a means to modify the condition would not mean that the condition would be valid under Jones. Id. at 182. See also infra note 138 and accompanying text. In addition to concluding that the condition complied with Jones and the State and Federal Constitutions, the dissent points out that all the trial court need do is include a mechanism in its order to allow the condition to be modified. Should that happen, Talty will appeal again and the court will be forced to deal with the merits of his constitutional challenge. Talty, 103 Ohio St. 3d at 187. The dissent has a valid point. It appears likely that the trial
who, as a result of failure to support their children, had been convicted of a criminal offense. In each case, the court rejected the argument that strict scrutiny, which would require a compelling state interest and a narrowly tailored means used to further that interest, should be applied to the condition. Instead, each court reviewed the condition with a lesser degree of scrutiny and came to the conclusion that the condition was valid. Similar restrictions placed on defendants convicted of severe child abuse, although subjected to the same lower level of scrutiny, have typically been determined to be too broad and as a result unconstitutional.

This article explores the use of probation conditions that restrict the right to freedom in procreation decisions. It begins by exploring the origin and history of the right to freedom in procreation decisions. Next, probation conditions in general will be discussed as a prelude to reviewing cases in which the courts have upheld or imposed conditions restricting the right to have children and those in which courts have determined that such conditions are impermissible. Although the cases this article reviews come from different jurisdictions, the underlying rationale for allowing or not allowing the probation condition to be imposed is the same.

The United States Supreme Court has not addressed the constitutionality of probation conditions restricting the right to have children; however, its decision in Zablocki v. Redhail may provide precedent. In Zablocki, the Court concluded that exercise of another fundamental right, the right to marry, could not be conditioned on fulfillment of a court ordered child support obligation. In this article, the Zablocki decision will be compared to the decisions in Oakley and Talty. This comparison will demonstrate that there are significant differences between Zablocki and those cases. Consequently, Zablocki alone may not prohibit courts from imposing such probation conditions.

Allowing courts to impose probation conditions that restrict the right to have children sends several messages to poor people. It tells them that they should not have children and that they are somehow unfit parents. Further, it says to their children that it would have
been better had they not been born. Ensuring that children are pro-
tected is a compelling government objective. Furthering this objective in
a manner that burdens the exercise of a fundamental right can lead
down a treacherous path. The dangers inherent in any approach that
burdens the exercise of the right to have children will be illustrated by
exploring other efforts to limit the right of disfavored groups to free-
dom in procreation decisions.

This article concludes that in order to avoid these dangers, state
legislatures should act to limit a trial court's ability to impose proba-
tion conditions that restrict the probationer's right to have children.
In addition, the courts should apply strict scrutiny to any government
action, including imposition of probation conditions, that attempts to
limit the right to freedom in procreation decisions. Application of
strict scrutiny will almost certainly result in the invalidation or strict
limitation of such actions. Finally, because of the fundamental nature
of the right to freedom in procreation decisions, the dangers inherent
in restricting this right, and the negative message sent to the poor,
their children, and the world, if all other means of forcing someone to
treat their children properly fail, incarceration of the offenders is pref-
erable to use of a probation condition that seeks to limit the right to
freedom in procreation decisions.

II. ORIGIN AND HISTORY OF THE RIGHT TO FREEDOM IN
PROCREATION DECISIONS

Although the Supreme Court has not addressed the constitution-
ality of probation conditions restricting the right to have children, it
has decided numerous cases dealing with freedom to make procreation
decisions. The holdings in these cases make it clear that this is a fun-
damental right protected by the constitution.

*Skinner v. Oklahoma* 9 was the first case recognizing the existence
of the right to freedom in procreation decisions. In *Skinner*, the Court
struck down an Oklahoma statute that allowed for the involuntary
sterilization of habitual criminals. Under the statute, someone who
committed larceny could be sterilized; someone who embezzled, re-
gardless of how much was stolen, was not eligible for sterilization.
The Court applied strict scrutiny to the classification made by the
statute because of the "basic liberty" involved. 10 Although *Skinner* is
often cited as the basis for the right to freedom in procreation deci-

8. The United States Supreme Court declined to review this issue. Oakley v.
State, 629 N.W.2d 200 (Wis. 2001), cert denied, 537 U.S. 813 (2002).
9. 316 U.S. 535 (1942). See infra notes 220-29 and accompanying text for addi-
tional discussion of *Skinner*.
10. Id. at 541.
sions, the Court did not specifically state that this was a constitutional right. Rather, it decided the case on equal protection grounds, applying strict scrutiny to the classification made by the statute, thereby acknowledging the fundamental nature of the right. In subsequent cases, the Court found what appears to be a permanent home, as part of the right to privacy, for the right to freedom in procreation decisions.\textsuperscript{11}

\textit{Griswold v. Connecticut}\textsuperscript{12} was the first case in which the Court explicitly recognized a right to privacy. The petitioners in \textit{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.\textsuperscript{13} It described the right to marital privacy as prenunbral to other constitutional rights but did not find a specific place for it in the Constitution. Later, in \textit{Eisenstadt v. Baird},\textsuperscript{14} a case challenging a state prohibition on the distribution of contraceptives to unmarried individuals, the Court concluded that: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\textsuperscript{15} The prohibition in \textit{Baird} was struck down on equal protection grounds.\textsuperscript{16}

The landmark abortion case, \textit{Roe v. Wade},\textsuperscript{17} provided the opportunity for the Court to clearly explain the constitutional basis for the right to privacy. In \textit{Roe}, the Court held the right to an abortion is a personal right "fundamental or implicit in the concept of ordered liberty" included in the guarantee of personal privacy.\textsuperscript{18} In discussing the nature of the right to an abortion, the Court noted that the rights to "marriage, procreation, contraception, family relationships, and child rearing and education" are all within the Fourteenth Amend-

\begin{itemize}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} 381 U.S. 479 (1965).
\item \textsuperscript{13} Id. at 485. Justice Douglas suggested several possible constitutional sources for the right to privacy. 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. Justice Douglas concluded that the right to privacy was among "prenunbral" rights of "privacy and repose." Id. at 484-85.
\item \textsuperscript{14} 405 U.S. 438 (1972).
\item \textsuperscript{15} Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
\item \textsuperscript{16} Eisenstadt, 405 U.S. at 443.
\item \textsuperscript{17} 410 U.S. 113 (1971).
\item \textsuperscript{18} Roe v. Wade, 410 U.S. 113, 152-53 (1971).
\end{itemize}
ment’s concept of liberty and restriction on state action.\textsuperscript{19} Once again, in \textit{Carey v. Population Services, International},\textsuperscript{20} 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 16 and provided that only a pharmacist could distribute contraceptives to others.\textsuperscript{21} The Court reiterated its holding in \textit{Roe} that “one aspect of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment is a ‘right of personal privacy, or a guarantee of certain areas or zones of privacy.’”\textsuperscript{22} Included in this zone of privacy is independence in making certain important decisions including marriage, procreation, contraception, family relationships and child rearing.\textsuperscript{23} Twenty years later, when the court revisited the issues raised in \textit{Roe}, it stated, “[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{24}

The right to freedom in procreation decisions is now clearly a fundamental right included within the right to privacy protected by the Fourteenth Amendment.\textsuperscript{25} It would appear to be a right enjoyed by everyone, including those on probation for failure to pay child support. The constitutional rights of those on probation can be limited by probation conditions under certain circumstances.\textsuperscript{26} Probation conditions limiting the exercise of freedom in procreation decisions, however, have generally not been allowed by state or federal courts.

\begin{itemize}
  \item \textsuperscript{19} \textit{Roe}, 410 U.S. at 152-53.
  \item \textsuperscript{20} 431 U.S. 678 (1977).
  \item \textsuperscript{22} \textit{Carey}, 431 U.S. at 684.
  \item \textsuperscript{23} \textit{Id.} at 685.
  \item \textsuperscript{24} Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992). In \textit{Casey} the Court reaffirmed its basic holding in \textit{Roe} that a woman has a fundamental right to an abortion. \textit{Id.} at 846. The Court modified its holding in \textit{Roe} by rejecting the trimester approach. \textit{Id.} at 873. In its place the Court adopted an approach that looks at whether the State has placed an undue burden on the right to obtain an abortion. \textit{Id.} at 877.
  \item \textsuperscript{25} This conclusion is also supported by the recent decision in \textit{Lawrence v. Texas}, 522 U.S. 1064 (2003), striking down a Texas sodomy law and citing in support of this conclusion, cases establishing the right to privacy in personal decisions, including \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965); \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972); \textit{Carey v. Population Services, Int'l}, 431 U.S. 678 (1977); and Planned Parenthood v. \textit{Casey}, 505 U.S. 833 (1992).
\end{itemize}
III. PROBATION CONDITIONS: AN INTRODUCTION

The use of probation emerged during the second half of the 19th century. It grew out of the belief that offenders should be rehabilitated, rather than simply locked up. Probation provides a means for a court to allow an offender to remain in or return to the community under supervision subject to conditions imposed by the court. Being placed on probation, rather than in jail, is viewed as an act of grace on the part of the court or legislature rather than as a matter of right for the offender. Probationary sentences are the most common type of criminal sanctions. Among the questions raised by the use of probation is what conditions the court may lawfully impose on the offender.

A. FEDERAL PROBATION CONDITIONS

Guidance for federal courts in setting probation conditions is found in federal statutes and the Federal Sentencing Guideline Manual. Statutory considerations for establishing probation conditions are the same as those for determining a sentence. In sentencing, courts must consider the nature and circumstances of the offense and the defendant's character. The sentence must reflect the seriousness of the offense, promote respect for the law, provide just punishment, deter criminal conduct, protect society, and provide the defendant with any needed training or education. The court is given discretion to impose probation conditions consistent with these factors. In addition, probation conditions can involve only such deprivations of lib-

28. In upholding the imposition of a probation condition that required the defendant to pay court costs, the court explained that "[p]robation is an act of grace . . . . It permits a court, in its discretion, to suspend what would be the normal penalty for violation of the criminal law in favor of conditions which, if performed, tend to promote the rehabilitation of the criminal as well as the welfare of society." Turner v. State, 484 A.2d 641, 645 (Md. App. 1984). The Court in State v. Oakley, 629 N.W.2d 200 (Wis. 2001), shared this view of probation. When looking at the issue of alternatives to a probation condition restricting Oakley's right to have children, the court noted that Oakley had no right to probation. The judge, by placing Oakley on probation instead of in jail, was extending a benefit Oakley had no right to. Id. at 212. The opinion that probation is a matter of grace rather than a right was also expressed by a Michigan court in Simms v. State, No. 238245, 2003 Mich. App. LEXIS 896 *1 (Mich. App. April 8, 2003). The court rejected a challenge to a probation condition that required the offender to quit her job as a police officer. The decision was based in part on the conclusion that probation was a matter of grace, not a matter of right. Simms could instead have been sentenced to incarceration. Id. at *11.
29. DEMLEITNER, supra note 27, at 519. At the end of 2001 there were four million individuals on probation in the United States. Id.
As a condition of probation, the court must require that the defendant not engage in any federal, state, or local offense. It may require that the defendant support his dependants, meet other family responsibilities, and work conscientiously at suitable employment. Occasionally, defendants challenge probation conditions on the basis that the conditions unnecessarily infringe on their rights. In responding to such challenges, courts focus on two issues: does the condition reasonably relate to the defendant's rehabilitation and to protecting the public? If the answer to this question is yes, the condition will normally be upheld. Among cases in which defendants have challenged conditions of probation are United States v. Crandon, United States v. Bortels, and United States v. Trainer. These cases are discussed briefly to illustrate the analysis courts have followed in dealing with this type of challenge.

In Crandon, the defendant pled guilty to receiving child pornography. His crime involved taking sexually explicit pictures of a fourteen year old girl he met over the Internet. Crandon's sentence included a three-year term of supervised release. One of the conditions of his release was that "[he] not possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers." Crandon objected to this condition on the grounds that it infringed on his liberty interest and was not logically related to his crime. The court upheld the imposition of the condition. The court reasoned that because Crandon used the Internet to meet the young girl and develop an illegal sexual relationship with her, the condition served to deter him from other criminal activities.

33. U.S. Sentencing Comm'n, Federal Sentencing Guidelines Manual § 5B1.3.(a)(1)(2001). This would include not violating any statute that requires support of dependants. Most states have laws criminalizing the failure to support dependants. See infra note 105 and accompanying text.
35. 173 F.3d 122 (3d Cir. 1999).
36. 962 F.2d. 558 (6th Cir. 1992).
38. Under the sentencing guidelines, probation is a sentence in itself. If the defendant violates a condition of probation, the court may continue probation or revoke probation and impose any other sentence it could have imposed initially. Sentencing Guidelines Manual, supra note 33, at Ch. 7. Pt. A (2)(a). Supervised release occurs after the defendant completes a term of imprisonment. It may be imposed by a court at the time of sentencing as part of the sentence to imprisonment. Conditions of supervised release that may be imposed are the same as conditions of probation. Id. at Ch. 7, Pt. A (2)(b).
conduct and to protect the public. The court also concluded that the condition was narrowly drawn to accomplish these goals.40

The defendant in United States v. Bortels41 was involved in a high-speed chase in an effort to help her fiancé, a convicted felon, avoid being apprehended by law enforcement officers. After pleading guilty to assaulting, resisting, or interfering with a United States Marshall, she was sentenced to six months in jail followed by one year of conditional supervised release. The judge required that she stay away from all convicted felons, especially her fiancé, as a condition of her release.42 Bortels appealed the imposition of this condition.43 On appeal, the court concluded that the trial court's decision to impose the condition was appropriate. Bortels endangered the public by engaging in the high-speed chase to help her fiancé. But for her involvement with him, she would not have become involved in the high-speed chase with the U.S. Marshall. Requiring that Bortels stay away from her fiancé would both aid in her rehabilitation and protect the public from such incidents in the future.44

In Trainer, Trainer was convicted of conspiracy to violate his victim's civil rights as the result of a cross burning incident. He was sentenced to thirty-five months in jail followed by three years supervised release.45 Trainer became involved with a white supremacist group, the World Church of the Creator, while in prison and wanted to become actively involved in the group while on supervised release. He insisted that the group was opposed to illegal acts.46 Ultimately, his probation officer requested that the court impose a condition limiting his involvement with the group.47 Trainer objected to the condition on the grounds that it violated his First Amendment rights to freedom of religion and free exercise of his religious beliefs.48 The court imposed a condition that limited Trainer to one-on-one discussions about his religious beliefs. It concluded that the condition was related to the ultimate goals of rehabilitation and deterrence. Trainer's crime was motivated by racial discrimination. Consequently, it made no sense to allow him to participate in public displays of white supremacist beliefs.49

40. Crandon, 173 F.3d at 128.
41. 962 F.2d 558 (6th Cir. 1992).
43. Bortels, 962 F.2d at 559.
44. Id. at 560.
46. Id.
47. Id.
48. Id.
49. Id. at 593. Cases coming to a similar conclusion include: United States v. Ritter, 118 F.3d 502 (6th Cir. 1997); United States v. Prendergrast, 979 F.2d 1289 (8th Cir.
In the cases discussed above, the courts focused on whether the condition at issue served to rehabilitate the defendant and protect the public. Imposition of the condition was upheld because each was related to the crime and to the goals of probation despite its impact on the offender's liberty. Federal courts have one set of guidelines to follow in selecting probation conditions. State systems generally have the same two primary goals for probation conditions and give trial courts broad discretion in selecting conditions. State courts also use similar methods to evaluate conditions if challenged by the probationer.

B. STATE PROBATION RESTRICTIONS

Every state has statutes dealing with probation. Many address the types of conditions courts may impose on probationers. Normally, there are mandatory and discretionary conditions. Consistent with the federal system, the most common mandatory condition is that the offender commit no other criminal offense while on probation. Statutes that address the nature of permissible conditions follow one of two basic approaches. Underlying the two approaches is the general idea that probation conditions must be reasonable and related to the goals of rehabilitating the defendant and protecting the public. Trial court judges generally have broad discretion in deciding what probation conditions to impose on offenders. Some states leave the choice of

1992); and United States v. Smith, 972 F.2d 960 (8th Cir. 1992). The defendant in Ritter was convicted of embezzling money from his employer. He objected to a condition that required him to tell future employers about his crime on the basis that the requirement violated his First Amendment right to free speech and association. Ritter, 118 F.3d at 504. The court upheld the lower court's decision to impose the condition as the condition was reasonably related to protecting future employers and rehabilitating the defendant. Id. at 506. In Prendergast, the defendant pled guilty to wire fraud. He objected to conditions of his release that prohibited the use, possession, distribution, or administration of alcohol or any paraphernalia unless prescribed by a physician, required that he submit to periodic alcohol and drug testing, and required that he be subject to unannounced searches for drugs and alcohol by his probation officer. Prendergast, 979 F.2d at 1292. The court concluded that these conditions were not reasonably related to the crime or the purposes of sentencing. Id. at 1293. Smith involved a condition that the defendant not father any other children while on probation for drug distribution. Smith, 972 F.2d at 961. The court removed the condition because it was not reasonably related to the crime or the defendant's rehabilitation. Id. at 962. See infra notes 67-72 and accompanying text for further discussion of Smith.

conditions to the judge's discretion with the guidance, either in the statute or in case law, that the conditions be reasonable. The statutes describe permissible conditions as "appropriate" or "reasonable" leaving it for the court to decide what conditions fit the particular offender's situation.51 Other state statutes give courts the discretion to impose reasonable conditions and provide a non-exclusive list of possible conditions. The court may choose conditions from the list and impose others that it determines are reasonable to rehabilitate the offender and protect the public. This is the most prevalent approach.52 In those statutes that list permissible conditions, requirements that the offender "work faithfully at suitable employment," support his or her dependants, and seek education or training in order to get a job, are frequently among the conditions listed.53


52. See, e.g., ALA. CODE § 15-22-52 (1995); ALASKA STAT. § 12.55.100 (a) (Michie 2003); ARK. CODE ANN. § 5-4-303 (c) (Supp. 2003); CAL. PENAL CODE § 1203.1 (j) (West 2004); COLO. REV. STAT. ANN. § 18-1.3-204 (1) (West 2003); CONN. GEN. STAT. § 53a-30 (a) (Supp. 2004); FLA. STAT. ANN. § 948.03 (1) (Supp. 2003); GA. CODE ANN. § 17-10-1 (a) (1) (Supp. 2003); HAW. REV. STAT. ANN. § 706-624(2)(m) (Michie 1993); ILL. COMP. STAT. § 5/5-6-3.1(c) (1993); IND. CODE ANN. § 35-38-2-2.3(a) (Michie Supp. 2003); KAN. STAT. ANN. § 21-4610 (c) (1995); KY. REV. STAT. ANN. § 533.030 (1) & (2) (Michie Supp. 2003); LA. CODE CRIM. PROC. art. 895(A) (West 2004); ME. REV. STAT. ANN. tit.17-A, § 1204.2-A(1) (West Supp. 2003); MICH. COMP. LAWS ANN. § 771.3.3 (2) & (4) (West Supp. 2004); MISS. CODE ANN. § 47-7-35 (1972); MO. ANN. STAT. § 559.021.(1) & (2) (West 1999); MONT. CODE ANN. § 46-18-201 (4) (2003); NEB. REV. STAT. § 29-2262 (1) & (2) (2003); NEV. REV. STAT. ANN. § 176A.400(1) (Michie 2000); N.J. STAT. ANN. § 2C:45-1 (a) & (b) (West 1995); N.Y. PENAL LAW § 65.10 (Consol. 2004); N.C. GEN. STAT. § 15A-1343 (b)(1) (Supp. 2003); N.D. CENT. CODE § 12.1-32-07.2 (Supp. 2003); OHIO REV. CODE ANN. § 2951.02 (c) (West 2002); OR. REV. STAT. § 137.540 (1) & (2) (2003); PA. CONS. STAT. ANN. § 9754 (c)(13)(West 1998); TENN. CODE ANN. § 40-35-303 (d)(9) (2003); TEX. CRIM. PROC. CODE ANN. art. 42.12, § 11.(a) (Vernon Supp. 2004); UTAH CODE ANN. § 77-18-1-8(a)(x) (2003); VT. STAT. ANN. tit. 28, § 252 (a) & (b) (Supp. 2003); and W. VA. CODE § 62-12-9 (a) (Supp. 2003).

53. See, e.g., ALA. CODE § 15-22-52 (1995); ALASKA STAT. § 12.55.100 (a)(3) (Michie 2003); ARK. CODE ANN. § 5-4-303 (b) & (c) (Supp. 2003); CAL. PENAL CODE § 1203.1 (d) (West 2004); COLO. REV. STAT. ANN. § 18-1.3-204 (2) (West 2003); GA. CODE ANN. § 17-10-1(a)(1) (Supp. 2003); LA. CODE CRIM. PROC. art. 895(A) (2) & (5) (West 2004); ILL. COMP. STAT. § 5/5-6-3 (b) (Supp. 2004); KAN. STAT. ANN. § 21-4610 (c) (1995); KY. REV. STAT. ANN. § 533.030 (2) (Michie Supp. 2003); MICH. CODE ANN. § 47-7-35 (1972); MO. ANN. STAT. § 559.021.(1) & (2) (West 1999); MONT. CODE ANN. § 46-18-201 (4) (2003); NEB. REV. STAT. § 29-2262 (1) & (2) (2003); NEV. REV. STAT. ANN. § 176A.400(1) (Michie 2000); N.J. STAT. ANN. § 2C:45-1 (a) & (b) (West 1995); N.Y. PENAL LAW § 65.10 (Consol. 2004); N.C. GEN. STAT. § 15A-1343 (b)(1) (Supp. 2003); N.D. CENT. CODE § 12.1-32-07.2 (Supp. 2003); OHIO REV. CODE ANN. § 2951.02 (c) (West 2002); OR. REV. STAT. § 137.540 (1) & (2) (2003); PA. CONS. STAT. ANN. § 9754 (c)(13)(West 1998); TENN. CODE ANN. § 40-35-303 (d)(9) (2003); TEX. CRIM. PROC. CODE ANN. art. 42.12, § 11.(a) (Vernon Supp. 2004); UTAH CODE ANN. § 77-18-1-8(a)(x) (2003); VT. STAT. ANN. tit. 28, § 252 (a) & (b) (Supp. 2003); and W. VA. CODE § 62-12-9 (a) (Supp. 2003).
A probation condition is normally permissible if it is reasonably related to the offender's rehabilitation and reasonably related to protection of the public. Some courts use a three-factor test to determine whether such a probation condition fits this description and is therefore valid. The test requires that the condition have a reasonable relationship to the crime involved and be reasonably related to future criminal conduct. A probation condition that impinges on the probationer's constitutional rights is valid if in addition to being reasonably related to the offender's rehabilitation and protection of the public, it is not overly broad. Occasionally, probationers challenge a probation condition on the grounds that it infringes on constitutionally protected rights. The cases below illustrate the approaches courts have taken in determining whether a probation condition is constitutionally permissible.

The defendants in Wiggins v. State were convicted of theft and forgery after stealing a check, forging a signature on it, and cashing it to buy goods. The evidence showed that none of the defendants were married, but all had children. They had stolen the check because they needed money to buy food for their children. The trial court imposed a condition prohibiting them from having sex with anyone other than their spouses. The defendants challenged this condition on the grounds that it was a violation of their right to privacy. In response, the State contended that the condition had a reasonable relationship to their rehabilitation because each defendant became involved in the crime to support their illegitimate children.

On appeal, the appellate court acknowledged that the trial court's goal in imposing the condition was to avoid additional financial stress being placed on the defendants should they have additional children.

54. See infra notes 59-66 and accompanying text for discussion of this approach.
55. Although there are different versions of this test, all basically seek the same information. For example, in State v. Jones, 550 N.E.2d 469, 470 (Ohio 1990) the court considered: (1) whether the condition was reasonably related to the defendant's rehabilitation, (2) whether the condition had some relationship to the crime of which the defendant was convicted, and (3) whether the condition related to conduct that was criminal or reasonably related to future criminality and serves the statutory ends of probation. The court in People v. Pointer, 151 Cal. App. 3d 1128, 1140 (1984) used a test that consisted of the following three factors: (1) whether the condition had a relationship to the crime of which the defendant was convicted, (2) whether the condition related to conduct which was not itself criminal, and (3) whether the condition required or forbade conduct not reasonably related to future criminality. The factors both courts considered are similar and focus on the ultimate issue: whether a probation condition is related to the rehabilitation of the offender and protection of the public. See infra notes 83-95 and accompanying text.
56. See, e.g., Pointer, 151 Cal. App. 3d at 1139.
57. 386 So.2d 46 (Fla. Ct. App. 1980).
59. Wiggins, 386 So.2d at 47.
However, the problem was the condition would not necessarily accomplish this goal; if the defendants married they could have additional children and a spouse to support. This would lead to the same type of financial stress the trial court sought to avoid by imposing the condition. The court applied a "reasonable relationship" test to the condition. Under this test, the condition was invalid because it had only a tangential relationship to the crime, related to conduct that was not criminal, and required conduct not related to future criminality. 60

Krebs v. Schartz 61 involved a defendant convicted of first degree sexual assault. As a condition of probation, the court required that he discuss with and seek approval from his probation agent before beginning any dating, intimate, or sexual relationship. 62 Krebs challenged this condition as a violation of his right to privacy, arguing that it was unreasonable and too broad. The court found that the condition was narrowly drawn and reasonably related to his rehabilitation and to protection of the public despite its impingement on Krebs' right to privacy. 63 Krebs could have a relationship—if he secured permission to do so from his probation agent. Although the requirement that he seek permission was an inconvenience, it did not deny him the right to have a relationship. Rather, the condition forced Krebs to be honest about his problem, which is important to rehabilitation. The requirement also served to protect the public because the probation agent would tell Krebs' potential partners about his deviant behavior, which would allow them to protect their children. 64

60. Id. at 48.
63. Krebs, 568 N.W.2d at 28-29.
64. Id. Other courts considering probation conditions have used similar approaches. In State v. Carrizales, 528 N.W.2d 29 (Wis. Ct. App. 1994), the defendant pled no contest to a sexual assault charge. As a condition of his probation, the judge required that he participate in a counseling program. Carrizales was involuntarily dropped from the program because he refused to accept responsibility for the assault, a step viewed as essential to successful completion of the program. Id. at 30. The Department of Corrections sought to have Carrizales' probation revoked because of his failure to complete the counseling program. Carrizales challenged the condition, arguing that it was an unconstitutional infringement on his Fifth Amendment right to remain silent. Id. On appeal, the court approved the use of the condition. The court held that a under Wisconsin law the trial court has broad discretion to impose "any conditions which appear to be reasonable and appropriate." Id. at 31. Further such conditions must serve to rehabilitate the defendant and protect the public. They may impinge on the defendant's constitutional rights as long as they are not overly broad and are reasonably related to his rehabilitation. Id.

The defendant in State v. Neurer, No. 49747-2-I, 2003 LEXIS 78 *1 (Wash. App. Jan. 21, 2003) was convicted of domestic violence and challenged a probation condition that prohibited him from contacting his wife, whom he had assaulted. He argued that the condition violated his First Amendment right to freedom of association. The court concluded that the condition was not too broad and was reasonably necessary to accom-
Probation conditions are subject to review using the approaches discussed above. Courts seek to ensure that probation conditions are reasonably related to the offense, to the offender's rehabilitation and to public protection. If a condition impinges on a fundamental right, it may not be overly broad. Probation conditions that seek to limit the right to have children are—at a minimum—subject to scrutiny using one of these approaches.

IV. PROBATION RESTRICTIONS ON PROCREATION

A. Offenses Not Involving Children

The courts have generally not allowed probation conditions restricting freedom in procreation decisions to be imposed in cases in which children are not the object of the probationer's offense. In these cases, although it would be good for a criminal to be reformed before

\[\text{plish the essential needs of public order and to rehabilitate the defendant. Consequently, the court upheld the imposition of the condition. Id. at *10.}\]

The defendant in Simms v. State, No. 238245, 2003 LEXIS 896 *1 (Mich. App. April 8, 2003), a Detroit police officer, physically abused the victim and while holding a firearm, threatened to "blow the victim's brains out." After she was convicted of reckless use of a firearm and domestic violence, the court required that she immediately quit her job as a condition of probation. Simms challenged this condition as unconstitutional, unlawful, and an abuse of the court's discretion. In rejecting her challenge, the appellate court noted that in addition to the required terms of probation, the court may "impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper." Id. at *9. Therefore the only way a defendant could prove that the court had abused its discretion was to show that a condition is unlawful or unwarranted in light of the circumstances presented. As a police officer, Simms was required to carry a firearm whenever she left her home. Her reckless use of a firearm was inconsistent with her duties as a police officer. Id. The court relied on an earlier decision, People v. Miller, 452 N.W.2d 890 (Mich. App. 1990), in which the court held that while there is no ultimate catalog of legal or illegal conditions, there must be a rational relationship between the restriction and rehabilitation. The trial court had not abused its discretion under the facts presented because the condition would remove Simms from a situation in which she would have to handle a firearm. The court also concluded that there was no constitutional violation because probation is a matter of grace and not a matter of right. Id. at *10-11.

In State v. Martin, 580 P.2d 536 (Or. 1978), after the defendant pleaded guilty to forgery, her lawyer argued that her husband was to blame for her crime. The trial court accepted that argument and placed Martin on probation for five years on the condition that she stay away from anyone convicted of a crime, including her husband. Id. at 538. Martin appealed the condition. The Oregon Supreme Court modified the condition to exclude Martin's husband. The court found under the applicable state statute the purpose of probation included both rehabilitation of the defendant and freedom for the defendant as long as the public was protected. Consequently, a probation condition not related to the offense or promotion of public safety is not legally permissible. Id. at 539. It held that in deciding what conditions to impose, the trial court must look at alternatives that are less invasive to the offender's rights but still serve to rehabilitate her and protect the society. In this case, the trial court had not even considered alternatives. Id. at 540.
having additional children, such restrictions do not relate to the crime committed or to rehabilitation.

*United States v. Smith* 65 provides an example of such a case. Smith pled guilty to attempting to possess heroin. A probation report showed that Smith had three children and two on the way—all by different women. The trial judge expressed concern about the welfare of Smith's children on the record, stating: "I mean, unless [these children] are adequately supported and sustained, we can't expect them to start out like the Rockefeller children. And if [they] wind up in crime, we shouldn't be too shocked that we didn't give them a good start." 66 The judge sentenced Smith to fifty-one months in prison followed by three years supervised release. During the three year period, he was not to father any children with anyone other than his wife unless he could show that he was supporting all of his children. He was also ordered to pay child support. Smith challenged the condition on the basis that it was beyond the authority of the district court. 67

On appeal, the court held that the condition was not legally permissible. To determine the condition's validity, the court considered whether it fostered Smith's rehabilitation and protected the public. 68 The procreation condition did not meet either criteria. The number of children Smith fathered had nothing to do with his rehabilitation or protecting society from the type of crime he committed. In addition, the condition dealt with a "sensitive and important area of human rights." 69 The court cited disturbing statistics regarding the level of poverty among black children and seemed to appreciate the district court's concern for the welfare of Smith's children. However, the court held the district court had no authority to impose a restriction on the number of children Smith could father. 70

A similar conclusion was reached by a California state court in *People v. Dominguez.* 71 Dominguez, a twenty-year-old woman who had never been married, was the mother of two children. At the time of her sentencing for second-degree robbery, Dominguez was not married, and pregnant with her third child. 72 As a condition of her probation, the judge required that Dominguez not become pregnant unless she were married. 73 The judge was clearly irritated with Dominguez for being an unwed mother of three children and dependent on the

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65. 972 F.2d 960 (8th Cir. 1992).
67. Smith, 972 F.2d at 961.
68. Id.
69. Id. at 962.
70. Id.
73. Dominguez, 256 Cal. App. at 625.
state for financial help. While explaining the probation condition to her, he stated, "[y]ou are not to become pregnant until after you become married . . . . You are going to prison unless you are married first. You already have too many of those." He continued by asking whether she knew the location of the Planned Parenthood Clinic and suggesting that she be more considerate of others in society who were supporting her children.

Dominguez complied with all of the conditions of her probation—except the one regarding becoming pregnant while unmarried. At the hearing concerning probation revocation, the judge once again appeared irritated. This time he said: "[i]t appears to me this woman is irresponsible, she is foisting obligations upon others . . . . It appears to me that probation is not serving any useful purpose." Ultimately, the judge decided to revoke Dominguez's probation because she violated the pregnancy condition.

Dominguez appealed the revocation of her probation and challenged the validity of the condition. The appellate court concluded that although the trial court had broad discretion in setting probation conditions, any such condition must serve the statutory ends of probation: making amends to society and reforming and rehabilitating the offender. Consequently, any condition that had no reasonable relationship to the crime of which the offender was convicted, related to conduct that was not criminal and required or forbade conduct that was not reasonably related to future criminality, was invalid. In declaring the condition void, the court

74. Id.
75. Id.
76. Id.
77. Id. at 626.
78. Id. at 627.

The defendant in Richard pled no contest to disorderly conduct and possession of drug paraphernalia. The sentence imposed included two years probation. As a condition of probation the court ordered the defendant to use some sort of birth control procedure, be it birth control pills or tubal ligation. Richard, 680 N.E.2d at 669. On appeal, this condition was determined to be invalid. Using the three question approach the court concluded that the condition had no relationship to the crime, related to conduct which is not itself criminal, and required conduct that was not reasonably related to future criminality. Id. at 670. The Dominguez analysis was adopted by the court in reaching a decision on the validity of a similar condition in People v. Zaring, 8 Cal. App. 4th 362 (1992). Ms. Zaring, a drug addict, was convicted of felony possession of heroin. She was 30 years old and had five children. None of the children were in her control. As a condition of her five year probation, she was not to become pregnant. The trial judge emphasized that his primary reason for setting this condition was to protect any unborn child whom he feared would be a "crack baby." Id. at 368. Ms. Zaring challenged the
also noted that the trial court’s motive for imposing the condition was to save the public money. Although saving the taxpayers money was in the public interest, it was not an interest sufficient to justify imposition of the condition.\textsuperscript{80}

Neither of these cases involved an offense against children. The outcome of cases involving child abuse has normally not differed from the outcome of those cases involving crimes not related to children. Courts have not been allowed to impose conditions restricting the right to freedom in procreation decisions.

B. CHILD ABUSE CASES

The majority of cases in which courts have attempted to impose a probation condition restricting procreation involved offenders convicted of child abuse. \textit{People v. Pointer}\textsuperscript{81} is one of those cases. Ruby Pointer ("Pointer") was devoted to a macrobiotic diet. The diet did not include fruits, milk products, meat, fish, poultry, or eggs.\textsuperscript{82} Pointer put her two children, Jamal (age two) and Barron (age four), on the diet, despite the advice of their doctor and objections from Barron’s father. Ultimately, due to the effect of the diet, Jamal was hospitalized. Pointer brought macrobiotic food to the hospital for Jamal and continued to breast feed him even though the doctors told her that her milk and the food would hurt him.\textsuperscript{83} Upon leaving the hospital, Jamal was removed from Pointer’s custody and placed in a foster home. Pointer kidnapped Jamal from the foster home and fled to Mexico with him and Barron. She put Jamal back on the diet. Eventually, Pointer

\textsuperscript{80} Dominguez, 256 Cal. App. 2d at 628.
\textsuperscript{83} Pointer, 151 Cal. App. at 1132-33.
was arrested and brought back to California. Both children were permanently injured as a result of the diet.\textsuperscript{84}

Pointer was found guilty 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.\textsuperscript{85} In coming to its decision to impose the condition, the trial court considered testimony from a psychiatrist indicating that Pointer would treat her present children and any subsequent children the same way if given an opportunity. In addition, she would not take birth control pills because of her fear of chemicals. Pointer challenged the probation condition as a violation of her freedom in procreation decisions.\textsuperscript{86}

In analyzing the condition, the court noted that a trial court has broad discretion to condition probation. As the objectives of probation conditions are to foster rehabilitation and protect the public, any probation condition must be reasonably related to these goals.\textsuperscript{87} A trial court may impose conditions that qualify or impinge upon constitutional rights when circumstances so require.\textsuperscript{88} In assessing the reasonableness of the condition, the court considered the three factors discussed by the court in \textit{People v. Dominguez}.\textsuperscript{89} The Pointer court determined that the condition related to the crime Pointer had committed. Her crime was child endangerment and the condition related to children. The condition related to conduct that was not in itself criminal; the act of having a child. Finally, 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.\textsuperscript{90}

Next, the court considered whether the condition was too broad, noting that a heightened level of scrutiny requires that the condition be narrowly drawn. The court recognized if there was an alternative to the restriction on procreation, the alternative should be used. The court acknowledged that, to the extent such a condition is overbroad, it is not reasonably related to the compelling state interest in re-

\begin{footnotesize}
\begin{itemize}
\item 84. \textit{Id.} at 1133.
\item 85. \textit{Id.}
\item 86. \textit{Id.}
\item 87. \textit{Id.} at 1138.
\item 88. \textit{Id.} at 1137.
\item 89. 256 Cal. App.2d 623 (1967). These factors are: (1) whether the condition has a "relationship to the crime of which the offender was convicted," (2) whether the condition relates to conduct that is not itself criminal, and (3) whether the condition "requires or forbids conduct which is not reasonably related to future criminality." \textit{Id.} at 627. See supra note 80 and accompanying text.
\item 90. \textit{Pointer}, 151 Cal. App. 3d. at 1138-39.
\end{itemize}
\end{footnotesize}
forming and rehabilitating the defendant. The court concluded that there was an alternative to restricting Pointer's right to procreate. Instead of the restriction, Pointer could be required to submit to pregnancy testing periodically. If pregnant, she could be required to follow an intensive prenatal/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. As there were alternatives to the condition, it was not the least restrictive alternative and was therefore invalid.

A more recent case, Trammell v. Indiana, followed the Pointer analysis. Trammell, a mildly retarded woman, failed to get necessary medical care for her child. She did not take him for a two month checkup, did not feed the child properly, and did not take the child for initial immunizations. Despite being encouraged by her mother to take the child to a doctor, Trammell failed to act. The child eventually died as a result of her failure to obtain proper medical care. Trammell was charged with child neglect and found guilty but mentally ill due to mental retardation. The court sentenced her to eighteen years. Eight of those years were to be served on probation. A condition of Trammell's probation was that she not become pregnant.

In reviewing this condition, the court stated conditions that impinge on constitutional rights must be designed to protect the community and promote rehabilitation. Further, the court noted it must consider "the purpose sought to be served by probation, the extent to which constitutional rights enjoyed by law abiding citizens should be afforded probationers, and the legitimate needs of law enforcement." Following the Pointer analysis, the court concluded that although the condition was related to protecting the public, there were less restrictive means to do this. Periodic pregnancy testing, prenatal/neonatal treatment with supervision, and removal of the child from Ms. Trammell's custody were all possibilities. Like the Pointer court, the Trammell court was concerned that Trammell may feel forced to have an abortion to avoid going to jail. Courts in other child abuse cases

91. Id. at 1139.
92. Id. at 1140.
93. Id. at 1141.
96. Trammell, 751 N.E.2d at 286.
97. Id. at 288
98. Id.
99. Id. at 289.
100. Id. at 290.
have followed an analysis similar to that used in Pointer and Trammell, and have reached the same conclusion. Probation 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. Monitoring the mother, removing the child from her custody, and placing the child in another home should danger arise again are seen as viable alternatives to limiting the offender’s right to have additional children. This type of analysis should lead courts to invalidate similar conditions in non-support cases.

C. CHILD SUPPORT CASES

Despite the holdings in cases involving child abuse, which seem to indicate that probation conditions limiting procreation will not be permitted if there is a reasonable alternative, in two recent cases courts have allowed a restriction on procreation to be placed on fathers who had a history of failing to support their children. The scenarios presented in these two cases could easily occur in other states because most states have laws criminalizing the failure to support one’s children.

101. These cases include: State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989); State v. Howland, 420 So.2d 918 (Fla. Ct. App. 1982); Rodriguez v. State, 378 So.2d 7 (Fla. Ct. App. 1979); and State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976). In Mosburg, the court removed a probation condition requiring that Ms. Mosburg not become pregnant during her two years of probation. Ms. Mosburg had been charged and convicted of child endangerment for abandoning her newborn child. Mosburg, 768 P.2d at 314. Howland was convicted of negligent child abuse. He was ordered not to father children while on probation for five years. The court removed this. Howland, 420 So.2d at 919. The defendant in Rodriguez pled nolo contendere to a charge of aggravated child abuse for hitting her 9 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, the others were removed. Rodriguez, 378 So.2d at 10. Livingston involved a 20 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 five year probation. The court held that the condition was invalid. Livingston, 372 N.E.2d at 1336.

The only case involving child abuse in which the court allowed a probation condition restricting procreation to stand is State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998). Mr. Kline was convicted of first degree criminal maltreatment. While on 36 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. Id. at 698. Prior to this, Mr. Kline and his wife had their parental rights to the first child terminated as a result of child abuse. Id. At the hearing to revoke his probation, the court added a condition to his probation that he not father additional children until he completed drug counseling and anger management treatment. Id. at 699. On appeal the court upheld this condition because of concern for the children's safety. It also noted that it was not a total ban on Mr. Kline's reproductive rights. The trial court retained the ability to modify the condition if and when Mr. Kline completed his treatment. Id.

102. See supra notes 94-95 and accompanying text.

103. Indeed many states, like Wisconsin and Ohio, have criminalized this type of failure to support one's children. See, ALA. CODE § 13A-13-4 (1994); ALASKA STAT.
The first case, *State v. Oakley*, involved a defendant who personified the expression "dead beat dad." Oakley had fathered nine children by four different women. He was able to work and had worked in the past, yet he refused to pay his court ordered child support. Oakley had been convicted several times of criminal nonsupport; he had been put in jail, fined—all in an effort to get him to pay. Still, 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 court judge conditioned Oakley's probation on his not fathering other children until he could show that he was supporting the nine he already had and could support any additional children.

On appeal, Oakley argued that this condition was an unconstitutional restriction on his right to procreate. He sought to have the court apply strict scrutiny to the condition because of its effect on this fundamental right. Although Oakley agreed that the State had a compelling interest in ensuring that his children were supported, he asserted that the condition was not narrowly tailored to serve that interest because it eliminated his right to procreate. As a practical matter, he might never be able to support his children.

Although the Wisconsin Supreme Court rejected Oakley's argument that strict scrutiny should be applied to the condition, it found 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. Rather than applying strict scrutiny, the court considered whether the condition was overly broad and whether it was reasonably related to the goal of rehabilitating Oakley. This, according to the court, was the appropriate consideration due to Oakley's status as a convicted felon on proba-

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104. 629 N.W. 2d 200 (Wis. 2001).
107. Oakley, 629 N.W.2d at 207.
108. Id.
109. Id. at 208.
110. Id. at 210. The court states that "while the condition here survives strict scrutiny,... we note that probation conditions—like prison regulations—are not subject to strict scrutiny." Id. at 208 n.23.
The court held the condition was reasonably related to Oakley's rehabilitation because it prevented him from violating the law by intentionally failing to support additional children. In addition, 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 only alternative the court considered was incarceration, which it noted would eliminate Oakley's right to procreate.

In reaching its conclusion, the court discussed the extent of the problem of failure to pay child support and its serious long-term consequences, which it noted include "poor health, behavioral problems, delinquency, and low educational attainment." In response to the dissent's argument that this holding conditioned the right to have children on the ability to support them and was contrary to the United States Supreme Court's decision in Zablocki v. Redhail, the court focused on the intentional nature of Oakley's conduct and his status as a felon on probation.

Justice William Bablitch filed a concurring opinion, joined by Justices Patrick Crooks and Jon Wilcox. Justice Bablitch emphasized that the Oakley case was about a defendant who intentionally refused to pay child support, thereby doing egregious harm to his children, rather than someone who was unable to pay. Had the case involved a defendant who was unable to pay, Justice Bablitch would have agreed with the dissenting justices. A second concurring opinion restated the applicable test and stressed that Oakley's children, not Oakley, were the true victims because Oakley's refusal to pay support may mean that his children will be raised in poverty.

Justice Ann Walsh Bradley—in a dissent joined in by Chief Justice Shirley Abrahamson and Justice Diane Sykes—discussed the constitutional infirmities in the court's decision. Justice Bradley began by addressing the preeminence of the right involved and what she saw as the true nature of the court's decision. She noted that the Wisconsin court was—at the time—the only court to have concluded that the

111. Id. at 210.
112. Id. at 213.
113. Id. at 212.
114. Id.
115. Id. at 204.
117. Oakley, 629 N.W.2d at 208 n.23.
118. Id. at 214 (Bablitch, J., concurring).
119. Id. at 215 (Crooks, J., concurring).
right to have children could be conditioned on the ability to support them.\textsuperscript{120}

Justice Bradley felt that due to the fundamental nature of the right implicated by the condition, it should be subject to heightened scrutiny. After briefly discussing the difference between a condition being “not overly broad” rather than “narrowly drawn,” she concluded that either way the issue was framed, the key concern was whether there were alternatives to the use of this condition.\textsuperscript{121} To Justice Bradley, the majority framed the condition as one focused on the intentional refusal to pay support, rather than a condition related to having children. In her opinion, the latter was what the court should have addressed in its decision.\textsuperscript{122}

Turning to the constitutional concerns raised by the condition, she pointed out that the trial judge imposed the condition on Oakley even though he knew Oakley would not be able to comply—by supporting his children.\textsuperscript{123} This means that even with the help of the condition, the State would not accomplish its goal of having Oakley support his children. In addition, there were other means available to collect child support. Other probation conditions could be used to accomplish this goal.\textsuperscript{124} Justice Bradley believed that the Court in \textit{Zablocki v. Redhail}\textsuperscript{125} addressed a similar issue and concluded that the state could not condition exercise of a fundamental right, the right to marry in \textit{Zablocki}, on payment of child support when there were other means available to get support for the children.\textsuperscript{126}

Next, Justice Bradley addressed the “unacceptable collateral consequences” of allowing the imposition of such a condition.\textsuperscript{127} First of all, the condition increased the possibility of a coercive abortion. The condition would serve as an incentive for the woman involved to seek

\textsuperscript{120} “Today's decision makes this the only court in the country to declare constitutional a condition that limits a probationer's right to procreate based on his financial ability to support his children.” \textit{Oakley}, 629 N.W.2d at 216 (Bradley, J., dissenting).

\textsuperscript{121} \textit{Id.} at 219.

\textsuperscript{122} \textit{Id.} at 221.

\textsuperscript{123} Justice Bradley was quoting the trial judge who said “it would always be a struggle to support these children and in truth [Oakley] could not reasonably be expected to fully support them.” \textit{Id.} at 217 (Bradley, J., dissenting).

\textsuperscript{124} “The narrowly drawn means described by the Supreme Court in \textit{Zablocki} still exist today and are appropriate means of advancing the state's interest in a manner that does not impair the fundamental right to procreate.” \textit{Id.} at 218 (Bradley, J., dissenting). Justice Bradley did not attempt to list the various means available to collect child support, but rather described them as “too numerous to list.” \textit{Id.} at 218 n.3 (Bradley, J., dissenting).

\textsuperscript{125} \textit{See infra} notes 163-172 and accompanying text for further discussion of \textit{Zablocki}.

\textsuperscript{126} \textit{Oakley}, 629 N.W. 2d at 218 (Bradley, J., dissenting).

\textsuperscript{127} \textit{Id.} at 219 (Bradley, J., dissenting).
an abortion.\textsuperscript{128} She cited the decisions in \textit{People v. Pointer}\textsuperscript{129} and \textit{State v. Mosburg}\textsuperscript{130} in support of her position. Secondly, use of the condition rationed the right to have children based on the wealth of the parent. Finally, the condition may very well be unworkable. It would be difficult to monitor; in fact, if Mr. Oakley violated the condition he would go to jail and another child would go unsupported.\textsuperscript{131}

In a separate dissent joined by Chief Justice Abrahamson and Justice Bradley, Justice Sykes described the condition as a "compulsory, state-sponsored, court enforced financial test for future parenthood."\textsuperscript{132} She reiterated that the Court's decision in \textit{Zablocki} answered "no" to the question of whether the ability to exercise a fundamental right could be conditioned on payment of child support.\textsuperscript{133}

Despite the constitutional concerns raised by imposing this type of condition, an Ohio court, without dissent, upheld the imposition of a similar condition citing \textit{Oakley} in support of its decision in \textit{State v. Talty}.\textsuperscript{134} Mr. Talty was charged with violating Ohio law by unlawfully and recklessly failing to support three of his seven children. He pled no-contest and the court placed him on probation for five years. As a condition of probation, the court required that Talty make all reasonable efforts to avoid conceiving another child.\textsuperscript{135} Talty appealed the trial court's decision to impose this condition. He argued that strict scrutiny should be applied to the trial court's action. The appel-

\textsuperscript{128} Justice Bradley noted that "[the condition] places the woman in an untenable position: have an abortion or be responsible for Oakley going to prison for eight years." \textit{Id.} at 219 (Bradley, J., dissenting).


\textsuperscript{131} Justice Bradley noted: "[t]he majority has essentially authorized a judicially imposed 'credit-check' on the right to bear and beget children." \textit{Oakley}, 629 N.W.2d at 220 (Bradley, J., dissenting).

\textsuperscript{132} \textit{Id.} at 221 (Sykes, J., dissenting).

\textsuperscript{133} \textit{Id.} at 222 (Sykes, J., dissenting).

\textsuperscript{134} No. 02CA0087-M, 2003 LEXIS 2907 *1 (Ohio App. June 18, 2003), rev'd, 103 Ohio St. 3d 177 (2004). In Ohio, probation conditions are referred to as community control sanctions. Both the Ohio Court of Appeals and the Ohio Supreme Court used cases dealing with probation conditions to evaluate the anti-procreation condition. The Ohio Supreme Court stated that:

The community-control statute, despite changing the manner in which probation was administered, did not change its underlying goals of rehabilitation, administering justice, and ensuring good behavior—withstanding the lack of explicit language in the community-control statute to that effect. Consequently, we see no meaningful distinction between community control and probation for purposes of reviewing the reasonableness of their conditions. \textit{Talty}, 103 Ohio St. 3d at 179. The court's analysis focused on \textit{State v. Jones}, 550 N.E.2d 469 (Ohio 1990) a case involving probation conditions. For clarity, the term "probation condition"—rather than "community control sanction", will be used in this article.

\textsuperscript{135} \textit{Talty}, 2003 LEXIS 2907, at *4. The trial judge stated of the condition; "What those efforts are are [sic] up to him, that is not for me to say, I am not mandating what he does, only that he has to make reasonable efforts to do something." \textit{Id.}
late court rejected this argument and instead applied the three-factor test adopted by the Ohio Supreme Court in *State v. Jones.* 136

The court found that the condition reasonably related to Talty’s rehabilitation, had some relationship to the crime he had been convicted of, and related to conduct that was “criminal or was reasonably related to future criminality.” 137 In reaching this conclusion, the court distinguished two Ohio cases that also applied the three-factor test but held such conditions impermissible. The first case, *State v. Livingston,* 138 involved a defendant charged with child abuse. According to the *Talty* court, the condition in *Livingston* was not closely related to the child abuse offense. The number of children Livingston had did not give rise to her offense. Talty’s offense, however, was directly related to the number of children he had. 139 In addition, the court distinguished *Livingston* because unlike the condition in that case, the condition in *Talty* was not a complete bar to Talty’s right to procreate. If Livingston got pregnant, she would have violated the condition regardless of efforts she may have taken to avoid pregnancy. 140 Talty would violate the condition only if he fathered a child after failing to take reasonable steps to avoid fathering another child. 141 The second case, *State v. Richard,* 142 involved a drug offense. The court easily distinguished that case because the condition in *Richard* was not related to the offense or to Richard’s rehabilitation. Citing *Oakley* in support of its conclusion, the *Talty* court found that the condition was not overly broad, and, as a result, did not look for alternatives. 143

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136. Id. at *11. The three factor test used by the *Talty* court was based on a prior Ohio case, *State v. Jones,* 550 N.E.2d 469 (Ohio 1990). The three factors are: (1) whether the condition was reasonably related to the defendant’s rehabilitation, (2) whether the condition had some relationship to the crime of which the defendant was convicted, and (3) whether the condition related to conduct that was “criminal or reasonably related to future criminality and serves the statutory ends of probation.” Id. The three questions are similar to those used by the courts in *Pointer* and *Trammell* discussed supra notes 83-102 and accompanying text.


140. Id. at *19-20.

141. Id. at *20. The court’s analysis on this point is flawed. According to the court, the condition was not a complete bar to Talty’s right to procreate because if a violation occurred the state would have to show that Talty was the father of any child conceived and that Talty had not taken reasonable steps to avoid the pregnancy. Talty is still not allowed to exercise his right to freedom in procreation decisions while he is on probation. That the state must prove that he is the father of the child and that he did not take steps to avoid the pregnancy, does not allow Talty freedom to choose to become a father. Thus, it appears that the condition is a complete bar to procreation during the period of probation.


1. Why the Different Results?

The courts in Oakley and Talty reached a different conclusion than other courts that have reviewed the use of a probation condition restricting the right to procreate. The factors the courts considered in every case were basically the same; yet the final results were not the same. The reason for this is a slight difference in the legal analysis used by the Oakley and Talty courts.

In Pointer and Trammell, for example, the courts considered whether the condition was related to the crime involved, whether it addressed conduct that was not itself criminal, and whether the condition was related to future criminality. The resolution of these issues was not crucial to the ultimate decision in either case; the critical issue was whether there were other means to accomplish the objective of rehabilitating the offender and protecting the children besides a condition that impinged on a fundamental right.

In Oakley, the court focused primarily on two factors: whether the condition was reasonably related to rehabilitation and to protecting the victim. In Talty, the court used the three factor approach. The courts in Oakley and Talty rejected the idea that the condition being evaluated was too broad. Their focus was in large part on the intentional or willful nature of the offense and the fact that the alternative to probation itself, incarceration, would eliminate the offender's right to procreate with no corresponding benefit to their children. Consequently, consideration of alternative means to collect support was not part of the court's analysis leading to the result that the conditions in both cases were permissible. The Oakley court looked at incarceration as the alternative to the probation condition. This raises the question of whether courts should look at probation conditions as alternatives to incarceration or look at probation conditions in light of alternative means to rehabilitate the defendant and protect victims. If the focus is on the former, almost any type of probation condition would be permissible because most will be less restrictive than incarceration.

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144. Pointer, 151 Cal. App.3d at 1139; Trammell, 751 N.E.2d at 288.
145. Id.
146. Oakley, 629 N.W.2d at 206-07.
148. Id. at *24, Oakley, 629 N.W.2d at 212
149. Oakley, 629 N.W.2d at 212; Talty, 2003 LEXIS 2907, at *23-26.
150. Oakley, 629 N.W.2d at 212; Talty, 2003 LEXIS 2907, at *23.
151. The Ohio Supreme Court's decision in Talty's appeal, 103 Ohio St. 3d 177 (2004), addressed this issue. The court rejected the "act of grace" theory and the idea that the government may withhold from a probationer any right that is denied to a prisoner. Id. at 182-83. The court stated that there is a difference between legitimate penological interests and legitimate probationary interests. The court held the "act of
If the courts applied the same analysis in Oakley and Talty as was used in Pointer and Trammell, the result may well have been different. Under the three-factor approach, the first issue would be whether the condition relates to the offense. The answer appears to be yes. The crime is failure to pay child support; the condition relates to having children who may not be supported. The next inquiry would be whether the condition relates to conduct which is not itself criminal. Having a child, no matter how little money you have, is not a crime. Finally, whether the condition reasonably relates to future criminality would be considered. The answer to this question is not clear. Obviously, one must have a child before child support becomes a concern. However, having a child you are not able to support is not automatically a crime. At the point a parent willfully fails to pay support or ignores a court order, the action becomes a crime. Future criminality depends on the probationer fathering a child and, despite an ability to financially support the child, refusing to pay child support.

The Pointer approach looks at whether there are alternatives to the condition. Consequently, the final question would be whether there are alternatives to the imposition of a probation condition restricting the offender’s right to have children that will serve to rehabilitate the offender and protect the children. The criminal conduct is not fathering a child; rather, the crime is the failure to pay child support. Therefore, a probation condition that addressed the payment of support, regardless of the number of children involved, would be appropriate. This would lead a court using the Pointer approach to look for alternative means to collect child support. Pertinent to the discussion of alternatives under this approach would be the ability of courts to require, as a condition of probation, that the offender get a

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152. Pointer, 151 Cal. App. 3d at 1138.
153. Id.
154. The necessary mental culpability requirement depends on the wording of the criminal statute. For instance Oakley was charged with intentionally refusing to support his children.Oakley, 629 N.W.2d at 202. He purposely failed to pay. Talty, however, was charged with recklessly failing to support his children. Talty, 2003 LEXIS 2907, at *1. This means that he consciously disregarded a substantial and unjustified risk that his children would not be supported. Because of the potential for a prison sentence this is not likely to be a strict liability offense. See, e.g., MODEL PENAL CODE § 2.02 (providing for mental culpability requirements for criminal offenses).
job, support his dependants, and follow all laws and court orders. In addition, the availability of administrative means to collect support would also be a consideration. As there will always be alternative means to collect support available, the condition would not be permitted under the Pointer approach.

None of the cases discussed above required that a court apply strict scrutiny in reviewing the probation condition. The approach taken by the courts in Pointer and Trammell leads to the same result that application of strict scrutiny would lead to—the condition would not be permitted. Strict scrutiny requires a compelling government interest and a restriction narrowly tailored to meet that interest. A restriction that is too broad is not narrowly tailored. A restriction that is narrowly tailored is not too broad. The Pointer and Trammell courts determined that the restriction was too broad because there were alternatives to accomplish the government's goals of protecting the children and rehabilitating the offender. This is an approach like strict scrutiny although the courts decline to use those words.

V. ZABLOCKI V. REDHAIL: DOES ZABLOCKI PROVIDE THE ANSWER?

The United States Supreme Court has not decided a case involving probation conditions that limit the right to have children, so there is no final definitive word on the subject. The dissenting Justices in Oakley cited the Court's decision in Zablocki v. Redhail in sup-

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156. See supra note 55 and accompanying text.
157. See infra notes 243-47 and accompanying text.
159. Pointer, 151 Cal. App. at 1140; Trammell, 751 N.E.2d at 289.
160. Abortion was also an issue that influenced the courts in Pointer, Zaring, Mosburg, and Trammell. The courts were concerned that the defendants, who were female, if faced with the possibility of incarceration, might feel coerced into having an abortion. In Oakley, the dissenting justices voiced this concern, however the majority failed to address the issue. Oakley, 629 N.W.2d at 219 (Bradley, J., dissenting). Likewise the court in Talty did not address this issue. Although no rationale is given for this exclusion, it could be a matter of law and biology. The father of an unborn child has no legal control over the mother's decision to have an abortion. Under the law, the mother is the only one who can make that decision. See Planned Parenthood v. Casey, 505 U.S. 833, 895-96 (1992). Should she decide to have the child, against the father's will, he would still be obligated to provide support. In the event he is subject to a probation condition restricting his freedom to have children, he could be in violation of that condition. On the other hand, a female offender has the choice of having the child and risking going to jail, or having an abortion to retain her freedom. The decision is hers with no one to stand in her way. The restriction could make the choice to have an abortion more likely and as a result make coercive abortion more of a concern when the defendant is a woman.

159. The Court declined to review the decision in State v. Oakley, 629 N.W.2d 200 (Wis. 2001), cert. denied, 537 U.S. 813 (2002).
port of their argument that the right to have children could not be conditioned on payment of child support when there are alternative means available to collect support.\textsuperscript{163} However, reliance on Zablocki when reviewing a probation condition could be misplaced. Although the presence of alternative means to collect support was a factor in the Court's decision in Zablocki, there is one significant difference in the situation presented in Zablocki: Redhail had not been convicted of a criminal offense because of his failure to support his child.

The Court's decision in Zablocki supports the position that procreation should not be restricted if there are alternative methods to rehabilitate the defendant and protect the victim. In Zablocki, Redhail challenged a Wisconsin statute requiring any state resident, who was the non-custodial parent of a child he was obligated to support by a court order or judgment, to get permission to marry from a state court. Permission would not be given unless the person proved that he had complied with the support order and that his children were not and were not likely to become public charges. Any marriage license issued without court permission was declared void by the statute.\textsuperscript{164}

Redhail had fathered a child when he was a high school student. After a paternity action in which he admitted he was the child's father, he was ordered to pay child support. Redhail was indigent and unemployed for several years following the paternity action—resulting in a substantial arrearage. Due to the arrearage and his inability to pay, he was not eligible for a marriage license and could not marry.\textsuperscript{165} Wisconsin sought to justify this statutory scheme on the basis that it protected the children involved by insuring that support would be paid and preventing the parent from assuming additional financial responsibilities.\textsuperscript{166}

The Court struck down the Wisconsin statute as a violation of the Fourteenth Amendment's guarantee of equal protection under the law. The classification made by the statute encompassed all Wisconsin residents who were non-custodial parents and who had a court-ordered obligation to support minor children. Those included within this classification could not marry without permission from a court. The Court determined that strict scrutiny should be applied because a fundamental right, the right to marry, was involved. Consequently, the State could restrict that right only if it had a compelling interest and the restriction was narrowly tailored to meet that interest.\textsuperscript{167}

\textsuperscript{163} Oakley, 629 N.W.2d at 218
\textsuperscript{164} Zablocki, 434 U.S. at 375.
\textsuperscript{165} Id. at 378.
\textsuperscript{166} Id. at 388.
\textsuperscript{167} Id.
The Court decided that the State's interests were not sufficient to justify the restriction on marriage for several reasons. First, although the state argued that the restriction protected children by ensuring that support would be paid, the restriction did not result in money being paid to the children. Nor did the condition prevent the parent from assuming other financial responsibilities that might affect his ability to pay support. In addition, the State had other ways to collect child support and thereby protect the children. The Court held that the classification interfered directly and substantially with the right to marry because no one in the class had the right to marry without court permission. Those who had no means to pay would never be able to marry. The burden imposed by the statute forced them to forgo that right or to suffer a serious intrusion in order to exercise the right.

A probation condition restricting the right to have children is—in essence—the same thing as the marriage restriction in Zablocki. An individual under such court supervision cannot have more children unless he receives permission from the court. In both situations a court is saying to someone: "you cannot exercise a fundamental right because of failure to support your children." In Zablocki, there were alternative methods available to collect child support. This fact was important to the Court's analysis. The same methods are available as alternatives to imposition of a probation condition restricting the right to have children.

In Zablocki, the Court pointed out that the restriction on marriage would not result in money for the children but could result in those unable to pay never being able to marry. Likewise, the probation conditions in Oakley and Talty do not result in money for their children. Rather, they result in the father not having additional children until he completes his probation or demonstrates he can support them all. Although the condition ends with probation, in the event the offender fails to pay again, this cycle could be repeated. In all three situations, the result of the restriction is not necessarily that the

168. *Id.* at 389.
169. *Id.* at 390.
170. *Id.* at 387.
171. The rights to marry and to have children are fundamental rights protected as part of the right to privacy by the constitution. See *supra* notes 10-26 and accompanying text.
173. The Court noted that there were several alternatives available under the civil and criminal codes of Wisconsin. *Id.* at 390. The same methods to collect child support are currently available in addition to extensive administrative procedures. See *infra* notes 243-47 and accompanying text.
175. *Oakley*, 629 N.W.2d at 203; *Talty*, 2003 LEXIS 2907, at *3.
children already existing get the support they are due. Other steps must be taken to obtain support for the children. The Court in Zablocki also pointed out that nothing prevented Redhail from incurring other financial obligations that could also affect his ability to pay support.\textsuperscript{176} Similarly, in Oakley and Talty, nothing prevented the offenders from assuming other financial obligations.

It is not clear how the Zablocki decision would apply to probationers like Oakley and Talty. Both pled no contest to a criminal charge involving willful or intentional failure to pay child support. This may mean that they had the ability to work and pay support, but simply would not do it. They were convicted criminals in need of rehabilitation. Their children were victims in need of protection. Redhail, on the other hand, was an indigent person unable to pay child support. His children were in need of support—just as were Oakley's and Talty's. Absent the willful or intentional nature of the failure to support, all three situations are the same. All involve conditioning the exercise of a fundamental right on the payment of child support.

In Zablocki, three of the concurring Justices imply that the result would be different if the justification for the statute was collection of support and it provided a method to exempt those who because of poverty would never be able to pay.\textsuperscript{177} Thus, only those who could pay

\textsuperscript{176} Zablocki, 434 U.S. 390.

\textsuperscript{177} The Court decided Zablocki by a vote of eight to one. Justice Marshall delivered the opinion of the Court. Four Justices filed separate concurrences. Three of the concurring Justices were troubled by the statute's failure to exempt indigent people from its provisions. In his concurring opinion, Justice Stewart pointed out the statute "makes no allowance for the truly indigent." \textit{Id.} at 394. Expanding on the problem, he stated: "[t]he fact remains that some people simply cannot afford to meet the statute's financial requirements. To deny these people permission to marry penalizes them for failing to do that which they cannot do. Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State." \textit{Id.} Justice Powell felt that the "collection device" rationale offered by the State posed a difficult question. Justice Powell disagreed with the suggestion in the Court's opinion that a State may never condition the right to marry on satisfaction of an existing support obligation simply because the State has alternative methods of compelling such payments. He concluded however that:

\begin{quote}
[t]o the extent this restriction applies to persons who are able to make the required support payments but simply wish to shirk their moral and legal obligation, the Constitution interposes no bar to this additional collection mechanism. The vice inheres, not in the collection concept, but in the failure to make provision for those without the means to comply with child-support obligations.
\end{quote}

\textit{Id.} at 400. Justice Stevens concurring in the decision made a similar point:

\begin{quote}
under this statute, a person's economic status may determine his eligibility to enter into a lawful marriage . . . . The statute appears to reflect a legislative judgment that persons who have demonstrated an inability to support their offspring should not be permitted to marry and thereafter to bring additional children into the world. Even putting to one side the growing number of childless marriages and the burgeoning number of children born out of wedlock,
but intentionally failed to pay would be prevented from getting married. Redhail clearly fits into the category of those unable to pay. Oakley and Talty may not fit into that category.

In Zablocki, the Court applied strict scrutiny because a fundamental right, the right to marry, was involved. The Court's application of strict scrutiny in Zablocki supports the position that strict scrutiny should be applied to probation conditions that restrict the offender's right to have children. The Zablocki decision is arguably precedential authority for courts considering the constitutionality of probation conditions limiting the right to have children. Regardless of how courts apply Zablocki, it remains for society to determine whether courts should have the power to impose such conditions. Although there would be benefits in the successful imposition of a probation condition restricting the right to have children, the serious potential collateral damage to society should be carefully considered in deciding whether to allow such conditions to be imposed.

VI. THE BENEFITS TO SOCIETY

Imposition of a probation condition that succeeds in preventing the probationer from having children should result in a safe and secure life for all of the probationer's children. In child abuse cases, children who may be victims of physical abuse or neglect would not be born. The probationer would have time to receive treatment, counseling, or other needed services without the stress of additional children. Children the probationer already has would most likely be removed from the probationer's custody. This would allow the probationer time to get his or her life in order before resuming the responsibilities of parenting. Child Protective Services ("CPS") would develop a case plan for the parent to complete before she could regain custody of her children. The end result, if all went well, would be a happy secure family. Society and the children would benefit from this outcome.

that sort of reasoning cannot justify this deliberate discrimination against the poor.

Id. at 404 (Stevens, J., concurring).

178. Id. at 388.

179. In State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998), this type of analysis lead the Oregon Court of Appeals to allow imposition of such a condition. Mr. Kline was convicted of first degree criminal maltreatment of one of his children. Prior to this, Mr. Kline and his wife had their parental rights to the first child terminated as a result of child abuse. Id. at 698. While on 36 months probation for this offense, he abused his two and a half month old daughter by breaking her leg, throwing her in a crib, and cursing at her. Id. At the hearing to revoke his probation, the trial court added a condition to his probation that he not father additional children until he completed drug counseling and anger management treatment. Id. at 699. On appeal, the court upheld this condition because of concern for the children's safety. It also noted that it was not a
Likewise, society would benefit from the successful use of a probation condition that prevents the probationer from having children until he is able to support them. As pointed out by the Oakley court, the children are the victims. If imposition of the condition is successful, meaning the offender has no children while on probation, there will be no additional victims. The probationer would not have to deal with the stress caused by the need to support additional children. He would have time while on probation to get a job and begin to meet his current support obligations. Since the probationer would be required to share his income with all of his children, the fewer he has, the more income he will have available to support current children. In addition, his relationship with his current children is likely to improve. Research indicates that parents who pay support tend to be more involved with their children, thereby providing emotional support in addition to financial support.

Although there are clear benefits to society and children in preventing probationers from having children while on probation when their offense involves mistreatment of their children, the probation condition alone is not enough to accomplish the ultimate goal of protecting the children. Other steps must be taken to stop someone who mistreated their child from doing it again and to secure financial support for the children. These other steps would themselves be sufficient to protect the children without the use of the probation condition. In light of the dangers use of a probation condition restricting anyone's right to have children poses to our society, these other steps alone should be used.

VII. DANGER TO SOCIETY
A. Is This The World We Want?

Imposition of a condition restricting a probationer's right to have children raises concerns beyond the tangible impact that this action may have on the individual involved. If a child is not supported to the point that the family is impoverished, society will bear a financial cost in the form of government programs such as TANF, Food stamps, and total ban on Mr. Kline's reproductive rights. The trial court retained the ability to modify the condition if and when Mr. Kline completed his treatment. Id.

180. Oakley, 629 N.W.2d at 468.
182. The other steps referred to include use of other probation conditions at the court's disposal and use of the administrative means available to collect support. See supra notes 243-47 accompanying text.
Medicaid, that will assist in supporting the child.\textsuperscript{183} It is better to bear the tangible costs of supporting the child, than to suffer the intangible costs of allowing a trial court judge to order someone not to have children because of a concern that they can't afford to support them. The intangible costs include the message such an action sends to poor families and their children about the value of their lives—as well as to the rest of the world about the values of our society.

The most obvious consequence to the child of allowing courts to impose a probation condition restricting the probationer's right to have children, regardless of the type of offense involved, is that some children will never be born. Either by abortion or some other form of birth control, these children will never experience life; poor or rich—physically abused or financially secure. If the condition is permitted, the message to poor children and their families is clear; it is better for a child not to be born than to come into the world facing poverty. It tells poor families that they should not have children.\textsuperscript{184} It sends the

\textsuperscript{183} Failure to pay child support is also a serious problem. According to statistics available from the Federal Office of Child Support Enforcement, in 2002 approximately $6 billion in past due child support was collected. Approximately 2.5 billion was collected on behalf of children who had never received public assistance, 3 billion was collected on behalf of those who formerly received assistance, and $500 million on behalf of those currently receiving assistance. Office of Child Support Enforcement Table 63: Total Amount of Support Distributed as Arrears, FY 2002, available at http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/annual_statistical_report/table_63.html.

Unfortunately, $92.3 billion in child support is due to almost 20 million children in the United States. $28 billion of this is owed to children who have never received public assistance. $58 million is owed to children who formerly received assistance, and $12 million is owed to children who are currently receiving public assistance. Office of Child Support Enforcement Table 63: Amount of Arrearages Due for all Fiscal Years, available at http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/annual_statistical_report/table_62.html. See Drew A. Swank, The National Child Non-support Epidemic, 2003 DET.C.L. REV. 357 (discussing the extent of the child support problem).

\textsuperscript{184} This message seems harsh but successful implementation of the family cap on Temporary Assistance to Needy Families (“TANF”) benefits, another encroachment upon procreation rights, suggests that society believes these are good messages and that money is at the root of the desire to prevent some people from having children. Like probation conditions limiting the right to have children, the TANF cap has withstood legal challenges. The “family cap” on cash assistance to poor families was first implemented as a reform to the Aid to Families with Dependent Children ("AFDC") program. The Personal Responsibility and Work Opportunities Act ("PRWORA"), which replaced the AFDC program with TANF, also allows the states to adopt a “family cap” provision. Such provisions eliminate the increase that occurred under the AFDC program when an additional child was added to the family. Like probation restrictions on procreation, family cap provisions have been challenged as violations of the constitutional right to procreate. Courts have rejected the argument that strict scrutiny should be applied to the cap, concluding that the cap does not infringe on the right to make procreation decisions, but rather reflects a decision by the legislature not to fund procreation choices made by TANF/AFDC recipients. As such, only a rational basis is needed to justify the cap. A rational basis has been found in the goals of enhancing family structure, while fostering responsibility and self-sufficiency. Unfortunately the result of the cap for the children involved is that they are born into families who have fewer resources to provide
collateral message that these parents, due to lack of financial resources, are unfit for parenthood.

Suppose the court is informed that someone subject to such a condition is pregnant or has fathered a child. Picture a man or woman who has allegedly violated the condition being dragged into court because of this violation. If the alleged mother-to-be is in fact pregnant, she or the father, whoever is subject to the condition, is thrown in jail for having a child in violation of the court’s order not to have more children. This is an unpleasant picture at best—something we could easily imagine happening in other countries where individual freedoms are subject to more government regulation. We so abhor scenarios like this that those who flee their home country to avoid imposition of mandatory birth control laws are deemed subject to persecution on account of a political opinion. 185 If they can establish facts to support their claim, they are eligible for political asylum. The facts

for the basic needs. However, the family cap achieves the goal of saving the state and taxpayers money.

In re C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995), aff’d by 92 F.3d 171 (3d Cir. 1996), arose under the AFDC program. Prior to the cap’s adoption, families receiving AFDC would get an increase of $102 per month for the second child born into the family and $64 per month for the third child. The family cap provision eliminated the increase for children conceived while the family was receiving AFDC benefits. Id. at 999. The plaintiffs sought to have strict scrutiny applied arguing that the cap was in reality a government attempt to deny them benefits should they make procreative decisions disfavored by the state and thus an infringement on their freedom to make procreative choices. The court declined to apply strict scrutiny and held that the cap need only be rationally related to a legitimate state interest. Id. at 1014. The latter standard of review was appropriate because the cap did not prohibit additional children from sharing in the AFDC grant already received by the family, it simply did not give more money to the family. Although the state couldn’t hinder procreation, it did not have to remove obstacles it did not create. The legitimate government purposes the court found for the cap were providing AFDC recipients with the same structure of incentives as working families, promoting individual responsibility, and strengthening and stabilizing the family unit. Id. at 1015. See also N.B. v. Sybinski, 724 N.E.2d 1103 (Ind. Ct. App. 2000); Sojourner v. New Jersey Department of Human Resources, 828 A.2d 306 (N.J. 2003) (upholding the family cap in the face of similar constitutional challenges).

The message sent to poor families dependant on TANF to help care for their children by the “family cap” and the decisions upholding it is “do not have children.” If you choose to have a child, or have a child despite steps taken to avoid pregnancy, no TANF assistance will be available to help provide the basic necessities of life for that child. The child has no choice in the matter. Having a child will thus make the poor even poorer—a result that seems to be endorsed by the courts. Once again, it is better for the parents to seek sterilization or abortion, to insure that the child will not be conceived or born, rather than having the child. The message to the children is “it would have been better had you not been born.” These are the same messages sent by probation conditions that limit the right to have children due to failure to pay child support.

185. 8 U.S.C. § 1101 (a)(42)(B) (2003). This statute states: “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or other resistance to a coercive population control program” is a refugee entitled to political asylum.
of one case in which the petitioner successfully sought asylum sound eerily similar to the hypothetical situation posed above.

In Li v. Ashcroft,\textsuperscript{186} two young people, ages nineteen and twenty, met and fell in love. Although old enough to marry in most countries, under the strict population control laws of China, they were too young.\textsuperscript{187} The couple was open about their desire to marry. Rumors spread that they were living together and that Li was pregnant, both violations of the population control laws.\textsuperscript{188} The local population control officer came to Li's home to investigate the rumor. After being told to end her relationship with the young man, Li told the official that "I'm going to have many babies . . . you have nothing to do with this."\textsuperscript{189} Later, two government nurses showed up at Li's doorstep and took her away for a forced gynecological exam. After the forced exam revealed Li was not pregnant, she was warned not to become pregnant without being married and not to marry below the legal age.\textsuperscript{190} The consequence should she violate these rules would be an involuntary abortion and sterilization. Despite this, Li and her boyfriend announced their intent to marry. Later, they fled China when they learned that the government had issued warrants for their arrest. These facts were enough to support her claim for political asylum.\textsuperscript{191}

Probation conditions restricting the right to have children can lead to a similar result. Someone alleged to be pregnant will be forced to undergo an exam of some kind. If pregnant, there will be some type of consequence—most likely revocation of probation and time in jail. They can avoid the consequence by deciding to use birth control or more radically to be sterilized, the most certain way to avoid becoming pregnant. They could also choose to have an abortion to avoid violat-

\textsuperscript{186} 356 F.3d 1153 (9th Cir. 2004).
\textsuperscript{187} 312 F.3d 1094, 1098 (9th Cir. 2002), rev'd en banc, 356 F.3d 1153 (9th Cir. 2004). The legal age for women to marry was twenty and for men twenty-two. \textit{Id}.
\textsuperscript{188} \textit{Li}, 312 F.3d at 1097-98.
\textsuperscript{189} \textit{Id}. 1097.
\textsuperscript{190} \textit{Id}. 1097-98.
\textsuperscript{191} \textit{Li}, 356 F.3d at 1160. Similarly appalling are the facts alleged in support of an asylum petition in Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004). In that case, the petitioner testified that he and his wife married, in a traditional Chinese ceremony in their village, while too young under the birth control laws. \textit{Id} at 555. The marriage could not be registered because they are still, under the law of the land, too young to marry. The wife became pregnant and under the law this pregnancy was illegal. \textit{Id}. She was forced to have an abortion when she was in her third trimester of pregnancy. \textit{Id}. at 556. In another case, the petitioner alleged that when it was discovered that his wife was pregnant with the couple's second child, one more than allowed by the law, she was subjected to an involuntary abortion in her seventh month of pregnancy. Liu v. Ashcroft, 93 Fed. App. (3d Cir. 2004). Scenarios such as these, if established by sufficient evidence, provide adequate grounds for granting a petition for asylum. That United States law allows this illustrates our commitment to freedom in procreation decisions. The use of probation conditions that limit freedom to have children is inconsistent with this commitment.
ing the terms of their probation and possibly going to jail. A choice between incarceration and sterilization or abortion really is not a voluntary choice. The idea that someone would have to make such a choice is contrary to the freedom guaranteed by the United States Constitution.\textsuperscript{192} Allowing even a probationer to be forced to make such a choice sends a negative message to the world about the values of our society.

B. THE PROVERBIAL DANGEROUS SLIPPERY SLOPE

First, the Wisconsin Supreme Court upheld the imposition of a probation condition restricting Mr. Oakley's right to have children. Later, an Ohio court allowed imposition of a similar condition, citing Oakley in support of its conclusion. Most states have a law criminalizing the failure to support one's dependants.\textsuperscript{193} A probation condition restricting someone's right to have children could be used in any state, unless there is a statute preventing the court from imposing such a condition. With the increased emphasis by the government on child support collection, there likely will be other courts that will use a similar probation condition. Efforts to force "dead beat dads" to stop having children may be motivated by valid concerns, but may lead down a treacherous path. The end of this path could easily be forced sterilization of offenders, presented as a voluntary alternative to incarceration, justified as a means to protect offenders from the consequences of

\textsuperscript{192} See supra notes 10-26 and accompanying text. Reasonable minds differ about the extent of this freedom. Reports surfaced in May 2004 of the efforts of one local judge to deal with the problem of "dead beat" dads. Judge Michael Foellger, a family court judge in Campbell Kentucky, considered implementing a payment plan for those who "voluntarily" elected to have a vasectomy rather than face 30 days in jail. Judge Foellger reported having already given some "dead beat" dads the option of 30 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. Judge Wants to Arrange Payment Plans for Vasectomies, Associated Press, available at http://www.kentucky.com/mld/kentucky/news.

The differing opinions on this issue were raised during an interview of Jeffrey Leving, President Emeritus of Fatherhood Educational Institute and Barbara Harris, Director of Children Requiring a Caring Community ("CRACK"). Mr. Leving opposed Judge Foellger's plan arguing that it is contrary to basic human rights guaranteed by the constitution. He used the Court's decision in Skinner v. Oklahoma, to support his position. Ms. Harris on the other hand, supported Judge Foellger's plan, arguing that it protected the children. Ms. Harris would extend the plan to include drug addicted women who may have children who will suffer because of the mother's addiction. Interview by Tavis Smiley with Jeffrey Leving, President Emeritus of Fatherhood Educational Institute and Barbara Harris, Director of Children Requiring a Caring Community ("CRACK"), NATIONAL PUBLIC RADIO, (May 27, 2004).

\textsuperscript{193} See supra note 105 and accompanying text.
their actions and to protect their potential children from the danger of not being financially supported by a parent.194

The desire to prevent certain individuals from having children is not new. Past efforts to limit the right of certain groups to procreate have been targeted at disfavored groups. Such efforts have included the forced sterilization of members of the targeted group. Although sterilization is a permanent, rather than temporary, means of restricting procreation, cases dealing with sterilization raise similar concerns. It is also an option courts appear to be encouraging when they impose probation conditions restricting the right to have children because it is a means to ensure compliance and avoid incarceration. The decision to select this method of birth control is not truly voluntary if made to avoid violating a court order and going to jail.

"Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."195 These words, penned by the Court when analyzing a sterilization statute, likewise apply to other procreation limits. The decisions in Skinner v. Oklahoma,196 striking down a statute that required the sterilization of habitual criminals, and Buck v. Bell,197 upholding a statute that allowed the sterilization of people with mental disabilities, illustrate the concerns raised by limiting procreative rights.

1. Background: Buck v. Bell and Skinner v. Oklahoma

The statutes at issue in Buck and Skinner were enacted at a time when many people in our society accepted eugenics as a valid social theory.198 Eugenics provides that certain traits, good and bad, are inheritable by descendants. Positive eugenics encouraged those with good traits to marry and have children. Negative eugenics sought to limit procreation by those with bad traits.199 The eugenicists believed that society could be improved by this and might be destroyed without

194. The efforts by a Campbell County Kentucky family court judge to deal with the problem of "dead beat" dads illustrate the reality of this concern. See supra note 193 and accompanying text.
197. 274 U.S. 200 (1927).
Their focus was on what they believed to be good for society, rather than the rights of the individual. They therefore believed that charity should be guided by the welfare of society, not the welfare of individuals. Eugenic plans were based on the idea that "much social inadequacy is of a deep-seated biological nature, and can be remedied only by cutting off the human strains that produce it." One obvious way to further such ideas was sterilization of those it was believed endangered society by having children.

Legislatures enacted statutes allowing involuntary sterilization of such individuals in twenty-eight states. These statutes generally targeted those who were feeble-minded, insane, criminalistic, epileptic, inebriate, diseased, blind, deaf, deformed, and dependant (orphans, never-do-wells, homeless, tramps and paupers). Many such statutes were overturned due to constitutional problems. Due process was an issue for statutes that failed to provide notice and a hearing to the target. Equal protection problems arose when statutes targeted some but not all of those similarly situated. Finally, objections on the basis of cruel and unusual punishment were raised when statutes sought to use sterilization solely as a punishment for a crime. The statutes at issue in Buck and Skinner were drafted to

201. Cynkar, supra note 198, at 1426.
202. Id. at 1428.
203. Philip Reilly, The Surgical Solution: A History of Involuntary Sterilization in the United States 88 (1991). In 1927, two states adopted sterilization laws. In 1928, one additional state adopted a sterilization law. In 1929, three states adopted new sterilization laws and six other states revised existing statutes to ensure they followed the statute upheld in Buck. In 1931, sterilization bills were introduced in ten states and became law in five, raising the number of states with enabling statutes to twenty-eight.
204. Paul Weindling, State Eugenic Sterilization History: A Brief Overview 31 (Robitscher ed. 1973). The categories created by sterilization statutes were consistent with the eugenic view that certain genes needed to be eliminated from American stock. Cynkar, supra note 198, at 1428.
206. Davis v. Berry, 216 F. 413, 419 (1914 S.D. Iowa). In Davis, the court struck down a statute that allowed someone with two felony convictions to be sterilized without notice or hearing. The court found that sterilization was cruel and unusual punishment. It also held that the procedure used by the statute denied the individual due process and that the statute was a bill of attainder. See also Williams v. Smith, 131 N.E. 2, 2-3 (Ind. 1921). In Williams, the court found that a sterilization procedure that gave the target no opportunity to challenge the evidence presented denied due process to individuals targeted. See supra note 206 and accompanying text.
207. Smith v. Board of Examiner of Feeble-minded, 88 A. 963 (N.J. 1913); Osborn v. Thomason, 169 N.Y.S. 638 (1918) aff'd, 171 N.Y.S. 1094 (1918). The sterilization statutes in both cases applied only to those in state institutions. Both courts concluded that it denied equal protection because those not institutionalized presented the same danger to society and yet were not eligible for sterilization under the statutes challenged.
208. Davis, 216 F. at 417. See also supra note 206 and accompanying text.
carry out eugenic principles by preventing the "feeble-minded" in *Buck*, and criminals in *Skinner*, from having children, because they purportedly would have characteristics similar to their parents. The statute in *Buck* was crafted with the possible constitutional objections in mind.


Carrie Buck was a white woman committed to a state institution. She and her mother were alleged to be feeble minded. Carrie had a daughter, born out of wedlock, who was allegedly feeble minded as well. The director of the institution initiated procedures to have Carrie sterilized. \(^{210}\) A Virginia statute provided a procedure for sterilizing inmates of state institutions who were afflicted with a hereditary form of insanity or imbecility. The procedure included notice, hearing, and appeal to the Supreme Court of Appeals of the State of Virginia. \(^{211}\) The Supreme Court of the United States held that this procedure complied with due process requirements, concluding that it was a permissible means for the state to protect the public welfare. \(^{212}\) Justice Holmes, speaking for the Court, callously stated in the *Buck* decision that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough." \(^{213}\) The Court did not question the premise underlying the statute, namely, that the "feeble mindedness" would be inherited. \(^{214}\)

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\(^{211}\) *Buck*, 274 U.S. at 206.

\(^{212}\) *Id.* at 207.

\(^{213}\) *Id.*

\(^{214}\) This was due, in part, to the fact that the only evidence before the Court on this issue was expert testimony presented in support of the statute by the Virginia Colony for the Epileptics. Ms. Buck's lawyer, presented no expert testimony to contradict the witness for the Colony. Cynkar, *supra* note 198, at 1430.

*Buck v. Bell* was a friendly lawsuit brought to test the constitutional validity of the Virginia sterilization statute. The superintendent of the colony, Dr. Albert Priddy and the attorney for the colony, Mr. Aubrey Strode, were instrumental in enacting the statute challenged in *Buck*. Lombardo, *supra* note 209, at 45. The attorney selected to represent Ms. Buck was Mr. Irving Whitehead, the former director of the colony and a friend of Mr. Strobe. *Id.* at 50. Mr. Whitehead did little to develop Ms. Buck's case during the trial. Although there was evidence indicating that neither Ms. Buck nor her child was actually feebleminded, Mr. Whitehead failed to develop these facts at the trial court level. Ms. Buck attended school, worked, and was involved in a church in the community. *Id.* at 52-53. Unfortunately, she had become pregnant as the result of a rape. She was considered immoral and therefore feebleminded. *Id.* at 54. Mr. Whitehead also did not attempt to contradict expert testimony that Ms. Buck and her daugh-
Although the Court has not overruled the *Buck* decision, it is not currently followed.215 Unfortunately, it cleared the way for states to adopt similar procedures for the involuntary sterilization of 60,000 purportedly mentally ill/disabled people between 1907-1972.216 Society eventually realized the error of this approach, and sterilizations of mentally disabled persons, although still permissible in some states, are now more limited.217


The Court in *Skinner v. Oklahoma*218 reached a result different from *Buck* even though the same eugenic rationale was used to support the statute Skinner challenged. In *Skinner*, the Court struck down an Oklahoma law that allowed for the involuntary sterilization of habitual criminals. Skinner was convicted of stealing chickens in 1926 and of robbery with a firearm in 1929. In 1935, Oklahoma enacted the *Habitual Criminal Sterilization Act*, which required the sterilization of those convicted two or more times of felonies involving moral turpitude.219 The sterilization statute did not apply to felonies arising out of violations of prohibitory laws, the revenue acts, embezzlement, or political offenses. In addition, it did not apply if the individual was convicted of three separate offenses at one trial or if the three separate convictions occurred in another state.

The next year, the Oklahoma Attorney General started proceedings to have Skinner sterilized. Under the statute, Skinner was entitled to be given notice of the proceeding, an opportunity to be heard, and a jury trial. The role of the jury was to determine whether Skinner had been convicted of two or more felonies involving moral turpitude and whether the sterilization could be done without danger to his feeble minded and that this condition was hereditary. *Id.* at 51. His argument at the Supreme Court focused on the constitutional concerns that had proved fatal to other sterilization statutes: due process, equal protection, and cruel and unusual punishment. *Id.* at 57.

215. The constitutional principles stated in *Buck* have never been overturned. Some scholars feel that *Buck* is still viable law. The majority suggest it would be overturned if presented to the Supreme Court today. Cynkar, *supra* note 198, at 1430.


217. States still struggle with the proper approach to sterilization of mentally disabled individuals. *See generally Field & Sanchez, supra* note 199, at 80-109 for a discussion of the concerns raised by sterilization of mentally disabled individuals. Two basic issues are raised by involuntary sterilization. First, who should make the choice? Secondly, what criteria should be used in deciding whether someone should be sterilized? *Id.* at 81.


life.\textsuperscript{220} Skinner could not challenge the premise underlying the statute—that his children would be criminals.

The Oklahoma Supreme Court rejected Skinner's appeal of the sterilization order, concluding that the statute was a proper exercise of the state's police power and that the court must defer to the legislature's judgment that the statute was necessary to protect the public. No evidence was before the court supporting the basis for the statute—nor did it appear that the legislature had any such evidence before it when it enacted the statute.\textsuperscript{221} Skinner appealed to the United States Supreme Court arguing, among other issues, that he had been denied due process of law under the Fourteenth Amendment because he had not been given an opportunity to challenge the basis for the sterilization—that he would father children who would be socially undesirable.\textsuperscript{222}

The Court applied strict scrutiny to the classification made by the statute because of the "basic liberty"\textsuperscript{223} involved. However, the Court did not state the constitutional basis for its conclusion that the right to freedom in procreation decisions was constitutionally protected.\textsuperscript{224} The Court held that the statute violated the equal protection clause of the Fourteenth Amendment because of the distinction it made between those convicted of similar offenses. Someone who committed larceny could be sterilized; those who embezzled, regardless of the amount involved could not be sterilized.\textsuperscript{225} Oklahoma law treated embezzlement and larceny the same for all purposes but application of the sterilization law. The State made no showing that descendants of those who committed larceny were more likely to inherit criminal traits than descendants of those who embezzled.

\textsuperscript{220} Skinner, 316 U.S. at 537.

\textsuperscript{221} The Oklahoma Supreme Court, deferring to the State Legislature, was willing to assume that the Legislature had evidence before it from which it found as fact that habitual criminals were more likely than not to have children who will also have criminal tendencies. The Court was also willing to assume that the Legislature concluded that embezzlers were not likely to have children who would inherit their criminal tendencies. Thus the exclusion of embezzlers from the sterilization statute was permissible. See Petitioner's Brief, at 10, Skinner v. Oklahoma, 316 U.S. 535 (1942) (No. 782).

\textsuperscript{222} Id. at 10. Skinner also argued that the statute violated the constitutional prohibitions of double jeopardy and ex post facto laws. Id. at 27, 30.

\textsuperscript{223} Skinner, 316 U.S. at 541.

\textsuperscript{224} Id. The Court stated:

[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . . He is forever deprived of a basic liberty . . . . We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential.

\textit{Id.}

\textsuperscript{225} Id. at 542.
The holding in *Skinner* has often been cited in support of the constitutional right to freedom in procreation decisions.\(^{226}\) This is a legacy quite different from that of *Buck*, which instead cleared the way for involuntary sterilizations. *Skinner* blocked the path of those who would seek to involuntarily sterilize convicted criminals and has provided the basis to challenge actions taken by the state to limit the right to have children. In *Oakley*, it was argued—unsuccessfully—that *Skinner* prevented the courts from imposing probation conditions on the offender's right to have children.\(^{227}\)

4. **What do Buck, Skinner, Oakley, and Talty have in common?**

Although the situations and cases discussed above arose at different times and have different facts, there are common themes running through all of them. Carrie Buck was a representative of a class disfavored at the time—those thought to be feeble-minded. As a "feeble-minded" person she could be involuntarily institutionalized. The rationale for allowing sterilization was that preventing Ms. Buck from having children would in fact allow her to be safely returned to society because it would protect her, protect any children she might otherwise have, and protect society. As she would be unable to care for any children, they would either become criminals or be dependent on the state for their support.\(^{228}\) To avoid the time and expense such a result would cost the public, the argument goes, it was better to sterilize Ms. Buck.

The Oklahoma sterilization law was aimed at a specified group of people—those who committed certain types of crimes.\(^{229}\) These crimes were not rationally different from other crimes that could not lead to sterilization. An unemployed person is likely to be poor and not likely to have an opportunity to embezzle, violate revenue laws, or commit a political offense. Stealing chickens or robbery are more likely to be a poor person's crimes. This statute targeted poor thieves—another disfavored group—in the interest of protecting society.

The rationale for allowing probation conditions that restrict procreation is similar to that used to support the decision in *Buck v. Bell* and the Oklahoma legislature's act in *Skinner*. Oakley and Talty are

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\(^{226}\) For example, the petitioner in Greber v. Hickman, 291 F.3d 617, 622 (9th Cir. 2002), used *Skinner* to support his argument that he should be allowed to exercise his right to procreate using artificial means while incarcerated. *Skinner* has also been cited as the basis for procreative freedom in other landmark cases. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1971); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

\(^{227}\) *Oakley*, 629 N.W.2d at 207-08.

\(^{228}\) *Buck*, 274 U.S. at 207.

\(^{229}\) *Skinner*, 316 U.S. at 537.
also members of a disfavored class—dead beat dads. In addition, they are criminals who may rightly be incarcerated for their crimes. A probation condition that restricts procreation allows them to return to the community instead of being incarcerated. The condition protects them by preventing them from violating the law by not supporting other children; it protects the children because it ensures that children will not be born who will not be financially supported; and it protects society from the possibility that we will have to step in and support the children in absence of the father.230

All of these efforts send the same messages: it is better for society if some people—those who are mentally disabled, have criminal convictions, or who lack the means to provide financial support—did not have children. The corresponding message sent to the children is that it would have been better had they not been born.

VIII. WHY ARE PROBATION CONDITIONS THE WRONG CHOICE?

Probation conditions that limit freedom to have children should not be used by the courts. Most probation statutes leave some discretion to judges to impose reasonable probation conditions.231 This simply does not provide enough guidance when an important constitutionally protected right is at issue. Instead, statutes should provide specific guidance on acceptable probation conditions. Any statute or regulation proposed should clearly state that a court may not impose a condition restricting the right to procreate. Courts would then be forced to use other alternatives to ensure that children receive the financial support they deserve. Leaving too much room for interpretation could result in a trial court interpreting the provision to allow some form of restriction. To avoid this possibility the statute or regulation must be crystal clear.

That the statute must be clear is evident from the decision in Ferrell v. State.232 The defendant in that case pleaded guilty to aggravated child battery and was sentenced to three months in jail followed by forty-eight months on probation. Her probation was subject to the

230. A similar rationale supports the TANF cap, discussed at note 183. TANF recipients are members of a disfavored class—poor people dependent on government benefits for their survival. Limiting the amount of the TANF grant serves a good purpose. It protects TANF recipients by helping them to attain self-sufficiency rather than furthering dependence on the government. In addition, it protects society by limiting the amount we pay to support poor families. Unfortunately, it does not appear to protect the children involved. They are born into a family without the financial means to support them and are not eligible, if they remain with their birth family, for cash benefits as a result of the TANF cap.

231. See supra notes 53-54 and accompanying text.

condition that "she not engage in any activity with the reasonable potential of causing pregnancy." Illinois had adopted the following statutory provision: "[a] court may not impose a sentence or disposition for a felony or misdemeanor that requires the defendant to be implanted or injected with or use any form of birth control." Several months after Ferrell was placed on probation, a court ordered pregnancy test revealed that she was pregnant. The state successfully sought to revoke her probation. The court later re-sentenced her for the aggravated child battery to six years in prison.

On appeal Ferrell argued that the condition violated the statute by requiring her to abstain from sex, a form of birth control. The State responded that the statute only prevented the court from requiring Ferrell to use a chemical or medical form of birth control. It argued that since abstinence is not a chemical form of birth control, it was not covered by the statute. Both parties pointed to certain parts of the legislative debates in support of their arguments.

The court agreed with Ferrell, concluding that "any form of birth control" means just what it says. The probation condition required that Ferrell use some form of birth control whether abstinence or something else. Consequently, the trial court's imposition of the condition violated the plain meaning of the statute.

Despite the court's conclusion that the statute's meaning is plain, the statute is ambiguous because it states "any form of birth control," yet specifically refers to chemical means of birth control by stating "implanted or injected." If the intent of the legislature was to prevent a trial court from setting any probation condition that restricts an offender's right to make procreation decisions, it could have chosen better language to accomplish this objective. By choosing the words that it did, the Illinois legislature left the door open for a trial court to use the type of probation condition the court imposed in Ferrell. The trial court's action in imposing the condition despite the language of the statute highlights the fact that legislatures should use crystal clear language when dealing with such a sensitive issue. The Ferrell decision appears to foreclose the possibility that an Illinois trial court would decide to establish a probation condition prohibiting an offender from having children while on probation regardless of the offense. This forces a court to use different conditions to accomplish the goals of probation.

234. 730 ILL. COMP. STAT. ANN. § 5/5-5-3 (k) (Supp. 2004).
235. Ferrell, 659 N.E.2d at 993.
236. Id. at 994.
237. Id.
238. Id. at 995.
In absence of a clear statutory provision, courts should apply strict scrutiny to any probation condition that restricts the right to make procreation decisions. Clearly, the right to freedom in procreation decisions is a fundamental right protected by the Constitution. Normally government actions that infringe on such rights are subject to strict scrutiny. The application of strict scrutiny is supported, if not mandated, by the holding in *Zablocki v. Redhail*. Use of strict scrutiny would result in the invalidation of the condition. Courts would be required to look for a compelling state interest and a narrowly tailored restriction. Most importantly, courts would be forced to look seriously at alternatives to the imposition of the condition. Alternatives are available and if used effectively will result in protection of the children and of society as well as rehabilitation of the offender.

A. **If Not Probation Conditions, Then What?**

There are alternatives to imposing a probation condition restricting the right to have children that will protect the children and society from the dangers posed by a parent who fails to support his children. First of all, courts should aggressively use the other probation conditions available to them. As discussed above, courts have the authority to require that a probationer get a job and support his dependents. Employment is the key. Once the probationer has a job, his wages can be assigned involuntarily to the child support enforcement agency. If the probationer refuses to work, he can be put in jail for failing to comply with the condition requiring him to get a job. In addition, Federal law requires that every state have an extensive child support collection program that must include administrative procedures to:

1. automatically withhold child support payments from wages,
2. intercept tax refunds,
3. place liens on real estate,
4. and withhold, suspend, or restrict the use of drivers' licenses, professional and occupational licenses, recreational licenses and sporting licenses of those owing support.

Once the probationer has a job, there is a mechanism in place to collect child support. The use of other probation conditions that re-

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239. See supra notes 10-26 and accompanying text.  
240. The Court decided that use of strict scrutiny was appropriate because of the fundamental nature of the right involved. *Zablocki*, 434 U.S. at 388.  
241. See supra note 55 and accompanying text.  
quire that the offender get a job and support his dependants coupled with the use of the system already in place to collect child support provide a reasonable alternative to restricting a probationer's right to have children.246

Use of intermittent sentencing is also an alternative. This option was raised by the ABA Standards for Criminal Justice Sentencing proposed by the ABA Criminal Justice Standards Committee. One of the proposed standards permits the offender to be committed to a facility on an intermittent basis.247 This would allow the court to permit

246. Although domestic relations is normally considered an area under the cognizance of the states, the issue of child support is extensively regulated indirectly by the federal government. An example of Congress' intervention in this area is the Child Support Enforcement Program 42 U.S.C. § 651-669 ("CSP") created in 1975. The goals of this program were to increase payment and collection of child support. In 1996 the Personal Responsibility and Work Opportunities Reconciliation Act ("PRWORA") 42 U.S.C. §§ 601 et seq. (2000 & Supp 2003) created a new program known as Temporary Assistance for Needy Families ("TANF") to replace Aid to Families with Dependant Children ("AFDC"). The number of families on welfare was viewed as a direct consequence of the non-custodial parent's failure to pay child support. Therefore PRWORA included amendments to the CSP geared toward increasing the effectiveness of child support collection efforts. Although the changes were the result of welfare reform efforts, assistance is available to anyone who needs help collecting child support. The CSP requires that each state have a plan for child support collection. The plan must include:

1. provisions for automatic wage withholding of child support payments,
2. expedited procedures for the administrative collection of child support,
3. procedures to intercept state tax refunds,
4. procedures to place liens on the real and personal property owned by the non-custodial parent for overdue support,
5. involuntary and voluntary procedures to establish paternity,
6. procedures to require non-custodial parents to post bond for overdue child support,
7. that orders are not subject to retroactive modification,
8. procedures for review of orders every three years upon the request of a party,
9. procedures to ensure that persons owing overdue support have a plan to pay, and
10. procedures to withhold, suspend, restrict the use of drivers license, professional and occupational licenses, recreational and sporting licenses of those owing support.


The state plan must also provide for the establishment of child support guidelines that "take into consideration all earnings and income of the non-custodial parent." 42 U.S.C. § 667 (a). Adherence to these guidelines must create a rebuttable presumption that the amount of support awarded is appropriate. Additionally, the plan must provide that any judge who deviates from the guidelines enter written findings of fact to justify the deviation. 42 U.S.C. § 667 (b). To ensure that the guidelines result in the appropriate amount of support being awarded, the guidelines must be reviewed every four years. 42 U.S.C. § 667 (a). Failure to pay can result in suspension of drivers licenses and certain other licenses until and unless the individual works out a payment plan with the state agency responsible for administering the program. In addition, the individual could be held in contempt of court or subject to state criminal charges for failure to support their dependants.

the offender to go to work or to a job training program, for instance, during the day and return to confinement during the evenings and weekends. Use of intermittent sentencing in this way would greatly reduce the offender’s opportunity to have children, while not imposing a condition prohibiting fatherhood. It also would allow the offender to work and provide support for his current children. Hopefully, the fact that his freedom is restricted in this way would be unpleasant enough to get the message across to the offender that he must support his children.

A similar alternative is suggested by the California probation statutes. Under California law, a probationer can be placed in counties or cities where road camps, farms, or other public work is available instead of in jail. The court has the power to order adult probationers to work. They are paid according to a pay scale fixed by the public entity. In addition, the court can order the probationer to support his or her dependants. If the court used both of these options, it would be easier to ensure that the probationer had a job and that the children received some level of support as the probationer’s wages could be easily attached for support. The restriction on his liberty would emphasize to the offender that he must support his children.

Finally, incarceration is an option available to courts when dealing with criminal failure to pay support. Incarceration would serve to rehabilitate the offender and protect society. A criminal conviction means that the offenders have violated the law. From a retributive standpoint, they must pay for their crimes. Incarceration is one they can pay. Incarceration would get the point across that failing to pay child support will not be tolerated. In addition, rehabilitation could occur behind bars.

Oakley and Talty involved offenders with a long history of failure to pay child support. It is likely that administrative means to collect support had been tried unsuccessfully. Oakley had faced criminal charges in the past for failure to pay child support. The problem in both cases was persistent leading to the conclusion that the defendants were either unable to pay or unwilling to pay. In either situation, a condition limiting their right to have children is not the most effective means to deal with the problem because the condition will not put food on the children’s table.

248. CAL. PENAL CODE § 1203.1(a) (West 2004). The court has the same power to require adult probationers to work, as prisoners confined in the county jail. Each county is required to establish a pay scale for compensation of the adult probationers in that county. Id.
249. CAL. PENAL CODE § 1203.1(d) (West 2004).
Criminal action should not be taken against someone truly unable to pay. They should be subject to neither incarceration nor probation. Instead, other means should be explored to help the individual so that he will be able to pay child support. Assistance in the form of job training and placement could be the key to solving the problem. Hopefully, for offenders like Oakley and Talty, their ability to pay has been thoroughly explored by their attorneys prior to making the decision to plead guilty or no contest to the offense. For those who decide to plead not guilty, the same issue should be addressed by the court in hearings leading up to the conviction.

On the other hand, those who are unwilling to pay support and who have demonstrated this by willful persistent violations of court orders should be dealt with by an appropriate prison sentence. This type of offender does not deserve the freedom allowed by probation. He is demonstrating that more forceful means are necessary to make him understand the gravity of his offense. Time behind bars would broadcast the message loud and clear that ‘You must support your children.’ If having additional children who would be victimized is truly a concern, incarceration is the only way to ensure that the offender doesn’t father additional children. Under current law there is no right to freedom in procreation decisions while incarcerated.250

There are disadvantages to putting the offender in jail. First, if the offender has a job, he is likely to loose it, especially if he is incarcerated for a long term. However, if he had a job he most likely

250. The court in Gerber v. Hickman, 103 F. Supp. 2d 1214 (E.D. Cal. 2000), aff’d, 291 F.3d 617 (9th Cir. 2002), cert. denied, 537 U.S. 1039 (2002) concluded that there is no right to procreate while behind bars using artificial methods. Mr. Gerber, sentenced to 100 years to life plus eleven years under a three strikes provision, wanted to have a child with his 41 year old wife. Gerber was not likely to be paroled and was not eligible for conjugal visits. He requested to provide sperm that would be sent to his wife so that she could be artificially inseminated. The prison officials refused to grant permission for this procedure and Gerber filed a 1983 action against them in Federal District Court. Gerber argued that under Skinner, his right to procreate survived incarceration. According to Gerber this meant that the right existed during incarceration. Rejecting this argument, the District Court ruled that Gerber had no right to procreate while in prison because such a right was inconsistent with his status as a prisoner. Gerber appealed the decision to the Ninth Circuit Court of Appeals. A three judge panel reversed the district court, ruling that further information was needed to decide whether the restriction on Gerber’s right to procreate was necessitated by a legitimate penological interest. The case was reconsidered by the Ninth Circuit Court of Appeals. It affirmed the district court’s decision concluding that the right to procreate while in prison is fundamentally inconsistent with incarceration. The Supreme Court declined to review this decision. At this time there is no right to freedom to make procreation decisions while incarcerated. Consequently, sentencing someone who refuses to pay child support to incarceration is a means to prevent them from having more children. If the court concludes that preventing the offender from having children is absolutely necessary to rehabilitate him and to protect the public, he should be incarcerated rather than put on probation.
wouldn't be facing criminal charges for failure to support his children. His wages could be attached for payment of child support. Another disadvantage of incarceration is that the child is likely to get nothing from the offender while he is behind bars. The impact of this disadvantage is lessened slightly by the fact that, in many jurisdictions courts will not suspend a child support obligation during periods of incarceration. Consequently, the court ordered support will continue to accumulate throughout the period of incarceration. The offender is likely to leave jail with substantial arrears accumulated. Payment of the arrears, should the offender ever be able to pay, would benefit the child. The offender will be required to pay both current support and the arrears. Although the amount accrued may be more than the offender can realistically be expected to pay, he will get a loud and clear message: support your child or go to jail. The final disadvantage is that the presence of a conviction on the offender's record may make finding a job difficult if not impossible. At the very least, it may

251. Many courts refuse to modify or terminate a parent's obligation to pay child support during a period of incarceration because courts view incarceration as a voluntary reduction in income that does not justify a reduction in child support. The Supreme Court of Pennsylvania provides a comprehensive summary of the approaches to this issue in Yerkes v. Yerkes, 824 A.2d 1169 (Pa. 2003). Yerkes, a non-custodial father, was convicted of aggravated sexual assault against his daughter, whom he had been ordered to support. He petitioned the court for a modification or termination of his support obligation during the ten years he expected to be incarcerated. The court affirmed the trial court's decision dismissing Yerkes' petition to reduce or terminate his child support obligation. Id. at 1177. The court discussed the three basic rules other courts had applied when considering this issue. The first approach referred to as the "no justification rule" provides that incarceration never justifies a modification of a child support obligation. The second approach, the "complete justification rule," provides that incarceration always justifies a modification of the obligation. The final approach, the "one factor rule," provides that incarceration is a factor the court can consider in determining whether to modify a child support obligation. In Yerkes the court adopted the "no justification rule" because the court concluded that this approach was in the best interest of the children involved. Id. at 1173. See also, Staffon v. Staffon, 587 S.E.2d 630 (Ga. 2003) (request for child support reduction by parent imprisoned for drug offense denied); Richardson v. Ballard, 681 N.E.2d 507 (Ohio Ct. App. 1996) (incarceration after probation revocation not sufficient basis to reduce or terminate child support); Reid v. Reid, 944 S.W.2d 559 (Ark. Ct. App. 1997) (court refused to modify support based on incarceration for molesting a child beneficiary of the support order); In the Matter of Marriage of Willis, 820 P.2d 858 (Or. Ct. App. 1991) (father imprisoned for drug offense not allowed suspension of child support obligation during period of incarceration); Koch v. Williams, 456 N.W.2d 299 (N.D. 1990) (imprisonment for incest offense involving child support beneficiary not sufficient basis for child support reduction). Courts are likely to be reluctant to reduce support when the offense leading to incarceration was failing to pay child support. To reduce the support would have the effect of terminating the very support obligation the prisoner is incarcerated for not fulfilling.

252. Some courts find this disadvantage a sufficient reason to adopt the "complete justification rule." This approach provides that incarceration is always a justification for the modification or termination of a child support obligation. Allowing support to accrue is viewed as a benefit to no one because it is unlikely the amount will be paid and interferes with the offender's rehabilitation by forcing him to deal with a substantial arrearage when he leaves prison. See Yerkes v. Yerkes, 824 A.2d 1169, 1172-73 (2003).
take some time for the offender to find work and pay child support following his release from incarceration.

Incarceration is not a perfect solution. To avoid the negative message sent to the children involved and to the poor by a condition that limits procreation, if a court concludes that preventing an offender from having more children is necessary to his rehabilitation and for the protection of other victims, it should put offenders in jail rather than on probation. This would send a clear message to them that their conduct is not acceptable, while not endangering sensitive constitutional rights, sending the wrong message to the children involved or poor families and placing the system on a slippery slope that could be heading for involuntary sterilization—the one sure way to stop dead beat dads from having children.

Incarceration, intermittent confinement, or assignment to public work are all alternatives to use of a probation condition that limits the probationer's right to have children. The latter two will yield immediate results, in terms of support for the child, if work is available. Incarcerating the offender, while not yielding immediate results, should yield long-term results. Hopefully, the offender would choose to pay support in the future rather than risk returning to prison.

IX. CONCLUSION

As acknowledged by the Court many years ago, the right to freedom in procreation decisions is a basic liberty. Efforts to curtail this liberty should be carefully considered to ensure that they do not send the wrong message to society or to those who are the object of such efforts. People who have a mental disability, who are convicted criminals, or who are poor are natural targets of such efforts because of the lack of sympathy they generate in the more affluent and their limited means to fight back. Preventing those who have mistreated children in the past from having more children sounds like a good idea. No children; no more victims. Allowing such efforts to succeed however, could have disastrous consequences for society. Just imagine how many children would be born if the criteria were that before becoming a parent you must have the ability to support the child. Who determines how much is enough or that a life lived in poverty is not worth living at all? This is a role no mere mortal, including a judge, should be allowed to assume.