

# LIMITING THE RIGHT TO PROCREATE: *STATE V. OAKLEY* AND THE NEED FOR STRICT SCRUTINY OF PROBATION CONDITIONS

Devon A. Corneal\*

## INTRODUCTION

In August 2001, the Wisconsin Supreme Court touched off a national debate<sup>1</sup> by upholding a probation condition placed on a man convicted of intentional failure to pay child support.<sup>2</sup> The probation condition prohibited David W. Oakley from fathering children for the term of his probation unless he could prove that he was capable of supporting the nine children he had already fathered and any additional children he wanted to have.<sup>3</sup> The ruling created a conflict between child welfare concerns and the fundamental right to

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\* J.D. Candidate, Seton Hall University School of Law; M.S. 1997, The Pennsylvania State University; B.A. 1994, The College of William and Mary.

<sup>1</sup> *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001). To see the breadth of coverage the case produced, as well as the countervailing policy and legal considerations, see Vivian Berger, *Bedroom Sentence*, NAT'L L.J., Sept. 17, 2001, at A21 (indicating that the ruling "illustrates the truth of the hoary maxim that hard cases make bad law"); Joan Biskupic, *'Deadbeat Dad' Told: No More Kids Wis. Court Backs Threat of Prison*, USA TODAY, July 11, 2001, at 1A (stating that the decision was "likely to reverberate across the USA"); Dennis Chaptman, *National Implications Seen in Ruling on Dad: Father of 9's Attorney Considering Taking Case to U.S. Supreme Court*, MILWAUKEE J. SENTINEL, July 12, 2001, at 2B; Glenda Cooper, *Wisconsin Deadbeat Dad Case Tests the Rights to Parenthood*, WASH. POST, July 15, 2001, at A2 (characterizing the decision as "spark[ing] a national furor"); Bruce Fein, *Irresponsible Fatherhood*, WASH. TIMES, August 07, 2001, at A12; Reynolds Holding, *The Judicial Sex Police; Stay Out of Our Bedrooms*, S.F. CHRON., July 22, 2001, at D3; Tamar Lewin, *Father Owing Child Support Loses Right to Procreate*, N.Y. TIMES, July 12, 2001, at A14; Leonard Pitts, Jr., *Judge's Ruling Raises Serious Doubts*, DAYTON DAILY NEWS, July 18, 2001. See also *Court to Deadbeat Dad: No More Kids*, at <http://www.cbsnews.com/now/story/0,1597,300855-412,00.shtml> (July 11, 2001) (on file with author); Jennifer Foote Sweeney, *Something Cheesy in the State of Wisconsin*, at <http://www.salon.com/mwt/feature/2001/07/13/wisconsin> (July 13, 2001) (on file with author).

<sup>2</sup> Wisconsin law provides that "[a]ny person who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony." WIS. STAT. ANN. § 948.22(2) (West 2002). Although Oakley received a five-year probation term, under Wisconsin law a conviction for a Class E felony is punishable by "a fine not to exceed \$10,000 or imprisonment not to exceed 5 years, or both." WIS. STAT. ANN. § 939.50(3)(e) (West 2002).

<sup>3</sup> *Oakley*, 629 N.W.2d at 201.

privacy and procreative control.<sup>4</sup> Child welfare advocates view the ruling as a victory for children and a mandate for child support enforcement.<sup>5</sup> In contrast, civil rights advocates, dedicated to protecting an individual's right to control his/her own reproductive future, view this type of probation condition as too great an infringement on individual constitutional rights.<sup>6</sup> Specifically, these advocates assert that there are less intrusive/more narrowly tailored means to achieve the same important goals.<sup>7</sup>

This Comment examines the potential consequences of the *Oakley* decision and argues that, when courts impose probation conditions, they may not infringe upon the fundamental right to procreate unless that infringement survives strict scrutiny. Part I of this Comment details the foundation and development of the right to procreate. Part II reviews the nature of probation and the difficulty of challenging probation conditions. Part III then examines how, and in what circumstances, probation conditions have been used to limit procreative rights. Finally, Part IV discusses the problems inherent in the *Oakley* decision and ultimately concludes that courts must invalidate probation conditions that infringe upon the right to procreate unless they survive strict scrutiny.

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<sup>4</sup> Cooper, *supra* note 1, at A2 (describing the decision as opening Pandora's box and comparing the viewpoints of representatives from the Association for Children for Enforcement of Support and the Wisconsin chapter of the ACLU). The majority and dissenting opinions in *Oakley* also illustrate the two positions. The majority focused on the impact that failure to pay child support has on children, noting that "[r]efusal to pay child support by so-called 'deadbeat parents' has fostered a crisis with devastating implications for our children" and has produced troubling consequences for children such as health and behavioral problems and lower levels of educational achievement. *Oakley*, 629 N.W.2d at 203. The dissent, however, focused on the basic human right to have children, characterizing it as a "fundamental liberty which the Constitution jealously guards for all Americans." *Id.* at 216 (Bradley, J., dissenting).

<sup>5</sup> Cooper, *supra* note 1, at A2 (quoting Geraldine Jensen, president of the Association for Children for Enforcement of Support as stating, "I understand why the court had to say no more kids until you support the ones you have. . . . These children are living in poverty. They have a right to clothing and food. This is an extreme case, but the poor have no excuse not to support their children. We have to make payment of child support as serious as payment of taxes.").

<sup>6</sup> *Id.* (quoting a former chairwoman of the American Bar Association's Family Law Section who characterized the *Oakley* decision as follows: "It gets the state back into the bedroom. . . . [H]ow do you keep from sliding down the slippery slope . . . ?").

<sup>7</sup> Lewin, *supra* note 1, at A14 (quoting Julie Sternberg, a lawyer for the American Civil Liberties Union as saying, "It's a very dangerous precedent. The U.S. Supreme Court has said that the right to decide to have a child is one of the most basic human rights. And in this case there were all kinds of less restrictive alternatives.").

## I. THE FUNDAMENTAL RIGHT TO PROCREATE

The United States Supreme Court has recognized the fundamental right to procreate for nearly sixty years. The Court took the first step toward affording constitutional protection to the right in its 1942 decision, *Skinner v. Oklahoma*.<sup>8</sup> In *Skinner*, the Court identified the right to procreate as “one of the basic civil rights of man”<sup>9</sup> and invalidated a state statute requiring the sterilization of habitual offenders<sup>10</sup> as an unconstitutional infringement on that right.<sup>11</sup> The Court explained that, because “[m]arriage and procreation are fundamental to the very existence and survival of the race,” forced sterilization of criminal offenders violates the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup> Additionally, the Court required strict scrutiny of governmental attempts to impose

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<sup>8</sup> 316 U.S. 535 (1942).

<sup>9</sup> *Id.* at 541.

<sup>10</sup> *Id.* at 536 (defining habitual criminals, under Oklahoma law as, “person[s] who, having been convicted two or more times for crimes ‘amounting to felonies involving moral turpitude,’ either in an Oklahoma court or in a court of any other State, [and] is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution”) (internal citations omitted).

<sup>11</sup> *Id.* at 537-42. This ruling was a sharp departure from the Court’s prior jurisprudence, most notably, *Buck v. Bell* where the Court upheld mandatory sterilization of the mentally handicapped in state institutions. 274 U.S. 200 (1927). In upholding the mandatory sterilization, Justice Holmes wrote his now infamous justification, “It is better for the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” *Id.* at 207. While the Supreme Court did not strike forcible sterilization laws until 1942, some lower courts acted earlier. For example, a federal district court judge invalidated a Nevada law allowing for the sterilization of certain criminals in 1918. See *Williams v. Smith*, 131 N.E. 2 (Ind. 1921) (striking a law allowing sterilization of prison inmates); see also *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918) (ruling that a Nevada law allowing forced sterilization (vasectomy) of some criminals violated the State constitutional prohibition against cruel and unusual punishment). But see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 162-63 (1993) (discussing later Indiana laws allowing sterilization of the “feebleminded”).

<sup>12</sup> *Skinner*, 316 U.S. at 541. Although the Court ruled on Fourteenth Amendment Equal Protection grounds, because the law impermissibly discriminated against criminals, commentators still trace the recognition of reproductive control as a fundamental right to this decision. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 657-58 (1997) (indicating that *Skinner*, by departing from the Courts’ previous jurisprudence as established in *Buck v. Bell*, was the first case to recognize the right to procreate); Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN’S L.J. 139, 148 (1993) (characterizing *Skinner* as the “springboard” for case law supporting the right to procreate).

involuntary sterilization.<sup>13</sup>

In 1965, the Court gave further protection to the right to control one's reproductive choices in *Griswold v. Connecticut*.<sup>14</sup> *Griswold* established the fundamental right to privacy for married couples and stands as the first of a series of contraceptive cases that built upon *Skinner* to firmly establish procreation as a fundamental right.<sup>15</sup> In *Griswold*, the Court invalidated a state law that prohibited dispensing information, instruction, or medical advice about contraception to

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<sup>13</sup> *Skinner*, 316 U.S. at 541 (stating that "strict scrutiny of the classification which a State makes in a sterilization law is essential"); see also CHEMERINSKY, *supra* note 12, at 658.

Courts review legislative enactments with strict scrutiny, intermediate scrutiny, or rational basis review. *Id.* at 529. Strict scrutiny is the least deferential, most exacting review a court applies and requires that the government have compelling goals achieved through narrowly tailored means. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (finding that infringements on the fundamental right to privacy will only be upheld if the State can demonstrate that the infringement is narrowly tailored to achieve a compelling state interest). Legislative enactments that infringe upon a fundamental right or discriminate against a protected class of persons trigger strict scrutiny. See CHEMERINSKY, *supra* note 12, at 529.

Intermediate scrutiny requires that the government have important goals achieved by a substantially related regulation. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma statute that prohibited sale of a type of beer to males under twenty-one and females under eighteen because the statute was not substantially related to an important governmental interest). But see *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (defining intermediate scrutiny as requiring the government to have an "exceedingly persuasive justification" for laws discriminating on the basis of gender) as an instance in which the Court may actually be applying a slightly higher level of scrutiny. The United States Supreme Court has limited the use of intermediate scrutiny to the Equal Protection context. CHEMERINSKY, *supra* note 12, at 529-30.

Rational basis review is the most deferential, least exacting scrutiny the Court applies and requires only that the government's goals are legitimate and that the means chosen are rationally related to those goals. See, e.g., *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 489 (1977) (applying rational basis where the "statute does not involve any discernible fundamental interest or affect with particularity any protected class"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (noting that rational basis scrutiny is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task"). Rational basis review is the default level of review applied where strict or intermediate scrutiny is inappropriate. CHEMERINSKY, *supra* note 12, at 533.

<sup>14</sup> 381 U.S. 479 (1965).

<sup>15</sup> See CHEMERINSKY, *supra* note 12, at 658-62. Additionally, *Griswold* has been called the "decision that inaugurated the Court's modern protection of fundamental rights under the Due Process Clause of the Fourteenth Amendment." David B. Cruz, "The Sexual Freedom Cases"? *Contraception, Abortion, Abstinence and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 299 (2000) (identifying *Griswold* as the "foundation for a series of Supreme Court decisions invalidating anti-contraception and anti-abortion laws—cases once referred to by Richard Posner as 'the sexual freedom cases'") (internal citation omitted).

married persons.<sup>16</sup> Justice Douglas's majority opinion relied on the Bill of Rights and "emanations from those guarantees" to recognize zones of privacy<sup>17</sup> that protect the intimate relationship between husband, wife, and doctor.<sup>18</sup> By recognizing zones of privacy through "penumbras" surrounding explicit fundamental rights, the Court determined that privacy itself is a fundamental right, even though it is not express in the text of the Constitution.<sup>19</sup>

While *Griswold* only protected a married couple's privacy, six years later the Court expanded the privacy right to individuals in *Eisenstadt v. Baird*.<sup>20</sup> The Court noted that, for privacy to have any meaning, it must extend to individuals.<sup>21</sup> Writing for the majority, Justice Brennan stated 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*."<sup>22</sup> Thus, by invalidating a Massachusetts statute prohibiting the distribution of

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<sup>16</sup> *Griswold*, 381 U.S. at 480 (citing a Connecticut law that prohibited persons from using "any drug, medicinal article or instrument for the purpose of preventing conception," and allowed for the prosecution of any person who "assists, abets, counsels, causes, hires or commands another to commit any offense"). In *Griswold*, the defendants were the executive director of the Planned Parenthood League of Connecticut and its medical director who gave married persons contraceptive information and materials. *Id.* at 480.

<sup>17</sup> *Id.* at 484. Justice Douglas's opinion noted that this right of privacy was "older than the Bill of Rights—older than our political parties . . . . Marriage is a coming together for better or for worse, hopefully unending, and *intimate to the degree of being sacred*." *Id.* at 486 (emphasis added). Justice Goldberg's concurrence echoed this position, stating that "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." *Id.* at 495 (Goldberg, J., concurring).

<sup>18</sup> *Id.* at 481-82.

<sup>19</sup> *Id.* at 484; see also CHEMERINSKY, *supra* note 12, at 659. Justices Black and Stewart dissented in *Griswold*, vigorously asserting that because the right to privacy was not express in the text of the Constitution, it was not fundamental. *Griswold*, 381 U.S. at 507-27 (Black, J., dissenting). Justice Black pointedly noted, "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 509-10 (Black, J., dissenting). Justice Stewart went so far as to state, "I think this is an uncommonly silly law," while still maintaining that it should be upheld because the Constitution did not enumerate privacy as an explicit right. *Id.* at 527 (Stewart, J., dissenting).

<sup>20</sup> 405 U.S. 438 (1972).

<sup>21</sup> *Id.* at 440 (overturning a defendant's conviction under a law banning distribution of contraceptives).

<sup>22</sup> *Id.* at 453 (emphasis added).

contraceptives to single persons,<sup>23</sup> *Eisenstadt* not only expanded privacy rights to individuals, but also anchored procreative control within that right.<sup>24</sup>

The final case establishing the fundamental right to procreate is *Carey v. Population Services International, Inc.*<sup>25</sup> In *Carey*, the Court followed the reasoning of *Eisenstadt* and expanded the right to contraceptive access and information to minors.<sup>26</sup> The Court stated, “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices [regarding family and procreative autonomy/control].”<sup>27</sup> *Carey* also cemented the underpinnings of *Griswold* and *Eisenstadt*, ensuring, as one commentator has written, that *Griswold* could “no longer be read as holding only that a State may not prohibit a married couple’s use of contraceptives,” rather, “[r]ead in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”<sup>28</sup> The Court also made it clear that State intrusions are only justified if they survive strict scrutiny.<sup>29</sup> Justice Brennan’s majority opinion stated that, “where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”<sup>30</sup>

Cases addressing the legality of, and access to, abortion have further addressed the protection afforded an individual’s decision whether or not to become a parent. In 1973, the Court’s ruling in *Roe v. Wade*<sup>31</sup> established a woman’s right to choose to terminate her pregnancy.<sup>32</sup> In *Roe*, the Court invalidated a Texas law prohibiting all

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<sup>23</sup> The Massachusetts law made it illegal to “sell[], lend[], give[] away, exhibit[] or offer[] to sell, lend or give away an instrument or other article intended to be used . . . for the prevention of conception” but allowed physicians to “administer or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception.” *Id.* at 442.

<sup>24</sup> CHEMERINSKY, *supra* note 12, at 661.

<sup>25</sup> 431 U.S. 678 (1977).

<sup>26</sup> *Id.* at 682; *see also* Cruz, *supra* note 15, at 300.

<sup>27</sup> *Carey*, 431 U.S. at 685; *see also* CHEMERINSKY, *supra* note 12, at 661.

<sup>28</sup> Cruz, *supra* note 15, at 310; *see also* *Carey*, 431 U.S. at 687 (noting that post-*Griswold* decisions make it clear that “the constitutional protection of individual autonomy in matters of childbearing” is not based on protecting only the marital relationship).

<sup>29</sup> *Carey*, 431 U.S. at 685.

<sup>30</sup> *Id.* at 686 (internal citations omitted).

<sup>31</sup> 410 U.S. 113 (1973).

<sup>32</sup> *Id.*

abortions except those necessary to save the life of the mother.<sup>33</sup> Interestingly, the Court no longer found privacy in the penumbras of the Bill of Rights as it had earlier in *Griswold*, but rather found privacy protection in the Fourteenth Amendment.<sup>34</sup> The Court stated that, although the Constitution does not expressly mention the right to privacy, such a right has been, and will continue to be, recognized by the Court as fundamental and “implicit in the concept of ordered liberty.”<sup>35</sup> The *Roe* court found that the privacy right is rooted in the liberty interest protected by the Due Process Clause of the Fourteenth Amendment, and includes not only an individual’s right to use contraceptives, but also a woman’s right to terminate a pregnancy.<sup>36</sup>

While *Roe* affirmed that the right to privacy includes personal reproductive freedom and control, the decision also explicated that the right is not absolute.<sup>37</sup> Narrowly tailored infringements designed to achieve compelling state interests are permissible.<sup>38</sup> At least one commentator has argued that allowing state infringement on the right to privacy indicates that the right is not secure.<sup>39</sup> This view, however, overstates the case when considered in the wake of the entire universe of cases following *Roe*.

Although the Court has never defined privacy as an absolute right,<sup>40</sup> the Court further secured the right to procreate in its 1992

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<sup>33</sup> *Id.* at 164.

<sup>34</sup> *Id.* at 153.

<sup>35</sup> *Roe*, 410 U.S. at 152.

<sup>36</sup> *Id.* at 152, 154; *see also* CHEMERINSKY, *supra* note 12, at 664.

<sup>37</sup> *Roe*, 410 U.S. at 154.

<sup>38</sup> *Id.* at 155-56 (stating that where fundamental rights are implicated, regulation is justified only “by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake”) (internal citations omitted).

<sup>39</sup> Ballard, *supra* note 12, at 149-50 (arguing that, in practice, the right to privacy is often constrained by an “expanding definition of what constitutes a compelling state interest” and that the “occasional evaluation of reproductive rights-burdening regulations under a mere rationality standard of review” prevents the right from finding “stable footing in our constitutional framework”). In fact, Ballard suggests that there is, in effect, “no substantially established and judicially recognized constellation of constitutional rights supportive of the option to have children and to control the conditions under which one procreates.” *Id.* Ballard further argues that it is this very impermanence and instability that has allowed courts to impose Norplant probation conditions on female probationers, conditions that she views as invalid infringements upon procreative rights because although temporary, Norplant (or Depo-Provera) is still medical sterilization. *Id.*

<sup>40</sup> *See, e.g., Roe*, 410 U.S. at 155 (stating that the privacy interest is not absolute, and “that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant”); *Harris v. McRae*, 448 U.S. 297, 326

decision, *Planned Parenthood v. Casey*.<sup>41</sup> The six-three decision in *Casey* affirmed the central holding of *Roe*. Justice O'Connor's opinion for the majority stated that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."<sup>42</sup> The Court further noted that at the core of liberty and, therefore, reproductive freedom, is the right of an individual to define his/her "own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>43</sup> While later limits on *Roe* raise questions regarding the breadth of the right to privacy as it extends to procreative control,<sup>44</sup> the mere existence of limits on a fundamental right does not mean that the right is in danger of being extinguished. No right is absolute; for example, the courts have imposed limits on freedom of speech and yet, the core of the right remains.<sup>45</sup> Abortion rights are a unique and particularly contentious issue in today's society, yet the Court's consistent protection of the right to procreate more generally highlights the right's stability and importance in constitutional jurisprudence.<sup>46</sup>

## II. PROBATION

Probation is a means by which the criminal justice system can impose "supervised, conditional freedom" instead of incarceration on convicted criminals.<sup>47</sup> Specifically, probation requires that probationers comply with conditions that may limit their freedom.<sup>48</sup> If those conditions are violated, a court may revoke an offender's probation and send him/her to prison.<sup>49</sup> How the United States has

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(1980) (holding the federal government is not required to fund abortions even when medically necessary); *Maher v. Roe*, 432 U.S. 464, 479 (1977) (ruling that under *Roe*, states can refuse to provide Medicaid funds for non-medically necessary abortions even when the state provides Medicaid funding for childbirth).

<sup>41</sup> 505 U.S. 833 (1992); *see also* *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a Nebraska law banning partial-birth abortions that did not provide a maternal health exception because *Casey* required that such an exception be included).

<sup>42</sup> *Casey*, 505 U.S. at 850.

<sup>43</sup> *Id.* at 851.

<sup>44</sup> *See supra* note 40.

<sup>45</sup> *See, e.g.,* *Turner Broad. Sys. v. Fed. Communication Comm'n*, 512 U.S. 622, 641-43 (1994) (discussing application of strict and intermediate scrutiny to regulations of speech); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-50 (1961) (rejecting the position that freedom of speech under the First Amendment is "absolute").

<sup>46</sup> *See supra* PART I.

<sup>47</sup> NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 1:2, at 1-7 (2d ed. 1999).

<sup>48</sup> *Id.* § 1:1, at 1-3.

<sup>49</sup> *Id.* § 1:1, at 1-3, 1-4 (noting that revocation can only occur by holding a "judicial revocation proceeding").



implemented its probation system and how this process interacts with fundamental rights is as much a study of social policy as it is of the law.

A. *Origin of Probation in the United States*

Surprisingly, the American probationary system began, not with a legislative enactment, but with the actions of a cobbler.<sup>50</sup> Probation in the United States first started when John Augustus convinced the Boston Police Court to release a drunk to his custody rather than to jail him.<sup>51</sup> In his lifetime, Augustus arranged the bail of nearly 2,000 defendants, and earned the titles of “inventor” and “father” of probation.<sup>52</sup> Augustus’s *ad hoc* system ended in 1878 when Massachusetts passed the first probation statute; other states and the federal government followed suit.<sup>53</sup> Today, probation statutes affect millions of individuals.<sup>54</sup>

B. *Goals of Probation*

The theoretical underpinnings of probation and its goals have changed over time. Probation initially developed as a way to avoid the harsh sentences at common law.<sup>55</sup> The severity of criminal

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<sup>50</sup> ANDREW R. KLEIN, *ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION* 67 (2d ed. 1997). The development of this informal system of probation is even more surprising given the hostility towards Augustus’ work from police and court personnel who were only paid if defendants were incarcerated. *Id.*

<sup>51</sup> *See id.* at 68, 71. The author notes Augustus’ position as a temperance worker who conditioned the defendants’ release on their willingness to take a sobriety pledge; if the defendants followed Augustus’ conditions, the cases against them were dismissed. *Id.*

<sup>52</sup> *Id.*; *see also* COHEN, *supra* note 47, § 1:2, at 1-8.

<sup>53</sup> *See* COHEN, *supra* note 47, at § 1:2, at 1-8, 1-9 (noting that the first federal probation statute, Law of Mar. 4, 1925, ch. 521, 43 Stat. 1259, was passed in 1925). Today the Federal Sentencing Guidelines govern probation on the federal level. *Id.* at 1-10; *see also* FRIEDMAN, *supra* note 11, at 162-63.

<sup>54</sup> *See* COHEN, *supra* note 47, § 1:2, at 1-8; *see also* KLEIN, *supra* note 50, at 68-69 (noting that by 1984, 63% of offenders were placed on probation, while 26% were incarcerated and 11% were on parole, and further indicating that probation caseloads rose 154% from 1980 to 1993). For examples of these statutes, see 18 U.S.C. § 3563 (2002). *See also infra* note 70. The most recent data from the Bureau of Justice Statistics indicates that on Dec. 31, 2000 there were 3,839,532 persons on probation (nearly three times the number of persons in prison) and that probationers are predominately men (78%). United States Department of Justice, Bureau of Justice Statistics, *National Correctional Population Reaches New High: Grows By 126,400 During 2000 to Total 6.5 Million Adults*, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus00.pdf> (last visited June 25, 2002) (on file with author).

<sup>55</sup> *See* KLEIN, *supra* note 50, at 71.

punishment, influenced by religious and moral determinations,<sup>56</sup> engendered criticism in the mid-eighteenth century, and by the middle of the nineteenth century public attention and resources finally turned to ameliorating criminal sanctions.<sup>57</sup> Probation mitigated the severity of sentences and incorporated rehabilitation into criminal law.<sup>58</sup>

Bolstered by the belief of many commentators that incarceration failed to rehabilitate,<sup>59</sup> that prisons were overcrowded, and that probation was less expensive than imprisonment, the focus on probation as a means of rehabilitation continued through the 1960's.<sup>60</sup> Faith in probation as a means of rehabilitation began to decline in the 1970's, however, when society began to view probation as a public threat.<sup>61</sup> As society became more fearful of crime and what appeared to be increasingly more violent criminals, the rationale for rehabilitation lost some of its appeal.<sup>62</sup> This shift in

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<sup>56</sup> See COHEN, *supra* note 47, § 1:2, at 1-7.

<sup>57</sup> *Id.* § 1:2, at 1-7, 1-8.

<sup>58</sup> *Id.* § 1:2, at 1-10; see also United States v. Murray, 275 U.S. 347, 357 (1928) (noting that the 1925 Federal Probation Act stated that its purpose was to provide "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance granted before actual imprisonment should stain the life of the convict"); United States v. Consuelo-Gonzalez, 521 F.2d 259, 263 n.5 (9th Cir. 1975) (noting that, in five amendments to the Act [through 1972], the rehabilitative goal of probation had never been rejected, and, in fact, the amendments seemed to emphasize the "rehabilitative theme").

<sup>59</sup> See GEORGE G. KILLINGER & PAUL F. CROMWELL, CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT 168 (1974).

<sup>60</sup> See Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 841 (1999); see also KILLINGER & CROMWELL, *supra* note 59, at 45; KLEIN, *supra* note 50, at 71; James C. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. ON PRISON L. 367, 368-69 (1982) (asserting that probation "functions as the prototypical alternative to incarceration for non-violent, repetitive conduct"); Jon A. Brilliant, Note, *The Modern Day Scarlett Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1368-70 (1989) (noting that probation is primarily rehabilitative).

<sup>61</sup> See KLEIN, *supra* note 50, at 71-72; see also FRIEDMAN, *supra* note 11, at 404 (stating that "[i]n retrospect, the 1950's and 1960's represented a peak or high point in the movement to make criminal justice more humane, and to tilt the balance away from the police and prosecution. A backlash or reaction then set it. A wave of conservatism swept over the country. It had its roots in the great fear: the fear and hatred of crime.").

<sup>62</sup> See COHEN, *supra* note 47, § 1:1, at 1-2 (characterizing politicians as being "enamored with the retribution and vengeance aspects of criminal law while simultaneously becoming less enchanted with the rehabilitation aspect of penology"). Cohen also notes that critics of the rehabilitative model argue that probation and parole have failed to rehabilitate as an empirical matter. *Id.* § 1:23, at 1-33, 1-34.

thinking prompted some states and the federal government to treat probation not as an alternative to sentencing, but as a sentence in and of itself.<sup>63</sup>

The American Bar Association's ("ABA") *Standards for Criminal Justice*,<sup>64</sup> ("Standards") illustrates this shift. In 1970, the Standards stated that the goal of probation was to "avoid[] future crimes by helping the defendant learn to live productively in the community which he has offended against."<sup>65</sup> The Standards further stated that this goal was best achieved by "orient[ing] the criminal sanction toward the community setting in those cases where it is compatible with the other objectives of sentencing."<sup>66</sup> In 1994, however, the revised Standards defined "compliance programs" (including probation) as sanctions designed to "promote offenders' future compliance with the law," thus, rejecting the use of the term "probation" in order to move away from the traditional definition of probation.<sup>67</sup> This shift also emphasized the "long-standing ABA policy that the legislature should authorize sentences to probation as a free-standing sanction."<sup>68</sup> The revision of the Standards indicates the ABA's view that probation is a stand-alone sanction and that rehabilitation is no longer the main goal of probation.<sup>69</sup>

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<sup>63</sup> See Kelly, *supra* note 60, at 844-45; see, e.g., 18 U.S.C. § 3561 (2002) (defining probation as a sentence and explicating when a convicted offender "may be sentenced to a term of probation"); DEL. CODE ANN. tit. 11 § 4302 (2001); N.J. STAT. ANN. § 2C:43-2(b) (West 2001); *Fonville v. McLaughlin*, 270 A.2d 529, 530 (Del. 1970) (stating that "the imposition of a term of probation constitutes a sentence").

<sup>64</sup> ABA, *Standards for Criminal Justice*, Sentencing §18-3.13, Commentary (3d ed. 1994) [hereinafter *Standards for Criminal Justice*].

<sup>65</sup> ABA Project on Standards for Criminal Justice, *Standards Relating to Probation 1* (Approved Draft 1970) [hereinafter *Approved Draft*].

<sup>66</sup> *Id.*

<sup>67</sup> *Standards for Criminal Justice*, *supra* note 65.

<sup>68</sup> *Id.*

<sup>69</sup> See *Approved Draft*, *supra* note 65, § 1.2, at 27 (stating that probation is desirable in certain cases because:

- (i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;
- (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contracts;
- (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;
- (iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;
- (v) it minimizes the impact of the conviction upon the innocent dependents of the offender).

Notwithstanding the ABA's position, however, many states continue to "conceptualize probation as fostering rehabilitation."<sup>70</sup> What constitutes rehabilitation in the face of social desires to "get tough on crime," however, is less clear. One commentator has described the current political climate as ushering in "[a]n era of more creative, experimental probation conditions"<sup>71</sup> including the harsh and punitive measures of "chemical therapy for sex offenders, forced birth control, and . . . castration."<sup>72</sup> The question today is whether such experimentation is constitutionally permissible in the area of the fundamental right to procreate.<sup>73</sup>

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<sup>70</sup> COHEN, *supra* note 47, § 1:5, at 1-11 (pointing to the importance of maintaining ties to the community and family in order to avoid the "corrupting influence" of prison).

Despite the move away from viewing rehabilitation as the primary goal of probation, many states still retain that goal in their statutory language. *See, e.g.*, ARK. CODE ANN. § 5-4-303(a) (Michie 2001); DEL. CODE ANN. tit. 11, § 4301 (2001); IOWA CODE ANN. § 907.6 (West 2001); LA. CODE. CRIM. PROC. ANN. art. 895 (West 2001); ME. REV. STAT. ANN. tit. 17A, § 1204-2-m (West 2001); N.M. STAT. ANN. § 31-20-6(F) (Michie 2001); N.Y. PENAL LAW § 65.10(1) (McKinney 2002); OHIO REV. CODE ANN. § 2951.02(C)(1)(a) (Anderson 2002); 42 PA. CONS. STAT. ANN. § 9754(c)(13) (West 2002); *see also* KLEIN, *supra* note 50, at 72-73 (positing that the continued faith in probation as rehabilitation stems from a belief that the administration of the system is problematic, not probation itself, noting that, in 1988, probation received only three cents to every dollar spent on corrections); Kelly, *supra* note 60, at 843 (noting that "because of a lack of funding and support staff, probation as a method of rehabilitation has not been nearly as effective" as hoped).

<sup>71</sup> Kelly, *supra* note 60, at 784. This characterization of probation conditions taking on an "experimental" quality raises questions as to whether state experimentation with probation conditions is permissible when the conditions implicate fundamental rights. *Id.* Justice Goldberg provided an insightful perspective on this issue in his concurring opinion in *Griswold v. Connecticut*:

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

....

... "[A] . . . State may . . . serve as a laboratory; and try novel social and economic experiments, I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ." The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

381 U.S. 479, 495-96 (1965) (internal citations omitted).

<sup>72</sup> Kelly, *supra* note 60, at 784.

<sup>73</sup> COHEN, *supra* note 47, § 1:22, at 1-32 (noting that recent concerns about the developments in the underlying theoretical foundation of probation are driven not only by reduced confidence in rehabilitation, but also by skepticism regarding the "vast discretion accorded those people who implement it"). Cohen raises additional concerns that the system itself is one "where arbitrariness and capriciousness are

### C. Probation Statutes

Probationary goals, whether punitive or remedial, are entirely statutory.<sup>74</sup> Overall, the structure of state and federal probation statutes is remarkably similar.<sup>75</sup> These statutes impose restrictions on the freedom of an individual who has been convicted of a crime.<sup>76</sup> These statutory restrictions, commonly called “conditions,” generally take one of three forms.<sup>77</sup> The first type of statute gives the sentencing court great latitude to impose appropriate restrictions by offering few specific suggestions of probation conditions and grants the court nearly unlimited discretion.<sup>78</sup> The second type requires the sentencing court to apply certain mandatory conditions but then confers upon the court the power to impose other necessary and appropriate conditions.<sup>79</sup> The third type, and the clear trend in probation, lists detailed, specific conditions that the court may (but is not required to) impose and also grants courts the authority to impose other reasonable conditions, usually through a “catch-all” provision.<sup>80</sup>

Mandatory or suggested conditions often include restrictions such as a prohibition against re-offending during the probationary term, remaining within the jurisdiction, and reporting to probation officers.<sup>81</sup> Violation of any of these conditions results in the

possible and very difficult to detect.” *Id.* § 1:24, at 1-34.

<sup>74</sup> See COHEN, *supra* note 47, § 2:1, at 2-3; see also *Ex parte* United States, 242 U.S. 27, 37 (1916) (noting there is no constitutional right to probation); *United States v. Mele*, 117 F.3d 73 (2d Cir. 1997) (identifying the power to grant probation as solely rooted in statutes); *United States v. Belgard*, 894 F.2d 1092 (9th Cir. 1990) (stating that there is no constitutional right to probation).

<sup>75</sup> See Klein, *supra* note 50, at 77-80 (discussing the similarity of statutes across jurisdictions and giving examples of the structure and provisions of those statutes).

<sup>76</sup> COHEN, *supra* note 47, § 7:13, at 7-22.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* See, e.g., MASS. GEN. LAWS ANN. ch. 279, § 1A (West 2002) (allowing the court to “place [an offender] on probation for such time and on such terms and conditions as it shall fix”).

<sup>79</sup> *Id.* See, e.g., 18 U.S.C.S § 3563 (Law. Co-op. 2002).

<sup>80</sup> COHEN, *supra* note 47, § 7:12, at 7-23. See, e.g., FLA. STAT. ANN. § 948.03 (West 2002).

<sup>81</sup> KLEIN, *supra* note 50, at 77-78. Klein characterizes the common statutory conditions as follows:

First, probationers must obey all laws. Second, they must report periodically to their probation officer. Third, they must obey all court orders, including payment of court-ordered fines, costs, fees, restitution, support and other financial assessments. Fourth, they must remain within the jurisdiction of the court. Fifth, they must participate in and often pay for proscribed treatment.

*Id.* The author additionally notes that other conditions are increasingly being

termination of probation and the incarceration of the offender.<sup>82</sup> This “laundry list”<sup>83</sup> of conditions may then be supplemented by discretionary “special conditions”<sup>84</sup> imposed in light of the particular facts of a case.<sup>85</sup> Indeed, legislatures have granted judges such extraordinary discretion to impose appropriate conditions that one commentator has noted that special conditions are “limited only by the sentencing judge’s imagination.”<sup>86</sup> These special conditions have ranged from so-called “scarlet letter provisions”<sup>87</sup> which require overt actions by the probationer to inform the public that s/he has been convicted of a crime<sup>88</sup> to less overt restrictions such as making donations to specific organizations,<sup>89</sup> refraining from associating with

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included as mandatory provisions, such as community service, jail terms as a condition of probation, searches or testing, or prohibitions from owning firearms. *Id.* See, e.g., 18 U.S.C.S. § 3563(a) (Law. Co-op. 2002).

<sup>82</sup> COHEN, *supra* note 47, § 1:2, at 1-7.

<sup>83</sup> Brilliant, *supra* note 60, at 1367.

<sup>84</sup> KLEIN, *supra* note 50, at 80-88 (noting that a sentencing judge’s discretion, while not total, is very broad and will be given discretion by appellate courts). See, e.g., 18 U.S.C.S. § 3563(b) (Law. Co-op. 2002) (giving courts the ability to impose discretionary conditions by explicating twenty-one optional conditions including restitution, support of dependents, required employment, medical or psychological treatment, and also including a catch-all category through which the courts may require a defendant to “satisfy such other conditions as the court may impose”).

<sup>85</sup> COHEN, *supra* note 47, § 1:10, at 1-16.

<sup>86</sup> Kelly McMurry, *For Shame: Paying for Crime Without Serving Time, But with a Dose of Humility*, TRIAL, May 1997, at 12.

<sup>87</sup> *United States v. William Anderson Co.*, 698 F.2d 911, 912-15 (8th Cir. 1982) (noting disapproval of “scarlet letter” terms of probation). See generally Kelly, *supra* note 60 (analyzing the validity of such conditions and recommending improvements on current approaches); Brilliant, *supra* note 60 (providing a broad analysis and critique of scarlet-letter probation conditions).

<sup>88</sup> See, e.g., *People v. Hackler*, 16 Cal. Rptr. 2d 681, 682 (Cal. Ct. App. 1993) (requiring a convicted felon to wear a t-shirt with “My record plus two six-packs equals four years” printed on the front and, “I am on felony probation for theft” printed on the back); *People v. McDowell*, 130 Cal. Rptr. 839, 842 (Cal. Ct. App. 1976) (overruled on other grounds by *People v. Welch*, 851 P.2d 802, 808 (Cal. 1993)) (forcing petitioner, a convicted purse snatcher, to wear tap shoes when leaving his house); *Lindsey v. State*, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992) (requiring probationer to take out an ad in a newspaper which had his mug shot and the caption “DUI—Convicted”); *Ballenger v. State*, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993) (forcing man to wear a pink fluorescent bracelet with “DUI Convict” on it); *People v. Meyer*, 680 N.E.2d 315, 316 (Ill. 1997) (imposing the condition that a man convicted of aggravated battery place signs at all entrances to his farm which stated “Warning! A Violent Felon lives here. Enter at your own risk!”); *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995) (striking down a probation condition requiring a convicted DWI offender to place a fluorescent bumper sticker stating “Convicted DWI” on his car); *State v. Bateman*, 771 P.2d 314, 316 (Or. Ct. App. 1989) (en banc) (forcing a man convicted of sexual abuse to put a sign at his home and on his car for 5 years that read “Dangerous Sex Offender”).

<sup>89</sup> See, e.g., *William Anderson Co.*, 698 F.2d at 912-915 (allowing a corporate

certain persons/groups,<sup>90</sup> or from engaging in certain activities.<sup>91</sup> Restrictions preventing probationers from engaging in certain activities have led to challenges in the area of reproductive rights; specifically, individuals have challenged conditions that prohibit them from conceiving and bearing children during their probationary terms as violative of the fundamental right to procreate.<sup>92</sup>

#### D. Challenges to Probation Conditions

##### 1. Obstacles to Challenges of Probation Conditions

Although there have been numerous critiques of probation conditions, challenges to these restrictions have been largely unsuccessful.<sup>93</sup> Courts rely on various theories to reject probation challenges, including (1) the “act of grace doctrine” and (2) the contract, or waiver, doctrine.<sup>94</sup> The United States Supreme Court first articulated the act of grace doctrine in *Escoe v. Zerbst*.<sup>95</sup> In *Escoe*, the Court stated, “probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.”<sup>96</sup> Thus, probation was viewed as a privilege that could be taken away at the discretion of the trial court and that should be accepted

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defendant to pay a fine to a charitable organization where corporate officers were doing community service); *People v. Burleigh*, 727 P.2d 873, 874 (Colo. Ct. App. 1986) (requiring probationer to make charitable contribution to a drug treatment program); *State v. Pieger*, 692 A.2d 1273, 1274 (Conn. 1997) (forcing probationer to make a donation to a local hospital).

<sup>90</sup> See, e.g., *United States v. Showalter*, 933 F.2d 573, 574-76 (7th Cir. 1991) (prohibiting probationer from associating with skinhead or neo-Nazi organizations); *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973) (prohibiting probationer from association with “known homosexuals”).

<sup>91</sup> See, e.g., *People v. Dominguez*, 64 Cal. Rptr. 290, 292 (Cal. Ct. App. 1967) (prohibiting a female offender from living with “any man to whom [she was] not married” and from becoming pregnant until after she was married).

<sup>92</sup> See *infra* notes 151-64 and accompanying text.

<sup>93</sup> COHEN, *supra* note 47, § 1:10, at 1-16. Of perhaps equal importance, however, is that few conditions are ever challenged. See Horwitz, *infra* note 99, at 81-84.

<sup>94</sup> Kelly, *supra* note 60, at 839-40 (identifying act of grace and contract theories as the “[t]raditional justifications for not allowing probationers to challenge their probation conditions”); see also COHEN, *supra* note 47, § 7:1, at 7-3; Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 791-92 (1987).

<sup>95</sup> 295 U.S. 490 (1934). Two years earlier, in *Burns v. United States*, the Court alluded to its understanding of probation as a beneficent grant when it characterized probation as a privilege, not a right. 287 U.S. 216, 220 (1932).

<sup>96</sup> *Escoe*, 295 U.S. at 492-93.

thankfully by the probationer.<sup>97</sup> In 1973, however, the Supreme Court explicitly rejected the act of grace doctrine in *Gagnon v. Scarpelli*,<sup>98</sup> finding that “a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, that probation is an ‘act of grace.’”<sup>99</sup> As one commentator has noted, “probationers do in fact have constitutionally protected rights that can neither be bartered away to the state for greater lenience in sentencing nor compromised in accordance with a restrictive act of grace theory.”<sup>100</sup>

Courts have also used the contract (or waiver) doctrine to reject challenges to probation conditions. The contract doctrine views probation as a contract between the probationer and the court in which the probationer agrees to abide by specific conditions and the court agrees not to incarcerate the probationer so long as the conditions are followed.<sup>101</sup> Under this doctrine, the probationer is deemed to have waived any right to challenge the bargain into which s/he entered; however, in 1932, the Supreme Court expressly stated

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<sup>97</sup> See Kelly, *supra* note 60, at 840; see also *People v. Osslo*, 323 P.2d 397 (Cal. 1958) (finding that there is no constitutional right to rehabilitation so there is no right to be put on probation rather than to be incarcerated). At least one court has also indicated that the act of grace doctrine subsumes a constructive custody theory which “suggests that since the convicted criminal might have been sentenced to prison instead of being placed on probation . . . [s/he] may be considered as living in a ‘prison without walls,’ subject to the same restrictions . . . as any other prisoner. Any departure from these restrictions should be viewed as a matter of grace, not one of right.” *Consuelo-Gonzalez*, 521 F.2d at 273-74.

<sup>98</sup> 411 U.S. 778 (1973).

<sup>99</sup> *Gagnon*, 411 U.S. at 782 n.4. For additional decisions eroding the doctrine, see *Morrissey v. Brewer*, 408 U.S. 471, 482 (1971) (granting Fourteenth Amendment protections to the liberty interests of parolees); *Mempa v. Ray*, 389 U.S. 128, 136 (1967) (granting the Sixth Amendment right to counsel where sentencing occurs after a probation revocation); *United States v. Pastore*, 537 F.2d 675, 681 (2d Cir. 1976) (granting procedural protections to an attorney convicted of filing a false tax return). For commentary discussing the theoretical problems inherent in relying on the act of grace doctrine, see Ballard, *supra* note 12, at 184 (noting the doctrine’s rejection by the judiciary); Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 88-90 (2000) (noting that the doctrine is highly criticized by scholars, yet recognizing that it is still used to deny review to probation challenges). Some commentators have suggested that the view of probation as a privilege has fueled the courts’ reluctance to hear Eighth Amendment challenges to special probation conditions. See, e.g., Kelly, *supra* note 60, at 839.

<sup>100</sup> Hurwitz, *supra* note 94, at 792; see also MODEL PENAL CODE § 7.01 cmt. at 225 (1985) (characterizing the act of grace theory as “out of date and unrealistic,” arguing that probation is not imposed as a matter of grace but rather because both “common sense” and research indicate “that it is better to maintain the offender in the environment in which he must eventually learn to live” rather than to incarcerate him).

<sup>101</sup> See Kelly, *supra* note 60, at 839.



that probation is not a contract and probationers “cannot insist on terms or strike a bargain.”<sup>102</sup> Additionally, critics have noted that the “significant pressure” exerted by the threat of incarceration undermines the voluntary nature of a convict’s acceptance of the conditions.<sup>103</sup>

Although the Supreme Court has expressly rejected, and commentators have sharply criticized both the act of grace and the contract/waiver doctrines, both doctrines still retain some influence.<sup>104</sup> Recent decisions continue to rely on both doctrines.<sup>105</sup> For example, a 1998 Indiana decision, *Morgan v. State*,<sup>106</sup> characterized

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<sup>102</sup> *Burns v. United States*, 287 U.S. 216, 220 (1932) (adopting instead the act of grace doctrine to uphold a probation condition); *see also* *Roberts v. United States*, 320 U.S. 264, 274 (1943) (stating that probation is not “a kind of bargain”) (Frankfurter, J., dissenting); *Hahn v. Burke*, 430 F.2d 100, 104 (7th Cir. 1970) (“Probation is in fact not a contract. The probationer does not enter into agreement on an equal status with the state.”); *United States v. Birnbaum*, 402 F.2d 24, 29 (2d Cir. 1968) (stating that probation is not a contract); *Consuelo-Gonzalez*, 521 F.2d at 265 n.15 (explaining that the Supreme Court had rejected contract theory in the parole context in *Morrissey v. Brewer*, therefore, the Ninth Circuit believed “that the custody and contract theories are equally inappropriate when applied in the probation setting”) (internal citation omitted); Kelly, *supra* note 60, at 840; Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 59 (1981); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 188-90 (1967) [hereinafter *Judicial Review*] (noting that “[i]t requires no sophisticated analysis to demonstrate that the acceptance of probation by the offender bears little resemblance to a contract” given that neither “release from custody” nor the offenders agreement to the conditions are “mutually bargained for,” and additionally noting that the form of “offer” and acceptance is merely a formality used “primarily for the purpose of ascertaining whether the offender intends to abide by the condition” in order to avoid “the necessity of a later revocation proceeding” if the offender intends not to comply); Sunny A.M. Koshy, Note, *The Right of the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 466-67 (1988) (noting that waiver of one’s rights is only valid when “made voluntarily and in the ‘totality of the circumstances’” and that the threat of incarceration undermines the “voluntariness” of agreement to probation conditions) (internal citation omitted).

<sup>103</sup> Greenberg, *supra* note 102, at 57.

<sup>104</sup> Kelly, *supra* note 60, at 838.

<sup>105</sup> *See, e.g.*, *State v. Donovan*, 568 P.2d 1107, 1110 (Ariz. Ct. App. 1977) (noting that “probation is a matter of legislative grace”) (internal citation omitted); *People v. Welch*, 851 P.2d 802, 810 (Cal. 1993) (adopting the waiver theory to reject a probation challenge); *People v. Bacon*, 587 N.E.2d 606, 608 (Ill. App. Ct. 1992) (stating that “a sentence of probation is a matter of judicial grace”); *State v. Macy*, 403 N.W.2d 743, 745 (S.D. 1987) (rejecting defendant’s probation challenge because he “chose probation but now challenges what he voluntarily accepted”); *State v. Bonestel*, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993) (describing probation as an “act of grace”); *State v. Martin*, 472 S.E.2d 822, 824 (W. Va. 1996) (defining probation as a “matter of grace”).

<sup>106</sup> 691 N.E.2d 466 (Ind. Ct. App. 1998).

the imposition of probation as a “matter of grace.”<sup>107</sup> Commentators also have noted the continued use of both doctrines, observing that “though the act of grace doctrine is ‘thoroughly discredited,’ courts continue ritualistically to mouth it,”<sup>108</sup> and that regardless of whether the acceptance of probation conditions actually constitutes a valid contract, courts still refer to probation as such.<sup>109</sup> The continued use of both highly criticized doctrines is troubling and will be discussed later in this Comment in light of the recent decision in *Oakley*.

## 2. Tests Applied to Review Probation Conditions

Despite these philosophical obstacles, courts still hear challenges to probation conditions and must apply some test to review those conditions. The myriad of tests applied is nothing short of a “chaotic hodgepodge.”<sup>110</sup> In the broadest sense, the tests for review of conditions fall into two categories: (1) relatively deferential tests which evaluate the reasonableness of the condition (generally applied to statutory challenges),<sup>111</sup> and (2) tests involving some heightened level of scrutiny when a condition implicates a constitutional right (also called “unconstitutional conditions” tests).<sup>112</sup> This Comment will look briefly at each approach in turn and then suggest that courts must review probation conditions implicating the fundamental right to procreate with strict scrutiny.

### a. Reasonableness Tests

Courts applying a review based on reasonableness examine probation conditions to “ensure that [they] further[] the implicit or explicit statutory goals of probation” and that those conditions fall within those that could be used generally as a sanction against criminal defendants.<sup>113</sup> This review may be applied not only to conditions that do not implicate constitutional rights, but also to those that do.<sup>114</sup> Courts adopting this type of review have further refined it by formulating two alternative/separate subtests: (1)

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<sup>107</sup> *Id.* at 468.

<sup>108</sup> *See, e.g.*, Greenberg, *supra* note 102, at 56.

<sup>109</sup> *See, e.g.*, Comment, *Rights of the Maryland Probationer: A Primer for the Probationer*, 11 U. BALT. L. REV. 272, 274 n.14 (1982).

<sup>110</sup> Kelly, *supra* note 60, at 838.

<sup>111</sup> Horwitz, *supra* note 99, at 90.

<sup>112</sup> *Id.*

<sup>113</sup> Brilliant, *supra* note 60, at 1373; *see also* Horwitz, *supra* note 99, at 90 (noting that these challenges seem to engender less confusion and more consensus regarding the appropriate standard of review than do constitutional challenges).

<sup>114</sup> *See infra* note 127.

reasonableness, and (2) reasonable relation.<sup>115</sup>

A reasonableness test is the most deferential review, as it requires only that conditions be reasonable; the convicted criminal must be able to follow them and they cannot be excessive, vague, or illegal.<sup>116</sup> Appellate courts applying this approach generally review conditions under a very deferential “abuse of discretion” standard, which in turn means that appellate courts very rarely invalidate challenged conditions.<sup>117</sup>

A reasonable relation standard entails the only slightly more exacting requirement that conditions be reasonably related to the underlying goals of probation.<sup>118</sup> This test produces wide-ranging results because the underlying goals of probation vary from state to state.<sup>119</sup> Reasonable relation is the level of review adopted by the Federal Sentencing Guidelines.<sup>120</sup> Two California state court decisions, *People v. Dominguez*<sup>121</sup> and *People v. Lent*,<sup>122</sup> articulate a well-

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<sup>115</sup> Kelly, *supra* note 60, at 846-61.

<sup>116</sup> *Id.* at 847. See, e.g., *Pastore*, 537 F.2d at 683 (invalidating a probation condition prohibiting an attorney from practicing law as “improper”); *Sweeney v. United States*, 353 F.2d 10, 11 (7th Cir. 1965) (invalidating as unreasonable a probation condition prohibiting an alcoholic from drinking); *State v. Brown*, 326 S.E.2d 410, 411 (S.C. 1985) (invalidating a probation condition requiring castration of defendant as illegal); *State v. Macy*, 403 N.W.2d 743, 744 (S.D. 1987) (characterizing the test as “one of reasonableness”); *State v. Barklind*, 532 P.2d 633, 637 (Wash. Ct. App. 1975) (applying reasonableness test to determine the “propriety of a condition of probation”); *Williams v. State*, 523 S.W.2d 953, 954 (Tex. Crim. App. 1975) (invalidating a probation condition as “vague and indefinite” where defendant was prohibited from “reenter[ing] without written permission from this Court.”); *People v. Baum*, 231 N.W. 95 (Mich. 1930) (invalidating a condition of probation requiring defendant to leave the state for the five year term of probation because it contravened public policy by encouraging states to dump convicted criminals into other states).

<sup>117</sup> Horwitz, *supra* note 99, at 90-91; see also *id.* at 78 (observing that the “general rule appears to be that if the appellate court cannot categorically describe the probation condition as irrational, the condition survives”); COHEN, *supra* note 47, § 7:32, at 7-58 (stating that “most probation and parole conditions are upheld”).

<sup>118</sup> Horwitz, *supra* note 99, at 92-93.

<sup>119</sup> *Id.* (observing that although the “majority of states” view rehabilitation as the primary goal of probation, courts have required that the condition be related to additional goals such as public safety, deterrence, retribution and future criminality).

<sup>120</sup> U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(b) (2001). The overarching purpose of the guidelines is to “prescribe appropriate sentences for offenders convicted of federal crimes,” and included in the guidelines are provisions for probation. *Id.* at *Introduction*. See, e.g., *United States v. Schiff*, 876 F.2d 272, 274 (2d Cir. 1989) (stating that under the federal probation regime, probation conditions need only be “reasonably related to the simultaneous goals of rehabilitating the defendant and protecting the public”) (internal citations omitted).

<sup>121</sup> 64 Cal. Rptr. 290 (Cal Ct. App. 1967).

<sup>122</sup> 541 P.2d 545, 548 (Cal. 1975).

known reasonable relation test. The test developed in these two cases is commonly known as the *Dominguez-Lent* test.<sup>123</sup> Under the *Dominguez-Lent* test, a probation condition is invalid if it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.”<sup>124</sup> This test has been widely adopted, leading commentators to characterize California as being “at the forefront of developing standards for analyzing probation conditions.”<sup>125</sup> One commentator has astutely noted, however, that the ultimate result of reasonableness or reasonable relation tests is an “extraordinarily deferential” review.<sup>126</sup>

#### b. Unconstitutional Condition Tests

While many courts apply a reasonableness or reasonable relation test to any and all probation conditions,<sup>127</sup> some courts adopt a more

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<sup>123</sup> See Kelly, *supra* note 60, at 848.

<sup>124</sup> *Dominguez*, 64 Cal. Rptr. at 293 (invalidating a probation condition, which prohibited a convicted robber from becoming pregnant unless she was married, as unrelated to robbery and further noting that “[c]ontraceptive failure is not an indicium of criminality”). For cases outside of the California Court of Appeals applying the *Dominguez* standard, see *Lent*, 541 P.2d at 548; *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); *State v. Livingston*, 372 N.E.2d 1335, 1337 n.2 (Ohio Ct. App. 1976).

<sup>125</sup> See, e.g., Kelly, *supra* note 60, at n.545 (noting that *Dominguez* shows California’s leading position at the state level in probation condition analysis, while *Consuelo-Gonzales* shows its leadership at the federal level).

<sup>126</sup> Horwitz, *supra* note 99, at 94-95 (noting, however, that the review does have “enough teeth in it to enable a court to overturn a condition that it finds offensive or troubling”).

<sup>127</sup> See, e.g., *Schiff*, 876 F.2d at 274 (stating that under the federal probation regime, probation conditions need only be “reasonably related to the simultaneous goals of rehabilitating the defendant and protecting the public”) (internal citations omitted); *Brumley v. Simmons*, No. 97-3161-DES, 2000 U.S. Dist. LEXIS 8160, at \*9 (D. Kan. May 26, 2000) (finding that “[p]robation conditions which restrict constitutional rights such as the right of association . . . must bear a reasonable relationship to the rehabilitation of the accused and the protection of the public”); *Commonwealth v. Pike*, 701 N.E.2d 951, 959-60 (Mass. 1998) (noting that courts have great flexibility in crafting probation conditions and that conditions that restrict constitutional rights must only be “reasonably related’ to the goals of sentencing and probation”); *State v. Bolt*, 984 P.2d 1181 (Colo. Ct. App. 1999) (upholding probation conditions limiting the probationer’s freedom of association where the conditions were “not punitive and are reasonably related to the purposes of probation”); *State v. Schertz*, No. 99-1516-CR, 1999 Wisc. App. LEXIS 1392, at \*15-16 (Wis. Ct. App. Dec. 23, 1999) (noting the broad ability of sentencing courts to impose reasonable conditions and allowing that “conditions may impinge on constitutional rights as long as they are not overly broad and are reasonably related to the defendant’s rehabilitation”).

searching review where conditions implicate constitutional rights.<sup>128</sup> As mentioned above, prior adherence to the act of grace and contract theories has limited the ability of probationers to challenge their conditions as unconstitutional.<sup>129</sup> However, some courts are more receptive to constitutional challenges now that these two doctrines have been discredited.<sup>130</sup>

In *United States v. Consuelo-Gonzalez*,<sup>131</sup> the Ninth Circuit articulated a heightened scrutiny for probation conditions that implicate constitutional rights. In *Consuelo-Gonzalez*, the court indicated that while it would uphold probation conditions that infringed upon fundamental rights, it would only do so if that condition survived “special scrutiny.”<sup>132</sup> This special scrutiny consisted of a three-part review examining “the purposes sought to be served by probation, the extent to which the full constitutional guarantees available to those not under probation should be accorded probationers, and the legitimate needs of law enforcement.”<sup>133</sup> The Ninth Circuit later clarified the test in *Higdon v. United States*.<sup>134</sup> The *Higdon* court explained that this “special scrutiny” consisted of a two-step test: first, the court must examine the purpose for the imposition of the condition and second, provided the purpose is permissible, the court must “determine whether the conditions are reasonably related to that purpose.”<sup>135</sup> This reformulation appears to render this “special scrutiny” as little more than a reasonableness analysis,<sup>136</sup>

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<sup>128</sup> See Kelly, *supra* note 60, at 849; see also *infra* notes 130-36 and accompanying text.

<sup>129</sup> Brilliant, *supra* note 60, at 1376; see also *Development in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1944, 1950 (1988) [hereinafter *Alternatives to Incarceration*] (noting that reliance on the “act of grace” and contract doctrines had limited constitutional challenges to probation conditions such that “[o]ffenders have enjoyed greater success when arguing that their probation conditions are not reasonably related to the purposes of probation”).

<sup>130</sup> See Brilliant, *supra* note 60 at 1376; see also *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978) (upholding a Fourth Amendment challenge to the use of evidence obtained by a warrantless search of probationer’s home in a probation revocation hearing); *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971) (upholding a First Amendment challenge to a probation condition prohibiting defendant from speaking about and questioning the constitutionality of tax laws).

<sup>131</sup> 521 F.2d 259 (9th Cir. 1975).

<sup>132</sup> *Id.* at 265. The court also categorically rejected the position that the contract/waiver doctrine would be an acceptable reason to side-step this review. *Id.*

<sup>133</sup> *Id.* at 262.

<sup>134</sup> 627 F.2d 893 (9th Cir. 1980); see also Kelly, *supra* note 60, at 849.

<sup>135</sup> *Higdon*, 627 F.2d at 897.

<sup>136</sup> Horwitz, *supra* note 99, at 99-101 (commenting that even when courts claim to apply some heightened review, the scrutiny afforded probation conditions is rarely more than a “variant on the ‘reasonableness’ test”).

particularly given the deference that appellate courts adopting this test have continued to show sentencing courts.<sup>137</sup> Commentators have also criticized the test for providing little guidance for appellate courts, particularly regarding the extent to which probationers are afforded constitutional rights.<sup>138</sup>

c. Choosing the Appropriate Standard of Review

Having two separate levels of review for probation conditions gives appropriate deference to the courts to impose suitable conditions to achieve probationary goals. Where conditions do not implicate constitutional rights, appellate courts defer to the sentencing court's determination of reasonable restrictions.<sup>139</sup> In contrast, when conditions infringe upon a fundamental right such as those that prohibit a probationer from conceiving or bearing children for the term of his/her probation, courts should apply a heightened scrutiny.<sup>140</sup> However, a review of probation conditions that implicate fundamental rights must be more exacting than a reasonableness test with a new label.<sup>141</sup> Review of constitutional challenges to probation conditions must prevent inappropriate encroachment on fundamental rights, particularly where those infringements are based on "pop-psychology, personal values and morality and various degrees of bias and prejudice."<sup>142</sup> Without a stringent and coherent level of scrutiny for constitutionally-based probation challenges, the criminal justice system allows trial courts nearly unbridled discretion to limit all fundamental rights, including not only privacy and procreative rights, but also freedom of speech,<sup>143</sup> freedom of association,<sup>144</sup> and freedom of religion.<sup>145</sup>

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<sup>137</sup> See, e.g., *Owens v. Kelly*, 681 F.2d 1362, 1366 (11th Cir. 1982); *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979); *State v. Smith*, 540 A.2d 679, 689 (Conn. 1988); *Patton v. State*, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991); see also Horwitz, *supra* note 99, at 102.

<sup>138</sup> See, e.g., Horwitz, *supra* note 99, at 102.

<sup>139</sup> *Id.* at 90-91.

<sup>140</sup> *Id.* at 157.

<sup>141</sup> *Id.* at 110.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 110-13 (citing *People v. King*, 73 Cal. Rptr. 440, 448 (Cal Ct. App. 1968) (upholding a condition that precluded probationer from, among other things, "making speeches" in anti-war demonstrations)).

<sup>144</sup> Horwitz, *supra* note 99, at 118-24 (noting that the courts have "trampled upon and virtually disregarded the right of a defendant to freedom of association perhaps more than any other cherished constitutional right" and that appellate courts are "particularly deferential" in this area).

<sup>145</sup> *Id.* at 132-36; see also *Malone v. United States*, 502 F.2d 554, 555 (2d Cir. 1974) (upholding a condition prohibiting probationer from participating in "any Irish

To this end, courts should apply strict scrutiny to probation conditions that implicate fundamental rights.<sup>146</sup> To do otherwise would run contrary to an extensive history of Supreme Court rulings that require strict scrutiny for state abridgement of fundamental liberties.<sup>147</sup> As Justice Goldberg wrote in his concurring opinion in *Griswold v. Connecticut*,

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."<sup>148</sup>

While Justice Goldberg was addressing regulation of contraceptives and not criminal sanctions such as probation, the same high level of scrutiny should be afforded probationers. The Supreme Court has given constitutional protection to the right to procreate for nearly sixty years and strict scrutiny appropriately protects this fundamental right while still affording courts discretion to craft and impose probation conditions. Additionally, strict scrutiny provides a coherent and consistent test for all courts to apply and minimizes discrepancies between courts.<sup>149</sup> Courts have already applied strict scrutiny to strike down criminal sentences imposing permanent sterilization or castration on offenders;<sup>150</sup> probationers should receive

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Catholic organizations or groups").

<sup>146</sup> Horwitz, *supra* note 99, at 157-58.

<sup>147</sup> Infringement upon a fundamental right or discrimination against a protected group triggers strict scrutiny, which requires that a statute be narrowly tailored to achieve a compelling governmental interest. *See* *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938) (suggesting, for the first time, a higher level of scrutiny for laws that infringe on fundamental rights or discriminate against certain groups). *Compare* *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (emphasizing the need for judicial deference to legislative decisions by applying rational basis review even when the Court might view the law as "unwise, improvident, or out of harmony with a particular school of thought"), *with* *Roe v. Wade*, 410 U.S. 113, 154-56 (1973) (finding that fundamental privacy rights include the right to terminate pregnancy, yet infringement on that right may be upheld if the infringement is narrowly tailored to achieve a compelling state interest).

<sup>148</sup> *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring) (internal citations omitted).

<sup>149</sup> Horwitz, *supra* note 99, at 157-58.

<sup>150</sup> *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942) (invalidating the Oklahoma Habitual Criminal Sterilization Act, which required forced sterilization after a third felony conviction involving "moral turpitude," as an invalid

similar protection for their procreative rights.

### III. INFRINGEMENTS ON THE FUNDAMENTAL RIGHT TO PROCREATE

Trial judges have vast discretion to impose probation conditions, so much so that judges have intruded on probationers' fundamental right to privacy with "alarming frequency."<sup>151</sup> Conditions preventing probationers from having children have taken a variety of forms including permanent sterilization, forced birth control, and general prohibitions against having children.<sup>152</sup> While rulings imposing permanent/surgical sterilization or castration as part of a criminal sentence or probation have consistently been struck down as unconstitutional,<sup>153</sup> sentencing judges have recently begun to require that probationers use reversible methods of birth control such as Norplant or Depo-Provera while on probation.<sup>154</sup> Commentators have argued that forced birth control imposes a reversible "sterilization" procedure that is as much an unconstitutional infringement on the right to procreate as permanent sterilization.<sup>155</sup> These commentators assert that the temporal character of the infringement is not the relevant consideration, rather the ultimate abridgement of the right is the important point.<sup>156</sup> Additionally, because the fundamental right to procreate survives incarceration and may be infringed upon only

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infringement on the basic civil rights of marriage and procreation); *Mickle v. Henrichs*, 262 F. 687, 690-92 (Dist. Ct. Nev. 1918) (invalidating a state constitutional provision requiring vasectomies of certain criminals as cruel and unusual punishment under the Eighth Amendment); *State v. Brown*, 326 S.E.2d 410, 410-11 (S.C. 1985) (invalidating the imposition of a probation condition requiring castration as cruel and unusual punishment under the Eighth Amendment); see also Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 787 (1993) (noting that "no appellate court has sustained an order forcing contraception or sterilization as a condition of probation"). An early California case, which upheld a probation condition requiring the vasectomy of a probationer as reasonable, *People v. Blankenship*, 61 P.2d 352 (Cal. 1936), was later questioned in *Dominguez*, 256 Cal. Rptr. at 293-94. In *Dominguez*, the court noted that *Blankenship* was a "most extreme case" based on "dubious" authority and, therefore, struck a probation condition requiring sterilization of the probationer. *Id.*

<sup>151</sup> Horwitz, *supra* note 100, at 136.

<sup>152</sup> *Id.* at 137-38.

<sup>153</sup> See *supra* note 148.

<sup>154</sup> See, e.g., *People v. Walsh*, 593 N.W.2d 558, 558 (Mich. 1999) (stating that, although the court did not reach the issue, a probation condition requiring a convicted child abuser to use Depo-Provera or Norplant during her probation was an invalid and unlawful restriction) (Corrigan, J., concurring).

<sup>155</sup> Ballard, *supra* note 12, at 149-50; see also Walker, *supra* note 150, at 787.

<sup>156</sup> Ballard, *supra* note 12, at 149-50.



to the extent necessary to achieve valid penological goals,<sup>157</sup> probationers, who suffer a less serious infringement on their liberty, should be afforded at least as much protection as incarcerated criminals.<sup>158</sup>

Alternatively, some courts have imposed probation conditions that preclude a woman from becoming pregnant while on probation without requiring the use of any specific contraceptive method.<sup>159</sup> Although supporters of these conditions argue that pregnancy prohibitions are necessary to protect children from drug-related birth defects and child abuse,<sup>160</sup> opponents correctly note that these

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<sup>157</sup> See, e.g., *Turner v. Safley*, 482 U.S. 78, 84, 94-96 (1987) (striking down a prison regulation prohibiting prisoners from marrying without the prison superintendent's permission; noting that, although the right to marry may be subject to restrictions resulting from imprisonment, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" and, therefore, a restriction implicating constitutional rights would be upheld only "if it is reasonably related to legitimate penological interests"); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (stating that prisoners must be "accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration"); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (reiterating that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"); see also *Gerber v. Hickman*, 264 F.3d 882, 888 (9th Cir. 2001) (finding that prisoners retain their right to procreate even though incarcerated); *Hernandez v. Coughlin*, 18 F.3d 133 (2d Cir. 1994) (noting that both the right to marry and the right to procreate survive incarceration, even though those rights may be restricted during incarceration); *Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990) (noting that constitutional rights survive incarceration and may be restricted only where necessary to serve valid penological goals).

<sup>158</sup> See, e.g., *Ballard*, *supra* note 12, at 166-67.

<sup>159</sup> See, e.g., *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Cal. Ct. App. 1992) (invalidating as overbroad a probation condition requiring that a woman not become pregnant for the term of her probation, which was five years); *People v. Pointer*, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984) (invalidating as overbroad a probation condition for a woman not to become pregnant because less restrictive alternatives were available); *People v. Dominguez*, 64 Cal. Rptr. 290 (Cal. Ct. App. 1967) (establishing a reasonableness test for probation conditions and invalidating a condition requiring that a convicted robber not become pregnant); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (invalidating a ten-year probation condition prohibiting a woman from becoming pregnant); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989) (invalidating a probation condition prohibiting a female offender from becoming pregnant as unreasonable and an abuse of discretion); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986) (invalidating a probation condition that precluded a convicted forger from becoming pregnant unless she was married because the condition was not reasonably related to the prevention of future criminality); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (invalidating a probation condition prohibiting a woman from becoming pregnant for five years because it was too great an infringement on her fundamental right to procreate).

<sup>160</sup> See, e.g., *Janet W. Steverson, Stopping Fetal Abuse with No-Pregnancy and Drug*

conditions are infringements of the greatest magnitude on personal privacy and reproductive freedoms and are often imposed on the basis of a trial judge's own prejudices or personal values rather than on the basis of rehabilitation.<sup>161</sup> Like forced sterilization, these conditions have consistently been invalidated.<sup>162</sup> Interestingly, but not surprisingly, nearly all of the past rulings and critiques have focused on women's rights and women's probation conditions. The latest wrinkle in the debate has been the imposition of similar conditions on men.<sup>163</sup>

#### IV. THE PROBLEMS WITH *OAKLEY*

David W. Oakley is not a model citizen. By the time he was convicted of felony failure to pay child support,<sup>164</sup> he had fathered nine children between the ages of three and sixteen with four different women and was \$25,000 in arrears on his child support payments.<sup>165</sup> The trial court was convinced that he had intentionally failed to make his payments in the past and that he had no intention of making his payments in the future.<sup>166</sup> At sentencing, the trial judge imposed a probation condition prohibiting Oakley from fathering

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*Treatment Probation Conditions*, 34 SANTA CLARA L. REV. 295, 346-47 (1994) (noting, however, that a no-pregnancy condition alone is insufficient to achieve these goals and proposing that the court must also require birth control either in the form of Norplant or a contraceptive of the probationer's choice).

<sup>161</sup> See, e.g., Ballard, *supra* note 12, at 139-141; see also Horwitz, *supra* note 99, at 138.

<sup>162</sup> Horwitz, *supra* note 99, at 139-42. Horwitz also notes that while courts have invalidated probation conditions, which restrict the fundamental right to procreate, the structural barriers inherent in appealing these conditions suggest that the rates at which these conditions are imposed, yet unchallenged, is high. *Id.*

<sup>163</sup> See *United States v. Smith*, 972 F.2d 960 (8th Cir. 1992) (invalidating a probation condition prohibiting a man from fathering more children until he could prove that he could provide for his current children because it was not reasonably related to the drug offense for which he was convicted and less restrictive alternatives existed); *Howland v. Florida*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982) (vacating a probation condition that prohibited a father convicted of child abuse from fathering more children while on probation); *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001). It is not that the protection of the right to procreate differs based on gender, but rather, that these conditions (or challenges) are relatively new and they implicate issues of privacy and practical enforcement. See *infra* notes 198-207.

<sup>164</sup> Oakley was a repeat offender; he had previously been convicted of witness intimidation. *Oakley*, 629 N.W.2d at 202.

<sup>165</sup> *Id.*

<sup>166</sup> Justice Wilcox's opinion for the majority quotes the sentencing judge, Judge Hazlewood, as noting, "If Mr. Oakley had paid something, had made an earnest effort to pay anything within his remote ability to pay, we wouldn't be sitting here," and further quotes Judge Hazlewood as characterizing Oakley's arrears as "obvious, consistent and inexcusable." *Id.* at 202-03.

children during his five-year probationary term unless he could prove that he was capable of supporting his nine children and any additional children.<sup>167</sup> Oakley's neglect of his parental responsibilities raises serious questions regarding his children's needs and the pressures placed on the women raising them. However, as critics of the majority's opinion have noted, "hard cases make bad law,"<sup>168</sup> and a determination that Oakley failed to pay child support does not automatically lead to the conclusion that he should lose his constitutional right to have children. *State v. Oakley* provides an example not only of the difficulties probationers face in challenging the terms of their probation, but also of the need for strict scrutiny review of probation conditions that implicate fundamental rights.

First, the *Oakley* decision appears to rely on the discredited "act of grace" doctrine.<sup>169</sup> Justice Wilcox's majority opinion stated that "because Oakley was convicted of [a felony, he] could have been imprisoned for six years, which would have eliminated his right to procreate altogether . . . [therefore], this probation condition, which infringes on his right to procreate during his term of probation, is not invalid under these facts."<sup>170</sup> While the court avoided using words such as "act of grace" or "privilege," the underlying message is clear—Oakley's probation was a gift.<sup>171</sup> As discussed previously, the act of grace doctrine has been repudiated as a means of rejecting challenges to probation restrictions.<sup>172</sup> Oakley has a constitutionally protected right to procreate and the court should not have dismissed Oakley's challenge to his probation condition so quickly or easily.

Not only is Justice Wilcox's statement troubling in its reliance on the act of grace doctrine, it is also inaccurate.<sup>173</sup> Had Oakley been incarcerated, he would not have entirely lost his right to procreate; his right would have been limited only to the extent necessary to meet valid penological goals.<sup>174</sup> Noting this inaccuracy, the dissent stated, "[Oakley] is a probationer and has retained a degree of his liberty, including 'a significant degree of privacy under the Fourth,

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<sup>167</sup> *Id.* at 203.

<sup>168</sup> Berger, *supra* note 1, at A21.

<sup>169</sup> *Supra* notes 93-100, 104-09 and accompanying text.

<sup>170</sup> *Oakley*, 629 N.W.2d at 201-02.

<sup>171</sup> *Id.*

<sup>172</sup> *Judicial Review*, *supra* note 102, at 202 (noting that the "assumptions upon which the act of grace theory rests have been shown to be unsound and the doctrine can no longer serve to immunize probation conditions from constitutional controls").

<sup>173</sup> *See supra* note 157.

<sup>174</sup> *Id.*

Fifth, and Fourteenth Amendments.’ While the State has chosen not to exercise control over Oakley’s body by incarcerating him, it does not necessarily follow that the State may then opt to exercise unlimited control over his right to procreate.<sup>175</sup> Because the functions of probation, protecting society and rehabilitating offenders, require some restrictions on offenders, probationers cannot expect to retain the same freedoms and rights as individuals not convicted of crimes.<sup>176</sup> However, to state that Oakley would have lost his right to procreate completely is an untenable position in light of the jurisprudence established by the United States Supreme Court regarding prisoners’ rights.<sup>177</sup>

Second, courts should review this type of probation restriction with strict scrutiny and such a review demands that the condition be invalidated. The need for strict scrutiny is clear: not only does such a review protect individual rights, but it also helps to remove from the criminal justice system the “personal biases, stereotypes and prejudices” that individual judges may include in their decision making.<sup>178</sup> Strict scrutiny review requires judges to impose conditions that have been narrowly tailored to meet the compelling governmental objectives of rehabilitating offenders while protecting public safety.<sup>179</sup> Under this rubric, Oakley’s probation condition is unconstitutional. There is no doubt that the right to procreate is fundamental.<sup>180</sup> It is also clear that the probation condition prohibiting Oakley from fathering children for the term of his probation infringes upon that right. Strict scrutiny requires that the state’s imposition of the condition be narrowly tailored to achieve compelling goals.<sup>181</sup>

There is no dispute that the state has a compelling interest in the instant case.<sup>182</sup> Indeed, Justice Bradley’s dissent echoed the majority’s position that there is a compelling state interest in requiring parents to support their children not only to provide for the individual child’s needs, but also to prevent greater societal

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<sup>175</sup> *Oakley*, 629 N.W.2d at 218 (Bradley, J., dissenting) (internal citation omitted).

<sup>176</sup> *See Judicial Review*, *supra* note 102, at 202.

<sup>177</sup> *See supra* note 157.

<sup>178</sup> Horwitz, *supra* note 99, at 162.

<sup>179</sup> *Id.*

<sup>180</sup> *See supra* notes 8-39 and accompanying text.

<sup>181</sup> *See supra* note 13.

<sup>182</sup> *Oakley*, 629 N.W.2d at 216, 220 (Bradley, J., dissenting); *see also* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that “[t]he state, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years”).

problems such as poverty, poor educational attainment, and poor health among the nation's children.<sup>183</sup> Justice Bradley's dissent clearly explicates, however, that the state had other means at its disposal, more narrowly tailored and available by statute to better ensure the payment of support to Oakley's children.<sup>184</sup> The court could have required that Oakley remain employed, that he hold two jobs, that his wages be assigned, that his tax refunds be intercepted, that liens be taken on his property, that he be found in civil contempt, or that he be prosecuted for "any additional intentional failures to support his children, present or future."<sup>185</sup> Justice Bradley appropriately placed the burden on the state to show that when it acts to infringe upon a liberty interest it does so with the least intrusive means possible.<sup>186</sup> Although the court may have been concerned that Oakley would not be swayed by these options, the dissent correctly noted that that inference is insufficient to impose an overly broad infringement on his right to procreate.<sup>187</sup> Ultimately, the condition clearly fails to survive strict scrutiny.

Additionally, by failing to apply strict scrutiny and upholding the probation condition, the Wisconsin Supreme Court became the first court in the United States to "declare constitutional a condition that limits a probationer's right to procreate based on his financial ability to support his children," and wrote a decision that may "affect the rights of every citizen of this state, man or woman, rich or poor."<sup>188</sup> The Supreme Court's decision in *Zablocki v. Redhail*<sup>189</sup> suggests that such a condition is indeed unconstitutional.<sup>190</sup> In *Zablocki*, the Supreme Court invalidated a Wisconsin statute that prohibited individuals from marrying until they had proven that they had met their child support obligations.<sup>191</sup> Although the right to marry and the right to procreate are not the same, Justice Bradley argued in dissent that they are closely aligned, an argument that is consistent

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<sup>183</sup> *Oakley*, 629 N.W.2d at 216 (Bradley, J., dissenting).

<sup>184</sup> *Id.* at 218 (Bradley, J., dissenting) (noting that under Wisconsin law, the court could have chosen to garnish Oakley's wages, place a lien on his personal property or hold him in civil contempt if he chose not to honor his obligations).

<sup>185</sup> *Id.* at 222 (Sykes, J., dissenting).

<sup>186</sup> *Id.* at 217 (Bradley, J., dissenting) (citing *Harris v. McRae*, 448 U.S. 297, 312 (1980); *Carey*, 431 U.S. at 684-85; *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972)).

<sup>187</sup> *Id.* at 219 (Bradley, J., dissenting) (stating that "[s]uch an inference does not a constitutional justification make").

<sup>188</sup> *Id.* at 216.

<sup>189</sup> 434 U.S. 374 (1978).

<sup>190</sup> *Id.* at 388-91.

<sup>191</sup> *Id.*

with prior Supreme Court cases.<sup>192</sup> Justice Bradley expressed concern regarding a “judicially-imposed ‘credit check’” on the right to bear children,<sup>193</sup> and characterized the majority’s decision as “imbue[ing] a fundamental liberty interest with a sliding scale of wealth.”<sup>194</sup> Justice Bradley noted further that “[m]en and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of that inability to provide support. However, the right to have a child has never been rationed on the basis of wealth.”<sup>195</sup>

Third, even under a less-exacting reasonableness or reasonable relation review, it is unclear that prohibiting Oakley from having more children will aid his rehabilitation or protect the public. Oakley’s crime is felony failure to pay child support—his probation condition does nothing to ensure that he supports his current children. Preventing Oakley from having additional children does not compel him to provide for his present children.<sup>196</sup> If anything, the condition is likely to make it more difficult for Oakley to support his children because if he fathers another child (a circumstance that could arise even if he uses birth control in his future sexual encounters), he will be incarcerated.<sup>197</sup>

Finally, the *Oakley* decision illustrates the complex policy considerations surrounding appellate review of probation conditions and underscores the need for more exacting review of probation conditions when they are challenged.<sup>198</sup> While the bulk of challenges to probation conditions have come from women,<sup>199</sup> the imposition of similar conditions on male probationers does not change the analysis regarding the unconstitutionality of infringement on procreative rights—rather, this case highlights the new practical hurdles and

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<sup>192</sup> *Oakley*, 629 N.W.2d at 218 (Bradley, J., dissenting); see also *Zablocki*, 434 U.S. at 374; *Skinner*, 316 U.S. at 541 (stating that “[m]arriage and procreation are fundamental to the very existence and survival of the race”).

<sup>193</sup> *Oakley*, 629 N.W.2d at 220 (Bradley, J., dissenting).

<sup>194</sup> *Id.* at 219 (Bradley, J., dissenting).

<sup>195</sup> *Id.* (Bradley, J., dissenting).

<sup>196</sup> *Oakley*, 629 N.W.2d at 201-02.

<sup>197</sup> This possibility was noted by the trial judge as a factor in his decision to impose probation instead of incarceration; Judge Hazelwood noted that “if Mr. Oakley goes to prison, he’s not going to be in a position to pay any meaningful support for these children.” *Id.* at 203.

<sup>198</sup> Horwitz, *supra* note 99, at 81-85, 154 (noting that challenges to probation conditions are not common and, therefore, many unconstitutional conditions may go unchecked).

<sup>199</sup> *Id.* at 136-41; see also *supra* note 155.

policy concerns raised when these restrictions are placed on men. This probation condition cannot be enforced. There is no means to prevent Oakley from engaging in sexual intercourse and certainly no means to ensure that he does so responsibly.<sup>200</sup> One must ask how a court can monitor the restriction prohibiting a male probationer from fathering children—unlike female probationers, who can be given pregnancy tests by their probation officers, there is no similar test for men. Additionally, there is no Norplant or Depo-Provera birth control equivalent for men.<sup>201</sup> Further, the probation condition will not be violated until a woman gives birth to a child,<sup>202</sup> so arguably Oakley could follow all the terms of his probation until 8 months before the end of his term and then father numerous children who will not be born until after the term expires. This allows Oakley to stay within the letter of this probation condition even as he violates its spirit. In fact, in 1992, the Eight Circuit noted these problems when it found a similar probation condition unworkable:

Short of having a probation officer follow [the probationer] twenty-four hours a day, there is no way to prevent [him] from fathering more children. If [he] were to violate this condition of his probation, he may well be returned to prison, leaving him no way to provide for his dependents. This certainly would not serve the district court's goal of "adequately support[ing] and sustain[ing]" [the probationers] children.<sup>203</sup>

By deferring to the trial court and applying a minimal reasonableness analysis to Oakley's probation condition, the Wisconsin Supreme Court failed to give appropriate weight to these difficulties and allowed far too great an imposition on Oakley's fundamental right to procreate.

A final policy concern is that imposing probation conditions prohibiting fathering or giving birth to children may be "coercive of abortion."<sup>204</sup> While past cases have raised this concern regarding

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<sup>200</sup> *Oakley*, 629 N.W.2d at 220 (Bradley, J., dissenting).

<sup>201</sup> *But see* *People v. Gauntlett*, 352 N.W.2d 310 (Mich. Ct. App. 1984) (invalidating a probation condition for a male sex-offender requiring that he receive Depo-Provera injections).

<sup>202</sup> *Oakley*, 629 N.W.2d at 220 (Bradley, J., dissenting).

<sup>203</sup> *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992).

<sup>204</sup> *Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting) (citing *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984) in which the court invalidated a probation condition prohibiting a female probationer from conceiving and raising fears that if she became pregnant while on probation, she might seek an abortion to avoid going to prison); *see also* *State v. Mosburg*, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

female probationers,<sup>205</sup> the fear of coerced abortion looms just as large where conditions are placed on men. If a male probationer impregnates a woman and realizes that having done so he will be sent to prison, his incentive is high to demand that that woman terminate her pregnancy.<sup>206</sup> It also places the woman in a terrible bind: she can choose to have an abortion or see the father of her child go to prison. In the latter case, the woman is then forced to raise and support the child on her own and grapple with any psychological repercussions should she feel responsible for the defendant's incarceration.<sup>207</sup> Such collateral consequences of probation restrictions again highlight the need for narrowly tailored restrictions designed to rehabilitate offenders and to protect the public.

#### CONCLUSION

*State v. Oakley* presents the stark difficulties inherent in balancing individual freedoms with state needs, specifically the tug-of-war between individual reproductive rights and the rights of children to be financially supported by both of their parents. Yet, simply because countervailing considerations make arriving at the correct decision difficult, courts cannot abdicate their responsibility to protect constitutional rights. Appellate courts must review probation conditions that infringe upon constitutional rights with strict scrutiny both to protect individual rights and to curb the inclusion of prejudice, bias, and personal values in probation restrictions. Strict scrutiny allows trial judges to be creative while precluding the imposition of overly harsh punitive probation restrictions. Although these restrictions may satisfy a simplistic notion of getting tough on crime, they fail to protect probationers' constitutional rights and also fail to further the rehabilitative goals of probation. Appellate review provides a check upon trial courts only when that review is truly substantive and not simply a rubber stamp; it is time for appellate courts to begin reigning in the immense discretion of trial courts and insist that probation conditions infringing upon the fundamental right to procreate survive strict scrutiny.

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<sup>205</sup> See *supra* notes 159-60 and accompanying text.

<sup>206</sup> *Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting).

<sup>207</sup> *Id.*