

“NO NEW BABIES?” GENDER INEQUALITY AND REPRODUCTIVE CONTROL IN THE CRIMINAL JUSTICE AND PRISON SYSTEMS*

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This article examines conflicts over the rights of prisoners and probationers to have sex or to procreate. While most of the literature focuses on judicial interference with women’s rights to have children, two recent cases have put men’s rights in the spotlight: *Gerber v. Hickman*, which addresses whether men in prison retain the right to

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procreate, and *Oakley v. Wisconsin*, which addresses whether men convicted of failing to pay child support lose their right to procreate. I argue that regardless of whether courts uphold or restrict men's rights in these cases, the way courts frame their decisions has negative implications for women. By addressing cases concerning both men and women from 1967-2002, this article contributes to a more thorough understanding of reproductive control in the criminal justice system, its significance for gender equality, and the right of all people, regardless of wealth, to have families.

INTRODUCTION

In the winter of 2000, Judge Dorothy McCarter of Helena, Montana ordered Dawn Sprinkle, who had been convicted of using drugs during pregnancy and who later violated her probation, not to get pregnant for ten years.¹ Specifically, Judge McCarter sentenced her to ten years in prison (suspending five), and ordered Sprinkle to take birth control pills and report for regular pregnancy tests at the local jail.² Should Sprinkle become pregnant after serving her time, Judge McCarter would jail her again or place her under some other form of intensive supervision.³ As a twenty-nine-year-old woman, Sprinkle thus faced a decade of intrusive regulation into her intimate life and health care decisions, as well as the chance that this sentence would foreclose the possibility of her ever again having a child.⁴

A spokeswoman for the National Organization for Women told a reporter, "I have never heard of a judge curtailing a man's reproductive life because of drug use; this is exclusively focused on women."⁵ This spokeswoman echoes a common refrain, and with respect to drug use, it may be true, but to the small extent that appellate courts have been willing to uphold sex or fertility-related conditions of probation, they have done so with respect to men.⁶

1. See *State v. Sprinkle*, No. 99-55 (D. Mont. Feb. 23, 2000). See generally Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999) (noting that outside of South Carolina, appellate courts have rejected criminal convictions for child endangerment on the basis of a positive drug test at birth).

2. See Brief for Respondent at 2, *State v. Sprinkle* (D. Mont. Feb. 23, 2000) (No. 00-309).

3. See Lawrence Hall, Editorial, *A Miscarriage of Justice in the Case of a Montana Mom*, STAR-LEDGER, Feb. 23, 2000, at 11 (quoting the judge as saying that she "doesn't want another damaged baby born because we didn't do enough to supervise that woman"); see also Brief for Respondent at 1-2, *Sprinkle* (No. 00-309).

4. See Brief for Respondent at 3-6, *Sprinkle* (No. 00-309).

5. Hall, *supra* note 3, at 11.

6. See, e.g., *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001) (upholding the defendant's condition of probation, which prohibited him from having any more

Does this mean that the criminal sentencing arena is one where women enjoy greater reproductive freedom than men? Such a conclusion may be premature. The public record suggests that courts are more likely to impose reproductive restrictions on women in the first place. And as my reading of the decisions shows, court orders restricting men's fertility can only be carried out on the backs of women.⁷ Moreover, corrections officials and courts invoke the principles of gender equality and fairness to women in order to justify limiting men's reproductive options. In doing so, they manage both to hold women responsible for men's grievances and to compromise women's claims to constitutional equality.

While cases like Sprinkle's have periodically made the news for more than a decade, two higher court decisions have recently raised the stakes. One decision, out of the "liberal" Ninth Circuit, upheld men's rights, but justified the holding in part by a retrograde Supreme Court decision undermining women's rights to equal protection.⁸ The other case concerns what constitutes legitimate punishment for a "deadbeat dad." That decision divided the Wisconsin Supreme Court along gender lines, with the four male justices upholding the punishment and the three women, though in the gender group more likely to suffer from delinquent support, all dissenting.⁹ Both cases help establish a precedent that has negative implications for women, regardless of whether these decisions and subsequent holdings uphold or restrict men's rights.

These decisions inspire a number of questions: What kind of gender politics do we find in these cases? Given that women and men of color are much more likely to be criminal defendants, how does race infuse those politics? What do the cases mean for women and men in the criminal justice system and beyond?

Part I of this article briefly outlines the standards that courts use to evaluate whether and to what extent a person retains rights during prison and probation. Part II examines how men have fared in asserting their right to procreate from within the confines of prison.¹⁰

children until he could show his ability to support his existing children).

7. See *infra* Part IV.

8. See *Gerber v. Hickman*, 264 F.3d 882, 892-93 (9th Cir. 2000), *vacated by* 273 F.3d 843 (9th Cir. 2001) (en banc), *aff'd*, 291 F.3d 617 (9th Cir. 2002) (reversing the lower court's decision that "the right to procreate does not survive incarceration"). This decision relies in part on a Supreme Court case which upheld a gender-based immigration policy on the basis of stereotypes derived from the biological differences between men and women in procreation. See *Nguyen v. INS*, 533 U.S. 53, 54 (2001).

9. See *Oakley*, 629 N.W.2d at 200 (listing the judges on the court).

10. On female prisoners' assertions of reproductive rights, see generally Ellen Barry, *Women Prisoners and Health Care: Locked Up and Locked Out*, in MAN-MADE

Although the Ninth Circuit ultimately retreated on male prisoners' rights, the original panel decision is important because its reasoning provides the only model for other courts. Parts III-V then examine the nature and status of reproductive penalties imposed on men and women sentenced to probation, beginning with the Wisconsin Supreme Court's "deadbeat dad" case and identifying distinctive gendered patterns emerging out of a quarter century of such cases.¹¹ I conclude with some observations about the significance of these cases, which are too easily dismissed as inconsequential or the work of a maverick judge, instead of as a serious threat to women's rights, prisoners' rights, and reproductive rights.

I. RIGHTS RETAINED IN THE CRIMINAL JUSTICE SYSTEM

People on probation and parole, in jail and in prison, have engaged in considerable litigation over the question of what fundamental rights they retain while under state supervision or behind bars.¹² These questions have never been more important than they are today. More than six million people are under some form of criminal justice supervision, more than two million of them behind bars, making the United States the world leader in incarceration.¹³ A majority of these prisoners are African American, Latino/a, and Native American men and women.¹⁴ Mandatory sentencing and "three strikes" policies are of special concern to prisoners and their life partners who may want children because such policies ensure that prisoners will be

MEDICINE: WOMEN'S HEALTH, PUBLIC POLICY, AND REFORM (Kary Moss ed., 1996) (describing litigation by women in prison to improve pregnancy care, general gynecological care, and access to abortion, but not to assert the right to become pregnant). See also Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUDIES 353 (2004).

11. Given the vagaries of media interest as well as the vagaries of electronic databases and their search engines, it is likely impossible to identify all instances where judges have imposed reproductive penalties. This article is based on those cases that I learned about in court opinions and scholarly sources, as well as additional cases identified by searching news and legal databases.

12. See, e.g., Lisa Davie Levinson, *Prisoners' Rights*, 75 DENV. U. L. REV. 1055, 1055-56 (1998) (providing a brief history of the court opinions shaping which fundamental rights prisoners retain). See generally JOHN A. FLITER, *PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY* (2000) (discussing the development of constitutional law relating to prisoners' rights).

13. See Lauren E. Glaze, *Probation and Parole in the United States, 2002*, 2003 BUREAU OF JUST. STAT. BULL. 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus02.pdf> (last visited Sept. 27, 2004); see also Editorial, *Unfree in America*, BOSTON GLOBE, Aug. 31, 2003, at D10.

14. See Paige M. Harrison & Jennifer C. Karberg, *Prison and Jail Inmates at Midyear 2003*, 2004 BUREAU OF JUST. STAT. BULL. 8 (reporting incarceration rates by race), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf> (last visited Sept. 27, 2004). More than ninety percent of prisoners are men. *Id.* at 5.

incarcerated for long periods of time.¹⁵

Probation is the most common criminal sanction.¹⁶ When someone is sentenced to probation, she is spared the total physical restraint of incarceration, but is nonetheless under the dominion of the state and lives with a diminished expectation of privacy and freedom. According to the California court of appeals, the purpose of probation is: “to foster rehabilitation and to protect the public to the end that justice may be done.”¹⁷ Sentencing judges typically have broad discretion to implement this policy goal. In Wisconsin, for instance, the statute on probation states that, “the court may impose *any* conditions which appear to be reasonable and appropriate.”¹⁸ A judge might order someone into drug treatment, for example, to abstain from alcohol and stay out of bars, to work, go to school, or not to see certain people.¹⁹ Judges have been praised and rebuked for imposing “shame” penalties, such as wearing a T-shirt that proclaims “I am a thief.”²⁰

Although the state wields great power through the probation system, that power is not exempt from all constitutional scrutiny. In general, conditions should be narrowly tailored when they impinge on constitutional rights.²¹ The United States Supreme Court recognized in 1973 that the revocation of probation, while “not a stage of a criminal prosecution,” does “result in a loss of liberty,”²² thus implicating due process concerns that cannot be written off on the theory that probation is “an act of grace.”²³

Where prisoners are concerned, the United States Supreme Court has upheld as a general principle that prisoners “retain those

15. See generally Angela Y. Davis & Cassandra Shaylor, *Race, Gender, and the Prison Industrial Complex: California and Beyond*, 2 MERIDIANS 1 (2001) (describing the relationship between sentencing policies and prison expansion).

16. See Glaze, *supra* note 13, at 1; see also LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS: IN A NUTSHELL 70 (5th ed. 1998) (“[P]robation is the most frequently imposed criminal sanction.”).

17. *People v. Pointer*, 199 Cal. Rptr. 357, 363 (Cal. Ct. App. 1984).

18. WIS. STAT. § 973.09 (1998) (amended 2004) (emphasis added).

19. See BRANHAM, *supra* note 16, at 70-74; see also *id.* at 71 (“Sentencing courts have traditionally been accorded broad discretion when defining the conditions of a probation sentence.”).

20. See Jeffrey Rosen, *The Social Police: Following the Law Because You'd Be Embarrassed Not To*, NEW YORKER, Oct. 20-27, 1997, at 170 (noting the use of such punishments for “low level crimes”).

21. See, e.g., *Pointer*, 199 Cal. Rptr. at 364.

22. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

23. *Oakley*, 629 N.W.2d at 218 n.2 (quoting *Gagnon*, 411 U.S. at 782 n.4) (illustrating that the “grace” theory nonetheless remains alive and well in some courts, including Wisconsin’s highest court).

constitutional rights that are not inconsistent with [their] status as prisoners.”²⁴ In the 1987 case *Turner v. Safley*, the Supreme Court clarified its approach to prisoners’ rights claims.²⁵ The Court rejected a strict scrutiny approach, even for alleged infringements of fundamental rights, and instead concluded that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests,”²⁶ security being the dominant interest.²⁷

The Court then articulated a four-part test of reasonableness:²⁸

1. A rational relationship between the regulation and the legitimate and neutral governmental interest that is put forward to justify the regulation;²⁹
2. The existence of alternative means to exercise the asserted right;³⁰
3. The impact on prison staff, other prisoners, and prison resources of accommodating the asserted right;³¹ and
4. The existence of “ready alternatives” to accommodate the asserted right at “de minimis” cost to valid penological interests.³²

Under this framework, the Court upheld a Missouri regulation restricting prisoners’ rights to correspond with prisoners at other institutions, citing concerns with security and burdens on the staff to screen mail.³³ In contrast, the Court struck down a regulation restricting prisoners’ right to marry without the superintendent’s permission and absent such “compelling” situations as pregnancy or

24. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

25. *See id.*

26. *Id.* at 89.

27. *See id.* (claiming that a strict scrutiny analysis would restrict prison personnel from dealing effectively with security concerns).

28. *See id.* at 89-91.

29. *See id.* at 89 (holding that infringements on prisoners’ constitutional rights are subjected to low-level scrutiny, also known as the rational basis test).

30. *See id.* at 90 (concluding that the courts should defer to prison officials’ judgment when prisoners will retain the ability to exercise their constitutional right despite the regulation).

31. *See id.* (reasoning that prisons are best able to predict the effect of imposing a regulation). Therefore, courts should give great deference to prison officials under this prong. *Id.*

32. *See id.* at 90-91 (explaining that while officials should not restrict the constitutional rights of prisoners when there is a “ready alternative” to doing so, the Court is not requiring a “least restrictive alternative test”).

33. *See id.* at 93 (declaring that forcing officials to read prisoners’ mail would be ineffective in detecting dangerous correspondence because of the “jargon” and “codes” used).

the birth of an illegitimate child.³⁴

Turner is thus important for two reasons: the case establishes a standard of review,³⁵ and it upholds the right to marry.³⁶ The Court reasoned that while incarceration necessarily imposes substantial restrictions on marriage, many important attributes of marriage remain:

First, inmate marriages, like others, are expressions of emotional support and public commitment. . . . In addition, many religions recognize marriages as having spiritual significance Third, most inmates will eventually be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status is often a pre-condition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits. . . . These incidents of marriage . . . are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.³⁷

As the phrase “expectation of ultimate consummation” suggests, the courts have not held that prisoners have a constitutional right to conjugal visits.³⁸ In the few states where such visits are permitted, they are typically established by state statute or regulation and are at the discretion of prison administrators.³⁹

II. GENDER EQUALITY AND THE RIGHT TO PROCREATE FROM PRISON

Few courts have addressed whether and to what extent the right to procreate survives incarceration, even though the fundamental nature of the right to procreate is well established. Only three men have brought claims to court seeking to exercise a right to procreate

34. See *id.* at 97 (holding that the restriction on marriage was not rationally related to a legitimate and neutral goal; it did not pass low level constitutional scrutiny analysis). The Court found that the superintendent “routinely” approved men’s marriages, but did not make clear whether he did so for reasons other than the “compelling” ones. *Id.* The superintendent expressed concern that female prisoners had been abused by men or overly dependent on men and this abuse or dependence had contributed to their criminal activity; hence, he wanted them to focus on developing their independence instead of getting married. *Id.*

35. See *supra* note 29 and accompanying text (identifying the low level rational basis analysis).

36. See *Turner*, 482 U.S. at 94-95 (stating that restrictions on marriage violated the rational basis test).

37. *Id.* at 95-96.

38. See, e.g., *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2nd Cir. 1994) (interpreting *Turner* as including only marriage, not sex, as a right maintained by prisoners).

39. See *Gerber*, 291 F.3d at 622 (holding that while California may permit conjugal visits, there is no constitutional right to such visits).

during their prison terms.⁴⁰ Any decision in this area will have a disproportionate impact on the reproductive possibilities of African American and Latino men, who are over-represented in the nation's prisons, but the cases themselves do not appear to be overtly racialized. The public record contains no information about the individual plaintiffs' racial identities, and the language of the decisions is not explicitly racially coded. One of the judges involved wrote that "the court hastens to speculate as to the institutional and societal chaos which would result" if prisoners were granted the right to procreate, but his fear was not clearly directed at any particular group, except perhaps women.⁴¹ All three men who have sought to exercise their procreative liberties are married, leaving no opportunity to expound about "illegitimate" children, a theme evident in cases restricting people on probation from having children.⁴²

In September 2001, a court vindicated one of these claims for the first time, when the Ninth Circuit Court of Appeals upheld two-to-one the procreative rights of a married man serving a life sentence.⁴³ Because he is a "lifer," William Gerber is not eligible for conjugal visits, as are other married prisoners in California.⁴⁴ In order to have a baby with his wife, Gerber requested permission to send his wife semen so that she might become pregnant through alternative insemination. Specifically, Gerber sought to provide semen to his wife at his own expense, whether by visiting a private doctor or by using a special overnight mailing kit from a fertility lab, which his

40. See *id.* at 617; *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990); *Percy v. N.J. Dept. of Corrections*, 651 A.2d 1044 (N.J. Sup. Ct. App. Div. 1995); see also *Pregnant Pause for Sperm Smuggling Wife*, N.Y. POST, Mar. 2, 2002, at 6 (recounting the story of male prisoners, described as "New York mobsters," who took matters into their own hands by bribing guards to ferry their semen to their wives and girlfriends). In one case, a wife was also criminally implicated, and the state impounded the semen at her doctor's office. *Id.* For related legal actions, see generally *Anderson v. Vazquez*, 827 F. Supp. 617 (N.D. Cal. 1992), rejecting claims by death-row prisoners that their civil rights had been violated by the denial of conjugal visits and the opportunity to preserve their sperm, and see generally Katherine Bishop, *Prisoners Sue to be Allowed to be Fathers*, N.Y. TIMES, Jan. 5, 1992, describing how the Virginia Supreme Court denied as frivolous two prisoners' requests to have their semen frozen for their girlfriends.

41. *Gerber v. Hickman*, 103 F. Supp. 2d 1214, 1218 n.3 (E.D. Cal. 2000), *aff'd*, 291 F.3d 617 (9th Cir. 2002).

42. See *infra* notes 185-194 and accompanying text.

43. See *Gerber*, 264 F.3d at 882 (ruling that Gerber's right to procreate survives incarceration).

44. See David Kravets, *Inmate Has No Right To Mail Sperm from Prison, Court Rules*, APWIRE, May 24, 2002 (declaring that Gerber was sentenced to life in prison under California's three strikes law and noting that California excluded from conjugal visits prisoners serving life sentences and prisoners convicted of sex crimes or violent crimes against family members or minors).

attorney offered to pick up or which could be mailed directly from the prison.⁴⁵ The court stopped short of saying that Gerber has a right to do as he wishes, although the decision implicitly anticipates this result.⁴⁶ Finding that Gerber's right to procreate survives imprisonment, based on precedents protecting prisoners' fertility as well as marriage and abortion rights, the court remanded the case for factual development to find out whether abridging Gerber's right to procreate satisfies the *Turner* test.⁴⁷

The three judges could not agree on the right at stake. The majority broadly casts the right as the "right to procreate,"⁴⁸ rejecting the district court's formulation of Gerber's claim as a "right to artificial insemination" per se (especially because Gerber wants to provide semen for *his wife* to be inseminated).⁴⁹ The majority also takes issue with the dissent's pithy characterization of the ruling as one upholding a "right to procreate from prison via FedEx."⁵⁰ This sort of semantic dispute has real consequences. The close decision in *Bowers v. Hardwick*, for instance, shows the impact of narrowly framing a contested right.⁵¹ In that case, five Supreme Court Justices rejected the idea that the Constitution protects a specific "right to engage in homosexual sodomy."⁵² In contrast, the dissent framed the issue in terms of a broad-based "right to privacy" that recognizes intimate relationships as central to personal identity and falling within a protected sphere of liberty.⁵³ Both cases thus demonstrate the power of framing issues in the interpretation of constitutional rights.

The State of California argued against granting Gerber's request on gender equality grounds. The state argued that if the prison

45. See *Gerber*, 264 F.3d at 885.

46. See *id.* at 892-93 (stating that Gerber's right to procreate survives incarceration and remanding the case for evidentiary development).

47. See generally *Turner v. Safley*, 482 U.S. 78 (1987) (protecting the right to marry); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (asserting that procreation is "one of the basic civil rights of man"); *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (upholding prisoners' right to an abortion, subsidized by the state if necessary).

48. See *Gerber*, 264 F.3d at 886 (deciding the constitutional right in the context of incarceration).

49. *Id.* at 886 n.3.

50. *Id.* at 888 n.6 (quoting Silverman, J., dissenting) (holding that finding a constitutional right for a prisoner to inseminate his wife would be "radical and unprecedented").

51. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that the State of Georgia's sodomy statute did not impinge on any fundamental rights).

52. *Id.* at 190.

53. See *id.* at 217-18. In 2003, the Court recognized a broader meaning of privacy when it struck down a statute criminalizing sodomy. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

accommodated Gerber, it would also have to accommodate female prisoners who wanted to become pregnant through artificial insemination, thus straining the prisons' resources.⁵⁴ The equality argument originated with the Federal Bureau of Prisons in an earlier case from which *Gerber* departs.⁵⁵ In that case, Steven Goodwin was a federal prisoner confined in Springfield, Missouri at the United States Medical Center for Federal Prisoners. Goodwin sought to provide semen to his wife for the purpose of insemination, at his own expense, and suggested a variety of means to do so, on or off prison grounds, with or without the assistance of outside personnel.⁵⁶ Prison staff rebuffed his initial requests by saying that the Bureau lacked a "program or provision" to implement his request.⁵⁷ Goodwin appealed the decision, eventually taking his concerns to the federal courts, where a magistrate judge found that the Bureau's "no policy" excuse violated Goodwin's right to due process.⁵⁸

The Bureau's executive staff then went to work, and came up with a policy statement opposing artificial insemination, seemingly on as many grounds as it could devise.⁵⁹ Where the district court had found the right to procreate incompatible with incarceration, the Eighth Circuit found it need not reach that question, because it accepted the Bureau's argument that accommodating Goodwin's request violated its policy of treating prisoners equally—rich or poor, male or female.⁶⁰ Indeed, the court almost seems to blame women for Goodwin's plight: "male prisoners cannot be allowed to procreate while incarcerated *because* the Bureau cannot afford to expand its

54. See *Gerber*, 264 F.3d at 890-91.

55. See *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) (holding that, assuming a fundamental right to procreation survives incarceration, state regulation restricting prisoner procreation is valid as reasonably related to the penological interest of treating male and female prisoners equally).

56. See *id.* at 1397 (enumerating his various suggestions in a *pro se* petition for writ of habeas corpus).

57. *Id.* at 1397.

58. See *id.*

59. See, e.g., *id.* at 1397-98 (noting the Bureau's concern that allowing prisoners to artificially inseminate someone would require either the development of collection and storage procedures for semen, or the acceptance of private medical persons to come in and collect the semen; both options would create security risks and add costs to the system). *Id.* The Bureau does not maintain any publicly available policy about insemination. My Freedom of Information Act appeal has been pending since January 2003.

60. See *id.* at 1399 (finding the denial of Goodwin's request to artificially inseminate his wife to be reasonably related to the goal of treating male and female prisoners equally). The Court accepted the Bureau's contention that if it allowed men to procreate while incarcerated, it would be required to provide the same services for women, which would necessitate an expensive expansion of medical services. *Id.* at 1398.

medical services for its female prisoners.”⁶¹ The implication is that men cannot exercise their rights because women’s rights are so expensive and cumbersome.⁶²

The Ninth Circuit took a third tack, finding first that the right to procreate survives incarceration, but also that the right as asserted by Gerber does not implicate equality concerns.⁶³ The Court noted that it could not “ignore the biological differences between men and women.”⁶⁴ Because women and men are not similarly situated with respect to reproduction, the state’s “legitimate penological interest” in treating prisoners “equally to the extent possible” is simply not relevant.⁶⁵

The “dis/similarly situated” conundrum relates back to the question of the right at stake.⁶⁶ Is it a generic right to procreate, in which a man’s interest will always be in impregnation and a woman’s will always be in conception? Or, is it a right to procreate with a spouse in the free world, in which case other options may be possible? As the court observed, “a more apt parallel may be the question of whether a woman has the right to donate an egg to her lesbian partner or to a surrogate mother,” than a right to *be* inseminated herself.⁶⁷

In the end, women who want to press this kind of equal protection claim might not fare much better than men. The state is likely to argue that just as pregnancy care imposes greater burdens on a prison’s budget and staff than sperm donation, so too does egg donation pose a greater burden. Egg donation typically involves daily doses of fertility drugs or injections, requiring daily visits to the prison’s clinic, as well as an invasive procedure guided by an ultrasound machine to extract the eggs, a procedure which would likely have to be done at an off-site doctor’s office or facility.⁶⁸ The

61. *Id.* at 1400 (emphasis added).

62. *See id.* (begging the question as to whether women would have equal rights to similar treatment, given the intermediate standard of scrutiny applied to gender equality claims and the lower standard of scrutiny applied in prisoners’ rights claims).

63. *See Gerber*, 264 F.3d at 882 (noting the distinction between the two sexes in the context of artificial insemination; men provide their semen to women, and women are inseminated in order to become pregnant).

64. *See id.*

65. *See id.* (noting that because women cannot avail themselves of the opportunity sought by Gerber, the state’s policy of equal treatment is not implicated).

66. *See supra* notes 48-50 and accompanying text (discussing the Court’s inability to agree on the constitutional right at stake).

67. *See Gerber*, 264 F.3d at 891 n.13.

68. *See* CHERYL L. MEYER, *THE WANDERING UTERUS* 24-25 (1997) (describing, generally, the medical procedures associated with egg donation).

majority's framework assures that a female prisoner's request would, at a minimum, be evaluated under the *Turner* standard of rational basis scrutiny.⁶⁹ The *Gerber* court observed that a woman's request for insemination was not before the court, and that the state could hardly deny the rights of one group because it might lead other groups to assert their rights.⁷⁰

While there is something appealing about the court's approach and its willingness to look beyond the prevailing paradigm of women-as-always-potentially-pregnant, the court nonetheless manages to strike a blow for gender equality. The *Gerber* court relied on the 2001 Supreme Court decision *Nguyen v. Immigration and Naturalization Service*, which reified archaic, biologically-based gender stereotypes about men and women.⁷¹ Because of the underlying equality concerns, *Nguyen* brought forth a host of feminist lawyers and organizations to advocate on behalf of an unlikely beneficiary: Tuan Anh Nguyen, a young man who had been convicted of a sex offense and was facing deportation.⁷² Nguyen was born in Vietnam to a Vietnamese mother and an American father who were not married to each other.⁷³ Joseph Boulais returned to the United States with his son Nguyen, but never filed the necessary paperwork for citizenship status.⁷⁴

Had Boulais been a mother instead of a father, he would not have had to do anything to gain U.S. citizenship for his son. The child would automatically have been recognized as a U.S. citizen.⁷⁵ In *Nguyen*, the Court upheld this unequal status quo by a five-to-four decision.⁷⁶ The opinion inscribes a host of conventional gendered assumptions about parental responsibility under the guise of

69. See *Gerber*, 264 F.3d at 891.

70. See *id.*

71. See *Nguyen v. INS*, 533 U.S. 53 (2001) (holding that a statute making it more difficult for a child born abroad to become a U.S. citizen when only the father has United States citizenship did not violate the equal protection guarantee of the Fifth Amendment).

72. See *id.* at 57.

73. See *id.*

74. See *id.* at 59-60.

75. Compare 8 U.S.C. § 1409(c) (2004) (stipulating that United States citizenship will be automatically transmitted to a child born out of wedlock to a U.S. citizen mother so long as the mother was a U.S. citizen at the time of the child's birth, and had previously been physically present in the U.S. continuously for at least one year), with 8 U.S.C. § 1409(a) (2004) (stipulating the requirements to gain U.S. citizenship for a child born out of wedlock to a U.S. citizen father, which include establishment of a blood relationship; paternity acknowledgement; and a written agreement to provide financially for the child).

76. See *Nguyen*, 533 U.S. at 53.

“undeniable” biological differences.⁷⁷ Because women are present at birth, the Court reasoned, they have a “unique opportunity” to develop a relationship with their child, a relationship which simultaneously creates ties to the United States.⁷⁸ Men must take extra steps to demonstrate a parental attachment worthy of state recognition because men need not be present at birth, and their presence does not guarantee paternity.⁷⁹

Many observers worry that *Nguyen* will further weaken the already inferior equal protection consideration afforded to claims of sex discrimination. Critics focus on two key stereotypes which the decision relies upon and reinforces. First, the decision perpetuates the stereotype that women are naturally and automatically mothers, while men are fathers at their discretion.⁸⁰ Linda Kerber identifies a further “ugly” subtext: the notion that women are “tricksters” from whom men need protection. The legal system historically reinforced this stereotype by giving men the option of whether or not to acknowledge or “legitimate” their children born out of wedlock.⁸¹ Both Catharine MacKinnon and Kerber see the Court as endorsing male irresponsibility, in essence giving men, especially military men, permission to “roam the world” fathering babies out of wedlock and abandoning them.⁸² The Ninth Circuit’s endorsement of *Nguyen* is particularly troubling, suggesting a trade-off between enhanced procreative liberty for some men and equal protection of the laws for all women.

77. *Id.* at 68.

78. *See id.* at 65 (noting that the opportunity for a meaningful relationship between a mother, who is a United States citizen, and her newborn child starts in the very event of childbirth because “the mother knows that the child is in being and is hers”).

79. *See id.* at 62 (noting that an affirmative step, confirming the parental relationship to the child, needs to be taken if the citizen parent is the father, but not if the citizen parent is the mother).

80. *See* Catharine MacKinnon, *Can Fatherhood Be Optional?*, N.Y. TIMES, June 17, 2001, at 15 (arguing that the Court assumes that “to be a mother, you just have to be there; to be a father, you have to do things”). But see an earlier challenge to gender-specific citizenship requirements, in which Justice Stevens described motherhood as a matter of conscious choice and work:

If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion—an alternative that is available by law to many, and in reality to most, women around the world. She must then actually give birth to the child. Section 1409(c) rewards that choice and that labor by conferring citizenship on her child.

Miller v. Albright, 523 U.S. 420, 433-34 (1998). (I am grateful to Sally Sheldon for alerting me to this passage).

81. Linda K. Kerber, *Top Court Took a Step Backward on Gender Bias*, BOSTON GLOBE, June 23, 2001, at A14.

82. *See* MacKinnon, *supra* note 80, at 15.

When the Ninth Circuit reconsidered Gerber's case *en banc*, a bare six-to-five majority held that the right to procreate is "fundamentally inconsistent" with incarceration, never reaching the equality question.⁸³ Although Gerber did not seek "cohabitation, physical intimacy [or the opportunity to raise] children," the majority focused single-mindedly on rulings that prisoners have no right to these aspects of marriage, and never evaluated the precise nature of Gerber's request.⁸⁴ Judge Tashima's dissent dismantled this blind spot piece by piece, concluding that the majority failed to support its position with virtually any facts, and that the case should be remanded for evidentiary development.⁸⁵ Both Judge Tashima and Judge Kozinski observed that by permitting some prisoners to have conjugal visits with their spouse, even as a matter of privilege, the legislature and Department of Corrections could not have intended to abrogate the right to procreate.⁸⁶ Of the two, Judge Kozinski more pointedly argues that if banning reproduction is to be imposed as a form of punishment, then this is a decision for the legislature to make, not the warden, who has illegitimately *added to* Gerber's punishment by cutting off his rights.⁸⁷

III. CONSTRAINING SEX AND REPRODUCTION ON THE OUTSIDE

If prisoners' assertions of their right to procreate rarely cross judges' desks, a more common problem occurs when judges prohibit criminal defendants from even asserting such rights. Coerced contraception erupted onto the public agenda when editorial and judicial entrepreneurs seized on the idea of using Norplant to temporarily sterilize women whose reproduction they deemed undesirable.⁸⁸ For example, a judge in California "offered" Darlene

83. See *Gerber*, 291 F.3d at 623 (concluding that it did not need to determine whether the prison's refusal to grant the prisoner's request was related to a valid penological interest).

84. *Id.* at 620-21.

85. See *id.* at 629.

86. See *id.* at 626-27 (inquiring how procreation can be per se fundamentally inconsistent with incarceration, as the majority asserted, if some prisoners are allowed conjugal visits).

87. See *id.* at 632 (arguing that judgments regarding prisoners' rights to procreate "must be made by the legislature in setting the nature and degree of punishment for particular crimes"); cf. *id.* at 626 (highlighting that the California legislature has not enacted any statutes that prohibit artificial insemination by prisoners).

88. See, e.g., *Poverty and Norplant: Can Contraception Reduce the Underclass*, PHILA. INQUIRER, Dec. 12, 1990, at A18 [hereinafter *Underclass*] (suggesting in an editorial that the government should offer "welfare mothers" financial incentives to use Norplant in order to "reduce the underclass").

Johnson, accused of child abuse, a “choice” between seven years in prison or one year in the local jail, followed by the implantation of Norplant.⁸⁹ Although Johnson was certainly responsible for hitting her children, once she entered the courtroom as a single, pregnant, African American mother of four who had received Aid to Families with Dependent Children (“AFDC”), she could not control becoming a symbol for many of the highly charged political debates of the day.⁹⁰ Just a few months later, sixty percent of respondents told public opinion pollsters that they approved of mandating Norplant for “drug abusing women of childbearing age.”⁹¹ Much of the commentary has focused on the Norplant cases as a result of this publicity, but the introduction of Norplant merely facilitated the imposition—and enforcement—of sentences judges had already been handing down for at least twenty-five years, including sentences imposed on men.⁹²

As with so many highly contested forms of reproductive control, we simply do not know how often judges bar probationers from sex or procreation. *American Law Reports* describes only eleven such decisions.⁹³ These decisions represent cases that went up for

89. See *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 725-26 (Cal. 1998) (describing the facts of the unpublished case, *People v. Johnson*, in which the judge ordered that the defendant submit to a Norplant birth-control implant as a condition of probation (citing *People v. Johnson*, No. F015316, 1992 WL 685375 (Cal. Ct. App. 1992))). Norplant is a hormonal contraceptive lasting five years that is implanted in a woman's upper arm and requires removal by a health professional. See also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 105-06 (1997).

90. See *Underclass*, *supra* note 88, at A18 (suggesting financial incentives for welfare recipients to use Norplant); ROBERTS, *supra* note 89, at 151-52 (noting the public stir that arose regarding the Darlene Johnson case); see also Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473 (1995) (analyzing the constitutionality of legislative proposals to link Norplant use to welfare benefits).

91. George Skelton & Daniel M. Weintraub, *The Times Poll: Most Support Norplant for Teens, Drug Addicts*, L.A. TIMES, May 27, 1991, at Part A. But see Lynn M. Paltrow & Robert Newman, *Treatment, Not Sterilization, Is the Way To Help Addicted Moms*, NATIONAL ADVOCATES FOR PREGNANT WOMEN, (debunking myths about substance abuse and drug-exposed babies), available at <http://www.advocatesforpregnantwomen.org/articles/oped.htm> (last visited Sept. 27, 2004).

92. See Toni Driver Saunders, Comment, *Banning Motherhood: An RX To Combat Child Abuse?*, 26 ST. MARY'S L.J. 203 (1994). The law review literature on coerced contraception is voluminous and almost exclusively concerned with restrictions imposed on women. *Id.* A great deal of the literature was written in the early 1990's and centers on Darlene Johnson's case, though other articles offer particularly helpful reviews of a large number of cases. *Id.* See also Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 43 (1992).

93. See John C. Williams, *Propriety of Conditioning Probation on Defendant's Remaining Childless or Having No Additional Children During Probationary Period*, 94 A.L.R.3d 1218 (2004) (recounting and analyzing cases requiring a defendant to

appellate review, not cases where judges withdrew their orders or where defendants did not appeal.⁹⁴ The prospect of jail time no doubt has a chilling effect on the pursuit of appeals. As Stacey Arthur notes, because cases like these may not be reported, “those that do not receive significant media attention can easily go unnoticed.”⁹⁵ Laurence Tribe seconds this observation, stating that the conditions are “frequently imposed” but rarely reviewed.⁹⁶ My own research finds that since 1966, cases have been reported by the press or the courts in at least twenty-one states: Arizona, California, Florida, Illinois, Indiana, Louisiana, Michigan, Missouri, Montana, Kansas, Kentucky, Nebraska, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin.⁹⁷ A judge in New York imposed a ban on reproduction as a form of punishment in 2004, an apparent first for the Northeast.⁹⁸ In Florida, judges from around the state continued to issue such orders even after an appellate court struck one down in 1979.⁹⁹ Trial level courts seem to be doing the same in Ohio.¹⁰⁰ The Missouri and Pennsylvania cases are unusual because federal district court judges issued the controversial orders.¹⁰¹ In a number of these states, judges have also “offered” or ordered chemical or surgical castration to men convicted

refrain from having future children).

94. See Mark Curriden, *Sterilization Ordered for Child Abuser: From Tennessee to Texas, Judges Order Procedure When Defendants Volunteer*, 79 A.B.A. J. 32, 32 (May 1993).

95. Arthur, *supra* note 92, at 6 n.19.

96. See *Oakley v. Wisconsin*, 537 U.S. 813 (2002), *petition for cert. filed*, 2001 WL 34116641, at 27-30 (U.S. Apr. 19, 2001) (No. 01-1573).

97. See *infra* notes 156-57, 169-71, 213-25 and accompanying text; see also *Involuntary Birth Control Is a Too-Simple Solution*, GREENSBORO NEWS & RECORD, Apr. 5, 1994, at A6 (describing a situation in North Carolina where a lawyer representing children who were removed from their mother’s custody asked a judge to order the woman to use Norplant).

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

99. See *Rodriguez v. State*, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (holding invalid the appellant’s probation term prohibiting her from pregnancy); see also *Judge Finds No Legal Precedent for Ordering Contraception*, UNITED PRESS INT’L, Nov. 14, 1992 (reporting that a Florida judge said he could find no legal precedent to order a woman to be implanted with birth control, when a local advocacy group asked that he do so).

100. See, e.g., *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (holding that prohibiting the defendant from having children during her five-year probation period was a violation of her constitutional right to privacy and a violation of the trial court’s discretion).

101. See, e.g., *United States v. Smith*, 972 F.2d 960, 961 (8th Cir. 1992) (describing the district court’s order that the defendant not conceive another child with a woman besides his wife unless he could show that he was supporting his existing children).

of sex offenses.¹⁰² Although other writers often treat all of these cases as a set, I distinguish them, because judges order castration for the purpose of preventing sexual assault, not to prevent procreation, although that will also follow. Legislatures have had little to say about these issues. The exception is Illinois, which enacted a law to prohibit judges from requiring birth control as a condition of probation in 1993; an appellate court subsequently ruled that the statute bans requiring abstinence, which is a form of birth control.¹⁰³

As a purely technical matter, not all of these cases involved outright bans on procreation, but they all raise questions about judicial discretion and power. For instance, in 1988, an Indiana judge made it clear that while he could not order a woman to be sterilized, he would be more inclined to give her a shorter sentence if she underwent the procedure: “She has no need for any more children. I can’t order this, but she could consider sterilization. It would be a mitigating circumstance.”¹⁰⁴ Melody Baldwin, who pleaded guilty to child neglect after facing a murder charge in the death of her four-year-old son, was pregnant when she appeared before the judge. She complied with his “suggestion,” undergoing sterilization after giving birth, and the judge sentenced her to ten years out of a possible twenty in prison.¹⁰⁵ Afterwards, Baldwin said that she sometimes regretted her decision, but “it was the only way.”¹⁰⁶ In another case in 1993, a Texas judge “went to great lengths,” according to the news report, “to have Alice Faye Byrd acknowledge she was accepting Norplant voluntarily and not as a result of coercion to end her six-month stay” in the county jail.¹⁰⁷ “But,” the account continues, the judge “also made it clear to Byrd, 29, that he was ‘not inclined to give [her] probation if [she didn’t] agree’ to the contraceptive measure.”¹⁰⁸

102. See, e.g., Julianne Malveaux, *Wrong Answer To Rape*, USA TODAY, Mar. 18, 1992, at A10 (discussing a judge’s offer to a man accused of sexual assaulting a child to choose between castration or more than twenty years in prison).

103. See *People v. Ferrell*, 659 N.E.2d 992, 995 (Ill. App. 4d 1995) (interpreting the statutory language that prohibits courts from imposing any form of birth control as a condition of probation).

104. *Judge Says Sterilization May Ease Sentence for Child’s Death*, APWIRE, July 21, 1988.

105. See *Woman Who Was Sterilized for Lighter Sentence Says She’s Angry*, ASSOCPR, Nov. 15, 1988, available at 1988 WL 3823085.

106. *Id.*

107. John Makeig, *Woman’s Probation Includes Birth Control: Mother, Whose Abandoned 4-Year-Old Died in Blaze, Accepts Norplant*, HOUS. CHRON., Oct. 6, 1993, at 21.

108. *Id.*; see also *Department of Corrections Debates Judge’s Order To Pay for Tubal Ligation*, APWIRE, Aug. 8, 2000 (describing a Pennsylvania case where a

These cases highlight the fine line between coercion and “choice” when someone confronts the power of the state. With their freedom on the line, defendants in criminal cases are extremely vulnerable to “suggestions” that they sacrifice their sexuality, bodily integrity, and reproductive intentions for the future, allowing judges to structure defendants’ lives under the guise of “voluntary” decisions.

Many commentators understandably fear that these probation conditions will be directed at poor women of color, and some go further to say that judges do primarily impose reproductive conditions on this group.¹⁰⁹ This can be a difficult claim to verify because the individuals who have appealed their sentences have not done so on the basis of race discrimination, thus court opinions and news reports rarely discuss a defendant’s racial identity. It seems plausible that some of the women about whom we lack information are white, such as methamphetamine users.¹¹⁰ News photographs and interviews with lawyers have provided information in some cases, as well as the occasional judicial cue: one opinion about a man ordered not to have children out of wedlock cites statistics on the number of Black children in poverty, strongly suggesting that the defendant in that case was African American.¹¹¹

Even absent systematic racial data, however, several historical and contemporary trends lend weight to the speculation that the restrictions fall most heavily on poor women of color. First, the history of coercive sterilization in this country has been dominated since mid-century by sterilization abuse of African American, Native American, and Puerto Rican women.¹¹² Second, because of the

judge acknowledged that he could not order a woman to be sterilized and said that the procedure would not affect her sentence, but also described sterilization as something “positive” for the woman to tell the parole board). He ordered the state Department of Corrections to pay for the operation if the woman asked for the operation. *Id.*

109. See, e.g., Rebecca Dresser, *Long-Term Contraceptives in the Criminal Justice System*, in *COERCED CONTRACEPTION? MORAL AND POLICY CHALLENGES OF LONG-ACTING BIRTH CONTROL* 134-50 (Ellen Moskowitz & Bruce Jennings eds., 1996); ROBERTS, *supra* note 89, at 196. See generally Michelle Oberman, *Commentary: The Control of Pregnancy and the Criminalization of Femaleness*, 7 *BERKELEY WOMEN’S L.J.* 1, 6 n.24 (1992).

110. See Fox Butterfield, *Across Rural America, Drug Casts a Grim Shadow*, N.Y. TIMES, Jan. 4, 2004, at 10 (reporting that “federal surveys have consistently shown that methamphetamine is largely a drug of whites, the less affluent, and those living in rural areas and west of the Mississippi [River]”).

111. See *United States v. Smith*, 972 F.2d 960, 962 (8th Cir.1992) (relating that “[i]n 1987, 48.1% of black children under six lived below the poverty line”).

112. See ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 95-125 (1995) (describing the history of eugenics and forced sterilization); see also *Judge Says He Wishes He Could Order Woman Sterilized*, APWIRES, Oct. 12, 2000 (describing a federal judge’s comments to a

“racial distribution of poverty,” Black and Latina women are more likely to receive public assistance, experience greater intervention from child protective services, and/or live in poor neighborhoods that are heavily policed to detect drug activity, all of which bring them into contact with state actors who may pressure them not to have children.¹¹³ African American women have borne the brunt of criminal prosecution for using drugs during pregnancy.¹¹⁴ And, finally, the rhetoric of “illegitimate children,” “irresponsibility,” and “welfare dependence” that laces judicial and public commentary is certainly racially coded, regardless of the specific case in which it is deployed.¹¹⁵

IV. PROHIBITING PROCREATION: A CLOSELY CONTESTED DECISION

Wisconsin v. Oakley is especially significant because it is the only case barring procreation to have survived the scrutiny of a court of last resort.¹¹⁶ In a universe of cursory opinions, the *Oakley* case also stands out for its depth of analysis and for the acrimony between the majority and the dissent. The case pits a bloc of male justices who claim the mantle of advocate for poor women and children, the “true victims” in this case, whose needs the dissenters “diminish,” against a bloc of female justices who see danger in their brethren’s reasoning and actions.¹¹⁷

The State of Wisconsin charged David Oakley with the crime of intentional failure to pay child support.¹¹⁸ Oakley is the father of nine children with four different women.¹¹⁹ He worked out a plea bargain, which included a three-year prison sentence and a stayed eight-year sentence.¹²⁰ In addition, the judge ordered Oakley to spend five years on probation, during which he could not father any children “unless he demonstrates that he ha[s] the ability to support them and that he is supporting the children he already ha[s].”¹²¹

Navajo woman in New Mexico sentenced to prison for child abuse).

113. See GWENDOLYN MINK, WELFARE’S END 138 (1998). See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (discussing the negative impact of child welfare intervention on African American families).

114. See generally ROBERTS, *supra* note 89; Rachel Roth, *The Perils of Pregnancy: Ferguson v. City of Charleston*, 10 FEMINIST LEGAL STUDIES 149 (2002).

115. See MINK, *supra* note 113 (discussing the racial politics of welfare policy).

116. See *Oakley*, 629 N.W.2d at 201-02.

117. See Tamar Lewin, *Father Owing Child Support Loses a Right to Procreate*, N.Y. TIMES, July 12, 2001, at A14.

118. See *Oakley*, 629 N.W.2d at 201 (stating the charges against the defendant).

119. See *id.* (describing the case’s factual background).

120. See *id.* at 203 (listing the case’s procedural history).

121. *Id.*

Oakley challenged this provision of his sentence.¹²²

It is worth noting at the outset that a few months after the Wisconsin Supreme Court reached its decision in the case, the court denied Oakley's motion for reconsideration. At that time, the Chief Justice, joined by the other two women on the court, issued a concurring opinion to clarify two significant facts.¹²³ First, Oakley was completely delinquent in his support payment for a period of precisely four months, months during which he was employed and could have made payments.¹²⁴ Most of the time, he did pay at least some child support, "in excess of" seventy percent of his obligations.¹²⁵ While consistently shirking on thirty percent of his payments and being \$25,000 in arrears does not make Oakley an angel, this information paints a different picture than the majority's discussion of his "persistent refusal to pay a cent to his children."¹²⁶

Second, the opinion withdraws references made by the majority to Oakley's intimidation of one of his own children at another trial, and to Oakley having abused at least one of his own children.¹²⁷ This correction is particularly significant given that the majority decision is replete with references to "child victims" and "victimizing."¹²⁸ The language of the decision seems to conflate physical abuse and non-support: "[I]t is overwhelmingly obvious that any child he fathers in the future is doomed to a future of neglect, abuse, or worse. That as yet unborn child is a victim from the day it is born."¹²⁹ Alongside the various references to intimidation, this conflation makes it easy for the reader to construe Oakley as violent and dangerous, on top of being irresponsible and unfair. For some, the depiction of Oakley as abusive may lend at least moral support to the requirement not to have more children.¹³⁰

The Court of Appeals affirmed the no-more-children condition in a

122. See *id.* (presenting a constitutional challenge to the terms of his probation).

123. See *State v. Oakley*, 635 N.W.2d 760, 760-62 (Wis. 2001) (denying the defendant's motion for reconsideration and presenting a justice's concurring opinion outlining key facts in the case).

124. See *id.* at 761.

125. See *id.*

126. *Oakley*, 629 N.W.2d at 213 n.28.

127. See *Oakley*, 635 N.W.2d at 760 (removing this language from its opinion).

128. See, e.g., *Oakley*, 629 N.W.2d at 208.

129. *Id.* at 215.

130. See generally Katherine E. McCanna, Note, *A Hot Debate in the Summer of 2001: State v. Oakley's Excessive Intrusion on Procreative Rights*, 36 IND. L. REV. 857 (2003) (arguing that the decision will lead to increased efforts by courts to curtail procreative rights in certain situations).

brief, unsigned, unpublished opinion.¹³¹ The court found the probation condition to be “narrowly drawn” and “reasonably related to Oakley’s rehabilitation and protection of the public,” satisfying constitutional standards.¹³² The court completely glosses over the role of women in carrying out the terms of probation: “Oakley’s condition of probation does not prohibit him from engaging in sexual activity. *It merely prohibits Oakley from having additional children* whom he cannot support, a task at which Oakley has wholly failed and for which he has been held criminally liable.”¹³³

What lies between the freedom to engage in sexual activity and the requirement not to have children is necessarily birth control. Unless Oakley has a vasectomy, this burden ultimately falls on women. That is, because no method of birth control is perfect, a woman may get pregnant despite diligent efforts at using contraception.¹³⁴ As the Eighth Circuit recognized in a related case, “[s]hort of having a probation officer follow [him] twenty-four hours a day, there is no way to prevent [him] from fathering more children.”¹³⁵ No way, that is, except by exerting pressure on any sex partner Oakley should happen to impregnate. As Wisconsin Supreme Court Justice Bradley puts it:

Because the condition is triggered only upon the birth of a child, the risk of imprisonment creates a strong incentive for a man in Oakley’s position to demand from the woman the termination of her pregnancy. It places the woman in an untenable position: have an abortion or be responsible for Oakley going to prison for eight years. Creating an incentive to procure an abortion in order to comply with conditions of probation is a result that I am not prepared to foster.¹³⁶

Bradley’s concern is one of several issues that divided the Wisconsin Supreme Court in this case. The court split four-to-three along gender lines: all the men upheld the terms of Oakley’s probation, and all the women dissented.¹³⁷ This result may initially be surprising, given that women belong to the class most affected by the lack of child support. But where the majority sees women primarily as victims

131. See *State v. Oakley*, 619 N.W. 2d 308 (Wis. Ct. App. 2000), *aff’d*, 629 N.W.2d 200 (Wis. 2001).

132. *Id.* at 6.

133. *Id.* at 7 (emphasis added).

134. See, e.g., *Facts About Birth Control*, PLANNED PARENTHOOD (demonstrating the effectiveness rates for various forms of birth control, concluding that, with the exception of abstinence, no method is absolutely fail-safe), at <http://www.plannedparenthood.org/bc/bcfacts2.html> (last visited Sept. 27, 2004).

135. See *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992).

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

137. See *id.* at 200.

of men's wrongdoing, as damsels in economic distress, the dissenters present a more complicated picture of gender, accountability, and reproductive politics.

Returning to the abortion question, the majority does not take Bradley's concern seriously enough to address. Justice Wilcox merely chides Bradley for invoking the "specter" of coercive abortion, in one of the many footnotes where they battle with each other.¹³⁸ Yet Bradley is hardly the first judge to be troubled by this possibility.¹³⁹ The majority's insensitivity to possible coercion is curious given the way the majority positions itself as the true champion of women.

The larger implications of the decision also divide the court. The majority accuses the dissenters of defending "Oakley's absolute right to procreate children while refusing to support them," as if they are callously indifferent to the plight of poor, single-mother families.¹⁴⁰ The dissenting justices are not oblivious to the fact that women suffer disproportionately when non-custodial parents abdicate their obligations.¹⁴¹ But their concerns transcend the particulars of Oakley's case; as Bradley puts it, "[W]e must keep in mind what is really at stake in this case. The fundamental right to have children, shared by us all, is damaged by today's decision."¹⁴² The majority's own presentation of data on parents who fail to pay child support "belies its contention that this case is truly exceptional;" instead, it has the potential to affect thousands of men in the state.¹⁴³ Justice Sykes also objects to what she calls "a compulsory, state-sponsored, court-enforced financial test for future parenthood."¹⁴⁴ She agrees that the state's "objective of collecting past and future support for [Oakley's] children, who are entitled to and need it" is "significant and laudable," but the means cannot stand when less restrictive alternatives are available, such as imposing jail time with work release for mandatory employment, garnishing wages, and intercepting tax returns.¹⁴⁵

Ultimately, conditioning parenthood on any sort of state criteria

138. See *id.* at 215 n.34 (arguing that Bradley's dissent intentionally circumvents the real issue).

139. See, e.g., *Trammel v. State*, 751 N.E.2d 283, 290 (Ind. Ct. App. 2001); *Zaring v. California*, 10 Cal. Rptr. 2d 263, 270 (Ct. App. 1992); *Kansas v. Mosburg*, 768 P.2d 313, 315 (Kan. Ct. App. 1989); *Pointer*, 199 Cal. Rptr. at 365.

140. *Oakley*, 629 N.W.2d at 208 n.22.

141. See *id.* at 216 (Bradley, J., dissenting).

142. *Id.* at 221 (Bradley, J., dissenting).

143. *Id.* at 220 (Bradley, J., dissenting).

144. *Id.* at 221 (Sykes, J., dissenting).

145. *Id.* at 222 (Sykes, J., dissenting).

may, as Bradley says, “affect the rights of every citizen in this state, man or woman, rich or poor.”¹⁴⁶ Although this particular decision restricts and penalizes men, it cannot do so without implicating women. The dissenting opinions do not draw out all of the connections, but we can fill them in: the history of reproductive politics makes clear that women bear the brunt of scorn heaped on parents deemed too poor to have children, and women have borne the brunt of coercive measures directed at discouraging both sexes from reproducing, including unwilling and unwitting sterilization.¹⁴⁷

V. A MISFORTUNE OR A CRIME? COURT ORDERS PROHIBITING PROCREATION¹⁴⁸

At the time the Wisconsin Supreme Court rendered its decision in *Oakley*, only two other appellate courts had upheld sexual or reproductive restrictions on men, and the Wisconsin Supreme Court relied on them both. In 1997, a Wisconsin court upheld a probation condition imposed on Kenneth Krebs, convicted of sexually assaulting his daughter.¹⁴⁹ For twenty years, Krebs must receive approval from his probation officer before engaging in a “dating, intimate, or sexual” relationship, and the probation officer must verify that Krebs seeks only the companionship of adult women who are aware of his criminal record.¹⁵⁰ The officer who testified about the condition called it a “rule” and made it sound routine rather than a condition imposed uniquely on Krebs, suggesting that other men may leave similar restrictions unchallenged. The court found the condition reasonably related to Krebs’ rehabilitation and protective of public safety, and rejected Krebs’ claim that it interfered with his right to procreate.¹⁵¹

Across the country in Oregon, a court upheld a three-year condition imposed on Tad Kline, convicted of child abuse, after he

146. *Id.* at 216 (Bradley, J., dissenting).

147. See Jennifer Foote Sweeney, *Something Cheesy in the State of Wisconsin*, SALON.COM (July 13, 2001) (describing the implications for reproductive rights), at <http://dir.salon.com/mwt/feature/2001/07/13/wisconsin/index.html> (last visited Sept. 27, 2004). See generally CAROLE McCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES: 1916-45 (1994) (describing the “economic ethic of fertility” that influenced birth control politics in the early twentieth century).

148. See *Dominguez v. California*, 64 Cal. Rptr. 290, 293 (Ct. App. 1967) (stating that becoming pregnant while unmarried is a misfortune, not a crime, and striking an order not to have children outside of marriage).

149. See generally *Krebs v. Schwarz*, 568 N.W.2d 26 (Wis. Ct. App. 1997).

150. See *id.* at 27-28.

151. See *id.* at 28 (holding that the condition restricts a constitutional right, but does not deny a right).

violated his probation.¹⁵² In order to father another child, Kline must successfully complete drug treatment, anger management, and any other required program, and must get prior written approval from the court.¹⁵³ The court found that the condition does not totally eliminate Kline's reproductive rights and it protects potential victims from injury.¹⁵⁴ In all these cases, a woman's pregnancy and/or the birth of a child would provide evidence that the man had violated the conditions of his probation. The Wisconsin Supreme Court dissenters distinguished these two cases from Oakley's because they do not condition sex or reproduction on the basis of financial criteria.¹⁵⁵

As the cases above suggest, courts imposed sexual and reproductive restrictions on men for two reasons: child abuse¹⁵⁶ and failure to support their children financially.¹⁵⁷ This second category is fairly broad. One man was convicted of intentionally refusing to pay child support.¹⁵⁸ Another had broken into a grocery store to steal food in

152. See generally *Oregon v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998).

153. See *id.* at 699.

154. See *id.*

155. See *Oakley*, 629 N.W.2d at 220 (Bradley, J., dissenting) (arguing that the majority in this case cites no cases where a court has allowed the right to have children to be conditioned on financial status).

156. See *Smith v. Arizona*, 725 P.2d 1101, 1104 (Ariz. 1986) (finding that the lower court did not have the power to order the defendant to be sterilized after his conviction for child abuse); *Howland v. Florida*, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (reversing the lower court's probation condition prohibiting the defendant from fathering a child after his conviction for negligent child abuse); *Kline*, 963 P.2d at 699 (finding the defendant's conviction for first degree criminal mistreatment of his child allowed for a condition prohibiting him from fathering any more children); *Krebs*, 568 N.W.2d at 28 (holding that the defendant's conviction for sexual abuse of his daughter warranted a restriction on his right to engage in a sexual relationship).

157. See *Oakley*, 629 N.W.2d at 200 (upholding a ban on procreation as a condition of probation); *United States v. Smith*, 972 F.2d 960 (8th Cir. 1992) (reversing an order not to have children outside of marriage); *Burchell v. State*, 419 So. 2d 358 (Fla. Dist. Ct. App. 1982) (striking a ban on procreation but not specifying the nature of the man's crime); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980) (reversing a lower court decision requiring marriage and forbidding extramarital sex by the defendants, who were all parents and who were all convicted of burglary or forging checks); see also *Judge Orders Drug Dealer To Halt Sex for 5 Years*, CHI. TRIB., Jan. 14, 1988, at 13 (describing an order by a federal judge that Michael Youngblood not have sex for five years), available at 1988 WL 3433037; Larry Copeland, *Does 'Scarlet Letter' Judge Cross the Line?*, USA TODAY, July 9, 2001, available at <http://www.usatoday.com/news/nation/2001/07/10/texas-judge.htm> (last visited Sept. 27, 2004) (describing the case of Robert Torres, who was convicted of statutory rape in 1999, and subsequently fathered children with two teenage girls, children he did not appear to be supporting). At a probation revocation hearing in 2001, the judge ordered Torres not to have sex outside of marriage. *Id.* According to Torres' attorney, he later married, rendering the order moot. See Email from Gerald A. Rogen, Attorney at Law, to Rachel Roth, Research Fellow, Ibis Reproductive Health (Mar. 1, 2004) (on file with author). Cases arising after *Oakley* are discussed in the conclusion. *Infra* notes 213-25 and accompanying text.

158. See *Oakley*, 629 N.W.2d at 202.

order to, in the state's words, "feed and care for [his] illegitimate children."¹⁵⁹ The crime that brought this man before the court was not failure to pay support, but the court took it as evidence that he was unable to fulfill his parental responsibilities. Another man was sentenced not to have children out of wedlock (more specifically not to impregnate any woman not his wife, while leaving unclear the question of whether he had a wife) until he proved he was supporting his children.¹⁶⁰ His crime: intent to sell drugs, something completely unrelated to child support.

Five of the eight courts to review impositions on men found them unacceptable. Two Florida courts overturned the restrictions because they did not consider them reasonably related to past or future criminal activity, they impinged on non-criminal conduct, and they coerced marriage by banning non-marital sex or procreation.¹⁶¹ The Arizona Supreme Court found the imposition of sterilization in a child abuse case outside the judge's jurisdiction.¹⁶² The Eighth Circuit found a ban on impregnation unworkable, counterproductive (because a father remanded to prison cannot support his children), and outside the trial judge's authority.¹⁶³ Few courts took the step to analyze the constitutional right to procreate, because they could overturn the conditions on other grounds.¹⁶⁴

Like unworkability, ambiguity bothered one court: a third Florida court found that a ban on "fathering" children could have two meanings—"begetting" and parenting.¹⁶⁵ Because the defendant was already prohibited from rearing or even being near children, the state could prevent him from abusing any future children he happened to "father" in the procreative sense. In another case, Michael Youngblood may have seen no need to appeal a judge's order to "obey all local, state and federal laws [pertaining to] fornication and bastardy," because Pennsylvania had repealed those laws and there

159. See *Wiggins*, 386 So. 2d at 47 (relaying the state's argument that the condition is reasonable and serves a useful rehabilitative purpose).

160. See *Smith*, 972 F.2d at 962.

161. See *Wiggins*, 386 So. 2d at 48 (holding that although the punishment intended to alleviate the financial pressure on the appellants convicted of forgery, it was nevertheless invalid); *Burchell*, 419 So. 2d at 358.

162. See *Smith v. State*, 725 P.2d 1101, 1103 (Ariz. 1986) (holding that courts can only order sterilization as a condition of sentencing under specific statutory authority).

163. See *Smith*, 972 F.2d at 962.

164. But see *id.* at 962 (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and observing the importance of the right to have offspring).

165. See *Howland v. Florida*, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982).

were no federal ones with which to contend.¹⁶⁶ In *Youngblood*, a federal judge ordered the defendant not to have sex for five years, but made no provisions for enforcing the order.¹⁶⁷ A Texas case was not reviewed because the defendant, ordered not to have sex outside of wedlock, got married.¹⁶⁸

Courts have imposed reproductive restrictions on women for primarily three reasons: child abuse and neglect,¹⁶⁹ drug use,¹⁷⁰ and

166. See *Judge Orders Drug Dealer To Halt Sex for 5 Years*, *supra* note 157, at 13.

167. See *id.*

168. See Email from Gerald A. Rogen, *supra* note 157.

169. See *Smith v. State*, 725 P.2d 1101 (Ariz. 1986) (overturning sterilization as condition of reduced prison sentence); *Pointer*, 199 Cal. Rptr. at 357 (overturning ban on pregnancy); *Rodriguez*, 378 So. 2d at 7 (overturning ban on pregnancy and marriage); *Livingston*, 372 N.E.2d at 1335 (overturning ban on having children); see also *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 725-26 (Cal. 1998) (describing the facts of the unpublished case, *People v. Johnson*, No. F015316 (Cal. Ct. App. Apr. 13, 1992), at 1992 WL 685375, in which the judge ordered Norplant; appeal mooted when defendant sent to prison for violating other probation conditions); *People v. Ferrell*, 659 N.E.2d 992 (Ill. App. 1995) (overturning ban on pregnancy but upholding pregnancy testing); *Trammel*, 751 N.E.2d at 283 (overturning ban on pregnancy); *Mosburg*, 768 P.2d at 313 (overturning ban on pregnancy); *In re Lacey P.*, 433 S.E.2d 518 (W. Va. 1993) (holding that a judge's order to be sterilized was mooted when the woman obtained Norplant); *Dresser*, *supra* note 109, at 136 (describing a 1990 Florida case where a judge ordered use of contraceptives as part of plea arrangement); *Id.* at 137 (describing a Tennessee case where the judge "offered" a lighter sentence for a married couple accused of child sexual abuse if the woman agreed to be sterilized); *Arthur*, *supra* note 92, at 19-21 (citing *Nebraska v. Carlton*, No. CR90-1937 (Neb. County Ct., 1991), in which the judge ordered use of birth control); *Saunders*, *supra* note 92, at 214 n.28 (describing an Arizona case overturning in 1988 a lifetime of compulsory birth control); *Jeff Feeley, Woman Accepts Sterilization as Term of Plea: Charged with Murdering Her Child*, NAT'L L.J., Aug. 18, 1986, and *Sterilized Woman Pleads Guilty To Manslaughter*, UNITED PRESS INT'L, July 22, 1986 (describing a South Carolina case where a woman underwent sterilization as part of a plea bargain); *Florida: Judge Overturns State Adoption "Gag Rule"*, 5 ABORTION REP., July 23, 1993 (describing a Florida case where a judge ordered a woman to use Norplant); *Judge Orders Mother To Be Given Contraceptive*, UNITED PRESS INT'L, Sept. 6, 1991 (describing a Texas case in which a woman obtained Norplant as part of a plea bargain to avoid prison); *Judge Says Sterilization May Ease Sentence for Child's Death*, APWIRES, July 21, 1988 (describing an Indiana case where the judge suggested leniency in exchange for sterilization); *Makeig, Women's Probation Includes Birth Control*, *supra* note 107, at 21 (describing a Texas case where a woman "agreed" to use Norplant); *John Makeig, Surgical Deterrent: Mom Convicted of Child Abuse Picks Birth-Control Implant Over Prison*, HOUS. CHRON., Mar. 6, 1992 (describing a Texas case where woman obtained Norplant to avoid prison); *Medical Sterilization Ordered for Abusive Louisiana Mother*, DESERET NEWS, Mar. 12, 2000, at A14 (describing a Louisiana case where a judge ordered sterilization or ten years in prison); *Retarded Woman Agrees To Norplant Instead of Jail*, LEGAL INTELLIGENCER, Feb. 18, 1994 (describing a Pennsylvania case); *Estela Villanueva, Forced Contraception Protested: Legislator Pushes Bill To Ban Courts from Ordering Use of Birth Control by Women*, ST. LOUIS POST-DISPATCH, Mar. 15, 1993 (describing an Illinois case where a woman "accepted" a sentence including Norplant). In two additional cases of child abuse, judges did not ban pregnancy but did order women to submit to regular pregnancy tests. See *Harriet Chiang, Monthly Pregnancy Test Ordered: Woman's Children Have Alcohol-Related Defects*, S.F. CHRON., June 8, 1995, at A19 (describing a California case where a judge ordered pregnancy tests); *Laura Griffin, Mother Pleads in Newborn's Death*,

criminal activity not directly related to children.¹⁷¹ In child abuse cases, by far the largest category, judges ordered women not to have more children.¹⁷² In cases of theft or check fraud, however, judges ordered women not to have children or sex *outside of marriage*.¹⁷³ No woman was restricted because she failed to pay child support, but judges' disapproval of women who rely on public assistance to support their children came into play in sentencing decisions.¹⁷⁴

Appellate courts found many reasons to overturn these restrictions: because they bear no direct relationship to the crime;¹⁷⁵ they restrict non-criminal conduct, or coerce conduct (marriage);¹⁷⁶ they are

ST. PETERSBURG TIMES, June 9, 1993, at 1B (describing a Florida case where a judge ordered pregnancy tests or proof of birth control). Cases arising after *Oakley* are discussed *infra* in the conclusion.

170. See *Zaring*, 10 Cal. Rptr. 2d at 263 (overturning ban on pregnancy); *State v. Richard*, 680 N.E.2d 667 (Ohio Ct. App. 1996) (overturning birth control or sterilization as condition of probation); *Court Removes Another 'No Pregnancy' Order*, APWIRES, July 3, 2001 (describing two cases where the Montana Supreme Court overturned bans on pregnancy; in one case, the court upheld required pregnancy tests).

171. See *Dominguez*, 64 Cal. Rptr. at 290 (overturning ban on pregnancy outside of marriage); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988) (overturning ban on pregnancy outside of marriage); *Wiggins*, 386 So. 2d at 46 (overturning ban on extramarital sex in three consolidated cases of two women and one man); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986) (overturning ban on pregnancy outside of marriage).

172. See, e.g., *Pointer*, 199 Cal. Rptr. at 365 (overturning the trial court's order that a woman refrain from conceiving a child during her probation period). The probation order stemmed from the woman's felony conviction of child endangerment. *Id.* at 359.

173. See, e.g., *Dominguez*, 64 Cal. Rptr. at 292 (considering the trial court's probation order, which included the condition that the female defendant, who was convicted of robbery, not become pregnant without being married).

174. See, e.g., *Zaring*, 10 Cal. Rptr. 2d at 267 (highlighting the sentencing judge's comments to the defendant regarding two of her children's receipt of public funds, when ordering her to refrain from becoming pregnant while on probation); see also Gregory A. Hall, *Judge To Rule Today on No-Sex Plea Deal*, COURIER-JOURNAL, May 13, 2002 (describing a Kentucky case from 1993, where the judge told a woman jailed on charges of failure to pay child support that her release from jail was contingent on getting a tubal ligation; the judge later suggested that he only meant to "get her attention," and the county clerk's office has no record of appeal).

175. See, e.g., *Thomas*, 519 So. 2d at 1114 (invalidating the no-pregnancy condition of probation, in part, because it bears no relationship to the defendant's convictions for grand theft and battery); *Norman*, 484 So. 2d at 953 (vacating the probation condition set by the trial court, which required the defendant to refrain from giving birth to any "illegitimate" children for two years, because the order failed to relate to the goal of rehabilitating the defendant). *But see Pointer*, 199 Cal. Rptr. at 364 (finding the trial court's no-pregnancy restriction reasonably related to the crime of child endangerment, because the defendant adhered to a strict macrobiotic diet for herself and her children, and such a diet might compromise healthy fetal development, should she become pregnant).

176. See, e.g., *Wiggins*, 386 So. 2d at 48 (asserting that an order prohibiting unmarried individuals from engaging in sexual intercourse with anyone other than spouses coerces them into marriage); *Rodriguez*, 378 So. 2d at 9 (invalidating probation conditions prohibiting pregnancy and marriage unless probationers

impermissibly overbroad in their violation of constitutional rights;¹⁷⁷ they cannot be enforced;¹⁷⁸ or they fall outside the judge's authority, and in some cases reflect judges' personal biases.¹⁷⁹ A Florida appellate court said simply that the condition is "so grossly erroneous on its face [that] in the interest of justice we must strike it."¹⁸⁰ Compared to cases about men, the greater number of courts focusing on privacy and procreative liberty could be simply a function of the greater number of cases. It might also be, however, because of the social construction of motherhood as more central to women's identity than fatherhood is to men's. That is, restrictions on motherhood may call for greater reflection and justification because motherhood is such a defining aspect of women's lives in American culture.¹⁸¹ A related issue here is the courts' concern with the practical implication of such orders, specifically the concern that if a woman becomes pregnant, she would be forced to hide her pregnancy and forego prenatal care, or to seek an abortion, something the courts (and some prosecutors) found unacceptable.¹⁸²

Significant differences emerge when comparing the cases about women and men. First, the record shows that judges are more likely to impose reproductive restrictions on women than men.¹⁸³ Second, judges are more likely to impose these restrictions on women in cases where the crime had no direct connection to children.¹⁸⁴ Two

obtained the trial court's consent because the condition pertained to non-criminal conduct).

177. See, e.g., *Pointer*, 199 Cal. Rptr. 2d. at 366 (finding the probation order that prohibited female defendant from conceiving unconstitutionally overbroad because less restrictive alternatives were available to meet the same rehabilitative purpose). The court noted that probation orders may be valid even though they infringe on an individual's constitutional rights, when required by the circumstances. *Id.* at 363. See also *Trammel*, 751 N.E.2d at 289-90 (invalidating the probation condition that ordered the defendant not to become pregnant because it violated her privacy right of procreation).

178. See Arthur, *supra* note 92, at 20 (noting where a judge conceded to the unenforceability of a mandatory contraception order).

179. See, e.g., *Dominguez*, 64 Cal. Rptr. at 292-93 (overturning a trial court's no-pregnancy probation order, which, in part, reflected the trial judge's bias against using public assistance to help "irresponsible" mothers).

180. *Thomas*, 519 So. 2d at 1114.

181. See Carol Sanger, *M Is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 49 (1992) (discussing various theories of why motherhood is so central to women's lives in American culture).

182. See *supra* note 139 (listing four cases where judges expressed concern about coerced abortion).

183. See *supra* notes 156-57, 169-71.

184. See, e.g., *Thomas*, 519 So. 2d at 1114 (overturning a no-pregnancy-unless-married probation condition ordered against a woman who was convicted of grand theft and battery).

federal cases stand out as exceptions, where judges ordered men not to have children even though their crimes had nothing to do with children or being a father.

Finally, appellate courts *did not uphold* any of these restrictions on women. In two cases, the courts considered the woman's appeal moot, either because she had been sent to prison for violating other conditions of her probation, or because she (apparently voluntarily) obtained Norplant while appealing an order that the local health department "assist" her in obtaining surgical sterilization.¹⁸⁵

When striking down a trial court's probation order prohibiting non-marital sex for two women and one man in 1980, a Florida appellate court stated, "While the trial court obviously intended to prevent the birth of additional children to alleviate additional financial pressure on appellants, the condition does not have that effect. Instead, it coerces appellants into marriage so they may lawfully engage in sex."¹⁸⁶ This appellate court was very generous in its reading of the trial court's intention: to alleviate additional financial pressure on the defendants, poor, single parents.¹⁸⁷ Some sentencing judges have been rather explicit in their concerns that defendants before them—in these cases, all women—are burdening the state with their "illegitimate" children.¹⁸⁸ In 1965, a California judge conditioned probation for Mercedes Dominguez, a twenty-year-old unmarried mother of two who was pregnant at time of sentencing, on not getting pregnant out of wedlock, and he made good on his threat to revoke her probation when she became pregnant again.¹⁸⁹ The appellate court overturned this condition, with a clear reprimand to the judge who let his personal views on "welfare mothers" affect his sentencing.¹⁹⁰ The court quotes him as saying, "You are going to prison unless you are married first. You already have too many of those," as if children were objects to be collected, and chiding her for

185. See ROBERTS, *supra* note 89, at 152 (explaining that an appellate court dismissed Darlene Johnson's appeal as moot after she was remanded to prison); see also *In re Lacey P.*, 433 S.E.2d at 525-26 (distinguishing the trial court's order that the Department of Health and Human Services assist the defendant in her "expressed desire" to be sterilized, from a court order mandating her to become sterile, an order which the court doubted could ever be valid).

186. *Wiggins*, 386 So. 2d at 48; see *id.* at 48 n.2 (noting that fornication—defined as sex with an unmarried woman—was illegal in Florida until 1979, when the state supreme court struck down the statute as an impermissible sex-based classification).

187. See *id.* at 48 (disagreeing with the trial court's presumption that "legitimate" children pose less of a financial burden on parents than extramarital children).

188. See, e.g., *Zaring*, 10 Cal. Rptr. 2d at 267.

189. See *Dominguez*, 64 Cal. Rptr. at 293 (relating the history of the case).

190. See *id.* at 625.

letting the community assume responsibility for her children.¹⁹¹

Twenty-five years later, in *California v. Zaring*, an appellate court remarked on the similarity between *Dominguez* and the case before it for review.¹⁹² The sentencing judge had scolded the defendant, stating, "I want [to make] it clear that one of the reasons I am making this order is you've got five children. You're thirty years old. None of your children are in your custody or control. Two of them on AFDC."¹⁹³ Similarly, a Louisiana judge told a twenty-year-old mother of two "illegitimate children" that having children outside of marriage indicated "irresponsible thinking."¹⁹⁴

In California, three cases that went up on appeal all justified prohibiting pregnancy by referring to the woman's dependence on public assistance.¹⁹⁵ The women who pursued these appeals were Latina, African American, and white.¹⁹⁶ The California cases illustrate that women from many groups have been affected by judicial orders while also making clear that the invocation of welfare, if accepted as a legitimate reason to limit reproduction in the criminal sentencing context, would have a disproportionate impact on women of color.

CONCLUSION: STATE POWER, GENDER POLITICS, AND THE RESILIENCE OF REPRODUCTIVE CONTROL

The cases discussed in this article demonstrate a number of ways that courts dealing with reproductive rights claims in the criminal justice arena can suppress gender equality. A crucial component of court decisions concerning men is the pivotal, but unstated, role of women. The Wisconsin Supreme Court decision in *Oakley* is a danger to women presented as if it were a gift, a penalty imposed on men to "protect" women: the decision makes women vulnerable to

191. *Id.* (reviewing trial court's remarks to the defendant, which included asking whether she knew where the Planned Parenthood Clinic was located). Women's ability to obtain contraception in 1965 would have been a matter of local discretion, and abortion was illegal everywhere, making compliance with the court's order difficult and potentially dangerous. See generally MCCANN, *supra* note 147; TYLER MAY, *supra* note 112; ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000 (Rickie Solinger ed., 1998).

192. See *Zaring*, 10 Cal. Rptr. 2d at 368-74 (reviewing a no-pregnancy probation order resulting from a conviction for possessing and being under the influence of heroin). The appellate court highlighted that the trial court here, as well as the trial court in the *Dominguez* case, made commentary that reflected their personal social values. *Id.* at 373-74.

193. *Id.* at 368.

194. *Norman*, 484 So. 2d at 953.

195. See *Dominguez*, 64 Cal. Rptr. at 292-93; *Zaring*, 10 Cal. Rptr. 2d at 266-67; *Pointer*, 199 Cal. Rptr. at 357.

196. See Arthur, *supra* note 92, at 11 (describing *Zaring* as white).

coercion and imperils their right to have children.¹⁹⁷ Similarly, the Ninth Circuit panel decision in *Gerber* expanded rights for some men at the expense of all women.¹⁹⁸

By emphasizing these cases' implications for gender equality, I do not mean to suggest that men do not face very real consequences if they are caught violating the terms of their probation or parole. They do. But there is no way to engage in this particular form of policing men without also policing women, and this basic fact often escapes judicial notice.¹⁹⁹ If the danger in some of these cases lurks under the radar, it is patently obvious in others. In a Tennessee case, for example, a judge "negotiated" a sterilization-for-probation deal with Mrs. Gross, but did nothing to curtail the fertility of Mr. Gross, even though both pleaded guilty to attempted sexual abuse of their children.²⁰⁰ To make matters worse, the judge presented two alternatives: either five years prison for both or ten years probation for both if Mrs. Gross got her "tubes tied," making his freedom contingent on her decision.²⁰¹ Sentencing judges appear to take more latitude with women than with men by restricting their reproductive lives more often and for more reasons, such as prohibiting childbearing outside of marriage when women commit economic crimes.²⁰² This pattern fits with courts' historic preoccupation with policing white women's sexuality and gender conformity.²⁰³ The economic and social marginality of poor women who are single mothers relying on public assistance appears to be a powerful combination for some judges who see enforcing "personal responsibility" as a legitimate exercise of their authority.²⁰⁴

Courts also apply reproductive restrictions to women who have

197. See *Oakley*, 629 N.W.2d at 200 (upholding a ban on procreation for a man who had not paid child support).

198. See *Gerber*, 264 F.3d at 882.

199. See *supra* note 155 and accompanying text (discussing how the birth of a child would provide evidence that a man had violated his probation).

200. See Dresser, *supra* note 109, at 137.

201. See *id.*

202. See *supra* notes 169-74 and accompanying text.

203. See, e.g., NICOLE RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS AND SOCIAL CONTROL 41 (2d ed. 1990); LUCIA ZEDNER, *Wayward Sisters: The Prison for Women*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 329 (Norval Morris & David Rothman eds., 1998) (explaining, in addition, that before the advent of gender-based equal protection, some courts and sentencing guidelines gave women harsher sentences than men, even in the case of a man and woman breaking the law together, because they thought women were harder to rehabilitate, since committing crime in the first place signified their fall from gender requirements).

204. See *supra* notes 188-95 and accompanying text (discussing cases involving women who receive public assistance).

abused children and to women who have used drugs,²⁰⁵ because these women fall short of the mark of normative womanhood.²⁰⁶ These cases suggest that courts as disciplinary institutions cast a wider net with the women who come before them than with men. What then are we to make of courts' greater willingness to *uphold* reproductive restrictions imposed on men? Does this too hark back to a kind of gender inequality, expressed in the motherhood imperative?

One judge who had ordered at least two women to use birth control defended himself against accusations of discrimination this way: "This Court in a proper case with appropriate technology would make a similar order against a man. The mere fact that technology has not arrived to implant a man does not mean that it should not be used in a woman."²⁰⁷ In these comments, Judge Broadman does not consider the ways that sex discrimination and the close cultural association between women and all things reproductive might influence the development of contraceptive technology and forestall the "arrival" of means to restrict men.

In addition to the implications these cases have for women's rights outside of the criminal justice system, the cases have important implications for prisoners' rights beyond reproduction. As Franklin Zimring says of the final decision in *Gerber*:

[T]his kind of litigation outcome may be a symptom of a much larger failure to take seriously the question of the legitimate interests of prisoners and those who are in sustained relationships with them. I am much more worried about the majority's dismissiveness of the human interest involved in a case like this than I am about the ease of ridiculing the idea of a constitutional right to send sperm through the mail.²⁰⁸

An op-ed in the *San Francisco Chronicle* displays exactly the dismissiveness Zimring fears by saying: "Earth to the Ninth Circuit court: the 'legitimate penological reason' [to deny Gerber's request] is that prison is punishment. No freedom. No hot Starbucks lattes. No new babies."²⁰⁹ Although not as mean-spirited as this commentator, the judge writing for the Eighth Circuit was

205. See *supra* notes 169-70 and accompanying text.

206. See generally MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS (Julia A. Hanigsberg & Sara Ruddick eds., 1999) (describing punitive responses to women who do not meet societal standards of good motherhood).

207. Michelle Oberman, *Commentary: The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN'S L.J. 1, 6 n.24 (1992).

208. Henry Weinstein, *Inmate May Not Ship Wife Semen*, L.A. TIMES, May 24, 2002, at B1.

209. See Debra Saunders, *Ill-Conceived Parenthood*, S.F. CHRON., Sept. 11, 2001, at A13.

unsympathetic when Steven Goodwin and his wife expressed concern that by the time he got out of prison, she would be facing greater risks of having a child with birth defects.²¹⁰ The court dismissed this worry with a few statistics, presuming to assess the risks for Goodwin and his partner, when reproductive risk assessment is both a highly personal and a highly cultural enterprise, not one of mere odds.²¹¹

The publicity and success of the *Oakley* case seem to be inspiring more prosecutors and judges to impose sexual and reproductive restrictions.²¹² In the spring of 2002, for instance, Luther Crawford of Kentucky signed an agreement pleading guilty to two counts of flagrant nonsupport and agreeing to abstinence as a condition of probation.²¹³ Crawford subsequently challenged the condition, but the judge presiding over the case ultimately sentenced him to jail instead, leaving the status of the abstinence condition unclear.²¹⁴ In what might be considered a pre-emptive move (or “proactive,” as the plea agreement put it), a twenty-eight-year-old Kentucky man being prosecuted by the same government attorney underwent a vasectomy in order to improve his chances of getting probation instead of jail time.²¹⁵ The news story suggests he owed “more than \$1,000” in child support.²¹⁶ Hopefully, this low dollar amount is a typo.

An Ohio judge concerned that an outright ban on procreation might not survive appellate review instead imposed a “softer” requirement that a defendant “take reasonable efforts to avoid conception,” such as using birth control.²¹⁷ While not as likely to trigger incarceration if violated, this requirement invites a high level of micro-management on the part of the judge.²¹⁸ Ohio courts in the

210. See *Goodwin*, 908 F.2d at 1396 (upholding a policy to prohibit a prisoner from providing semen to his wife for the purpose of insemination).

211. See *id.* at 1397 (citing to statistics that predict the chances of having a child with Downs Syndrome). See generally RAYNA RAPP, *TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA* (2000) (discussing how women interpret the meanings of amniocentesis).

212. See *Gerber*, 291 F.3d at 621.

213. See Hall, *supra* note 174.

214. See Bruce Schreiner, *Deadbeat Dad Sent To Prison But Avoids No-Sex Condition*, APWIRES, May 14, 2002.

215. See *Man Undergoes Vasectomy To Try To Win Probation*, APWIRES, July 26, 2002.

216. *Id.*

217. Terry Oblander, *Fathering More Children Could Land Dad in Jail*, CLEVELAND PLAIN DEALER, Sept. 7, 2002, at B1, B3; see also Terry Oblander, *Fatherhood Ban Considered for Deadbeat Dads*, CLEVELAND PLAIN DEALER, July 27, 2002 (discussing a court’s strategy to deter a defendant from fathering any more children during his five-year probation for failing to pay child support).

218. See Oblander, *Fathering More Children*, *supra* note 217, at B1, B3 (noting that the judge said that the defendant “could father a child without violating his

1970s and 1990s had struck down procreation bans imposed on women.²¹⁹ Though the press may now be especially attuned to cases about men, women are also feeling the consequences. One month after the state supreme court upheld Oakley's punishment, a Wisconsin judge placed a twenty-six-year-old woman on probation for ten years and ordered her not to have children.²²⁰ She had been convicted of second-degree reckless homicide in the starvation of her infant daughter.²²¹ A Michigan judge ordered a woman facing child abuse allegations to use a "verifiable" form of birth control, such as an IUD or Depo-Provera injections.²²² Apparently, the first such case in the state, the judge rescinded his order once confronted with an appeal.²²³ A Florida woman who pleaded no contest to attempted murder of her baby was sterilized as part of the plea agreement.²²⁴ And in an apparent first for the entire Northeast region, a New York judge recently ordered a couple not to have more children until they prove they can care for the children they already have, all of whom are in foster care.²²⁵

In the Fall of 2002, the United States Supreme Court declined to hear Gerber's appeal, sending imprisoned men back to square one if they encounter administrative resistance to their desire to father children.²²⁶ Perhaps somewhat more surprising, the Court also rebuffed Oakley's appeal, ensuring that these conflicts will continue to arise, but without any guarantee of public oversight, whether from

probation if [the judge] was convinced that [he] had tried to use birth control but it failed"); see also Ed Meyer, *Ohio Court Skeptical of Procreation Limits*, BEACON JOURNAL, May 12, 2004 (describing oral argument before the Ohio Supreme Court about the probation condition), available at <http://www.ohio.com/mld/beaconjournal/8643952.htm?lc> (last visited Sept 27, 2004).

219. See generally *Richard*, 680 N.E. at 667 (invalidating the tubal ligation and birth control conditions of the defendant's probation); *Livingston*, 372 N.E.2d at 1335 (holding that prohibiting the defendant from having children during her five year probation period was a violation of her constitutional right to privacy and a violation of the trial court's discretion).

220. See *Judge Orders Woman To Have No More Children*, APWIRE, Aug. 30, 2001 (noting that if this woman violated the order and had more children she could face up to fifteen years in prison).

221. See *id.*

222. See *Addict's Birth Control Order Fought*, UNITED PRESS INT'L, July 9, 2003.

223. See *In re J.N.G. and B.S.*, No. 246592, 2003 WL 22299795 (Mich. App. Oct. 7, 2003); see also Telephone interview with Michael Steinberg, Legal Director, ACLU of Michigan (Mar. 1, 2004).

224. See *Panhandle Woman's Sentence Cut, But Illinois Prison Waits*, APWIRE, Apr. 4, 2003.

225. See Marc Santora, *Negligent Upstate Couple Is Told Not To Procreate*, N.Y. TIMES, May 11, 2004, at B6 (explaining that the judge did not specify how the woman should avoid pregnancy).

226. See *Gerber v. Hickman*, 537 U.S. 1039 (2002).

the media, watchdog groups, or reviewing courts.²²⁷ In this time of deep budget deficits, we may be seeing greater use of probation as alternatives to incarceration gain pragmatic political support. The gulf between sentencing judges' actions and appellate judges' evaluations of those actions suggests that these issues will not be resolved any time soon.

227. See *Oakley v. Wisconsin*, 537 U.S. 813 (2002).