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NOTES

The Constitutionality of the Use of the Norplant Contraceptive Device as a Condition of Probation

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Introduction

In December 1990, the federal Food and Drug Administration (FDA) approved Norplant, a revolutionary, long-acting contraceptive device.[1] Norplant is the first significant development in birth control in three decades.[2] The device consists of six match-sized, plastic tubes that are surgically implanted under the skin of a woman's inner arm.[3] Once inserted the tubes continuously diffuse a synthetic hormone into the bloodstream, effectively inhibiting conception for as many as five years.[4] Norplant's contraceptive effects are temporary and once the device is removed fertility returns almost immediately.[5] Because of its effectiveness and convenience, Norplant presents a positive new option for women seeking reliable, long-term, yet reversible birth control.

For these same reasons, however, Norplant also presents a special temptation to some judges who view the device's short-term sterilizing effects as a potential sentencing tool. Within months of its approval, several judges around the country had already succumbed to Norplant's allure. In California, Nebraska, and Texas, judges imposed use of Norplant as a mandatory condition of probation for mothers convicted of child abuse.[6] The haste with which the criminal justice system adopted the use of the device reflects at once the system's frustration with the

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1. Ellen Goodman, *An Old Fix In a New Form*, BOSTON GLOBE, Feb. 17, 1991, at 79.

2. Kim Painter, *'New Birth Control Option: As perfect a method as you can have'*, USA TODAY, Dec. 6, 1990, at 1A.

3. Carey Q. Gelernter, *Long Term Contraceptive Implant Provides New Choice, Concerns*, CHI. TRIB., Jan. 20, 1991, at 7.

4. *Id.*

5. *Id.*

6. *See infra* Part IB.

efficacy of existing measures in the fight against child abuse and the danger inherent in Norplant's novel powers. Relieved of the specter of permanent, punitive sterilization, a practice universally rejected after only a brief period of acceptance at the turn of the century,[7] the promise of Norplant's temporary and reversible effects could prompt a revival of court-ordered, albeit temporary, sterilization.

This Note explores the constitutional ramifications of these recent probation orders. Part I examines the development of Norplant, its advantages and disadvantages as a birth control device, and its prompt adoption by the criminal justice system, legislators, and commentators as a novel remedy for child abuse and other societal ills. Part II considers how the Norplant condition impairs an individual's right to privacy. Using the California case of *People v. Johnson*[8] as an analytical framework, this section considers whether in the context of child abuse, the state's interest in protecting children is sufficiently compelling to justify the infringement of an individual's fundamental right to make personal decisions regarding procreation, parenting, and medical treatment. In particular, Part II reviews studies which indicate that family size may contribute to the occurrence of child abuse and considers whether these studies justify the imposition of Norplant as a means of protecting existing children from further abuse. Finally, Part III examines the impact of mandatory Norplant use on an individual's constitutional rights to equal protection and freedom from cruel and unusual punishment.

This Note proposes that courts should never order Norplant use as a condition of probation for defendants convicted of their first child-abuse offense. Given the availability of alternatives less restrictive of the right to privacy, the Norplant condition is unconstitutional when imposed upon first time abusers. In the case of the recurrent abuser, this Note concludes that although court-ordered contraceptive use may withstand constitutional scrutiny, the risks involved in state-coerced relinquishment of the right to reproduce are simply too grave to sanction. This Note proposes that the role of Norplant in the fight against child abuse should be restricted to those situations where the defendant volunteers to use it.

I. Norplant: Its Arrival and Its Implications

The FDA announced its approval of Norplant on December 10, 1990.[9] Norplant is the first major advance in birth control technology since the advent of the birth control pill twenty-five years ago. The contraceptive implant took over twenty years to develop.[10] Initial clinical

7. *See generally* PHILIP R. REILLY, THE SURGICAL SOLUTION, ch. 4 (1991).

8. Superior Court of Tulare County No. 29390.

9. Goodman, *supra* note 1, at 79.

10. *Id.*; *see also* Tamar Lewin, *Implanted Contraception Device Renews Debate Over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20.

trials of the device indicate that it promises to be the most effective form of temporary contraception available, with a cumulative five-year pregnancy rate of less than four in one hundred.[11] Approximately 100,000 American women already use Norplant. Although this figure represents less than one percent of the number of women presently taking birth control pills, public health officials predict the device is on its way to widespread usage.[12]

A. Mechanics of the Device: Its Attributes and Drawbacks

Norplant consists of six flexible, plastic capsules each of which contains a small amount of the synthetic hormone progestin.[13] Norplant must be surgically implanted under the skin on the inside of the upper arm. The procedure takes approximately fifteen minutes and is performed with local anesthetic. Although a small incision must be made in the arm, the primary cause of pain is the injection of the anesthetic.[14] Infection at the site of incision is rare, occurring in less than 1% of procedures; if infection does occur, the device is normally removed and antibiotics are administered.[15]

Once implanted, the hormone levonorgestrel (a type of progestin) is diffused continuously into the bloodstream for up to five years. Unlike birth control pills, Norplant does not contain any estrogen and contains one-half to one-quarter of the amount of progestin used in oral contraceptives; both of these hormones prompt adverse side effects and an elimination or reduction in their use is advantageous.[16] In addition, because of its use in birth control pills, progestin has been heavily studied for over twenty-five years, alleviating concerns about the hormone's safety.[17] Removal of the Norplant tubes requires a second surgical procedure that can be performed at any time after implantation.[18]

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11. Mary Franklin, *Recently Approved And Experimental Methods of Contraception*, 35 J. NURSE-MIDWIFERY 365, 369 (1990). *See also* PHYSICIANS' DESK REFERENCE 2484 (46th ed. 1992). This effectiveness rate compares favorably with reported rates of less than 1 in 100 for birth control pills, approximately 18 in 100 for diaphragms, and 10 in 100 for the contraceptive sponge. *Id.* at 2305, 2422.

12. Tamar Lewin, *Five Year Contraceptive Implant Seems Headed for Wide Use*, N.Y. TIMES, Nov. 29, 1991, at A1.

13. PHYSICIANS' DESK REFERENCE, *supra* note 11, at 2484.

14. Philip D. Darney et al., *Acceptance and Perceptions of Norplant Among Users in San Francisco, USA*, 21 STUD. FAM. PLAN. 152, 156 (1990) (87% of respondents in his study reported no or only slight discomfort during insertion).

15. Jan Flattum-Riemers, M.D., *Norplant: A New Contraceptive*, AM. FAM. PHYSICIAN, July 1991, at 103, 105.

16. *Id.* For a discussion of the side effects associated with Norplant, see *infra* notes 24-27 and accompanying text.

17. For a discussion of potential safety problems with the plastic casing used for the device, see *infra* note 27 and accompanying text.

18. Flattum-Riemers, *supra* note 15, at 108.

Norplant bars conception in a number of ways. In many women, it entirely prevents ovulation; in others, a thickening of the cervical mucus inhibits the migration of sperm; and in all users, a reduction in the thickness of the endometrial lining of the uterus prevents implantation of the fertilized egg.[19]

Norplant has several advantages over other birth control methods. First, one of Norplant's most attractive features is its ease of use. Once the six rods are implanted under the skin, the device works automatically; the woman does not need to do anything further. There is no daily pill to remember and no interruption of intercourse to accommodate birth control.[20] In addition, Norplant is also readily reversible; after removal, fertility returns quickly.[21] One study indicated that 50% of former Norplant users conceived within four months of removal and close to 90% of those who wished to conceive did so within a year.[22] Finally, Norplant users are generally satisfied with the drug; 80-98% of women continue to use the product after one year and over 40% continue to use it after five years.[23]

Despite its many advantages, Norplant is not for everyone. Medical conditions contraindicating use include liver disease, blood clotting disorders, pregnancy, diabetes, and hypertension.[24] In addition, unpleasant and sometimes serious side effects accompany Norplant use. One study in San Francisco revealed that 95% of participating women suffered from at least one of the implant's side effects and 61% reported suffering from two or more.[25] The most common side effect cited was disruption in normal menstrual bleeding ranging from a complete cessation of bleeding to spotting and prolonged bleeding; this disruption occurred in 60% to 70% of users.[26] Other side effects included weight gain, headaches, mood changes, and acne.

In addition to the chemical side effects, the safety of the plastic casing used in Norplant is also suspect. The capsules are made of the same material—silastic—that is found in the outer lining of the silicone breast

19. *Id.* at 103; *see also* Franklin, *supra* note 11, at 369.

20. Gelernter, *supra* note 3, at 7.

21. *Id.*

22. Flattum-Riemers, *supra* note 15, at 104.

23. *Id. See also* Darney et al., *supra* note 14, at 156 (74% of the 140 women in the study reported they would use Norplant again in the future).

24. Franklin, *supra* note 11, at 370. *See also* PHYSICIANS' DESK REFERENCE, *supra* note 11, at 2484.

25. Darney et al., *supra* note 14, at 156-57. Another disadvantage of Norplant is that the cost of the device is high: $350 for the device and $150 to $650 for insertion and checkups. Lewin, *supra* note 12, at A26.

26. Darney et al., *supra* note 14, at 156-57. *See also* Flattum-Riemers, *supra* note 15, at 104-05 (reporting that most menstrual irregularities decline within one year, although they may continue for the full five-year period in as many as 10% of users).

implant, the safety of which the FDA is currently investigating.[27] Although a quarter of the women who experienced side effects claimed not to be bothered by them, almost half considered having the device removed because of adverse effects.[28] Despite the existence of unpleasant complications, many women have elected to use Norplant due to dissatisfaction with other methods of contraception which often entail similar side effects and lack Norplant's advantages.[29]

B. The Controversy Begins

Within months of its approval by the FDA in December 1990, Norplant was embroiled in controversy in courtrooms, legislatures, and newspaper opinion pages around the country. Elected officials, judges, and other interested parties began advocating and implementing widespread and sometimes mandatory use of Norplant, often as a means to fight poverty.[30] These initial proposals were of several types. The first category advocated the development of state-sponsored "incentive" programs to promote the use of Norplant by lower income women. A second set sought to enlist Norplant in the fight against fetal drug exposure. The final category, initiated by several judges across the country, employed Norplant use as a condition of probation for mothers convicted of child abuse.

1. Welfare Recipients and Norplant

Representative of the first group of proposals is a bill introduced by Kansas state representative Kerry Patrick during the 1991 legislative session.[31] After seeing statistics indicating that most women on welfare do not take advantage of free family planning, he proposed House Bill 2089 that would offer "welfare mothers" a $500 "incentive" to use Norplant, plus pay for the device and the cost of implantation and annual medical checkups.[32] Representative Kathleen Sibelius, an outspoken critic of

27. PHYSICIANS' DESK REFERENCE, *supra* note 11, at 2484. However, this substance is commonly used in surgical implants of all types and the amount of silastic used in Norplant is relatively minor in comparison to the amount used in a breast implant. In addition, the capsules are removed after a few years, unlike the breast implant which may remain in a woman's body for forty years or more.

28. Darney et al., *supra* note 14, at 156-59 (noting that those women who discontinue use of Norplant are more likely to have suffered side effects from the implant than those who continue use).

29. *Id.* at 159.

30. Goodman, *supra* note 1, at 79.

31. Matthew Rees, *Shot in the Arm: The Use and Abuse of Norplant*, NEW REPUBLIC, Dec. 9, 1991, at 16.

32. *Sixty Minutes: Norplant* (CBS television broadcast, Nov. 10, 1991) (interview with Rep. Kerry Patrick by Ed Bradley). During the interview, Patrick argued that such an incentive program would give welfare mothers a choice and "empower" them to decide whether or not to use Norplant. Patrick denied that the legislation was racist or imbued with eugenic

Patrick's proposal, argued in committee for more "realistic" uses of the money at an earlier stage in a woman's life. She suggested that the same money could be used for such things as scholarships and child care, rather than as a "bounty" to coerce the use of a birth control device.[33] The bill was defeated in 1991 by a vote of 77-27 in the House chamber.[34] The Kansas Legislature did enact a second measure providing the Norplant device free of charge to female welfare recipients through the Medicaid program.[35] Currently, forty-eight states have similar provisions in place.[36] In Louisiana, state representative and unsuccessful gubernatorial candidate David Duke sponsored legislation offering $100 per year to welfare recipients who use Norplant.[37] The legislation was amended to remove the cash incentive, but failed to emerge from the Senate Health and Welfare Committee for consideration in the 1991 legislative session.[38]

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theory. He argued that the effect of Norplant is temporary and the purpose of the legislation was to give women a chance to obtain important skills before they are burdened with multiple children.

33. *Id.*

34. Rees, *supra* note 31, at 16. Representative Patrick has described himself as a "pro-life Republican Presbyterian;" in 1992, he waged an unsuccessful bid to be the Republican nominee for Congress for his district. *Id.* He was required to give up his seat in the state legislature to run for Congress and, therefore, he will be unable to pursue his legislative proposals in the near future. No other Kansas state legislator has introduced similar legislation in the current session. Telephone interview with Legislative Bill Status Office, Kansas Legislature (Sept. 3, 1992).

35. *See, Sixty Minutes: Norplant*, *supra* note 32.

36. Lewin, *supra* note 12, at A1. California has also instituted a program to provide Norplant free to Medi-Cal recipients, bringing the total to forty-nine states. *Controlling Birth Control Urge*, S.F. EXAMINER, Mar. 2, 1992, at A14.

37. Lewin, *supra* note 12, at A26.

38. Rees, *supra* note 31, at 16. Perhaps unpredictably, Planned Parenthood has endorsed the use of "incentive" programs as a means of encouraging women to use the Norplant device. One official from the organization has stated that: "Our agency believes that if a woman chooses to accept extra welfare payments for using Norplant, it's a choice that the woman makes and if she can get something extra for using birth control, that's positive." *Id.* at 17. Planned Parenthood currently sponsors its own "incentive" plan; it pays "high-risk" teenage girls one dollar for each day they don't get pregnant. *Id.* According to the *New Republic*, incentive programs have been opposed by the National Organization for Women, the National Abortion Rights Action League, Feminists for Life, Americans United for Life, and the Family Research Council. *Id.* at 16-17. In addition, the American Medical Association has officially condemned state proposals to pay women welfare recipients to use Norplant. In defending its position, the AMA's board of trustees argued that "[i]ndividuals should not be required to assume a potentially serious health risk as a condition of receiving government benefits, particularly when those benefits may be needed for basic human needs like housing, clothing, and food." Board of Trustees Report, *Requirements of Incentives by Government for the Use of Long-Acting Contraceptives*, 267 J. AMER. MED. ASS'N 1818, 1820-21 (1992) The board also condemned court-ordered use of Norplant for women convicted of child abuse. *Id.* at 1821.

Finally, the day after the FDA approved Norplant, a *Philadelphia Inquirer* editorial posited that Norplant could be an effective tool in solving the cycle of the permanent underclass and suggested giving incentives to women on welfare to use the device.[39] After receiving overwhelming criticism of the proposal, the *Inquirer* retracted its opinion and apologized.[40] The defeat of both the Kansas and Louisiana legislation and the hostile reaction to the *Inquirer*'s editorial most likely reflects the public's uneasiness with any measure that attempts to reduce the nation's "underclass" by coercing its members not to reproduce.[41]

2. *Norplant and Fetal Drug Exposure*

The second category of initial Norplant proposals advocates the use of the contraceptive to combat fetal drug exposure. In Washington state, for example, several women "impatient with abusive parents" lobbied the legislature about Norplant.[42] These women hope that the constant increase in the population of drug-exposed children will prompt the legislature to impose Norplant as a means of preventing addicted women from bearing children.[43] Their pleas have not gone unheard. During last year's legislative session, one state legislator introduced a bill that would have authorized judges to order Norplant use for women who give birth to drug or alcohol affected babies.[44] In addition, legislation requiring convicted female drug abusers to use Norplant currently is under consideration in both the Kansas and Ohio legislatures.[45]

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39. *Poverty and Norplant: Can Contraception Reduce the Underclass*, PHILA. INQUIRER, Dec. 12, 1990, at A18.

40. *An Apology: the Editorial on 'Norplant and Poverty' was Misguided and Wrongheaded*, PHILA. INQUIRER, Dec. 23, 1990, at C4.

41. At least one commentator has questioned whether these incentive proposals are actually improperly coercive. Noting that incentives are employed in a broad variety of situations, the author concludes that "the mere offering of an incentive to stimulate the use of Norplant is by no means coercive per se." Michael T. Flannery, *Norplant: The New Scarlet Letter?*, 8 J. CONTEMP. HEALTH L. & POL'Y 201, 209-10 (1992). Flannery also argues that because the incentives are not targeted at specific minorities, but rather at all welfare recipients, they are not per se discriminatory. *Id.* at 210.

42. Christy Scattarella, *Forced Birth Control?—Drug Baby Boom Sparks Call to Control Female Addicts*, SEATTLE TIMES, June 24, 1991, at A1.

43. *Id.* Estimates indicate that "a baby is born about once an hour in Washington to a woman who has a serious problem with drugs or alcohol." The total cost to the state in medical care and special education for these drug-affected children is estimated to be between $29 and $46 million each year. *Id.*

44. Jim Simon, *Heavy Hand of Welfare Reform—Legislators Planning To Get Tough*, SEATTLE TIMES, Jan. 31, 1992, at B1. The legislation, HB2909, is sponsored by Representative Joanne Brekke, a Democrat from Seattle.

45. Scattarella, *supra* note 42, at A1. The Kansas legislation, also sponsored by Representative Patrick, would require women convicted of felony possession of cocaine or heroine to choose between Norplant and prison. Karen Southwick, *'Use Norplant, Don't Go to Jail'; Judges, Social Workers and Medical Professionals Debate the Ethics*, S.F. CHRON., Aug. 2, 1992, at 13 (*This World* section). The Ohio measure would make prenatal neglect an aggra-

Although these bills have met with little legislative success,[46] the idea of fighting fetal drug exposure through mandatory Norplant use has strong popular support. A *Los Angeles Times* poll taken in the spring of 1991 revealed that 61% of respondents agreed that use of the Norplant device should be made mandatory for female drug users of child-bearing age.[47] It may be only a matter of time before this popular support translates into political pressure on legislators to give fuller consideration to measures imposing Norplant use on drug-addicted women.

3. *Child Abusers and Norplant*

The first actual target for mandatory Norplant use has been women convicted of child abuse.[48] While legislators and the public have wrestled with whether Norplant use should ever be encouraged through incentive programs or imposed as a criminal sanction for illegal drug use, judges in four separate cases have independently mandated Norplant use as a condition of probation for child abusers. In each case, the court offered Norplant as part of a negotiated plea bargain designed to eliminate periods of incarceration and combined the condition with other probationary terms, including parenting classes.[49] Because of the significant factual differences between them, a brief review of the four cases demonstrates the initial arbitrariness with which courts have ordered Norplant use.

In Tulare County, California, less than one month after the FDA approved the new birth control device, Judge Howard Broadman of the Tulare County Superior Court ordered Darlene Johnson to use Norplant

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vated felony in the second degree. First-time offenders can choose between using Norplant or entering a drug treatment program. For second-time offenders, Norplant use would be mandatory. Rorie Sherman, *Split Rulings for Fetal Abuse Cases*, NAT'L L. JOUR., Feb. 24, 1992, at 3, 10.

46. All three bills have languished in committee. The Washington bill, HB 2909, failed to emerge from the Health Care Committee in the 1992 legislative session. Telephone interview with Legislative Bill Status Office, Washington Legislature (Sept. 4, 1992). The Kansas Legislation, HB2255, died in the House Judiciary Committee. Telephone interview with Legislative Bill Status Office (Sept. 4, 1992). Finally, the Ohio legislation, SB82, sponsored by Senator Cooper Synder, failed to receive approval from the Senate Judiciary Committee during the 1991-1992 legislative session. Telephone interview with Legislative Information Bureau (Sept. 4, 1992).

47. George Skelton and Daniel M. Weintraub, *The Times Poll; Most Support Norplant For Teens, Drug Addicts*, L.A. TIMES, May 27, 1991, at A1, A34. A similar indication of widespread public support for such measures can be found in a poll conducted by GLAMOUR MAGAZINE, a popular women's magazine, in which 55% of its readers supported mandatory Norplant use for women convicted of child abuse. *This is What You Thought*, GLAMOUR MAG., July 1991, at 101, 101.

48. *See infra* notes 50-74 and accompanying text.

49. *Id.*

as part of her negotiated, three-year probation.[50] Judge Broadman's order represents the first use of Norplant in a criminal sentence.[51] Ms. Johnson pled guilty to child abuse for beating two of her children with a belt and electrical cord. Under the terms of her plea, Ms. Johnson was to complete a short jail term and then continue with three years of probation during which time she was to use the Norplant device and participate in parenting classes and personal counseling.[52] Her children were not taken from her custody; in fact the court specifically rejected this option.[53] The Norplant condition was stayed while Ms. Johnson pursued an appeal challenging its constitutionality.[54] The appeal was never considered. After twice testing positive for cocaine use during her probation, the court ultimately dismissed Ms. Johnson's appeal and revoked her probation including the Norplant condition.[55] She is currently serving a five-year prison term for her offense.[56]

In Lincoln County, Nebraska, Michelle Carlton, twenty-one, pled guilty to felony child abuse in connection with the death of her six-month-old son, Kevin.[57] Kevin died as a result of being shaken repeatedly by Carlton's boyfriend, Keith Brown; the state charged Ms. Carlton with negligent endangerment for failing to prevent her child's abuse.[58] As part of her plea arrangement, Lincoln County Judge James O'Rourke ordered Ms. Carlton to serve two years probation, the terms of which included mandatory Norplant use. In exchange, Ms. Carlton was convicted of a lesser misdemeanor and avoided imprisonment.[59] In addition to the birth control condition, Judge O'Rourke directed Ms. Carlton to

50. Mark Stein, *Judge Stirs Debate With Ordering of Birth Control*, L.A. TIMES, Jan. 10, 1991 at A3, A31.

51. Lewin, *supra* note 10, at A20.

52. Michael Lev, *Judge is Firm on Forced Contraception*, N.Y. TIMES, Jan. 11, 1991, at A17.

53. Reporter's Transcript [hereinafter RT] from Felony Plea Hearing, at 11-12, in Clerk's Transcript On Appeal, No. F015316 [hereinafter CT], People v. Johnson (Superior Court of Tulare County, Cal. - No. 29390), at 49-50; *see also* RT from Motion to Modify Sentence, at 21-22.

54. CT, *supra* note 53, at 69.

55. Gene Garaygordobil, *Norplant Case Defendant Jailed for Parole Violation*, Gannett News Service, Mar. 13, 1992. Ms. Johnson, therefore, never had the Norplant device inserted in her arm. Telephone interview with Charles Rothbaum's office (Sept. 3, 1992) (Rothbaum represented Ms. Johnson).

56. Garaygordobil, *supra* note 55.

57. USA TODAY, § News *Nebraska*, April 23, 1991, at 6A.

58. Telephone interview with Kent Turnbull, Lincoln County Attorney (Jan. 21, 1992). Keith Brown pled guilty to manslaughter in connection with Kevin's death and was sentenced to five to fifteen years in state prison. According to Mr. Turnbull, Mr. Brown shook Kevin to death. A pathologist's report revealed scar tissue around the child's brain which indicated that other shaking incidents had occured prior to his death. Mr. Turnbull noted that each year during his prison term, on the child's birthday, Mr. Brown will be placed in solitary confinement as a reminder of the tragedy.

59. *Id.*

undergo counseling. The county temporarily removed her other child from her custody.[60]

On a motion to modify sentence, Judge Lloyd Kaufman maintained the contraceptive condition, but allowed Ms. Carlton to select the method of birth control in consultation with her doctor. Although this was Ms. Carlton's first conviction of child abuse in Nebraska, she had several recorded child-abuse violations in Colorado. County Attorney Kent Turnbull stated that the goal of the Norplant condition was not to sterilize Ms. Carlton, but to make sure that before she has any additional children she learns how to take care of them. He noted that through her previous behavior, she had shown herself to be incapable of properly caring for children.[61]

In Harris County, Texas, Cathy Lanel Knighten, twenty-three, pled guilty to attempting to suffocate her ten-month-old child while the child was hospitalized. Ms. Knighten's actions were captured on a video camera which was placed in the child's room after nurses noticed that on two occasions when the mother was visiting her child, the child had suffered breathing problems.[62] Ms. Knighten held her hand over her daughter's face for over a minute, but stopped after a heartbeat monitor was activated. When confronted with the videotape, Ms. Knighten told police that she had her hands full with two other children and she hoped to keep her daughter in the hospital.[63]

Judge Doug Shaver imposed the Norplant condition as part of a plea agreement that allowed the defendant to avoid imprisonment.[64] In addition to Norplant use, the judge also mandated that during the ten-year probation period Ms. Knighten take parenting classes and agree to only supervised visits with any children under the age of fourteen, including her own.[65] Ms. Knighten's children will remain with relatives for the extent of the probation period.[66]

Although Ms. Knighten had Norplant implanted at the direction of

60. *Id.*

61. *Id.*

62. *Judge Orders Mother to be Given Contraceptive*, UPI, Sept. 6, 1991, *available in*, LEXIS, Nexis Library, UPI file.

63. *Id.*

64. Telephone interview with Donna Goode, Harris County Prosecutor, (Nov. 13, 1991).

65. *Id.* In an interview with United Press International, Ms. Goode reflected on the Norplant condition, noting "[i]t was a question of whether someone like this goes to prison and gets out and reproduces, or do we do something like this. [W]e've got a chance to make a difference, and it's not irreversible." *Judge Orders Mother to be Given Contraceptive*, *supra* note 62. A different judge in the same county recently approved a request by a convicted rapist to be surgically castrated rather than serve prison time for his offense. *Judge OKs Molester's Plea to be Castrated*, S.F. EXAMINER, Mar. 7, 1992, at A9. The defendant later reconsidered his decision and elected to stand trial, rather than undergo the operation. Richard Lacayo, *Sentences Inscribed on the Flesh*, TIME, Mar. 23, 1992, at 54, 54.

66. *Judge Orders Mother to be Given Contraceptive*, *supra* note 62.

the court, she suffered severe side effects due to her petite size.[67] She subsequently appeared before the court requesting the condition be modified. At her own suggestion, she agreed to undergo a tubal ligation.[68] This was Ms. Knighten's first criminal conviction of any kind. No appeal has been filed and one is not anticipated.

More recently, also in Harris County, Texas, a second convicted child abuser avoided a prison term by agreeing to have Norplant implanted in her arm.[69] Ida Jean Tovar, a teenage mother of three, was convicted of felony child abuse for violently shaking her two-month-old son. He now suffers from brain damage and recurrent seizures as a result of the abusive episode.[70] Judge Patricia Lykos combined the Norplant condition with numerous other probationary terms including a ninety-day stay at a "boot camp," parenting classes, literacy courses, and in-home detention.[71] In addition, Ms. Tovar was denied custody of her three children for the duration of her probation.[72] Judge Lykos has said she preferred the probation package to the available ten-year prison sentence because she was "aware of the early release problem" from prison and did not want Tovar to become another "in-and-out parolee no one can find."[73] As in the Knighten and Carlton cases, no appeal has been filed in the Tovar matter.[74]

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67. Ms. Knighten is under five feet tall. The Physicians' Desk Reference reports that progestin concentrations in the bloodstream will vary depending on body weight and other factors. PHYSICIANS' DESK REFERENCE, *supra* note 11, at 2484.

68. The implications of this change in birth control method are significant. According to one study, tubal ligations may not be reversible with successful reversal rates ranging from 41% to 84% depending on the method of sterilization used. Given this, the chances that Ms. Knighten is now permanently sterilized are high. *Operations for Sterilization of Men and Women*, CURRENT OBSTETRIC & GYNECOLOGIC DIAGNOSIS & TREATMENT 1987, at 827-28 (Martin L. Pernoll, M.D. and Ralph C. Benson, M.D. eds.).

69. *Child Abuser Chooses Norplant Over Prison*, ABORTION REPORT, March 12, 1992, (State Report - Texas).

70. John Makeig, *Surgical Deterrent; Mom Convicted of Child Abuse Picks Birth-control Implant over Prison*, HOUSTON CHRON., Mar. 6, 1992, at A1.

71. *Id.*

72. Telephone interview with Mark Ellis, Harris County Prosecutor (Sept. 4, 1992).

73. Makeig, *supra* note 70, at A1. According to Mr. Ellis, Judge Lykos was concerned that Ms. Tovar would serve only a small fraction of the seven years prison sentence requested by the state because, in practice, defendants normally serve only a few months for each year in jail to which they are sentenced for non-aggravated offenses. The Norplant condition was imposed on Judge Lykos' own initiative as were the other probationary conditions. The state had recommended prison time for Ms. Tovar. Telephone interview with Mark Ellis, *supra* note 72.

74. Telephone interview with Mark Ellis, *supra* note 72. The absence of appeal in the Carlton, Knighten, and Tovar cases may indicate, in part, that the imposition of this condition as part of a plea negotiation circumvents the constitutional scrutiny such a proposal would face in the legislative arena. In many cases, it can be expected that an individual would choose probation over incarceration despite the presence of potentially constitutionally objectionable conditions. *See* Colleen M. Coyle, Note, *Sterilization: A "Remedy for the Malady" of Child Abuse?*, 5 J. CONTEMP. HEALTH L. & POL'Y 245, 252-55 (1989).

The variety of circumstances in these first four Norplant cases demonstrates the arbitrary manner in which courts have initially imposed Norplant use. Although all four women were convicted of child abuse, the cases differ in other significant details. For example, although three of the four women were first time offenders, Ms. Carlton had previous child-abuse violations.[75] In addition, the severity of abuse inflicted on the children varied from case to case, ranging from death, to permanent brain damage, to a more "traditional" belt strapping in the Johnson case. Despite these important differences, all four women were subjected to the same dramatic probation condition.[76] Such uniform treatment of dissimilar defendants raises two major concerns. First, and perhaps most importantly, a judicial determination of the constitutionality of court-ordered Norplant use is imperative before the rights of future defendants are affected. Second, these initial cases suggest that the only way to control the current unfettered use of court-ordered Norplant is to define the circumstances, if any, under which Norplant can be appropriately employed by the criminal justice system and to limit its use to only those circumstances. The lack of an appeal in all four of the cases[77] suggests that these issues may remain unaddressed for some time. The remainder of this Note will consider each of these issues in turn.

C. A Case Study—*People v. Johnson*[78]

The Darlene Johnson case is a useful model to test the constitutionality of the Norplant condition for several reasons. First, because Johnson was a first-time abuser who inflicted comparatively slight abuse on her children, opponents of the Norplant condition have pointed to her case as a particularly strong example of the dangers of court-ordered Norplant use.[79] Second, the Johnson case is the only one of the four cases in which an appeal was pursued.[80] Although the appeal was ultimately dismissed,[81] both the state and Ms. Johnson's advocates thoroughly briefed the issues raised by the unusual condition and their arguments provide a helpful source of discussion and analysis. Finally, the standard of review used by California courts in considering the constitutionality of probationary conditions is particularly rigorous[82] and of-

75. *See supra* note 61 and accompanying text.

76. *See infra* Part IB(3).

77. As noted above, Darlene Johnson did appeal her condition, but the appeal was ultimately dismissed prior to review. *See supra* notes 55-56 and accompanying text.

78. Information regarding the trial proceedings gathered from: CT, *supra* note 53; Bill Ainsworth, *"I Take Away People's Rights All the Time"*, LEGAL TIMES, Apr. 8, 1991, at 10; Lewin, *supra* note 10, at A20; and Lev, *supra* note 52, at A17.

79. *See, e.g.*, Appellant's Reply Brief at 1, People v. Johnson (Ct. of Appeal - Fifth Appellate Circuit - No. F015316).

80. *See supra* note 74 and accompanying text.

81. *See supra* note 55 and accompanying text.

82. *See infra* notes 143-45 and accompanying text.

fers a comprehensive framework within which to analyze the constitutional soundness of the Norplant condition. Prior to embarking on any legal analysis of the condition, however, a review of the circumstances under which it was imposed is in order.

On December 3, 1990, Darlene Johnson pled guilty to three counts of felony child abuse in violation of California Penal Code section 273(d).[83] Although this was her first child-abuse offense, Ms. Johnson had a criminal record consisting of six previous convictions involving petty theft and check fraud for which she served two years in prison.[84]

When Ms. Johnson entered her negotiated plea, Judge Broadman predicted that the terms of her probation would include mandatory participation in parenting classes, personal counseling, and a condition prohibiting Johnson from smoking during the remainder of her pregnancy. Although he commented that he was "going to try and think . . . of some special probation conditions for this lady," at no time during the hearing did Judge Broadman reveal that he might impose the use of Norplant.[85] The judge remanded Ms. Johnson to custody for the month between the plea and sentencing hearings in part because he was "concerned about drug use" and she was pregnant.[86] Nothing in the record suggested that Ms. Johnson was a substance abuser and she specifically denied the accusation during the subsequent sentencing hearing.[87]

Judge Broadman announced the Norplant condition during the sentencing hearing on January 2, 1991.[88] During the hearing Judge Broadman asked Ms. Johnson whether she had ever heard of Norplant; she responded that she had not. He then provided the following descrip-

83. CT, *supra* note 53, at 19.

84. *See* Lev, *supra* note 52, at A17.

85. RT from Felony Plea Hearing, at 3, in CT, *supra* note 53, at 20.

86. RT from Judgment Proceedings, at 3-4, in CT, *supra* note 53, at 41-42. For a discussion of the constitutionality of judges using the sentencing phase of trials to incarcerate pregnant, substance-dependent women to protect fetal health, see Barrie L. Becker, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L.Q. 235 (1991).

87. CT, *supra* note 53, at 51.

88. At the time Broadman announced the condition, Norplant was not even available on the market. Lewin, *supra* note 10, at A20. Interestingly enough, this was not the first time that Judge Broadman thought to impose contraception as a condition of probation. In the fall of 1990, Judge Broadman was sentencing a petty-theft convict for possession of heroin. The judge told the woman that he would not send her to jail if she participated in a drug counselling program and did not become pregnant for five years. Judge Broadman did not specify what type of birth control she had to use. The judge later withdrew this settlement and sentenced the woman to two years in jail after she was late for her sentencing hearing. Ainsworth, *supra* note 78, at 10. The Norplant decision has ignited passions on all sides of the reproductive rights debate. In March 1991, an anti-abortion activist entered Judge Broadman's court room and shot at him stating that Norplant kills babies. The bullet just missed Judge Broadman's head. *Id.*

tion of the device: "it's a thing that you put into your arm and it lasts for five years . . . it's like birth control pills, except you don't have to take them every day."[89] When Ms. Johnson asked whether the contraceptive was "harmful to the body," Broadman responded that "it's like a birth control pill. It's FDA-approved."[90] He did not discuss the myriad of potential side effects, the surgical implantation procedure, or the novelty of the device. Most importantly, he did not advise her, perhaps because he did not know, that the substance is contraindicated for women with certain medical conditions. According to her attorney, Charles Rothbaum, Ms. Johnson suffers from high blood pressure and diabetes, both of which contraindicate Norplant use.

Judge Broadman emphasized, however, that the effects of the contraceptive were temporary and offered her an opportunity for reprieve, stating, "[i]f you want to get pregnant, you can come back and say . . . 'look I did all my parenting classes,' whatever, and we'll move from there."[91] Based on this discussion, Ms. Johnson agreed to use the device and consented to the other terms of her probation. Although the court ordered Ms. Johnson not to strike her children, it did not take steps to remove them from her custody.[92]

On January 7, 1991, five days after the sentencing hearing, Ms. Johnson filed a motion to reconsider sentence.[93] The motion challenged the statutory and constitutional validity of the imposed sentence and questioned the adequacy of Ms. Johnson's consent to the Norplant condition.[94] In addition, defense counsel argued that prescribing Norplant from the bench violated Business and Professional Code section 2053, which prohibits the practice of medicine without a license.[95] Judge Broadman was unpersuaded by these arguments. In response to concerns that Norplant might be unsuitable given Ms. Johnson's health, the court noted that it would appoint a doctor to determine her suitability for the device.[96] Judge Broadman rejected all challenges posed and em-

89. RT from Judgment Proceedings, at 6-7, in CT, *supra* note 53, at 44-45.

90. *Id.* Because once the device is implanted, it continuously diffuses hormones into the bloodstream, this last comment must have referred to the fact that unlike the birth control pill, Norplant is self activating.

91. RT from Judgment Proceeding, at 7, in CT, *supra* note 53, at 45.

92. *Id.* at 49-50.

93. Motion to Reconsider Sentence, in CT, *supra* note 53, at 31.

94. Despite Judge Broadman's reliance on Ms. Johnson's "willing, knowing, voluntary acceptance of the probationary terms," California decisional law clearly permits a defendant to challenge a condition to which he or she has given consent. *See, e.g.*, In re Bushman, 463 P.2d 727, 733 (Cal. 1970) (stating that a defendant who accepts probation "may seek relief from the restraint of any alleged invalid condition of probation on appeal from the order granting probation or on habeas corpus").

95. RT from Motion to Reconsider Sentence, at 6-7, in CT, *supra* note 53, at 36-37.

96. Appellant's Opening Brief at 12, People v. Johnson (Cal. Ct. App. - Fifth App. District - No. F015316) (citing RT from Motion to Modify at 23).

phasized the importance of protecting Ms. Johnson's unconceived children, stating: "It is in the defendant's best interest, and certainly in any unconceived child's interest, that she not have any more children until she is mentally and emotionally prepared to do so."[97]

On January 22, 1991, Ms. Johnson filed an appeal in the California Court of Appeal for the Fifth Appellate District.[98] The Norplant condition was stayed pending the outcome.[99] The appeal was never heard, however, because Ms. Johnson twice tested positive for cocaine use during her probation.[100] As a result, Ms. Johnson's probation was revoked.[101] Her case was consequently dismissed, and the decision not to hear the appeal means that no legal precedent has been set in the case because "California law bars as precedent any order issued by a trial judge."[102]

II. The Norplant Orders and the Constitutional Right to Privacy

By ordering Darlene Johnson to submit to Norplant use in exchange for an elimination of an available prison sentence, Judge Broadman entered a constitutionally sensitive area. Both the federal and California Constitutions guarantee to all individuals a fundamental right to privacy which a state may infringe for only the most compelling reasons.[103] At the same time, courts have recognized that probationers may be required to forfeit some of their constitutional rights as a consequence of their criminal behavior if such forfeiture relates to the goals of probation.[104] The *Johnson* case raises an interesting constitutional dilemma and exposes an underlying tension between different aspects of the right to privacy that exists in child-abuse cases.[105] This section will examine the current status of the constitutional right to privacy implicated in the *Johnson* case. In addition, it will consider whether the use of Norplant can be defended as a reasonable and constitutionally permissible condition of probation for women convicted of child abuse.

97. Respondent's Supplemental Brief at 8-9, People v. Johnson (Ct. of Appeal - Fifth Appellate District - No. F015316) (citing RT from Motion to Reconsider at 19-21).

98. CT, *supra* note 53, at 69.

99. Appellant's Opening Brief, *supra* note 96, at 3 n.2.

100. David Cooper, *Woman in Norplant Case Ordered Back for Sentencing*, Gannett News Service, Mar. 13, 1992.

101. Superior Court Judge David Allen sentenced Ms. Johnson to five years in jail; she is serving her sentence at a California Rehabilitation Center where she will undergo drug treatment. *Id.*

102. *California: Mandated Norplant Now Irrelevant*, ABORTION REPORT, April 15, 1992.

103. *See infra* notes 106-33 and accompanying text.

104. *See infra* note 134 and accompanying text.

105. *See infra* note 185 and accompanying text.

A. The United States and California Constitutions and the Right to Privacy

Both the United States and California Constitutions provide a right to privacy that protects decisions regarding procreation, parenting, and medical treatment from government intrusion.[106] The *Johnson* case implicates all three of these aspects of the right to privacy.

First, the federal Constitution provides a right to privacy that reserves to a woman all decisions regarding procreation and which may be impaired only in furtherance of a compelling state interest. Although this right is not textually explicit, the Supreme Court repeatedly has recognized its presence in the various "zones of privacy" embodied by the federal Constitution.[107] In *Griswold v. Connecticut*, the Court first attempted to characterize the source of an individual's privacy interests, noting that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."[108] The court concluded that these "zones of privacy" include the right of married couples to use contraceptives.[109]

In *Carey v. Population Services International*,[110] the Court reviewed the established contours of the right to privacy,[111] noting that "the decisions that an individual may make without unjustified government interference are personal decisions . . . involving marriage, procreation, contraception, and family relationships."[112] The Court continued: "The decision whether or not to beget or bear a child is at the very heart of this

106. U.S. CONST. amend. XIV; CAL. CONST. art. 1, § 1. Although the Fourteenth Amendment does not explicitly guarantee a right to privacy, courts have relied on its due process clause to infer such a right. *See infra* notes 107-09 and accompanying text.

107. Griswold v. Conn., 381 U.S. 479, 484 (1964) (majority and concurring opinions relied on the First, Third, Fifth, Ninth and Fourteenth Amendments to derive a generalized right to individual privacy).

108. *Id.* at 484, 486.

109. *Id.* at 486. This right to use contraceptives was later extended to unmarried individuals. Eisenstadt v. Baird, 405 U.S. 438 (1972). It was in *Skinner v. Oklahoma*, a case decided on equal protection grounds, that the court first recognized the right to marry and procreate as basic civil rights "fundamental to the very survival of the race." Skinner v. Okla., 316 U.S. 535, 541 (1941). For a further discussion of *Skinner* see *infra* notes 196-98 and accompanying text and 240-42 and accompanying text.

110. 431 U.S. 678 (1977).

111. More recent decisions by the Court indicate its willingness to curb certain of these rights particularly regarding access to abortion. *See, e.g.*, Webster v. Reprod. Health Serv., 492 U.S. 490, 521 (1989); Rust v. Sullivan, 111 S. Ct. 1759, 1776-77 (1991).

112. *Carey*, 431 U.S. at 684 (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973) (other citations omitted)). Although there have been no cases dealing with the mandatory use of birth control in relation to the right to privacy, this final language regarding the prevention or accomplishment of conception appears to indicate the court's intention that not only may an individual not be prohibited from using contraception, he or she also may not be required to use it.

cluster of constitutionally protected choices . . . [and] decisions whether to accomplish or prevent conception are among the most private and sensitive."[113] By requiring Ms. Johnson to submit to involuntary contraceptive use, the Norplant condition directly impairs her reproductive autonomy.

As indicated in *Carey*, the Court also has recognized within the right to privacy an individual's fundamental right to parent and to rear children.[114] It has done so by construing the Fourteenth Amendment as a guarantee of the freedom to make independent decisions regarding family life.[115] The Court has stated that: "It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom . . . the state can neither supply nor hinder."[116] In regard to neglectful or abusive parents, the Court has cautioned that the fundamental right of parents to raise and care for their children "does not evaporate simply because they have not been model parents."[117]By temporarily depriving Ms. Johnson of the option to conceive and bear children, the Norplant order also directly restricts her constitutionally recognized "right to parent."

Finally, the Supreme Court has extended the right to privacy to include the right of an individual to refuse unwanted medical treatment and other invasions of bodily integrity.[118] In her concurring opinion in *Cruzan v. Director*, Justice O'Connor noted that "the liberty guaranteed by the Due Process Clause must protect . . . an individual's deeply personal decision to reject medical treatment."[119] The Court has also recognized the existence of an individual's right to refuse medical treatment in criminal settings.[120] By requiring Ms. Johnson to use a contraceptive device during her probation, Judge Broadman's order prevented Ms.

113. *Carey*, 431 U.S. at 685.

114. *Id.* at 687. The Court has relied on three different constitutional provisions to protect the integrity of the family relationship from unwanted state interference. *See, e.g.*, Meyer v. Neb., 262 U.S. 390, 400 (1923) (Due Process Clause); Skinner v. Okla., 316 U.S. 535, 541 (1942) (Equal Protection Clause); Griswold v. Conn., 381 U.S. 479, 489 (1965) (Ninth Amendment).

115. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that before state could permanently terminate a parent's rights in a child it must support its allegations of neglect and abuse by at least clear and convincing evidence).

116. Prince v. Mass., 321 U.S. 158, 166 (1944).

117. *Santosky*, 455 U.S. at 753. *See also* Stanley v. Ill., 405 U.S. 645, 651 (1972) ("The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential.' "); Meyer v. Neb., 262 U.S. 390, 399 (1923).

118. *See* Cruzan v. Director, 110 S. Ct. 2841, 2851 (1990) ("The principal that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); *see also* Rochin v. Cal., 342 U.S. 165, 172-74 (1952).

119. *Id.* at 2857.

120. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 755 (1985).

Johnson from exercising her constitutionally guaranteed right to refuse medical treatment.

The California Constitution also recognizes the three different aspects of privacy recognized in the federal Constitution. In 1972, voters in California approved an amendment to article 1, section 1 of the California Constitution, which added the right of privacy to the other inalienable rights outlined therein.[121] Unlike the federal Constitution, the textual explicitness of the California amendment makes forays into implied "zones of privacy" unnecessary. Indeed, since its enactment, the privacy clause of Article I consistently has provided greater protection to the individual than the corresponding federal penumbras.[122] California courts have interpreted it to include the right of procreative choice, a right which has frequently been asserted to safeguard personal decisions about abortion,[123] contraception,[124] and sterilization.[125]

The California Supreme Court also has recognized that the right to parent one's children is fundamental in nature.[126] In accordance with federal decisions in this area, the California Supreme Court has stated that "the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights."[127] Further, the Court has declared that any state-ordered disruption of the family relationship should only occur in "extreme cases of persons acting in a fashion incompatible with parenthood."[128] Finally, the California Constitution also safeguards an individual's fundamental right to refuse medical treatment.[129]

B. Permissible Impairment of Constitutional Rights—State Regulation on Behalf of a Compelling Interest

A determination that both the federal and California constitutions recognize the various aspects of the right to privacy implicated in the

121. CAL. CONST. art. I, § 1; White v. Davis, 533 P.2d 222, 224-25 (Cal. 1975).

122. Planned Parenthood Affiliates v. Van de Kamp, 226 Cal. Rptr. 361, 378 (1986).

123. Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 798 (Cal. 1981).

124. People v. Pointer, 199 Cal. Rptr. 357 (1984).

125. Conservatorship of Valerie N., 707 P.2d 760, 774 (Cal. 1985).

126. *See In re* B.G., 523 P.2d 244, 250 (Cal. 1974). *See also In re* Angelia P., 623 P.2d 198, 202 (Cal. 1981).

127. *In re* B.G., 523 P.2d at 250.

128. *In re* Carmaleta B., 579 P.2d 514, 518 (Cal. 1978) ("[T]he involuntary termination of [the parent/child] relationship by state action must be viewed as a drastic remedy which should be resorted to only in extreme cases of neglect or abandonment.").

129. Cobbs v. Grant, 502 P.2d 1, 9 (Cal. 1972) ("[A] person of adult years and in sound mind has the right, in the exercise of control over his body, to determine whether or not to submit to lawful medical treatment."); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (1986) ("[T]he right to refuse medical treatment is basic and fundamental."); Bartling v. Superior Court, 209 Cal. Rptr. 220, 224 (1984); Conservatorship of Drabick, 245 Cal. Rptr. 840, 853 (1988), *cert. denied*, 488 U.S. 958 (1988).

Johnson case as fundamental is not dispositive of the constitutionality of the Norplant condition. Rather, both the United States and California Supreme Courts permit state impairment of the right to privacy if the state can justify its action by demonstrating a compelling interest.

In *Carey v. Population Services International*, for example, the United States Supreme Court held that although "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . . [it] does not, however, automatically invalidate every state regulation in this area."[130] Rather, "even a burdensome regulation may be validated by a sufficiently compelling state interest."[131] Similarly, the California Supreme Court has permitted state interference with the right to privacy if "the state . . . demonstrate[s] that 'the utility of imposing the conditions . . . manifestly outweighs any resulting impairment of constitutional rights.' "[132] But the Court also has stated that because the right involved (in this instance the right to choose whether or not to reproduce) is "among the most intimate and fundamental of all constitutional rights, . . . only the most compelling of state interests could possibly satisfy this test."[133] In the *Johnson* case, therefore, to justify its order of Norplant use, the state of California would have had to demonstrate that its value to the public outweighed the consequent impairment of Ms. Johnson's constitutional rights. Before examining the adequacy of the state's justification in the *Johnson* case, it is necessary to consider the status of an individual's constitutional rights in the special context of probation.

C. By Accepting Probation, Probationers Do Not Waive Their Constitutional Rights

The constitutional rights of probationers are not absolute and "may be reasonably restricted in the public interest."[134] California courts enjoy broad discretion when crafting conditions of probation.[135] This discretion, however, is not boundless; rather, it is circumscribed by both constitutional and statutory safeguards.[136]

130. *Id.*, 431 U.S. 678, 685-86 (1977).

131. *Id.* at 686.

132. Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 791 (Cal. 1981) (quoting *Bagley v. Washington Township Hosp.*, 421 P.2d 409, 415 (Cal. 1966)).

133. *Myers*, 625 P.2d at 793.

134. *In re* White, 158 Cal. Rptr. 562, 567 (1979).

135. *In re* Bushman, 463 P.2d 727, 732-33 (Cal. 1970).

136. *In re* White, 158 Cal. Rptr. at 565. Because this Note focuses on the Darlene Johnson case, the California standard for reviewing constitutionally challenged probation conditions will be used. It should be noted, however, that most federal courts and both Nebraska and Texas — the two other states in which judges have imposed Norplant — use the less stringent "reasonably related" standard to determine whether probation conditions are constitutionally fit. *See, e.g.*, State v. Morgan, 295 N.W.2d 285, 288 (Neb. 1980) (Probation conditions which restrict constitutional rights "should be sparingly imposed and should be reasonably related to

In an interview after Ms. Johnson's sentencing hearing, Judge Broadman defended his imposition of Norplant and the resulting impairment of Ms. Johnson's constitutional liberties arguing, "I take away people's rights all the time when I send them to jail; that's what judges do."[137] But courts have consistently rejected the argument that because probation is offered in lieu of incarceration—a condition which greatly restricts a defendant's constitutional rights[138]—there can be no legitimate claim that a term of probation infringes upon constitutionally protected interests.[139] Rather, many have urged that given the rehabilitative goals of probation, constitutional interests should be protected to the greatest extent possible.[140] As a result, courts recognize that a probationer is entitled to a considerable amount of privacy under the Fourteenth Amendment to the federal Constitution.[141] The California Constitution provides similar protection for a probationer's constitutional rights.[142]

California courts[143] have held that "where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitu-

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the offense for which the defendant was convicted."); Simpson v. State, 772 S.W.2d 276, 281 (Tex. 1989) (Condition restricting probationer's constitutional right to privacy must be "reasonably calculated to contribute significantly to the rehabilitation of [the defendant] and to the protection of society in general.").

In addition, it should be noted at the outset of this analysis that California courts review probationary terms for compliance with both statutory and constitutional requirements. Under California Penal Code § 1203.1, a court is given broad, but not limitless, discretion in prescribing conditions of probation. Conditions of probation must be assessed in terms of a three-part reasonableness test. This test was defined in People v. Dominguez, 64 Cal. Rptr. 290 (1967), and dictates that "[a] condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid." *Id.* at 293. A statutory analysis of the Norplant condition is beyond the scope of this Note. However, even if the condition were to survive this analysis, it would still need to pass the more rigorous constitutional analysis discussed herein.

137. Ainsworth, *supra* note 78, at 10.

138. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 22-23 (1990).

139. *See, e.g.*, *In re* Mannino, 92 Cal. Rptr. 880, 888 (1971) (Although "petitioner's conviction subjected him to imprisonment which would restrain his [constitutional rights] . . . it is an over-simplification to conclude that the greater restraint should include the lesser.").

140. *White*, 158 Cal. Rptr. at 568 ("Unlike the purpose of imprisonment which is punishment, the purpose of probation is rehabilitation."). *See also* People v. Mason, 5 Cal. 3d 759, 769 (1971) (dissenting opinion) ("The function of probation is to strengthen independent judgment and internal controls, and to give the individual selective responsibility over his own actions.").

141. People v. Keller, 76 Cal. App. 3d 827, 832 (1978).

142. People v. Pointer, 181 Cal. App. 3d 1128, 1139 (1984).

143. *See, e.g.*, *In re* White, 158 Cal. Rptr. 562 (1979).

tional rights."[144] California courts have embodied this standard in a three-part "compelling interest" test to determine whether a condition of probation is constitutional: (i) the condition must reasonably relate to the intended purpose of probation; (ii) the value to the public from the imposition of the condition must manifestly outweigh any resulting impairment of the probationer's constitutional rights; and (iii) there must be available no alternative means less subversive of constitutional rights.[145]

1. Part One: Does the Norplant Condition Further the Purposes Sought by Probation?

California courts have concluded under part one of the compelling interest test that the goals of the probation code are "to foster rehabilitation and to protect public safety."[146] In the *Johnson* case, the hope was that proper counseling and instruction, and in Judge Broadman's view, the temporary postponement of additional children, would have provided Ms. Johnson with the skills necessary to avoid a recurrence of abuse against her children. To satisfy part one of the analysis, however, the state would have had to demonstrate that the Norplant condition would have somehow furthered Ms. Johnson's rehabilitation.

Judge Broadman argued that Norplant would have helped Ms. Johnson improve her parenting capabilities. At the hearing during which he considered Ms. Johnson's motion to modify sentence, he revealed his reasoning, noting:

> It is in the defendant's best interest and certainly in any unconceived child's interest that she not have anymore children until she is mentally and emotionally prepared to do so. The birth of additional children until after she has successfully completed the court-ordered mental health counselling and parenting classes dooms both her and any subsequent children to repeat this vicious cycle. . . . The stress and trauma of a sixth child on a person who is a convicted child abuser with her record cannot but help delay or prevent her ultimate rehabilitation.[147]

Despite Judge Broadman's own opinion that the birth of additional children would retard Ms. Johnson's rehabilitation, the state presented no evidence suggesting that this opinion was well-founded. In reviewing the constitutionality of unusual probationary conditions, courts require more than a mere speculative link between a condition and the goals of probation. Indeed, the Supreme Court of California has held that while "the severity of the sentence and the placing of the defendant on proba-

144. *Id.* at 565-66.

145. People v. Beach, 147 Cal. App. 3d at 622.

146. *In re* Mannino, 92 Cal. Rptr. 880, 882 (1971) (citations omitted). *See also* People v. Richards, 552 P.2d 97, 100 (Cal. 1976); *In re* Martinez, 150 Cal. Rptr. 366, 369 (1978).

147. Respondent's Supplemental Brief, *supra* note 97, at 8-9 (citing RT from Motion to Reconsider at 19-21).

tion rest in the sound discretion of the trial court . . . [t]he term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason."[148] Courts have used this standard to strike conditions which, although not wholly unrelated to a defendant's rehabilitation, are simply too tangential to justify.

In *People v. Beach*,[149] for example, a California appellate court rejected as too speculative a condition requiring that an elderly woman convicted of violently assaulting a neighbor move out of her home. Although the court acknowledged that the continuing deterioration of her neighborhood had contributed to the woman's action and therefore her continued presence in the neighborhood could lead to future assaults, it concluded that "[k]eeping appellant out of her home and neighborhood would not necessarily prevent future criminal conduct of a similar nature except perhaps in her own particular neighborhood."[150]

In a similar vein, Ms. Johnson's attorneys argued that "the nexus between fertility and Johnson's episode of abusive discipline [was] too attenuated to justify stripping Johnson of her procreative choice."[151] They stressed that nothing in the record established that family size or pregnancy contributed to Johnson's abusive behavior.[152] At the same time, the state maintained on appeal that "because the defendant [will have] fewer parental responsibilities and, so [consequently], more time and energy to devote to improving her life skills and parenting skills, she may well have a greater opportunity for rehabilitation."[153] The state's position might have been bolstered by studies that suggest that the birth of additional children contributes to the stress that prompts violent episodes in abusive parents, but these were not introduced.

One study, which examined various causes of family violence, revealed that one of the factors that "influenced substantially" severe mother-to-child abuse was family size.[154] In a sample involving nearly 1500 Utah families, the study found that "[t]he rate of severe physical

148. *In re* Cortez, 490 P.2d 819, 823 (Cal. 1971).

149. 195 Cal. Rptr. 381 (1983).

150. *Id.* at 386. *See also* Appellant's Opening Brief, *supra* note 96, at 47-49.

151. Appellant's Opening Brief, *supra* note 96, at 48.

152. *Id.* Johnson's counsel did not themselves offer any proof that these were not factors leading to Johnson's abusive episode, rather they simply argued that the state had not shown that they were contributive. In addition, Ms. Johnson's attorneys argued that rather than promoting her rehabilitation, the Norplant condition might actually hinder it. They contended that "stripping Johnson of her fundamental right to make decisions about her own body . . . is at least as likely to undermine as to foster her rehabilitation. . . . The government is likely to undermine her feelings of self-esteem and her ability to view herself as a responsible adult who can guide the welfare of her children." *Id.* at 49-50.

153. Respondent's Supplemental Brief, *supra* note 97, at 7.

154. Boyd C. Rollins and Yaw Ohenebe-Sakyi, *Physical Violence in Utah Households*, 5 J. OF FAM. VIOLENCE 301, 308 (1990).

violence toward children was about twice as high . . . when four or more children were in the home."[155] Acknowledging that stress is one of the key contributing causes of child abuse, the authors concluded that because "[m]others with large families . . . would seem to be prime candidates for a high level of frustration or stress . . . such mothers were substantially more likely to resort to severe physical violence toward their children than were other mothers."[156]

Studies such as these could have helped the state establish that postponing the birth of additional children would have enhanced Ms. Johnson's chances for rehabilitation by reducing the stress that causes child abuse. If the state had been able to substantiate a link between family size and the likelihood of child abuse, it could have argued that the Norplant condition futhered the goals of probation by promoting Ms. Johnson's rehabilitation and protecting her children from future abuse. Thus, the state might have been able to satisfy part one of the compelling interest test.[157]

2. *Part Two: Does the Value to Society in Imposing the Norplant Condition Manifestly Outweigh the Impairment of Ms. Johnson's Right to Privacy?*

The second part of the compelling interest test requires that the value of the probationary condition to the public manifestly outweighs the impairment of the probationer's constitutional rights. In the *Johnson* case, the state would have had to establish on appeal that the value to the public in the possibility that Ms. Johnson and her children might benefit from the temporary postponement of additional children manifestly outweighed her total loss of reproductive autonomy.

The United States Supreme Court has identified the safeguarding of children as unique and worthy of unfailing protection.[158] The California Supreme Court also has recognized that the protection of children constitutes an interest of "unparalleled significance."[159] A recent California Supreme Court case demonstrates the length to which that court will go to defend the protection of children as an important state interest. In *Walker v. Superior Court*, the state was required to balance the defendant's constitutional right to freedom of religion against the state's interest

155. *Id.* at 308.

156. *Id.*

157. The state argued precisely this on appeal. Respondent's Supplemental Brief, *supra* note 97, at 11 ("[A] probation condition prohibiting a woman convicted of child abuse from becoming pregnant for a period of time may decrease the possibility that she will abuse her children in the future. . . . [Thus] the goals of probation will be effectuated: the defendant's rehabilitation will be fostered, and society will be protected.").

158. *See, e.g.*, Prince v. Mass., 321 U.S. 158, 168 (1944).

159. Walker v. Superior Court, 763 P.2d 852, 869 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

in protecting children. In allowing the manslaughter prosecution of a Christian Scientist who had relied on prayer rather than medicine to treat his ill child, the Court noted that "[r]egardless of the severity of the religious imposition, the governmental interest is plainly adequate to justify its restrictive effect."[160] Thus, in certain circumstances, society's interest in protecting children will outweigh the impairment of an individual's constitutional rights.

The circumstances of child abuse often require prompt state intervention to ensure the protection of children. The incidence of abuse and neglect of children, as reflected in reports of abuse to child welfare agencies, increased 66% between 1980 and 1986.[161] The National Center for the Prevention of Child Abuse and Neglect estimates that nationwide one million children are abused each year and 2,000 to 4,000 children die annually as a result of maltreatment.[162] Some commentators fear that child abuse "is assuming epidemic proportions and is becoming more entrenched in the population."[163] These figures present a very compelling justification for state intervention to protect children despite the resulting impairment of individual privacy.

It is well-established law, however, that the state may not infringe upon a woman's right to privacy to protect her pre-viable fetus. In *Roe v. Wade*,[164] the Court held that during the first two trimesters of pregnancy, the state may not regulate to protect the fetus because prior to viability, the state's interest in protecting the fetus is not of an adequately compelling character.[165] In addition, California courts have explicitly held that the state's child-abuse statutes are not intended to protect the unborn.[166] If the state may not impair the right to privacy to protect a pre-viable fetus, it is likely that a court would also prohibit a state from interfering with the right to privacy to protect future, yet-to-be-conceived children. Thus, the only way the Norplant condition could satisfy the second part of the compelling interest analysis is through proof that it would protect Ms. Johnson's existing children.

As noted briefly above,[167] some child-abuse studies indicate that family size negatively influences violent tendencies in abusive parents. One study revealed that "[t]he proportion of families with four or more children was nearly twice as high among the families of the reported

160. 763 P.2d at 820. *See* RSB, *supra* note 96, at 12.

161. *See* Enalee Gottbrath Flaherty, M.D. & Howard Weiss, M.D., *Medical Evaluation of Abused and Neglected Children*, 144 AM. J. DISEASES OF CHILDREN 330, 330 (1990).

162. Harold I. Kaplan, M.D. and Benjamin J. Sadock, M.D., CLINICAL PSYCHIATRY 485 (1988).

163. *Id.*

164. 410 U.S. 113 (1973), *reh'g denied*, 410 U.S. 959 (1973).

165. *Id.* at 164-65.

166. *See* Reyes v. Superior Court, 141 Cal. Rptr. 912, 913 (1977).

167. *See supra* notes 154-56 and accompanying text.

abuse children [in the study's sample] than among all families with children under [eighteen] in the U.S. population."[168] One explanation for the disproportionate presence of large families in reported child-abuse cases is the established role that stress plays in triggering child abuse.[169] Child-abuse experts have emphasized that such stress factors as "the socioeconomic position of parents, marital stresses, *excess children*, unemployment, social isolation . . . [and] unwanted or 'problem' children" precipitate abuse in parents.[170]

These studies may support the state's contention that the temporary postponement of additional children would have protected Ms. Johnson's *existing* children because they indicate that increased family size contributes to the stress that causes child abuse. It is debatable, however, whether a reviewing court would have found the nexus between family size and occurrence of child abuse to be sufficiently compelling to justify such a substantial impairment of Ms. Johnson's constitutional rights. More specifically, it is unclear whether these studies, which indicate only that family size is one of many factors contributing to the "multi-causal nature of child abuse,"[171] would satisfy the *Cortez* standard requiring that judicial discretion in meting out probation conditions must be "within the bounds of reason" and not the result of "arbitrary determinations, capricious dispositions, or whimsical thinking."[172] Ms. Johnson's attorneys were not convinced; rather they contended that "the gain [in protecting Ms. Johnson's existing children] promised by mandatory contraception is illusory."[173]

Even assuming that the state could have conclusively established on the basis of these studies that the Norplant condition both furthered the goals of probation and manifestly outweighed the interference with Ms. Johnson's right to privacy, it would have still needed to satisfy the final part of the compelling interest test.

168. David G. Gil, *Violence against Children*, 33 J. MARRIAGE AND FAM. 637, 640 (1971). *See also* Jonathan B. Kotch and L. Parke Thomas, *Family and Social Factors Associated with Substantiation of Child Abuse and Neglect Reports*, 1 J. FAM. VIOLENCE 167, 173 (1986) ("Families with two or more children were nearly twice as likely to be substantiated as families with only one child.").

169. David G. Gil, *Unraveling Child Abuse*, *in* CHILD ABUSE AND VIOLENCE 12 (David S. Gil ed., 1979) ("[A]busive attacks tend to be triggered by stress and frustration which may cause reduction or loss of self control.").

170. Blair Justice & David F. Duncan, *Life Crisis as a Precursor to Child Abuse*, PUB. HEALTH REP., Mar. - Apr. 1976, at 110, 110 (emphasis added) (quoting R.J. Gelles, *Child Abuse as Psychopathology*, 45 AM. J. ORTHOPSYCHIATRY 611 (1973)).

171. Justice & Duncan, *supra* note 170, at 112.

172. *In re* Cortez, 490 P.2d 819, 823 (Cal. 1971).

173. Appellant's Reply Brief, *supra* note 79, at 11.

3. *Part Three: Does the Norplant Condition Represent the Least Restrictive Means Available of Protecting Ms. Johnson's Children?*

The final prong of the compelling interest test requires that "the state utilize the 'least intrusive' means to satisfy its interest. Mere convenience of means or cost will not satisfy [this part of the] test for that would make expediency and not the compelling interest the overriding value."[174] Ms. Johnson's attorneys argued that there were other means available to protect Ms. Johnson's children that would have been less restrictive of her constitutional rights. In particular they proposed that counseling, parenting classes, assistance with day care, and limitations on and monitoring of the family relationship would have been more reasonable and constitutionally sound alternatives.[175] In addition, they argue that as a last resort, the state should temporarily remove children from an abusive parent's custody rather than infringe upon a probationer's constitutional freedoms.[176] This viewpoint is supported by case law.

In *People v. Pointer*, for example, a California Court of Appeal concluded that the sanction of forced contraception was too severe a probation condition for the crime of child abuse given the availability of other, less severe measures.[177] The court noted that "the salutary purpose [of preventing future child abuse] can adequately be served by alternative restrictions less subversive of appellant's fundamental right to procreate."[178] In the court's opinion, these alternatives included pregnancy testing, prenatal and neonatal care, and the ultimate measure of removing the appellant's children born during probation from her custody.[179] Several cases from other states concur in this conclusion.[180]

174. Wood v. Superior Court, 212 Cal. Rptr. 811, 820 (1985).

175. Appellant's Opening Brief, *supra* note 96, at 56-58.

176. *Id.* at 56.

177. 199 Cal. Rptr. 357, 365 (1984). It is interesting to note, however, that although the court ultimately concluded that the birth control condition was unconstitutional, earlier in its opinion it held that the condition was reasonably related to future criminality and therefore met the statutory requirements of probation. *Id.* at 364. For a further discussion of the analysis which courts use to determine statutory validity of probation conditions, see *supra* note 136.

178. *Pointer*, 199 Cal. Rptr. at 365.

179. *Id.* While pregnancy testing and mandatory prenatal and neonatal care would be less subversive of a defendant's right to procreate, they would certainly still interfere with her fundamental right to refuse medical treatment.

180. *See, e.g.*, Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (holding that although constitutional protections are reduced by probationary status, a condition prohibiting a convicted child abuser from becoming pregnant was not reasonably related to future criminality when the defendant also was prohibited from having custody of any minor children during the probationary period); Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982) (because defendant was already denied custody of any child during probation, condition requiring that he not father any children served no additional purpose); State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989) (probation condition requiring convicted child abuser to refrain from becoming pregnant was unconstitutional); State v. Livingston, 372 N.E.2d 1335 (Ohio

Many of the above outlined alternatives would have been less restrictive of Ms. Johnson's right to privacy than the Norplant condition. For example, unlike the Norplant condition, a rehabilitation plan that coupled parenting classes and counseling with child care assistance and home monitoring would not intrude at all with two of the three aspects of privacy discussed above: the right to choose to reproduce and the right to refuse medical treatment. Although this alternative plan would still interfere with Ms. Johnson's right to parent, it would arguably do so in a manner less burdensome on that right than a condition that prohibited the parenting of future children for a period of years. Thus, even if the Norplant condition were to have satisfied the first two parts of the compelling interest test, it would likely have been unable to meet the demands of the third because alternatives less restrictive of the right to privacy were available. In the case of a first-time offender such as Ms. Johnson, therefore, the Norplant condition is unconstitutional.

A repeat offender who has previously received some of the less intrusive methods of treatment discussed above might present an exception to this conclusion. Given statistics which indicate that reported rates of reabuse are exceedingly high,[181] this possible exception is worthy of consideration. In the case of the repeat offender whom a court feels is suitable for continued probation rather than incarceration, the less restrictive alternatives outlined above—such as parenting classes, counseling and assistance with child care—may already have been imposed during a prior probation and failed. In such a scenario, the sentencing court would be faced with several options: (1) reimpose the same probationary conditions in the hope that they ultimately prove efficacious; (2) reimpose similar rehabilitative conditions while simulataneously ordering Norplant use in an attempt to reduce the stress which precipitates child abuse; or (3) remove the abuser's children from her custody to guarantee their protection while further treatment is pursued.

Critics of the Norplant decisions have argued that even in the case of a repeat offender, removal of the abuser's children from her custody is preferable to ordering Norplant use.[182] Such a measure was also endorsed by the court in *Pointer*, which argued that, rather than violating the defendant's right to privacy, it was better to remove all of her children including ones born during her probation if doing so was necessary

Ct. App. 1976) (condition requiring probationer not to have a child for five years was arbitrary, remote, and violated her constitutional right to privacy).

181. Naomi Ferleger et al., *Identifying Correlates in Reabuse of Maltreating Parents*, 12 CHILD ABUSE & NEGLECT 41 (1988). Ms. Ferleger notes that "studies examining abusers . . . in treatment have reported reabuse rates ranging from 16% to 66.8%. The discrepancy often found between official and unofficial rates of reported reabuse suggests that the true incidence of reabuse is seriously underreported in official tallies." *Id.*

182. Lev, *supra* note 52, at A17; Appellant's Opening Brief, *supra* note 96, at 56.

to protect them from future abuse.[183] Yet, assuming that adequate safeguards such as home monitoring could be put into place to ensure the continued safety of the children, it is not clear that the removal of children from the home of a repeat offender would be less restrictive of her constitutional right to privacy than the Norplant condition.

Although the Norplant condition subverts the reproductive autonomy aspect of the right to privacy, removal of children from a parent's custody impairs another recognized aspect of that same right to privacy: the right to raise one's children free from state interference.[184] Indeed, a decision to temporarily remove a probationer's children from her custody denies her any control over their care. Advocates of removal over Norplant use place a premium on the right to reproduce that some women may be unwilling to bear. Some offenders may prefer to use Norplant during probation rather than suffer the temporary loss of custody of their children. At least one commentator has argued that "if we condemn court-ordered birth control because it diminishes a woman's dignity and violates [her] privacy, it is incumbent upon us to ask whether stripping her of custody the moment she gives birth is truly a more respectful alternative."[185]

An argument can be made, however, that the nexus between requiring a forfeiture of an individual's right to parent and child abuse is more logical and compelling than the nexus between requiring a forfeiture of an individual's right to reproduce and child abuse. In addition, the fiscal crisis currently facing most states may preclude the type of intensive monitoring necessary to assure that, if children remain in the home while the abuser's rehabilitation is pursued, they do not continue to suffer abuse at her hands. Nevertheless, the case of the repeat offender, in which there is tension between two aspects of the right to privacy—the right to reproduce and the right to parent—may present a court with a more difficult constitutional choice than the case of the first-time offender. In situations involving recurrent abusers, a court may not find itself compelled to conclude that the removal of children from the home is less burdensome on the repeat offender's constitutional right to privacy than the Norplant condition. This is particularly likely if it has evidence that the Norplant condition will help reduce the likelihood of renewed abuse against existing children.

183. *Pointer*, 199 Cal. Rptr. at 365.

184. *See supra* notes 114-17 and 126-28 and accompanying text.

185. Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control or Crime Control?*, 40 UCLA L. Rev. 73 (1992). The author suggests that "[t]here is a strange irony in the argument that because coerced contraception violates a woman's autonomy, an alternative should be imposed that will relegate her to the role of gestational vessel" by allowing her to continue to bear children, but denying her custody of them while she is on probation. *Id.* at 81.

A determination that the Norplant condition violates the right to privacy of first-time offenders, and may violate the privacy rights of repeat offenders, under the three-part test used in California to determine the constitutionality of probation conditions does not dictate the results that may be reached in other states. As mentioned previously,[186] Texas and Nebraska—the two other states in which the Norplant condition has been imposed—use a less rigorous, although slightly modified, "reasonable relation" standard to test the constitutionality of probation conditions that restrict constitutional rights.[187] This less rigorous standard may permit greater impairment of a probationer's privacy rights and enable the Norplant condition to withstand a constitutional challenge.

III. Other Constitutional Issues[188]

A. Eighth Amendment—Cruel and Unusual Punishment

The Eighth Amendment of the Constitution provides in part that the federal government shall not inflict cruel and unusual punishments.[189] The Amendment is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.[190]

The constitutional proscription against cruel and unusual punishment undisputedly prohibits punishments that were considered cruel at the time of its ratification, such as burning at the stake and drawing and quartering. The scope of the Amendment, however, is not limited to excessive physical punishment, but rather "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing soci-

186. *See supra* note 136.

187. *Id.* Both the Texas and Nebraska standards might be termed "reasonable relation with teeth." The Texas standard requires that a probation condition which infringes the constitutional rights of the probationer must be "reasonably calculated to *contribute significantly*" to the rehabilitation of the defendant. Simpson v. State, 772 S.W.2d 276, 281 (Tex. 1989) (emphasis added). Nebraska requires that in addition to the condition being reasonably related to the offense committed, a condition which restricts constitutional rights "should be *sparingly imposed*." State v. Morgan, 295 N.W.2d 285, 288 (Neb. 1980) (emphasis added). One commentator has suggested that even in those courts that normally employ a reasonable relation standard to review the constitutionality of probation conditions, "[i]t is difficult to imagine . . . that an appellate court . . . would dare approve a condition as controversial as mandatory contraception without first determining that there are no other reasonable means by which future child abuse can be averted." Arthur, *supra* note 185, at 67.

188. This section examines whether the Norplant probation order constitutes cruel and unusual punishment or violates equal protection. There remain, however, several other constitutional issues that are beyond the scope of this Note, such as freedom of religion and concerns about procedural due process. For a discussion of the due process ramifications of the Norplant cases see Arthur, *supra* note 185, at 67.

189. U.S. CONST. amend. VIII.

190. *See* Robinson v. Cal., 370 U.S. 660 (1962).

ety."[191] Indeed, the Supreme Court has held that punishment which "offends fundamental notions of human dignity"[192] or "seek[s] to cast out a defendant from society"[193] is cruel and unusual even though its only effect is psychological. In addition, courts also consider whether a criminal sentence is so disproportionate to the crime for which the defendant was convicted as to constitute cruel and unusual punishment.[194]

Although the Supreme Court has never ruled on the specific issue of whether involuntary sterilization constitutes cruel and unusual punishment, many commentators believe that this would be its likely ruling given the Court's "recent emphasis on the Eighth Amendment as protecting the 'dignity of man.' "[195] *Skinner v. Oklahoma*[196] presented the Court with the opportunity to determine whether forced sterilization as a penal sanction constitutes cruel and unusual punishment. The court declined, however, to consider the petitioner's Eighth Amendment challenge. It instead applied strict scrutiny and determined that an Oklahoma statute which required the sterilization of certain classes of felons, but not others, violated the Equal Protection Clause.[197] Despite its failure to address the Eighth Amendment issue directly, the *Skinner* opinion demonstrates, the seriousness with which the Court views involuntary sterilization. Underscoring the danger inherent in such a statute, it noted: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. . . . [T]he individual whom the law touches . . . is forever deprived of a basic liberty."[198]

The lower courts that have addressed this issue have reached divergent conclusions. In the earliest case to consider whether government-imposed sterilization constitutes cruel and unusual punishment, the Supreme Court of Washington concluded that it did not.[199] The appellant, Peter Feilen, was convicted of the rape of a child under the age of ten and ordered to undergo a vasectomy, a statutorily authorized

191. Trop v. Dulles, 356 U.S. 86, 101 (1958). *See also* Wayne R. LaFave & Austin W. Scott, Jr., CRIMINAL LAW § 2.14(f), at 177 (2d ed. 1986).

192. Furman v. Ga., 408 U.S. 238, 270 (1972), *reh'g denied*, 409 U.S. 902 (1972).

193. *Id.* at 273 (Brennan, J., concurring).

194. Solem v. Helm, 463 U.S. 277, 284, 290 (1983).

195. LaFave & Scott, *supra* note 191, at 177.

196. 316 U.S. 535 (1942) (statute required the sterilization of "habitual criminals" which it defined as persons convicted two or more times for crimes of "moral turpitude").

197. *Id.* at 541-42. In an earlier case, Buck v. Bell, 274 U.S. 200 (1927), the court upheld a statute authorizing the sterilization of "mental incompetents" housed in state institutions. Here again, the court declined to determine whether sterilization constituted cruel and unusual punishment although the respondent had argued before the court that it did not. *Id.*

198. *Id.* at 541.

199. State v. Feilen, 126 P. 75 (Wash. 1912).

sanction.[200]

In rejecting Feilen's Eighth Amendment challenge, the court stressed that there was no evidence that the procedure would subject Feilen to any significant pain.[201] In addition, the court deferred to the legislative determination that permanent sterilization was an appropriate and proportionate punishment for the crime of statutory rape.[202] Finally, the prevailing public support for eugenic theory[203] clearly influenced the court's decision, which noted that "[t]here appears to be a wonderful unanimity of favoring opinion as to the advisability of the sterilization of criminals and the prevention of their further propagation."[204] The court appeared willing to limit its categorization of cruel and unusual punishments only to those "of a barbarous character and unknown to the common law."[205]

Two other cases from the same period reached contrary results. In *Davis v. Berry*, a federal district court in Iowa invalidated on Eighth Amendment grounds a statute requiring the sterilization by castration of twice-convicted felons.[206] Although the court recognized that the physical suffering incident to castration was greater than a vasectomy, this finding was not dispositive. Rather, the court emphasized the psychological trauma consequent to the procedure, noting "[physical suffering] is not the only test of cruel punishment; the humiliation, the degradation,

200. *Id.* at 76.

201. *Id.* at 77 (noting that a vasectomy is "an office operation, painlessly performed in a few minutes" under local anesthetic).

202. *Id.* It is difficult to see what additional societal protection was accomplished by sterilizing Mr. Feilen given his sentence of life imprisonment. *Id.* at 76.

203. The eugenics movement was founded by Francis Galton and enjoyed significant support in this country at the turn of the century. It has since been discredited. Adherents to the movement believed that it was in society's best interest to control and limit the reproduction of mental and criminal "undesirables" whose traits were thought to be caused by defective genes. *See* Philip Reilly, THE SURGICAL SOLUTION, at 1-4 (1991).

204. *Feilen*, 126 P. at 77.

205. *Id.* at 78 (citation omitted). The Washington statute was repealed in 1913 and replaced by a sterilization law that did not apply to convicted felons. Reilly, *supra* note 203, at 51.

206. Davis v. Berry, 216 F. 413, 417 (S.D. Iowa1914), *rev'd on other grounds*, 242 U.S. 468 (1917). Because the statute mandated the sterilization of all twice-convicted felons, it avoided the equal protection considerations implicated in the statute in *Skinner*, discussed *supra* notes 196-98 and accompanying text. *See also* State v. Brown, 326 S.E.2d 410, 412 (S.C. 1985) (ruling that castration constitutes cruel and unusual punishment). Castration renders more profound effects than vasectomy including physical disfigurement, removal of the testes, and certain, permanent sterilization. Despite these rulings characterizing castration as cruel and unusual punishment, a court in Harris County, Texas, approved the recent request by a defendant to be surgically castrated rather than go to prison for the rape of a thirteen-year-old girl. The defendant made the request after reading that the judge presiding over his case supported the castration of some sex offenders. *Judge OKs Molester's Plea to be Castrated*, S.F. EXAMINER, Mar. 7, 1992, at A9. The defendant later reconsidered his decision and elected to stand trial. Richard Lacayo, *Sentences Inscribed on Flesh*, TIME, Mar. 23, 1992, at 54.

and the mental suffering [associated with involuntary sterilization] are always present and known by all the public, and will follow him wheresoever he may go. This belongs in the Dark Ages."[207] The court specifically rejected the use of eugenic theory as a justification for the punishment.[208]

Likewise, in *Mickle v. Henrichs*, a federal district court in Nevada enjoined the performance of a vasectomy on a defendant convicted of statutory rape after concluding that the statute authorizing the sanction constituted cruel and unusual punishment.[209] Once again, the court emphasized the psychological impact of the procedure on the defendant. The court argued that the punishment ran contrary to the goals of punishment, noting that "degrading and humiliating punishment is not conducive to the resumption of upright and self-respecting life. When the penalty is paid, [and the offender is freed], he . . . will carry to his grave, a mutilation which, as punishment, is a brand of infamy."[210]

It is difficult to predict how these considerations would influence an Eighth Amendment challenge to the Norplant cases. The major justification relied upon in *Feilen*—eugenics—has now been discredited and could no longer be used to defend the imposition of the Norplant condition. Indeed, opponents of the *Johnson* decision frequently cite the potential for impermissible social engineering as one of the gravest dangers of court-ordered Norplant use.[211] In addition, unlike the court in *Feilen* which focused strictly on the physical pain of sterilization, the courts in *Davis* and *Mickle* stressed the psychologically far-reaching impact which sterilization would have on the defendants. The influence which the permanence of the procedures had on the courts' decisions is unclear. Both opinions, however, emphasized the injustice in requiring defendants, who had paid their debts to society by completing imposed prison sentences, to carry a "brand of infamy to the grave."

The Norplant condition, however, is temporary and coincides with the probationary period. Once the defendant has completed probation, the device can be removed and fertility will return quickly.[212] It is unclear whether the temporary nature of this "brand of infamy" would remove the cruelty from the sentence by reducing the duration of the

207. *Davis*, 216 F. at 416.

208. *Id.* at 416-17 (The court asked, "Must the marriage relation be based and enforced by statute according to the teachings of the farmer in selecting his male animals to be mated with certain female animals only?").

209. 262 F. 687 (D. Nev. 1918).

210. *Id.* at 691. Similarly, the ACLU argued that rather than promote her rehabilitation, the Norplant condition would impede the development of Ms. Johnson's sense of responsibility and judgment. *See* Appellant's Opening Brief, *supra* note 96, at 49-50.

211. *See, e.g.*, Helen R. Neuborne, *In the Norplant Case, Good Intentions Make Bad Law*, L. A. TIMES, Mar. 3, 1991, at M1; Lewin, *supra* note 12, at A1.

212. Flattum-Riemers, *supra* note 15, at 103-05.

psychological trauma which concerned the courts in *Davis* and *Mickle*. At least one commentator has suggested that "[b]ecause the procedure is painless, inconspicuous, and reversible, claims of cruel and unusual punishment [based on psychological trauma] are not persuasive in the age of Norplant."[213] This conclusion, however, too readily dismisses the distinction between voluntary Norplant use and court-ordered implantation of the device. Use of the contraceptive under the direction of a court entails greater potential for feelings of humiliation and social ostracism on the part of the defendant, particularly given the nationwide attention the Norplant cases have received.

In addition, the physical discomfort associated with Norplant use distinguishes it from sterilization accomplished through vasectomy or tubal ligation. While the Norplant implantation procedure is comparably painless, unpleasant and often painful side effects persist during Norplant use. Some studies indicate that 95% of women using the device experience adverse side effects.[214] The influence that the existence of this type of continuing discomfort would have on a reviewing court is unclear. A strong argument could be made, however, that given the large number of women who willingly use Norplant despite its side effects, an Eighth Amendment challenge grounded solely on the discomfort they cause would be insufficient.

Another consideration is the absence of legislative sanction for the imposition of Norplant as a condition of probation. In the three early twentieth century cases discussed above, the sterilization condition was statutorily authorized.[215] The absence of legislative authorization in the Norplant cases increases the likelihood that a reviewing court would question a judge's discretion to impose such an unusual condition at the sentencing stage. Lack of legislative approval also raises concerns about whether the severity of the sanction in relation to the offense has been fully considered and whether it comports with society's "evolving standards of decency." In a recent decision, the Supreme Court stated that a determination of whether a punishment comports with society's "evolving standards of decency" consists primarily of an examination of "statutes passed by society's elected representatives."[216] Given that probation codes routinely give judges broad discretion in crafting conditions of probation, it is unclear how this analysis could be conducted in relation to the Norplant condition. In her concurring opinion, Justice O'Connor argued that an analysis of whether a punishment comports with society's "evolving standards of decency" must include a proportionality analysis which considers whether the punishment is excessive in relation to the

213. Flannery, *supra* note 41, at 218.

214. *See supra* notes 24-26 and accompanying text.

215. *See* Feilen, 126 P. 75, 76 (Wash. 1912); Davis v. Berry, 216 F. 413, 414 (S.D. Iowa 1914); Mickle v. Henrichs, 262 F. 687, 687 (D. Nev. 1918).

216. Stanford v. Ky., 492 U.S. 361, 369-70 (1989) (plurality opinion).

offense committed.[217] Traditionally, the proportionality analysis examines: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[218] Again, given that the Norplant condition is the product of the exercise of a judge's discretion authorized by the probation code, the traditional factors considered in a proportionality analysis are not readily applicable to the Norplant cases.[219]

It is possible that the Norplant condition might escape Eighth Amendment challenge entirely because it is offered as a means of rehabilitating the defendant and not as a form of punishment. In *Feilen*, *Davis*, and *Mickle*, the courts imposed sterilization as a statutorily authorized punitive sanction. A court may well view a probation condition that is part of a rehabilitative plan as immune to an Eighth Amendment challenge. This possibility is less likely, however, when the condition is offered as an alternative to incarceration and thereby takes on more of a punitive character.

B. Fourteenth Amendment—Equal Protection

The Equal Protection Clause of the Fourteenth Amendment mandates that the government treat individuals who are similarly situated similarly.[220] Classifications based on race, national origin, and alienage are subject to strict judicial scrutiny which requires that the government must have a compelling interest, and use the least restrictive means of achieving it, to justify the use of discriminatory classifications.[221]

The Supreme Court has adopted a lesser level of scrutiny for gender-based classifications. This "intermediate" level of scrutiny requires that gender-based classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives."[222] The Court has shown a willingness to carefully scrutinize the stated objectives and application of gender-based classifications to ensure that they are not the product of "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and

217. *Id.* at 381.

218. LaFave & Scott, *supra* note 191, at 181 (citations omitted).

219. An argument can be made, however, that the novelty and gravity of the Norplant condition is an indication that it is disproportionate to the offense committed.

220. U.S. CONST. amend. XIV.

221. Graham v. Richardson, 403 U.S. 365, 372 (1971).

222. Craig v. Boren, 429 U.S. 190, 197 (1976), *reh'g denied*, 429 U.S. 1124 (1976); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (party alleging gender-based classification is valid has the "burden of showing an 'exceedingly persuasive justification' for the classification").

women."[223]

Within the category of gender discrimination, the Court has yet to conclude that pregnancy-based classifications by themselves constitute per se unconstitutional gender discrimination, despite the fact that only women become pregnant.[224] Rather, the Court carefully has distinguished between pregnancy discrimination that does not render any identifiable benefit to men and pregnancy discrimination which "impose[s] on women a *substantial burden* that men need not suffer" and found that only the latter category violates equal protection.[225]

The Norplant cases raise two main equal protection concerns. First, court ordered Norplant use imposes on female child abusers a particularly intrusive probationary condition that their male counterparts are not required to withstand. Second, because all four of the "Norplant defendants" are welfare recipients and three of the four are minorities,[226] serious questions regarding the possible discriminatory application of the Norplant condition have been raised.[227] Each of these concerns will be addressed in turn.

First, a probation condition that requires only female child abusers to use birth control is susceptible to an equal protection challenge because men also abuse their children. Such unequal treatment by the government of similarly situated men and women constitutes a prima facie case of gender-based discrimination. A reviewing court would be unable to skirt an equal protection challenge by characterizing the Norplant condition as a pregnancy-based classification; the defendants in the Norplant cases were ordered to use the device not because they had the potential of becoming pregnant, but because they had the potential of becoming parents. Male child abusers share this same potential.

Judge Broadman and others have justified the Norplant condition by arguing that it will help rehabilitate the child abuser by temporarily

223. *Hogan*, 458 U.S. at 726. Although equal protection challenges most frequently involve state statutes and ordinances, courts have held that state court trial orders must also satisfy the mandates of the Equal Protection Clause. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (upholding judgment of a state court divesting mother of the custody of her child because of the mother's remarriage to a man of a different race violated equal protection).

224. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 16-29 (2d ed. 1988).

225. Nashville Gas Co. v. Satty, 434 U.S. 136, 141-42 (1977) (emphasis added). In addition, cases involving pregnancy discrimination are limited to the employment context and gain support from both the Pregnancy Discrimination Act and Title VII; it is unclear whether the Court would apply this same analysis to pregnancy discrimination occurring in non-employment contexts.

226. Ms. Johnson and Ms. Knighten are African-American; Ms. Tovar is Hispanic. All three and Ms. Carlton were welfare recipients at the time the Norplant condition was imposed. Kathy Holub, *When Worlds Collide*, THE WEST, July 7, 1991, at 11; interviews with Donna Goode, Harris County Prosecutor (Knighten), Mark Ellis, Harris County Prosecutor (Tovar) and Kent Turnbull, Lincoln County Attorney (Carlton).

227. *See, e.g.*, Stephanie Denmark, *Forcing Norplant on Poor is Ploy to Control Women's Bodies*, L.A. DAILY J., Nov. 5, 1991, at 6; Goodman, *supra* note 1, at 79.

preventing the stress that accompanies the birth of a child.[228] This rationale applies with equal force to male child abusers. Although the stress of pregnancy, childbirth, and the first few months of child care fall more heavily on the mother, the demands of an infant undoubtedly affect the father as well. Studies indicating that the birth of additional children may exacerbate violent tendencies in abusive parents have not differentiated between male and female child abusers.[229] Therefore, a pattern mandating that only female child abusers use birth control while on probation may violate the Equal Protection Clause because it would discriminate against women solely on the basis of their gender, though members of either sex can be abusive parents.

Although courts could also impose birth control conditions on male child abusers, it is unclear whether this alone would be sufficient to shelter the Norplant condition from an equal protection challenge. No form of male contraception compares to Norplant. At least two commentators have argued that the imposition of birth control upon both men and women as a probationary condition still would violate equal protection because the "only readily available birth control device for men is a condom, which does not involve significant bodily intrusion. . . . If a male defendant were convicted of child abuse and were ordered to use birth control . . . as a condition of probation, the invasion on his privacy would not be as great, the health dangers associated with birth control use would not be as severe, and the punishment would not be so cruel."[230] In addition, the only other widely used form of male birth control, the vasectomy, is not readily reversible.[231] The permanence of the procedure distinguishes it from Norplant and also makes it highly unlikely that a court could impose such a condition given the general recognition of permanent sterilization as a cruel and unusual punishment.[232]

A second equal protection concern raised by the Norplant cases is that, at least in the first four cases, courts have imposed the condition exclusively on lower income and minority women.[233] Many commentators have cautioned that underlying biases could result in the discriminatory imposition of the condition.[234] Bolstering these concerns are studies which indicate that members of minority groups and lower income individuals "have been disproportionately subject to reporting and prosecu-

228. *See supra* note 147 and accompanying text.

229. *See supra* notes 154-56 and 168-70 and accompanying text.

230. Jack P. Lipton and Colin F. Cambell, *The Constitutionality of Court-Imposed Birth Control as a Condition of Probation*, 6 N.Y.L. SCH. J. HUM. RTS. 271, 288 (1989).

231. One study indicates that using modern microsurgical techniques, vasectomy reversal rates are about 50%. E. Scott Yarbro & Stuart S. Howards, *Vasovastomy*, 14 UROLOGIC CLINICS N. AM. 523 (1987).

232. *See supra* notes 206-10 and accompanying text.

233. *See supra* note 226.

234. Denmark, *supra* note 227, at 6; Goodman, *supra* note 1, at 79.

tion of child abuse."[235] Despite these justified concerns, an equal protection challenge alleging that court ordered Norplant use discriminates against lower income women is unlikely to succeed because the Court has refused to apply any form of heightened scrutiny to wealth-based classifications.[236] The Supreme Court has applied strict scrutiny to classifications based on race.[237] The Court, however, has required that an intent to discriminate be demonstrated before an equal protection racial discrimination claim will be upheld.[238] A mere showing of a disparate impact upon members of a minority group is insufficient.[239] As such, a race-based equal protection challenge is also unlikely to succeed.

Despite the obstacles hindering a race-based challenge to the Norplant condition, an equal protection challenge requiring a court to apply strict scrutiny may still be possible. In *Skinner v. Oklahoma*,[240] the Court invalidated an Oklahoma statute that required some classes of twice-convicted felons, but not others, to be permanently sterilized.[241] Although the Court recognized that legislative decisions are normally entitled to great judicial deference, it strictly scrutinized the statute and concluded that it "ran afoul" of equal protection. The Court defended its use of the strict scrutiny standard noting that because the legislation "involves one of the basic civil rights of man[,] . . . strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[242] Thus, opponents the Norplant decisions may be able to rely on *Skinner* to force a reviewing court to strictly scrutinize the constitutionality of court-ordered Norplant use. As a result, opponents may be able to raise many of the same arguments used in a right to privacy challenge regarding the availability of less intrusive alternatives to establish that court ordered Norplant use for female child abusers violates equal protection.

235. Board of Trustees Report, *supra* note 38, at 1820 (quoting Richard O'Toole et al., *Theories, Professional Knowledge, and Diagnosis of Child Abuse*, THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH, 349, 359 (David Finkelhor et al. eds., 1983)).

236. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-29, *reh'g denied*, 411 U.S. 959 (1973).

237. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

238. *See* Washington v. Davis, 426 U.S. 229, 239-44 (1976).

239. *Id.*

240. 316 U.S. 535 (1941).

241. The statute mandated sterilization for only those felons who were twice convicted of crimes of "moral turpitude", but did not apply to "white collar" crimes such as embezzlement even though the two crimes were "intrinsically the same." *Id.* at 538-39.

242. *Id.* at 541.

IV. Proposed Alternatives

The imposition of the Norplant condition on a first-time child-abuse offender is unconstitutional. The use of Norplant as a condition of probation in the Darlene Johnson case was inappropriate and an unconstitutional violation of her right to privacy given the availability of less restrictive rehabilitative conditions. Although Ms. Johnson had compiled a record of convictions involving theft and fraud, this was her first child-abuse conviction. The imposition of such an intrusive condition as temporary sterilization was disproportionate to her offense which could ultimately prove to be an isolated incident.

Court-ordered Norplant use for women who repeatedly are convicted of child abuse presents a more difficult question. Many would argue that in the case of the recurrent abuser, the state should remove children from the home, rather than violate an abuser's fundamental right to reproduce. By endorsing such a measure, however, critics appear willing to barter the forfeiture of one aspect of the right to privacy—the right to parent—for the protection of another, the right to reproduce. In addition, recent studies reveal that foster care systems frequently do not provide the safe havens children deserve.[243] So that, in addition to impairing the abuser's right to parent, a decision to protect her right to reproduce by placing her children in foster care may also result in moving children from one dangerous environment to another. The recurrent child abuser, therefore, presents a difficult constitutional and ethical question given the burden on at least one aspect of the abuser's right to privacy and the potential danger to her children under either scenario.

At the same time, proponents of court-ordered Norplant use have seemingly failed to address the full ramifications of state-coerced, temporary sterilization. The Supreme Court has described the right to reproduce as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."[244] The speed with which certain segments of the criminal justice system have endorsed the temporary forfeiture of this right by first-time child abusers is alarming. Judge Broadman has argued that the Norplant condition is defensible because "[he] take[s] away people's rights all the time. . . . that's what judges do."[245] This argument fails to address the fact that while the impairment

243. Ann Bancroft, *Foster Care Criticized By Little Hoover Panel*, S.F. CHRONICLE, Apr. 10, 1992, at A21 (noting that "children removed from troubled families are often damaged by the very system designed to protect them").

244. *Skinner*, 316 U.S. at 541.

245. Ainsworth, *supra* note 78, at 10. It is interesting to note that Judge Broadman himself has undergone a change of heart. In announcing the revocation of Ms. Johnson's probation after she twice tested positive for cocaine use, he stated that the Tulare County Court now "recognizes that the coercive use of Norplant fails to serve the rehabilitative goals of California's probation statute." *California: Mandated Norplant Now Irrelevant*, ABORTION REP., Apr. 15, 1992.

of a probationer's First[246] and Fourth[247] Amendment rights, for example, is a serious matter, state-coerced relinquishment of the right to procreate is rife with a host of ethical issues that simply are not present when other constitutional rights are infringed by a probationary condition.

Concerns about the exceptional dangers of a probation condition that denies an individual the right to reproduce are bolstered by studies which indicate that socio-economic status and race often determine whether health care workers, who are under an obligation to do so, actually report individuals they suspect of child abuse to child protective services.[248] If health care workers are influenced by underlying biases in deciding whom to report, it is not unrealistic to predict that judges will be susceptible to these same improper influences in deciding which probationers are appropriate candidates for Norplant use.

As a result of these concerns, court-mandated Norplant use cannot be countenanced even for repeat offenders. The risks are simply too great, despite the fact that in the case of a recurrent abuser Norplant use as a condition of probation might withstand constitutional attack because of the exhaustion of less restrictive probationary alternatives. Because Norplant could play an affirmative role in rehabilitating a child abuser, however, its use should not be entirely precluded. Rather, courts faced with a repeat offender should encourage, but not order, her to use Norplant while rehabilitation is pursued. For those women who agree to use the device, it should be provided without cost along with free medical follow-up.

Conclusion

"Child abuse is an area of concern that one has great difficulty approaching objectively and analytically. It is a phenomenon that arouses moral outrage and other intense emotions."[249] The use of Norplant as a condition of probation reflects the extreme frustration experienced by judges and prosecutors as they search for a solution to the escalating problem of child abuse. The Norplant cases present an unparalleled constitutional and ethical dilemma because they pit the most "basic of civil rights," the right to reproduce, against one of the cruellest crimes society

246. *See, e.g.*, People v. Osslo, 323 P.2d 397, 412-13 (Cal. 1958) (probationer convicted of crime related to his union activities, restricted from participating in them during probation).

247. *See, e.g.*, People v. Wardlow, 278 Cal. Rptr. 1. 2-3 (1991) (probationer required to submit to announced, warrantless searches by law enforcement agents).

248. *Race and Status May Determine if Abuse is Reported*, UPI, Oct. 31, 1981 (Regional News Section) (citing Ohio State University study). *See also* Irene Sege, *Agony of Child Abuse Cuts Across Class Lines*, BOSTON GLOBE, Feb. 27, 1989, at 1 (Metro/Region Section); Gail Zellman, *The Impact of Case Characteristics on Child Abuse Reporting Decisions*, 16 CHILD ABUSE & NEGLECT 57, 67 (1992).

249. David S. Gil, *Unraveling Child Abuse*, CHILD ABUSE AND VIOLENCE, 37 (David S. Gil ed., 1979).

endures, the mistreatment of children. Limiting Norplant's role as a rehabilitative measure to only those defendants who volunteer to use it will no doubt hamper its impact as a creative and potentially beneficial remedy for child abuse. But the alternative is to allow courts to "play God" by selecting who will and who will not be allowed to reproduce.