RESTRICTIONS ON SEXUAL ACTIVITY AS A CONDITION OF CRIMINAL PROBATION: AN ANALYSIS OF CONTEMPORARY PROBATION PRACTICES AND THEIR LEGALITY

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Despite the Supreme Court's recognition of procreation as a fundamental right in Skinner v. Oklahoma *and subsequent cases, state courts continue to impose probationary conditions on criminal defendants that restrict their ability to procreate or engage in sexual activity. These restrictions, ranging from bans on sex outside marriage to outright prohibitions on reproduction without prior permission, have been applied to a wide array of crimes and upheld in some jurisdictions. While sterilization in the criminal context has received some scholarly attention, these broader non-pharmaceutical and non-surgical probationary conditions remain underexplored. This Note analyzes these criminal cases and argues that these restrictions are both constitutionally impermissible and practically unworkable. This Note also produces the first comprehensive survey of all such known cases with these restrictions in nearly two decades, including seven cases where the restrictions were not overturned on appeal, in the process filling in a gap in the literature and examining the troubling intersection of criminal justice, reproductive control, and judicial discretion in probationary sentencing.*

* J.D., Stanford Law School, 2025. This Note would not have been possible without the support, feedback, patience and suggestions of Professor Joanna L. Grossman. Additional thanks go to Sandra Casak for spellchecking and reviewing my grammar and listening to my long speeches on the topic.

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INTRODUCTION

Long after the Supreme Court ruled procreation a fundamental right in *Skinner v. Oklahoma*,[1] judges have continued to impose restrictions on criminal defendants limiting their right to procreate and engage in sexual conduct, as punishment for an assortment of crimes. While there is much written about the fact that nine states currently allow chemical or surgical sterilization procedures in a criminal context, scholarship has paid less attention to the imposition of non-medical probationary conditions that also violate this fundamental right.[2] As punishment for crimes ranging from forgery to possession of heroin to child sexual abuse, judges across the country have imposed sentences that ban sexual activity outside of marriage, prohibit the probationer from reproducing and even require receiving permission from a probationary officer prior to any sexual contact.

These are not isolated occurrences or the dictates of rogue judges; rather, this is a systematic problem, affecting dozens of Americans and approved by at least one state supreme court. Overall, there are at least twenty-four separate criminal cases imposing such probationary limitations, at least seven of which were not overturned on appeal.[3] This Note surveys these conditions in contemporary criminal jurisprudence and argues that such conditions are both legally impermissible and practicably unworkable. While there exists some academic literature on this topic, no paper relating to these conditions has been published in over twenty years, and many writings focus on the related Norplant cases, only briefly touching upon probation conditions that limit reproduction via non-pharmaceutical means.[4] This article offers updated data and a more specific look into these conditions across various states and jurisdictions.

Section II of this Note provides a brief overview of the background and history of probationary conditions in the United States, as well as the history of

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1. 316 U.S. 535 (1942).

2. *See, e.g.*, Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY AND L. 502, 503 (2003), https://perma.cc/UVW9-ZENH.

3. *See infra,* Section III.

4. During the 1990s, many judges imposed as a condition of probation the use of Norplant, a reversible contraceptive that works by preventing ovulation. This drug was discontinued in 2002 due to its severe side effects, ending what appeared at the time to be a worrying trend of mandating contraception for probationers. *See* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant,* 41 BUFF. L. REV. 703 (1993); Elizabeth Jekanowski, *Voluntarily, for the Good of Society: Norplant, Coercive Policy, and Reproductive Justice*, U.C. PUB. POL'Y J., Fall 2018 (Aug. 23, 2018), https://perma.cc/C294-MJH4; Katherine E. McCanna, *A Hot Debate in the Summer of 2001:* State v. Oakley*'s Excessive Intrusion on Procreative Rights*, 36 IND. L. REV. 857 (2003), https://perma.cc/L854-JZGP; *see* Jack P. Lipton & Colin F. Campbell, *The Constitutionality of Court-Imposed Birth Control as a Condition of Probation*, 6 N.Y. L. SCH. J. HUM. RTS. 271 (1989), https://perma.cc/FVR8-ZARD; William R. Betesh, *Has the State Gone Too Far? Testing the Constitutionality of Probation Conditions that Limit a Probationer's Right to Procreate*, 26 SETON HALL LEG. J. 459 (2002), https://perma.cc/8DC6-U5AW.

state-sponsored racial eugenics and contemporary restrictions on reproductive rights in the criminal justice system. Section III provides a survey of how, when and why contemporary probationary restrictions on sexual activity are imposed. Section IV provides a legal analysis of these restrictions, arguing that they are likely an impermissible infringement of Constitutionally guaranteed reproductive rights. Finally, Section V provides a list of practical and other legal reasons that these probationary conditions should not be enforced, followed by a summary and conclusion in Section VI.

I. BACKGROUND & HISTORY

In order to understand these probationary conditions, we must first explore the history of criminal probation and the history and the contemporary realities of state-enforced restrictions on sexual activity and reproduction in the United States. Although the Supreme Court recognized the right to reproduce in 1942,[5] this right has often been circumscribed in practice, especially in the context of criminal punishment and probation. In this context, we see the resurgence of eugenic principles—the desire of legislative and other decision-makers to limit the reproduction of social "undesirables," often defined in racialized terms.[6]

A. Background of Criminal Probation

In order to analyze conditions limiting reproductive rights in the context of criminal justice, it is important to have an understanding of the purpose and constitutional framework behind probation. Probation refers to the practice of judicially imposed conditions as part of a criminal sentence where a defendant agrees to follow said conditions in exchange for not being incarcerated.[7] This is an essential part of the criminal sentencing regime and is designed to keep convicted individuals outside of prisons but still subject to behavioral control. Parole, a closely related concept, refers to an early release from a prison sentence, often conditional on abiding by a set of restrictions or requirements.[8]

Today, probation is widely used and serves several objectives.[9] The Chief Probation Officers of California note the various reasons for probation, including "[p]reventing crime . . ., [r]estoring victims and preventing future

5. In *Skinner v. Oklahoma*, the Supreme Court recognized that compulsory sterilization as a criminal punishment was subject to strict scrutiny and also established the right to reproduce as "one of the basic civil rights of man." 316 U.S. 535, 541.

6. *See infra,* Section II.B.

7. *See Probation and Pretrial Services—Post-Conviction Supervision*, U.S. COURTS, https://perma.cc/BF2P-4YZJ (last visited Feb. 10, 2024).

8. *See Parole*, NAT'L INST. CORR., https://perma.cc/2BQM-GSC5 (last visited Feb. 24, 2024).

9. In California, there are 1.36 probationers and parolees per incarcerated individual (as there are 199,000 incarcerated individuals in California and 259,000 probationers and parolees in the state). *California Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/8VFD-AMGC (last visited Feb. 10, 2024)

victimization[,] [r]ehabilitating [convicted defendants] with evidence-informed strategies that change behavior [and] [e]nsuring secure and effective detention services and successful reentry."[10]

Probation also serves other important functions: reducing jail population and minimizing state spending on prisons and also providing a form of social control over probationers.[11] As Allison Frankel of the ACLU notes, "the 'tough on crime' movement that began in the 1970s turned probation and parole into a means of racial control" by requiring convicts to "abide by numerous vague, difficult to follow, and oppressive conditions—including paying fines and fees many cannot afford; attending frequent meetings, often far away or during work hours; reporting every address change, even if they lack housing stability; and staying away from people with felony records."[12] This especially impacts Black Americans, who are 252 percent more likely to be on probation than their white counterparts.[13]

This is especially worrying given that there exist few safeguards for ensuring that conditions of probation in fact meet the statutory goals of probation and courts have almost complete "unfettered discretion" in making these conditions.[14] 'Judicial creativity'—crafting unique probationary conditions in order to maximize deterrence and rehabilitation—is an accepted part of the criminal justice system, especially for minor offenses.[15] Judge Howard Broadman, who imposed a probationary condition prohibiting pregnancy for a heroin user, is illustrative of the discretion granted to judges.[16] "Broadman has ordered people to attend Alcoholics Anonymous meetings, get a high school diploma, donate an auto to a battered women's shelter" and more concerningly "even wear a T-shirt proclaiming 'I am a felon'" in what appears to be a condition motivated solely

10. *Probation in California*, CHIEF PROB. OFFICERS CAL., https://perma.cc/5JJ5-AT93 (last visited Feb. 10, 2024).

11. Magnus Lofstrom & Brandon Matin, *Public Safety Realignment: Impacts So Far*, PUB. POL'Y INST. CAL. (Sept. 2015), https://perma.cc/AH8B-4M48.

12. Allison Frankel, *The Problem with Probation & Parole*, STANDARD TIMES (Dec. 4, 2020), https://perma.cc/UM7Y-AG53.

13. "This system is oppressive for everyone, but it disproportionately impacts Black people. Across the nation in 2016, one out of 23 Black people was on probation or parole, compared to one in 81 whites." *Id.*

14. Andrew Horwitz, *Coercion, Pop-Psychology and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH & LEE L. REV. 75, 157 (2000), https://perma.cc/ZS7Y-4UEH.

15. Judges have in the last ten years ordered probation conditions that include hiking 30 miles, requiring marriage, leading a donkey through town with a sign that says "Jackass" and working at a fast-food restaurant. Benson Varghese, *Creative Sentencing: Ten Unusual Punishments*, VARGHESE SUMMERSETT, https://perma.cc/FXQ6-QJCF (last accessed Mar. 19, 2024); Laura Temme, *How Creative Can Judges Be with Sentencing?*, FINDLAW (Dec. 8, 2023), https://perma.cc/DF6D-HPYK. *See also* Jason W. Swindle, *Judges Can Hand Down Creative Sentences*, VALLEY TIMES-NEWS (May 3, 2019), https://perma.cc/JY9W-85UG.

16. Stephanie B. Goldberg, *No Baby, No Jail*, 78 A.B.A. J. 90 (1992), https://perma.cc/T8WU-YM3L.

by public humiliation.[17] Probationary conditions like those imposed by Judge Broadman "are designed primarily to inflict shame or humiliation on the offender" and have led to the "destruction of families, vigilantism, and even suicides."[18]

B. History of Negative Eugenics

It is also important to explore the history of state control of reproduction as it relates to reproductive probation conditions. The United States has a long and painful history of negative eugenics marked by attempts to inhibit reproduction by disfavored members of society, often racial minorities and the urban poor. Prior to the enactment of the Thirteenth Amendment, enslavers often castrated enslaved men seen as unfit for "breeding" in an attempt to limit the population of African Americans outside the agricultural workforce.[19] Following Reconstruction, sterilization of Black women was common, particularly in the American South, where "'Mississippi appendectomy' was a label used to describe a practice at some Southern hospitals: hysterectomies performed on poor Black women without anything that could be considered consent."[20] The United States later developed an institutionalized regime of involuntary sterilization as part of a broader eugenics movement aimed at augmenting the white population at the expense of Americans seen as unfit.[21] States enacted statutes creating boards that had the authority to decide whether someone was unfit and should be sterilized, a practice upheld by the Supreme Court in *Buck v. Bell*.[22] Many states also enacted statutes allowing the sterilization of prisoners, whose propensity to crime was seen as hereditary.[23] Who counted as "unfit" was often determined in a racialized lens with devastating results for communities of color. For example, African American people "constituted just over one percent of California's population in the 1920s, yet they accounted for four percent of total sterilizations by the State of California."[24] Although this practice waned in the aftermath of the Nuremberg trials and recognition of the horrors of Nazi eugenics,[25] for many Black Americans, "the word 'sterilization' understandably evokes images of abuse."[26]

17. *Id.*

18. Horwitz, *supra* note 14, at 77.

19. CAL. TASK FORCE TO STUDY & DEV. REPARATION PROPOSALS FOR AFR. AMS., *Final Report,* 438 (2023), https://perma.cc/UKP4-CYME [hereinafter *Reparation Report*].

20. Joanna L. Grossman & Lawrence M. Friedman, *The Born and the Unborn in Law & Society* (forthcoming).

21. *Id.*

22. 274 U.S. 200 (1927).

23. *See* Kristan A. Moore & Jennifer L. Lux, *Eugenics and Crime: Early American Positivism in* ENCYCLOPEDIA OF CRIMINOLOGICAL THEORY (Francis T. Cullen & Pamela Wilcox, eds., 2010).

24. *Reparation Report*, *supra* note 19, at 151.

25. Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, THE NEW YORKER (Apr. 27, 2016), https://perma.cc/FWW5-YEMM.

26. Aaronette White, *Tubes Tied, Truly Child-Free at Last! in* RADICAL REPRODUCTIVE

C. Contemporary Castration & Restrictions on Reproduction in the Criminal Legal System

Even as support for eugenics decreased in the United States following World War II, it never ended. Several states permit the non-consensual sterilization of persons under guardianships and legally incompetent individuals.[27] Additionally, the federal government has conducted non-consensual sterilizations in ICE facilities.[28] In the 1990s, several states tried unsuccessfully to condition the receipt of social services on the use of Norplant, the first implantable contraceptive, which offered long-term birth control without any room for user error.[29] Additionally, many judges imposed as a condition of probation during this period the temporary use of Norplant.[30] This drug was discontinued in 2002 due to its severe side effects, ending what appeared at the time to be a worrying trend of mandating contraception for probationers.[31]

Castration, however, is still practiced in the criminal context. Nine states currently authorize castration for child sexual abusers, via both chemical and surgical methods.[32] Despite many legal arguments against this practice, judicial castration is still practiced today, with cases from as recently as 2023.[33] While these punishments, as well as court-ordered pharmaceutical contraception, face many of the same legal and practicable problems as probationary conditions limiting reproduction, they raise additional questions of bodily autonomy, surgical invasion and medical experimentation outside the scope of this Note.[34]

II. CONTEMPORARY CASES

Aside from involuntary sterilization of prisoners, several states continue to place non-surgical restrictions on probationers. From 1967 to 2017, there were at least 24 instances where a judge imposed, as a condition of probation, a restriction on either sexual contact, pregnancy or having a child, without ordering contraception or sterilization. Nine of these cases were in the twenty-first century. In seventeen cases, the probationary conditions were overturned on appeal, leaving seven instances where these conditions were allowed to take effect, either

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JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE 404, 409 (Loretta Ross et al. eds., 2017).

27. *See, e.g.*, *In re Guardianship of Moe*, 960 N.E.2d 350 (Mass. App. Ct. 2012).

28. Emily Medosch, *Not Just ICE: Forced Sterilization in the United States*, IMMIGR. & HUM. RTS. L. REV. (May 28, 2021), https://perma.cc/D79C-E5TL.

29. Henley, *supra* note 4, at 749-50; ANNA GLASIER, *Contraception in* ENDOCRINOLOGY: ADULT AND PEDIATRIC 2297-2309 (7th ed., 2016).

30. Henley, *supra* note 4, at 705, 735.

31. *See* Jekanowski, *supra* note 4.

32. These states are California, Georgia, Florida, Iowa, Louisiana, Montana, Oregon, Texas and Wisconsin. Scott & Holmberg, *supra* note 2, at 503.

33. *See* Chloe Mayer, *Louisiana Man to Be Chemically Castrated After Raping Minor*, NEWSWEEK (Mar. 17, 2023), https://perma.cc/G56A-WVD7.

34. For a good summary of these issues, see Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117 (1998).

because they were upheld on appeal or not appealed.[35]

This is almost certainly an undercount—at least two cases have no publicly accessible court records and were only found through newspaper articles[36] and several sources state that additional cases exist.[37] It is likely that there exist many more unreported cases, as courts do not always make readily publicly available conditions of probation for individual cases and conditions are often not reported unless they are the subject of an appeal. In fact, every single reported case involved appeals—however, "appellate scrutiny of probation conditions is highly unlikely," further adding to the likely undercount of cases.[38]

The primary reason for this is because defendants rarely challenge probationary conditions on appeal. Many sentences are the result of plea deals, which often include binding conditions waiving the right to appeal the judgment.[39]Additionally, a successful challenge of a probationary condition often results in either a revocation of probation and imposition of a jail sentence or a remand for resentencing, which carries the risk of a longer sentence with worse conditions.[40] "As a consequence, the validity of even some of the most extreme conditions of probation rarely faces litigation at all."[41] For this reason, appeals in the probationary context overall are rare and it is likely that many more cases involving such conditions occur but have never been written about. Appendix I presents a table with all the relevant cases from this period, along with the underlying criminal conduct and conditions in question, information on their disposition, reasons for reversal (if reversed) and demographic information on the probationers. Although this is almost certainly an undercount, it provides a snapshot of the cases in which sexual and reproductive conditions are imposed. The rest of this Section will focus on analyzing these data and providing a summary of judicial reasoning for imposing these conditions.

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35. One case, *State v. Herrera*, was appealed, but only to challenge the underlying prison sentence, not the conditions of probation. *See* No. 44913, 2017 WL 5896420, at *1 (Idaho Ct. App. Nov. 30, 2017).

36. These cases are *Commonwealth v. Crawford* and *State v. Curtis*. *See 'I Should Sterilize You': Deadbeat Dad of Nine Agrees to Judge's Order to Stop Having Kids*, DAILY MAIL (Dec. 8, 2012), https://perma.cc/2KTC-8PEE. Note that a record that is not fully available online exists at *State v. Curtis*, No. 2011RA003654, WL 2011CF00686, at *1 (Wis. Cir. Ct. Racine, June 2, 2011).

37. *See, e.g.*, Stephanie B. Goldberg, *supra* note 16 ("A Chattanooga judge, Walter Williams, has told unwed mothers to stop having children . . . "); *'Revered' Judge Faces 26 Misconduct Charges*, DESERET NEWS (July 23, 2001), https://perma.cc/7H42-QAYQ ("[A judge] admits telling some poor women to stop having children.").

38. Horwitz*, supra* note 18, at 78.

39. Megan Hailey-Dunsheath, *Challenging the Validity of Conditions of Probation and Other Types of Formal Supervision*, FIRST DIST. APP. PROJECT, May 2021, at 3-4, https://perma.cc/2DE8-F2S9. Note that in some jurisdictions, this right is not always waivable. *See, e.g.*, People v. Patton, 255 Cal. Rptr. 3d 1, 5-6 (Cal. Ct. App. 2019).

40. Horwitz, *supra* note 18, at 81-82. For this in the context of reproductive restrictions, see also *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (Littlejohn, C.J., concurring).

41. Horwitz, *supra* note 18, at 82.

A. Demographics and Statistics

The twenty-four cases in this sample involve probationary conditions imposed on twenty-six individuals.[42] Of these individuals, half were male.[43] This goes against the common perception that probationary conditions limiting reproductive rights almost always apply to women.[44] However, of the nine cases since the year 2000, seven have involved male probationers and every single case in which such conditions were not ultimately reversed had male probationers.

The racial demographics of these probationers do not match that of society or the population of criminal defendants. While the race of most probationers could not be determined with certainty, of those for whom a photographic record exists, three appear to be white, while five appear to be Black.[45] Even though African Americans are overrepresented among criminal defendants generally, they are still disproportionately subjected to these conditions. This may be because most contemporary cases with reproductive restrictions relate to failure to pay child support, a charge that overwhelmingly is imposed on Black individuals. For example, in California, "Black people in particular are overrepresented, at 6.5% of the population but about 18% of parents who owe outstanding public child support debt."[46]

The criminal charges in cases involving reproductive restrictions also vary by gender. In the sample, there was a marked gender difference with five of the thirteen male probationers and none of the female probationers being charged with failure to pay child support.[47] Meanwhile, nine of the probationers (two males and seven females) were charged with child abuse or neglect, representing 54% of female probationers and 15% of male probationers, even though women are only marginally more likely than men to be charged with child abuse.[48]

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42. *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980) involved three defendants.

43. *See infra,* Appendix I.

44. For example, a prominent attorney in the field of reproductive rights said of these conditions "Have you ever heard of these punishments being applied . . . to a man?" Goldberg, *supra* note 16.

45. The case record does show, however, that one defendant was Black. *See* United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992); *The Deadbeat Daddy Baby Machine*, THE SMOKING GUN (Sep. 11, 2002), https://perma.cc/A74B-RSX9; *Judge Orders No Sex for Twin Falls Man Convicted of Rape*, EAST IDAHO NEWS (Feb. 5, 2017), https://perma.cc/AWN9-9U7R; *Mason City Woman Not Allowed to Get Pregnant During Probation After Guilty Plea in Shaken Baby Case*, NORTH IOWA TODAY (Aug. 3, 2015), https://perma.cc/SRG9-CL4C; DAILY MAIL, *supra* note 36; Rachel Quigley, *Judge Bans Father-of-Four Who Owes $100k Child Support from Having Any More Kids*, DAILY MAIL (Jan. 28, 2013), https://perma.cc/6BXG-8ABQ; Hannah Catlett, *Lorain County Judge's Order to Not Procreate Because of Owed Child Support Is Unconstitutional, Ohio Supreme Court Says*, CLEVELAND 19 (Dec. 21, 2020), https://perma.cc/DS2M-LBG4.

46. Kate Cimini, *California Keeps Millions in Child Support While Parents Drown in Debt*, CAL MATTERS (Apr. 19, 2023), https://perma.cc/9QR8-XNL6.

47. Which is not surprising given that 80% of single-parent households are headed by women. *See Child Support Statistics in the United States*, ANNIE E. CASEY FOUND. (Jun. 29, 2024), https://perma.cc/3AT5-9Q4K.

48. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2022

Overall, seventeen of these cases—the fourteen above and two where the probationers were accused of sexual abuse of minors[49]—involved children and one has no mention of the crime committed.[50] However, six involved probationers charged with crimes that had no apparent connection to the probationary conditions in question; these include forgery,[51] burglary,[52] theft,[53] heroin offenses[54] and robbery.[55]

B. Types of Probationary Conditions

These probationary conditions relating to sex and reproduction fall into several categories. Eight of the cases ban the probationer from either getting pregnant or impregnating another individual. Three ban the probationer from having children,[56] one from conceiving a child[57] and three from "fathering" a child[58]—a term which is "ambiguous" and could mean either biological reproduction or acting in a paternal role.[59] Several cases do not outright ban reproduction and only limit it by prohibiting sexual activity outside of marriage,[60] pregnancy outside of marriage[61] or the birth of a child outside of marriage.[62]

Some sentences go even further, banning all sex,[63] requiring probationary

71 (2022), https://perma.cc/T2AC-SURV.

49. Krebs v. Schwarz, 568 N.W.2d 26 (Wis. Ct. App. 1997); State v. Herrera, No. 44913, 2017 WL 5896420 at *1 (Idaho Ct. App. Nov. 30, 2017).

50. Burchell v. State, 419 So. 2d 358 (Fla. Dist. Ct. App. 1982).

51. Wiggins v. State, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986).

52. *Wiggins*, 386 So. 2d 46.

53. Thomas v. State, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988).

54. United States v. Smith, 972 F.2d 960 (8th Cir. 1992); People v. Zaring, 8 Cal. App. 4th 362 (Cal. Ct. App. 1992).

55. People v. Dominguez, 256 Cal. App. 2d 623 (Cal. Ct. App. 1967).

56. State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976); State v. Oakley, 629 N.W.2d 200 (Wis. 2001); State v. Curtis, No. 2011RA003654, WL 2011CF00686 (Wis. Cir. Ct. Racine, June 2, 2011); *see* DAILY MAIL, *supra* note 36.

57. State v. Talty, 814 N.E.2d 1201 (Ohio 2004).

58. Burchell v. State, 419 So. 2d 358 (Fla. Dist. Ct. App. 1982); Howland v. State, 420 So. 2d 918 (Fl. Dist. Ct. App. 1982); State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998).

59. *Howland*, 420 So. 2d at 919.

60. State v. Herrera, No. 44913, 2017 WL 5896420, at *1 (Idaho Ct. App. Nov. 30, 2017); s*ee* Alex Riggins, *Judge: No Sex on Probation*, MY MAGIC VALLEY (Feb. 6, 2017), https://perma.cc/U7DC-PGDQ.

61. People v. Dominguez, 256 Cal. App. 2d 623, 626 (Cal. Ct. App. 1967); Thomas v. State, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); United States v. Smith, 972 F. 2d 960, 961 (8th Cir. 1992).

62. Wiggins v. State, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986).

63. Crawford, *supra* note 36. This raises the question of what constitutes sexual activity, which varies depending on each individual's interpretation. *See* Matthew Smith, *Does Oral Sex Count as "Having Sex"?*, YOUGOV (Mar. 3, 2023), https://perma.cc/L6PV-4FYP.

officer approval before any sexual encounter[64] or banning "activity with the reasonable potential of causing pregnancy."[65] In none of the cases restricting sex are terms like "sex" or "sexual encounter" defined and with the exception of one case, where it was noted in dicta,[66] the ambiguity in these sentences were never addressed in any appellate argument. The majority of cases impose these conditions throughout the entire period of probation, with no opportunity to have them lifted.[67] In five cases, however, the restrictions were conditional and could be lifted if certain requirements were met such as paying all child support or completing a drug rehabilitation and anger management program.[68]

C. Reasoning for Probationary Conditions

The reasons given by judges for imposing these reproductive restrictions are equally varied. Records from trial courts for criminal cases are typically not available online and many of the cases contain no record of why the sentence was imposed. However, proponents tend to explicitly justify these restrictions in one of three ways: prevention of injury to specific individuals, rehabilitation of the probationer and preventing the birth of poor children. Some of these conditions are also explicitly predicated on the judge's belief the probationer does not deserve to reproduce or sexually act in a way the judge does not find morally correct.

In the majority of cases for which there is explicit reasoning for imposing these conditions, judges state that limiting reproductive activity is necessary to protect the general public or specific individuals, one of the explicit goals of probation. For cases involving child abuse, this is relatively easy to justify: as one judge pointed out, "[t]he challenged condition was . . . [in order] to protect the public by preventing injury to an unborn child."[69] In *Krebs v. Schwarz*, the court added a condition requiring the probationer, who had been convicted of child sexual assault, to inform his probationary officer before any sexual encounter.[70] The judge in that case justified this by saying:

> [T]he reason for the rule is that it gives the agent the opportunity to talk to the probationer's potential partner and then [they] can make an informed decision

64. State v. Krebs, 568 N.W.2d 26, 27 (Wis. Ct. App. 1997).

65. It is unclear what this means and whether this encompasses protected penile-vaginal sex. *See* People v. Ferrell, 659 N.E.2d 992 (Ill. App. Ct. 1995).

66. Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982).

67. See, for example, *State v. Talty*, 814 N.E.2d 1201 (Ohio 2004) and discussion *infra* text surrounding notes 126-130.

68. These cases are *United States v. Smith*, 972 F.2d 960 (8th Cir. 1992), *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001), *State v. Curtis*, No. 2011RA003654, WL 2011CF00686 (Wis. Cir. Ct. Racine June 2, 2011), *State v. Taylor*, No. 13CA010366, 2014 WL 1896480 (Ohio Ct. App. May 12, 2014) (all with a lifting condition related to contributing toward existing child support obligations), and *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998) (with a lifting condition relating to completion of anger management and drug treatment programs).

69. People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App.1984).

70. 568 N.W.2d 26, 27 (Wis. Ct. App. 1997).

> about who they are becoming involved with. The public is protected because the agent can substantiate that the person is an adult. It also places a potential partner who may have children or grandchildren on alert that the probationer is a sex offender.[71]

Similarly, judges will often justify their sentences by noting their rehabilitative nature. The judge in *Krebs* noted that the conditions "force[] [the probationer] to be honest with others by confronting and admitting to his sexually deviant behavior."[72] In *State v. Oakley*, involving failure to pay child support, the judge noted the conditions were "designed to assist [the probationer] in conforming his conduct to the law" and that "[f]uture violations of the law would be detrimental to [the probationer]'s rehabilitation."[73] This argument hinges on the belief that it will be easier to pay child support with no monetary obligations from future children[74] and that limiting reproduction would in this way facilitate rehabilitation.

However, these reasons were very much overshadowed by both explicit and implicit reliance on eugenic principles. Many of these conditions seemed designed solely to prevent the birth of poor children: as one judge told a probationer, "[t]he court gets concerned whether we're running a revolving door—we start out a bunch of people with no opportunities . . . . [W]e can't expect [your children] to start out like the Rockefeller children. And if [they] wind up in crime, we shouldn't be too shocked."[75] Another court noted that "[t]he motive was to prevent the appellant from producing offspring who might become public charges."[76] Given the intertwined nature of poverty and racial status in the United States,[77] reliance on these principles disproportionately affects people of color and creates a system where the poor are not allowed to raise children, "imbu[ing] a fundamental liberty interest with a sliding scale of wealth."[78]

Additionally, judges also predicate their sentences on their belief that the probationer does not deserve to bear children or reproduce due to their failure to abide by what are normatively considered proper reproductive choices. As one judge mentioned to a probationer, explaining why he was banning her from reproducing during the term of her probation, "I want make [*sic*] to make it clear that one of the reasons I am making this order is you've got five children. You're thirty years old."[79] Another judge told a probationer he would ban him from

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71. *Id.* at 28-29.

72. *Id.* at 28.

73. State v. Oakley, 629 N.W.2d 200, 207, 213 (Wis. 2001).

74. Ignoring the fact that Oakley was convicted of *intentional* failure to pay child support, not failure due to lack of funds. *Id.* at 214.

75. United States v. Smith, 972 F.2d 960, 961 (8th Cir. 1992).

76. People v. Dominguez, 256 Cal. App. 2d 623, 628 (Cal. Ct. App. 1967).

77. African Americans are nearly twice as likely to live below the poverty line as white non-Hispanic individuals and American Indians and Alaska Natives more than twice as likely. *See* Emily A. Shrider, *Poverty in the United States: 2023*, U.S. CENSUS BUREAU (2024), at 6, https://perma.cc/34F8-UDRX.

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

79. People v. Zaring, 8 Cal. App. 4th 362, 368 (Cal. Ct. App. 1992).

engaging in sexual activity outside marriage in part because "I have never seen that level of sexual activity," referring to his 34 sexual partners.[80] Comments like these suggest that the judges are motivated by a desire to punish the individuals for what they view as abnormal family practices—much in the ways eugenicists targeted those who they viewed as having had too many children or being sexually promiscuous.[81]

III. PRIVACY CONCERNS

Regardless of the reasoning behind them, probationary conditions limiting reproductive rights raise serious concerns relating to the proper goals of probation and the inherent interests of probationers in their reproductive lives as protected by the constitutional right to privacy. This Section analyzes how the right to privacy is implicated by these conditions. It then examines the dominant *Dominguez/Lent* standard for determining the legality of probationary conditions, before looking at other lesser used tests. This Section then ultimately concludes that, at least in every case so far, these conditions are impermissible restrictions of the constitutionally guaranteed right to privacy.

This analysis, however, is not simple, because there is only limited federal constitutional jurisprudence on the acceptability of probationary conditions overall.[82] This is because the majority of criminal cases are at the state level and federal probation is guided by regulations that allow limited space for "creative sentencing." Additionally, federal statutes provide that federal probation can only include "deprivations of liberty or property as are reasonably necessary" for purposes of deterrence, protecting the public, rehabilitation and just punishment, meaning most challenges to federal probationary conditions are resolved on statutory rather than constitutional grounds.[83]

In spite of this limited jurisprudence, there is some consensus as to the minimum constitutional requirements in the probationary process. The Court has also noted that "'contract theory', which analogizes the acceptance of probation to the formation of a contractual agreement between the defendant and the sentencing court" does not waive constitutional protections.[84] This also applies to the "act of grace" theory, which erroneously states that since probation is an act of grace, any condition less punitive than incarceration is acceptable.[85]

80. Ronn Blitzer, *Judge Suspends Child Rapist's Prison Sentence, Orders Him Not to Have Sex*, LAW & CRIME (Feb. 9, 2017), https://perma.cc/EU44-SFG7.

81. "Categories [of individuals targeted for eugenics] included those described as imbeciles, n'er do wells, the mentally ill, poor people, sexually promiscuous women, men who could not support a family, prisoners, alcoholics, epileptics, sexual deviants or delinquents, criminals and anyone who was not white." Leigh Ann Charlot et al., *Exhumed: Reckoning with the History of Eugenics in Marriage and Family Therapy,* 30 FAM. J. 493, 493 (2022), https://perma.cc/39J8-YYK9.

82. *See* Horwitz, *supra* note 14, at 102.

83. 18 U.S.C. §3563(b)(1) (2018); *see* 18 U.S.C. §3553(a)(2) (2018).

84. Horwitz, *supra* note 14, at 84.

85. *Id.* at 88; Burns v. United States, 287 U.S. 216, 220 (1932).

Additionally, the Supreme Court has stated that there exist minimal due process requirements for imposing conditions of probation.[86] Unfortunately, probationary conditions are an underdeveloped area of law and one mostly explored at a state level and "[a]s a consequence, many trial judges have taken full advantage of the opportunity to impose probation conditions that significantly infringe upon the offender's constitutional or basic human rights."[87]

A. Right to privacy and reproductive freedoms

It is important to note that the fundamental right being violated by these probationary conditions is the right to privacy, under which reproductive behavior and decisions fall. While privacy is not explicitly mentioned in the Constitution, the Supreme Court has held that there is a fundamental right to privacy within the Due Process Clause of the Fourteenth Amendment.[88] In the first cases to recognize the existence of this right, the Court found support for the right to privacy in "the penumbra*,* formed by emanations" of the First, Third, Fourth, Fifth and Ninth Amendments and applied to the states via the Fourteenth Amendment.[89] This right is especially strong in the context of the bedroom and private sexual activity[90] and has been held to guarantee a fundamental right to procreation.[91] The Supreme Court has held that this right also encompasses the right against involuntary sterilization and the right to use contraception.[92] This also extends to reproduction: as the Supreme Court has stated, "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race."[93] This Note argues that probationary conditions restricting the fundamental right to privacy by limiting reproductive ability likely do not pass legal muster.

B. *Dominguez/Lent* Test

As most criminal cases occur at a state level and federal probationary restrictions are limited by statute,[94] the acceptability of probationary conditions that violate fundamental rights is thus largely a question of state law. Most cases on the legality of reproductively restrictive probationary conditions have adopted the *Dominguez/Lent* test, named after a pair of California cases.[95] In *Dominguez*,

86. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 782 n. 4 (1973).

87. Horwitz, *supra* note 14, at 160.

88. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

89. *Id.* at 484.

90. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

91. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

92. *See* Carey v. Population Servs., Int'l., 431 U.S. 678 (1977); *Griswold*, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

93. *Skinner*, 316 U.S. at 541 (1942).

94. *See supra* text surrounding notes 82-84.

95. People v. Dominguez, 256 Cal. App. 2d 623, 627 (Cal. Ct. App. 1967); People v. Lent, 541 P.2d 545, 548 (Cal. 1975). Note that the test was first articulated in *Dominguez* but first used by the California Supreme Court in *Lent*.

a trial court convicted the plaintiff, Mercedes Dominguez, of robbery and imposed a sentence including a condition banning her from getting pregnant unless she first married.[96] California statutes require that conditions of probation be "fitting and proper to the end that justice may be done."[97] The court ruled that this was determined by analyzing whether:

> 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.[98]

In this particular case, the court determined that Dominguez's future pregnancy had no relation to robbery and pregnancy was both not illegal and not reasonably related to committing future crimes, striking down this condition. This test was later adopted by courts in Florida,[99] Louisiana,[100] Ohio[101] and Kansas[102] in relation to their own statutory requirements regarding the "proper" ends of probation. In thirteen out of the twenty-four cases in which reproductive restrictions were imposed, this test was used to determine the acceptability of conditions; in each of these cases save one,[103] the challenged conditions were overturned. In California and Ohio,[104] courts have held that a condition needs to meet both *Dominguez/Lent* and an additional state constitutional test: when "imping[ing] upon the exercise of a fundamental right . . . [the court] must additionally determine whether the condition is impermissibly overbroad."[105]

Under the *Dominguez/Lent* test, a condition of probation is not illegal if it can satisfy any of the three prongs. The first prong can never be satisfied, as adult sexual activity has no clear relation to any crime. This is especially the case for crimes with no relation to sexual activity, such as robbery or forgery. For these unrelated crimes, "[t]here is a greater divide between reproduction and the harm sought to be prevented and remedied. From this perspective, punishing [these probationers] by prohibiting [reproduction] is entirely misdirected: it punishes [individuals] for their procreative conduct" and essentially is punishment "for

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96. *Dominguez*, 256 Cal. App. 2d at 624

97. *Id.* at 627 (quoting CAL PENAL CODE §1203.1).

98. *Id.*

99. Where it is sometimes termed the *Rodriguez* test after *Rodriguez v. State*, 378 So. 2d 7, 9 (Fl. Dist. Ct. App. 1979).

100. State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986).

101. Where it is often termed the *Jones* test after *Ohio v. Jones*, 550 N.E.2d 469, 470 (Ohio 1990) and phrased as "courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation."

102. State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

103. In which the test was ultimately not applied. State v. Taylor, No. 13CA010366, 2014 WL 1896480, at *2 (Ohio Ct. App. May 12, 2014). *See infra* text surrounding notes 125-128.

104. *See* People v. Pointer, 199 Cal. Rptr. 357, 364-65 (Cal. Ct. App. 1984); State v. Chapman, 170 N.E.3d 6, 9 (Ohio 2020).

105. *Pointer*, 199 Cal. Rptr. at 364-65.

being a 'bad [parent],' rather than for . . . criminal conduct."[106] For example, one court held that barring extramarital sexual conduct "bears . . . only a tangential relationship to" forgery and cannot satisfy condition one of this test.[107]

Even for crimes such as child abuse and failure to pay child support, where there is a plausible connection, future reproduction is still unrelated to these crimes—as the probationers in question victimized existing children and having more children would not relate to the crime in question.[108] The second prong can also not be met because reproduction between two consenting non-related adults is a constitutionally protected right.[109] The same goes with getting pregnant, impregnating an individual and carrying a fetus to term.[110] Thus, these conditions never satisfy prong two of the *Dominguez/Lent* test, as this conduct is never criminal.[111] In fact, no court has ever found prongs one or two were ever met for conditions limiting reproduction.

The restrictions may rarely satisfy the third prong, as there is an argument that sexual activity and reproduction is reasonably related to future criminal conduct.[112] The vast majority of courts, however, have found that this is not the case. For crimes not relating to children or sexual activity, this is quite clear: after all, "future pregnancy ha[s] no reasonable relationship to future" robbery convictions[113] and "forbid[ding] extramarital sex . . . [is] not reasonably related to curtailing [the probationer]'s necessity to steal."[114] Since prongs one and two of the *Dominguez/Lent* test can never be met for reproductive conditions, only those accused of child or sexual abuse or failure to pay child support can satisfy prong three and potentially have these restrictions imposed on them.

For intentional failure to pay child support, having future children does not impede the ability to pay current obligations; failure to pay is not related to a lack

106. Henley, *supra* note 4, at 723-24, 742.

107. State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986).

108. *Chapman*, 170 N.E.3d at 12.

109. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); CONG. RSCH. SERV., PRIVACY RIGHTS UNDER THE CONSTITUTION: PROCREATION, CHILD REARING, CONTRACEPTION, MARRIAGE AND SEXUAL ACTIVITY (2022), pp. 4-5, https://perma.cc/RM9D-ZAVD.

110. *Lawrence*, 539 U.S. at 574.

111. Wiggins v. State, 386 So. 2d 46, 48 (Fla. Dist. Ct. App. 1980). Note that in this case, the concurrence points out that extramarital sex was actually illegal in Florida at the time of the trial court's decision, meaning a condition banning sex outside of marriage could be potentially permitted. *Id.* (Farrington, J., concurring). While adultery is still illegal in some jurisdictions, these conditions are only rarely enforced. *See* Deborah L. Rhode, *Why Is Adultery Still a Crime?*, L.A. TIMES (May 2, 2016), https://perma.cc/A22N-ZVCL. Additionally, some consensual activity might be criminalized if it relates to incest or HIV status and theoretically could result in probationary conditions banning sexual activity with relatives or banning an HIV-positive probationer from unprotected sexual activity with HIV-negative individuals, but these are edge cases and have never been applied in the context of probationary conditions. *See*, *e.g.*, CAL. PENAL CODE §285; S.D. CODIFIED LAWS §22-18-31. Additionally, these activities are already illegal by themselves and would likely be a violation of the very common probationary condition banning any further criminal activity.

112. *See* People v. Pointer, 199 Cal. Rptr. 357, 362 (Cal. Ct. App. 1984).

113. People v. Dominguez, 256 Cal. App. 2d 623, 627 (Cal. Ct. App. 1967).

114. *Wiggins*, 386 So. 2d at 48.

of funds, which is a valid defense to this charge, but rather unwillingness to pay.[115] As the Ohio Supreme Court pointed out in *Chapman*, further reproduction "would have little effect on preventing the criminal conduct [of intentional failure to pay child support] . . . and that remains the case whether [the probationer] has 7 [*sic*] children or 77."[116] As for child abuse, "this condition of probation could reasonably relate to future criminality . . . only if [the probationer] had custody of the child or was permitted to have contact with the child."[117] The existing child protective services system, while dysfunctional,[118] already serves the goal of protecting children from physical abuse.[119] The actual bearing of a child thus has no relation to preventing further abuse.

The third prong presents such a high bar that only one court has ever found a probationary condition met it. In *People v. Pointer*, the probationer, Ruby Pointer, had fed her children a nutritionally insufficient diet, leading to their malnourishment, and resisted all efforts to change their diet. [120] Pointer even said she would do the same to any and all future children she had and would continue this inadequate diet even while pregnant.[121] The court found that barring Pointer's ability to reproduce was "related to child endangerment . . . because of evidence that the harm sought to be prevented . . . may occur before birth," meeting prong three of the *Dominguez/Lent* test.[122]

However, the *Pointer* court also held that when a condition of probation infringes on a fundamental right, an additional constitutional criterion must be satisfied: the condition must be as narrowly tailored as possible to preserve this right while accomplishing the goals of probation.[123] In *Pointer*, the court noted that "this salutary purpose can adequately be served by alternative restrictions less subversive of [Pointer]'s fundamental right to procreate," such as periodic pregnancy testing, an intensive treatment program by a supervising physician with probation officer supervision.[124] Thus, because of the requirement that probationary conditions be narrowly tailored, conditions limiting reproduction are still disallowed in California as a matter of constitutional law given the availability of alternatives. For example, as child protective services have the ability to remove children from the custody of abusive parents, probationary conditions involving mandatory consultation or supervision by CPS would constitute a less restrictive intervention than limiting reproduction, meaning that there exists no

115. *See* State v. Chapman, 170 N.E.3d 612 (Ohio 2020).

116. *Id.*

117. Howland v. State, 420 So. 2d 918, 920 (Fla. Dist. Ct. App. 1982).

118. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

119. *See Child Protective Services*, CAL DEP'T OF SOC. SERVS, https://perma.cc/HG3L-7C76 (last visited Feb. 24, 2024).

120. 199 Cal. Rptr. 357, 359-63 (Cal. Ct. App. 1984).

121. *Id.* at 362-63.

122. *Id.* at 364

123. *Id.* at 364-65.

124. *Id.* at 365.

restriction on pregnancy or fathering a child that is not impermissibly overbroad.

With this additional criterion, the *Dominguez/Lent* test seems to always prohibit probationary conditions restricting reproductive rights. In fact, the only case in which such conditions were ever accepted in a jurisdiction utilizing the *Dominguez/Lent* test is *State v. Taylor*, where an Ohio appeals court allowed a condition requiring the probationer "to make all reasonable efforts to avoid impregnating a woman."[125] However, the condition was upheld only due to a procedural failure by defendant, who failed to attach the sentencing record to the petition for appeal.[126] While the majority did not address the merits of the probationary conditions, one judge noted in a concurring opinion that the conditions were reasonably related to preventing future criminality because having more children would risk further instances of willful failure to pay child support.[127] The concurrence also states that such conditions are not overbroad because they have a lifting condition: paying owed child support.[128]

This lifting condition attempted to resolve the issue of *State v. Talty*, where the Ohio Supreme Court ruled that the absence of such a lifting condition made a restriction on procreation unconstitutional and a lifting condition "would have better accommodated . . . procreation rights at *de minimis* costs to the legitimate probationary interests" of banning the probationer from conceiving another child.[129] Even with this lifting condition, however, the argument is weak on its merits and was in fact ruled invalid by the Ohio Supreme Court in *State v. Chapman* six years later.[130]

In that case, the court ruled that restrictions on reproduction are not allowed for willful failure to pay child support.[131] The court reasoned that ability to pay is unrelated to the number of additional children the probationer chooses to have, meaning prong three of the *Dominguez/Lent* test could not be met.[132] Additionally, the court said that such conditions are overbroad and courts could more easily order restrictions on spending, the garnishing of wages or other financial controls to more readily assure compliance with the law while less severely restricting the probationer's constitutional rights.[133] Thus, under the *Dominguez/Lent* test, it is nearly impossible for reproductive conditions limiting procreation to comply with relevant statutes, and with the additional overbroad modifier adopted by California and Ohio, these conditions are unconstitutional in all cases.

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125. No. 13CA010366, 2014 WL 1896480, at *3 (Ohio Ct. App. May 12, 2014) (Carr, J., concurring).

126. *Id.* at *1 (majority opinion).

127. *Id.* at *5 (Carr, J., concurring).

128. *Id.* at *6.

129. 814 N.E.2d 1201, 1205 (Ohio 2004) (italics added).

130. 170 N.E.3d 612 (Ohio 2020).

131. *Id.*

132. *Id.* at 12

133. *Id.*

C. Other Tests

While the *Dominguez/Lent* test is the standard in most states, it is not the only one. Three states with a history of restricting the reproductive freedoms of probationers use different tests for determining the acceptability of probationary conditions relating to reproductive conduct and the federal government uses its own test as well in relation to statutory language around probation. While Indiana and the federal government use alternative tests that are relatively stringent, Wisconsin and Oregon use tests that allow for more conditions than the restrictive *Dominguez/Lent* test.[134] Of the four cases where conditions were upheld on appeal, three involved these alternative tests.[135] This Section argues that in every case so far, regardless of which test is applied, the conditions limiting reproduction are likely not allowed as a matter of state or federal law.

For federal probationers, current statutory language only allows probationary conditions "to the extent that such conditions involve only such deprivations of liberty or property as reasonably necessary."[136] This essentially serves as an overbroad modifier, as in California and Ohio constitutional law.[137] In *U.S. v. Smith*, the Eight Circuit analyzed a case where a probationer, who had been convicted of possession of heroin, was subject to a condition banning him from conceiving a child outside of marriage.[138] The court determined that since "other, more 'fine-tuned' conditions of probation" exist that do not infringe on the right to procreate, a condition banning fathering a child was unacceptable in federal sentencing.[139]

Some states use tests other than the *Dominguez/Lent* test or the federal statutory language. For example, in the sole Indiana case, *Trammel v. State*, the Indiana Supreme Court used a balancing test to determine the validity of probationary conditions as a matter of state law, weighing the purpose of the condition against the limitation on constitutional rights.[140] Here the court determined that a limit on pregnancy had "no discernible rehabilitative purpose" and did not protect future children, as the probationer could simply get pregnant after the

134. *See* State v. Oakley, 629 N.W.2d 200, 209 (Wis. 2001) (arguing that the correct test is not a form of strict scrutiny). Additionally, for an argument that most states use a *de facto* results-oriented balancing test, see Horwitz, *supra* note 14, at 100.

135. *Oakley*, 629 N.W.2d; Krebs v. Schwarz, 568 N.W.2d 26 (Wis. Ct. App. 1997); State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998).

136. 18 U.S.C. § 3563(b) (2018).

137. *See supra* text surrounding notes 123 and 133.

138. 972 F.2d 960, 961 (8th Cir. 1992).

139. *Id.* at 962. Note that the court does not mention what these fine-tuned alternatives are.

140. "[W]here a defendant contends that a probation condition is unduly intrusive on a constitutional right, the following three factors must be balanced: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement." 751 N.E.2d 283, 288 (Ind. Ct. App. 2001) (quoting Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999)).

expiration of her sentence.[141] Thus, the court found that the condition, having no legitimate use, was outweighed by the fundamental right to procreate, as determined by the U.S. Supreme Court in *Carey v. Population Servs. Int'l.*[142]

Wisconsin, on the other hand, allows as a matter of statute all conditions that serve a state function and are "reasonable and not overly broad" even if they infringe on constitutional rights.[143] In *State v. Oakley*, the Wisconsin Supreme Court affirmed a condition ordering probationer, convicted of willful failure to pay child support, "not to have any further children unless it can be shown to the Court that he is meeting the needs of his other children. . ."[144] The court stated the condition was reasonable, given that it would be easier to comply with his existing child support obligations if he had no more children to pay for.[145] The court then found the condition was not overbroad because it would be lifted upon successful payment of existing obligations,[146] before concluding that had Oakley been imprisoned instead, he would not have the right to procreate, and thus the court "preserved much of [probationer]'s liberty by imposing probation with conditions" and any condition less punitive than imprisonment was permissible.[147]

This reasoning is baffling on multiple levels. The condition is not reasonable; as the court itself acknowledges, Oakley was convicted of *willful* failure to pay child support[148] and Oakley's problem is not inability to pay, but rather an unwillingness to do so. Having future children does not relate to his refusal to pay his current obligations in any way.[149] This condition, additionally, is overbroad in that it bans Oakley from having further children until he can meet the needs of his other children. This limitation would ban Oakley from procreating even if he wished to support his existing children simply if he did not have the money to do so, going far beyond the criminal conduct for which Oakley was convicted, which allowed inability to pay as an excuse.[150]

This condition is also overbroad in that other less restrictive alternatives exist that achieve the same goal. As one commenter noted, "to better achieve the

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141. *Id.* at 289, 291.

142. "While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *Id.* at 290 (citing 431 U.S. 678, 684-85 (1977)).

143. State v. Oakley, 629 N.W.2d 200, 212 (Wis. 2001); *see also* Krebs v. Schwarz, 568 N.W.2d 26, 28 (Wis. Ct. App. 1997).

144. *Oakley*, 629 N.W.2d at 217 (Walsh Bradley, J., dissenting).

145. *Id.* at 207 (majority opinion).

146. *Id.* at 212.

147. *Id.* at 212-13.

148. *Id.* at 202.

149. In this case in particular, Oakley acknowledged he would never be able to obtain sufficient funds to pay off his child support obligations. However, Oakley "made [no] earnest effort to pay anything within his remote ability to pay." *Id.* at 202-03.

150. WIS. STAT. § 948.22(6).

goals of protection of society and rehabilitation . . . the [court] could have imposed a requirement that Oakley obtain employment and have child support payments garnished from his pay."[151] Additionally, in justifying Oakley's conditions as less punitive than incarceration and thus allowed, the court is relying on the "act of grace" theory of probation.[152] This theory was explicitly ruled an unconstitutional denial of due process rights by the Supreme Court in *Gagnon v. Scarpelli* and forms unconstitutional grounds for a sentence of probation.[153] It is thus difficult to reconcile the Wisconsin Supreme Court's decision with either its own state law or the federal Constitution, which *Oakley* likely violates.

In another Wisconsin case, an appellate court ruled in *Krebs v. Schwarz* that a condition requiring the probationer, who had been convicted of sexual assault, to obtain consent from his probationary officer prior to any sexual contact was both reasonable and not overbroad.[154] The court tied the condition to the probationer's rehabilitation by noting that it forced Krebs to be honest with others about his sexual history and such "[a]dmission of sexually deviant behavior [was] necessary to help prevent relapse" and helped ensure potential sexual partners were aware of Krebs' history and had the ability to consent.[155] The court also ruled that the condition was not overbroad, as it allowed Krebs to have platonic, but not sexual, relationships without officer consent.[156]

This again seems like incorrect reasoning. Because Krebs was convicted of child sexual assault, and not assault of an adult, there is no stated reason why the court could not have applied a narrower condition limiting Krebs' unsupervised contact with minors. Additionally, the court's reasoning that a platonic relationship was an appropriate substitute for a sexual one seems at odds with common sense and goes against federal constitutional precedent specifically protecting consensual sexual relationships from legal bans, distinct from merely platonic ones, which have never been explicitly criminalized.[157]

While Wisconsin applies a test allowing reasonable and not overbroad conditions, Oregon uses, as a matter of state constitutional law, an intermediate standard of least restrictive means, allowing conditions that infringe on constitutional rights if they are the least restrictive way of achieving a legitimate government goal.[158] In *State v. Kline*, an Oregon appellate court ruled that limiting a

151. McCanna, *supra* note 4, at 875.

152. *Oakley*, 629 N.W.2d at 212.

153. 411 U.S. 778, 782 n. 4 (1973); State v. Talty, 814 N.E.2d 1201, 1206 (Ohio 2004) ("[a]lthough it is true that probationers, like incarcerated persons, do not enjoy the absolute liberty to which every citizen is entitled, the United States Supreme Court has rejected the 'act of grace' doctrine.").

154. 568 N.W.2d 26 (Wis. Ct. App. 1997).

155. *Id.* at 28.

156. *Id.*

157. While interracial marriage and sexual conduct was illegal in much of the country until the middle of the twentieth century, this never explicitly applied to platonic friendship, see *Loving v. Virginia*, 388 U.S. 1 (1967). For other examples of how relations were criminalized, but not platonic friendship, see also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

158. State v. Kline, 963 P.2d 697, 699 (Or. App. 1998).

probationer convicted of child abuse's right to reproduce until he completed anger management and drug treatment was the least restrictive way of limiting the probationer's right to procreate while protecting future children from abuse.[159] However, the court, in its short opinion, failed to consider other less restrictive alternatives, simply saying the lifting condition was sufficient to make this less restrictive than a total ban on procreation.[160] While this is true, the child protective services system exists in order to prevent and respond to abuse to children and there is no guarantee Kline, a convict, would have custody or even access to any future child

The court also failed to consider supervised visits or limiting contact with minors instead—these conditions would achieve much the same goals at a lower cost to Kline's reproductive freedoms. It thus seems that under a least restrictive means test, these conditions should not be allowed and the court's decision seems to be inconsistent with its own reasoning and state law. Thus, even under other existing tests, it appears that conditions restricting probation, at least in every case in the sample, are likely impermissible under applicable state or federal law.

IV. OTHER CONCERNS

Whether or not courts view these claims as legally impermissible intrusions on the right to reproductive freedom, there are also many other reasons such conditions should not be imposed. These conditions are at times explicitly banned by statute.[161] Especially when dealing with conditions that ban pregnancy, they may be unworkable or counterproductive in practice, fail to account for the very real risk of contraceptive failure or be coercive of abortion. These conditions in certain cases may also violate constitutional rights of equal protection relating to race and class, violate the right to freedom of religion and may constitute cruel or unusual punishment. Finally, regulating reproduction is not a proper objective of the criminal legal system, but rather an improper judicial imposition of personal values onto probationers.

A. Specific Statutory Bans

Conditions restricting reproduction often also run afoul of explicit provisions of probation statutes by mandating the use of birth control. For example, in *People v. Ferrell*, an Illinois appellate court ruled that a condition forbidding the probationer from "engag[ing] in any activity which has the reasonable potential of causing pregnancy"[162] violated part of the Illinois Code of Corrections, which bans conditions requiring "any form of birth control."[163] The court concluded

159. *Id.*
160. *Id.*
161. *See infra* text surrounding notes 173-174.
162. 659 N.E.2d 992, 993 (Ill. App. Ct. 1995).
163. Specifically, 730 ILCS 5/5-4.5-50(g).

this was broad enough to include abstinence.[164]

B. Unworkability of Conditions

Additionally, even when permitted by statute, conditions surrounding reproductive constraints are essentially impossible to monitor, unworkable in practice and coercive of abortion. First, it is nearly impossible for the probation officer or a court to monitor compliance with conditions that restrict sexual activity. As the Eighth Circuit stated in *Smith*, "[s]hort of having a probation officer follow [the probationer] twenty-four hours a day, there is no way to prevent [him] from fathering more children."[165] This was echoed by a dissent from the Wisconsin Supreme Court, which stated that when a probationer "is not restrained,. . . [they] realistically cannot be stopped. . . from having intercourse—protected or otherwise."[166] While courts have considered monitoring probationers for pregnancy via blood tests,[167] this only detects probationer's pregnancy, not activity that could result in pregnancy or fathering a child.

Additionally, conditions relating to pregnancy often do not account for contraceptive failure. Condoms fail 2% of the time when used correctly and, with typical use, this rate is 13%.[168] Even methods like intrauterine devices or contraceptive implants occasionally fail,[169] as does abstinence. [170] "Contraceptive failure is not an indicium of criminality"[171] and conditions banning pregnancy lead to individuals having to either abstain from all sexual activity, far beyond the stated scope of the conditions, or procure abortions if their contraceptive methods fail.

For conditions that ban pregnancy, the only option available to probationers upon contraceptive failure would be "the surreptitious procuring of an abortion."[172] This would force probationers to "choose among concealing [pregnancy] (thus denying [the] child adequate medical care), abortion, or incarceration."[173] In a post-*Roe* world where fifteen states have banned elective abortion[174] and others have made the procurement of an abortion highly

164. People v. Ferrell, 659 N.E.2d at 995 (Ill. App. Ct. 1995).

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

166. State v. Oakley, 629 N.W.2d 200, 220 (Wis. 2001) (Walsh Bradley, J., dissenting).

167. *See, e.g.*, People v. Pointer, 199 Cal. Rptr. 357, 365-66 (Cal. Ct. App. 1984).

168. *Contraceptive Effectiveness in the United States*, GUTTMACHER INST. (Apr. 2020), https://perma.cc/4U6T-UFJM.

169. *Id.*

170. Which also has a non-zero success rate and is not realistic in many scenarios. *See* Cynthia Dailard, *Understanding "Abstinence": Implications for Individuals, Programs, and Policies*, 6 GUTTMACHER REP. ON PUB. POL'Y, Dec. 2003, at 4, 5.

171. People v. Dominguez, 256 Cal. App. 2d 623, 627 (Cal. Ct. App. 1967).

172. People v. Pointer, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984)

173. State v. Mosburg, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

174. *See Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (Jan. 24, 2024), https://perma.cc/F455-MDTZ.

difficult,[175] this option is simply not available in much of the country, a problem especially aggravated by the high incidence of rape.[176] These conditions could thus lead to a cruel hypothetical in which an individual is raped, forced to carry a child to term and then imprisoned for having said child.

C. Violation of Other Constitutional Rights

Probation conditions might also violate constitutional guarantees in the First and Eighth Amendments, as well as the rights to equal protection and due process. While a religious freedom argument has never been tried in an actual case to overturn a probation sentence restricting reproductive activity, at least one court has stated in dicta that such conditions might potentially be "incompatible with [probationers'] freedom of religion."[177] Additionally, other courts have stated that probationary conditions cannot impose religious faith, such as church attendance[178] or attendance at a religious group, such as Alcoholics Anonymous.[179] Several aspects of probationary conditions relating to reproduction may violate common religious beliefs: the Catholic Church bans the use of many contraceptive methods[180] and many interpreters of Jewish law believe that husbands are obligated to engage in sex on a regular basis with their wives.[181] A variety of religious denominations further restrict or ban abortion.[182] Several commentators have persuasively argued that requiring Norplant goes against the First Amendment by requiring probationers to consume contraceptives in violation of their sincerely held beliefs, although no court has ruled on this issue.[183]

There is also the issue that many of these sentences ban sexual activity

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175. For example, Georgia imposes a six-week abortion ban and nearly one-quarter of people do not realize they are pregnant until seven weeks or later. *Id.; see* Amy M. Branum & Katherine A. Ahrens, *Trends in Timing of Pregnancy Awareness Among US Women*, 21 MATERNAL CHILD HEALTH J.715 (2017), https://perma.cc/R7YY-5YNR.

176. 21.3% of women and 2.6% of men have been the victims of attempted or completed rape. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE 2-3 (2018).

177. Rodriguez v. State, 378 So. 2d 7, 9 (Fl. Dist. Ct. App. 1979) (quoting INST. OF JUD. ADMIN., STANDARDS RELATING TO PROBATION, § 3.2(b) (1970)).

178. *See, e.g.*, State v. Morgan, 459 So. 2d 6 (La. Ct. App. 1984); Commonwealth v. Kuhn, 475 A.2d 103, 108 (Pa. Super. Ct. 1984).

179. *See* Warner v. Orange Cty. Dep't of Probation, 115 F.3d 1068, 1077 n. 8 (2d Cir. 1996).

180. *What Does the Catholic Church Teach About Contraception?*, INST. OF CLINICAL BIOETHICS, https://perma.cc/5V8K-EUBD (last visited Feb. 28, 2024).

181. "The set interval defining the frequency of a husband's conjugal obligation to his wife stated in the Torah (see Exodus 21, 10), unless the couple stipulated otherwise, varies according to the man's occupation and proximity to his home: Men of leisure, who do not work, must engage in marital relations every day, laborers must do so twice a week, donkey drivers once a week, camel drivers once every thirty days, and sailors once every six months." Mishnah Ketubot 5:6.

182. *See, e.g.*, *Respect for Unborn Human Life: the Church's Constant Teaching*, U.S. CONF. OF CATH. BISHOPS, https://perma.cc/4AU8-68XU (last visited Feb. 28, 2024).

183. *See* Lipton & Campbell, *supra* note 4, at 279.

outside of marriage.[184] While states have a legitimate interest in regulating marriage,[185] it is questionable whether a state can coerce or ban marriage[186] or ban extramarital sexual conduct,[187] especially in light of societal changes such that today more than forty percent of children are born out of wedlock.[188] The additional constitutional concerns around marriage and equal treatment of married and unmarried couples is complex, but a ban on sexual activity outside of marriage is a potentially unconstitutional form of discrimination between married and unmarried couples.[189]

These conditions may also violate the Eighth Amendment's prohibition on cruel and unusual punishment.[190] As with First Amendment claims, these arguments have never been addressed by a court with relation to conditions limiting reproductive activity. However, the analysis of the Eighth Amendment in other contexts is instructive. An influential concurrence on the Supreme Court from Justice Brennan states, for example, that a punishment violates the Eighth Amendment if it is "degrading to human dignity . . . clearly and totally rejected throughout society. . .[or] patently unnecessary."[191] This is judged based on the "evolving standards of decency that mark the progress of a maturing society."[192]

While the Court has never addressed castration, two state supreme courts have ruled that castration violates state constitutional restrictions on cruel and unusual punishment,[193] and a federal district court has stated that judicial castration would make the probationer "handicapped with the consciousness that he . . . will carry . . . as punishment . . . a brand of infamy."[194] While the primary

184. *See supra* text surrounding notes 60-69.

185. *See* Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1 (2000).

186. In *Zablocki v. Redhail*, the Supreme Court overturned a Wisconsin law blocking marriage licenses to applicants who were behind on child support payments, saying that "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage . . . '." 434 U.S. 374, 385 (1978) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

187. *See* Rhode, *supra* note 111.

188. *Births to Unmarried Women*, CHILDSTATS, https://perma.cc/L7JD-LXLT (last visited Feb. 28, 2024).

189. While governments have the ability to promote and attach benefits to marriage, this has limits. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Curtis v. Kline, 666 A.2d 265 (Pa. 1995).

190. But arguing these conditions do not constitute cruel and unusual punishment, Betesh, *supra* note 4 at 484-490. This analysis focuses on the temporary aspect of the conditions and proportionality given the scope of the problem of non-payment of child support. It does not however reflect views on what constitutes cruel punishment in society nor the social stigma of such a condition.

191. Furman v. Georgia, 408 U.S. 238, 281 (1972) (Brennan, J., concurring). Note that the case itself was effectively overturned by *Gregg v. Georgia*, 428 U.S. 153 (1976), although the analysis still remains influential.

192. Trop v. Dulles, 356 U.S. 86, 101 (1958).

193. Indiana and South Carolina. *See* Williams v. Smith, 131 N.E. 2 (Ind. 1921); State v. Brown, 326 S.E.2d 410 (S.C. 1985).

194. Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918).

consequences of court-ordered abstinence are not a physical brand, "[i]f a punishment offends fundamental notions of human dignity, it may be classified as cruel and unusual even when its primary or only effect is psychological."[195] As a district court stated in relation to castration, "the humiliation, the degradation, the mental suffering are always present."[196] While the humiliation is likely to be less than with castration, prohibitions against participating in normal non-criminal aspects of human life—sex, romance and procreation—seem degrading, unnecessary[197] and against the standards of international human rights law[198] and domestic beliefs about the inherent right to parenthood.[199]

Finally, many of these probationary conditions seem to violate Fifth and Fourteenth Amendment guarantees of due process and equal protection under the law. These conditions are likely applied to Black individuals at a rate much higher than the general public.[200] As mentioned in Sections II and III, there are strong linkages between this practice and the history of negative eugenics and racially motivated sterilization in the United States. Comments made by judges in the sentencing process seem to rely on enduring stereotypes casting Black individuals as reproductively irresponsible.[201] Some judges even explicitly justified the sentences as having the purpose of "prevent[ing] the [probationer] from producing offspring who might become public charges"[202] or who might "wind up in crime."[203] These are clearly racist dog whistles that invoke the image of the irresponsible Black woman and her criminal children. Reporting on several of these cases has echoed these images, describing a Black man in one of these cases as an "infamous baby machine" guilty of "excessive breeding."[204] There exists the possibility that these punishments in some of these cases are impermissibly and purposefully racially motivated.[205] Thus, these conditions violate

195. Lipton & Campbell, *supra* note 44, at 286.

196. Davis v. Berry, 216 F. 413, 416 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917).

197. *See supra* text accompanying note 151.

198. While not enforceable in a domestic context, the United Nations Declaration of Human Rights states: "[people] of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." G.A. RES. 217, 16 (Dec. 10, 1948).

199. For example, the influential framework of reproductive justice views the right to have a child and the right to parent a child as fundamental rights. *See* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE 9 (2017).

200. *See supra* text accompanying note 23.

201. *See supra* Section II.B; Linda C. McClain, *"Irresponsible" Reproduction*, 47 U.C. L. J. 339, 379 (1996), https://perma.cc/J754-CEKR.

202. People v. Dominguez, 256 Cal. App. 2d 623, 628 (1967).

203. United States v. Smith, 972 F.2d 960, 961 (8th Cir. 1992).

204. DAILY MAIL, *supra* note 36.

205. Note, for example, that the *Smith* court specifically mentioned the problem of poverty rates among Black children and particularly Black children in single-parent households, before ultimately concluding that such conditions were impermissible. *Smith*, 972 F.2d at 962. The unnecessary emphasis on the race of the children in the decision suggests improper racial motivation for the trial court's decision, especially when viewed in light of the judge's aforementioned comments.

not only state law, but can also infringe on rights afforded to all Americans by the First, Fifth, Eighth and Fourteenth Amendments.

D. Improper Objectives

Finally, these restrictions are not only likely illegal, but also constitute an improper and counterproductive objective beyond the scope of the criminal justice system. The goal of a judge in determining conditions of probation is to provide deterrence, punishment and rehabilitation[206] and not to impose their own personal values on the probationer. However, it often seems like these sentences are intended not in response to the crimes committed, but rather as punishment for reproductive "irresponsibility." For example, the judge in *Zaring* told the probationer a restriction on her pregnancy was imposed because "you've got five children. You're thirty years old. None of your children are in your custody or control."[207] This was not related in any way to her crime (possession of heroin)[208] or any future criminal conduct but seemed designed to punish Zaring for her reproductive choices. As the appeals court correctly noted, "the morality of having children while on public assistance . . . [is a matter] properly left to the wisdom and judgment of the legislature elected by the people, and not to the morality of individual judges," striking down the sentence as being an imposition of personal values.[209] Similar comments from judges remarking on the number of children[210] or sexual encounters[211] of the probationer suggest many of these conditions were imposed because the probationers did not live their reproductive lives in accordance with the ideal of a monogamous nuclear family. In several cases, it appears that the judge-imposed conditions solely because the probationer and their children were poor, serving as a judicial prohibition on reproduction for poor individuals and conditioning the fundamental right to procreation on a "sliding scale of wealth."[212] If the goal were truly prevention of child poverty rather than punishment, these conditions would not make sense, particularly for probationers who already have children. After all, "[i]f [the probationer] were to violate this condition . . . [they] may well be returned to prison, leaving [the]m no way to provide for [their] dependents. This certainly would not serve the . . . goal of 'adequately support[ing] and sustain[ing]'" children.[213] Thus, these conditions seem to be predicated more on improper state objectives and the personal beliefs of judges rather than legitimate penological goals and the challenged conditions

206. *See Probation in California*, *supra* note 10.

207. People v. Zaring, 8 Cal. App. 4th 362, 368 (1992).

208. *Id.* at 364-65.

209. *Id.* at 374.

210. *See* State v. Oakley, 629 N.W.2d 200, 206 (Wis. 2001).

211. *See* Blitzer, *supra* note 80, on how the judge commented he had "never seen that level of sexual activity" in a defendant.

212. *Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting). *See supra* text accompanying notes 78-79.

213. United States v. Smith, 972 F.2d 960, 962 (1992).

constitute "pervasive judicial abuse of the power of sentencing."[214]

CONCLUSION

Conditions restricting pregnancy or sexual activity violate the fundamental right to procreate and the right to sexual activity between consenting adults. These limitations are wrong, morally and legally. They are morally wrong because the state should not be able to stop individuals from exercising their right to procreate. These conditions are a continuation of the history of negative class and race-based eugenics in the United States. They are often imposed based on judges' personal values and beliefs about what probationers' reproductive lives should look like and not in relation to the crime in question. Legally, they are also wrong. They are overbroad and are a gross violation of the right to privacy. In every examined case, these conditions appear to violate state or federal law on the acceptability of probationary conditions. In certain cases, they also infringe upon constitutional rights to equal protection and religious freedom and from cruel and unusual punishment. These conditions, like others restricting reproductive rights, do not comply with the Constitution and are not acceptable. Like other forms of wanton cruelty, they "belong[] to the Dark Ages"[215] and should be relegated to the history books.

214. Horwitz, *supra* note 14, at 162.

215. Davis v. Berry, 216 F. 413, 416 (1914), *rev'd on other grounds*, 242 U.S. 468 (1917).

APPENDIX I—TABLE WITH CASE INFORMATION

Name of Case	Year	State/Legal System	Crime	Condition Imposed	Ultimate Disposition	Reason for Reversal	Sex
People v. Dominguez, 256 Cal. App. 2d 623 (Cal. Ct. App. 1967)	1967	California	Second-degree robbery	No pregnancy outside marriage	Reversed	*Dominguez* and improper motive	F
State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976)	1976	Ohio	Cruel abuse of a child resulting in serious physical harm	No children	Reversed	*Dominguez/Lent*, improper motive and cruel on an already pregnant woman	F
Rodriguez v. State, 378 So. 2d 7 (Fl. Dist. Ct. App. 1979)	1979	Florida	Aggravated child abuse	No pregnancy and no marriage without permission with no marriage to anyone with minor children	Reversed	*Dominguez/Lent*	F
Wiggins v. State, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980)	1980	Florida	Forgery; uttering a forged instrument; burglary of a structure	No children outside marriage	Reversed	*Dominguez/Lent*	2 F, 1 M
Burchell v. State, 419 So. 2d 358 (Fla. Dist. Ct. App. 1982)	1982	Florida	Unknown	Not fathering any child	Reversed	*Dominguez/Lent*	M
Howland v. State, 420 So. 2d 918 (Fl. Dist. Ct. App. 1982)	1982	Florida	Negligent child abuse	Not fathering any child	Reversed	*Dominguez/Lent*	M
People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984)	1984	California	Child endangerment; violation of a custody decree	No pregnancy	Reversed	Overbroad and coercive of abortion	F

State v. Norman, 484 So. 2d 952 (La. Ct. App. 1986)	1986	Louisiana	Forgery	No children outside marriage	Reversed	*Dominguez/Lent*	F
Thomas v. State, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988)	1988	Florida	Grand theft; battery	No pregnancy outside marriage	Reversed	*Dominguez/Lent*	F
State v. Mosburg, 768 P.2d 313 (Kan. Ct. App. 1989)	1989	Kansas	Endangering a child	No pregnancy	Reversed	Right to privacy, coercive of abortion, unworkable in practice	F
People v. Zaring, 8 Cal. App. 4th 362 (Cal. Ct. App. 1992)	1992	California	Possession of heroin; unlawfully using and being under the influence of heroin	No pregnancy	Reversed	*Dominguez/Lent*, overbroad, inappropriate factors considered in sentencing	F
United States v. Smith, 972 F.2d 960 (8th Cir. 1992)	1992	Federal Court	Attempted possession of heroin with intent to distribute	No pregnancy outside marriage unless Smith supported his other three children	Reversed	Overbroad and unworkable	M
People v. Ferrell, 659 N.E.2d (Ill. App. Ct. 1995)	1995	Illinois	Disorderly conduct; possession of drug paraphernalia	No activity that might reasonably result in pregnancy	Reversed	Statutory	F
Krebs v. Schwarz, 568 N.W.2d 26 (Wis. Ct. App. 1997)	1997	Wisconsin	First-degree sexual assault of a child	Approval from probationary agent prior to any intimate contact	Allowed	-	M

State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998)	1998	Oregon	Criminal mistreatment in the first degree	No fathering a child until completion of an anger management program and drug treatment program	Allowed	-	M
Trammel v. State, 751 N.E.2d 283 (Ind. Ct. App. 2001)	2001	Indiana	Neglect of a dependent	No pregnancy	Reversed	No rehabilitative purpose; right to privacy	F
State v. Oakley, 629 N.W.2d 200 (Wis. 2001)	2001	Wisconsin	Intentional refusal to pay child support	No children until financial support is paid for existing children	Allowed	-	M
Commonwealth v. Crawford[216]	2002	Kentucky	Failure to pay child support	No sexual activity	No appeal	-	M
State v. Talty, 814 N.E.2d 1201 (Ohio 2004)	2004	Ohio	Failure to pay child support	All reasonable efforts must be made to avoid conceiving another child	Reversed	Lack of a mechanism for lifting the condition	M
State v. Curtis, No. 2011RA003654, WL 2011CF00686, at *1 (Wis. Cir. Ct. Racine, June 2, 2011)[217]	2011	Wisconsin	Failure to support a child; bail jumping	No procreation without showing of financial support of existing child	No appeal	-	M

216. No case record is available. *See* DAILY MAIL, *supra* note 36.

217. *See supra* note 36.

State v. Taylor, No. 13CA010366, 2014 WL 1896480 (Ohio Ct. App. May 12, 2014)	2014	Ohio	Failure to pay child support	Make all reasonable efforts to avoid impregnating a woman until financial support of existing children	Allowed	-	M
State v. Fatland, 882 N.W.2d 123 (Iowa Ct. App. 2016)	2016	Iowa	Child endangerment resulting in bodily injury	No pregnancy	Reversed	Fundamental right to procreation	F
State v. Herrera, No. 44913, 2017 WL 5896420, at *1 (Idaho Ct. App. Nov. 30, 2017)	2017	Idaho	Statutory rape	No sexual activity outside marriage	Not appealed	-	M
State v. Chapman, 170 N.E.3d 6, 9 (Ohio 2020)	2020	Ohio	Failure to pay child support	All reasonable efforts must be made to avoid impregnating a woman	Reversed	Unrelated to crime or rehabilitation	M