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ALTERNATIVE SENTENCING OR REPRODUCTION CONTROL: SHOULD CALIFORNIA COURTS USE NORPLANT TO PROTECT FUTURE CHILDREN FROM CHILD ABUSE AND FETAL ABUSE?

I. INTRODUCTION

Allowing a trial court to order a defendant not to become pregnant as a condition of probation has never survived appellate scrutiny. Appellate courts have always reversed probation conditions requiring the defendant not to have children until she married or completed probation. Probation orders requiring sterilization have also been declared invalid. In 1991, a judge in Tulare County, California, challenged this precedent by ordering Darlene Johnson to have a new birth-control device, Norplant, inserted in her arm as a
condition of probation for a child abuse conviction.6

The first use of Norplant as a probation condition7 received nationwide attention.8 The Johnson case generated debate in the legal community,9 the medical community,10 and the public at large.11 The California Court of Appeal was going to review the validity of the “Norplant condition”; however, the case was involuntarily dismissed because Johnson violated another condition of her probation that made the Norplant condition moot.12 Since the legality of the Norplant condition was never decided in the Johnson case, the possibility exists that another court might order Norplant (or some other similar type of birth control) as an alternative sentence for a woman convicted of either child or fetal abuse.

The State’s interest in protecting children from the harms of...
fetal abuse and the foster care system is attracting support for court-ordered birth control. However, the Norplant condition raises several constitutional concerns. The use of this type of coercive reproductive control restricts several constitutional rights and may violate the defendant's right to due process. The Norplant condition may also be a form of cruel and unusual punishment—due to its similarity to involuntary sterilization—and its use may violate the right to equal protection. Any use of the Norplant condition by trial courts must be given a thorough analysis to avoid a repetition of the eugenics movement or any resemblance to the fictional Republic of Gilead described in The Handmaid's Tale.

This comment examines the validity of reproduction control as a condition of probation. The background addresses the factual, legal, and policy concerns raised by the Norplant condition. First, the medical history of the Norplant device is described. Second, the cases dealing with the validity of probation conditions forbidding pregnancy introduce the statutory and constitutional due process requirements of a probation condition in California. Third, developments in fetal rights cases and problems with the foster care system show potential compelling interests that may satisfy the due process requirements of probation. Finally, cruel and unusual punishment and equal protection challenges that apply to the Norplant condition are discussed.

13. See discussion infra part II.C.
14. 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, 272-83 (1989) (constitutional right of privacy for contraception, procreation, parenting, and free exercise of religion); see also Appellant's Opening Brief at 42, Johnson (No. F015316) (arguing that the Norplant condition burdens procreative choice and the right to bodily integrity).
15. See discussion infra part II.D.
16. Appellant's Opening Brief at 60-61, Johnson (No. F015316); see infra note 157 and accompanying text; see also Lipton & Campbell, supra note 14, at 289-93 (discussing involuntary sterilization).
17. MARGARET ATWOOD, THE HANDMAID'S TALE (1986); Gardner, supra note 4, at 15 (comparing the dangers of ordering Norplant as a condition of probation to the situation experienced by the main character in The Handmaid's Tale, where reproduction is completely state-controlled).
18. See discussion infra part II.A.
19. See discussion infra part II.B.
The analysis examines the legality of the Norplant condition by looking at hypothetical defendants who have been convicted of child neglect,\(^23\) cruelty to a child,\(^24\) or felony corporal punishment.\(^25\) This section considers whether the Norplant condition is cruel and unusual punishment, violates the statutory and constitutional due process requirements of probation, and violates equal protection.

After determining the likely outcome of constitutional objections to the Norplant condition, this comment proposes methods to eliminate the coercive use of Norplant by trial courts. This goal is achievable by improving the methods used by judges to sentence women in child-abuse cases and limiting trial court discretion to create conditions of probation. Birth control methods such as Norplant should either be proposed by the defendant for sentence mitigation or ordered by a hearing officer after procedures similar to involuntary sterilization proceedings.\(^26\)

\(^{23}\) California Penal Code § 270 states:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.


\(^{24}\) California Penal Code § 273a states:

(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years.

(2) Any person, who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.


\(^{25}\) California Penal Code § 273d states:

Any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 4, or 6 years, or in the county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both.


II. BACKGROUND

A. Introduction to the Norplant System

The medical community considers the Norplant System (levo-
norgestrel implants) a revolution in birth control.\textsuperscript{27} The implants work automatically without the need for taking a pill or inserting a diaphragm.\textsuperscript{28} Studies show Norplant has more than 99 percent efficacy for five years. While Norplant’s minute failure rate compares to sterilization, Norplant is reversible when removed.\textsuperscript{29}

Norplant does not have the side effects associated with oral contraceptives containing estrogen.\textsuperscript{30} However, the prescribing information contains a list of both minor and serious adverse reactions that may occur.\textsuperscript{31} The manufacturer recommends a complete medical history and physical examination before insertion and annual follow-up examinations.\textsuperscript{32} The device is contraindicated for women with a medical history of liver disease, heart disease, blood clots, high blood pressure, diabetes, breast cancer, or mental depression.\textsuperscript{33} Women are also advised not to smoke while using Norplant.\textsuperscript{34}

Norplant takes about ten to fifteen minutes to insert and twenty minutes to an hour to remove.\textsuperscript{35} Under a local anesthetic, a two-millimeter incision is made in the inside of the upper arm in order to

\textsuperscript{28} Id.; \textit{Wyeth-Ayerst Laboratories}, supra note 5.
\textsuperscript{29} Id.; \textit{Wyeth-Ayerst Laboratories}, supra note 5. Studies show a Norplant failure rate of .2% and a sterilization failure rate of .2 to .4% during the first year. The manufacturer advertised that over 500,000 women in seventeen countries have used the device with a continuation rate of 81% after one year. Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.; $500 Implant Considered Reliable Contraceptive, supra note 27.
insert six thin silicone rubber tubes in a fanlike arrangement. The tubes contain a birth control hormone, levonorgestrel, which is released into the bloodstream in a steady, low dose that becomes effective approximately twenty-four hours after insertion.

There are several health-related factors that must be considered before a woman and her doctor choose Norplant as a suitable birth-control method. The judge in the Johnson case, however, only displayed a cursory knowledge of Norplant during the sentencing phase. He did not consider whether Johnson had any contraindications or objections to the possible side effects and health risks of Norplant. The manner in which Johnson received the Norplant condition provides legitimate reasons to void her consent. However, this comment focuses on the legal issues other than lack of informed consent that are triggered when a judge orders birth control as a condition of probation: due process, equal protection, and cruel and unusual punishment. The next section introduces the judicial history of probation conditions prohibiting pregnancy. These cases provide the necessary background for a due process analysis of the Norplant condition.

B. Judicial History of Conditions of Probation that Prohibit Pregnancy

Due process requires that conditions of probation restricting activity that is not criminal and that is constitutionally protected meet both statutory and constitutional requirements. California Penal Code section 1203.1 requires that probation conditions be reasonable. The constitutional test requires a higher level of scrutiny:

36. Wyeth-Ayerst Laboratories, supra note 5.
37. Id.
39. Id.
40. Id. at 18-19.
41. "The discretion granted is not boundless. In the first place, the authority is wholly statutory; the statute furnishes and limits the measure of authority which the court may thus exercise." People v. Keller, 143 Cal. Rptr. 184, 187 (Ct. App. 1978).
42. Id.
43. Cal. Penal Code § 1203.1 (Deering Supp. 1993). The statute provides in part: The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . .
Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent that 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 constitutional rights.\textsuperscript{44}

Federal case law follows the same approach\textsuperscript{45} and has been used by California appellate courts as a guide in their analysis.\textsuperscript{46}

1. **Judicial Approach to Conditions Prohibiting Pregnancy for Crimes Unrelated to Children**

*People v. Dominguez*\textsuperscript{47} established the standard judicial test for determining if a condition was "reasonable" under Penal Code section 1203.1.\textsuperscript{48} The court held that under the statute a condition of probation is invalid if it "(1) has no relationship to the crime for 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."\textsuperscript{49} The test ensures that conditions of probation do not exceed the statutory limits set on trial court discretion.\textsuperscript{50}

In *Dominguez*, upon finding the twenty-year-old defendant guilty of second-degree robbery, the trial court ordered the defendant not to become pregnant until she was married.\textsuperscript{51} She was already pregnant, had two other children supported by public assistance, and

\textsuperscript{44} People v. Mason, 488 P.2d 630, 635 (Cal. 1971); People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984); *In re White*, 158 Cal. Rptr. 562, 565-66 (Ct. App. 1979); People v. Keller, 143 Cal. Rptr. 184, 189 (Ct. App. 1978).

\textsuperscript{45} "Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety." United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975); see also *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980) (invalidating condition of probation as not reasonably related to rehabilitation or public safety).

\textsuperscript{46} E.g., *Keller*, 143 Cal. Rptr. at 187, 191-92.

\textsuperscript{47} People v. Dominguez, 64 Cal. Rptr. 290 (Ct. App. 1967).

\textsuperscript{48} Id. at 293; *Keller*, 143 Cal. Rptr. at 188.

\textsuperscript{49} *Dominguez*, 64 Cal. Rptr. at 293; see also People v. Lent, 541 P.2d 545, 548 (Cal. 1975) (stating the following in adopting the *Dominguez* test: "Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.").

\textsuperscript{50} *Dominguez*, 64 Cal. Rptr. at 293; see also People v. Richards, 552 P.2d 97, 100-03 (Cal. 1976) (interpreting the "broad discretion" granted trial courts under California Penal Code § 1203.1 in determining the validity of a probation order for restitution).

\textsuperscript{51} *Dominguez*, 64 Cal. Rptr. at 291-92.
had never been married. The defendant violated her probation by becoming pregnant with her fourth illegitimate child, and she claimed her pregnancy resulted from a failure of birth-control medication.

The appellate court found the defendant's prospective pregnancy had no reasonable relationship to either her robbery conviction or possible future criminality. The court also decided that the public interest in reducing the number of illegitimate children requiring welfare was an inappropriate motivation for conditions of probation designed to reform and rehabilitate offenders. The court invalidated the probation revocation and struck the condition forbidding pregnancy.

Two recent cases from jurisdictions outside of California also invalidated conditions forbidding the birth of illegitimate children for crimes not related to the care of children. In State v. Norman, the defendant, who had been convicted of forgery, challenged the condition requiring her not to give birth out of wedlock as a violation of her privacy. Applying the "reasonable relationship test," the Louisiana appellate court struck the condition because no facts in the record showed that the crime related to the responsibilities of caring for the defendant's children. In Thomas v. State, a Florida appellate court also applied the same type of three-prong test. The court held that the order not to become pregnant during probation unless married was "grossly erroneous on its face" as applied to a defendant who had committed grand theft and battery.

Dominguez and the subsequent cases support the conclusion

52. Id. at 292.
53. Id. at 293.
54. Id. The court also doubted the authority of the "most extreme" example of an unusual condition of probation which required the defendant who had syphilis and had been convicted of rape to be sterilized. Id. (citing People v. Blankenship, 61 P.2d 352 (Cal. Ct. App. 1936)).
55. Id. at 294.
56. Id.
58. Norman, 484 So. 2d at 953.
59. Id. The court used the same three part test as Dominguez. The defendant was the same age and already had two illegitimate children. Id.
60. Id.
62. Id. at 1114. The court found the condition "(1) bearing no relationship to the offense for which Thomas was convicted; (2) relating to conduct which is not in itself criminal; and (3) requiring or forbidding conduct which is not reasonably related to future criminality." Id.
that probation conditions restricting pregnancy for crimes having no direct relationship to children do not satisfy the due process requirements of probation. These cases also indicate that judicial concern about the burdens on the State from illegitimate children is not a sufficient reason to control procreation.

2. Judicial Approach to Conditions Prohibiting Pregnancy for Crimes Related to Children

The first case to examine the constitutional merits of a probation condition not to become pregnant was State v. Livingston. The defendant in the case was an unmarried twenty-year-old woman who had burned her seven-month-old infant by placing the child on a space heater. She pled guilty to the crime of cruel abuse of a child resulting in serious physical harm. The trial court ordered her, as a condition of her probation, not to have a child for five years.

The defendant claimed that the condition prohibiting the woman to become pregnant violated the probation statute and her constitutional right of privacy. The court decided that both objections had merit. It held "the trial court is not free to impose arbitrary conditions that significantly burden the defendant in the exercise of her liberty." Further, the condition had only a "remote relationship" to child abuse and "the objectives sought by probation of education and rehabilitation." The court also found the restriction an unreasonable burden on a woman who was pregnant at sentencing.

The second case to deal with a probation condition prohibiting pregnancy was Rodriguez v. State. The defendant was charged with aggravated child abuse for hitting her nine-year-old child in the face and against a car. The defendant suffered from "psychological and alcohol-induced problems." The trial court placed four special

64. Id. at 1336. The court also noted the defendant had an IQ significantly below 100.
65. Id.
66. Id.
67. Id.
68. Id. at 1337.
69. Id. The court also relied on Dominguez as authority for finding the condition unreasonable. Id.
70. Id.
72. Id. at 8.
73. Id.
conditions on a ten-year probation order: (1) no possession or consumption of alcoholic beverages, (2) no custody of any children, (3) not to become pregnant, and (4) not to marry without the court’s consent. The defendant challenged the last three conditions as “overly restrictive, overbroad and in violation of her fundamental constitutional rights” to “procreation, marriage, and custody of her children.”

The defendant argued that the State failed to show a compelling state interest as set forth in Roe v. Wade, 410 U.S. 113 (1973). The court also held that the relationship to future criminality was unreasonable because custody of minor children was already prohibited.

A subsequent Florida case involving negligent child abuse dealt with a condition prohibiting a man from fathering children. Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982). The court followed Rodriguez and upheld the conditions prohibiting the defendant from having any contact with his child and from residing with any minor child under sixteen years of age. Id. However, the condition prohibiting the defendant from fathering a child was held invalid because the court found it did not reasonably relate to child abuse, that it concerned noncriminal conduct, and that the relationship to future criminality was prevented by
The only California case invalidating a probation condition prohibiting pregnancy for a crime of child abuse is *People v. Pointer*. Ruby Pointer was convicted of felony child endangerment for almost causing the death of her infant child from malnutrition. She was breast-feeding him while on an extreme macrobiotic diet and refused to give him medical attention. Pointer also violated a custody decree by abducting the child from a foster home.

The trial court sentenced Pointer to five years of probation, including a year in the county jail, and imposed conditions such as a counseling program and no unsupervised visits with her youngest child. The court also ordered that she not have custody of any children without prior court approval and that she bear no children during the period of probation. Pointer challenged the order not to have children as a violation of her constitutional rights of privacy and to procreate.

The *Pointer* appellate court noted that the trial court appreciated the "extraordinary nature" of the challenged condition. A probation report showed that Pointer was unwilling to alter her conduct, predicting that imprisonment would not increase her sense of responsibility, although it would prevent Pointer from harming another small child in the future. A psychological exam revealed that Pointer would most likely endanger future children with the same conduct. The psychologist also felt that Pointer would not comply with an order for any type of birth-control medication, so the condition would most likely be violated.

The court first examined the "reasonableness" of the condition under the *Dominguez* test. The court decided that the condition

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84. *Id.* at 359. The child was saved when a doctor had police intervene and rush him to a hospital for emergency procedures. *Id.; see Cal. Penal Code § 273a* (Deering 1993) (felony child endangerment statute).
85. *Pointer*, 199 Cal. Rptr. at 359. Pointer's diet and maternal neglect made her older child underdeveloped and her youngest child severely damaged with growth retardation and permanent neurological injury. *Id.* at 360.
86. *Id.* at 359; *see also Cal. Penal Code § 278.5* (Deering 1993) (felony statute prescribing detention or concealment of child from a person with legal custody).
88. *Id.*
89. *Id.*
90. *Id.* at 362.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 363-64; *see also supra* notes 47-50 and accompanying text.
was reasonably related to child endangerment because Pointer’s dietary practices made the “harm sought to be prevented” to any future children possible before their birth.\footnote{95} The court distinguished cases from other jurisdictions that found conditions prohibiting pregnancy unreasonable in that those cases only involved the possibility of harming children that were already born and could be handled with a condition prohibiting custody of children.\footnote{96}

Even though the court found the condition reasonable under the statute, it still had to determine whether the condition violated the defendant’s fundamental right of privacy protected by the California and Federal Constitutions.\footnote{97} To survive constitutional scrutiny, the challenged condition “must be narrowly drawn” and not have “available alternative means . . . which are less violative of a constitutional right.”\footnote{98}

The court held that the condition was overbroad because periodic pregnancy testing and prenatal and neonatal treatment programs were less restrictive alternatives to prevent injury to an unborn child.\footnote{99} The court also found the condition “troublesome” because the possibility of violating the condition and going to prison would encourage aborting or hiding a pregnancy.\footnote{100}

The most recent appellate case attacking a condition prohibiting pregnancy for a crime involving some form of child abuse is \textit{State v. Mosburg},\footnote{101} which concerns a condition not to become pregnant during a two-year term of parole. In that case, the forty-year-old de-
fendant abandoned her newborn infant in a truck.102 She already had three children and was involved in a divorce.103 The court applied the same law that controls probation conditions for this type of parole condition.104 Examining cases from other jurisdictions,108 the court held that the probation condition was an invalid intrusion on the right to privacy.108 The court noted that a pregnancy created difficult enforcement problems because the defendant could choose only among concealment, abortion, or imprisonment.107 The court also observed that the State lacked the power to penalize someone if contraception failed.108

While these cases are persuasive authority that conditions forbidding pregnancy never satisfy constitutional scrutiny in child-abuse cases, they do not expressly address a direct order to take birth control. The only case to present this type of order never reached appellate review.109 In State v. Forster, the trial court ordered the minor defendant, guilty of two counts of attempted child abuse, to take birth control for the rest of her life. The trial court rescinded the condition after the defendant became pregnant.110 Commentators who have analyzed the case concluded that the birth-control order violated substantive due process because there were less restrictive alternatives available, such as removal of custody, counseling services, and parenting classes.111 All of these alternatives were imposed on Darlene Johnson, yet the trial court still found it necessary to impose the Norplant condition.112

The Norplant condition restricts procreation more severely than a judicial order against getting pregnant and imposes an invasive medical procedure that interferes with the right to bodily integrity.113

102. Id. at 313-14.
103. Id. at 313.
104. Id. at 314.
106. Id. at 315. The court recognized that the federal right to privacy includes choices concerning conception. Id. at 314 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).
107. Id. at 315.
108. Id.
110. Id. at 297-98.
111. Id. at 285.
113. The right to bodily integrity has been developed under a line of cases concerning
However, it also eliminates concerns expressed by the Pointer and Mosburg courts about penalizing the defendant if pregnancy results.\textsuperscript{114} Whether a defendant can successfully void the Norplant condition on due process grounds is discussed in the analysis.\textsuperscript{115} The following section examines the state interests that might validate a Norplant Condition.

C. Development of State Interests that May Support the Norplant Condition

Any restrictions on the exercise of constitutional rights in conditions of probation must "serve the dual objectives of rehabilitation and public safety."\textsuperscript{116} The trial court in Johnson decided that the Norplant condition served both of these purposes: "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."\textsuperscript{117} The court wanted Johnson to complete counseling and parenting classes before having a sixth child in order to increase the likelihood of rehabilitation and to decrease the likelihood of future child abuse.\textsuperscript{118} In the Forster case discussed above, commentators concluded that the State lacked sufficient interest in unconceived children and that the court could impose less restrictive probation conditions than birth control, such as removal of custody and parenting classes.\textsuperscript{119} However, their conclusion that a probation condition cannot prohibit the right to refuse medical treatment. \textit{Id.} at 36-37, 39-40 (citing Cruzan v. Director, Mo. Dept. of Health, 110 S. Ct. 2841, 2846 (1990); Washington v. Harper, 494 U.S. 210, 229 (1990); People v. Adams, 265 Cal. Rptr. 568, 572 (Ct. App. 1990); Conservatorship of Drabick, 245 Cal. Rptr. 840, 854-55 (Ct. App. 1988); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (Ct. App. 1986); Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Ct. App. 1984)); see also Lipton & Campbell, supra note 14, at 276 ("Every method of birth control . . . necessitates some form of bodily intrusion.").

114. \textit{See supra} text accompanying notes 29, 100, 107-08.
115. \textit{See infra} part IV.B.
118. \textit{Id.} The State provided authority to show that the birth of another child would increase the risk of the defendant abusing her children. The risk factors for child abuse and neglect included: "(1) environmental stresses causes by financial problems, unemployment, marital difficulties, physical illness, untimely child bearing, or other problems; (2) social isolation, particularly lack of a network of supportive relationships; and (3) poor parenting skills." \textit{Id.} at 9.
119. \textit{See supra} notes 109-11 and accompanying text.
pregnancy is weakened by recent developments in the field of fetal rights and the foster care system.\textsuperscript{120}

1. The Impact of Fetal Rights on a Condition Prohibiting Pregnancy

The State, whether in the context of probation or not, clearly has an interest in the health and safety of living children. Child-abuse prosecutions and dependent-child petitions provide the means for states to limit or sever parental rights in order to protect children.\textsuperscript{121} The "\textit{parens patriae} power" even obligates the states to intervene in nontreatment decisions of handicapped infants that do not meet the standard of "'best interests' of the child."\textsuperscript{122}

The State also has an interest in fetal development. At common law, fetal rights depended on live birth.\textsuperscript{123} With the ability of modern technology to treat the fetus independently of the mother, modern law has started protecting the fetus before birth and balancing the state concern for a healthy fetus with the privacy rights of the mother.\textsuperscript{124} When protecting the state interest in fetal rights, the State restricts maternal "rights of privacy, autonomy, and bodily integrity."\textsuperscript{125}

The main battleground between fetal rights and maternal rights is the right to abortion. Until the passage of \textit{Roe v. Wade,}\textsuperscript{126} states

\begin{itemize}
\item \textsuperscript{120} See infra text accompanying notes 121-45.
\item \textsuperscript{121} See CAL. PENAL CODE §§ 270, 273a, 273d (Deering 1985 and Supp. 1993); CAL. WELF. & INST. CODE § 300 (Deering Supp. 1993).
\item \textsuperscript{122} SHERMAN ELIAS & GEORGE ANNAS, REPRODUCTIVE GENETICS & THE LAW 169 (1987). Federal regulations require individual states to establish special procedures for neonatal care of handicapped newborns as a condition of federal funding for child-abuse programs. The impetus for federal involvement was a court decision allowing parents to withhold lifesaving surgery from a newborn with Down's syndrome. However, protection of children from child abuse and neglect still remains a "state and local responsibility." \textit{Id.} at 177-78, 181.
\item \textsuperscript{124} \textit{Id.} at 1556 (noting changes in the law due to the ability to diagnose and treat the fetus and knowledge of the detrimental effects of maternal conduct on fetal health). There is a trend among doctors to treat the fetus as a "second patient with many rights and privileges comparable to those previously achieved only after birth." Krauss, supra note 20, at 529 & n.39 (quoting JOHN WHITRIDGE WILLIAMS, WILLIAMS OBSTETRICS at xi, 867-71 (1985)).
\item \textsuperscript{125} \textit{Developments in the Law—Medical Technology and the Law, supra} note 123, at 1556; see ELIAS & ANNAS, supra note 122, at 253-54; Krauss, \textit{supra} note 20, at 523-25 (analyzing disproportionate effects on women of color from fetal rights measures in prosecution of pregnant women using illegal drugs and court-ordered Caesarean sections); cf. MacKinnon, \textit{supra} note 20, at 1300-01, 1307 (suggesting that fetal rights and other means of limiting a woman's procreation rights are based on men's desire to control women through their children).
\item \textsuperscript{126} \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\end{itemize}
were allowed to criminalize abortion. While the federal right of privacy presently permits a woman to terminate a pregnancy, it is not an absolute right. The right to an abortion can be restricted by the State when "important and legitimate" state interests in maternal health and "protecting the potentiality of human life" become compelling. The plurality opinion and the concurring opinion by Justice Scalia in Webster v. Reproductive Health Services indicate that the present Court is less protective of the right to abortion and may overturn Roe, giving the states greater power to regulate abortion for protection of the fetus.

Unlike the Federal Constitution, the California Constitution makes privacy an express inalienable right. The California Supreme Court has interpreted the state right to privacy to encompass procreative choice and to give broader protection than the federal right to privacy. If Roe is overturned, federal privacy law will probably permit greater restrictions on maternal rights during pregnancy. In California, however, the state law will probably remain unchanged, affording abortion rights more protection than under

127. ELIAS & ANNAS, supra note 122, at 147.
128. Roe, 410 U.S. at 164-65 (establishing regulation for maternal health after the first trimester and regulation to protect the fetus after viability). The Court's opinion undermines fetal rights theories by recognizing that "the unborn have never been recognized in the law as persons in the whole sense." Id. at 162.
131. Id. at 537-38 (1989) (Blackmun, J., concurring in part and dissenting in part) ("[T]he plurality and Justice Scalia would overrule Roe... and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decisions whether to carry a fetus to term."). The main arguments for overruling Roe include the belief that abortion should not be covered by the fundamental right to privacy, viability is too arbitrary a line, and the life of the fetus should have the same protection as that of the mother throughout pregnancy. ELIAS & ANNAS, supra note 122, at 148, 157-60.
132. CAL. CONST. art. I, § 1. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Id. (emphasis added).
133. Compare Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (holding that Medi-Cal funding for elective abortion for indigent women cannot be withdrawn under California constitutional test for denial of a fundamental right) with Harris v. McRae, 448 U.S. 917 (1980) (holding that federal funding for abortion can be denied because not seen as an obstacle to abortion).
federal law.

Fetal rights are also used as a justification to restrict maternal rights after a woman decides to carry the child to term. Courts have permitted doctors to compel women to have blood transfusions and Cesarean sections against their will. Women have been incarcerated or committed to institutions for the duration of their pregnancies when their drug use or other behavior may harm the fetus.

Other efforts to control a woman's behavior during pregnancy include criminalizing fetal abuse and promulgating fetal protection policies, which prevent women from working in jobs with possible hazards to a fetus. Some states, through legislative or judicial action, have changed their child abuse and drug distribution statutes to cover fetal abuse. While not as extensive as some states, California law contains some provisions that penalize fetal abuse by the mother.

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134. Developments in the Law—Medical Technology and the Law, supra note 123, at 1565. The court decisions in this area reflect that the judiciary favors fetal rights while the commentators favor maternal rights. Id.

135. MacKinnon, supra note 20, at 1301 n.95; Developments in the Law—Medical Technology and the Law, supra note 123, at 1566-72. A national survey showed that 13 out of 15 orders for Caesareans in 11 states had been granted. Id. at 1567. One commentator believes these decisions have little authoritative value due to the rashness of the decisions in emergency situations and misplaced reliance on Roe v. Wade because the opinion places the fetus subordinate to the woman's life and health. Roe, 410 U.S. at 157-62; Elias & Annas, supra note 122, at 256-57.

136. Developments in the Law—Medical Technology and the Law, supra note 123, at 1572-73. A California court decided that § 300 of the Welfare and Institutions Code could not be used to detain a pregnant woman by declaring her unborn fetus a dependent child of the court. However, the woman could have been detained if proper mental health commitment proceedings had been brought. Cal. Welf. & Inst. Code § 300 (Deering Supp. 1993); In re Steven S., 178 Cal. Rptr. 525, 528 (Ct. App. 1981).


138. Id. at 1577-79. But see UAW v. Johnson Controls, 111 S. Ct. 1196 (1991), rev'g 886 F.2d 871 (7th Cir. 1989) (holding that sex-specific fetal protection policy that prohibited all women not documented infertile from working in jobs involving actual or potential unsafe exposure to lead was discriminatory on its face and a violation of Title VII as amended by the Pregnancy Discrimination Act).


Some observers call the prosecution of addicts who give birth to drug-addicted babies "cruel and unusual punishment" since most are poor and are often denied access to drug treatment centers because they are either pregnant or on Medicaid. These women are also denied public funding for abortions. Michele Mager, The Sins of the Mothers, Student Law., Sept. 1991, at 30, 33.

140. Section 270 of the Penal Code proscribe as a misdemeanor the willful omission of a parent "without lawful excuse, to furnish necessary . . . medical attendance, or other reme-
While a women's right to terminate a pregnancy can be restricted to protect the health and safety of the fetus, this does not completely determine whether the State has an interest in preventing conception of a child. The appellate court in the Pointer case recognized that protecting the fetus from maternal behavior was reasonably related to the purposes of probation, but the court decided that less restrictive alternatives such as prenatal monitoring were suitable substitutes. However, harm to the fetus can occur before the woman is aware she is pregnant, and states may not have the resources to implement monitoring programs. Under these circumstances, a court might find that the State has a compelling interest in restricting pregnancy.

2. The Impact of Foster Care on a Condition Prohibiting Pregnancy.

Some courts have decided that prohibiting custody of children during the period of probation makes forbidding pregnancy unnecessary. This alternative depends on the ability of the State to remove the child to a foster home. As the State noted in its brief for the Johnson case, there is some doubt as to whether this option supports the State's interest in protecting children because foster care "does not take into consideration the best interests of the child." In
reaching this conclusion, the State relied on two studies of the state foster care system. These studies indicated problems with monitoring by social workers as well as inadequate health care and overcapacity in foster homes, which place children at a "serious risk of being emotionally damaged, neglected, or physically abused."  

D. Is a Probation Condition Ordering Birth Control Cruel and Unusual Punishment or a Violation of Equal Protection?

1. Cruel and Unusual Punishment and Involuntary Sterilization

Under Solem v. Helm, 147 the Cruel and Unusual Punishments Clause forbids both "barbaric punishments" and "sentences that are disproportionate to the crime committed." 148 The case lists the following objective factors to be considered in a "proportionality analysis" of the punishment: "(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." 149 California follows the same guidelines to determine whether a sentence is "so disproportionate to the crime . . . that it shocks the conscience and offends fundamental notions of human dignity." 150 As some commentators have noted, an order to use birth control may constitute cruel and unusual punishment.151 The order to use birth control may cause psychological harm from stigmatization and, in addition, most birth control methods involve health risks.152

Courts have already determined that involuntary sterilization is

from Johnson's custody as a least restrictive alternative).

146. Id. at 15-17 (citing Auditor General of Cal., Report by the Auditor General of California, Los Angeles County Needs to Improve Its Services to Foster Children and the State Needs to Improve Its Oversight of the County’s Foster Care Program (1990); Commission of Cal. State Gov’t Org. and Economy, The Children’s Services Delivery System in California, Final Report (1987)).

148. Id. at 284.
149. Id. at 292.
152. Lipton & Campbell, supra note 14, at 286-88 (citing Robinson v. California, 370 U.S. 660 (1961)) (law making status of addiction to narcotics a misdemeanor invalid as cruel and unusual punishment).
a cruel and unusual punishment for certain crimes.\textsuperscript{153} Norplant is the form of birth control closest to sterilization. Its efficacy is comparable to sterilization, it involves a surgical procedure, and it is effective without the woman's efforts.\textsuperscript{154} Only one state court has considered a probation order for sterilization in a child-abuse case. In \textit{Smith v. Superior Court},\textsuperscript{155} the trial court imposed a condition of sterilization on male and female defendants convicted of felony child abuse for the death of their child.\textsuperscript{156} Following the majority of cases, the Arizona Supreme Court held that sterilization should not be required as a condition for a lesser sentence without specific statutory or constitutional authority. The court never reached the issue of cruel and unusual punishment.\textsuperscript{157} The court looked at the California Supreme Court's decision in \textit{Conservatorship of Valerie N.},\textsuperscript{158} as representative of the minority view that allows sterilization of incompetents without specific statutory authority.\textsuperscript{159} The court stated,

\begin{enumerate}
\item\textsuperscript{153} Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918) (holding that vasectomy for certain types of criminals is unconstitutional as cruel and unusual punishment); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914) (holding that vasectomy is cruel and unusual punishment for criminals twice convicted of a felony), rev'd on other grounds, 242 U.S. 468 (1916).
\item An area comparable to the sterilization cases is surgical castration. An Arizona Attorney General opinion stated that a proposed bill to make the penalty of castration for rape of a child victim would be unconstitutional. Lipon & Campbell, \textit{supra} note 14, at 291; accord State v. Brown, 326 S.E.2d 410-12 (S.C. 1985) (invalidating a condition of surgical castration because it violated state constitutional prohibition on the infliction of cruel and unusual punishment).
\item\textsuperscript{154} \textit{See supra} text accompanying notes 28-34.
\item\textsuperscript{155} Smith v. Superior Court, 725 P.2d 1101 (Ariz. 1986).
\item\textsuperscript{156} \textit{Id.} at 1102.
\item\textsuperscript{157} \textit{Id.} at 1104. The court reviewed the judicial history of the eugenics movement that sought to prevent burdening society with the birth of defective persons. The movement was popular in the United States between 1907 and 1963. Several states passed laws that allowed compulsory sterilization of criminals, idiots, imbeciles, and rapists in state institutions when recommended by a panel of experts. \textit{Id.} at 1103 (quoting Annotation, \textit{Validity of Statutes Authorizing Asexualization or Sterilization of Criminal or Mental Defectives}, 53 A.L.R.3d 960, 963-64 (1973)).
\item These laws were validated by the Supreme Court in \textit{Buck v. Bell}, 274 U.S. 200 (1927): "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for the imbecility, society can prevent those who are manifestly unfit from continuing their kind." \textit{Id.} at 207. The \textit{Smith} court distinguished the eugenics cases because the sterilization was ordered to protect future children rather than to protect society from defective children. \textit{Smith}, 725 P.2d at 1103.
\item\textsuperscript{158} \textit{Conservatorship of Valerie N.}, 707 P.2d 760 (Cal. 1985) (declaring legislation prohibiting sterilization as a means of contraception for a ward or conservatee who is unable to give consent an unconstitutional violation of privacy and liberty interests).
\item\textsuperscript{159} \textit{Smith}, 725 P.2d at 1103-04. The California legislature has since amended its statutory scheme to provide specific procedures for sterilization of an adult conservatee unable to consent and now forbids only sterilization of a minor by a guardian or conservator. \textit{Cal. Prob. Code} §§ 1950-1969 (Deering 1991). California also ensures that refusal to submit to sterilization will not cause forfeiture of any privileges or immunities or public benefits. \textit{Cal.
however, that the trial court could consider the defendants voluntarily sterilizing themselves as a mitigating factor during sentencing.\textsuperscript{160}

2. \textit{Equal Protection}

The birth-control condition may also violate equal protection\textsuperscript{161} by severely restricting the fundamental right of procreation and disproportionately affecting impoverished and minority women.\textsuperscript{162} In \textit{Skinner v. Oklahoma},\textsuperscript{163} the Supreme Court held that the Virginia statute allowing the sterilization of "habitual criminals" with two or more offenses of "felonies involving moral turpitude" violated equal protection of the law.\textsuperscript{164} Even though police powers generally receive great deference, making equal protection the last resort of constitutional arguments, the Court decided that sterilization laws deserve "strict scrutiny of the classification" because of the harsh impact on the fundamental right to procreation.\textsuperscript{165}

The Court concluded that a law making larceny subject to sterilization but exempting the similar crime of embezzlement was "as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."\textsuperscript{166} An order to use a birth-control method such as Norplant also impacts the fundamental right of procreation. Its use in sentencing will discriminate by gender because it can be used only on women convicted of child abuse and not on men. The use of the Norplant condition might also discriminate against women of color because of racial stereotypes and biases that make women of color subject to more scrutiny for fetal abuse during

\begin{itemize}
\item Health & Safety Code § 25955.3 (Deering 1988).
\item Smith, 725 P.2d at 1103.
\item U.S. Const. amend. XIV, § 1.
\item See Lipton & Campbell, supra note 14, at 288; Krauss, supra note 20, at 523.
\item Skinner v. Oklahoma, 316 U.S. 535 (1942).
\item Id. at 541. The petitioner also raised due process and cruel and unusual punishment grounds, which were not addressed. However, Chief Justice Stone commented on the failure to meet due process because he did not see a violation of equal protection. He found the hearing unconstitutional because there was no determination that the sterilization was needed for eugenic purposes. \textit{Id.} at 538, 544-45. A similar problem could be found with the Norplant condition if the judge does not develop a record that supports the need for the condition, especially in first-time cases for child abuse.
\item Id. at 541. The court described the rationale for strict scrutiny as follows: We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. 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.
\item Id.
\item Id. at 538-39, 541.
\end{itemize}
pregnancy.\textsuperscript{167}

Because the Norplant condition is imposed by judicial discretion and not by statute, the cruel and unusual punishment and equal protection challenges to the Norplant condition require a factual situation for them to be tested as applied. The analysis section utilizes two different hypothetical defendants in order to evaluate the strengths and weaknesses of these constitutional objections to the Norplant condition.\textsuperscript{168}

III. Problem

No appellate court has ever approved a probation order forbidding a woman to become pregnant.\textsuperscript{169} However, the earlier cases invalidating these conditions do not completely foreclose a probation order to use Norplant because trial courts have broad discretion to consider probation conditions that promote rehabilitative benefits or protect the public interest under the specific facts of each case.\textsuperscript{170} With the problems of drug use by pregnant women, an overburdened foster care system, and the horror of repeat offenders like Ruby Pointer,\textsuperscript{171} preventing a woman from having additional children during probation may seem to be an appropriate alternative sentence to imprisonment.

Norplant alleviates the difficulties of previous court orders that encouraged a woman to have an abortion or hide her pregnancy to avoid a violation;\textsuperscript{172} however, the Norplant condition generates new legal and policy concerns. When medical technology is used coercively by a court, it becomes an invasive method of reproduction control comparable to court-ordered sterilization. As the eugenics movement demonstrated with involuntary sterilization, the potential for abuse is great once a higher court allows procreation to be re-

\textsuperscript{167} See Krauss, supra note 20, at 523 (discussing the impact of forced Cesarean sections and drug babies on the judicial treatment of women of color).

\textsuperscript{168} See infra parts IV.A, IV.C.

\textsuperscript{169} See cases cited supra note 1. However, one commentator predicted that “until appellate courts definitely rule that such practices are unconstitutional, judicial excess will continue.” Lipton & Campbell, supra note 14, at 298.

\textsuperscript{170} In re White, 158 Cal. Rptr. 562, 568 (Ct. App. 1979) (“The manifest goals of probation and the need for individualistic treatment compels the imposition of special probation conditions framed to meet the particular needs of each individual case.”); People v. Keller, 143 Cal. Rptr. 184, 187 (Ct. App. 1978); see also People v. Pointer, 199 Cal. Rptr. 357, 364 (Ct. App. 1984) (finding probation condition forbidding pregnancy reasonable by distinguishing contrary authority due to specific facts of case).

\textsuperscript{171} See supra note 99 and text accompanying notes 136-37, 145-46.

\textsuperscript{172} See supra text accompanying note 29.
The analysis determines whether a court can legally impose the Norplant condition on women guilty of child abuse offenses by utilizing two hypothetical defendants, J and P, to determine whether the Norplant condition is unconstitutional in three areas: cruel and unusual punishment, substantive due process, and equal protection.

A. Defendant J Hypothetical

J closely resembles Darlene Johnson. She is a first-time offender who has been convicted of felony corporal punishment of a child. Johnson fit the typical pattern of earlier cases imposing conditions forbidding pregnancy: the defendant was not married, she had several illegitimate children who had to be placed in foster care after her arrest, she was pregnant at the time of sentencing, and she required welfare assistance. J has these same characteristics and is also a member of a minority group, as was Darlene Johnson. Besides the Norplant condition, the court ordered J to remain in the county jail until her child was born, to attend parenting classes, and not to have custody of any children until successful completion of parenting classes. The judge also informed J that the Norplant device could be removed before the expiration of her probation if she satisfied two prerequisites: she must successfully complete the parenting classes, and the state child protection agency must return custody of her children and determine that she can handle another child. If J does not accept these conditions, the judge will impose two years in the state prison.

B. Defendant P Hypothetical

P resembles Ruby Pointer, the repeat offender whose behavior will harm the fetus. P is a drug addict, and her use of drugs while pregnant has already caused permanent disabilities in her first two children. These children were permanently removed from her custody by the State shortly after their birth, because she left them unattended and was convicted of child neglect.
P recently had another drug-addicted baby. She had custody of the child until the baby was brought to a hospital near death after she left the child unattended for several days while partying and taking drugs with her boyfriend. P was convicted of cruelty to a child and faces a six-year prison sentence. The child has been placed in a foster home.

P's drug addiction and psychological problems make her an abusive and irresponsible parent. She has dropped out of several drug treatment programs, and her prospects for rehabilitation are marginal, according to the probation officer and mental health workers. She presently has no desire to stop taking drugs or to stop having children. The judge has offered the following alternative sentence: one year in the county jail, completion of a drug treatment program with follow-up care throughout probation, periodic drug testing, mental health and parenting classes, no custody of children without the court's permission, the Norplant condition until successful completion of a drug rehabilitation program, and one year of staying drug-free after release from jail.

IV. ANALYSIS

A. Is a Norplant Condition Cruel and Unusual Punishment?

Before resolving the constitutional issue, the Norplant condition must first satisfy the statutory requirements of probation and not be considered as punishment. "The primary purpose of probation is to rehabilitate the offender. . . . Punishment of an offender may not be the primary purpose of the judge's imposition of probation." If its primary purpose is punitive, the condition does not satisfy the requirements of Penal Code section 1203.1. However, a condition of probation is valid if it only has "an incidental punitive effect, in that any restriction of liberty is in a sense a 'punishment.'" The fact scenarios for J and P show that the Norplant condition was imposed primarily for a rehabilitative effect. In P's case, the other motive was to reduce the possibility of fetal abuse. Therefore, the Norplant condition constitutes punishment for purposes of a cruel and unusual punishment analysis because it interferes with procreation and bodily integrity, but it is not invalid as a condition of probation because there is no intent to punish.

179. Higdon v. United States, 627 F.2d 893, 897-98 (9th Cir. 1980).
180. See supra notes 38-43 and accompanying text.
181. Higdon, 627 F.2d at 898 n.8.
182. See supra text accompanying notes 117-18 and part III.A.-B.
The Norplant condition might constitute cruel and unusual punishment under both the United States and California Constitutions for either J or P. The Norplant condition must first pass the proportionality test used in Solem v. Helm. The first part of the test looks at the harshness of the penalty in relation to the offense. In Robinson v. California, the Supreme Court held that imposing a ninety-day jail sentence for addiction to narcotics was excessive and unconstitutional as cruel and unusual punishment. The case stands for the proposition that it is disproportionate to punish certain behavior as a "crime."

The Norplant condition appears more disproportionate than the jail sentence for drug addiction. It punishes procreative behavior that is constitutionally protected and not criminal. However, the use of the Norplant condition to prevent fetal abuse and promote rehabilitation, by relieving the defendant of the stress of pregnancy and providing incentives for behavior modification, is less harsh than a jail sentence, which only has a punitive aspect. In fact, the Norplant condition allows the defendant to avoid a prison sentence.

The other criteria of the proportionality test compare the sentence with those imposed for similar crimes in the same jurisdiction and with those imposed for similar crimes in other jurisdictions. California has never allowed a judge to prohibit pregnancy. Additionally, in P's case, endangering a fetus is still not a crime. Imposing a Norplant condition in these circumstances allows a judge to imply that fetal endangerment by a mother is a crime. This is contrary to the current judicial position that providing legal protection for the fetus is a legislative function. Further, no state has ever found a condition prohibiting pregnancy or ordering birth control valid.

Two federal district court cases offer additional guidance as to why a Norplant condition might be cruel and unusual punishment.

185. See supra text accompanying note 149.
187. Id.
188. See supra note 96.
189. See supra note 149.
191. See supra note 140.
192. See cases cited supra note 1.
In *Mickle v. Henrichs*, the district court held that a vasectomy was "cruel or unusual punishment" for a rape offense under the Nevada Constitution. The court concluded that the words "cruel and unusual" "forbid newly devised as well as cruel punishments." They also felt that the Eighth Amendment is a "more humane and liberal doctrine" that has "adaptability to restrain cruel innovations in the way of punishment." The court determined that a vasectomy was contrary to the purposes of reformation, because a "degrading and humiliating punishment is not conducive to the resumption of upright and self-respecting life."

The court in *Davis v. Berry* also held that vasectomy was cruel and unusual punishment. The court looked at a law that made sterilization mandatory for anyone committing two felonies. The court compared vasectomy to castration, which at common law was considered cruel and unusual punishment. Even though vasectomy is not as physically severe, both procedures affected the "power of procreation" and resulted in the same "public humiliation," "degradation," and "mental suffering."

The Norplant condition is a novel and unusual use of a birth control device. When used coercively to force a defendant to choose between probation or prison, the condition generates the same harm as involuntary sterilization. Both involve a relatively simple but invasive surgical procedure and "destroy the power of procreation." The use of the Norplant condition also places the defendant under extreme public scrutiny. This publicity makes birth control, usually a private and personal decision, a humiliating and degrading experience.

While Norplant is temporary sterilization, it can cause physical suffering and is dangerous for a woman with contraindications.

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196. *Id*.
197. *Id*. at 691.
199. *Id*. at 414.
200. *Id*. at 416.
201. *Id*. at 416-17.
202. See supra text accompanying notes 35-37; *Mickle*, 262 F. at 687.
204. See supra text accompanying notes 8-12.
205. See supra notes 31-32 and accompanying text; see also Lipton & Campbell, supra
fact, the physical suffering imposed by the Norplant condition is another possible grounds for invalidation. One court found that "[d]eliberate indifference to a [probationer's] serious medical needs may constitute the unnecessary and wanton infliction of pain that the [E]ighth [A]mendment proscribes."206

California no longer permits nonconsensual sterilization of developmentally disabled individuals for eugenic reasons and allows sterilization of a conservatee only after a showing by clear and convincing evidence of its necessity by the conservator who is seeking the power to consent.207 The consensual aspect of the Norplant condition is dubious, especially for someone such as J, a first-time offender who presents no harm of fetal abuse. Faced with the alternative of a prison sentence, most women will likely accept the Norplant condition despite the medical risks they might not assume without the threat of incarceration. The judicial use of Norplant is contrary to the present public policy against involuntary sterilization and should have at least legislative authorization before being utilized by the judiciary.208

If it is considered cruel and unusual punishment, the Norplant condition is absolutely prohibited. The court in State v. Brown invalidated a condition of probation requiring surgical castration for reduction of a thirty-year sentence for brutal sexual assault.209 Even if the defendant consents to the condition, a "[c]ourt cannot impose conditions which are illegal and void as against public policy."210

Due to the sensitive nature of birth control as a private and constitutionally protected activity, the potential for unusual and serious emotional and physical consequences, and the similarities of involuntary sterilization to a Norplant condition, a court could rationally decide that the Norplant condition is cruel and unusual punishment. However, a court will likely find otherwise because a probation condition differs from mandatory sterilization in that it

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207. Conservatorship of Valerie N., 707 P.2d 760, 764-66, 777 (Cal. 1985) (describing the statutory development of involuntary sterilization in California and the procedures for allowing a conservator to consent to sterilization on behalf of a conservatee).
210. Id. at 411.
can be rejected by the defendant; unlike castration, women use the Norplant condition in a noncriminal setting; and the Norplant condition is only temporary.

B. Does the Norplant Condition Violate Due Process?

The next part of the analysis proceeds on the assumption that a cruel and unusual punishment defense does not work for either P or J. Therefore, the Norplant condition must be assessed under the statutory and constitutional tests applied in *People v. Pointer.*211 These tests will determine whether the Norplant condition violates due process.

1. *Is the Norplant Condition Reasonable?*

The reasoning in *Pointer* can be used to meet the less demanding statutory test required under *People v. Dominguez.*212 While birth control is a more specific method of restricting pregnancy, the desired result is the same. Pointer and P both share a behavior that makes pregnancy related to child abuse and that causes harm to the fetus. While the court cannot punish P directly for bearing drug-addicted babies, fetal rights policies would justify the Norplant condition as an appropriate preventive step. For P, having a baby would most likely result in future criminality as well. P already has three children suffering from the same type of abusive behavior, and she does not possess the present ability to change her behavior without outside intervention.

Establishing the reasonableness of the Norplant condition for J is more difficult. Other jurisdictions have always invalidated a condition prohibiting pregnancy at this stage because the condition was too remotely related to the crime and because it severely restricted a fundamental constitutional right.213 However, these cases can be distinguished in three critical areas. First, these decisions were influenced by the defendant’s violation of the condition by becoming pregnant.214 The chance of pregnancy while on Norplant, however, is so low that a court no longer has to worry about a violation of the

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212. *People v. Dominguez,* 64 Cal. Rptr. 290, 293 (Ct. App. 1967); see *supra* text accompanying notes 95-96.
214. *See supra* text accompanying note 69.
condition unless the device is removed. This also eliminates the court's fears that the condition effectively coerces a defendant to have an abortion or hide pregnancy, which deprives the fetus of adequate prenatal care.

Second, the prior decisions did not consider the potential rehabilitative aspect of preventing more children. The Norplant condition for J terminates when she completes her parenting classes and is judged a suitable parent to resume care of her existing children. Having another child creates a stronger likelihood that further child abuse will continue and that attempts at rehabilitation will not be successful.

Finally, prior decisions rationalized that the condition prohibiting custody of children would be an adequate measure to prevent future criminality. Such a condition also serves as a deterrent to becoming pregnant if the woman wants custody of her child at birth because the baby will be removed. However, this condition forces the child into a foster care system that is no longer able to protect the best interests of the child, according to recent state reports. This situation makes the prevention of future children who will have to be removed a more reasonable option. The foster care argument is also distinguishable from the condition in Dominguez, which was inspired by the judge's desire to eliminate future children who would probably become tax burdens, because the safety of children is a legitimate purpose of probation.

2. Is the Norplant Condition a Constitutional Restriction on Privacy and Bodily Integrity?

Assuming that the condition is reasonable for both P and J, the Norplant condition must also meet the stricter scrutiny of the three-part constitutional test used in California to test conditions of probation that restrict constitutional rights. Courts allow more restrictions in conditions of probation, so fundamental rights are not absolutely protected and can be "reasonably restricted in the public..."
interest." The test requires the Norplant condition to serve the compelling purposes of rehabilitation and public safety by being narrowly drawn.

a. *Reasonable Relationship to Rehabilitation and Public Safety*

The Norplant condition must "reasonably relate to the intended purpose of the legislation" to satisfy the first prong of the test. In *P*'s case, the Norplant condition has been linked to her successful completion of a drug treatment program and staying off drugs for a year. Since her drug addiction is one of the major causes of her criminal behavior, a probation condition designed to promote recovery from her addiction should satisfy the rehabilitative purpose.

Additionally, *P* will be prevented from having another drug baby while the Norplant condition is in place. Cases based on fetal-rights theories have established that the State has a legitimate health and safety interest in preventing exposure of unborn children to drug and alcohol abuse. While California does not go as far as some states in protecting the fetus with the full force of the criminal law, *P* has already come under the court's jurisdiction for criminal behavior, making the State's interference more justifiable.

The use of the Norplant condition with *J* also has some merit as serving both the rehabilitation and public-safety purposes. First, the court has imposed the Norplant condition in a limited manner to ensure that some of the risk factors of child abuse are removed until *J* completes a parenting class and has successfully received custody of her children. The Norplant condition places pressure on *J* to rehabilitate; however, she may also resent the court's interference with her personal life. This could impede long-term rehabilitation that the parenting classes and mental health counseling seek to foster.

Second, the Norplant condition supports the State's interest in the health and safety of children by reducing the number of children in foster care. The condition prevents future children from needing

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220. *Beach*, 195 Cal. Rptr. at 387. "Conditions which infringe on constitutional rights are not automatically invalid. Certain intrusions by government which would be invalid under traditional constitutional concepts may be reasonable at least to the extent that such intrusions are required by legitimate governmental demands." *In re White*, 158 Cal. Rptr. 562, 567 (Ct. App. 1979); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975).


222. *Beach*, 195 Cal. Rptr. at 387.

223. See *supra* text accompanying notes 121-43.

224. See *supra* note 140.

225. See *supra* note 118.
foster care while the defendant is most at risk of a relapse and makes reunification of the defendant with her present children more likely. The State's argument that the foster care system is not in the best interests of children helps support this last proposition.226

b. Proportional Assessment of the Impact on Fundamental Rights with the State’s Compelling Interests

To satisfy the second prong of the test, the public interest in imposing the Norplant condition must outweigh the restriction on constitutional rights.227 The Norplant condition severely restricts the exercise of fundamental privacy rights protecting procreation, contraception, and parenting as well as interfering with the defendant's privacy right to bodily integrity.228 The public interests in this context are the ones for rehabilitation and public safety described above.229

A judicially imposed Norplant condition forces P and J to choose between imprisonment and the waiver of fundamental privacy rights. With the scope of the abortion right under federal law increasingly limited and likely to be overruled,230 states have more power to encroach on the decision whether or not to bear a child. While California still gives great weight to the right to have an abortion, this right protects the right to terminate a pregnancy, not the right to start one. However, by its enactment forbidding the conditioning of public benefits on submission to abortion or surgical sterilization, the California legislature has indicated that state interference in procreation decisions should not involve coercion.231

In child-abuse cases, where the State is already directly supervising the woman's role as a parent, there are compelling reasons for state interference with procreation. The State has a strong interest in preventing victims of child and fetal abuse. The interest in P's case is stronger—due to the presence of both risks—but J's case also involves the compelling state interests of rehabilitation and public safety. Additionally, the amount of coercion in criminal sentencing can be distinguished from granting public benefits because people receiving benefits are more favored than criminals, and the benefit programs have greater potential for abuse and arbitrary application

226. See supra text accompanying notes 144-46.
228. Lipton & Campbell, supra note 14, at 283-85.
229. See supra text accompanying notes 213-18.
230. See cases cited supra note 129.
231. CAL. HEALTH & SAFETY CODE § 25955.3 (Deering 1988).
by administrators.

As established in *Skinner v. Oklahoma*, the right to procreation is constitutionally protected. A sentence aimed at the destruction of procreation is carefully scrutinized to ensure that it is used only when absolutely necessary. This concern is partly diminished by the temporary nature of the Norplant condition, especially if the court has not acted arbitrarily and has fashioned the Norplant condition to produce constructive behavior. In the hypothetical fact patterns for both *P* and *J*, the Norplant condition has a rational basis for application.

The rationale for *Roe v. Wade* provides a counterargument to the condition's interference with contraception. The Court in *Roe* emphasized the medical aspect of the abortion decision and the need to prevent unnecessary state interference in the doctor-patient relationship, especially in the early stages of pregnancy. The Norplant condition allows the State to interfere with the doctor-patient relationship at an even earlier stage. It prevents a woman from choosing the method of birth control she and her doctor decide is best suited for her. If the defendant has the contraindications for Norplant, the State's interest would probably not be strong enough to expose her to serious health risks.

The relationship between physician and patient also raises concerns regarding the infringement on the right to bodily integrity. The right of a competent adult to decide her own medical treatment is strongly protected. Further, the State wants to protect the right to individual autonomy in medical decisions. The rationale behind the forced-Cesarean cases, however, can be used to make the right to bodily integrity less important in the Norplant condition. When the woman's rights are put in the fetal-rights context, the court must balance the competing rights of the woman with the public-safety interest in preventing harm to children before and after birth. While decisions allowing dangerous medical procedures such as forced Caesareans are highly disfavored by some appellate courts and com-

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233. *Id.* at 537.
234. *Id.* at 541.
236. *Id.* at 165-66.
237. See supra text accompanying note 33.
238. See cases cited supra note 113.
mentators, they support a judicial trend toward interfering with a woman’s right to bodily integrity when necessary for the best interests of children.

c. Less Restrictive Alternatives to the Norplant Condition

Under the third prong, there must not be any alternative measures that meet the needs of the compelling interests while also being less subversive of the constitutional rights that are being restricted. The Pointer court found this part of the test the most difficult to satisfy. However, courts are allowed considerable leeway in fashioning conditions of probation that are suited to the specific facts of each case to promote the needs of society and of the individual defendant. A good initial test of the constitutionality of the Norplant condition is to imagine the court not being able to use Norplant or an equally successful method of birth control because of the defendant’s medical history. If the facts of the case would compel the court to impose the maximum possible imprisonment because of the risks presented by the defendant are too great and are not diminished by other measures, then the Norplant condition would probably be constitutional. While this seems likely in P’s case, a court would be acting harshly with a first-time offender such as J if some type of alternative sentencing was not offered that would provide an opportunity for rehabilitation (such as parenting classes).

In P’s situation, prohibition of drug use, enrollment in a drug treatment program, and monitoring for drug use as conditions of her probation are feasible alternatives. However, such conditions have two serious drawbacks. First, studies in teratology have shown that the fetus is most vulnerable to structural and developmental defects from drugs and other outside agents during the first four months of pregnancy. Harm to the fetus could be done before the State could intervene. Second, if the defendant uses drugs, she will be imprisoned. This penalizes drug addiction, which is contrary to the policy expressed in Robinson v. California.

In J’s situation, a court might decide that less restrictive alternatives such as parenting classes and mental health counseling do not

240. Krauss, supra note 20, at 538-41; Elias & Annas, supra note 122, at 254.
243. See supra text accompanying note 181.
244. Elias & Annas, supra note 122, at 198-99.
provide sufficient rehabilitation measures and that preventing pregnancy is also necessary. While there is some merit to the rehabilitative benefits of preventing pregnancy, the parenting classes will most likely be considered sufficient to prevent further instances of child abuse and be given an opportunity to succeed before such a major infringement on privacy is allowed.

The alternative of prohibiting custody of children during the period of probation, already implemented for $P$, is sufficient in other jurisdictions for child-abuse cases. However, the state data indicating that foster care endangers the child's welfare makes this alternative unsatisfactory to the State. With someone such as $J$, who displays rehabilitative potential, the burden on the foster care system is temporary and does not require placement of additional children. The condition prohibiting custody of children provides sufficient incentive for rehabilitation. On the other hand, $P$ greatly burdens the foster care system because she already has had two children permanently removed, her potential for rehabilitation is poor, and permanent placement of a drug baby is often impossible. Removal of custody and drug testing do not remove the risks of fetal abuse. The Norplant condition allows the defendant to receive treatment for drug abuse while preventing drug-addicted babies who would be at high risk in the foster care system because of their disabilities.

The Norplant condition for a first-time offender such as $J$ violates substantive due process because it substantially interferes with a fundamental right when less restrictive alternatives are available that have not been proven ineffective. A Norplant condition for a repeat offender such as $P$, however, will likely survive a substantive due process attack, especially if the court is influenced by fetal-rights policy. There are no effective alternatives to imprisonment for preventing fetal abuse, and the Norplant condition is imposed as a temporary safeguard with drug treatment and counseling to promote rehabilitation.

C. Does the Norplant Condition Violate Equal Protection?

The Norplant condition can be challenged as a denial of "equal protection of the laws." This ground is the weakest for invalidating the Norplant condition, but it should be raised to ensure equal treatment of defendants in similar circumstances. Because the Nor-
plant condition deals with a type of reproduction control closely equivalent to the involuntary sterilization statute invalidated in *Skin- ner v. Oklahoma*, it should be analyzed with "strict scrutiny of the classification."  

Men can never be subject to this type of probation condition, even though they are guilty of the same child-abuse offense. The equivalent methods of castration and vasectomy for men have been declared cruel and unusual punishment, and there is no male birth control method equivalent to Norplant. Under a *Skinner* analysis, such a difference in treatment for defendants convicted of similar crimes subject to the same terms of imprisonment triggers an equal protection analysis.

The only rational basis for the difference in treatment between male and female defendants would be with defendant P. She presents a risk of fetal abuse that men do not. It is predicted that narrowly drawn criminal fetal abuse statutes will survive equal protection challenges. However, some maternal conduct that may be harmful to the fetus is not likely to be subject to state criminalization. The better policy for most cases of child abuse is to use less restrictive methods that do not penalize the biological differences between men and woman. These methods include education, prenatal monitoring, and drug treatment programs.

The Norplant condition also may be applied in a discriminatory fashion by judges with strong biases against certain racial and ethnic groups and women on welfare. This would most likely be the claim of a first-time offender like J who belongs to a racial minority and who is on welfare. The majority opinion in *Skinner* recognized that a sterilization law might be used to prevent the procreation of minorities.

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250. *Id.* at 541.
251. *See supra* text accompanying notes 193-201.
253. *Developments in the Law—Medical Technology and the Law, supra* note 123, at 1581-82 (finding that biological differences are acceptable grounds to treat men and women differently).
254. *Id.* at 1564, 1581; *see also* ELIAS & ANNAS, *supra* note 122, at 196, 208-16 (noting risks generated by legal drugs as well as illegal drugs, smoking, alcohol consumption, chemicals in the workplace, and radiation).
255. Krauss, *supra* note 20, at 546-47. One commentator thinks that "any constitutional interpretation of a sex equality principle must prohibit laws, state policies, or official practices and acts that deprive women of reproductive control or punish women for their reproductive role or capacity." MacKinnon, *supra* note 20, at 1319.
Many of the cases prohibiting pregnancy dealt with unmarried women with illegitimate children.\textsuperscript{257} The appellate court in \textit{People v. Dominguez} acknowledged that the condition forbidding pregnancy was imposed to prevent an increase in the welfare rolls.\textsuperscript{258} Application of fetal rights in other areas such as forced Caesarean sections and fetal-endangerment prosecutions show that minorities and the poor are unfairly singled out due to social stereotypes.\textsuperscript{259} The fact that the first woman chosen for a Norplant condition is African-American and on welfare supports the fears of apparent or actual discrimination.\textsuperscript{260}

A judge's bias for or against the use of the Norplant condition can also have discriminatory effects. Whether the State should be allowed to control the exercise of procreative powers is an issue with very divergent moral and philosophical viewpoints among the judiciary and society at large. The court in \textit{Mickle v. Henrichs} expressed concern about the arbitrary application of a sterilization law because some judges will find it too severe while others will not.\textsuperscript{261} The use of the Norplant condition would most likely receive the same type of arbitrary application because of a lack of uniformity concerning the appropriateness of its use as a probation condition.

The Norplant condition may lead to arbitrary sentencing based on gender, racial, and moral biases rather than on the legitimate rehabilitative and public-safety concerns applicable to the individual case. A Norplant condition makes uniformity difficult because it depends heavily on the personal biases of the judge. Some method is needed to eliminate the discretion of a judge to impose the Norplant condition so sentencing in child abuse cases does not create "invidious discrimination."\textsuperscript{262}


\textsuperscript{258} Dominguez, 64 Cal. Rptr. at 294.

\textsuperscript{259} Krauss, supra note 20, at 525-32.


\textsuperscript{261} Mickle v. Henrichs, 262 F. 687, 688 (D. Nev. 1918). "It is a notorious fact that many judges do not regard mutilation as a wise or a lawful method of punishment. It is only those of the contrary opinion who will prescribe vasectomy as a part of the punishment for this offense." \textit{Id}.

\textsuperscript{262} Skinner, 316 U.S. at 541.
A. Legislative Action to Remove the Norplant Condition from Judicial Discretion During Sentencing

Because of the due process objections to a Norplant condition and the likelihood of arbitrary and discriminatory use by judges, Norplant as well as other birth control methods should not be allowed in the sentencing of child-abuse cases. A legislative act to limit the court’s statutory authority rather than a judicial decision based on constitutional violations is preferable. The wide discretion given trial courts in fashioning probation conditions severely narrows the holding of each case. A legislative act will also eliminate the timely appeal process on a case-by-case basis and promote uniformity in child-abuse sentencing.

To limit trial court discretion and to provide more direction in child abuse cases, the California legislature should amend Penal Code section 1203.1 as follows:

Upon conviction of any offense involving child abuse or neglect, the court may require . . . that the defendant shall participate in counseling or education programs . . . including, but not limited to, parent education or parenting programs operated by community colleges, school districts, other public agencies, or private agencies and substance abuse programs operated by public agencies or private agencies. The court shall not impose any conditions restricting the defendant's ability to procreate.263

In order to ensure that probation conditions adequately serve rehabilitative and public-safety purposes, a uniform preliminary sentencing procedure must be implemented. A child-abuse offender should be required to undergo a thorough psychological examination and counseling process to determine what measures would best prevent future child abuse or fetal abuse. This was the step undertaken by the judge in Pointer.264

The defendant should also be given access to family planning and medical counseling, so she can choose Norplant or any other method of birth control suited to her personal and medical concerns. Voluntary use of birth control should be considered by the trial court for sentence mitigation only upon the defendant's initiation. The

263. CAL. PENAL CODE § 1203.1 (Deering Supp. 1993) (proposed changes are in italics and drafted to be gender-neutral).
court in *Smith v. Superior Court* suggested this approach in the child-abuse case involving sterilization. However, the judge will have to rely on the sincerity of the defendant in her promise to use birth control because the sentence cannot make birth control a probation condition. This should eliminate concern about the voluntariness of the defendant's decision to use birth control that is raised by civil rights advocates and medical practitioners when a court orders the use of birth control as a condition of probation and claims that the defendant consented to waiving constitutional rights.

The legislature should also provide adequate support for preventive and rehabilitative programs. Prevention of fetal and child abuse requires public assistance in the following areas: prenatal care for the poor, parenting skills training, education and job training, and alcohol and drug abuse treatment programs for pregnant women.

**B. Norplant with Procedural Safeguards**

Reproductive control by the State should only be used when the defendant has severe emotional or substance-abuse problems and has received a prison sentence. This category includes defendants such as P, repeat offenders showing no potential for rehabilitation because there is a great likelihood that they will continue to harm children if allowed to have them. Voluntary use of contraception for this type of defendant would not be an adequate safeguard. Such defendants cannot be trusted to keep using birth control on their own, and prevention of procreation is necessary for their release from prison to safeguard public safety.

After receiving her sentence, a defendant such as P should be given a special administrative hearing to determine the feasibility of using Norplant as a parole condition for early release from prison. Norplant should only be imposed if it is in the best interests of both the defendant and the State. The hearing officer will have to take into account the medical risks to the defendant, the importance of not being imprisoned to her rehabilitation, and the defendant's personal beliefs about using birth control. This hearing requires adequate testimony by medical professionals and psychologists to determine suitability for the Norplant condition. These hearings should also be

265. *Smith v. Superior Court*, 725 P.2d 1101 (Ariz. 1986) ("[H]ad the defendants voluntarily sterilized themselves, the trial court could have legitimately taken that fact into consideration in sentencing the defendants.").

266. See Curriden, *supra* note 4, at 32.
confidential to avoid the stigma associated with coercive birth control.

Relevant sections from chapter 6 in the Probate Code on sterilization provide a good starting point for drafting this type of comprehensive legislation. The legislation should be drafted to ensure that appropriate physical and psychological exams are conducted and that the hearing officer has a list of factors to use to determine when Norplant should be offered as a parole condition.

VI. CONCLUSION

Reproductive control does not belong in the California criminal justice system under most circumstances. The Norplant condition is closely related to involuntary sterilization, a method considered cruel and unusual punishment. The Norplant condition will often violate statutory and constitutional safeguards for most defendants. Further, the application of the Norplant condition is certain to result in equal protection abuses due to judicial bias and prejudice. The application of fetal protection laws already shows that women of color and the poor are disproportionately singled out. The sentencing system must ensure that all women are treated fairly and equally.

The use of Norplant or any other birth control device should not be allowed as a condition of a lesser sentence. The legislature needs to provide sentencing guidelines for child abuse that prohibit the use of birth control such as Norplant, provide for an adequate rehabilitation evaluation, and give specific examples of what types of probation conditions are valid. A defendant should only use birth control on her own initiative or in proceedings after sentencing when a Norplant condition is justified by her best interests as well as the State's best interests.

The words of Justice Jackson in his concurring opinion in Skinner v. Oklahoma provide cautionary advice for further debates on reproduction control: "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes."  

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