

A HOT DEBATE IN THE SUMMER OF 2001: *STATE V. OAKLEY'S EXCESSIVE INTRUSION ON PROCREATIVE RIGHTS*

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INTRODUCTION

David Oakley is the father of nine children. His failure to pay child support for his nine children has led to arrears in excess of \$25,000. Faced with this violator of Wisconsin Statute section 948.22(2)¹ (which makes neglect of child support payments for over 120 days a felony in Wisconsin), circuit court Judge Fred Hazlewood crafted an unusual punishment for Oakley.² Judge Hazlewood knew that Oakley would be of no financial assistance to his children from a prison-cell, and so he chose to suspend Oakley's eleven-year prison sentence, imposing instead a five-year probationary period. Among the terms of Oakley's probation, Judge Hazlewood included a prohibition of Oakley's right to procreate until he demonstrated an ability to support his present and possible future children.³ This prohibition led to a Wisconsin Supreme Court appeal⁴ and one of the most controversial decisions of the summer of 2001.⁵ The supreme court majority upheld the lower court's questionable probation term, amidst voices of apprehension in the two concurrences and two dissents.⁶

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1. WIS. STAT. § 948.22(2) (1997-98).

2. *State v. Oakley*, 629 N.W.2d 200, 202-03 (Wis. 2001), *cert. denied*, 123 S. Ct. 74 (2002).

3. *Id.* at 203.

4. *Id.*

5. Journalists and other concerned individuals spanning the globe expressed opinions concerning the heated debate over procreative rights in *Oakley*. Glenda Cooper, a staff writer for the WASHINGTON POST, stated, "The decision . . . has sparked a national furor, with legal experts warning that the case opens a potential Pandora's box: giving the state the power to decide who has the right to have children—based on their financial position." Glenda Cooper, *Wisconsin Deadbeat Dad Case Tests the Rights to Parenthood; Ruling Sets Conditions on Having More Children, Stirs Debate*, WASH. POST, July 15, 2001, at A02.

In an interview with a reporter for National Public Radio, Wisconsin reporter Dennis Chaptman opined that the controversy in *Oakley* was far from over: "[Oakley's attorneys] have hinted very broadly that they will appeal to the Supreme Court. And this seems a very likely case to go up and get reviewed by the justices." Interview by Lisa Simeone with Dennis Chaptman, reporter, MILWAUKEE J. SENTINEL, *Weekend All Things Considered* (NPR radio broadcast, July 14, 2001). Oakley's attorneys did, in fact, seek review by the U.S. Supreme Court; however, their petition for certiorari was denied on October 7, 2002. 123 S. Ct. 74 (2002).

6. Justice Jonathan Wilcox authored the one-man majority opinion, while Justices William Bablitch and N. Patrick Crooks both filed concurring opinions. The three women justices, Chief Justice Shirley S. Abrahamson, and Justices Diane Sykes and Ann Walsh Bradley, dissented. *Oakley*, 629 N.W.2d at 200.

In Indiana, a similar issue was before the Indiana Court of Appeals in *Trammell v. State*.⁷ Kristie Trammell was a mother who had been convicted of child neglect on two separate occasions, one of which resulted from neglect so severe that Trammell's helpless infant died of malnutrition. She appealed the trial court's order that she be precluded from becoming pregnant again as a term of her probation. The Indiana Court of Appeals, in a case of first impression,⁸ struck down this procreative restriction, holding that such an impingement of Trammell's right of procreation was excessive, as it served no rehabilitative purpose.⁹

The conflicting outcomes of these two summer 2001 opinions illustrate a sharp division among state courts in the treatment of probationers and attempts to more creatively and effectively deal with criminals. Despite the sympathetic listener's shock and dismay at a father who would bring nine children into the world and then refuse to financially support them, or at a mother who so severely neglects her dependent infant that the infant dies of malnutrition and dehydration, prohibiting these criminals from procreating is not the answer. This Note explores the reasons why the Wisconsin Supreme Court went too far when it upheld such a probation term and will offer alternative means of achieving the judiciary's goal of upholding the rights of individuals while rehabilitating criminals by imposing useful and creative probation sentences.

Before delving into a deep analysis of the problems and solutions associated with the prohibition of procreation as a probationary term, the decision in *State v. Oakley* will be placed in context in order to illustrate why it is a landmark case. Thus, Part I of this Note surveys past cases in which conditions prohibiting procreation have been upheld and explain how David Oakley differs from the defendants in those cases. Part II addresses the nature and theories behind imposition of probation for criminals and the standards appellate courts employ in reviewing probation conditions, generally. Analysis of the standard of review employed for probation conditions that impinge upon fundamental constitutional rights will be reserved for Part III, which begins by exploring the constitutional aspect of the right to procreate. In Part IV, I tie together the standards of review laid out by the probation discussion of Part II and the constitution discussion of Part III, thus offering and applying my test of choice for probation conditions that impinge upon constitutional rights. Part V explores the practical side of the

The decision's split along gender lines did not go unnoticed by observers of the case. A Salt Lake City, Utah, journalist noted: "What makes the Wisconsin ruling especially interesting is the seven state supreme court justices split along gender lines, with the four men voting to penalize the deadbeat dad. The three women justices dissented. Imagine deserting 'the sisterhood' like that." Bonnie Erbe, *Deadbeat-dad Split Surprising*, THE DESERET NEWS (Salt Lake City, UT), July 31, 2001, at A12. Erbe went on to hypothesize that the women's apparent sympathies for Oakley's civil liberties could be linked to abortion issues: "Perhaps [the women justices] fear that once the government starts messing with bedroom issues, abortion rights will be out the window." *Id.*

7. 751 N.E.2d 283 (Ind. Ct. App. 2001).

8. *Id.* at 288.

9. *Id.* at 289.

Oakley debate, covering the two main problems of practical enforceability and inconsistency with public policy. Finally, Part VI addresses alternative means of dealing with defendants like *Oakley* and other deadbeat parents.

I. *STATE V. OAKLEY'S* PROHIBITION OF PROCREATION:
AN OLD CONDITION FOR A NEW DEFENDANT

Restrictions on procreative rights as probation conditions and sanctions for criminal behavior are not new concepts. Numerous cases and articles concerning the restriction of procreative rights of mentally incompetent individuals,¹⁰ prisoners,¹¹ sex-offenders,¹² child-abusers,¹³ and others¹⁴ have filled the legal landscape since the ability to prevent conception came about. While the idea of limiting procreative rights is not a new one, the extreme limitations permitted in the landmark case of *State v. Oakley* were unprecedented.¹⁵ *Oakley* stands apart from its predecessors because it limits the procreative rights of an entirely new set of defendants: *Oakley*, a convicted "deadbeat dad," stands apart from convicted child-abusers, convicted sex-offenders, mental incompetents, and prisoners in several respects.¹⁶

10. Justice Oliver Wendell Holmes, in the Supreme Court case *Buck v. Bell*, stated, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough." 274 U.S. 200, 207 (1927).

11. See *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002); *Hernandez v. Coughlin*, 18 F.3d 133 (2d Cir. 1994); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990); *Percy v. State*, 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995); Jacqueline B. DeOliveira, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 *TOURO L. REV.* 189 (1988); Stephen S. Sypherd & Gary M. Ronan, *Substantive Rights Retained by Prisoners*, 89 *GEO. L.J.* 1897 (2001).

12. See *People v. Gauntlett*, 352 N.W.2d 310 (Mich. Ct. App. 1984); Carol L. Kunz, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 *AM. U. L. REV.* 453 (1997).

13. See *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976); Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 *UCLA L. REV.* 1 (1992).

14. See *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967) (defendant was convicted of second degree robbery); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988) (defendant was convicted of grand theft and battery); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980) (defendants were convicted of forgery and burglary); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986) (defendant was convicted of forgery).

15. In her dissenting opinion, Justice Sykes asserted: "Conditioning the right to procreate upon proof of financial or other fitness may appear on the surface to be an appropriate solution in extreme cases such as this, but it is unprecedented in this country, and for good reason." *State v. Oakley*, 629 N.W.2d 200, 222 (Wis. 2001) (Sykes, J., dissenting).

16. A USA TODAY article called the decision "an unprecedented action against 'deadbeat

In order to differentiate Oakley from past defendants on whom restrictions of procreation have been imposed, a review of these different types of defendants in past cases must take place. State appellate courts in the past thirty years have seen roughly fifteen challenges to lower courts' imposition of procreative restrictions.¹⁷ These cases involved defendants who were abusive to children physically or sexually,¹⁸ defendants who had been convicted of child neglect,¹⁹ and defendants who had been convicted of non-child-related crimes.²⁰ The only two cases out of these fifteen cases before *Oakley* in which procreative restrictions were upheld, *State v. Kline* and *Krebs v. Schwarz*, involved defendants who were convicted of crimes of physical child abuse.

The Wisconsin Court of Appeals, in *Krebs v. Schwarz*, became one of the first appellate courts to uphold a probation condition that had the effect of limiting the convicted individual's procreative rights.²¹ Defendant Krebs challenged a probation condition that required his probation officer's approval before entering into a sexual relationship as a violation of his constitutional right of privacy.²² This practical limitation on his right to procreate stemmed from

dads' The dissenters said it was the first time any court in the nation had limited someone's right to procreate based on the ability to pay child support." Joan Biskupic, 'Deadbeat Dad' Told: No More Kids Wis. Court Backs Threat of Prison, USA TODAY, July 11, 2001, at 1A.

17. *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984); *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *People v. Negrete*, 629 N.E.2d 687 (Ill. App. Ct. 1994); *Trammell v. State*, 751 N.E.2d 283 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976); *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998); *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001); *Krebs v. Schwartz*, 568 N.W.2d 26 (Wis. Ct. App. 1997).

Note that in twelve out of these fifteen cases, the reviewing court struck down the lower court's restriction on the defendant's procreative rights. The Wisconsin and Oregon courts of *State v. Oakley*, *Krebs v. Schwartz*, and *State v. Kline*, upheld the restrictions on defendants' procreative rights.

18. *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976); *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998); *Krebs v. Schwartz*, 568 N.W.2d 26 (Wis. Ct. App. 1997).

19. *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Trammell v. State*, 751 N.E.2d 283 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989).

20. *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Ct. App. 1992); *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986).

21. 568 N.W.2d at 29.

22. The term of probation stated specifically, "You shall not enter into any dating, intimate, or sexual relationship with any person without first discussing this with your agent and obtaining

Krebs's status as a sexual offender: He had been convicted of first-degree sexual assault of his daughter and received a twenty-year prison term that was stayed in exchange for a twenty-year probationary period.²³

The court, in upholding the limitation on the defendant's sexual freedom, reasoned that its requirement that he gain approval from his probation officer before engaging in a sexually intimate relationship did not constitute a complete ban on his right to procreate.²⁴ Rather, the condition survived constitutional scrutiny since it was not overly broad, was reasonably related to his rehabilitation, and was also related to the protection of the public.²⁵ The court emphasized the second part of this analysis in its determination that the specific nature of Krebs's offense rendered such a probation condition appropriate and constitutional: "[T]he condition is rationally related to Krebs' rehabilitation because it forces him to be honest with others by confronting and admitting to his sexually deviant behavior. Admission of sexually deviant behavior is necessary to help prevent relapse."²⁶

The next year, the Oregon Court of Appeals upheld a more directly restrictive condition on the defendant's procreative rights in *State v. Kline*:²⁷ This criminally abusive defendant was ordered not to father any children until he successfully completed treatment relating to his abusive behavior.²⁸ The charges against Kline, a father of two, were far from minor. The court included a gruesome summary of Kline's many incidents of violence toward his children. One such graphic report is as follows:

[Kline] broke [his son's] arm and inflicted numerous bruises on him . . . [and] was physically and emotionally abusive to both his wife and [their son]. Defendant abused methamphetamine and, when high, he was angry and hostile. When his daughter would cry, defendant would hold her close to his face while screaming obscenities at her. Defendant would also leave the baby in her crib for an entire day while preventing

your agent's approval." *Id.* at 27 n.1.

23. *Id.*

24. The court stated,

[T]he condition does not prohibit Krebs' right to procreate as he claims. Rather, he is free to maintain platonic relationships with individuals; it is only when the relationship turns intimate and/or to sexual gratification that Krebs needs to seek permission from his probation officer. Although this may be a constriction of a constitutional right, it is not a denial of it. We conclude that the condition . . . is no more than an inconvenience.

Id. at 28.

25. *Id.*

26. *Id.*

27. 963 P.2d 697, 699 (Or. Ct. App. 1998).

28. The specific condition that Kline challenged stated: "You may not without prior written approval by the Court following the successful completion of a drug treatment program and anger management program and any other program directly related to counseling related to your conduct towards children[,] father any child." *Id.* (alteration in original).

his wife from checking on her. [Defendant's wife] also reported seeing defendant throwing the baby into her crib.²⁹

Based on this litany of abusive acts, the Oregon Court of Appeals upheld the lower court's imposition of the restriction on his procreative rights, reasoning that the defendant's "pattern of abusive behavior . . . warranted a provision keeping defendant from young children, . . . at least until he completes extensive counseling for his acknowledged drug and anger problems."³⁰

While Oakley's failure to financially support his nine children constitutes a serious criminal act, he stands apart from the violently abusive defendants in *Krebs* and *Kline*. Unlike Krebs and Kline, Oakley was not before the court for violent behavior or abusive tendencies.³¹ Oakley's violation, while grave and harmful to his children, did not rise to the level of physical abuse. Rather, it was

29. *Id.* at 698. More such accounts fill the court's summary of the charges against Kline, including a later incident in which Kline broke his daughter's leg:

When asked specifically about his daughter's leg, defendant answered that, "when he entered the room, the baby's leg was twisted and stuck in the crib" and that he just "yanked it out." He further stated that, "because he didn't hear a crack, he thought that the child's leg was not injured despite her screaming."

Id. at 699.

30. *Id.*

31. In the July 10, 2001, decision of *Oakley*, the majority made mention of past charges of child intimidation on Oakley's record as further justification for their support of the trial court's extreme probation condition. The court asserted that Oakley had repeat offender status after "intimidating two witnesses in a child abuse case—where one of the victims was his own child." *State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001).

In its subsequent November 23, 2001, denial of Oakley's request for reconsideration, the court admitted to misconstruing those facts and withdrew all portions of its former opinion that asserted Oakley had committed intimidation of children against one of his own children. *State v. Oakley*, 635 N.W.2d 760, 760 (Wis. 2001) (per curiam). In this supplemental opinion, the court emphasized that its support of the trial court's probation condition limiting Oakley's procreative rights "was based on extraordinary circumstances . . . [that] show an intentional unwillingness to pay child support by a man with a prior criminal record." *Id.*

In her more detailed explanation of the new findings made by the court in response to Oakley's petition for rehearing, Chief Justice Abrahamson, who concurred in the decision to deny the motion for reconsideration, stated: "Oakley asserts that the majority misapprehended his supposed history of intimidation and abuse. The majority and concurrence apparently agree with Oakley on this point and have appropriately corrected in the per curiam opinion the 'facts' stated in the respective opinions." *Id.* at 762 (Abrahamson, C.J., concurring).

Based on the majority's retraction of their former assertions of Oakley's possible abusive behavior and emphasis that their decision was based on the "extraordinary circumstances" of his failure to pay child support alone, Oakley still stands in stark contrast to the violent Krebs and Kline, whose procreative limits were linked directly to proven violent, abusive behavior toward children.

a financial crime that constitutes neglect of his children at best.³²

For this reason, the category of defendants falling under *Oakley*'s heading and the scope of this Note is a new one, totally separate from the child abusers and sexual offenders that have been addressed in the past.³³ Furthermore, this Note's focus is limited to the rights of probationers and thus does not address the broad and equally complex area of prisoners' rights.³⁴

II: PROBATION: THE CONVICT'S PURGATORY

According to Chief Justice Taft in the Supreme Court case *United States v. Murray*,³⁵ "[p]robation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."³⁶ A modern definition more clearly describes probation as "a sentence under which the court either suspends or substantially reduces the period of incarceration, but retains the authority to condition the defendant's freedom on her agreement to abide by certain requirements and to revoke the grant of freedom should any of the conditions be violated."³⁷

These definitions of probation as a basic middle-ground between the protected freedom of a law-abiding citizen and the highly restricted freedom of an incarcerated criminal leave the true boundaries of probationers' rights all but clearly defined. These boundaries are even further blurred by the dichotomy in treatment between probation rights that do not implicate constitutional issues and those that clearly impinge upon the probationer's fundamental constitutional rights.³⁸ Stopping short of the constitutional issues examined in Part III, the

32. Justice Bradley, in her dissent, emphasizes her disagreement with imposition of the procreative restriction for Oakley's financial failings:

[T]he majority has essentially authorized a judicially-imposed "credit check" on the right to bear and beget children. Thus begins our descent down the proverbial slippery slope. While the majority describes this case as "anomalous" and comprised of "atypical facts," the cases in which such a principle might be applied are not uncommon. The majority's own statistical data regarding non-payment of support belies its contention that this case is truly exceptional.

Oakley, 629 N.E.2d at 220 (Bradley, J., dissenting).

33. In limiting my scope to the new class of defendants that is identified in *Oakley*, I am not endorsing procreative restrictions imposed upon violent offenders like those who have been addressed in prior cases. The permanent or temporary prohibition of procreation for violent offenders is a different topic that requires separate and equally extensive analysis.

34. Prisoners' rights to procreate while incarcerated involve a similarly complex field that requires separate treatment from the rights of probationers. For a deeper discussion of the rights of incarcerated individuals, see Sypherd & Ronan, *supra* note 11.

35. 275 U.S. 347 (1928).

36. *Id.* at 358.

37. Arthur, *supra* note 13, at 29.

38. Courts review probation conditions that impinge on probationers' fundamental

following brief overview will touch on the goals and nature of probation, thus lending support to the thesis that probationers, while entitled to lesser freedoms than the typical law-abiding citizen, are nonetheless deserving of a fundamental layer of rights and freedoms that all non-incarcerated individuals retain.

A. *The Main Goals of Probation*

A trial judge's individual crafting and imposition of the specific terms of probation upon a convicted criminal, authorized by the applicable state or federal statute,³⁹ is a highly discretionary matter.⁴⁰ Within this level of discretion, trial judges are expected to conform to overarching objectives of probation.⁴¹ While

constitutional rights with a greater degree of scrutiny than conditions that do not implicate these fundamental constitutional rights. See, for example, *People v. Zaring*, in which the court applied a three-part test to examine the propriety of the probation condition in general. The court stated, "[E]ven in those instances in which a condition of probation satisfies the [three part] test, 'where a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds we must additionally determine whether the condition is impermissibly overbroad.'" 10 Cal. Rptr. 2d 263, 268 (Ct. App. 1992) (quoting *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984)). This constitutional over-breadth analysis involves an additional two-part test, which is more fully explored in Part III's constitutional debate.

39. Arthur, *supra* note 13, at 29. "The power of the federal judiciary and of any state court to place a defendant on probation and to impose conditions on her suspension of sentence is created solely by statute." *Id.*

40. In his article *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, Professor Andrew Horwitz emphasizes the wide discretion given to trial courts in designing and imposing probation conditions: "[T]rial courts currently operate under virtually no restraints, even when imposing probation conditions that severely restrict the probationer's exercise of his or her constitutional rights." 57 WASH. & LEE L. REV. 75, 78-79 (2000).

Horwitz goes on to describe multiple accounts of unusual probation conditions by trial courts, most of which go unchallenged. Especially shocking were the probation conditions Horwitz described under the category of "Infringements on the Right to Basic Human Dignity." *Id.* at 144.

Perhaps the most common shaming condition requires the offender to publicize either the facts of the case or his or her status as a convicted criminal through the use of a wide variety of media, including wearing a T-shirt, bracelet, or placard; making a speech in front of the courthouse; placing an advertisement in a newspaper; or posting a sign on one's property.

Id.

One such court-ordered publication involved a Georgia trial court's requirement that a convicted drunk driver "wear a fluorescent pink plastic bracelet imprinted with the words 'D.U.I. CONVICT' until further order of the court." *Id.* (quoting *Ballenger v. State*, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993)).

41. Justice Wilcox noted numerous observers' criticisms of trial court judges' tendencies to impose inappropriate terms of probation, crafted after their own idiosyncrasies. He wrote: "We agree that judges should not abuse their discretion by imposing probation conditions . . . that reflect

each state's goals of probation may be worded differently in respective state statutes, the two most common goals of probation, stated broadly, are rehabilitation of the criminal and preservation of public safety.⁴²

B. Meeting Goals of Probation: Level of Freedom Retained by Probationers

Keeping in mind these two broad purposes of probation, along with the high level of deference afforded trial courts in the imposition of probation conditions, reviewing courts test probation conditions under baseline standards that have been developed in their respective jurisdictions. Andrew Horwitz notes "several pervasive themes running through the case law [of appellate courts reviewing probation conditions]: the malleability of the standards of review, the unpredictable and result-oriented application of those standards, and the significant degree to which most appellate courts will defer to the trial court."⁴³ Within this lack of consistency of appellate court treatment of probation conditions, however, patches of commonly applied standards have developed. One of the most common standards of review that appellate courts have imposed in relation to probation conditions that infringe on the right to procreate is a three-part inquiry that was set out by the case of *People v. Dominguez*.⁴⁴ Under this *Dominguez* test, a probation condition will be upheld unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."⁴⁵

only their own idiosyncrasies. Instead, they should use their discretion in setting probation conditions to further the objective of rehabilitation and protect society and potential victims from future wrongdoing." *State v. Oakley*, 629 N.W.2d 200, 206 (Wis. 2001).

42. Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 791 (1993).

Numerous cases cite these dual aims of probation, including *Oakley*. Justice Wilcox wrote, [W]hen a judge allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing. To that end—along with the goal of rehabilitation—the legislature has seen fit to grant circuit court judges broad discretion in setting the terms of probation.

629 N.W.2d at 206.

43. Horwitz, *supra* note 40, at 97.

44. 64 Cal. Rptr. 290, 293 (Ct. App. 1967).

45. *Id.* Numerous courts employed this test in their initial review of probation conditions that limited procreative rights: *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

Many of the probation conditions in the foregoing cases passed the *Dominguez* test, but were

A later court applying the *Dominguez* test to a probation condition that limited procreation discussed an additional hurdle that the condition had to clear: “[E]ven in those instances in which a condition of probation satisfies the *Dominguez* . . . test, ‘where a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds, we must additionally determine whether the condition is impermissibly overbroad.’”⁴⁶ This constitutionally-triggered standard will be further discussed in Part III’s constitutional debate.

Oakley’s majority did not employ the popular test set out by *Dominguez*, opting instead to move straight to the constitutional analysis of the condition.⁴⁷ While the intricacies of this constitutional analysis will be saved for the constitutional discussion of Part III, the court’s assumptions concerning the constitutional rights of probationers versus law-abiding citizens fits well in this discussion of probation. Majority author Justice Wilcox emphasized the inequality between probationers and non-convicted citizens with regard to the level of permissible government intrusion on fundamental constitutional rights: “[I]t is well-established that convicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law. . . . felon[s] on probation [do] not enjoy the same constitutional guarantees as the citizenry.”⁴⁸ Thus, *Oakley*’s majority reaffirmed the stance that probationers are entitled to fewer constitutional protections than non-convicted citizens.

Contrary to Wilcox’s extreme stance that led to total elimination of *Oakley*’s constitutional right to procreate,⁴⁹ however, probationers may be restricted in their rights without being stripped of the most basic fundamental constitutional freedoms due other law-abiding citizens. The fact that the probationer was spared incarceration reveals that he or she has been adjudged as a less culpable, safer, more freedom-worthy individual than an incarcerated individual. For this reason, it is not inconsistent to recognize the probationer’s necessarily restricted rights to participate in acts that may lead to future criminality while simultaneously allowing him or her to retain the non-incarcerated citizen’s fundamental foundation of deeply-rooted constitutional freedoms.⁵⁰

invalidated for failing later constitutional scrutiny.

46. *Zaring*, 10 Cal. Rptr. 2d at 268 (quoting *Pointer*, 199 Cal. Rptr. at 364).

47. 629 N.W.2d at 211.

48. *Id.* at 208 (citing *Von Arx v. Schwarz*, 517 N.W.2d 540, 545 (Wis. Ct. App. 1994)).

49. Part III’s constitutional discussion will include federal and state support for the widely recognized status of procreation as a fundamental constitutional right.

50. The *Rodriguez* court addressed the importance of retaining a fundamental layer of constitutional rights for probationers: “[C]onstitutional rights of probationers are limited by conditions of probation which are desirable for the purposes of rehabilitation. . . . Trial courts have broad discretion to impose various conditions of probation, but a special condition of probation cannot be imposed if it is so punitive as to be unrelated to rehabilitation.” 378 So. 2d at 9.

Horwitz also stressed the probationer’s retention of fundamental constitutional rights: Any hope that an offender might be rehabilitated or have some respect for the criminal justice system in the future would seem to follow more naturally from the imposition of

III. THE CONSTITUTIONAL DEBATE

Embedded in the analysis of probation conditions like the one imposed in *Oakley* is a wealth of constitutional implications concerning the defendant's rights and freedoms protected by both the United States and the defendant's state constitution. Since this analysis does not target the laws of any one state in particular, and each state must afford at least an equivalent level of protection that the Federal Constitution affords, the focus of this Note will remain fixed on the fundamental freedoms protected by the U.S. Constitution, particularly the right of privacy that has been recognized under the liberties protected by the Substantive Due Process Clause of the Fourteenth Amendment.⁵¹

A. *The Rights at Stake*

Among the most frequently cited constitutional provisions are the Due Process Clauses of the Fifth and Fourteenth Amendments.⁵² Both the express rights protected by the Fifth Amendment, which ensures protection on a federal level, and the slightly varied rights protected by the words of the Fourteenth Amendment, which applies at the state level, have been the source of much debate in an age of liberal constitutional interpretation and expanded civil liberties. Because cases like *Oakley* involve the ability of states to limit probationers' rights, the Fourteenth Amendment's pertinence to states makes it the guiding constitutional principle in this area.

The words of the Fourteenth Amendment expressly forbid states to deprive any person of life, liberty, or property without due process of law.⁵³ Beyond the explicitly stated rights of life, liberty and property expressed in the text of the Constitution, however, expanded rights have been interpreted into the Fourteenth Amendment. In the famous Supreme Court case of *Palko v. Connecticut*,⁵⁴ Justice Cardozo made the argument that some rights are so fundamental as to be "implicit in the concept of ordered liberty"⁵⁵ and thus enforceable through the textual protection of liberty in the Fourteenth Amendment.⁵⁶ A significant arena of rights that was subsequently recognized falls under the heading of privacy.

1. *Privacy Rights*.—A landmark case in the development of the right of

a sentence that respects the rights and dignity of the offender than from the imposition of a sentence that shows a disregard for those vital issues.

Horwitz, *supra* note 40, at 158. Thus, constitutionally intrusive probation conditions must be carefully scrutinized under the requirement that they be related to rehabilitation of the probationer.

51. U.S. CONST. amend. XIV, § 1.

52. U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

53. *Id.*

54. 302 U.S. 319 (1937).

55. *Id.* at 325.

56. *Id.*

privacy is U.S. Supreme Court case *Griswold v. Connecticut*.⁵⁷ In *Griswold*, a Connecticut statute imposing penalties for individuals using and assisting in the use of contraceptives was struck down as an unconstitutional invasion of the right of marital privacy.⁵⁸ Another landmark case involving the right of privacy is *Roe v. Wade*, which held unconstitutional a Texas law prohibiting abortion except to save the life of the mother.⁵⁹

The privacy interests protected by *Griswold* and *Roe* are slightly different. Beyond the facial distinction of the specific rights protected (right to use contraceptives in *Griswold* and the right to choose to terminate pregnancy in *Roe*), the underlying nature of privacy rights in the two cases illustrates two distinct lines of privacy cases:⁶⁰ those involving protection of private matters from the public, as emphasized in *Griswold*,⁶¹ and the protection of personal autonomy, as emphasized in *Roe*.⁶² Within its branch of personal autonomy, *Roe*'s majority author Justice Blackmun listed several protected activities:⁶³

57. 381 U.S. 479 (1965). In these early stages of a recognized right of privacy, Justices struggled to find a textual basis to justify their holding. Justice Douglas, in his majority opinion, grounded the protection of the right of privacy in the Bill of Rights: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. In his concurrence, Justice Goldberg instead relied on the Ninth Amendment's demand that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* at 488 (Goldberg, J., concurring) (quoting U.S. CONST. amend. IX). Finally, Justice White's concurrence alluded to the most widely recognized source of the right to privacy today, the Fourteenth Amendment liberties preserved by its Due Process Clause. *Id.* at 502 (White, J., concurring).

58. *Id.* at 485.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

59. 410 U.S. 113, 162-65 (1973).

60. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 570-71 (Robert Clark et al. eds., Foundation Press 11 ed. 2001).

61. The chief concern in *Griswold* was the implication of intrusion upon the marital bedroom that would be required in order to uphold the statute prohibiting contraceptives. Justice Douglas stated: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 485-86.

62. In *Roe* the majority emphasized the protected autonomy of women and physicians performing abortions, holding that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

63. *Id.* at 152-53.

activities relating to marriage,⁶⁴ contraception,⁶⁵ family relationships,⁶⁶ and child rearing and education.⁶⁷ An additional activity protected under the personal autonomy branch of Fourteenth Amendment privacy is procreation.⁶⁸

2. *The Right of Procreation.*—The right of procreation, as a constitutional right insured by the fundamental liberties of the Fourteenth Amendment, has been widely recognized on both state⁶⁹ and federal⁷⁰ levels. The Supreme Court case of *Skinner v. Oklahoma*,⁷¹ decided on equal protection grounds, invalidated a state statute that provided for compulsory sterilization of repeat offenders of crimes of moral turpitude.⁷² Justice Douglas recognized the fundamental nature of the right to procreate in his statement, “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.”⁷³ After thus recognizing the constitutionally fundamental right of procreation, the *Skinner* court struck down the Oklahoma statute, holding that it failed to survive the strict constitutional scrutiny that impingement of such a right required under the Equal Protection Clause.⁷⁴

While Oakley’s right to procreate does not involve equal protection grounds, *Skinner* serves as useful precedent for the treatment of impingement of constitutional rights with a high level of scrutiny. Since one of the main disagreements among the Wisconsin Supreme Court Justices in *State v. Oakley* centered around the level of scrutiny with which to evaluate the trial court’s

64. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

65. *Eisenstadt v. Baird*, 405 U.S. 438, 453-545 (1972).

66. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

67. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

68. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

69. *See, e.g., People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984).

70. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

71. *Id.*

72. *Id.* at 536. The challenged statute was Oklahoma’s Habitual Criminal Sterilization Act. The *Skinner* court summarized the statute as follows: “If the . . . defendant is an ‘habitual criminal’ and . . . he ‘may be rendered sexually sterile without detriment to his or her general health,’ then the court ‘shall render judgment to the effect that said defendant be rendered sexually sterile.’” *Id.* at 537.

The statute was invalidated upon equal protection grounds because it treated individuals who had committed the crimes of larceny and embezzlement differently: The statute listed larceny as a crime that counted towards the tolling of crimes that could lead to an individual’s designation as a habitual offender. Embezzlement did not appear in this list. Justice Douglas, in his majority opinion, found that sterilization of a criminal who committed larceny (a crime with elements virtually identical to the crime of embezzlement) was an unequal penalty to the embezzler’s less restrictive punishment. *Id.* at 539.

73. *Id.* at 541.

74. *Id.*

impingement on his constitutional right to procreate, a discussion of possible levels of review will clarify the issues.

B. How Far May Judges Go? Tests Analyzing the Extent to Which Probation May Impinge on Criminals' "Fundamental" Constitutional Rights

The Wisconsin Supreme Court decision in *Oakley* was far from unanimous: Justice Jon P. Wilcox authored a one-man majority opinion. Justices William A. Bablitch and N. Patrick Crooks both filed concurring opinions. Chief Justice Shirley Abrahamson, Justice Ann Walsh Bradley, and Justice Diane S. Sykes all dissented.⁷⁵

Among the divisive disagreements concerning the treatment of the trial court's unprecedented probation condition, one of the most contested issues was the level of deference to afford the lower court's impingement upon *Oakley's* constitutional right of procreation. The debate over the proper standard of review in *Oakley* stems from the lack of consistent precedent in two important areas of state and federal analysis: the appropriate level of review to afford fundamental rights under the Fourteenth Amendment's Substantive Due Process requirements, and the proper level of review to afford probationers whose constitutional rights are imposed upon.

1. *Substantive Due Process Standards for Law Abiding Citizens.*—A significant set of cases dealing with a right of privacy under the concept of substantive due process are the abortion cases of *Roe v. Wade*,⁷⁶ *Planned Parenthood v. Casey*,⁷⁷ and *Stenberg v. Carhart*.⁷⁸ In *Roe*, the woman's right to choose whether or not to procreate was deemed a fundamental constitutional right under the Fourteenth Amendment, any infringement of which was subject to strict scrutiny review.⁷⁹ This strict scrutiny review placed a burden on the state to show that it had a compelling interest that was narrowly tailored to the regulatory infringement it imposed.⁸⁰

The strict scrutiny foundation that was established in *Roe*, however, was uprooted nineteen years later in *Planned Parenthood v. Casey*,⁸¹ a case that involved a challenge to a Pennsylvania law imposing requirements on women and abortion clinics, such as required consent from the father of the unborn child, parental consent for under-age women, a twenty-four-hour waiting-period before a woman could obtain an abortion, and others.⁸² In the *Casey* Court's review of these intrusions on the woman's previously established fundamental Fourteenth

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

76. 410 U.S. 113 (1973).

77. 505 U.S. 833 (1992).

78. 530 U.S. 914 (2000).

79. 410 U.S. at 155-56.

80. *Id.* at 155.

81. 505 U.S. 833 (1992).

82. The challenged law was the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 PA. CONS. STAT. §§ 3203-20 (1990).

Amendment right, plurality author Justice O'Connor suggested the down-grading of the level of scrutiny from strict scrutiny to her proposed "undue burden" test.⁸³ Under this undue burden analysis, if a regulation had a "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," it would be struck down.⁸⁴ Within her suggested undue burden test, Justice O'Connor placed the burden of establishing the undue burden on the challenger, rather than the state.⁸⁵ However, because the majority of the Court failed to adopt the undue burden portion of Justice O'Connor's opinion,⁸⁶ it remained a blurry suggestion that did not directly overrule *Roe's* strict scrutiny requirement.

The uncertainty over strict scrutiny versus undue burden was somewhat resolved in the 2000 case of *Stenberg v. Carhart*.⁸⁷ Justice Breyer authored the majority opinion in this case involving a challenge to a state law that prohibited partial birth abortions.⁸⁸ The majority adopted a variation of Justice O'Connor's previously suggested undue burden standard: First, as announced in *Casey*, if a regulation "[had] a purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," it would be struck down.⁸⁹ However, the *Stenberg* majority shifted the burden to establish or negate such an undue burden from the challenger to the state.⁹⁰ Thus *Stenberg* occupied a middle-ground between *Roe* and *Casey*: While the higher strict scrutiny standard in *Roe* was vacated, the increased difficulty the lower undue burden standard imposed on the challenger was appeased by the placing of the burden of proof upon the state.

The amorphous middle ground that *Stenberg* occupies reflects the overall trend in standards of review of impingement upon Fourteenth Amendment fundamental rights: As stated by a popular treatise on constitutional law, "[t]he standard of review for fundamental rights cases, under . . . the due process clause[] . . . remains unclear. Lower courts . . . must examine the rulings regarding a specific fundamental right to determine . . . what type of standard is

83. 505 U.S. at 874. Justice O'Connor stated specifically, "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.*

84. *Id.* at 877.

85. While Justice O'Connor did not explicitly place the burden on the challenger, she effectively did so throughout her analysis by reviewing evidence offered by the challenger and then explaining whether such evidence was sufficient to constitute an undue burden. *Id.* at 884-85.

86. *Id.* at 844.

87. 530 U.S. 914 (2000).

88. NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999).

89. 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 877).

90. Like in *Casey*, the majority does not expressly place the burden on one party, but in *Stenberg*, the majority effectively shifts the burden to the state by holding for the challenger when the state has failed to provide adequate evidence to negate the finding of an undue burden. *Id.* at 932.

actually being used."⁹¹ This lack of a uniform standard in this complex constitutional area thus illustrates the basis for controversy and uncertainty in the *Oakley* court's attempt to properly review the limitation on Oakley's right to procreate.

2. *Constitutional Standards for Probationers.*—Even more uncertain than the level of review to afford *law-abiding citizens'* fundamental substantive due process rights is the level to afford to *criminally convicted probationers'* constitutional rights. This topic falls squarely in Andrew Horwitz's discussions in *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions.*⁹² As already asserted in the probation discussion of Part II of this Note, appellate courts' treatment of probation conditions, in general, is far from uniform.⁹³ In his later discussion of constitutional challenges to probation conditions, Horwitz further observes a lack of uniformity in the narrow area of review of conditions that impinge upon probationers' fundamental constitutional rights.⁹⁴ Horwitz asserts,

[S]ome jurisdictions claim to take a more serious look at probation conditions that infringe on constitutional rights, using language like "special scrutiny." However, the standard of review in these jurisdictions is some form of a loosely worded, result-oriented balancing test, often still framed under the rubric of reasonableness and abuse of discretion.⁹⁵

Thus, like the individual areas of appellate review of probation conditions and substantive due process rights, the more specific combination of the two (appellate review of probation conditions that impinge upon substantive due process rights) becomes extremely complex due to inconsistencies in precedence.

Justice Wilcox did not address this lack of uniformity when he adopted his "reasonableness" standard of review in *Oakley*.⁹⁶ Citing a long string of past cases that did not require least restrictive means analyses,⁹⁷ Justice Wilcox suggested that the proper test to apply to the trial court's probation condition in *Oakley* was *Edwards v. State's* test of whether the probation condition was "not overly broad" and "reasonably related to the person's rehabilitation."⁹⁸

On the opposite end of the spectrum, dissenting Justice Bradley argued for utilization of the traditional strict scrutiny test often employed to evaluate

91. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 (Jesse H. Choper et al. eds., West 5th ed. 1995) (1978).

92. Horwitz, *supra* note 40.

93. *Id.* at 97.

94. *Id.* at 99-154.

95. *Id.* at 100.

96. *State v. Oakley*, 629 N.W.2d 200, 212 (Wis. 2001).

97. *Id.* at 212 n.27. Justice Wilcox claims that "there is abundant case law that a probation condition infringing on a constitutional right is analyzed under the . . . well-established reasonability standard." *Id.*

98. *Id.* at 210 (quoting *Edwards v. State*, 246 N.W.2d 109, 111 (Wis. 1976)).

impingement of fundamental constitutional liberties.⁹⁹ She argued that this strict scrutiny analysis required that the state establish a compelling interest in imposing the probation condition and that the condition must be narrowly construed to meet that interest.¹⁰⁰ Bradley argued for strict scrutiny “[b]ecause of the heightened importance of the liberty interest at stake.”¹⁰¹

A compromise of the two differing tests appears in Justice Sykes’s dissent: She recognized the reasonableness test from *Edwards* that Justice Wilcox utilized while disagreeing with his failure to include a less restrictive means evaluation.¹⁰² Justice Sykes instead found that the probation condition should be invalidated as unconstitutionally overbroad since it was not reasonably related to Oakley’s rehabilitation and less restrictive means could have achieved the state’s goal of rehabilitation.¹⁰³ This approach by Justice Sykes appears under the constitutional over-breadth analyses in numerous cases that evaluated trial courts’ limitations of procreative rights.¹⁰⁴

IV. REVIEW OF PROBATION CONDITIONS THAT IMPINGE ON CONSTITUTIONAL RIGHTS: THE TEST OF CHOICE

Justice Wilcox’s supportive list of cases makes his amorphous reasonability standard somewhat convincing at first blush. However, more rigorous research of probation conditions that are closely aligned with the constitutional right to procreate yield a separate and equally impressive list of cases supporting Sykes’s method of review of the probation term in *Oakley*.¹⁰⁵ By choosing a more simply-stated reasonability standard, Justice Wilcox oversimplified his analysis and overlooked a wealth of applicable case law that addresses the specific issues of procreative restrictions in terms of probation.

This wealth of on-point case law supports a two-tiered test of probation conditions that impinge upon procreative rights.¹⁰⁶ The first tier of this two-

99. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978).

100. *Oakley*, 629 N.W.2d 200 at 217 (Bradley, J., dissenting).

101. *Id.*

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

103. *Id.*

104. See *People v. Zaring*, 10 Cal. Rptr. 2d 263, 268 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Ct. App. 1984); *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); *Trammell v. State*, 751 N.E.2d 283, 289 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

105. See *supra* note 104.

106. *People v. Zaring*, 10 Cal. Rptr. 2d 263, 268 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Ct. App. 1984); *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); *Trammell v. State*, 751 N.E.2d 283, 289 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313, 315 (Kan. Ct. App. 1989); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

tiered test is imposition of the aforementioned *Dominguez* test for probation conditions.¹⁰⁷ *Dominguez*'s three-step test results in the probation condition being upheld unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."¹⁰⁸ The second tier of the two-tiered test is triggered when a constitutional right is at stake. This portion of the analysis asks whether the probation condition is overbroad and contains two considerations: whether the condition is reasonably related to the probationer's rehabilitation and whether there are less intrusive means of accomplishing the state's goal of rehabilitation.¹⁰⁹ Since the main point of disagreement between Justice Wilcox's and Justice Sykes's approaches was the propriety of least intrusive means analysis, it is important to emphasize that the on-point cases that reached the second tier constitutional over-breadth analysis all included least restrictive means analyses.¹¹⁰ The remaining courts deciding cases in the area of procreative rights for probationers that did not include a least restrictive means analysis merely did so because they concluded that the condition violated one of the three requirements of *Dominguez* tier one, thus holding the condition invalid before reaching the constitutional analysis.¹¹¹

In applying this two-tiered test to *Oakley*, the probation condition fails both tiers. The most comparable case for analysis under the first tier is the Florida case of *Howland v. State*.¹¹² In *Howland*, the defendant father was convicted of negligent child abuse on his infant child. The court sentenced the father to 364 days in prison and five years of probation. The court imposed three conditions on the father's probation: He was prohibited from "(1) having any contact with his child, who was the victim in [the] case; (2) fathering any other children while on probation; and (3) residing with any child under 16 years of age while on probation."¹¹³

Employing the three-part test set out in *Dominguez*, the *Howland* court upheld the first and third conditions of the father's probation, but struck down the

107. *Dominguez*, 64 Cal. Rptr. at 293.

108. *Id.*

109. *Zaring*, 10 Cal. Rptr. 2d at 268 (quoting *Pointer*, 199 Cal. Rptr. at 364).

110. For example, the court in *People v. Pointer* stated, "[i]f available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used." 199 Cal. Rptr. at 365.

Other courts included nearly identical language in their analyses. See, e.g., *Zaring*, 10 Cal. Rptr. 2d at 268; *Rodriguez*, 378 So. 2d at 9; *Trammell*, 751 N.E.2d at 289; *Mosburg*, 768 P.2d at 315.

111. *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

112. 420 So. 2d 918 (Fla. Dist. Ct. App. 1982).

113. *Id.* at 919.

second condition that prohibited him from fathering any more children during his probation.¹¹⁴ The court reasoned that prohibiting the father from having contact with the abused child and preventing him from living with young children related to his underlying crime of child abuse, but preventing him from having more children proved unrelated to the crime of child abuse.¹¹⁵ Furthermore, since the act of fathering children is in itself not a criminal act, the condition violated the second part of the *Dominguez* test.¹¹⁶ Finally, since the other two conditions preventing the father's sustained contact with children could effectively prevent future criminality, the further intrusion of prohibiting procreation was unnecessary.

Under this analysis, the condition in *Oakley* also fails. Like the crime of the father in *Howland*, whose parenting future children bore no relationship to the crime for which he was convicted, Oakley's crime of failing to provide child support to his existing children bears an attenuated connection to the fathering of more children at best. The mere fact that both the crime and procreating involve the common denominator of children does not create a sufficient link between the two. Additionally, the condition in *Oakley* similarly violates the second part of the *Dominguez* test: As the court in *Howland* found, procreating is itself noncriminal conduct. Lastly, just as other probation conditions could adequately achieve the desired effect of preventing future criminality in the father in *Howland*, impingement of Oakley's procreative rights is not a necessary means to achieve the desired ends of the condition. Rather, to better achieve the goals of protection of society and rehabilitation of the probationer, the *Oakley* court could have instead imposed a requirement that Oakley obtain employment and have child support payments garnished from his pay.¹¹⁷

Even if the condition prohibiting procreation passed the first tier of review, the condition fails to survive constitutional muster. As *People v. Zaring* stated, "[W]here a condition . . . impinges upon . . . a fundamental right and is challenged on constitutional grounds we must . . . determine whether the condition is impermissibly overbroad."¹¹⁸ *Zaring* went on to define this overbreadth analysis as inclusive of two main inquiries. First, the condition must bear a reasonable relationship to the compelling state interest in the probationer's rehabilitation, and second, there must be no less intrusive means to achieve the desired goal.¹¹⁹ Under this analysis, *Oakley*'s condition fails.

First, the prohibition of procreation for Oakley bears no reasonable relationship to the state's compelling interest in rehabilitating him. The court gives very little guidance to Oakley in the imposition of its probation condition: Rather than giving him a rough set of guidelines through which to follow the probation condition, the court merely places a blanket ban on his reproductive

114. *Id.*

115. *Id.* at 919-20.

116. *Id.* at 920.

117. *See infra* note 123.

118. 10 Cal. Rptr. 2d at 268 (quoting *People v. Pointer*, 199 Cal. Rptr. at 364).

119. *Id.*

freedoms.¹²⁰ The majority nowhere states an expectation that Oakley is to refrain from having sex altogether. It leaves unanswered the question of what it would do in the face of Oakley's honest attempts and subsequent failures to refrain from having future children—even regularly and properly used contraceptives have failure rates.¹²¹ The court nowhere discusses the possibility that Oakley could fervently use contraceptives and still fail to comply with his probation condition.¹²²

Moreover, by ordering Oakley to refrain from fathering future children, the court took no steps to rehabilitate Oakley into the kind of law-abiding, financially supportive parent that will aid the children he currently has. While prevention of future criminality is an important end achieved by the prohibition of procreation for this class of defendants, it does nothing to solve the existing problem faced by the current victims of Oakley's deadbeat parentage.

Under the second part of the over-breadth analysis, the *Oakley* court's condition similarly fails. More effective, less restrictive alternatives, such as

120. *State v. Oakley*, 629 N.W.2d 200, 201 (Wis. 2001).

121. An article in the periodical *CONTEMPORARY OB/GYN* reported the following failure rates for common forms of contraception: "Barrier methods" of contraception (such as the condom, diaphragm, spermicides, and the cervical cap) are reported to have failure rates of five percent and higher. Intra Uterine Devices (IUDs) (devices surgically placed in women's uteruses to prevent pregnancy) have a failure rate between one percent and 2.9%. Norplant, a device implanted in the woman's arm that emits hormones that prevent pregnancy has a reported failure rate of less than one percent, but this failure rate increases for women who weigh more than 154 pounds. Andrew Kaunitz & Donald Zimmer, Jr., *Cover Story: A Medicolegal Evaluation of Reversible Contraceptives*. *CONTEMPORARY OB/GYN*, May 1, 2000, vol. 5 at 74-110.

122. "Will probation officers monitor Oakley's bedroom, and the use of contraceptives by himself and sex partners? Suppose he conceives under the mistaken belief that his partner was on the pill. Would that trigger an embarrassing evidentiary hearing before the sentencing judge?" Bruce Fein, *Irresponsible Fatherhood*, *WASH. TIMES*, Aug. 7, 2001, at A12.

The cases of *Pointer* and *Trammell* also raised this point:

It deserves to be noted that the [no-pregnancy] condition imposed did not include a prohibition on sexual intercourse. As the trial judge stated at the sentencing hearing: "I would never require somebody to have no sexual activity; I don't think that's even suggested." The conceded fact that even the best birth control measures sometimes fail raises the possibility that appellant could conceive despite reasonable precautions to comply with the condition imposed.

Trammell v. State, 751 N.E.2d 283, 289 n.8 (quoting *People v. Pointer*, 199 Cal. Rptr. 357, 366 n.12 (Ct. App. 1984)).

This problem also arose in *People v. Dominguez*: The woman on whom the probationary procreative restriction had been placed challenged the condition when her probation officer revoked her probation after she had become pregnant. The probationer claimed that she had been using birth control at the time of her pregnancy, but that its defective nature resulted in her pregnancy. The California Court of Appeals overturned the trial court's revocation of probation, stating that "[c]ontraceptive failure is not an indicium of criminality." 64 Cal. Rptr. 290, 293 (Ct. App. 1967)

forcing the father to obtain employment and have his wages garnished,¹²³ would much more effectively satisfy the goals of rehabilitating Oakley into a more productive father for the children he already has.¹²⁴

V. THE PRACTICAL DEBATE: THE EXTRA-CONSTITUTIONAL PROBLEMS WITH OAKLEY'S PUNISHMENT

Aside from the complex constitutional issues implicated by the prohibition of procreation for non-sex offenders and non-child abusers, an entire arena of practical problems surfaces with this type of probation condition.¹²⁵ These problems can be divided into two types of categories: enforceability problems and public policy problems.

A. Enforceability Problems

Many of the conundrums raised by a probation condition generally prohibiting procreation were preemptorily raised in the constitutional analysis of over-breadth in Part IV.¹²⁶ The probation condition in *Oakley* sends Oakley to prison the moment he fathers a child. There are two main problems with enforcing such a probation condition.

First, in its broad, general forbiddance, the *Oakley* court does not discuss what kind of consequences Oakley would face if he broke his probation by fathering a child, yet had acted as responsibly as expected, in properly using contraceptives in order to prevent such an occurrence.¹²⁷ One would expect that the court would view Oakley's responsible use of contraceptives differently than promiscuous and unprotected sex, yet how could the court discover Oakley's culpability in such a scenario?¹²⁸ It would be next to impossible to prove or disprove that he had acted responsibly in trying to prevent pregnancy.

Secondly, if Oakley fathered another child, it is highly likely that such a violation of his probation term could go undetected. Were a woman to violate a similar condition, her violation would quickly become apparent as she carried the child to term and became visibly pregnant. The man's situation is drastically

123. Employment and wage garnishing is a suggestion made by both Justices Bradley and Sykes in their separate dissenting opinions. *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001).

124. Since Part VI of this Note more extensively addresses alternative means of dealing with defendants like Oakley, a majority of the alternative means analysis will be delayed until Part VI.

125. For a wealth of discussion concerning many of the practical problems of this probation condition, see several of the local, nationwide, and international news stories on the *Oakley* case: Vivian Berger, *Bedroom Sentence*, NAT'L L.J., Sept. 17, 2001, at A21; Bruce Fein, *Irresponsible Fatherhood*, WASH. TIMES, Aug. 7, 2001, at A12; Leonard Pitts, Jr., 'Make a Baby, Go to Jail' Ruling Misguided, BALTIMORE SUN, July 20, 2001, at 21A; *Punishing A Deadbeat Dad*, TAMPA TRIB., July 18, 2001, at 16; Kathleen Parker, *Reproductive Limits by Court Order?*, WASH. TIMES, July 16, 2001, at A14.

126. See *supra* Part IV.

127. See *supra* notes 121-22.

128. See *supra* note 122.

different, however, as his fatherhood is not evidenced by any such drastic change in physical appearance. Thus, a probation condition prohibiting the fathering of children would likely be difficult to enforce against the male probationer.

B. Public Policy Problems

The probation condition in *Oakley* is fraught with public policy problems. Courts frequently turn to public policy analysis as a final check to ensure the attainment of the just results they are expected to reach.¹²⁹ Policy did not escape the minds of the Wisconsin Justices in *Oakley*: Justice Wilcox's majority opinion included over a page of discussion of the "crisis" deadbeat parentage has created.¹³⁰ Justice Wilcox, unlike his dissenting colleagues, however, failed to explore the policy implications of the probation condition he chose to uphold. Both Justices Sykes and Bradley, in their dissenting opinions, cited policy problems resulting from probation conditions prohibiting procreation.¹³¹

1. *Allowing Birth of Child to Carry Criminal Sanctions*.—In the opening statements of her dissenting opinion, Justice Bradley asserted "[t]he majority's decision allows, for the first time in our state's history, the birth of a child to carry criminal sanctions."¹³² The majority praised the trial court's probation

129. See, for example, *In re Baby M*, a famous Supreme Court of New Jersey decision of considerable length, based almost entirely on public policy considerations. 537 A.2d 1227 (N.J. 1988).

The main issue in *Baby M* was the legality of "surrogacy contracts": An infertile couple that wished to adopt a child entered a contract whereby they paid another woman to carry a child for them. The issue came before the court when the surrogate mother changed her mind about following through with the contract and the adoptive parents sued to enforce the contract.

The court held surrogacy contracts unenforceable, noting that the sale of babies violates public policy: "We invalidate the surrogacy contract because it conflicts with the . . . public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a 'surrogate' mother illegal, perhaps criminal, and potentially degrading to women." *Id.* at 1234.

130. Justice Wilcox begins his policy discussion of the crisis of deadbeat parentage: "Refusal to pay child support by so-called 'deadbeat parents' has fostered a crisis with devastating implications for our children." *State v. Oakley*, 629 N.W.2d 200, 203 (Wis. 2001). Justice Wilcox goes on to back this assertion with a discussion of the perils of single parenthood and the adverse effects on children, such as "poor health, behavioral problems, delinquency and low educational attainment," and child poverty in general. *Id.* at 204.

131. Justice Bradley, using words from the California case *People v. Pointer*, calls the condition "coercive of abortion." *Id.* at 219 (Bradley, J., dissenting) (quoting *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Ct. App. 1984)). Bradley also notes the injustice of "allowing the right to procreate to be subjected to financial qualifications" and thus "imbu[ing] a fundamental liberty interest with a sliding scale of wealth." *Id.* (Bradley, J., dissenting)

Justice Sykes rejected the probation condition, calling it "a compulsory, state-sponsored, court-enforced financial test for future parenthood." *Id.* at 221 (Sykes, J., dissenting).

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

condition, claiming that it “will prevent [Oakley] from adding victims if he continues to intentionally refuse to support his children.”¹³³ Were Oakley to violate his probation, however, the majority’s decision to allow the child’s birth to carry with it criminal sanctions poses serious policy problems from the new child’s perspective: First, partly due to the majority’s failure to impose a probation condition that would successfully rehabilitate Oakley, the future child would be another victim to its father’s refusal to support it financially. More importantly, the child would have an added stigma of being the very existence that sent its father to prison. Finally, the prison sentence falling on the father as a result of the new child’s birth would make it doubly impossible for the new child to gain financial assistance from him.

2. *Policy Problems for the Potential Mother.*—In addition to the policy issues raised from the prospective child’s perspective, the prohibition of procreation as a probation condition also raises policy concerns for the potential mother.¹³⁴ Because this limitation of procreation is conditioned upon the birth of an infant, rather than conception,¹³⁵ a defendant like Oakley is able to escape probation violation as long as he insures that the child is not born. This mode of escape presents two possible dangers for potential mothers.

The first danger for potential mothers is that of coerced abortion.¹³⁶ First, a woman who has become impregnated by a probationer with this probation term could pressure herself into obtaining an abortion that she would not otherwise have obtained. There is a strong possibility that she would feel enough affinity with the father that she would not want to send him to prison, and additionally, the knowledge that if she did keep the child she would be forced to raise it alone could provide further incentive to terminate the pregnancy.

Aside from the woman’s potential inner-conflicts, this probation condition creates a likelihood of outside coercion from the father. Not wanting to go to prison, the father whose future is at stake would likely attempt to convince the woman carrying his child to obtain an abortion, through emotional or possibly physical means.

Secondly, the probation condition provides increased incentive for such a father to physically abuse the mother so that her agreement to obtain an abortion

133. *Id.* at 213.

134. The possibility of coerced abortion is raised by Justice Bradley, many other courts evaluating prohibition of procreation as a probation condition, and other commentators of *Oakley*. See, e.g., *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989) and *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Ct. App. 1984).

135. I do not, in this observation, suggest that the appropriate condition be that Oakley is prohibited from *conceiving* a child. Such a condition would prove even more unworkable than the condition prohibiting pregnancy since Oakley’s probation officer would have little ability to determine whether Oakley violated probation by impregnating a woman. In noting the problem that conditioning probation on *birth* of a child creates, I merely explore why the specific condition in *Oakley* is unworkable. I remain true to my contention of the impropriety of a condition prohibiting procreation generally in this context.

136. See *supra* note 134.

no longer becomes necessary.¹³⁷ Such physical abuse could lead to the extreme physical and mental suffering on the potential mother's behalf, not to mention the possibility of her own fatality.

VI. THE SOLUTION: ALTERNATIVE WAYS TO DEAL WITH DEFENDANTS LIKE OAKLEY AND OTHER DEADBEAT PARENTS

As mentioned in the dissents of Justices Bradley and Sykes, the probation condition upheld by the majority is not the least intrusive means of accomplishing the goals of probation. Satisfactory probation conditions would promote public safety by addressing the problem Oakley has created for his present children and promote rehabilitation of Oakley by crafting terms that will make him into a more supportive father. Thus, a reactive *and* proactive solution is required, rather than the mere proactive solution offered by the majority of *Oakley* in its blanket ban on his procreative rights.

An alternative probation condition, as suggested by Justices Bradley and Sykes,¹³⁸ would allow Oakley to remain on probation, free from prison time, as long as he gains employment and has a significant portion of his wages garnished for the payment of child support. This solution not only requires the father to cease the criminal conduct of failing to pay support, but also solves the major problem his criminality caused—lack of financial support for the existing children.

In making this suggested alternative, it is necessary to recognize its weaknesses. Especially in the wake of a drained economy and resultant shortage of jobs, a defendant like Oakley could argue that he is unable to obtain

137. Recent studies on domestic violence already link pregnancy with higher abuse rates of women. Sandra L. Martin, Ph.D. et al., *Physical Abuse of Women Before, During, and After Pregnancy*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Mar. 28, 2001, at 1581-84.

A report published by the American Academy of Pediatrics noted this trend: "pregnancy has been associated with a higher risk of women being abused and injured." Robert M. Siegel, M.D. et al., *Screening for Domestic Violence in the Community Pediatric Setting*, PEDIATRICS 1999, Oct., 1999, at 874-77.

An article outside the medical realm cited another study from the JOURNAL OF AMERICAN MEDICAL ASSOCIATION that took place in Maryland in 2001. That study focused on the sharply increased rate of homicide among pregnant women, as compared with nonpregnant women. The author noted that from 1993 to 1998 homicide was the leading killer among pregnant women while it was the fifth leading killer among nonpregnant women. This severe disparity between the safety of pregnant women and nonpregnant women was tied to the increased likelihood of domestic violence towards women. Sarah Ramsay, *Study Uncovers 'Disturbing' Level of Pregnancy-Associated Homicide*, LANCET, Mar. 31, 2001, at 357.

If homicide and abuse rates already sharply increase as a result of the victim's possibly unwanted pregnancy, a probation condition like *Oakley's*, that carries the additional burden of a prison sentence with the birth of a child, could even further encourage increased rates in domestic violence toward pregnant women.

138. See *supra* note 123.

employment. The probationer should not be imprisoned after a good-faith effort and resultant failure to obtain gainful employment. This evaluation of the probationer's efforts in attempting to gain employment should be performed by the probation officer after sustained contact of the probationer and reasonable investigation of his job search.

If Oakley fails to gain employment, or the court, in its initial judgment of Oakley, determines that he will respond more effectively to prison-time, an alternative to probation would be to send Oakley to jail with a work-release provision that allows him to earn money that would go strictly toward payment of his child support arrears. This solution could be criticized since it requires taxpayers to pay for the cost of Oakley's upkeep while he earns money for his children's support, but is a satisfactory trade-off considering the unconstitutional and ineffective alternative imposed by the majority of *Oakley*.

While no solution to a societal crisis like deadbeat parentage can be a perfect one, a complete prohibition of procreation is not the answer. More satisfactory conditions like wage garnishment or prison work-release avoid the pitfalls of the constitutional and practical problems presented by the condition in *Oakley* since they address the existing problem the criminal conduct caused and further promote the rehabilitation of the probationer. These more responsive conditions thus constitute more reasonable alternatives than the proactive attempt to unconstitutionally restrict the probationer's constitutional freedoms by banning him from procreating.

