

HOW OHIO V. TALTY PROVIDED FOR FUTURE BANS ON
 PROCREATION AND THE CONSEQUENCES THAT ACTION
 BRINGS: OHIO V. TALTY: HIDING IN THE SHADOW OF THE
 SUPREME COURT OF WISCONSIN

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I. INTRODUCTION

Meet David Oakley: a Wisconsin resident and convicted deadbeat dad of nine minor children. Oakley is \$25,000 arrears in child support payments.¹ Despite his physical ability to do so, Oakley cannot seem to keep a fulltime job, and he openly admits that he will never be able to support his current or future children.²

Now meet Kristie Trammell: an Indiana resident convicted of child neglect on two separate occasions. One of these convictions resulted from Trammell's neglect of her infant son, J.T., who consequently died of severe malnutrition and dehydration.³ Trammell ignored many signs of J.T.'s worsening condition and also ignored the warnings of several people, including doctors and her own mother, that J.T. needed proper care and medical attention.⁴

For both of these defendants, the respective Wisconsin and Indiana trial courts chose to issue sentences of probation.⁵ Recognizing that probationers do not enjoy the absolute liberty that non-probationers do,⁶ the sentences included conditions restricting the defendants' rights to procreate. On appeal, however, one court struck down this probation condition as excessive.⁷

Each of the courts deliberated over the issue of whether a restriction that abrogated a probationer's right to have a child was reasonably related to the goals of the probation. Putting aside the highly emotionally charged atmosphere, the Indiana court of appeals in *Trammell* held that the condition was not reasonably related to the

¹State v. Oakley, 629 N.W.2d 200, 202-03 (Wis. 2001), *cert. denied*, 123 S. Ct. 74 (2002).

²*Id.* at 217.

³Trammell v. State, 751 N.E.2d 283 (Ind. Ct. App. 2001).

⁴*Id.* at 285-86.

⁵*Oakley*, 629 N.W.2d at 203; *Trammell*, 751 N.E.2d at 286.

⁶Carey v. Population Services Int'l, 431 U.S. 678, 688-89 (1977); Arx v. Schwarz, 517 N.W.2d 540 (Wis. Ct. App. 1994).

⁷*Trammell*, 751 N.E.2d at 291.

probationary goals.⁸ In contrast, while utilizing a more deferential standard of review, the Supreme Court of Wisconsin held that the condition was reasonably related to the goals to withstand constitutional analysis.⁹

In the fall of 2004, the Supreme Court of Ohio addressed this same issue in *Ohio v. Talty*.¹⁰ The *Talty* court chose to strike down the antiprocreation restriction within a deadbeat dad's community control sanction, or probation order.¹¹ However, the *Talty* court's approving language of *State v. Oakley*, where the Supreme Court of Wisconsin upheld the antiprocreation restriction as a condition of probation, fundamentally set the stage for Ohio to join the *Oakley* precedent in the future.

This Note discusses the constitutionality of antiprocreation restrictions as they relate to the purposes and goals of probation, in the context of the *Talty*, *Oakley*, and *Trammell* decisions. This Note addresses the ramifications and implications of these restrictions in relation to the deadbeat parent crisis, and it proposes more adequate means to accomplish the competing goals of child welfare and adherence to constitutional doctrine.

Section II introduces and dissects the fundamental right to procreate as it is found under two concepts: the right itself and the right to privacy. Section III discusses the purposes of probation, generally, and articulates two leading ways state courts deal with antiprocreation restrictions in probation sentences. Section IV provides the factual and procedural backgrounds of *Trammell*, *Oakley*, and *Talty*. It further provides a full analysis of the *Oakley* and *Talty* rationales. Section V discusses how the *Oakley* and *Talty* courts respectively misapplied, expressly and impliedly, the constitutional review of these probation conditions. Section VI sets forth the ramifications and implications of *Talty* and *Oakley*. Section VII illustrates how the Indiana case of *Trammell v. State*, where the appellate court used a "less restrictive means" analysis, properly struck down an antiprocreation condition,¹² and calls for a nationwide adoption of a less restrictive means test. This section also makes the call for, and proposes, more legislation that directly compensates the children involved in these situations.

II. THE FUNDAMENTAL RIGHT TO PROCREATE

Justice Sandra Day O'Connor once explained that "the Constitution is the cornerstone of our nation's commitment to principles of representative government and majority rule," while the Bill of Rights is clearly, and purposefully, an antimajoritarian document.¹³ The Bill of Rights (the "Bill") built a wall around certain fundamental freedoms,¹⁴ which, theoretically, limits a majority's ability to intrude upon these freedoms.¹⁵ As originally adopted, the Bill's purpose was to limit

⁸See generally *id.* (discussing, throughout, the goals and purposes of probation).

⁹See *Oakley*, 629 N.W. 2d 200.

¹⁰*State v. Talty*, 814 N.E.2d 1201 (Ohio 2004).

¹¹Community control sanctions are the functional equivalent to probation. *Id.* at 1205.

¹²*Trammell*, 751 N.E.2d at 289-90.

¹³Sandra Day O'Connor, *The Majesty of the Law* 59 (Craig Joyce ed., 2004).

¹⁴U.S. Const. amend. V.

¹⁵O'CONNOR, *supra* note 13, at 59.

the federal government's abuse of power and to ensure the sovereignty of the states in legislating in furtherance of the Bill of Rights'.¹⁶ Years later, Congress adopted the Fourteenth Amendment, which requires the *states* to accord all citizens due process and equal protection, similar to the Fifth Amendment's protections.¹⁷

The Fifth and Fourteenth Amendments each provide that neither the federal nor state governments shall deprive any person, "of life, liberty, or property without due process of law."¹⁸ This clause, the Due Process Clause, is interpreted as instituting two separate limits on these governments, that of "procedural due process," and that of "substantive due process."¹⁹

Procedural due process refers to the procedures that the government *must* follow before it deprives a person of life, liberty, or property.²⁰ Substantive due process poses the question of whether the government has an *adequate reason* for taking away a person's life, liberty, or property.²¹

The United States Supreme Court has consistently held the Fourteenth Amendment incorporates most of the Bill's protections, such as freedom of religion, freedom of the press, and the right to privacy under the Amendment's use of the word "liberty."²² Because of this incorporation, states, like the federal government, cannot encroach upon these fundamental rights.²³

Some rights, quite decidedly, were not expressly set forth in the Bill. The Framers singled out only a small number of fundamental principles.²⁴ The purpose of this was to refrain from diminishing the significance and importance of the Bill itself.²⁵ Justice O'Connor explains that, "a laundry list of lesser rights, such as the right to wear powdered wigs in public, would sit uneasily beside such fundamental liberties as freedom of speech and religion."²⁶ The Court has historically adhered to this belief and its converse that some rights are so implicit in the *concept* of liberty that the Court must hold them to be fundamental, because one would never consider the need to enumerate such a basic right.²⁷ The Court, accordingly, offers them

¹⁶*Id.*

¹⁷*Id.*

¹⁸U.S. CONST. amend. V and XIV.

¹⁹Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 7.1 (2d ed. 2002).

²⁰*Id.*

²¹*Id.*

²²*See* O'CONNOR, *supra* note 13, at 59.

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 59-60.

²⁶*Id.*

²⁷*Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942) (finding the right to procreate fundamental). *Accord* *Roe v. Wade*, 410 U.S. 113 (1973) (finding constitutional protection in reproductive autonomy); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding the right to marriage fundamental); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding the right to purchase contraceptives protected by the fundamental right to privacy).

special protections during appellate review, via heightened scrutiny, under substantive due process.²⁸

A. *The Right to Procreate*

The Court originally rejected its current position that the right to procreate is fundamental in *Buck v. Bell*, and it, accordingly, need not be offered heightened protection by the courts.²⁹ Here, the Court stated that it was perfectly constitutional for the state of Virginia to involuntarily sterilize mentally retarded persons.³⁰ The state institutionalized the named plaintiff, Carrie Buck, an 18 year old woman.³¹ Justice Holmes, who delivered the opinion of the Court, described Carrie Buck as a “feeble minded white woman.”³² The Justice went on to advocate the Court’s position by explaining that, “[t]hree generations of imbeciles are enough.”³³

Arguably, the Court first recognized the right to procreate as a protected fundamental right in the 1942 landmark decision of *Skinner v. Oklahoma*.³⁴ There, the *Skinner* Court declared the Oklahoma Habitual Criminal Sterilization Act (OHCSA) unconstitutional. OHCSA allowed courts to order the sterilization of men convicted two or more times for crimes of “moral turpitude.”³⁵ Justice Douglas, writing for the Court, stated, with urgency, the sensitive area sterilization statutes invade – the basic human right to produce offspring.³⁶ He explained, “[Procreation] involves one of the basic civil rights of man. . . . Procreation [is] fundamental to the very existence and survival of the race.”³⁷ Justice Douglas’ strong language emphasizes the fundamental nature of procreation, because of which the Court has treated the right as fundamental in most, if not all, of its subsequent decisions.³⁸

²⁸See generally *supra* note 27. Appellate courts review impingements on fundamental rights by utilizing strict scrutiny. The United States Supreme Court, however, affords abortion the slightly, less strict standard of review, “unduly burdensome,” even though abortion is still regarded as a right held within the fundamental right to procreate. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁹*Buck v. Bell*, 274 U.S. 200 (1927).

³⁰*Id.*

³¹*Id.*

³²*Buck*, 274 U.S. at 205. In 1980, however, Carrie Buck was evaluated as a woman of normal intelligence and was living with her sister, who had also been sterilized by the state. See Stephen Jay Gould, *Carrie Buck’s Daughter*, 2 CONST. COMMENT. 331, 336 (1985).

³³*Buck*, 274 U.S. at 207.

³⁴316 U.S. 535 (1942). The United States Supreme Court overturned a sterilization statute that applied to burglars but did not apply to embezzlers. The State convicted each class of felons on the identical *actus reus* and *mens reus* elements. The Court found that the statute’s classification violated the Equal Protection Clause of the Fourteenth Amendment, while finding the right to procreate fundamental.

³⁵*Skinner*, 316 U.S. at 536-37.

³⁶*Id.* at 536.

³⁷*Id.* at 541.

³⁸*E.g.*, *Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113 (1973) (holding the right to an abortion fundamental on the grounds that the right to procreate and not to procreate are

B. The Right to Privacy

The fundamentality of the right to procreate gains further support by the Court's decisions in *Griswold v. Connecticut*³⁹ and *Eisenstadt v. Baird*,⁴⁰ which discuss privacy rights. Although the United States Constitution does not explicitly mention any right to privacy,⁴¹ the Court recognizes that a right of *personal* privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution.⁴² In varying contexts, the Court has found the roots of the right in the First Amendment,⁴³ in the Fourth and Fifth Amendments,⁴⁴ and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.⁴⁵

Specifically, the *Griswold* Court recognized the existence of penumbras, or, "surrounding areas or periphery of uncertain extent,"⁴⁶ which contain implied rights within the guarantees enumerated in the Bill of Rights.⁴⁷ Various guarantees found within the Bill of Rights create zones of privacy.⁴⁸ Without these elements, which act as subparts to these guaranteed rights, substantive due process rights, and those expressed in the Bill, have no foundation to stand upon.⁴⁹ The Court, further, cited the Ninth Amendment, which provides: "The enumeration in the Constitution, of

fundamental); *Griswold*, 381 U.S. 479 (1965) (finding the right to contraception fundamental because the right to procreation is fundamental). In *Skinner*, the Supreme Court holds the right to procreate fundamental. However, the Court in *Buck v. Bell*, 274 U.S. 200 (1927), held sterilization of mentally retarded people constitutional. The distinction lies in that Justice Douglas distinguishes between similarly situated inmates in *Skinner*, versus *all* mentally retarded people in *Buck*.

³⁹381 U.S. 479 (1965) (holding the ban of contraceptives to married persons as an unconstitutional invasion of the right of privacy of married persons).

⁴⁰405 U.S. 438 (1972) (holding a statute that prohibited the sale of contraceptives to unmarried persons unconstitutional on equal protection grounds).

⁴¹*See* *Roe v. Wade*, 410 U.S. 113, 152 (1973); *see also* *Griswold*, 381 U.S. 479 at 482 (noting that the First Amendment does not mention the right to educate a child in a school of the parents' choice, however it has been construed to include that right).

⁴²*See* *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 (1977); *Roe*, 410 U.S. at 152.

⁴³*Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁴⁴*See* *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350-51 (1967); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616 (1886).

⁴⁵*See* *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also* *Roth v. Bd. of Regents*, 408 U.S. 564, 572 (1972).

⁴⁶BLACK'S LAW DICTIONARY 522 (2d pocket ed.) (2001).

⁴⁷*Griswold*, 381 U.S. at 484-85 (holding the First, Third, Fourth and Fifth Amendments are buttressed by penumbras like privacy). This approach, the "penumbra approach," has been treated as and is now analogous to a due process analysis. CHEMERINSKY, *supra* note 19, at § 10.3.2.

⁴⁸*Griswold*, 381 U.S. at 514.

⁴⁹*See* CHEMERINSKY, *supra* note 19, at § 10.3.2.

certain rights, *shall not* be construed to deny or disparage others retained by the people.”⁵⁰

Griswold helped clarify that only personal rights can be deemed “fundamental,” or “implicit in the concept of ordered liberty.”⁵¹ The decision also affirms that the right to privacy has some extension to activities relating to marriage,⁵² procreation,⁵³ contraception,⁵⁴ family relationships,⁵⁵ child rearing, and education.⁵⁶

In *Eisenstadt*, the Court reaffirmed that personal privacy is a fundamental right protected by the Constitution, and that the right to procreate falls under its umbrella.⁵⁷ The *Eisenstadt* Court held that, if the right to privacy means anything, it means freedom from governmental intrusion into matters “so fundamentally affecting a person as the decision to bear or beget a child.”⁵⁸

More recently, the Court explicated that the lower courts’ roles are not to mandate any sort of “moral code” for the nation.⁵⁹ Instead, the courts’ duties should extend only to protect a person’s liberty.⁶⁰ The Court recognizes that an aspect of “liberty” protected under the Due Process Clause of the Fourteenth Amendment is this right to personal privacy in certain areas or zones.⁶¹ The right of personal privacy includes “the interest in independence in making certain kinds of important decisions.”⁶² The Court has not determined how far-reaching this right is or where this right to personal privacy ends. That being said, it is certain that an individual may make personal decisions, without unjustified government interference, “relating

⁵⁰*Griswold*, 381 U.S. at 484 (citing U.S. CONST. amend. IX) (emphasis added).

⁵¹*Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). It should be noted Justice Douglas avoided a substantive due process argument as the basis of the *Griswold* decision. Professor Erwin Chemerinsky notes that this action was taken in response to the *Lochner* era of the Court, which generally did not afford this somewhat broader analysis. Today, the penumbral approach is treated as a substantive due process analysis. CHEMERINSKY, *supra* note 19, at § 10.3.2.

⁵²*Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding the right to marry fundamental).

⁵³*Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 541-542 (1942) (holding the right to procreate fundamental).

⁵⁴*Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (holding the right to contraception fundamental).

⁵⁵*Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁵⁶*Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer*, 262 U.S. 390.

⁵⁷See generally *Eisenstadt*, 405 U.S. 438.

⁵⁸*Eisenstadt*, 405 U.S. at 453 (citations omitted).

⁵⁹*Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Casey*, 505 U.S. at 850 (stating the United States Supreme Court’s “obligation is to define the liberty of all, not to mandate [its] own moral code”).

⁶⁰See *Lawrence*, 539 U.S. 558, 571.

⁶¹*Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977).

⁶²*Id.*

to marriage, procreation, contraception, family relationships, and child rearing and education."⁶³

III. PROBATION PARTICULARS

When government regulation significantly impinges on a fundamental right or upon personal liberty, the state prevails only upon a showing of a subordinate, compelling government interest.⁶⁴ The Court established, however, that probationers do not enjoy the same degree of freedom and liberty as those citizens who have not broken the law.⁶⁵ The commonly requisite strict scrutiny review in such cases, therefore, is inapplicable.⁶⁶ The Court, notably, has yet to establish a test or rule in any matter as to what extent the government may infringe upon a probationer's fundamental rights.⁶⁷

A. Probation: Purposes and Rationale

In lieu of jail time, a court may extend a probation agreement to the defendant. Here, the probationer agrees to abide by a catalog of restrictions, called probation conditions, in consideration for avoiding a prison term.⁶⁸

Generally, the purpose of probation is two-fold: (1) to protect the public welfare while the probationer is at large and (2) to facilitate rehabilitation for the offender.⁶⁹ Trial courts utilize broad discretion when instituting probation conditions.⁷⁰ At the very least, these conditions, when restricting certain constitutional rights, must reasonably relate to the probationary purposes and to the criminal activity itself.⁷¹

⁶³State v. Trammell, 751 N.E.2d 283, 290 (Ind. Ct. App. 2001) (quoting *Carey*, 431 U.S. 678 at 685).

⁶⁴See *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

⁶⁵See *Richardson v. Ramirez*, 418 U.S. 24 (1974). Here, the United States Supreme Court upheld a statute denying a felon, who served his complete sentence, the fundamental right to vote. The Court recognized felons do not enjoy the same degree of liberty as non-felons.

⁶⁶See Elizabeth F. McCright, *Prohibiting Deadbeat Dads from Fathering More Children . . . What's Next? The Wisconsin Supreme Court's Decision in State v. Oakley*, 86 MARQ. L. REV. 153, 172 (2002). But see Devon A. Corneal, Note, *Limiting the Right to Procreate: State v. Oakley and the Need for Strict Scrutiny*, 33 SETON HALL L. REV. 447, 468 (2003).

⁶⁷See *State v. Talty*, 814 N.E.2d 1201 (Ohio 2004); *Oakley*, 629 N.W.2d at 202-03; see also *Trammell*, 751 N.E.2d 283; *People v. Pointer*, 151 Cal. 3d 1128 (Cal. Ct. App. 1984). Each court applies a different appellate review where probation conditions impinge the fundamental right to procreate.

⁶⁸LAURA DIETZ, 21A AM. JUR. 2D *Criminal Law* §907 (2004). It should be noted that courts disfavor challenges to probation agreements based upon contractual theory. However, for the purposes of explaining probation's purposes and rationales only, a contractual metaphor defines the parties' intents in a simple manner.

⁶⁹*Id.* See *Trammell*, 751 N.E.2d 283; see *Pointer*, 151 Cal. 3d 1128 (Cal. Ct. App. 1984).

⁷⁰See 21A DIETZ, *supra* note 68. Wisconsin statutory law supports the proposition that courts have broad discretion when instituting probation conditions. See *Edwards v. State*, 246 N.W.2d 109, 110-11 (Wis. 1978); *State v. Garner*, 194 N.W.2d 649, 651-52 (Wis. 1972).

⁷¹*Id.* at 111-12. See *Gordy v. State*, N.E.2d 190 (Ind. Ct. App. 1996).

On review, conditions that the court finds to be vindictive, vague, overly broad, or unreasonable will be stricken from the probation order.⁷²

B. Constitutional Challenges to Probation Conditions, Tests Used by Courts

The general population usually perceives probation as a gift – the gift of not serving a prison sentence. Under this rationale, known simply as the “Act of Grace Doctrine,”⁷³ a court treats probation as a privilege that the probationer should accept thankfully, despite whatever constitutionally-held rights the conditions in the probation order may infringe.⁷⁴ In 1973, the United States Supreme Court explicitly rejected this doctrine, explaining that “a probationer can no longer be denied due process in reliance . . . that probation is an ‘act of grace.’”⁷⁵

Since the demise of the Act of Grace Doctrine, courts in Wisconsin, Ohio and numerous other states have held that probation conditions may impinge on probationers’ fundamental rights, so long as the conditions are reasonably related to the probationer’s rehabilitation and the public’s protection.⁷⁶ This reasonableness standard is the most deferential test used by an appellate court when reviewing a trial court’s probation order. It requires only that the conditions must not be vague, excessive or illegal.⁷⁷

Notably, when a probation condition does impinge on a fundamental right, some forward-thinking courts employ a more stringent review, or special scrutiny standard.⁷⁸ For example, the Indiana court of appeals in *Trammell v. State*⁷⁹ utilized this special scrutiny. The review entails balancing (1) the purpose sought to be served by probation, (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers, and (3) the legitimate needs of law enforcement.⁸⁰ Even if these factors weigh in favor of the state, the state must still demonstrate that no less intrusive means exist to accomplish these goals.⁸¹

⁷²See 21A DIETZ, *supra* note 68; see also *Garrett v. State*, 680 N.E.2d 1 (Ind. Ct. App. 1997); *Kahn v. State*, 700 So. 2d 767 (Fla. Dist. Ct. App. 2d Dist. 1997).

⁷³*Escoe v. Zebst*, 295 U.S. 490, 492-93 (1934).

⁷⁴*Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

⁷⁵*Id.* at 782.

⁷⁶See, e.g., *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) (“[The] probation condition is not necessarily invalid simply because it affects probationer’s ability to exercise constitutionally protected rights”); *State v. Talty*, 814 N.E.2d 1201 (Ohio 2004); *Smith v. State* 727 N.E.2d 763, 767 (Ind. Ct. App. 2000) (“The condition may impinge upon a probationer’s exercise of an otherwise constitutionally protected right”); *Edwards v. State*, 246 N.W.2d 109, 111 (Wis. 1976) (“Conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation”).

⁷⁷*Corneal*, *supra* note 66, at 465; see also 21A DIETZ, *supra* note 68.

⁷⁸See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975); *Pointer*, 151 Cal. 3d 1128; *Trammell*, 751 N.E.2d 283.

⁷⁹*Trammell*, 751 N.E.2d at 289.

⁸⁰*Id.* at 289. California courts use a slightly more stringent, narrowly tailored test. In addressing the “reasonably related” prong, the court will invalidate a condition if it:

IV. *TRAMMELL, OAKLEY, AND TALTY: THE NATION'S THREE LEADING CASES
CONCERNING ANTIPROCREATION RESTRICTIONS*

A. *Trammel v. Indiana*

On April 25, 1999, Kristie Trammell gave birth to a son, J.T.⁸² From the outset, Trammell failed to take her son to multiple doctors appointments, including his two-week check-up and his initial immunization appointment.⁸³

Approximately six weeks before J.T.'s death, Trammell left the child in the care of her mother, Carol Hatcher.⁸⁴ While in Hatcher's care, J.T. experienced vomiting and suffered severe diarrhea. Hatcher testified at trial that Trammell's older daughter, S.P., experienced the same conditions as an infant and subsequently underwent corrective esophageal surgery.⁸⁵ Hatcher alerted Trammell to J.T.'s poor condition, and Trammell told her mother she would make an appointment for her son with his doctor, but never did.⁸⁶ A few days later, according to Hatcher, J.T.'s eyes "looked funny" and were "deep set into his head."⁸⁷

Just after midnight on September 20, 1999, Trammell returned home from shopping. She fed J.T., who regurgitated most of his milk.⁸⁸ Trammell put J.T. to sleep. She looked into his room the next morning and saw J.T. lying in his bassinet.⁸⁹ Trammell left the house without feeding him and returned home around 3:30 p.m. She then left again to run various errands. She returned home and took care of some matters concerning her daughter, and moved some outdoor plants before checking on her son.⁹⁰

J.T. had died at approximately 5:00 a.m. that morning from "emaciation, dehydration and salt or electrolyte imbalance due to chronic malnutrition," according to forensic pathologist Dr. John Heidingsfelder, who also performed the autopsy.⁹¹

"(1) has no relationship to the crime which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. Furthermore, where a condition impinges on a fundamental right, the court must determine whether the condition is impermissibly overly broad." *Pointer*, 151 Cal. 3d at 1139; *see also* *People v. Dominguez*, 256 Cal.App.2d 623, 627 (1967).

⁸¹*Trammell*, 751 N.E.2d at 287.

⁸²*Id.* at 285.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Trammell*, 751 N.E.2d at 286.

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

The state of Indiana charged Trammell with child neglect of a dependent as a Class B Felony.⁹² The trial court found Trammell guilty, but mentally ill due to mental retardation, sentencing Trammell to eighteen years in prison. The trial court determined Trammell would serve eight years of the prison sentence on probation.⁹³ As a condition of the probation, the trial court ordered Trammell not to become pregnant.⁹⁴

Upon appeal of the antiprocreation condition, the Indiana court of appeals vacated the probation order.⁹⁵ Indiana appellate courts utilize a heightened scrutiny, comparable to a less intrusive means standard, discussed in Section III(B), *supra*. The Indiana court of appeals held that the existence of numerous less intrusive means, which did not severely affect the right to procreate, rendered the probation order invalid.⁹⁶

B. *Wisconsin v. Oakley*

Arrears \$25,000 in child support, David Oakley, the defendant in *Wisconsin v. Oakley*, could not support his nine children.⁹⁷ The state of Wisconsin charged him with four counts of refusing to pay child support as a repeat offender, a felony in the state of Wisconsin.⁹⁸ Oakley pleaded “no contest” to the charges.⁹⁹ The trial court imposed both a three year prison sentence and five years probation following his incarceration.¹⁰⁰ The court ordered that, “[W]hile on probation, Oakley cannot have any more children unless he demonstrates that he has the ability to support them and that he is supporting the children he already has.”¹⁰¹ If Oakley did procreate, the

⁹²*Trammell*, 751 N.E.2d at 286

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Trammell*, 751 N.E.2d at 289.

⁹⁶*Id.*

⁹⁷*State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001), *cert. denied*, 123 S. Ct. 74 (2002). The Wisconsin Supreme Court found that, despite Oakley’s non-payment, his actions were unintentional when considering relevant factors such as his unemployment, his drug addiction problems and his status as a welfare recipient. The Court accepted Oakley’s statement that, if he had the money, he would pay his outstanding debt to his children.

⁹⁸*Id.* at 204-05. The statutory sanction against non-payment of child support is defined as a Class E felony for any person, “who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide” WIS. STAT. ANN. § 948.22(2) (West 2000). A Class E felony is punishable with “a fine not to exceed \$10,000 or imprisonment not to exceed 2 years, or both.” *Id.* at § 939.50(3)(e). The legislature has amended this statute so that intentionally refusing to pay child support is now punishable by up to five years in prison. *See* WIS. STAT. ANN. § 939.50(3)(e) (West Supp. 2001).

⁹⁹*Oakley*, 629 N.W.2d at 206.

¹⁰⁰*Id.* at 203. The probation condition allowed Oakley to avoid a prison sentence totaling eight years.

¹⁰¹*Id.*

state would incarcerate him.¹⁰² Upon appeal, both the Wisconsin court of appeals and the Supreme Court of Wisconsin affirmed the probation condition.¹⁰³ The Wisconsin Supreme Court, utilizing the less stringent reasonableness test, held that the condition was not overly broad and was reasonably related to the probationary goals.¹⁰⁴

The majority in *Oakley* impliedly determined the procreation condition to be reasonable based on the outdated Act of Grace doctrine (discussed *supra*, Section III(B)). The Wisconsin court stated, “because Oakley was convicted of [a felony], [he] could have been imprisoned for six years . . . this probation condition, which infringes on his right to procreate during his term of probation, is not invalid under these facts.”¹⁰⁵ The *Oakley* court argued that Oakley, in contractual terms, got the benefit of the bargain. The majority’s statement can hardly be distinguished from the rationale that probation is a privilege that should be “thankfully accepted by the probationer, despite whatever constitutionally held rights were infringed,”¹⁰⁶ because the act of granting probation is clearly a gift from this court.

The *Oakley* court further explained that antiprocreation restrictions survive constitutional analysis because convicted individuals do not enjoy the same degree of liberty as non-criminal citizens.¹⁰⁷ Since criminals do not share the same “clean slate” as non-criminals, probation conditions forced upon a probationer may impinge upon his constitutional rights, so long as the conditions are not overly broad and are reasonably related to the probationer’s rehabilitation.¹⁰⁸

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Oakley*, 629 N.W.2d at 206. *Oakley* argued that the condition infringed on his fundamental right to procreate, therefore, the condition must be subject to a strict scrutiny analysis. “That is, it must be narrowly tailored to serve a compelling state interest.” *Oakley*, 629 N.W. 2d at 207-08. On a national scale, the *Oakley* court adopted the standpoint of the minority of jurisdictions. See *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992) (procreation restriction imposed on defendant convicted of heroin possession invalid); *Pointer*, 199 Cal. Rptr. at 365 (procreation restriction imposed on defendant convicted of child endangerment overly broad where less restrictive means existed to provide safety for children); *People v. Zaring*, 10 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 1992) (condition that defendant convicted for heroin possession not become pregnant during probation invalid); *Howland v. State*, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (condition prohibiting defendant from fathering a child not reasonably related to crime of child abuse where other less restrictive means existed to protect future children); *People v. Ferrell*, 659 N.E.2d 992, 995 (Ill. App. Ct. 1995) (“no-pregnancy” condition for defendant convicted of battery of a two-month-old child struck); *State v. Trammell*, 751 N.E.2d 283, 290-91 (Ind. Ct. App. 2001) (condition prohibiting defendant convicted of child neglect from becoming pregnant while on probation violated the right of privacy).

¹⁰⁵*Oakley*, 629 N.W.2d at 201-02.

¹⁰⁶*Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935).

¹⁰⁷*State v. Oakley*, 629 N.W.2d 200, 207 (Wis. 2001); see also *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

¹⁰⁸*Oakley*, 629 N.W. at 210.

The *Oakley* court concluded that the antiprocreation restriction did not permanently eliminate the defendant's ability to exercise his constitutional right, and therefore, the condition was not overly broad.¹⁰⁹ In contrast to *Carrie Buck in Buck v. Bell*, once the term of the probation expired, *Oakley* retained the ability and freedom to father more children. More importantly, *Oakley* could satisfy the condition of probation by making efforts to support his children as required by law.¹¹⁰ The *Oakley* court also held that the condition was reasonably related to the goal of rehabilitation because it prevented the defendant from creating more victims, should he continue to intentionally refuse to support his children.¹¹¹

C. *Ohio v. Talty*

1. Historical and Procedural Backgrounds

On February 27, 2002, the state of Ohio indicted Sean E. Talty, an Akron resident, on two counts of non-support of dependants in violation of O.R.C. §§ 2929.21 and/or 2929.21(B),¹¹² "a fourth degree felony, for unlawfully and recklessly failing to provide adequate support for three of his seven children."¹¹³ Talty initially plead not guilty to the non-support charges, but later changed his plea to no contest.¹¹⁴ The Medina County Court of Common Pleas accepted his plea, and found him guilty of all of the counts charged in the indictment.¹¹⁵

Prior to sentencing, the presiding judge, Judge James L. Kimbler,¹¹⁶ ordered each party to the action to submit briefs to determine "whether or not the Court can lawfully order that, as a condition of [Talty's] supervision by the Adult Probation Department, [Talty] may not impregnate a woman while under supervision."¹¹⁷ Each party filed a brief in support of their position.¹¹⁸

After reviewing the arguments, the court held that it did in fact have the power to institute such a restriction.¹¹⁹ Further, the court held that such a community control

¹⁰⁹*Id.* at 212; *see also* *State v. Kline*, 963 P.2d 697 (Ore. Ct. App. 1998).

¹¹⁰*Oakley*, 629 N.W.2d at 203.

¹¹¹*Oakley*, 629 N.W.2d at 212.

¹¹²*Ohio v. Talty*, No. 02CA0087-M, 2003 Ohio App. LEXIS 2907 (Ohio Ct. App., Medina County June 18, 2003).

¹¹³*Id.* at *2.

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶Robert. E. Pierre, *In Ohio, Supreme Court Considers Right to Procreate*, WASH. POST, May 11, 2004, at A02.

¹¹⁷*Talty*, 2003 Ohio App. LEXIS 2907, at *2.

¹¹⁸*Id.* at *2. The America Civil Liberties Union (ACLU) of Ohio, upon motion to intervene, also submitted a brief as amicus curiae. The ACLU argued that the trial court did not have the authority to impose such a restriction as a term of probation on the fundamental right to procreate. *Id.* at *2-3.

¹¹⁹*Id.*

sanction, a form of probation,¹²⁰ was consistent with the purposes of probation, as dictated by O.R.C. § 2929.11(A),¹²¹ and sentenced Talty to community control for five years under the general supervision of the Adult Probation Department.¹²²

Judge Kimbler ordered Talty:

1) to make regular payments of \$75 a week for each case he maintained with to the Medina County Child Support Enforcement Agency; 2) to make all reasonable efforts to remain employed on a fulltime basis; 3) to obtain a GED within five years; 4) to make all reasonable efforts to avoid conceiving another child while under the supervision of the Medina County Adult Probation Department.¹²³

In Ohio, community control sentences operate as the functional equivalent to probation sentences.¹²⁴ As long as it is not required by the court to do otherwise, the trial court may impose a sentence on a felonious offender that consists of one or more of these community control sanctions.¹²⁵ Such sanctions, like probation conditions, include stipulations such as the offender must abide by the law, and must not leave the state without the permission of the court or the offender's probation officer.¹²⁶ The court can also impose any other condition under a community control sanction that the court considers "appropriate."¹²⁷

Like the majority of states, Ohio's laws dictate that the trial court retains broad discretion in determining the conditions of a probation order.¹²⁸ However, the trial court may not impose any arbitrary conditions, which in purpose or *in effect*, burden

¹²⁰*Id.* at *3. Community control is the functional equivalent to probation. *Id.* at *9. A "community control sanction" is defined by Ohio Revised Code § 2929.01(F) (West 2003) as a sanction that is not a prison term and is described in OHIO REV. CODE ANN. § 2929.15 (West 2003) (community control), OHIO REV. CODE ANN. § 2929.16 (West 2003) (residential sanction), OHIO REV. CODE ANN. § 2929.17 (West 2003) (nonresidential sanctions) or OHIO REV. CODE ANN. § 2929.18 (West 2003) (financial sanctions; restitution). *Talty*, 2003 Ohio App. LEXIS 2907, at *3, n.2.

¹²¹OHIO REV. CODE ANN. § 2929.11(A) (West 2003). This statute defines the purposes of felony sentencing as, "the overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

¹²²*Talty*, 2003 Ohio App. LEXIS 2907, at *3.

¹²³*Id.*

¹²⁴*Id.* at *9.

¹²⁵*Id.* (citing OHIO REV. CODE ANN. § 2929.15(A)(1)); *see also* OHIO REV. CODE ANN. § 2929.16; OHIO REV. CODE ANN. § 2929.17; OHIO REV. CODE ANN. § 2929.18.

¹²⁶*Talty*, 2003 Ohio App. LEXIS 2907, at *9-10.

¹²⁷*Id.* at *10. *See State v. Sturgeon*, 742 N.E.2d 730, 733 (Ohio 2000).

¹²⁸OHIO REV. CODE ANN. § 2951.02; *Lakewood v. Hartman*, 714 N.E. 2d 902, 904 (Ohio 1999); *State v. Jones*, 550 N.E.2d 469, 470 (Ohio 1990).

the defendant in the exercise of his or her liberty.¹²⁹ Ohio case law defines “arbitrary” as “bearing only a remote relationship to the crime for which [defendant] was convicted and to the objectives sought by probation of education and rehabilitation.”¹³⁰ Similarly to Wisconsin’s doctrine, when the trial court invokes a probation sentence, it, therefore, may not be so overly broad as to unnecessarily infringe on the constitutional rights of the probationer.¹³¹ Talty appealed the antiprocreation restriction; however, the Ohio court of appeals upheld the condition.¹³²

Upon review, Ohio appellate courts currently utilize a “reasonableness” standard, or the *Jones* test, to determine whether a trial court’s probation order and its conditions should be upheld.¹³³ The Supreme Court of Ohio, in *State v. Jones*,¹³⁴ set forth a three-part test to determine whether a probation condition is sufficiently related to the interests of doing justice, rehabilitating the offender, and ensuring the offender’s good behavior.¹³⁵

Under *Jones*, courts should consider each of the following: (1) whether the condition is reasonably related to the rehabilitating the offender, (2) whether the condition has some relationship to the crime of which the offender was convicted, and (3) whether the condition relates to the conduct which is criminal or reasonably related to future criminality and serves the statutory ends of the probation.¹³⁶ Notably, although community control sanctions are not exactly the same as probation,¹³⁷ the trial court’s authority – as it is with probation – is not limitless and those conditions may not be overly broad as to impinge upon the offender’s liberty.¹³⁸

Utilizing the *Jones* test,¹³⁹ the Ohio court of appeals found that the reasonableness standard governs the validity of the community control sanction.¹⁴⁰ Even though the issue involves a fundamental right, the court of appeals held that, because Talty was a felon, he was not entitled to the heightened scrutiny.¹⁴¹

¹²⁹*Talty*, 2003 Ohio App. LEXIS 2907, at *7-8 (citing *State v. Livingston*, 372 N.E.2d 1335, 1336 (Ohio Ct. App., 1976)).

¹³⁰*Livingston*, 372 N.E.2d 1335, 1337 (Ohio Ct. App., 1976).

¹³¹*State v. Maynard*, 547 N.E.2d 409, 411 (Ohio Ct. App. 1988).

¹³²*See generally Talty*, 2003 Ohio App. LEXIS 2907.

¹³³*Livingston*, 372 N.E.2d at 1337.

¹³⁴*State v. Jones*, 550 N.E.2d 469, 470 (Ohio 1990).

¹³⁵*Id.*

¹³⁶*Talty*, 2003 Ohio App. LEXIS 290, at *8-9.

¹³⁷*Talty*, 814 N.E.2d 1201 (Ohio 2004). *See State v. Lake*, 781 N.E.2d 1053, 1056 (Ohio Ct. App., 2002) (citing *State v. Jahnke*, 772 N.E.2d 156 (Ohio Ct. App. 2002)).

¹³⁸*State v. Jahnke*, 772 N.E.2d 156, 158 (Ohio Ct. App. 2002).

¹³⁹*Jones*, 550 N.E.2d at 470.

¹⁴⁰*Talty*, 2003 Ohio App. LEXIS 290, at *27.

¹⁴¹*See generally Talty*, 2003 Ohio App. LEXIS 290. *See supra* Section III (discussing the limited rights of probationers).

The Ohio Supreme Court agreed that the *Jones* test governed this type of review, but the court struck down the appellate court's holding.¹⁴² The court found that the condition was overly broad under *Jones*, and accordingly it vacated that portion of the trial court's community control sanctions.¹⁴³

2. Application of *Jones*

The Ohio Supreme Court in *Talty* chose not to address the constitutionality of the antiprocreation restriction in the probation order, saying only that the court will not reach constitutional issues unless absolutely necessary.¹⁴⁴ Instead, the court focused only on the non-constitutional argument: whether the sanctions met the *Jones* test.¹⁴⁵

In its opinion, the *Talty* court dispensed of the out-of-date "act of grace" doctrine, which the Wisconsin Supreme Court relied upon heavily. The court did agree that probationers do not enjoy the same liberties and freedom as those not convicted of breaking the law.¹⁴⁶ However, the Ohio Supreme Court reiterated that the fact that the state might have incarcerated Talty does not, in itself, justify an intrusion upon his or her rights.¹⁴⁷

The *Talty* court's rejection of the "Act of Grace Doctrine" rests on the undisputed proposition that infringements on constitutional rights must be tailored to meet specific government interests.¹⁴⁸ These interests differ depending on whether the defendant is incarcerated or subject to community control sanctions.¹⁴⁹

The *Talty* court used the example of a person incarcerated for a crime wholly unrelated to procreation — burglary — who is denied conjugal visits.¹⁵⁰ This is arguably an infringement on this person's right to procreate; however, the regulation keeping a person who otherwise would not be at the prison is reasonably related to the legitimate state interest of maintaining the security of the prison.¹⁵¹ On the other hand, for the same crime of burglary, a probationer may not be denied the right to procreate based on that same government interest (prison security), because the reality is that probationers are free from restraint like non-probationers. A legitimate government interest, in this situation, does not exist.

¹⁴²*Talty*, 814 N.E.2d at 1202.

¹⁴³*Id.*

¹⁴⁴*Id.* at 1203. See *In re Miller*, 585 N.E.2d 396, 405 (Ohio 1992); *Hall China Co. v. Pub. Util. Comm.*, 364 N.E.2d 852, 854 (Ohio 1977).

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Talty*, 814 N.E.2d at 1206 (citing *United States v. Tolla*, 781 F.2d 29, 33 (2d Cir. 1986); *United States v. Pastore*, 537 F.2d 675, 681 (2d Cir. 1970); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)).

¹⁴⁸*Talty*, 814 N.E.2d at 1206.

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹*Id.*; see also *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994); *Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990).

Summarily, it follows for the Ohio Supreme Court that a legitimate penological interest may be different from a legitimate probationary interest.¹⁵² The government would make an unwise and erroneous conclusion that it may withhold any right from a probationer simply because the court *could have* imprisoned the probationer.¹⁵³

Second, the court analyzed the antiprocreation restriction under its *Jones* reasonability standard. If a probation condition or community control sanction can not meet the three-part *Jones* test, the condition unnecessarily infringes on the probationer's liberty, and the condition is deemed overly broad.¹⁵⁴ The overly broad threshold, therefore, determines the reasonableness of the condition.¹⁵⁵

The availability of readily apparent alternatives to the regulation demonstrates this "unreasonableness."¹⁵⁶ However, in *Talty*, the court noted that this unreasonableness standard is not the functional equivalent of a "least restrictive alternative" test.¹⁵⁷ Courts need *not* summon and exhaust *every* conceivable, alternative method to accommodate an offender's constitutional complaint.¹⁵⁸ Rather, the test is this: if the probationer himself devises a scheme in which the court can meet the purpose of the probation order without infringing on the probationer's fundamental rights, the trial court arbitrarily infringed on those rights.¹⁵⁹

Thus, the *Talty* court found that *Jones* stands for the proposition that probation conditions must be reasonably related to the statutory ends of probation and must not be overly broad.¹⁶⁰ Since community control sanctions act as the functional equivalent to probation, the *Jones* test applies in this case with equal force.¹⁶¹

Under the *Jones* analysis, Talty asserted that the Ohio Supreme Court should strike down the procreation restriction in the community control sanction because it did not provide an opportunity for the condition to be lifted if he fulfilled his child

¹⁵²*Talty*, 814 N.E.2d at 1206.

¹⁵³*Id.*

¹⁵⁴*Talty*, 814 N.E.2d at 1204. See *State v. Jones*, 550 N.E.2d 469, 470 (Ohio 1990). Other jurisdictions have recognized the same proposition. See, e.g., *Hughes v. State*, 667 So. 910, 912 (Fla. Ct. App., 1996) (asserting that the trial court may not impose conditions of probation that are "overbroad and can be violated unintentionally"); *Williams v. State*, 661 So.2d 59, 61 (Fla. Ct. App., 1995) (stating that the trial court may not "impose conditions of probation which are overbroad"); *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) (noting that probation not only must be reasonably related to the purposes of sentencing, but must not be "unduly restrictive of the probationer's liberty or autonomy").

¹⁵⁵*Talty*, 814 N.E.2d at 1204. See *Turner v. Safley*, 482 U.S. 78, 90-91 (1987).

¹⁵⁶*Turner*, 482 U.S. at 90.

¹⁵⁷*Talty*, 814 N.E.2d at 1204 (citing *Turner*, 482 U.S. at 90-91).

¹⁵⁸See *Talty*, 814 N.E.2d at 1204-05 (emphasis added); see also *Turner*, 482 U.S. at 90-91.

¹⁵⁹The Ohio Supreme Court states, "[b]ut if an [offender] can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Talty*, 814 N.E.2d at 1204-1205 (citing *Turner*, 482 U.S. at 91).

¹⁶⁰*Talty*, 814 N.E.2d at 1205.

¹⁶¹*Id.*

support obligations. Talty argued, therefore, that the condition was overbroad.¹⁶² The State of Ohio, conversely, cited *Wisconsin v. Oakley*¹⁶³ as authority supporting its argument that the condition placed on Talty was reasonable.

The Ohio Supreme Court turned the State's argument around, using *Oakley* for the purpose of proving the condition was overly broad because it lacked a mechanism to release the condition, or a time constraint.¹⁶⁴ The court stated that, based on the altered scenario that the time constraint had been part of Talty's sanctions, the court would not at this time determine the condition's validity. The court impliedly embraces, however, the anti-procreation concept by stating, "such a mechanism would have been, at the very least, an easy alternative [better] accommodating Talty's procreation rights at de minimis costs to the legislative interests."¹⁶⁵ The court implied, therefore, that such a mechanism would likely make the restriction valid. To the court, this accommodation tallies up to a lower cost to the legitimate probationary interests of rehabilitation and avoidance of future criminality.¹⁶⁶

V. ANALYSIS: TOGETHER, *OAKLEY* AND *TALTY* SET THE WRONG PRECEDENT

A. *Oakley's Approval of Overly Broad Conditions*

The *Oakley* court made a few fatal errors in determining that the antiprocreation imposed on Oakley – that he could not sire any more children until he demonstrates he can provide for his current and future children – was reasonably related to the statutory goals of rehabilitation of the defendant.

In *Oakley*, the state of Wisconsin chose to grant Oakley probation, and with that he retained a significant amount of privacy as compared to imprisoned felons. While the state chose not to exercise control over Oakley's body by depriving him his freedom from restraint — or imprisonment, it does not follow that the state may automatically opt to exercise unlimited control over his right to procreate and his right to privacy.¹⁶⁷

The *Oakley* court made a crucial error in the application of the reasonableness test. The *Oakley* court held, under this analysis, that impinging a probationer's fundamental right is lawful so long as the impinging condition is not overly broad.¹⁶⁸

However, the court ignored issues like the condition's enforcement and the condition's effects on future partners of Oakley (discussed *infra*, Section VI). The court held the probation condition valid because the order allocates time restrictions

¹⁶²*Id.*

¹⁶³*Oakley*, 629 N.W.2d at 202-03.

¹⁶⁴*Talty*, 814 N.E.2d at 1205.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Oakley*, 629 N.W.2d at 216 (Bradley, J., dissenting). All three female justices of the Wisconsin Supreme Court dissented in the *Oakley* opinion.

¹⁶⁸*Id.* at 210 (quoting *Edwards*, 246 N.W.2d 109).

to the condition.¹⁶⁹ While time limits are indicative of a narrowly tailored test, the *Oakley* court should not have held this single element determinative.¹⁷⁰ Instead, the court should have addressed all of the readily apparent implications of the procreation restriction.¹⁷¹

The condition is overly broad in other ways. The *Oakley* court fails to acknowledge its own findings: Oakley did not have the means, nor would he ever likely have the means, to support his children.¹⁷² Effectually, if the court's findings are true, the court *extinguished* his right to procreate. Further, the *Oakley* court failed to state what amount of money would be sufficient to fulfill the condition, only reciting that Oakley fulfills the condition when he "has demonstrated"¹⁷³ he can support his current and future children.¹⁷⁴ The court should not validate such a vague standard.¹⁷⁵

The *Oakley* majority further asserts that the procreation restriction is reasonably related to Oakley's rehabilitation because it prevents Oakley from creating more victims should he continue not paying child support.¹⁷⁶ Since the birth of his next child triggers the probation condition, Oakley's "rehabilitation" commences only when he fathers more children, or breaks the law.¹⁷⁷ Nothing in the court's reasoning illustrates how the probation condition will actually rehabilitates Oakley if he does not sire another child. The condition does not, for example, teach Oakley how to sustain employment or master a way to support the other victims, his *current* children.

B. Talty's *Misapplication of Jones*

Employing the *Oakley* court's reasoning, the *Talty* court strikes down the community control sanction against Talty based on the fact that the condition

¹⁶⁹*Id.* at 212. The Wisconsin Supreme Court pointed out that the probation condition ceases once Oakley demonstrates he can support his current and future children; or, the condition ceases when the five year probation period expires. *Id.*

¹⁷⁰*Cf. Grutter v. Bollinger*, 539 U.S. 306 (2003). The United States Supreme Court found time limits for affirmative action cases to be a necessary element of a narrowly tailored education program. The Court also found other elements, such as a complete look at a student's diversity character, rather than a cursory look at skin color, necessary for a valid program. Consideration of just one of these factors does not transform the program into a narrowly tailored one. While the Court has not applied the measures necessary for a valid education affirmative action program to other law that requires an appellate court to use strict scrutiny on review, like procreation infringements, it provides an analogous baseline; *see also Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J., writing for the plurality of the Court).

¹⁷¹*Oakley*, 629 N.W.2d at 216.

¹⁷²*Id.* at 217.

¹⁷³*Id.* at 203.

¹⁷⁴*Id.*

¹⁷⁵*See* 21A DIETZ, *supra* note 68.

¹⁷⁶*Oakley*, 629 N.W.2d at 213.

¹⁷⁷*Id.* at 217 (Bradley, J., dissenting).

contained no escape hatch, the time constraint.¹⁷⁸ The *Talty* court only takes time to ponder, “What if Mr. Talty could pay his obligations? How would the restriction end?”

The *Talty* court expressly notes the trial court’s decision, to place the antiprocreation restriction on Talty, stemmed from the trial court’s desire to help Talty avoid future violations of the same law.¹⁷⁹ The Ohio Supreme Court goes as far as to say that this goal is valid, though overly broad because the condition lacks an “out.”¹⁸⁰ Although this court states it does not consider whether the escape mechanism renders the condition valid under *Jones*, the court’s emphasis on *Oakley* certainly leans in the direction that it would.¹⁸¹

Furthermore, the *Talty* court impliedly enunciates that a time-restrictive condition is valid under *Jones* by failing to address the remaining *Jones* factors.¹⁸² The court lost an opportunity to address the real matters at the heart of the case: the constitutionality of the condition, the rehabilitative character of probation, and whether a “less intrusive means” test is better suited for situations when a fundamental right is at stake.¹⁸³

Under *Jones*, the first issue a court addresses is whether the sanction or restriction is reasonably related to rehabilitating the offender.¹⁸⁴ Clearly, the ban on procreation is not. While the production of future victims is arguably halted (discussed *infra* Section VI), nothing in the restriction aids Talty. The condition does not help Talty find steady employment or teach him parenting skills. It does not make him a more productive citizen and a supportive father. The restriction only accomplishes cutting off a person’s fundamental right to procreate and right to personal privacy as protected by the Fourteenth Amendment.¹⁸⁵

Second in the *Jones* analysis, the condition must have some relationship to the crime committed by the probationer.¹⁸⁶ This is perhaps the only prong of *Jones* that is fulfilled, though an exceedingly attenuated relationship exists, at best. Talty’s children do not receive monetary support from him, which is a crime in Ohio.¹⁸⁷ The condition in the sanction states that Talty cannot sire any more children.¹⁸⁸ The only nexus that exists is that the crime and the condition involve children and Talty. However, no nexus exists between Talty siring more children and Talty providing proper support for his current children. The court cannot say with any certainty that

¹⁷⁸State v. Talty, 814 N.E.2d 1201, 1205 (Ohio 2004).

¹⁷⁹*Id.*

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²*Id.* at 1206-07.

¹⁸³*Talty*, 814 N.E.2d at 1210 (Pfeifer, J., dissenting).

¹⁸⁴*Talty*, 2003 Ohio App. LEXIS 2907, at *8-9 (citing *Jones*, 550 N.E.2d at 470-71).

¹⁸⁵Carey v. Population Servs. Int’l, 431 U.S. 678, 685 (1977).

¹⁸⁶*Talty*, 814 N.E.2d at 1207.

¹⁸⁷*Talty*, 2003 Ohio App. LEXIS 2907, at *1-2.

¹⁸⁸*Id.*

Talty would provide the same support to each of his children; or that personal factors, like marriage to another woman or a stronger father-child bond, would not affect his disposition of support to his future children versus his current children.

Lastly, under *Jones*, the condition must relate to the charged conduct that is criminal or reasonably related to future criminality, serving the statutory ends of the probation.¹⁸⁹ The statutory ends of probation are doing justice, rehabilitating the offender, and insuring the offender's good behavior.¹⁹⁰ Placing a ban on a person's right to procreate in no way serves justice, as none of the actual problems, like education of the probationer and payment to the probationer's current children, are met. At most, this restriction offends justice and the long precedent set by the United States Supreme Court.¹⁹¹

Moreover, the *Talty* court points to constitutional doctrine that defines reasonableness as a "burden that fully accommodates the probationer's rights at a *de minimis* cost to valid penological interests."¹⁹² The court specifically notes that if the probationer himself can point to a less intrusive mean to achieve the statutory ends of the probation, the court may take that as evidence of an overly broad condition.¹⁹³ Under this rationale, no procreation ban survives review, because almost any probationer can list less intrusive means that do not offend his liberty interests while serving the penological interests, doing justice, rehabilitating the offender, and insuring the offender's good behavior.¹⁹⁴ Education, counseling, and work release programs facilitate rehabilitation at a lower cost to the probationer's liberty interest than those endorsed by the Wisconsin and Ohio Supreme Courts. *Talty's* antiprocreation condition bears only a remote relationship to the crime for which the State convicted him and to the objectives sought by probation and rehabilitation. *Jones* explicitly forbids this remote relationship.¹⁹⁵

VI. RAMIFICATIONS OF PROCREATION RESTRICTIONS AS PROBATION CONDITIONS

Apart from the constitutional impingements these antiprocreation restrictions support, for many persons who disagree with the *Oakley-Talty* rationales, the question whether the condition is really *that* bad remains. If your answer is, "no," the reason for this acquiescence likely hinges on the notion that the antiprocreation condition ends the production of more victims. Unfortunately, this is not true.

A. Forced Sacrifice of One Liberty Interest for Another

The government must provide due process, both procedural and substantive, when there has been a deprivation of liberty.¹⁹⁶ Until recently, the United States

¹⁸⁹*Id.* at *8-9 (citing *Jones*, 550 N.E.2d at 470-71).

¹⁹⁰*Id.*

¹⁹¹*See supra* notes 26 and 27.

¹⁹²*Talty*, 814 N.E.2d at 1204 (citing *Turner*, 482 U.S. at 90-1).

¹⁹³*Id.*

¹⁹⁴*Jones*, 550 N.E.2d at 470-71.

¹⁹⁵*Livingston*, 372 N.E.2d at 1337.

¹⁹⁶CHEMERINSKY, *supra* note 19, at § 7.3.

Supreme Court narrowly defined “liberty.”¹⁹⁷ Today, the Court has avoided explicitly defining “liberty” as found in the Fifth and Fourteenth Amendments; however, it has attempted clarifying its meaning.¹⁹⁸ In *Roth v. Board of Regents*, the Court stated:

The term denotes not only freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit In a Constitution for a free people, there can be no doubt that the meaning of “liberty” must be broad indeed.¹⁹⁹

Roth and the precedents set by *Griswold* and *Eisenstadt* clearly indicate that the definition of “liberty” includes not only those rights that are expressly stated in textual context, but also those that are not, such as the right to procreate.

As noted in Sections IV and V, the *Oakley* and *Talty* courts posited a choice to their respective probationers: sacrifice their rights to procreate for their freedom of restraint, or retain their rights to procreate and sacrifice their freedom from restraint. Such a choice is an example of the “unconstitutional conditions doctrine.”²⁰⁰ This doctrine, well established in law and in scholarship pertaining to constitutional law, prohibits the government from conditioning a privilege on the requirement that a person give up a constitutional right.²⁰¹

If one accepts the faulty *Oakley* perception that probation, or freedom from restraint in this context, is a *privilege* granted by the state,²⁰² it must therefore follow that a person should not be forced to sacrifice his *right* to procreate for probation. To do so would impermissibly condition a privilege, probation, on the relinquishment of a constitutional right, procreation.²⁰³ Because the Supreme Court has yet to address the extent to which a state may impinge on a probationer’s fundamental rights,²⁰⁴ the constitutionality of this sacrifice also remains questionable.

Notably, in most cases involving restrictions of a probationer’s rights, the actual sacrifice of that right is not, in contractual terms, the “consideration” for the

¹⁹⁷See *McAuliffe v. New Bedford*, 29 N.E. 517 (1992) (holding that a liberty interest exists only if a *right* existed. A privilege, granted by the government, at one time was not a basis for requiring due process) (emphasis is added). *Contra Roth*, 408 U.S. at 472.

¹⁹⁸*Roth*, 408 U.S. at 572.

¹⁹⁹*Id.*

²⁰⁰Timothy C. Layton, *Welfare for Lobbyists or Nonprofit Gag Rule: Can Congress Limit a Federal Grant Recipient’s Use of Private Funds for Political Advocacy?*, 47 SYRACUSE L. REV. 1065, 1069 (1997) (citing Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1414-1416, (1989)).

²⁰¹Layton, *supra* note 200, at 1069.

²⁰²*Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935).

²⁰³Layton, *supra* note 200, at 1069.

²⁰⁴*Carey v. Population Servs. Int’l*, 431 U.S. 678, 688-89 (1977); *Arx v. Schwarz*, 517 N.W.2d 540 (Wis. Ct. App. 1994).

“bargain.” For example, in some states, probationers, as a condition of their probation, indefinitely lose their rights to vote.²⁰⁵ The Court has upheld that condition’s constitutionality.²⁰⁶ The distinction between the voting cases and *Oakley-Talty* may be subtle, but devastating in its effects. Simplistically, these courts are telling the probationer, “You may go free *so long as* a child is not born. If you cannot *agree* to this, or if a child is born, you will return to prison.” In the voting cases, the courts are telling the probationer, “You can go free but you may not vote.” The latter restriction does not invade an *autonomic* right, personal to human beings; nor has the probationer been asked to sacrifice one right for another. Further, procreation involves one of the basic civil rights of man, fundamental to the very existence of the race. Voting, while an indelible and vitally imperative right of citizens of the United States, is not.

B. *The Practical Impact of an Impractical Punishment*

1. Enforcement of the Decision against Male and Female Probationers

Had the *Talty* condition contained a time restraint (hereinafter “revised condition”), the state of Ohio could not enforce or regulate the revised condition. The probation condition sends Talty to prison the moment he sires another child. Two problems arise from this decision: general enforcement and an issue of fairness.

First, no state has the means to prevent a probationer from engaging in sexual intercourse; nor can a state ensure that a probationer will take all of the necessary steps to prevent conception, and that those steps are 100 percent effective. In striking down a similar antiprocreation condition of a man convicted on federal drug charges, the Federal Court of Appeals for the Eighth Circuit properly explained that, “short of having a probation officer follow [Defendant] twenty-four hours a day, there is no way to prevent [him] from having more children.”²⁰⁷

Second, if a male probationer sires another child during the probation term, the state, possibly, will not know of the violation. If a woman probationer is subject to such a condition, her violation inevitably becomes apparent to that state because, at some point, her pregnancy will be visible.²⁰⁸ Thus, an unfair advantage in the sphere of enforcement exists in favor.

Under the female probationer scenario, if a court convicts a woman of non-payment of child support and subjects her to the same probation condition as the *Talty* revised condition, the state provides her with two choices: (1) have an abortion to avoid jail time; or (2) have the child and go to prison. Few can conceptualize a larger burden than having one’s choice to parent a child rest on that person’s

²⁰⁵Richardson v. Ramirez, 418 U.S. 24 (1974).

²⁰⁶*Id.*

²⁰⁷Vivian Berger, *Bedroom Sentence*, NAT’L L.J., Sept. 17, 2001, at A1. Also, the United State Supreme Court has held that the bedroom is a setting where government legislation has no place when the conduct in question involves the private actions between two consenting adults. See *Lawrence v. Texas*, 539 U.S. 558 (2003). The right to liberty, specifically privacy, ensures this. *Id.*

²⁰⁸Katherine E. McCanna, Note, A Hot Debate in the Summer of 2001: State v. Oakley’s Excessive Intrusion on Procreative Rights, 36 IND. L. REV. 857, 878 (2003).

willingness to face a prison sentence.²⁰⁹ While it has been duly noted that probationers do not enjoy the same liberty as non-criminals,²¹⁰ it is utterly doubtful that the United States Supreme Court wishes to endorse the result of this state action: coercive abortion.²¹¹ The Supreme Court holds abortion to be unique and “[the] most intimate and personal choices a person may make in a lifetime.”²¹² Clearly, state action does not belong in this realm of privacy.

2. The Effects on Male Probationers’ Female Partners is Unduly Burdensome

Matters that concern the intimate choices of people lie at the core of personal dignity and at the center of the liberty protected by the Fourteenth Amendment.²¹³ The Supreme Court holds that women’s liberty interests are unique to both the human condition and the law,²¹⁴ and that states must be extremely careful not to cause additional personal suffering when attempting to regulate abortion.²¹⁵ The right to privacy supports the notion of women’s liberty because it “involves personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.”²¹⁶

Like a penny, the right to procreate is two-sided. A woman retains the choice *to procreate* and a choice *not to procreate*. The Court holds that the government enjoys no legitimate interest in a fetus until it reaches the point of viability.²¹⁷ Prior to that point, the state cannot impose legislation that unduly burdens her decision.²¹⁸ The *Oakley* decision and the *Talty* revised condition ignore the Court’s precedent.

²⁰⁹*See id.* While this Note’s scope excludes a full analysis as to whether a male or female probationer suffers more, it is recognized, both legally and logically, that making this choice, as a female probationer, involves different factors due to mere biology; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992). The *Casey* Court stated, “the liberty of the woman is at stake in a sense unique to the human condition The destiny of the woman must be shaped in a large extent on her own conception of her spiritual imperatives”; *see also* Roe v. Wade, 410 U.S. 113 (1973) (holding the restriction on abortion impinges the woman’s right to privacy and her choices in regards to her personal autonomy).

²¹⁰*Richardson v. Ramirez*, 418 U.S. 24 (1974). The United States Supreme Court upheld a statute denying a felon who served his complete sentence the fundamental right to vote. The Court recognized felons do not enjoy the same degree of liberty as non-felons.

²¹¹Citing the language of *People v. Pointer*, 151 Cal. 3d 1128 (Cal. Ct. App. 1984), the Chief Justice of the Wisconsin Supreme Court, Justice Bradley, describes these antiprocreation restrictions’ effects upon partners of male probationers tantamount to “coercive abortion.”

²¹²*Casey*, 505 U.S. at 851.

²¹³*Id.* at 850.

²¹⁴*Id.* at 852.

²¹⁵*Id.* at 852.

²¹⁶Amanda R. Schehr, Note, *State v. Oakley: Infringing on Women’s Reproductive Right*, 18 WIS. WOMEN’S L.J. 281, at 284 (2003) (citing *Casey*, 505 U.S. at 852).

²¹⁷*Casey*, 505 U.S. at 873. The *Casey* Court defines viability as the point when the fetus can live outside the mother’s womb.

²¹⁸*Id.* at 876-77.

Courts upholding antiprocreation restrictions in probation orders of deadbeat dads largely disregard the effects such a condition places on a probationer's partner.²¹⁹ A probationer's partner's procreation rights, logically, are directly linked to the probationer.²²⁰ Notwithstanding the fact that the partner's constitutional rights are predicated on a man's felonious behavior, the "no further children" requirement creates a hostile environment.²²¹

A state regulation may be found to be an undue burden on a woman's decision not to procreate, and therefore her right to procreate, if it places a substantial obstacle in the path of a woman who seeks an abortion.²²² Although parental consent laws and informed consent laws do not constitute an undue burden,²²³ other regulations that entail an increase in risk of death or serious injury to the woman are found to create a "substantial obstacle."²²⁴ However, the state action must amount to more than just an inconvenience.²²⁵

Because the trigger of the *Oakley* condition and *Talty* revised condition is the birth of another child, the risk of imprisonment creates strong motivation for a man in *Talty*'s or *Oakley*'s positions to demand a woman to terminate her pregnancy, or worse, fall victim to deadly, domestic violence.²²⁶ This regulation clearly entails an increased risk of death or serious injury; accordingly, it unduly burdens the partner's right to choose to have the child.²²⁷ By advocating these probation conditions, the *Oakley* and *Talty* courts clearly contradict the Supreme Court's handling of the right to procreate since the inception of *Roe v. Wade* and its progeny.²²⁸

3. Child Support Possibilities Eliminated for the Current Children

If the State of Ohio sends *Talty* to prison for fathering another child, his other children ultimately suffer. These antiprocreation restrictions, by themselves, do

²¹⁹*See generally* State v. Talty, 814 N.E.2d 1201, 1206 (Ohio 2004); *Oakley*, 629 N.W.2d 200.

²²⁰*See* Schehr, *supra* note 216, at 289.

²²¹*Id.*

²²²Callista M. Puchmeyer, House Bill 421 – Ohio's Undue Burden on Women's Rights To Choose Abortion and the Erosion of Women's Rights To Exercise Their Own Reproductive Choices 6 (Dec. 2, 2005) (unpublished comment, on file with the Cleveland-Marshall College of Law Journal of Law and Health), *citing* 1 C.J.S. *Abortion & Birth Control* § 9 (citing Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999); Eubanks v. Schmidt, 126 F. Supp. 2d 451 (W.D. Ky. 2000)).

²²³*Id.*

²²⁴*Id.*

²²⁵*Id.*

²²⁶*Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting); *see also* State v. Trammell, 751 N.E.2d 283 (Ind. Ct. App. 2001); People v. Pointer, 151 Cal. 3d 1128 (Cal. Ct. App. 1984).

²²⁷*See generally* Planned Parenthood v. Casey, 505 U.S. 833 (1992). The United States Supreme Court defines "to unduly burden," as the purpose, or the effect, of placing a substantial obstacle in the way of a person wishing to exercise their fundamental right. *Id.*

²²⁸*Roe v. Wade*, 410 U.S. 113 (1973). *See generally* Casey, 505 U.S. 833.

little, if anything, to further the support interests of any child. Combined with the fact that the entire community control sanction in *Talty* ordered Talty to make regular payments of \$75 a week to the Medina County Child Support Enforcement Agency,²²⁹ the revised condition becomes redundant and unnecessary.²³⁰

The states' imprisonment of these probationers prevents the probationers from meaningful involvement in their children's lives, which may victimize the children far more than any of the probationers' actions.²³¹ The trial courts in *Talty* and *Oakley* sought to avoid the further victimization of the children.²³² By imposing a redundant and non-rehabilitative condition, however, the trial courts set the probationer up for failure.²³³ By not examining the ramifications of the condition, the courts have created a tool that operates in the exact opposite manner than intended — not only is the chance of monetary support stripped from the children, but the opportunity for emotional support is as well.

C. The Societal Implications of Antiprocreation Restrictions

1. Criminality for Impoverished Parents

The birth of a child is now a crime in the United States. In the opening statements of the dissenting opinion in *Oakley*,²³⁴ Justice Bradley makes vehemently clear that “the majority’s decision allows, for the first time in our state’s history, the birth of a child to carry criminal sanctions.”²³⁵ The *Talty* court stepped into the same line as the *Oakley* precedent by grandly stating that the restriction needed only a time release mechanism.²³⁶

The *Oakley* court justified its position that the antiprocreation conditions were valid by stating that the conditions stop the production of more victims.²³⁷ This is not true. Even if the probationer uses contraception, birth control methods are not

²²⁹*Talty*, 2003 Ohio App. LEXIS 2907, at *5-6.

²³⁰In *Rodriguez v. State*, the Fla. District Court of Appeals held a similar condition redundant due to other probation conditions, and was not reasonably related to the defendant's rehabilitation since it did nothing to ensure the prevention of future criminality. 378 So. 2d at 10. *But see Talty*, 814 N.E.2d at 1209 (Pfeifer, J., dissenting).

²³¹*See Schehr*, *supra* note 216, at 295.

²³²*State v. Oakley*, 629 N.W.2d 200, 212 (Wis. 2001), *cert. denied*, 123 S. Ct. 74 (2002); *Ohio v. Talty*, No. 02CA0087-M, 2003 Ohio App. LEXIS 2907, at *16 (Ohio Ct. App., Medina County June 18, 2003).

²³³*See Schehr*, *supra* note 216, at 295.

²³⁴The *Oakley* court was bitterly divided, 4-3, across gender lines. The dissenting opinions belong to the female justices of the court, while the majority opinion belongs to the male justices. *Oakley*, 629 N.W.2d at 220.

²³⁵*Oakley* at 216 (Bradley, J., dissenting).

²³⁶*Talty*, 814 N.E.2d at 1205.

²³⁷*Oakley*, 629 N.W.2d at 213 (Bradley, J., dissenting).

100 percent reliable.²³⁸ If the probationer used reasonable care and the protection failed, ultimately resulting in the birth of a child, that child will carry the stigma of knowing its birth sent its father or mother to prison.²³⁹

Furthermore, the financial status of a probationer may dictate the likelihood of future parenthood, as wealth now becomes a prerequisite to parenthood. As a growing trend, courts are increasingly punitive towards fathers who do not pay child support.²⁴⁰ The courts' views of this "irresponsibility" take three forms: (1) they bring into the world illegitimate children they do not intend to support; (2) they leave marriages they should remain in; and (3) they fail to pay child support.²⁴¹ The courts use this perceived "irresponsibility" to justify increasingly punitive measures against non-custodial parents.²⁴²

One way the state can affect the "immorality" of such non-custodial parents is to restrict their fundamental rights to procreate.²⁴³ Applying this rationale, states may use this as justification to restrict the fundamental rights of the poor. For example, Talty's attorney stated to the press that if Talty were a man of means, he would have paid the support; his attorney explained that Talty did not have any money and that he was supporting his children to the best of his ability.²⁴⁴ The trial court, appellate court, and the Ohio Supreme Court did not dispute this conclusion.²⁴⁵ In fact, Wade F. Horn, assistant secretary for children and families at the United States Department of Health and Human Services, recognizes that not everyone who owes money is a deadbeat dad, and that "some people just don't have the money." However, in the narrow, overprivileged views of these courts, low-income families become less deserving of parenthood, justifying further unconstitutional restrictions on their fundamental rights.²⁴⁶

The revised condition in *Talty* offers a brightline rule that few courts could misapply. And, like many simplistic solutions, the ramifications and effects of the solution devalue the ease of its application. By granting the state the power to decide

²³⁸See *Planned Parenthood, Facts About Birth Control* at <http://www.plannedparenthood.org> (follow "Health Info" hyperlink; then follow to "Birth Control" hyperlink; then follow to "Facts About Birth Control" hyperlink). The author last visited this site on January 20, 2006.

²³⁹See *supra* note 223.

²⁴⁰Brief of Amicus Curiae Center on Fathers, Families and Public Policy at 12, *State v. Oakley*, 629 N.W.2d 200 (2001) (No. 01-1573) [hereinafter "Brief of Amicus Curiae Memorandum"]. The Center on Fathers, Families and Public Policy (CFFPP) submitted a brief of amicus curiae in support of writ of certiorari to the United States Supreme Court. CFFPP argued the Wisconsin Supreme Court is limiting the right to procreate based on financial status via antiprocreation restrictions as probation conditions.

²⁴¹Brief of Amicus Curiae Memorandum, *supra* note 240, at 12. See David Chamber, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575, 2576 (Nov. 1995).

²⁴²Brief of Amicus Curiae Memorandum, *supra* note 240, at 12.

²⁴³*Id.*

²⁴⁴Pierre, *supra* note 116.

²⁴⁵See *State v. Talty*, 814 N.E.2d 1201 (Ohio 2004).

²⁴⁶*Id.*

who has the right to have children, it bases its decision on an individual's financial status.²⁴⁷ If a court can eliminate a person's right to have a child solely on the grounds of non-payment of child support, what is to say the court could not eliminate someone's right to have a child on account of poverty? The *Oakley-Talty* precedents do so by lumping together fathers who simply *cannot* pay with fathers who *refuse* to pay. The distinction may be subtle, and in some cases nearly difficult to distinguish, but it is absolutely crucial to identify.

The courts of the United States, moreover, have never rationed the right to have a child on the basis of wealth.²⁴⁸ Americans are free to have as many children as desire.²⁴⁹ They may do so without the means to support their children, and then face the legal consequences resulting from their inability to provide for them.²⁵⁰ This fundamentally precious right is "at the very heart of [a] cluster of constitutionally protected choices."²⁵¹ Bending the right in this manner only adds confusion and injustice to the lives of those living in poverty.

2. *Buck v. Bell* Rears its Ugly Head

The newest, most taxing infringement on procreation rights is "pay-up or submit to surgery." Some legal scholars tout the latest affront on the right to procreate as an aftershock of the *Oakley* decision.²⁵² In Kentucky, Campbell County Judge Michael "Mickey" Foellger gave at least seven men the choice of serving a civil contempt order for refusing to pay child support or having a vasectomy.²⁵³ Judge Foellger believes his orders lie within legal bounds because he does not *specifically* order any of the men to have the procedure.²⁵⁴ Instead, Judge Foellger offers a vasectomy as an "option" in certain civil contempt cases.²⁵⁵ For example, if a man has four or more children, by three or more women, and he is at least \$10,000 arrears in child support

²⁴⁷Laurie Madziar, Note, *State v. Oakley: How Much Further Will the Courts go in Trying to Enforce Child Support?*, 24 WOMEN'S RIGHTS L. REP. 65, 79 (2003). The author argues that since *Oakley*'s non-payment of child support was unintentional, the probation condition predicates itself upon *Oakley*'s financial status. See *Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting).

²⁴⁸*Id.*

²⁴⁹*Id.*

²⁵⁰*Id.* While there are some scholars who might support this position as a policy matter, it clearly violates established constitutional law. See also *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (finding that a person's inability to pay child support can not compromise a fundamental right).

²⁵¹*Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

²⁵²See Dee McAree, *Deadbeat Dads Face Ban on Procreation*, NAT'L L. J., May 31, 2004, at 4.

²⁵³Jim Hannah, *Vasectomy Policy Raises Questions*, THE CINCINNATI ENQUIRER, June 27, 2004, at 1A.

²⁵⁴*Id.*

²⁵⁵*Id.*

payments, the man might be allowed to undergo a vasectomy rather than spend up to six months in jail.²⁵⁶

Judge Foellger's court has kept each of the cases confidential.²⁵⁷ But, according to the Judge, six men have accepted this offer since he became Campbell County's first and only family court judge in January of 2003.²⁵⁸ Only one father opted for a prison term.²⁵⁹

Judge Foellger contends: "Most of the men have shown some relief when they are offered something they should have thought of themselves. . . . These are the type of people who live on spontaneity. They just float through life irresponsibly."²⁶⁰ Judge Foellger sets standards for these men based on his own morality. It is not the purpose or role of the courts, however, to do so.²⁶¹ Instead, the Supreme Court maintains that it is the courts' duty to protect a person's liberty.²⁶²

Furthermore, Judge Foellger clearly abdicates the unconstitutional conditions doctrine. Here the court asks the defendant to sacrifice his personal autonomy for his freedom from restraint. There is no difference between this and "sacrifice your right to procreate for your freedom from restraint," as explained in Section VI(A).

Judge Foellger, in contrast, argues that the imposition of this choice educates the public that having a child is a responsibility, and therefore the choice itself is appropriate.²⁶³ However, communicating to parents that they should take their duties more seriously does not justify manipulating a person's procreation right as a personal service announcement. Judge Foellger has failed to explain how this invasive vasectomy, which may or may not be reversible,²⁶⁴ teaches the virtues of responsibility. Instead, his message simply scares men into choosing their freedom from restraint over their rights to procreate and to personal autonomy. Judge Foellger backs his position only by proclaiming, "I *felt* like [they] were indiscriminately procreating."²⁶⁵ Clearly, the Judge is mandating his own moral code.

Despite the constitutional issues looming over the Foellger cases, Judge Foellger's offer may be illegal on other grounds "because nothing in the Kentucky Child Support Guidelines authorizes a judge to use this technique as a remedial

²⁵⁶*Id.*

²⁵⁷*Id.*

²⁵⁸See Hannah, *supra* note 253, at 1A.

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹See generally Planned Parenthood v. Casey, 505 U.S. 833 (1992); Lawrence v. Texas, 539 U.S. 558 (2003).

²⁶²Lawrence, 539 U.S. 558.

²⁶³See Hannah, *supra* note 253, at 1A.

²⁶⁴<http://www.vasectomy.com/main.asp> (follow "Reversal Home" hyperlink; then follow "Top 10 Reversal Microsurgery Questions and Answers" hyperlink). The author last visited this site January 20, 2006.

²⁶⁵See Hannah, *supra* note 253, at 1A.

measure.”²⁶⁶ While state law often authorizes a circuit judge in a court of general jurisdiction to employ “equitable remedies,”²⁶⁷ the mere definition of “equitable remedy” pulls the ground out from underneath this argument.

An equitable remedy, simply stated, signifies that “no other adequate remedy at law”²⁶⁸ exists. Here, plenty of alternative, adequate remedies exist. Better legislation, harsher probation guidelines, state-supervised employment – all constitute adequate remedies that better serve the defined probationary purposes, without offending the fundamental right to procreate. Despite these obvious alternatives, Judge Foellger makes no plans to discontinue his sterilization scheme.²⁶⁹

In his opinion for the *Skinner* Court, which effectually overturned *Buck v. Bell*, Justice Douglas states, “[t]he 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. There is no redemption for the individual whom the law touches He is forever deprived of his basic liberty.”²⁷⁰ In the spirit of the Supreme Courts of Ohio and Wisconsin, Judge Foellger fervently ignores the cautionary foresight of the United States Supreme Court.

VII. BETTER SOLUTIONS THAN A BAN ON PROCREATION

A. *Precautionary Measures, A Less Intrusive Means Standard for the Courts*

There is no doubt that the child support dilemma in the United States is measurably grave, causing children to be raised in poverty.²⁷¹ As the Supreme Court of Wisconsin points out, the deadbeat parent epidemic fosters a crisis with devastating implications for our children.²⁷² Of those single-parent households with established child support awards or orders, approximately one-third do not receive any payments, while another one-third receive only partial payment.²⁷³ The nonpayment of child support frequently presses single mothers below the poverty line.²⁷⁴

Writing for the majority of the Court in *Roe v. Wade*, Justice Blackmun stated, “[o]ur task, of course, is to resolve the issue by constitutional measurement, free of

²⁶⁶*Id.*

²⁶⁷*Id.*

²⁶⁸1-9 MURRAY ON CONTRACTS, *Specific Performance and Instructions* § 127 (Matthew Bender & Company, Inc., 2001).

²⁶⁹Paul A. Long, *Judge Proposes Vasectomy Pay Plan*, KENTUCKY POST, available at <http://www.kentuckypost.com/2004/05/13/vasect051304.html> (May 5, 2004). The author last visited this site on February 6, 2005.

²⁷⁰*Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 541 (1942).

²⁷¹*State v. Oakley*, 629 N.W.2d 200, 204 (Wis. 2001).

²⁷²*Id.* at 203.

²⁷³*Id.*

²⁷⁴*Id.* at 204.

emotion and of predilection.”²⁷⁵ States always have an important, if not compelling interest, to see that children are sufficiently supported.²⁷⁶ However, when a fundamental right is at issue, an appellate court should utilize a more searching review of the probation conditions. Constitutional analysis of the right to procreate must take center stage over the emotionality of the matter. The stakes are too high in these cases.²⁷⁷

While the Ohio Supreme Court seemingly settled that, had the *Talty* community control sanction contained a durational limit²⁷⁸ the sanction may be a valid one, other proactive states balance their probationary goals and statutory ends against a different, more searching backdrop, a “less intrusive means” standard.²⁷⁹ As a case of first impression to the Indiana courts, *Trammell v. State*²⁸⁰ serves as an illustrative analysis of more searching standards of review of probation conditions when fundamental rights are impinged.

As in Ohio and Wisconsin, Indiana trial courts retain broad discretion when imposing probation conditions.²⁸¹ In Indiana, the goal of these conditions is to produce a law-abiding citizen and to protect the public.²⁸² In some instances, probation conditions may impinge upon the probationer’s exercise of an otherwise constitutionally protected right.²⁸³ These impingements must be constructed to achieve the explicit goals of protecting the community and promoting the probationer’s rehabilitation process.²⁸⁴ Expressed in other terms, the condition must “have a reasonable relationship to the treatment of the accused and the protection of the public.”²⁸⁵

²⁷⁵*Roe v. Wade*, 410 U.S. 113, 116 (1973) (Blackmun, J. delivered the opinion of the Court).

²⁷⁶*Oakley*, 629 N.W.2d at 216 (Bradley, J., dissenting).

²⁷⁷*Id.* Justice Bradley used similar language while discussing the importance of evaluating procreational issues carefully.

²⁷⁸*Talty*, 814 N.E.2d at 1205.

²⁷⁹*See* *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992) (procreation restriction imposed on defendant convicted of heroin possession invalid); *People v. Pointer*, 151 Cal. 3d 1128 (Cal. Ct. App. 1984) (procreation restriction imposed on defendant convicted of child endangerment overly broad where less restrictive means existed to provide safety for children); *People v. Zaring*, 10 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 1992) (condition that defendant convicted for heroin possession not become pregnant during probation invalid); *Howland v. State*, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982) (condition prohibiting defendant from fathering a child not reasonably related to crime of child abuse where other less restrictive means existed to protect future children).

²⁸⁰751 N.E.2d 283 (2001).

²⁸¹*Id.* at 288.

²⁸²*Id.*

²⁸³*Smith v. State*, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000).

²⁸⁴*Purdy v. State*, 708 N.E.2d 20, 23 (Ind. Ct. App. 1999).

²⁸⁵*Carswell v. State*, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999).

When a probationer argues that a condition is unduly intrusive on a constitutionally-held right, the Indiana appellate courts balance the following: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement.²⁸⁶ Even if these factors weigh in favor of the state of Indiana, the state must meet one last element: that there are no less intrusive means available to accomplish these goals.²⁸⁷

The *Trammell* court cites many examples of what constitutes “less intrusive means.”²⁸⁸ In the case of Kristie Trammell, mother of J.T., such means include the requirement that Trammell submit to pregnancy testing. If she were to become pregnant, Trammell would be forced into prenatal and neonatal programs under the supervision of her probation officer and attending physician.²⁸⁹ If the state determines that Trammell is unfit to be a parent, protective services could remove the child and place it in foster care.²⁹⁰

Because the *Trammell* court identified such obvious examples of less intrusive means to achieve the goals of probation, while determining that the antiprocreation restriction did not meet its rehabilitative end, the *Trammell* court vacated the antiprocreation restriction.²⁹¹

Applying the *Trammell* court’s test to *Oakley*, the *Oakley* court would reach a more equitable result.²⁹² For example, Wisconsin statutory law allows court-determined support obligations to be enforced through wage-assignments.²⁹³ Considering *Oakley*’s ability to work and inability to sustain employment,²⁹⁴ an

²⁸⁶State v. Trammell, 751 N.E.2d 283, 289 (Ind. Ct. App. 2001). California courts use a slightly more stringent, narrowly tailored test. In addressing the “reasonably related” prong, the court will invalidate a condition if it: “(1) has no relationship to the crime which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. Furthermore, where a condition impinges on a fundamental right, the court must determine whether the condition is impermissibly overly broad.” *Pointer*, 151 Cal. 3d at 1139; see also *Dominguez*, 256 Cal.App.2d at 627.

²⁸⁷*Trammell*, 751 N.E.2d at 290, n. 9.

²⁸⁸*Id.* at 289.

²⁸⁹*Id.*

²⁹⁰*Id.*

²⁹¹*Id.* at 291. The *Trammell* court also held that the restrictions had no rehabilitative purpose.

²⁹²In support of its decision to utilize the reasonability standard, the majority in *Oakley* cites various courts that employ the reasonability standard “in analyzing a probation that infringes upon a convicted individual’s fundamental right” State v. *Oakley*, 629 N.W.2d 200, 210 (Wis. 2001). Such cases include restrictions placed upon the fundamental rights to free speech, free exercise of religion and voting. *Id.* The majority found that the condition was “narrowly tailored to serve the State’s compelling interest of having parents support their children . . . [and] to serve the State’s compelling interest in rehabilitating *Oakley* through probation rather than prison.” *Id.* at 212.

²⁹³*Oakley*, 629 N.W.2d at 217 (Bradley, J., dissenting).

²⁹⁴*Id.* at 218.

alternative, the less intrusive means approach, easily translates. The Wisconsin trial court could sentence Oakley to an appropriate prison term, stay the sentence, and place him on probation.²⁹⁵ A condition of that probation would be that Oakley serve a substantial amount of time in jail, with work release privileges.²⁹⁶

This kind of probation condition nearly serves all of the interests at stake. The money earned from the work release program would benefit Oakley's current children. Further probation conditions would also include those that are actually rehabilitative to Oakley, like parental counseling and other dependency counseling should the Wisconsin trial court deem them necessary. And finally, via the restriction on his freedom from restraint, the *Oakley* majority receives what it has demanded. By serving the needs of prison security while incarcerated, Oakley would be prevented from procreating as conjugal visits could be denied.

B. Remedial Measure, Proactive Legislation

1. Current Legislation

The Framers did not intend that the courts legislate from the bench.²⁹⁷ While it was hoped that the courts would function as a blockade against unauthorized assumptions of power by the other branches of the government, it was believed that the state legislatures would be "sure guardians of the people's liberties."²⁹⁸

The appropriate branch of the government to remedy the deadbeat parent crisis, accordingly, is not the judiciary, but the legislature. Over the past ten years, in response to the national attention this crisis has garnered, legislatures have introduced and initiated laws criminalizing the non-payment of support.

Congress made non-payment of child support a federal criminal offense, under certain circumstances, through the Child Support Recovery Act of 1992 (CSRA).²⁹⁹ The CSRA imposed criminal sanctions on those non-custodial parents who willfully failed to pay past-due obligations owed to a child residing in another state.³⁰⁰ CSRA's intent was to prevent non-custodial parents from fleeing across state lines in order to avoid their payment obligations.³⁰¹ A first-time conviction under the CSRA is punishable by up to six months in prison and a fine,³⁰² while a repeat offender may be punished up to two years in prison.³⁰³

²⁹⁵*Id.* at 219.

²⁹⁶*Id.*

²⁹⁷O'CONNOR, *supra* note 13, at 47.

²⁹⁸*Id.*

²⁹⁹18 U.S.C. § 228 (1992).

³⁰⁰Catherine Wimberly, Note, Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families, 53 STAN. L. REV. 729, 737 (2000).

³⁰¹*Id.*

³⁰²18 U.S.C. § 228 (b)(1).

³⁰³18 U.S.C. § 228 (b)(2).

Subsequently, Congress passed the Deadbeat Parents Punishment Act of 1998 (DPPA). Under the DPPA, non-payment of support obligations is prosecutable at the federal level.³⁰⁴ The DPPA amended the CSRA of 1992, establishing violations for interstate travel or foreign commerce when evading child support.³⁰⁵ To convict a deadbeat parent under CSRA, the government must establish that (1) past-due child support is in arrears \$5,000 or more, (2) the children are under the age of majority, (3) all civil remedies were exhausted, (4) no payments from the deadbeat parent were received within the past twelve (12) consecutive months (a payment is considered any amount), (5) there is evidence that the non-custodial parent had the ability to pay and willfully failed to do so, and (6) there is proof that the non-custodial parent had knowledge of the child support obligation.³⁰⁶

Many state laws now allow officials to suspend driver's licenses, deny parents passports who owe more than \$5000, and require paternity matches at birth.³⁰⁷ According to Wade F. Horn, the assistant secretary for children and families at the United States Department of Health and Human Services, the National Directory of New Hires is the most effective national legislation to help remedy the child support problem yet.³⁰⁸ The registry requires employers to submit lists of all new hires, including their wages and unemployment claims, on a quarterly basis.³⁰⁹ Those employees who have outstanding child support claims raised against them automatically have their wages garnished.³¹⁰ This legislation significantly increased collections. From 2001 to 2002, collections grew by six percent.³¹¹

Proactive legislation like the National Directory of New Hires and the Deadbeat Parents Punishment Act of 1998 work *directly* to achieve the states' goal: enforcement of child support obligations. Such legislation is necessary, as it avoids offending the fundamental right to procreate.

2. Proposed Legislation

While Congress instituted compensatory legislation, more needs to be done. At least two of the five *prima facie* elements of a CRSA action should be strengthened. Currently, only children under the age of majority can benefit from this criminal action.³¹² If Congress extended the requisite age such that children could sue deadbeat parents when the children reach the age of majority, deadbeat parents would have less of an opportunity to avoid their responsibilities. If Congress extended eligibility for suit to twenty-one years old, these children would be given three years at a legally competent age to determine, on their own accord, whether the

³⁰⁴18 U.S.C. § 228 (2002).

³⁰⁵*See* 18 U.S.C. § 228(a)(1)-(3) (1998).

³⁰⁶*See* Madziar, *supra* note 247, at 11.

³⁰⁷Pierre, *supra* note 116.

³⁰⁸*Id.*

³⁰⁹*Id.*

³¹⁰*Id.*

³¹¹*Id.*

³¹²Madziar, *supra* note 247, at 11.

action should be brought. This revised requirement acts in both a punitive manner (punishing the deadbeat parent for his or her lack of support during the child's minority), but it is rehabilitative for the child. The child, in his or her majority, is finally given the control to bring their parent to justice.

Also, Congress should dispense of the requirement to exhaust all civil remedies before bringing a CRSA action. The requirement should rest on the number of past-violations a deadbeat parent has accrued. If a deadbeat parent violates his or her support obligations a determinable amount of times, the child, after each new violation, should immediately be allowed to bring suit, instead of needing to exhaust all civil remedies for each new violation. A child who is forced to wait that much longer is not only a drain on society's resources, but is suffering from lost-opportunities, which only a sufficiently-funded childhood can provide.

All of these legislative measures are truly compensatory and punish those parents who do not fulfill their obligations. The legislative branches of the state and federal governments possess a greater ability to assess and institute programs that actually compensate the children involved. While the protection of fundamental rights is often left to the courts, decisions like *Talty* and *Oakley* leave room for the courts to abdicate this responsibility.

VII. CONCLUSION

It is well settled that probationers do not enjoy the same degree of freedom as non-criminals.³¹³ When dealing with a basic civil right of man,³¹⁴ however, the courts should submit to a test that safeguards the probationer and society from its overstretched arm. If such a right is at stake, no court should have the means to extinguish that right permanently, or conditionally, if less intrusive means are available to achieve the same goal.

Antiprocreation sanctions as probation conditions cannot feasibly solve the deadbeat parent problem because: they are not rehabilitative, they do not improve a deadbeat parent's financial or employment status, and they do not educate. When courts uphold these restrictions, the problems created by the restrictions outweigh their minimal beneficial value. Moreover, courts upholding these conditions seem to, at all costs, avoid addressing how these restrictions affect women's rights. Women probationers subject to the same sentence suffer an unfair disadvantage as compared to their male counterparts. If a woman probationer chooses to carry the fetus to term, the state will inevitably discover her pregnancy. Men will not suffer this same result.

Non-criminal female partners of male probationers, sentenced under these probation conditions, now face a burdensome decision upon becoming pregnant: carry the child to term and send the child's father to jail, or terminate the pregnancy under this duress. The United States Supreme Court dictates that the government may not unduly burden a woman's right to an abortion.³¹⁵ If this coin is flipped, the government should not unduly burden a woman's right *to have* a child. The

³¹³Richardson v. Ramirez, 418 U.S. 24 (1974).

³¹⁴Skinner v. Oklahoma, *ex rel.* Williamson, 316 U.S. 535 (1942) (implying the right to procreate is fundamental because it is a basic civil right of man).

³¹⁵See Planned Parenthood v. Casey, 505 U.S. 833 (1992).

conditions restricting a male probationer's right to procreate, naturally, and inseparably, burden his non-criminal partner's right to conceive a child.

While judges likely feel that they stand at an impasse – that any remedy they institute for non-payment of child support produces no desirable results – this hardship does not constitute a valid argument to use the right to procreate as a bartering chip. The protection of reproductive rights in the probation context demands, at the very least, a less intrusive means test. If courts are forced to adopt the test, different solutions become readily apparent, such as work release programs for the offending parent.

Furthermore, proactive legislation on behalf of the state and federal legislatures presents more effective options than those the courts have the ability to institute or develop. Legislatures have the ability to institute truly compensatory means, like wage garnishing and new hire registries that work directly to compensate the children of deadbeat parents.³¹⁶ Legislatures need to recognize the inability of the courts to do this, and activate widespread, positive change.

The United State Supreme Court describes the right to procreate as one that the Constitution “jealously guards.”³¹⁷ While the *Oakley* court focused solely on its desire to stop the production of more victims, abdicating its responsibility to guard a constitutional right, the *Talty* court leaves little room for comfort in its approving language of the *Oakley* decision. If appellate courts reviewed probation conditions that impinge on procreation rights with the *Trammell* special scrutiny standard, the courts, in the absence of legislative action, could design appropriate and effective solutions to the difficulties of designing a proper probation sentence.

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³¹⁶Pierre, *supra* note 116.

³¹⁷*Skinner*, 316 U.S. at 536.

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