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COMMENTS

LAWS LIKE WHITE ELEPHANTS*: STERILIZATION OF THE RIGHT TO PRIVACY

Gina K. Robeen

I. INTRODUCTION

When twenty-seven year old Darlene Johnson beat her two children with a belt and an electrical cord it never occurred to her that she would be arrested and charged with three counts of felony child abuse. Nor did she expect to be caught up in the middle of a maelstrom of national controversy. When Judge Howard Broadman, a California Superior Court Judge notorious for creative sentencing, gave Darlene a sentencing choice, however, the storm clouds gathered. According to Broadman's sentence, Darlene could either spend four years in prison or serve her time on probation on the condition that she be implanted with the new Norplant contraceptive device for three years.¹ Frightened by the thought of going to prison and losing her children, Darlene accepted the probation and implant offer.² Later, uneasy with undergoing the minor surgery required to implant the contraceptive and hearing of the device's potential side effects, Darlene withdrew her consent to the agreement.³

* An interesting similarity exists between the debate aroused by Judge Howard Broadman's order and the exchange of a young couple in Ernest Hemingway's short story, "Hills Like White Elephants." ERNEST HEMINGWAY, *Hills Like White Elephants*, in *THE FIFTH COLUMN AND THE FIRST FORTY-NINE STORIES* 371(1938); see also J. MEYERS, *HEMINGWAY: A BIOGRAPHY* 196-97 (1985). Hemingway's vignette describes a conversation between a man and his girlfriend while awaiting a train to Madrid. The man subtly encourages his unsophisticated girlfriend to consent to an abortion by describing the procedure as a natural and rational option that will guarantee a return to their prior carefree lifestyle. The woman finds the abortion procedure frighteningly unnatural, but is resigned to the fact that the operation is the only way she can maintain her relationship with this man. It is only through continuous pleading that the woman is able to convince the man to discuss something else.

Similarly, advocates for sterilization encourage women like Darlene Johnson to undergo Norplant implants or risk losing their children. Further, proponents of such use buttress their policy with appeals to rationality.

1. *State v. Johnson*, No. 29390, slip op., at 13-14 (Super. Ct. Cal. Jan. 10, 1991) (motion to modify sentence); see Susan Cruzan, Food and Drug Administration, Press Release (Dec. 10, 1990); WYETH LABORATORIES, INC., NORPLANT SYSTEM—PATIENT LABELING (1990) [hereinafter "Norplant System"].

2. *Johnson*, No. 29390, slip op. at 3, 13-14.

3. *Id.*; Michael Ryan, *Did the Judge go too Far?*, *PARADE MAGAZINE*, Sept. 1, 1991, at

At first glance, Broadman's sentence appears to be a common sense approach to the problem of child abuse. If a woman is unable to care properly for the children she has, eliminate her right to have additional children. In addition to using Norplant to alleviate the problems of child abuse, at least one legislator has proposed using Norplant to solve the problem of drug abuse among pregnant women. Kansas representative Kerry Patrick, who declared that society should "stop worrying about the rights of the mother," recently proposed a bill requiring Norplant implants for all mothers who give birth to drug-addicted babies until they successfully pass twelve monthly drug tests.⁴ California Governor Pete Wilson and some editorial writers suggest using the implants to cut down on poverty.⁵ Proponents argue that the state should give monetary incentives to mothers on welfare who use the Norplant contraceptive and withdraw funds from those mothers who do not voluntarily use the implant.⁶ California Governor Wilson introduced a plan to make the Norplant contraceptive financially available to poor women and teenagers by utilizing state subsidies.⁷ A controversial editorial in the Philadelphia Inquirer went so far as to advocate Norplant use to reduce the population of the "underclass," which includes the poor and minorities who create a burden on the rest of society.⁸

Judge Broadman's decision brought to light the constitutional question of whether the judicial or legislative branch may issue sentences or pass laws that use Norplant as a preventative medicine to reduce child abuse, welfare, and drug addicted infants. The utilitarian argument in favor of sterilization perceives women as unable to control their sexual behavior, drug abuse problems, or tendencies toward child abuse, thereby draining the state and federal budgets.⁹ Utilitarians view Norplant as a miraculous panacea.¹⁰

George Annas, director of the program on law, medicine, and ethics at Boston University School of Medicine, notes that Norplant presents a spe-

8-9; John Hurst, *Controversial Judge Dodges not only Critics, but Bullet*, LOS ANGELES TIMES, April 29, 1991, at A3; Tamar Lewin, *Implanted Birth Control Device Renews Debate over Forced Contraception*, NEW YORK TIMES, Jan. 10, 1991, at A20.

4. See *Drug Addicted Moms—Norplant Would Enable us to Keep Denying the Real Problems*, SEATTLE TIMES, July 16, 1991, at A7; James Willwerth, *Should We Take Away Their Kids? Often the Best Way to Save the Child is to Save the Mother as Well*, TIME, May 13, 1991, at 62; George Skelton & Daniel M. Weintraub, *The Times Poll: Most Support Norplant for Teens, Drug Addicts*, LOS ANGELES TIMES, May 27, 1991, at A1. In a statewide random-digit survey of 1,679 California adults with a 3% margin of error, results showed that 61% of those polled favored mandatory Norplant for drug abusers. The majority in all the categories of respondents responded favorably to the use of Norplant. Half of all African-Americans and more than half of the Latinos surveyed strongly approved of the concept. Skelton and Weintraub, *supra* at A1.

5. Daniel B. Wood, *Wilson Stays Course in California Budget Battle*, CHRISTIAN SCIENCE MONITOR, July 16, 1991, at U.S.1.

6. *Id.*

7. *Id.* Wilson states that he has yet to decide if he will support state legislation compelling women who have "crack babies" to undergo Norplant implantation. See Tim Rutten, *Norplanting or Supplanting Private Rights*, LOS ANGELES TIMES, May 31, 1991, at E1.

8. *Poverty and Norplant—Can Contraception Reduce the Underclass?*, PHILADELPHIA INQUIRER, Dec. 12, 1990, at A18.

9. Robert H. Blank, *REGULATING REPRODUCTION*, 25-28 (1990).

10. *Id.*

cial temptation to legislators and judges anxious to find solutions to today's social problems because it is relatively inexpensive, easily monitored, and effective.¹¹ He predicts that more attempts to use Norplant as a cure-all will force society to contend with the problems its use presents.¹²

Where does society draw the line? Any discussion of involuntary sterilization arouses controversial constitutional questions that society must answer before the government or courts can proceed with plans to curtail reproduction as a solution to society's problems. Unless society answers these questions, women face the threat of a government that, cloaked in the self-righteousness of common-sense, is ready to steal their fundamental right to control their reproductive systems.

This Comment attempts to answer some of the questions raised by forced Norplant implantation. This Comment begins with a brief discussion of the origins of the general right to privacy. It then traces the development of the right to privacy as it pertains to reproductive issues: first, in establishing and defining a woman's reproductive rights derived from the general right to privacy; second, in analyzing current attempts to define those rights more closely; and, third, in balancing women's reproductive rights against other legitimate state interests. Finally, this comment focuses on constitutional objections to using Norplant to keep women from reproducing and the possible outcome of Supreme Court decisions on the issue.

II. CONSTITUTIONALITY AND THE RIGHT TO PRIVACY

A. *The Supreme Court Framework for Analysis of State Statutes and Constitutional Rights*

Any analysis of Supreme Court treatment of various constitutional rights and privileges must begin with a review of the different levels of scrutiny the Court uses when examining state statutes that restrict or curtail the alleged rights. The Court is often faced with the task of balancing the states' interests in exercising their police powers to further the public health, safety, and welfare against the individual's right to be free from burdensome state regulations.¹³ Traditionally, the Court upholds state police power regulation if the law in question is reasonable and rationally related to the attainment of a legitimate governmental goal.¹⁴ Where the state legislation comes into conflict with a fundamental right guaranteed by the Constitution, however, the Court requires that the law pass a more stringent test.¹⁵ When a fundamen-

11. Tamar Lewin, *Implanted Birth Control Device Renews Debate Over Forced Contraception*, NEW YORK TIMES, Jan. 10, 1991, at A20.

12. *Id.*

13. Stephen L. Isaacs, *The Law of Fertility Regulation in the United States: A 1980 Review*, 19 J. FAM. L. 65, 66 (1980).

14. *Id.*

15. *Id.* According to the Supreme Court, "[t]he nature of the right invaded is pertinent . . . for statutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny.'" *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 774 n.3 (1986) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) and "must be viewed in the light of less drastic means for achieving the same basic purpose". *Sheldon v.*

tal right is threatened, a state must demonstrate that the law in question is necessary and narrowly drawn to promote a compelling state interest.¹⁶ If the state cannot meet this standard, the Court will declare the statute unconstitutional.¹⁷

B. *The Constitutional Right To Privacy*

Although the Constitution contains no explicit mention of a right to privacy, legal scholars and courts alike accept the theory that such a right exists. Generally, the right to privacy "is the right to be free from the unwarranted appropriation or exploitation of one's personality," and to be free in one's private affairs.¹⁸ In 1890, Louis D. Brandeis and Samuel D. Warren first introduced the concept of a distinct right to privacy in a law review article advancing the need for a tort cause of action for people exploited for commercial purposes, such as when, for example, advertisers use celebrity names or likenesses to sell products without the celebrities' prior consent.¹⁹ They argued that people have a basic right, not found at common law, to be free from both public disclosure of private facts and appropriation of their names or likenesses for another's benefit.²⁰ Later, Justice Brandeis defined this right as the "most comprehensive of rights and the right most valued by civilized men."²¹ Since the Brandeis and Warren article, the right to privacy has been "the right of an individual to be left alone, to live a life of seclusion, and to be free from unwanted publicity."²² In one jurist's words, the right to privacy is the "right to define one's circle of intimacy."²³ One justification for creating this right that is not explicitly stated in the Constitution is that privacy is necessary to prevent a complex society and governmental structure from encroaching on a citizen's personal freedom when technological advancements make that intrusion increasingly simple.²⁴

Tucker, 364 U.S. 479, 488 (1960). Where a fundamental right is threatened, the State may prevail only upon a showing of a compelling interest. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). Although the Court has yet to come up with a definition of "fundamental right," frequently cited definitions include those rights that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and that "cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .'" *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

16. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

17. *Id.*

18. 62A AM. JUR. 2D *Privacy* § 1 (1990).

19. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890). *But cf.*, William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (distinguishing appropriation from intrusion and invasion of privacy).

20. Brandeis & Warren, *supra* note 19, at 195-96.

21. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

22. *Moore v. Charles B. Pierce Film Enter. Inc.*, 589 S.W.2d 489, 490 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

23. *Kinsey v. Macur*, 165 Cal. Rptr. 608, 612 (Cal. Ct. App. 1980) (quoting *Briscoe v. Readers Digest Ass'n*, 483 P.2d 34, 37 (Cal. 1971)).

24. 62A AM. JUR. 2D *Privacy*, § 4 (1990).

C. *The Right to Privacy in the Home*

The United States Supreme Court first recognized the right to privacy in one's home in 1886. The Court in *Boyd v. United States*²⁵ held that the Constitution provides protection against all unjustified governmental invasions into the "sanctity of a man's home and the privacies of life."²⁶ *Boyd* concerned attempts by a United States district attorney to force criminal defendants to produce personal documents that would allegedly prove criminal charges made against those defendants.²⁷ The Court in *Boyd* held that "compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property" violates the Fourth Amendment right to privacy.²⁸ The Court considers this right to privacy as important as any of the other carefully articulated rights provided by the Constitution.²⁹ It is enforceable in the same manner as other basic constitutional rights.³⁰

III. PROGRESSION TOWARD THE RIGHT TO REPRODUCTIVE PRIVACY

A. *The Eugenics Movement of the Early 1900s*

While the Court developed the right to privacy in *Boyd*³¹ as a protection against unjustified invasion of the home, citizens remained relatively unprotected against similar governmental invasions of their bodies. For example, the eugenics movement of the early 1900's sought to use sterilization to prevent mental defectives, the criminally inclined, and the mentally retarded from reproducing.³² During the heyday of the eugenics movement in 1927, the Supreme Court in *Buck v. Bell*³³ upheld compulsory sterilization of mental defectives, the retarded, or the insane.³⁴ Justice Holmes wrote the

25. 116 U.S. 616 (1886).

26. *Id.* at 630. The Court stated that the privacy principles established in *Boyd* apply to all such invasions by the government and its employees. The Court further held that it was not the actual breaking into Boyd's home that constituted "the essence of the offense; but it [was] the invasion of his indefeasible right of personal security" *Id.*

27. *Id.* at 618.

28. *Id.* at 622.

29. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

30. *Id.* at 660.

31. 116 U.S. at 630.

32. Eugenics is the study of the agencies under social control that may improve or impair the qualities of future generations. Richard A. Estacio, Comment, *Sterilization of the Mentally Disabled in Pennsylvania: Three Generations without Legislative Guidance are Enough*, 92 DICK. L. REV. 409, 411 (1988). Negative eugenics seeks to eliminate procreation of the unfit. *Id.*; see also, ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 357-58 (2d ed. 1949) (defining eugenics as "the study of agencies under social control that may improve or impair . . . future generations either physically or mentally"); Sandra S. Coleman, Comment, *Involuntary Sterilization of the Mentally Retarded: Blessing or Burden?*, 25 S.D. L. REV. 55, 57 (discussing the origins of the eugenics movement); Susan Stefan, *Whose Egg is it Anyway?: Reproductive Rights of Incarcerated, Institutionalized, and Incompetent Women*, 13 NOVA L. REV. 405, 413-27 (1989) (relating the history of sterilization in the Twentieth Century). Margaret Sanger summarized the foundation of the eugenics movement when she wrote, "[m]ore children from the fit, less from the unfit—that is the chief issue of birth control." Tim Ruttan, *Norplanting or Supplanting Private Rights*, LOS ANGELES TIMES, May 31, 1991, at E1.

33. 274 U.S. 200 (1927).

34. *Id.* at 207.

opinion for the Court, upholding a state statute compelling the involuntary sterilization of a sixteen-year-old mentally retarded woman.³⁵ In a startling example of the times, Justice Holmes stated,

[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes Three generations of imbeciles are enough.³⁶

B. *The Right to Privacy Extended to Provide Freedom from Nonconsensual Bodily Invasions*

After the Court recognized the concept of protection from unwarranted invasion in the home, the court extended this right to encompass protection from nonconsensual bodily invasions as well, thereby contributing to the decline of the eugenics movement. In several of their decisions, the courts interpreted the right to be "secure in your person" to prohibit nonconsensual surgical invasions.³⁷ The nonconsensual invasions in these cases were both minor and instrumental in obtaining crucial evidence against criminal defendants.³⁸ In 1990 the Supreme Court, in *Cruzan v. Director, Missouri Department of Health*,³⁹ reaffirmed the idea that competent persons have the

35. *Id.* at 205-07.

36. *Id.* at 207.

37. *Smith v. Superior Ct.*, 725 P.2d 1101, 1103-04 (Ariz. 1986) (appellate court refused to uphold sentence of sterilization unauthorized by statute); *Briley v. California*, 564 F.2d 849, 857 (9th Cir. 1977) (upheld the use of castration as punishment only if the convict's consent to sterilization as an alternative to imprisonment was truly voluntary); *South Carolina v. Williams*, Indictment No. 86-187, July 7, 1986; *Jef Freely, Woman Accepts Sterilization as Term of Plea*, NAT'L L.J., Aug. 18, 1986, at 61; *see also In re Romero*, 790 P.2d 819, 821 (Colo. 1990) (involuntary surgical intrusions must be carefully scrutinized because of their traumatic, potentially long-lasting emotional effects).

38. *See Winston v. Lee*, 470 U.S. 753, 759 (1985) (Justice Brennan stated that surgical intrusion into an accused robber's chest to remove a bullet was unreasonable under the Fourth Amendment because it would violate the defendant's right to be secure in his person, despite the fact that the surgery was likely to produce crucial evidence); *Rochin v. California*, 342 U.S. 165, 172-73 (1952). The Court held that forcible pumping of a criminal suspect's stomach without his consent violated the individual's Fourth Amendment due process rights. This type of nonconsensual bodily intrusion was condemned by the court as "conduct that shocks the conscience." *Rochin*, 342 U.S. at 172. The *Rochin* Court added that in order to be brutal and . . . offensive to human dignity, . . . a bodily intrusion need not leave the civilized jurist reeling; it should suffice (1) that the imposition was deficient in procedural regularity, or (2) that it was needlessly severe, or (3) that it was too novel, or (4) that it was lacking in a fair measure of reciprocity.

Id. at 174; *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-9, 1332 (2d ed. 1988). Factors considered in determining whether an intrusion was too severe include the presence of physical pain, creation of anxiety and apprehension of danger, permanence, complications, risk of irreversible injury to health, and danger to life itself. TRIBE, *supra* at 1332-33. *But see Schmerber v. California*, 384 U.S. 757, 760 (1966) (Court held warrant necessary before an involuntary blood test of a suspected drunk driver could be taken); *United States v. Crowder*, 543 F.2d 312, 316 (D.C. Cir. 1976) (holding the same as in *Hughes*), *cert. denied*, 429 U.S. 1062 (1977); *Hughes v. United States*, 429 A.2d 1339, 1341 (D.C. 1981) (Fourth Amendment not violated by state's non-consensual surgical removal of bullet from suspect's body).

39. 110 S. Ct. 2841, 2843 (1990). This case involved an action for a declaratory judgment

right to withhold their consent to surgical procedures even if those procedures are in their best interests. In reaching its decision, the Court applied a balancing test, weighing the right of the individual to be free from nonconsensual medical procedures against society's interests in preserving human life by the use of medical intervention and life support systems.⁴⁰ The Court in *Cruzan* expressed its continued support for the right of persons to be secure in themselves and their right to control their bodies.⁴¹

C. Constitutionally Protected Reproductive Freedom

Once the Court established that the right to privacy applied to both citizens' right to be secure in themselves and privacy in the home, the Court naturally extended its reasoning to provide protection for reproductive privacy. The eugenics movement of the 1900's died out in part because the Supreme Court recognized a person's right to reproduce in *Skinner v. State of Oklahoma*.⁴² In *Skinner*, the Supreme Court ruled on the constitutionality of an Oklahoma statute mandating sterilization for those convicted of felonies involving moral turpitude.⁴³ After rejecting the statute as unconstitutional because it lacked a rational basis for determining who was subject to sterilization, the Court in *Skinner* stated that the right to reproduce is "one of the basic civil rights of man" since it is fundamental to the very existence and survival of the race.⁴⁴ The Court then held that it would strictly scrutinize any group for which the statute made sterilization a mandatory penalty.⁴⁵ Part of the reason for the Court's holding in *Skinner* was that, in the early 1900's, sterilization was a permanent surgical procedure for which there was no redemption and would forever deprive the afflicted of a basic

brought by the parents and coguardians of Nancy Cruzan, a young woman in a persistent vegetative state as a result of an automobile accident. Cruzan's parents sought judicial sanction of their desire to terminate the artificial hydration and nutrition sustaining their daughter's life after it became apparent that "she had virtually no chance to recover her cognitive faculties." *Id.* at 2845. The Supreme Court confirmed that a competent person has a constitutional right to refuse unwanted medical treatment. *Id.* at 2843 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905)); see also *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

40. *Cruzan*, 110 S. Ct. at 2851-52. In *Schmerber v. California*, 384 U.S. at 767, the Court endorsed the balancing test for determining whether bodily intrusions are proper and confirmed that freedom from such intrusions is one of the values basic to a free society.

41. *Cruzan*, 110 S. Ct. at 2851-52.

42. 316 U.S. 535 (1942). A convicted man challenged the constitutionality of statutorily mandated sterilization as a part of his sentence. *Id.* at 537-38. It is important to note that, despite strong dicta regarding reproductive rights, the Court found that the statute violated equal protection rights, since it required sterilization for some criminals but not others and provided no rational scheme to determine who should receive the punishment. *Id.* at 541.

43. *Id.* at 536.

44. *Id.* at 541.

45. *Id.* After characterizing the right to reproduce as one of the "basic civil rights of man," the Court observed that "the power to sterilize, if exercised . . . in evil or reckless hands . . . can cause races or types . . . inimical to the dominant group to wither and disappear." *Id.* The *Skinner* Court was motivated in part by fear of potential genocide stemming from governmental control of reproduction. *TRIBE*, supra note 38, § 15-10 at 1339.

liberty.⁴⁶ These concerns influenced other courts subsequent to *Skinner* in their decisions to invalidate statutorily mandated permanent sterilization. For example, in *In re Truesdell*,⁴⁷ a case involving the involuntary sterilization of a mentally retarded woman, the North Carolina Court of Appeals stated that recognition of procreation as a fundamental right renders inadequate all but the most compelling justifications for the sterilization.⁴⁸

More recently, the Supreme Court has found justification for reproductive freedom in areas other than the Fourth Amendment. In *Griswold v. Connecticut*,⁴⁹ the Supreme Court found constitutionally protected zones of privacy in various penumbras surrounding the specific guarantees in the Bill of Rights.⁵⁰ The *Griswold* Court then went on to hold that a state statute forbidding contraceptive use by married couples was unconstitutional because the right to privacy includes marital relations.⁵¹ Subsequently, the Supreme Court expanded the right to privacy to include freedom of choice in those basic decisions respecting marriage,⁵² procreation, and contraception.⁵³ Moreover, the Court relied on previous cases that held that the right to privacy is "essential to the orderly pursuit of happiness by free men"⁵⁴ and is a matter in which the state should not interfere.⁵⁵

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

47. 304 S.E.2d 793 (N.C. Ct. App. 1983). In examining a petition for an order for the involuntary sterilization of a mentally retarded eighteen-year-old female, the court stated that equal protection concerns dictated "strict scrutiny of both the classification of those subject to the involuntary sterilization laws as well as the application of that classification." *Id.* at 799.

48. *Id.* at 800-01.

49. 381 U.S. 479 (1965).

50. *Id.* at 484. The Court found the right to privacy in the penumbras of the First Amendment (freedom of association), Third Amendment (right not to quarter troops), Fourth Amendment (right to be secure in the home), Fifth Amendment (right not to incriminate oneself), and Ninth Amendment (the forfeiture clause). *Id.* at 484-85; see also *Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969) (Court held Constitution protects right to be generally free from governmental intrusion into a person's lifestyle); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (Court held Fourth Amendment protection against unreasonable searches protected people, not places, and applied to citizens on the streets as well as at home); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Court held actual entry on premises was not required for unconstitutional search). But see *Katz v. United States*, 389 U.S. 347 (1967) (Black, J., dissenting). In *Katz*, Justice Black expressed his disapproval of the Court's method of deriving a right to privacy from the Constitution. Black stated that, by substituting the Court's language for that of the Constitution, the Court was making the Constitution a vehicle for invalidating all laws that offended the Court's personal concept of privacy. *Id.* at 373.

51. *Griswold*, 381 U.S. at 485. The Court expressed its attitude toward this kind of regulation by asking, "[W]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Id.* The Court found this idea repulsive. *Id.* at 485-86. Justice Goldberg, joined in a concurrence by Justice Brennan, stated that the test for determining fundamental rights involves looking at the "traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental." *Id.* at 493 (quoting *Snyder v. Commonwealth of Mass.*, 291 U.S. 97, 105 (1934)).

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

53. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that "marriage and procreation are fundamental to the very existence and survival of the race").

54. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

55. *Id.* at 400.

In *Eisenstadt v. Baird*⁵⁶ the Court held that if the right of privacy was to have real meaning, it must include the "right of any individual, married or single, to be free from unwarranted governmental intrusion into" his or her sex life, including his or her choice of whether or not to have children.⁵⁷ The Illinois District Court held in *Doe v. Scott*⁵⁸ that the protected areas included "women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation."⁵⁹ The Court has expanded the right to reproductive privacy to include medical technological advancements. In *Matter of Baby M*,⁶⁰ the New Jersey Supreme Court stated that reproductive freedom included the right to have children by unconventional means such as artificial insemination.⁶¹

D. Roe v. Wade

In *Roe v. Wade*,⁶² the Supreme Court extended the right to reproductive privacy to its most controversial extreme when it ruled that the right to privacy was broad enough to encompass a woman's decision to have an abortion.⁶³ While previous decisions focused on reproductive rights prior to conception, *Roe v. Wade* was the first decision to assert that a woman's limited right to control over her body, even while pregnant, outweighed the state's interest in the fetus, at least before viability.⁶⁴ The Court held that the right to privacy was broad enough to encompass a woman's decision to terminate her pregnancy but cautioned that such right was not absolute.⁶⁵ According to the Court, state interests in fetal life do not become compelling enough to justify absolute prohibitions of abortions until the point of viability, established in *Roe* to be the beginning of the third trimester.⁶⁶

IV. CURTAILMENT OF REPRODUCTIVE FREEDOM AFTER *ROE V. WADE*

A. Modern Restrictive Theories of Women's Reproductive Freedom

Despite the expansive Supreme Court decisions regarding reproductive rights, further expansions of a woman's right to reproductive freedom came to a relative standstill after *Roe*. Responding in part to the public pressures of the pro-life movement, several courts have gone to extreme lengths to protect unborn fetuses by upholding increasingly restrictive abortion laws

56. 405 U.S. 438 (1972).

57. *Id.* at 453.

58. 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated*, 410 U.S. 950 (1973).

59. *Id.* at 1389.

60. 537 A.2d 1227 (N.J. 1988).

61. *Id.* at 1253.

62. 410 U.S. 113 (1973). *Roe* involved an attack on Texas abortion laws making it a crime to procure an abortion except by medical advice for the purpose of saving the mother's life. *Id.* at 113. Jane Roe, a single, pregnant woman, accompanied by a licensed physician, challenged the statute as improperly invading the right of a pregnant woman to terminate her pregnancy. *Id.*

63. *Id.* at 153.

64. *Id.* at 152-53.

65. *Id.*

66. *Id.* at 163-64.

and exerting physical control over pregnant women to protect the fetuses in their wombs.⁶⁷

Anti-abortion activists, dissatisfied with the Court's expansion of reproductive rights, are asserting their views by focusing on the rights of the fetus.⁶⁸ Proponents of fetal rights argue that *Roe*'s recognition of compelling state interests in fetal life gives the state authority to override a woman's wishes and to compel the medical treatment necessary to protect the health of a fetus.⁶⁹ Courts and legislatures wishing to curtail the abortion right place less emphasis on women's reproductive rights and focus instead on the state's interest in the welfare of the unborn. This approach has resulted in startling lower court decisions. Judges are now placing pregnant women in prison to protect unborn fetuses⁷⁰ and have even gone so far as to force pregnant women to undergo unwanted surgical procedures such as caesarean sections⁷¹ and blood transfusions to protect their unborn children.⁷² Viewing the mother and fetus as adversaries thus allows courts to control women's behavior.⁷³

Because the existence of a fundamental privacy right does not bar all state restrictions on the exercise of that right,⁷⁴ the Supreme Court uses strict

67. See generally Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599 (1986) (the author analyzes the growth and development of the concept of fetal rights and its potential impact on women's rights).

68. Andrew Patner, *Handful of Prosecutors Start Treating Pregnant Drug Users as Child Abusers*, WALL ST. J., May 12, 1989, § 2 at 8. The current focus on fetal rights procured at the expense of the mother is curious when viewed in light of the legal tradition that, absent a special relationship, one is under no duty to come to the aid of another. According to Lawrence Tribe, courts have long recognized the wisdom of acting as though persons can never be used as means to benefit another. See TRIBE, *supra* note 38, § 15-10 at 1334-35.

69. See John A. Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333, 353-61 (1982).

70. See Ellen M. Barry, *Pregnant, Addicted and Sentenced*, CRIMINAL JUSTICE, Winter 1991, at 23-27; Kenneth Jost, *Mother versus Child*, A.B.A. J., Apr. 1989, at 84-88.

71. *In re A.C.*, 573 A.2d 1235, 1240 (D.C. App. 1990). After a brief hearing at the woman's hospital, the judge ordered a cesarean section to try to save the child's life despite the mother's professed resistance to the procedure. Both mother and infant died shortly afterwards. *Id.* at 1237; *Jefferson v. Griffen Spalding County Hosp. Auth.*, 274 S.E.2d 457, 459-60 (Ga. 1981) (Hill, J., concurring) (per curiam). Judge Hill acknowledged the conflict between the fetal rights movement and our nation's historical emphasis on individual rights. He stated, "the power of the court to order a competent adult to submit to surgery is exceedingly limited. Indeed, until this unique case arose, I would have thought such power to be nonexistent." *Id.* at 460. See generally Johnsen, *supra* note 67.

72. *In re Jamaica Hosp.*, 128 Misc. 2d 1006, 1007-08, 491 N.Y.S.2d 898, 899-900 (Sup. Ct. 1985) (after pregnant woman refused medical treatment on religious grounds, the court concluded that her personal interest in her religious belief was not sufficient to override the state's interest in her unborn fetus); *Crouse Irving Memorial Hosp. v. Paddock*, 127 Misc. 2d 101, 102-03 485 N.Y.S.2d 443, 444-45 (N.Y. Sup. Ct. 1985) (court ordered that a blood transfusion be given to mother for the benefit of her fetus despite religious objections of both parents). For a pre-*Roe* example of forced medical treatment, see *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964) (ordering blood transfusions to a Jehovah's Witness over her objection in order to save her life and that of her fetus), *cert. denied*, 377 U.S. 985 (1964).

73. Johnsen, *supra* note 67, at 599.

74. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1776-77 (1991) (Court upheld state restrictions on provision of abortion information to patients of clinics receiving public funds); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 501-11 (1989) (Court upheld Missouri

scrutiny to determine whether statutory restrictions are necessary to further a compelling state interest.⁷⁵ If a law is necessary to implement a permissible state policy⁷⁶ and is the least intrusive means available to achieve that policy, it may be upheld.⁷⁷

B. Recent Court Decisions Narrowing Women's Reproductive Choices

Decisions since *Roe* emphasize that the right to an abortion is not absolute but is subject to reasonable state restrictions when those restrictions are necessary to achieve legitimate state ends.⁷⁸ The Supreme Court in *Maher v. Roe*⁷⁹ upheld a state statute prohibiting the use of federal funds to finance abortions for indigent women and others, holding that a woman's freedom of choice does not carry with it constitutional entitlement to the financial resources necessary for her to exercise that choice.⁸⁰ The Court held that withholding federal funding for abortions does not foreclose a woman's choice any more than would the state's provision of no funding at all.⁸¹ This holding ignores the fact that for poor women who cannot afford to pay for their own treatments, abortions are effectively withheld.⁸²

statute restricting use of public employees or facilities to perform or assist in performing therapeutic abortion); *Harris v. McRae*, 448 U.S. 297, 306-11, 315 (1980) (Court upheld statute allowing state refusal to provide Medicaid funds for medically necessary abortions and held that this refusal presented no obstacle to women's ability to get an abortion).

75. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Skinner*, 316 U.S. 535, 541 (1942).

76. See *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Fischer v. Commonwealth of Pa. Dept. of Pub. Welfare*, 482 A.2d 1148, 1156 (Pa. Commw. Ct. 1984); *Comm. to Defend Reprod. Rights v. Myers*, 172 Cal. Rptr. 866, 876, 625 P.2d 779, 789 (1981).

77. *In re Truesdell*, 304 S.E.2d. 793, 801 (N.C. Ct. App. 1983); *Sheldon v. Tucker*, 364 U.S. 479, 488-90 (1960); see also *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 789 (Cal. 1981). In *Myers*, The California Supreme Court articulated the barriers a statute must overcome when it seeks to hinder exercise of fundamental rights. First, the statute "must establish that the imposed conditions relate to the purpose of the legislation that confers the benefit or privilege." *Myers*, 876 P.2d at 786. Second, the utility of imposing the conditions attached to the benefits must outweigh the resulting impairment of constitutional rights. *Id.* Finally, "[i]n imposing conditions upon the enjoyment of publicly conferred benefits, . . . the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn as narrowly as possible to further state goals. *Id.*

78. *Carey v. Population Health Servs.*, 431 U.S. 678, 696 (1977); *Roe v. Wade*, 410 U.S. at 153-54.

79. 432 U.S. 464 (1977).

80. *Id.* at 469-71. *Maher* was brought by two indigent women wishing to obtain abortions who were denied state funds by a statute that withheld those abortion funds that were not necessary to protect a woman's health, despite state provision of funds for indigent women wishing to have children. *Id.*; see also *Beal v. Doe*, 432 U.S. 438, 445-47 (1977) (Court held that inclusion of nontherapeutic abortions from Medicaid coverage was reasonable given the significant state interest in protecting potential human life); Stephen L. Isaacs, *The Law of Fertility Regulation in the United States: A 1980 Review*, 19 J. FAM. L. 65, 72-74 (1980) (discussing Medicaid and other restrictions on funding abortions).

81. *Maher*, 432 U.S. at 469-71, 480; see also *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989) (The Court held that the State's decision to use public resources to encourage childbirth only placed no governmental obstacle in the way of a woman desiring to abort); *Harris v. McRae*, 448 U.S. 297, 317 (1980) (the Court held that governmental limits on funding for medically necessary abortions does not impinge on a woman's right to choose to have an abortion).

82. *Maher*, 432 U.S. at 482-83 (Brennan, J., dissenting).

In *Carey v. Population Services International*,⁸³ the Court held that laws abridging due process rights must pass a less stringent "unduly burdensome" or "rationally related" test.⁸⁴ The plurality in *Carey* replaced the "strict scrutiny" test with a "rational basis" test that would allow restrictions on reproductive rights as long as they further a permissible state interest.⁸⁵ In *Carey*, Justice Rehnquist's dissent showed his exasperation with Court-created privacy laws by stating that he did not believe that those who "valiantly but vainly defended the heights of Bunker Hill" ever imagined that the Constitution for which they were fighting would be stretched to current limits.⁸⁶

In *Thornburg v. American College of Obstetricians & Gynecologists*,⁸⁷ Chief Justice Rehnquist and Justice White stated that they found no mention of a right to reproductive privacy in the Constitution and that they found it doubtful that the framers considered the right during the drafting process.⁸⁸ Justice O'Connor also displayed her willingness to sustain significant limits on reproductive freedom by using the "undue burden" test on restrictive state laws.⁸⁹ She seemed reluctant to uphold affirmative state actions completely curtailing reproductive freedom, although her "compelling state interest" test could serve to uphold forced sterilizations by the state.⁹⁰

Because of the importance of *Roe* in establishing reproductive freedom, the Court's demotion of a woman's reproductive right to a due process right indicates that the Court is receptive to varied legislation severely curtailing

83. 431 U.S. 678 (1977) (White, J., concurring). In his concurrence, Justice White stated that post-*Griswold* Court decisions regarding reproductive privacy put *Griswold* in proper perspective. "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusions by the State." *Thornburg v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 775 (1986) (quoting *Carey v. Population Servs. Int'l*, 431 U.S. at 687 (1977)).

84. *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 771-72 (1986).

85. *Carey*, 431 U.S. at 696; see Eric M. Haas, *Webster, Privacy, & RU486*, 6 J. CONTEMP. HEALTH L. & POL'Y, 277, 286 (1990); see also JOHN E. NOWAK, ET. AL., CONSTITUTIONAL LAW 696 (3d ed. 1986).

86. *Carey*, 431 U.S. at 717.

87. 476 U.S. 747 (1986).

88. *Id.* at 789. For scholarly predictions concerning the future of *Roe*, see Walter Dellinger & Gene B. Sperling, *Webster v. Reproductive Health Services: Abortion and the Supreme Court — The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 90 (1989); Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 538 (1990); James Bopp, Jr. & Richard E. Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157, 157-65 (1989).

89. Dellinger & Sperling, *supra* note 88. In *Thornburg*, Justice O'Connor stated that states have "compelling interests in ensuring maternal health and in protecting potential human life and these interests throughout pregnancy." 476 U.S. at 828. She then claimed that "under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes." *Id.* An undue burden, according to O'Connor, "will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision, not wherever a state regulation may inhibit abortions." *Id.* She then added that even "if a state law does interfere with the abortion decision to an extent that is unduly burdensome so that it becomes necessary to apply an exacting standard of review, the possibility remains that the statute might withstand the stricter scrutiny." *Id.*

90. Dellinger & Sperling, *supra* note 88, at 98-99.

women's reproductive choices after conception.⁹¹ This receptiveness might extend to legislation curtailing reproductive choice before conception as well. The state has a legitimate interest in ending child abuse, drug-addicted infants, and poverty. If forced sterilization is the least intrusive means available to reach those legitimate goals and "compelling state interest" is given its usual interpretation, state interests may overcome a woman's liberty interests enough to allow forced sterilization of this type.⁹²

C. Webster v. Reproductive Health Services

In *Webster v. Reproductive Health Services*⁹³ the Supreme Court refused to rule on the constitutionality of the statute's preamble, which stated that life begins at conception and that the state has an interest in protecting that life.⁹⁴ The Court upheld the statute's prohibitions limiting any employee or facility that received state funding from assisting in or performing abortions.⁹⁵ The plurality opinion by Chief Justice Rehnquist reiterated the idea that although "stare decisis is a cornerstone of our legal system," the Court considers it less persuasive in constitutional cases in which the Supreme Court alone may make changes.⁹⁶ This timely rejection of a long-accepted legal principle may indicate the Court's willingness to overrule *Roe*.⁹⁷

Although the majority in *Webster* expressed its desire to overrule *Roe* quietly,⁹⁸ Justice Scalia, in his concurrence, explicitly stated that he wished to

91. See *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2980-84 (1990); *Webster v. Reproductive Servs.*, 492 U.S. 490, 507-11 (1989).

92. Haas, *supra* note 85, at 286.

93. 492 U.S. 490 (1989). *Webster* was a declaratory judgment action in which state employed health professionals and nonprofit corporations providing abortion services challenged the constitutionality of a Missouri statute regulating performance of abortions. *Id.* at 500-03. The statute in question stated, in its preamble, that human life begins at conception and that the unborn have protectable interests in life and health. *Id.* at 504. The statute required doctors performing abortions to first medically ascertain whether the fetus was viable, *id.* at 513-21, forbade the use of public employees to perform or assist in performing abortions unnecessary to protect maternal life, and forbade performance of medically unnecessary abortions in facilities receiving public aid. *Id.* at 507-11. The statute made it unlawful to use public funds to encourage or even counsel women to have unnecessary abortions. *Id.* at 511-13. The district court and court of appeals both held the statute unconstitutional as violative of a woman's right to choose abortion as stated in *Roe v. Wade*. *Id.* at 502-04.

94. *Id.* at 504-07.

95. *Id.* at 509-10.

96. *Id.* at 518.

97. *Id.* at 538 (Blackmun, J., dissenting); see also Dellinger & Sperling, *supra* note 88, at 83-84.

98. *Id.* at 538 (Blackmun, J., dissenting). In his dissent, Justice Blackmun stated, "Today . . . the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive[s], but [is] not secure The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State. . . . I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this court."

Id. at 537-38.

overrule *Roe*.⁹⁹ In his opinion, the Constitution contains no express right to abortion, the abortion right cannot be found in traditions, and it cannot be logically deduced from the text of the Constitution.¹⁰⁰

The dissenting trio in *Webster*, Blackmun, Brennan, and Marshall, acknowledged the dark future for *Roe*. Writing the dissenting opinion, Blackmun stated that "the signs are evident and very ominous, and a chill wind blows."¹⁰¹ Given the appointment of Justices Souter and Thomas, conservative replacements for Brennan and Marshall, Blackmun's predictions may at some time prove true.¹⁰²

V. FORCED TEMPORARY STERILIZATION

A. *The Constitutionality of Forced Norplant Implants*

Judge Broadman's decision, which started the current debate about the constitutionality of forced temporary sterilization, would not have been possible without recent medical advancements allowing for nonpermanent sterilization, as before, other methods were either permanent or unreceptive to court regulations. In providing an alternative to permanent sterilization, Norplant became an impetus for the sterilization controversy.

B. *Norplant*

The Food and Drug Administration recently approved Norplant, a contraceptive produced by Philadelphia's Wyeth-Ayerst Laboratories.¹⁰³ Originally manufactured in Finland, Norplant is already available in fourteen countries and has been studied in the United States since 1972 in a multicenter study of 2,400 women.¹⁰⁴ The contraceptive is implanted under the skin of the upper, inner arm, using a local anesthesia in the doctor's office.¹⁰⁵ Upon implantation, Norplant can prevent pregnancy for up to five years.¹⁰⁶

99. *Id.* at 532 (Scalia, J., concurring).

100. *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. at 2984. In his concurrence Justice Scalia stated,

I continue to believe . . . as I said in my separate concurrence last Term in *Webster* . . . that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins.

Id.

101. *Webster*, 492 U.S. at 560 (Blackmun, J., dissenting).

102. Joan Beck, *Marshall Exit will Reignite the Abortion Fire*, CHICAGO TRIBUNE, July 1, 1991, at C17. Beck points out that the opportunity is near for the Court to actually overrule *Roe*. *Id.* The Court is scheduled to hear the appeals of three restrictive and controversial state laws on abortion in the fall of 1992. *Id.* One concerns a Pennsylvania statute banning abortions in public hospitals for sex selection and mandates a 24-hour waiting period and parental notification. *Id.* A Utah statute forbids abortion except in cases of rape, incest, fetal abnormalities, or potential threat to the mother's health, and a Louisiana law is similar except that it also imposes a ten-year prison sentence and \$100,000 fine for doctors who perform unauthorized abortions. *Id.*

103. Cruzan, *supra* note 1.

104. *Id.*

105. *Id.*

106. *Id.*

Studies show it is 99% effective in women under 150 pounds.¹⁰⁷

The implant itself "consists of a fan like arrangement of six silicone rubber rods," each 1 1/3 inches long.¹⁰⁸ The rods contain the synthetic progesterin hormone, levonorgestrel, also used in some oral contraceptives, which, when released continuously into the body, inhibits ovulation.¹⁰⁹ In addition, levonorgestrel thickens the cervical mucus, which makes it more difficult for sperm to reach the egg.¹¹⁰ Norplant removal requires minor out-patient surgery and, once the device is removed, fertility returns.¹¹¹

Norplant is not for everyone. It is not recommended for women with "acute liver disease, unexplained vaginal bleeding, breast cancer, or blood clots in the legs, lungs, and eyes."¹¹² In addition, side effects reported by those who use oral contraceptives are also found in Norplant:¹¹³

1. menstrual irregularity ranging from prolonged bleeding to spotting, missed, or nonexistent periods;
2. "headaches, mood changes, nausea, and an increase in acne;"¹¹⁴
3. delayed disintegration or disappearance of follicles and ectopic pregnancies (those that occur in places other than the uterus);
4. dizziness, enlargement of the ovaries and fallopian tubes; and
5. changes in appetite, weight gain, breast tenderness, excessive growth of body or facial hair, hair loss, and discoloration of the skin over the implantation site.¹¹⁵

C. Use of Norplant as a Punishment or Preventative

Legislators and courts advocate forced Norplant implantation to help solve the problems of child abuse, drug abuse, and poverty.¹¹⁶ Requiring demonstrably unfit mothers to use Norplant to prevent them from having children, or more children, seems, at first, like a good idea. It is a relatively quick procedure involving a minimum amount of pain and is less expensive to the state than paying for more court proceedings, imprisonment, or welfare benefits. The procedure is temporary and would thus avoid any permanent infringement on the affected women's rights to have children. In addition, by the time courts ordered Norplant implantation as a punishment, the women so sentenced would have already forfeited their constitutional rights by committing their crimes.¹¹⁷

107. *Id.*

108. *Id.*

109. *Id.*

110. Norplant System, *supra* note 1.

111. *Id.*

112. Cruzan, *supra* note 1.

113. *Id.*

114. Cruzan, *supra* note 1; Norplant System, *supra* note 1.

115. Norplant System, *supra* note 1, at 3.

116. See *State v. Johnson*, No 29390, slip op. at 13-14 (Super. Ct. Cal. Jan. 10, 1991) (motion to modify sentence); Lewin, *supra* note 3, at A20.

117. For statistics regarding the tremendous problem of female drug addicts having babies, see Christy Scattarella, *Forced Birth Control?—Drug Baby Boom Sparks Call to Control Female Addicts*, SEATTLE TIMES, June 24, 1991, at A1. Washington state estimates that, each

Forced Norplant implantation would ostensibly achieve various beneficial results. Judge Broadman, in his alternative sentence for Darlene Jones, for instance, wished to use Norplant to "cure" her of child abuse.¹¹⁸ Norplant can also be used as a punishment for mothers who have drug-addicted babies. Statistics concerning drug addicted pregnant women and child abuse show the need for state intervention. The problem is undeniably severe.¹¹⁹ Researchers estimate that as many as 375,000 newborns may be harmed by maternal substance abuse in the United States each year.¹²⁰ Female addicts generally will not have just one drug baby. They are far more likely to have several, and many of these women will abandon their children.¹²¹ Treatment or counseling for these women is frightfully inadequate, and the costs of maintaining the current support systems are excessive. In Washington alone, for example, less than one in seven pregnant addicts will receive treatment.¹²² This lack of treatment costs the state from \$29 million to \$46 million a year for special education and medical care for children of addicted mothers, and costs are expected to rise.¹²³

VI. CONSTITUTIONALITY OF FORCED STERILIZATION

A. *Questions Concerning Forced Norplant Implantation*

Before courts can grasp Norplant sterilization as a solution to the problems of child abuse and drug abuse, however, they must demarcate boundaries for proper Norplant use to prevent temporary sterilization from becoming a panacea for society's ailments. Several questions must be answered: What rights do women have to control their reproductive systems? What will happen to those rights if an increasingly conservative Supreme Court continues to modify and reduce the rights of women to be secure in themselves? Do women faced with the decision of going to prison or undergoing sterilization have a meaningful choice? Does the state have the right to require women to make such a choice, if in fact there is one? Is the government really trying to prevent crime by forced Norplant implants? Or, is the government really advocating selective reproduction, advancing the idea that only "good" people have the right to bear children and that others who do so are only adding to the burden on society by producing more people like themselves? This latter idea was the basis for the eugenics movement at the turn of the century and has the potential to resurface as lawmakers begin

hour, a woman with serious drug problems has a baby within the state. Because drugs affect the fetuses in the womb, sometimes altering their brain chemistry, babies exposed to drugs may be jittery, still, or inconsolable. In some cases, drugs can cut off blood supply to a limb, resulting in babies with missing or shriveled appendages. *Id.*

118. *Johnson*, No. 29390, at 3, 13-14.

119. Scattarella, *supra* note 117, at A1.

120. Paul Marcotte, *Crime and Pregnancy*, A.B.A.J., Aug. 1989, at 14.

121. *Id.*

122. *Id.*; see also Wendy Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. TIMES, July 18, 1989, at A21 (reporting that of 78 drug treatment programs in New York City, 54% refused treatment to all pregnant addicts, an additional 13% refused to treat pregnant addicts on Medicaid, and another 20% refused to treat Medicaid recipients addicted to crack cocaine).

123. Scattarella, *supra* note 117, at A1.

to recognize temporary sterilization, made seductively possible by Norplant, as a quick-fix for the problems of crime and poverty in society today. A critical analysis of these fundamental questions leads, however, to the inescapable conclusion that the quick-fix is, like many easy solutions, too good to be true. Forced Norplant implantation is simply not constitutional.

B. *Forced Sterilization Violates the Right to Privacy*

Undoubtedly, the framers of our Constitution, constantly guided by their concerns that all citizens be free, surely did not anticipate a state so bold and intrusive that it would seek to force a woman¹²⁴ to undergo surgery and forego procreation.¹²⁵ Nonetheless, forced Norplant sterilization, although temporary, violates the fundamental right to privacy that the Court infers from the Fourth Amendment, the Fourteenth Amendment and/or the penumbras of the First, Third, Fifth, and Ninth Amendments.¹²⁶ Past decisions of the Supreme Court considered the Constitution's failure to mention a right to privacy irrelevant because the Constitution is a broad outline of governmental powers and behavior and not an all-inclusive legal code.¹²⁷ Indeed, the right to privacy is not the only fundamental right implied by our Constitution.¹²⁸

Griswold established the right of married people to choose whether or not to conceive a child, and the Court to date has not overruled *Griswold*.¹²⁹ Later cases explicitly stated that mentally competent women must be allowed to retain their freedom to choose whether or not to reproduce, even if that means the possibility of making decisions that many would consider unwise.¹³⁰ Just as one scholar called "mandatory childbearing a totalitarian intervention into a woman's life,"¹³¹ its corollary, sterilization, is equally offensive.

124. Cruzan, *supra* note 1; Norplant System, *supra* note 1, at 1.

125. Ironically, Norplant poses no threat to male rights to reproduce despite the contributions of males to the problems of child abuse, etc., that sterilization of women is intended to solve.

126. See *Griswold v. Connecticut*, 381 U.S. at 485-89.

127. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317 (1819).

128. In *Shapiro v. Thompson*, the Court found in the Constitution an implicit fundamental right to travel. 394 U.S. 618, 630 (1969). The Court invalidated the statutes of two states and the District of Columbia denying welfare benefits to residents who had not lived in the area for at least one year. *Id.* at 642. The Court held that, by establishing this waiting period, the states were impairing citizens' fundamental right of interstate movement. *Id.* at 630-31. Although this right is not expressly stated in the Constitution, the Court found that the right existed because the nature of our federal system and our constitutional ideas of personal liberty unite to require that all citizens be free to travel throughout the country. *Id.*

129. *Griswold v. Connecticut*, 381 U.S. at 484-86.

130. *In re Romero*, 790 P.2d 819, 823 (Colo. 1990). This case concerned compulsory sterilization of a mentally disabled woman. The court found that the woman was competent to understand the proceedings concerning her sterilization and that, because she was able to comprehend her behavior and its possible consequences, freedom of choice dictated that she remain able to make those decisions, despite her history of poor judgment. *Id.* at 823-24.

131. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 791 (1989); see also TRIBE, *supra* note 38, § 15-10 at 1352-55 (discussing the constitutional quandary presented by abortion).

C. *Forced Sterilization Violates Women's Rights to Equal Protection*

Forced sterilization violates the Fourteenth Amendment equal protection guarantee of the right to privacy. Because there is no male equivalent to Norplant, temporary sterilization is only available to women. Forced Norplant implantations, like restrictive abortion laws, would "require women, and only women, to endure government-mandated physical intrusions significantly more substantial than those the Court has held to [and] which violate the constitutional principle of bodily integrity."¹³² Forced sterilization would "give the state control over a woman's basic choices about reproduction and family planning."¹³³ By regulating women as if their sole societal function is to reproduce, the state fosters and encourages sexual discrimination based on the unavoidable biological fact that women can have children and men cannot.¹³⁴ One scholar argues that, "[i]n American society today, reproductive freedom is the key to achieving gender equality. Women must be able to determine if, when, and how they will bear children if they are ever to gain ground and participate as equals in social, economic, and political life."¹³⁵ Laws regulating reproductive freedom have a critical impact on women's status as equal citizens; therefore courts examining forced sterilization statutes have a duty to ensure that they do not reflect explicit or implicit sexual discrimination.¹³⁶

In addition, statutes mandating temporary sterilization violate equal protection because the poor will tend to bear most of the burden the statutes impose. According to one attorney who represents drug-addicted women in custody battles with the state, "[t]hese women are poor, they are black, and they are female, and that's why we're seeing them in court . . . Rarely have we had a case of a middle class or upper class woman suspected of drug use . . . [brought] into court to surrender her infant. We're making perpetrators out of victims."¹³⁷ According to the Committee to Defend Reproductive Rights, poor women are sterilized by the state 49% more often than nonpoor women.¹³⁸ One study has, in fact, revealed that a disproportionate number of court-ordered caesarean sections are directed at poor and minority women.¹³⁹ Of the 121 requests by doctors and hospitals for court-ordered obstetrical interventions surveyed in the study, courts granted such

132. Dellinger & Sperling, *supra* note 88, at 92-93; *see, e.g.,* *Winston v. Lee*, 470 U.S. 753, 767 (1985), in which the Court enjoined surgical removal of a bullet under the skin, a relatively low risk procedure. The procedure for Norplant implantation is also relatively low risk; however, the effects of Norplant on individual women cannot be determined until after implantation. Uncertainty also exists as to the possibility of Norplant's detrimental long-term effects.

133. Dellinger & Sperling, *supra* note 88, at 93; Rubinfeld, *supra* note 131, at 788-92; *see also* TRIBE, *supra* note 38, § 15-10 at 1352-55 (discussing the effect abortion laws have had on privacy).

134. Dellinger & Sperling, *supra* note 88, at 105.

135. SHERRILL COHEN & NADINE TAUB, *A LAWMAKER'S GUIDE TO REPRODUCTIVE FREEDOMS - A REVIEW OF REPRODUCTIVE LAWS FOR THE 1990S* 5 (1989).

136. Johnsen, *supra* note 67, at 599.

137. Patner, *supra* note 68, at 8.

138. Veronika E.B. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 *NEW ENG. J. MED.* 1192, 1193 (1987).

139. *Id.* at 1192-93.

interventions 86% of the time.¹⁴⁰ Of the interventions granted, 81% were for black, Asian, or Hispanic women, 24% of whom did not speak English as their primary language.¹⁴¹ All of the women for whom the court ordered obstetrical intervention either received public assistance or received treatment in a teaching hospital clinic.¹⁴² Of the fifteen court orders authorizing nonconsensual caesarean sections, 47% of women affected were black, 33% were African or Asian, and only 20% were white.¹⁴³ These statistics indicate that the law's coercive power is most often used on those unable to resist its orders.¹⁴⁴

Coercive use of medical intervention generally discriminates against the poor and minorities.¹⁴⁵ Instituting such class-directed birth control would effectively revive a social policy akin to the eugenics movement of the early 1900's. Given the current budget crisis and the fact that poor, minority women and their children add to that crisis by sapping the welfare budget, they are even more likely targets for measures intended to prevent reproduction. This temptation is made especially attractive by Norplant because it is not permanent and so appears to be a more reasonable sacrifice for a utilitarian-minded society to force upon a woman.

Even though the eugenics movement received its death blow in the Court decisions in *Skinner* and *Matter of Truesdell*, the permanence of sterilization options available at the time influenced those decisions.¹⁴⁶ Now that Norplant has made temporary sterilization possible, it has eliminated one of the court's major objections to compulsory sterilization and has opened the door to a modern form of the eugenics movement.¹⁴⁷

D. *The Likely Outcome of a Supreme Court Decision on the Constitutionality of Forced Norplant Use*

After decades of expansive Court decisions regarding reproductive freedom, *Webster*¹⁴⁸ signaled a return to a social framework in which a woman's fundamental right to privacy is considered subordinate to some legitimate

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Margaret Diamond, Comment, *Echoes from Darkness: The Case of Angela C.*, 51 U. PITT. L. REV. 1061, 1093 (1990).

145. *Id.*

146. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (the court stated that one of its objections to sterilization was that it was a permanent surgical procedure, a punishment for which there was no redemption, and which would forever deprive the afflicted of their basic right to procreate). *In re Truesdell*, 304 S.E.2d 793, 805 (N.C. Ct. App. 1983) (sterilization is a "drastic and extraordinary means of contraception," which was known at the time of the decision to be substantially irreversible); see also *In re Moe*, 385 Mass. 555, 432 N.E.2d 712, 716-17 (1982) (court stated that it questioned the use of compulsory sterilization because it permanently deprives the individual of his right to procreate); *In re Guardianship of Eberhardy*, 307 N.W.2d 881, 894 (Wis. 1981) (court emphasized the permanence of sterilization as the reason for the extra scrutiny given to a request for compulsory sterilization).

147. See *Skinner*, 316 U.S. at 541; *In re Truesdell*, 304 S.E.2d at 805.

148. 492 U.S. 490 (1989).

state interests.¹⁴⁹ *Webster* recast *Roe v. Wade*¹⁵⁰ as a narrow, fact-specific ruling, not as a landmark decision that provides the foundation for many of women's basic expectations about their reproductive rights.¹⁵¹ This Court's willingness to overrule *Roe* signals several possibilities. The Supreme Court could curtail women's reproductive rights to exert control over their bodies and make forced Norplant sterilization constitutionally acceptable.¹⁵² It is conceivable that the Court might consider important state objectives, such as the prevention of child abuse, either inside or outside the womb, and the prevention of drug abuse, as sufficiently compelling reasons to uphold temporary sterilization with Norplant. The Court might apply Justice O'Connor's "rationally related" test¹⁵³ to determine whether it found the state interest in preventing child abuse or drug abuse legitimate. Under O'Connor's suggested analysis, the Court would then analyze whether, in their opinion, forced Norplant implantation is a reasonable means to achieve an end to child abuse and drug abuse.¹⁵⁴ If the Court found a legitimate state interest rationally related to a narrowly tailored statute, it might uphold that statute.¹⁵⁵

The Court will most likely, however, maintain a distinction between women's rights before and after conception and allow curtailment of those rights only after conception when states arguably have attained a more tangible interest in the new life. The Court will continue, in the tradition of *Griswold*,¹⁵⁶ to hold that the decision whether or not to conceive is fundamental and is not subject to government intervention. The rights to contraceptive freedom and abortion are logically and legally separate.¹⁵⁷ Planned Parenthood explained the difference in its 1963 pamphlet, *Plan Your Children For Health and Happiness*, which stated, "An abortion kills the life of a baby after it has begun Birth control merely postpones the beginning of life."¹⁵⁸ The Supreme Court recognized contraceptive rights in *Griswold* long before recognizing any right to terminate a pregnancy.¹⁵⁹ The Court decided *Griswold* in 1965, while *Roe* was not decided until 1973. Justice Scalia, in fact, recognized the distinction between the two cases during oral arguments for *Webster* and asked why the Court could not separate the two.¹⁶⁰

149. See Diamond, *supra* note 144 at 1091-94; F. Clinton Broden, *Emergency Room Surgery on Abortion Rights*, 6 J.L. & POL'Y 827 (1990); Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, The Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, & Research Policy*, 5 HIGH TECH. L. J. 257, 270-76 (1990).

150. 410 U.S. 113 (1973).

151. Elizabeth Carlin Benton, Note, *The Constitutionality of Pregnancy Clauses in Living Will Statutes*, 43 VAND. L. REV. 1821, 1828 (1990).

152. Haas, *supra* note 85, at 287.

153. *Id.* at 285.

154. *Id.* at 286.

155. *Id.*

156. 381 U.S. 479 (1965).

157. Bopp & Coleson, *supra* note 88, at 167.

158. *Id.* (quoting PLANNED PARENTHOOD-WORLD POPULATION, PLAN YOUR CHILDREN FOR HEALTH AND HAPPINESS (1963)).

159. *Griswold v. Connecticut*, 381 U.S. at 485.

160. Haas, *supra* note 88, at 168.

In *Webster*, the Court expressly or impliedly reaffirmed *Griswold's* extension of the right to privacy to contraceptive use.¹⁶¹ The plurality opinion took pains to distinguish its analysis of *Griswold*, of which the majority approved, from that of *Roe*.¹⁶² O'Connor,¹⁶³ Blackmun, Brennan, Marshall,¹⁶⁴ and Stevens¹⁶⁵ also distinguished between *Griswold* and *Roe*. Significantly, Justice Scalia, who articulated his desire to overturn *Roe*, indicated in *Michael H. v. Gerald D.*¹⁶⁶ that *Griswold* was consistent with his constitutional analysis.¹⁶⁷ *Michael H.* was an action to establish paternity brought by the natural father of a child conceived during an affair with the child's mother.¹⁶⁸ Relevant California law provided that a child born to a married woman living with her husband was a child of the marriage and that the presumption could be rebutted only by the husband or wife and only in limited circumstances.¹⁶⁹ The United States Supreme Court affirmed the California Court of Appeals' judgment, rejecting the natural father's procedural and substantive due process challenges to the statute.¹⁷⁰ Justice Scalia, writing for the majority, stated "that the term liberty in the Due Process Clause extends beyond freedom from physical restraint" but is not absolute.¹⁷¹ Establishing boundaries for the Due Process Clause, according to Scalia, is a treacherous task for the Court, given the inherent subjectivity of any determination of what rights are fundamental.¹⁷² Justice Scalia expressed his own reluctance to further expand the substantive content of the Due Process Clause in order to strike down state statutes designed to promote state welfare.¹⁷³ Scalia asserted that Due Process Clause interests denominated as "liberty" must be fundamental interests, interests traditionally protected by our society.¹⁷⁴ Scalia quoted *Griswold* when he stated that past Court decisions reflect "continual insistence upon respect for the teachings of history

161. 492 U.S. 490 (1989).

162. *Id.* at 520-21.

163. *Id.* at 522 (O'Connor, J., concurring in part).

164. *Id.* at 537 (Blackmun, J., concurring in part and dissenting in part).

165. *Id.* at 560 (Stevens, J., concurring in part and dissenting in part).

166. 491 U.S. 110 (1989).

167. *Id.* at 122-23.

168. *Id.* at 110.

169. *Id.* at 112.

170. *Id.* at 131-32.

171. *Id.* at 121.

172. *Id.*

173. *Id.* at 122. Justice Scalia quoted from Justice White's dissenting opinion in *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977). White stated,

That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution The Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.

Id.

174. *Michael H.*, 491 U.S. at 122.

[and] solid recognition of the basic values that underlie our society."¹⁷⁵

The justices have made clear, in their recent opinions, their unwillingness to curtail rights to reproductive freedom before conception as those rights relate to contraceptive use.¹⁷⁶ Therefore, the Supreme Court, when faced with the constitutionality of judicially or statutorily forced Norplant implants, will likely characterize such efforts to force sterilization as unconstitutional invasions of women's reproductive rights, even if orders or statutes are narrowly drawn to accomplish legitimate state goals.

VII. NON-CONSTITUTIONAL OBJECTIONS TO FORCED NORPLANT IMPLANTATION

Even if the Court determines that forced Norplant sterilization is a constitutional punishment, it is an inappropriate punishment.¹⁷⁷ There are several objections to using Norplant in this manner.¹⁷⁸

1. Medicine is imprecise. Because Norplant has not been on the market for long, there may be significant health risks that were not discovered by premarket testing.¹⁷⁹ Forcing women to use Norplant would make them involuntary test subjects. The Food and Drug Administration (FDA) recently approved Norplant for marketing and use in the United States.¹⁸⁰ FDA approval is a prerequisite for national marketing and widespread use of a drug in the United States, not a guarantee that the approved drug is 100 percent safe.¹⁸¹

A recent example of an FDA-approved drug that was not safe in the long term is diethylstilbesterol (DES). DES is a "synthetic compound of the female hormone estrogen" that was administered to pregnant women between 1941 and 1971 to prevent miscarriages.¹⁸² In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.¹⁸³ Later studies showed that "DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy."¹⁸⁴ These daughters suffer from a form of cancer called adenocarcinoma, which "manifests itself after a minimum latent period of 10-12 years."¹⁸⁵ Adeno-

175. *Id.* at 121-22 (quoting *Griswold v. Connecticut*, 381 U.S. at 501 (Harlan, J., concurring in judgment)).

176. *Webster v. Reproductive Health Servs.*, 492 U.S. at 520-21.

177. See Colleen M. Coyle, Comment, *Sterilization: A Remedy for the Malady of Child Abuse?* 5 J. CONTEMP. HEALTH L. & POL'Y, 245-62 (1989).

178. The structure and ideas of the following objections to coercive use of Norplant were originally used to object to forced medical intervention during pregnancy. See Comment, *Medical Technology and the Law: State Intervention during Pregnancy*, 103 HARV. L. REV. 1556, 1583-84 (1990) [hereinafter *Medical Technology*].

179. Cruzan, *supra* note 1.

180. *Id.*

181. *Id.*

182. *Sindell v. Abbott Lab.*, 607 P.2d 924, 925 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

183. *Id.*

184. *Id.*

185. *Id.* at 925.

carcinoma is a "fast-spreading and deadly disease, and radical surgery is required" to halt its progression to other parts of the body.¹⁸⁶ DES is also responsible for precancerous growths called adenosis, and treatment for adenosis is cauterization, surgery, or cryosurgery.¹⁸⁷ Women who suffer from adenocarcinoma must undergo biopsies or colposcopic examinations twice a year, procedures both painful and expensive.¹⁸⁸ Although the FDA, in 1971, ordered manufacturers of DES to cease marketing the drug, it is significant that for thirty years, this FDA-approved drug was distributed to women who would only later discover, after the harmful exposure was completed, that the drug had potentially fatal effects.¹⁸⁹

2. Post-abuse use of Norplant as a punishment is merely punitive and does little to serve state goals of ending child abuse and drug abuse.¹⁹⁰ Although Norplant would prevent a mother from having more children to abuse, this punishment fails to address the crime already committed.¹⁹¹ Preventing an abusive parent from having more children will not stop her from abusing the children she already has.¹⁹² Therefore, implantation will not protect the victims of crime but will instead operate only to victimize the perpetrators.¹⁹³ Forced sterilization would punish the affected women for crimes they have yet to commit by preventing them from having more children when, in fact, they might not abuse those children.¹⁹⁴

In *In re May*,¹⁹⁵ the Washington Court of Appeals addressed a similar dilemma. The state juvenile court permanently terminated a fifteen-year-old mother's custodial and parental rights to her newborn son.¹⁹⁶ The young mother had a history of avoiding responsibility by running away from home, school, and juvenile authorities.¹⁹⁷ She was detained by the juvenile court for shoplifting at the time her son was born.¹⁹⁸ The state removed her son to a foster home following his birth and filed a dependency petition with re-

186. *Id.*

187. *Id.*

188. *Id.*

189. 26 Cal. 3d at 594, 163 Cal. Rptr. at 133-34, 607 P.2d at 925-26; see also Lawrence R. Allen, Note, *A Remedy for the DES Daughters: Products Liability without the Identification Requirement*, 42 U. PITT. L. REV. 669, 670-72 (the author analyzes the *Sindell* case and the potential impact the holding in favor of liability will have on drug manufacturers) (1981). For information concerning other diseases or injuries not apparent for years or decades that may lead to severe complications or death, see 1 STEVEN E. PEGALIS & HARVEY F. WACHSMAN, *AMERICAN LAW OF MEDICAL MALPRACTICE* (1981) § 7:29 (traumatic birth injuries); § 9:18 (effects of DES on the fetus); § 9:10 (effects of birth control pills); §§ 4:7-43 (birth injuries and antepartum care).

190. *Medical Technology*, *supra* note 178, at 1583.

191. *Id.*

192. *Id.*

193. *Id.* at 1584.

194. Rachel Pine, *Don't Force Birth Control on Women*, USA TODAY, Feb. 4, 1991, at 8A (Ms. Pine is Senior staff counsel for the American Civil Liberties Union's Reproductive Freedom Project).

195. 545 P.2d 25 (Wash Ct. App. 1976).

196. *Id.* at 25-26.

197. *Id.* at 26.

198. *Id.*

spect to him.¹⁹⁹ In the deprivation proceeding, since the mother's history made her an unlikely candidate to be a good mother, the juvenile court permanently deprived her "of all parental rights and interest in her child."²⁰⁰

The court of appeals found that the young woman was never given an opportunity to be a parent to her son and that the state based its decision solely on professional opinion that, because of her "youth and conduct before she had the child she was unlikely to become a good parent."²⁰¹ The court of appeals held that, while the welfare of the child should be its first consideration, the court was unwilling to disregard the parent's rights.²⁰² The court held that it was unwilling to deprive a parent of her child simply because she did not meet society's ideas of the perfect or proper parent.²⁰³ The court further ruled that, absent evidence that the mother was cruel, abusive, or neglectful toward her son or that she had mental or drug problems, the state had no justification to deprive her of her son.²⁰⁴ The court stated,

It may very well be, as the social workers and psychiatrists opined . . . that the odds do not favor that a petitioner of this youth and history of avoiding responsibility will become a good parent. Fortunately for the preservation of the human species, however, a lot of people who would rate poorly on any scale of parental prospects have done rather well at it when confronted by the reality of a baby²⁰⁵

Forced Norplant implantation is also unlikely to deter other women from committing crimes. In the case of women who use drugs while pregnant, it can safely be said that they are addicts who do not consider the costs of their habit or, if they do, are unable to control their actions due to their addiction.²⁰⁶ A woman who has elected not to have an abortion is likely to care about the well-being of her child even if her actions do not show it.²⁰⁷ It is rational to assume that women are more capable of controlling their behavior than is the state.²⁰⁸ There are abusive mothers who either do not believe

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* In full, the Court stated,

While it is true that the welfare of the child should be the first consideration of the court, yet the right of the parent is not to be disregarded, and it is assuming a grave responsibility to deprive parents of the care, control, custody, and education of their children because they do not come up to the standard of perfection that we have established for our action in that respect. There is, perhaps scarcely a day but that children may be seen who . . . are neglected, and of whom the popular verdict would declare, that they would be better off and stand a better chance of becoming useful members of society if they were removed from the pernicious influence of their parents. Yet it would not do for that reason to interfere with the domestic relations"

Id.

204. *Id.* at 27.

205. *Id.*

206. See Note, *Rethinking Motherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1341-42 (1990) [hereinafter *Rethinking Motherhood*].

207. *Id.*

208. Johnsen, *supra* note 67, at 613.

they will be caught, or act when consumed by rage or passion, and are unlikely to be stopped by remote threats of forced sterilization.²⁰⁹

3. Using Norplant as a punishment for crime, even if the crime bears a rational relationship to reproduction, would divert government attention and resources from establishing effective treatment programs designed to educate, to provide counseling, parental training, and drug rehabilitation, and to deal with and improve existing situations.²¹⁰ The solution to child abuse and drug abuse is not to deny women reproductive autonomy through forced sterilization.²¹¹ The answer to these problems is to create conditions in which female abusers and addicts can learn to behave properly toward their children and to have healthy pregnancies.²¹² Such a program would include not only educating affected women about birth control and providing them with a choice in making their contraceptive decisions, but also formulating policies designed to provide prenatal care for addicts and parenting classes for parents with abusive tendencies.²¹³

4. Coercive state behavior concerning something as fundamental as reproductive freedom suggests that women are no more than reproductive machines, inert incubators.²¹⁴ This is the theory of *parens patriae*, which implies that women are unable to control themselves or their bodies and that the state therefore is justified in treating them as less capable, less intelligent, and less deserving of their fundamental constitutional rights than men.²¹⁵ Coerced Norplant use is the ultimate example of social engineering that avoids enabling people to help themselves.²¹⁶

5. Forced sterilization by Norplant places all the blame for these societal problems on women and their mistakes in controlling their own behavior. Forced sterilization of women ignores men's roles in reproduction and child-rearing.²¹⁷ Forced Norplant use makes women unequal citizens because of a biological makeup that allows them to have babies despite men's equal importance in the reproductive process. Using Norplant as a punishment targets only women and seems premised on the belief that women can't make their own contraceptive decisions or control their own sexual behavior.²¹⁸

Forced sterilization of women brings to mind images of women like those in Margaret Atwood's *The Handmaid's Tale*,²¹⁹ in which most women were sterile and those who were not had the duty of reproduction as their sole

209. *Id.*

210. *Rethinking Motherhood*, *supra* note 206, at 1341-42.

211. *Id.* at 1342.

212. *Id.*

213. *Id.*

214. George Annas, *Pregnant Women as Fetal Containers*, HASTINGS CENTER REPORT, Dec. 1986, at 13-14.

215. *Id.*

216. Don Williamson, *Norplant—Forced Surgery is No Answer*, THE SEATTLE TIMES, June 27, 1991, at A12.

217. *Drug Addicted Moms—Norplant Would Enable Us to Keep Denying the Real Problems*, SEATTLE TIMES, July 16, 1991, at A7.

218. See Blank, *supra* note 9 at 25-28.

219. MARGARET ATWOOD, *THE HANDMAID'S TALE* 311 (1986).

purpose in life.²²⁰ They were "two legged wombs . . . sacred vessels."²²¹ Using Norplant to prevent women from reproducing implies that reproduction and childbearing are their only purposes in life and that they are not very good even at these things.²²² If the state really wants to do something to protect children, in the opinion of one scholar, it should do so by improving the welfare of their mothers, not by oppressing them.²²³

VIII. CONCLUSION

Temporary sterilization is not an appropriate response to the admittedly compelling problems of child abuse, drug abuse, and poverty. Depriving women of their fundamental right to procreate is inconsistent with our governmental system that traditionally reveres personal autonomy. The Supreme Court has inferred a right to privacy from the Constitution for more than a century, and considers this right to be as fundamental as those enumerated in the Bill of Rights.²²⁴ The Court has extended this privacy right to include reproductive freedom, and has subjected state laws seeking to abridge that freedom to exacting scrutiny.

Despite the likelihood that the increasingly conservative Supreme Court will curtail abortion rights, such a decision will be based on state interests in whatever life is deemed to exist after conception. Pre-conception reproductive rights will continue to receive the Court's protection because they are distinct from post-conception rights. Court decisions restricting abortion rights take pains to clarify that they do not alter contraceptive freedom.

Moreover, preventing certain individuals from procreating because society deems it best is similar to the eugenics movement of the early 1900's. Selective sterilization is based on the idea that only desirable people should have children and be entitled to make contraceptive choices. In addition, attempts to compel Norplant implantation could be challenged on equal protection grounds, since no similar punishment for men is available. The likelihood that the policy will affect mostly poor women also makes it suspect.

Using Norplant to solve social problems will not work. Instead, the problems will live on; women will continue to abuse their children or abuse drugs. Society will attain a false sense of accomplishment at having taken affirmative action toward solving problems that so far have proven unre-

220. *Id.*

221. *Id.* at 136.

222. See Rubinfeld, *supra* note 131, at 788-91.

223. Annas, *supra* note 214, at 13-14. For a discussion of the use of sterilization as a punishment for child abuse, its alternatives, and drawbacks, see Coyle, *supra* note 177, at 245-46. The author discusses the case of *South Carolina v. Williams*, Indictment No. 86-187 (July 7, 1986), in which a mother pled guilty to involuntary manslaughter after she starved her twelve-week-old son to death. *Id.* The woman, a classic high-risk candidate for child abuse, had two prior child abuse convictions, but after those convictions, the state failed to provide any treatment or counseling even though it was recommended by a psychologist. *Id.* When Ms. Williams killed her infant, she received national attention after she voluntarily accepted sterilization as a term of her plea. *Id.*

224. *Mapp v. Ohio*, 367 U.S. 643, 656 (1962).

sponsive to state efforts. Instead of devoting public funds to drug treatment counseling, education and parent training in order to help prevent child abuse and to force delinquent fathers to pay child support, funds for these programs will go to subsidize nonconsensual birth control.

