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## NORPLANT MEETS THE NEW EUGENICISTS: THE IMPERMISSIBILITY OF COERCED CONTRACEPTION

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Legislative proposals and prosecutorial initiatives designed to force low income women and female parolees to use contraceptives are making headlines.<sup>1</sup> However, for the sake of women's lives — and the preservation of well-founded constitutional principles — they should not make law. Government-sponsored contraceptive incentive schemes serve only to strip low income women of their dignity and to deny them their precious reproductive freedom. Far from being part of a new trend, these proposals constitute the resurrection of old fashioned eugenics: plans designed to “improve society” by ensuring that certain state identified “undesirables,” namely low income women and women of color, do not reproduce.<sup>2</sup>

Ironically, it is the introduction of the first substantially new contraceptive device in twenty years that has spurred this revival. In December of 1990, the Food and Drug Administration (FDA) approved the use of Norplant in this country.<sup>3</sup> This contraceptive device, which had been used in third-world countries for years, comes in the form of six match-stick sized rubber capsules that are implanted in a woman's forearm during a minor surgical procedure.<sup>4</sup> Norplant, which requires

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1. See, e.g., Booth, *Judge Orders Birth Control Implant in Defendant*, Washington Post, Jan. 4, 1991, at 1; Lewin, *Implanted Birth Control Device Stirs Debate Over Forced Contraception*, N.Y. Times, Jan. 10, 1991, at A20.

2. See, e.g., J. LANDMAN, *HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT* 46-47 (1932) (advocating sterilization); S. TROMBLEY, *THE RIGHT TO REPRODUCE: A HISTORY OF COERCIVE STERILIZATION* (1988) (critiquing forced sterilization).

3. N.Y. Times, Jan. 10, 1991, at A14 (nat'l ed.).

4. R. HATCHER, *CONTRACEPTIVE TECHNOLOGY 1990-1992* 303 (1990) [hereinafter *CONTRACEPTIVE TECHNOLOGY*].

the use of a local anesthetic, can only be inserted by a clinical practitioner who is specifically trained in its insertion. The tubes contain a synthetic female hormone, levonorgestrel, which is steadily released in minute amounts into the body.<sup>5</sup> The device usually works to prevent fertilization but at times acts to prevent implantation of an already fertilized egg.<sup>6</sup>

After insertion, a woman need not do anything: Norplant provides highly effective protection for most women for up to five years.<sup>7</sup> A woman cannot do anything to stop the device short of having it surgically removed. Removal is somewhat more complicated than the initial insertion and it may require more than one session to remove all capsules.<sup>8</sup> Thus, Norplant currently is the contraceptive method closest to sterilization without actual, irreversible sterilization. Indeed, the developer of the device has consistently urged that, since a woman has so little control over Norplant after implantation, physicians should take great care to ensure that her decision to use the device is free and informed at the outset.<sup>9</sup>

Norplant may be well suited to women who do not wish to conceive for long periods of time or who have decided against surgical sterilization, but it is not without significant drawbacks. First, not all women can use the device safely. It is contraindicated for women with a history of liver disease, heart disease, blood clots, or high blood pressure.<sup>10</sup> Moreover, it may not be advisable for women with breast nodules, fibrocystic disease of the breast, an abnormal breast x-ray or mammogram, or for women with diabetes, elevated cholesterol or triglycerides, migraine or other headaches, epilepsy, mental depression, or gallbladder or kidney disease.<sup>11</sup>

For the women who can safely use Norplant, the device may cause a number of unpleasant side effects, the most common of which is excessive or irregular bleeding.<sup>12</sup> Other common side effects include head-

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5. *Id.* at 303-04.

6. *Id.* at 301. (The levonorgestrel prevents conception by suppressing ovulation. In addition, it causes a thickening of the mucus lining the cervix, thereby preventing sperm from entering the cervical canal.)

7. *Id.* at 303.

8. *Id.* at 311.

9. See, e.g., Segal, *Norplant Developed for All Women, Not Just the Well-to-do*, N.Y. Times, Jan. 6, 1991 (Letter to Editor by inventor of Norplant) ("I am totally and unalterably opposed to the use of Norplant for any coercive or involuntary purpose.").

10. See Affidavit of Philip D. Darney, M.D., in Support of Motion to Reconsider/Modify Sentence at 2, *People v. Johnson*, No. 29390 (Super. Ct. Tulare Cty. Cal., Jan. 2, 1991) [hereinafter *Darney Aff.*].

11. CONTRACEPTIVE TECHNOLOGY, *supra* note 4, at 308.

12. *Darney Aff.*, *supra* note 10, at 3; CONTRACEPTIVE TECHNOLOGY, *supra* note 4, at 309, 313; Shoupe, *The Significance of Bleeding Patterns In Norplant Implant Use*, 77 OB. & GYN. 259 (Feb. 1991).

ache, nervousness, nausea, dizziness, dermatitis, acne, weight gain, breast tenderness, abnormal hair growth, and hair loss.<sup>13</sup> Other, less common, complaints include breast discharge, inflammation of the cervix, mood change, depression, general malaise, weight loss, hypertension, and itching.<sup>14</sup> In fact, from two to six percent of the women using Norplant discontinue its use for this reason by the end of the first year. Further, four to sixteen percent discontinue its use by the end of two years.<sup>15</sup> Accordingly, the decision to undergo the surgical implantation of Norplant — like the decision to undergo any type of surgery or use any type of contraception — is a personal one that takes into account an individual woman's medical history, life circumstances, and personal needs. In line with professional ethics, it is imperative that women remain free to decide when to have Norplant inserted and then removed.

Though heralded as a major advance in reproductive technology, the fact that it is very effective renders Norplant vulnerable to governmental abuse. This Article outlines the legislative and judicial initiatives that, contrary to women's needs and desires, have seized upon Norplant's unique nature in an attempt to cure a host of social problems. But Norplant is no solution: it does not address the underlying causes of poverty, drug abuse or child abuse. Indeed, we argue that forced contraception only serves to deprive women of reproductive autonomy, particularly the right to bear children. Further, this Article details the main legal and policy arguments against such actions and demonstrates, through comparison with long-standing sterilization litigation, the pernicious nature of this trend.

## I. LEGISLATIVE AND JUDICIAL INITIATIVES

At a one-time start up cost of approximately \$300-\$500, Norplant is prohibitively expensive for many women. Thus, all states have added Norplant to the list of contraceptives covered under their state Medicaid plans,<sup>16</sup> or have created direct state funding schemes to make the device available to low income women who request it.<sup>17</sup> If Norplant is the only contraceptive device funded, these programs will serve to restrict reproductive freedom by steering women to one particular method of family planning. But if Norplant is offered along with alternative methods and full and complete information is provided as to the

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13. CONTRACEPTIVE TECHNOLOGY, *supra* note 4, at 313.

14. *Id.* at 313-14.

15. Darney Aff., *supra* note 10, at 3; CONTRACEPTIVE TECHNOLOGY, *supra* note 4, at 309.

16. Women's Legal Defense Fund, Legislation and Litigation Involving Norplant 1 (Mar. 1992).

17. *Id.* (The Governor of California has earmarked five million dollars to be used for funding the provision of Norplant to low income women who seek it from family planning clinics).

relative advantages of each method, these programs will expand women's reproductive choices by removing the economic barrier to using Norplant. This section summarizes only plans falling under the former scenario: government or judicial schemes that overtly or covertly coerce women to use Norplant. All of these plans are motivated by Norplant's great effectiveness in preventing pregnancy and its relative permanence. Although some of the plans, if improved, could enhance women's ability to make choices freely, some will always remain unduly coercive and accordingly must be rejected outright.

#### A. *Legislator as Doctor*

FDA approval of Norplant sparked immediate discussions in legislatures across the country as to how the new technology could be used in both welfare and drug rehabilitation programs. Two types of bills involving Norplant emerged from these discussions. The first would use financial incentives, beyond the cost of Norplant itself, to encourage low income women receiving financial assistance to have Norplant implanted. The second would mandate that women convicted of drug use during pregnancy and/or certain types of drug use, regardless of pregnancy, be forced to use Norplant.

Less than two months after the FDA approved Norplant, Representative Kerry Patrick introduced two bills in the Kansas legislature that exemplify both types of Norplant initiatives. Under the first proposal, Kansas would have provided Norplant at no charge and paid \$500 "insertion bonuses" to women receiving public assistance.<sup>18</sup> An additional \$50 bonus would have been paid to women for each year they kept the device in their arm (presumably up to five years). After debate, the legislature rejected this incentive scheme.

The second Kansas proposal would have mandated that all women convicted of certain narcotics offenses be implanted with Norplant as a condition of their probation.<sup>19</sup> A judge would not be able to order removal of the device until the woman had passed random drug tests for one year. Exceptions would apply only to a woman who was physically incapable of bearing children and to a woman who obtained a note from a doctor stating that she is unable to be implanted with Norplant. An exception is not made for a woman who never intended to have children. Unlike the first proposal, this plan was never voted out of committee.

As part of his gubernatorial election campaign, Representative David Duke also introduced a proposal to reward Louisiana women on welfare with \$100 a year as long as they used Norplant.<sup>20</sup> In response

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18. H.B. 2089, 1991 Leg., Reg. Sess., Kansas.

19. H.B. 2255, 1991 Leg., Reg. Sess., Kansas.

20. H.B. 1589, 1991 Leg., Reg. Sess., Louisiana.

to public outrage over what some called a thinly-veiled racist scheme, the bill was amended to provide \$100 per year to all women receiving public assistance who used any method of birth control, including abstinence. After another amendment, the bill was changed again to provide that Norplant would be provided free of charge to women on public assistance. As of this writing, the Louisiana legislature has failed to pass any alternative version of the Duke plan.

Bills mandating that certain pregnant, drug addicted women be implanted with Norplant were also introduced in Ohio and South Carolina. The Ohio bill would amend the definition of a neglected child to include a child who is born addicted to a drug as the result of the mother's drug use during pregnancy. If a woman is convicted of child neglect for the first time, she can choose as punishment either to complete a drug addiction program or to undergo the implantation of Norplant or similar device, and agree to abstain from using drugs for five years.<sup>21</sup> On the other hand, if the woman has been previously convicted of child neglect, Norplant insertion is mandatory and she must agree to remain drug free for five years.<sup>22</sup>

The South Carolina bill is more draconian. This proposal requires physicians to test newborns for drugs if they have reason to suspect that a mother has used a controlled substance during her pregnancy. South Carolina would then consider a positive drug test prima facie evidence that the infant was abused. The Department of Social Services would investigate all positive test results and, if the tests were valid, petition the family court for relief. If the family court in turn found that the infant tested positive for drugs, it would order the woman either to be implanted with Norplant or to undergo irreversible sterilization. The woman could only have Norplant removed once she demonstrated to a judge that she had completed a drug treatment program and remained drug free for two years.<sup>23</sup> Although neither the Ohio nor the South Carolina bills have passed, they continue to be discussed seriously and other states are likely to consider similar proposals.

A myriad of commentators have also remarked on ways that Norplant and other contraceptive devices can be used to entice low income and drug addicted women not to have children. One notable example is the *Philadelphia Inquirer's* suggestion, in an editorial in December 1990, to implant all inner city welfare mothers, particularly low income

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21. S. 82, § (G)(8), 119th Gen. Assembly, Reg. Sess., Ohio (1991-1992).

22. S. 82, § (B)(1), (2), 119th Gen. Assembly, Reg. Sess., Ohio (1991-1992).

23. The bill also provides immunity against civil and criminal liability for actions carried out by the Department of Social Services or a physician while pursuing a course of action allowed under the bill. S. 986, § 1 (D), (E), (F), (G), 1991 Leg., Reg. Sess., South Carolina.

teenage girls, with Norplant.<sup>24</sup> While this plan prompted immediate public outcry, it is in fact not far removed from the Kansas bill that inspired it. As will be explained below, the suggestion to implant all welfare mothers with Norplant derives from faulty thinking about the rights of women and their ability to exercise them. Furthermore, all of these contraceptive incentive plans, including those less overtly coercive and discriminatory, are grounded in old fashioned notions of eugenics. But first we must note a parallel phenomenon that suffers from the same defects: judicially-imposed Norplant implantation.

### B. Judge as Doctor

Just as Norplant could place a potent tool for reproductive control within the grasp of legislators, it could pave the way for reproductive regulation based on the predilections of judges. Indeed, even before the first piece of Norplant legislation was introduced, a California judge ordered that a woman who pled guilty to child abuse submit to Norplant as a condition of her probation.<sup>25</sup> Although other judges have ordered women to use contraception as a condition of probation,<sup>26</sup> this was not only the first time a judge specified the type of contraception, but also the first time a judge ordered a type of contraception that

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24. See Kurtz, *Inquirer's Birth Control Bomb*, Washington Post, Dec. 18, 1990, at B1.

25. Transcript of judgment proceedings, *People v. Johnson*, No. 29390 (Super. Ct. Tulare Cty., filed Jan. 2, 1991) [hereinafter T.J.] at 6-7.

26. Recently, in October 1990, a young woman in Jacksonville, Florida was convicted of manslaughter and sentenced to two years in jail and ten years probation. One of the conditions of her probation was that she use birth control. She did not challenge this condition. See Barringer, *Sentence for Killing Newborn: Jail Term, Then Birth Control*, N.Y. Times, Nov. 18, 1990, at 1. See also *Smith v. Superior Court*, 726 P.2d 1101 (Ariz. 1986) (en banc) (striking sterilization for reduced sentence for child abuser as excess of trial court's jurisdiction); *People v. Pointer*, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (1984) (striking birth control probation condition imposed on woman who allegedly injured her young children by requiring a strict microbiotic diet for the entire family); *Thomas v. State*, 519 So. 2d 1113 (Fla. App. 1988) (striking condition that probationer not become pregnant unless married); *Howland v. State*, 420 So. 2d 918 (Fla. App. 1982) (striking condition forbidding defendant convicted of child abuse from "fathering" a child); *Wiggins v. Florida*, 386 So. 2d 46 (Fla. App. 1980) (striking condition prohibiting probationers from sexual intercourse with anyone but their lawfully married spouses); *Rodriquez v. State*, 378 So. 2d 7 (Fla. App. 1979) (striking conditions forbidding marriage and pregnancy for probationers convicted of child abuse); *State v. Mosburg*, 768 P.2d 313 (Kan. App. 1989) (striking probation condition ordering woman to refrain from becoming pregnant as an unconstitutional intrusion on right to privacy); *State v. Norman*, 484 So. 2d 952 (La. App. 1986) (striking condition forbidding probationer from bearing children out of wedlock); *People v. Gauntlett*, 352 N.W.2d 310 (Mich. App. 1984) (striking condition requiring probationer to take experimental drug to effect "chemical castration"); *State v. Livingston*, 372 N.E.2d 1335 (Ohio App. 1977) (striking condition forbidding probationer convicted of child abuse from bearing children).

requires an invasive surgical procedure.

On December 3, 1990, one week before the FDA approved Norplant for use in the United States, Darlene Johnson pled guilty to beating her children after catching them smoking. At the time of the plea, the judge indicated that he was "going to try and think. . . of some special probation conditions for this lady . . ." including counseling sessions, parenting classes, and a condition that Johnson not be allowed to discipline her children by striking them.<sup>27</sup> But the Norplant condition, evidently inspired by newspaper reports of its FDA approval one week after Johnson's plea, was not announced until sentencing.<sup>28</sup>

At the time of her sentencing, Ms. Johnson had never heard of Norplant. Her only information about the device came from the judge, who explained that "[i]t's a thing that you put into your arm and it lasts for five years," and that "it's like birth control pills, except that you don't have to take them every day," and that it had been approved by the FDA, was not experimental, and was not permanent.<sup>29</sup> The judge did not mention that the device could only be implanted and later removed by medical professionals in a surgical procedure performed under a local anesthetic.<sup>30</sup> When Johnson asked whether Norplant could be harmful, the judge only replied, "[w]ell, it's like a birth control pill."<sup>31</sup> The judge failed to explain that Norplant may be contraindicated and, even if not contraindicated, may cause unpleasant side effects.<sup>32</sup>

Faced with the prospect of up to seven years in prison, Johnson said "okay" to the judge's proposal that she spend only one year in county jail and be implanted with Norplant upon her release.<sup>33</sup> But

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27. Transcript of Felony Plea at 3, *People v. Johnson*, No. 29390 (Super. Ct. Tulare Cty. Cal. Dec. 3, 1990).

28. T.J., *supra* note 25, at 6-7.

29. *Id.*

30. At the hearing on the motion to reconsider, the court noted that he had "indicated by hand movement that I was going to be implanting in the upper forearm." Transcript of Motion to Modify at 7, *People v. Johnson*, No. 29390 (Super. Ct. Tulare Cty. Cal. Jan. 10, 1991) [hereinafter *Motion*]. Even if Darlene Johnson saw this alleged gesture, and she says she did not, such a hand movement does not sufficiently indicate that surgery is required for Norplant recipients.

31. T.J., *supra* note 25, at 7.

32. Indeed, because she has high blood pressure, Norplant may be contraindicated for Darlene Johnson. The judge's unfamiliarity with the medical risks of Norplant highlights the importance of having qualified health care professionals provide women with this information: For this reason, the American College of Obstetricians & Gynecologists has argued that judicially-imposed Norplant implantation constitutes practicing medicine without a license in violation of section 4036 of the California Business and Professions Code. See Brief *Amici Curiae* of the American College of Obstetricians & Gynecologists District IX, *et al.*, in Support of Petitioner, at 4-7, *People v. Johnson*, No. F015316 (Cal. Ct. App. filed June 25, 1991).

33. In addition to the Norplant probation condition, the court ordered that Ms. Johnson abstain from the use of alcohol and drugs of any kind (whether or not pre-

Johnson had neither adequate information nor any realistic opportunity to reflect upon what was being proposed. In addition, her counsel had not been placed on notice that Norplant would be imposed and therefore was not given the opportunity to argue the appropriateness of the condition. Thus, only five days after sentencing — as soon as Johnson learned more about Norplant and could meet with counsel — she petitioned the court for reconsideration.

In a supporting affidavit, a physician stated that Ms. Johnson should not use Norplant because she suffered from high blood pressure, diabetes, a heart murmur, and asthma. Moreover, the physician commented that "it would be medically irresponsible" as well as unethical "for any doctor to administer Norplant pursuant to this Court's order and without the voluntary and informed consent and participation of Ms. Johnson."<sup>34</sup> The court, however, was unpersuaded. The court found that "a willing, knowing, voluntary, acceptance of the probationary terms" had taken place and saw no reason to allow Johnson to "change her mind."<sup>35</sup> The court's only concession was that should Ms. Johnson's personal physician find Norplant unsuitable for her, he would appoint an independent physician to investigate.<sup>36</sup>

The court flatly rejected Ms. Johnson's constitutional and statutory arguments. Even though it recognized that the right to procreate is "a substantial right, which is constitutionally protected," it nevertheless ruled that the rights of Johnson's unconceived children were paramount.<sup>37</sup> According to the court, the power given a court to impose conditions of probation justified the coerced use of Norplant against a woman convicted of child abuse. But a judge's power is not without limits. Rather, judges, like legislators, are bound by basic constitutional and statutory principles that protect individuals and groups from unwarranted governmental interference. Whether the judge in Darlene Johnson's case violated the principles will never be decided as the case

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scribed by a physician) and stop smoking during her pregnancy. Clerk's Order at 2, *People v. Johnson*, No. 29390 (Super. Ct. Tulare Cty. Cal. Jan. 2, 1991).

34. *Darney Aff.*, *supra* note 10, at 2.

35. Motion, *supra* note 30, at 17. The issue of whether Johnson consented to using Norplant is not addressed in this Article. We suggest, however, that under the conditions described above, she could not give consent. Indeed, in a five page brief in response to Johnson's appeal of the probation condition, the State conceded that Johnson did not knowingly and voluntarily accept Norplant as a condition of probation. *See* Respondent's Brief, *People v. Johnson*, No. F015316 (Cal. Ct. App. filed May 30, 1991). The State thus urged the Court of Appeals to remand the case without consideration of appellant's constitutional and statutory arguments. The Court of Appeals, however, ordered the State to submit a supplemental brief addressing all of the statutory and constitutional issues raised in Appellant's Opening Brief. Order of Court of Appeals, Fifth Appellate District, *People v. Johnson*, No. F015316 (Cal. Ct. App. filed September 3, 1991).

36. Motion, *supra* note 30, at 23.

37. Motion, *supra* note 30, at 20.

was mooted on appeal. Nevertheless, these issues are bound to arise again as judges continue to test their sentencing authority. We now turn our attention to these principles restricting governmental control over reproduction and their application to both legislative and judicial uses of Norplant.

## II. ARGUMENTS AGAINST FORCED CONTRACEPTION

Coercive legislative and judicial contraceptive incentive schemes embody the erroneous premise that low income women are not competent to make their own contraceptive decisions. On the contrary, once provided access to contraceptives, low income women and probationers, like all women, are best suited to choose the method most appropriate for their individual needs. That nearly twenty percent of the women who have chosen Norplant in test studies change their minds within a year<sup>38</sup> illustrates that the new device may not be the best contraceptive method for everyone. If indeed Norplant is the best choice, women will choose it on their own, without monetary incentives or judicial mandates. Such government intervention serves only to strip low income women of their dignity and decisional autonomy. In doing so, both legislative contraceptive schemes and contraceptive probation conditions raise questions of grave constitutional concern.

Judicially-imposed Norplant implantation implicates additional issues as to the proper scope of judicial sentencing authority. Discretion to impose reasonable conditions of probation, like the discretion to pass legislation, is circumscribed by constitutional safeguards, including privacy guarantees.<sup>39</sup> The scope of constitutionally permissible invasions of a prisoner's federal and state constitutional rights is not coterminous with the scope of those permitted for a probationer.<sup>40</sup> Rather, a probationer enjoys substantially greater constitutional protection. Unlike restrictions on a prisoner's privacy rights in a custodial situation, limitations on a probationer's privacy cannot be justified by the need for

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38. Bardin, *Norplant Contraceptive Implants*, 2 OB. & GYN. REP. 96, 98 & Table II (1990) (one study showed that 19% of women terminated Norplant during the first year; continuation rates in subsequent years were similar).

39. "A probationer has the right to enjoy a significant degree of privacy, or liberty, under the Fourth, Fifth and Fourteenth Amendments to the federal Constitution." *In re White*, 97 Cal. App. 3d 141, 146, 158 Cal. Rptr. 562 (1979) (quoting *People v. Keller*, 76 Cal. App. 3d 827, 832, 143 Cal. Rptr. 184, 187 (1978)). See also *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975); *People v. Bauer*, 211 Cal. App. 3d 937, 940, 260 Cal. Rptr. 62, 65 (1989). Because the only case involving forced Norplant implantation arose in California, many of the cases cited throughout this Article regarding the constitutional law of probation are California cases. Of course, it is difficult to predict the context in which the next forced Norplant implantation case will arise.

40. *Morrissey v. Brewer*, 408 U.S. at 482.

orderly administration of a prison.<sup>41</sup> Furthermore, “[u]nlike the purpose of imprisonment which is punishment, the purpose of probation is rehabilitation.”<sup>42</sup> Probation conditions thus fail to meet constitutional scrutiny when they serve only penal and not rehabilitative goals.<sup>43</sup>

To the extent that the implications for women’s constitutional rights are similar in both the legislative and judicial scenarios, they are treated together as we outline the constitutional arguments against forced contraception.<sup>44</sup> In this section, we first explain how forced contraception implicates women’s rights to both privacy and bodily integrity, and then argue that these intrusions into women’s rights cannot be justified by a compelling appropriate governmental interest.

#### *A. Forced Contraception Implicates Women’s Rights to Privacy, Equality and Bodily Integrity*

The United States Supreme Court “long [has] recognized that the [federal] Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.”<sup>45</sup> The “interest in independence in making certain kinds of important decisions”<sup>46</sup> has long been considered fundamental because they are “basic to individual dignity and autonomy.”<sup>47</sup> Among the decisions that an individual may make without unjustified government interference are personal decisions relating to child rearing and educa-

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41. See, e.g., *Washington v. Harper*, 492 U.S. 210 (1990).

42. *White*, 158 Cal. Rptr. at 568.

43. Similarly, many state penal codes explicitly provide that the goal of probation is rehabilitative. See, e.g., CAL. PENAL CODE § 1203.1 (West 1985). A probation condition that is not directly related to the crime of which the defendant was convicted, that does not reasonably relate to the prevention of future similar criminal conduct, and that prohibits conduct which in itself is not criminal, is thus beyond the statutory power of a court. See, e.g., *People v. Lent*, 15 Cal. App. 3d 481, 124 Cal. Rptr. 905 (1975); *People v. Keller*, 76 Cal. App. 3d 827, 833, 143 Cal. Rptr. 184, 188 (1978). Although this Article discusses the validity of Norplant conditions under only federal constitutional law, the restrictions set forth in states’ penal codes apply as well. For a discussion of restrictions under California’s Penal Code see Appellant’s Opening Brief, *People v. Johnson*, No. F015316 (Cal. Ct. App., dated April 24, 1991).

44. For the purpose of this discussion, then, the legislative and judicial scenarios are collectively referred to at times as “forced contraception.”

45. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

46. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); see also *Roe v. Wade*, 410 U.S. 113, 211 (1973) (Douglas, J., concurring) (fourteenth amendment protects “freedom of choice in the basic decisions of . . . life”).

47. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); See also *Thornburgh* at 777 n.5 (Stevens, J., concurring) (concept of privacy embodies the “moral fact that a person belongs to himself and not others nor to society as a whole”) (quoting Charles Fried, Correspondence, 6 PHIL. & PUB. AFF. 288-89 (1977)).

tion,<sup>48</sup> marriage,<sup>49</sup> procreation,<sup>50</sup> and contraception.<sup>51</sup>

The decision of whether to bear a child is at the heart of constitutionally protected private decisionmaking.<sup>52</sup> A probation condition that expressly restricts a woman's ability to conceive, and thus to procreate, directly intrudes upon these constitutionally protected rights. Legislative contraceptive incentive schemes, although not as directly intrusive, are similarly constitutionally infirm. By offering large financial incentives to women who do not have children, a legislature skews women's procreative decisions. In this sense, state-imposed Norplant implantation policies raise serious constitutional concerns surrounding decisional autonomy and the very right to procreate.

In addition, instead of facilitating true choice among alternative methods, contraceptive incentive schemes push low income women into making a single contraceptive choice, thereby effectively restricting many low income women's contraceptive choices to one. Similarly, judicially-imposed Norplant implantation not only usurps a woman's decision regarding whether and when to have children, it prescribes the precise method of birth control to be used. The right to use contraceptives has not been significantly restricted by recent abortion decisions; it is still a strong fundamental right. For this reason, government sponsored contraceptive inducements implicate fundamental privacy and reproductive freedom rights.

The Supreme Court has likewise long recognized and protected an individual's right to self-determination, which allows a person to control decisions made about her own body.<sup>53</sup> In *Cruzan*, the Court noted that "[t]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."<sup>54</sup> Justice Rehnquist, writing for the plurality, noted that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is to refuse treatment,"<sup>55</sup> and that the "principle that a competent person has a consti-

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48. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

49. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

50. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

51. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (White, J., concurring in result); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

52. See generally *Estrich & Sullivan, Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); *Walker, Dellinger & Sperling, Abortion and the Supreme Court: The Retreat From Roe v. Wade*, 138 U. PA. L. REV. 83 (1989).

53. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. \_\_\_\_\_, 110 S. Ct. 2841, 2846 (1990) (citing *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) ("No right is held more sacred . . . than the right of every individual to the possession and control of his own person.").

54. 110 S. Ct. at 2846.

55. *Id.* at 2847.

tutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."<sup>56</sup> Indeed, in her concurring opinion in *Cruzan*, Justice O'Connor stated that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment. . . ."<sup>57</sup>

All government imposed contraceptives threaten both the interest in bodily integrity and the related right to refuse medical treatment. The Norplant device, however, presents unique problems. Norplant is particularly intrusive because it must be surgically implanted. Government actions provoking actual bodily intrusions have always been regarded with extreme skepticism. As Justice O'Connor noted in *Cruzan*, "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed State incursions into the body repugnant to the interests protected by the Due Process Clause."<sup>58</sup>

Furthermore, because Norplant cannot be discontinued without surgical removal, a woman cannot simply change her mind. For this reason, before inserting the device, medical clinicians must ensure that a woman's decision is independent, not the product of third party persuasion. In contrast to this mandate, legislative incentives virtually ensure that some women's decisions will be made on the spur of the moment, for the sake of the monetary "bonus." The resulting government induced implantation of Norplant by its very nature interferes with a woman's bodily integrity.

The sex bias in contraceptive incentive plans also cannot be ignored. In all plans that have surfaced to date, only women are con-

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56. *Id.* at 2851.

57. *Id.* at 2857 (O'Connor, J., concurring). See also *Washington v. Harper*, 492 U.S. 210 (1990) ("The forcible injection of medicine into a nonconsenting person's body represents a substantial interference with that person's liberty"); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) ("a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment"); *Jacobson v. Mass.*, 197 U.S. 11, 24-30 (1904) (liberty interest in refusing vaccine).

58. 110 S. Ct. at 2856 (O'Connor, J., concurring) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). The Court's "Fourth Amendment jurisprudence has echoed this same concern." *Cruzan*, 110 S. Ct. at 2856 (O'Connor, J., concurring). In the evidentiary context, the Supreme Court has held that the fourth amendment protects "personal privacy and dignity [from] unwarranted intrusion by the State." *Schmerber v. Cal.*, 384 U.S. 757, 767 (1966); *Id.* at 771 (court-ordered blood tests do not violate the fourth amendment because such procedures are "commonplace. . . and . . . involve[] virtually no risk, trauma, or pain."); but see *Winston v. Lee*, 470 U.S. 753 (1985) (invalidating court ordered surgical removal of a bullet from a suspect's chest). Courts have characterized *Winston* and *Schmerber* as cases that "assume that individuals have the right, depending on the circumstances, to accept or refuse medical treatment or other bodily invasion." *In re A.C.*, 573 A.2d 1235, 1245 (D.C. 1990).

structively bribed not to procreate. No similar provisions apply to men. Nor should they. Certainly, a provision to pay men a \$500 incentive either to be sterilized or to use a male contraceptive, such as the "cork" device pioneered in China, would be equally objectionable.<sup>59</sup> Yet, as written, the biased nature of these plans renders them particularly objectionable. For the constitutional guarantee of liberty to "extend[ ] to women as well as to men," courts protect reproductive freedom lest they "protect inadequately a central part of the sphere of liberty that our law guarantees equally to all."<sup>60</sup>

Similarly, the race bias inherent in incentive schemes cannot be overlooked. Because the proposed policies target low income women and, in this country, a disproportionate number of low income women are women of color, such legislation has a particularly adverse impact on this group of women. The adverse effect on women of color raises grave fourteenth amendment concerns as well.

#### *B. Forced Contraception is Not Necessary to Serve a Compelling Governmental Interest*

As long as the Supreme Court still considers privacy and bodily integrity to be fundamental rights,<sup>61</sup> legislation that interferes with these rights cannot be upheld unless it is narrowly tailored to advance a compelling governmental interest.<sup>62</sup> Probation conditions that implicate fundamental privacy rights likewise "may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety."<sup>63</sup> Thus, before a court may deprive a probationer of a constitutional right, the probation con-

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59. Similarly, a plan to use the sword of imprisonment to induce rapists to be sterilized is objectionable. See *infra* note 98.

60. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. at 772.

61. The Supreme Court will have an opportunity to reconsider the fundamental nature of privacy rights in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991) *cert. granted*, 60 U.S.L.W. 3498 (1992) (Nos. 91-744 & 91-902) (oral argument heard on Apr. 22, 1992). The Supreme Court in *Casey* will consider the constitutionality of the Pennsylvania abortion law's requirements of spousal notice, state-mandated lectures designed to discourage abortion followed by a twenty-four hour mandatory delay, and a dangerously narrow definition of medical emergency. If the Court overrules or weakens *Roe v. Wade*, 410 U.S. 113 (1973), many of the constitutional arguments against forced contraception may be substantially weakened.

If the imposition of Norplant is viewed as an equality issue, as it affects only women and not men, courts would also employ a heightened standard of review. The Supreme Court has held that measures classifying on the basis of gender are unconstitutional unless the government can "carry the burden of showing an exceedingly persuasive justification for the classification." *Miss. Univ. for Women v. Hogan* 458 U.S. 718, 724 (1982). See also *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

62. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154-56 (1973).

63. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (1972).

dition must be directly related to the offense, the restriction's benefit to society must significantly outweigh the defendant's loss of a fundamental liberty, and the condition must achieve its end in a manner that minimizes the impact on the defendant's exercise of constitutional rights.<sup>64</sup>

Under any guise — legislative or judicial — Norplant conditions fail to meet these constitutional standards. In this section, we discuss only how judicially-imposed Norplant implantation fails to pass constitutional muster in a child abuse context. Nevertheless, parallel arguments can be applied to the various legislative proposals involving Norplant.

The threshold inquiry involves identification of the government interest purportedly advanced by the judicially-imposed condition. The compelling governmental goal to be served by probation is rehabilitation, not mere punishment.<sup>65</sup> In this light, probation conditions should be fashioned "to restore [a probationer's] self-esteem, integrate [her] into a working environment, and inculcate in [her] a sense of social responsibility. . . ."<sup>66</sup> At the same time, probation conditions must be

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64. See, e.g., *Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 230-31, 57 Cal. Rptr. 623, 630 (1967):

When . . . the conditions annexed to the enjoyment of a publicly conferred benefit require a waiver of rights secured by the Constitution, however well-informed and voluntary that waiver, the governmental entity seeking to impose those conditions must establish: (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of the constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

The test for probation conditions under most state penal laws is similar. For example, the test that is universally applied in California in determining the validity of a condition of probation under California Penal Code § 1203.1 (West 1985), is as follows:

A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid.

See also *People v. Dominguez*, 256 Cal. App. 2d 623, 627, 64 Cal. Rptr. 290, 293 (1967); accord *People v. Lent*, 15 Cal. App. 3d 481, 486, 124 Cal. Rptr. 905, 908 (1975).

65. *In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr 562, 568 (1979). See also *People v. Richards*, 17 Cal. 3d 614, 620, 552 P.2d 97, 131 Cal. Rptr. 537 (1976) ("major goal of section 1203.1 is to rehabilitate the criminal."). Indeed, the Ninth Circuit has specifically observed that rehabilitation is the "central objective" of probation under both California's Penal Code and the Model Penal Code, § 301.1(2) (1). *Consuelo-Gonzalez*, 521 F.2d at 263.

66. *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980). See also ABA Standards Relating to Probation, § 3.2(b) (Approved Draft 1970) (recommending that

issued with an eye toward public safety.<sup>67</sup> The insertion of Norplant into a woman's arm, however, serves none of these legitimate goals.

The ultimate goal of rehabilitation in a child abuse case is to improve the woman's mothering skills. Yet there simply is no indication that a woman with Norplant implanted in her arm will become a better mother as a consequence of using Norplant. Nor is there any indication that forced contraception would either improve a woman's self-esteem or enhance her sense of social responsibility. On the contrary, mandatory Norplant would only serve to stigmatize a woman, strip her of her fundamental right to procreate, and deny her the freedom to learn how to become "responsibly free."<sup>68</sup>

Furthermore, public safety concerns do not warrant forced contraception. It is a basic maxim of our criminal justice system that people are innocent until proven guilty and that courts cannot assume future criminality. Consequently, to prohibit lawful, indeed rightful, activity as a means of preventing future crime, a court must identify a close nexus between a probation condition and the future crime the court seeks to prevent.<sup>69</sup> Accordingly, courts will uphold constitutionally infirm probation conditions only when, at a minimum, there is a "direct relationship" between a probation condition and the crime of which the defendant was convicted,<sup>70</sup> and the likelihood of "repetition of [the criminal] conduct."<sup>71</sup> On the other hand, courts refuse to sanction pro-

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"[c]onditions imposed by the court should be designed to assist the probationer in leading a law abiding life," and that such conditions be "reasonably related to his probation and not unduly restrictive of his liberty. . .").

67. *People v. Hodgkin*, 194 Cal. App. 3d 795, 808, 239 Cal. Rptr. 831, *see also Consuelo-Gonzalez*, 521 F.2d at 264 (rehabilitation and public safety joint goals of Federal Probation Act).

68. *People v. Mason*, 5 Cal. 3d 759, 770, 488 P.2d 630, 637, 97 Cal. Rptr. 302 (Peters, J., dissenting).

69. *See People v. Keller*, 76 Cal. App. 3d 827, 143 Cal. Rptr. 184 (1978). *Compare Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 231, 57 Cal. Rptr. 623, 631 (1967) (evidence failed to establish incidence of welfare fraud or efficacy of mass morning raids) and *People v. Bauer*, 211 Cal. App. 3d 937, 260 Cal. Rptr. 62 (1989) (no nexus between appellant's residence and past or future crimes) with *Mason*, 488 P.2d 630, 632-33 n.2 (high recidivism rate for narcotics offenders sufficient evidence that search condition is related to past and future narcotics crimes).

70. *In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979). Similarly, most state penal codes either explicitly require or have been construed to require that probation conditions be related to the offense for which a probationer stands convicted. *See, e.g., Keller*, 143 Cal. Rptr. at 191:

The broad power granted the sentencing judge does not authorize through a "consent" or "waiver" process the imposition of conditions of probation for "rehabilitative" purposes not related to the offense of which the probationer stands convicted, no matter how superficially rational they appear.

71. *People v. Arvanites*, 17 Cal. App. 3d 1052, 1063; 95 Cal. Rptr. 493 (1971) (prohibition against planning and engaging in demonstrations valid in light of defendant's past conduct, total lack of regret for actions, and great probability of future violations).

bation conditions that are not directly related to both past and future crimes and that are not likely to be effective in promoting public safety.<sup>72</sup>

A trial court cannot simply assume that there is a close nexus between forced contraception and child abuse. More precisely, there is no indication that a woman with Norplant implanted in her arm presents a lesser threat to society or to her children. The mere proposition that having more children will increase the opportunities for the commission of future crimes<sup>73</sup> is an insufficient nexus to support such an intrusive probationary condition.<sup>74</sup> So, too, cutting off a robber's arm may decrease the chance that the robber will steal again, yet surely amputation would not be an appropriate probation condition. Where the benefit to the public is so minuscule — if it exists at all — and the burden on the individual is so great, a probation condition cannot stand.<sup>75</sup>

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72. See, e.g., *In re Martinez*, 86 Cal. App. 3d 577, 583, 150 Cal. Rptr. 366, 370 (1978) (probation condition requiring waiver of fourth amendment rights invalid where there was "nothing in the defendant's past history or in the circumstances of the offense [that] indicate[d] a propensity on the part of defendant to resort to the use of concealed weapons in the future"); *People v. Beach*, 147 Cal. App. 3d 612, 613, 195 Cal. Rptr. 381, 387 (1983) ("causing appellant to move from one geographical area to another is of minimal value to the public when compared with the infringement of appellant's basic constitutional rights").

73. The state made exactly this argument in the *Johnson* case:

[I]f a probation condition prohibiting pregnancy is the only condition ordered that would prevent a defendant convicted of child abuse from giving birth to, and having custody of, yet another child whom she could abuse, that condition relates to future criminality. During the probationary period, the defendant is denied the opportunity to commit abuse.

Respondent's Supplemental Brief at 7, *People v. Johnson*, No. F015316 (Cal. Ct. App. filed Nov. 5, 1991).

74. See, e.g., *People v. Burden*, 205 Cal. App. 3d 1277, 253 Cal. Rptr. 130 (1988) (probation condition designed to reduce opportunity for future crime is invalid). In *Burden*, the appellate court found that a probation condition prohibiting the defendant from working as a salesperson was overbroad. The defendant in that case had pled guilty to writing checks with insufficient funds while working as a phone solicitor and outside salesman. While the *Burden* court observed that a sales position provides an individual with extra opportunities to commit fraud, the court noted the crime for which the defendant pled guilty — writing bad checks — could have been perpetrated at any job. Accordingly, the link between the probation condition and future crimes simply was too weak. Indeed, the protection of "unborn children" is not a recognized objective of child abuse statutes. *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1971).

75. The striking disparity between the probation condition's declared purpose and the means employed raises questions as to whether "improper considerations dictated [the probation condition's] ultimate scope. . . ." *Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 231, 57 Cal. Rptr. 623, 631 (1967). Indeed, ample evidence in the *Johnson* case suggests that the Norplant condition employed there was motivated by improper considerations. For example, Judge Broadman remarked about Ms. Johnson's status as a welfare recipient, see T.J., *supra* note 24, at 6, and as the mother of illegitimate children, see Motion, *supra* note 30, at 19. In addi-

Probation conditions imposing contraceptive use must, in any event, be invalidated when "available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated [and, thus,] those alternatives should be used."<sup>76</sup> Forced Norplant implantation is so intrusive, and its nexus to rehabilitation is so attenuated, that it is rarely, if ever, the least restrictive alternative.

In fact, in the only child abuse case in California to review a procreative condition placed on a probationer, the appellate court expressly struck down the condition because less restrictive means of furthering rehabilitation were available.<sup>77</sup> Even though the court, in *People v. Pointer*,<sup>78</sup> found that a repeat offense might endanger a fetus in utero, it nevertheless found that methods less restrictive of fundamental rights were available to prevent such future harm. The court noted, "Such

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tion, Judge Broadman's in-court statements indicate an interest in protecting "unborn children." See T.J., *supra* note 25, at 3, 4 and 7; Transcript of Felony Plea at 3-4, *People v. Johnson*, No. 29390 (Super Ct. Tulare Cty. Cal. Dec. 3, 1990); Motion, *supra* note 30, at 21-22. Patently, contraceptives — by preventing conception itself — do little to protect "unborn children." Moreover, the protection of "unborn children" is not recognized as a legitimate goal under California's Penal Code. See *Reyes v. People*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977) (finding that there is no such crime as "felony fetal endangerment;" child abuse statute presupposes existence of living child).

76. *People v. Pointer*, 151 Cal. App. 3d 1128, 1139, 199 Cal. Rptr. 357 (quoting *People v. Arvanites*, 17 Cal. App. 3d 1052, 1062, 95 Cal. Rptr. 493, 500 (1971)). Restrictions on travel, for example, have been struck down when alternative means of preventing future crimes were available. See, e.g., *In re White*, 97 Cal. App. 3d 141, 158, 158 Cal. Rptr. 562, 568-69 (1979) (striking down broad travel restrictions on convicted prostitute). Similarly, courts have invalidated expansive speech and association restrictions when less restrictive conditions would adequately ward against future abuses. See, e.g., *Arvanites*, 95 Cal. Rptr. at 500 (finding prohibition against planning or engaging in picketing, posting or carrying signs or placards and distributing leaflets or pamphlets too sweeping). The court in *Arvanites* did, however, uphold a prohibition against engaging in or planning demonstrations. The two conditions were distinguishable based on their relationship to the crime charged. While the demonstration prohibitions related directly to the crime charged — conspiracy to falsely imprison a university official during a demonstration — "many of the perfectly legal activities covered by [the] further prohibitions may have no relationship whatever to the crime of which the defendants have been convicted and may be not at all related to further criminality." *Id.* at 500. See also *People v. Beach*, 147 Cal. App. 3d 612, 623, 195 Cal. Rptr. 381, 383 (1983) (probation condition prohibiting the possession of dangerous weapons, involvement in a program of psychological and psychiatric counseling and program of extensive community work far less intrusive than condition that elderly defendant relocate).

77. *People v. Pointer*, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (1984).

78. In this case a mother who was accused of seriously injuring her children by adhering to a strict macrobiotic diet was convicted of felony child endangerment. As a condition of her probation, she was ordered not to conceive during her five year probationary period. In finding this restriction unconstitutionally broad, the appeals court noted that it was "apparently not intended to serve any rehabilitative purpose." *Id.* at 365.

less onerous conditions might include, for example, the requirement that appellant periodically submit to pregnancy testing; and that upon becoming pregnant she be required to follow an intensive prenatal and neonatal treatment program. . . ."<sup>79</sup>

Where the crime to which a woman pled guilty, and therefore the crime the judge may be interested in preventing, occurred after birth, an even wider array of less restrictive options are available. Less restrictive steps that would actually further rehabilitation include: forbidding a woman from disciplining her children by striking them,<sup>80</sup> counseling, parenting classes, prenatal care, job assistance, and monitoring family relationships, including, if necessary, periodic examinations of the children by a physician or social worker trained in identifying child abuse. As a last resort, a court has the power to initiate proceedings to temporarily remove children from a parent's home. The availability of such less restrictive means in and of itself precludes a finding of constitutionality.<sup>81</sup> Accordingly, forced Norplant implantation unnecessarily deprives probationers of reproductive freedom and decisional autonomy.

The analysis of probation conditions outlined above applies equally to legislative proposals involving Norplant. Rarely, if ever, could any government body demonstrate that forced or coerced Norplant implantation is the least restrictive means of furthering a compelling governmental interest. Indeed, as the next section indicates, legislative Norplant initiatives are perhaps most troubling because of their similarity to state-sponsored sterilization campaigns of the past — a likeness that only highlights the insidious nature of today's proposals.

### III. THE LESSONS OF FORCED STERILIZATION

The history of sterilization as a method of controlling pregnancy and childbearing is instructive both in assessing how the coercive use of Norplant has developed thus far, and in determining how forced Norplant use can be avoided in the future. Since the beginning of this century, sterilization has been abused by physicians and the state and federal governments as a method of controlling women's procreation in much the same way as Norplant would be under the legislative proposals and judicial initiatives described above.

By analogy, mandatory implantation of Norplant may be viewed as "short-term" sterilization for several reasons beyond the similarity in physical effect. There are many historical examples of coerced sterilization or cases in which a woman's decision to undergo sterilization was

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79. *Id.* at 365.

80. Indeed, this is one of the conditions employed by Judge Broadman in the *Johnson* case. Clerk's Order at 2, *People v. Johnson*, No. 29390 (Super. Ct. Tulare Cty. Jan. 2, 1991).

81. *Pointer*, 199 Cal. Rptr. at 366.

“influenced” by governmental incentives of some kind. Moreover, sterilization abuse was motivated by racism and classism, dangerously combined with principles of eugenics — motivations that have recurred in the debates about Norplant outlined above.<sup>82</sup> Courts have been grappling with sterilization abuse and the possible remedies for it for most of this century. We should not ignore this history in crafting our responses to efforts to coerce women to use Norplant or to “influence” them to use Norplant by using incentives, lest we dally for half a century while low income women are continually deprived of fundamental freedoms.

#### A. *The Misuse of Sterilization*

Voluntary, consented sterilization has been among the most commonly used forms of birth control in the United States for many years, and represents an important alternative that should be available to women as part of the panoply of reproductive choices.<sup>83</sup> Norplant, too, has the potential to become an important alternative for women in a time when advances in reproductive health are few and far between. At the same time, sterilization has a record of abuse, particularly among low income women and women of color, that justifies special safeguards before a sterilization procedure may be performed, and that can suggest possible ways of avoiding repetition of that abuse with Norplant. A careful balance must be struck between keeping the sterilization option (like the option of Norplant implantation) open to all women who want to avail themselves of it, while not coercing women, by incentives or otherwise, to “choose” that option.

Historically, involuntary sterilization has been used disproportionately among low income women and women of color; and as a method of eugenics to weed out traits or characteristics that are held to be undesirable.<sup>84</sup> Further, sterilization was simultaneously *discouraged* among affluent white women.<sup>85</sup> We now see Norplant being used to

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82. Former Ku Klux Klan leader David Duke's sponsorship of similar Norplant incentive legislation in Louisiana confirms that there is an outright racist motive behind the legislation: to reduce the number of poor people and to reduce the number of people of color by discouraging them from having children. See Redman, *Duke's Bills Shelved*, Baton Rouge Morning Advocate, July 1, 1991, at 1B (“when Duke, a former Klan leader, talks about welfare recipients in need of birth control education, Duke is using ‘code words’ to talk about young, black women.”).

83. See, e.g., NATIONAL CENTER FOR HEALTH STATISTICS, CONTRACEPTIVE USE IN THE UNITED STATES, 1973-1988 2 (Table 1) (March 20, 1990) (24% of women in 1988 were using contraceptive sterilization versus 37% using all other contraceptive methods combined) See generally M. SAIDI, FEMALE STERILIZATION: A HANDBOOK FOR WOMEN (1980).

84. See, e.g., Radford, *Sterilization Verses Segregation: Control of The “Feeble-minded,” 1900-1938*, 33 Soc. Sci. Med. 449 (1991).

85. One handbook describes the “Rule of 120,” supported by the American Col-

fulfill the same purposes: discouraging procreation by low income women and women of color and as punishment for women convicted of certain crimes.

The general principle that forced sterilization is permissible and, indeed, socially beneficial, was adopted by the Supreme Court in 1927.<sup>86</sup> The Supreme Court specifically approved sterilization of Carrie Buck by the superintendent of the Virginia Colony for Epileptics and the Feeble Minded. The Court, per Justice Holmes, described Ms. Buck as "a feeble minded white woman," "the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child."<sup>87</sup> Justice Holmes proceeded to argue in favor of sterilization "in order to prevent our being swamped by incompetence."<sup>88</sup> The opinion ends with a famous coda:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.<sup>89</sup>

The remainder of the *Buck* opinion, though less often quoted, is perhaps even more ominous, as it suggests that these principles could be applied beyond those confined to institutions for the "feeble minded," to "the multitudes outside," but that the law cannot be condemned for taking one step at a time.<sup>90</sup>

Whether other groups fell within Holmes's concept of the "manifestly unfit" we can only speculate. We do know, however, that the *Buck* opinion could have settled the issue against forced sterilization early on, but instead promoted and approved it. Further, sterilization proposals of the early 1920's had already grouped low income people along with the feeble-minded, insane, and criminal among the categories of "socially inadequate" for whom forced sterilization should be permitted,<sup>91</sup> and *Buck's* reasoning regarding imbeciles could be applied word for word to low income people or to racial minorities.

When the Supreme Court revisited the issue fifteen years later in the context of compelled sterilization of a convicted criminal, it failed to denounce the use of sterilization as an impermissible method of

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lege of Obstetricians & Gynecologists, and in effect through about 1970, which required that for a woman to be sterilized, her age multiplied by the number of her children must be over 120. NATIONAL WOMEN'S HEALTH NETWORK, STERILIZATION ABUSE: WHAT IT IS AND HOW IT CAN BE CONTROLLED 6 (1981) [hereinafter STERILIZATION ABUSE].

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

87. *Id.* at 205-6.

88. *Id.* at 207.

89. *Id.*

90. *Id.* at 208.

91. STERILIZATION ABUSE, *supra* note 85, at 4 & n.\*\* (describing proposals of eugenicist H.H. Laughlin); Radford, *supra* note 84, at 451.

eugenics. In *Skinner v. Oklahoma*,<sup>92</sup> the Court announced that "strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws."<sup>93</sup> The Court also recognized that it was "dealing [ ] with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."<sup>94</sup> Nevertheless, the Court still attributed the seriousness of sterilization to the "survival of the race," rather than to individual autonomy or a collective right of some group.

Only Justice Jackson in *Skinner* recognized that there was lurking in the case the question of the "extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority — even those who may be guilty of what the majority may define as crimes."<sup>95</sup> By failing to directly condemn involuntary sterilization and overrule *Buck*, the Supreme Court implied that forced sterilization was constitutional in some cases.

Indeed, mental incompetence a la *Buck v. Bell* has since been used as a pretense for sterilizing women of color, and low income or young women.<sup>96</sup> In many of the sterilization abuse cases of the early 1970s, it is clear, moreover, that the opportunity for sterilization abuse arose by virtue of the woman's receipt of welfare;<sup>97</sup> many of the legislative programs for Norplant incentives likewise are tied to eligibility for welfare. Finally, criminality remains a legal justification for sterilization even after *Skinner*, and we see this justification for forced Norplant use both in legislative proposals and in the *Johnson* case.<sup>98</sup>

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92. 316 U.S. 535 (1942).

93. 316 U.S. at 541.

94. *Id.*

95. *Id.* at 546 (Jackson, J., concurring).

96. STERILIZATION ABUSE, *supra* note 84, at 8 (describing *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974)).

97. See, e.g., *Relf v. Weinberger*, 372 F. Supp. at 1199 ("[A]n indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization.") (footnote omitted); *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975) (mother of plaintiff Cox, an 18-year old, was a welfare recipient); *Walker v. Pierce*, 560 F.2d 609, 611 (4th Cir. 1977) (plaintiff Walker, a black woman "who had completed the seventh grade," was receiving AFDC and Medicaid benefits; plaintiff Brown, also a black woman, qualified for Medicaid).

98. Most recently, surgical castration was imposed on Steven Butler as punishment on a black man charged with aggravated sexual assault of a 13 year-old girl. Although this punishment was allegedly agreed to voluntarily, Butler's advocates soon argued that the agreement was coerced and that it was "intentionally aimed at African-American males." Suro, *Amid Controversy, Castration Plan in Texas Rape Case Collapses*, N.Y. Times, Mar. 17, 1992, at A16 (quoting Charles Freeman, attorney for Butler).

In the wake of *Buck* and *Skinner* many states considered whether to impose sterilization on women receiving public assistance.<sup>99</sup> Although such legislation — like Norplant “incentive” legislation introduced thus far — did not pass, it did lead to a liberalization of voluntary sterilization laws “which allowed doctors to do without fear of liability that which they were already doing: sterilization of poor patients with less than informed consent.”<sup>100</sup> Given this history, it is not unreasonable to predict that a ruling against a woman’s right to refuse forced Norplant implantation will spark an intensified Norplant legislative campaign.<sup>101</sup>

In response to growing concern over sterilization abuse, highlighted by a well-publicized sterilization case arising in 1973, the U.S. Department of Health, Education & Welfare revised its regulations governing sterilization. They now comply with a district court’s guidelines for what would constitute constitutionally acceptable standards for federally funded sterilization procedures.<sup>102</sup> These guidelines draw from the doctrine of informed consent: “The willing and uncoerced acceptance of medical intervention by a patient after disclosure by the physician of the nature of intervention, its risks and benefits, as well as of alternatives with those risks and benefits.”<sup>103</sup> The core element of current federal law on sterilization, thus, is voluntariness, knowledge, and noncoercion.

Yet, even though much sterilization abuse has been exposed, “poor and minority women [continue to be] coerced into sterilization [because of] the lack of alternatives to publicly funded health services.”<sup>104</sup> Sterilization receives Medicaid funding,<sup>105</sup> while federal funding of abortions is virtually prohibited by the Hyde Amendment.<sup>106</sup> Indeed, “in the decade after Medicaid began funding sterilization in 1966, there was a tenfold increase in the number of tubal ligations performed

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99. STERILIZATION ABUSE, *supra* note 84, at 5-6.

100. *Id.* at 6.

101. Lewin, *5 Year Contraceptive Implant Seems Headed For Wide Use*, N.Y. Times, Nov. 29, 1991, at A1.

102. See *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977).

103. A. JONSEN, CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE 62 (2d ed. 1986).

104. Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in REPRODUCTIVE LAWS FOR THE 1990S: A BRIEFING HANDBOOK 17, 45 (Taub & Cohen eds., 1988); T. SHAPIRO, POPULATION CONTROL POLITICS: WOMEN, STERILIZATION AND REPRODUCTIVE CHOICE 100 (1985) (women of color are sterilized more than white women); see also R. PETCHESKY, ABORTION AND WOMAN’S CHOICE (1984).

105. See 42 C.F.R. § 50.209 (1991) (requiring informed consent form before sterilization procedure may be performed).

106. See 42 C.F.R. § 50.303 (1991) (general rule against federal funding of abortions).

on poor women."<sup>107</sup> Thus, many low income women are steered toward sterilization as a foolproof method of avoiding pregnancy because abortion, as a "backup" for contraception, is unavailable, and the risk of contraceptive failure is therefore too great.

This skewing of women's procreative decisionmaking is precisely the problem with legislative proposals for Norplant and, indeed, the difficulty with the argument that a woman faced with imprisonment could knowingly accept Norplant implantation as a condition of her probation. Knowledge about Norplant and sterilization, and apparent "voluntariness" in accepting it, does not necessarily remove coercion from the process. Instead, coercion only becomes more subtle and invidious.

### B. Possible Remedies

The parallels between forced Norplant use and forced sterilization are striking. Forced Norplant implantation is being used to achieve precisely the same overall purposes as was involuntary sterilization: discriminatory, coerced prevention of pregnancy and childbearing by low income women and women of color. Judges and legislators alike must act quickly to end this trend by insuring true free choice in reproductive decisionmaking.

The long development in the law of sterilization from the eugenics proposals of the early 1900s through the reform of federal funding regulations in the 1970s reveals two types of coercion: physical and economic. Darlene Johnson has already been subject to physical coercion to use Norplant, for surely the threat of prolonged incarceration is a form of physical coercion. Judges must be admonished that if they impose Norplant implantation as a punishment for a crime, they are coercing a constitutionally protected choice and are joining a tradition that classifies those convicted of crimes as undesirables who have forfeited their right to procreate. To endorse forced Norplant implantation is to resurrect *Buck v. Bell*. Judges and legislators who take this regressive step must be made to understand exactly whose company they keep.

Physical coercion of Norplant use may be guarded against by requiring voluntary, knowing, informed consent.<sup>108</sup> Yet, as we have

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107. J. LINDGREN & N. TAUB, *THE LAW OF SEX DISCRIMINATION* 415 (1988).

108. There are dangers, too, in advocating informed consent as the solution for coerced Norplant implantation. "Informed consent," as it has been employed in the abortion context, can become yet another opportunity for the state to discourage or encourage particular alternatives. See generally *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 760-63 (1986). Risks and benefits of Norplant use could also, without doubt, be weighted and selectively emphasized in such a way that a woman is directed to or away from Norplant.

learned from sterilization cases, informed consent<sup>109</sup> is only half the answer. The context in which a woman makes her decision must also be considered.<sup>110</sup> A woman needs more than information about Norplant to make a free and informed decision about contraceptive use.

This brings us to the second, more invidious form of coercion: economic coercion. Plainly, a woman cannot actualize her choice if she has no means to pay for it, and thus, any "choice" she makes under the pall of economic compulsion is not truly free.

As with more recent sterilization laws that skew women's choices by selective funding, economic coercion is the foundation of the Norplant incentive legislation and is the basis for ongoing sterilization abuse to the extent it occurs today.<sup>111</sup> The government simply cannot use "the power of the purse. . .to nullify constitutional rights,"<sup>112</sup> but this is exactly what the government seeks to do with many women.<sup>113</sup> The degree of economic coercion is particularly great when the monetary reward for using Norplant or sterilization is large or the women targeted are particularly poor and powerless. It is no accident that Puerto Rican women are targeted for sterilization and that thirty-five percent of Puerto Rican women have been sterilized, because as a non-

109. Generally, informed consent has been recognized to have three main components: adequate information must be given to enable the patient to consent to the treatment; the patient must be capable of receiving the information and making the decision; and the patient's decision must be voluntary. *President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research*, 1 MAKING HEALTH CARE DECISIONS 55 (1982).

110. As may be seen from the *Johnson* litigation, consent in the context of a sentencing hearing is hardly free, let alone informed. This observation leads to the idea that ensuring reproductive freedom solely by requiring informed consent places the burden unfairly on the woman: Did she know the risks? Was she competent to evaluate the benefits? These questions ignore the social and economic context in which a woman makes her decision, and therefore obscure more subtle forms of coercion.

111. As recently as 1974, one study concluded that "[a]mong nonwhites, the data suggest that welfare recipients have about one-third more sterilizations than nonrecipients even when age and parity are controlled." Vaughan & Sparer, *Ethnic Group and Welfare Status of Women Sterilized In Federally Funded Family Planning Programs 1972*, 6 FAM. PLAN. PERSP. 224, 229 (1974).

112. *Comm. to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 284 (1981).

113.

It is one thing. . .to say that it is permissible for economics to dictate the outcome of many decisions, and quite another to say that the government may manipulate the economics in order to control how women exercise their constitutional rights. If the government is permitted to buy up constitutional rights by offering its citizens the proverbial "offer you can't refuse," then only the financially secure will have any constitutional rights left to exercise.

*Women's Caucus of the California State Legislature and the Senate Health and Human Services Comm.*, (1991) (testimony of Ann Brink, on behalf of the ACLU) (on file with authors).

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