Prohibiting Deadbeat Dads from Fathering More Children . . . What's Next? The Wisconsin Supreme Court's Decision in State v. Oakley

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PROHIBITING DEADBEAT DADS FROM FATHERING MORE CHILDREN . . . WHAT'S NEXT? THE WISCONSIN SUPREME COURT'S DECISION IN STATE V. OAKLEY

I. INTRODUCTION

Imagine a society in which courts condition individuals' rights to parenthood on their financial status. In such a society, only those citizens with stable incomes and the ability to provide for their present and future children could become fathers or mothers. If only the wealthy could become parents, perhaps the "deadbeat parents" crisis in America would be ameliorated or would vanish altogether.1 Such a limitation might have prevented the Wisconsin Supreme Court from ever hearing the case of State v. Oakley.2

David Oakley, a thirty-four-year-old Wisconsin resident, fathered nine children by four different women.3 Despite the numerous support orders entered for his children, he consistently failed to pay child support.4 His employment record portrayed a man who was unable to hold down a stable job.5 Oakley's history of criminal convictions only added to his financial and parenting troubles.6 One of his four daughters, Stephanie Oakley, wanted to change her last name.7 She has stated of Oakley, "Ever since we were born he didn't give us no Christmas presents, no birthday presents, no nothing . . . . He doesn't deserve the [children] he has now."8

There is no doubt that David Oakley epitomizes one who has been coined a "deadbeat dad."9 In an unprecedented decision against this

1. State v. Oakley, 629 N.W.2d 200, 203 (Wis. 2001). The majority opinion discussed the "deadbeat parents" crisis whereby one-third of single parent households with child support orders do not receive payment.
2. Id.
4. Oakley, 629 N.W.2d at 206.
5. Nahai Toosi & Jessica McBride, Ruling on Prolific Dad Divides His Family; Mothers, Kids Themselves Disagree on Barring Him from Procreating, MILWAUKEE J. SENTINEL, July 15, 2001, at 01A.
6. Id.
7. Id.
8. Id. (quoting Stephanie Oakley in an interview) (alteration in original).
9. See generally EARL. S. JOHNSON ET AL., FATHER'S FAIR SHARE: HELPING POOR
particular deadbeat dad, the four male justices of the Wisconsin Supreme Court upheld the trial court's imposition of a probation condition whereby Oakley was prohibited from fathering more children until he demonstrated his ability to financially support them. At the risk of slipping down the proverbial slope, why not just prevent impoverished people like Oakley from having children in the first place? This too would serve the noble objective of reducing childhood poverty.

This Comment will argue that the Wisconsin Supreme Court should have invoked a heightened special scrutiny test when reviewing Oakley's probation condition. Under such a test, the condition placed on Oakley would fail because it is overbroad, serves no rehabilitative purpose, and other practical alternatives to achieve the same objective without infringing upon Oakley's constitutional right to procreate are available.

Specifically, Part II of this Comment will discuss the holding in *State v. Oakley.* Part III presents a general exposition of probation conditions and their review. Part IV discusses those probation conditions which impinge upon fundamental rights. Part V examines the practical ramifications and alternatives to the probation condition set forth in *Oakley.*

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11. 629 N.W.2d 200 (Wis. 2001). Following the Wisconsin Supreme Court's decision, Oakley moved for reconsideration on November 23, 2001. *State v. Oakley*, 635 N.W.2d 760 (Wis. 2001). In a per curiam opinion, the court denied Oakley's motion. However, the court withdrew certain language from the original opinion in order to clarify it. The court withdrew language that may have characterized Oakley as a child abuser. Id. (withdrawing, for example, the words: "He has abused at least one of them"). Chief Justice Abrahamson wrote a concurring opinion in which she concluded that "the majority has not fully stated the facts in its opinion and in the per curiam opinion and has not considered all the facts in applying its holding." Id. at 761. Justice Abrahamson also pointed to the record which supported Oakley's contention that he made support payments in excess of 70%, which the majority did not mention. Id. Finally, Justice Abrahamson concurred with the decision to deny the motion for reconsideration because she concluded that the circuit court is the appropriate forum for Oakley to argue compliance with his probation condition. Id. According to Oakley's attorney, Timothy T. Kay, this denial of reconsideration opinion is significant and will help his case when he petitions the Supreme Court of the United States. Telephone Interview with Timothy T. Kay, Kay & Kay Law Firm (Feb. 22, 2002). Timothy Kay filed a petition for certiorari to the United States Supreme Court in April 2002. 70 USLW 3670 (No. 01-1573).
II. WISCONSIN PRECEDENT: STATE V. OAKLEY

A. Summary of the Facts and Lower Court Holdings

Oakley's refusal to support his children and his status as a repeat offender precipitated the State's charge: seven counts of intentionally refusing to pay child support as a repeat offender.12

At the sentencing hearing in the trial court, Oakley pleaded no contest13 and thus "waived his right to have the State prove that he was legally obligated to support his children and that he intentionally refused to do so for at least 120 days."14 The State, after noting that Oakley's failure to pay child support had resulted in arrearages totaling $25,000, proposed a sentence of six years in prison.15 Oakley, on the other hand, asked the trial judge for the opportunity to sustain full-time employment while supporting his children and making payments toward his arrears.16

The trial court imposed the following sentence: three years in prison on one of the counts, eight years (stayed) on two other counts, and a probation period of five years to follow his incarceration.17 Judge Hazlewood also attached the controversial probation condition at issue: "[W]hile on probation, Oakley cannot have any more children unless he demonstrates that he had the ability to support them and that he is supporting the children he already had."18

The appellate court affirmed the trial court's holding, finding that the probation condition "was not overly broad and that it was

12. Oakley's repeat offender status stemmed from "intimidating two witnesses in a child abuse case—where one of the victims was his own child." Oakley, 629 N.W.2d at 206. Oakley subsequently entered into a plea agreement from which the State withdrew upon learning that his probation in Sheboygan was being revoked. Id. at 202.
13. Following the dissolution of the first plea agreement, Oakley entered another with the State "in which he agreed to enter a no contest plea to three counts of intentionally refusing to support his children and have the other four counts read-in for sentencing." Id. He also agreed that on appeal, he would not complain of the State's withdrawal of the initial plea agreement. Id. In exchange, the State agreed to cap its sentencing recommendation to just six years for all seven counts; still, Oakley was free to argue for a variable sentence. Id.
14. Id.
15. Id.
16. Id.
17. In deriving this sentence, "Judge Hazlewood observed that 'if Mr. Oakley had paid something, had made an earnest effort to pay anything within his remote ability to pay, we wouldn't be sitting here.'" Id. at 202–03. However, he also acknowledged that "'if Mr. Oakley goes to prison, he's not going to be in a position to pay any meaningful support for these children.'" Id. at 203.
18. Id.
reasonable." Subsequently, Oakley petitioned the Wisconsin Supreme Court for review, which the court granted.

B. The Issue Defined

On appeal, the Wisconsin Supreme Court considered both Oakley's constitutional challenge to the probation condition and his contention that the "State was impermissibly allowed to withdraw from an earlier plea agreement . . . ." The discussion in this Comment is tailored to focus entirely on the constitutional issue, to which the better part of the majority opinion was devoted.

Oakley condemned the probation condition as an unconstitutional infringement on his right to procreate. Further, he claimed that the infringement did not satisfy the "strict scrutiny" test because the probation condition was not narrowly tailored to serve the State's concededly compelling interest in requiring parents to support their children.

C. The Majority's Analysis and Holding

The majority began its review with an examination of the "deadbeat parent" crisis and the implications this crisis has for both children and single parents. The court determined that "[t]he effects of the nonpayment of child support on our children are particularly troubling. In addition to engendering long-term consequences such as

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19. "After sentencing, Oakley filed for post-conviction relief," challenging both the probation condition and the State's withdrawal from the initial plea agreement. Id. Concerning the latter challenge (not the focal issue of this Comment), the court of appeals found that Oakley's agreement to enter the second plea agreement resulted in a waiver to challenge "matters relating to the first plea agreement." Id. at 203 (citations omitted).

20. Id.

21. Id. at 213. With regard to the issue of improper withdrawal from the first plea agreement, the court, agreeing with the court of appeals, held that Oakley waived any claim of error for the State's withdrawal from the initial plea agreement when he entered the subsequent plea agreement and pleaded no contest. Id.

22. Id. at 203–13.


24. Oakley, 629 N.W.2d at 208.

25. Justice Jon P. Wilcox wrote the majority opinion. Concurring opinions by Justices William A. Bablitch, N. Patrick Crooks, and David Prosser, Jr. were also filed, but they are not subject to an in-depth analysis by this Comment.

26. See Oakley, 629 N.W.2d at 203. The majority considers a vast number of statistics regarding the number of single parents that actually receive child support payments, the percentage of single moms below the poverty line, etc. Id.
poor health, behavioral problems, delinquency and low educational attainment, inadequate child support is a direct contributor to childhood poverty. In light of these determinations, the court then noted that the Wisconsin Legislature attached "severe sanctions" to the crime of intentionally refusing to pay child support.

Next, the majority contemplated the broad discretion given to trial judges in addressing a violation of child support requirements. In fact, a judge may choose a probation sentence instead of a more harsh sanction of incarceration. The probation sentence may be coupled with particular "conditions which appear to be reasonable and appropriate." In exercising discretion, the judge may devise conditions of probation aimed to "meet the rehabilitative needs of the defendant." At the same time, the judge must take steps to ensure the

27. Id. at 204 (citing Martha Garrison, The Goals and Limits of Child Support Policy 16 in CHILD SUPPORT: THE NEXT FRONTIER (J. Thomas Oldham & Marygold S. Melli eds., 2000)).

28. Oakley, 629 N.W.2d at 205. The Wisconsin Legislature has made it a Class E felony to violate WIS. STAT. § 948.22(2) (1999–2000), punishing "[a]ny person who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide." WIS. STAT. § 948.22(2) (1999–2000).

29. A Wisconsin judge can consider a number of factors when awarding a sentence, including the following:

[T]he past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for close rehabilitative control; the rights of public; and the length of pretrial detention.

Oakley, 629 N.W.2d at 205 (quoting State v. Guzman, 480 N.W.2d 446 (Wis. 1992)).

30. Id. (citing WIS. STAT. § 973.09(1)(a) (1999–2000)). This section reads:

Except as provided in par. (c) or if probation is prohibited for a particular offense by statute, if a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously. If the court imposes an increased term of probation, as authorized under sub. (2) (a) 2. or (b) 2., it shall place its reasons for doing so on the record.


31. WIS. STAT. § 973.09(1)(a).

32. Oakley, 629 N.W.2d at 205 (quoting State v. Gray, 590 N.W.2d 918 (Wis. 1999)).
protection of "society and potential victims from future wrongdoing" by the defendant. 33

The majority acknowledged that such broad discretion on the part of trial judges has been criticized in the past where judges have imposed probation conditions reflective of their own values instead of values tailored to a rehabilitative purpose. 34 Here, however, the court felt the trial judge had fashioned "a sentence that would address Oakley's ongoing refusal to face his obligations to his nine children as required by law" while protecting society and potential victims. 35

On the other hand, Oakley argued that the probation condition represented a violation of his constitutional right to procreate. 36 He argued that the probation condition should be tested under strict scrutiny; whereby, it must be "narrowly tailored to serve a compelling state interest." 37 Oakley did not deny that the State's interest in mandating parents to financially support their children was a compelling interest, but he argued that the probation condition was not narrowly tailored to meet that interest because his "right to procreate is not restricted but in fact eliminated." 38 Oakley maintained that his right to procreate was eliminated because he would never be able to support his children, and if he did exercise his fundamental right on probation, he would face the eight-year stayed prison term. 39

The majority was not persuaded by Oakley's analysis. 40 In rejecting the strict scrutiny test, the court instead adopted a reasonability standard to assess a probation condition that may infringe upon a fundamental right. 41 This standard is characterized as permitting

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33. Id. at 206.
34. See id.
35. Id. at 207.
36. Id. In accordance with the United States Supreme Court, the Wisconsin Supreme Court has recognized the liberty interest of a citizen in deciding whether or not to procreate. Id. (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); Eberhardy v. Circuit Court for Wood County, 307 N.W.2d 881 (Wis. 1981)).
37. Oakley, 629 N.W.2d at 207–08 (citing Zablocki v. Redhail, 434 U.S. 374, 388 (1978)).
38. Id. at 208.
39. Id.
40. See id. at 208–09.
41. See id. at 210 n.27. The court indicated a number of cases in which a reasonableness standard was invoked to evaluate probation conditions that infringe upon convicted individual's fundamental rights. Id. Such rights include: First Amendment-Freedom of Speech, First Amendment-Freedom of Association, First Amendment-Freedom of Religion, Second Amendment-Right to Bear Arms, Fourth Amendment-Right to be Free from Unreasonable Searches and Seizures, Right to Engage in Political Activity or Run for Political Office, Freedom of Movement, and Right to Procreate. Id.
conditions of probation to "impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." 42

In applying this standard to the probation condition at hand, the court found the condition was not overly broad because it did not prevent Oakley from exercising his right to procreate, as long as he met the condition by making an effort to pay child support. 43 The majority also highlighted the fact that when the term of probation expired, the condition would also expire, and Oakley would be free to exercise his right to procreate. 44

Finally, the majority found that the condition was "reasonably related to the goal of rehabilitation." 45 According to the court, the rehabilitative goal in this case was to prevent Oakley from creating more victims should he persist in his failure to pay child support. 46 The court reasoned that the probation condition essentially banned Oakley from future violations of the law. 47 In short, the probation condition satisfied the reasonability standard because it was not overly broad, and it was reasonably related to Oakley's rehabilitation. Thus, an infringement of constitutional rights was justified. 48

D. The Dissent's Analysis

Justice Ann Walsh Bradley, Chief Justice Shirley Abrahamson, and Justice Diane Sykes dissented in this case. 49 Justice Bradley began her analysis by accentuating the significance of the right to procreate. 50 She maintained that "[t]he right to have children is a basic human right and an aspect of the fundamental liberty which the Constitution jealously guards for all Americans." 51 Justice Bradley argued that while the majority acknowledged the right to procreate, they did not contemplate

42. Id. at 210 (quoting Edwards v. State, 246 N.W.2d 109 (Wis. 1976)).
43. Id. at 212.
44. Id.
45. Id. at 213.
46. Id.
47. Id.
48. See id. at 210 (citing Edwards v. State, 246 N.W.2d 109 (Wis. 1976)).
49. The three dissenting opinions are set forth by the three female justices on the Wisconsin Supreme Court. Justice Bradley and Justice Sykes filed separate opinions, but all three justices joined in each dissenting opinion filed. Oakley, 629 N.W.2d at 216–23.
50. Id. at 216 (Bradley, J., dissenting).
51. Id. (Bradley, J., dissenting) (relying on Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536 (1942)).
its "preeminence."52 In addition to the constitutional implications, the dissent also examined the "collateral consequences" and "practical problems" with the majority's holding.53

This preeminence of the right to procreate was established in the United States Supreme Court case of Skinner v. Oklahoma, according to the dissent.54 In Skinner, the Court described the right to bear children as a "'basic liberty' . . . 'fundamental to the very existence and survival of the [human] race.'"55 Further, the right to bear children has been construed as residing "in the sphere of personal privacy protected from unjustified governmental intrusion by the Due Process Clause of the Fourteenth Amendment."56

The dissent argued that because the right to procreate is a fundamental right, the probation condition in this case should be subjected to heightened scrutiny.57 While the dissent conceded that probationary conditions may encroach upon constitutional rights, the conditions must be "reasonably related to the probationer's rehabilitation," while not being "'overly broad.'"58 In short, this part of the dissent argued that the State may justify such a probation condition only if it is "narrowly drawn" to serve the State's interest.59

Next, Justice Bradley argued that the majority and concurring opinions erroneously construed the probation condition to require intent (intentionally failing to pay child support payments), where the condition itself simply prohibited Oakley from fathering more children until he could prove his financial capability to support his existing children.60 Therefore, the majority's interpretation would permit Oakley to satisfy his probation condition by simply trying to meet the condition. The dissent focused on the actual language that prohibited Oakley from fathering more children unless he could show to the Court his ability to

52. Id. at 216 (Bradley, J., dissenting).
53. Id. at 219–20 (Bradley, J., dissenting).
54. Id. at 216 (Bradley, J., dissenting).
55. Id. (Bradley, J., dissenting) (alteration in original) (quoting Skinner, 316 U.S. at 541).
56. Id. (Bradley, J., dissenting) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
57. Id. at 217 (Bradley, J., dissenting) (citing Edwards v. State, 246 N.W.2d 109 (Wis. 1976)).
58. Id. (Bradley, J., dissenting) (quoting in part, Edwards, 246 N.W.2d 109 (Wis. 1976)).
60. Id. at 217 (Bradley, J., dissenting).
pay child support, or "that he is meeting the needs of his other children . . ." 61

According to the dissent, the condition was not narrowly drawn to further the State's interest, because it effectively eliminates Oakley's right to bear children and because the trial court recognized Oakley's inability to meet the probation condition. 62 In support of this contention, Justice Bradley relied on the United States Supreme Court's holding in Zablocki v. Redhail where a "statutory prohibition on the right to marry . . . was not a justifiable means of advancing the state's [sic] interest in providing support for children." 63 In Zablocki, the Court found that there were alternative means of advancing the State's interest that did not impinge on the fundamental right to marry. 64 Likewise, the dissent argued that there were alternative approaches to advance the State's interest in providing for Oakley's children other than the unconstitutional probation condition. 65

In addition to the constitutional implications of the majority's holding, the dissent also highlighted the "collateral consequences and practical problems" inherent in the court's decision. 66 First, the dissent contemplated the risks of "coercive [abortion]" if Oakley impregnates a woman. 67 Justice Bradley suggested that because of the probation condition, Oakley has a strong incentive to demand a woman (pregnant with his child) to undergo an abortion—thus preventing his incarceration for a term of eight years. 68 Second, Justice Bradley accused the majority of attaching "a sliding scale of wealth" to the right

61. Id. (Bradley, J., dissenting) (emphasis added).
62. Id. at 217–18 (Bradley, J., dissenting).
63. Id. at 218 (Bradley, J., dissenting) (citing Zablocki, 434 U.S. 374 (1978)).
64. Id. (Bradley, J., dissenting) (relying on Zablocki, 434 U.S. 374, 388–90).
65. Id. at 218 n.3. Justice Bradley listed a few alternative approaches that could be used to advance the State's interest:

[S]entence Oakley to eight years in prison; stay the sentence and place him on probation; a condition of probation is that he serve a substantial amount of time in jail with work release privileges; after getting work release hours extended, another condition of probation is that he maintain two full-time jobs, working a minimum of 70 hours per week; conditions of probation also include parenting classes and alcohol and drug assessment/counseling if deemed appropriate.

Id. at 219 n.3 (Bradley, J., dissenting).
66. Id. at 219 (Bradley, J., dissenting).
67. See id. at 219 (Bradley, J., dissenting) (relying on People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984)).
68. Id. (Bradley, J., dissenting).
to have children.\textsuperscript{69} She argued that men and women alike are allowed to have as many children as they wish, and if they cannot ultimately provide the necessary support, then they must face the legal consequences.\textsuperscript{70}

Finally, the dissent pointed out the impracticality of the probation condition.\textsuperscript{71} Because the condition did not prevent Oakley from having intercourse, and because there is no realistic way to monitor his sexual activity, there would be no effective way to prevent him from fathering more children.\textsuperscript{72} Further, if Oakley were to father another child, he would be forced to return to prison while leaving behind his dependent children.\textsuperscript{73}

Justice Bradley concluded her dissent by reiterating her disapproval of Oakley's conduct.\textsuperscript{74} However, she underscored the fundamental nature of the right to procreate, and the need to protect that right.\textsuperscript{75} Ultimately, she drew attention to the fact that the Wisconsin Supreme Court was the only court in the country to deem this condition constitutional.\textsuperscript{76}

Justice Bradley's dissenting opinion was followed by Justice Sykes's brief dissent.\textsuperscript{77} In short, Justice Sykes argued that while Oakley, a convicted felon, may endure "limitations on the fundamental human liberties the rest of us freely enjoy, he cannot constitutionally be banned from having further children without court permission."\textsuperscript{78} She maintained that because there are reasonable alternatives to the probationary condition at issue, the State had gone too far by infringing upon the fundamental right to procreate.\textsuperscript{79}

The dissent also took issue with the majority's comparison of Oakley's loss of reproductive freedom on probation with the loss he would have experienced had he been incarcerated. Justice Bradley wrote, "[T]he fact of the matter is that Oakley had not been imprisoned. He is a probationer and has retained a degree of his liberty, including 'a

\textsuperscript{69} \textit{Id.} (Bradley, J., dissenting).
\textsuperscript{70} \textit{Id.} (Bradley, J., dissenting).
\textsuperscript{71} \textit{See id.} at 220 (Bradley, J., dissenting).
\textsuperscript{72} \textit{Id.} (Bradley, J., dissenting).
\textsuperscript{73} \textit{Id.} (Bradley, J., dissenting).
\textsuperscript{74} \textit{Id.} at 221 (Bradley, J., dissenting).
\textsuperscript{75} \textit{Id.} at 220 (Bradley, J., dissenting).
\textsuperscript{76} \textit{Id.} (Bradley, J., dissenting).
\textsuperscript{77} \textit{Id.} at 221–23 (Sykes, J., dissenting).
\textsuperscript{78} \textit{Id.} at 222 (Sykes, J., dissenting).
\textsuperscript{79} \textit{See id.} at 222 (Sykes, J., dissenting).
significant degree of privacy under the Fourth, Fifth, and Fourteenth Amendments. This quote underscores the divergence between incarceration and probation, two entirely different sentences.

III. PROBATION

A. Generally

Probation is a "court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to prison." This concept grew out of the recognition that harsh prison sentences do not necessarily rehabilitate criminals to the extent that future crime is thwarted. Instead, probation permits the wrongdoer "to reform without the stigma or the corruptive influences of prison." Finally, the overcrowding of prisons and the associated economic repercussions lend support to the probationary system.

If a sentencing court decides to grant probation, then general conditions are usually attached, such as a requirement to maintain lawful conduct and steady employment. In addition, the trial judge may devise individualized conditions aimed at the rehabilitation of the particular defendant, such as participating in a family counseling or a drug rehabilitation program. In effect, both federal and state judges have wide latitude in fashioning probationary conditions. The following sections, with emphasis on Wisconsin's approach, will

80. Id. at 218 (Sykes, J., dissenting) (quoting People v. Pointer, 199 Cal. Rptr. 357, 368 (Cal. Ct. App. 1984)).
81. BLACK'S LAW DICTIONARY 503 (Pocket ed. 1996).
82. John Augustus, often regarded as the "Father of Probation," frequently stated, "[T]he object of the law is to reform criminals and to prevent crime, and not to punish maliciously or from a spirit of revenge." PAUL F. CROMWELL & GEORGE G. KILLINGER, COMMUNITY-BASED CORRECTIONS: PROBATION, PAROLE, AND INTERMEDIATE SANCTIONS 11 (3d ed. 1994). Augustus' efforts resulted in the passage of the first probation law in the United States, which was enacted in 1878. Id.
84. Id. at 1852. "[P]robation costs about one-fourteenth as much as imprisonment." Id. at 1852 n.52. (quoting ABA SENTENCING STANDARDS, Std. 18-2.3 cmt., at 77).
86. Id. at 25.
expound upon judges' authority and motivations to impose a probation sentence.

**B. The Statutory Authority and Objectives of Probation**

A state or federal judge's power to impose probation is derived from statute. The statutory authority for federal courts was guided by the Federal Probation Act, which is in effect for crimes committed before November 1, 1987. Under this Act, the court is empowered to condition probation "upon such terms and conditions as the court deems best." While this statutory language gives a federal judge broad discretion in fashioning the probation sentence, at least one district court has required that the "terms . . . be reasonably related to the purposes of the Act. In determining whether a reasonable relationship exists . . . it [is] necessary to give consideration to the purposes sought to be served by probation."  

Just as the Federal Probation Act contains liberal language, in general, so do the state probationary statutes. Although the probationary statutes vary from state-to-state, a common thread among them is the discretion accorded to the trial judges in fashioning the probation terms and attaching conditions. For example, Wisconsin's probation statute allows the court to "impose any conditions which appear to be reasonable and appropriate."  

The Wisconsin courts have broadly construed this statutory authority. The Wisconsin Supreme Court has adopted standard 3.2 of the American Bar Association Standards Relating to Probation

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88. See id.; see also Levine, supra note 83, at 1849; Elinor F. Parker, Comment, Birth Control as a Probation Condition for Child Abusers—Creative Alternative or Unconstitutional Condition?, 19 W. St. U. L. Rev. 289, 291.


92. United States v. Virginia Consuelo-Gonzalez, 521 F.2d 259, 262 (9th Cir. 1975).

93. See Jebson, supra note 87, at 304.

94. WIs. STAT. § 973.09(1)(a) (1999–2000).

This standard concerns the "nature and determination of [probationary] conditions," and reads in part:

"It should be a condition to every sentence of probation that the probationer lead a law-abiding life during the period of his probation. No other conditions should be required by statute; but the sentencing court should be authorized to prescribe additional conditions to fit the circumstances of each case."  

While such language permits the judge to fashion a probation sentence that accords with the Wisconsin statute and the ABA probation standard, the courts have stated that "[p]robation is not a matter of right, rather it is a privilege." In deciding whether to place the convicted individual on probation instead of in prison, the courts must contemplate whether the individual will be rehabilitated via supervision, and yet not pose a danger to society.  

C. Appellate Review of Probation Conditions

Probation conditions fashioned by the lower courts are not left unchecked; appellate courts review the conditions to determine reasonableness. This review is essential because "unreviewed exercise of discretion could result in the imposition of restraints which bear no reasonable relation to the purposes of probation." Accordingly, the Wisconsin appellate courts determine the reasonableness of a probation condition by assessing how well it effectuates the "dual goals" of probation: the rehabilitation of the convicted individual and the safeguarding of the societal interest.

96. See Edwards v. State, 246 N.W.2d 109, 110 (Wis. 1976) (citing State v. Garner, 194 N.W.2d 649 (Wis. 1972)).
97. Id. (quoting Section 3.2(a) of American Bar Association Standards Relating to Probation (Approved Draft, 1970)).
98. Id. at 111.
100. People v. Dominguez, 64 Cal. Rptr. 290, 293 (Cal. Ct. App. 1967). "The trial court has very wide discretion in setting the conditions of probation, but its discretion is not boundless." Id.
102. Id. at 407; see also State v. Lo, 599 N.W.2d 659, 661 (Wis. Ct. App. 1999); State v. Simonetto, 606 N.W.2d 275, 277 (Wis. Ct. App. 1999); State v. Miller, 499 N.W.2d 215, 216 (Wis. Ct. App. 1993). Federal courts also review conditions with probationary goals in mind. E.g., United States v. Virginia Consuelo-Gonzalez, 521 F.2d 259, 262 (9th Cir. 1975). The Consuelo-Gonzalez court stated, "In determining whether a reasonable relationship exists, we have found it necessary to give consideration to the purposes sought to be served by
A similar approach to assessing reasonableness is set forth in the widely adopted three-part test developed by a California appellate court in *People v. Dominguez*. The *Dominguez* test stipulates the following:

A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to the 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.

If the probation condition meets each of the three *Dominguez* test criteria, then the condition is held to be unreasonable. The *Dominguez* test is a variation of the "reasonable relationship" test spelled out by the Ninth Circuit in *Higdon v. United States*.

The *Higdon* court set forth a two-prong inquiry where the reviewing court must first conclude that the lower court imposed the conditions for permissible purposes, and secondly, the conditions must be reasonably related to those purposes. The court construed permissible purposes of probation to be only those that are imposed to facilitate defendant rehabilitation and public protection.

While a sentencing judge has broad discretion, he or she is limited not only by the reasonableness requirements above, but also by basic standards of criminal law. Generally, courts cannot impose probation conditions that would also constitute improper penal or parole conditions. For instance, the Ninth Circuit struck down a probation

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103. 64 Cal. Rptr. at 293. Besides California, many other states have adopted the *Dominguez* test; including Wisconsin in *State v. Garner*, 194 N.W.2d 649, 652 n.5 (Wis. 1972) (although the *Dominguez* test was not expressly adopted, the court relied upon the same three criteria in determining the reasonableness of the probation condition). *See Garner*, 194 N.W.2d at 652 n.5; *see also* Jebson, *supra* note 88, at 304 n.15.

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

105. 627 F.2d 893, 897 (9th Cir. 1980); *see Levine, supra* note 83, at 1855-56.

106. *Higdon*, 627 F.2d at 897.

107. *Id.* at 897-98. In *Higdon*, the defendant was convicted of defrauding the government. *Id.* at 896. As a condition of probation, the lower court required the defendant to forfeit all of his assets and work for charity for three years without pay. *Id.* The Ninth Circuit reviewed these conditions of probation and held that the conditions were impermissible "because they were not reasonably related to rehabilitation of the offender or protection of the public." *Id.* at 898.


109. *See Levine, supra* note 83, at 1857 (citing United States v. Virginia Consuelo-
condition requiring a probationer to donate a pint of blood. Likewise, a court cannot fashion conditions which are "impossible or extremely difficult to satisfy."

Like many of the aforementioned courts, the Wisconsin Supreme Court in Oakley determined that the probation condition prohibiting Oakley from fathering more children was reasonable because it was both rehabilitative and did not pose a threat to society. However, Oakley argued that the probation condition implicated his constitutional right to procreate and therefore, warranted strict scrutiny.

IV. PROBATION CONDITIONS THAT IMPINGE CONSTITUTIONAL RIGHTS

A. Probationers' Constitutional Rights

The United States Supreme Court in Griffin v. Wisconsin concluded that a probationer does not behold the "absolute liberty" to which other citizens are entitled. Instead, the Court found that probationers were entitled only to "conditional liberty" dependent upon the restrictions in their probation conditions. Although a probationer's liberty interest is diminished, courts have acknowledged that probationers still have "the right to enjoy a significant degree of privacy, or liberty, under the Fourth, Fifth, and Fourteenth Amendments to the Federal Constitution."

Still, a probation condition that impinges upon a probationer's

Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975)).
110. Consuelo-Gonzalez, 521 F.2d at 264 (citing Springer v. United States, 148 F.2d 411, 416 (9th Cir. 1945)).
112. State v. Oakley, 629 N.W.2d 200, 201-02 (Wis. 2001).
113. Id. at 207.
115. Id. at 874 ("To a greater or lesser degree, it is always true of probationers ... that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special [probation] restrictions.'") (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
116. Id. at 874.
fundamental rights is not *per se* impermissible.\footnote{118} Instead, courts apply "special scrutiny" to such conditions to determine if the limitation advances the dual goals of probation—rehabilitation and public safety.\footnote{119} Thus, in a constitutional challenge to a probation condition, the question becomes one of whether the judge crossed the fine line between a permissible and impermissible impingement on a probationer's rights. The logical question remains: where do we draw that line?\footnote{120}

**B. Conditions Impinging Fundamental Rights, Generally**

Countless federal and state courts alike, including Wisconsin, have held that probation conditions may impinge on a probationer's constitutional rights as long as they are reasonably related to the defendant's rehabilitation.\footnote{121} However, when a probation condition does impinge upon a fundamental right, such as the right to procreate, the courts usually subject the condition to special scrutiny.\footnote{122} The court in *United States v. Virginia Consuelo-Gonzalez* set forth the special scrutiny test for probation conditions that impinge upon fundamental rights.\footnote{123} Consuelo-Gonzalez, the defendant, was convicted for possession of heroin with the intent to distribute.\footnote{124} As a condition of her probation, the defendant was required to "submit to search of her person or property at any time when requested by a law-enforcement officer."\footnote{125} On appeal, Consuelo-Gonzalez argued that the trial court erroneously failed to suppress evidence obtained from a search of her home.\footnote{126} Defendant argued that the probation condition authorizing

\[\text{\begin{footnotesize}
\footnote{118} See \textit{United States v. Virginia Consuelo-Gonzalez}, 521 F.2d 259, 265 n.14 (9th Cir. 1975).}
\footnote{119} \textit{Id.} at 265.
\footnote{120} See, e.g., Parker, supra note 88, at 296.
\footnote{121} See, e.g., \textit{United States v. Tonry}, 605 F.2d 144, 150 (5th Cir. 1979) ("[P]robation condition is not necessarily invalid simply because it affects a probationer's ability to exercise constitutionally protected rights."); \textit{Consuelo-Gonzalez}, 521 F.2d at 265 n.14 ("Merely because a convicted individual's fundamental rights are involved should not make a probation condition which limits those rights automatically suspect."); \textit{Smith v. State}, 727 N.E.2d 763, 767 (Ind. Ct. App. 2000) ("[T]he condition may impinge upon the probationer's exercise of an otherwise constitutionally protected right."); \textit{Edwards v. State}, 246 N.W.2d 109, 111 (Wis. 1976) ("[C]onditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.").
\footnote{122} See \textit{Consuelo-Gonzalez}, 521 F.2d at 265 ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny . . . .")
\footnote{123} \textit{Id.} at 265.
\footnote{124} \textit{Id.} at 261.
\footnote{125} \textit{Id.} at 262.
\footnote{126} \textit{Id.}"}
such warrantless searches was improper because it did not "meet the Fourth Amendment's standard of reasonableness."127

Judge Sneed, writing for the Ninth Circuit, enhanced the level of scrutiny for probation conditions implicating constitutional rights to that of special scrutiny;128 thereby requiring more than a mere reasonable relationship between the condition and the purposes of probation.129 The court held that the appropriate test of a probation condition's constitutionality was not whether the fundamental rights limited by the condition would be afforded "preference" under the usual constitutional analysis, but whether the "limitations [on the fundamental rights] are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public."130 In applying the test, the court looked at the following factors: the scope of constitutional guarantees to which a probationer (as opposed to non-probationer) is entitled,131 the relationship between the condition and the rehabilitative purposes of the Federal Probation Act, and the justifiable needs of law enforcement in protecting the community.132

In applying this special scrutiny analysis to Consuelo-Gonzalez's probation condition authorizing warrantless searches, the Ninth Circuit held it to be an impermissible condition133 because it permitted "searches which could not possibly serve the ends of probation."134

C. Conditions Impinging the Fundamental Right to Procreate

Although the Consuelo-Gonzalez holding does not directly extend to state cases concerning probation conditions that impinge constitutional rights,135 the special scrutiny analysis has been applied by

127. Id.
128. Id. at 265.
129. See, e.g., Higdon v. United States, 627 F.2d 893, 898(9th Cir. 1980) (setting forth the "reasonable relationship" test for probation conditions).
130. Consuelo-Gonzalez, 521 F.2d. at 265 n.14.
131. Id. at 264–65.
132. Id. at 266–67 (Choy, J., concurring). For a similar analysis, see Trammell v. State of Indiana, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001). When a defendant claims a probation condition impinging a constitutional right, the Trammell court balances the following factors: "(1) [T]he purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement." Id.
133. Consuelo-Gonzalez, 521 F.2d at 267.
134. Id. at 265.
135. See id. at 266 ("[W]e express no opinion here regarding the extent to which the states constitutionally may impose conditions more intrusive on the probationer's privacy
some courts in testing probation conditions that implicate fundamental rights—including the right to procreate.136

While the United States Constitution does not explicitly mention the right to procreate, the Supreme Court has recognized the right to bear children as being fundamental, inherent in the right to privacy.137 "Privacy" is not privacy in the general sense, but rather in the constitutional sense, referring to "the right of individuals to make certain personal choices in the realm of sexual relationships, familial relationships, and child-bearing. A term such as . . . 'self-determination' would more aptly denote this right."138

In Griswold v. Connecticut,139 the Supreme Court struck down a statutory provision prohibiting married persons from using contraceptives.140 The Court deemed the statute unconstitutional because it intruded upon the most intimate details of a marital relationship, such as the decision of whether to procreate.141 Griswold was a groundbreaking decision because it recognized a fundamental constitutional right to privacy within the "penumbra" of the Bill of Rights.142

The holding of Griswold was carried one step further in Eisenstadt v. Baird.143 There, the Court held that a ban on the distribution of
contraceptives to unmarried persons was as equally impermissible as the statute in *Griswold* affecting married persons. The Court struck down the statute as a violation of the privacy rights of single persons under the Equal Protection Clause of the Fourteenth Amendment. In effect, *Eisenstadt* expanded the right to privacy. The Court's opinion stated: "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."  

*Griswold* and its offspring carved out the right to procreate from the broader and more implicit Fourteenth Amendment right to privacy. Once the court determines that a statute implicates the constitutionally protected right to privacy, the statute is not *per se* invalid; but rather, it is subjected to strict scrutiny. In order to withstand strict scrutiny, the statute may be justified by a "compelling state interest" which is "narrowly drawn to express only those interests."  

In accordance with the aforementioned cases, the majority, concurrences, and dissents in *Oakley*, all conceded that Oakley's right to procreate was indeed a fundamental one. However, the Wisconsin Supreme Court was divided on the question of what the appropriate test was to determine the constitutionality of the probation condition.

145. See id. at 443.
146. Id. at 453.
149. Id. at 686 (quoting *Roe*, 410 U.S. at 155–56).
150. State v. Oakley, 629 N.W.2d 200 (Wis. 2001).
151. Id.
152. Justice Wilcox, delivering the majority opinion, stated that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." Id. at 210 (quoting Edwards v. State, 246 N.W.2d 109 (Wis. 1976)). In her dissent, Justice Bradley (joined by Chief Justice Abrahamson and Justice Sykes) wrote that "[t]he State must justify its action by establishing that it is narrowly drawn in light of the governmental interest at stake." Id. at 217 (Bradley, J., dissenting) (citations omitted). Justice Sykes (joined by Chief Justice Abrahamson and Justice Bradley), in her dissent, agreed with the majority's test, but the majority argued that
Oakley argued strict scrutiny was the appropriate test,\textsuperscript{153} while the majority tested the condition's constitutionality under a reasonableness standard.\textsuperscript{154} In her dissent, Justice Bradley argued that the fundamental nature of the right to procreate required a heightened scrutiny.\textsuperscript{155}

This writer argues that the correct test is not strict scrutiny,\textsuperscript{156} which would be appropriate only if Oakley were entitled to enjoy the same degree of freedom as those citizens who have not violated the law; rather, the correct test is what some courts have termed special scrutiny.\textsuperscript{157} As discussed in Part IV.B, many federal and state courts have applied special scrutiny when assessing a condition that impinges upon a fundamental right, like the right to procreate.\textsuperscript{158} The California Court of Appeals in \textit{People v. Pointer}\textsuperscript{159} applied this heightened scrutiny to a probation condition that infringed upon the probationer's fundamental right to procreate, similar to Oakley's condition.\textsuperscript{160}

Ruby Pointer was convicted of willfully endangering her two...

\begin{footnotesize}
\begin{enumerate}
\item Justice Sykes actually adhered to a strict scrutiny analysis in her application. \textit{Id.} at 208.
\item \textit{Id.} at 207-08.
\item \textit{Id.} at 210 n.27.
\item \textit{Id.} at 217 (Bradley, J., dissenting). In her dissent, Justice Bradley articulated a heightened scrutiny to test the condition's constitutionality. \textit{Id.} (Bradley, J., dissenting). In order to be constitutional, a probation condition must be "reasonably related to the probationer's rehabilitation" and "narrowly drawn" to meet the State's interest, while not being "overly broad." \textit{Id.} at 217-18 (Bradley, J., dissenting). While this level of scrutiny bears semantic resemblance to the majority's test, the result is wholly different. A distinction between the two tests might be that Justice Bradley's heightened scrutiny places a burden on the State to show that the condition is "narrowly drawn." \textit{Id.} at 218 (Bradley, J., dissenting).
\item The majority in \textit{Oakley} argued that the probation condition survived strict scrutiny, though strict scrutiny was not the correct test. \textit{See Oakley,} 629 N.W.2d at 207 n.23. Instead the majority and Justice Sykes agreed that the correct test was the following: "[C]onditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to [the probationer's] rehabilitation." \textit{Id.} at 221 (Sykes, J., dissenting) (quoting Edwards v. State, 246 N.W.2d 109 (Wis. 1976)). However, the majority did not agree with Justice Sykes' application of the standard. \textit{Id.} at 208. The \textit{Pointer} court invoked special scrutiny in their review of the constitutionality of a probation condition. 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984). The court provided a workable definition of special scrutiny. \textit{See discussion infra} notes 163-70 and accompanying text. The dissent did not identify the appropriate test as special scrutiny, but did adopt and apply elements of special scrutiny set forth in \textit{Pointer}. \textit{Oakley,} 629 N.W.2d at 221-22. Although the distinction between strict scrutiny and special scrutiny appears to be a semantic one, it is important to recognize that the test used for ordinary citizens is more "strict" than that used for convicted criminals. For this reason, the author here emphasizes the distinction between the two tests.
\item \textit{See infra} text accompanying notes 167-68.
\item \textit{See supra} notes 123-35 and accompanying text.
\item \textit{Id.} at 365.
\end{enumerate}
\end{footnotesize}
children. Her failure to adequately nourish her children resulted in their underdevelopment and neurological damage. Subsequent to her conviction, Ruby was sentenced to five years probation with various conditions attached. She challenged a condition that prohibited her from conceiving during the probationary period. In addressing the constitutionality of the condition, the court undertook a two-part analysis. First, the court assessed the condition in terms of its reasonableness. The court held the condition to be reasonable, especially because the condition prohibiting conception was related to child endangerment.

The court did not end its analysis there, but further determined that when a condition impinges upon a fundamental right, "we must additionally determine whether the condition is impermissibly overbroad." The court assessed constitutionality of the condition based on the following criteria:

[A] governmental entity seeking to impose... [a probation] condition [...] 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

161. Id. at 360. Ruby Pointer was convicted under California Penal Code sections 273a and 278.5. Section 273a reads as follows:

(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, ... willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 3, or 4 years.

199 Cal. Rptr. 357, 360 n.3 (quoting Cal. Penal Code § 273a(1) (West 1984)).
162. Id. at 360.
163. Id.
164. Id.
165. Id. at 364–66.
166. Id. at 363–64. The court employed the three-part test established in People v. Dominguez, 64 Cal. Rptr. 290, 293 (Cal. App. 1987). The three-part test is discussed supra Part III.C.
167. Pointer, 199 Cal. Rptr. at 364.
168. Id. at 364. In assessing whether a condition is overbroad, the court determined "in some cases, [it may] be necessary to determine whether the condition is impermissibly vague." Id. at 364 n.10.
When the court applied this heightened level of special scrutiny, it held the probation condition to be unconstitutional. The court construed the condition as failing to serve any rehabilitative purpose, only protecting the public "by preventing injury to an unborn child." Further, the court maintained that the purpose of the condition could "be served by alternative restrictions less subversive of appellant's fundamental right to procreate." In short, the condition prohibiting conception was an overbroad restriction on Pointer's fundamental right to procreate.

Similarly, the probation condition in Oakley would fail the three-part test because it, too, serves no rehabilitative purpose and there are alternative means to reach the same end. The Oakley majority rejected this special scrutiny analysis altogether, contending that Oakley's right to procreate was not totally eliminated because he could satisfy the condition by making an effort to support his children. Thus, they argued, reasonableness was the appropriate standard of review because the fundamental right was not eliminated altogether. In her dissent, Justice Bradley argued that the condition effectively eliminated Oakley's right to procreate because he would be unable to financially support his children. The dissenters felt heightened scrutiny was appropriate because Oakley's fundamental right to procreate was compromised by the condition. Although the statute under which

169. Id. at 365 n.11 (emphasis in original omitted) (quoting Parrish v. Civil Serv. Comm'n, 57 Cal. Rptr. 623 (1967)).
170. The Pointer court subjected the condition to special scrutiny and employed the aforementioned criteria to determine whether the condition was constitutional. Id. at 365.
171. Id. at 366.
172. Id. at 365.
173. Id.
174. See id. at 366.
175. State v. Oakley, 629 N.W.2d 200 (Wis. 2001).
176. These arguments are also invoked in the dissents' opinions. Id. at 216–21 (Bradley, J., dissenting); id. at 221–23 (Sykes, J., dissenting).
177. The majority argued that the appropriate test was the reasonability standard. In applying this standard, they found the condition was not overly broad. Id. at 212.
178. Id.
179. Id. at 217 ("The majority and both concurrences frame the condition as if it only forbids an intentional refusal to pay support. This is not the case.").
180. Id. at 216–23 (Bradley, J., dissenting).
Oakley was convicted required intent, the condition itself merely stated that, "Oakley cannot have any more children unless he demonstrates that he had the ability to support them and that he is supporting the children he already had." Even if one construed the probation condition, as did the majority, as permitting Oakley to procreate once he demonstrated only his intention and effort to support his present children, the condition was still unconstitutional. Justice Bablitch was incorrect in his concurrence—the distinction between the intentional refusal and the inability to pay support is simply insignificant because under either interpretation, the condition does not meet the requisite rehabilitative objective. Preventing one from fathering another child does not rehabilitate a man who is already a father. Whether or not the probation condition is rehabilitative is determinative under the Pointer analysis, and should have been determinative in Oakley, as well. Accordingly, there are alternative means (e.g., mandatory job training or parenting classes) to serve the same salutary purpose. Further, the practical problems of this probation condition, which prohibits only conception and not sexual intercourse itself, are self-evident and unworkable, as discussed below.

181. See Wis. Stat. § 948.22(2) (1999–2000) (designating a Class E felony for any person "who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide . . . .").

182. Oakley, 629 N.W.2d at 203 (emphasis added).

183. See id. at 214 (Bablitch, J., concurring) ("The two dissents frame the issue in such a way that Oakley's intentional refusal to pay support evolves into the inability to pay support. This case is not at all about an inability to pay support; it is about the intentional refusal to pay support.").

184. See People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (holding that the condition was not intended to serve any rehabilitative purpose but rather to protect the public). Even if Oakley does not try to pay child support, preventing him from fathering more children only treats the symptom, not the problem. Obviously he has a misconception of what a father's obligations are to his children—whether financial or otherwise.

185. Id. at 365–66. In the majority opinion in Oakley, the court recognized that the correct test was not strict scrutiny, but rather "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." Oakley, 629 N.W.2d at 210 (emphasis added) (quoting Edwards v. State, 246 N.W.2d 109 (Wis. 1974)).

186. Many courts have found alternative means which are less restrictive on the probationer's constitutional rights. See, e.g., People v. Zaring, 10 Cal. Rptr. 2d 263, 268 (Cal. Ct. App. 1992); Pointer, 199 Cal. Rptr. at 365; Trammell v. Indiana, 751 N.E.2d 283, 289 (Ind. Ct. App. 2001).

187. See Oakley, 629 N.W.2d at 220 (Bradley, J., dissenting) ("[T]he condition of probation is unworkable").
V. Ramifications, Practical Problems, and Alternative Solutions

A. Coercive Abortion

In addition to the infringement upon Oakley's fundamental rights, the probation condition may indirectly curtail his partner's rights, as well. Justice Bradley argued that:

Because the condition is triggered only upon the birth of a child, the risk of imprisonment creates a strong incentive for a man in Oakley's position to demand from the woman the termination of her pregnancy. It places the woman in an untenable position: have an abortion or be responsible for Oakley going to prison for eight years.

Indeed, many courts have recognized the risk of coercive abortion when imposing a condition prohibiting procreation. The Pointer court noted that if the probationer became pregnant during her probation, she might feel compelled to obtain an abortion. The court stated that "[a] condition of probation that might place a defendant in this position, and, if so, be coercive of abortion, is in our view improper." As was the case in Pointer, such a probation condition is often placed upon a woman—prohibiting her from bearing children. In Oakley, the condition was imposed upon Oakley himself, but if he were to impregnate a woman, she might feel pressure to procure an abortion to prevent Oakley from going to prison. Should a woman become pregnant with Oakley's child, her right to choose whether or not to bear the child is thus compromised based on the knowledge that if she gives birth to his child, Oakley will be sent to prison and will certainly not pay child support. Whereas, if Oakley's probation condition instead mandated parenting classes, the same impregnated woman would not face the threat of Oakley's imprisonment when considering her options.

188. Id. (Bradley, J., dissenting).
189. Id. (Bradley, J., dissenting).
190. See, e.g., Zaring, 10 Cal. Rptr. 2d at 268; Pointer, 199 Cal. Rptr. at 365; Trammell, 751 N.E.2d at 289.
191. 199 Cal. Rptr. at 366.
192. Id.
193. See, e.g., Zaring, 10 Cal. Rptr. 2d 263; Trammell, 751 N.E.2d 283.
194. Oakley, 629 N.W.2d at 219 (Bradley, J., dissenting).
195. Id. (Bradley, J., dissenting).
Although it is an overstatement to argue that the probation condition defeats a woman's right to choose altogether, it should at least be recognized that a woman's right to choose under these circumstances is diminished due to the consequences of bearing Oakley's child.

B. Practical Problems

In addition to the potential risk of coercive abortion, the nature of Oakley's probation condition is also inherently impracticable. As the dissent correctly pointed out, Oakley is not prohibited from having sexual intercourse, and he cannot realistically be restrained from having unprotected sex.

The Pointer court acknowledged the difficulty of monitoring the use of contraception, and the court suggested that "it might be more advisable to simply incarcerate her now rather than wait for her to violate probation." Likewise, the Trammell court noted that even the best contraceptive devices are not fail-safe, which raises the possibility that a probationer might conceive even when using "reasonable precautions to comply with the condition imposed."

The probation condition in Oakley is problematic because there is no realistic way to prevent Oakley from impregnating another woman. The condition does not prohibit Oakley from having sexual intercourse; rather, it prohibits him from conceiving a child, an event which is ultimately beyond his control. Further, should a woman become pregnant and bear Oakley's child, the condition will be violated and he will be sent to prison for a term of eight years; leaving his children without financial support for the duration.

In addition to the problems of enforcement, many commentators argue that the Oakley decision did not directly address the non-support issue. Jacquelyn Boggess, a senior policy analyst for the Center on Fathers, Families and Public Policy, stated of the case: "The justices purport to address the problem of taking care of poor children... I don't think it does that at all. Whether or not this man has a child while

196. Id. at 220 (Bradley, J., dissenting).
197. Id. (Bradley, J., dissenting).
200. Id. at 289 (citations omitted).
201. Oakley, 629 N.W.2d at 220 (Bradley, J., dissenting).
202. Id. (Bradley, J., dissenting).
on probation, what was done [in this decision] won't get his or children of any poor men supported." In other words, prohibiting Oakley from fathering more children does not provide him with a realistic or practical way to meet his current support obligations. His nine children are in no better position after the Wisconsin Supreme Court ruling than before because as Oakley himself admitted, "unless he wins the lottery," he will not be able to bring his arrearages up to date. 204

C. Alternatives

Oakley's probation condition is not only unconstitutional and impracticable, but there are suitable alternatives that would effectuate the State's interest. In United States v. Smith, 205 the Eighth Circuit reviewed a probation condition similar to that found in Oakley. 206

Jesse Smith had been charged with attempting to possess heroin and was sentenced to a period of imprisonment, followed by a three-year supervised release. 207 Smith challenged the following condition of his release: "[D]uring his period of supervised release, defendant shall not cause the conception of another child other than to his wife, unless he can demonstrate he is fully providing support to the three children presently in existence.... " 208 Like the dissent in Oakley, the Smith majority held that imposition of such a condition was beyond the authority of the court. 209 Further, the Smith court suggested that, in the alternative, the court could require Smith to "work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment." 210

These conditions are akin to those suggested for Oakley in Justice Bradley's dissent. 211 For example, Oakley could be placed on probation with a condition that he serve jail time with work release privileges, work two full-time jobs, or attend parenting classes. 212

These alternatives are consistent with the goals of a national

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203. Dennis Chaptman, High Court Limits Dad's Procreation; Justices Split on Gender Lines in Child Support Case, MILWAUKEE J. SENTINEL, July 11, 2001, at 01A.
204. Oakley, 629 N.W.2d at 217 (Bradley, J., dissenting).
205. 972 F.2d 960 (8th Cir. 1992).
206. Id. at 961.
207. Id.
208. Id.
209. Id. at 962.
210. Id. (citation omitted).
211. State v. Oakley, 629 N.W.2d 200, 218 (Wis. 2001) (Bradley, J., dissenting).
212. Id. (Bradley, J., dissenting).
research project entitled, "Parent's Fair Share." This program was designed to help so-called deadbeat dads meet their child support payments. The fathers were referred by the courts and then required to participate in numerous activities, including a rehabilitation process whereby they attended peer support groups, learned parenting skills, and underwent job-training, to name a few. Overall, the research conducted during this study indicated that the program led to increased payments to the child support agencies.

In short, the above alternatives would advance the State's interest in requiring Oakley to provide child support for his children. Yet, these conditions would not undermine Oakley's fundamental right to bear children.

VI. CONCLUSION

There is no doubt that David Oakley's nine children have suffered as a result of his poor parenting choices. However, their situation will not be improved by the imposition of an unconstitutional and impractical probation condition—prohibiting Oakley from fathering more children. In upholding this condition, the four male justices of the Wisconsin Supreme Court erroneously adopted the lax reasonability standard when testing the constitutionality of the probation condition. Oakley's preferred strict scrutiny test was equally inappropriate, since probationers are not entitled to the same freedoms as law-abiding citizens. The Wisconsin Supreme Court should have analyzed the condition under the special scrutiny analysis, adopted by other courts where fundamental rights are at issue. Under that test, Oakley's probation condition unquestionably fails because there are alternative means to achieve the same goal, and the condition does nothing to rehabilitate Oakley to become a more supportive father. In other words, stripping Oakley of his most fundamental right to procreate will not necessarily result in him becoming a better parent to those children he already has. To achieve that goal, the court could have fashioned a probation condition, thereby requiring Oakley to attend job-training or

214. See id.
215. See id.
216. Id. at 15.
217. Oakley, 629 N.W.2d at 214.
218. Id. at 207–08.
parenting classes. Further, the majority should have at least considered the reproductive rights of Oakley's female sexual partners before upholding this condition. David Oakley, a deadbeat dad and probationer, though not entitled to the same freedoms as a law-abiding citizen, should have been afforded the protection of the special scrutiny analysis when the court evaluated the constitutionality of his probation condition. The three female justices\textsuperscript{219} on the Wisconsin Supreme Court correctly noted that the majority's holding in this case was unprecedented in the United States\textsuperscript{220}—and so, it should have remained.

ELIZABETH F. MCCRIGHT\textsuperscript{*}

\textsuperscript{219} The three dissenters are comprised of the three female justices on the Wisconsin Supreme Court: Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, and Justice Diane S. Sykes.

\textsuperscript{220} Oakley, 629 N.W.2d at 216 (Bradley, J., dissenting) ("Today's decision makes this court the only court in the country to declare constitutional a condition that limits a probationer's right to procreate based on his financial ability to support his children.").

\textsuperscript{*} This author would like to thank her husband, Ed, and her entire family for their love, patience, and encouragement throughout law school. This author especially thanks her parents for teaching her the value of education and the meaning of gratitude.