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PAY UP OR ZIP UP: GIVING UP THE RIGHT TO PROCREATE AS A CONDITION OF PROBATION

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.”¹ These infamous words written by Justice Holmes in 1927 allowing state ordered sterilization have been the source of controversy and debate for the last seventy-six years. Throughout this time, state courts and the United States Supreme Court have continuously grappled with the idea of what kind of protection to afford an individual in regard to his right to procreate. While mandatory sterilization is not as prominent a remedy these days,² the latest trend³ is to condition a criminal’s probation on the promise that he or she will not procreate during the probationary period.

This note will examine a person’s right to procreate in light of the recent Wisconsin Supreme Court case of Wisconsin v. Oakley.⁴ After a historical analysis of the right to privacy, this note will consider what constitutional standard should be used to examine the right to procreate. The analysis will then turn to a comparison of rights lost while in prison against those lost while on probation and will ultimately conclude that rights infringed upon while on probation are subject to a lesser standard of constitutional scrutiny than the infringement of fundamental rights of a free person. This note will argue that the decision in Wisconsin v. Oakley to make probation conditional on a promise not to procreate is both constitutional and a valuable alternative to prison.

INTRODUCTION

In Wisconsin v. Oakley, Defendant David Oakley, the father of nine children by four different women intentionally refused to make child support

2. See generally Jason O. Runckel, Note, Abuse It and Lose It: A Look at California’s Mandatory Chemical Castration Law, 28 PAC. L.J. 547 (1997) (discussing the growing use of mandatory chemical castration for repeat sex offenders).
payments and was behind in payments in excess of $25,000. The circuit court rationalized that had Mr. Oakley paid something or made an earnest effort to pay anything, he would not be in court that day. Recognizing that if Mr. Oakley went to prison, he would not be in a position to support any of his children, Judge Hazelwood sentenced him to three years in prison on the first count, imposed and stayed an eight-year term on the two other counts, and imposed a five-year term of probation consecutive to his incarceration. His probation was conditioned on that fact that “while on probation, Oakley [could not] have any more children unless he demonstrate[d] that he had the ability to support them and that he [was] supporting the children he already had.” The Wisconsin Supreme Court concluded that in light of the ongoing victimization of Oakley’s nine children and his record of disregard for the law, the condition of not procreating unless he can support that child and his current children is not overly broad and is reasonably related to Oakley’s rehabilitation. Mr. Oakley argued that the condition imposed by Judge Hazelwood violated his constitutional right to procreate, but the Supreme Court of Wisconsin reasoned that because Oakley was convicted of intentionally refusing to pay child support, which was a felony in Wisconsin, and could have been imprisoned for six years, the probation condition which infringes on his right to procreate was valid.

I. RIGHT TO PRIVACY

While the phrase “right to privacy” is not explicitly mentioned in the Constitution, courts have found an implicit guarantee of the right to privacy in different sections of the Constitution. In a line of decisions going back as far as 1891, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have found at least the roots of that right in the First Amendment, the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth

5. Id. at 202 (all facts articulated in this section are taken from the court’s opinion in Oakley).
6. Id.
7. Id. at 201.
8. Id. at 201-02.
11. See Roe, 410 U.S. at 152.
12. See id. (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
13. See id. (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967)).
Amendment,\textsuperscript{15} or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.\textsuperscript{16}

The Due Process Clause of the Fourteenth Amendment guarantees that no "state [shall] deprive any person of life, liberty or property, without due process of law."\textsuperscript{17} While courts have not defined the term "liberty" with great exactness, it certainly denotes more than just mere freedom from bodily restraint.\textsuperscript{18} As early as 1923, the Supreme Court was declaring that one's liberty included:

\begin{quote}
[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{19}
\end{quote}

The Supreme Court has recognized that within this zone of privacy lie several fundamental constitutional guarantees,\textsuperscript{20} and in deciding which rights are "fundamental" the courts must assess whether there is an explicit or implicit guarantee of this right in the Constitution.\textsuperscript{21}

\section*{A. Fundamental Rights}

The Supreme Court has found that several rights not specifically mentioned in the Constitution should be protected as fundamental rights. One example of this is the right to marry.\textsuperscript{22} In \textit{Griswold v. Connecticut}, the Supreme Court declared that, "Marriage is a coming together for better or worse, hopefully enduring and intimate to the degree of being sacred."\textsuperscript{23} The Supreme Court sees the fundamental rights of personal, marital, familial, and sexual privacy to be protected under the Constitution,\textsuperscript{24} and it is a well-settled principle with the Court that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.\textsuperscript{25}

\textsuperscript{15} See id. (citing Griswold, 381 U.S. at 486 (Goldbert, J., concurring)).
\textsuperscript{16} See Roe, 410 U.S. at 486. (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
\textsuperscript{17} U.S. CONST. amend. XIV, § 1.
\textsuperscript{18} See Meyer, 262 U.S. at 399.
\textsuperscript{19} Id.
\textsuperscript{20} See Griswold, 381 U.S. at 485.
\textsuperscript{21} See Griswold, 381 U.S. at 486.
\textsuperscript{22} See Griswold, 381 U.S. at 486.
\textsuperscript{23} Id.
\textsuperscript{24} See Roe v. Wade, 410 U.S. 113, 129 (1973) (citing Griswold, 381 U.S. at 486).
\textsuperscript{25} See Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) ("The right to marry is of fundamental importance for all individuals" and "is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause."); Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).
B. The Right to Procreate as a Fundamental Right

The Supreme Court has never explicitly guaranteed anyone a liberty interest in having a sex drive or in not being temporarily prevented from producing offspring.26 However, the Supreme Court recognized a broad right to procreate in *Skinner v. Oklahoma*.27 Petitioner, Jack Skinner, was convicted of the crimes of stealing chickens and robbery with firearms, and he was sentenced to the Oklahoma State Reformatory. Under Oklahoma’s Habitual Criminal Sterilization Act, any habitual criminal convicted of felonies involving moral turpitude may have a proceeding brought against them in court for a judgment that such a person should be rendered sexually sterile. The Supreme Court decided that because sterilization would permanently deprive Skinner of his right to procreate, the Oklahoma statute was unconstitutional.28

Even though the Court decided *Skinner* purely on equal protection grounds, Justice Douglas inferred that procreation is a fundamental right by saying, “[W]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.”29 Justice Douglas went on to state that a “strict scrutiny” analysis must be employed whenever a state’s classification authorizes sterilization because such a classification affects a fundamental right.30

The right to have children is a basic human right and an aspect of the fundamental liberty that the Constitution zealously guards for all Americans.31 The Supreme Court has stated that:

[The] law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, . . . [and the law protects] 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.32

Although all of the Supreme Court cases dealing with the fundamental right of procreation have been in the context of a permanent deprivation of the

27. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (all facts articulated in this section are taken from the Court’s opinion in *Skinner*).
28. *Id.* at 541.
29. *Id.*
30. *Id.*
31. *See id.* at 536.
right to procreate,33 in broad terms it is well accepted that the right to procreate has been declared a fundamental right in our society. Under the Establishment Clause or the Due Process Clause of the Fourteenth Amendment, the right to privacy in our country has been extended to include the right of a person not to be permanently deprived of the right to procreate.

It can be argued that Mr. Oakley’s right to procreate is not a classical example of a fundamental right because he is not being permanently deprived of this right like other petitioners were in previous procreation cases.34 The previous cases that deem the right to procreate as a fundamental right that should be strictly scrutinized35 are not necessarily controlling for Mr. Oakley’s case. Those cases deal with issues such as sterilization and irreversibly taking away someone’s right to have a child. Here, in contrast, Mr. Oakley’s right to procreate is only being infringed upon for a limited time and by his own choice. If he can prove that he is able to support his current children and any future children, he has total freedom to procreate. This case is not analogous to earlier sterilization cases because there is no permanent deprivation of Mr. Oakley’s right to procreate. Whether by supporting his family, waiting out the probation sentence, or waiving probation in order to go to prison, Mr. Oakley will in a short matter of time be returned the right to procreate as often as he chooses. His right to procreate is merely restricted, not eliminated.36

However, it is not necessary to examine this argument at great length because the constitutionality of Mr. Oakley’s probation condition does not rest on whether or not the right to procreate is a fundamentally protected right by the Constitution. Even conceding that the right to procreate is given broad constitutional protection as a fundamental right, the condition placed on Mr. Oakley’s probation can still pass constitutional scrutiny.

33. See generally Skinner, 316 U.S. at 535 (declaring a state sterilization statute unconstitutional, stating that “marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects . . . . He is forever deprived of a basic liberty.” (emphasis added)); Casey, 505 U.S. at 833 (1992) (right to terminate pregnancy affirmed); Roe v. Wade, 410 U.S. 113 (1973) (right to terminate pregnancy); and Griswold v. Connecticut, 381 U.S. 479 (1965) (ban on contraception).
34. See the situations described in note 33, supra.
35. See, e.g., Skinner, 316 U.S. at 541.
36. See Wisconsin v. Oakley, 629 N.W.2d 200, 208, 212 (Wis. 2001); see also Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988) (an inmate denied the right to artificially inseminate his wife, tried to rely on Skinner v. Oklahoma for support that the right to procreate is a fundamental right, but the court stated that “because Skinner involved a permanent deprivation of the means to procreate, rather than a mere delay as in petitioner’s case, this Court finds Skinner non-dispositive”).
II. STANDARDS OF CONSTITUTIONAL SCRUTINY

A. Strict Scrutiny

Depending on what type of infringement is occurring, there are different standards employed for constitutional scrutiny, the highest level of which is strict scrutiny. Strict scrutiny applies to any government action that calls for differential treatment of individuals because of their race, national origin, alienage, or any characteristic the Court deems “suspect.” When one’s “fundamental rights” are involved, the Court has held that this too deserves a strict scrutiny analysis and that any regulation limiting these rights may be justified only when there is a compelling state interest, and the legislative enactment must be narrowly drawn to express only the legitimate state interests at stake.

In practice, for a means to be “narrowly tailored,” there must be no feasible alternative available, and it must be the “least-intrusive means” possible. This is the crucial difference from the rational basis test, and it makes the “narrowly tailored” prong of the test the most difficult to meet. In every situation, a feasible alternative can almost always be devised, and the history of cases decided under strict scrutiny show that “almost all government actions analyzed under strict scrutiny are found unconstitutional.” In fact, many have described the strict scrutiny test as “strict in theory, fatal in fact.”

39. Logan, supra note 37, at 464 (citing Rodriguez, 411 U.S. at 51).
40. See id.
41. See id. (citing Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 629 n.9 (1989) (“[J]udges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.”) (internal quotation marks omitted); 2 CHESTER JAMES ANTEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 25.02 at 8 (2d ed. 1997) (“[S]trict scrutiny as employed by the Court create[s] virtually insurmountable hurdles for the government seeking to defend its classification.”)). Examples of cases where state statutes have been struck down under a strict scrutiny analysis include Zablocki v. Redhail, 434 U.S. 374 (1978) (statute requiring deadbeat parents to get court approval before obtaining a marriage license); Roe v. Wade, 410 U.S. 113 (1973) (abortion statute prohibiting abortions at any stage of pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute prohibiting any person from using any drug, medicinal article or instrument for the purpose of preventing conception); and Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute allowing sterilization for habitual felony offenders).
42. See Logan, supra note 37, at 464-65
B. Intermediate Scrutiny

The intermediate level of scrutiny was developed as a separate standard because there are instances in which neither the rigorous level of strict scrutiny nor the deferential standard of rational basis is appropriate. Craig v. Boren, the first case to use strict scrutiny, identified gender as the first of the so-called “quasi-suspect” classifications that trigger intermediate scrutiny because gender meets some of the qualities of suspect classes but not all. Intermediate scrutiny examines whether the legislative enactment serves an “important” governmental interest and whether the means used are “substantially related” to accomplishing that goal.

C. Rational Basis

If an act is to be reviewed under the rational basis standard, it is presumed that the action is a legitimate exercise of governmental discretion. Historically, courts have used the rational basis level of scrutiny when evaluating social or economic legislation. It is the default method for examining assertions of equal protection violations, and it applies unless the governmental action uses classifications such as race or sex which have often been used as a means of discrimination.

When a right involved is not fundamental, the state’s regulation will pass constitutional review if it meets the mere rationality test. To satisfy this mere rationality test, a court only needs to examine whether the act in question serves a legitimate governmental interest and whether the classification used is rationally related to furthering that governmental interest. While rights involved still receive constitutional protection under the rational basis test, it is an extremely deferential standard and an easy test for legislation to pass.

43. See id. at 465 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33 at 1609-10 (1988)).
45. See Logan, supra note 37, at 465.
46. See id. at 465 (citing Craig, 429 U.S. at 197).
47. See id. at 462 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).
48. See id. at 462-63 (citing Hartwin Bungert, Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569, 578 (1994)).
49. See id.
51. See Logan, supra note 37, at 462-63 (citing City of Cleburne, 473 U.S. at 440).
52. See id.
There have been variations of the rational basis standard used that are somewhat more demanding on the government. One variation requires a “fair and substantial relation to the object of the legislation.” Other courts have struck down statutes under rational basis scrutiny after undertaking a detailed examination of the government’s purposes and means. This approach has been described as “rational basis with teeth.” Although these versions of the rational basis test have sometimes provided a level of scrutiny higher than just mere rationality, these variations on the traditional rational basis test generally still provide a high degree of deference to legislatures.

D. Analysis

The Fourteenth Amendment’s privacy protection forbids the government from infringing on fundamental liberty interests of a free person unless the infringement is narrowly tailored to serve a compelling state interest. Under an interpretation that the right to procreate is a fundamental right, Mr. Oakley argued that his probation condition warrants strict scrutiny. If the restriction on Mr. Oakley’s right to procreate in Wisconsin v. Oakley were to be analyzed under the strict scrutiny approach, the probation condition must be narrowly tailored to serve a compelling state interest.

Both the majority and dissent agree that there is a compelling state interest at stake. As the majority in the case points out, refusal to pay child support by so-called “deadbeat parents” has fostered a crisis with devastating implications for children today. In 1997, out of 26.4 billion dollars awarded by a court order to custodial mothers, only 15.8 billion dollars was actually paid, and these figures only represent a small portion of the child support

53. See id.
54. See id. (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
55. See id. (citing City of Cleburne, 473 U.S. at 450 (using rational basis scrutiny to strike down the denial of a zoning permit for a group home for the retarded because the court found the denial was based purely on prejudice); Plyer v. Doe, 457 U.S. 202, 224 (1982) (invalidating a state statute prohibiting use of state funds for education of illegal aliens under a standard requiring that the legislation must further a “substantial goal” to demonstrate the rationality of denying such a benefit)).
56. See Logan, supra note 37, at 462-63 (citing Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 CONST. COMMENT. 257, 260 (1996)).
57. See id. at 464 (citing Kenji Yoshino, Note, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,” 108 YALE L.J. 485, 488 n.5 (1998)).
59. See Wisconsin v. Oakley, 629 N.W.2d 200, 207 (Wis. 2001).
60. Id. at 208.
61. See generally id.
62. Id. at 203.
obligations that could be collected if every custodial parent had a support order. In addition to long-term consequences of non-payment of child support such as poor health, behavioral problems, delinquency and low educational attainment, inadequate child support is a direct contributor to child poverty. In our country, approximately twelve million children, or about one in every six, live in poverty. In the state of Wisconsin alone, poverty strikes approximately 200,000 children. There is little doubt that payment of child support benefits poverty-stricken children, so enforcing child support orders is a compelling state interest.

The majority in the case also argued that there is a compelling state interest in rehabilitating Oakley through probation rather than prison because the alternative to probation is incarceration for eight years, which would further victimize his children.

Although Mr. Oakley concedes that the State’s interest in requiring parents to support their children is compelling, he argues that the means employed are not narrowly tailored. Mr. Oakley believes that his right to procreate is effectively eliminated by this condition because he “probably never will have the ability to support his children.”

The majority of the court argued that this restriction is narrowly tailored because Mr. Oakley can satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by the law. The court argued that the condition is narrowly tailored because the alternative – eight years in prison – is much broader than this conditional impingement on his procreative freedom because it would deprive Mr. Oakley of his fundamental right to be free from physical restraint. Judge Hazelwood of the circuit court actually believed that he was preserving much of Oakley’s

65. Id.
66. Id. (citing Bernadetter D. Proctor & Joseph Falaker, United States Census Bureau, Poverty in the United States vi (2000)).
67. Id.
68. See id. at 204.
69. Oakley, 629 N.W.2d at 212.
70. Id. at 208.
71. Id.
72. Id. at 212.
73. Id.
liberty through this condition on his probation because he did not send him to prison.  

While the majority in the case seemed to believe that this condition on Mr. Oakley’s probation would pass even the strict scrutiny test, the dissent states, equally as strong, that this test could never pass that heightened level of scrutiny. The dissent looked to the case of Zablocki v. Redhail75 for help in deciding what it means to be “narrowly tailored.” That case held that a Wisconsin statute that prohibited people from marrying until they established that their child support obligations were met was not a justifiable means of advancing the state’s interest in providing support for children.76 The Court held that the Wisconsin law provided other available means of advancing the state’s interest that did not infringe upon the liberty interest at stake.77 The dissent argued that the Zablocki analysis of “narrowly tailored” applies to this case, and because there are several less intrusive means of advancing the compelling state interest in ways that do not infringe upon Mr. Oakley’s right to procreate, this condition can never pass the heightened strict scrutiny analysis.78 Examples of less intrusive remedies would be for Oakley to have his probation conditioned on spending a substantial amount of time in jail with work release privileges, maintaining two full time jobs, or taking parenting classes.79

The majority of the court in Wisconsin v. Oakley erred by arguing the case under a strict scrutiny analysis because it is a losing argument. Strict scrutiny is the highest standard of scrutiny, and under this standard, the means employed by the government must be narrowly tailored to advance the compelling government interest.80 This requires the least-intrusive means and no feasible alternative.81 While the first prong of the test, compelling state interest, is clearly met, Mr. Oakley’s probation condition is not narrowly tailored. The dissent points out several realistic alternatives to limiting his right to procreate, so it clearly cannot be claimed that there is no feasible alternative.

The majority argued a broader definition of narrowly tailored by claiming that Mr. Oakley can easily bypass the restriction on his probation by paying the support to his children and that probation is a better alternative to prison. While these arguments are compelling, the “narrowly tailored” prong is a high

74. Oakley, 629 N.W.2d at 213-14.
76. Id. at 388-90.
77. Id. at 389.
78. See Oakley, 629 N.W.2d at 218.
79. Id. at 218 n.3.
level of scrutiny that has been shown to strike down most government actions encroaching on fundamental rights. The majority in Oakley has misplaced their argument because under a strict scrutiny analysis, the restriction on Mr. Oakley’s probation that he not have any more children unless he demonstrates the ability to support them and that he is supporting the children he already has, would be unconstitutional because it is limiting a fundamental right to procreate by means that are not narrowly tailored.

Although the Supreme Court of Wisconsin should lose on its strict scrutiny argument, the restriction placed on Mr. Oakley’s probation is not actually unconstitutional because strict scrutiny is the wrong standard to apply. Even conceding that the right to procreate is a fundamental right into which an encroachment would normally demand strict scrutiny because Mr. Oakley is on probation, an infringement on his fundamental rights invoke a lesser standard of scrutiny.

III. STANDARD OF CONSTITUTIONAL SCRUTINY FOR PRISON AND PROBATION

A. Introduction

For various reasons, including demographics and the changing size of the prison population, conventional intermediate sanctions such as probation, parole, and suspended sentences have come to be regarded as valuable alternatives to incarceration. What has become increasingly popular is the imposition of conditions on conventional probationary sentences. Typically, the court will grant probation subject to a list of specific conditions. Classic examples of these conditions on probation include substance abuse rehabilitation, employment, educational or training programs, confinement, monitoring, and others. The work-release program, a commonly imposed

82. Examples of cases where state statutes have been struck down under a strict scrutiny analysis include Zablocki v. Redhail, 434 U.S. 374 (1978) (statute requiring deadbeat parents to get court approval before obtaining a marriage license); Roe v. Wade, 410 U.S. 113 (1973) (abortion statute prohibiting abortions at any stage of pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute prohibiting any person from using any drug, medicinal article or instrument for the purpose of preventing conception); and Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute allowing sterilization for habitual felony offenders).


84. Id. at 1947.

85. Id.

86. See id. at 1947-48 (citing Thomas Bonczar, U.S. Dep’t of Justice, Characteristics of Adults on Probation, 1995, at 7 (1997) (59% of federal probationers were required to participate in rehabilitation programs in 1995, 40% of federal probationers were required to participate in employment, educational or training programs, and confinement, monitoring or other restrictions were required of 31% of federal probationers in 1995)).
condition to probation, has been available since at least 1975 in every state and in the federal system, and by 1990, home surveillance systems were available in all fifty states.

Although the concept of probation in a criminal case has its origins in the common law, the alternative remedy of probation is now governed by statute. Massachusetts enacted the first probation statute in 1878, basing it largely upon the groundwork laid by John Augustus. A number of states quickly followed, and the federal probation legislation was passed in 1925. Currently, all fifty states and the federal government have probation statutes, and the number of individuals currently on probation is growing rapidly each year.

Legislatures give little direction to sentencing courts on how to handle probation conditions. When describing the scope of a court’s sentencing power, courts and commentators have used terms such as “breathtaking” and have taken notice of the fact that legislative limitations are “conspicuously

87. See id. at 1948 (citing ROBERT ROSENBLUM & DEBRA WHITCOMB, U.S. DEP’T OF JUSTICE, MONTGOMERY COUNTY WORK RELEASE/PRE-RELEASE PROGRAM 11 (1978)).

88. See Developments in the Law, supra note 83, at 1948 (citing INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 85-120, 104 (Michael Tonry & Kate Hamilton eds., 1995)).


90. Id. at 80.

91. See id. (referring to John Augustus, a Boston cobbler, as the inventor of probation) (citing ANDREW KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION 68 (2d ed. 1997)).

92. Id. (citing Greenberg, supra note 89, at 50-52).

93. See id.

In 1984 . . . there were 1.7 million people—one out of every thirty-five adult American males—on probationary supervision. By 1996, that number had skyrocketed to well over three million probationers. The numbers are equally staggering when one looks at the percentage of convicted criminals who are placed on probation: forty-nine percent of the defendants convicted of a felony in a state court in 1994 were placed on some form of probation.

Id.

94. See Horwitz, supra note 89, at 80.
One media account “suggested that the content of special conditions is limited only by the sentencing judge’s imagination.”

B. Reliance on Contract, Waiver, and Act of Grace Theories

When a defendant actually challenges a probation condition, there are several procedural obstacles that must be overcome. The common feeling among courts is that an offender is free to reject the imposition of probation and to accept the alternative of incarceration. It is therefore believed that once a defendant makes the “choice” of probation, he or she is precluded from challenging the validity of these probationary conditions.

The most common formulation of this preclusion theory is the “contract theory,” the foundation of which is the belief that once a probationer accepts probation as an alternative to incarceration, he has formed a contractual agreement with the sentencing court. Both the Supreme Court and Congress have invalidated the contract theory. Nevertheless, courts have continued to use the contract theory in different forms.

Another theory employed by courts to justify the imposition of conditions on probation is the waiver theory. Under this theory, courts will find that by accepting any conditions placed on his probation, a defendant has forfeited or waived the right to challenge them later.

A final theory used to justify probation conditions is the so-called “act of grace” theory. The act of grace theory has its origins in two United States
Supreme Court cases: Burns v. United States and Escoe v. Zerbst. Although the statements about grace were not part of the central holding of these cases, courts soon began to rely on these statements about graciously giving the convicted probation instead of incarceration. One commentator has described the logic of the act of grace theory as such that:

The convicted defendant has no right to expect anything less than the full penalty prescribed by law. Thus, the sentencing judge has untrammeled discretion to grant or withhold probation, and should he decide to offer the offender a modicum of freedom, he may make the grant subject to any conditions he believes to be proper. The probationer will not be heard to complain of this voluntary act of clemency, even though the conditions imposed are arbitrary, unfair, vague, or otherwise invalid.

Like the contract theory, the Supreme Court called for an end to any reliance on the act of grace theory, declaring it to be “clear... that a probationer [could] no longer be denied due process in reliance on the dictum in Escoe v. Zerbst that probation is an ‘act of grace.’” Despite the Supreme Court’s clear rejection of any “act of grace” theory, some appellate courts continue to rely on the theory as a justification for denying review of probation conditions. The act of grace theory frequently appears today couched in language such as “probation is not a right but a privilege.”

While the contract theory, waiver theory, and act of grace theory may seem like appealing arguments to justify why Mr. Oakley should forfeit his right to procreate during his probationary period, the Supreme Court and Congress have specifically rejected these theories. Therefore, it is unnecessary to even

107. Id.
110. See Horwitz, supra note 89, at 89.
111. Id. (citing Note, Judicial Review of Probation Conditions, 67 COLUM. L. REV. 181, 189 (1967)).
112. Id. (citing Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973) (punctuation in original)).
113. Id. (citing United States v. Kohlberg, 472 F.2d 1189, 1190 (9th Cir. 1973) (relying on act of grace theory to uphold several probation conditions, including one that precluded association with “known homosexuals”); People v. Pointer, 199 Cal. Rptr. 357, 363 n.7 (Cal. Ct. App. 1984) (noting that “some reviewing courts continue to give lip service to the act of grace theory even though the United States Supreme Court has repudiated it”); State v. Kohlman, 854 P.2d 318, 319 (Kan. Ct. App. 1993) (relying on act of grace theory to uphold unspecified probation conditions); State v. Means, 257 N.W.2d 595, 600 (S.D. 1977) (relying on act of grace theory and applying probation review standards to uphold several bail conditions that prohibited defendant from participating in activities of American Indian Movement)).
114. See id. at 90 (citing Gilliam v. Los Angeles Mun. Ct., 159 Cal. Rptr 74, 77 (Cal. Ct. App. 1979) (commenting that probation is a privilege, not a right); State v. Heyn, 456 N.W. 2d 157, 160 (Wis. 1990) (probation is privilege, not a right)).
undergo an analysis of these theories. The only justification for Mr. Oakley’s probation condition passing constitutional muster is under the theory that probation, like prison, is subject to a lesser standard of scrutiny.

C. Prison Restrictions Are Not Analyzed under Strict Scrutiny

The greatest challenge to probation regulations is that these innovative sentences imposed by sentencing courts infringe on one’s fundamental rights. To properly understand what analysis probation conditions should receive, it is important to first look at what constitutional standard of scrutiny is used when fundamental rights of prisoners are infringed upon.

The leading case on the standard of scrutiny in the prison context is Turner v. Safley. Two regulations were at issue in that case: a regulation on the type of correspondence inmates were allowed to have with other inmates, and a marriage regulation permitting an inmate to marry only with the permission of the prison superintendent and only when there is a compelling reason to provide this approval. The Supreme Court started its analysis of this case with the proposition that: “[P]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” However, the Court then went into a lengthy analysis of several cases involving prisoners’ rights and ultimately concluded that “in none of these . . . ‘prisoners’ rights’ cases did the Court apply a standard of heightened scrutiny.” The Court resolved the question of what constitutional standard to apply to prison regulations when it stated that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if ‘prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.’”

The Turner Court listed several factors that are relevant in determining the reasonableness of a prison regulation. First, there must be a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it. The governmental objective must also be legitimate and neutral. A second factor is whether there are alternative

115. See Developments in the Law, supra note 83, at 1949.
117. Id. at 81-82.
118. Id. at 84-87.
120. Id. at 87.
121. Turner, 482 U.S. at 89.
122. Id. at 90.
123. Id.
means of exercising the right that remain open to prison inmates.\footnote{124} A third condition is the impact accommodation of the asserted constitutional right will have on guards, other inmates, and on the allocation of prison resources generally.\footnote{125} The final factor relevant in determining the reasonableness of a prison regulation is that the absence of ready alternatives is evidence of the reasonableness of the regulation.\footnote{126}

An example of how this lesser standard of scrutiny in the prison context works is best shown through a comparison of two cases on the fundamental right of marriage and procreation. At issue in the 1978 case of \textit{Zablocki v. Redhail}\footnote{127} was a statute stating that any person with an obligation to pay child support to a child not in their custody must obtain court permission to marry.\footnote{128} Mr. Redhail was not on probation, parole, or incarcerated when he challenged the constitutionality of this statute. The Court in \textit{Zablocki} held that the statute was unconstitutional because Mr. Redhail’s fundamental right to marry was infringed, and the statute could not pass a heightened standard of strict scrutiny.\footnote{129}

In contrast to this case is the 1994 case of \textit{Hernandez v. Coughlin}.\footnote{130} Hernandez, an inmate, brought an action against state correction officials for denying him conjugal visitation rights. While acknowledging that many constitutional guarantees survive incarceration,\footnote{131} the Second Circuit relied on Supreme Court precedent to hold that a prisoner’s fundamental right to marry is substantially limited as a result of incarceration.\footnote{132} The court found it significant to note that Hernandez possessed the right to maintain his procreative abilities for later use once released from custody.\footnote{133}

Chief Justice Rehnquist, in the 1987 case of \textit{O’Lone v. Estate of Shabazz},\footnote{134} made this distinction between the rights of a free person and the rights of one incarcerated even more clear. He stated that “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”\footnote{135} Chief Justice Rehnquist announced that prison regulations that
allegedly infringed on constitutional rights were to be judged under a “reasonableness” test which was less restrictive than the test of strict scrutiny ordinarily applied to alleged infringements of fundamental constitutional rights.\(^{136}\) In describing the “reasonableness test,” the Court relied upon the four factors set out by the *Turner v. Safely* court to determine the reasonableness of a prison regulation.\(^{137}\)

Later cases have built upon this fundamental idea that the reasonableness standard is to be applied to cases where a prisoner’s fundamental rights are being restricted, even if the State under other circumstances would be required to satisfy a more rigorous standard of review.\(^{138}\) It is now a well-settled principle that a prisoner’s fundamental rights are subject to a lower standard of constitutional scrutiny under the “reasonableness test.” Cases of this nature include\(^{139}\) infringements upon the fundamental right of First Amendment freedom of speech,\(^{140}\) First Amendment freedom of association,\(^{141}\) First

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136. *Id.* at 347.

137. *Id.* at 350-53. The four factors from *Turner* were: (1) valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, (2) alternative means of exercising the right that remain open to prison inmates, (3) impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally, and (4) reasonableness of a prison regulation is that the absence of ready alternatives is evidence of the reasonableness of the regulation. *Id.*

138. See Goodwin v. Turner, 908 F.2d 1395, 1398 (8th Cir. 1990) (“[T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate’s constitutional rights is to ask whether the regulation is ‘reasonably related to legitimate penological interest.’”).

139. Wisconsin v. Oakley, 629 N.W.2d 200, 212 n.27 (Wis. 2001) (all examples of the cases cited hereinafter in footnotes 140-47 of this note come from this opinion).

140. State v. Miller, 499 N.W.2d 215, 217-18 (Wis. Ct. App. 1993) (holding that probation condition prohibiting probationer from telephoning any woman not a member of his family without prior permission was a reasonable and not overly broad infringement); United States v. Turner, 44 F.3d 900, 903 (10th Cir. 1995) (asserting that probation condition requiring defendant convicted of obstructing a federal court order to refrain from harassing, intimidating, or picketing in front of any abortion family planning service center a permissible restriction because it was reasonably related to the goal of prohibiting further illegal conduct); United States v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988) (upholding probation condition that defendant not speak for money about her crime, even though it infringed on her right to free speech, because it was reasonably related to her rehabilitation); United States v. Beros, 833 F.2d 455, 467 (3rd Cir. 1987) (upholding probation condition that defendant refrain from representing union as elected official or paid employee because significant imposition upon defendant’s First Amendment rights was “reasonable in light of the offense”).

141. *Turner*, 44 F.3d at 903 (ruling that probation condition prohibiting defendant from harassing, intimidating or picketing in front of any abortion family planning services center permissible restriction of First Amendment freedom of association when convicted of obstructing federal court order and restriction reasonably related to goal of prohibiting further illegal conduct); United States v. Hughes, 964 F.2d 536, 542-43 (6th Cir. 1992) (upholding as reasonable a probation condition that prohibited the defendant from representing or serving as officer in Communications Workers of America constitutionally permissible when defendant
Amendment freedom of religion,\textsuperscript{142} Second Amendment right to bear arms,\textsuperscript{143} Fourth Amendment right to be free from unreasonable searches and seizures,\textsuperscript{144} the right to engage in political activity or run for political office,\textsuperscript{145} freedom of movement,\textsuperscript{146} and the right to procreate.\textsuperscript{147}

\\textsuperscript{142} United States v. Juvenile No. 1, 38 F.3d 470, 473 (9th Cir. 1994) (holding that probation condition prohibiting Native American juveniles who pleaded guilty to simple assault from possessing firearms until age twenty-one is constitutionally permissible even though hunting with firearm is an important religious ritual to juveniles because probation condition reasonably served statutory goals of punishment, deterrence and public protection).

\textsuperscript{143} See generally Rice v. United States, 850 F. Supp. 306 (E.D. Pa. 1994) (ruling that Congress could restrict a person’s right to possess a firearm, after a conviction for possession of firearms by a convicted felon, even when a pardon was granted with regard to the underlying felony).

\textsuperscript{144} Griffin v. Wisconsin, 483 U.S. 868, 874-75 (1987) (upholding Wisconsin law allowing a search of a probationer’s home as long as the probation officer has “reasonable grounds” to believe the presence of contraband and reiterating its Morrissey v. Brewer, 408 U.S. 471 (1972) language that “probationers . . . do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special restrictions.’”).

\textsuperscript{145} U.S. v. Peete, 919 F.2d 1168, 1181 (6th Cir. 1990) (holding that probation condition on elected official convicted of attempting to extort bribe lawfully prevented that official from seeking or serving in elected public office during period of probation were valid because it would assist in the probationer’s rehabilitation and protect the public); United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979) (ruling that probationer convicted of violating federal election laws could be lawfully prohibited from running for political office or engaging in political activities during period of probation because the condition was reasonably related to the probationer’s rehabilitation).

\textsuperscript{146} United States v. Lowe, 654 F.2d 562, 568 (9th Cir. 1981) (upholding probation condition that prohibited defendants convicted of entering a submarine base illegally from coming within 250 feet of the base was reasonable “[g]iven the alternatives of imprisonment or some other greater restriction” upon the defendant’s rights of movement, association, and speech); State v. Cooper, 282 S.E.2d 436, 438-39 (N.C. 1981) (ruling that probation condition prohibiting defendant from operating a motor vehicle on the public streets and highways between 12:01 a.m. and 5:30 a.m. was reasonably related to defendant’s rehabilitation where defendant pled guilty to fourteen crimes involving the use of stolen credit cards).

\textsuperscript{147} State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998) (rejecting strict scrutiny of probation condition that required defendant to complete drug counseling and anger management treatment before fathering any future children); Krebs v. Schwarz 568 N.W.2d 26, 27-28 (Wis. Ct. App. 1997) (upholding probation condition that required defendant convicted of sexually...
D. The Similarities of Prison and Probation

While there have been no major court rulings on what constitutional standard of scrutiny to apply to probationers, court rulings have made it clear that probation and prison are similar enough to warrant the same lower standard of scrutiny for restrictions on a probationer’s fundamental rights. The Supreme Court has held that “Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilt . . . . Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments.” The Supreme Court has made clear that probationers do not enjoy the same absolute freedom to which every citizen is entitled, but instead, a “conditional liberty” that is dependent on observance of their special probation restrictions that in themselves infringe on constitutional rights.

There is a great public interest in the protection of the community that justifies treating incarceration and probation similarly. Although it may be argued that probationers were not sentenced to prison and therefore deserve a stronger degree of government protection, this reasoning is flawed. “By definition, a prisoner is not a risk to the community.” In contrast, a probationer’s freedom represents a continuing risk to the community because he is more inclined to commit a crime than a law-abiding citizen. Therefore, closely supervising a probationer is the only way a state can reduce the risk to the community that the probationer will violate the law again, and this accordingly justifies a high level of intrusion into probationer’s rights. “Furthermore, although probationers certainly have a greater expectation of privacy than prisoners, any reasonable expectation of privacy must be less than that of law-abiding persons.”

assaulting his daughter to obtain permission from his probation agent prior to engaging in sexual relationship was reasonable and not overly broad).

148. See Griffin, 483 U.S. at 874 n.2 (“We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are reasonably related to legitimate penological interests. We have no occasion in this case to decide where, as a general matter, that test applies to probation regulations as well.”).

149. See id. at 874.

150. See Logan, supra note 37, at 481 (citing Griffin, 483 U.S. at 874).

151. Id.

152. Id.

153. Id.

154. Id.

155. See Logan, supra note 37, at 481 (citing Griffin, 483 U.S. at 880 (“[I]t is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law . . . .”)).

156. See id.

157. See id.
E. Analysis

When a person is convicted of a crime and sent to prison, he loses certain rights that people not violating the law may enjoy. Since the Court has held that prisoners deserve a lower standard of constitutional scrutiny\(^{158}\) and that probation and prison contain some of the same fundamental characteristics, it is a logical extension of the Supreme Court's interpretation of the "reasonableness test"\(^{159}\) in the prison context to apply it to the probation context.

The "reasonableness test" was formulated for the prison context, and it is necessary to adapt its prongs to fit the different context of probation. Under the first prong of the test, one looks to see if there is a "valid, rational connection"\(^{160}\) between the probation regulation and the legitimate government interest justifying it. Mr. Oakley conceded that there exists a compelling government interest in a father paying child support and not having any more children below the poverty line. Because Mr. Oakley has shown an intentional disregard for his children and the law mandating him to support his children, it is not hard to see a connection between a restriction forbidding him from procreating until he shows he can support all of his current children, which is the government's legitimate interest.

The second factor in the Turner test asks if there are "alternative means of exercising the right that remain open."\(^{161}\) Mr. Oakley still has the right to engage in sexual activity, and alternatives to his restriction would be for Mr. Oakley to get two jobs or take parenting classes to show that he could support his children. By employing these alternatives, Mr. Oakley would then be able to exercise his right to procreate again.

The third factor is unique to the prison context and is not directly applicable to the probation context. It deals with what kind of "ripple effect"\(^{162}\) the asserted right would have on guards and inmates in the closed environment of the correctional institution. Because probationers naturally have more freedom than an inmate confined to prison, instead of fellow probationers or his probation officer feeling the "ripple effect," the people being affected by Mr. Oakley asserting his right to procreate would be his current children, future children, the mothers of these children, and the community at large supporting his children who have fallen below the poverty line.

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160. Id. at 89.
161. Id.
162. Id.
The final factor in the reasonableness test is an analysis of whether there are alternatives to the restriction that would achieve the same goal.\textsuperscript{163} The Turner court makes clear to point out that “this is not a ‘least restrictive alternative’ test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.”\textsuperscript{164} There are no reasonable alternatives to the probation condition imposed on Mr. Oakley that would achieve the same goal of protecting the children. Mr. Oakley has had numerous opportunities to support his children, and yet he continues to intentionally disregard the mandate to support them. Conditioning his probation on getting several jobs to pay his support does not seem to be a realistic alternative.

\textbf{F. Other Constitutional Tests Used for Probation Restrictions}

While the Supreme Court has never articulated a clear standard for how to scrutinize probation restrictions, several appellate level courts have created their own tests. In \textit{United States v. Consuelo-Gonzalez},\textsuperscript{165} the Ninth Circuit considered the legality of a condition that required the probationer to “submit to a search of her person or property at any time when requested by a law-enforcement officer.”\textsuperscript{166} The court created the following standard for its analysis:\textsuperscript{167} “In determining whether a reasonable relationship exists, we have found it necessary to give consideration to the purposes sought to be served by probation, the extent to which the full constitutional guarantees available to those under probation should be accorded probationers, and the legitimate needs of law enforcement.”\textsuperscript{168} Several jurisdictions have adopted this three part test to analyze probation conditions.\textsuperscript{169}

Under this lesser standard of scrutiny, it is obvious that Mr. Oakley’s condition would pass constitutional muster. The purpose of giving Mr. Oakley probation instead of incarceration is to rehabilitate him into a law abiding

\textsuperscript{163} Id.  
\textsuperscript{164} Turner, 482 U.S. at 89.  
\textsuperscript{165} United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975).  
\textsuperscript{166} See Horwitz, supra note 89, at 101 (citing Consuelo-Gonzalez, 521 F.2d at 261).  
\textsuperscript{167} Id.  
\textsuperscript{168} See Consuelo-Gonzalez, 521 F.2d at 262.  
\textsuperscript{169} See Horwitz, supra note 89, at 101 (citing United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981) (applying restated version of Consuelo-Gonzalez test and noting “broad discretion” of the trial judge in establishing probation conditions); United States v. Tomry, 605 F.2d 144, 148 (5th Cir. 1979) (discussing former congressman who violated Federal Election Campaign Act on probation with the restriction not to engage in any political activity and court held that “a condition of probation satisfies the statute so long as it is reasonably related to rehabilitation of the probationer, protection of the public against other offenses during its term, deterrence of future misconduct by the probationer or general deterrence of others, condign punishment or some combination of these objectives.”)).
father who pays child support while giving him the opportunity to make money and develop relationships with his children. Courts have stated that a person’s right to procreate while in prison is not an absolute right, and thus the same can apply to probation. Additionally, with the overwhelming number of children below the poverty line, there is an obvious need for some law enforcement and judicial control over a parent intentionally refusing to pay child support.

Another standard applied to analyze probation conditions is the “unconstitutional conditions” doctrine. This balancing test involves four factors: (1) the nature of the right affected; (2) the degree of the infringement of the right; (3) the nature of the benefit conferred; and (4) the nature of the state’s interest in conditioning the benefit. This too has been a valid test used by a number of courts and commentators to analyze the constitutionality of probation conditions.

Another standard of scrutiny that has been applied to probation, and the standard adopted by the Wisconsin Supreme Court in Wisconsin v. Oakley, is that “the conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the defendant’s rehabilitation.” Followers of this standard adopt the American Bar Association standard that:

Conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life. They should be reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion. They should not be so vague or ambiguous as to give no real guidance.

G. Analysis

Although it may be argued that the condition on Mr. Oakley’s probation would not pass strict scrutiny, “probation conditions – like prison regulations –

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170. See id. at 105.
171. See id. at 105-06.
172. See id. at 106 (citing People v. Pointer, 199 Cal. Rptr. 357, 365 n.11 (Cal. Ct. App. 1984) (asserting that unconstitutional conditions doctrine requires that conditions impinging on constitutional rights be reasonably related to compelling state interest in rehabilitation and that no less restrictive alternative be available); Michael G. Honeymar, Jr., Note, Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does it Amount to Establishment of Religion?, 97 COLUM. L. REV. 437, 439 n.9 (1997) (“Various commentators have applied this doctrine to analyze the constitutionality of certain probationary conditions.”)).
174. See Miller, 499 N.W.2d at 218 (quoting A.B.A., Standards Relating to Probation, Sec. 3.2(b), at 44 (Approved Draft 1970)).
are not subject to strict scrutiny.”175 As the Wisconsin Supreme Court points out, if probation conditions were subject to strict scrutiny, then incarceration, a more severe punitive sanction which deprives individuals of their right to be free from physical restraint and infringes upon numerous fundamental rights, would also be subjected to a strict scrutiny analysis.176 If probation conditions were subject to strict scrutiny, it leads to one of two illogical and unworkable conclusions: (1) strict scrutiny for conditions of probation that infringe upon fundamental rights but not for the more restrictive alternative of incarceration, or (2) the state must meet the heavy burden of strict scrutiny every time it is confronted with someone who has violated the law.177

While adhering to the constitutional standard of mere rationality, the Wisconsin v. Oakley court states that the proper test for this analysis is 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.”178

Applying this reasonability standard, the majority of the court found that Mr. Oakley’s condition was not overly broad because it did not eliminate Mr. Oakley’s ability to exercise his constitutional right to procreate.179 His right was merely restricted, and the condition on his probation could be satisfied by making efforts to support his children as required by law or the condition expiring at the end of his probation term.180

While acknowledging that the “no more children” probation condition certainly appears to be reasonably related to Mr. Oakley’s rehabilitation,181 the dissent argues that even in light of the state’s strong interest in protecting against the further victimization of Mr. Oakley’s children, this court-ordered condition on procreation is overly broad.182 The court again relies on Zablocki183 to state that because there are several alternate ways to achieve the state’s goals of rehabilitating Mr. Oakley and making him a supportive father to his nine children, this condition is overly broad.184

175. Wisconsin v. Oakley, 629 N.W.2d 200, 208 n.23 (Wis. 2001).
176. Id. (citing Sherry F. Colb, Freedom from Incarceration: Why is This Right Different from All Other Rights?, 69 N.Y.U. L. Rev. 781 (1994) (advocating strict scrutiny every time an individual is incarcerated because fundamental rights are being infringed upon)).
177. See Oakley, 629 N.W.2d at 208.
178. Id. at 215 (Crooks, J., concurring).
179. Id. at 212.
180. Id.
181. Id. at 221 (Sykes, J., dissenting).
182. Oakley, 629 N.W.2d at 221 (Sykes, J., dissenting).
184. See Oakley, 629 N.W.2d at 221-22 (Sykes, J., dissenting).
In light of the overwhelming consensus that this constitutional test is liberal and easily passable, the dissent’s arguments go more toward refuting a strict scrutiny analysis. If the appropriate test is the rational basis test, then the condition, which is limited in scope and able to be overcome by Mr. Oakley taking responsibility and supporting his children, cannot be said to be overbroad.

Likewise, this condition on his probation passes the second prong of the rational basis test. Because Mr. Oakley’s crime was failing to support his children, a probation condition dealing with procreative rights is reasonably related to the state’s goal of rehabilitating Mr. Oakley and making him a supportive father. The State in the case argues that the condition essentially bans Oakley from violating the law again.\textsuperscript{185} Future violations of the law would be detrimental to Oakley’s rehabilitation, which necessitates preventing him from continuing to disregard its dictates. So the condition on his probation is reasonably related to his rehabilitation because it will assist Mr. Oakley in conforming his conduct to the law.\textsuperscript{186} Because the rational basis test is such an easy standard for this condition on probation to pass, there is no real doubt that this clause in Mr. Oakley’s terms of probation passes constitutional review under this lower scrutiny standard.

It is clear from Supreme Court decisions that strict scrutiny is not the appropriate test to apply to probation conditions. While no clear test has been articulated for the probation context, it is apparent that Mr. Oakley’s probation condition would pass constitutional scrutiny under any of these lower standards of scrutiny. Whether the appropriate test is the rational basis test, reasonableness test, or some combination of the two, the important point to recognize is that strict scrutiny is not the appropriate test to apply to probation conditions, and therefore, the condition on Mr. Oakley’s probation is constitutional.

\textit{H. Examples of Constitutional Probation Conditions}

Probation conditions of all kinds in all different jurisdictions have been held to be constitutional.\textsuperscript{187} In establishing the fact that convicted individuals

\textsuperscript{185} Id. at 213.

\textsuperscript{186} Id.

\textsuperscript{187} See, \textit{e.g.}, United States v. Turner, 44 F.3d 900 (10th Cir. 1995) (prohibiting abortion protestor convicted of obstructing a federal court order from harassing, intimidating or picketing in front of any abortion family planning services center was probation condition was permissible restriction upon protestor’s First Amendment right of free speech and association given that restriction was reasonably related to the goal of prohibiting further illegal conduct); State v. Miller, 499 N.W.2d 204, 215 (Wis. Ct. App. 1993) (explaining condition of probation which prohibited defendant from telephoning any woman not a member of his own family without permission of a probation officer was valid and not unreasonable).
do not enjoy the same liberty and freedom as citizens who have not violated the law,\(^{188}\) the Wisconsin Supreme Court points to the case of *State v. Kline*\(^{189}\) for support of its condition on Mr. Oakley’s probation. In *Kline*, the defendant was a physically and emotionally abusive father, who, when high on methamphetamine, regularly abused his children.\(^{190}\) At one point, the defendant broke his son’s arm, and when he and his wife subsequently had another child, the defendant caused a spiral fracture in his two and a half month old baby’s leg and bruised her head and chest.\(^{191}\) The defendant was sentenced to probation for all of these heinous acts with the condition that, among other things, he obtain prior written approval of the court before fathering any future children.\(^{192}\) Although the defendant argued that this condition deserved strict scrutiny for violating his right to procreate, the Oregon appellate court denied this and determined that the condition was valid because it “did not impose a total ban on defendant’s reproductive rights . . . [it] provide[d] potential victims with protection from future injury and interfere[d] with defendant’s fundamental rights to a permissible degree.”\(^{193}\)

In a similar case, a condition on probation was upheld that required a defendant who sexually assaulted his own daughter to obtain his probation agent’s permission before entering into an intimate or sexual relationship.\(^{194}\) Although the condition infringed upon a constitutional right, the Wisconsin appellate court held that it was reasonable and not overly broad.\(^{195}\)

I. Different Rationales for Probation

There are four different rationales used to support and justify putting a person on probation. The traditional rationale is that probation is for the purpose of offender rehabilitation.\(^{196}\) “Most criminal statutes explicitly state that the purpose of intermediate sanctions is to rehabilitate,\(^{197}\) and the Supreme Court has noted that the purpose of probation is to provide a young or unhardened offender an opportunity to rehabilitate himself without institutional


\(^{190}\) *Id.* at 698.

\(^{191}\) *Id.* at 698-99.

\(^{192}\) *Id.* at 699.

\(^{193}\) *Id.*


\(^{195}\) *Id.* at 28.

\(^{196}\) See *Developments in the Law, supra* note 83, at 1956.

\(^{197}\) See *id.* (citing FLA. STAT. § 921.187(1) (1997) (permitting judges to impose alternatives to incarceration so as to “best serve the needs of society, punish criminal offenders, and provide the opportunity for rehabilitation”); IOWA CODE § 907.7 (1997) (“[T]he purposes of probation are to provide maximum opportunity for the rehabilitation of the defendant.”)).
confinement."198 Another traditional rationale to support probation is the idea of public protection.199 Although incarceration is the ultimate form of public protection, the probation system has also been used to protect the public by imposing restrictions on a probationer’s freedom through various conditions on his or her probation.200 Two less traditional rationales for probation are the ideas of just punishment for the probationer and deterrence for the probation in committing future crimes.201

Wisconsin law gives judges great latitude in choosing between incarceration and probation. In sentencing, a Wisconsin judge can take into account a broad variety of factors including: the gravity of the offense; the need for protection of the public and potential victims; the past record of criminal offenses; any history of undesirable behavior patterns; defendant’s personality, character, and social traits; the results of a pre-sentence investigation; the vicious or aggravated nature of the crime; the degree of 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.202

Wisconsin Statute § 973.09(1)(a) provides that:

[I]f 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 therefore. The court may impose any conditions which appear to be reasonable and appropriate.203

The Wisconsin Supreme Court notes that the purpose of the probation statute is to rehabilitate the defendant and protect society without placing the defendant in prison.204

The Wisconsin Supreme Court believed that giving Mr. Oakley probation was a better alternative to incarceration. “When a judge allows a convicted individual to bypass a prison sentence and enjoy the relative freedom of probation, it is within the judge’s discretion to take reasonable measures to further the objective of rehabilitation and protect society and potential victims from future wrongdoing."205 Restrictions are meant to assure that the

198. See id. at 1956-57 (citing Roberts v. United States, 320 U.S. 264, 272 (1943)).
199. See id. at 1960.
200. Id.
202. See Wisconsin v. Oakley, 629 N.W.2d 200, 205 (Wis. 2001) (quoting State v. Guzman, 480 N.W.2d 446 (1992)).
203. See id. (quoting Wis. STAT. § 973.09(1)(a) (1998)).
204. Id.
205. Id. at 206.
probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer being at large.206

CONCLUSION

The Supreme Court has said that the Fourteenth Amendment’s Due Process clause implicitly includes a right to privacy, which, in turn, includes the fundamental right to procreate. If a law-abiding citizen’s right to procreate was being infringed upon, that person would deserve the highest level of strict scrutiny to determine if the infringement was constitutional. However, prisoners and probationers are subject to a more conditional form of liberty. Prisoners are not afforded strict scrutiny for infringement of their fundamental rights, and because probation and prison share many similarities, a probationer is likewise not afforded the highest level of scrutiny when his rights are infringed. Although courts disagree over which lesser standard to apply to probationer’s rights, the important fact to recognize is that until the Supreme Court announces a specific level of scrutiny to use for probationers, courts are justified in adopting any standard of scrutiny as long as it is not strict scrutiny.

The Wisconsin Supreme Court, in Wisconsin v. Oakley, chose to use the “rational basis test” to evaluate Mr. Oakley’s probation condition. The Wisconsin Supreme Court recognized that the holding in Wisconsin v. Oakley is a narrow holding for an extraordinary set of facts.207 However, the decision by this court is proper in light of the circumstances. Under the rational basis standard, the condition on Mr. Oakley’s probation is not overly broad and is reasonably related to his rehabilitation. Mr. Oakley’s ability to procreate is only restricted, not eliminated, and if he were sent to prison, he would not be able to exercise his procreation rights anyway. When Mr. Oakley intentionally committed the crime of refusing to support his children, he gave up certain rights and freedoms. Given the overwhelming problems that coincide with children in poverty, the state of Wisconsin has a compelling interest in protecting their youth. If Mr. Oakley is on probation, he can work two jobs, make money to support his family, and build a relationship with his nine children. Given the compelling reasons to give Mr. Oakley probation over incarceration, a condition that protects children, simultaneously assists him in his rehabilitation, and possibly deters him from future criminality can only be viewed as a positive step by the Wisconsin Supreme Court.

KELLY R. SKAFF*

206. Id.
207. Oakley, 629 N.W.2d at 214.