1992

Norplant: The New Scarlet Letter?

Michael T. Flannery
University of Arkansas at Little Rock William H. Bowen School of Law, mxflannery@ualr.edu

NORPLANT: THE NEW SCARLET LETTER?

*Michael T. Flannery**

> [W]hat is it but to laugh in the faces of our godly magistrates, and make a pride out of what they, worthy gentlemen, meant for a punishment?[1]

Hester Prynne lived in the eighteenth century in an early New England, Puritan colony and is a character of Nathaniel Hawthorne's classic American novel, *The Scarlet Letter*.[2] Darlene Johnson was born in 1964 and presently lives in California.[3] Except for the decision of Judge Howard Broadman,[4] these two women would have nothing in common. However, when Judge Broadman ordered Darlene Johnson to undergo the implantation of Norplant[5] to effectuate sterilization,[6] the two women then shared a common bond: for the crime they each committed, both were sentenced, in effect, to shame. Hester's crime was adultery; Darlene's crime was child abuse.[7] What is ironic is that in an age when criminals were chained to the

---

* Assistant City Solicitor, Law Department, City of Philadelphia; B.A., The University of Delaware; J.D., The Catholic University of America, The Columbus School of Law. The legal arguments presented in this essay are not necessarily indicative of the author's moral disposition regarding the use of Norplant.

1. NATHANIEL HAWTHORNE, THE SCARLET LETTER 51 (Bantam Classic ed., Bantam Books 1989) (1850).

2. *Id.*

3. *See In re* Johnson, No. 29-390 (Tulare County Super. Ct. Cal. Jan. 2, 1991) *appeal dismissed* (5th Cir. 1992).

4. *Id.*

5. *See infra* notes 21-30 and accompanying text.

6. Technically, an argument may be made that the use of Norplant is not the equivalent of sterilization since the effects of Norplant are completely reversible with the simple removal of the implantation. *See* Carey Q. Gelernter, *Another Choice: New Contraceptive Holds Promise*, CHI. TRIB., Jan. 20, 1991, § 6, at 7 (discussing medical, legal, and social effects of the drug); Stephen M. Lieb, *Judge Orders Contraception*, L.A. TIMES, Mar. 15, 1991, at B6 (distinguishing between sterilization and birth control). Rather, Norplant should be considered a form of birth control since fertility is resumed with the first menstrual cycle subsequent to removal of the tubes. *See* Sylvia Rubin, *Birth Control Breakthrough*, S.F. CHRON., Jan. 28, 1991, at B3. For example, the Delaware Code defines sterilization as "any surgical or medical procedure intended to render a person *permanently* unable to procreate." DEL. CODE ANN. tit. 16, § 5701(a) (1983 & Supp. 1990) (emphasis added). Because Norplant does not render the individual permanently incapable of procreation, its use would not qualify as sterilization under this state statute. For purposes of this Essay, however, sterilization and Norplant are recognized as substantially similar in their effectiveness as forms of birth control.

7. Darlene Johnson pleaded guilty to charges of child abuse after beating her children

stocks and burned at the stake, Hester Prynne was sentenced to wear the embroidered letter "A" on her bosom while in an age when privacy rights are a fundamental element of societal integrity, Darlene Johnson was sentenced to be physically prevented from conceiving children.[8] Perhaps to Judge Broadman, the irony was not so apparent and the sentence of Hester Prynne was not so unusual.[9] In fact, Judge Broadman has sentenced criminals to wear articles of clothing on which their crime was emblazoned.[10] Nevertheless, whether or not the irony was apparent, Judge Howard Broadman has sewn a new judicial thread by holding that in cases of child abuse, Norplant will conveniently serve as the "scarlet letter" of the twenty-first century.

INTRODUCTION

This Essay asserts that the mandatory and involuntary imposition of Norplant is invalid as a punitive tool in sentencing convicted child abusers. However, Norplant may serve as a rehabilitative tool for those who voluntarily consent to the implantation as either a means of sentence reduction or a sentence option.

This Essay begins with a discussion of Norplant and how it has affected

---

with a belt. *In re* Johnson, No. 29-390 (Tulare County Super. Ct. Cal. Jan. 2, 1991) *appeal dismissed* (5th Cir. 1992).

8. *Id.*

9. Referring to some of his novel, unorthodox sentences, *see infra* note 10, including that of Darlene Johnson, Judge Broadman has been quoted as saying: "I don't think these [rulings] are that unusual . . . . If you look at them, they are linear, logical, common-sense decisions. I don't think there is anything that controversial about them." Bill Ainsworth, *'I Take Away People's Rights All the Time'*, LEGAL TIMES, Apr. 8, 1991, at 10, 11.

10. *See* Desda Moss, *Court-Ordered Birth Control Draws Fire*, USA TODAY, Jan. 10, 1991, at 2A (stating that Judge Broadman had ordered a felon to wear his crime—theft—on his T-shirt as part of his probation). Russell Hackler, who had stolen two six packs of beer, was ordered by Judge Broadman to wear a T-shirt that read on the front "MY RECORD AND TWO SIX PACKS EQUAL FOUR YEARS" and on the back it read "I AM ON FELONY PROBATION FOR THEFT." Hackler was subsequently arrested for another theft after he was identified by the T-shirt. John Hurst, *Controversial Judge Dodges Not Only Critics, but Bullet*, L.A. TIMES, Apr. 29, 1991, at A3, A15; Michael Lev, *Judge Is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. TIMES, Jan. 11, 1991, at A17.

Judge Broadman has rendered other unorthodox sentences from the bench, including ordering a defendant to learn how to read, requiring donations of personal property to charity, allowing a child molester to serve his sentence at home provided a sign was posted outside of the home that read, "Do not enter, I am under house arrest," and printing the names of 6,000 county residents, who owed fines, in the newspaper in an effort to stimulate payments. Mark A. Stein, *Judge Stirs Debate with Ordering of Birth Control*, L.A. TIMES, Jan. 10, 1991, at A3, A31. Broadman also ordered an alcoholic to swallow the drug Antabuse, which would make that person violently ill upon drinking alcohol. *Id.* A similar order was upheld in Jaco v. Shields, 507 F. Supp. 67 (W.D. Va. 1981) (requiring a parolee to take Antabuse is not cruel and unusual punishment under the Eighth Amendment).

both the medical and legal communities.[11] Despite diverse opinions as to its proper use, Norplant has already found its way into the courtroom and heated the debate surrounding its social consequences. These consequences will be discussed in Part I in both a factual and legal context. Part II will briefly analyze the standard required to be used if the courts are to implement the mandatory use of Norplant for crimes of child abuse.[12] Such a standard necessarily includes clear and convincing proof of prospective abuse or neglect. The present status of the law pertaining to the use of sterilization as a condition for sentence reduction is reviewed in Part III.[13] This condition has been imposed in areas outside the scope of child abuse and is becoming an increasingly important and controversial issue as Norplant and other medical advances continue to develop and affect the reproductive freedoms of women.[14] This essay concludes that the mandatory

11. *See infra* notes 17-82 and accompanying text.

12. *See infra* notes 83-97 and accompanying text.

13. *See infra* notes 98-154 and accompanying text.

14. Although Norplant is the first major breakthrough in the reproductive field since the early 1960s, further advances in birth control technology are expected in the near future. For example, one researcher at Vanderbilt University estimates that a reversible contraceptive for men will be available in oral or injection form by the year 2000. Similar studies confirming this finding have been conducted at Eastern Virginia Medical School and the Harbor-UCLA Medical Center, in which it has been predicted that the male birth control will take the form of periodic injections or possibly an implantation similar to Norplant; further research on the reversibility of the procedures is still required. *See* Cynthia Floyd, *Male Contraceptive Predicted by 2000*, Gannett News Serv., June 20, 1991, *available in* LEXIS, Nexis Library, Gannett News Serv. File; *see also* Mike Snider, *Advances Made in Male Contraception*, USA TODAY, June 20, 1991, at 6D.

There have also been recent advances in birth control for women. During the past two years, aside from Norplant, the Federal Drug Administration (FDA) has approved two other forms of birth control: the cervical cap, a barrier contraceptive that fits over the cervix, and ParaGard T380A, an improved version of the IUD. Marge Colborn, *Hers? Future Methods Promise Options*, Gannett News Serv., Apr. 19, 1991, *available in* LEXIS, Nexis Library, Gannett News Serv. File. Three other forms of birth control have been developed but have not yet been approved by the FDA: the female condom, medicated disposable diaphragms, and the FlexiGard 330 IUD. *Id.* None of these forms of birth control prevents sexually transmitted diseases. *Id.*

Other advances in contraceptive technology are expected in the near future, including: Norplant-like biodegradable implants that will be inserted under the skin but will dissolve in a year; injectable microcapsules that will release hormones within the body and dissolve in six months; monthly injections that will only minimally disrupt the menstrual cycle; a vaginal ring that will have the same effect as the pill, but it will be effective for three months; a postcoital contraceptive designed to prevent fertilization by causing the uterine lining to shed; a vaccine that will disrupt gestation and prevent fertility; and a battery-operated device that will be implanted within the cervix and will neutralize sperm. *Id.*

Despite these advances, the United States is far behind Western Europe in reproductive technology. *See* Michael H. Hodges, *Choices? U.S. Lags Behind Europe*, Gannett News Serv., Apr. 19, 1991, *available in* LEXIS, Nexis Library, Gannett News Serv. File. There are over twice as many teenage pregnancies in the United States compared with European countries.

imposition of Norplant is a violation of the fundamental right to procreate.[15] However, voluntary consent to the postconviction use of Norplant as a rehabilitative device is an effective waiver of this right and a valid factor to be considered in sentencing.[16]

I. NORPLANT

A. Factual Implications

On December 10, 1990, the Food and Drug Administration approved the public use of Norplant as an acceptable and effective means of birth control, and it is now widely distributed by Wyeth-Ayerst Laboratories of Philadelphia.[17] It has been hailed as the first new birth control device available in the past twenty-five years.[18] Since its initial development in the 1960s,[19] Norplant has been used by more than one million women in nineteen countries.[20]

Philip Elmer-Dewitt, *Why Isn't Our Birth Control Better?*, TIME, Aug. 12, 1991, at 52. The American abortion rate is one of the highest in the developed world—1.6 million per year. *Id.* Also, Europe has a much larger variety of contraceptive techniques available to the public, including the revolutionary RU-486, which is a postcoital contraceptive. *Id.* at 53.

Some researchers feel the disparity in reproductive technology is partly due to anti-abortion movements. Jeannie Rosoff, president of the Alan Guttmacher Institute, states: "A lot of the controversy about abortion has spilled over to development of new contraceptives . . . . [I]t's had a chilling effect on funding and undertaking in this area." Hodges, *supra* at *1. Douglas Johnson, legislative director at the National Right to Life Committee, on the other hand, feels that the prolife movement has not inhibited contraception development. *Id.* Nevertheless, reports estimate that 1.5 million abortions are performed each year in the United States as a result of failed contraception. *Id.* In addition, 3.4 million pregnancies carried to term in America are unplanned. Elmer-Dewitt, *supra* at 52.

Others feel the United States' lag is a result of manufacturers' fears of litigation as a result of failed contraceptives. For example, A.H. Robins Co., the producer of the defective Dalkon Shield, a form of IUD, faced over 100,000 claims from dissatisfied and injured users. Hodges, *supra* at *2. The company claimed bankruptcy after setting up a $2.47 billion trust fund to pay the claims. *Id.*

15. *See infra* notes 98-127 and accompanying text.

16. *See infra* notes 128-51.

17. *See* William Booth, *Updating a Revolution: 5-Year Birth Control Implant Offers Reliability, but with Side Effects*, WASH. POST, Jan. 7, 1991, at A3 (discussing various characteristics of the drug).

18. *Id.*

19. The drug was originally developed by Sheldon Segal of the Population Council's laboratories at Rockefeller University. *Id.*

20. Fawn Vrazo, *Implant Gets Few Takers: Norplant Finds Slow Acceptance*, PHILA. INQUIRER, June 17, 1991, at 1-A, 8-A. In countries like China, where overpopulation threatens future generations, Norplant is being more readily welcomed. The United Nations Population Fund is currently building a plant in China to manufacture Norplant that will be used to control the "population bulge," which is expected to surge to 15 million newborns each year. Ramon Isberto, *Population: China Faces Aging Problem on Top of Baby Boom*, Inter Press Serv., May 13, 1991, *available in* LEXIS, Nexis Library, Inter Press Serv. File.

The use of Norplant entails the insertion of six small silicone tubes, each the size of a matchstick, under the skin of a woman's upper arm.[21] The tubes release the hormones nomegestol acetate and levonorgestrel,[22] which cause the cervical mucus in the uterus to remain thick thereby suppressing ovulation and inhibiting fertilization.[23] These hormones are effective within twenty-four hours after implantation[24] and are steadily released over a five year period so long as the tubes remain implanted.[25] The insertion or removal of the tubes takes approximately ten to fifteen minutes each[26] and, according to a study conducted by Philip Darney at San Francisco General Hospital, involves little or no pain.[27] Only one out of five women in the study reported that someone had noticed the implantation in their arm after the surgery was completed.[28] Although Norplant has proven extremely effective with a very low failure rate,[29] there are side effects, such as headaches, depression, nausea, dizziness, acne, hirsutism, tenderness of the breast, and irregular bleeding.[30] A notable advantage to Norplant, however,

---

21. Booth, *supra* note 17, at A3. Researchers have tested implantations at other locations on the woman's body, for example, the buttocks and the forearm. Due to migration of the tubes or greater visibility in either location, the drug is best inserted under the skin of the upper arm. *Id.*

22. *See FDA Approves Brazilian Contraceptive Drug Implant*, Pharmaceutical Bus. News, Jan. 4, 1991, *available in* LEXIS, Nexis Library, Pharmaceutical Bus. News File; Booth, *supra* note 17, at A3; Gelernter, *supra* note 6, at 7.

23. "The combination of suppressed ovulation and sticky mucus results in Norplant's extremely low failure rate in preventing contraception." Booth, *supra* note 17, at A3. Nevertheless, researchers estimate that during the first year of use, 11% of all women still ovulate, and that by the fifth year, one-half of all Norplant users will ovulate. *Id.*

24. Gelernter, *supra* note 6, at 7. The implantation must take place within the first week of the menstrual cycle. *Id.*

25. Booth, *supra* note 17, at A3.

26. Gelernter, *supra* note 6, at 7. Removal of the tubes may sometimes be more complicated because tissue may begin to grow around the tubes and may have to be cut away before the tubes are removed. *Id.*

27. Booth, *supra* note 17, at A3.

28. *Id.*

29. *See supra* note 23. Researchers also estimate that Norplant may be most effective for women who weigh under 150-155 pounds. Booth, *supra* note 17, at A3; Gelernter, *supra* note 6, at 7. Some researchers estimate that four percent of all women, regardless of weight, may become pregnant during a five year period of Norplant implantation. Booth, *supra* note 17, at A3. The overall success rate of Norplant is said to be 99.8%. *Appraising New Birth Control*, CHI. TRIB., Jan. 20, 1991, § 6, at 7. Compared to other forms of birth control, Norplant has the highest rate of effectiveness; the rates of other forms include: tubal ligation—99.6%; IUD—99.2%; oral contraceptives—97.0%; condom—88.0%; diaphragm—82.0%; and vaginal sponge—72.0%. Rubin, *supra* note 6, at B4.

30. *Appraising New Birth Control, supra* note 29, at 7; Booth *supra* note 17, at A3. In some instances women will experience a complete cessation of menstruation. *Appraising New Birth Control, supra* note 29, at 7. In one trial study, 15% of the women who tried Norplant had to have it removed due to irregular bleeding. Rubin, *supra* note 6, at B4. Other reports

is that it contains no estrogen, the chemical compound found in oral contraceptives, which is said to cause various side effects, including cancer.[31]

Another criticism of Norplant is its cost and availability to indigent women.[32] The cost of the Norplant device and the procedure is between $350 and $600.[33] Wyeth-Ayerst, the manufacturer of Norplant, reports that forty-three states have offered to absorb the cost of implanting the device through respective Medicaid programs.[34] However, for most women who are not covered under Medicaid, the procedure is unavailable. A special foundation has been established with $2.8 million in Wyeth-Ayerst funds to help women pay for Norplant; however, as of June 1991 the foundation had awarded no money.[35]

In an effort to alleviate the cost of Norplant, Kerry Patrick, State Representative of Kansas (Rep.), introduced a bill proposing financial incentives to women who use Norplant.[36] The bill was rejected by a 77-27 vote, however, and was seen by some as a coercive attempt to manipulate the underprivileged populations.[37] Former Louisiana State Representative David Duke (Rep.) introduced a similar proposal, which would give $100 per year to

---

estimate this figure to be at 20%. Jennifer J. Bush, *Orange County Focus: Countywide; 4 Doctors Trained in Contraceptive Use*, L.A. TIMES (Orange County), Mar. 21, 1991, at B3. Approximately six percent of the women participating in the study experienced some form of complication during removal. *Id.*

31. Rubin, *supra* note 6, at B4. According to recent reports, a positive effect of daily doses of estrogen is that they may minimize the risks of heart disease and other diseases like osteoporosis. Fawn Vrazo, *Stunning Benefits of Estrogen Shown, but Doubts Persist*, PHILA. INQUIRER, Sept. 22, 1991, at 1-C, 2-C. Additionally, scientists have discovered, through research outside of the reproductive field involving laboratory mice, that the chemicals used in Norplant may be effective in helping women who suffer from Lupus, an auto-immune disease. Ron Kotulak & John Van, *Hormone Could Help Women with Lupus*, CHI. TRIB., Apr. 7, 1991, § 5, at 4.

32. Linda R. Monroe, *New Expensive Birth Control Implant Gets Slow Acceptance*, L.A. TIMES (San Diego County), May 16, 1991, at B1; Vrazo, *supra* note 20, at 1-A (explaining why the use of Norplant is off to a slow start in the U.S.).

33. Booth, *supra* note 17, at A3.

34. Vrazo, *supra* note 20, at 8-A. Nelson Sabatini, the state health secretary of Maryland, for example, estimates that "at least 110,000 Maryland women of child-bearing age might be eligible for Medicaid reimbursement for Norplant." *State to Use Medicaid to Pay for Norplant*, UPI, Mar. 14, 1991, *available in* LEXIS, Nexis Library, UPI File. As of August 1, 1991, Medicaid will cover the cost of both the device and the surgical procedure to have it implanted or removed. *Medicaid to Pay for Norplant Contraceptive*, UPI, July 11, 1991, *available in* LEXIS, Nexis Library, UPI File.

35. Vrazo, *supra* note 20, at 8-A; *see also* WALL ST. J., Apr. 29, 1991, at A8.

36. The incentive would pay an initial $500 to welfare mothers to have Norplant implanted, plus $50 per month for its continued use. Jason DeParle, *The Nation: As Funds for Welfare Shrink, Ideas Flourish*, N.Y. TIMES, May 12, 1991, at E5.

37. *See id.*

women on welfare who already have one child and choose to use Norplant.[38] Shortly after its introduction, the bill was amended to include a $100 per month incentive.[39] Opponents of these and similar legislative responses to Norplant claim that if not enough welfare mothers accept the incentives and use Norplant, the proposals may actually cost the state money.[40] This fear is generated by the fact that Norplant has not been as widely accepted as originally expected.[41] Despite its unpredictable start, however, economic analysts estimate that if the drug does meet its expected goal, sales could approach $85 million by the mid-1990s, and as high as $200 million annually.[42]

The accessibility of Norplant to sexually active teenagers[43] has also been criticized.[44] Although the use of Norplant will reduce the number of teenage pregnancies, some commentators suggest that this successful form of birth control will lull teenagers into a false sense of security and merely promote more sexual activity.[45] This is especially harmful because Norplant does nothing to curb sexually transmitted diseases, which continue to increase in number.[46] In effect, the added sense of protection against pregnancy may actually be an added risk. Consequently, the technical qualities of Norplant are no longer at issue, but rather the question is who should use it.

B. Legal Implications

Since its introduction to the market in December 1990, Norplant has

38. Maralee Schwartz, *Duke Presses Louisiana Birth Control*, WASH. POST, May 29, 1991, at A14.

39. *Id.* The cash incentives were ultimately removed from the bill, leaving education as the only means of encouraging welfare mothers to use birth control. *See id.*

40. C.J. Fogel, *Duke Bill for Welfare Moms Clears Louisiana House Panel*, Gannett News Serv., May 23, 1991, *available in* LEXIS, Nexis Library, Gannett News Serv. File.

41. *See generally* Vrazo, *supra* note 20, at 1-A (offering costs, side effects, and lack of insurance coverage as reasons for the initial slow acceptance of Norplant).

42. Christine Shenot, *Norplant Getting Off to an Uncertain Start*, INVESTOR'S DAILY, June 18, 1991, at HC1. Some analysts are unsure of the financial future of Norplant because of unlikely insurance coverage, unproven long-term effects, and the unpredictable effect the drug will have on sales of competitors' oral contraceptives. *See id.*

43. Planned Parenthood, for example, will offer Norplant to teenagers without parental consent, as it does with other forms of birth control. Kim Painter, *Minors Won't Need Consent for Norplant*, USA TODAY, Apr. 5, 1991, at 1A. However, most teenagers have not accepted Norplant because of the possibility of variant side effects and the fact that the implantation can not be completely concealed from parents. *See* Vrazo, *supra* note 20, at 8-A.

44. *See, e.g.*, Painter, *supra* note 43, at 1A (criticizing Planned Parenthood for disregarding parental authority).

45. *Ultimate Protection*, L.A. TIMES, May 24, 1991, at B5 (citing statement by Tom Minnery, vice president of a national family counseling organization).

46. *Id.*

aroused heated discussion as to the appropriateness of its use. "A lot of people have given up on social policy, on taking care of poor women, and there is an increasing undercurrent that since we don't really know what to do about crack addicts, people with AIDS[,] and child abusers, we should stop them from having kids."[47] The three major controversies stirring within the social and legal fields are the coercive use of Norplant as a means of controlling the minority populations,[48] the court-ordered implantation of Norplant in drug-addicted women,[49] and the mandatory use of Norplant for convicted child abusers.[50]

On December 12, 1990, the Philadelphia Inquirer published an editorial that ignited a national controversy over the appropriate use of Norplant.[51] The editorial suggested that in order to curb the growing poverty among welfare recipients, mothers on welfare should be offered incentives to use Norplant.[52] However, so many readers found the editorial racially tainted[53] that the paper renounced the column and published an apology.[54] The developers of Norplant, including Dr. Sheldon Segal, anticipated and feared

47. Tamar Lewin, *Implanted Birth Control Device Renews Debate Over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20 (quoting Dr. George Annas, Director of the program on law, medicine, and ethics at the Boston University School of Medicine).

48. *See Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILA. INQUIRER, Dec. 12, 1990, at 18-A [hereinafter *Poverty and Norplant*].

49. *See generally* George P. Smith, II, *Fetal Abuse: Culpable Behavior by Pregnant Women or Parental Immunity?*, 3 J.L. & HEALTH 223 (1988-89) (discussing options for courts in sentencing women convicted of child abuse through drug addiction). Sixty percent of the people polled in California support the mandatory use of Norplant for drug abusers. Tim Rutten, *Norplanting or Supplanting Private Rights*, L.A. TIMES, May 31, 1991, at E1, E5; George Skelton & Daniel M. Weintraub, *Most Support Norplant for Teens, Drug Addicts*, L.A. TIMES, May 27, 1991, at A1.

50. *See* Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. (forthcoming 1992) (discussing the use of Norplant as a preventive tool for child abuse). *But see* Colleen M. Coyle, Comment, *Sterilization: A "Remedy for the Malady" of Child Abuse?*, 5 J. CONTEMP. HEALTH L. & POL'Y 245, 261-62 (1989) (suggesting that sterilization is ineffective as a solution to the problem of child abuse).

51. *Poverty and Norplant, supra* note 48, at 18-A.

52. *See id.*

53. *See, e.g.*, Rita C. Baldwin, *Norplant Editorial Exhibited "Classic Racism,"* PHILA. INQUIRER, Dec. 19, 1990, at 16-A (challenging the motives behind the editorial as examples of racism and classism); Vanessa Williams, *Seriously Flawed*, PHILA. INQUIRER, Dec. 19, 1990, at 16-A (criticizing the editorial's contribution to racial polarization by irresponsibly handling an extreme social problem).

54. *An Apology: The Editorial on 'Norplant and Poverty' Was Misguided and Wrongheaded*, PHILA. INQUIRER, Dec. 23, 1990, at 4-C. The article stated in part:

> We realize now that we hastily and foolishly juxtaposed two news items that appeared in The Inquirer the previous day—federal approval of the long-term contraceptive Norplant and the release of a research group's report that said nearly half of black children are living in poverty and that the situation is getting worse with time.

such coercive use of the drug by governments;[55] however, "frankly, they were worrying about China, not California."[56] Dr. Segal states that "[a]ny coercive purpose . . . is a gross misuse of the method,"[57] and that the line between incentive and coercion becomes gray especially "when you single out a welfare mother, wave a $500 bill in front of her face and say that the government is going to induce you not to have children."[58] However, Donald Kimelman, the author of the controversial editorial in the Philadelphia newspaper, responds that the suggestion of such a use was in no way *coercive*, but rather *rehabilitative*. He writes,

> If Norplant could significantly reduce the number of children born into the bleakest possible circumstances, wouldn't society be better off? And wouldn't the mothers have a better chance of organizing their lives to escape poverty?
>
> Improved contraception cannot win the war on poverty. But shouldn't it be an important weapon in the arsenal?[59]

When narrowly directed toward the issue of incentives for welfare recipients, the editor's reasoning is logical and legally valid—provided that the submission to the implantation is voluntary and done for rehabilitative purposes. First, notwithstanding any racial undertones that may be inferred from offering financial incentives, the idea of stimulating an anticipated response is not foreign to the democratic ideology, nor does it affront moral integrity per se. Commenting on the use of incentives, Dr. Segal states that, "[i]t's the way we get people to join the army, buy a Chevrolet, give to charity."[60] Thus, the mere offering of an incentive to stimulate the use of Nor-

---

> The editorial posed the question of whether encouraging women who are on welfare to use Norplant could help reverse this bleak trend . . . .
>
> [I]n linking the issues of race and contraception, we left too many people with the impression that our cure for poverty was to reduce the number of black people.

Id. *See also* David R. Boldt, *A Conference on Political Correctness Forces a Revisiting of Norplant*, PHILA. INQUIRER, Sept. 15, 1991, at 5-C (commenting on the role of the press in stimulating and disseminating politically sensitive commentary); David R. Boldt, *A "Racist Pig" Offers Some Final Thoughts on Norplant*, PHILA. INQUIRER, Dec. 30, 1990, at 7-F (offering the editor's view of the controversial Norplant editorial).

55. For a commentary on how the Indonesian government, in an effort to control overpopulation, conducts "safaris" to recruit native women to submit to the implantation of Norplant, see Arthur Caplan, *Birth-Control Implant Leads to Population Control by Governments*, SEATTLE TIMES, July 7, 1991, at A13.

56. Ellen Goodman, *Norplant: Birth Control—Or Woman Control?*, Newsday, Feb. 19, 1991, *available in* LEXIS, Nexis Library, Newsday File.

57. Don Williamson, *Norplant: Forced Surgery Is No Answer*, SEATTLE TIMES, June 27, 1991, at A12.

58. Goodman, *supra* note 56, at *2 (quoting Dr. Sheldon Segal).

59. Donald Kimelman, *The Norplant Editorial Writer Responds*, WASH. POST, Mar. 17, 1991, at D6.

60. Goodman, *supra* note 56, at *2.

plant is by no means coercive per se. Second, because the incentives are not focused on specific minority groups, particularly blacks or hispanics, but rather on all welfare recipients, then they are presumptively nondiscriminatory. Third, neither the Norplant implantation nor the incentives are forced upon any member of the recipient class. Each member may weigh the offered incentives against any collateral effects of using Norplant, thereby making a voluntary decision to use Norplant. Provided the incentives offered to all welfare recipients are noncoercive and allow for voluntary decisions, they are valid.

The second controversy ignited by Norplant is whether it should be used in an effort to reduce the high rate of mothers giving birth to drug-addicted newborns.[61] As more courts acknowledge the impact that drugs and alcohol have on the fetus, factors affecting childbearing and reproductive freedoms will take on greater significance in decisions regarding sentencing. For example, in *United States v. Denoncourt*, the court considered whether there should be an upward departure from the sentencing guidelines for a nineteen-year-old pregnant woman convicted of illegally entering the United States following deportation, and stated its concern that the defendant may abuse drugs or engage in prostitution while pregnant.[62] The court found that "in sentencing, the rights and interests of the unborn baby should be considered along with those of his or her mother."[63] As a result, it is foreseeable that courts will take an active role to intervene on behalf of unborn children. Arthur Caplan, director of the University of Minnesota's Center for Biomedical Ethics, states, "There's definitely a trend toward third-party involvement in reproductive decisions, including all the attempts to put women in jail for taking drugs that can affect the fetus."[64] Dr. George Annas agrees, commenting that, "Norplant presents a special temptation to judges because it's so long lasting and doesn't require any cooperation after it's implanted, and can be monitored by a parole officer just by looking at the woman's arm . . . . I think we're going to see more of these cases."[65]

---

61. *See, e.g.*, Christy Scattarella, *Forced Birth Control: Drug-Baby Boom Sparks Call for Implants for Addicts*, SEATTLE TIMES, June 24, 1991, at A1 (questioning whether a mother who has given birth to ten drug-addicted babies should have the device surgically implanted). For a statistical summary of drug-addicted newborns, see Flannery, *supra* note 50.

62. United States v. Denoncourt, 751 F. Supp. 168, 170 (D. Haw. 1990).

63. *Id.*

64. Lewin, *supra* note 47, at A20.

65. *Id.* The difficulty of policing compliance with the use of other forms of birth control was a concern in the case of People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984). In *Pointer*, Dr. Barbara O. Murray states, "[I]f required to take birth control pills, for example, it . . . would be extremely difficult to monitor or supervise such a condition, and the likelihood of noncompliance would be inordinately high." *Id.* at 362.

Closely related to this is the third issue involving mandatory implantation of Norplant for convicted child abusers[66] in an effort to reduce the generational recidivism of child abuse. Advocates of mandatory implantation seek to avoid scenarios such as the one experienced by Ruby Pointer. In 1981, authorities in California placed two of Pointer's children in foster care.[67] The children, one of whom was found semicomatose and weighed only eight pounds, suffered from severe malnutrition.[68] A Santa Cruz Superior Court judge subsequently held that Pointer would be prohibited from having children for five years.[69] However, the California Court of Appeal for the First District found the order overly broad and Pointer was thereafter free to bear children.[70] Unfortunately, within ten years after the order was reversed, Pointer had given birth to three more children who, in June 1991, were severely neglected—found hiding in piles of garbage and urine inside Pointer's apartment.[71]

It logically follows that a prohibition on childbearing would have prevented further abuse and suffering. On the other hand, some argue that such cases are a result of a failed social service system.[72] Perhaps most agree that both explanations are accurate: "The system isn't designed to help the kids as much as it should because there are so many concerns over parents' rights."[73] Nevertheless, as more and more cases like Ruby Pointer's continue to overburden the social service system and child abusers and drug-

66. Most commentators see maternal substance abuse as one form of child abuse. *See generally* Flannery, *supra* note 50 (theorizing that gestational substance abuse is a form of child abuse—subject to the same reporting requirements and abuse and neglect laws as other forms of child abuse).

67. Paul Rogers, *Calif. Suspect Was Once Ordered Not to Have Children*, PHILA. INQUIRER, June 23, 1991, at 4-A.

68. *See id.* The mother, Ruby Pointer, adhered to a strict macrobiotic diet that caused the malnutrition in the children. People v. Pointer, 199 Cal. Rptr. 357, 359 (Ct. App. 1984). "Macrobiotic, as it's usually used, refers to a diet that is pretty much exclusively grains, beans[,] and vegetables, meaning pretty much excluding fruits, deemphasizing salads, deemphasizing or eliminating milk products of all form, yogurt, milk, cheese, cottage cheese[,] and, also, no fish, meat, poultry, or eggs . . . ." *Id.* at 359 n.2 (quoting appellant's physician).

69. Rogers, *supra* note 67, at 4-A. At the sentencing hearing, the trial judge stated,

> I have never considered imposing as a condition of probation the requirement that someone not conceive during the period of probation, and I have never considered requiring as a condition of probation that a defendant not have custody of her children without approval by the sentencing court following a hearing, but that's certainly what I intend to do in this case. This is an extremely serious case.

Pointer, 199 Cal. Rptr. at 362.

70. *See id.* at 366.

71. Rogers, *supra* note 67, at 4-A.

72. *See generally* Coyle, *supra* note 50 (arguing that the failing child protective system is stimulating interest in the rejuvenation of sterilization legislation).

73. Rogers, *supra* note 67, at 4-A (quoting Deputy Police Chief Mike Dunbaugh).

addicted mothers abuse their rights and responsibilities as parents, courts will continue to consider preventive measures such as mandatory sterilization and temporary childbearing prohibitions as viable options in sentencing.

Some commentators view sterilization, and therefore Norplant, as a means of reducing the growing surge of child abuse.[74] These proponents mandate sterilization despite lack of consent on the part of the convicted recipient.[75] Other commentators advocate that,

> when treatment has been offered and rejected—or failed—or when a convicted drug user continues to get pregnant, she should be offered a choice . . . . The judge could say, "Every time we turn our backs, you're having more drug babies. Your choice is not to let you have any more kids for a while or to put you in jail."[76]

Still others oppose even voluntary sterilization, arguing that sterilization is a punitive measure and does not cure the deep-rooted psychological problems inherent in child abusers and child abuse victims.[77]

Recently, a California Superior Court judge was confronted with the child abuse dilemma. Less than one month after the Food and Drug Administration approved Norplant, Tulare County Superior Court Judge Howard Broadman sentenced twenty-seven year-old Darlene Johnson to undergo implantation as a result of her child abuse conviction.[78] Originally Johnson

---

74. *See* Smith, *supra* note 49, at 234; *see also* Flannery, *supra* note 50 (offering Norplant as one option for courts to consider in dealing with mothers who repeatedly give birth to drug-addicted infants).

California Governor Pete Wilson is presently considering making Norplant mandatory for women of childbearing age who abuse drugs. Although he is unsure whether such a plan will take effect, he is concerned that all teenagers and drug addicted women who want Norplant are unable to receive it. Consequently, Governor Wilson has proposed adding $10 million to the budget of the Office of Family Planning in order to obtain Norplant kits. Daniel M. Weintraub & George Skelton, *Wilson Favors Use of Birth Control Implant: Family Planning: Governor Hopes to Make Norplant Device Widely Available to Teen-Agers and Drug Users*, L.A. TIMES, May 17, 1991, at A1.

75. *See generally* Smith, *supra* note 49, at 234. Professor Smith states,

> More serious consideration should be given to sterilizing those women who prove themselves to be repeated child abusers through drug addiction and other willful acts. Just as a conviction for statutory rape has brought, in lieu of sentencing, an agreed sterilization, courts should act (with or without personal agreement or acquiescence) to prevent continued tragedies of birth where egregious cases of maternal negligence or culpable behavior have clearly shown that a woman is not deserving of the dignity and moral recognition of a true mother.

Id. (citations omitted).

76. Scattarella, *supra* note 61, at A4 (quoting Daniel Polsby, law professor at Northwestern University); *see also The Norplant Dilemma: Encourage, Don't Force, Use of New Birth Control*, SEATTLE TIMES, July 7, 1991, at A14 (arguing that the use of Norplant should be a matter of choice, not a legal mandate).

77. *See* Coyle, *supra* note 50, at 261-62.

78. *In re* Johnson, No. 29-390 (Tulare County Super. Ct. Cal. Jan. 2, 1991) *appeal dis-*

agreed to the implantation but has since changed her mind,[79] thus questioning whether courts can constitutionally intrude into the area of women's rights regarding reproductive freedom.[80]

Darlene Johnson may criticize the decision because she is not medically suited for the implantation of Norplant. The drug has proven inappropriate for women who suffer from heart or liver disease, diabetes, or blood deficiencies;[81] Johnson suffers from diabetes, a heart murmur, and high blood pressure.[82] However, despite the fact that Johnson and other women with similar medical problems are not suited for Norplant, this does not detract from the *validity* of Norplant as an option for the courts.

---

missed (5th Cir. 1992). At the time of sentencing, Darlene Johnson had four children and was pregnant with her fifth child. Moss, *supra* note 10, at 2A. She was found guilty of beating her children with a belt and an extension cord. *Judge: Birth Control Order Stands*, CHI. TRIB., Jan. 11, 1991, § 1, at 9 [hereinafter *Order Stands*]. In addition to the implantation of Norplant, Johnson's sentence included one year in jail and three years of probation. William Booth, *Judge Orders Birth Control Implant in Defendant*, WASH. POST, Jan. 5, 1991, at A1. Judge Broadman also ordered her to quit smoking during her pregnancy, stating, "If you can't quit smoking for the betterment of your baby, how are you ever going to get your act together not to beat your children?" *Order Stands, supra* at 9.

Approximately two months after making his decision, Judge Broadman was shot at in his courtroom by Harry Bodine, who admitted that he was angry over Broadman's Norplant decision. *Man Is Arraigned in Court Shooting*, N.Y. TIMES, Mar. 7, 1991, at A22. Only two days after the shooting, Judge Broadman filed a civil suit against Bodine for mental and physical suffering that resulted from the incident. *Judge Who Was Shot at in Courtroom Files Suit Against Alleged Assailant*, L.A. TIMES, Mar. 9, 1991, at A23. Judge Broadman later removed himself from the case, stating, "Due to the local, national, even international attention associated with me and this case—and my attempted assassination because of it—I am disqualifying myself from this case and will make no further rulings." *Controversial Judge Steps Aside*, WASH. POST, Apr. 15, 1991, at A6.

79. Since the decision, the attorney general's office has stipulated that Darlene Johnson did not voluntarily agree to the implantation and has asked that the case be remanded to Superior Court for a new sentence. *See* Gene Garaygordobil, *Prosecutors Side with Defendant in Norplant Case*, Gannett News Serv., June 9, 1991, *available in* LEXIS, Nexis Library, Gannett News Serv. File. Recently, the Fifth Circuit Court of Appeal dismissed the appeal at the request of Johnson's lawyers after Johnson violated the terms of her probation by testing positive for drug use which resulted in a five year prison sentence and rendered the Norplant issue moot. *Birth Curb Order is Declared Moot*, N.Y. TIMES, Apr. 15, 1992, at A7.

80. Judge Broadman defends the constitutionality of his decision because the state has a compelling interest in the protection of children. Lev, *supra* note 10, at A17.

> [T]he order was "reasonably related to the compelling state interest, public safety and rehabilitation." Although the right to procreate is substantial and constitutionally protected, "it is not absolute and can be limited in a proper case." . . . The compelling state interest in the protection of the children of the state . . . supersedes this particular individual's right to procreate and does not interfere with her right of sexual expression.

Id. (quoting Judge Broadman).

81. *See* Gelernter, *supra* note 6, at 7.

82. Lev, *supra* note 10, at A17.

Other arguments available to Johnson and any other defendant facing mandatory imposition of Norplant may involve constitutional considerations, including equal protection and due process. However, before these issues arise in a court of law, there must first be a standard by which a court determines whether the imposition of Norplant is appropriate for any given defendant. This standard must consider the conduct for which the defendant has been convicted and the effectiveness of sterilization in preventing similar conduct in the future.

II. PROSPECTIVE ABUSE STANDARD

The mandatory imposition of birth control or sterilization may be equated with the termination of parental rights because the mother is denied the opportunity to be a parent.[83] However, by imposing Norplant, courts are not terminating parental rights in already existing children, but in future children. To constitutionally terminate these rights, the courts must find prospective abuse or neglect.[84] When mothers repeatedly give birth to drug-

83. *See* Motes v. Hall County Dep't of Family and Children Servs., 306 S.E.2d 260, 261 (Ga. 1983) (requiring clear and convincing evidence to authorize involuntary sterilization).

84. Most states that have addressed the concept of prospective abuse have done so statutorily. *See, e.g.*, FLA. STAT. ANN. § 39.464 (West 1988 & Supp. 1991), which allows the department, the guardian ad litem, or a licensed child-placing agency to petition for the termination of parental rights for several reasons including: "[s]evere or continuing abuse or neglect.—The parent or parents have engaged in conduct towards the child or towards other children that demonstrates that the continuing involvement . . . in the parent-child relationship threatens the life or well-being of the child regardless of the provision of services."

Florida defines abuse as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired." FLA. STAT. ANN. § 39.01(2). However, at least eighteen state courts have addressed the issue of prospective abuse, including Alabama—*see, e.g., In re* Sanders, 420 So. 2d 790 (Ala. Civ. App. 1982) (terminating father's rights to four minor children when father had been abusive to only two of the children); Colorado—*see, e.g., In re* C.R., 557 P.2d 1225 (Colo. Ct. App. 1976) (holding that it could reasonably be inferred that the nonabused child lacked proper parental care from evidence that established mistreatment of others); Florida—*see, e.g., In re* Baby Boy A, 544 So. 2d 1136 (Fla. Dist. Ct. App. 1989) (terminating father's parental rights and permanently committing child for adoption when evidence of prospective abuse and neglect of child was established); Georgia—*see, e.g., In re* A.T., 370 S.E.2d 48 (Ga. Ct. App. 1988) (holding that continuous neglect and parental misconduct of one child was detrimental and egregious enough to terminate rights in older child who was not subject to that abuse); Illinois—*see, e.g., In re* A.D.R., 542 N.E.2d 487 (Ill. App. Ct. 1989) (holding that when evidence establishes an injurious environment, court should not wait until each child becomes a victim of abuse before taking action); *In re* J.R., 473 N.E.2d 1009 (Ill. App. Ct. 1989) (holding that abusive events occurring prior to birth of some children could serve as basis for terminating parental rights in other children); *In re* Brooks, 379 N.E.2d 872 (Ill. App. Ct. 1978) (holding that children could be adjudicated wards of the court despite lack of evidence of neglect or abuse towards them due to physical abuse of two other children); Iowa—*see, e.g., In re* W.G., 349 N.W.2d 487 (Iowa 1984) (holding that the district court's termination of parental rights was justified on the basis of past and probable future abuse of seven

addicted babies or abuse or neglect their children, a court may impose Norplant if it shows that Norplant is necessary to avoid similar occurrences in the future. The question remains: By what standard must this be proven? The only possible standards are those used by courts to terminate parental rights in already existing children.

In *Lassiter v. Department of Social Services*,[85] the Supreme Court held that the Due Process Clause under the Fourteenth Amendment does not require that counsel be appointed for indigent parents in every parental rights termination proceeding.[86] This holding led to further questioning of the scope of the rights afforded natural parents under the Due Process Clause. One year after *Lassiter*, the Supreme Court again addressed the issue of terminating

---

children), *cert. denied sub nom.* J.G. v. Tauke, 469 U.S. 1222 (1985); Louisiana—*see, e.g.*, Louisiana v. Young, 342 So. 2d 1205 (La. Ct. App. 1977) (finding that five children were neglected in light of unsanitary and unwholesome living conditions). *But* see Louisiana *ex rel.* CAB v. EB, 504 So. 2d 162 (La. Ct. App. 1987) (holding that court improperly terminated mother's parental rights to daughters when evidence showed mother's abuse of son and only father's sexual abuse of daughters); Massachusetts—*see, e.g., In re* Custody of Two Minors, 487 N.E.2d 1358, 1366 (Mass. 1986) (holding that the trial court may "assess prognostic evidence derived from prior patterns of parental neglect or misconduct in determining future fitness and likelihood of harm to the child"); Michigan—*see, e.g., In re* LaFlure, 210 N.W.2d 482 (Mich. Ct. App. 1973) (holding that mistreatment of one child is probative of how the parents may treat other children); Minnesota—*see, e.g., In re* J.L.L., 396 N.W.2d 647 (Minn. Ct. App. 1986) (considering the father's likelihood of future abuse as a factor in terminating parental rights in child); *In re* B.C., 356 N.W.2d 328 (Minn. Ct. App. 1984) (upholding the termination of mother's parental rights to son on ground that she had physically abused and murdered another child); Missouri—*see, e.g., In re* R.A.M., 755 S.W.2d 431 (Mo. Ct. App. 1988) (holding that abuse of one child may justify termination of parental rights with respect to both victim and other siblings); K.S. v. M.N.W., 713 S.W.2d 858 (Mo. Ct. App. 1986) (terminating parental rights in siblings of abused child even though siblings receives no serious injuries); Montana—*see e.g., In re* T.Y.K., 598 P.2d 593 (Mont. 1979) (removing all three children from the parents because of physical injuries sustained by only one child); Nebraska—*see, e.g., In re* S.L.P., 432 N.W.2d 826, 830 (Neb. 1988) (stating that "a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child"); New Mexico—*see, e.g., In re* I.N.M., 735 P.2d 1170 (N.M. Ct. App. 1987) (terminating parental rights in younger child when evidence demonstrated severe abuse to older child); New York—*see, e.g., In re* Cruz, 503 N.Y.S.2d 798 (N.Y. App. Div. 1986) (finding the court cannot and should not "await broken bone or shattered psyche before extending its protective cloak around a child . . . .") (citation omitted); Pennsylvania—*see, e.g., In re* Black, 417 A.2d 1178 (Pa. Super. Ct. 1980) (declaring newborn infant "deprived" based on evidence of prior deaths of two children as a result of parents' improper care); South Dakota—*see, e.g., In re* K.D.E., 210 N.W.2d 907 (S.D. 1973) (ordering both a boy and girl be removed from the parents when only the boy was tied to a bed, beaten, and caged in a basement); and Texas—*see, e.g.*, Zeigler v. Tarrant County Child Welfare Unit, 680 S.W.2d 674 (Tex. Ct. App. 1984) (terminating parental rights in all five children when mother directed abuse toward only one son in the presence of the other children).

85. 452 U.S. 18 (1981).

86. *Id.* at 25-27.

the rights of natural parents[87] when it questioned a New York law that allowed for the termination of parental rights upon a finding that the child is "permanently neglected."[88] The applicable standard of proof to support such a finding required only a "fair preponderance of the evidence" under Article 10 of the Family Court Act.[89] The Court concluded that, "the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[90]

Many states have held that proof of prospective abuse in cases of child abuse and neglect must be clear and convincing despite a lack of physical evidence.[91] Recently, in *In re Palmer*,[92] the clear and convincing standard was not met. In that case, a one-year-old child was "adjudicated dependent" and ordered to remain in the custody of his maternal grandmother after his stepsister died under suspicious circumstances.[93] The boy's father was arrested and charged with the death of the girl.[94] The child's mother argued that because there was no evidence that she was unfit to care for the boy and she would not allow the father to live with the boy after the father's incarceration, there was no longer a threat to her son.[95] The appellate court reversed the dependency adjudication and held that a finding of dependency could not be justified solely on the basis of the daughter's death when there was no evidence that the mother knew of the danger to the daughter.[96] The *Palmer* case demonstrates the difficulty and frustration in reaching the clear and convincing standard to find that prospective abuse exists. If courts are to constructively terminate parental rights through the use of Norplant, any prospective abuse or neglect must be clearly and convincingly shown before the fundamental rights of the parent are extinguished. Some state sterilization statutes expressly require a clear and convincing standard before such a procedure can be authorized.[97] If such a standard is met, Norplant may be

87. *See* Santosky v. Kramer, 455 U.S. 745 (1982).

88. N.Y. SOC. SERV. LAW § 384-b.4(d) (McKinney 1983).

89. 1976 N.Y. LAWS 666.

90. *Santosky*, 455 U.S. at 747-48.

91. *See supra* note 84.

92. 590 A.2d 798 (Pa. Super. Ct. 1991).

93. *Id.* at 799.

94. *Id.*

95. *Id.* at 801.

96. *Id.* at 802.

97. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-699(b) (West Supp. 1991) (requiring the court to give its consent to sterilization only if it finds by clear and convincing evidence that such an operation or procedure is in the individual's best interest); FLA. STAT. ANN.

compelled in cases of repeated gestational substance abuse or child abuse if sterilization or mandatory birth control is a factor considered in sentencing.

III. STERILIZATION AS A CONDITION IN SENTENCING

Once a court considers using Norplant as part of a sentence, it is then faced with the issue of how the implantation will be imposed—mandatorily or voluntarily. In making this determination, not only must the court weigh the benefits of each but also the constitutional limitations of the First,[98] Eighth,[99] and Fourteenth[100] Amendments.

A. Mandatory Sterilization

The idea of sterilizing convicted criminals is not as new to the courts as is Norplant. In fact, the issue was raised almost a century ago in *Davis v. Berry*,[101] which held unconstitutional a state law requiring a vasectomy to be performed on all criminals who were twice convicted of a felony.[102] The state law violated the Eighth Amendment because it subjected the defendant to cruel and unusual punishment.[103] In making this finding, the court compared the vasectomy procedure with castration and reasoned that the permanent effects of the operations make them cruel and unusual.[104]

> There is a difference between the operation of castration and vasectomy: castration being physically more severe than the other. But vasectomy in its results is much the coarser and more vulgar. But the purpose and result of the two operations are one and the same. . . . [E]ach operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will

§ 744.3725(5) (West Supp. 1991) (requiring clear and convincing evidence that sterilization is in the best interest of the recipient).

98. U.S. CONST. amend. I states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

99. U.S. CONST. amend. VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

100. U.S. CONST. amend. XIV, § 1 states in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

101. 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1914). At that time, the law authorized "a surgical operation called vasectomy on idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and . . . criminals who [were] twice convicted of a felony." *Id.* at 414.

102. *Id.* at 419.

103. *Id.* at 417.

104. *Id.* at 416.

> follow him wheresoever he may go. This belongs to the Dark Ages.[105]

Likewise, in *Mickle v. Henrichs*,[106] a mandatory sterilization procedure for a convicted rapist was found to be cruel and unusual punishment despite the fact that it could be performed without physical pain or suffering.[107] In *Mickle* and *Davis*, the degradation and humiliation that accompanies the procedures were found to be unjust.[108]

Some state statutes address the technical aspects of the specific sterilization procedure in determining whether it is in the best interest of the recipient. In Hawaii, for example, the court considers:

> (4) the feasibility and medical advisability of less restrictive alternatives to sterilization both at the present time and under foreseeable future circumstances;
>
> (5) whether scientific or medical advances may occur within the foreseeable future which will make possible the improvement of the ward's condition or result in less drastic contraceptive measures.[109]

However, the humiliating and degrading factors in *Davis* and *Mickle* and the medical advances addressed in more recent statutes are avoided with the use of Norplant. Because the procedure is painless, inconspicuous, and reversible, claims of cruel and unusual punishment are not persuasive in the age of Norplant.

The onset of mandatory sterilization debates arose during a surge in the eugenic movement[110] beginning in the early twentieth century. The Supreme Court contributed to these debates when it held in *Buck v. Bell*[111] that the sterilization of institutional inmates who suffer from hereditary forms of insanity or imbecility is valid under the Fourteenth Amendment.[112] Distinguishing *Buck*, the Supreme Court later struck down an Oklahoma

105. *Id.*

106. 262 F. 687 (D. Nev. 1918).

107. *Id.* at 690. *But see* State v. Feilen, 126 P. 75 (Wash. 1912) (requiring actual physical pain for cruel and unusual punishment and affirming a vasectomy order for defendant because the procedure was simple and painless).

108. *See Mickle*, 262 F. at 690-91; *Davis*, 216 F. at 417.

109. HAW. REV. STAT. § 560:5-608(c) (1988 & Supp. 1990).

110. The eugenic movement was an effort to control the reproductivity of the socially inept and mentally or criminally deficient, who were believed to have genetically acquired their given predispositions. For a brief history of the eugenic movement, see Julie Marcus, Comment, *In re Romero: Sterilization and Competency*, 68 DEN. U.L. REV. 105, 105-07 (1991) and Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1420-25 (1981). *See also In re* Grady, 426 A.2d 467 (N.J. 1981) (questioning whose judgment should substitute for the incompetent's consent to sterilization).

111. 274 U.S. 200 (1927).

112. *Id.* at 207.

statute that provided for the sterilization of "habitual criminals" in *Skinner v. Oklahoma ex rel. Williamson*.[113] Relying on the Equal Protection Clause,[114] the Court established procreation as a fundamental human right that is "basic to the perpetuation of [the] race"[115] and protected under the right to privacy.[116] Nevertheless, the Court did not deny that such rights may be qualified by a compelling state interest,[117] nor did the Court declare that all sterilization statutes are invalid.[118]

---

113. 316 U.S. 535 (1942).

114. *Id.* at 541. *But cf.* Cook v. Oregon, 495 P.2d 768, 771-72 (Or. Ct. App. 1972) (denying an equal protection claim against the mandatory sterilization of a mentally retarded girl).

115. *Skinner*, 316 U.S. at 536.

116. The right of privacy has been recognized within the personal liberty context of the Fourteenth Amendment and within the penumbras of the Bill of Rights. These privacy rights include: the right to abortion, Roe v. Wade, 410 U.S. 113 (1973); the right to interracial marriage, Loving v. Virginia, 388 U.S. 1 (1967); the right to use contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965); and the right to procreate, Eisenstadt v. Baird, 405 U.S. 438 (1972).

As in *Mickle* and *Davis*, the Court in *Skinner* noted that "[t]here is no redemption for the individual whom the [sterilization] law touches . . . . He is forever deprived of a basic liberty." *Skinner*, 316 U.S. at 541. However, such would not be the case with Norplant since it is reversible.

117. *Skinner*, 316 U.S. at 541. For a justification of denying fundamental rights because of a "compelling state interest," *see* Roe v. Wade, 410 U.S. at 154-56. Similarly, Judge Broadman, in *In re Johnson*, justified denying Darlene Johnson the right to bear children because of a compelling interest in the protection of unborn children. *See supra* note 80.

118. In Smith v. Superior Court, 725 P.2d 1101 (Ariz. 1986), the Arizona Supreme Court reviewed the history of eugenic sterilization laws. It stated that,

> Indiana . . . enacted the first compulsory eugenic sterilization law in 1907, under which sterilization of confirmed criminals, idiots, imbeciles, and rapists in state institutions, when recommended by a board of experts, was made mandatory. Fifteen other states passed similar measures by 1917, 32 states had enacted such legislation by 1942, but by 1968 the total had dropped to 27 states retaining eugenic sterilization laws.

Id. at 1103.

Presently, at least 23 states have statutes specifically referring to sterilization, although not necessarily mandating eugenic sterilization. *See, e.g.*, ARK. CODE ANN. §§ 20-49-101 to -304 (Michie 1987) (regarding sterilization of mental incompetents pursuant to petition or medical certification); CAL. PROB. CODE §§ 1950-1969 (West 1991) (authorizing procedures for sterilizing developmentally disabled persons); COLO. REV. STAT. § 27-10.5-132 (1989) (providing that consent to sterilization shall not be made a condition for release from any institution); CONN. GEN. STAT. ANN. § 19a-112 (West 1986) (requiring consent for any sterilization procedure); CONN. GEN. STAT. ANN. §§ 45a-690 to -700 (West Supp. 1991) (allowing for sterilization upon the consent of the court); DEL. CODE ANN. tit. 16, §§ 5701-5716 (1983 & Supp. 1990) (allowing involuntary sterilization); D.C. CODE ANN. § 6-1968 (1989) (prohibiting sterilization of persons in facilities for the mentally retarded by employees of those facilities); FLA. STAT. ANN. § 39.046(7) (West Supp. 1991) (regarding the sterilization of delinquent children); FLA. STAT. ANN. § 744.3215(4)(e) (West Supp. 1991) (prohibiting guardians of incapacitated persons from authorizing sterilizations without a court order); GA. CODE ANN. §§ 31-20-1 to -6 (Michie 1991) (regarding sterilizations of mentally incompetent persons); HAW. REV. STAT. §§ 560.5-601 to -612 (1988) (allowing sterilization when it is in the best interest of the ward);

Mandatory sterilization also raises due process issues under the Fourteenth Amendment.[119] Chief Justice Stone, concurring in *Skinner*, addressed the due process claim:

> Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. . . . [However,] [a] law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process. And so, while the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies.[120]

Only one of the three proposed purposes in using Norplant[121] would pass muster under this reasoning—the mandatory use of Norplant for repeated gestational substance abusers. Here, the objective sought is to prevent the birth of drug-addicted newborns. In *Cook v. Oregon,* the court found,

> The state's concern for the welfare of its citizenry extends to future generations and when there is overwhelming evidence . . . that a potential parent will be unable to provide a proper environment for

---

IDAHO CODE §§ 39-3901 to -3910 (1985) (allowing for involuntary sterilization); ME. REV. STAT. ANN. tit. 34-B, §§ 7001-7017 (West 1988) (regarding due process in sterilization procedures); MD. HEALTH-GEN. CODE ANN. § 20-214(c) (1990) (prohibiting sterilization as a ground for either the loss of privilege or immunity to which patient is otherwise entitled or the receipt of any public benefits); MASS. GEN. LAWS ANN. ch. 112 § 12(W) (West 1983) (regarding consent before physician may perform procedure); MISS. CODE. ANN. §§ 41-45-1 to -19 (1981 & Supp. 1991) (authorizing sterilization of inmates in specific institutions); N.J. STAT. ANN. § 30:6D-5(4) (West 1981 & Supp. 1991) (prohibiting sterilization of mentally disabled persons without consent); N.C. GEN. STAT. § 35-36 to -50 (1990) (allowing sterilization of mentally ill or mentally retarded persons); OR. REV. STAT. §§ 436.205-.335 (1989) (requiring consent before sterilization or an order of the court stating sterilization is in the best interest of the individual); S.D. CODIFIED LAWS ANN. § 20-9-4.2 (1987) (regarding consent for sterilization of a minor); TENN. CODE ANN. § 68-34-108 (1987) (allowing sterilization of minors upon written request); TEX. REV. CIV. STAT. ANN. art. 3174b-2 (West 1968 & Supp. 1991) (excepting sexual sterilization from authorized medical treatments that may be performed without consent); UTAH CODE ANN. §§ 62A-6-101 to -116 (1989 & Supp. 1991) (regarding sterilization of handicapped persons); VA. CODE ANN. §§ 54.1-2974 to -2980 (Michie 1991) (allowing for court-authorized sterilizations); W. VA. CODE §§ 27-16-1 to -4 (1986) (allowing sterilization of mental incompetents upon consent and court authorization).

119. *See, e.g.*, McKinney v. McKinney, 805 S.W.2d 66 (Ark. 1991) (invalidating an Arkansas statute that allows for involuntary sterilization without court authorization).

120. *Skinner*, 316 U.S. at 544-45 (Stone, J., concurring) (citation omitted).

121. *See supra* notes 48-50 and accompanying text.

> a child because of his own mental illness or mental retardation, the state has sufficient interest to order sterilization.[122]

Each pregnant, addicted defendant is entitled to present evidence that the fetus will not be born addicted and that she will be capable of providing a proper environment for the child. Therefore, any due process claims can be overcome before a court may sentence her to implantation of Norplant.[123]

Another objective in mandatorily imposing Norplant is to reduce incidences of child abuse; however, due process requirements will not necessarily be met because of the difficulty in predicting the recidivism of physical and sexual child abusers.[124] Likewise, it will be difficult to demonstrate that the use of Norplant will effectively control minority populations, if that is indeed the admitted objective. Thus, the mandatory use of Norplant in preventing child abuse and controlling populations will likely be a violation of due process under the Fourteenth Amendment.

The mandatory use of Norplant for any reason may also be contrary to the First Amendment if the use of birth control is adverse to a woman's religious beliefs.[125] Nevertheless, although "conditions imposed by the

---

122. 495 P.2d 768, 771-72 (Or. Ct. App. 1972); *see also In re* Sterilization of Moore, 221 S.E.2d 307 (N.C. 1976) (validating a sterilization statute as a reasonable exercise of the state's police power).

123. Due process also guarantees that Norplant will be removed if the woman later shows at a hearing that she has undergone treatment, become drug-free, and will remain so.

124. *Compare* Randal C. Shaffer, Comment, *Protecting the Innocent: Confrontation, Coy v. Iowa, and Televised Testimony in Child Sexual Abuse Cases*, 78 KY. L.J. 803, 815 (1989-90) (citing David L. Armstrong & John S. Gillig, *Responding to Child Sexual Abuse and Exploitation: The Kentucky Approach*, 16 N. KY. L. REV. 17 (1988)) ("This crime is one that feeds upon itself, as more than eighty percent of child sexual abusers were themselves victims of abuse as children.") *and* Raymond C. O'Brien, *Pedophilia: The Legal Predicament of Clergy*, 4 J. CONTEMP. HEALTH L. & POL'Y 91, 114 (1988) (recognizing patterns of future abuse committed by those who were abused as children) *with* John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1725-26 (1990) (citing DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 47 (1984)) (" '[A] history of molesting may play a role in the creation of some child molesters . . . . [However,] most children who are molested do not go on to become molesters themselves. This is particularly true among women, who whether victimized or not rarely become offenders.' ") *and* James M. Peters et al., *Why Prosecute Child Abuse?*, 34 S.D. L. REV. 649, 654-55 (1989) (discussing evidence contrary to findings that abusers are themselves victims of abuse). The Supreme Court recognized the former of the two positions in New York v. Ferber, 458 U.S. 747, 758 n.9 (1982), stating, "It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults."

125. For example, Catholics may have a First Amendment claim against the mandatory imposition of birth control because birth control violates their religious tenets. For a brief discussion of the Free Exercise Clause in opposition to the right to refuse other kinds of medical treatment see *Developments in the Law: Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1669-70 (1990).

court should be designed to assist the [defendant] in leading a law-abiding life . . . [and] reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion,"[126] the state's compelling interest in the protection of human life has been held to outweigh the religious objections.[127]

Mandatory sterilization through the use of Norplant is inevitably at odds with the fundamental right of procreation recognized in *Skinner* and other similar cases. Despite the fact that Norplant may defeat First, Eighth, and Fourteenth Amendment claims within a very specific context, it is unlikely that a court will find both a sufficient compelling state interest and clear and convincing proof of prospective abuse such that it can deny a woman the fundamental right to bear children without her consent.

B. Voluntary Sterilization

If a court may not legally impose Norplant mandatorily, it is still possible that Norplant may be offered as a means of sentence reduction or as a condition of probation. Courts have broad discretion in prescribing reasonable conditions of probation[128] and will be reversed only upon a showing of abuse of this discretion.[129] Recently, Texas District Judge Doug Shaver used his discretion and ordered the implantation of Norplant as part of a plea bargain agreement.[130] Cathy Lanel Knighten pleaded guilty to injuring her ten-month-old daughter after hidden video cameras in her daughter's hospital room twice captured Knighten placing her hands over the child's face for more than a minute in an effort to smother her.[131] Knighten was ordered to serve ten years of probation, which included five years of using Norplant and her participation in parenting classes.[132] Additionally, she has been denied

126. Rodriguez v. Florida, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979).

127. *See, e.g.*, Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981) (ordering a caesarean section performed against the woman's religious objections based on the compelling state interest in the unborn fetus); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J.) (ordering blood transfusion to a pregnant Jehovah's Witness), *cert. denied*, 377 U.S. 985 (1964); Crouse Irving Memorial Hosp. v. Paddock, 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985) (parents' constitutional right to freedom of religion must yield to the compelling state interest in protecting the unborn when a blood transfusion is necessary). *But see* St. Mary's Hosp. v. Ramsey, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985) (patient may refuse blood transfusion on grounds of religious belief).

128. *See* 18 U.S.C.A. § 3563 (West 1985 & Supp. 1991).

129. United States v. Wickenhauser, 710 F.2d 486, 487 (8th Cir. 1983) (citing United States v. Rifen, 634 F.2d 1142, 1144 (8th Cir. 1980)).

130. *Judge Orders Mother to Be Given Contraceptive*, UPI, Sept. 6, 1991, *available in* LEXIS, Nexis Library, UPI File.

131. *Id.*

132. *Id.*

unsupervised visits with her other children for ten years.[133] This case demonstrates the use of Norplant as both a means of plea bargaining for pregnant women and a rehabilitative tool for the courts.

In *People v. Blankenship*,[134] a twenty-three-year-old man convicted of statutory rape appealed the condition of probation requiring sterilization.[135] The District Court of Appeal for the Fourth District of California upheld the condition on the grounds that it protected the health and welfare of the citizens of the state.[136] The court commented on whether the sterilization was voluntary:

> [I]t may be remarked that appellant was not compelled by the condition which the court imposed to submit to an operation whose effect would be to foreclose him from procreation. He was permitted to elect whether he would comply with the condition and receive the clemency which he asked or decline to submit to the operation and accept the penalty which the law provides as punishment for his offense.[137]

Thus, the defendant was not coerced into accepting the sterilization procedure, but rather the procedure was voluntarily accepted as a valid condition of probation.[138]

The facts surrounding a given condition of probation, whether mandatory or voluntary, must be confronted before the condition may be found unconstitutional. For example, a condition of probation which prohibits procreation is reasonable if it relates to child endangerment and the possibility of prospective abuse.[139] Therefore, the use of Norplant as a condition in sentencing will be valid if it is shown to be effective and least restrictive in confronting facts of the case and if it passes constitutional muster.

---

133. *Id.*

134. 61 P.2d 352 (Cal. Dist. Ct. App. 1936).

135. *Id.* at 352.

136. *Id.* at 353. Arguably the state's interest in protecting its citizens extends to prenatal life. Roe v. Wade, 410 U.S. 113, 150 (1973).

137. *Blankenship*, 61 P.2d at 353-54.

138. For another example of voluntary sterilization as a condition of sentencing, see Briley v. California, 564 F.2d 849 (9th Cir. 1977). *But see* California v. Dominguez, 64 Cal. Rptr. 290, 293-95 (Ct. App. 1967) (impliedly overruling *Blankenship*, in which it was found unreasonable to require as a condition of probation that a woman convicted of second-degree robbery not become pregnant until after she became married). Other courts have upheld such conditions if accompanied by statutory authority. *See, e.g.*, Smith v. Superior Court, 725 P.2d 1101 (Ariz. 1986). Similarly, the court in United States v. Smith, 414 F.2d 630 (5th Cir. 1969), held that it was a reasonable condition of probation to prohibit one from associating with certain activist groups with whom he broke the law. *Smith* at 636. The court found that, "[h]e could have rejected probation and elected prison. He chose to enjoy the benefits of probation; he must also endure its restrictions." *Id.*

139. *See, e.g.*, People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984).

In *Rodriguez v. Florida*,[140] the Florida District Court of Appeal found that the particularized facts of the case did not mandate certain conditions of probation that were imposed.[141] After pleading guilty to aggravated child abuse, the defendant was placed on ten years of probation which prohibited her from marrying, becoming pregnant, and retaining custody of children.[142] The court held that the prohibition on pregnancy was invalid because it was punitive in nature and unrelated to rehabilitation.[143] The *Rodriguez* court offered a standard by which courts may determine if a condition of probation is not reasonably related to rehabilitation. If the condition: "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality[,] then it is not reasonably related to rehabilitation."[144] In this case, the condition prohibiting pregnancy was not related to future criminality because the custody of the children was already restricted by another condition which was upheld.[145] However, this reasoning is not applicable to gestational substance abuse cases since the abuse takes place in the mother's womb, which is not affected by a custody decision. The court in *People v. Pointer*,[146] confirmed this reasoning when it stated,

> Although cases in other jurisdictions have concluded that a condition of probation that a defendant not become pregnant has no

140. 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

141. *Id.* at 10.

142. *Id.* at 8.

143. *See id.* at 10; *see also* United States v. Conforte, 624 F.2d 869, 883 (9th Cir. 1979) (restrictions on fundamental rights must serve the broad purposes of the Probation Act), *cert. denied*, 449 U.S. 1012 (1980); Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980) ("[P]unishment of an offender may not be the primary purpose of the judge's imposition of probation." (citing United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975)); Louisiana v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986) (a valid probation condition must be reasonably related to rehabilitating the defendant); Ohio v. Livingston, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (court may not impose arbitrary conditions that are only remotely related to the objectives of education and rehabilitation). *But see* United States v. Torrez-Flores, 624 F.2d 776, 783 (7th Cir. 1980) (condition of probation need not be reasonably related to the rehabilitation of the defendant and the protection of the public).

144. *Rodriquez*, 378 So. 2d at 9; *see also* Thomas v. Florida, 519 So. 2d 1113, 114 (Fla. Dist. Ct. App. 1988) (using similar criteria to determine validity of probation conditions).

145. *Rodriquez*, 378 So. 2d at 10. *See also* Howland v. Florida, 420 So. 2d 918, 920 (Fla. Dist. Ct. App. 1982) (possibility that condition of prohibition from fathering a child was related to future criminal conduct was foreclosed by other valid conditions of probation). The attorney for Darlene Johnson argues against her conditioned probation with the same reasoning: "The conditions of probation have to be related in some way to rehabilitation . . . . Preventing someone from having a child really doesn't have anything to do with the crime of child abuse. Case law says child abuse is remedied by removing the child. Contraception is too broad a remedy." Lev, *supra* note 10, at A17 (quoting Charles Rothbaum).

146. 199 Cal. Rptr. 357 (Ct. App. 1984).

> relation to the crime of child abuse or to future criminality, those cases relied heavily upon the fact that the abuse could be entirely avoided by removal of any children from the custody of the defendant. This case is distinguishable, however, because of evidence that the harm sought to be prevented by the trial court may occur before birth.[147]

Assuming gestational substance abuse is a criminal offense,[148] a condition restricting pregnancy is valid under this standard if the condition is directly related to the crime.

Furthermore, Norplant may be a rehabilitative tool because it assures that the abusive parent will not bear children within an extended period of time, thereby alleviating the risk of abuse[149] and affording her an opportunity to seek psychological or rehabilitative treatment. Once the conditions of probation are met, Norplant may be removed. In *Burns v. United States*,[150] the Supreme Court stated that the purpose of probation is "to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which [might otherwise be] . . . less probable."[151] Norplant does just this. It is not meant to cure the underlying problem, nor is it meant solely to punish. It is meant to aid in rehabilitation so that the abusive parents may, in the future, more fully appreciate the rights and responsibilities—and the lives—that they have abused.

IV. CONCLUSION

It is a puzzling and unfortunate fact that people who abuse children, for whatever reason, continue to have children. It is also frustrating that women who are addicted to drugs and who make no effort to treat their addiction continue to have children. It is also sad that underprivileged people who cannot afford to put food in their own mouths continue to have chil-

147. *Id.* at 364 (citation omitted).

148. For a discussion supporting the criminalization of prenatal conduct, see Flannery, *supra* note 50.

149. In *In re* Sterilization of Moore, 221 S.E.2d 307 (N.C. 1976), the court commented on the justification for the sterilization of mentally ill persons in specific situations which may be equally as applicable to gestational substance abusers:

> [T]he sterilization of a mentally ill or retarded individual at certain times may be in the best interest of that individual. The mentally ill or retarded individual may not be capable of determining his inability to cope with children. In addition, he may be capable of functioning in society and caring for his own needs but may be unable to handle the additional responsibility of children . . . . Therefore, the [s]tate may only be providing for the welfare of the individual when this individual is unable to do so for himself.

Id. at 312-13.

150. 287 U.S. 216 (1932).

151. *Id.* at 220.

dren. To some—like Judge Howard Broadman—the arrival of Norplant has allowed the courts an opportunity to address these unfortunate facts. Others argue that its use only adds to this list.

Whatever its effect, Norplant has significantly altered the reproductive field in terms of a woman's options. The potential technology that lies ahead in the twenty-first century will only magnify its significance. If recent cases are any indication of Norplant's effect in the legal field, then the use of the drug will continue to be a contested issue.

Implantation of Norplant will remain a sentencing option available to the courts. If it is offered within the scope of a plea bargain or as a probation condition and collateral rights surrounding its effect have been voluntarily waived, then it will be a valid means of solving problems related to the defendant's ability to raise children. This is especially true for women who continue to abuse substances during gestation and, consequently, are unable to care for themselves and their addicted child. However, when the defendant opposes the implantation of Norplant, other constitutional issues become more relevant. The courts will have the difficult task of weighing the relevance of these constitutional issues against the objectives underlying each particular decision involving Norplant. Because Norplant is neither restrictive in its effect nor "cruel and unusual," and is medically proven to be safe and effective for most women, the drug will continue to be used as a method of reversible sterilization. Most importantly, Norplant will be available as a consideration for the courts because children continue to be abused and neglected by parents who lack the opportunity to help themselves.