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Banning Motherhood: An RX to Combat Child Abuse.

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BANNING MOTHERHOOD: AN RX TO COMBAT CHILD ABUSE?

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Children are a mirror, an honest reflection of their parents and their world.[1]

I. INTRODUCTION

As the United States faces a growing number of child abuse incidents, society struggles to find new solutions to old problems. The victimization of America's youth represents a national crisis, as evidenced by reports of rampant abuse and neglect[2] and rising fatality rates.[3] While child abuse affects the individual in ways beyond statistical calculation, society as a

1. *World Summit for Children*, N.Y. TIMES, Oct. 1, 1990, at A13.

2. *See* 139 CONG. REC. H5511-12 (daily ed. July 29, 1993) (remarks inserted into record by Rep. Mink) (discussing doubling of abuse and neglect cases in last decade). Reports alleging abuse or neglect occur every 12 seconds. *Id.*; *see also* Gale Holland, *High-Profile Abuse Cases May Not Shed Much Light*, SAN DIEGO UNION-TRIB., Jan. 10, 1994, at A3 (noting that three million abuse and neglect allegations were reported in 1992). *See generally* Amy Sinden, Comment, *In Search of Affirmative Duties Toward Children Under a Post-*Deshaney *Constitution*, 139 U. PA. L. REV. 227, 227–28 (1990) (relating increased

whole suffers the repercussions.[4] Recently, however, Americans have witnessed the rapid transformation of their notions of child abuse as drug-abusing mothers have given birth not to healthy babies, but to addicts.[5] Estimates indicate that one out of every ten newborns in the

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public awareness regarding abuse to enactment of legislation granting children greater protection).

3. *See* 139 CONG. REC. E1913 (daily ed. July 28, 1993) (statements of Sen. Molinari) (citing 1,300 abuse and neglect related deaths in 1992, an average of more than three child fatalities per day); Randall Samborn, *Prosecutors Go to Boot Camp*, NAT. L.J., Sept. 14, 1992, at 1 (finding that in past 10 years, reports of abuse have increased tenfold). *See generally* Mark Levine, Comment, *The Need for the "Special Relationship" Doctrine in the Child Protection Context:* DeShaney v. Winnebago, 56 BROOK. L. REV. 329, 332 (1990) (advocating placement of affirmative duty on state agencies to prevent child abuse deaths).

4. *See* Greenville County Dep't of Social Servs. v. Bowes, 437 S.E.2d 107, 113 (S.C. 1993) (indicating that child abuse survivors experience higher rate of psychiatric illness, substance abuse, and criminal behavior); 1990 TEXAS SURVEY OF POSTPARTUM WOMEN AND DRUG-EXPOSED INFANTS, TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE 2 (1991) (expressing educators' concerns regarding greater number of drug-exposed children entering school); CATHY S. WIDOM, NATIONAL INSTITUTE OF JUSTICE, THE CYCLE OF VIOLENCE 1 (1992) (revealing that childhood abuse escalates probability of future criminality by 40%); John Brandl, *Compromise on Adopting Abused Kids Benefits None*, STAR TRIB., Nov. 18, 1991, at 11A (arguing that lack of early bonding between child and parent thwarts child's development and future ability to form meaningful relationships); Leslie Sowers, *Shutting Love Out; Abused, "Unbonded" Infants Grow into the Children We Fear*, HOUS. CHRON., Sept. 20, 1992, (Lifestyle), at 1 (asserting that abused and love-deprived infants become "unbonded" and subsequently develop into remorseless adults). *But see* Francis T. Murphy, *Prejudice Attacks Victims of Prenatal Drug Abuse*, N.Y.L.J. Jan. 29, 1992, at 37 (challenging prejudices connected with "crack babies" and asserting that immediate intervention, though costly, could produce healthy and functioning children). *See generally* 139 CONG. REC. S14,834 (daily ed. Nov. 2, 1993) (remarks by Sen. Daschle) (determining that costs of treating drug-exposed infant multiplies exponentially as child grows older); Ann Japenga, *A 'Heroin Baby' at 42: Attorney Who Was Born into Addiction Loses Her Right to Practice Law*, S.F. CHRON., July 28, 1991, at 2 (describing attorney's lifelong concealment of heroin addiction until her arrest, detailing her struggle to overcome drug dependency that plagued her from birth).

5. *See* Johnson v. Florida, 602 So. 2d 1288, 1295 (Fla. 1992) (citing studies determining that each year approximately 375,000 babies are born to substance-abusing mothers); 139 CONG. REC. S2936 (daily ed. Mar. 16, 1993) (statements of Sen. Rockefeller) (recognizing prevalent substance abuse among pregnant women); Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 647 (1992) (estimating that as of 1988, five million women used illegal drugs in their childbearing years); Deborah A. Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 U. DAYTON L. REV. 1019, 1019 (1992) (reporting that 7.5 to 11% of pregnant women abuse drugs (citing 106 DEP'T OF HEALTH & HUMAN SERVS. PUB. HEALTH REP. 292 (May-June 1991))). *See generally* Sandra A. Garcia, *Drug Addiction and Mother/Child Welfare*, 13 J. LEGAL MED. 129, 142–48 (1992) (exploring social, legal, and economic factors relevant to growing crisis of substance abuse during pregnancy); Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is this the Answer?*, 1991 U. ILL. L. REV. 533, 533–34 (advancing argument that maternal sub-

United States suffers from illicit drug exposure.[6] In spite of a range of medical complications,[7] these infants reach out to both a parent and a society ill-equipped to cope with the challenges ahead.

The injury inflicted by prenatal exposure to drugs often signals only the beginning of a child's difficulties, for society's responses to the child create obstacles as well. Because of questions regarding parental fitness, drug-exposed children often face temporary placement in foster care.[8]

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stance abuse gives rise to host of legal and constitutional issues regarding potential state responses).

6. CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., TREATMENT IMPROVEMENT PROTOCOL (TIP SERIES) IMPROVING TREATMENT FOR DRUG-EXPOSED INFANTS 2 (1993); *see* S. 596, 103d Cong., 1st Sess. (1993) (reporting prenatal exposure to illegal drugs among 15% of newborns). *See generally* Robinson v. California, 370 U.S. 660, 670 (1962) (Douglas, J., concurring) (illustrating initial medical responses to emerging problem of drug-addicted newborns); Jim Schachter, *Help is Hard to Find for Addict Mothers: Drug Use 'Epidemic' Overwhelms Services*, L.A. TIMES, Dec. 12, 1986, (Metro), at 1 (discussing escalating number of drug-addicted newborns referred for home health visits).

7. *See* Zambrana v. United States, 790 F. Supp. 838, 848 n.8 (N.D. Ind. 1992) (commenting on studies describing cocaine babies' low birth weight, sensitive skin, high-pitched cries, and inability to stop kicking and waving arms); *Johnson*, 602 So. 2d at 1295 (emphasizing vast physical and neurological problems associated with cocaine-exposed infants, including smaller head circumferences, sudden infant death syndrome, and shorter body lengths); *In re* Ashanti, 558 N.Y.S.2d 447, 447 (N.Y. Fam. Ct. 1990) (noting that newborn infant, who weighed only four pounds, was "jittery, irritable, and cried a lot," and that baby's mother refused to cooperate with drug program or to seek prenatal care); *see also* Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1217–18 (1987) (discussing effects of prenatal substance abuse such as emotional disturbances, behavioral abnormalities, cognitive deficits, and sensory system impairment); Julia E. Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1161–62 (1992) (finding that prenatal cocaine exposure affects brain chemistry by altering neurotransmitters which regulate mood and responsiveness). *See generally* Barbara Shelley, Comment, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691, 691 (1988) (observing correlation between prenatal history and quality of life following birth).

8. *E.g.*, New Jersey Div. Youth & Family Serv. v. E.D., 558 A.2d 1377, 1383 (N.J. Super. Ct. App. Div. 1989); *In re* Michael M., 567 N.Y.S.2d 693, 693 (N.Y. App. Div. 1991); *In re* Adoption of T.M.F., 573 A.2d 1035, 1039 (Pa. Super. Ct. 1990); *see* Sandra A. Garcia, *Drug Addiction and Mother/Child Welfare*, 13 J. LEGAL MED. 129, 167 (1992) (supporting evidence that social service agencies remove newborns of drug addicts based upon beliefs of maternal unfitness). Evidence suggests that newborns returned to their addicted mothers generally suffer postnatal abuse and neglect. *Id.* The reasons for continued abuse center on criminal activity and diversion of funds to support drug habits, cycles of family violence, poor parenting skills, and varied side effects from illegal drug use. *Id. But see* Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1435–36 (1990) (urging that removal to foster care be used as "last resort" measure). *See generally In re* Stephen W., 271 Cal. Rptr. 319, 321 (Cal. Ct. App. 1990) (affirming lower court decision awarding custody to paternal grandparents of drug-addicted newborn until parents com-

This bureaucratic system, flooded with calls for assistance, lacks the necessary resources to adequately protect children's interests, making foster care typically worse than the circumstances which compelled intervention in the first place.[9] In other instances, the state terminates parental rights, making adoption possible.[10] Although adoption usually provides better opportunities for these children, placing abused, neglected, and drug-addicted infants into new families presents problems as well.[11] As demon-

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pleted family reunification program); Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1255 (1991) (reiterating arguments for removing children to foster placement when drug-addicted parent is unable to provide necessary care).

9. *See* S. 844, 103d Cong., 1st Sess. (1993) (designing program to alleviate hardships burdening foster care system). Congress reported that although 450,000 United States children resided in foster homes, less than 10% enjoyed the possibility of adoption. *Id.* Furthermore, 40% of foster children had remained in foster care for a minimum of two years, while 25% of these children had languished in foster care for at least three years. *Id.*; L.J. v. Massinga, 838 F.2d 118, 121 (4th Cir. 1988) (contending that foster care often causes irreparable harm to children, including further abuse and neglect); Lynch v. King, 550 F. Supp. 325, 341 (D. Mass. 1982) (recognizing that greatest danger of foster care is risk of "losing" child in system); *see also* Sandra A. Garcia, *Drug Addiction and Mother/Child Welfare: Rights, Laws, and Discretionary Decision Making*, 13 J. LEGAL MED. 129, 170 (1992) (noting that nation's foster care system is understaffed and overcrowded); Stacy Robinson, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L.Q. 395, 397 (1993) (examining significant rise in number of children in foster care during last decade: 247,000 to 407,000 children); Isaiah J. Poole, *Judge Set to Order District to Provide Better Foster Care*, WASH. TIMES, Feb. 27, 1991, at B10 (supporting allegations that children are victimized by bureaucracy because social system is unable to handle overwhelming number of needy).

10. *See generally In re* Solomon L., 236 Cal. Rptr. 2, 5–6 (Cal. Ct. App. 1987) (holding that lower court acted within its discretion when it terminated parental rights based on findings of drug use during pregnancy and mother's inability to end addiction after child's birth); Vanessa W. v. Texas Dep't of Human Servs., 810 S.W.2d 744, 752 (Tex. App.—Dallas) (ruling that drug use during pregnancy constituted probative proof that mother knowingly engaged in behavior dangerous to child's emotional and physical well-being, and therefore supported termination of mother's parental rights), *rev'd on other grounds sub nom.* Texas Dep't of Human Servs. v. White, 817 S.W.2d 62 (Tex. 1991); *In re* Guillory, 618 S.W.2d 948, 951 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (illustrating instance in which mother's rights were terminated in part because of drug use during pregnancy); Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1234 (1991) (reviewing Minnesota statute granting statewide discretion to terminate parental rights in case of serious drug abuse); Marcy T. Stovall, Looking for a Solution: In re Valerie D. *and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1282 (1993) (analyzing Connecticut approach to terminating parental rights as solution for drug-addicted newborns).

11. *See* S. 844, 103d Cong., 1st Sess. § 2(17) (1993) (finding that foster care system designated 60% of its children as having "special needs," thus hindering adoption efforts); 139 CONG. REC. S2936 (daily ed. Mar. 16, 1993) (statements of Sen. Rockefeller) (addressing physical, mental, and developmental problems children entering foster care face as result of parental neglect and separation trauma); *see also* Cox v. Court of Common Pleas,

strated by these additional factors, blaming mothers for the nation's crisis involving children neither solves nor addresses the entire issue. As society insufficiently responds, these mothers, who are often victims of poverty, illiteracy, and abandonment, remain captive to their addictions, free to err and become pregnant again.[12]

The ineffectiveness of traditional means of combatting this social emergency has generated recent recommendations from judges and legislators alike. The advent of Norplant,[13] a long-lasting contraceptive device in-

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537 N.E.2d 721, 729 (Ohio Ct. App. 1988) (mentioning reluctance of adoptive parents to consider adopting drug-addicted newborns). As the recent trend in litigation illustrates, the growing number of "special needs" children exposes adoption agencies to potential liability. *See, e.g.*, M.H. v. Caritas Family Servs., 488 N.W.2d 282, 284–86 (Minn. 1992) (considering wrongful adoption action initiated by adoptive parents after their discovery that child, who suffered from range of psychological and physical problems, was product of sibling incest); Burr v. Board of County Comm'rs, 491 N.E.2d 1101, 1109 (Ohio 1986) (allowing judgment against adoption agency for deliberately concealing child's severe physical and emotional problems from adopting couple); Gibbs v. Ernst, 615 A.2d 851, 853 (Pa. Commw. Ct. 1992) (illustrating litigation based on adoption agency's failure to disclose child's extreme physical and sexual abuse to adoptive parents); Daniel Golden, *When Adoption Doesn't Work*, BOSTON GLOBE, June 11, 1989, (Magazine), at 16 (depicting individual families coping with troubled adoptees and discussing recent litigation boom surrounding their adoptions). Commentators urge reform of current adoption practices to protect the rights of adoptive parents. *See* Paula K. Bebensee, Note, *In the Best Interests of Children and Adoptive Parents: The Need for Disclosure*, 78 IOWA L. REV. 397, 398 (1993) (advocating full disclosure for adoptive parents to educate them on potential risks and necessary resources to handle special needs child).

12. *See* 134 CONG. REC. H11,229 (daily ed. Oct. 21, 1988) (remarks by Rep. Vento) (discussing legislation designed to break cycle of drug abuse among pregnant women in light of "astronomical" rise in maternal substance abuse); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 537 n.7 (1990) (Blackmun, J., dissenting) (referring to cycle of poverty and abuse acutely apparent in younger mothers with unwanted children); Constance Matthiessen, *Offsetting the Effects of Crack on Babies: Early Stimulation Helps Children Who Were Exposed to Drugs in the Womb*, WASH. POST, Dec. 31, 1991, at Z12 (recognizing that drug-addicted mothers were once victims too). "The mothers were just like these children [addicted infants] 20 years ago, and if something isn't done, the children are going to be these mothers 20 years from now." *Id.*; *see also* Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 658 (1992) (uncovering that children with drug-addicted parents are likely to develop addictions as well, and demonstrating need for effective intervention to stop cycle); *cf.* Susan C. Smith, Comment, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriative Legal Response*, 42 CATH. U. L. REV. 141, 152–60 (1992) (discussing cycle of violence regarding victims of physical and sexual abuse).

13. *Norplant: Opportunities and Perils for Low-Income Women*, (Alan Guttmacher Inst., Washington, D.C.), Dec. 1992, at 1, 2 (Special Rep. #1). The United States Food and Drug Administration authorized Norplant's use in December 1990, although the contraceptive had been available in other countries for several years. *Id.* Norplant, considered a revolution in birth control, prevents conception by releasing hormones through six silicone tubes inserted into a woman's upper arm under the skin. Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78

serted under the skin, has stimulated interest in the implementation of mandatory birth control policies to thwart the increasing number of drug-addicted babies.[14] Such calls for action, while motivated by reasonable concerns, raise significant constitutional issues.[15] As children's status becomes increasingly bleak, reform efforts likely will gain momentum and support, thereby forcing states to seriously consider the issue of compulsory birth control.

Beginning with a history of judicial attempts to control child abuse through the prohibition of pregnancy and court-ordered contraception, this Comment presents an overview of recent state legislative efforts to control the contraceptive practices of low-income individuals and of women whose newborns suffer from illicit-drug addiction. Following a constitutional and legal evaluation of the issues implicated by such reform attempts, this Comment considers the problems facing Texas and pro-

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IOWA L. REV. 779, 787–88 (1993). Side effects include headaches, irregular bleeding, acne, weight gain, and changes in moods. *See* Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 980 (1992) (describing Norplant device and discussing its development over past 20 years, its guaranteed effectiveness, and potential side effects).

14. *See* Malcolm Gladwell, *Contraceptive Implant Approved for U.S. Use; Birth Control Option Effective Up to 5 Years*, WASH. POST, Dec. 11, 1990, at A3 (noting social policy experts' suggestion that Norplant be provided to drug addicts due to their high pregnancy rates and inability to successfully utilize other contraceptives). Much commentary exists regarding the enlistment of Norplant against maternal substance abusers. *E.g.*, Stephanie Denmark, *Birth-Control Tyranny*, N.Y. TIMES, Oct. 19, 1991, at 23; Tamar Lewin, *Implanted Birth Control Device Renews Debate Over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20; Cynthia Tucker, *Norplant: Does it Have a Role in Sentencing?*, ATLANTA J. & CONST., Jan. 30, 1991, at A9. *See generally* 139 CONG. REC. S10,982 (daily ed. Sept. 7, 1993) (remarks by Sen. Nickles) (criticizing U.S. Surgeon General Joycelyn Elder's suggestion that Norplant be provided to drug-using women); 135 CONG. REC. H2138 (daily ed. May 24, 1989) (remarks by Rep. Boxer) (advocating aggressive legislation aimed at maternal substance abusers because resulting children face life-time struggle to overcome addiction).

15. *Compare* James H. Taylor, Note, *Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse*, 44 FLA. L. REV. 379, 386–90 (1992) (reminding that despite United States Supreme Court's recognition of procreative rights, those rights remain largely undefined) *and* Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 376–77 (1992) (comparing recent attempts to implement mandatory birth control to constitutionally repudiated sterilization movement of 19th century) *with* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 160–66 (1993) (attacking court-ordered Norplant use as constituting gender and racial discrimination) *and* Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 799–802 (1993) (concluding that mandatory Norplant measures violate notions of bodily integrity and medical self-determination).

poses a direction for the development of legislation which recognizes the need to protect the interests of both mother and child.

II. Judicial Attempts to Remedy Child Abuse

A. *Judicial Orders Forbidding Procreation*

Although case law provides endless accounts of physical, emotional, and sexual abuse of children, the emergence of drug-addicted newborns has presented the judiciary with a relatively recent and growing problem.[16] Cognizant of the system's inability to cope with abusive parents, some judges have required women to refrain from pregnancy as a condition of probation for various child abuse convictions.[17] Men, unable to

16. *See, e.g., In re* S.W., 290 N.W.2d 675, 676 (N.D. 1980) (denying custody to parents in case in which father kicked daughter and repeatedly struck her legs and backside with leather belt, leaving bruises and welts); Bjerke v. D.T., 248 N.W.2d 808, 812 (N.D. 1976) (justifying removal of child from home because of child's attempted suicide and parent's refusal to acknowledge problem); Kennedy v. State, 839 P.2d 667, 669 (Okla. Crim. App. 1992) (relating facts offered by three-year-old describing her sexual abuse by father). The courts currently face various issues involving prenatal abuse ranging from termination of parental rights to criminalization. *See, e.g., In re* D.M.W., 623 So. 2d 634, 635 (Fla. Dist. Ct. App. 1993) (terminating parental rights after baby was born addicted to cocaine); Brown v. Department of Health & Rehab. Serv., 582 So. 2d 113, 114–15 (Fla. Dist. Ct. App. 1991) (illustrating neglect proceeding resulting from mother's prenatal cocaine abuse); *In re* Theresa J., 551 N.Y.S.2d 219, 220 (N.Y. App. Div. 1990) (finding prima facie neglect after newborn died due to mother's substance abuse); *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 281–86 (N.Y. App. Div. 1990) (describing neglect proceeding after mother's cocaine use resulted in drug-affected newborn); *In re* Wright, 367 N.E.2d 931, 931–36 (Ohio Ct. App. 1977) (resolving custody issues surrounding drug-abusing mother and putative father by awarding county welfare department custody of their two children). *Compare* Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 Emory L.J. 1401, 1404 (1990) (investigating states' unsuccessful attempts to prosecute substance-abusing mothers under existing laws) *with* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. Rev. 1, 25–26 (1992) (voicing judicial frustration over rampant child abuse prompting mandatory Norplant orders). *See generally* Colleen M. Coyle, Comment, *Sterilization: A "Remedy for the Malady" of Child Abuse?*, 5 J. Contemp. Health L. & Pol'y 245, 248 (1989) (revealing that parent's aberrant childhood, aggressive tendencies, and high stress levels, as well as early bonding problems between parent and child, constitute factors customarily found in abuse cases).

17. *E.g.*, People v. Pointer, 199 Cal. Rptr. 357, 359 (Cal. Ct. App. 1984); Rodriguez v. State, 378 So. 2d 7, 8 (Fla. Dist. Ct. App. 1979); State v. Mosburg, 768 P.2d 313, 313 (Kan. Ct. App. 1989); State v. Livingston, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976); *see* Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 Brook. L. Rev. 979, 980–82 (1992) (illustrating that idea behind mandatory Norplant initiatives is not innovative, as shown by prior judicial orders controlling pregnancy). *But see* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 Tul. L. Rev. 1945, 1969 (1993) (alleging that belief that certain racial groups are undeserving of procreative freedom underlies coerced Norplant measures); Michelle Oberman, Comment,

evade such judicial attempts to protect children, have endured similar restrictions on their reproduction as well.[18] Moreover, judges have imposed comparable stipulations of probation for crimes wholly unrelated to child abuse, including drug possession,[19] theft and robbery,[20] forgery,[21]

The Control of Pregnancy and the Criminalization of Femaleness, 7 BERKELEY WOMEN'S L.J. 1, 2 (1992) (contending that concern over fetal health merely constitutes rhetoric to mask governmental efforts to dictate reproductive choices of women).

18. *See* Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (prohibiting man from fathering children because of negligent child abuse conviction); *see also* Smith v. Superior Court, 725 P.2d 1101, 1102 (Ariz. 1986) (describing offer to reduce prison sentence if offender consented to voluntary sterilization). *Smith* involved the prosecution of Dan and Tracy Smith for the death of their nine-month-old infant. *Id.* The infant, deprived of food and liquids for several days, died "slowly in great pain" of dehydration, while the parents left the child unattended and unmonitored. *Id.* Furthermore, the court discovered that Tracy Smith had neglected a child from an earlier marriage. *Id.* Due to the substantial aggravating circumstances, the trial judge sentenced both parents to two-and-a-half year prison terms. *Id.* The judge, however, offered to reduce the sentence if the Smiths consented to voluntary sterilization. *Id.*; Gauntlett v. Kelley, 849 F.2d 213, 219 (6th Cir. 1988) (discussing terms of original probation order, later reversed on appeal, which provided for "chemical castration" of sex offender). Roger Gauntlett faced criminal sexual conduct charges in connection with his stepdaughter and stepson. People v. Gauntlett, 352 N.W.2d 310, 311 (Mich. Ct. App. 1984). The sentencing judge ordered Gauntlett to undergo Depo-Provera treatment for the duration of his five-year probationary period. *Id.* at 313. Depo-Provera, when administered to men, reduces their sex drive and results in temporary impotence. *Id.* at 315; Briley v. State, 564 F.2d 849, 852 (9th Cir. 1977) (examining Briley's allegation that he underwent castration to avoid child molestation conviction); State v. Feilen, 126 P. 75, 76–78 (Wash. 1912) (upholding order requiring convicted rapist to undergo vasectomy and rejecting claim of cruel and unusual punishment); *cf.* Michalow v. State, 362 So. 2d 456, 457 (Fla. Dist. Ct. App. 1978) (striking probation condition directing appellant to "rectify" marital status and legitimize his child). The appellate court agreed with appellant's assertions that the probation order constituted mandate to marry and, specifically, that he wed his child's mother. *Id.*; Mays v. State, 349 So. 2d 792, 793–94 (Fla. Dist. Ct. App. 1977) (invalidating probation condition prohibiting convicted burglar from living with female, unless married, as overbroad). *See generally* Ellen Goodman, *The Wrong Punishment*, WASH. POST, Dec. 3, 1983, at A19 (discussing judicial offer of surgical castration to defendant convicted of rape); *Maryland: State Legislature Approves Norplant Plan*, ABORTION REP., Mar. 29, 1993 (reporting passage of Maryland Governor William Schaefer's measure that offers vasectomies to ex-convicts).

19. *See* People v. Zaring, 8 Cal. App. 4th 362, 365 (Cal. Ct. App. 1992) (noting probation condition restricting pregnancy based on drug possession conviction). Although drug possession charges are unrelated to child abuse, the sentencing judge indicated his desire to protect the unborn from a substance-abusing mother. *Id.* at 368–69; *see also* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 11 (1992) (describing Zaring as mother of five children, all of whom had been removed from her care, who supported cocaine and heroin addiction through prostitution). *See generally* Stephanie B. Goldberg, *No Baby, No Jail: Creative Sentencing Has Gone Overboard, a California Court Rules*, 78 A.B.A. J. 90, 90 (1992) (reviewing probation condition imposed by Judge Broadman, forbidding defendants from becoming pregnant, as one of his many attempts at creative sentencing). Judge Howard Broadman had previously

and sex offenses.[22] Although courts have rationalized that necessity,[23] a

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required individuals to complete high school, donate an automobile to battered women's shelter, and wear a shirt reading "I am a felon." *Id.* In a more controversial case, Judge Broadman ordered Darlene Johnson to submit to a Norplant implantation after she was convicted of child abuse. *E.g.*, Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 144–46 (1993); Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 365–67 (1992); Elinor F. Parker, Comment, *Birth Control as a Probation Condition for Child Abusers—Creative Alternative or Unconstitutional Condition?*, 19 W. ST. U. L. REV. 289, 289–90 (1991).

20. *See* Thomas v. State, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (reviewing prohibition of pregnancy as probation condition for conviction of grand theft and battery). In *Thomas*, Christina Thomas grappled with a citizen and a department store employee after they attempted to prevent her from shoplifting several gold watches. *Id.* The special condition forbidding pregnancy remained effective unless Thomas married. *Id.*; *see also* People v. Dominguez, 64 Cal. Rptr. 290, 292–93 (Cal. Ct. App. 1967) (discussing judicial requirement that woman, who was convicted of robbery, refrain from pregnancy as probation condition). In *Dominguez*, Mercedes Dominguez drove the "get away" car after her two companions robbed a liquor store. *Id.* at 292. At the time, Dominguez, who was 20 years of age and dependent on public assistance, was pregnant with her third child. *Id. See generally* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 88 (1992) (arguing that it is impossible for women to comply with probation terms restricting pregnancy).

21. *See* State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986) (examining probation condition imposed following forgery conviction that forbade pregnancy outside of wedlock). In *Norman*, Savitri Norman's efforts to cash a forged check were thwarted outside a Baton Rouge bank's branch office. *Id.* at 952. After she pled guilty and received a one-year prison sentence, the trial court suspended Norman's sentence in favor of a two-year supervised probation term, which required that she not conceive a child unless she married. *Id.* at 953; *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 343 n.335 (1992) (noting case in which woman, brought before judge on misdemeanor forgery allegations, was incarcerated for duration of her pregnancy after judge discovered she used cocaine). *See generally* Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 MD. L. REV. 293, 303 (1990) (criticizing connection of restrictions on procreation, specifically sterilization, with reduction in prison term). Williams argues that "The defendant, in privatized terms, is positioned as a purchaser, as 'buying' her freedom by paying the price of her womb. And because that womb is in the position of money in this equivalency, it seems to many to be a form of expression, a voluntary and willing expenditure in the commerce of free choice." *Id.*

22. State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985). In *Brown*, Mark Vaughn, Michael Braxton, and Roscoe James Brown were involved in a brutal sexual assault. *Id.* After pleading guilty to first-degree criminal conduct, the trial judge sentenced Vaughn, Brown, and Braxton to the maximum period of 30 years in prison. *Id.* The trial judge ruled that the men could suspend their sentences and be placed on probation if they completed a surgical castration, which they later agreed to do. *Id.* The appellate court invalidated the surgical castration probation term on state public policy grounds. *Id.* at 412; *see also* Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 MD. L. REV. 293, 303–04 (1990) (examining Roscoe Brown's case in terms of "freedom of choice" in that Brown "asked" to be castrated only after he had been incarcerated); Michael Hirsely, *3 Ask for*

mother's denial of or unwillingness to correct her detrimental behavior,[24] and the protection of the unborn[25] demand such extraordinary probation

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Castration as Option to Prison, CHI. TRIB., Jan. 10, 1985, (News), at 29 (describing battle by Vaughn, Braxton, and Brown to enforce castration option and avoid lengthy prison term).

23. *Pointer*, 199 Cal. Rptr. at 362. In *Pointer*, the jury convicted Ruby Pointer of child endangerment after she restricted her children, Jamal and Barron, ages two and four respectively, to a disciplined macrobiotic diet despite her physician's warnings. *Id.* at 359. After Jamal became semicomatose, the mother brought her "emaciated" and "dying" child to the hospital. *Id.* at 360. The hospital saved Jamal's life with emergency procedures and eventually released him into foster care. *Id.* The mother later abducted Jamal, fled the country with both children, and resumed the rigid diet. *Id.* By the time the authorities returned the children to California, Barron had suffered serious underdevelopment, and Jamal had sustained permanent physical and neurological damage. *Id.* Explaining the sentence he assessed the mother, the judge asserted that although he had never previously considered forbidding pregnancy as a probation condition, the extreme seriousness of the case required extraordinary means. *Id.* at 362; *see also* Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 996–97 (1992) (recognizing nexus between Pointer's crime and probation condition, but determining that infringement on child-bearing constituted impermissible burden on mother's rights). Other judges have employed extraordinary probation terms in an effort to hinder future criminal behavior. *Compare* Goldschmitt v. State, 490 So. 2d 123, 124–26 (Fla. Dist. Ct. App. 1986) (upholding placement of bumper sticker reading "Convicted D.U.I—Restricted License" on convicted drunk driver's automobile as serving sufficient rehabilitative purposes and rejecting claim of cruel and unusual punishment) *with* United States v. William Anderson Co., 698 F.2d 911, 912–14 (8th Cir. 1982) (rejecting challenges to probation condition that required corporate defendants to pay fines to charitable organizations without control over use of money or benefit of tax deduction), *overruled on other grounds by* United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1550 (1984). *But see* People v. McDowell, 130 Cal. Rptr. 839, 843 (Cal. Ct. App. 1976) (invalidating probation condition requiring purse snatcher to wear tap shoes whenever he left his home to "alert" unsuspecting victims).

24. *See Pointer*, 199 Cal. Rptr. at 362 (finding that despite physician's warnings, mother strictly adhered to macrobiotic diet which she imposed on children to point of starvation and nearly to point of death). The court further held that the mother's conduct demonstrated a likelihood of future abuse, as evidenced by her continuation of the macrobiotic diet even after the child's near-fatal reaction. *Id.* Unfortunately, the judge's predictions proved accurate. *See* Associated Press, *Tales of Neglect Surface After Girls are Removed from Squalid Home*, CHI. TRIB., June 22, 1991, at C15 (describing discovery of poor conditions in which Ruby Pointer's three malnourished daughters lived and their subsequent removal to foster care). After neighbors complained of physical abuse, police investigators went to the Pointer home. *Id.* When the police arrived, they discovered 33 marijuana plants, rotten food, and piles of garbage scattered across the home. *Id.* The eldest child, age six, was apparently autistic, and the younger girls, ages two and four, had never learned to speak. *Id.*

25. *Smith*, 725 P.2d at 1103; *see also Dominguez*, 64 Cal. Rptr. at 293–94 (justifying restrictions on procreation to prevent mothers from giving birth to children who would eventually become wards of state). *See generally* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 728 (1993) (criticizing judicial inclination to equate unwed motherhood with irresponsible behavior and justifying intervention and restrictions on procreation);

terms, in each instance appellate review has led to reversal of court-ordered restrictions on procreation in light of constitutional concerns.[26]

B. *Court-Mandated Birth Control*

New advancements in birth control, such as Norplant, once again have spurred controversy regarding the judiciary's authority to restrict an individual's reproductive choices.[27] While prior attempts to ban pregnancy

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Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 993 (1992) (delineating factors rendering probation condition void as established in *Dominguez*, which include whether condition relates to non-criminal behavior, lacks nexus between condition and crime, and forbids or mandates behavior not reasonably related to future criminal conduct).

26. *See Gauntlett*, 352 N.W.2d at 314–15 (striking down order of "chemical castration" as invalid without specific statutory authority). The Arizona Supreme Court has also refused to permit court-ordered sterilization without legislative authority to impose such a penalty. *Smith*, 725 P.2d at 1104; *see also Pointer*, 199 Cal. Rptr. at 365–66 (asserting that although condition controlling procreation related to future criminality, less intrusive means existed to serve governmental interests); *Norman*, 484 So. 2d at 953 (invalidating probation condition as lacking connection to crime of forgery); *Brown*, 326 S.E.2d at 412 (holding that castration constitutes mutilation, as well as cruel and unusual punishment). Other courts have invalidated probation terms on the basis that the terms are unrelated to the offense underlying the conviction. *See, e.g.*, *Thomas*, 519 So. 2d at 1114 (finding pregnancy restriction imposed for conviction of theft and battery crimes unrelated to present offenses, involving behavior in itself not criminal, and lacking value in prediction of future criminality); *Howland*, 420 So. 2d at 919–20 (finding that probation term forbidding man from fathering children not reasonably related to negligent child abuse conviction); *Livingston*, 372 N.E.2d at 1337 (arguing that trial judges' discretion in establishing special probation terms does not encompass freedom to impose arbitrary and unduly burdensome conditions); *Dominguez*, 64 Cal. Rptr. at 293 (treating future pregnancy as unconnected with robbery offense); Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 981 (1992) (tracing historical judicial efforts to curtail reproductive freedoms and consistent refusal by appellate courts to uphold such restrictive probation terms). *But see* People v. Blankenship, 61 P.2d 352, 353 (Cal. Ct. App. 1936) (rejecting contention that condition requiring syphilis-infected rapist to submit to sterilization was unreasonable). In *Blankenship*, the court convicted a man of statutory rape and offered him a choice between sterilization or prison. *Id.* at 352. In upholding the lower court's decision, the appellate court asserted that preventing the transmission of syphilis to both society and the man's future children was paramount. *Id.* at 353. "If reproduction is desirable to the end that the race shall continue," the appellate court stated, "it is equally desirable that the race shall be a healthy race and not one whose members are afflicted by a loathsome and debilitating disease." *Id.* at 353. *See generally* Leonard M. Niehoff, Note, *Developing a Victims' Suit for Injuries Caused by a Compulsorily Released Prisoner*, 17 U. MICH. J.L. REF. 99, 104 n.21 (1983) (detailing *Blankenship* case and noting that although appellate court upheld condition's validity, outcome of order remains uncertain).

27. *Compare* Jim Persels, Comment, *The Norplant Condition: Protecting the Unborn or Violating Fundamental Rights?*, 13 J. LEGAL MED. 237, 261–62 (1992) (predicting that advances in contraceptive technology will serve to protect children) *and* Thomas E. Bar-

or require birth control proved unsuccessful, Norplant remedies the problems of supervision, enforcement, and effectiveness, which proved fatal to prior judicial efforts.[28] Once implanted, Norplant requires no additional attention except upon removal, and its visibility simplifies verification of contraceptive use.[29] Norplant's attractiveness has recently prompted the judiciary to employ this revolutionary birth control device as a new weapon in its battle against child abuse.[30] Although only one

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trum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037, 1052–53 (1992) (advocating novel approach of mandatory birth control to remedy growing crisis of child abuse) *with* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 139–87 (1993) (suggesting that forced contraceptive use violates array of constitutional freedoms) *and* Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 981–84 (1992) (warning against establishment of dangerous precedent allowing courts to determine parental fitness regarding reproductive choices).

28. *See* People v. Pointer, 199 Cal. Rptr. 357, 362 (Cal. Ct. App. 1984) (addressing difficulties in monitoring birth control use and predicting noncompliance); State v. Mosburg, 768 P.2d 313, 315 (Kan. 1989) (rejecting ban on pregnancy based on possibility that contraceptives could fail, forcing mother to choose between prosecution, abortion, or concealment, all to fetus's detriment); *see also* McRae v. Califano, 491 F. Supp. 630, 672 n.37 (E.D.N.Y.) (noting high failure rate of contraceptives depending on type of birth control method used), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980); J.W. Brown, *Teen Ordered on Birth Control is Expecting*, PHOENIX GAZETTE, Aug. 30, 1988, at A1 (reviewing success of judicial order requiring Debra Ann Forster, with lifetime probation, to utilize birth control for probation's duration); *Judge Reverses Birth-Control Edict for Teen Mom*, SACRAMENTO BEE, Sept. 3, 1988, at A5 (describing Forster's crime of leaving eighteen-month-old and six-month-old sons in unairconditioned apartment, without food or water, for three days). The state terminated Forster's parental rights to the two boys, as well as to her daughter born in jail. *Id.* After Forster became pregnant with her fourth child, the judge reversed her compulsory birth control order as unenforceable. *Id.*

29. Janet R. Studley, *Norplant: Miracle Drug or Threat to Women's Rights?*, 20 SUM. HUM. RTS. 16, 16 (1993); *see* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 142 (1993) (recognizing Norplant's effectiveness and its guarantee against user error); *Norplant's Threat to Civil Liberties and Racial Justice*, N. JERSEY L.J., July 26, 1993, at 20 (suggesting that Norplant provides government with easier means to supervise women's contraceptive practices). *See generally Study: Birth Control Failed in 43% of Unwanted Pregnancies*, ST. LOUIS POST-DISPATCH, July 13, 1989, at 15A (summarizing Alan Guttmacher study revealing that out of 3.4 million unexpected pregnancies each year, 1.5 million result from contraceptive failure).

30. *See* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 36–37 (1992) (referring to Indiana judge's imposition of Norplant sentence for woman who allowed her boyfriend to murder her six-month-old son); *ACLU Will Challenge Norplant Sentence*, LEGAL INTELLIGENCER, Feb. 12, 1993, at 24 (relating ACLU's pledge to defend Lisa Smith, convicted of aggravated battery charges, against mandatory Norplant sentence); *Norplant as Punishment*, ABORTION REP., July 23, 1993, State Report (discussing Katrice Hay's agreement to receive Norplant after being convicted of aggravated child abuse for "sealing her newborn son in a plastic bag");

case involving compulsory Norplant, *In re Lacey P.*,[31] has reached the appellate level, that case may indicate the future of judicial enlistment of Norplant.

In re Lacey P. involved a challenge to a West Virginia court order that placed Tauna P.'s four children, as well as her unborn child, in protective custody and terminated her parental rights.[32] Tauna also contested the trial court's directive requiring the Department of Health and Human Services to assist her in being surgically sterilized.[33] Because the court order regarding temporary sterilization arose from Tauna's express wishes, the West Virginia Supreme Court of Appeals ruled the issue moot.[34] However, the Supreme Court of Appeals emphasized its doubts regarding the permissibility of court-ordered contraception absent statu-

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see also Felicity Barringer, *Birth Control Ruling Meets Opposition*, ST. PETERSBURG TIMES, Nov. 19, 1990, at 1B (discussing probation terms mandating completion of high school, psychological counseling, and birth control use). In 1990, 17-year-old Tracy Wilder was sentenced to two years in prison, followed by a ten-year probationary period in which she was required to use birth control. *Id.* Judge Lawrence Page Haddock employed this unusual sentence after Wilder smothered her newborn in a hospital bathroom. *Id. But see* Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 367–68 (1992) (identifying issues regarding permissible breadth of judicial sentencing powers with regard to court-ordered birth control); *No Legal Precedent Found for Ordering Birth Control*, LEGAL INTELLIGENCER, Nov. 16, 1992, at 5 (reporting judge's refusal to act on advocacy group's demand to require Norplant implant for Crystal Gayle Jones, who was accused of being "unfit" mother).

31. 433 S.E.2d 518 (W. Va. 1993).

32. *In re Lacey P.*, 433 S.E.2d at 519. On several occasions, the West Virginia Department of Health and Human Services (HHS) investigated Tauna P. for alleged child abuse, neglect, abandonment, and drug use. *Id.* at 519–20. Attempts to provide assistance to Tauna proved unsuccessful since she failed to attend any scheduled parenting classes or similar sessions. *Id.* at 520. On one visit, an HHS worker found the children bruised and the infant bleeding from severe diaper rash. *Id.* A week later, the HHS worker returned to discover that all four children were ill; the children subsequently developed pneumonia after Tauna failed to comply with her physician's orders and to provide the necessary medication. *Id.* at 521. Once again, HHS attempted to prevent removal of the children by implementing an agreement with Tauna. *Id.* The agreement failed, however, because Tauna refused to abide by the protection plan's terms requiring that she seek medical care for the children, change their diapers regularly, and pay her bills on time. *Id.* Furthermore, HHS discovered that Tauna was four months pregnant and lacked any prenatal care. *Id.* After Tauna repeatedly failed to comply with the agreement and made no improvement over several months, the trial court terminated Tauna's parental rights. *Id.* at 522.

33. *Id.* The order originally mandated surgical sterilization. *Id.* Tauna, however, voluntarily chose a five-year Norplant implant instead of tubal ligation. *Id.*

34. *Id.* at 525. Tauna stated that after her fourth child's birth, she had intended to undergo a tubal ligation. *Id.* at 521–22. Further, Tauna already had obtained a five-year Norplant implant. *Id.* at 525.

tory authorization.[35] While it expressed concern for the substantial problems abused children face, the court urged the state legislature to take action.[36]

III. Legislative Efforts to Control Procreation

A. *History Behind Sterilization Laws*

Along with the judiciary, state legislatures have influenced the realm of reproductive choice.[37] Legislative intrusion, however, is not novel. In the early 1900s, statutes surfaced authorizing the sterilization of habitual criminals, prostitutes, the insane, the mentally impaired, and those suffering from syphilis.[38] Underlying these statutes was the belief that society,

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35. *Id.* at 525–26.

36. *In re Lacey P.*, 433 S.E.2d at 525 n.8. The Supreme Court of Appeals stated in its opinion:

> The facts of this case show parents who care little for the welfare of their children. Unfortunately, this is not an isolated situation—similar cases appear before this Court on an increasingly regular basis. We find ourselves settling for temporary solutions, such as removing the abused children to foster care, rather than doing anything to prevent reoccurrences. Most of these children have little or no chance of achieving their constitutional rights to property, happiness and safety, let alone a normal life. . . . While it seems unlikely that this State would require sterilization [of convicted child abusers] . . . the introduction of a long term but temporary contraceptive implant (Norplant) makes this option more palatable. However, this decision belongs in the hands of the Legislature or HHS, not the Court. What we do emphasize is that something must be done to stop the tide of neglected, abused children. It is not fair to them, and the State cannot afford the results of unchecked neglect. . . . [A] constitutional right is guaranteed only until abused. Neither the State nor the children can afford to let this abuse continue.

Id.

37. *See* Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. Cin. L. Rev. 257, 289 (1982) (proposing justifications for involuntary sterilization statutes, including therapeutic reasons, punishment, eugenics, societal needs, and population control); *cf.* Donald P. Baker, *Legislative Session Opening in Maryland and Virginia; GOP Leadership Setting the Tone for Va. Assembly*, Wash. Post, Jan. 12, 1994, at C1 (presenting conservative Republican agenda likely to surface in Virginia, including family values platform limiting birth control information and sex education in schools); Philip J. Hilts, *Clinics Seek to Overturn Rule on Abortion Advice*, N.Y. Times, May 25, 1991, at 9 (discussing family planning organizations' commitment to reverse federal regulations that prohibit employees of federally funded clinics from discussing abortion with clients); Ethel G. Lawner, *Putting Health Care Back 25 Years*, N.Y. Times, Feb. 13, 1983, (New Jersey), at 26 (disparaging federal regulations mandating parental notification when federally funded clinics distribute contraceptives to minors).

38. *E.g.*, Gina K. Robeen, Comment, *Laws Like White Elephants: Sterilization of the Right to Privacy*, 46 SMU L. Rev. 57, 79 (1992); Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 Iowa L. Rev. 779, 781 (1993); *Norplant's Threat to Civil Liberties and Racial Justice*, New Jersey L.J., July 26, 1993, at 20; *see also* Rex Dunn, Comment, *Eugenic Sterilization Statutes: A*

in order to flourish, needed healthy, wholesome, and competent citizens.[39] In interpreting these early statutes, the United States Supreme Court endorsed eugenic principles, such as those articulated in its infamous *Buck v. Bell*[40] decision, marking the zenith of the sterilization era.[41]

Constitutional Re-Evaluation, 14 J. FAM. L. 280, 281–84 (1975) (tracing historical development of eugenic sterilization, which began in early 19th century with castration and progressed to vasectomy and salpingectomy procedures, as result of advances in medicine and changes in public sentiment). *See generally* Smith v. Superior Court, 725 P.2d 1101, 1102–03 (Ariz. 1986) (citing Indiana as first state to legislatively implement eugenic theories in 1907).

39. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 463–64 (1985) (Marshall, J., concurring and dissenting) (explaining prejudices against mentally impaired persons and legislative efforts to restrict their marriage and reproduction to preclude "the retarded from propagating"); *Smith*, 725 P.2d at 1103 (showing fear that procreation of defective individuals would burden society); *In re* Lee Ann Grady, 405 A.2d 851, 856 (N.J. Super. Ct. Ch. Div. 1979) (exploring social Darwinism as origin for eugenic principles embodied in legislatively approved sterilization); *see also* Elyce Z. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 591 (1966) (explaining that "eugenics" originates from Greek term meaning "well born"); Charlotte Rutherford, *Reproductive Freedoms and African-American Women*, 4 YALE J.L. & FEMINISM 255, 273 (1992) (including unemployables, morons, illiterates, and paupers among those deemed "unfit"); William M. Matoush, Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DENV. L.J. 631, 631 (1969) (discussing principle underlying eugenics that humanity could be improved through regulating heredity, and tracing eugenic thought to ancient Spartans). *But see* Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 807 (acknowledging radical transformation of sterilization laws arising from societal desire to cure past injustices).

40. 274 U.S. 200 (1927).

41. *See* Robert A. Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONTEMP. HEALTH L. & POL'Y 71, 103 (1986) (analyzing and advancing certain assumptions underlying *Buck* decision, such as notion that certain individuals are "unfit" and therefore lack equal protection guarantees afforded to others); Julie Marcus, Comment, In re Romero: *Sterilization and Competency*, 68 DENV. U. L. REV. 105, 106 (1991) (characterizing *Buck* as "high water mark for eugenic sterilization" and discussing its subsequent demise after *Skinner*). *But see* Davis v. Berry, 216 F. 413, 417 (S.D. Iowa 1914) (invalidating statute mandating vasectomy after second felony conviction), *rev'd*, 242 U.S. 468, 470 (1917) (dismissing action because 1913 legislation authorizing sterilization was repealed and its substitute was inapplicable to defendants). Although *Davis* was decided pre-*Buck*, the federal district court viewed mandatory sterilization as contrary to the Constitution. *Davis*, 216 F. at 417. Conceding that society's interest would be served if some individuals abstained from producing offspring, the court nevertheless found the statute indicative of the "Dark Ages." *Id.* at 416. *See generally* Robert L. Burgdorf & Marcia P. Burgdorf, *The Wicked Witch is Almost Dead*: Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1013–23 (1977) (discussing irony that *Buck* fostered so many "defective" progeny of its own and recognizing impossibility of predicting parental "fitness").

In *Buck*, Justice Oliver Wendell Holmes rejected challenges to a 1924 Virginia statute that permitted the sterilization of certain mentally impaired individuals.[42] Justice Holmes defended his position by stating:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. 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.[43]

By sanctioning eugenic sterilization, the Court effectively opened the door for other states to enact similar statutes.[44] Although the Court never overruled Justice Holmes's opinion, judicial attitudes concerning state sterilization statutes shifted in favor of individual rights by the 1940s.[45] The 1942 decision of *Skinner v. Oklahoma*[46] signaled the Court's

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42. *Buck*, 274 U.S. at 204. Carrie Buck, an inmate at the State Colony for Epileptics and Feeble Minded, sought to void a judicial declaration that she be sterilized. *Id.* at 205. Buck asserted that the order violated her due process and equal protection rights as guaranteed by the Fourteenth Amendment. *Id.*

43. *Id.* at 207.

44. Jan C. Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas*, 41 U. CIN. L. REV. 529, 578 (1972); *see* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 123 (1993) (reporting that after *Buck*, 20 states embraced eugenic sterilization legislation, resulting in over 60,000 sterilizations of women prior to 1950). *See generally* Rex Dunn, Comment, *Eugenic Sterilization Statutes: A Constitutional Re-Evaluation*, 14 J. FAM. L. 280, 303 (1975) (determining that if Supreme Court reviewed present sterilization statutes arising from *Buck* affirmance of eugenic principles, all such legislation would be deemed unconstitutional).

45. Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 782 (1993); *see* Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918) (invalidating Nevada statute requiring vasectomy for defendants convicted of rape). *Mickle* demonstrates that even before *Buck*, courts attempted to alter eugenic principles. *Id.* The *Mickle* court maintained that punishment should reform the criminal, not degrade or humiliate him. *Id.* The court further emphasized that when an offender completes his punishment, he should be allowed to resume his life free of all handicaps. *Id. See generally* James C. Dugan, Note, *The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, The Developmentally Disabled, and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507, 525 (1993) (finding that although Court never overruled *Buck* decision, subsequent decisions, primarily *Skinner*, limited its application); Craig L. McIvor, Comment, *Equitable Jurisdiction to Order Sterilizations*, 57 WASH. L. REV. 373, 375 (1982) (alleging that discoveries in genetic science regarding mental deficiency's hereditary nature weakened theories of eugenics).

46. 316 U.S. 535 (1942).

repudiation of eugenic principles and its recognition of procreation's central role in American society.[47]

Skinner involved Oklahoma's Habitual Criminal Sterilization Act, which provided for the sterilization of persons convicted of two or more felonies involving moral turpitude.[48] Skinner faced his third conviction—two for robbery with a firearm and one for stealing chickens[49]—and thus was subjected to Oklahoma's sterilization act.[50] Although Skinner alleged that the Act violated his constitutional rights as applied to his case, Justice Douglas stressed the importance of reproductive liberty and invalidated the Act on equal protection grounds.[51] Although *Skinner* signified the Court's unwillingness to promote eugenics through compulsory sterilization laws, state legislatures continued their efforts, focusing primarily on criminals and the mentally impaired.[52]

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47. *Skinner*, 316 U.S. at 541. The Court identified procreation as fundamental to society's existence. *Id.*; *see* Stefanie L. Black, Comment, *Competing Interests in the Fetus: A Look into Paternal Rights After* Planned Parenthood v. Casey, 28 WAKE FOREST L. REV. 987, 1002–03 (1993) (showing reproductive freedom's central role in American society and individual rights as articulated in *Skinner*). *See generally* Mark J. Kappelhoff, Note, Bowers v. Hardwick: *Is There a Right to Privacy?*, 37 AM. U. L. REV. 487, 493 (1988) (suggesting that substantive due process approach, rather than equal protection rationale, would have resulted in extension of privacy interest to marriage and reproductive rights); Anika Rahman, *The Right to Bear Kids*, NEWSDAY, Feb. 1, 1994, (Viewpoints), at 83 (discussing *Skinner* decision's "birth" to body of law regarding reproductive autonomy and importance of vesting childbearing decisions with individual freedom from government interference).

48. *Skinner*, 316 U.S. at 536. The statute provided notice, as well as an occasion to be heard. *Id.* Furthermore, the offender possessed the right to a jury trial. *Id.*

49. *Id.* at 537.

50. *Id.* Interestingly, all three convictions occurred prior to the Act's passage in 1935. *Id.* The following year, the Attorney General initiated an action against Skinner in which a jury determined that a vasectomy operation could be performed without endangering Skinner's general health. *Id.*

51. *Id.* at 538. Justice Douglas noted that the Act inequitably applied only to felonies involving moral turpitude. *Id.* For example, embezzlement crimes, regardless of the number of offenses, were beyond the Act's reach. *Id.* at 538–39. *See generally* James B. O'Hara & T. Howland Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 22–23 (1956) (discussing modifications in legal thought since *Skinner* decision and judicial reluctance to enforce sterilization statutes); Ronald D. Rotunda, *What* Roe *Really Means*, TEX. LAW., Feb. 8, 1993, at 16 (interpreting Supreme Court's decision in *Roe v. Wade* as resurrecting sterilization principles rejected in *Skinner*, and warning that future courts may rely on *Roe* as authority to approve compulsory sterilizations).

52. *E.g.*, ARK. CODE ANN. §§ 20-49-101 to 20-49-304 (Michie 1991); DEL. CODE ANN. tit. 16, §§ 5701-5716 (Supp. 1992); GA. CODE ANN. §§ 31-20-1 to 31-20-6 (1991); ME. REV. STAT. ANN. tit. 34-B, §§ 7001-7016 (West 1988); MISS. CODE ANN. §§ 41-45-1 to 41-45-19 (1972); *see also In re* A.W. 637 P.2d 366, 367-68 (Colo. 1981) (tracing historical development of sterilization and finding Colorado statute inapplicable to minors, but determining that district court has inherent power to consider sterilization action); *In re* Hayes, 608 P.2d

B. *State Statutes and Welfare Recipients*

Currently, rising tides of poverty and crime, as well as swelling welfare rolls, have prompted state legislators to concentrate on the reproductive choices of low-income persons.[53] Threatened with loss of welfare benefits, numerous low-income individuals have acquiesced to state-sanctioned sterilization operations.[54] Although modern contraceptives

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635, 637 (Wash. 1980) (disregarding need for controlling legislation provided that petitioners satisfy "best interest" standard for retarded individual's sterilization order). *But see* Hudson v. Hudson, 373 So. 2d 310, 311 (Ala. 1979) (refusing to provide judiciary with inherent power to order sterilization absent specific legislation, consistent with other jurisdictions). *See generally* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 126 (1993) (distinguishing between prior eugenic motives behind sterilization of mentally impaired individuals and current statutes designed to prevent children from becoming financially draining wards of state); Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1437 (1986) (surveying historical mistreatment of handicapped individuals and deep-rooted preconceptions that promote discrimination against disabled persons even today); Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 782–84 (1993) (responding to "revival" of attempts to employ surgical castration against convicted sex offenders).

53. *See* Colo. H.B. 1199, 59th Leg., 1st Sess. (1993) (offering financial incentives to encourage use of birth control by both men and women); *see also* Del. H.B. 366, 137th Leg., Reg. Sess. (1994) (providing incentives to AFDC recipients to discourage expansion of family size, and promoting employment in those families with additional children by permitting greater income earnings without loss of eligibility for benefits). One commentator has described similar social policy innovations as utilizing a "cash carrots and cash sticks" method. *See* Paul Taylor, *Welfare Policy's 'New Paternalism' Uses Benefits to Alter Recipients' Behavior*, WASH. POST., June 8, 1991, at A3. For example, an Arkansas program fined parents $50 who failed to attend parent-teacher conferences. *Id.* In Wisconsin, 806 welfare checks were docked an average of $120 each because the recipient's children had been truant from school. *Id.* Furthermore, Wisconsin's Governor Thompson proposed in his 1991 budget to provide an additional $80 to teen welfare mothers upon marriage. *Id. See generally* Elizabeth Bowles, *Family Law in the 1990's—New Problems, Strong Solutions*, 46 VAND. L. REV. 677, 679 (1993) (stressing that welfare mothers face possible pressure stemming from efforts to alleviate burdens placed on welfare system from government concerning their reproductive decisions); Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 717–18 (1993) (reviewing prior legislative attempts in Maryland and Mississippi that criminalized illegitimacy or mandated sterilization for unwed mothers); Tim Rutten, *Norplanting or Supplanting Private Rights*, L.A. TIMES, May 31, 1991, at E1 (raising concerns over government efforts to employ Norplant as solution to overburdened welfare system, and suggesting that Norplant threatens individual liberties in manner comparable to eugenic sterilization laws).

54. Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (1977). In *Relf*, the federal district court determined that federally funded programs sterilized approximately 100,000 to 150,000 low-income individuals annually. *Id.*; *see In re* Primus, 436 U.S. 412, 415 (1978) (examining allegations that welfare mothers faced threats of discontinued Medicaid assistance unless they consented to sterilization); Cox v. Stanton,

preclude the need for involuntary sterilization, these new birth control methods present similar opportunities for abuse.[55] After the United States Food and Drug Administration (FDA) granted its approval of Norplant, all fifty states and the District of Columbia swiftly incorporated the contraceptive into their welfare systems and enacted measures to provide Norplant to low-income women.[56] Many states, however, have extended their efforts beyond furnishing low-cost or free Norplant to welfare-de-

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529 F.2d 47, 49 (4th Cir. 1975) (addressing unwed African-American woman's allegations that social worker threatened to eliminate her welfare benefits unless she submitted to sterilization); Emily Diamond, Note, *Coerced Sterilization Under Federally Funded Family Planning Programs*, 11 NEW ENG. L. REV. 589, 601 (1976) (identifying attempts in Illinois, New Hampshire, Ohio, and Tennessee to either offer financial incentives to welfare recipients if they consented to sterilization, or to deny benefits altogether unless the recipients submitted to sterilization); *see also* Dorothy Roberts, *Norplant's Threat to Civil Liberties and Racial Justice*, N.J. L.J., July 26, 1993, at 20 (alleging that states have targeted African-American women and utilized coercion and deception to accomplish many sterilizations); *cf.* Barbara A. Serrano, *Cash-For-Sterilization Plan Dies—Bill Decried as Another Anti-Poor Measure*, SEATTLE TIMES, Feb. 7, 1992, at B1 (detailing failed Washington measure offering welfare mothers $10,000 for tubal ligation after first child's birth, or $5000 after birth of second child). *But see* Bowen v. Gillard, 483 U.S. 587, 629 (1987) (Brennan, J., dissenting) (presuming that few could justify involuntary sterilization of low-income individuals on grounds that procedures would reduce welfare costs).

55. *See* Dorothy Roberts, *Norplant's Threat to Civil Liberties and Racial Justice*, N.J. L.J., July 26, 1993, at 20 (identifying legislatures' immediate embrace of Norplant as means to combat crime and welfare); Steven S. Spitz, *The Norplant Debate: Birth Control or Woman Control?*, 25 COLUM. HUM. RTS. L. REV. 132, 140 (1993) (suggesting that legislators envision Norplant as technological answer to social maladies); *see also Norplant: Opportunities and Perils for Low-Income Women*, (Alan Guttmacher Inst., Washington, D.C.), Dec. 1992, at 1, 3 (Special Rep. #1) (comparing legislative enlistment of Norplant to prior sterilization efforts); *Norplant: Opportunities and Perils for Low-Income Women*, (Alan Guttmacher Inst., Washington, D.C.), July 1993, at 1, 3–4 (Special Rep. #2) (delineating 17 legislative efforts employing Norplant in 10 states—Arizona, Arkansas, Colorado, Florida, Illinois, North Carolina, Ohio, South Carolina, Tennessee, and Washington—during 1993 that ranged from welfare incentives to mandatory implantation).

56. Lynn Smith & Nina J. Easton, *The Dilemma of Desire*, L.A. TIMES, Sept. 26, 1993, (Magazine), at 24; *see* Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 383 (1992) (urging that contraceptives be made affordable to prevent "economic coercion" from limiting women's reproductive choices); *see also* Sally Squires, *The Price of Norplant; The Birth Control Implant Costs Too Much for Poor Women, Consumer Advocates Say*, WASH. POST, Nov. 16, 1993, at Z9 (revealing that excessive cost—$365—prevents low-income women from using Norplant). Norplant costs 16 times more in the United States than in developing countries. *Id. See generally* Susan Duerksen, *State Funding Norplant Birth Control Low-Income Women Can Now Qualify for 5-Year Contraceptive*, SAN DIEGO UNION-TRIB., Feb. 27, 1992, at A3 (pointing to high cost as obstacle for low-income mothers seeking Norplant and discussing efforts to incorporate Norplant into state-funded programs).

pendent mothers by attempting to tie Norplant use to the receipt of welfare benefits.[57]

In 1991, Representative Kerry Patrick presented a bill to the Kansas Legislature that offered $500 to female recipients of Aid to Families with Dependent Children (AFDC) if they consented to Norplant implantation.[58] Furthermore, the bill allotted an additional fifty dollars annually for each woman who continued Norplant use.[59] The Louisiana Legislature considered a similar bill that authorized the payment of $100 to pub-

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57. *See* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 751 (1993) (describing 1992 New Jersey law that reduces welfare benefits for single mothers by refusing incremental per-child increases established by AFDC guidelines); David S. Coale, Note, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 192 (1992) (classifying incentive programs as falling under "unconstitutional conditions" doctrine, which holds that matters constitutionally forbidden cannot be achieved indirectly through government actions); Sally Jacobs, *Norplant Draws Concerns Over Risks, Coercion*, BOSTON GLOBE, Dec. 21, 1992, (National/Foreign), at 1 (equating state's encouragement of Norplant use through cash incentives with bribery). *See generally* Rust v. Sullivan, 111 S. Ct. 1759, 1774–78 (1991) (reviewing "unconstitutional conditions" doctrine, which prohibits government from placing conditions on receipt of benefit which effectively denies person exercise of protected right); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254–62 (1974) (finding that once government offers certain benefit, state cannot impose unconstitutional conditions on receipt of that benefit).

58. Kan. H.B. 2089, 74th Leg., 2d Sess. (1991). *See* Tamar Lewin, *A Plan to Pay Welfare Mothers For Birth Control*, N.Y. TIMES, Feb. 9, 1991, at 9 (reporting Representative Patrick's statements defending his measure on fiscal concerns such as $205,000 public assistance tally for each welfare child reaching adulthood); Wesley B. Smith, *'Norplant's Threat' Is No Threat at All*, N.J. L.J., Aug. 13, 1993, at 19 (claiming that welfare incentives are not racially motivated, but are merely means of discouraging individuals who are unable to effectively carry out parental obligations from having children until they can fulfill these duties). *But cf.* Western Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918) (affirming principle that "constitutional power cannot be used by way of condition to attain an unconstitutional result"). *See generally* John R. Hand, *Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion*, 46 VAND. L. REV. 715, 719 (1993) (suggesting that welfare bonuses are unconstitutional because such incentives interfere with fundamental right of procreation).

59. Kan. H.B. 2089, 74th Leg., 2d Sess. (1991); *see* Matthew Rees, *Shot in the Arm: The Use and Abuse of Norplant; Involuntary Contraception and Public Policy*, NEW REPUBLIC, Dec. 9, 1991, at 16 (announcing defeat of Kansas bill by vote of 77 to 27). *But see* John R. Hand, *Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion*, 46 VAND. L. REV. 715, 720 (1993) (advancing equal protection arguments against Norplant incentives, and suggesting that such measures discriminate against women both racially and economically); Tamar Lewin, *A Plan to Pay Welfare Mothers For Birth Control*, N.Y. TIMES, Feb. 9, 1991, at 9 (assailing proposed Kansas legislation as bribery, and arguing that measure amounted to unconstitutional coercion).

lic welfare recipients who agreed to use Norplant.[60] Although each bill ultimately failed, the measures foreshadowed similar legislative attempts in other states.[61]

C. *State Measures Aimed at Pregnant Drug Users*

Increasing numbers of drug-addicted newborns have spawned state legislative attempts to combat this epidemic, ranging from expanding child-abuse definitions to compulsory birth control.[62] For example, Ohio

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60. La. H.B. 1584, 17th R.S. (1991); *see* Walter A. Graham, *Norplant Can Aid Mothers*, USA TODAY, Feb. 16, 1993, at A10 (disparaging attempts to penalize families for having more children, but advocating Norplant incentives as means to break cycle of poverty). *Contra Don't Use Norplant Against Welfare Mothers*, USA TODAY, Feb. 16, 1993, at A10 (urging government to counsel women concerning birth control rather than using coercive tactics to reduce low-income family sizes). *See generally* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 752–54 (1993) (attacking myth that welfare mothers have additional children to increase monthly benefits, and arguing that such beliefs perpetuate idea that women on welfare lack self-control); David S. Coale, Note, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 208 (1992) (arguing that welfare bonuses unconstitutionally burden women's rights by forcing women either to undergo Norplant insertion or suffer reduction in economic status, ultimately eroding their self-esteem).

61. *See* Fla. S.B. 1886, 13th Leg., 1st Sess. (1993) (providing AFDC mothers with $258 per month, and raising that base amount to $400 per month if the mother uses Norplant); *Norplant: Opportunities and Perils for Low-Income Women*, (Alan Guttmacher Inst., Washington, D.C.), Dec. 1992, at 1, 3 (Special Rep. #1) (describing some of 20 bills, amendments, and welfare reform recommendations offered in 1991–92 legislative terms of 13 states); *Birth-Control Incentive*, CHI. TRIB., Apr. 26, 1992, (Womannews), at 11 (describing Tennessee measure aimed toward welfare reform, which offers welfare recipients $500 scholarships for Norplant insertion or vasectomies); Jason DeParle, *The Nation: As Funds for Welfare Shrink, Ideas Flourish*, N.Y. TIMES, May 12, 1991, at 5 (addressing three categories of welfare reform proposals: cutbacks in welfare checks, work requirements, and incentives to reduce family size).

62. *See* IND. CODE ANN. § 31-6-4-3.1 (Burns Supp. 1993) (providing that children born with addictions to controlled substances need state intervention); MINN. STAT. ANN. § 626.556 (West Supp. 1994) (expanding "neglect" to encompass prenatal exposure to illegal drugs); NEV. REV. STAT. § 432B.330 (1991) (legislating protection for children suffering from congenital drug addiction); *see also* Mary Dieter, *Measure of Addicted Moms-To-Be Near Death*, COURIER-J., Jan. 23, 1994, at 1B (detailing Indiana proposal to allow involuntary commitment of pregnant addicts). Under Indiana's bill, any mother whose newborn tests positive for fetal alcohol syndrome or illicit drugs could face a $10,000 fine and imprisonment for four years. *Id.*; *cf.* Janna C. Merrick, *Maternal Substance Abuse During Pregnancy: Policy Implications in the United States*, 14 J. LEGAL MED. 57, 62 (1993) (indicating that as of 1992, approximately 167 women in 24 states faced criminal charges relating to their pregnancies); Nancy K. Schiff, Note, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197, 205–26 (1991) (analyzing recently proposed legislation which criminalizes giving birth to drug-addicted newborn, requires testing and reporting, or separates child from

sought to include drug-addicted infants in the definition of "neglected children."[63] Furthermore, under Ohio's measure, a woman without a prior drug-addicted newborn could elect between successfully completing a substance abuse program or receiving a Norplant insert for a monitored five-year period, with second offenses resulting in mandatory Norplant implantation.[64]

In May 1991, Representative Ryan Shealy submitted a bill to the South Carolina Senate Judiciary Committee proposing that compulsory toxicology tests be performed on newborns suspected of substance abuse exposure.[65] Under the bill, positive test results established prima facie evidence of abuse and obligated health care providers to notify the Department of Social Services.[66] The proposed bill further required courts to order Norplant implantation for the drug-addicted mother and to restore her reproductive capability only after she successfully completed a certified drug program and remained drug free for a two-year period.[67]

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mother under newly defined "abuse" statutes). *But see* Ill. H.B. 671, 88th Leg., Reg. Sess. (1993) (amending state's Unified Code of Corrections to prohibit sentences from incorporating involuntary birth control measures); Patricia Corrigan, *Requiring Implant Breaches Rights, Legislators Claim*, ST. LOUIS POST-DISPATCH, May 23, 1993, at A9 (discussing introduction of Illinois House Bill 671, which would prohibit judges from ordering criminals to use birth control because such orders impermissibly intrude upon personal autonomy and other rights).

63. Ohio S.B. 82, 119th Leg., Reg. Sess. (1991); *see also* Deborah A. Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 U. DAYTON L. REV. 1019, 1032–34 (1992) (discussing proposed changes to Ohio's Child Abuse and Neglect Law and enhanced penalty provisions incorporating Norplant). *See generally* Dorothy Roberts, *Norplant's Threat to Civil Liberties and Racial Justice*, N.J. L.J., July 26, 1993, at 20 (summarizing Ohio's bill and asserting that such measures are merely part of systematic government attempt to deny African-Americans their reproductive liberties); Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 369–73 (1989) (noting that criminalizing maternity may have negative consequences that deter prenatal care, affect doctor-patient relationships, destroy family units, and create financial burdens concerning enforcement).

64. Ohio S.B. 82, 119th Leg., Reg. Sess. (1991). The bill allowed women to choose either Norplant or a similar hormonal contraceptive device. *Id.*

65. S.C. S.B. 986, 75th Leg., Reg. Sess. (1991); *see* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 747–48 (1993) (comparing South Carolina bill with proposals of Washington, Kansas, and Ohio); Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 363 (1992) (characterizing South Carolina bill as "draconian"). *See generally* Colo. H.B. 1252, 59th General Assembly, 2d Sess. (1994) (allowing prisoners to earn time granted by submitting to vasectomy, tubal ligation, or Norplant insert).

66. S.C. S.B. 986, 75th Leg., Reg. Sess. (1991).

67. *Id.*

Concurrently with his welfare reform proposal, Kansas Representative Patrick also introduced a compulsory Norplant measure, which demanded Norplant implantation for women convicted under the state's controlled substance statute.[68] If the woman tested negative in random drug screenings for twelve months, the bill required discontinuation of the birth control device.[69] Unlike South Carolina's contemplated legislation, the Kansas bill excluded from its scope women deemed medically unable to comply.[70]

In January 1993, Washington State Senator Shirley Winsley introduced an initiative, which is currently pending, designed to permit chemical dependency specialists to petition courts for the protection of newborns

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68. Kan. H.B. 2255, 74th Leg., 2d Sess. (1991). The bill applied only to those women who are capable of having children. *Id.*; *see* Jim Persels, Comment, *The Norplant Condition: Protecting the Unborn or Violating Fundamental Rights?*, 13 J. LEGAL MED. 237, 260–61 (1992) (criticizing Patrick's bill as "fatally flawed" because its breadth included wide spectrum of drug-related offenses); *see also* Michael Kramer, *The Political Interest; Who Owes What to Whom?*, TIME, Oct. 14, 1991, at 32 (noting strong public support for legislative proposals regarding Norplant). According to Representative Patrick, despite the importance of reproductive freedom, "a child's right to be born healthy is paramount over a woman's right to bear a drug-impaired baby." *Id. See generally* KAN. STAT. ANN. § 65-4127a (1992) (including use of opium, opiates, specified stimulants, and narcotic drugs in statute which would trigger Representative Patrick's mandatory birth control measure).

69. Kan. H.B. 2255, 74th Leg., 2d Sess. (1991); *see* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 748 (1993) (examining apparent impetus spurring proposed legislation and finding similarity to motivations prompting judicial action); Jim Persels, Comment, *The Norplant Condition: Protecting the Unborn or Violating Fundamental Rights?*, 13 J. LEGAL MED. 237, 260–61 (1992) (discussing legislative intent underlying proposed bill, and finding that Kansas legislature had overriding desire to protect newborns from injury); James Willwerth, *Should We Take Away Their Kids? Often the Best Way to Save the Child is to Save the Mother As Well*, TIME, May 13, 1991, at 62 (quoting Representative Patrick's statement that after personally witnessing aftermath of maternal substance abuse, mother's rights seem immaterial).

70. Kan. H.B. 2255, 74th Leg., 2d Sess. (1991); *cf.* Sally Jacobs, *Norplant Draws Concerns Over Risks, Coercion*, BOSTON GLOBE, Dec. 21, 1992, (National/Foreign), at 1 (revealing that minority women are being coerced to use Norplant by physicians without being advised of possible adverse health consequences). *See generally* Judy Mann, *New Contraceptive Advances Freedom, Responsibility*, WASH. POST, Dec. 12, 1990, at B3 (warning against Norplant use by smokers, as well as by women suffering from acute liver disease or breast cancer); Susan Okie, *FDA Urged to Approve Birth Control Implant: Capsules Inserted Under Woman's Skin Prevent Pregnancy for Five Years*, WASH. POST, Apr. 28, 1989, at A1 (commenting that Norplant may detrimentally affect cholesterol levels); Sally Squires, *The Price of Norplant: The Birth Control Implant Costs Too Much For Poor Women, Consumer Advocates Say*, WASH. POST, Nov. 16, 1993, at Z9 (acknowledging that some women, especially those with diabetes, anemia, or high blood pressure, may be medically unsuited for Norplant use).

they suspect suffer from fetal alcohol syndrome or drug exposure.[71] Under this initiative, after reviewing all relevant evidence and establishing by "clear, cogent, and convincing proof" that the mother gave birth to a drug-exposed infant, the court must order Norplant use until it deems the mother "clean and sober" for a period of six consecutive months.[72]

IV. CONSTITUTIONAL AND LEGAL ISSUES

A. *The Right to Procreate*

Judicial and legislative efforts enlisting involuntary birth control methods implicate the fundamental right to procreate.[73] Reproductive autonomy, which stems from the right to privacy,[74] encompasses the power to

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71. Wash. S.B. 5249, 53d Leg., Reg. Sess. (1993). *See generally* Barbara Whitaker, *Protecting Baby from Mom; Tot Welfare at Issue in Drug Cases*, NEWSDAY, Nov. 6, 1989, at 8 (reporting that from 1986 to 1989, hospitals witnessed rise in number of infants—3.2% to 8.2%, or 41,000 to over 60,000 cases–testing positive for illicit drug exposure).

72. Wash. S.B. 5249, 53d Leg., Reg. Sess. (1993); *see* Lynn Smith & Nina J. Easton, *The Dilemma of Desire*, L.A. TIMES, Sept. 26, 1993, (Magazine), at 24 (narrating Senator Winsley's assertions that her bill does not engage in "welfare bashing," but rather provides avenue for change). *But see* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 771 (1993) (noting irony of Norplant because, although it was developed to enhance women's reproductive choice, it is effectively being employed to deny freedom).

73. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (asserting that decisions concerning child bearing lie at "the very heart of this cluster of constitutionally protected choices"); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (affirming constitutional privacy right which encompasses woman's abortion decision); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending privacy rights equally to individuals regardless of marital status in matters so fundamental as having children); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (striking down state law banning contraceptives as unconstitutionally burdening privacy freedoms). *See generally* Julia E. Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1171–72 (1992) (determining that intervention in maternal substance abuse intrudes on procreative freedoms).

74. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (establishing that unless restrained under clear authority of government, individuals should enjoy freedom from interference). "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . ." *Id.*; *see also Roe*, 410 U.S. at 152 (arguing that despite its silence regarding privacy, Constitution does guarantee zones of privacy created from penumbras of Bill of Rights); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (noting that freedom from unwanted governmental impingement on individual privacy is guaranteed, barring limited circumstances). *See generally* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1516 (recognizing that privacy right encompasses fundamental right to have children, even in surrogacy context). *But see* David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 56 (1993) (denying individuals fundamental right to adopt children or become foster parents).

control one's body and reproductive destiny.[75] However, consistent with other fundamental rights, the United States Constitution does not afford an absolute shield against governmental intrusion.[76] The United States Supreme Court has consistently recognized that states may intrude upon a citizen's fundamental rights when a compelling governmental interest exists.[77] For example, to preserve the national system of social security tax collection, the Court permitted curtailment of Amish religious freedoms.[78] In another instance, national security concerns justified restric-

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75. *See Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1544 (1990) (explaining that right of privacy includes reproductive autonomy). First addressed in *Skinner v. Oklahoma*, procreative liberties were revolutionized through subsequent cases involving family issues. *See Roe*, 410 U.S. at 153 (recognizing woman's right to decide whether or not to terminate her pregnancy); *Eisenstadt*, 405 U.S. at 453–55 (invalidating Massachusetts statute prohibiting sale of contraceptives to unmarried individuals, while allowing sales to married persons); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (declaring that self-definition of "personhood"—one's personal notion of personal dignity, existence, and meaning of life—lies at heart of Fourteenth Amendment's liberty interest); *Griswold*, 479 U.S. at 484 (establishing reproductive autonomy for married persons stemming from penumbra rights of First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments); Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1420 (1990) (suggesting that although privacy cases do not specifically address prenatal conduct, those decisions illustrate proposition that judges should refrain from substituting personal judgment for that of individual).

76. *Roe*, 410 U.S. at 155 (contending that privacy rights are not boundless); *see* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 789 (1989) (recognizing right to control one's body as limited); *see also* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 148–49 (1993) (analyzing "compelling" standard used to review state encroachments on individual liberty interests and noting expanding definition of legitimate state concerns). The Supreme Court has also refused to extend absolute protection in other areas. *E.g.*, Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 270 (1990) (freedom from unwanted medical treatment); United States v. Eichman, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting) (freedom of communication); DeJonge v. Oregon, 299 U.S. 353, 364–65 (1937) (freedom of speech and assembly); Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech and press).

77. Jim Persels, Comment, *The Norplant Condition: Protecting the Unborn or Violating Fundamental Rights?*, 13 J. LEGAL MED. 237, 246 (1992); *see Carey*, 431 U.S. at 686 (reiterating principle that only compelling interests justify invasion of fundamental liberties); *cf.* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (advancing that only grave abuses justify infringement on First Amendment freedoms). *See generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919 (1988) (finding Constitution silent concerning definition of compelling governmental interests).

78. United States v. Lee, 455 U.S. 252, 259–61 (1982); *see* Mormon Church v. United States, 136 U.S. 1, 49–50 (1890) (forbidding practice of polygamy despite arguments of religious freedom); *cf.* Department of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (upholding denial of unemployment compensation to Native Americans terminated from employment after failing drug test, despite religious reasons for using peyote); Hernandez

tions on travel freedoms.[79] Furthermore, certain types of speech fall outside the ambit of fundamental protection,[80] and marriage secures fundamental status only when contracted between a man and a woman.[81] Additionally, the Court has upheld statutes designed to protect children's

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v. Commissioner, 490 U.S. 680, 698–700 (1989) (rejecting challenges to Internal Revenue Code § 170 by Scientologists claiming that provision burdened their right to exercise religion freely); Braunfeld v. Brown, 366 U.S. 599, 601–09 (1961) (sustaining Pennsylvania statute prohibiting retail sales on Sundays over challenges by Orthodox Jews alleging infringement on free exercise of religion); State v. Massey, 51 S.E.2d 179, 179–80 (N.C. 1949) (declining to invalidate city ordinance that prohibited handling of poisonous reptiles although reptiles were used in religious worship). *See generally Dateline Michigan—Gladwin*, DET. FREE PRESS, (NWS), at A4 (informing that Michigan State Department of Natural Resources had rejected Amish requests for property tax rebate program exemption).

79. *See* Haig v. Agee, 453 U.S. 280, 308 (1981) (sanctioning revocation of American citizen's passport on national security grounds, thereby restricting travel abroad); Zemel v. Rusk, 381 U.S. 1, 3 (1964) (justifying travel restrictions to Cuba due to deterioration of diplomatic ties and security concerns); *cf.* Jones v. Helms, 452 U.S. 412, 422–23 (1981) (rejecting challenges to Georgia statute, which upgraded child abandonment offense from misdemeanor to felony if parent left state boundaries). *But see* Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (invalidating § 6 of Subversive Activities Control Act, which denied passports to registered Communist Party members); Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (concluding that Secretary of State lacks authority to refuse passport to individuals associated with Communist Party).

80. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (excluding "fighting words" from constitutional protection afforded other speech, and asserting that such words lack value in expression of ideas); Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasizing that falsely shouting "fire" in crowded theater falls outside constitutionally protected boundaries of speech). *See generally* Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1530–33 (1993) (summarizing development of "clear and present danger" doctrine, which originated in early 20th century, and its subsequent weakening during Cold War).

81. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888) (defining importance of marriage to civilization and morality, but acknowledging legislative authority over institution); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1966) (invalidating Virginia's miscegenation statute on equal protection and due process grounds). In *Loving*, Justice Stewart emphasized that marriage represents "vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. Furthermore, Justice Stewart asserted that the Constitution requires freedom to marry persons of another race. *Id.*; Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (declaring Wisconsin law that required certain persons to gain permission to marry unconstitutional, and reaffirming marriage's fundamental role in society); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (voiding mandatory maternity leave policy as violative of protected constitutional freedoms such as marriage and childbirth); Alma Lopez, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 347 (1993) (noting states' reluctance to expand marriage definition beyond traditional union between woman and man). *But see* Baehr v. Lewin, 852 P.2d 44, 59–66 (Haw. 1993) (recognizing for first time right to contract same-sex marriage on equal protection grounds).

physical and emotional well-being, even though this type of legislation operates in the "sensitive area of constitutionally protected rights."[82]

Thus, fundamental rights, including the right to procreate, are not absolute. As the Court stated in *Roe v. Wade*,[83] protecting maternal health and the potential of human life constitute important and legitimate governmental interests with regard to reproductive rights.[84] Moreover, even though a compelling governmental interest may exist, the Court will invalidate restrictions on fundamental rights unless the restrictions are narrowly tailored to serve state objectives.[85]

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82. New York v. Ferber, 458 U.S. 747, 757 (1982); *see* Maryland v. Craig, 497 U.S. 836, 853 (1990) (holding that defendant's right to face accuser in court is outweighed by child abuse victim's physical and psychological safety); Osborne v. Ohio, 495 U.S. 103, 109 (1990) (limiting *Stanley* decision, which allowed private possession of obscene materials within home, by disallowing child pornography in interest of protecting children); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (agreeing that protection of children's physical and mental well-being constitutes compelling state interest justifying restrictions on press); F.C.C. v. Pacific Found., 438 U.S. 726, 749–50 (1978) (explaining that children's accessibility to radio broadcasts may justify special regulation of material, despite freedom of speech concerns); Ginsberg v. New York, 390 U.S. 629, 638–40 (1968) (enjoining sale of "girlie" magazines to minors although permissible for adults and affirming state's interest in safeguarding children's well-being); *see also* Leah Murphy, *The Second Circuit Review—1987-1988 Term: First Amendment: The Second Circuit and Dial-a-Porn: An Unsuccessful Balance Between Restricting Minors' Access and Protecting Adults' Rights:* Carlin Communications Inc. v. F.C.C., 55 BROOK. L. REV. 685, 689–91 (1989) (recognizing limitations on adult freedoms in interest of protecting children from harmful materials). *See generally* Jessalyn Hershinger, Note, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 VAND. L. REV. 473, 497 (1992) (affirming that states have compelling government interest in protecting children's welfare).

83. 410 U.S. 113 (1973)

84. *Roe*, 410 U.S. at 162; *see* Gloria C. v. William C., 476 N.Y.S.2d 991, 996 (N.Y. Fam. Ct. 1984) (reiterating that state possesses legitimate interest in protecting pregnant woman's health and fetus); Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519, 550–51 (1991–1992) (listing factors favoring state intervention based on prenatal abuse, which includes consideration that fetus is legal equivalent of child, prior subordination of women's rights for fetal health, constitutional silence regarding right to abuse drugs, state declaration that safeguarding children satisfies "compelling" standard, and advances in medical technology that offer less intrusive means). *See generally* Catherine A. Kyres, Note, *A "Cracked" Image of My Mother/Myself? The Need for a Legislative Directive Proscribing Maternal Drug Abuse*, 25 NEW ENG. L. REV. 1325, 1348 (1991) (interpreting *Roe* as recognizing state interest in unborn infant which continues throughout pregnancy's duration); Louise B. Wright, Comment, *Fetus vs. Mother: Criminal Liability for Maternal Substance Abuse During Pregnancy*, 36 WAYNE L. REV. 1285, 1301–02 (1990) (asserting that states have interest in safeguarding maternal health, potential life, and child's right to be born healthy).

85. *See* Kramer v. Union Sch. Dist., 395 U.S. 621, 633 (1969) (invalidating § 2012 of New York Education Law because it was not narrowly tailored to achieve governmental

Based on this analysis, protecting children's safety and well-being should constitute a sufficient state interest to warrant intrusion upon the right to procreate.[86] Importantly, although this significant concern exists, any infringement on reproductive freedom must be narrowly tailored to pass constitutional muster. While compulsory contraceptives for mothers convicted of physical and sexual abuse sweep beyond permissible legal boundaries, temporary limitations on future pregnancies for prenatal substance abusers relate directly to conduct the state seeks to prevent.[87]

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objectives); Shapiro v. Thompson, 394 U.S. 618, 633–38 (1969) (striking residency requirement for welfare recipients and asserting state's interests—protection of fiscal budgets, prevention of fraud, and establishment of objective criteria—could be achieved through other narrowly tailored means); *Griswold*, 381 U.S. at 485 (warning that statutes may not achieve their ends by unnecessarily invading guaranteed freedoms); *cf.* Ellen L. Townsend, Note, *Maternal Drug Use During Pregnancy as Child Neglect or Abuse*, 93 W. VA. L. REV. 1083, 1098 (1991) (discrediting arguments for criminalizing maternal substance abuse and advocating residential drug treatment programs as less intrusive means to achieve state objectives).

86. *See* Kristen R. Lichtenberg, Comment, *Gestational Substance Abuse: A Call for a Thoughtful Legislative Response*, 65 WASH. L. REV. 377, 377 (1990) (noting state's compelling interest to intervene, but suggesting that limitations are necessary); *cf.* Caban v. Mohammed, 441 U.S. 380, 402 (1979) (Stevens, J., dissenting) (determining that government has strong, if not compelling, interest in facilitating adoption of illegitimate children); Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (holding that neither freedom of religion nor parental rights are beyond state interference when children's welfare is at issue). *But see* Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 371–76 (1992) (criticizing mandatory Norplant in child abuse cases due to lack of compelling state interest and existence of less intrusive means to accomplish state objectives). Regulating drug use also represents an important governmental interest. *See* Department of Human Resources v. Smith, 494 U.S. 872, 904 (1990) (O'Connor, J., concurring) (recognizing substantial state interest in regulating use and possession of illicit substances); United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (concluding that trafficking of illegal drugs, which threaten welfare of nation, particularly its youth, constitutes compelling government interest); *cf.* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (indicating compelling state interest in averting illegal drug trafficking across borders).

87. *See* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 158–59 (1993) (attacking logic of employing Norplant against physical and sexual child abuse in that contraceptive only prevents pregnancy to protect those children who could subsequently be born and later abused). For example, sterilizing convicted child molesters merely prevents offenders from having children, not from continuing their crimes. Compulsory birth control policies for maternal substance abusers, on the other hand, represent an appropriate measure that attacks the problem itself. *Cf.* Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037, 1047–48 (1992) (advancing idea that mandatory birth control for child abusers satisfies "reasonably related" requirement). "Prohibiting a convicted armed robber from owning firearms has been a condition of probation and has been found to be reasonably related to the prevention of future criminal-

Therefore, mandatory birth control, implemented in limited circumstances, is defensible, especially in light of the dearth of less intrusive options within the government's reach.[88]

In addressing maternal substance abuse issues, the magnitude and pervasiveness of the nation's drug problem limit viable alternatives. Despite the great strides they have achieved toward combatting the prevalence of drugs, prevention and treatment programs fall short of effectively coping with this growing crisis.[89] However, the problems facing drug programs

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ity," Bartrum noted. "Yet in those instances, the crime was armed robbery, not purchasing a gun." *Id.* at 1048. *But cf.* Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 374 (1992) (rejecting sufficient nexus between future criminality of physical and sexual child abuse and forced birth control). Mertus and Heller asserted that "cutting off a robber's arm may decrease the chance that the robber will steal again, yet surely amputation would not be an appropriate probation condition." *Id.*; Gina K. Robeen, Comment, *Laws Like White Elephants: Sterilization of the Right to Privacy*, 46 SMU L. REV. 57, 79 (1992) (condemning forced Norplant implants as victimizing offenders rather than addressing crimes already committed). *See generally* Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 794 (1993) (indicating absence of correlation between number of children in family and incidents of child abuse).

88. *See Prince*, 321 U.S. at 165 (balancing individual freedoms against state's exercise of legitimate power).

> Against these sacred private interests, basic in a democracy, stand the interest of society to protect the welfare of children . . . . It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.

Id.; Doe v. Irwin, 428 F. Supp. 1198, 1211 (W.D. Mich. 1977) (suggesting use of balancing approach to resolve conflicting fundamental rights of different individuals, and warning against exaltation of one right over another), *cert. denied*, 449 U.S. 829 (1980). *But see In re* Valerie N., 707 P.2d 760, 772 (Cal. 1985) (affirming procreation's fundamental status and woman's constitutional right to choose contraceptive devices); Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981) (referring to California Attorney General's concession that state constitution places no limits on women—rich or poor—to exercise procreative decisions "as they see fit"). *See generally* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 619–20 (1986) (asserting that laws regulating pregnant women in name of fetal rights sweep broadly, and therefore fail to survive strict scrutiny test).

89. *See* Theresa L. Hawley & Elizabeth R. Disney, *Crack's Children: The Consequences of Maternal Cocaine Abuse*, 6 SOC. POL'Y REP. 1, 12 (1992) (finding that only 15% of crack abusers receiving treatment at New York health facility return after first day in outpatient program); *see also* Louise M. Chan, Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 208–09 (1993) (concluding that even if drug treatment facilities could cope with large number of individuals seeking assistance, women must voluntarily submit and complete program); Dan Morgan, *Louisiana Took 'Every Federal Dollar We Could Get Our Hands On,'* WASH. POST, Jan. 31, 1994, at A9 (indicating lack of progress in drug treatment and

extend far beyond money and resources—an individual must willingly participate. Evidence suggests that few abusers voluntarily submit to such programs, and when they do obtain assistance, success rates often prove dismal.[90] Furthermore, because of cost and safety concerns, pregnancy hinders access to treatment facilities.[91] Thus, although drug pre-

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prevention despite millions of dollars expended); *cf.* 135 CONG. REC. H2138 (daily ed. May 24, 1989) (statement of Rep. Boxer) (revealing that only 250,000 of 6.5 million drug users receive treatment). *See generally* 139 CONG. REC. S14,834 (daily ed. Nov. 2, 1993) (comment of Sen. Daschle) (estimating that United States spends $238 billion annually on substance abuse problems and treatment).

90. *See* 139 CONG. REC. S15,291 (daily ed. Nov. 8, 1993) (statement of Sen. Hatch) (questioning overall effectiveness of drug treatment programs that link substance abuse with criminal behavior); William H. Miller, Jr. & Mark C. Hyatt, *Perinatal Substance Abuse*, 18 AM. J. DRUG & ALCOHOL ABUSE 247, 257 (1992) (finding that 50% of patients in Chicago's Perinatal Center for Chemical Dependency ceased drug use during pregnancy, but that 70% of that number suffered relapse after child's birth); *see also* Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 659 (1992) (determining from previous research that only small percentage of chemically dependent parents successfully end addiction); Lisa J. Keyes, Comment, *Rethinking the Aim of the "War on Drugs": States' Roles in Preventing Substance Abuse by Pregnant Women*, 1992 WIS. L. REV. 197, 204 (arguing that ending perinatal substance abuse requires both incentive and resources). *But see* United States v. Maier, 777 F. Supp. 293, 295–96 (S.D.N.Y. 1991) (stating that comprehensive drug programs prove successful and reduce criminal behavior). *See generally* Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809, 819 (1993) (relying on recidivism rates in questioning effectiveness of compulsory drug treatment programs).

91. *See* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 518–19 (1992) (offering four basic reasons for scarcity of drug rehabilitation facilities for pregnant addicts). First, pregnant addicts provide few incentives for creating these programs due to expense and patient noncompliance. *Id.* Pregnant addicts miss approximately 38% of all their scheduled appointments. *Id.* Second, complications during pregnancy arouse fear of legal liability among treatment providers. *Id.* Third, a female addict's lifestyle makes her a prime candidate for contracting the HIV virus, thus discouraging intervention due to health concerns. *Id.* Finally, treatment facilities are currently unprepared to handle the special needs of pregnant addicts. *Id.*; *see also* 139 CONG. REC. S2308-09 (daily ed. Mar. 3, 1993) (statement of Sen. Daschle) (explaining proposed legislation that would amend Social Security Act by extending coverage for substance-abusing mothers). Drug treatment centers often deny admission to pregnant women, while others fail to provide child care, thus effectively preventing women from attending. *Id.*; *see also* State v. Luster, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (referring to legislation offering priority to pregnant addicts in treatment facilities); Theresa L. Hawley & Elizabeth R. Disney, *Crack's Children: The Consequences of Maternal Cocaine Abuse*, 6 SOC. POL'Y REP. 1, 12–13 (Society for Research in Child Development 1992) (finding that 54% of drug treatment facilities rejected pregnant women and 67% excluded mothers on Medicaid, and that two-thirds of major hospitals were unable to refer pregnant addicts for assistance); Megan R. Golden, Note, *When Pregnancy Discrimination is Gender Discrimination: The Constitutionality of Excluding Pregnant Women from Drug Treatment Programs*, 66 N.Y.U. L. REV. 1832, 1844–47 (1991) (finding historical basis for unavailability of treatment facilities for pregnant addicts,

vention and treatment agendas need improvement and implementation, their current ineffectiveness suggests the need for other solutions.

Problems unique to female drug users also present obstacles to effectively confronting maternal substance abuse. First, addicted women's birth rates exceed those among nonaddicted women.[92] Some commentators assert that having children provides a source of self-worth for women, especially those women with low self-esteem, such as the typical drug abuser.[93] Others argue that a substance abuser's lifestyle contributes to a lack of precaution, thereby leading to more unplanned pregnancies.[94] Female addicts also suffer irregularities with menstruation; therefore, many pregnancies progress unnoticed, limiting prenatal care opportunities.[95] Additionally, the tragic reality is that many drug-

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which stems from drug-abusers being predominantly male). *See generally* Elaine W. v. Joint Diseases N. Gen. Hosp., 613 N.E.2d 523, 523–26 (N.Y. 1993) (finding unlawful gender discrimination against pregnant women denied access to hospital's residential drug treatment program).

92. *See* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 514 (1992) (relating research results showing increased chances for healthy baby with earlier medical care); *see also* Gina K. Robeen, Comment, *Laws Like White Elephants: Sterilization of the Right to Privacy*, 46 SMU L. REV. 57, 72 (1992) (explaining that women addicts often give birth to several drug-dependent infants); Elanie Pofeldt, *Couple Beat Drug Habit, Now Are Helping Others*, L.A. TIMES, Sept. 15, 1988, at 1 (confirming that addicted women have higher birth rates and face additional difficulties in raising children).

93. *See* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 771 (1993) (asserting that women view having children as constructive act they can accomplish); *cf.* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 409 (1983) (asserting that some women derive significance from pregnancy and childbirth, regardless of whether or not they see or rear child); Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 788 (1989) (insisting that women's lives and identities are shaped significantly through controlling their bodies, and that forced motherhood molds women's occupations and preoccupations); James H. Taylor, Note, *Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse*, 44 FLA. L. REV. 379, 411 (1992) (advancing that child-bearing represents essential expression of woman's identity).

94. *See* 135 CONG. REC. 67, H2138 (daily ed. May 24, 1989) (remarks by Rep. Boxer) (noting unlikelihood that addicts will utilize contraceptives and tragic result of infants forever cursed by mother's drug problem); Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 649 (1992) (reporting that most substance-abusing women did not plan pregnancies, and that many addicts believe they are unable to conceive); *cf.* Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 769 (1990) (commenting that many addicted women support their habit by prostitution).

95. Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 649–50 (1992); *see* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 514 (1992) (noting that chronic drug use leads to diminished cognizance of body); William H. Miller, Jr. &

abusing women experience repetitive pregnancies, resulting in multiple drug-exposed babies within one family.[96]

Finally, the realities of poverty and limited government resources further restrict possible options for coping with mothers who abuse drugs during pregnancy. Many women, principally those living in poverty, lack access to prenatal care, as is evident from the staggering rates of infant mortality, maternal deaths, and low birth rates.[97] Moreover, because of

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Mark C. Hyatt, *Perinatal Substance Abuse*, 18 AM. J. DRUG & ALCOHOL ABUSE 247, 250 (1992) (concluding that irregularities in menstrual cycle hamper determination of exact conception date, thereby causing management problems in complicated pregnancies).

96. *See* Johnson v. State, 602 So. 2d 1288, 1290–91 (Fla. 1992) (summarizing facts of mother's drug use during pregnancies with her son and daughter). After giving birth to her first child, Jennifer Johnson admitted to her physician that she had ingested cocaine the night before. *Id.* A toxicology test confirmed cocaine use. *Id.* One month prior to her second child's birth, Johnson suffered a crack overdose requiring hospitalization. *Id.* Moreover, on the morning that Johnson went into labor, she had used rock cocaine. *Id.*; *see also* Christy Scattarella, *Forced Birth Control?—Drug-Baby Boom Sparks Call to Control Female Addicts*, SEATTLE TIMES, June 24, 1991, at A1 (describing behavior of drug-exposed newborn, whose mother smoked crack, shot heroin, and used other drugs during pregnancy). The newborn, Sammy, is the tenth drug-affected newborn of his mother, a mother who refused drug treatment, prenatal care, and free transportation to visit Sammy after his birth. *Id.* In another instance, a social worker described three women who have 25 drug-addicted children among them. *Id.* Furthermore, the social worker related the cases of substance-abusing mothers of addicted newborns—one mother with nine children, another with only two—both pregnant again. *Id.*; *see also* Jonathan Eig, *The More Things Change . . . Poverty Held its Grip on Homeless in 1993*, DALLAS MORNING NEWS, Jan. 9, 1994, at 1J (describing life of woman who gave birth to six cocaine-addicted infants, of which two died, as well as nine other children, all of whom were placed in foster care); Jerry Thomas, *Center Gives Addict a 2nd Chance at Life*, CHI. TRIB., Dec. 19, 1993, (Lake), at 3 (narrating woman's determination to end drug dependence after three of her six children were born addicted to cocaine). *See generally* David H. Montague & Sharon E. McLauchlin, *Drug Exposed Infants: En Ventre Sa Mere—And In Need of Protection*, 44 BAYLOR L. REV. 485, 518 (1992) (urging state action to prevent maternal substance abuse, and to ensure healthy newborns since mothers often have additional children).

97. *See, e.g.*, 139 CONG. REC. S10,896 (daily ed. Aug. 6, 1993) (statement of Sen. Glenn) (recognizing absence of prenatal care for pregnant women and high infant mortality rate in United States); 139 CONG. REC. H2797 (daily ed. May 25, 1993) (statement of Rep. McKinney) (acknowledging that in past decade, access to prenatal care has declined); 139 CONG. REC. S4442-44 (daily ed. Apr. 2, 1993) (statement of Jeffrey Lewis, as read by Sen. Wofford) (noting that poor women are likely to delay obtaining prenatal care, causing multiple problems for their children). In comparison with other industrialized countries, the United States ranks 20th in newborn deaths, 31st in low birth weight infants, and 75th in low birth weight African-American infants. 139 CONG. REC. H2797 (daily ed. May 25, 1993) (statements by Rep. McKinney); *see* Charlotte Rutherford, *Reproductive Freedoms and African-American Women*, 4 YALE J.L. & FEMINISM 255, 259 (1992) (finding further that infants denied prenatal care are three times as likely to die); Sandra Evans, *Prenatal Care to Combat Infant Mortality*, WASH. POST, Dec. 21, 1993, at Z8 (indicating that of 25 industrial nations, United States ranks 21st, tying with South Korea, in infant mortality rates, with 9 of every 1,000 infants dying within first year). *See generally* L. Rachel Eisen-

the obstacles to adequate medical supervision, most drug-abusing women fail to obtain any prenatal care.[98] While some of these women fear prosecution, drug addiction often renders others incapable or unwilling to seek the necessary medical attention.[99] Furthermore, human immunodeficiency virus (HIV) infection has become a significant problem among many drug-addicted newborns.[100] Combining the barriers inher-

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stein, *Prenatal Health Care: Today's Solution to the Future's Loss*, 18 FLA. ST. U. L. REV. 467, 474 (1991) (listing other barriers to prenatal care including individual's beliefs, lifestyle, and attitude, as well as availability of information regarding prenatal care).

98. *See, e.g.*, Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 650 (1992) (informing that pregnant drug users, because of lifestyle and addiction, frequently fail to keep medical appointments or to comply with physicians' recommendations); Janna C. Merrick, *Maternal Substance Abuse During Pregnancy: Policy Implications in the United States*, 14 J. LEGAL MED. 57, 58 (1993) (revealing that 58% of maternal substance abusers fail to obtain prenatal care); Deborah A. Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 U. DAYTON L. REV. 1019, 1036 & n.146 (1992) (accepting that pregnant addicts fail to obtain prenatal care, but noting that those who do seek care face potential criminal prosecution); Jim Schachter, *Help is Hard to Find for Addict Mothers; Drug Use 'Epidemic' Overwhelms Services*, L.A. TIMES, Dec. 12, 1986, (Metro), at 1 (stating that most pregnant addicts fail to obtain medical care until delivery time).

99. *See Johnson*, 602 So. 2d at 1295–96 (suggesting that criminal penalties may exacerbate threat to fetal health by causing women to avoid prenatal care); People v. Pointer, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984) (predicting that women will conceal pregnancy to avoid detection of probation condition violation); Lisa J. Keyes, Comment, *Rethinking the Aim of the "War on Drugs": States' Roles in Preventing Substance Abuse by Pregnant Women*, 1992 WIS. L. REV. 197, 209 (noting that criminal sanctions may deter women from obtaining prenatal care, but not from continuing substance abuse); Janna C. Merrick, *Maternal Substance Abuse During Pregnancy: Policy Implications in the United States*, 14 J. LEGAL MED. 57, 69 (1993) (arguing that criminal penalties create adversarial relationship between mother and fetus, thus acting to deter substance-abusing mothers from prenatal care); *see also* Veronika Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1196 (1987) (warning that forced intrusions into pregnancy, such as court-ordered Caesarean sections, may drive women away from prenatal care); *cf.* United States v. Valencia, 558 F. Supp. 1270, 1273 (E.D.N.Y. 1983) (discussing pregnant woman's attempt to frustrate police investigation by hiding cocaine in her rectum, thus indicating wanton disregard of fetus); Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 654 (1992) (recognizing that substance abusers fail to ensure own well-being).

100. *See* 139 CONG. REC. H4059 (daily ed. June 1, 1993) (comments by Rep. Richardson) (discovering nexus between drug addiction and AIDS virus, especially with drug-exposed newborns); 135 CONG. REC. H2138 (daily ed. May 24, 1989) (statement of Rep. Boxer) (suggesting rapid escalation of number of drug-affected newborns with AIDS as result of mother's lifestyle, which often involves prostitution); 1990 TEXAS SURVEY OF POSTPARTUM WOMEN AND DRUG-EXPOSED INFANTS, TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE 2 (1991) (underscoring high risk among drug-abusing mothers of contracting HIV and exposing infants); Taunya L. Banks, *Women and AIDS—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 353 n.4 (1989–90) (citing Curran et al., *Epidemiology of HIV Infection and AIDS in the United States*, 239 SCIENCE 610, 611 (1988) (finding that over 70% of prenatally contracted AIDS cases related to mother or her sexual partner's drug abuse)); Joanne Jacquart, *Born Hooked on Cocaine: More and*

ent in the current health care and welfare systems with the underlying realities of maternal substance abuse, one can easily see the conflict created between reproductive freedom and children's rights—a problem lacking easy solutions.

Allowing substance-abusing mothers to continue having children creates several contradictions. For example, protecting the right to procreate often allows the birth of a child, only to result in that child's abandonment or death.[101] Yet, when the infant survives, the state often removes the child to foster care and terminates the mother's parental rights because of her prior drug use and perceived "unfitness."[102] The

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More Babies Die from Mom's Drug Abuse, ORLANDO SENTINEL, June 26, 1988, at G1 (revealing that increasing number of addicted newborns are also afflicted with AIDS virus, and attributing this occurrence to lifestyle of maternal substance abusers). Jacquart reports of one woman who gave birth to her fourth AIDS infant, despite the fact that her previous three children died. *Id.* Furthermore, Jacquart relates the story of a 26-year-old woman who began having children at 13. *Id.* In her 10th pregnancy, the mother delivered premature twins, both of whom showed signs of prenatal cocaine abuse and tested positive for AIDS. *Id.*; *see also* William H. Miller, Jr. & Mark C. Hyatt, *Perinatal Substance Abuse*, 18 AM. J. DRUG & ALCOHOL ABUSE 247, 250 (1992) (determining that HIV transmission rate from mother to newborn ranges from 50 to 75%); Jonetta R. Barras, *Crawford Seeks to Discourage AIDS-Infected Mothering*, WASH. TIMES, Apr. 24, 1992, at B2 (disclosing that HIV positive infants live only approximately three years).

101. *See* Joanne Jacquart, *Born Hooked on Cocaine: More and More Babies Die from Mom's Drug Abuse*, ORLANDO SENTINEL, June 26, 1988, at G1 (describing maternal abandonment of newborns in neonatal intensive care, which costs thousands of dollars each day). Jacquart also describes one instance in which a mother entered the emergency room, high on cocaine, and in labor. *Id.* The drug addict's baby, born addicted to cocaine, was several months premature. *Id.* The following morning, the mother awoke wondering why she was in the hospital, failing to remember giving birth the night before. *Id.*; *see also* Jennifer Dixon, *Tiniest Castoffs*, CHI. TRIB., Nov. 9, 1993, at 7 (offering reasons for abandonment including homelessness or transientness, incarceration, and inability to support baby because of other children); Hamil R. Harris, *The Babies Who Were Left Behind; Abandoned Infants Burden Hospitals*, WASH. POST, Nov. 11, 1993, at J1 (finding that of 22,000 infants deserted in hospitals each year, three-fourths were born to drug-addicted mothers, and 85% suffered from addiction as well); Stephanie Mencimer, *Nursing a Miracle: A D.C. Story; How City Government Officials and Kind-Hearted People Actually Solved the Crack-Baby Crisis*, WASH. POST, Feb. 6, 1994, at C1 (discussing "boarder babies" phenomenon, which involves drug-abusing mothers' abandonment of their infants at hospitals). *See generally In re* Theresa J., 551 N.Y.S.2d 219, 220 (N.Y. App. Div. 1990) (relating infant's death resulted from premature birth and renal failure caused by mother's cocaine use); 135 CONG. REC. H2137 (daily ed. May 24, 1989) (remarks by Rep. Boxer) (describing America's war against drugs, and warning that "children are on the frontlines" and are likely to be permanently disabled, predisposed to drug use, victims of AIDS, or dead from mother's drug abuse).

102. *See In re* Baby X, 293 N.W.2d 736, 738–41 (Mich. 1980) (permitting temporary removal of newborn based on evidence of prenatal substance abuse by mother). "We hold that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction

current strategy for coping with this crisis sends an ironic message: a drug-abusing woman possesses a constitutional right to have a child, but may be denied any corresponding rights to that child once it is born. In other instances, the child, already suffering from disabilities, returns home with the mother only to endure physical abuse or neglect.[103] This approach, riddled with inconsistencies and impracticalities, ignores the

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of the probate court." *Id.* at 739; *In re* Ruiz, 500 N.E.2d 935, 936 (Ohio 1986) (describing drug-addicted newborn's removal by Department of Human Services from home on grounds that no suitable parent was available to care for child); *see also* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (establishing "clear and convincing" standard to govern termination of parent's rights). *See generally* Cox v. Court of Common Pleas, 537 N.E.2d 721, 729 (Ohio Ct. App. 1988) (Lynch, J., dissenting) (characterizing substance-abusing mothers as "irresponsible," which often results in child's removal from home); Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 310 (1992) (questioning appropriateness of removing children from substance-abusing mothers and claiming that separation may have detrimental effect on child's development); Stacy Robinson, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L.Q. 395, 403–04 (1993) (advancing that although states may intervene to protect children, states must act with due regard for parents' fundamental rights); Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 804 (1993) (recognizing flaws within foster care system, but warning that compulsory contraception offers impermissible solution).

103. *See In re* Monique, 4 Cal. App. 2d 198, 202–03 (Cal. Ct. App. 1992) (determining that prenatal substance abuse is indicative of future abuse of child); *In re* Stephen W., 271 Cal. Rptr. 319, 324 (Cal. Ct. App. 1990) (agreeing that dangerous drug use during pregnancy is probative evidence of future child neglect); Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037, 1052–53 (1992) (determining that of all child deaths associated with abuse or neglect, roughly 25% involve children previously known by child protective services to be in dangerous situation); Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519, 539 (1991–92) (finding that newborns returned to mothers suffer abuse and neglect because mothers usually continue drug use); *see also* William H. Miller, Jr. & Mark C. Hyatt, *Perinatal Substance Abuse*, 18 AM. J. DRUG & ALCOHOL ABUSE 247, 253–56 (1992) (questioning substance-abusing mother's ability to parent based on factors stacked against her—social isolation, poverty, low self-esteem, depression, inability to maintain relationships, and inadequate parenting skills). A New York City study indicated that of all the child abuse and neglect cases, 50% involve psychoactive substances. *Id.* When the study included alcohol as well, that figure rose to 64%. *Id. See generally* 135 CONG. REC. H2138 (daily ed. May 24, 1989) (remarks by Rep. Boxer) (examining San Francisco's Department of Social Services statistics that as of 1988, 77% of all cases placing child in foster care involved parent's crack addiction); Jim Schachter, *Help is Hard to Find for Addict Mothers: Drug Use 'Epidemic' Overwhelms Services*, L.A. TIMES, Dec. 12, 1986, (Metro), at 1 (revealing study's findings that half of drug-exposed newborn cases reported to Child Protective Services subsequently resurfaced in other forms of abuse). One-third of drug-addicted newborns later suffered from neglect. *Id.* Furthermore, 35% of those infants eventually became wards of the court. *Id.*

rights of the child.[104] Therefore, in limited, narrowly defined circumstances when repetitive maternal substance abuse is involved, the legislature should be allowed to require temporary birth control.[105]

Importantly, involuntary sterilization should never be a judicial or legislative solution for prenatal child abuse.[106] As Justice Douglas stated in *Skinner v. Oklahoma*,[107] "[t]here is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[108] Contraceptives negate the need for involuntary sterilization and permit highly effective temporary birth control at low risk to the user. While Norplant currently occupies the attention of most legislators and judges, the FDA

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104. *See Prince*, 321 U.S. at 168 (sanctioning state intervention to protect children from dangerous circumstances). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Id.*; *see also* IMPROVING TREATMENT FOR DRUG-EXPOSED INFANTS; TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES 21 (Center for Substance Abuse Treatment, U.S. Department of Health and Human Services, 1993) (listing other problems typically associated with drug-addicted mothers including: poverty, inadequate or no prenatal care, poor nutrition, HIV and other sexually transmitted diseases, domestic violence, child abuse and neglect, unemployment, criminal record, little education, and homelessness or substandard housing).

105. *See* Colleen M. Coyle, Comment, *Sterilization: A "Remedy for the Malady" of Child Abuse?*, 5 J. CONTEMP. HEALTH L. & POL'Y 245, 260 (1989) (agreeing that protection of children constitutes compelling state interest and predicting that at some point, states could justify restricting procreative freedom to benefit society as whole); *cf. Cleveland Bd. of Educ.*, 414 U.S. at 651 (Powell, J., concurring) (insisting that not all state policies burdening childbearing rights constitute constitutional violations); *Meyer*, 262 U.S. at 401 (indicating state's power to improve quality of citizen's physical, mental, and moral fitness, with respect, however, to fundamental rights). *But see* Sheldon J. Segal, *The Purpose of Norplant*, WASH. POST., Dec. 29, 1990, at A18 (criticizing proposed coercive uses of Norplant and arguing implant should be used to enhance reproductive freedoms). *See generally* Matthew Rees, *Shot in the Arm: The Use and Abuse of Norplant; Involuntary Contraception and Public Policy*, NEW REPUBLIC, Dec. 9, 1991, at 16 (reporting 61% of those surveyed in Los Angeles Times poll agreed Norplant should be mandatory for substance-abusing women of childbearing age).

106. *See In re* Moe, 432 N.E.2d 712, 724 (Mass. 1982) (Nolan, J., dissenting) (equating sterilization with mutilation because it is degrading to human dignity); *see also In re* Tulley, 146 Cal. Rptr. 266, 268 (Cal. Ct. App. 1978) (stressing extremity of sterilization since it forever denies individual's fundamental right to procreate), *cert. denied*, 440 U.S. 967 (1979); *In re* Grady, 426 A.2d 467, 471–72 (N.J. 1981) (regarding sterilization as destruction of individual's social and biological identity); *cf.* Mickle v. Henrichs, 262 F. 687, 690 (D. Nev. 1918) (stating that vasectomy operation is not cruel until coupled with punitive intent). *See generally* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1970–71 (1993) (proposing that sterilization of criminals was tool used by white majority to oppress African-Americans' reproductive choices).

107. 316 U.S. 535 (1942).

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

recently approved another long-acting contraceptive, Depo-Provera.[109] Depo-Provera, a progestin injection effective for three months, offers the freedom of Norplant with less physical intrusion and a 99.6 percent effectiveness rate.[110] Once injected, Depo-Provera becomes effective immediately, but cannot be reversed regardless of the side effects until the hormone level wanes.[111] Depo-Provera, nonetheless, represents a forerunner to other contraceptives, such as once-a-month injectable contraceptives[112] and non-hormonal, anti-fertility vaccines that could be employed to counteract the phenomenon of addicted newborns.[113]

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109. *See* Elizabeth Lenhard, *Depo-Provera: A New Contraceptive Decision*, ATLANTA J. & CONST., Nov. 16, 1993, at D4 (discussing history behind Depo-Provera's use as cancer therapy and its approval as contraceptive in October 1992). Injections, given in a woman's arm or buttock, stop ovulation and create a mucous wall that deters sperm. *Id.*; *see also A Welcome New Choice for Women*, N.Y. TIMES, Nov. 2, 1992, at A18 (finding Depo-Provera 100% effective in preventing pregnancy for three months, but revealing possible health risks including osteoporosis); *cf.* Gustav Niebuhr, *A Place of 'Conversion' for Priests Who Abused Children*, WASH. POST, Jan. 2, 1993, at A1 (mentioning Depo-Provera use as treatment against sex offenders because it reduces sex drive). *See generally* Judy Foreman, *FDA Allows Depo-Provera as Injectable Contraceptive*, BOSTON GLOBE, Oct. 30, 1992, at 1 (discussing FDA approval, despite health concerns over its alleged link to breast cancer, as culmination of lengthy battle over Depo-Provera).

110. Elizabeth Lenhard, *Depo-Provera: A New Contraceptive Decision*, ATLANTA J. & CONST., Nov. 16, 1993, at D4; *see FDA Approves Injectable Contraceptive Depo-Provera; Food and Drug Administration*, FDA CONSUMER, Jan. 1993, 1, 2 (informing that Depo-Provera eliminates need to remember birth control daily).

111. Lynn Smith & Nina J. Easton, *The Dilemma of Desire*, L.A. TIMES, Sept. 26, 1993, (Magazine), at 24; *see* George R. Huggins, *Obstetrics and Gynecology*, 270 JAMA 234, 235 (1993) (identifying acne, amenorrhea, irregular bleeding, and weight gain as possible Depo-Provera side effects); *see also Clipping the Stork's Wings*, ECONOMIST, Jan. 9, 1993, at 73 (underscoring Depo-Provera's drawback in that large amounts of progestogen are released immediately, and are irreversible until hormone levels off). *See generally* Dori Stehlin, *Depo-Provera: The Quarterly Contraceptive*, FDA CONSUMER, Mar. 1993, 11, 12 (relating that Depo-Provera's highest concentration in blood stream occurs just after injection, and diminishes over three-month period).

112. *World Health Agency Endorsing 2 New Injectable Contraceptives*, N.Y. TIMES, June 6, 1993, at 20 (reporting endorsement by World Health Organization of Cyclofem and Mesignya, which are new injectable contraceptives currently being tested in Chile, Indonesia, Jamaica, Mexico, Thailand, and Tunisia, proving practically 100% effective).

113. *Id.*; *see also* Lynn Smith & Nina J. Easton, *The Dilemma of Desire*, L.A. TIMES, Sept. 26, 1993, (Magazine), at 24 (discussing future advances in contraception such as two-rod variant of Norplant, vaginal rings, and morning-after methods including RU-486 and Ovral, already used in other countries).

B. *The Right to Bodily Integrity and Autonomy*

Another hurdle legislators must overcome in enacting mandatory birth control measures involves the recognized right to bodily integrity.[114] This right encompasses freedom from governmental interference with personal autonomy as well as the authority to make personal medical decisions.[115] In affirming this right, the judiciary has generally prohibited nonconsensual bodily intrusions for mere evidentiary purposes.[116] Moreover, courts have regularly championed an individual's right to refuse

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114. *See* Wons v. Public Health Trust, 500 So. 2d 679, 686–87 (Fla. Dist. Ct. App. 1987) (discussing deeply rooted beliefs underlying constitutional principle that individuals should be free from governmental interference); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 422 (Mass. 1977) (recognizing common law interest in freedom from nonconsensual bodily intrusions and constitutional privacy right of self-determination); *see also In re* Storar, 420 N.E.2d 64, 70–71 (N.Y. 1981) (holding that self-determination with regard to medical treatment comprises right inherent in bodily integrity notion that can be paramount to state interest); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 789 (1989) (interpreting *Roe v. Wade* as providing women powers of self-determination and control over their bodies).

115. Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1421 (1990). "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be the master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment." Natanson v. Kline, 350 P.2d 1093, 1104 (Kan. 1960). The right to refuse medical treatment originated from the common law tort doctrines of battery and trespass. Mills v. Rogers, 457 U.S. 291, 294 n.4 (1982); *see In re* Conroy, 486 A.2d 1209, 1222–26 (N.J. 1985) (reviewing constitutional and common law basis for bodily integrity doctrine and discussing balancing of state interests against self-determination assertions).

116. *See* Rochin v. California, 342 U.S. 165, 173–74 (1952) (discussing coerced confessions). On suspicion of drug-selling, the police went to Rochin's home to question him. *Id.* at 166. An officer noticed several capsules of drugs and inquired about them at which time Rochin quickly swallowed the evidence. *Id.* After the officers unsuccessfully attempted to extract the drugs, they transported Rochin to the hospital and directed a physician to "pump" Rochin's stomach. *Id.* The capsules, which contained morphine, served as evidence to convict Rochin, resulting in his imprisonment. *Id.* The United States Supreme Court reversed the conviction on due process grounds, finding that the officers' conduct shocked the human conscience. *Id.* at 172; *see also* Michael G. Rogers, Note, *Bodily Intrusion in Search of Evidence: A Study in Fourth Amendment Decisionmaking*, 62 IND. L.J. 1181, 1183 (1986) (discussing Court's decision in *Rochin* whereby Court analogized between coerced confessions and forced stomach pumpings). *But see* Schmerber v. California, 384 U.S. 757, 772 (1966) (allowing compulsory blood tests to establish intoxication level despite individual resistance). In *Schmerber*, the police required an automobile accident victim, believed to be intoxicated, to submit to an involuntary blood test to determine blood-alcohol content. *Id.* at 758. The Court upheld the blood test, rejecting due process, self-incrimination, and search and seizure claims. *Id.* at 759–72. "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772.

medical care or life-prolonging treatment.[117] Consistent with other areas of constitutionally protected liberties, however, significant state interests justify overriding an individual's bodily integrity rights.[118]

In the 1905 decision of *Jacobson v. Massachusetts*,[119] the United States Supreme Court sustained a state compulsory vaccination statute although the law infringed on an individual's desire to be free from such unwanted bodily intrusions.[120] Recognizing the limits of the right to bodily integrity, the Court maintained that public welfare sometimes warrants state intervention.[121] The Court stated that "[r]eal liberty for all could not ex-

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117. *See, e.g.*, Bouvia v. Superior Court, 225 Cal. Rptr. 297, 307 (Cal. Ct. App. 1986) (granting 28-year-old quadriplegic and severe cerebral palsy sufferer's request to remove nasogastric tube that facilitated involuntary feeding); *In re* Osborne, 294 A.2d 372, 375–76 (D.C. 1972) (upholding Superior Court's decision to respect emergency patient's refusal of blood transfusion on religious grounds); Lane v. Candura, 376 N.E.2d 1232, 1233 (Mass. 1978) (permitting patient afflicted with gangrene in leg and foot to forego amputation and medical treatment); *In re* Quackenbush, 383 A.2d 785, 789–90 (N.J. 1978) (preventing state intervention on behalf of elderly man suffering from gangrene in both legs, although amputation was necessary to avert death); *In re* Quilan, 355 A.2d 647, 671–72 (N.J.) (allowing withdrawal of life support system for woman in persistent vegetative state if hospital's consultative body found that no reasonable possibility existed that she would recover), *cert. denied*, 429 U.S. 922 (1976); *In re* Hamlin, 689 P.2d 1372, 1375–76 (Wash. 1984) (affirming trial court's conclusion that withholding life-sustaining treatment was in individual's best interest, and emphasizing need for case-by-case determination); *In re Colyer*, 660 P.2d 738, 741 (Wash. 1983) (authorizing removal of life support system, and emphasizing patient's privacy interest over significant state concern with preservation of life); *see also* Christine K. Cassel, *Deciding to Forego Life-Sustaining Treatment: Implications for Policy in 1985*, 6 CARDOZO L. REV. 287, 287–89 (1984) (analyzing medical profession's traditional approach to decisions regarding life-sustaining treatment and noting shift toward allowing society to decide).

118. *See* Winston v. Lee, 470 U.S. 753, 766 (1985) (prohibiting compelled surgery to remove bullet from attempted robbery suspect as unreasonable intrusion into privacy interests). Although the procedure involved minimal intrusion and the state possessed a legitimate interest in collecting evidence, the Court refused to permit the operation based on Fourth Amendment freedoms. *Id.*; *cf.* Joel K. Greenberg, Note, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747, 762–70 (1983) (addressing constitutional right of privacy precluding force-feeding of prisoners except upon showing of necessity due to prison discipline or security). *But see* Hughes v. United States, 429 A.2d 1339, 1341 (D.C. 1981) (finding no legal or constitutional impediment to compelling murder suspect to undergo operation to remove bullets allegedly fired by victim). *See generally* Sheila Brutoco, Note, *The* Barber *Decision: A Questionable Approach to Termination of Life-Support Systems For the Patient in A Persistent Vegetative State*, 15 GOLDEN GATE L. REV. 371, 376 (1985) (understanding need to harmonize individual liberty interest with state concerns for preservation of life in context of termination of life-support systems for permanently comatose persons).

119. 197 U.S. 11 (1905).

120. *Jacobson*, 197 U.S. at 26–27.

121. *Id.* The Court asserted that the Constitution does not afford absolute protection against all government interferences. *Id.* at 26. As the court noted, "there are manifold

ist under the operation of a principle which recognizes the right of each individual person to use his own [liberty], whether in respect of his person or his property, regardless of the injury that may be done to others."[122]

More recently, in *Washington v. Harper*,[123] the Court announced that a state, consistent with due process considerations, may administer psychotropic drugs to unwilling, mentally ill prisoners without a judicial hearing.[124] In *Harper*, over a patient's objections, a physician at the Washington Special Offender Center sought to continue the patient's antipsychotic treatment, maintaining that prison safety necessitated the drug treatment.[125] Although it recognized a significant liberty interest in refusing antipsychotic drugs, the Court rejected the patient's constitutional assertions and held in favor of the state's interests.[126]

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restraints to which every person is necessarily subject for the common good." *Id.* The Court further argued that the community possesses the power to protect itself against a disease which threatens its safety. *Id.* at 27.

122. *Id.* at 26; *see* Railroad Co. v. Husen, 95 U.S. 465, 471 (1877) (asserting legislative power to promote domestic order, health, and public safety); *see also* Missouri, Kan. & Tex. Ry. v. Haber, 169 U.S. 613, 628–29 (1898) (identifying state authority to protect public welfare and approving legislation designed to serve that end); Crowley v. Christensen, 137 U.S. 86, 89–90 (1890) (conceding that liberty is not "unrestricted license" to act as one pleases).

123. 494 U.S. 210 (1990).

124. *Harper*, 494 U.S. at 236; *cf.* Williams v. Anderson, 959 F.2d 1411, 1417 (7th Cir. 1992) (denying recovery to psychiatric patient at Menard Correctional Center who suffered allergic reaction and tachycardia due to involuntary administration of Haldol); State v. Law, 244 S.E.2d 302, 307 (S.C. 1970) (finding that under compelling circumstances, courts may require involuntary medication for criminal defendants to render them competent for trial). *But cf.* Woodland v. Angus, 820 F. Supp. 1497, 1514–19 (D. Utah 1993) (rejecting state's assertion that sufficient reasons existed to warrant forcible medication of defendant to render him competent for trial); State v. Maryott, 492 P.2d 239, 243–44 (Wash. Ct. App. 1971) (concluding that involuntary administration of tranquilizers to criminal defendant, which controlled his behavior at trial, violated due process guarantees). *See generally* Brian Shagan, Note, Washington v. Harper: *Forced Medication and Substantive Due Process*, 25 CONN. L. REV. 265, 293 (1992) (criticizing *Harper* decision as flawed and warning that standard it established could become negative precedent for involuntary medication of all "dangerous" criminals).

125. *Harper*, 494 U.S. at 214–15. Antipsychotic drugs are commonly employed to treat schizophrenia as well as other mental illnesses. *Id.* at 214; *cf.* Peek v. Ciccone, 288 F. Supp. 329, 336–37 (W.D. Mo. 1968) (rejecting argument that involuntary administration of antipsychotic drugs to schizophrenic prison inmate violated cruel and unusual punishment prohibitions). *See generally* Jami Floyd, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1250–53 (1990) (noting prevalence of involuntary medication of prisoners with psychotropic drugs); Nancy Prahoffer, *Compelling Competence Through the Use of Psychotropic Drugs: A Due Process Analysis*, 62 N.C. L. REV. 1271, 1271–79 (1984) (examining right to bodily integrity in context of court-imposed psychotropic treatment for defendants incompetent to stand trial).

126. *Harper*, 494 U.S. at 225. "There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here." *Id. But cf.* Riggins v. Ne-

Furthermore, pregnant women, as well as new mothers, have not escaped court-imposed intrusions into their personal autonomy.[127] For example, courts have justified the imposition of Caesarean sections on unwilling mothers to save unborn children who might otherwise die.[128]

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vada, 112 S. Ct. 1810, 1816 (1992) (reversing conviction of defendant, who was involuntarily administered Mellaril during trial, as violative of his Sixth and Fourteenth Amendment rights because state failed to show sufficient interest); Linda C. Fentiman, *Whose Right Is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1120–59 (1986) (criticizing compelled medication of insane defendant as violative of right to privacy, right to present defense, and privilege against self-incrimination). *See generally* Laura Ryan, Note, *Washington State Prison Procedure for the Forcible Administration of Antipsychotic Medication to Prison Inmates Does Not Violate Due Process:* Washington v. Harper, 110 S. Ct. 1028 (1990), 59 U. CIN. L. REV. 1373, 1414 (1992) (warning that *Harper* decision may lead to arbitrary denial of prisoners' rights, and suggesting that such denials are only justified in short-term, emergency situations).

127. *E.g.*, *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1006–10 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 458–59 (Ga. 1981) (per curiam); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537, 537–38 (N.J.), *cert. denied*, 377 U.S. 985 (1964); Hoener v. Bertinato, 171 A.2d 140, 142–45 (N.J., Bergen County Ct. 1961); *In re* Jamaica Hosp., 491 N.Y.S.2d 898, 899–90 (N.Y. Sup. 1985). *But see* Mercy Hosp., Inc. v. Jackson, 489 A.2d 1130, 1134 (Md. Ct. Spec. App. 1985) (affirming lower court's refusal to require mother to submit to blood transfusion despite risk to fetus). *See generally In re* Klein, 538 N.Y.S.2d 274, 275–76 (N.Y. 1989) (discussing appointment of guardian for comatose pregnant woman whose husband sought to terminate pregnancy); Beth D. Osowski, Note, *The Need for Logic and Constancy in Fetal Rights*, 68 N.D. L. REV. 171, 198–201 (1992) (reviewing allegation that fetal rights laws discriminate against women, and offering alternative solution that would regulate harmful conduct proximately related to future life); Robin M. Trindel, Note, *Fetal Interest v. Maternal Rights: Is the State Going Too Far?*, 24 AKRON L. REV. 743, 776 (1991) (criticizing state policies that protect unborn children at expense of maternal autonomy and legal rights).

128. *In re* A.C., 573 A.2d 1235, 1237 (D.C. 1990). A study in the New England Journal of Medicine determined that in 11 states, 14 court orders regarding Caesarean sections were granted of the 15 requests for such action. Veronika Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1193 (1987). The court orders were requested in Colorado, Hawaii, Illinois, Maine, Michigan, Minnesota, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas. *Id.* Of the 15 orders, Maine's order was denied and two others were not enforced because the mothers eventually agreed to the medical procedure. *Id.* Furthermore, in Illinois and Colorado, court orders for hospital detention were obtained in cases involving mothers who refused treatment even though they had diabetes. *Id.* The Illinois court rejected another request for intervention involving a 20-to-30-week-old fetus endangered by bleeding. *Id.*; *see* Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 287–88 (1982) (discussing state's apparent authority to require woman to submit to one form of childbirth, thereby ensuring live birth); *cf.* Gloria C. v. William C., 476 N.Y.S.2d 991, 998 (N.Y. Fam. Ct. 1984) (determining court jurisdiction to protect unborn child, on mother's request, from father's physical abuse). *But see* Taft v. Taft, 446 N.E.2d 395, 397 (Mass. 1983) (refusing to require pregnant woman to undergo operation to protect non-viable

Other invasions into bodily integrity have also been allowed, as illustrated by the New York decision of *Crouse Irving Memorial Hospital v. Paddock*.[129] In *Paddock*, Stacy Paddock encountered medical complications during her pregnancy.[130] Although she consented to a Caesarean section, Paddock refused blood transfusions because of her deeply held religious convictions.[131] While it recognized Paddock's constitutionally protected religious freedom, the court ordered the blood transfusions based on the state's vital interest in protecting children's welfare.[132] Ad-

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fetus). Based on the mother's prior medical history, the Massachusetts Probate and Family Court entered a judgment ordering the mother to submit to a "purse strings" operation to prevent miscarriage. *Id.* at 396. The mother, who had undergone the operation for her other children, refused the procedure because of her recently adopted religious convictions. *Id.* Finding that the record lacked evidence of sufficient risk to the unborn child, the court ruled in favor of the mother's constitutional right of freedom of religion. *Id.*; *County Appeals Ruling on Caesarean*, WASH. POST, Dec. 16, 1993, at A22 (reporting Illinois Appellate Court decision, which refused to order Caesarean section although physicians stated it was medically necessary to prevent death or severe brain damage). *But cf.* Cox v. Court of Common Pleas, 537 N.E.2d 721, 722–25 (Ohio Ct. App. 1988) (refusing to exercise jurisdiction over unborn child of known drug user and compel mother to act for child's benefit based on absence of statutory authority). *See generally* Andrea Goetze, *Court-Ordered Caesarean Sections: Probing the Wound*, 1 TEX. J. WOMEN & L. 59, 83 (1992) (suggesting that court-mandated Caesarean operations occur more frequently than documented).

129. 485 N.Y.S.2d 443, 444–46 (N.Y. Sup. Ct. 1985).

130. *Paddock*, 485 N.Y.S.2d at 444. Paddock suffered from an intrauterine pregnancy further complicated by her anemia. *Id.*

131. *Id.*; *see also* Joel J. Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239, 251–52 (1991) (interpreting forced Caesarean cases as treating viable fetus as child deserving of legal protection). *See generally* David H. Bamberger, Comment, Mercy Hospital, Inc. v. Jackson: *Recurring Dilemma for Health Care Providers in the Treatment of Jehovah's Witnesses*, 46 MD. L. REV. 514, 526 (1987) (suggesting that medical intrusions into personal autonomy stem from fear that health care workers will be held accountable for injuries that could have been prevented).

132. David H. Bamberger, Comment, Mercy Hospital, Inc. v. Jackson: *Recurring Dilemma for Health Care Providers in the Treatment of Jehovah's Witnesses*, 46 MD. L. REV. 514, 526 (1987); *see also Jefferson*, 274 S.E.2d at 458–59 (ordering that all necessary medical procedures be employed to save fetus despite mother's religious beliefs). The *Jefferson* court found that the state's obligation to protect a viable fetus outweighed the intrusion suffered by the mother. *Id.* at 460; *Raleigh Fitkin-Paul Morgan Memorial Hosp.*, 201 A.2d at 537–38 (requiring pregnant woman, contrary to religious beliefs, to undergo blood transfusion necessary to save her life and life of unborn child); *Jamaica Hosp.*, 491 N.Y.S.2d at 899–90 (subordinating mother's right to refuse necessary blood transfusion to protect midterm fetus). *See generally* Veronika Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1195 (1987) (questioning application of court-ordered transfusion cases to Caesarean context because of current significance of individual self-determination); Judith Kahn, Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is this a Mother's Crime?* 53 BROOK. L. REV. 807, 834–36 (1987) (interpret-

ditionally, in 1961, a New Jersey court awarded custody of an unborn child to the county welfare department after the parents opposed blood transfusions that would be necessary after the child's birth.[133] Subsequently, the District of Columbia Court of Appeals justified overriding a woman's religious objections to a blood transfusion because she had a seven-month-old child who depended upon her support.[134] These cases illustrate a judicial concern for the protection of unborn children, and suggest the judiciary's inclination to favor fetal rights.

Prior judicial intrusions into personal autonomy demonstrate that mandatory birth control is tenable in limited circumstances.[135] Compulsory vaccinations and involuntary administration of psychotropic drugs,

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ing *Griffin Spalding* and *Raleigh Fifkin* to support state intervention only in emergency medical situations involving maternal-fetal relationship).

133. *Hoener*, 171 A.2d at 142–45. Gloria Bertinato, a Jehovah's Witness, suffered from RH negative, a blood condition which imperiled her child's life. *Id.* at 140–41. Bertinato had previously had three children. *Id.* Although the first child survived without a blood transfusion, physicians indicated that RH negative rarely proved detrimental to first-born children. *Id.* at 141. Bertinato's second child survived as well, but only because a court order compelled the blood transfusion. *Id.* Without judicial intervention, her third child died because of her refusal to agree to the necessary transfusion. *Id.* In granting the county custody of the unborn child, the court affirmed the child's right to be born healthy and alive. *Id.* at 144. *See generally* Shannon K. Such, Note, *Lifesaving Medical Treatment for the Nonviable Fetus: Limitations on State Authority Under* Roe v. Wade, 54 FORDHAM L. REV. 961, 961 (1986) (discussing progress in medical technology, which resulted in health care providers viewing fetus as patient, raising legal and moral issues regarding maternal duties).

134. *In re President & Directors of Georgetown College, Inc.*, 331 F.2d at 1006–10. Jesse Jones, a 25-year-old Jehovah's Witness, suffered from a ruptured ulcer that caused her to lose two-thirds of her blood. *Id.* at 1006. The court ordered the transfusion against both her husband's wishes and her own. *Id.* The court reasoned that "the state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother." *Id.* at 1008.

135. *E.g.*, *Harper*, 494 U.S. at 236; *Jacobson*, 197 U.S. at 27; *Law*, 244 S.E.2d at 307; *see* George J. Annas, *Predicting the Future of Privacy in Pregnancy: How Medical Technology Affects the Legal Rights of Pregnant Women*, 13 NOVA L. REV. 329, 347 (1989) (contemplating coerced intervention into women's bodily integrity and predicting that judicial approval will ultimately hinge on reasonableness of intervention). *But see* United States v. Charters, 829 F.2d 479, 491 (4th Cir. 1987) (reiterating liberty interest in refusing unwanted medical invasions, which is grounded in constitutional freedoms); Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 1003 (1992) (basing belief that compulsory contraceptive would be impermissible burden on reproductive liberty on prior decisions regarding childbearing and medical treatment). *See generally* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 771 (1986) (emphasizing that constitutional rights frequently lack ascertainable boundaries, giving rise to turbulent controversy), *overruled in part sub nom.* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

as seen in *Jacobson* and *Harper*, respectively, are similar to mandatory Depo-Provera injections and Norplant implants for maternal substance abusers. Whereas protection of public health and safety proved sufficient to override individual resistance to vaccinations and medication, the government's interest in preventing the birth of drug-exposed infants should also justify state intervention.[136] Moreover, the motivations behind compulsory vaccinations or antipsychotic medication are analogous to the mandatory birth control context, in that the state seeks to control behavior that potentially endangers the individual and third persons.[137] While certain side effects can accompany Norplant or Depo-Provera, the health risks involved with vaccinations and antipsychotic drugs have not precluded their enlistment in serving state interests.[138]

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136. *See Harper*, 494 U.S. at 227 (allowing treatment because of inmate's threat to himself and other prisoners, despite recognized liberty interest in freedom from unwanted administration of antipsychotic medications); *Jacobson*, 197 U.S. at 35 (emphasizing necessity of vaccinations, although contrary to individual's religious beliefs in order to prevent spread of smallpox); *see also* Chester A. Robinson, *The President's Child Immunization Initiative—A Summary of the Problem and the Response*, PUB. HEALTH REP., July 1993, at 419 (hailing vaccinations as saving countless lives and avoiding expensive medical costs and human suffering). *See generally* Johnson v. State, 602 So. 2d 1288, 1295 (Fla. 1992) (finding that maternal substance abuse plagues society and produces infants who suffer variety of physical and neurological disorders as result).

137. *Compare Harper*, 494 U.S. at 226 (recognizing state's legitimate objective of preventing seriously disabled individuals from injuring themselves or others) *and Jacobson*, 197 U.S. at 31 (disregarding individual liberty concerns because of vaccination's important function of ending disease of smallpox) *with In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447, 449 (N.Y. Fam. Ct. 1990) (justifying state intervention when mother gives birth to drug-addicted baby) *and In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 285 (N.Y. App. Div. 1990) (asserting that states have interest in safeguarding unborn's rights). Societal costs for drug-addicted infants alone warrant state intervention to prevent such occurrences. *See, e.g.*, Louise M. Chan, Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 199 (1993) (estimating annual costs to care for drug-exposed newborns to exceed $13 billion); Julia E. Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1162–63 (1992) (comparing neonatal costs for non-exposed infants and exposed infants, finding that costs averaged $5200 more for those newborns suffering from drug addiction, and predicting national costs of $504 million); Alex Beasley, *When Foster Care is Flawed Care; Kids Falling Through Cracks in a Troubled System*, ORLANDO SENTINEL TRIB., Nov. 4, 1990, at A1 (attributing overwhelmed foster care system in part to flood of drug-exposed infants entering system).

138. *See Harper*, 494 U.S. at 229–30 (considering antipsychotic drugs' health risks in light of state interests). For example, tardive dyskinesia, which often causes permanent, uncontrollable muscle spasms, is the most common side effect. *Id.* Other complications, such as neuroleptic malignant syndrome, can prove fatal. *Id.* The negative effects of these drugs are well documented. *See, e.g.*, Mills v. Rogers, 457 U.S. 291, 293 n.1 (1982) (summarizing potential side effects of antipsychotic drugs, including neurological syndromes and retarded movement); United States v. Charters, 829 F.2d 479, 483 n.2 (4th Cir. 1987) (noting effect on thought processes, memory, and reasoning skills); Nancy K. Rhoden, *The Right to Refuse Psychotropic Drugs*, 15 HARV. C.R.-C.L. L. REV. 363, 380 (1980) (delineat-

Cases involving forced surgical procedures or blood transfusions further illustrate the enormous state power over individuals when a compelling government interest exists.[139] Additionally, court-ordered Caesarean operations, blood transfusions, and compulsory birth control raise similar issues of bodily integrity, religious freedom, and reproductive liberty.[140] Because the state's interest in protecting the unborn proved sufficient to override individual rights in *Paddock* and its progeny, presumably the state possesses comparable authority to restrict procreation in response to the problem of drug-addicted newborns.[141] Impor-

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ing side effects of antipsychotic drugs, including blurred vision, skin discoloration, jaundice, rapid heart rate, dizziness, altered appetite and sex drive, constipation, and drowsiness); Nancy Bunn, Note, *More Meaningful Protection for the Right to Refuse Antipsychotic Drugs*, 62 CHI.-KENT L. REV. 323, 325 n.14 (1985) (exploring temporary side effects of antipsychotic drugs such as akathesia, which subjectively compels individual to move constantly). With any medication, such as antipsychotic drugs or vaccines, benefits and risks are involved. *Compare* Al Podgorski, *The Risks*, CHI. SUN-TIMES, Dec. 26, 1993, at 15 (detailing symptoms and fatality rates from measles, mumps, tetanus, diphtheria, and other diseases, and contrasting benefits against potential health risks involved with vaccinations that prevent such diseases) *with* Shari L. Kahn, Comment, *The Right to Adequate Treatment Versus the Right to Refuse Antipsychotic Drug Treatment: A Solution to the Dilemma of the Involuntarily Committed Psychiatric Patient*, 33 EMORY L.J. 441, 449 (1984) (examining trade-off between benefits of medication and debilitating physical and psychological effects of drugs). *See generally Thornburgh*, 476 U.S. at 809 (White, J., dissenting) (discussing Court's support of compulsory vaccinations in *Jacobson* despite potential for grave illness or death); Arnold W. Reitze, Jr., *Federal Compensation for Vaccination Induced Injuries*, 13 B.C. ENVTL. AFF. L. REV. 169, 169–214 (1986) (describing litigation surrounding vaccine-related deaths that prompted legislation creating compensation program); Ruth Richman, *Push for Vaccines Sparks Debate; Pols Must Weigh Risk to Some Kids*, CHI. SUN-TIMES, Dec. 26, 1993, at 1 (citing 4,584 as number of claims asserted to Vaccine Injury Compensation Program since 1988).

139. *See Developments in the Law: Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1567 (1990) (describing Cesarean sections, which are universally compelled to protect unborn, as highly intrusive). *But see* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 157 (1993) (agreeing that Norplant, in comparison to other intrusions, seems minor). As the ACLU noted, however, "[n]o court has recognized governmental authority to limit privacy rights in the interest of *unconceived* children; the state may not limit fundamental freedoms to promote the general welfare of a future generation." *Id.*

140. *See Crouse*, 485 N.Y.S.2d at 444 (favoring children's welfare over parents' "most fervently held religious beliefs"); Elizabeth E. Drigotas, Comment, *Forced Cesarean Sections: Do the Ends Justify the Means?*, 70 N.C. L. REV. 297, 321 (1991) (asserting that involuntary Cesarean sections violate woman's right to bodily integrity and place woman and fetus at odds).

141. *See* Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960) (recognizing child's right to be born with "sound mind and body"); *see also Stefanel Tyesha C.*, 556 N.Y.S.2d at 286 (affording unborn children protection when parents have not). "Living children have legal rights and interests in remaining alive, in being protected from physical injury, from disabling preventable illnesses and afflictions, and from psychological damage." *Id.*; *see also*

tantly, compulsory contraception for substance abusers does not require maximizing fetal health at the mother's expense; rather, the state merely precludes the possibility of a drug-addicted baby during the time the woman is ending her addiction.[142] Protecting children from drug exposure warrants a limited and temporary intrusion into a mother's rights. However, specific statutes need to be enacted to govern such mandatory birth control measures.[143] The importance of this issue demands legislative consideration and the implementation of sound guidelines to eradicate the possibility of wide judicial discretion or abuse.[144]

David H. Montague & Sharon E. McLauchlin, *Drug Exposed Infants: En Ventre Sa Mere—And In Need of Protection*, 44 BAYLOR L. REV. 485, 510–11 (1992) (finding justification for regulating maternal substance abuse in courts' authority to require Caesarean section operations or medical treatment).

142. *See Thornburgh*, 476 U.S. at 771 (confirming that maternal health may not be jeopardized to benefit fetus); *cf.* Margaret Diamond, Comment, *Echoes from Darkness: The Case of Angela C.*, 51 U. PITT. L. REV. 1061, 1088 (1990) (finding that maternal fatality rates increase four times with Caesarean operations); Elizabeth E. Drigotas, Comment, *Forced Cesarean Sections: Do the Ends Justify the Means?*, 70 N.C. L. REV. 297, 306 (1991) (arguing that even with compelling state interest in safeguarding health of fetus, intervention or forced surgery would be impermissible since effect is subordination of maternal health to that of fetus). *Contra* Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: "Compelling Each to Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703, 706 (1986) (finding risk of maternal mortality low for Caesarean sections). *But see* Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1958 (1991) (criticizing government efforts to protect fetal health despite adverse consequences to women, and warning that elevating fetal rights above maternal health threatens women's reproductive autonomy). *See generally* Greenspan v. Slate, 97 A.2d 390, 397 (N.J. 1953) (imposing duty on parents to provide for children's well-being and allowing state to intervene in instances in which parents do not).

143. *See In re* C.D.M., 627 P.2d 607, 616 (Alaska 1981) (Matthews, J., dissenting) (demanding legislative enactments to govern any restrictions on fundamental right to reproduce). *But see* Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 367–68 (1992) (warning that mandatory birth control measures foster erroneous perception that certain women are incapable of controlling own reproductive systems). *See generally In re* Tulley, 146 Cal. Rptr. 266, 268–69 (Cal. Ct. App. 1978) (denying parents' request to sterilize profoundly mentally retarded daughter because of absence of legislative authorization conferred on courts), *cert. denied*, 440 U.S. 967 (1979).

144. *See* Sherrer v. Sherrer, 334 U.S. 343, 364–66 (1948) (Frankfurter, J., dissenting) (warning against judicial establishment of social policy because judiciary has only limited resources available to aid in decisionmaking); Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992) (emphasizing that only legislators, not prosecutors or judges, can create criminal statutes); *see also* Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 984 (1992) (declaring that court-imposed birth control would authorize judiciary to determine who is "fit" to bear children); *cf. In re* Matejski, 419 N.W.2d 576, 582–83 (Iowa 1988) (Harris, J., dissenting) (emphasizing that questions involving involuntary sterilizations require legislative judgment because courts are ill-equipped to decide such issues integral to nation's founda-

V. Texas Problems and Solutions

A. *Judicial and Legislative Attempts Aimed at Preventing Child Abuse*

The problems plaguing Texas mirror those experienced nationwide,[145] eliciting similar judicial and legislative responses. Because Texas statutes fail to address the issue of drug-addicted newborns, the Texas Department of Protective and Regulatory Services (formerly the Texas Department of Human Services) has been forced to rely on current definitions of child abuse when attempting to terminate parental rights, an approach

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tion); Eberhardy v. Circuit Court for Wood County (*In re* Eberhardy), 307 N.W.2d 881, 895–99 (Wis. 1981) (deferring to legislature on complex public policy issue of involuntary sterilization). *See generally* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 Buff. L. Rev. 703, 772–77 (1993) (criticizing judges and legislators for implementing public policy based on their understanding of societal views, which are often founded on misconceptions or myths).

145. *See* Karyl Burns, *Nationwide Child Abuse Reports Climb Nearly 8 Percent*, UPI, Apr. 7, 1993, *available in* LEXIS, Nexis Library, UPI File (reporting that Texas led nation with 103 child abuse deaths in 1992). Ohio, which followed Texas, reported 81 deaths. *Id.* Illinois ranked third with 75 fatalities and California had 69. *Id.*; Robbie Morganfield, *Adoption Program Resurrected: Aim is to Place More Black Kids*, Hous. Chron., Jan. 23, 1994, at C1 (indicating growing problems African-American foster children face because few families are available to adopt them). The Texas Department of Protective and Regulatory Services has witnessed a 30% increase in the number of African-American children awaiting adoption, and an overall 11% increase among children. *Id.*; Deborah Tedford, *State May Again Cut Payments for Foster Care of Abused Children*, Hous. Chron., Nov. 6, 1993, at A34 (discussing possible decrease in daily compensation for residential care of abused children although payments had already been reduced); Deborah Tedford, *Texans Push for Rights of Foster Children: Activists Helping Lawmakers Draft Measures to Fight Abuse*, Hous. Chron., Jan. 11, 1993, at A11 (discussing need to reform Texas foster care system through legislatively enacted measures); *see also* Jonathan Eig, *Statistics Bleak for Many Children: Group Appeals to New Administration to Reverse Trends*, Dallas Morning News, Dec. 23, 1992, at 26A (listing recently released Children's Defense Fund statistics regarding Texas children). In 1993, Texas witnessed 134,295 incidents of child abuse and neglect. *Id.* In Texas, an infant is born into poverty every seven minutes. *Id.* Additionally, an underweight child is born every 25 minutes, and a baby is born to a mother who received inadequate prenatal care every 15 minutes. *Id.* Among the 50 states, Texas ranks last in immunizing children and 47th in monthly payments of Aid to Families with Dependent Children. *Id.* Furthermore, Texas spent $15 billion, or over $800 a person, on substance abuse in 1989. *Id.*; Deborah Tedford, *Texas Children Often Languish in Foster Care: Study Reveals Flaw in System*, Hous. Chron., Sept. 27, 1992, at A1 (discovering that 44% of 7,861 Texas children in foster care had been in system over two years); *cf.* Alexander Cockburn, *Memory: Winston Churchill's Sterilization Proposal Beat the Devil*, Nation, Nov. 23, 1992, at 618 (reporting that 1981 poll of Houston legislator's constituents revealed that 60% of 6,000 asked favored sterilization of welfare mothers who have at least three children).

that often proves unsuccessful.[146] Likewise, prosecutors initiating criminal actions against child-abusing drug users have met with little success.[147] For example, in *Jackson v. State*,[148] Tracy Jackson, while smoking cocaine in an apartment with several other individuals, gave birth to a stillborn infant in the apartment's bathroom unknown to anyone else.[149]

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146. *See* G.M. v. Texas Dep't of Human Resources, 717 S.W.2d 185, 185–89 (Tex. App.—Austin 1986, no writ) (refusing to terminate mother's parental rights because evidence of prenatal substance abuse fell short of "clear and convincing" standard). Currently, the Texas Family Code enumerates certain instances in which the state may involuntarily terminate parental rights. TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1994). The laundry list includes only two provisions, both of which are riddled with legal inconsistencies, that could be applied to maternal substance abusers. *Id.* The state may terminate a parent's rights if the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." *Id.* However, the statute defines "child" as an unmarried or unemancipated individual under eighteen. TEX. FAM. CODE ANN. § 11.01 (Vernon Supp. 1994). Thus, it appears that the state may only act if the mother continues drug use after the child's birth. *But see* Vanessa W. v. Texas Dep't of Human Servs., 810 S.W.2d 744, 752 (Tex. App.—Dallas) (concluding prenatal substance abuse indicates that mother knowingly engaged in behavior detrimental to her child's well-being), *rev'd on other grounds*, 817 S.W.2d 62 (Tex. 1991); *In re* Guillory, 618 S.W.2d 948, 951 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (terminating mother's parental rights because of prenatal drug use, prior heroin conviction, aggravated robbery conviction, and continued drug use). *See generally* Doretta M. McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 511 (1990) (predicting amendments in current state statutes regarding maternal substance abuse as legislative response to judiciary's failure to convict pregnant drug users).

147. *See* David H. Montague & Sharon E. McLauchlin, *Drug Exposed Infants: En Ventre Sa Mere—And In Need of Protection*, 44 BAYLOR L. REV. 485, 488 (1992) (discussing cases in Tarrant and Nueces Counties, as well as in City of Houston, in which prosecutors have filed or planned to file criminal charges against mothers who gave birth to drug-exposed infants). An appellate court reversed a Houston case against a mother whose stillborn infant tested positive for cocaine, finding the evidence insufficient to support a conviction. *Id.* at 488 n.24. In Tarrant County, prosecutors dismissed an action after discovering that the mother had ingested legally prescribed methadone. *Id.* at 488 n.23. In dismissing the indictment for felony injury to a child, the court asserted that it was unclear whether the child was injured by the methadone or by illegal drugs. Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1407 n.58 (1990). *See generally* J. Michael Kennedy, *Startled Police Find Girl, 3, Running Texas Crack House; Drugs: Mother and Grandmother Arrested. Young Dealer Was Also Tending 3 Siblings in Vermin-Infested Site.*, L.A. TIMES, Sept. 13, 1991, at A1 (detailing situation, discovered during investigation of roach-infested crack house, in which Texas police found one-month-old newborn lying on bed soaked with urine).

148. 833 S.W.2d 220 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

149. *Jackson*, 833 S.W.2d at 221–22. Witnesses testified that they heard screams and running water from the bathroom. *Id.*

Jackson emerged with a towel wrapped around her waist and continued to smoke cocaine, refusing to allow anyone to enter the bathroom.[150] Later that day, another woman discovered the baby in a plastic bag.[151] DNA analysis established Jackson's maternity, and the autopsy results determined the death to have been cocaine-induced.[152] Although a jury convicted Jackson for possession of a controlled substance, the Fourteenth Court of Appeals reversed the decision because the state failed to establish the elements of possession, resulting in Jackson's acquittal.[153]

On their own initiatives, Texas judges have attempted to fashion remedies to alleviate the growing social problems involving Texas children. For example, several Houston judges have employed Norplant against child abusers, but with mixed results.[154] Although those judges imple-

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150. *Id.* at 221.

151. *Id.* at 222. Jeanine Cooper found the stillborn child, initially believing it to be a doll. *Id.* Cooper, along with the other individuals in the apartment, decided not to call the police. *Id.* They did contact an emergency medical unit, which tried to resuscitate the baby, unaware that it was stillborn. *Id.*

152. *Id.*

153. *Jackson*, 833 S.W.2d at 222. The state's burden involved establishing that Jackson "exercised care, custody, control or management over the contraband" and that Jackson had knowledge that the substance possessed was actually contraband. *Id.* The court rejected the test results demonstrating the infant died from Jackson's cocaine ingestion as proof of possession. *Id.* at 223. In the court's opinion, holding otherwise would have altered the nature of the offense from "possession" to "use." *Id.*

154. *See* John Makeig, *Surgical Deterrent; Mom Convicted of Child Abuse Picks Birth-Control Implant Over Prison*, HOUS. CHRON., Mar. 6, 1992, at A1 (describing District Judge Patricia Lykos's agreement with convicted child abuser that abuser use Norplant instead of serving prison term). In one case, Ida Jean Tovar, age 19, violently shook her two-month-old son, resulting in brain damage. *Id.* Tovar had three children ranging in age from two months to six years. *Id.* Unlike actions in other states, Judge Lykos did not mandate birth control as a probation condition; rather, Tovar requested the implant. Telephone Interview with Hon. Patricia R. Lykos, Judge, 180th District Court of Texas (Feb. 9, 1994) (summary on file with the *St. Mary's Law Journal*). Judge Lykos believed that ordering an implantation of Norplant would exceed her inherent power absent a statutory grant of authority. *Id.* During Tovar's initial 90-day term at Harris County's boot camp, which she was required to serve before beginning her 10 year probationary period, Tovar escaped while on furlough, resulting in her imprisonment. *Id.* Although Judge Lykos offered to have the implant removed, Tovar declined. *Id.*; *Mother Gets Norplant as Condition of Probation*, ABORTION REP., Oct. 8, 1993, State Report (detailing Judge Jim Barr's decision to employ Norplant against mother convicted of misdemeanor child abandonment); *see also* Telephone Interview with Hon. Jim Barr, Judge, 337th District Court of Texas (Feb. 2, 1994) (summary on file with the *St. Mary's Law Journal*) (relating motivations behind Norplant agreement). In another instance, Alice Faye Bird left her two children alone while she allegedly went out for milk. *Id.* Judge Barr indicated that the evidence suggested Bird actually left to acquire drugs. *Id.* During her absence, a fire broke out killing one child and seriously injuring the other. *Id.* Judge Barr found Bird guilty of child abandonment, a misdemeanor punishable by one year in the county jail and a fine. *Id.* Bird, however, had already served one year by the time her case concluded. *Id.* Judge Barr faced a dilemma

mented Norplant use with the women's consent, Houston Judge Doug Shaver required twenty-three-year-old Cathy Knighten to submit to a Norplant implantation after she unsuccessfully attempted to suffocate her daughter.[155] Additionally, in an effort to ensure the safety and well-being of Texas children, legislators have advocated measures for incentive programs, sterilization laws, and abuse prevention programs.[156] Despite the prevalence of maternal substance abuse, Texas lacks a comprehensive legislative plan to confront and solve the issues facing its citizenry.

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because he was aware that Bird had a severe cocaine problem, and that she had previously given birth to one stillborn child as a result of her addiction. *Id.* On the record, Judge Barr discussed with Bird his concern for other children she might have, and she agreed that she posed a threat to them. *Id.* Believing that ordering Norplant exceeded his authority, Judge Barr sought to employ Norplant with Bird's consent, as long as the agreement was not accomplished through duress. *Id.* Because Bird had already served her sentence, Judge Barr possessed no leverage over Bird; thus, no coercion was involved. *Id.* After lengthy discussions, Bird and Judge Barr agreed to a Norplant implant. *Id.* Bird, however, never complied with the agreement, continuing her cocaine use, and violating other terms of her probation. *Id. See generally* Michael E. Tigar, *Moving Backward in Sentencing and Intent*, NAT. L.J., Nov. 29, 1993, at S18, S19 (noting Texas judge's frustration over sentencing 19-year old first offender and crack addict who has drug-exposed child). The only sentencing alternatives are imprisonment in an already over crowded system, or probation, which is also overburdened. *Id.*

155. *See* Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 737 (1993) (discussing sentence Judge Shaver imposed on Knighten which included probation terms forbidding unsupervised meetings with her children under 14 years of age). After suffering adverse effects from the contraceptive device, Knighten had the Norplant insert removed and underwent a tubal ligation. *Id.*

156. *See* Tex. H.B. 2485, 73d Leg., Reg. Sess. (1993) (recognizing need for state intervention into high-risk families to prevent problems associated with inadequate prenatal care, drugs, poverty, and poor education); *Norplant: Opportunities and Perils for Low-Income Women*, (Alan Guttmacher Inst., Washington, D.C.), Dec. 1992, at 1, 3 (Special Rep. #1) (noting Texas incentive program proposed in 1991). This welfare incentive proposal, introduced by Representative Billy Clemons, was an amendment to the DHS Appropriations Bill. Telephone Interview with Lisa Kaeser, Senior Public Policy Associate of Alan Guttmacher Institute, (Feb. 9, 1994) (summary on file with the *St. Mary's Law Journal*). The bill offered to provide welfare mothers with free Norplant implantation and $300. *Id.* If the mother continued Norplant use for the next five years, an additional $200 would be paid. *Id.*; *see also* Alexander Cockburn, *Memory: Winston Churchill's Sterilization Proposal Beat the Devil*, NATION, Nov. 23, 1992, at 618 (reporting that controversial 1980 initiative, proposed by Texas Board of Resources, mandated sterilization of all welfare recipients); Valerie Godines, *Lawmakers Urged to Pass Bill on Abuse Prevention Program*, HOUS. CHRON., May 27, 1993, at A26 (advocating "Healthy Start" bill designed to intervene in high-risk families expecting newborns); *cf.* Lynn Smith & Nina J. Easton, *The Dilemma of Desire*, L.A. TIMES, Sept. 26, 1993, (Magazine), at 24 (citing unpublished study, conducted by Baylor College of Medicine Assistant Professor Margaret L. Frank, which revealed that 81% of 100 Texas family-planning providers agreed that women infected with HIV should use Norplant).

Although sending drug-addicted mothers to prison is not the answer, neither is inaction. Prevention measures encompassing both contraceptive use and drug rehabilitation programs present the only realistic solution.

B. *A Call for Limited Action*

While previously proposed legislation regarding mandatory Norplant in Kansas, Washington, Ohio, and South Carolina possessed significant flaws, it can provide guidance for Texas legislators.[157] Importantly, legislation temporarily restricting reproduction must be narrowly tailored to serve state objectives in preventing drug-exposed newborns and must not arbitrarily deny women their fundamental rights.[158] The Texas Legisla-

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157. *See* Doretta M. McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 511–12 n.31 (1990) (suggesting that drafting successful statute would require inclusion of legislative history supporting initiative, and substantial evidence of detrimental prenatal behavior with tragic results). Ohio's measure ignores the importance of rehabilitation by offering Norplant to first-time offenders as an alternative to completing a drug treatment program. Ohio S.B. 82, 119th Leg., Reg. Sess. § 2919.221(B)(1) (1991). Its application to repeat offenders, however, offers notice and an opportunity to end the drug addiction prior to state intrusion. *Id.* § 2919.221(B)(2). South Carolina imposes mandatory Norplant in the first instance of prenatal substance abuse, but fails to consider the medical health of the mother. S.C. S.B. 986, 75th Leg., Reg. Sess. § 1(D) (1991). The Kansas measure is over-inclusive in that it applies to all women convicted under the controlled substance act, regardless of whether an addicted infant is involved. Kan. H.B. 2255, 74th Leg., 2d Sess. § 4(D) (1991). Yet, it does exclude women medically unable to comply with a Norplant order. *Id.* Washington's measure presents the most viable option for Texas legislators to follow, but its application to fetal alcohol syndrome may present difficulties as well. *See* Wash. S.B. 5249, 53d Leg., Reg. Sess. (1993) (requiring filing of petition with physician's certificate followed); *see also* Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1220–21 (1987) (recognizing that although illicit drugs are criminally forbidden, women do enjoy privilege of drinking alcohol). *But see* Ellen P. Parson, *A Woman's Right to Choose: Reproductive Rights and Fetal Protection*, NETWORK NEWS, Nov. 1990, at 1 (condemning mandatory birth control proposals as placing fetal rights above women's choices and effectively pitting fetus against mother).

158. *See In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 285 (N.Y. App. Div. 1990) (recognizing that state interest in protecting potential life is meaningless unless state is authorized to act to safeguard that interest). "An interest stripped of a method of enforcement is a feckless thing. Nowhere in law are significant state interests unaccompanied by a means of implementation. This is certainly true where the state seeks to prevent death or seriously bodily injury." *Id.*; *see also* Rennie v. Klein, 653 F.2d 836, 847 (3d Cir. 1981) (arguing for balancing test when issue of involuntary medical treatment arises), *cert. granted and judgment vacated*, 458 U.S. 1119 (1982). "The least intrusive means standard does not prohibit all intrusions. It merely directs attention to and requires avoidance of those which are unnecessary or whose cost benefit ratios, weighed from the patient's standpoint, are unacceptable." *Id. See generally In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447, 448–49 (N.Y.

ture should avoid authorizing compulsory contraception except in limited circumstances in which mothers repetitively give birth to addicted babies.[159] Such legislation must be drafted as a remedial, temporary measure designed to rehabilitate mothers as well as to deter prenatal substance abuse.[160]

The legislature should authorize the medical profession to test newborns suspected of drug exposure and should establish criteria for

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Fam. Ct. 1990) (analogizing to property and tort law to argue validity of fetal rights doctrine for prenatal substance abuse); Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 47–48 (1992) (illustrating prior legal protection for unconceived children through sterilization laws for mentally impaired, incest prohibitions, bans on surrogacy contracts, and wrongful life tort actions).

159. *See* Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992) (stressing that individuals may not be punished for behavior unless it is clearly defined as criminal within particular statute); State v. Gray, 584 N.E.2d 710, 714 (Ohio 1992) (Wright, J., dissenting) (criticizing *Roe v. Wade*'s balancing approach as applied to case at bar, and reminding that no fundamental right is at stake). As Justice Wright observed:

> There is no fundamental right to abuse cocaine. The act of using cocaine is not an act relating to a right connected with marriage, procreation, contraception, family relations, or child bearing. No special protection is afforded the cocaine abuser just because she is pregnant. She is not spared the consequences of her illegal cocaine use because she is pregnant. Here you are *not* being asked to balance a woman's significant interest in bodily integrity against the States' interest in the health and welfare of its' [sic] children. No, you are being asked to balance a woman's desire to use illegal drugs, while she happens to be pregnant, with the health and welfare of her child. . . . This case is not about a woman's choice to conceive or carry a child. This is about the right of a child to be born healthy, free of injuries inflicted by the illegal acts of another.

Id.; *see also* David H. Montague & Sharon E. McLauchlin, *Drug Exposed Infants: En Ventre Sa Mere—And In Need of Protection*, 44 BAYLOR L. REV. 485, 508 (1992) (recognizing state's broad latitude in regulating illegal drug use, and finding that issue focuses on illegal conduct, which may be regulated regardless of whether or not individual is pregnant); *cf. Fathima Ashanti K.J.*, 558 N.Y.S.2d at 449 (arguing that if state has authority to require woman to continue pregnancy once fetus is viable, then state has power and obligation to ensure fetal health); Louise M. Chan, Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 220–21 (1993) (discrediting arguments against prosecuting mothers who engage in substance abuse during pregnancy, and emphasizing compelling interest in fetal health over any fundamental right to privacy). *See generally* Deborah A. Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 U. DAYTON L. REV. 1019, 1045 (1992) (agreeing that state has compelling interest to ensure children are born healthy and free from drug-exposure).

160. *See* Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037, 1053 (1992) (recommending novel approaches such as Norplant to address child abuse problems since current policies have proven ineffective); *cf.* Fosmire v. Nicoleau, 536 N.Y.S.2d 492, 495–96 (N.Y. App. Div. 1989) (identifying four state concerns that could justify overriding individual rights: preserving human life, preventing suicide, protecting innocent third parties, and maintaining medical profession's integrity).

involuntary testing to avoid potential racial or socio-economic discrimination.[161] Medical professionals should be required to report test results to the Texas Department of Protective and Regulatory Services so that the identities of all women tested—whether treated by the county hospital or private doctors—are documented.[162] Women who have given birth to an addicted newborn for the first time should undergo compulsory residential drug treatment programs, contraceptive counseling, parenting classes, and education completion studies, and should be provided with the option of job training.[163] During this initial phase, the primary objective

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161. *See* Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 784–85 (1990) (concluding that certain factors provide objective criteria to determine which mothers should be tested). Because most drug abusers refuse to admit their addiction, hospitals may screen newborns when "clear and definable signs of drug use" exist. *Id.* at 797. Factors considered include the mother's behavior and the presence of "needle tracks." *Id.* Additionally, the screening of newborns is authorized under the state's *parens patriae* power, and serves as the least intrusive means as opposed to maternal screening. *Id.* at 788; *see also* Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519, 547 (1991–1992) (determining that toxicology screening would fall under state's police powers in protecting well-being of children). *But see* Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 306 (1992) (predicting drug screening will prove over inclusive since tests merely detect drugs and are not conclusive regarding frequency, amount, or level of maternal dependency). *See generally* Louise M. Chan, Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 227 (1993) (discussing New York law which currently allows drug screening of women suspected of maternal substance abuse).

162. *See* Brian C. Spitzer, *A Response to "Cocaine Babies"—Amendment of Florida's Child Abuse and Neglect Laws To Encompass Infants Born Drug Dependent*, 15 FLA. ST. U. L. REV. 865, 865 (1987) (describing policy changes in Florida system, which require immediate reporting to Department of Health and Rehabilitative Services when mother gives birth to drug-exposed baby). *But see* Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 306–07 (1992) (claiming disproportionate application of reporting requirements against minorities and low-income women); Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1435 (1990) (considering possibility that fear of being reported may encourage homebirths and thereby deny infants adequate medical care); Barbara Whitaker, *Protecting Baby from Mom; Tot Welfare at Issue in Drug Cases*, NEWSDAY, Nov. 6, 1989, at 8 (asserting that African-American women are more than nine times more likely to be reported for substance abuse than white mothers, even though number of positive test results among both groups are comparable).

163. *See* Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 320–22 (1992) (proposing use of residential treatment facilities, parenting classes, housing assistance, job training, and high school equivalency classes to remedy maternal substance abuse since most drug-using mothers lack adequate resources to help themselves); Judy Licht, *Pregnant Addicts: A Call for Treatment, Not Punishment*, WASH. POST, Jan. 29, 1993, at Z13 (arguing that

would be treatment and preservation of the mother-child relationship.[164] Such a statute would not only provide notice of subsequent punitive measures, but would also offer each woman an opportunity to end her addiction and to cultivate a relationship with her child before she faces more serious repercussions.[165]

Under this legislation, after it receives notification of allegedly repetitive maternal substance abuse, the Department of Protective and Regulatory Services would initiate judicial action.[166] To further proceed, the reviewing court must first find by clear and convincing evidence that the infant's drug exposure resulted from the mother's illicit substance abuse.[167] Once this fact is conclusively determined, the court would then review the mother's treatment history, hear evidence regarding the first child's status and well-being, and elicit recommendations from the Department of Protective and Regulatory Services. Additionally, the mother would be required to undergo a medical evaluation to determine whether contraceptives would be harmful.[168] After considering all relevant information, the judge would be empowered to order a Depo-Provera injection if medically feasible in conjunction with further drug

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addicts can develop nurturing relationships with their children and overcome drug problem if treatment focuses on every aspect of women's lives from housing to public benefits).

164. *In re* J.W., 578 A.2d 952, 958 (Pa. Super. 1990); *see* McGowan v. State, 558 S.W.2d 561, 564 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (acknowledging universal agreement that bond of parental affection is unique and irreplaceable); *see also* Judith Kahn, Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is This a Mother's Crime?*, 53 BROOK. L. REV. 807, 841 (1987) (proposing residential treatment facility designed to foster mother-child relationship and prevent alienation); Susan C. Smith, Comment, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriative Legal Response*, 42 CATH. U. L. REV. 141, 149–58 (1992) (discussing social service agency approach to fostering family unit and encouraging parents to seek treatment). *But see* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process*: Deshaney *in Context*, 68 N.C. L. REV. 659, 708 (1990) (contending that preserving family unit often leads to decriminalization of abuse and effective consent to detrimental behavior).

165. *See* Skinner v. Oklahoma, 316 U.S. 535, 545 (1942) (Stone, J., concurring) (disparaging system in which individuals face punishment without hearing as violative of due process guarantees).

166. *See* Joseph A. D'Elia, *Nassau Acts to Protect Newborns*, NEWSDAY, Sept. 29, 1988, (Viewpoints), at 97 (clarifying that positive test results for drug-exposed newborn provide sufficient grounds to initiate neglect proceedings).

167. *See* Barbara Whitaker, *Protecting Baby from Mom; Tot Welfare at Issue in Drug Cases*, NEWSDAY, Nov. 6, 1989, at 8 (demanding independent confirmation of newborn's drug exposure, aside from positive screening results, before removing child from mother).

168. *Cf. Rennie*, 653 F.2d at 865 (Garth, J., concurring) (contending that states may administer antipsychotic medication against patient's wishes only when person is incompetent to decide personally, or danger to third persons necessitates treatment).

treatment.[169] Continuation of Depo-Provera injections at the end of the initial three-month period would hinge upon the mother's progress in treatment, which would be monitored by random drug testing.[170] Restoration of the mother's full reproductive capacity, as well as her rights to the child, would depend on the mother's compliance with her treatment guidelines.[171]

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169. *See In re* Lacey P., 433 S.E.2d 518, 525 n.8 (W. Va. 1993) (advocating limitation of procreative freedoms in situations in which children are endangered); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981) (per curiam) (holding that state interest in protecting unborn is paramount to parents' constitutional rights, and thereby justifies intrusions in light of serious threat to child); *Fathima Ashanti K.J.*, 558 N.Y.S.2d at 449 (establishing that compelling state interest in protecting unborn children's health and welfare overrides parents' constitutional rights to religious freedom, bodily integrity, and privacy); Eberhardy v. Circuit Court (*In re* Eberhardy), 307 N.W.2d 881, 895–99 (Wis. 1981) (acknowledging, in sterilization context, that improved and reversible contraceptives could provide permissible less intrusive means as public policy matter). *But see* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 53 (1992) (arguing that drug treatment programs, and not restrictions on procreation, adequately promote government's interest in preventing addicted newborns). Drug rehabilitation, in conjunction with drug testing, can protect against drug-exposed infants. *Id.* If a woman tests positive for drug use, courts may revoke probation and imprison the woman. *Id.*

170. *See* Laura A. Lundquist, *Weighing the Factors of Drug Testing for Fourth Amendment Balancing*, 60 GEO. WASH. L. REV. 1151, 1168 (1992) (noting great weight given to government's interest in drug testing by federal courts if based on concern for public or individual safety); Catherine A. Kyres, Note, *A "Cracked" Image of My Mother/Myself? The Need for a Legislative Directive Proscribing Maternal Drug Abuse*, 25 NEW ENG. L. REV. 1325, 1353 (1991) (sanctioning drug screening of female addicts and arguing that such testing is as constitutionally permissible as intoxication tests); Susan J. Levy, Comment, *The Constitutional Implications of Mandatory Testing For Acquired Immunodeficiency Syndrome—AIDS*, 37 EMORY L.J. 217, 245 (1988) (intimating that random testing based on reasonable suspicion would not violate right to privacy). Furthermore, random drug testing of maternal substance abusers appears to be permissible under this plan because the women would have prior notification of possible testing and a diminished expectation of privacy as a result of her offense. *Cf.* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (upholding random drug testing of railroad employees because of concern for safety of innocent parties); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (rejecting challenge to drug-testing program for U.S. Customs Service employees and holding that those employees could endanger citizens by virtue of their positions); Donald M. Remy, Comment, *The Constitutionality of Drug Testing of Employees in Government Regulated "Private" Industries*, 34 How. L.J. 633, 649 (1991) (supporting random drug testing of employees in government-regulated industries because of their decreased expectation of privacy and in interest of public safety).

171. *See Jefferson*, 274 S.E.2d at 461 (Smith, J., concurring) (favoring intrusions into mother's bodily integrity since maternal risk and interference are minimal and threat to fetus is great); *see also Lacey P.*, 433 S.E.2d at 525 n.8 (stressing obligations to provide for child's safety and well-being that accompany right to have children); David H. Montague & Sharon E. McLauchlin, *Drug Exposed Infants: En Ventre Sa Mere—And In Need of Protection*, 44 BAYLOR L. REV. 485, 504 (1992) (exploring state interest in protecting un-

VI. CONCLUSION

The controversy surrounding the idea of mandatory birth control transcends racial, socio-economic, moral, and practical boundaries, thrusting a range of emotionally charged issues into the legal forum. The sensitive issues involved often mask the fact that no liberty, even the right to procreate, deserves absolute protection from government interference. Because maternal substance abuse places procreative freedom at odds with a child's well-being, any solution necessarily subordinates the rights of one party. A statute mandating birth control for chemically dependent women would merely implement a balancing test between two substantial liberty interests and shift the burden away from the innocent party.

At first glance, state-imposed birth control appears offensive to the very notions of liberty. However, upon review, its offensiveness is relative to the only alternative: drug-addicted newborns. As one judge stated, "[w]e should not permit the Bill of Rights to be twisted into becoming a 'Bill of Wrongs' in the perception of the victims of crime. The shield protecting our civil liberties should not be refabricated into a cloak to hide and protect the child abuser . . . ."[172] Compulsory birth control measures may be the only prescription available to stop the tragic results of maternal substance abuse.

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born child from prenatal drug exposure and finding state authority to prevent maternal acts that adversely affect child); *cf.* Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 802 (1990) (contending that commitment to drug treatment program indicates mother's ability to provide for child).

172. State v. Boggess, 340 N.W.2d 516, 526 (Wis. 1983) (Day, J., concurring).