

## Novel Condition of Probation: Don't Get Pregnant

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On September 5, 2008, Texas District Judge Charlie Baird sentenced Felicia Salazar, a 20-year old mother with no criminal history, to 10 years probation for injury to a child when she failed to act to protect her 19-month old daughter from abuse at the hands of her father, Roberto Alvarado.<sup>1</sup> In addition to the usual conditions of probation, including community service and psychiatric evaluation, Ms. Salazar was further ordered to refrain from becoming pregnant for the duration of her probation.<sup>2</sup> When asked to comment, Judge Baird stated, "Under Texas law, judges can impose any condition on probation so long as it's reasonable.<sup>3</sup> [Ms. Salazar] has a fundamental right to reproduce, so I couldn't order her to be sterilized. But she can be forced to forfeit certain fundamental rights."<sup>4</sup> While this condition of probation is not unheard of—a Wisconsin court placed the same restriction on David Oakley in 1991 for failure to pay child support—it is certainly unusual and raises a number of questions, both constitutional and practical.

Recognition of reproductive freedom in the United States has undergone dramatic transformation over the past 80 years. In 1927, the United States Supreme Court upheld a Virginia Act that provided for the involuntary sterilization of "mental defectives;" the Court's opinion, infamously penned by Justice Oliver Wendell Holmes, proclaimed "three generations of imbeciles is enough."<sup>5</sup> At that time, there was no rights-based language with regard to procreation, and thus only a rational relationship between the Virginia legislation and the public health goal was required. Fifteen years later, the Supreme Court in *Skinner v. Oklahoma* recognized that procreation was a fundamental right and thus any law that attempted to regulate an individual's procreative ability would be subjected to strict scrutiny. Under this level of review, the Oklahoma Habitual Criminal Sterilization Act, which provided for the involuntary sterilization of any individual convicted 2 or more times for felonies involving moral turpitude, was struck down.

A separate but related line of cases similarly established a constitutional right to avoid procreation. In 1965, the Supreme Court in *Griswold v. Connecticut* struck down a Connecticut statute that criminalized the use of contraceptives by married couples.<sup>6</sup> Similarly in *Eisenstadt v. Baird*, the Court struck down a Massachusetts statute that prohibited distribution of contraceptives to single individuals for the purpose of preventing pregnancy.<sup>7</sup> This fundamental right to avoid procreation was further elucidated in *Roe v.*

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<sup>1</sup> Steven Kreytak, *Travis judge tells woman to stop having kids: Constitutionality of Order in Child Injury case is Questioned by Experts*, AUSTIN AMERICAN STATESMAN, September 12, 2008, available at <http://www.statesman.com/news/content/news/stories/local/09/12/0912salazar.html> (last accessed October 13, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> Texas Code of Criminal Procedure 42.12 Section 11(a).

<sup>4</sup> Dan Slater, *The Judge Says: Don't Get Pregnant. A Lapsed Law Now Sees New Life*, WALL STREET JOURNAL, September 25, 2008, available at [http://online.wsj.com/article/SB122230566090673847.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122230566090673847.html?mod=googlenews_wsj) (last accessed October 3, 2008).

<sup>5</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>6</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>7</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

*Wade* when the Supreme Court emphasized, “The right of privacy is found in the 14<sup>th</sup> Amendment’s concept of personal liberty and is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>8</sup>

Given the recognition by the Supreme Court of a fundamental right to procreate in addition to a right to avoid procreation, it would appear doubtful that Judge Baird’s decision could survive constitutional challenge; however, in two other cases where orders not to procreate while on probation have been entered, the decisions have been split—one order was upheld and the other overturned.

In 1999, an Indiana state court sentenced Kristie Trammell to 8 years probation and ordered her not to become pregnant as a condition of that probation. The Indiana Court of Appeals struck down the condition noting that it “excessively impinges upon her privacy right of procreation and serves no discernible rehabilitative purpose.”<sup>9</sup> The Indiana Supreme Court did not review the case.

Three years after the Trammell case was decided, a Wisconsin judge ordered David Oakley to refrain from fathering any additional children after he plead no contest to charges of intentional failure to pay child support. The condition was to remain in effect until such a time that Mr. Oakley could demonstrate that he was financially able to care for his nine children. The Wisconsin Supreme Court upheld the condition of probation as constitutional in a split decision;<sup>10</sup> the United States Supreme Court denied certiorari.<sup>11</sup>

Interestingly, the facts of Ms. Trammell’s case were particularly egregious,<sup>12</sup> yet the Indiana Court of Appeals was reluctant to intrude upon her privacy right without furthering any rehabilitative goals. In fact, the court acknowledged that there were significantly less restrictive means of accomplishing the protection of Ms. Trammell’s future unborn children.<sup>13</sup> The Wisconsin Supreme Court, on the other hand, stated “that ‘conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation.’”<sup>14</sup> In this case, “the condition is not overly broad because it does not eliminate Oakley’s ability to exercise his constitutional

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<sup>8</sup> *Roe v. Wade*, 410 U.S. 113. page (1973).

<sup>9</sup> *Trammell v. State*, 751 N.E.2d 283, 291 (2001).

<sup>10</sup> *State v. Oakley*, 629 N.W.2d 200 (2001).

<sup>11</sup> *Oakley v. Wisconsin*, 537 U.S. 813 (2002).

<sup>12</sup> At approximately 5 months of age, J.T., the son of Ms. Trammell, was found dead in his bed secondary to chronic malnutrition. Despite evidence of diarrhea and vomiting for the 6 weeks preceding his death, Ms. Trammell failed to seek care for J.T. Ms. Trammell carries a diagnosis of mental retardation with a documented IQ of 63.

<sup>13</sup> “We believe this salutary purpose [of preventing injury to an unborn child] can adequately be served by alternative restrictions less subversive of appellant’s fundamental right to procreate. Such less onerous conditions might include, for example, the requirement that appellant periodically submit to pregnancy testing; and that upon becoming pregnant she be required to follow an intensive perinatal and neonatal treatment program monitored by both the probation officer and by a supervising physician. If appellant bears a child during the period of probation it can be removed from her custody and placed in foster care, as was done with appellant’s existing children, if the court then considers such action necessary to protect the infant.” *Supra* note 7 at 289.

<sup>14</sup> *State v. Oakley*, *supra* note 8 at 210, citing *Edwards v. State*, 246 N.W.2d 109 (1976).

right to procreate. He can satisfy the condition of probation by making efforts to support his children as required by law.”<sup>15</sup>

Whether constitutional or not, the logical questions are how can Judge Baird’s order be enforced and whether it is consistent with the underlying policy goals? If Ms. Salazar becomes pregnant, she will be in violation of her probation, and she will then be incarcerated to serve the remainder of her sentence. It would stand to follow that Ms. Salazar would have every incentive to keep a pregnancy secret and would likely shun prenatal care and contact with any government agencies who provide resources to pregnant women. It is difficult to see how a policy decision made under the guise of promoting the welfare of future children is accomplished by discouraging women to seek prenatal, perinatal, and postpartum care.

Even a woman who is highly motivated to avoid pregnancy faces challenges in achieving that goal. Contraception does not come cheap; the majority of women who would be affected by such an order are already marginalized members of society. The justice system may recommend that a woman refrain from becoming pregnant because it is in her best interest and in the best interest of any future unborn children, yet the system fails to provide women with the resources or access they need to accomplish that goal. While it is now possible for women to obtain generic birth control pills at various participating pharmacies for only \$4 per month,<sup>16</sup> a woman must first schedule an appointment with a physician to obtain a prescription. This may be possible for woman with access to a free clinic or a reduced-fee clinic, but for women without access to the health care system, it is a substantial obstacle. Even after obtaining a prescription, a woman must have \$4 of disposable income per month to spend on oral contraceptives. When deciding whether to feed her family, buy gasoline, or pay an electric bill, it is doubtful that contraceptives will be a high priority. Use of more reliable reversible contraception options such as the intrauterine device or the etonogestrel implant would certainly be cost prohibitive for any woman not covered by Medicaid or a charitable county health care system. It is naïve to think that these women have the resources that would allow them to choose their contraceptive option, much less have the resources to afford them.

In sum, the decision of the Indiana court is the most realistic and practical, though it also has its limitations. There are far less intrusive ways to promote the health and welfare of unborn children, ones that do not intrude upon 14<sup>th</sup> Amendment liberty issues. As tempting as it is to tell parents who have failed to live up to their duties that they must refrain from procreation, a far better approach is to invest in providing these individuals the skills they need to become better parents. If we can achieve this lofty goal, not only will we protect future generations of children, but also help to reduce the burden on an already overburdened foster care system.

*Health Law Perspectives* (October 2008), available at:  
<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

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<sup>15</sup> *Id.* at 212.

<sup>16</sup> One such program exists at WalMart stores, *available at*  
[http://i.walmartimages.com/i/if/hmp/fusion/customer\\_list.pdf](http://i.walmartimages.com/i/if/hmp/fusion/customer_list.pdf) (last accessed 10/9/08).