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Some People Just Shouldn't Have Kids!: Probation Conditions Limiting the Fundamental Right to Procreate and How Texas Courts Should Handle the Issue

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SOME PEOPLE JUST SHOULDN'T HAVE KIDS!: PROBATION CONDITIONS LIMITING THE FUNDAMENTAL RIGHT TO PROCREATE AND HOW TEXAS COURTS SHOULD HANDLE THE ISSUE

By Kellie Brady

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I. INTRODUCTION

"When the average person hears a story of a mom who failed to protect a child, their instinct is that she doesn't deserve to have a child. But, we don't get to decide that for her."[1] This statement,

1. Posting of Dan Slater to The Wall Street Journal Law Blog, http://blogs.wsj.com/law/2008/09/25/less-child-abuse-fewer-criminals-sizing-up-a-no-pregnancy-order/ (Sept. 25, 2008, 12:21 EST).

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made by a prosecutor in the case of Felicia Salazar, epitomizes the feelings of many legal scholars throughout the country and the holdings of many courts as well. However, Judge Baird in Travis County, Texas did just what the prosecution said he could not. And with no objection by Felicia Salazar, the offender in the case, Judge Baird's order stands. Salazar was sentenced to community supervision for ten years, one of her conditions being that she is not allowed to have any more children.[2]

This Comment focuses on the ability of a judge to limit the fundamental rights of a probationer through the imposition of probation conditions; more specifically, the ability of judges to limit the fundamental right to procreate. Although courts across the nation are split on the issue, Texas courts could have addressed this as recently as September 2008 when Salazar's case came before the Travis County court. But, with no objection, and consequently no appeal, the trial court's order will stand as issued.

This Comment will start with a brief history—the history behind the fundamental right to procreate and the history of probation throughout the country, first looking at the federal system and then the state systems in general. This Comment continues by examining how the courts across the nation have treated the issue of limiting the fundamental right to procreate. Because Texas has no established precedent examining the constitutionality of conditions of probation that limit the right to procreate, cases that limit other fundamental rights will be examined to see if a natural analogy can be made. Finally, this Comment will conclude with an analysis of how Texas courts should treat the issue when faced with it in the future. And realistically, they will definitely have that opportunity.

II. THE ROOTS OF THE FUNDAMENTAL RIGHT TO PROCREATE

It has been almost 50 years since the United States Supreme Court recognized that the fundamental right to privacy exists implicitly in the United States Constitution.[3] *Griswold v. Connecticut* involved a medical clinic that gave information on the use of birth control to married people.[4] The distribution of the material violated statutes that limited the ability to make personal contraceptive decisions.[5] Upon review by the U.S. Supreme Court, the Court struck down the law and held that there is a zone of privacy that is implied in the First,

2. Posting of Dan Slater to The Wall Street Journal Law Blog, http://blogs.wsj.com/law/2008/09/12/can-a-judge-order-a-woman-to-stop-having-childen/ (Sept. 12, 2008, 13:38 EST).

3. Griswold v. Connecticut, 381 U.S. 479 (1965).

4. *Id.* at 480.

5. *See id.*

Third, Fourth, Fifth, and Ninth amendments contained in the Bill of Rights.[6]

Although *Griswold* was pivotal in the establishment of the right to privacy, the U.S. Supreme Court recognized the right to procreate in a decision handed down over 20 years before in the case of *Skinner v. Oklahoma*.[7] Even though the decision was based on equal protection grounds and not a fundamental rights analysis, the Court stated that "marriage and procreation are fundamental to the very existence and survival of the [human] race."[8] This very statement has long been regarded as the point in which the courts determined that the right to procreate qualifies as a fundamental right protected under the United States Constitution.

The U.S. Supreme Court later examined the fundamental right to procreate as one facet of the right to privacy enumerated in the *Griswold* case. Following up on the *Griswold* decision, in a landmark decision by the U.S. Supreme Court in *Roe v. Wade*, the Court acknowledged that the "right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[9] The Court further stated that this right to privacy is broad enough to cover the woman's right to choose whether she will continue or terminate a pregnancy.[10] However, the Court qualified its holding by claiming that this right is not absolute and is still subject to limitations imposed through state regulation.[11]

III. History of Probation in General

One of the most recent and glaring ways the states have been limiting fundamental rights is through the imposition of certain terms of probation. Probation, also known as "community supervision" in some states, has long been an alternative to the imposition of criminal sentences that require imprisonment. The use of probation emerged long ago during the late nineteenth century, first originating with the states and then, in the early twentieth century, the federal systems followed suit.[12]

During this same time period, John Augustus, credited by many as the "founder of probation in the United States," began bailing people out of jail and taking responsibility for them as they were released

6. *Id.* at 484.
7. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
8. *Id.*
9. Roe v. Wade, 410 U.S. 113, 152 (1973).
10. *Id.* at 153.
11. *Id.*
12. Beginnings of Probation and Pretrial Services, http://www.uscourts.gov/fedprob/history/beginnings.html (last visited Oct. 2, 2009) [hereinafter Beginnings of Probation and Pretrial Services].

back into the community.[13] However, not everyone was given the opportunity to be one of Augustus's "probationers," as Augustus was very selective with whom he bailed out.[14] Because this was considered one of the first attempts at releasing offenders into the community under supervision, usually only first-time offenders and those not "wholly depraved of heart" were given the opportunity to partake in the program.[15] As a result, probation became recognized by many courts and state statutes as a rehabilitative, more than a punitive, form of punishment.[16]

A. *Federal Probation System in General*

Federal probation did not come about until many years after the states had enacted statutes setting up formal probation systems.[17] However, prior to the enactment of formal probation in the federal system in the early twentieth century, the courts were already using suspended sentences as a form of probation.[18] In a 1916 case, the U.S. Supreme Court decided that suspending sentences indefinitely was unconstitutional and as a result, the legislature enacted the Probation Act of 1925.[19] Although many bills supporting the imposition of probation statutes were introduced beginning as early as 1909, it was not until the Probation Act of 1925 that the federal system passed a law allowing federal courts to suspend sentences and impose a term of probation.[20]

Currently, federal probation, oftentimes referred to as supervised release, is subject to the restrictions of certain federal statutes as well as the Federal Sentencing Guidelines Manual. Under the Federal Sentencing Guidelines, the district courts are given wide discretion when imposing conditions of supervised release.[21] However, such conditions must meet certain criteria as outlined in 18 U.S.C. § 3583(d).[22] As with most probation statutes, the federal system can only impose terms and conditions that are reasonably related to the factors laid out in section 3583(d).[23] These factors include "(1) the nature and circumstances of the offense; (2) the history and characteristics of the offender; (3) the need for adequate deterrence; (4) the

13. Probation and Parole: History, Goals, and Decision-Making–Origins of Probation and Parole, http://law.jrank.org/pages/1817/Probation-Parole-History-Goals-Decision-Making-Origins-probation-parole.html (last visited Oct. 2, 2009).
14. *Id.*
15. *Id.*
16. *Id.*
17. Beginnings of Probation and Pretrial Services, *supra* note 12.
18. *Id.*
19. *Id.*
20. *Id.*
21. United States v. Paul, 274 F.3d 155, 164 (5th Cir. 2001).
22. *Id.*
23. *Id.* at 165.

need to protect society from future crimes of the offender; and (5) the need to provide rehabilitative services to the offender."[24] Historically, federal courts have focused on factors (3) and (4) when analyzing whether a condition limiting the liberties of the offender will be upheld or not.[25] When imposing conditions, the federal courts also must be careful not to impose conditions that result in a "greater deprivation of liberty than what is reasonably necessary" to meet the specific goals of probation.[26]

B. *State Probation Systems in General*

Much like the federal system of supervised release, each state has implemented a probation system to handle the offenders it releases into the community each year. Massachusetts became the first state to implement a system of probation in 1878 and many other states followed its lead and created probation systems in the early twentieth century.[27] By 1951, all states in the country had some form of a working probation system.[28]

Through their respective legislatures, each state created a statute requiring judges to impose mandatory conditions on probationers; for example, offenders are prohibited from committing any other criminal offense during the term of probation.[29] Mandatory conditions apply to all offenders.[30] Additionally, many state statutes provide discretionary conditions that the judge may impose at his will. Typically, the statutes state that the discretionary conditions listed are non-exhaustive and allow for the imposition of any other condition the judge deems reasonable.[31] The majority of states have followed the approach of the federal system and required that discretionary condi-

24. *Id.*

25. *See* United States v. Crandon, 173 F.3d 122, 128 (3d Cir. 1999) (holding that a condition that limited access to computers was constitutional because it was related to deterrence and protecting the public); United States v. Bortels, 962 F.2d 558, 559–60 (6th Cir. 1992) (per curiam) (holding that a no-contact condition was constitutional as it related to rehabilitation and protecting the public); United States v. Trainer, 265 F. Supp. 2d 589, 594 (D. Md. 2003) (holding that a condition limiting involvement with a particular group is constitutional because it is related to rehabilitation and deterrence).

26. *Paul*, 274 F.3d at 165.

27. Beginnings of Probation and Pretrial Services, *supra* note 12.

28. History of Probation: Origins and Evolution, http://www.spiritus-temporis.com/probation/history-of-probation-origins-and-evolution.html (last visited Aug. 30, 2009).

29. United States Probation Officer's Role, http://www.uscourts.gov/fedprob/officer/probation.html (last visited Aug. 30, 2009).

30. *Id.*

31. *See, e.g.*, CAL. PENAL CODE § 1203.1(j) (West 2004); FLA. STAT. ANN. § 948.03(1) (West Supp. 2009); IND. CODE ANN. § 35-38-2-2.3(a) (West 2004); OHIO REV. CODE ANN. § 2951.02(c) (West 2002); OR. REV. STAT. §§ 137.540(1)–(2) (2007); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 11(a) (Vernon Supp. 2008); WIS. STAT. ANN. § 973.09(1)(a) (West Supp. 2003).

tions imposed by a judge must be reasonable and related to the goals of rehabilitating the offender and protecting the public.[32]

IV. TEXAS PROBATION SYSTEM

Like many other states, Texas created a system of probation through the legislative enactment of specific statutes designed to oversee the release of offenders into the community.[33] Texas's adult probation system, commonly referred to as community supervision, was essentially created by the 65th legislature in 1977 when they approved the formation of the Texas Adult Probation Commission.[34] However, the Commission was short lived. In 1989, the Texas Legislature consolidated the Commission and a few other agencies into what is now known as the Texas Department of Criminal Justice (TDCJ).[35]

Under the TDCJ, the Community Justice Assistance Division (CJAD) is responsible for maintaining and regulating all community supervision departments throughout the state of Texas.[36] These "CSCD's," as they are commonly referred to, have the direct responsibility of providing community supervision services to the offenders.[37] Community Supervision Officers have the task of putting together an adequate rehabilitation plan and providing services that will aid the offender in rehabilitation.[38] Of course, these service plans include all the conditions stipulated by the court.[39]

Additionally, Texas trial courts are given immense discretion when imposing conditions of probation.[40] Expressly stated in Article 42.12 of the Texas Code of Criminal Procedure is the legislature's intention that the responsibility of determining the conditions of community supervision be placed wholly within the courts of the state.[41] Texas case

32. Howland v. State, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982); State v. Mosburg, 768 P.2d 313, 314 (Kan. Ct. App. 1989); People v. Pointer, 151 Cal. App. 3d 1128, 1136 (Ct. App. 1984); Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979; State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 6; State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998); State v. Oakley 2001 WI 103, ¶¶ 11–12, 245 Wis. 2d 447, 459–60, 629 N.W.2d 200, 205–06); Trammell v. State, 751 N.E.2d 283, 288 (Ind. Ct. App. 2001).

33. TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp. 2008).

34. A History of Texas Community Justice Assistance Division, http://www.lib.utexas.edu/taro/tslac/20144/tsl-20144.html (last visited Sept. 7, 2009).

35. *Id.*

36. Tex. Department of Criminal Justice, Community Justice Assistance Division, What We Do: The Role of the Division, http://www.tdcj.state.tx.us/cjad/cjad-what.htm (last visited Sept. 7, 2009).

37. Texas Department of Community Justice, Community Justice Assistance Division, Who We Serve: Community Supervision and Corrections Departments, http://www.tdcj.state.tx.us/cjad/cjad-whoserve.htm (last visited Oct. 24, 2009).

38. *Id.*

39. *Id.*

40. Fielder v. State, 811 S.W.2d 131, 134 (Tex. Crim. App. 1991).

41. TEX. CODE CRIM. P. ANN. art. 42.12 § 1 (Vernon Supp. 2008).

law has continued to hold that the trial courts possess the inherent authority to set all reasonable conditions of probation.[42]

A. *Basic Probation Conditions under Texas Code of Criminal Procedure, Article 42.12, Section 11*

Under the Texas Code of Criminal Procedure, a judge may impose any reasonable condition, as long as the condition is designed to protect or restore the victim or community, and is designed to punish, rehabilitate, or reform the offender.[43] The Texas Code of Criminal Procedure also states that the judge may include, but shall not be limited to, any of the basic conditions listed in section 11(a).[44] The word "may" implies that the judge has discretion to impose any of the conditions listed, such as not committing any additional criminal offense, not associating with specified persons, and seeking suitable employment.[45] However, the Texas Legislature expanded the judge's authority by including the phrase "but shall not be limited to" in section 11. This phrase gives the judge authority to impose any reasonable condition not listed in section 11, so long as the condition is designed to protect or restore the victim or community and to punish, rehabilitate, or reform the offender.[46]

When creating section 11 of the Texas Code of Criminal Procedure Article 42.12, the legislature specifically addressed the issue of limiting the fundamental right to procreate, as brought forth in the landmark U.S. Supreme Court case of *Skinner v. Oklahoma*.[47] Under section 11(f), a judge in Texas may not impose any condition of community supervision that requires an offender to undergo an "orchiectomy," a common medical term for castration or sterilization.[48] Under an orchiectomy, the ability to reproduce would be terminated and the offender completely stripped of his fundamental right to procreate forever.[49] By adding section 11(f), the legislature expressly forbids any condition ordering the permanent deprivation of the right to procreate. However, the legislature did not expressly forbid probation conditions that merely limit or restrict the right to procreate for a specified period of time.

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42. *Fielder*, 811 S.W.2d at 134.

43. Art. 42.12 § 11(a).

44. *Id.*

45. Art. 42.12 § 11(a)(1), (3), (6).

46. Art. 42.12 § 11.

47. Skinner v. Oklahoma, 316 U.S. 535 (1942).

48. Art. 42.12 § 11(f); *see also* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 952 (3d ed. 1997).

49. *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY, *supra* note 48.

B. *Length of Probation in Texas*

Texas Code of Criminal Procedure Article 42.12, section 3(b)(1) allows a judge to impose a maximum term of community supervision of ten years for felony convictions, subject to the extensions allowed in section 22(c).[50] Texas is one of the few, if not the only state that allows such a long term of community supervision.[51] Until 2007, Texas probation terms were on average 67% higher than the average for all states nationwide.[52] In 2005, after years of attempts at probation reform, the 79th Legislature passed House Bill 2193 which, among other things, would have limited the maximum term of probation for certain third-degree felonies from ten years to five years.[53] Governor Perry vetoed this bill shortly thereafter.[54] Fortunately, this was not the end for probation reform. In 2007, the Texas Legislature passed House Bill 1678, which was signed by Governor Perry later that year.[55] House Bill 1678, which took effect on September 1, 2007, slightly modified the current probation system.[56] As a result of House Bill 1678, the maximum term for probation remained ten years for most felony offenses, while the maximum term was reduced to five years for offenses against property and for drug-related offenses.[57] Additional revisions made to Article 42.12 provide that the judge is now required to review the offender's record after the offender serves one-half of the community supervision term or two years, whichever is longer.[58]

Even with the changes made under House Bill 1678 to Article 42.12, community supervision in Texas has not changed dramatically. Judges continue to impose ten-year community supervision terms regularly.[59] It is only those third-degree felony convictions that fall under Title 7

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50. Art. 42.12 §§ 3(b)(1), 22(c).

51. Nolan Hicks & Ingrid Norton, *Probation May be a Problem in Texas' Criminal Justice System,* THE DAILY TEXAN ONLINE, Nov. 14, 2006, http://www.criminaljustice coalition.org/files/userfiles/Probation_may_be_a_problem_in_Texas.pdf.

52. ANN DEL LLANO & ANA YANEZ-CORREA, TEXAS LULAC, CRIMINAL JUSTICE POLICY BRIEF: PROVEN PRO-FAMILY CRIMINAL JUSTICE POLICIES THAT SAVE FAMILIES, SAVE TAX PAYERS' MONEY AND IMPROVE THE SAFETY OF OUR COMMUNITY 6 (2004), *available at* http://www.realcostofprisons.org/materials/LULAC.pdf.

53. Tex. H.B. 2193, 79th Leg., R.S. (2005).

54. Veto Message of Gov. Perry, Tex. H.B. 2193, H.J. of Tex., 79th Leg., R.S. 5899 (2005).

55. Tex. H.B. 1678, 80th Leg., R.S. (2007).

56. *Id.*

57. *Id.*

58. *Id.*

59. Bailey v. State, No. 09-07-545-2008-CR, 2008 WL 4509353, at *1 (Tex. App.—Beaumont Oct. 8, 2008, no pet.) (mem. op., not designated for publication) (imposing a term of five years community supervision for a conviction of robbery, a Title 7 crime); Vela v. State, No. 05-07-00149-CR, 2008 WL 1704369, at *1 (Tex. App.—Dallas Apr. 14, 2008, pet. ref'd) (mem. op., not designated for publication) (imposing a term of five years community supervision for possession of methamphetamine and various other prescription drugs, a Chapter 481 crime).

of the Texas Penal Code and Chapter 481 of the Texas Health and Safety Code that have been affected.[60] For those categories of third-degree felonies, the offender can now only receive a maximum of five years community supervision, as opposed to the ten-year terms imposed just a year before.[61]

C. *Judicial Discretion in Modifying, Reducing, or Terminating Probation*

Even though the length of probation terms have been modified slightly through House Bill 1678, the judge still maintains discretion in determining when, if at all, to reduce or terminate the offender's period of community supervision.[62] According to Article 42.12, section 20, at any time after the offender has completed one-third of the imposed sentence, or a period of two years has lapsed, whichever is less, the original judge has the discretion to reduce or terminate the remaining period of community supervision.[63] Thus, even though Texas has maximum probation terms higher than most states nationwide, the judges have the discretion to review the offender's record at the one-third mark and, with the enactment of House Bill 1678, are now required to revisit the original term of community supervision at the halfway mark.[64]

With the new requirement of judges to review the offender's community supervision record after one-half of the sentence is completed or two years, whichever is more, Texas will likely see a drop in the number of offenders that remain on community supervision for the entire term. According to the Texas Public Policy Foundation, studies have shown that once an offender is crime free for a period of seven years, they are considered only as likely to commit another criminal offense as a person who has had no criminal activity of record.[65] Additionally, if the offender is crime free for a period of at least five years, which is the point of review for most offenders that are sentenced to the maximum term of community supervision, the studies indicate that the likelihood of that offender committing another crime is merely insignificant compared to someone with no prior criminal

60. Tex. H.B. 1678.

61. Ford v. State, 243 S.W.3d 112, 115 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (imposing a sentence of 10 years community supervision for a conviction of robbery, a Title 7 offense); Sheldon v. State, No. 12-06-00110-CR, 2006 WL 3459725, at *1 (Tex. App.—Tyler Dec. 1, 2006, no pet.) (mem. op., not designated for publication) (imposing a 10-year term of community supervision for a conviction of a third-degree felony DWI, a Chapter 481 offense).

62. Tex. H.B. 1678; TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20 (Vernon Supp. 2008).

63. Art. 42.12 § 20.

64. Tex. H.B. 1678.

65. MARK LEVIN, TEXAS PUBLIC POLICY FOUNDATION, POLICY PERSPECTIVE: TEN TALL TALES ABOUT TEXAS CRIMINAL JUSTICE REFORMS 1 (2008), http://www.texaspolicy.com/pdf/2008-03-PP07-10tales-ml.pdf.

record.[66] From this data one can logically conclude that even though an offender is sentenced to ten years of community supervision, if they can make it through the first half of the term and complete all the requirements set forth, the judge may, at his discretion, reduce or even terminate the remainder of the community supervision.

V. NATIONAL TREATMENT OF PROBATION CONDITIONS LIMITING THE RIGHT TO PROCREATE

Although Texas is recognized nationally as a state that is tough on crime, the Texas courts have not had the opportunity to examine one major issue that has come up in a few jurisdictions across the country. In many cases where probation is imposed, at least one of the conditions will limit a basic constitutional right.[67] Whether it be the right to associate included in the First Amendment or the right to be free from unreasonable search and seizure as protected by the Fourth Amendment, the courts have consistently included conditions of probation that limit these basic human rights.[68] Many states even include these conditions as basic conditions of probation that the state applies to all probationers.[69] A major conflict between courts shows up when the judge imposes a probation condition that limits the fundamental right to procreate, an issue that the Texas courts have so far avoided deciding.

A. *Overturning Probation Conditions that Restrict Procreation*

When dealing with a probation condition that limits, or entirely strips, a person of the fundamental right to procreate, courts across the nation have been split on the issue of whether such a condition is constitutional. Most courts have found that the condition is unconstitutional and invalid when dealing with cases that have no connection to either child abuse or failure to pay child support.[70] However, when dealing with cases that involve children, mostly through child abuse or non-support, the courts have taken an entirely different view.

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66. *Id.*

67. *See* COMMUNITY JUSTICE ASSISTANCE DIVISION, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, TEXAS INTERMEDIATE SANCTIONS BENCH MANUAL 22 (2003), *available at* http://www.tdcj.state.tx.us/PUBLICATIONS/cjad/Bench-Manual.pdf; OHIO REV. CODE ANN. § 2929.15 (LexisNexis 2006); OR. REV. STAT. § 137.540 (2007); WIS. STAT. ANN. § 973.09 (West 2007).

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

69. *See, e.g.*, CAL. PENAL CODE § 1203.1(j) (West 2004); FLA. STAT. ANN. § 948.03 (1) (West Supp. 2003); IND. CODE ANN. § 35-38-2-2.3(a) (2003); OHIO REV. CODE ANN. § 2951.02(c) (West 2002); OR. REV. STAT. § 137.540(1)–(2) (2003); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 11(a) (Vernon Supp. 2008); WIS. STAT. ANN. § 973.09(1)(a) (West Supp. 2003).

70. *See* United States v. Bortels, 962 F.2d 558 (6th Cir. 1992); Wiggins v. State, 386 So. 2d 46, 48 (Fla. Dist. Ct. App. 1980); People v. Dominguez, 64 Cal. Rptr. 290 (Cal. Ct. App. 1967).

The Supreme Court of Florida has recognized that a trial court may impose any valid condition which serves a useful rehabilitative purpose.[71] In the case of *Rodriguez v. State of Florida*,[72] a Florida mother pled to aggravated child abuse for hitting her nine-year-old child and throwing her against a car, causing injuries to the child.[73] The Florida trial court imposed a ten-year probation term in which Rodriguez was prohibited from marrying and conceiving.[74] In addition, the court prohibited Rodriquez from having custody of any children during the probationary period.[75] Rodriguez challenged the constitutionality of the conditions and the Florida Court of Appeals held that the conditions relating to marriage and procreation, although constitutional, do not meet the standard that the condition imposed must be reasonably related to rehabilitation.[76]

The Florida Court of Appeals addressed the issue again about three years later in the case of *Howland v. State of Florida*.[77] Howland was convicted of negligent child abuse and one of his conditions of probation was that he not father any children during the five-year probation term.[78] Like Rodriguez who was not allowed custody, Howland was not allowed any contact with his child.[79] In both *Rodriguez* and *Howland*, the Florida court stated that the condition prohibiting procreation was constitutional but was not reasonable and is therefore invalid.[80] The court reasoned that the other imposed conditions served the purpose of keeping the offender away from children and thus would prevent future criminality.[81] Both courts also did not address what they would have ruled if the custody and contact conditions were not imposed. Perhaps the court would have upheld a condition limiting procreation if the trial court did not impose conditions that limit custody and contact with children.

Merely a year after the Florida court decided *Howland*, the California Court of Appeals faced a similar case in *People v. Pointer*.[82] The State of California convicted Ruby Pointer of child endangerment and violating a child custody decree when she refused to take her children off a strictly macrobiotic diet, even at the direction of many doctors.[83] Pointer's children were eventually removed from her care. Pointer

71. *Rodriguez*, 378 So. 2d at 9 (citing Hines v. State, 358 So. 2d 183, 185 (Fla. 1978)).
72. *Id.* at 7.
73. *Id.* at 8.
74. *Id.*
75. *Id.*
76. *Id.* at 9–10.
77. Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982).
78. *Id.* at 919.
79. *Id.*
80. *Rodriguez*, 378 So. 2d at 9–10; *Howland*, 420 So. 2d at 919.
81. *Howland*, 420 So. 2d at 920; *Rodriguez*, 378 So. 2d at 10.
82. People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984).
83. *Id.* at 1131–32.

then kidnapped one child and fled the country.[84] Eventually, Pointer was brought back to the United States and sentenced to five years probation with one of the conditions being that she could not conceive during the probationary period.[85] The California court first looked at the reasonableness of the condition, stating that "[a] condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."[86] Upon looking at these factors, the court stated that the probation condition was reasonable; however, the court also stated that the condition was impermissibly overbroad because less onerous conditions were available.[87]

Indiana courts have also examined the condition of probation that limits the right to procreate. In 2001, the Indiana Court of Appeals decided the case of *Trammell v. State of Indiana* and stated that the condition ordering Trammell not to become pregnant during her eight-year probation term excessively impinges on her right to procreate and serves no rehabilitative purpose.[88] The State of Indiana convicted Kristie Trammell of neglect of a dependent in the death of her infant son and sentenced to jail and an eight-year probation term upon release.[89] The Indiana court told Trammell that she was not allowed to become pregnant while on probation.[90] The court recognized that it has broad discretion and may impose conditions that impinge on a probationer's exercise of a constitutionally protected right.[91] The court did not use a special scrutiny analysis similar to the California court in *Pointer*. Instead, the court stated that the condition is analyzed through the balancing of three important factors; "(1) the purpose probation is supposed to serve, (2) the extent to which the constitutional rights of law abiding citizens should be given to probationers, and (3) the legitimate needs of law enforcement."[92] However, the court did not address each factor individually but instead followed the analysis of *Pointer* and held that the condition was overbroad in that there were less restrictive means of carrying out the purpose of the condition.[93]

84. *Id.* at 1133.
85. *Id.*
86. *Id.* at 1138.
87. *Id.* at 1138–40.
88. Trammell v. State, 751 N.E.2d 283, 290–91 (Ind. Ct. App. 2001).
89. *Id.* at 286.
90. *Id.*
91. *Id.* at 288.
92. *Id.*
93. *Id.* at 289.

B. *Upholding Probation Conditions that Restrict Procreation*

Although the Ohio Supreme Court in *State of Ohio v. Talty* found the condition limiting procreation invalid, the analysis in both the majority and the dissenting opinions show that the case may have been wrongly decided.[94] In *Talty*, the court found the defendant guilty of not supporting his children and sentenced him to five years of community control, which the Ohio Supreme Court equated to probation.[95] As a condition of Talty's probation, the trial court ordered him to take all reasonable steps to avoid conceiving another child.[96] On appeal, the appellate court agreed with the trial court and held that the condition was constitutional.[97] However, on the subsequent appeal to the Ohio Supreme Court, the condition was struck down as overbroad using the analysis of a prior Ohio Supreme Court case, *State v. Jones*.[98] One of the most interesting things about the *Talty* decision is that although the condition was rendered overbroad, the court did not address whether the condition would have been deemed valid if it allowed for review or modification once Talty met the other conditions of his probation.[99] The dissenting opinion by Justice Pfeifer however, addressed this issue quite thoroughly.

Justice Pfeifer, an eleven-year veteran of the Ohio Supreme Court and one of the dissenting Justices in the *Talty* decision, was very convincing in his dissenting opinion. Justice Pfeifer stated that the majority mistakenly used the *Jones* case and instead should have looked directly at the statutory language of the Ohio community-control statutes to make the decision.[100] The Ohio community-control statute allows the judge to consider any condition that will protect the public and punish the offender.[101] In doing so, the court should consider the need for incapacitation, deterrence of the offender, and rehabilitation of the offender.[102] According to Justice Pfeifer, the condition limiting Talty's procreative rights met all three of these factors.[103] Justice Pfeifer also attacked the majority opinion on the overbroad argument and stated that the Ohio Legislature enacted statutes that specifically provide a mechanism to lift the prohibition, thus rendering moot one of the major criticisms of the trial court's decision.[104] Talty's condition could be reduced or terminated on review by the court upon comple-

94. State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 25.
95. *Id.* ¶ 4, 814 N.E.2d at 1202.
96. *Id.* ¶ 4, 814 N.E.2d at 1202.
97. *Id.* ¶ 6, 814 N.E.2d at 1203.
98. *Id.* ¶ 25, 814 N.E.2d at 1207 (using the reasoning of State v. Jones, 550 N.E.2d 469 (Ohio 1990)).
99. *Id.* ¶ 21, 814 N.E.2d at 1205.
100. *Id.* ¶¶ 30–31, 814 N.E.2d at 1207–08 (Pfeifer, J., dissenting).
101. *Id.* ¶ 31, 814 N.E.2d at 1208.
102. *Id.* ¶ 31, 814 N.E.2d at 1208.
103. *Id.* ¶ 32, 814 N.E.2d at 1208.
104. *Id.* ¶ 34, 814 N.E.2d at 1209.

tion of a significant amount of his probationary sentence.[105] Finally, Pfeifer addressed the majority's dismissal of the Wisconsin Supreme Court decision of *State of Wisconsin v. Oakley*.[106] The court in *Oakley*, like many federal courts, stated that the standard of review—strict scrutiny for most instances of fundamental rights—is merely a reasonableness standard when involving probation conditions.[107] If the majority had used the correct standard of review for this situation, Talty's condition would likely have been upheld. Pfeifer stated, in using the words of the Wisconsin Supreme Court in *Oakley*, that a "condition that infringes on the right to procreate during a term of community control is not invalid under these facts."[108]

Although *State of Wisconsin v. Oakley* received criticism from some courts, the majority of feedback this controversial decision has received has been positive. *Oakley* involved a father of nine children by four different women who intentionally failed to pay child support and accumulated a large amount of arrearages.[109] The court sentenced Oakley to prison and a five-year term of probation upon release.[110] As a condition of Oakley's probation, the judge stated that Oakley cannot have any more children without first demonstrating to the court that he has the ability to support the children he already has.[111] Upon review, the Wisconsin Court of Appeals, stated that the condition was reasonable and not overly broad.[112] The Supreme Court of Wisconsin agreed and issued one of the two main state-court opinions—the other state being Oregon—sustaining the constitutionality of probation conditions that limit the fundamental right to procreate.

The Supreme Court of Wisconsin recognized that, through the intention of the legislature in creating such a statute, the trial court is given broad discretion in imposing individual conditions of probation.[113] In imposing conditions, the court must consider whether the condition is overly broad and whether the condition is reasonably related to the goals of rehabilitation.[114] The Wisconsin Supreme Court rejected Oakley's claim that because the condition is a restriction on his fundamental right to procreate, it should be subject to strict scrutiny analysis.[115] The court reasoned instead that if probation condi-

105. *Id.* ¶ 34, 814 N.E.2d at 1209.
106. *Id.* ¶¶ 35–36, 814 N.E.2d at 1209–10.
107. *Id.* ¶¶ 35–36, 814 N.E.2d at 1209–10 (citing State v. Oakley, 2001 WI 103, ¶ 16 n.23, 245 Wis. 2d 447, ¶ 16 n.23, 629 N.W.2d 200, ¶ 16 n.23).
108. *Id.* ¶ 36, 814 N.E.2d at 1210 (citing *Oakley*, 2001 WI 103, ¶ 16 n.23, 629 N.W.2d 200, 207).
109. *Oakley*, 2001 WI 103, ¶¶ 3, 5, 629 N.W.2d 200, 202.
110. *Id.* ¶ 6, 629 N.W.2d at 202–03.
111. *Id.* ¶ 6, 629 N.W.2d at 202–03.
112. *Id.* ¶ 7, 629 N.W.2d at 203.
113. *Id.* ¶ 12, 629 N.W.2d at 205.
114. *Id.* ¶ 19, 629 N.W.2d at 209.
115. *Id.* ¶¶ 16–17, 629 N.W.2d at 207–08.

tions were subject to strict scrutiny, then the court would also be required to subject more restrictive alternatives, like incarceration, to strict scrutiny since this obviously infringes on the right to liberty.[116] The court does however recognize that had Oakley not committed a crime by intentionally refusing to pay child support, his argument would have some merit.[117] However, because intentional failure to pay child support is a criminal offense in the state of Wisconsin, the court recognized the well-established notion that individuals that have violated the law are not entitled to the same degree of liberty as law-abiding citizens.[118]

The Wisconsin Supreme Court then went on to analyze Oakley's situation using the reasonability standard employed by many other courts when addressing the issue of probation conditions that infringe on a fundamental right.[119] In applying the reasonability standard as opposed to strict scrutiny, the court held that Oakley's fundamental right to procreate was not unconstitutionally restricted because it did not completely eliminate Oakley's right to procreate.[120] Oakley's condition will expire at the end of his eight-year probation term and at that time, he is free to have more children. The court stated that the condition is not overbroad and is in fact narrowly tailored to serve the compelling state interest of having a parent support the children they have.[121] Additionally, the court stated that the condition is reasonably related to the rehabilitation of Oakley in that the condition will prevent Oakley from adding victims should he continue to refuse to support his children.[122] Thus, the condition will assist Oakley by banning him from violating this specific law again.[123] Oakley has essentially been given a chance to conform his conduct to the law, a chance he may not have had if the judge had imposed a prison sentence instead of the probation Oakley was granted.

In analyzing the correct standard to use when addressing the constitutionality of Oakley's procreation condition, the Wisconsin Supreme Court relied in part on *State of Oregon v. Kline*, a 1998 case that handled the issue of procreation conditions before the Wisconsin courts did.[124] Much like *Oakley*, the Oregon Court of Appeals was faced with determining the validity of a condition that limited the right of the defendant to have children until he satisfied certain conditions of probation.[125] Tad Kline was sentenced to 36 months probation after

116. *Id.* ¶ 17, 629 N.W.2d at 207.
117. *Id.* ¶ 17, 629 N.W.2d at 207.
118. *Id.* ¶ 17, 629 N.W.2d at 207.
119. *Id.* ¶¶ 19–20, 629 N.W.2d at 209–12.
120. *Id.* ¶ 20, 629 N.W.2d at 212.
121. *Id.* ¶ 20, 629 N.W.2d at 212.
122. *Id.* ¶ 21, 629 N.W.2d at 213.
123. *Id.* ¶ 21, 629 N.W.2d at 213.
124. State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998).
125. *Id.* at 699.

being convicted of criminal mistreatment in the first degree for the injuries sustained by his daughter.[126] Kline admitted to bruising the child and fracturing her leg because he was frustrated and "didn't know his own strength."[127] On appeal, the court stated that the probation condition imposed was reasonable in light of the potential of harm to any children Kline might conceive in the future.[128] The court also stated that the condition was not a permanent ban on Kline's right to reproduce because Kline has the ability to completely regain this right with the completion of treatment.[129] The court finally stated that the protection of the future potential victims allows the fundamental right to be infringed to a permissible degree, as it is here.[130]

One thing that the Ohio Supreme Court dissent, the Wisconsin Supreme Court, and the Oregon Court of Appeals have in common is the recognition of the need to protect the future victims of the offender. In all three of these cases, children, defenseless by definition, were the victims of their own biological parents. Without the conditions of probation imposed in these cases, the future children of these offenders are at greater risk of neglect or abuse. By imposing conditions that limit the right to procreate, the state is acknowledging the compelling interest of protecting children. By structuring conditions to allow the offender to earn the right back during the probationary period, the courts have tailored the condition narrowly enough as to not completely strip the offender of his fundamental right, thus meeting the reasonability standard necessary to impose such conditions.

C. *Why the Split of Authority?*

When examining how the states that have struck down procreation conditions compare to Wisconsin and Oregon, the most glaring difference in the way the courts treated the cases is the scrutiny applied. Historically, fundamental rights have been subject to a strict scrutiny analysis when the rights are infringed.[131] Under a strict scrutiny analysis, the court must show that there is a compelling governmental interest and the condition must be narrowly tailored to promote that interest.[132] However, many states have recognized that the offender is not afforded the same protection of fundamental rights as the law abiding citizen.[133] As a result, many states have created their own tests for determining whether a probation condition that violates a fundamental right is valid.

126. *Id.* at 698–99.
127. *Id.* at 699.
128. *Id.*
129. *Id.*
130. *Id.*
131. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).
132. *Id.*
133. State v. Oakley, 2001 WI 103, ¶ 17, 245 Wis. 2d 447, ¶ 17, 629 N.W.2d 200, ¶ 17 (2001).

While all states require that the condition be reasonably related to the rehabilitation of the offender, not all states have employed the same methods of analysis to reach their decisions. In Florida, the courts require that in addition to the reasonable analysis, the condition must not be unduly restrictive of liberty or freedom.[134] In Indiana, the court stated that the purpose of the condition must not be attainable by alternative restrictions less subversive of the imposed condition.[135] California actually calls its test the "special scrutiny" test and requires the condition be narrowly drawn, very similar to the strict scrutiny analysis used for non-offenders.[136] And finally, in *Talty*, the Ohio Supreme Court went ahead and used the strict scrutiny analysis when reviewing Talty's probation condition.[137] However, as pointed out in the dissent, the Ohio Supreme Court applied the wrong standard and thus, the courts should have held that the condition was not overbroad and thus permissible.[138]

Alternatively, when looking at the analysis of *Oakley* and *Kline*, it seems that the Wisconsin Supreme Court and the Oregon Court of Appeals used the correct scrutiny analysis when reviewing the conditions in question. Wisconsin used the "reasonability standard" when reviewing the condition limiting Oakley's fundamental right to procreate.[139] However, when looking at the condition, the court used a higher scrutiny and found that even though strict scrutiny is not required, the condition still met the strict scrutiny standard of being narrowly tailored to serve the state's compelling interest.[140] In *Kline*, the court simply rejected Kline's argument that strict scrutiny was needed when reviewing probation conditions that limit fundamental rights.[141] The court went on to say that as long as the condition did not impose a total ban, it infringed on the fundamental rights to a permissible degree.[142]

Looking at the years in which these cases were decided, it seems that the reasonability standard is becoming the modern trend. With *Kline* and *Oakley* being decided in 1998 and 2001 respectively, only Ohio, in the 2004 *Talty* decision, has produced an opinion that has ruled the opposite way since then. And if the Ohio Supreme Court employed the correct standard when determining the constitutionality of Talty's probation condition, as the dissent did in their analysis, the

134. Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979).
135. Trammell v. State, 751 N.E.2d 283 (Ind. Ct. App. 2001).
136. People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984).
137. State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶¶ 16–20.
138. *Id.* ¶ 34, 814 N.E.2d at 1209 (Pfeifer, J., dissenting).
139. State v. Oakley, 2001 WI 103, ¶ 19–20, 245 Wis. 2d 447, ¶ 19–20, 629 N.W.2d 200, ¶ 19–20 (2001).
140. *Id.* ¶ 19–20, 629 N.W.2d at 209–12.
141. State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998).
142. *Id.*

court would have likely upheld the condition.[143] This merely shows that courts are becoming more and more aware of the need for conditions that limit basic fundamental rights, when warranted by the conduct of the offender of course.

VI. TEXAS COURTS' STAND ON LIMITING FUNDAMENTAL RIGHTS THROUGH PROBATION

In September 2008, in the Travis County court located in Austin, Texas, District Judge Charlie Baird sentenced Felicia Salazar to a community supervision term of ten years for failing to provide protection and medical care for her then 19-month-old daughter.[144] The child's father, Roberto Alvarado, was sentenced to 15 years in prison for beating the child so severely that she suffered broken bones and other injuries.[145] The mother in this case, Salazar, did nothing to obtain medical care for her child after the beating. The child has recovered from her horrific injuries, and the parental rights of Salazar and Alvarado have since been terminated.[146]

Salazar was charged with injury to a child by omission and in addition to the standard terms of community supervision, Salazar was told to stop having children for her ten-year probationary period.[147] When confronted by the media about his decision to impose such a term, Judge Baird recognized Salazar's fundamental right to reproduce and thus could not order her to be sterilized.[148] However, Judge Baird justified the imposition of the condition because under Texas law, "judges can impose any condition, so long as it is reasonable."[149]

Even though Salazar's case provides no precedential value to Texas, because it is only a district court decision and thus is not mandatory authority for Texas courts to follow, it seems likely a similar issue will come up sometime in the near future. Neither Salazar, nor her attorney, objected at the time the condition was imposed.[150] In Texas, conditions not objected to at trial are accepted as terms of the contract that is community supervision.[151] Thus, because Salazar, nor her attorney, objected at the trial court level, the court will not address the constitutionality of the condition should Salazar decide to appeal at a later time.

143. State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶¶ 35–36 (Pfeifer, J., dissenting).

144. Steven Kreytak, *Judge Orders Woman Not to Have Any More Kids*, AUSTIN AMERICAN-STATESMAN, Sept. 12, 2008, at A1.

145. *Id.*

146. *Id.*

147. *Id.*

148. Slater, *supra* note 1.

149. *Id.*

150. Slater, *supra* note 2.

151. Speth v. State, 6 S.W.3d 530, 534 (Tex. Crim. App. 1999) (en banc).

A. *How has Texas Handled Restrictions on Fundamental Rights in the Past?*

Texas Code of Criminal Procedure defines community supervision as a suspension of a sentence.[152] The courts have gone on to state that community supervision is an arrangement in lieu of a sentence, not a part of a sentence.[153] The Texas Court of Criminal Appeals, in *Speth v. State*, held that when community supervision is granted, it creates a contractual relationship between the offender and the court.[154] The court went on to say that because of the contractual nature of probation in Texas, an offender can affirmatively waive unreasonable terms by entering into a probation contract without objection.[155] Because the Texas courts have held that the community supervision agreement is more of a contract between the offender and the court, and not a sentence under the Texas Code of Criminal Procedure, when an offender agrees to complete community supervision, he or she is agreeing to the terms set forth in the contract.[156]

Texas courts have had the opportunity to address many different fundamental rights cases, using three main factors in determining if the conditions are valid or not. Such factors include whether the condition is related to the crime, whether the condition related to conduct that is not in and of itself criminal, and whether the condition forbids conduct not reasonably related to the future criminality of the offender.[157] Using this analysis, the courts have many times held conditions of probation that limit constitutional rights valid.

In the Texas Court of Appeals case of *Marcum v. State of Texas*, the appellant argued that his First Amendment right to associate was unreasonably infringed when the trial court placed a condition of probation that required appellant have no contact with anyone under the age of 17.[158] Because the appellant was convicted of aggravated sexual assault of a child, the court stated that the condition satisfied all three factors laid out above.[159] As recently as 2004, in the case of *Belt v. State of Texas*, the Texas Court of Appeals once again reviewed a no-contact condition requiring an offender convicted of aggravated sexual assault to have no contact with children under 18 years old.[160] The court stated that the condition was valid as it directly related to the offense and relates to the future criminality of the defendant.[161]

152. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 2(2)(B) (Vernon Supp. 2008).
153. *Id.* art. 42.12 § 3(a).
154. *Speth*, 6 S.W.3d at 533.
155. *Id.* at 534.
156. *Id.* at 533.
157. Marcum v. State, 983 S.W.2d 762, 768 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).
158. *Id.*
159. *Id.*
160. Belt v. State, 127 S.W.3d 277, 280 (Tex. App.—Fort Worth 2004, no pet.).
161. *Id.* at 286.

When the Texas Court of Appeals decided *Belt*, they used the analysis from an earlier case that looked at the reasonableness of a probation condition that limited the Fourth Amendment right to be free of unreasonable searches and seizures. In *McArthur v. State of Texas*, decided in 1999, the appellant was convicted of indecency with a child and placed on ten years community supervision.[162] As a condition of his community supervision, McArthur was required to allow the community supervision officer to search and seize any sexually explicit materials in his possession.[163] The court held, using the three factors listed above, that the condition was valid and reasonably related to his future criminality.[164]

In another Texas Court of Appeals case, *Ex Parte Renfro*, the court held that a condition of probation requiring that the appellant take polygraph exams was reasonable and not a violation of his Fifth Amendment right against self incrimination.[165] Renfro was convicted of indecency with a child and was placed on community supervision for ten years.[166] Renfro claimed the polygraph condition violated his Fifth Amendment right and should thus be held invalid. The court disagreed and, using the three factors in *Marcum*, held that the polygraph helps monitor compliance and is thus reasonably related to Renfro's crime.[167]

In all these cases, the court has upheld a condition of probation that so obviously infringes on a constitutionally protected right. In each of the Texas cases, the condition was not worded in a manner that allows for the condition to be removed once a certain event takes place. The condition will be imposed for the entire period of community supervision and will only be modified or terminated upon successful completion of the term or petition to the court allowed under Texas Code of Criminal Procedure article 42.12, section 20.[168] However, in the cases discussed regarding the imposition of conditions that limit the fundamental right to procreation, the courts have stated that a mechanism for which the prohibition can be lifted should be included or the condition will be deemed overbroad.[169] Why then do the courts allow for other rights to be restricted without such a mechanism in place? Have the courts put the fundamental right to procreate above all other constitutionally protected rights? Possibly. However, because Texas has

162. McArthur v. State, 1 S.W.3d 323, 327 (Tex. App.—Fort Worth 1999, pet. ref'd 2000).

163. *Id.* at 330.

164. *Id.* at 333.

165. *Ex Parte* Renfro, 999 S.W.2d 557, 560 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd 2000).

166. *Id.* at 559.

167. *Id.* at 560.

168. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20 (Vernon Supp. 2008).

169. State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶¶ 35–36 (Pfeifer, J., dissenting).

not been faced with the task of determining whether conditions that limit the fundamental right to procreate are valid, we will have to wait and see which approach the courts will follow.

B. *How Should Texas Handle Restrictions on the Fundamental Right to Procreate in the Future?*

With conflicting case law from other states, and no Texas cases on point, it would be interesting to know how Texas would have handled Ms. Salazar's case had she appealed. Should Texas follow the lead of other states that have held the conditions invalid? Or maybe follow the lead of Oregon and Wisconsin and hold the conditions valid. There seems to be two clear paths that make sense for when Texas courts are faced with this tough decision in the future.

First, as pointed out above, Texas has many times dealt with the issue of fundamental rights being encroached through probation, or community supervision conditions. It has been recognized throughout the country that a probationer is only entitled to conditional liberty dependent on certain imposed conditions.[170] The trial courts in Texas have long used this notion when imposing conditions of probation. In the future, should the Texas courts be faced with the task of determining if a probation condition that limits the right to procreate is valid, it would seem quite reasonable for them to analogize that case with the many other cases discussed above. If Salazar had appealed her case, and the court does analogize, it would seem the only reasonable holding the court could make would be to find the condition a valid exercise of judicial discretion and a valid condition of probation.

A reasonable alternative route is to follow the analysis of the dissenting opinion of Justice Pfeifer in *State of Ohio v. Talty*. Even though the offender in *Talty* is a father who failed to support his children, and Salazar is a mother who failed to provide medical care for her daughter, the two cases are very similar.[171] As Justice Pfeifer points out, the main reason the majority deemed the condition invalid was that there was no explicit mechanism for terminating the condition had the relevant conduct changed.[172] Justice Pfeifer then points out the statutory mechanism that is in place in Ohio, much like that statutory mechanism in place in Texas. Under these statutes, the offender is entitled to petition the court for modification or termination of the condition of probation upon showing that she has completed the other requirements imposed.[173] Because of this statute, the courts

170. McArthur v. State, 1 S.W.3d 323, 332 (Tex. App.—Fort Worth 1999, pet. ref'd) (citing United States v. Tonry, 605 F.2d 144, 150–51 (5th Cir. 1979)).

171. *Talty*, 2004-Ohio-4888, ¶ 2, 814 N.E.2d at 1202; Kreytak, *supra* note 144.

172. *Talty*, 2004-Ohio-4888, ¶¶ 35–36, 814 N.E.2d at 1209–10 (Pfeifer, J., dissenting).

173. OHIO REV. CODE ANN. § 2929.15(C) (LexisNexis Supp. 2009); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20 (Vernon Supp. 2008).

should not be required to explicitly state in the condition the means for overcoming it. It is already established that the right exists in the statutory law.

Finally, for all the courts who have stated that the condition causes major problems with enforcement, that is not necessarily the case. By simply adding the condition, courts are trying to proactively stop the offender from committing another crime. If the courts tell the offender she will be in violation of her probation upon having more children, this does not coerce termination of the pregnancy, or abortion. Should the offender become pregnant or father another child, most courts would simply impose alternate conditions, such as parenting classes and medical care.[174] It is highly unlikely, and absolutely a violation of procreative rights, for the court to coerce or order abortion of the fetus.[175] In addition, the offender would likely not even be subject to a probation revocation resulting in jail time.[176] Texas case law has shown that first time violators, whose violation is a technical violation and not a criminal violation, like committing another crime, have been shown leniency and not had their probation immediately revoked.[177]

Therefore, if the unfortunate case against Felicia Salazar had ever reached the Texas Court of Appeals, it would be reasonable for the court to have upheld the condition that Salazar not become pregnant during her probation term. Judge Baird, by no means, stripped Salazar of her right to procreate forever because she can petition for modification after one third of her sentence is complete.[178] He is simply imposing a condition of probation that satisfies all three factors laid out in *Marcum*.[179] The condition relates to the crime Salazar was convicted of because if she is allowed to have more children, they will automatically be in danger simply by being born. The condition relates to conduct that is criminal because if Salazar is allowed to have children, the likelihood of her failing to provide adequate care is very high. And finally, the condition relates to the future criminality of Salazar because so long as she is not allowed to have more children, the chances of her failing to provide care for them are very slim. Because the condition meets this test, the court, if ever faced with a case

174. *Contra* State v. Mosberg, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

175. *Id.* at 315 (citing People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984)).

176. Flournoy v. State, 589 S.W.2d 705, 709 (Tex. Crim. App. 1979).

177. *Id.* at 706 (allowing four violations before community supervision was revoked); *see also* Brooks v. State, 153 S.W.3d 124, 125 (Tex. App.—Beaumont 2004, no pet.) (allowing three violations of community supervision before revocation); Eisen v. State, 40 S.W.3d 628, 630 (Tex. App.—Waco 2001, pet. ref'd) (allowing 5 violations before revocation of probation); Gonzalez v. State, No. 05-02-01716-CR, 2003 WL 22072692, at *1 (Tex. App.—Dallas Sept. 8, 2003, no pet.) (not designated for publication) (allowing four violations before revocation of probation).

178. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20 (Vernon Supp. 2008).

179. Marcum v. State, 983 S.W.2d 762, 768 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

similar to Salazar, should uphold the condition as a valid exercise of judicial discretion.

VII. CONCLUSION

When looking at the history of probation over the years, it seems that the trends are moving toward a more restrictive means of allowing an individual to remain in the community, under the watchful eye of the government. With jails and prisons becoming more and more overcrowded by the day, probation, community supervision, or community control, whichever term is preferred, is used more frequently. Each state has enacted statutes to regulate the imposition of probation conditions as well as give the judge a very wide discretionary power when it comes to imposing those conditions. This discretion is apparent in the large number of judges that have imposed conditions that limit the fundamental rights of the probationers.

The right to procreate, a fundamental right that has long been recognized through the right to privacy, is definitely a gray area when it comes to probation conditions. Is it constitutional to restrict this right? Is it constitutional to limit this right? Although the majority of courts have held probation conditions that limit procreation invalid, Wisconsin and Oregon are leading the trend in finding that limiting the right to procreate is a reasonable and valid exercise of judicial discretion in imposing probation conditions.

Felicia Salazar, although not aware of it at the time, could have been a pivotal player in Texas probation history. By imposing a condition of probation that restricts her right to procreate, Judge Baird essentially stripped Salazar of a right so fundamental to life that on the surface, one would automatically assume Judge Baird abused his discretion as a Judge and thus the condition should be invalid. This is simply not the case. Judge Baird merely exercised his statutorily given power and imposed a reasonable condition that related to Salazar's crime, her rehabilitation, and the protection of the public. Judge Baird acted as the Supreme Court of Wisconsin did, as the Court of Appeals of Oregon did, and as the Supreme Court of Ohio should have done through Justice Pfeifer's dissent. However, because no objection to the condition was made at Salazar's trial, Texas will have to wait for another Judge to step up and impose a reasonable, although somewhat controversial, condition limiting the right to procreate. Maybe the future defendant will object next time around and give the Texas courts the opportunity to firmly establish precedent allowing for the reasonable imposition of probation conditions that limit the fundamental right to procreate.