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“The Average Single Black Father”

Dear Colleagues,

Thank you for taking the time to read my work. For the past five years, I have researched the rights of single fathers. These projects have covered the efficacy of putative father registries, property rights in children, and reproductive freedom. All of these projects invoke constitutional principles of substantive due process, procedural due process, equal protection, and privacy.

These same inquiries remain pertinent in my current project, which is a trade book on the limitations of modern fatherhood. This book will convey these legal problems and social conflicts to a general audience. It mainly argues that presumptions of incompetency—but not unfitness—for modern fathers complicate men's standing as equal parents.

The paper that I have attached for the workshop was previously published in the Michigan State Law Review. This take on “deadbeat dads” considers the issue of reproductive conditional probation, where unmarried fathers who fall behind on child support payments receive probation with a stipulation of not fathering additional children. Upon violation of these terms, the father faces imprisonment. Upon full payment of the arrears, the condition would be released. For poor fathers, who are the primary targets of these schemes, debt satisfaction is a virtually guaranteed impossibility. As a result, reproduction is permanently curtailed—a reality mutually acknowledged by judge and defendant.

In this article, I argue that these probation conditions violate principles of substantive due process and act more like population control and symbolic censure rather than actual child support enforcement. In the interests of “protecting society” and “saving taxpayer dollars,” judges resort to loosely tailored punishments that condemn rather than correct.

But the most salient issue in the current project is the strong undercurrent of race in the policing of non-marital childbearing. This article will become part of a chapter about black fatherhood in my book. While the other chapters are not racially specific, this subchapter turns to pervasive racial biases to illustrate a classic presumption of parental incompetency. Each of the cases cited in the attached article, and a considerable number of similar cases, involve unmarried African-American men. They bear the ire of critics, who rely on stereotypes and sensationalism to make categorical assumptions about promiscuity and instability. It is a favorite and familiar topic, which could be described as the “Moynihan Blues”: lack of responsibility, absence of marriage, and matriarchal structure lead to the breakdown of the black family. This refrain echoes throughout American history, as early as Jefferson and as recently as Obama: single black men are absent fathers, deadbeat dads, and irresponsible procreators.

Although the paper focuses on very extreme cases, it demonstrates that pervasive stereotypes affect judicial discretion. In this respect, the “average” single black defendant approaches the court burdened by a narrative of irresponsibility. Although judges cannot force physical sterilization upon serial fathers, they can individually enforce constructive sterilization by threatening imprisonment on successive procreation. No standard calculation exists to decide how many different children by different mothers would automatically trigger the condition. Additionally, judges may view some cases as more extreme or even exasperating than others

based on presumptions of incompetency that are imputed to individuals as members of certain groups.

The average single black father, however, is the exact opposite of the collective impression. Recent studies by the Centers for Disease Control and the Pew Research Center defy stereotypes: black fathers of children of all ages are more likely to be involved with their children on a daily basis than white or Latino fathers, whether or not they live with their children. I would like to continue this vein of research by questioning the validity of the pervasive assumptions about single black fathers, and how this affects their legal outcomes. Is the defendant seen as an individual father with a specific case, or is he a typical example of a group prone to pathology? While the CDC and Pew studies concern caregiving support rather than monetary support, an honest realization of the reality—not the image—would not only have profound effects on punishments for extreme cases, but also alleviate the racial presumption of deadbeat status for single black fathers.

I look forward to your comments.

# SERIAL PATERNITY

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## INTRODUCTION

Absentee fathers face a strong stereotype: irresponsible men who father children without regard to their future or well-being.<sup>1</sup> But for those nonperforming fathers who are poor and unmarried, cultural stereotyping paints a bleak picture that turns individual domestic problems into sites of political contention. “Bad dads,” conservatives lament, are repelled by responsibility, lured by sex, and doomed to absenteeism, all which lead to the disintegration of the American family.<sup>2</sup> Reproduction without responsibility is viewed as a pathology of low-income communities.<sup>3</sup> Although “deadbeat

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1. For more information about combating this negative image of fathers, see KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013); Hanna Rosin, *The Best Book About Fathers*, SLATE (June 14, 2013, 3:50 PM), [http://www.slate.com/articles/double\\_x/doublex/2013/06/doing\\_the\\_best\\_i\\_can\\_a\\_new\\_book\\_debunking\\_a\\_stereotype\\_about\\_the\\_deadbeat.html](http://www.slate.com/articles/double_x/doublex/2013/06/doing_the_best_i_can_a_new_book_debunking_a_stereotype_about_the_deadbeat.html); THE MYTH OF THE MISSING BLACK FATHER (Roberta L. Coles & Charles Green eds., 2010).

2. See generally DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) [hereinafter *THE MOYNIHAN REPORT*], available at <http://www.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf>. See Ben Shapiro, *American Fathers Disappearing*, BREITBART.COM (Dec. 27, 2012), <http://www.breitbart.com/Big-Government/2012/12/27/American-fatherhood-disappears> (implying that conservatives lament the negative impacts of missing fathers); Don Wycliff, ‘*The Politics of Respectability*,’ CHI. TRIB., Aug. 11, 2013, at 19, available at [http://articles.chicagotribune.com/2013-08-11/opinion/ct-perspec-0811-wycliff-20130811\\_1\\_don-lemon-bill-o-reilly-black-family](http://articles.chicagotribune.com/2013-08-11/opinion/ct-perspec-0811-wycliff-20130811_1_don-lemon-bill-o-reilly-black-family).

3. See U.S. CENSUS BUREAU, *AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2011 tbl.C8* (2011), <http://www.census.gov/hhes/families/data/cps2011.html>; THE MOYNIHAN REPORT, *supra* note 2.

dad” rhetoric universally bemoans moral decay and nuclear decline,<sup>4</sup> the real fear is one of financial pragmatism: children born to single parents have fewer resources for private support.<sup>5</sup> Where there is less money, there is a greater likelihood of public assistance.

Negative views of absentee fathers intensify when men have multiple children with multiple women. “Baby daddy” stories spark tensions about sexual morals and monetary prudence. Largely tabloid in nature, these cases fuel stereotypes and stir outrage. The rare and few stories<sup>6</sup> that claim media attention are extreme and gothic: *3 Men Have 78 Kids from 46 Women*,<sup>7</sup> *Man Fathered 30 Children*,<sup>8</sup> and *Man Wants 100 Children by 2015*.<sup>9</sup> These stories attract attention not only because of their prurient nature<sup>10</sup> and curious sexuality, but also because they embody a negative image of serial pater- nity: many children, many mothers, and an abundance of profligacy.

These cases generate calls for sterilization, which present a hard conflict of reproductive rights and public policy.<sup>11</sup> From the right, sexual sterili-

4. See *Congressional Caucus on Black Men and Boys—Status of Black Males*, C-SPAN (July 24, 2013), <http://www.c-spanvideo.org/clip/4460234>; THE MYTH OF THE MISSING BLACK FATHER, *supra* note 1, at 6.

5. See U.S. CENSUS BUREAU, *supra* note 3; TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 4 (2011), available at <http://www.census.gov/prod/2011pubs/p60-240.pdf>.

6. See *3 Men Have 78 Kids from 46 Women*, EMIRATES 24/7 (June 19, 2012), <http://www.emirates247.com/crime/world/3-men-have-78-kids-from-46-women-2012-06-19-1.463553>; Michael Billera, *Desmond Hatchett of Tennessee Has 30 Children with 11 Different Women*, INT’L BUS. TIMES (May 18, 2012, 4:01 PM), <http://www.ibtimes.com/desmond-hatchett-tennessee-has-30-children-11-different-women-699129>; *UAE Father of 78 Eyes New Brides for Century Target*, REUTERS (Aug. 20, 2007, 11:17 AM), <http://www.reuters.com/article/2007/08/20/us-emirates-father-odd-idUSL2020651320070820?feedType=RSS&feedName=oddlyEnoughNews>; Declan Lawn, *Feckless Father Cannot Remember Children’s Names*, BBC PANORAMA (Jan. 17, 2011), [http://www.bbc.co.uk/panorama/hi/front\\_page/newsid\\_9362000/9362089.stm](http://www.bbc.co.uk/panorama/hi/front_page/newsid_9362000/9362089.stm); *Orlando Shaw, Nashville Father with 22 Children by 14 Women, Sued for Unpaid Child Support (VIDEO)*, HUFFINGTON POST (June 7, 2013, 11:01 AM), [http://www.huffingtonpost.com/2013/06/06/orlando-shaw-father-22-children-14-women\\_n\\_3397397.html](http://www.huffingtonpost.com/2013/06/06/orlando-shaw-father-22-children-14-women_n_3397397.html) [hereinafter *Nashville Father*].

7. *3 Men Have 78 Kids from 46 Women*, *supra* note 6.

8. Billera, *supra* note 6.

9. *UAE Father of 78 Eyes New Brides for Century Target*, *supra* note 6.

10. See *State v. Haltom*, 642 N.W.2d 807, 815 (Neb. 2002) (quoting NEB. REV. STAT. § 28-807(10) (2012)) (stating that the court did not read *Roth v. United States*, 354 U.S. 476 (1957), where prurient interests were first examined by the Supreme Court, to define “prurient” as a “tendency to excite lustful thoughts” but, instead, as defining “prurient” as obscenity which “predominately appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion”).

11. See, e.g., *Trammell v. State*, 751 N.E.2d 283, 290-91 (Ind. Ct. App. 2001) (finding a privacy right of procreation); *Skinner v. Okla. ex rel Williamson*, 316 U.S. 535, 541 (1942) (holding that sterilization of repeat criminals violated the Equal Protection Clause);

zation champions prevention: future children, future obligations, and future state dependents.<sup>12</sup> Once reproduction is prohibited, there is no possibility of future deadbeatness or absenteeism and, most significantly, regeneration of the promiscuous strain. From the left, sterilization infringes upon the fundamental right to have children, regardless of any future detriments on child welfare.<sup>13</sup> Prohibiting reproduction recalls disfavored attempts of states to cleanse the population of “undesirables.”<sup>14</sup> Additionally, forced sterilization runs afoul of invasions upon bodily integrity by categorically mandating surgery for promiscuous men and women.

Although outright, wide-scale sterilization schemes are unlikely to materialize in contemporary culture, individual judges have found ways to control reproduction on a case-by-case basis without surgery.<sup>15</sup> Imprisonment is a likely consequence of non-payment of child support, yet some

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Buck v. Bell, 274 U.S. 200, 207-08 (1927) (holding that the sterilization of the mentally disabled was within due process).

12. See *infra* notes 92-99 and accompanying text (discussing Barbara Harris’s project, Project CRACK, now called Project Prevention).

13. Corey G. Johnson, *Lawmakers Call for Investigation into Sterilization of Female Inmates*, THE CENTER FOR INVESTIGATIVE REPORTING (Jul 10, 2013), <http://cironline.org/reports/lawmakers-call-investigation-sterilization-female-inmates-4961>. See generally Anna Tamar-Mattis, *Sterilization and Minors with Intersex Conditions in California Law*, 3 CAL. L. REV. CIRCUIT 126 (2012), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1039&context=clrcircuit>.

14. See Frederick Osborn, *Development of a Eugenic Philosophy*, AM. SOC. REV. 389, 389 (June 1937); Ellen Barry, *Eugenics Victims Are Heard at Last: Outrage Voiced Over State Sterilization*, BOS. GLOBE, Aug. 15, 1999, at B1; POPULAR EUGENICS: NATIONAL EFFICIENCY AND AMERICAN MASS CULTURE IN THE 1930S (Susan Currell & Christina Cogdell eds., 2006).

15. See *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967) (holding that the condition that the defendant was not to become pregnant without being married was void as the condition was unrelated to her robbery charge or future criminality); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988) (holding that the condition that the defendant was not to become pregnant without being married during the course of her probation was grossly erroneous due to the lack of a relationship with the offense committed); *People v. Ferrell*, 659 N.E.2d 992 (Ill. App. Ct. 1995) (holding that the condition that the defendant was not to become pregnant during her probation for the battery of a two-month-old child was invalid, however the blood test to detect the pregnancy was reasonable); *Trammell*, 751 N.E.2d at 283 (holding that the condition that the defendant not become pregnant while on probation infringed upon her privacy right to procreate and served no discernible rehabilitative purpose); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986) (holding that the condition that the defendant not give birth to any children without being married during her probationary period was not valid); *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201 (holding that the condition that the defendant take reasonable steps to avoid conceiving another child during her probationary period was not absolutely necessary); *State v. Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 (holding that the condition that the defendant was to avoid conceiving another child without showing ability to support additional children was valid despite her fundamental right to procreate due to her conviction for intentional refusal to support her current children).

judges have conditioned probation of the defendant on not having additional children.<sup>16</sup> Presumably, reproductive conditional probation aims to secure employment and income for the father, which would not be possible were he incarcerated. The father is expected to work, earn money, and not father any additional children until he pays off past and current child-support obligations. But low-income fathers earning minimum wage can never expect to satisfy all debts: at \$7.25 an hour,<sup>17</sup> for forty hours a week, for fifty-two weeks a year, a worker will earn \$15,080 before taxes. Even a modest debt of \$1,000, in addition to monthly living expenses and current support obligations, could take years to pay. By conditioning reproduction on an event unlikely to happen, this amounts to constructive sterilization—an indirect prohibition on reproduction.

This form of conditional probation is a symbolic solution devoid of actual results. It censures the father for sexual imprudence but fails to support the best interests of existing children. Courts rationalize the stipulation as preventing future splits of support entitlements for extant offspring and also for protecting society from bearing the costs of financially abandoned children.<sup>18</sup> But these are speculations rather than practical strategies for compelling real payment. When courts forbid fathers from having additional children, this does not alleviate the present obligation of support. The “forgiving” court has done nothing to ensure more money in the hands of needy children and their caregiving mothers.

Reproductive conditional probation acts more like population control rather than child-support enforcement. Articulated interests of “protecting society” directly echo the rhetoric of eugenics, which states embraced as a cheap, long-term solution for eliminating undesirables. Classifying a person as feeble-minded, moronic, or immoral gave states sufficient grounds to sterilize. Quite often, the subjects were poor and unmarried. States justified eugenics as a cost-effective method of social welfare because it eliminated future generations of public charges.<sup>19</sup> The same calculus applies to serial

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16. See generally *Dominguez*, 64 Cal. Rptr. 290; *Thomas*, 519 So. 2d 1113; *Ferrell*, 659 N.E.2d 992; *Trammell*, 751 N.E.2d 283; *Norman*, 484 So. 2d 952; *Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201; *Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200.

17. Wage & Hour Div., U.S. Dep’t of Labor, *Minimum Wage Laws in the States*, U.S. DEP’T OF LABOR (Jan. 1, 2013), <http://www.dol.gov/whd/minwage/america.htm>.

18. See *Ferrell*, 659 N.E.2d 992; *Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 (affirming a probationary condition that the defendant could not have another child without showing the ability to support his current children); GRALL, *supra* note 5 (explaining that the average cost per month to support a child is \$300); Press Release, Office of Inspector Gen., U.S. Dep’t of Health & Human Servs., *OIG Launches Child Support Enforcement Web Page: Introduces ‘Most Wanted’ List of Deadbeat Parents* (Jan. 17, 2012), available at <http://oig.hhs.gov/newsroom/news-releases/2012/cse.asp>.

19. Harry H. Laughlin, *The Legal Status of Eugenical Sterilization*, in *BUCK V. BELL DOCUMENTS* (2009), [http://digitalarchive.gsu.edu/col\\_facpub/79](http://digitalarchive.gsu.edu/col_facpub/79) (providing a draft of the

fathers: if only stable, productive—married—citizens bear children instead of “moronic” and “feeble” unmarrieds, it is “better for . . . the world.”<sup>20</sup>

This Essay is divided into three parts. First, egregious and shocking cases of men fathering high numbers of children with multiple women demonstrate judicial pushes to set limits on the reproductive capacities of fathers. While such cases are rare in number and occurrence, they set extreme examples of what I term “serial paternity” to challenge the fundamental right of reproductive freedom. Second, I discuss the practice of conditional reproductive probation for serial fathers, where judges forbid men from fathering additional children. Upon violation of this condition, offending men are imprisoned, which, along with forbidding them to have more children, also fails to solve the problem of child support. Thirdly, I liken probation conditions to constructive sterilization, which is a concerted, systematic effort to eliminate the reproductive capacities of citizens deemed undesirable. This is nothing less than a justification for eugenics.

### I. SERIAL FATHERS

Serial fathers command significant media attention. Orlando Shaw, an unmarried thirty-three-year-old resident of Nashville, Tennessee, allegedly fathered twenty-two children by fourteen women.<sup>21</sup> He is unable to pay child support, and the mothers have sued him for arrears.<sup>22</sup> Also in Tennessee, media outlets report three other men in similar circumstances<sup>23</sup>: Terry Turnage (twenty-three children, seventeen women); Richard Colbert (twenty-five children, eighteen women); and Desmond Hatchett (twenty-four children, eleven women).<sup>24</sup> When questioned by reporters for explanations, Shaw asserted that he was “young and ambitious” with a “love [for] women.”<sup>25</sup> Hatchett claims that “it just happened.”<sup>26</sup> All of the men are unmarried, poor, and African-American. None pay child support.

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Model Eugenical Sterilization Statute: “An Act to prevent the procreation of persons socially inadequate from defective inheritance, by authorizing and providing for the eugenical sterilization of certain potential parents who carry defective hereditary qualities”).

20. *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927).

21. *Nashville Father*, *supra* note 6.

22. *Id.*

23. Lydia Warren, *Tennessee’s Deadbeat Dads: The Three Men Who Have Fathered 78 Children with 46 Different Women . . . And They’re Not Paying Child Support to Any of Them*, MAILONLINE (June 14, 2012, 4:52 PM), [http://www.dailymail.co.uk/news/article-2159476/Tennessees-deadbeat-dads-The-men-81-children-46-different-women--theyre-paying-child-support-them.html?\\_hstc=223762052.9122a38c1f696481916b775754cc7888.1373048010756.1373048010756.1373048010756.1&\\_hssc=223762052.14.1373048010756](http://www.dailymail.co.uk/news/article-2159476/Tennessees-deadbeat-dads-The-men-81-children-46-different-women--theyre-paying-child-support-them.html?_hstc=223762052.9122a38c1f696481916b775754cc7888.1373048010756.1373048010756.1373048010756.1&_hssc=223762052.14.1373048010756).

24. *Id.*

25. *Nashville Father*, *supra* note 6.



In Muskegon, Michigan, Howard Veal, also unemployed and African-American, fathered twenty-three children with fourteen women.<sup>27</sup> He owes more than \$533,000 in unpaid child support,<sup>28</sup> which is a felony in Michigan.<sup>29</sup> “Judge Dennis Leiber sentenced [him] to two to four years in prison for [non-payment of] child support.”<sup>30</sup> Expressing disbelief in the scope of Veal’s offspring, Judge Leiber remarked, “[a]nimals procreate, human beings are supposed to nurture their children.”<sup>31</sup>

Each of these cases went viral on the Internet, with overwhelming calls for restraint from commentators, both professional and amateur. Local news stations in Knoxville reported Desmond Hatchett’s story as “your tax dollars at work.”<sup>32</sup> MSNNow describes Orlando Shaw “as a cross between Don Juan and the Most Interesting Man in the World.”<sup>33</sup> Internet commentators were not as subtle: On the New York Daily News, JOSIE912 wrote that Hatchett “needs to be castrated,” while CHRIS876541 lamented, “[a]ll of ‘em are idiots . . . not to be racist.”<sup>34</sup>

Serial paternity issues existed long before the Internet, yet media attention and public derision telescopes on the most extreme “deadbeat dad” stories to shape a common narrative of nonpaying fathers. This shapes an impression of unmarried, nonpaying fathers as categorically serial, unemployed, and unattached. This overlooks the much larger problem of child-support enforcement for everyday, nonsensational cases: in 2009, only 61% of the \$35.1 billion due in child support was paid to children—leaving

26. Amber Miller, *Father, 29, in Child Support Court Says He Has 21 Kids* (May 22, 2009, 6:15 PM), <http://www.local8now.com/home/headlines/45871127.html>.

27. Barton Deiters, *Man Who Fathered 23 Children with 14 Women Sent to Prison After Missing More Than \$500,000 in Child Support Payments* (Sept. 24, 2010, 6:51 AM), [http://www.mlive.com/news/grand-rapids/index.ssf/2010/09/man\\_who\\_fathered\\_23\\_children\\_w.html](http://www.mlive.com/news/grand-rapids/index.ssf/2010/09/man_who_fathered_23_children_w.html).

28. *Id.*

29. See MICH. COMP. LAWS ANN. § 750.165(1) (West 2004) (“If the court orders an individual to pay support for the individual’s former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than \$2,000.00, or both.”).

30. Deiters, *supra* note 27 (reporting that a man who fathered twenty-three children with fourteen women was sent to prison after missing more than \$500,000 in child-support payments).

31. *Id.*

32. Miller, *supra* note 26.

33. *Deadbeat Dad Doesn’t Even Know How Many Kids He Has (It’s 22 Pal)*, MSNNow (June 7, 2013), <http://now.msn.com/orlando-shaw-a-deadbeat-day-with-22-kids-sued-for-child-support>.

34. Nina Mandell, *Desmond Hatchett Sets Record with 30 Children—by 11 Women*, N.Y. DAILY NEWS (May 20, 2012, 11:16 AM), <http://www.nydailynews.com/news/national/desmond-hatchett-sets-record-30-children-11-women-article-1.1081531?comment=true> (comment section).

\$13.68 billion unpaid.<sup>35</sup> Nonpayment cuts across all demographic lines: class, income, marital status, race, and even sex.<sup>36</sup> Noncustodial parents of all incomes and configurations evade support obligations, but the letdowns of middle-class divorces are easily forgotten in the wake of low-income, unemployed men who father many children with numerous women.

The main problem is accessing income. If a noncustodial parent has no income to pay child support, the burden of support falls on state welfare departments. Tennessee Department of Human Services provides \$7,000 of support per month to Orlando Shaw's twenty-two children.<sup>37</sup> Combined with the inability of custodial mothers to support the child alone, the state must intervene. If Shaw had income of his own, he would be able to alleviate some or all of this public expenditure. Because he cannot, the children's interests must still be met, which means that the obligation of child support shifts from a private paradigm of individual responsibility to a public interest in welfare administration.

For low-income serial fathers who cannot pay child support, some judges conjure alternative schemes that focus more on the erring parent rather than the needy children.<sup>38</sup> These approaches place restrictions on reproduction, usually as a condition of probation. Defendants face two choices: imprisonment or reproductive conditional freedom. In Wisconsin, Corey Curtis fathered nine children by six women, and he owed \$90,000 in child-support arrears.<sup>39</sup> Curtis pled no contest to charges of bail jumping and failure to pay child support.<sup>40</sup> Judge Tim Boyle sentenced him to three years probation, under the condition that he not reproduce until he paid his

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35. GRALL, *supra* note 5, at 1, 10 (explaining that \$13.7 billion in child support went unpaid in 2009).

36. *Id.* at 2-5.

37. *33-Year-Old Deadbeat Dad on Why He Had 22 Kids: 'I Was Young and Ambitious,'* NEWSONE (June 7, 2013), <http://newsone.com/2538400/orlando-shaw-deadbeat-dad-nashville/>.

38. *State v. Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200, 206-07 (explaining that the lower court opined, "[t]he refusal to pay the fines [while defendant was employed] and the victim intimidation [of his children in court] both show Oakley's cavalier attitude toward the justice system. . . . Oakley needs to be rehabilitated from his perception that one may flout valid court orders and the judicial process with impunity and suffer no real consequence"); *Deadbeat Parents Punishment Act of 1998*, Pub. L. No. 105-187, 112 Stat. 618 (1998) (detailing the punitive statute enacted on the presumption that "the obligor has the ability to pay the support obligation for that time period," but did not make payments).

39. *Corey Curtis, Wisconsin Father of 9, Ordered to Stop Having Kids Until He Can Pay Child Support*, HUFFINGTON POST (Dec. 5, 2012, 1:48 PM), [http://www.huffingtonpost.com/2012/12/05/corey-curtis-wisconsin-stop-have-kids\\_n\\_2245157.html](http://www.huffingtonpost.com/2012/12/05/corey-curtis-wisconsin-stop-have-kids_n_2245157.html) [hereinafter *Wisconsin Father*].

40. Bridget Thoreson, *Deadbeat Dad Sentenced to Probation, Ordered Not to Procreate*, J. TIMES (Dec. 3, 2012, 1:34 PM), [http://journaltimes.com/news/local/crime-and-courts/deadbeat-dad-sentenced-to-probation-ordered-not-to-procreate/article\\_50347514-3d80-11e2-9eee-0019bb2963f4.html](http://journaltimes.com/news/local/crime-and-courts/deadbeat-dad-sentenced-to-probation-ordered-not-to-procreate/article_50347514-3d80-11e2-9eee-0019bb2963f4.html).

debts.<sup>41</sup> If Curtis broke probation (i.e. fathered more children), he would go to prison. The judge lamented he could not do more: “[i]t’s too bad the court doesn’t have the authority to sterilize.”<sup>42</sup>

Other courts have made the probation terms more graphic. In Kentucky, a judge viewed sex itself as the root of the problem. Luther Crawford fathered twelve children by eleven women.<sup>43</sup> He owes \$33,000 in unpaid child support for two of his offspring.<sup>44</sup> The judge sentenced him to probation for one to five years under the strict condition that he “refrain from having ‘ANY sexual intercourse.’”<sup>45</sup>

While reproductive conditional probation appeases public outrage and censures prolific fathers, it fails to produce tangible, immediate results. Ostensibly, courts intend for the noncustodial father to work, earn money, and fulfill child-support obligations—an economic potential that would be impossible with incarceration. It allows a possibility of income, but only that—it does nothing to affect directly the lives of existing children. Judges embracing this tactic view it as preventing further support splits, even though the children receive little or nothing. If the delinquent payor fathered more children, the new infants are believed to diminish support for older ones, and the new infants are protected from financial neglect by not being born. Under this zero-sum logic, prolific fathers are considered a detriment to the best interests of children, living and imagined.

## II. CONDITIONAL REPRODUCTIVE PROBATION

David Oakley, of Racine, Wisconsin, fathered nine children by four different women, and by 2001, he owed more than \$25,000 in unpaid child support.<sup>46</sup> Intentional refusal to pay child support is a felony in Wisconsin, and Oakley faced a sentence of six years imprisonment.<sup>47</sup> In conjunction with preexisting plea agreements, Judge Fred Hazlewood granted probation on the condition that the defendant had no additional children without a showing of ability to pay child support.<sup>48</sup> Judge Hazlewood reasoned, “if Mr. Oakley goes to prison, he’s not going to be in a position to pay any

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41. *Id.*

42. *See Wisconsin Father*, *supra* note 39.

43. *Deadbeat Dad: I Want Sex*, THE SMOKING GUN (Mar. 1, 2002), <http://www.thesmokinggun.com/documents/crime/deadbeat-dad-i-want-sex>.

44. *Id.*

45. *Id.*

46. *State v. Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200.

47. *Id.* at 201.

48. *Id.* at 203. The State of Wisconsin “charged Oakley with seven counts of intentionally refusing to provide child support as a repeat offender. His repeat offender status stemmed from intimidating two witnesses in a child abuse case—where one of the victims was his own child.” *Id.* at 202.

meaningful support for these children.”<sup>49</sup> Still, the majority ruled against Oakley, holding that reproduction is a necessary restriction to fulfill a compelling state interest—support for children. Oakley appealed his case to the state Supreme Court.

The lower court judge declared that judicial discretion was necessary in dealing with a convicted felon.<sup>50</sup> Judge Hazlewood had knowledge that Oakley intimidated his own children as witnesses in his earlier defense trial, and the judge also knew that Oakley had routinely promised and failed to pay child support.<sup>51</sup> Realizing the unlikelihood and practical impossibility of full payment, Judge Hazlewood shifted the focus from financial to reproductive. If Oakley fathered additional children while released on probation, he returned to prison. The state Supreme Court agreed, asserting the interest of “protecting society” numerous times in the majority opinion.<sup>52</sup>

Yet societal interests cannot overcome constitutional inquiry. Because Oakley’s conditional probation potentially impacts a fundamental right to procreation,<sup>53</sup> he argued that the condition must survive strict scrutiny. However, heightened analysis does not apply here because probation conditions are exempted from consideration of fundamental rights.<sup>54</sup> Even though the majority refused to apply strict scrutiny, it reasoned that the condition was narrowly tailored because Oakley would be free to work while serving a compelling state interest of parents supporting their children.<sup>55</sup> “Narrowly tailored,” in this respect, applies to low-income serial fathers like Oakley.

The Supreme Court found that the condition did not eliminate Oakley’s right of reproduction, as he was free to have further children once he paid his debts.<sup>56</sup> The majority did not view this as a permanent deprivation of his ability to have more children, but as a simple requirement during his period of rehabilitation.<sup>57</sup> Upon satisfaction of his arrears, he would have been free to continue reproducing.

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49. *Id.* at 203.

50. *Id.* at 205.

51. *Id.* at 206.

52. *Id.* at 205-07.

53. See *In re Eberhardy*, 307 N.W.2d 881, 891 (Wis. 1981) (establishing a “fundamental decisional right of a citizen to procreate”); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that “[m]arriage and procreation are fundamental to the very existence and survival of the race”).

54. *Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 (citing Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994)); see also *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201.

55. *Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200.

56. *Id.* at 212.

57. *Id.*

Unspoken in this logic is the accepted improbability of Oakley ever satisfying the past debt, in addition to his ongoing one. The circuit court told Oakley:

[Y]ou know and I know you're probably never going to make 75 or 100 thousand dollar [sic] a year. You're going to struggle to make 25 or 30. And by the time you take care of your taxes and your social security, there isn't a whole lot to go around, and then you've got to ship it out to various children.<sup>58</sup>

Knowing his history and the unlikelihood of repayment, the court welcomed the conundrum of convenience. It presented simple reasoning that necessarily has dramatic impact. Because the court could not place an outright ban on his reproductive rights,<sup>59</sup> it found an alternative way to prevent him from having children, which, according to the majority, was constitutionally permissible.

This constructive ban has a better fit with sociological reasoning rather than ensuring practical results. The majority expresses concern with “protecting society and potential victims.”<sup>60</sup> The potential victims, it reasons, are Oakley’s additional children and, implicitly, the State and its citizens.<sup>61</sup> The Court cites “poor health, behavioral problems, delinquency and low educational attainment,”<sup>62</sup> in addition to poverty statistics, to demonstrate the negative consequences of nonpayment of child support—a “direct contributor to childhood poverty.”<sup>63</sup> These assertions are persuasive yet speculative, as they look to victims unborn and projected, rather than extant. As noted in the dissent, Oakley’s probation condition will not bring his children out of poverty any more than it will force him to settle his debts.<sup>64</sup>

The dissent rightly objects to the majority’s conclusion that the probation condition is narrowly tailored to a governmental interest.<sup>65</sup> The conscientious prohibition in anticipation of a certain result—no additional children for Oakley—is loosely, not narrowly, related to child support. From a general perspective, it curtails the probability of additional unpaid support in the event of more children, but it fails to rehabilitate in the sense of actually securing payment. The means do not effectuate the ends, and it results in a de facto prohibition on reproduction,<sup>66</sup> as a de jure prohibition would directly curtail a fundamental freedom.

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58. *Id.* at 217-18.

59. *See supra* note 53.

60. *Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200, 206.

61. *Id.* at 207.

62. *Id.* at 204.

63. *Id.*

64. *Id.* at 216 (Bradley, J., dissenting).

65. *Id.*

66. *Id.* at 217.

## III. THE LEGAL ROOTS OF STERILIZATION

Historically, American courts have taken exception to the reproductive rights of poor and marginalized people in the interest of “protecting society.”<sup>67</sup> According to Oliver Wendell Holmes, Carrie Buck was a “feeble minded white woman[,] . . . the daughter of a feeble-minded mother[,] . . . and the mother of an illegitimate feeble-minded child.”<sup>68</sup> Because she was an unmarried, pregnant teen in foster care, state officials viewed her as a societal threat and sought institutionalization. She was committed to the Virginia State Colony for Epileptics and Feeble Minded in 1924, where officials classified her as “feebleminded of the lowest grade Moron class.”<sup>69</sup> Although she was later proven to be of average intelligence and capability, she was subjected to a lopsided hearing that ultimately approved her sterilization. The Colony Board justified the salpingectomy (fallopian tube removal) procedure by reasoning that Carrie Buck “by the laws of heredity is the probable . . . parent of socially inadequate offspring, . . . and that the welfare of . . . [Carrie] and of society will be promoted.”<sup>70</sup>

Buck’s sterilization was authorized by the Virginia Eugenical Sterilization Act of 1924, which explicitly aimed to promote the “welfare of society” by sterilizing “mental defectives under careful safeguard and by competent and conscientious authority.”<sup>71</sup> The statute outlined a sterilization procedure for “defective persons” who, if left alone, “would likely become by the propagation of their kind a menace to society.”<sup>72</sup> This law reflected the interests of Virginia leaders who embraced Francis Galton’s science of good breeding as a cure for perceived or feigned societal ills.<sup>73</sup> Eugenics stirred moral anxieties about people deemed undesirable: the lazy, lawless, drunk, and oversexed—all were targeted as the agents of degeneracy and a burden on society.<sup>74</sup> From this angle, sterilization marked an investment in the future.<sup>75</sup> Selective matching and concerted prevention were promoted as forward-thinking community obligations, while natural selection, attraction, and liberty were criticized as short sighted, individual indulgences.

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67. See, e.g., *id.* at 206-07 (majority opinion).

68. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

69. PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 107 (2008).

70. *Id.* at 107.

71. *Id.* at 288.

72. *Id.*

73. Francis Galton, *The Eugenic College of Kantsaywhere* (unpublished manuscript) (on file with UCL Library Services at <http://www.ucl.ac.uk/library/special-coll/ksw.shtml>) (describing a eugenic utopia of fitter and smarter humans).

74. LOMBARDO, *supra* note 69, at 8.

75. *Id.* at 11 (“Every ‘hundred dollars invested now saves a thousand in the next generation.’”).

Most concerns about “undesirables” had sexual and ultimately economic connotations. Eugenicians believed that “weak willed,” illicit, and impressionable people had too many offspring, who would in turn adopt the same characteristics, thus perpetuating a sad cycle of inherited pathology. Consistently, proponents shifted characteristics to justify sterilization, which was treated as an investment with future benefits.

In *Buck v. Bell*, Carrie Buck sued the superintendent of the Virginia Colony for Epileptics and Feeble Minded for denying her due process and equal protection for performing the sterilization operation upon her.<sup>76</sup> She argued that “[t]he inherent right of mankind to go through life without mutilation of organs of generation needs no constitutional declaration.”<sup>77</sup> The defendant held that all patients considered for sterilization were provided a fair hearing before the operation to determine the best interests of the patient and of society.<sup>78</sup> Under the Virginia statute, the superintendent had discretion to consider appropriate patients for sterilization according to “very careful provisions by which the act protects the patients from possible abuse.”<sup>79</sup>

Buck challenged the Act itself as an unlimited power of the State to eliminate undesirables according to suspicious standards.<sup>80</sup> The Supreme Court held that the sterilization hearings mandated by the Act sufficiently considered the rights of patients, giving them due process of law.<sup>81</sup> The Court deferred to the Colony’s finding, holding that preventing degenerates from producing “socially inadequate offspring” was a justifiable matter of public concern.<sup>82</sup> Justice Holmes, writing for the majority, viewed sterilization as an effortless community imperative for “those who already sap the strength of the State.”<sup>83</sup> In his view, it was a public duty: “It is better for all the world, if . . . society can prevent those who are manifestly unfit from

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76. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

77. Transcript of Oral Argument at 2, *Buck v. Bell*, 274 U.S. 200 (1927) (No. 202), available at <http://academic.evergreen.edu/curricular/lifeandcon/HPB%20Buck%20v%20Bell%20Transcript.pdf>.

78. *Id.* at 2-3.

79. *Buck*, 274 U.S. at 206.

80. Virginia Sterilization Act, 1924 Va. Acts 569 (stating those subject to the Act were “in various State institutions . . . defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society”).

81. *Buck*, 274 U.S. at 207.

82. *Id.* at 206-07.

83. *Id.* at 207.

continuing their kind.”<sup>84</sup> In an infamous passage, he concluded, “Three generations of imbeciles are enough.”<sup>85</sup>

*Buck v. Bell*, although a dated opinion, reflects a strong support of the legitimacy of eugenics. Proponents of the “science of breeding” fervently believed that societal ills could be curtailed by regulating reproduction. Eugenics was prospective in its outlook, as it considered the politically palatable elimination of future generations rather than the violently transparent eradication of present ones. In a sense, eugenics is a passive aggressive purging policy. It identifies a future demographic threat, and it connives to prevent it.

At the root of eugenic policy was a fear of sex and its repercussions.<sup>86</sup> Illegitimacy was the primary concern in *Buck*, as Colony officials expressed concern at Carrie’s unmarried motherhood and her own mother’s alleged record of prostitution.<sup>87</sup> The superintendent, preempting Justice Holmes’s lament, feared a fourth generation of sexual impropriety, which echoed the eugenic fear of intergenerational illegitimacy.<sup>88</sup> Believing that that improper sexual behavior was a genetic trait,<sup>89</sup> sterilization provided a medical solution for the perceived horrors of fornication, prostitution, and lewdness. Once cleansed of their reproductive capacity, sexual appetites and their concomitant results would no longer drain state resources.

If sex were the substantive fear of eugenics, the practical horror was money. In eugenics calculus, those classified as undesirable presented two State concerns, present and future: the immoral infraction of mere existence and the looming specter of economic dependence. Perverts, morons, imbeciles, and other state-designated ne’er do wells posed not only a current financial burden but also a future, subgenerational threat. Severing the link between progenitor and offspring manifested a monetary prudence that measured value as an opportunity cost. Every birth prevented was treated as a state and local victory. Eradicating the possibility of future abnormal generations meant that “every hundred dollars invested now saves a thousand in the next generation.”<sup>90</sup> Eugenics offered an economic and medical justification for ethically unsound practices, protected by the cover of law.

84. *Id.*

85. *Id.*

86. *See id.* at 205-08 (affirming a statute limiting the potential of probable undesirable offspring should those deemed unfit to rear children engage in sexual relations with one another and conceive).

87. LOMBARDO, *supra* note 69, at 106.

88. *Id.* at 286 (deeming that Buck was unfit to procreate and the superintendent found it was in the best interest of both Bell and society that she be sterilized and not allow her hereditary line to harvest another generation).

89. *Id.* at 6.

90. *See* ANNUAL REPORT OF THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR IDIOTIC AND FEEBLE-MINDED YOUTH (1892), *available at*



Although *Buck v. Bell* has yet to be overturned, public sterilization policies are disfavored. This does not rule out, however, private efforts to control reproduction in disadvantaged communities. Under the guise of “protecting society,” direct sterilization persists as eugenic agenda for marginalized populations in modern America.<sup>91</sup>

In California, the right to procreation is bartered for meager payments to needy individuals. Barbara Harris, founder of the Children Requiring a Caring Kommunity (CRACK), offers long-term birth control and permanent sterilization along with a one-time payment of \$300 to people suffering substance abuse in exchange for their reproductive futures.<sup>92</sup> As late as January 2012, CRACK—now re-branded as Project Prevention—boasts of 4,000 unborn children prevented from lives of struggle and welfare.<sup>93</sup> The private program, supported by federal and state governments, has branches in Illinois, Nevada, New Jersey, and Washington D.C.<sup>94</sup>

Project Prevention views itself as a benevolent charity, with a mission of reducing irresponsible procreation.<sup>95</sup> The organization’s goals reiterate eugenic thought. It classifies drug addicts and alcoholics as undesirable and posits their reproduction as a threat to taxpayers.<sup>96</sup> It claims that governments save up to \$1.3 billion for every 4,000 births prevented.<sup>97</sup> Middle-

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<http://books.google.com/books/reader?id=fsQnAQAAAMAAJ&printsec=frontcover&output=reader&pg=GBS.PR1> (providing a rationale to funding institutional facilities).

91. JOHN GLAD, *FUTURE HUMAN EVOLUTION: EUGENICS IN THE TWENTY-FIRST CENTURY* (2006), available at [http://www.whatwemaybe.org/txt/txt0000/glad.john.2006.future\\_human\\_evolution.book.full.003k.en.pdf](http://www.whatwemaybe.org/txt/txt0000/glad.john.2006.future_human_evolution.book.full.003k.en.pdf) (explaining that we need to maintain our own selection in the world as humans reversed evolutionary selection by knowledge and science); see also Laura Hix, *Modern Eugenics: Building a Better Person?*, SCI. IN SOC’Y (July 23, 2009), <http://scienceinsociety.northwestern.edu/content/articles/2009/research-digest/eugenics/modern-eugenics-building-a-better-person>.

92. Sandy Banks, *A Tough Approach to Drug-using Mothers*, L.A. TIMES (Oct. 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-banks17>; Tiesha Rashon Peal, *The Continuing Sterilization of Undesirables in America*, 6 RUTGERS RACE & L. REV. 225, 240 (2004).

93. *Statistics*, PROJECT PREVENTION, <http://www.projectprevention.org/statistics> (last visited Nov. 20, 2013).

94. PROJECT PREVENTION, <http://www.projectprevention.org> (last visited Nov. 20, 2013).

95. See Sheila C. Cummings, *Foreword: Is Crack the Cure?*, 5 J.L. SOC’Y 1, 5-9 (2003); *Frequently Asked Questions*, PROJECT PREVENTION <http://www.projectprevention.org/faq> (last visited Nov. 20, 2013).

96. See Peal, *supra* note 92, at 241; *Treatment, Not Sterilization, Is the Way to Help Addicted Moms*, NAT’L ADVOC. FOR PREGNANT WOMEN, <http://www.advocatesforpregnantwomen.org/articles/oped.htm> (last visited Nov. 20, 2013).

97. *What’s New*, PROJECT PREVENTION, <http://www.projectprevention.org/whats-new> (last visited Nov. 20, 2013). *But see* Lynn M. Paltrow, *Why Caring Communities Must Oppose C.R.A.C.K./Project Prevention: How C.R.A.C.K. Promotes Dangerous Propaganda*

class addicts are not targeted—Project Prevention disproportionately impacts low-income, minority communities.<sup>98</sup> Founder Barbara Harris argues that sexual impulses must be controlled, as impoverished addicts cannot repress animal urges: “We don’t allow dogs to breed. We spay them. We neuter them. We try to keep them from having unwanted puppies, and yet these women are literally having litters of children.”<sup>99</sup>

Likening the reproductive decisions to animal litters unveils a clear outlook of dehumanization. Spaying and neutering household pets is a mark of domestication—the civilizing process of cats and dogs that don’t know any better. Humans driven by desire without reason, according to Harris, must be tamed in the same way. While Project Prevention does not force sterilization and birth control on its subjects, it presents voluntary sterilization as an obligation of responsibility for low-income men and women.

#### CONCLUSION

In many ways, both eugenics and conditional reproductive probation respond to a perceived problem of unbridled sexuality in poor communities. They both cite nonmarital reproduction as a societal problem. They both view multiple sexual partners as an absence of self-control. Most importantly, they take concern with a sexual liberty that results in dependent children. Beginning with moral irresponsibility and ending with public welfare, they aim to eliminate the problem at its source.

Proponents of conditional probation argue that defendant fathers suffer no deprivation from what they view as a temporary limitation on reproduction.<sup>100</sup> While sexual activity itself cannot be controlled, its outcomes can. When judges state that imprisonment of serial fathers depends on repayment of child support, they proclaim objectivity. In reality, however, the real possibility of the father ever repaying the full debt is either impossible or unreachable.

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*and Undermines the Health and Well Being of Children and Families*, 5 J.L. SOC’Y 11 (2003).

98. *Statistics*, *supra* note 93 (providing that as of October 2013, a total of 4,688 people were paid to undergo permanent or long-term birth control: 2,682 white, 1,007 black, 559 Hispanic, and 440 other).

99. Peal, *supra* note 92, at 241.

100. Jim Hannah, *Vasectomy Policy Raises Questions*, CINCINNATI ENQUIRER, June 27, 2004, at A1 (illustrating a judge offering men with substantial delinquent child-support payments the option to get vasectomies rather than jail time); Dee McAree, *Deadbeat Dads Face Ban on Procreation*, NAT’L L.J., May 31, 2004, at 4.

No public or private agency can force pregnant women to have abortions, which would be constitutionally suspect.<sup>101</sup> In addition, they cannot forcibly sterilize prolific and serial fathers without encroaching upon fundamental rights.<sup>102</sup> There is no sound basis to restrict the reproductive capacities of adult citizens based on their social class, employment status, sexual activity, racial origin, or marital status. But states do have an interest in the welfare of children—existing children—to ensure basic support and care. Conditional reproductive probation amounts to constructive sterilization—blocking reproduction in the interest of “protecting society.”<sup>103</sup> This reifies the ethically suspect practices of eugenics, even though judges refrain from condemning serial fathers to actual sterilization. It is a tenuous and dangerous link that reifies the suspect goals of selective breeding and population control. Most notoriously, this granting power is left entirely to judicial discretion, which allows judges to decide individually and selectively the right to procreate. Even in the most egregious cases of serial paternity, defendant, nonpaying fathers still possess fundamental rights. Restricting their ability to have future children does nothing to promote the welfare of existing children that progressively demand support and care. Such restrictions, while justified by state courts as narrowly tailored to the best interests of the child, simply fail to improve the conditions of living children. Breaching this inviolable liberty, even in cases that appear to warrant it, rehashes the dark and dangerous ghosts of eugenics.

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101. *United States v. Virginia*, 518 U.S. 515, 545-46 (1996) (holding that Virginia could not exclude women from a Virginia military college); *Roe v. Wade*, 410 U.S. 113, 153-55 (1973) (recognizing a right to bodily autonomy).

102. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942); *In re Eberhardy*, 307 N.W.2d 881, 891 (Wis. 1981).

103. *Buck v. Bell*, 274 U.S. 200, 207 (1927).