The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender

C. Albiston

Berkeley Law

Follow this and additional works at: http://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

C. Albiston, The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender, 9 Berkeley Women's L.J. 9 (1994)
The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender

Catherine Albiston†

And they had the operation voluntarily, for the good of Society.¹

We protect [these] rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of the individual’s life.²

I. INTRODUCTION

Children are not faring well in America these days. A significant proportion of children live in poverty,³ schools are becoming sites of violence rather than learning,⁴ and “the decline of the American family” figures prominently in the news.⁵ The prevalence of child abuse and neglect is one of the most disturbing trends affecting children’s lives.⁶ Although many

¹ ALDOUS HUXLEY, BRAVE NEW WORLD 7 (1946).
³ One in five American children lives in poverty. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 24 (1991) [hereinafter BEYOND RHETORIC].
⁵ See generally Barbara Dafoe Whitehead, Dan Quayle Was Right, THE ATLANTIC, Apr. 1993, at 47.
⁶ BEYOND RHETORIC, supra note 3, at 281.
child abusers are men,\textsuperscript{7} prosecutorial attention and judicial intervention increasingly have focused on women who abuse their children. Evidence of this is the increased prosecution of women for drug use during pregnancy.\textsuperscript{8} In the criminal justice context, policy makers, prosecutors, and judges addressing the problems of child abuse and drug use during pregnancy have chosen the moment prior to conception as the appropriate point of intervention, thanks to the advent of a contraceptive device called Norplant. Accordingly, some courts recently have required Norplant as a condition of probation for child abusers and for women who used drugs while pregnant.\textsuperscript{9}

Norplant consists of six matchstick-size silicone capsules implanted under the skin of a woman's upper arm. These capsules suppress ovulation and inhibit fertilization through the release of hormones. Implanting the contraceptive requires a local anesthetic and takes approximately fifteen minutes. Norplant is extremely effective, with a failure rate lower than that of oral contraceptives.\textsuperscript{10} It remains effective for five years after implantation or until the capsules are removed.\textsuperscript{11}

Norplant has both financial and medical drawbacks. The initial implantation cost for Norplant is relatively high—$365 for the capsules themselves and from $150 to $500 for the implantation procedure.\textsuperscript{12} Removal costs are also high—$150 to $300,\textsuperscript{13} or more depending on complications. The medical side effects of Norplant include headaches, depression, nervousness, enlargement of the ovaries and/or fallopian tubes, inflammation of the skin, weight gain, inflammation of the cervix, nausea, dizziness, acne, abnormal hair growth, tenderness of the breasts, and prolonged or irregular bleeding.\textsuperscript{14} Norplant is contraindicated for women who suffer from heart disease, kidney disease, liver disease, diabetes, or high blood pressure.\textsuperscript{15} Furthermore, Norplant capsules that are not removed after their five-year contraceptive life put the woman at risk of ectopic pregnancy and continue to interfere with the woman's fertility.\textsuperscript{16}

\begin{itemize}
\item In one study conducted by the Women's Safety Project, 96% of the perpetrators of child abuse on girls under 16 were men. \textit{Violence Against Women, Toronto Star}, July 30, 1993, at A23.
\item Norplant has a higher pregnancy-prevention rate (99%) than oral contraceptives (94%). Reshma Menon Yaqub, \textit{The Double-Edged Sword of Norplant}, \textit{Chi. Trib.}, Jan. 24, 1993, at 11.
\item \textit{Id.}
\item \textit{Id.}
\item Removal can cost as much as $300 and may also be very painful. \textit{Norplant's Side Effects Lead Women to Remove Device} (CNN television broadcast, Apr. 25, 1992).
\item Brief summary of Prescribing Information for the Patient, advertisement for Norplant in \textit{Glamour}, May 1992, at 172.
\item \textit{Id.}
\end{itemize}
The unique characteristic of Norplant is that it removes virtually all control over contraception from the woman. In fact, it is this lack of control that makes Norplant an attractive coercive device. Once it is implanted, it does not require daily pill-taking or actions at the time of sexual activity, nor can it be discontinued without the advice and assistance of a physician. Norplant is a contraceptive that is susceptible to coercive use because it does not depend on the cooperation of the woman.17

Norplant has been used to further social policy goals in part because it may be controlled by the provider. States have taken advantage of this aspect of Norplant by promoting its use among certain targeted groups. The choice of which groups to target for state mandated or sponsored uses of Norplant suggests which women's reproductive rights the state wishes to control. Some states have considered incentives or requirements for women receiving public aid to use Norplant, although none of these bills has been signed into law.18 In addition, Medicaid now covers Norplant in all fifty states, despite the initial concern over the racist implications of limiting the birth rate of Medicaid recipients.19 Some inner-city high schools with high rates of student pregnancy offer Norplant to students as a contraceptive choice.20 The common thread among these various programs is that they target poor women of color.21

While these social programs concern voluntary use of Norplant, increasingly Norplant has been used in more coercive ways. Judges have imposed Norplant as a condition to probation for women convicted of drug use or child abuse. These women face a choice between prison or a five-year curtailment of their reproductive freedom. Norplant as a condition of probation may seem less objectionable than other Norplant policies.
tion conditions are imposed only on individual women convicted of child abuse or drug use while pregnant, whereas other social policies attempt to control the reproductive rights of poor women of color without the justification of individual culpability. Many proponents of the use of Norplant as a condition of probation argue that women who have been convicted of abusing a child or using drugs while pregnant have failed at parenting and, as a result, do not deserve to have additional children.\textsuperscript{22} Norplant is considered less objectionable than sterilization because it is reversible and less physically intrusive than tubal ligation.\textsuperscript{23} It also may save the government the costs of caring for children damaged by abuse and drug exposure in vitro.

The particular factual circumstances of cases where Norplant has been imposed, however, are disturbing. One defendant agreed to Norplant as a condition of her probation with little information about its health consequences, no consultation with a doctor, and without the presence of her lawyer. When she later appealed on the grounds that the probation condition violated her constitutional rights and that Norplant would complicate her preexisting health conditions, the judge denied her motion, finding that she had given informed consent.\textsuperscript{24} Another defendant was unable to tolerate the side effects of Norplant, and had her implants removed. She then obtained a tubal ligation because she believed permanent sterilization was the only way to avoid violating her probation and risking imprisonment.\textsuperscript{25} Both these women had no prior record of child abuse.\textsuperscript{26}

The systemic implications of the Norplant policy are even more disturbing than these individual cases. Although the application of Norplant as a condition of probation seems impartial, poor women of color are most likely to receive the condition because institutional biases make them most likely to be prosecuted for child abuse and drug use during pregnancy. Furthermore, the seemingly impartial application of Norplant as a condition of probation hides how this policy derives from and reinforces stereotypes of poor women of color. The Norplant policy resonates with racist and sexist stereotypes such as the welfare queen, the "evil" woman, and the inadequate mother. Moreover, the enthusiasm for the Norplant policy has precluded offering less punitive, more supportive means for addressing the problems of child and drug abuse. Thus, the Norplant policy confirms


\textsuperscript{24} See Arthur, \textit{supra} note 9, at 16-17. Though the defendant had high blood pressure, heart murmurs, and diabetes, these conditions—all of which contraindicate Norplant use—did not affect the judge’s decision that she had given informed consent to Norplant, although her consent was informed by neither her doctor nor her lawyer. \textit{Id.} at 17.

\textsuperscript{25} Rosenblum, \textit{supra} note 9, at 276.

\textsuperscript{26} See id. at 276; Persels, \textit{supra} note 23, at 260.
racist stereotypes and absolves society of responsibility for child and drug abuse by defining the problem as the personal moral failing of poor women of color.\textsuperscript{27}

Whether or not social recognition of the systemic nature of child and drug abuse is forthcoming, constitutional guarantees force a reconsideration of whether Norplant as a condition of probation is an acceptable solution to these problems. Because the Norplant policy targets the procreative liberty of poor women of color, it raises serious concerns under both the Equal Protection and Due Process clauses of the Fourteenth Amendment.

Part II of this article outlines the historical and social factors that affect which women risk receiving Norplant as a condition of probation. Part II also addresses the social meaning of the Norplant policy in terms of the stereotypes it reinforces and the societal responsibilities it ignores. Part III discusses the Equal Protection implications of Norplant as a condition of probation and the trifurcated approach that equal protection doctrine takes to the identities of poor women of color. Part IV discusses the due process limits on probation conditions that infringe on the fundamental right of procreative liberty. The final section of Part IV discusses how equal protection doctrine must inform the due process fundamental rights analysis and offers a new constitutional theory that combines liberty and equality concerns to protect poor women of color from impermissible burdens on their procreative liberty.

II. Social and Historical Context of the Norplant Policy

Perhaps because the American criminal justice system focuses on individual responsibility for discrete criminal acts, policy debates rarely consider the historical and social forces influencing selection of probation conditions. However, Norplant as a condition of probation resonates with historical discrimination against certain subgroups of American society and has significant social implications that have been ignored. Society readily accepts prevention of pregnancy as a solution to child abuse because controlling the reproductive capacity of women of color is an historically accepted practice. Furthermore, the Norplant policy's focus on individual responsibility diverts attention from the systemic causes of child abuse, such as poverty, drug use, and the lack of institutional supports for families.

The following sections address the social context of the Norplant policy. As I will explain, this context includes the discriminatory prosecution for child abuse, the reinforcement of racist and sexist stereotypes, and the failure to address the systemic causes of child abuse. By ignoring this social context, courts also have failed to consider the health risks of Norplant for poor women of color. Courts have given inadequate consideration

\textsuperscript{27} See Arlene Skolnick, \textit{Embattled Paradise} 201 (1991).
to probationers' interest in retaining their dignity and autonomy with respect to their reproductive capacity. Elaboration of social context develops the social meaning of the Norplant policy, which is a crucial tool in the constitutional analysis.

A. Discriminatory Prosecution of Poor Women of Color

Evaluation of the Norplant policy requires considering how race and class affect who is prosecuted for child abuse and drug abuse. A number of factors make poor women of color more likely than other women to be prosecuted for drug use and child abuse. First, because poor women of color are more likely to be under government supervision through public hospitals and welfare agencies, their drug use or child abuse is more likely to be discovered. Second, the racist attitudes of some health care professionals and social workers cause them to disproportionately report women of color to the authorities. Third, prosecutorial efforts focus on the drugs used primarily by poor women of color, even though drugs used by white women, such as alcohol and marijuana, also harm fetuses when used during pregnancy.

Institutional factors skew prosecution toward poor women of color, because their conduct is more likely to be scrutinized. Poor women of color experience greater governmental intrusion on their privacy because they rely on welfare agencies for economic support and public health facilities for health care. Reliance on governmental institutions subjects them to a heightened level of scrutiny of their parenting, as well as the racist application of neglect statutes and racist inferences about women of color's future child-rearing behavior. By increasing scrutiny of parenting, institutional reliance implicitly raises the standard of adequate parenting for poor women of color relative to women who can afford not to rely on these agencies. Thus, women of color's reliance on public institutions raises the threshold at which they will be prosecuted for child abuse, particularly

---

28 Minority status is strongly correlated with poverty. "Black women are five times more likely to be in poverty, five times more likely to be on welfare, and three times more likely to be unemployed than white women." UNITED STATES COMM'N ON CIVIL RIGHTS, THE ECONOMIC STATUS OF BLACK WOMEN 1 (1990).

29 Because race and poverty are strongly correlated, a greater percentage of black women than white women receive AFDC payments than white women, although the majority of welfare recipients are white. Clarence Page, Forget the Numbers—Poor is Poor, and Most Poor Americans are White, HOUS. CHRON., Sept. 9, 1992, at B11. Welfare recipients are subjected to severe invasions of their privacy which may increase the likelihood they will be reported to Child Protective Services. Michael Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 STAN. L. REV. 623, 629 (1976). Child Protective Services, in turn, evaluates the potential harm to the child partially on the race of the mother. See infra, note 65.

in circumstances where economically privileged women are protected by the privacy that money can buy.

Race and class also affect which women are reported to authorities for drug use or child abuse. Even where the rates of detection in white and black populations are the same, black women are reported for drug use far more often than white women. For example, a recent study published in the New England Journal of Medicine found that although rates of drug use by black women and white women were the same, black women were reported for their drug use ten times more often than white women.\textsuperscript{31} Class is also a factor. Economically privileged social workers and health care professionals are more likely to report child abuse by poor parents because these professionals tend not to believe that parents in their own economic class abuse their children.\textsuperscript{32} In contrast, private family physicians may protect middle- or upper-class white women from prosecution by refusing to report their drug use or child abuse.\textsuperscript{33}

Finally, while not every drug harmful to fetuses triggers prosecution, those that do are associated with lower economic status and inner-city minority communities. Poor women of color are targets of prosecution for drug use because of the drugs they use. Prosecutors concerned about maternal substance abuse harmful to the fetus have focused on crack use, which is more prevalent in inner-city minority communities than in white suburbs where cocaine may be the drug of choice.\textsuperscript{34} In fact, crack use carries a higher criminal penalty than cocaine use, although chemically the drugs are the same substance in different form.\textsuperscript{35} Prosecutors largely ignore the damage to fetuses from drugs such as alcohol and marijuana, more likely to be used by white, middle- to upper-class women,\textsuperscript{36} even though the incidence of both these types of substance abuse is similar to that of crack abuse.\textsuperscript{37}

\textsuperscript{31} Ira J. Chasnoff et al., \textit{The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida}, 322 \textit{New Eng. J. Med.} 1202, 1205 (table 3) (April 26, 1990).

\textsuperscript{32} See Kathleen Coulborn Faller & Marjorie Ziefert, \textit{Causes of Child Abuse and Neglect}, in \textit{Social Work with Abused and Neglected Children} 32, 46-47 (Kathleen Coulborn Faller ed., 1981) (explaining that poor women are likely to use community agencies, which are more inclined to comply with child abuse and neglect reporting laws than are private facilities).

\textsuperscript{33} The use of controlled substances among women of reproductive age does not vary with socioeconomic status. Chasnoff, \textit{supra} note 31, at 1204. However, private physicians who serve more affluent women perform less infant toxicology screening, "because they have a financial stake in both retaining their patients' business and securing referrals from them, and because they are socially more like their patients." Roberts, \textit{supra} note 30, at 1433. Moreover, women who do not deliver their children at inner-city public hospitals, where testing is nearly universal, are likely to evade detection. Michelle Oberman, \textit{Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs}, 43 \textit{Hastings L. J.} 505, 522-23 (1992).

\textsuperscript{34} Roberts, \textit{supra} note 30, at 1435.


\textsuperscript{36} Roberts, \textit{supra} note 30, at 1435 nn.84-85.

\textsuperscript{37} Elisabeth Rosenthal, \textit{When a Pregnant Woman Drinks}, \textit{N.Y. Times}, Feb. 4, 1990, § 6 (Magazine), at 30, 49 (citing a 1989 study of more than 2,000 highly educated women indicating that 30% had more than one drink per week while pregnant). One study indicated white women test positive for marijuana use more often than black women. Chasnoff, \textit{supra} note 31, at 1204 (table 2).
B. Stereotypes of Poor Women of Color

The choice of Norplant as a means of protecting potential fetuses does not occur in a cultural vacuum. Stereotypes of poor women of color, particularly black women, make Norplant appear to be an appropriate criminal penalty. Although these stereotypes have historical origins, they continue to be played out in social policies and re-emerge in modern interpretations. The stereotypical images of poor women of color that permeate our culture may influence sentencing decisions in a manner hidden within the broad discretion judges enjoy in making such decisions. Stereotypes influence predictions of future behavior made in child abuse cases—that is, that poor women of color are more likely to abuse children than white women. In addition, stereotypes drive assessments that poor women of color prosecuted for drug use while pregnant are likely to be sexually active in the future and unlikely to use other forms of contraceptives. Finally, judges may use these stereotypes to make normative judgments about whether a woman qualifies as a socially acceptable mother.38

Stereotypes of women of color must be carefully evaluated to appreciate the cultural force they bring to bear on judicial decisions.39 One stereotype of women of color, particularly black women, is sexual promiscuity. Historically, black women have been viewed as “sexual savages, the embodiment of female evil and sexual lust, jezebels and sexual temptresses.”40 The popular myth is that “all black women [are] eager for sexual exploits, voluntarily ‘loose’ in their morals and, therefore, deserve[ ] none

---


I want . . . to make it clear that one of the reasons I am making this order is you’ve got five children. You’re thirty years old. None of your children are in your custody or control. Two of them are on AFDC. And I’m afraid that if you get pregnant we’re going to get a cocaine or heroin addicted baby.

Id. at 267. Given the monetary and psychological costs of appeal, it seems likely that judges may consider many inappropriate factors in imposing the Norplant condition without fear of challenge.

39 While different stereotypes apply to different ethnic backgrounds, for the most part the dominant ideology portrays women of color in a negative light. Moreover, over time stereotypes of women of color from different ethnic groups begin to bleed into one another. It is not my intention to lump the racially diverse experiences of Asian, Hispanic, black, and other women of color together by using the term “women of color.” Rather, I use the construct “women of color” to signify women whom society defines as both “other” and subordinate by virtue of their race.

40 BELL HOOKS, AIN’T I A WOMAN 33 (1981). The image of black women as wanton dates from slavery and racist attempts to deal with the aftermath of its abolishment. Victorian prudishness led critics of slavery to describe the sexual exploitation of black women slaves as “prostitution.” The euphemism perpetuated the myth that “black females were inherently wanton and therefore responsible for rape.” Id. at 33-34. After slavery was abolished, whites “perpetuat[ed] the myth that all black women were incapable of fidelity and sexually loose, . . . hop[ing] to so devalue them that no white man would marry a black woman.” Id. at 61.
of the consideration and respect granted to white women."41 Black women have been singled out and judged as more immoral that other groups of women.42 Media images of black women as whores, sluts, and prostitutes continue today.43 Moreover, stereotypical images of blacks as lazy, unintelligent, immoral, ignorant, criminal, shiftless and lascivious are opposed to corresponding positive images of whites, so that race becomes the referent for a number of personal characteristics.44

These racist and sexist45 stereotypes of the promiscuity and personal irresponsibility of women of color have long supported repression of their fertility. Women of color historically have experienced systematic sterilization abuse and attempts to cut off their reproductive rights.46 In the 1970's, illiterate black welfare recipients were tricked into consenting to the sterilization of their teenage daughters by public assistance officials.47 Doctors demanded that black Medicaid patients consent to being sterilized before agreeing to deliver these women's babies.48 Today, classism and racism cause some doctors to urge sterilization on patients they feel are incapable of using other methods.49 Doctors also recommend hysterectomies for women they perceive as having too many children.50 Since poor women have no alternative to publicly funded health services, which do not provide abortions, subtle coercion by public health providers may convince poor women that sterilization is the only alternative to the degrading and inadequate reproductive health care provided by publicly funded sources.51

The Norplant policy plays on a modern incarnation of this stereotype of women of color as promiscuous and irresponsible: the "welfare queen" who lives a life of leisure on the taxpayers' money and has more children in order to collect a larger welfare check.52 Although the welfare queen image

---

41 Gerda Lerner, The Myth of the "Bad" Black Woman, in BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 163, 163 (Gerda Lerner ed., 1972) [hereinafter BLACK WOMEN IN WHITE AMERICA].
42 Elsie Johnson McDougald, In Defense of Black Women, in BLACK WOMEN IN WHITE AMERICA, supra note 41, at 169, 170.
43 "One has only to look at American television twenty-four hours a day for an entire week to learn the way in which black women are perceived in American society—the predominant image is that of the 'fallen' woman, the whore, the slut, the prostitute." HOOKS, supra note 40, at 52. See also Nell Irvin Painter, Hill, Thomas, and the Use of Racial Stereotype, in RACE-ING JUSTICE, EN-GENDERING POWER 200, 209-10 (Toni Morrison ed., 1992).
45 Painter points out that the "imagery of sex and race . . . does not work in identical ways for black women and men . . . ." Painter, supra note 43, at 207-08.
47 Id. at 46.
48 Id.
49 Id. at 47.
50 Id. at 48.
51 Id. at 47.
52 See Painter, supra note 43, at 201. Painter describes how Clarence Thomas used the image of his sister as a lazy deadbeat on welfare as a contrast to his own industriousness to increase his credibility as a black man and decrease the credibility of Anita Hill as a black woman. Painter notes that Thomas' sister was in fact "only on welfare temporarily and . . . was usually a two-job-
was popularized by Ronald Reagan, its racist assumptions have filtered into reproductive policies. For example, some clinics in Oakland, California provide brochures on Norplant in Spanish, but not in English. The director of the National Latina Health Organization notes that availability only in Spanish reflects the stereotype that “Spanish-speaking women have too many children, they’re all on welfare and are a drain on the economy . . .” In addition, commentators accept the welfare queen ideology and suggest that Norplant is a fast, easy, cost-effective means to prevent the birth of additional children to “the underclass.” Finally, the welfare queen image affects judicial decisions. One judge who imposed Norplant as a condition of probation specifically noted the defendant’s status as a welfare recipient and mother of illegitimate children, indicating the welfare queen stereotype influenced his decision.

The Norplant policy seems acceptable, in part, because it reinforces another image of black women in American society: the Sapphire image. This negative stereotype of women of color originates in the image of the female as inherently evil. Sapphires are “depicted as evil, treacherous, bitchy, stubborn, and hateful . . .” and become “the scapegoats for misogynist men and racist women who [need] to see some group of women as the embodiment of female evil.” The Norplant policy adopts this stereotype by focusing on the personal responsibility of “evil” women who abuse their children. Because the Norplant policy takes an individual, punitive approach to the problem of child abuse and drug use during pregnancy, it scapegoats women of color, shifting the blame for these social ills to their shoulders. Scapegoating women of color absolves society of any responsibility for addressing systemic problems such as racism and poverty that contribute to child abuse and drug addiction.

One role into which women of color are not typecast is that of motherhood. Historically, women of color, particularly black women, have been devalued as mothers. Dorothy Roberts describes a popular mythology holding, minimum-wage-earning mother of four.” Thomas’ sister went on welfare to care for an aunt who had suffered from a stroke, while he as the privileged male child was sent to private schools. Id. at 201-02. See Skolnick, supra note 27, at 217.

Id. at 201-02. See Skolnick, supra note 27, at 217.
53 Jacobs, supra note 17, at 1 (quoting Luz Alvarez Martinez, director of the National Latina Health Organization in Oakland, California). Charon Asetoyer, director of the Native American Women’s Health Education Resource Center in South Dakota, said that she has heard from dozens of Native American women that they were not advised about the side effects associated with Norplant. When some of them sought to have the capsules removed, their doctors discouraged them or flat out refused. Id.

54 See Mertus & Heller, supra note 18, at 374 n.75.

55 Poverty & Norplant: Can Contraception Reduce the Underclass?, supra note 18, at A18.


57 The Sapphire image was popularized by the famous radio show Amos ‘n’ Andy, in which the character Sapphire is the nagging, shrewish wife of Kingfish. hooks, supra note 40, at 85.

58 Id. See generally Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 539 (1989).

59 hooks, supra note 40, at 85.

60 This is a perverse expansion of the dynamic that hooks notes: white women used the image of the evil sinful black woman to emphasize their own innocence and purity. Id.

61 Roberts, supra note 30, at 1436-44.
that degrades black women and portrays them as less deserving of motherhood. This mythology has its roots in the brutal denial of black women’s reproductive autonomy during slavery, during which “black women’s childbearing was . . . largely a product of oppression rather than an expression of self-definition and personhood.” Past sterilization abuse of poor women of color indicates a belief on the part of health care workers that poor women of color are not adequate mothers. Today, poor women of color continue to be devalued as mothers, often losing custody of their children through the arbitrary and discriminatory application of child abuse and neglect standards.

Roberts makes the compelling argument that prosecution of drug addicts who have babies punishes women of color for having children. According to Roberts, pregnancy is the underlying rationale for these prosecutions, because pregnant women receive harsher sentences than drug-addicted men or women who are not pregnant, and because criminal charges are brought against pregnant women for conduct that is legal but harms the fetus. Roberts questions the rationale of fetal protection offered by prosecutors, given the historical lack of concern over the welfare of children of color, and connects the prosecution of drug-addicted pregnant women to the tradition of devaluing women of color as mothers.

Given this history of devaluing women of color as mothers, it is not surprising that the judicial remedy to these problems is the prevention of motherhood. When sentencing a poor woman of color convicted of child abuse, a judge has broad discretion with the potential to make inferences based on these stereotypical images. Stereotypes of women of color as lascivious, sexually insatiable, and loose may drive the inference that a probationer is likely to become pregnant again. Stereotypes of women of color as lazy, childlike, and stupid drive the inferences that they cannot or will not use other means of birth control, and that a contraceptive such as Norplant that removes control from the woman herself is the only effective and appropriate solution. The historical devaluation of women of color as mothers enables the conclusion that they do not “deserve” to be parents.

---

62 Id. at 1436.
63 Id. at 1437. Roberts offers the powerful illustration of slaveowners who forced pregnant women to lie face down in a depression while they were whipped, allowing the master to protect the fetus, their property, while abusing the mother. Id. at 1438.
64 See supra notes 45-51 and accompanying text.
65 Wald, supra note 29, at 640-41. “Neglect standards have been applied in an arbitrary, even discriminatory manner. . . . Of special concern is the fact that neglect laws appear to be applied more stringently in cases involving poor parents than in those involving middle class parents. Numerous commentators have criticized juvenile courts as biased against or insensitive to minority cultures and values as well.” Id.
66 Roberts, supra note 30, at 1445.
67 Id.
68 Id. at 1446. “When a society has always closed its eyes to the inadequacy of prenatal care available to poor Black women, its current expression of interest in the health of unborn Black children must be viewed with suspicion.” Id.
69 See supra note 38.
Furthermore, as the Norplant policy professes to "protect" children of color by preventing their conception, it resurrects the historical sterilization abuse of women of color and its eugenic goals.

C. Norplant Cannot Replace Institutional Supports for Poor Families

The context in which child abuse and drug addiction occur is often overlooked in the Norplant debate. This context includes a host of psychological, sociological, physiological, and economic factors that shape the lives and choices of poor women of color. Ignoring these factors in framing a solution to child abuse and drug addiction precludes reaching the roots of these problems. As Michelle Oberman has noted, "to the extent that [the probationer's] actions were responsive to her environment, were inevitable and perhaps even rational, similar actions will be repeated over and over again by women like her." 70

Poor women of color face the formidable challenge of raising children without the basic supports on which most middle-class families depend. Women of color are more likely than white women to be single parents, raising their children in poverty, and without adequate health or child care. Furthermore, some of the social institutions ostensibly designed to assist poor women perpetuate this status. Welfare agencies require that no man, particularly one with a job, live in the household with the mother of the child receiving AFDC benefits.71 Medicaid benefits do not provide for abortions, and until recently, federal regulations prohibited health care providers from even informing women of this option.72 Federal and state assistance for child care generally consists of tax credits, which primarily benefit the middle class. Across race and class boundaries, an epidemic of fathers who fail to pay child support is sweeping the country, and little is being done to enforce support orders or replace unpaid support. Thus, social institutions offer little help to families that do not fit the traditional model of one wage earner and one stay-at-home parent, living on a middle-class income.73

Child abuse and drug use during pregnancy are in part products of this social context of poverty and minimal institutional support. The burdens of poverty, added to the normal pressures of parenthood, contribute to child abuse and neglect.74 The lack of affordable childcare sometimes presents a

---

70 Oberman, supra note 33, at 506.
71 The Clinton Administration has proposed new regulations to change the anti-family aspects of welfare regulations. Jason de Parle, Expanding Aid for 2-Parent Homes, N.Y. Times, Dec. 10, 1993, at A18.
73 Families with a working father and housewife mother comprise one-third of American families. Skolnick, supra note 27, at 205.
74 High levels of stress, induced by factors such as financial problems, job-related problems, health problems, and social isolation, are associated with parents who abuse their children. Michael S.
working poor woman with the choice of losing a job necessary for survival or risking charges of child neglect for leaving a young child home alone while she is at work. Rape or prostitution, which is often induced by the need to support a drug addiction, when coupled with an inability to obtain or use contraception, may lead to pregnancy while using drugs. Once pregnant, lack of money or other barriers to obtaining an abortion may force a woman to continue that pregnancy. This situation is exacerbated by the fact that these women cannot seek help for child abuse and drug addiction, because health care professionals are likely to report them. Furthermore, most drug treatment facilities refuse to take pregnant addicts, and prenatal care for drug addicts is virtually unattainable. In addition, most treatment programs are ill-equipped to deal with the particular psychological correlates of women's drug use, because, in part, treatment methods are based on a male model. Thus, characterizing the source of the problem as women who are careless about becoming pregnant while using drugs ignores the institutional and societal forces that contribute to their untenable situation.

D. Health Implications of Imposing Norplant on Poor Women

Examining the social context of the Norplant policy reveals hidden health risks implicated by this use of Norplant. The poor health and inadequate access to health care of poor women create particularly serious risks for the unsupervised use of Norplant as a condition of probation. Norplant is contraindicated for women who suffer from heart or liver disease, diabetes, or blood deficiencies. These conditions often correlate with poverty and race. The side effects of Norplant include headaches, depression, nausea, dizziness, acne, abnormal hair growth, tenderness of the breasts, and irregular bleeding. Without adequate monitoring and care, these side effects pose a significant threat to the health of any woman. Women who receive Norplant as a condition of their probation for drug abuse have the

76 See supra note 72.
77 See Oberman, supra note 33, at 535-36 (discussing the disincentives for pregnant women who are addicted to drugs or are abusing their children to seek help when it is mandatory for health workers to report such activity).
79 Oberman, supra note 33, at 514-19.
80 Id. at 512 (discussing the psychological differences between male and female addicts); Roberts, supra note 30, at 1448.
81 In fact, Darlene Johnson had high blood pressure. This did not affect the judge's decision that she had given informed consent to Norplant, although her consent was informed by neither her doctor nor her lawyer. Arthur, supra note 9, at 17.
82 Black women are more likely than white women to suffer from high blood pressure and diabetes. BELL HOOKS, SISTERS OF THE YAM 88 (1993).
added health concerns that accompany drug addiction, compounded by limited access to treatment.  

Norplant implanted as a condition of probation also raises concerns about adequate follow-up and removal of the capsules. Norplant capsules that are not removed after their five-year contraceptive life put the woman at risk of ectopic pregnancy, and continue to interfere with her fertility. In one study of the use of Norplant abroad, nearly thirty percent of the participants could not be located for follow-up after only one year. Although women on probation are intended to remain in close contact with their probation officer, in reality the contact tends to be minimal. In fact, those women who have violated their probation have a significant incentive to evade their probation officer, regardless of the risk to their health or welfare. Several poor women who have sought to have Norplant removed because of medical complications have been unable to do so because of the $150 cost. Without government assistance, poverty presents a significant barrier to removal.

E. The Social Meaning of the Norplant Policy

One of the underlying messages of the Norplant policy is that poor women of color and their families are expendable components of society. The use of Norplant as a condition of probation for drug use while pregnant will prevent the defendant from becoming pregnant and giving birth to a drug-exposed baby. Usually framed as “protecting children,” Norplant perversely protects potential fetuses from the behavior of their mothers by preventing their creation. This policy also places little value on protecting the lives of poor women of color. Drug-addicted women often trade sex for drugs and thus are at a higher risk of contracting and dying from HIV. Norplant does not protect women from AIDS. Moreover, by reducing the incentive to use condoms, Norplant reduces the incentives for drug-addicted women to protect themselves from AIDS. The Norplant policy sends the

---

83 See Oberman, supra note 33, at 514-19. In addition to these health concerns, many crack addicts trade sex for drugs or turn to prostitution to support their habit, putting them at increased risk of contracting HIV. Id. at 513.
84 Todd, supra note 16, at H10.
85 In a recent trial of Norplant in Indonesia, 238 women out of 813 were lost to follow-up. Betsy Hartman, Reproductive Rights and Wrongs 198 (1987) (citing Firman Lubis et al., One-year Experience with Norplant Implants in Indonesia, in Studies in Family Planning 14 (June-July 1983)).
87 One California woman was not told about the cost of removal when the capsules were inserted. When she went to a doctor for their removal, he removed one for $75 and told her to return when she had the money for the rest. Other women seeking removal have been discouraged or flat out refused by their doctors. Jacobs, supra note 17, at 14.
88 Oberman, supra note 33, at 513.
message that so long as drug addicts do not burden society by giving birth to damaged children, they are disposable. Reva Siegel, Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 344 n.340 (1992) ("If the mother wants to smoke crack and kill herself, I don't care, [said a police sergeant], Let her die, but don't take that poor baby with her.").

Thus, Norplant as a policy to prevent drug abuse during pregnancy discounts the worth of both women of color and their children.

Rather than supporting families and children's welfare, the Norplant policy implies the destruction of already existing families. Since Norplant does nothing to prevent the abuse of children already born to the probationer, using Norplant to prevent child abuse implicitly requires the removal of the probationer's present children.90 Requiring the use of Norplant coupled with removing existing children from the probationer's home is not necessarily a policy that prioritizes children's welfare. Separation from their parents has an extremely negative impact on children, even where the parents are abusive.91 Additionally, children often suffer adjustment problems in foster homes and view foster home placement as punishment for something they did wrong.92 Children are often abused or neglected in their foster care placements and shunted from one foster home to the next.93 The Norplant solution allows the state to neglect options such as counseling or in-home assistance to the mother. Although these options are often rejected as too expensive, the foster care implicit in the Norplant policy costs more than the best in-home programs.94 In addition, research indicates that in-home interventions may be particularly effective for low-income mothers.95 Counseling and other services more effectively protect the welfare of children because they address the concerns of both the present and potential future children of the defendant.

The Norplant policy also makes poor women of color the scapegoats for child abuse and drug addiction while diverting public attention from poverty, racism, and inadequate health care.96 Shifting blame for child abuse and drug addiction to individual women perpetuates the myth that social ills are caused by "bad women," and that society bears no responsibility for the damage done to these children.97 Rather than focusing on the individual's status as a child abuser or drug user, a solution should address the contextual factors that surround child abuse and drug use, such as limited access to prenatal care, unavailability of adequate food, and lack of

---

90 Otherwise the same social supports that allow her to keep her children could be applied to any new children born to her.
91 Children are strongly attached to their parents, and their emotional ties do not distinguish between good and bad parents. Wald, supra note 29, at 644-45.
92 Id. at 645.
93 Id. at 644-46; see also Arthur, supra note 9, at 77-79.
94 Wald, supra note 29, at 646.
95 Wald & Cohen, supra note 74, at 290.
96 Roberts, supra note 30, at 1436.
97 See SKOLNICK, supra note 27, at 217.
adequate shelter and a stable environment. As a policy to prevent harm to children, Norplant is doomed to failure because it neglects the roots of these social problems: poverty, racism, lack of institutional supports for the family, and a failure to effectively deal with drug addiction.

F. The Logical Flaw in the Justification for Norplant: Conflating Child Abuse with Having Children

The primary justification for the Norplant policy is that it protects the welfare of children. The argument is that without Norplant the convicted woman is likely to become pregnant again and abuse the additional child. This argument may seem reasonable because it relies on implicit stereotypes about women of color as: sexually promiscuous and personally irresponsible, thus likely to become pregnant; inherently evil, thus likely to abuse again; and devalued as mothers, thus undeserving of future motherhood. However, the proffered goal of protecting children is undermined by the fact that the Norplant policy fails to prevent abuse of existing children. Moreover, there is an odd logic to protecting future children by preventing their existence.

The foregoing analysis reveals a dangerous assumption underlying the justification for using Norplant as the remedy for child abuse and drug use during pregnancy—that abusing children is synonymous with having children. The fallacy of this assumption emerges when one notices the gender stereotypes on which the Norplant rationale is premised. First, preventing pregnancy is a solution for child abuse only where a woman is presumed to have custody of the child after birth. Thus, the Norplant solution presumes all women, but not men, will be the caretakers of the children they beget. Second, preventing pregnancy as a solution to drug use during pregnancy focuses on the capacity of the woman to become pregnant rather than on her ability to control her addiction. Seen within the framework of stereotypes of poor women of color, the Norplant policy sends the message that it is better not to be born at all than to be born to a drug-addicted woman of color in poverty.

The conflation of abusing children with having children is an unacceptable justification for the Norplant policy that renders the policy unconstitutional under the Due Process and Equal Protection clauses. Norplant as a condition of probation demands an equal protection analysis because it is a gender-specific penalty for child abuse and drug use. Norplant, a female contraceptive, imposes temporary sterilization on women but never on men.

99 As Reva Siegel has noted, "[t]he state can promote the welfare of the unborn in many ways—by means that subject women to state coercion in their capacity as mothers, or by means that support women in their efforts to bear and raise a healthy baby." Siegel, supra note 89, at 345.
The Norplant policy requires a due process analysis because it infringes on the right to procreative liberty by restricting women's reproductive freedom. These constitutional infringements seem related to the state's interest in children's welfare only because the Norplant policy equates the ability to become pregnant with the opportunity to abuse a child.

The following sections examine how Norplant as a condition of probation infringes on constitutional liberties. Part III explores equal protection doctrine as it relates to the Norplant policy, utilizing an expanded interpretation of the intermediate scrutiny standard applied to gender classifications. Part IV undertakes a fundamental rights analysis of the Norplant policy's infringement on procreative liberty. Part IV.A. reviews statutory and constitutional requirements for probation conditions. Part IV.B. discusses how substantive due process rights limit infringement on procreative liberty. Finally, Part IV.C. unites the doctrinal elements of substantive due process and equal protection to impose the requirement of evenhandedness on policies affecting fundamental rights, thereby safeguarding potentially disadvantaged groups.

III. Equal Protection and the Trifurcated Identity

The following discussion examines the implications of the structure of equal protection doctrine for poor women of color seeking to challenge the Norplant policy. I examine how equal protection doctrine makes it difficult to prove the wealth- and race-based classifications implicit in the use of Norplant. I attempt to draw out the assumptions about class and race in the gender discrimination standard, and I examine how current gender-based equal protection doctrine fails to consider the historical infringement on the reproductive rights of poor women of color.

A. The Equal Protection Clause of the Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Historically, the Supreme Court has subjected classifications to three tiers of scrutiny under the Equal Protection Clause. First, racial classifications that burden historically despised or disadvantaged groups are generally considered suspect and are subject to strict scrutiny. To survive strict scrutiny, the legal classification must be necessary to serve a compelling governmental interest. Second, classifications based on quasi-suspect classes such as gender or mental disability are subject to intermediate scrutiny, a standard somewhere between rationality and strict scrutiny. Classifications subject to intermediate scrutiny must be

101 Id. at 216-17.
substantially related to an important government interest.\textsuperscript{102} Classifications that are not suspect or quasi-suspect are subject to rationality review, under which they must be rationally related to a legitimate government purpose. Although occasionally the Court suggests some form of heightened scrutiny may be appropriate for distinctions based on economic classifications,\textsuperscript{103} generally classifications based on wealth are subject only to rationality review.\textsuperscript{104}

In addition to this three-tier structure, where legislation infringes on a fundamental right, the Supreme Court will employ strict scrutiny and require the legislation to be necessary to promote some compelling state interest. Fundamental rights that are independently and explicitly guaranteed by a constitutional provision other than the Equal Protection Clause itself are protected in this manner,\textsuperscript{105} as are some rights considered implicitly granted by the Constitution and important in terms of equality.\textsuperscript{106} The Norplant policy raises the question of whether classifications that impinge on the right to privacy by burdening an individual's reproductive autonomy must be subjected to heightened scrutiny under an equal protection analysis.\textsuperscript{107} This discussion is reserved for Part IV.C. below.

The three levels of scrutiny under equal protection doctrine provide inadequate protection for poor women of color who are the targets of the Norplant policy. The present structure of the doctrine forces a poor woman of color challenging the policy to choose among the legally recognized, and thus protected, elements of her identity. As classifications based on race historically have been subjected to closer judicial scrutiny than those based on gender, a woman's first preference may be to challenge the Norplant policy as racially discriminatory. However, this type of challenge does not address the gender-specific reason that the Norplant policy affects her—that she is capable of carrying a child.\textsuperscript{108} It also does not address the contribu-


\textsuperscript{103} See, e.g., Edwards v. California, 314 U.S. 160 (1941) (striking down, under the commerce clause, a law making it a misdemeanor knowingly to bring a non-resident indigent into the state); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the state must provide indigent criminal appellants with a free transcript of their trial if necessary to their defense). The Court has used heightened scrutiny under the equal protection doctrine to strike down only two sorts of laws disadvantaging the poor: laws denying indigents or non-freeholders the franchise and laws limiting the access of indigents to the state's criminal justice system. Laurence H. Tribe, American Constitutional Law § 16-35, at 1626 (2d ed. 1988).


\textsuperscript{105} See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (protecting the fundamental right to travel).


\textsuperscript{107} This analysis is different from heightened scrutiny under the due process clause. The equal protection analysis inquires first whether \textit{all persons are treated equally} with respect to the exercise of their fundamental right to privacy, not merely whether the state may restrict that right in furtherance of its objectives. The state may well be able to impinge on this right, but because the right to privacy is an important and implicit constitutional right inherent in our conception of individual autonomy, the state must impose its burdens equally on all of its citizens.

\textsuperscript{108} Of course, the Supreme Court does not always find pregnancy to be a relevant, gender-related characteristic. See Geduldig v. Aiello, 417 U.S. 484 (1974); Wendy W. Williams, The Equality
tion her economic class has made to her status as a convicted drug addict or child abuser. Any poor woman of color challenging the Norplant policy will be unable to find an equal protection theory that allows her to press all her race-, class-, and gender-based claims without denying the reality of her identity.

Commentators discuss the Norplant policy as a "women's issue"—that is, Norplant infringes on all women's procreative freedoms, rights to privacy, and reproductive abilities. Indeed, addressing the equal protection implications of the Norplant policy requires recognition that it forms a legal classification on the basis of gender. This approach, however, ignores the fact that the Norplant policy specifically affects poor women of color on the basis of their class, race, and gender.

Challenging the Norplant policy as only a gender classification takes an "essentialist" approach that ignores the contribution of race and poverty to a probationer's experience. Essentialist perspectives presume all women are alike, sharing a common "essence" or certain "essential" traits that differentiate them from men. Some feminists challenge this idea by demonstrating how gender is a social construct. Essentialist conceptions of women rely on a single construct of "woman," abstracted from the experience of white, economically privileged, heterosexual women, and ignore other features such as race, class, and sexual orientation that play important parts in any inquiry regarding equality.

A better, anti-essentialist approach addresses the real differences in women's experiences. An anti-essentialist approach to the Norplant policy recognizes that legal doctrine sometimes ignores how the intersection of race, class, and gender affect both the experiences of women and how women are perceived by others. Recognizing the discriminatory implications of the Norplant policy requires recognition that poor women of color face significant challenges in parenting precisely because of their identity as

---


See, e.g., Persels, supra note 23, at 239.

See infra notes 148-54 and accompanying text.

"Essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela Harris, Race and Essentialism in Feminist Legal Theory, in FEMINIST LEGAL THEORY: FOUNDATIONS 335 (D. Kelly Weisberg ed. 1993); DIANA FUSS, ESSENTIALLY SPEAKING xi (1989).


FEMINIST LEGAL THEORY: FOUNDATIONS, supra note 112, at 217; see also Angela Harris, Race and Essentialism in Feminist Legal Theory, in FEMINIST LEGAL THEORY, supra note 108, at 239-40.

Clare Dalton, Where We Stand, 3 BERKELEY WOMEN'S L.J. 1, 8 (1987).

Cain, supra note 113, at 204-05.

poor women of color. Moreover, these challenges are both quantitatively and qualitatively different from those faced by white, male, or middle-class parents. Current equal protection doctrine, however, has evolved to give different levels of protection to different aspects of identity. The doctrine allows challenges on the basis of race or gender or economic class, but it does not allow for multiple positions of subordination—that is, for the plaintiff to be a woman and economically disadvantaged and a person of color.

B. Wealth- and Race-Based Classifications are Inadequate

As my discussion of the social context of the Norplant policy should make clear, poor women of color have both race- and wealth-based equal protection claims against the use of Norplant as a condition of probation. First, racially discriminatory reporting and prosecution of women of color for child abuse supports a disparate impact claim. Second, the greater vulnerability of poor women to prosecution because of their dependence on public health institutions supports a wealth-based claim. However, both of these equal protection theories will fail under current equal protection jurisprudence. This section briefly sketches the difficulties of establishing these two types of equal protection claims with respect to the Norplant policy.

The opinion in *San Antonio Independent School District v. Rodriguez* articulates the Court's position on wealth classifications. The challenge in that case was to a large disparity in educational spending that depended on whether a child lived in a poor or rich neighborhood. This disparity was directly caused by the state's choice of property tax schemes to fund the public school system. The plaintiffs claimed that the disparity violated the rights of children in poor districts to equal protection of the laws. The Supreme Court held that challenges based on wealth classifications require a precisely defined class of indigents and noted that the plaintiff class in *Rodriguez* was "large, diverse, and amorphous." The Court further held that only where the economic classification affected an absolute deprivation of educational benefit would it be recognized.

Because economic class influences the selection of the women at risk of receiving the Norplant condition, low-income women are likely to be disproportionately affected. Poor parents are more likely to be reported for child neglect than wealthy parents, because the poor are in closer contact with government agencies and because of the discriminatory attitudes of

---

118 Harris, *supra* note 114, at 239-40.
120 Tribe, *supra* note 103, at 1653.
121 411 U.S. at 28.
social workers. It will be difficult to demonstrate, however, that the class of women affected by the Norplant policy will be uniformly economically disadvantaged. Subtle discrimination, rather than an indicator with a clear connection to wealth, drives the selection of which women are reported and prosecuted for child abuse. Moreover, even if a plaintiff class could prove itself to be precisely defined as indigent, a wealth-based classification need only be rationally related to a legitimate government interest to be upheld. Although this test has occasionally been applied with teeth, under more modern interpretations, any connection proffered by the state between the Norplant policy’s objectives and the wealth-based classification will probably suffice.

In contrast to this weak standard of review for economic classifications, classifications that draw distinctions based on race must be substantially related to a compelling state interest to survive constitutional strict scrutiny. A woman of color challenging Norplant as a condition of probation must first prove the existence of a classification based on race. Then, she may challenge the motives and means of the state-imposed classification.

Race is implicated in the Norplant policy because women of color are more likely than white women to be the recipients of the Norplant condition. First, as discussed in Part II, women of color are disproportionately reported and prosecuted for drug use and child abuse. Second, because women of color do not meet society’s image of the ideal mother and their status as mothers is devalued, they are more likely than white women to receive Norplant as a condition of probation. The imposition of Norplant involves an evaluation of the likely future conduct of the woman before the court. Negative stereotypes of women of color as mothers are likely to bias the judge’s evaluation of their future conduct. This is not to say that decisionmakers consciously will use racist standards to impose Norplant as a condition of probation. Potential unconscious racism, however, especially in the context of historical sterilization abuse of and eugenic policies toward women of color, makes it particularly likely that judges will impose this condition on poor women of color.

---

124 Id. at 47.
125 See generally The Supreme Court, 1980 Term, 95 Harv. L. Rev. 91, 157-58 (1981) (requiring an articulated purpose and a fair and substantial relation between objective and means chosen).
126 Id. at 158-59.
127 See generally Roberts, supra note 30, at 1432-36. The majority of women charged with criminal offenses after giving birth to babies who test positive for drugs are poor and black. Id. at 1421 n.6.
128 See Roberts, supra note 30, at 1436-44.
130 See supra notes 38-69 and accompanying text.
132 See supra notes 45-51 and accompanying text.
Although the Norplant policy disproportionately affects women of color, it would be difficult to provide the elaborate statistical evidence of disparate impact necessary under current doctrine to establish that the Norplant policy is a racial classification. The Supreme Court requires careful comparison between the relevant pool from which defendants might have been selected for prosecution and the defendants who were actually chosen.133 If the Court defines the relevant pool as women reported to prosecutors by health care agencies, the racist selection will have taken place before the comparison has begun. Moreover, statistical evidence must be specific to the geographical area and decisionmaker in question,134 and it cannot consist of evidence of general, societal, racial animus.135

Even if the appropriate statistics can be gathered and provided, prosecutorial and sentencing decisions are further insulated from disparate impact challenges because they are inherently discretionary.136 The Court has held that “the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case.”137 Because the Court feels that “discretion is essential to the criminal justice process” and prosecutors traditionally enjoy wide discretion, the Court “demand[s] exceptionally clear proof before . . . infer[ring] that [prosecutorial] discretion has been abused.”138 Thus, Norplant’s imposition as a condition of probation is particularly insulated from a racial, disparate impact challenge because of the added deference to sentencing and prosecutorial decisions.

Even if there were sufficient statistical evidence of the disparate impact of the Norplant policy, disparate impact alone would not be enough to prove a violation of equal protection.139 Present constitutional law requires identification of a perpetrator with discriminatory intent whose actions can be linked to the creation of the injurious classification.140 Racially disparate impact, however, may be enough in some contexts to establish a prima facie case of discriminatory purpose and shift the burden of proof to the defendant to disprove racial animus.141

133 Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) (relevant comparison was to individuals who possess the necessary qualifications, not to the general population).
134 See McCleskey v. Kemp, 481 U.S. 279, 292, 295 n.15 (1987); but cf. id. at 354 n.7 (Blackmun, J., dissenting) (disagreeing with the Court’s finding that the statistical evidence was inadequate to infer discriminatory intent).
136 Trial courts are vested with broad discretion concerning probation conditions. See Arthur, supra note 9, at 33.
137 McClesky, 481 U.S. at 294-95.
138 Id. at 297.
140 See Tribe, supra note 103 § 16-21, at 1514-15.
The assumption behind requiring discriminatory intent for claims of racial discrimination is that society is generally race-neutral and nondiscriminatory, and that only the individual perpetrators of racist acts need be found and punished. Racism, however, is not the isolated acts of misguided individuals, but an unconscious force operating throughout American society. As Charles Lawrence notes, "requiring proof of conscious or intentional motivation . . . disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious." and "places a very heavy . . . burden of persuasion on the wrong side of the dispute."

The present equal protection doctrine with its focus on intent ignores the reality of societal racism. Alternatively, an equal protection theory based on the antisubordination principle would focus on the meaning of a classification in terms of its reinforcement of racial subordination and would therefore better address the racism in prosecutorial and sentencing decisions. Lawrence proposes a new test for racial discrimination that is based on cultural meaning. This test:

would . . . evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors: The actors are themselves part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs.

Although the antisubordination principle is not used in the equal protection standard for race, I argue below that the antisubordination principle does underlie the equal protection standard for gender, which takes into account societal discrimination and the social meaning of gender distinctions in evaluating whether gender classifications are discriminatory. A

---

142 Lawrence, supra note 131, at 322 ("Most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivations."). Derrick Bell addressed the pervasive nature of racism in his book, Faces at the Bottom of the Well. In his allegorical story, The Space Traders, Bell addresses how racist attitudes and practices are built into the American economic structure, social relations, and politics. Derrick Bell, Faces at the Bottom of the Well 158 (1992).

143 Lawrence, supra note 131, at 323.

144 Id. at 319.

145 The antisubordination principle focuses on "break[ing] down the legally created or legally reinforced systems of subordination that treat some people as second-class citizens," as opposed to the traditional antidiscrimination principle that focuses on the state of mind of the perpetrator to eliminate decisions motivated by racial or other unacceptable types of bias. Tribe, supra note 103, at 1515. Equality according to the antisubordination principle means that all people have equal worth, and where the law treats some people as though they are worth less than others, equal protection has been violated. Id. at 1516.

146 Lawrence, supra note 131, at 324.
racialized\textsuperscript{147} gender standard would allow consideration of the racially-linked social and institutional factors, such as poverty, surveillance by government agencies, and racially biased reporting, that affect which women are prosecuted for drug use and child abuse. Moreover, it would recognize the cultural and historical meanings attached to the abuse of the reproductive rights of women of color and the continuing impact of racist stereotypes of these women on the exercise of discretion by judges and prosecutors.

C. Gender

Because gender more precisely defines the class affected by the Norplant policy than race or wealth, a gender-based challenge is more feasible. Courts subject gender classifications to intermediate scrutiny, requiring the classification to be substantially related to an important government interest.\textsuperscript{148} The courts posit that real differences between men and women do exist to justify some gender classifications.\textsuperscript{149} Courts recognize, however, that legislators sometimes create gender classifications based on sexist stereotypes, and as a result, courts have refused to uphold such classifications.\textsuperscript{150} Thus, when applying intermediate scrutiny, courts inquire whether the gender classification stigmatizes women by promoting traditional stereotypes of their roles in society.\textsuperscript{151} These stereotypes include nonpartici-
When probing for traditional gender stereotypes, a court addresses not only the harm to the particular plaintiff in the case, but also the social meaning of the perpetuated stereotype as it affects all women, including those not before the court. Gender classifications which reference traditional stereotypes harm women outside the plaintiff class because they support sexist assumptions used to deny women equal access to the benefits of society. Moreover, stereotypical assumptions regarding women’s roles affect men as well, because they limit the life choices available to both men and women. Thus, a court is concerned not only with the specific outcome in the case before it, but also the social meaning of the gender classification.

Gender-based policies often have social meanings that go beyond the proffered government interests. The inquiry into social meaning extends beyond the government’s proffered justifications for the classification to society’s construction and interpretation of the gender distinction. Moreover, these gendered social meanings are delimited by class and race, as well as by sex. The courts recognize these social meanings when they examine whether society attaches symbolic or traditional meaning to the gender classification being challenged. For example, where employers use concern about reproductive abilities to justify excluding women from work-related roles, a court is likely to find that the gender classification reinforces traditional stereotypes of women belonging in the home and caring for children, rather than participating in the workforce. Thus courts have found gender classifications objectionable, in part, because their social meaning derives from discriminatory gender roles.

---

152 Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (rejecting statutory presumption of female economic dependency as romantic paternalism operating to put women in a cage rather than on a pedestal); see also Stanton v. Stanton, 421 U.S. 7, 14 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); Califano v. Westcott, 440 U.S. 268 (1979) (holding that providing benefits to the dependents of unemployed mothers but not to those of unemployed fathers violates equal protection).

153 Weinberg v. Wiesenfeld, 420 U.S. 636 (1975) (finding that the actual statutory purpose of allowing survivors' benefits to widows but not to widowers was to enable the surviving widow to remain at home to care for a child).

154 "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." International Union, UAW v. Johnson Controls, 499 U.S. 187, 211 (1991). In contrast to the standard for pregnancy discrimination under Geduldig, Johnson Controls challenged pregnancy discrimination under Title VII. Most commentators agree the Court will henceforth interpret equal protection guarantees surrounding pregnancy to be consistent with Title VII. See Oberman, supra note 33, at 527-28; Siegel, supra note 89, at 354.


156 See Siegel, supra note 89, at 335.

157 Id. at 344.

158 The Equal Protection Clause demands “heightened scrutiny of state action directed at certain protected groups to ensure it is free of prejudicial or stereotypical modes of reasoning about them.” Id. at 353.

Because Norplant is imposed only on women, it creates a gender classification in the application of a probation condition. This classification must be substantially related to important government interests in order to be sustained. The primary government interests served by the Norplant policy are rehabilitating the probationer and protecting the welfare of children.\textsuperscript{160} Assuming for purposes of this discussion that these interests are legitimate and important,\textsuperscript{161} the inquiry focuses on the fit between the means, namely the gender classification, and the ends of rehabilitation and child welfare. If the rationale for how the gender classification serves these ends relies on traditional stereotypes of women, it is constitutionally prohibited.

Norplant invokes traditional stereotypes of women because it focuses on their reproductive biology and social role as caretakers of children. In cases involving drug use while pregnant, the Norplant policy focuses on the reproductive ability of women, rather than men, even though the genetic material contributed by a drug-addicted man also could be harmful to the child.\textsuperscript{162} Some may argue that the Norplant policy relies on a real distinction between men and women rather than on a stereotype because only a woman carries a fetus and can harm the fetus while it is in the womb. Those who argue that this danger to the fetus supports greater intervention\textsuperscript{163} fail to acknowledge two problems with their fetal protection theory. First, fetal protection is not a recognized objective of child support statutes and is not supported by most existing statutes.\textsuperscript{164} Second, even if fetal protection were a valid objective, the Norplant policy only protects potential fetuses. The woman is not yet pregnant, and Norplant is actually designed to prevent the fetus' creation. Before there is a viable fetus, the state has no interest in the welfare of the unborn child that can support regulation of the woman's behavior.\textsuperscript{165} With the Norplant policy there is no fetus at all, let alone a viable fetus. Thus, relying on harm that might occur to potential fetuses while in the womb would be a significant extension of child-protec-

\begin{itemize}
\item \textsuperscript{160} See infra notes 248-50 and accompanying text.
\item \textsuperscript{161} See infra notes 248-58 and accompanying text for discussion of these interests in the due process context.
\item \textsuperscript{163} The causal relationship between drug use and harm to the fetus is not clear. Drug use may not always affect the child, and studies of drug use during pregnancy fail to control for other serious health problems such as lack of prenatal care and poor nutrition. See Oberman, supra note 33, at 528-29; Roberts, supra note 30, at 1429-30.
\item \textsuperscript{164} See infra note 257.
\item \textsuperscript{165} Planned Parenthood of Southern Pa. v. Casey, 112 S. Ct. 2791, 2816 (1992) (providing that the state has an interest in the welfare of the fetus before viability, but that this interest does not become compelling enough to justify state regulation until the point of viability).
\end{itemize}
tion laws and an unprecedented invasion of fetal-protection policies into the realm of criminal sanctions.\textsuperscript{166}

In cases involving child abuse, the court imposes Norplant on women not because they have the potential to become pregnant, but because they have the potential to become parents.\textsuperscript{167} The imposition of Norplant on women without equivalent restrictions on men implies that women, and not men, will always be the caretakers of the children they bear.\textsuperscript{168} This inference relies on the traditional stereotype of women as mothers and nurturers, making the classification constitutionally suspect.

By searching for traditional stereotypes of white women, current equal protection doctrine disregards the intersection of race, gender, and class in the Norplant policy. Gender discrimination claims must unidimensionally focus on the gender element to the exclusion of other applicable classifications.\textsuperscript{169} The particular gender stereotypes with which the Supreme Court is concerned, namely nonparticipation in the workforce, a primary role as mother and nurturer, and an identity derived from biological reproductive abilities, are stereotypes of a white, economically privileged woman.\textsuperscript{170} The historical experiences of poor women of color, however, do not match these stereotypes. Only an economically privileged woman would have sufficient family income to allow her to remain home with the children and be delimited as a mother and nurturer. Women of color were forced by their economic circumstances to work to support themselves and their families long before white women began entering the workforce in large numbers.\textsuperscript{171} Moreover, women of color have been historically devalued as mothers and nurturers,\textsuperscript{172} except as caretakers for white children.\textsuperscript{173} Finally, rather than excessive concern over and protection of their biologi-

\textsuperscript{166} See infra notes 204-08 and accompanying text.
\textsuperscript{168} Cf. Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982) (condition of probation requiring man not to father any more children was not sufficiently related to crime of child abuse because it assumed he would have custody of any child he fathered).
\textsuperscript{169} See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. LEGAL F. 139, 141-50 (discussing the doctrinal response to the intersection of race and gender in Title VII claims). Equal protection doctrine requires a similar severing of elements of identity by providing different levels of scrutiny for classifications based on race, sex, and class. See supra notes 108-18 and accompanying text.
\textsuperscript{170} See Crenshaw, supra note 169, at 139-40.
\textsuperscript{171} Hooks, supra note 40, at 82-83. Black women’s participation in the workforce did not, however, change their subordinate status relative to black men. Id. at 79-80 (discussing the racist implications of the matriarch stereotype of black women). See also Gerda Lerner, Making a Living, in BLACK WOMEN IN WHITE AMERICA, supra note 41, at 219.
\textsuperscript{172} See Roberts, supra note 30, at 1436-44; Anonymous, Having a Baby Inside Me is the Only Time I’m Really Alive, in BLACK WOMEN IN WHITE AMERICA, supra note 41, at 313-15. “They came telling us not to have children, and not to have children, and sweep up, and all that. . . . They tell you you’re bad, and worse than others, and you’re lazy, and you don’t know how to get along like others do. . . . [T]hey try to get you to plan your kids, by the year; except they mean by the ten-year plan, one every ten years. The truth is, they don’t want you to have any, if they could help it.” Id. at 313-14.
\textsuperscript{173} Hooks, supra note 40, at 84-85 (discussing the black mammy stereotype).
cal reproductive capacities, women of color have been subjected to systematic sterilization abuse and attempts to cut off their reproductive rights.\footnote{See supra notes 45-51 and accompanying text. Although one exception seems to be the restricted access of poor women of color to abortion (to promote childbirth), this restricted access results in more women choosing sterilization over other methods of birth control because abortion is not available to them as a safety net should their birth control method fail. Laurie Nsiah-Jefferson, supra note 46, at 47.}

With respect to the Norplant policy, current equal protection doctrine looks for the wrong stereotype when evaluating the relation between the gender classification and the government’s interests. The doctrine only evaluates the social meaning of the classification with reference to stereotypes of white women. Searching for traditional stereotypes of white women, however, fails to provide adequate scrutiny for women of color. Equal protection doctrine’s bifurcation of identity forces women of color to bring a challenge based solely on gender, and then imposes a white standard upon them. One might argue that the Norplant policy does not perpetuate traditional gender stereotypes of white women because it does not emphasize protection of reproductive capacity, force women to take on the role of mother and nurturer, or burden a woman’s ability to enter the workforce. In fact, superficially it does just the opposite: it prevents women of color from becoming mothers, allowing them to work without the “burden” of children,\footnote{Women convicted of child abuse most likely abused their own children and thus already have the burden of motherhood.} and protecting them from the more drastic and intrusive step of irreversible sterilization.\footnote{See Persels, supra note 23, at 258 (arguing that Norplant is a better solution than sterilization because it is less intrusive). Arguments such as these overlook the fact that although Norplant is less intrusive, it still unequally burdens the fundamental right to procreate. For fundamental rights analysis, see infra notes 228-86 and accompanying text.}

A more adequate equal protection doctrine would probe for the specific gender stereotypes that derive from and reinforce the historical devaluation of women of color. Once the gender standard is racialized, the relevant inquiry becomes the social meaning of the Norplant policy in reference to stereotypes of women of color. Rather than searching for glorification of motherhood and homelife, a court should look for continued devaluation of the motherhood of women of color. Rather than probing for excessive concern over biological reproductive abilities, a court should look for attempts to cut off reproductive rights and perpetuate sterilization abuse of women of color. Rather than disapproving of inferences that women are weak, sensitive, naive and unfit for the working world, a court should be vigilant against inferences that women of color are sexually promiscuous and evil. Changing the inquiry to match the relevant stereotypes requires recognition of the implicit white, economically privileged stereotypes already embodied in equal protection doctrine.

It is important to note that it does not matter if a particular woman fits the stereotype of women of color, just as it does not matter that most
women actually were primary caretakers of children at the time earlier gender decisions were made. The objective of equal protection is to prevent laws from perpetuating harmful gender roles. The Norplant policy maintains the detrimental stereotypes of poor women of color as welfare queens, inadequate parents, and untreatable drug addicts.177

Racializing the gender standard should make it clear how the Norplant policy resonates with harmful stereotypes of women of color. Just as gender was used as a proxy for the role of nonbreadwinner and primary caretaker of children in traditional gender cases, the intersection of gender and race becomes a proxy for being an inadequate parent, "welfare queen," and immoral drug user in Norplant cases. The Norplant policy makes pregnancy the locus of abuse in both child abuse and drug use cases, and consequently preventing pregnancy becomes the solution. Preventing women of color from becoming mothers, however, perpetuates the eugenic goals of historical sterilization abuse of women of color. The social meaning of preventing the pregnancy of poor women of color is that they and their children are inferior and expendable, and that poor women of color are inadequate to be mothers.

Proponents of Norplant as a condition of probation may argue that the Norplant policy is not directed at all poor women of color, only at those who abuse their children. However, as with traditional equal protection doctrine for gender discrimination, a court must consider the effects of the classification on all women. The social meaning of the Norplant policy also will harm poor women of color who have not been convicted of child abuse or drug use while pregnant. The Norplant policy reinforces racist and sexist stereotypes used to justify sterilization abuse of women of color. Perpetuation of these stereotypes affects policy decisions in reproductive rights legislation which disadvantage women of color and affects the actions of private physicians and social workers. Defining certain women as some-

177 See supra notes 38-69 and accompanying text.
180 See supra notes 38-69 and accompanying text.
181 See Arthur, supra note 9, at 9 n.29 (arguing that Norplant targets an individual who has demonstrated a propensity to harm children). Arthur argues that Norplant is not a eugenic policy because its objective is "not to prevent procreation, but to deny offenders access to children until they can better control their destructive behavior." Id. She does not explain, however, how Norplant denies women access to children already born to either them or another.
182 Compare the cases where men bring gender discrimination cases relying in part on the harm to both men and women caused by traditional gender stereotypes. See, e.g., Weinberg v. Wiesenfeld, 420 U.S. 636, 652 (1975) ("[T]his legislation act[s] to reinforce sex-based stereotypes and in general inhibit[] the exercise, by both men and women, of liberty in the choice of social roles.").
183 David Duke’s proposal may be only the beginning. Other states are also considering incentives for Norplant use among women receiving welfare and statutes permitting Norplant as a condition of probation. See Persels, supra note 23, at 240-43; Coale, supra note 18 at 195-98.
184 See supra notes 45-51 and accompanying text for a discussion of racist and sexist attitudes driving sterilization abuse of women of color.
how “different” and inferior makes infringement of their reproductive freedoms more palatable.  

Just as gender stereotypes that promote images of women as homemakers reinforce social stigmas that prevent women from entering the workforce, gender stereotypes that devalue women of color as mothers perpetuate the social stigma of women of color as irresponsible and “unworthy” parents. This allows continued belief in the theory that child abuse is the result of the actions of “bad” women, and not the responsibility of society as a whole. While a woman who abuses her children cannot be absolved of responsibility, it must be recognized that social conditions and lack of support for her parenting influence her to act in conformity with the stereotype of poor women of color as inadequate parents. The use of Norplant as a punishment reinforces the stereotypes of poor women of color while doing little to further rehabilitation of the probationer or protection of children. The Norplant policy draws attention away from more positive interventions that might break the circle of social bias, abuse, and reinforcement of stereotypes. Norplant as a “solution” precludes provision of better parenting services and support services that benefit women who have not yet abused their children and who may be seeking help. By choosing Norplant, the state places responsibility for the welfare of poor children squarely on the shoulders of poor women, relieving society of responsibility for providing treatment for pregnant addicts, counseling for child abusers, and the financial or emotional support that would facilitate the maintenance of families. Defining poor women of color as bad mothers makes it easier to justify denying them the support necessary to be good mothers, and thus creates a self-fulfilling policy.

It is important to note that although the stereotypes of women of color differ from those of white women, they still reference the same gender factors found in traditional stereotypes: identity defined by the ability to become pregnant and primary responsibility for children. Norplant as a remedy for child abuse and drug use during pregnancy conflates pregnancy with child abuse. It does so because the biological ability to have a child is synonymous in a sexist society with responsibility for the care and welfare of children. As Reva Siegel notes,

185 Roberta Cepko, *Involuntary Sterilization of Developmentally Disabled Women*, 8 Berkeley Women’s L.J. 122, 148 (1993). Cepko notes that judicial opinions allowing sterilization of developmentally disabled women consistently use language distancing the court from these women’s humanity. Defining them as “Other” allows the court virtually to ignore the aspect of fundamental rights analysis that considers the worth of their reproductive rights in comparison to the benefit of the sterilization to their caretakers and the state. *Id.*


187 See generally Oberman, *supra* note 33. “One need not take the position that women are entitled to immunity in their conduct during pregnancy to determine that fetal-protective regulation be subject to the kind of scrutiny that will ensure it is the product of rational and responsible social deliberation.” Siegel, *supra* note 89, at 347.
[w]here the class of women targeted for regulation is defined by criteria associated with norms of gender, race, or class, it is all the more likely that fetal-protection policy reflects tacit assumptions about the women whose conduct is regulated, rather than simple solicitude for the welfare of future generations. Openly normative judgments about women’s maternal conduct that purport to rest on standards which are neutral with respect to matters of gender, race, and class may instead rest on unexamined normative assumptions about the group of women selected for regulation; these same assumptions may tacitly influence the means chosen to protect the unborn.188

Careful examination of the circumstances of abuse cases demonstrates that it is possible to provide means for furthering the state’s interests in rehabilitation and child welfare without impinging on reproductive rights and procreative freedom.189 This is possible, of course, because pregnancy and responsibility and care for children are not the same, they are only conflated by using the shorthand of sexist and racist stereotypes.

Because both white and nonwhite gender stereotypes revolve around pregnancy and care of children, racializing the context in which these factors are considered does not create a different standard for every woman dependant on her race and class. Rather, it simply uses a more sophisticated gender standard by requiring courts to recognize the implicit white, economically privileged stereotype already embodied in equal protection doctrine.

IV. FUNDAMENTAL RIGHTS ANALYSIS

The use of Norplant also raises concerns under the Fourteenth Amendment because it infringes on fundamental rights. Fundamental rights rooted in the Fourteenth Amendment traditionally have been divided into two strands: one stemming from the Due Process Clause, the other originating in the Equal Protection Clause.190 Rights considered “due process” fundamental rights include:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.191

188 Siegel, supra note 89, at 344 (emphasis added).
189 These means include the social supports noted above: treatment of drug addicts, counseling for child abusers, financial or emotional support, day care, or anything else that would facilitate the maintenance of families of color.
Griswold v. Connecticut and its progeny established the right to privacy, which encompasses the right to marry, to procreate, and to terminate pregnancy. The right to privacy extends to some but not all unmarried persons and relationships outside of marriage. Rights considered "equal protection" fundamental rights include the right to vote, the right to interstate travel, the right of access to the courts, and the right to education.

The Norplant policy impinges on the fundamental rights of the probationer by restricting her procreative freedom. In this section, I argue that constitutional and statutory standards severely limit the states' permissible infringement on this right. These standards come from three sources: state statutory requirements for probation conditions, the constitutional requirements of substantive due process, and the constitutional requirement of evenhandedness embodied in the equal protection clause. Part IV.C. explains how both due process and equal protection can be used to resolve the trifurcated identity issues of equal protection doctrine.

A. Probation Conditions Generally

Rules governing probationary conditions generally come from state statutes. Conditions of probation must be reasonable and must be directed toward the goals of rehabilitation and public safety. A condition of probation is unreasonable if it is not related to the offender's crime, relates to conduct which is not in itself criminal, or requires or forbids conduct which is not reasonably related to future criminality.

Probation conditions requiring defendants to refrain from becoming pregnant where the offense is unrelated to pregnancy or children consistently have been found invalid. For example, in People v. Dominguez, the court found a probation condition requiring the probationer not to become pregnant unreasonable because it had no relationship to her crime of sec-

200 See Arthur, supra note 9, at 29.
202 See Arthur, supra note 9, at 37.
ond-degree robbery. Similarly, courts have held that prohibiting conception is not reasonably related to forgery or grand theft and battery.

Even in cases of child abuse, courts have found conditions requiring the offender to refrain from having more children invalid. For example, in Howland v. State, the court held that a condition prohibiting the probationer from fathering a child was only related to his crime of child abuse if he had custody of or access to the child. Because access to the child was foreclosed by other conditions of probation, the restriction on fathering children was invalid.

In addition, considerations of reasonableness are subject to constitutional limitations. Probation conditions are unreasonable where they unduly intrude on the individual's right to privacy and less restrictive alternatives are available for furthering probation goals. For example, in overturning a probation condition prohibiting a convicted child abuser from having children for five years, the court in State v. Livingston held that the condition significantly burdened the probationer's liberty rights and was only remotely related to the crime of child abuse and the rehabilitation and education objectives of probation. Similarly, in State v. Mosburg, the court found that ordering the probationer not to become pregnant unduly infringed on her right to privacy. Moreover, where limiting access to children or providing support and monitoring services to the probationer provide less restrictive means of furthering probation objectives, conditions prohibiting procreation are overbroad and thus invalid.

Because the women subject to Norplant as a condition of probation have been convicted of a crime, the tempting conclusion is that they forfeit their fundamental rights surrounding procreation in exchange for avoiding imprisonment. Indeed, supporters of the Norplant policy have argued that probationers retain only a limited liberty interest, and that this justifies infringement on their rights to privacy and procreative liberty. This conclusion, however, relies on cases that do not address the right to procreative liberty. Indeed, those cases that specifically consider restrictions on con-

---

207 Howland v. State, 420 So. 2d 918 (Fla. App. 1982).
208 Id.
211 People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984) (condition overbroad because the less restrictive means of supervision and removal of custody were available); see also Howland v. State, 420 So. 2d 918 (Fla. App. 1982) (prohibiting defendant from fathering a child is not related to future child abuse if defendant will not have custody or access to that child); Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (removal of custody less restrictive alternative).
212 Persels, supra note 23, at 257.
213 Bartrum, supra note 22, at 1053.
214 See, e.g., Griffin v. Wisconsin, 483 U.S. 868 (1987). Griffin concerned reducing the standard for searches of probationers' home from probable cause to reasonable grounds, implying a reduced
ception in terms of the way they impinge on procreative liberty have consistently held such conditions invalid.215 Constitutional rights may be limited for probationers, but this is justified by the needs of penal administration, not by the probationers' criminal status per se.216 Although probationers remain within the criminal justice system, their rights are not coterminous with those of incarcerated criminals.217 Theories justifying onerous conditions through either consent to probation conditions or waiver of constitutional rights cannot overcome the problems of coercion and lack of informed consent.218 Moreover, even without these difficulties, the state cannot constitutionally condition the granting of the government benefit of probation on the probationer's relinquishment of important constitutional rights.219

Fundamental rights are not automatically forfeited upon violation of the law.220 Past decisions indicate that probationers retain a significant degree of privacy,221 and that probationers' right to procreative liberty continues to act as a check on probation conditions. Thus, before a court may deprive a petitioner of a constitutional right, the probation condition must be directly related to the offense, the restriction's benefit to society must significantly outweigh the defendant's loss of a fundamental liberty, and the condition must achieve its end in a manner that minimizes the impact on the defendant's exercise of constitutional rights.222 Although probation conditions may be permitted to impinge on fundamental rights under certain circumstances,223 a court may not dispense with the constitutional analysis simply because the probationer must choose between probation conditions and prison.

In summary, the Norplant policy does not enjoy a more permissive standard for infringement of fundamental liberty rights by virtue of its status as a condition of probation. Rather, probation conditions face the added

expectation of privacy for probationers. This case addressed standards under the Fourth Amendment, however, and did not address the fundamental right to procreative liberty associated with substantive due process conceptions of the right to privacy. Moreover, the statement indicating probationers retain limited liberty interests was dicta. Id. at 874. See also Arthur, supra note 9, at 60-65 (discussing infringements on the right to travel, rights of association, First Amendment rights, and waivers of Fourth and Fifth Amendment rights).


217 Id. at 1011.

218 Id. at 1012.

219 Cf. Coale, supra note 18.


223 See Arthur, supra note 9, at 61-65.
statutory hurdle that they be reasonably related to rehabilitation and public safety, the permissible goals of probation. Although standards of review for probation conditions impinging on fundamental rights differ from jurisdiction to jurisdiction,224 most require that the condition further the rehabilitation and public safety goals of probation,225 a requirement consistent with substantive due process standards.226 Review of due process decisions addressing infringement on procreative liberty indicates that appellate courts must determine that no less restrictive alternatives exist for avoiding future child abuse before affirming the imposition of Norplant as a condition of probation.227

B. Due Process

Determining that courts must undertake the substantive due process analysis does not answer the question of whether the Norplant policy violates the right to procreative liberty. As commentators have noted, the few existing decisions concerning probationary limits on procreation do not provide adequate guidelines for analysis.228 A careful review of the interests involved and the means chosen to further those interests is sorely needed.

Norplant implicates due process rights because it infringes on rights rooted in tradition and essential to human autonomy and dignity.229 The Due Process Clause of the Fourteenth Amendment ensures procreative liberty, which includes “the right of the individual . . . to marry, establish a home and bring up children.”230 The right to procreative liberty is one of several rights under the umbrella of the right to privacy. Protection of privacy rights surrounding contraception began with Griswold v. Connecticut, which protected the right of married couples to use contraception.231 Griswold was followed by Eisenstadt v. Baird, which extended the right to use contraception to unmarried couples. In Eisenstadt, the Court recognized that “[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”232 Roe v. Wade affirmed the right to be free from governmental interference in procreative choice, extending this freedom to the abortion realm.233 More recently, however, the Supreme Court has curtailed the

224 See id. at 65-66.
225 Id. at 66.
226 See supra notes 209-11 and accompanying text.
227 See Arthur, supra note 9, at 67.
228 Id. at 69-70.
229 Bowers v. Hardwick, 478 U.S. 186, 204-05 (1986) (Blackmun, J., dissenting) (arguing that the rights associated with family are protected under the due process clause because they are essential to personal autonomy, self-definition, and liberty).
231 381 U.S. 479, 483 (1965).
right to procreative freedom as it relates to abortion. The Court has recog-
nized the power of the states to promote a preference for childbirth by
restricting access to abortion.234 The Court also upheld a former federal
government policy that prohibited employees of federally funded clinics
from informing patients about abortion.235

As these opinions indicate, the Supreme Court allows some infringe-
ment on procreative liberty in the context of abortion. To understand the
relevance of this precedent to Norplant's infringement on procreative
liberty, it is important to compare the Norplant policy to restrictions on abor-
tion. Unlike the regulations restricting access to abortion, Norplant is an
anti-childbirth, rather than pro-childbirth policy. Although the Court has
recognized that state interests support minimal infringement on procreative
liberty in the interests of furthering childbirth, these opinions do not support
the permissibility of infringements through policies that prevent
childbirth.236

The right to procreative liberty rests, in part, on the autonomy principle
protected under substantive due process. Certain rights are considered fund-
damental because they are essential to the exercise of individual autonomy
necessary to establish identity and human dignity.237 Procreative liberty is
protected under substantive due process because "independence in making
certain kinds of important decisions"238 is "basic to individual dignity and
autonomy."239 Thus, "[w]e protect [these] rights not because they contrib-
ute, in some direct and material way, to the general public welfare, but
because they form so central a part of the individual's life."240

The Due Process Clause generally has been interpreted to protect tradi-
tional practices and values against short-run departures driven by passionate
majorities insensitive to the claims of history.241 The parameters or stan-
dards for establishing fundamental rights protected under substantive due
process rely on an historical interpretation of liberty.242 Fundamental rights

234 See Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992) (upheld require-
ments that a woman seeking abortion be informed of effects on fetus, observe a 24-hour waiting
period, and obtain parental consent or court authorization if she is under 18); Webster v. Reprod.
Health Serv., 492 U.S. 490 (1989) (allowed state to prohibit the use of public facilities to perform
abortions).
236 Casey explicitly says that no eugenic goals of the state are legitimate. Casey, 112 S. Ct. at 2811.
A detailed exploration into the state interest in protecting unborn life is beyond the scope of this
article.
237 Laurence Tribe observes that trying to identify the conditions of an open society implicates identi-
fying the elements of being human and deciding which elements are left to politics to protect and
which must be protected by judicial decree. Tribe, supra note 103, at 778.
238 Whalen v. Roe, 429 U.S. 589, 599-600 (1977); see also Roe v. Wade, 410 U.S. 113, 211 (1972)
(Douglas, J., concurring) (Fourteenth Amendment protects freedom of choice in the basic deci-
sions of life).
rights associated with the family).
241 Sunstein, supra note 190, at 1163.
242 Lupu, supra note 190, at 1022.
THE NORPLANT CONDITION

associated with the family fall under the ambit of substantive due process because "the institution of the family is deeply rooted in this Nation's history and tradition." Moreover, fundamental rights associated with family, marriage, and procreation are considered "implicit in the concept of ordered liberty." Thus, substantive due process protects certain traditionally recognized rights from the intrusion of state and federal power.

Even fundamental rights protected under substantive due process may be infringed under appropriate circumstances. As suggested by the fact that such rights are only protected from "unwarranted" government intrusion, the right to procreative liberty is not absolute. Where a privacy right protected by substantive due process is at stake, however, the state may only infringe on that right if it demonstrates that its intrusion is narrowly drawn to further a compelling interest.

The state interests proffered to support the use of Norplant as a condition of probation are relatively straightforward and appear unobjectionable on their face. Recall that statutory probation requirements combined with constitutional considerations narrow the range of reasonable state interests to those relating to the objectives of probation. In People v. Johnson, a typical example, the state advanced two interests in opposition to the defendant's fundamental right of procreative liberty. First, the state argued that implanting Norplant in probationers facilitates achievement of the state's probationary goal of rehabilitation by greatly reducing the risk of an untimely childbirth. Untimely childbirth is relevant because it has been identified as a risk factor for child abuse and neglect. Second, the state argued that Norplant "furthers the state['s] compelling interest in protecting the welfare of [its] children." This interest derives from increasing numbers of child abuse and neglect cases.

First, consider the state's professed concern for the rehabilitation of the child abuser or drug addict. Rehabilitation of a child-abuser logically would involve some effort to improve his or her parenting skills, while rehabilitating a drug-addicted woman would require some kind of drug

244 Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)). The unfortunate outcome of the analysis, however, was to deny homosexuals the right to privacy in their intimate relations because these relations were not recognized by historical tradition. See id. This interpretation overlooks the autonomy and personhood interests in the right to privacy. See id. at 204-05 (Blackmun, J., dissenting).
245 Sunstein, supra note 190, at 1170.
248 See supra notes 224-27 and accompanying text.
251 See Arthur, supra note 9, at 25-28.
252 Mertus & Heller, supra note 18, at 372-73.
treatment. Counseling, rather than punishment, seems a more appropriate remedy for child-abusing parents who were likely abused themselves as children.\textsuperscript{253} States have shown little interest, however, in promoting programs such as in-home care, economic assistance, prenatal care, drug treatment for pregnant addicts, or counseling that are more directly rehabilitative than contraception. Norplant as a remedy focuses on one risk factor, pregnancy, to the exclusion of many others that also put stress on the family.\textsuperscript{254} Because Norplant is so loosely related to rehabilitation, it appears that the state’s real interest is the prevention of children being born to “unacceptable” mothers—that is, to drug addicts and child abusers.\textsuperscript{255}

Second, consider the state’s interest in protecting the welfare of children. In cases of drug use during pregnancy, “protecting the welfare of children” extends into the arena of fetal protection. Although protection of unborn children finds some support in existing law,\textsuperscript{256} “protecting unborn children” is not a recognized objective of child abuse statutes or a valid state interest.\textsuperscript{257} Even if fetal protection were a valid objective of probation conditions, the Norplant policy only protects potential fetuses. Before there is a viable fetus, the state has no interest in the welfare of the unborn that can support regulation of a woman’s behavior.\textsuperscript{258} Furthermore, it is far from clear that drug use during pregnancy always harms the fetus. Studies of cocaine-exposed babies have failed to determine the percentage of children harmed and to control for other risk factors such as socioeconomic status.\textsuperscript{259} More importantly, fetal protection theories often hide government interests in curtailing the activities of women—even those activities that are legal.\textsuperscript{260} This sudden government concern over the welfare of these fetuses

\textsuperscript{253} Many studies indicate that abusing parents were themselves abused as children. Wald & Cohen, supra note 74, at 284.

\textsuperscript{254} Id. Other risk factors include: aberrant childhood nurture of the parent, early attachment problems between the mother and child, aggressive tendencies in relationships in general, and high levels of stress. Id. Factors causing high levels of stress include financial problems, health problems, marital problems, job-related problems, poor family interaction, a difficult or ill child, and social isolation. Id. at 286.

\textsuperscript{255} This is not to suggest that preventing the tragedy of drug-exposed children is not a legitimate state interest. It is interesting to note, however, that this is not the stated interest in the case of a pregnant, drug-addicted mother. The state’s desire to save the money spent caring for drug-addicted babies is the preferred state interest in such a case. Weighing this state interest against the mother’s fundamental right to procreative liberty, however, highlights how the enormous amount of funds spent on caring for babies could be put to better use in prevention programs that would not infringe on procreative liberty. See Oberman, supra note 33, at 514-15 (discussing the high cost of caring for babies).

\textsuperscript{256} See Arthur, supra note 9, at 47-48 (discussing legal protection of unborn children primarily in the areas of sterilization of mentally incompetent adults, prevention of child bartering in surrogacy, and wrongful life claims by impaired children).

\textsuperscript{257} See, e.g., Reyes v. Sup. Ct., 141 Cal. Rptr. 912 (Cal. Ct. App. 1977). Child abuse and neglect laws “establish no positive obligations, but instead serve only to set a minimum threshold beneath which parents may not fall; and they are based on well established legal duties owed by parents to their children while no such tradition of legally enforceable duties exists between a pregnant woman and her fetus.” Oberman, supra note 33, at 530.

\textsuperscript{258} See supra note 165.

\textsuperscript{259} Roberts, supra note 30, at 1429-30; Oberman, supra note 33, at 532-33.

\textsuperscript{260} See Siegel, supra note 89, at 341-43.
is suspicious, given the historical neglect of prenatal care for poor women of color\textsuperscript{261} and the sterilization abuses of the past.\textsuperscript{262} Given that Norplant prevents conception and birth of children, rather than protecting existing children, the state’s real concern may be lowering the birth rate in certain communities.

Once the state establishes a compelling interest, it must demonstrate that infringement on the fundamental right is narrowly drawn to further this interest. Part of this analysis usually includes consideration of whether less restrictive alternatives to the infringement are available.\textsuperscript{263} In cases of child abuse, the imposition of Norplant only marginally advances the state’s interest in the welfare of children. Norplant may prevent the birth of additional children who potentially could be abused, but it does nothing to protect the children the defendant already has or to prevent the child abuser from abusing children who are not her own. Thus, Norplant will protect, by preventing their existence, only a small subset of the children at risk of abuse. In addition, less restrictive alternatives for protecting children’s welfare are available. Since abuse of future children is possible only where the individual has access to or custody of the victim, limiting an abuser’s access to her children as a condition of probation would prevent future abuse.\textsuperscript{264}

Courts must recognize that less restrictive alternatives to Norplant are available.\textsuperscript{265} Provision of prenatal care, drug treatment facilities, and general health care—all now lacking for many women prosecuted for child endangerment through drug use—would serve the state’s interests in protecting the child and rehabilitating the woman without infringing on procreative liberty. In addition, in-home family support services and parental counseling are more desirable alternatives in both child abuse and drug use cases because they may enable children to remain with their parents. These programs would reduce the cost of foster care and the damage foster care does to children. Moreover, the funding and development of these programs could benefit women who have not yet abused their children in a manner that the technological fix of Norplant cannot.

The analysis of the state’s interests and the means it has chosen to further those interests does not end the discussion of substantive due process. One important element often overlooked in cases involving procreative liberty is the interests of the person whose liberty is infringed.\textsuperscript{266} The probationer’s interest in retaining control of her reproductive abilities must be balanced against the interests of the state. Recall that “before a court

\textsuperscript{261} Roberts, supra note 30, at 1446.
\textsuperscript{262} See supra notes 45-51 and accompanying text.
\textsuperscript{264} See supra notes 207-08 and accompanying text.
\textsuperscript{265} People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984) (involving potential harm to a fetus in vitro and holding that a restriction on conception was overbroad and that less restrictive alternatives were available to provide the protections necessary).
\textsuperscript{266} Cepko, supra note 185, at 133-35.
may deprive a probationer of a constitutional right, . . . the restriction's benefit to society must significantly outweigh the defendant's loss of a fundamental liberty. . . ."267 Unfortunately, the weight of the procreative liberties of women, particularly women who are members of disadvantaged or despised groups, has been undervalued in substantive due process cases.268 The reproductive rights of women convicted of child abuse or drug use during pregnancy are easily discounted, because these women tend to be poor women of color, and poor women of color are devalued as mothers.269 Courts must carefully avoid using stereotypical images of poor women of color to diminish the importance given to their procreative liberty.

The Norplant policy inflicts substantial harms by infringing on individuals' fundamental rights. Norplant cuts off a woman's procreative ability for at least five years,270 has unknown health consequences, and has been applied with little concern for the health and welfare of probationers.271 Most importantly, however, Norplant infringes on the personhood and autonomy rights implicit in the right to choose whether or not to bear a child.272

The autonomy and human dignity rights protected by the right to procreative liberty are particularly salient to poor women of color because these women have been historically devalued as mothers and subjected to sterilization abuse.273 In addition, the infringement on liberties that are embedded in history and tradition is exactly the circumstance which substantive due process was meant to prevent. The Norplant policy allows a "passionate majorit[y],"274 stirred to action by a specter of "crack babies," swelling welfare rolls, and media images of "welfare queens," to infringe on a fundamental right without careful consideration of the liberty interests at stake. Infringement on these rights is made palatable by the historical abuse of the reproductive rights of women of color and the diminished level of humanity allotted to them in society.275 The historical devaluation of women of color as mothers also makes it hard to see that Norplant is an anti-family policy.

Just as the court considers the state's interests in the social context of increasing child abuse and drug addiction, the court must consider the probationer's interests in their larger social context. By reinforcing racist and sexist stereotypes of poor women of color, the Norplant policy harms the

268 See Cepko, supra note 185, at 135.
269 See supra notes 61-65 and accompanying text.
270 The long-term implications for fertility are unclear. See supra notes 84-85 and accompanying text.
271 See supra notes 24-26 and accompanying text.
272 See supra notes 237-40 and accompanying text.
273 See supra notes 45-51 and accompanying text.
274 Sunstein, supra note 190, at 171.
275 See supra notes 61-68 and accompanying text.
reproductive rights of women of color who have not been convicted of child abuse or drug use during pregnancy. The Norplant policy also reinforces the sexist stereotype that women are solely responsible for the care and welfare of children by conflating pregnancy with child abuse and punishing the probationer for her ability to become pregnant. Finally, the Norplant policy harms all of society by turning attention away from less burdensome solutions such as drug treatment, parenting support, and counseling—alternatives that benefit both probationers and women not convicted of child abuse.

A careful consideration of the probationer’s interest in retaining her procreative liberty, particularly when evaluated in the full social context, weighs heavily against allowing the Norplant policy to infringe on procreative liberty. This is particularly so given the tenuous fit between prohibiting conception and the probation goals of rehabilitation and public safety. Less restrictive alternatives are available to further the goals of probation. These alternatives are more likely to further the state’s objectives, and they support, rather than denigrate, the parenthood of poor women of color.

One commentator has argued that resorting to less restrictive means of protecting the welfare of children is unrealistic because these alternatives are neither financially feasible nor effective. She proposes that discriminatory acts of government should not be held invalid unless truly effective, nondiscriminatory means of accomplishing the state’s objectives exist. She argues that social services as an alternative to Norplant are “simply not feasible” because of increased demand and inadequate funding. The other alternative she proposes, removal of custody from the probationer, is undesirable because it harms both mother and child.

The argument that Norplant, which infringes on fundamental rights, is the only feasible solution because other service alternatives are too expensive is highly questionable. The proponent herself acknowledges the difficulty of arguing “that civil liberties should be curtailed because it costs too much to solve social problems in a less oppressive manner.” She fails, however, to offer a principled means for making the normative judgment. An analogous example from another area of law may illustrate the trade-offs implicit in her argument.

Consider whether the argument that providing judicial officers to grant search warrants is too expensive justifies a warrantless search. The constitutional right of both the guilty and the innocent to be free from unwar-
ranted searches forces the state to provide adequate safeguards to individual rights. If the state wishes to intrude on the constitutionally protected sanctity of the home, it must observe the safeguards required by the Constitution regardless of the cost. Indeed, one of the primary functions of recognizing constitutional rights is to force the state to take additional steps necessary to protect those rights, even if those safeguards come at a price.\(^{284}\)

It is important to recognize that the state controls the financial feasibility of less restrictive alternatives. Allocation of resources for many alternatives to Norplant are within the exclusive control of the state. Once lack of funds justifies ignoring safeguards established to protect fundamental liberties, citizens can expect a "sudden" financial crisis surrounding the alternatives to infringing on constitutional rights. It is always easier to argue that funds are limited than to comply with restrictions on infringement of fundamental rights. Fundamental rights are recognized as such, however, to raise barriers to commonplace infringement and to force the state to look for less intrusive alternatives.

Arthur's argument that denying custody to a probationer is an undesirable alternative because it harms both mother and child is also problematic. Although I agree that denial of custody is seldom an attractive alternative, framing the problem as a choice between infringing on either procreative liberty or parental rights precludes consideration of an alternative that infringes on neither: providing support and services that reinforce the family of the probationer. Although it is frequently noted that foster care is not a good solution to child abuse, it is seldom acknowledged that the best in-home services cost far less than foster care.\(^{285}\) Moreover, the Norplant policy is not a substitute for foster care, as women convicted of abusing their already-born children will most likely lose custody of them.\(^{286}\) The Norplant remedy actually constitutes an infringement of both parental rights and procreative liberty, not a choice between them.

C. Fundamental Rights Under Equal Protection: Equality in the Protection of Liberty

Due to an accident of history, the fundamental right to procreative liberty has roots in both equal protection and substantive due process doctrine. The right to procreative liberty developed during the Supreme Court's doctrinal transition from relying on equal protection theories to relying on substantive due process theories to expand the protection of fundamental

\(^{284}\) The costs of supportive programs is not a sufficiently important state interest to justify a classification that discriminates on the basis of gender, as does the Norplant policy. See Golden, supra note 78, at 1875-76.

\(^{285}\) See supra notes 94-95 and accompanying text.

\(^{286}\) Estimates indicate that as many as 50% of child neglect proceedings result in removal of the child from the natural parents' home. See Wald, supra note 29, at 626. See supra notes 90-92 and accompanying text.
Because the protection of the fundamental right to procreative liberty bridges these two historical trends, the textual source of the right is unclear. Not surprisingly, given this history, opinions addressing the right to procreative liberty have relied on both equal protection and due process reasoning. For example, in *Skinner v. Oklahoma*, the Supreme Court considered a challenge to Oklahoma’s sterilization of male inmates. Recognizing the right to bear children as “one of the basic civil rights of man,” the Court held that legislation requiring sterilization of an arbitrary class of criminals was invalid because it “[ran] afoul of the equal protection clause.” In *Griswold v. Connecticut*, however, the Court relied on substantive due process arguments to recognize the right to privacy as one of the fundamental rights protected by the Constitution. The distinction between due process and equal protection did not remain clear. In *Eisenstadt*, although the Court discussed the right to privacy, it invalidated prohibitions on the distribution of contraception to unmarried individuals because they “violate[d] the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.” Thus, a clear historical dividing line between equal protection and substantive due process does not emerge with respect to the right to privacy.

*Zablocki v. Redhail*, in particular, demonstrates the interconnection between liberty values embodied in substantive due process and equality concerns of equal protection. *Zablocki* presented a challenge to a state statute prohibiting the grant of a marriage license to individuals with unpaid, court-ordered, support obligations. Justice Marshall, who wrote the majority opinion, had long supported a sliding-scale approach to equal protection doctrine: one in which the scrutiny applied depended both on the status of the disadvantaged group in question and the fundamental right on which the classification impinged. Although Justice Marshall struck down the statute as a violation of equal protection, he put great emphasis on the infringement of the fundamental right to marry. The three concurring justices covered the spectrum from equal protection to substantive due pro-

---

288 Id. at 992.
289 Oklahoma’s Habitual Criminal Sterilization Act authorized the sterilization of persons previously convicted two or more times for crimes of "moral turpitude," who were then convicted of a third such crime. Embezzlement, political offenses, and revenue act violations were expressly exempted from the Act. As a result, an individual convicted three times of larceny was subject to sterilization, but an individual convicted three times of embezzlement was not. *Skinner v. Oklahoma*, 316 U.S. 535, 536-37 (1942).
290 Id. at 541.
291 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (framing the issue in terms of the due process clause of the Fourteenth Amendment).
293 Id. at 443.
296 473 U.S. at 382.
297 Id. at 388.
cess theories. Justice Stevens concurred on equal protection grounds,\textsuperscript{298} Justice Stewart concurred on due process grounds,\textsuperscript{299} and Justice Powell concurred on both.\textsuperscript{300}

While some commentators have decried the interconnection of liberty and equality theories as a doctrinal morass,\textsuperscript{301} this theoretical interconnection enjoys some historical and jurisprudential support. Indeed, one of the first proposed drafts of the Fourteenth Amendment secured "to all persons . . . equal protection in their rights, life, liberty and property."\textsuperscript{302} Although the proposal was changed to the present two-clause construction, the Fourteenth Amendment was to accomplish its objectives "through equal freedom, equal privileges and immunities, equal due process, equal rights to vote, and equal protection of the laws."\textsuperscript{303} Philosophers also acknowledge the connection between these doctrines. For example, John Rawls concludes that all the liberties of equal citizenship must be the same for each member of society.\textsuperscript{304} Thus, fundamental rights cannot be protected by substantive due process without also considering the equal protection of the laws.\textsuperscript{305}

There is, however, an important distinction between due process and equal protection analyses as they apply to fundamental rights. The distinction is due, in part, to the different constitutional roles these doctrines play. Substantive due process has been used to protect traditional and historical practices against infringements by the states and federal government.\textsuperscript{306} In contrast, equal protection doctrine attempts to protect disadvantaged groups from discriminatory practices, however historically ingrained those practices might be.\textsuperscript{307} Although both doctrines generate heightened scrutiny of an infringement of fundamental rights, due process focuses on balancing the state and individual interests involved, whereas equal protection focuses on the evenhandedness of the state’s intrusion.

An example using the Norplant policy may illustrate this subtle but important distinction. Using substantive due process analysis, a court might conclude that probationers who engage in criminal conduct enjoy diminished liberty interests, and that, consequently, the state’s interests prevail.\textsuperscript{308}

\textsuperscript{298} \textit{Id.} at 403.
\textsuperscript{299} "[I]n a case like this one, the doctrine is no more than substantive due process by another name."
\textit{Id} at 391, 395.
\textsuperscript{300} \textit{Id} at 396, 400.
\textsuperscript{301} See Lupa, \textit{supra} note 190, at 1003.
\textsuperscript{302} Mayer-Schonberger, \textit{supra} note 190, at 310 (citing \textsc{Tenbroeck}, \textit{Equal Under Law} 205 (1951)).
\textsuperscript{303} John P. Frank & Robert F. Munro, \textit{The Original Understanding of "Equal Protection of the Laws,"} 1972 \textsc{Wash. U. L.Q.} 421, 478 (1972).
\textsuperscript{304} \textsc{John Rawls}, \textit{A Theory of Justice} 60-61 (1971). For a discussion of Rawls’ theory, see Ronald Dworkin, \textit{Taking Rights Seriously} 180-83 (1977) (discussing a right to equal concern and respect).
\textsuperscript{305} See generally Mayer-Schonburger, \textit{supra} note 190.
\textsuperscript{306} See Sunstein, \textit{supra} note 190, at 1170.
\textsuperscript{307} \textit{Id.} at 1163.
\textsuperscript{308} I have argued above, however, that this is not the present state of the law. \textit{See supra} notes 220-27 and accompanying text.
The due process analysis requires the court to evaluate the state's power to infringe on the rights of all probationers convicted of harming children. In contrast, equal protection requires the court to focus on the class distinctions drawn by the state, in this case along the lines of gender. Focusing on the uneven application of the probation condition makes the underlying criminal conduct irrelevant. As Cass Sunstein notes, "[t]he fact that the underlying conduct can be criminalized is irrelevant to the problem; it is always immaterial to an equal protection challenge that members of the victimized group are engaging in conduct that could be prohibited on a general basis." Thus, the relevant question under equal protection is not whether the state has a sufficiently compelling interest in fighting child abuse to overcome the liberty interests of probationers, but whether the state has an interest in drawing the line so as to infringe on the procreative rights of female offenders, but not those of male offenders.

Fundamental rights analysis using equal protection differs from standard equal protection analysis. Because imposing Norplant, a female contraceptive, creates a gender classification, standard equal protection doctrine requires the state to prove it has an important interest that is substantially related to the gender classification it has created. Where that classification impinges on a fundamental right, however, the scrutiny applied to the use of the classification should be increased. Thus,

\[\text{[n]o restriction, which unequally burdens some while leaving similarly situated people unaffected, can be imposed to restrain a fundamental right without a showing of compelling justification. Such a justification is independent of the compelling interest the government has to prove in order to restrict a fundamental right [under due process]. Here we are talking about the justification of the government to restrict a fundamental right of a particular group or class of people.\]}

The state can demonstrate a compelling interest in unequal infringement of a fundamental right only if there are no less restrictive alternatives for achieving the government's objectives. Note how this increased scrutiny ties together equal protection and due process doctrine. The importance of equality is recognized by focusing on the classification, whereas the importance of the fundamental right infringed is recognized by increasing the standard of review under equal protection to require a compelling state interest and the search for less restrictive alternatives.

---

309 Sunstein, supra note 190, at 1167.
310 See supra note 148 and accompanying text.
311 Mayer-Schonberger, supra note 190, at 316.
312 Id. at 317.
313 This makes some intuitive sense. It is unclear why strict scrutiny should be applied where the fundamental right to procreative freedom is infringed for all people and only intermediate scrutiny or the rational relation test where that fundamental right is infringed for only some people. See also Tribe, supra note 103, at 1464. "[E]qual protection analysis demands strict scrutiny not only of classifications that penalize rights already established as fundamental for reasons unrelated to equality . . . but also of classifications unequally distributing access to choices that ought to be placed beyond government's reach . . . because, in government's hands, control over those
The Norplant policy reveals a kind of constitutional loophole for policies that infringe on fundamental rights in an unequal manner. The state may defend against probationers’ equal protection challenge to the Norplant policy by demonstrating an important interest substantially served by unequal application. The state may defend against due process objections by producing some compelling justification for infringing upon the procreative liberty of everyone. The relevant question—whether the state can produce a compelling interest in unequal infringement of a fundamental right—is never addressed. I certainly do not wish to argue that if the state curtailed the reproductive rights of men and women equally, a solution like Norplant would be acceptable. Requiring evenhanded restriction of rights, however, protects against violations of procreative liberty by affecting everyone, rather than only a powerless minority. Thus, as Cass Sunstein has recognized, “[t]he requirement of generality operates as a political safeguard, ensuring that if the . . . majority is to burden [the minority] it must burden itself as well. In imposing this requirement of generality, the Equal Protection Clause . . . serves its most familiar and established function.” Where everyone is forced to bear the burden, the interests implicated are more carefully evaluated.

Another significant advantage to the equal protection approach to the fundamental rights implications of the Norplant policy is that it elevates consideration of the social context of the Norplant policy from an implicit to an explicit level. Although this social context can be considered under due process as a factor to be weighed on the side of the individual’s liberty interests, it is not the primary focus of that analysis. As previously discussed, under an equal protection analysis of gender, a court focuses on the social context by analyzing whether the classification reinforces harmful stereotypes about women. Once a racialized gender standard is utilized, an analysis of uneven application will focus on the implications of the Norplant policy for poor women of color rather than only for women in general.

Fundamental rights analysis under equal protection thus reunites the trifurcated identity of poor women of color. Poor women of color, as a class, may challenge the Norplant policy as a discriminatory infringement on their procreative liberty. Regardless of whether the relevant identity is economic class, gender, or race, the state still must demonstrate a compelling interest, rather than only an important or legitimate one, in drawing the classification. The focus of the analysis remains on Norplant’s unequal infringement, however, because the equal protection analysis addresses the choices would pose too great a danger of majoritarian oppression or enduring subjugation.” Id. (citations omitted).

314 Sunstein, supra note 190, at 1178.
315 See supra notes 169-80 and accompanying text.
316 This is important because even if the woman cannot prove a classification based on one element, such as race or class, the remaining distinction—gender—receives the highest level of protection.
classifications involved, rather than balancing the fundamental rights against the state's interests.

Armed with this new constitutional theory, women challenging Norplant as a condition of probation have a greater chance of success. The Norplant policy clearly infringes on their fundamental right of procreative liberty by restricting their ability to have children. Although the state may be able to present compelling interests to outweigh a probationer's interests, this will not be enough to justify imposing this burden unevenly upon women but not men. Equal protection doctrine requires the state to demonstrate a compelling interest in imposing the Norplant condition disproportionately on women. This gender line is dubious under even intermediate scrutiny.\(^{317}\)

Even if the state is able to produce a compelling interest to justify its differential treatment of its citizens, it must also demonstrate that no less restrictive alternative exists to infringing on the fundamental right. Courts have consistently found that alternatives do exist that meet the interests of the state, reinforce and support the family, and assist poor women of color in their parenting role.\(^{318}\) Drug treatment and rehabilitation, long denied to pregnant addicts,\(^ {319}\) offer hope of recovery at the time the woman may be most motivated to recover. Economic and family support services meet the needs of overburdened single parents who must work to survive and reduce the stresses that contribute to drug use and child abuse. Counseling, rather than punishment, seems a more appropriate remedy for child-abusing parents who were likely abused themselves as children.\(^ {320}\) Contraception education and provision may be as effective in preventing pregnancy as Norplant and also protect the woman from the risk of AIDS.

The joined equality-liberty doctrine forces the state to choose a policy that supports the families of poor women of color, rather than one that devalues them as mothers and prevents the birth and successful lives of people of color. This doctrine also forces society to accept responsibility for the poverty, violence, and desperate circumstances in which women and children of color live, rather than shifting the blame for the consequences of these problems to the shoulders of women of color. Finally, the doctrine affirms the personhood and humanity of women of color by not depriving them of a right fundamental to the development of personal autonomy and dignity and by allowing them a constitutional challenge based on their full identity.

\(^{317}\) See supra notes 175-80 and accompanying text.  
\(^{318}\) See supra notes 200-27 and accompanying text.  
\(^{319}\) See Oberman, supra note 33, at 517-19; Roberts, supra note 30, at 1448-50.  
\(^{320}\) Many studies indicate that abusing parents were themselves abused as children. See Wald & Cohen, supra note 74, at 284.
V. Conclusion

After following the debate concerning the various ways Norplant could be used to restrict the reproductive abilities of disadvantaged women, Dr. Sheldon Segal, the originator and developer of Norplant, sent a letter to the Washington Post. That letter stated in part:

Hold everything! Norplant should never be used for any coercive or involuntary purpose. It was developed to enhance reproductive freedom, not to restrict it. My colleagues and I worked on this innovation for decades because we believe in human dignity and believe that women should have the opportunity to have the number of children they want, when they want to have them—not just educated and well-to-do women, but all women. Those who suggest using Norplant for involuntary or coercive sterilization or birth control will find me leading the opposition. Our purpose in improving contraceptive technology is to enrich the quality of human life. Using Norplant . . . to toss aside rights and trample human dignity would be an intolerable perversion.321

The Constitution as well as Dr. Sheldon recognizes the elements of human dignity inherent in choosing whether or not to bear children. The Constitution also recognizes that these fundamental dignity rights are not reserved for a chosen few white and economically privileged women, but are guaranteed to all in equal measure. This is the purpose of equal protection. Constitutional guarantees of personal liberty and equal protection were meant to protect against racist, classist, and sexist penalties imposed by the operation of law. Enforcing those protections in the context of the Norplant condition of probation, however, requires recognition of the discriminatory elements inherent in that policy.

Addressing child abuse by focusing on pregnancy as the locus of intervention makes sense because only women get pregnant and women, but not men, are held responsible for children in our society. Poor women of color are the targets of the Norplant policy because they are stereotyped as bad and inappropriate mothers. Thus, the social meaning of Norplant as a condition of probation depends not only on gender, but also on class and race.

Discussions of the Norplant policy have often noted, in passing, that Norplant might affect women of color and poor women more severely than privileged white women. I have suggested that this observation is not simply part of the story, it is the story. Norplant has been accepted as a condition of probation so quickly precisely because it resonates with familiar stereotypes of poor women of color, and because it does not threaten the reproductive freedom of economically privileged white women or men. So long as the Norplant policy remains a threat only for poor women of color, its infringement on reproductive freedom will be tolerated. The Fourteenth Amendment requires burdens upon fundamental rights to fall equally upon

those with privilege and those without. The rights of poor women of color to procreative freedom demand the same respect as the rights of those not threatened by the Norplant policy.