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THE CONSTITUTIONALITY OF COURT-IMPOSED BIRTH CONTROL AS A CONDITION OF PROBATION*

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The impetus for this article was provided by a recent criminal matter in Maricopa County Superior Court in Arizona involving Debra Ann Forster.[1] The case received considerable local and national attention in the media and raises profound constitutional and ethical issues that could be of direct concern to both legal scholars and practicing attorneys. While this article focuses primarily on the *Forster* case, our discussion and analysis have more general implications.

The basic facts of the *Forster* case are as follows. On the basis of a plea agreement, Forster, who was a minor at the time the crimes were committed, was convicted of two charges of attempted child abuse.[2] The plea agreement was executed by Forster and accepted by the Maricopa County Superior Court on April 4, 1988.[3]

On May 24, 1988, Debra Forster was placed on probation.[4]

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1. State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., Sept. 2, 1988).

2. Sentencing Memorandum, at 1-2, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., June 7, 1988). The basic facts of the crime follows. Debra Forster had two children, William, who was one and one-half years old, and Scott, who was six months old. In July 1987, Ms. Forster left the two children alone in an apartment in Mesa, Arizona for two days; during her absence, no one cared for the children. *Id.* at 68. Ms. Forster's then estranged husband discovered the children. They were suffering from dehydration, diaper rash, and skin lesions. *Id.* Both children were immediately hospitalized and remained in serious condition for several days. *Id.*

3. Reporter's Transcript of Proceedings, Change of Plea, at 19-20, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., June 7, 1988); Change of Plea, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., June 7, 1988).

4. Reporter's Transcript of Proceedings, Sentencing, at 13, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., June 7, 1988).

Despite the fact that Forster is Catholic, Superior Court Judge Ellis-Budzyn ordered her to use birth control for the rest of her life as a condition of the probation.[5] Specifically, Term #20 of the probation order specified that: "the defendant shall remain on some method of birth control throughout the term of probation with written evidence to be furnished periodically to the supervising adult probation officer."[6] Although no appellate court has yet considered the issue, the imposition of birth control as a condition of probation could be deemed a violation of both the United States and Arizona Constitutions.[7]

In this article, we analyze six propositions: First, a court ordering a person to use birth control represents an unconstitutional invasion of privacy.[8] Second, if the defendant is Catholic, as Debra Forster is, and since the Catholic Church prohibits the use of artificial birth control, Term #20 violates the free exercise clause of the first amendment.[9] Third, the State has no compelling interest that could justify the infringement on constitutional privacy rights and religious freedom of a defendant like Forster. Fourth, being required to use birth control is "cruel and unusual punishment" and therefore unconstitutional under the eighth amendment.[10] Fifth, court-ordered birth control constitutes impermissible involuntary sterilization. Sixth, the specific language of Term #20 in the *Forster* case is unconstitutionally vague. Because the *Forster* case originated in Arizona, applicable Arizona law is discussed throughout this article.

I. CONSTITUTIONAL RIGHT OF PRIVACY

Sexual and reproductive activities are perhaps the most private

5. *Id.*, at 13-14. In Arizona, the statute authorizing lifetime probation, ARIZ. REV. STAT. ANN. § 13-604.1 (1974 & Supp. 1988), was recently declared unconstitutional. State v. Wagstaff, 12 Ariz. Adv. Rep 14 (Ct. App. July 7, 1988).

6. Probation Order, at 28, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., May 24, 1988).

7. This probation term also violates provisions of the Arizona state constitution. *See, e.g.*, ARIZ. CONST., art. II, §§ 8, 15. Indeed, although state constitutions are often overlooked, in considering such issues, the Arizona Constitution is a fruitful source of analysis and argument.

8. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

9. U.S. CONST. amend. I. Of course, this argument would also apply to any religion which prohibits contraception.

10. U.S. CONST. amend. VIII.

of all human behavior.[11] For a judge to order a person to use contraceptives is a startling abuse of governmental power. Certainly, such a grave infringement on a person's privacy rises to a constitutional violation.[12] In the following section, we analyze the existing jurisprudence relating to the right of privacy. Specifically, we argue that court-ordered birth control is unconstitutional because of the intrusions on contraceptive behavior, procreation, parenting, and interpersonal intimacy.

A. Privacy and the Decision to Use Birth Control

Although there is considerable disagreement regarding the specific textual support of the federal constitutional right of privacy,[13] the United States Supreme Court has repeatedly declared that such a right does exist. Similarly, the Arizona Supreme Court recently declared that the "right to privacy emanated from the penumbra of specific guarantees of particular amendments to the Constitution."[14]

Among the rights that are protected by the Constitutional right of privacy are "those which are 'fundamental' or 'implicit in the concept of ordered liberty.'"[15] Certainly, "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[16] While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that, among the decisions that an individual may make without unjustified governmental interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education."[17]

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11. *See Griswold*, 381 U.S. at 485-86; *Roe*, 410 U.S. at 153-54.

12. *Cf. Griswold*, 381 U.S. at 479; *Roe*, 410 U.S. at 113.

13. *Roe*, 410 U.S. at 152-53.

14. Rasmussen v. Fleming, 154 Ariz. 207, 212, 741 P.2d. 674, 681 (1987) (right to refuse medical treatment is sufficiently fundamental to fall within the constitutionally protected zone of privacy).

15. Paul v. Davis, 424 U.S. 693, 713 (1976) (while matters relating to marriage procreation, contraception, family relationships, child rearing, and education are fundamental in the guarantee of privacy, the circulation of a flyer with petitioner's picture on it captioned "active shoplifters" does not violate any fundamental right).

16. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (mere private possession of obscene matter cannot constitutionally be made a crime).

17. Carey v. Population Serv. Int'l, 431 U.S. 678, 684-85 (1977) (citations omitted). Of course, there are some activities that are outside the protections of the constitutional right of privacy. For example, the Supreme Court of Arizona has ruled that "the right to wear long

In *Griswold v. Connecticut*,[18] the Supreme Court struck down a state statute which essentially criminalized the use of birth control.[19] If the government may not constitutionally *prohibit* the use of contraception,[20] then it would seem to follow that the government cannot *require* the use of birth control. Indeed, "decisions whether to accomplish or to prevent conception are among the most private and sensitive,"[21] and the decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[22]

Furthermore, if the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[23] a decision that arguably involves the termination of the life of a potential child, then certainly a woman's decision whether or not to use birth control is similarly protected by the Constitution.

Court-imposed birth control intrudes on the sanctity of the marital relationship itself. Indeed, marriage "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness of free men,"[24] and sexual or birth control decisions within a marriage are as private as one can imagine. From a psychological perspective, court-imposed birth control not only constitutes an unconstitutional infringement on a woman's body and

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hair is [not] a fundamental right," Pendley v. Mingus Union High School, 109 Ariz. 18, 24, 504 P.2d 919, 925 (1972), and that "[t]here is no fundamental right to possess marijuana." State v. Murphy, 117 Ariz. 57, 60, 570 P.2d 1070, 1073 (1977). And while we may be further willing to concede that "the 'right' to unobserved masturbation in a public theatre is [neither] 'fundamental' [n]or 'implicit in the concept of ordered liberty,'" Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243, 1248 (9th Cir. 1982) (*quoting* Paris Adult Theatre I v. Slayton, 413 U.S. 49, 66 (1973) (*quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937))), the right to conceive a child is not in this same category. Furthermore, in the recent decision of Bowers v. Hardwick, 478 U.S. 186, 190 (1986), the Supreme Court found no fundamental right for homosexuals to engage in sodomy but still acknowledged "a fundamental individual right to decide whether or not to beget or bear a child." *Id.*

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

19. *Id.* at 485-86. In considering the implications of such a statute, the Court considered whether "we [would] allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.*

20. *Id.* at 479.

21. *Carey*, 431 U.S. at 685.

22. *Id.*

23. Roe v. Wade, 410 U.S. 113, 153 (1973).

24. Loving v. Virginia, 388 U.S. 1, 12 (1967).

on her contraceptive decision-making, but can also intrude on her marital relationship.[25] Based on empirical research, psychologists are in agreement that contraception influences the marital relationship.[26]

Although the defendant in the *Forster* case is female, court-imposed birth control would also intrude on the privacy of male probationers.[27] Here, the privacy rights of Debra Forster's husband are not squarely at issue. However, it should be noted that the probation order would also directly infringe upon the constitutional privacy rights of Mr. Forster.

B. Privacy and the Fundamental Rights of Procreation and Parenting.

In addition to the severe infringement on a person's contraceptive behavior, court-imposed birth control also unconstitutionally invades privacy rights because of its effects on the rights to procreate and to be a parent. Certainly the fundamental liberty interest of prospective parents, including Debra Forster, to care and provide for their unborn children "does not evaporate simply because they have not been model parents or have lost temporary custody of the child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."[28] By complying with the probation order, defendants like Debra Forster will forever be denied the opportunity to give birth, be a parent again, and choose to live their lifes in a family atmosphere.

The state must meet a heavy burden in order to terminate parental rights.[29] In *Forster*, the government sought to terminate the parental rights of Debra Forster before a child was born, and certainly well before any parental wrongdoing was proven with

25. *See, e.g.*, E. POHLMAN, THE PSYCHOLOGY OF BIRTH PLANNING 347-50 (1969).

26. *Id.*

27. There are, however, important constitutional distinctions between court-ordered birth control for men versus women. For example, condoms, the most common male form of birth control, are considerably less intrusive than female methods such as the pill, the IUD, and the diaphragm. It is not clear, though, whether a man ordered to use birth control would be in compliance if his woman partner used contraception. Would the man be in compliance if he erroneously believed that his partner used birth control?

28. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (due process clause demands more than a "fair preponderance of the evidence" to support the termination of parental rights in their natural child, must be at least clear and convincing).

29. *Id.* at 748.

respect to these yet unborn children.[30] No state interest can justify such a constitutional invasion.

C. *Intimacy and the Intrusiveness of Court-Ordered Birth Control*

When one considers the realities of birth control, and specifically the degree of intimacy and physical intrusion involved, the idea of court-ordered birth control is startling. Every method of birth control involves very intimate sexual activity and necessitates some form of bodily intrusion, with the most effective methods of birth control being the most intrusive. Indeed, for a court to require such intrusions into privacy, to use the words of Justice Frankfurter, "shocks the conscience."[31]

A brief discussion regarding the intrusiveness of various methods of birth control is in order. Basically, birth control pills prevent the ovaries from releasing eggs.[32] Birth control pills involve serious privacy intrusions in that the woman ingests synthetic hormones which "obtain their contracetive effect primarily by altering the cervical mucus, making it inhospitable to sperm transport, and by altering the endometrial environment, thus inhibitin the implantation of the fertilized egg."[33] The intrauterine device (IUD) must be surgically implanted, leading to possible complications at time of insertion.[34] The contraceptive effect of the IUD is thought to occur as a result of the "foreign body" stimulating "an inflammatory

30. Certainly, if Forster were to bear a child, and if she were deemed incapable or unwilling to properly care for the child, then several alternatives would be available including (a) Forster voluntary relinquishing her parental rights and putting the child up for adoption, ARIZ. REV. STAT. ANN. §§ 8-106 - 8-107 (1974 & Supp. 1988); and (b) the state instituting formal termination proceedings in compliance with the due process and equal protection clauses of the fourteenth amendment. ARIZ. REV. STAT. ANN. §§ 8-531 to -544, § 8-106 (1974 & Supp. 1988). *See* Stanley v. Illinois, 405 U.S. 645 (1971).

31. Rochin v. California, 342 U.S. 165, 172 (1952). In addition to the unconstitutional intrusion into privacy caused by the mandated birth control itself, the probation order further intrudes into Forster's constitutionally protected zone of privacy by requiring the periodical submission of "written evidence" concerning this private activity. Reporter's Transcript of Proceedings, Sentencing, at 13, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., June 7, 1988).

32. PLANNED PARENTHOOD, BASICS OF BIRTH CONTROL at 2 (1988).

33. C. PORTER, R. WAIFE, & H. HOLTROP, CONTRACEPTION 23 (1983).

34. D. EDELMAN, G. BERGER, & L. KEITH, INTRAUTERINE DEVICES AND THEIR COMPLICATIONS 71 (1979).

reaction somewhat similar to infection."[35] There are various kinds of barrier methods,[36] such as diaphrams, spermicides, and condoms, and each entails different types of intrusiveness.[37] There are several types of "natural" birth control methods. The most comprehensive method, the "rhythm method," requires very intimate, private activity involving observations of cervical mucus in conjunction with the monitoring of the woman's basal body temperature.[38] Surgical sterilization is also a form of birth control that would fall under Term #20. The physical intrusion into a woman's privacy as a result of this procedure is, of course, severe.[39]

D. Relevance of Other Federal Constitutional Provisions

In some sense, the physical intrusion, court-ordered birth control and its requisite documentation would impose, could be considered to be an illegal search, violative of the fourth amendment.[40] Note that at least one court has struck down a condition of probation which would have required the defendant to subject himself to warrantless searches at any time by the police.[41]

Concerning the right of association, however, in *Malone v. United States*,[42] the Ninth Circuit upheld the validity of certain conditions of probation for a defendant convicted of unlawful exportation of firearms to aid the Irish Republican Army (IRA). Specifically, the terms included prohibitions on participating in any IRA activities, belonging to any Irish or Irish Catholic organizations,

35. C. PORTER, R. WAIFE & H. HOLTROP, *supra* note 33, at 80-81.

36. Note that barrier methods of birth control have lower effectiveness rates than either the pill or the IUD and are generally recommended when "intercourse is infrequent." *Id.* at 132.

37. The diaphragm, for example, "is relatively cumbersome and messy to use. As it necessitates far more manipulation of the genitals that any other barrier methods, it may be unacceptable for some people." *Id.* at 136. The contraceptive sponge involves the insertion of chemicals and a foreign body into the vagina. PLANNED PARENTHOOD, *supra* note 32, at 3. Spermicides, including foams and jellies, also involve an obvious intrusion.

38. M. POTTS & P. DIGGERY, CONTRACEPTIVE PRACTICE 100 (2d ed. 1983).

39. *See* M. SAIDI & C. ZAINIE, FEMALE STERILIZATION (1980).

40. *See* Rochin v. California, 342 U.S. 165 (1952); U.S. CONST. amend. IV.

41. United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir. 1975) "While it must be recognized that probationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free, it is also true that these limitations in the aggregate must serve the ends of probation." *Id.* at 265.

42. Malone v. United States, 502 F.2d 554 (9th Cir. 1974).

and visiting any Irish pubs.[43] But unlike the instant case, the probations in *Malone* are "not too vague and [are] reasonably related to the goals of probation and the accomplishment of public order and safety."[44]

E. Arizona Constitutional Right of Privacy

The Arizona Constitution is much more explicit in its protection of the right of privacy than is the United States Constitution.[45] Specifically, there is a provision in the Arizona Constitution which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[46] In general, "[t]he right of privacy is deemed fundamental because it is basic to the concept of the individual in our American culture, and because it is a necessary prerequisite to the effective enjoyment of all our other fundamental rights."[47] Furthermore, the Arizona Supreme Court has ruled that terms of probation may not violate basic fundamental rights.[48]

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43. *Id.* at 555.

44. *Id.* at 557.

45. ARIZ. CONST. art. II, § 8. In addition, when questions of privacy arise under the federal Constitution, decisions of the United States Supreme Court are binding upon the courts of Arizona. State v. Davis, 58 Ariz. 444, 120 P.2d 808 (1942).

46. *Id.*

47. State v. Callaway, 25 Ariz. App. 267, 271, 542 P.2d 1147, 1151 (Ct. App. 1975), *vacated sub nom.*, State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 864 (1976). Also, the Arizona Supreme Court has declared that "[t]he right to sexual privacy 'exists within the context of the intimate sexual relations between consenting adults in private,'" State v. B Bar Enter., Inc., 133 Ariz. 99, 101, 649 P.2d 978, 980 (1982) (*quoting* State v. Bateman, 113 Ariz. 107, 110, 547 P.2d 6, 9 (1976)) and that "[t]he right to bodily privacy is constitutionally protected . . . ." Creamer v. Raffety, 145 Ariz. 34, 45, 699 P.2d 908, 919 (Ct. App. 1984).

48. State v. Montgomery, 115 Ariz. 583, 566 P.2d 1329 (1977); *see also* State v. Livingston, 53 Ohio App. 2d 195, 196, 372 N.E.2d 1335, 1337 (Ct. App. 1976) ("the trial court is not free to impose arbitrary conditions that significantly burden the defendant in the exercise of her liberty and bearing only a remote relationship to the crime for which she was convicted and to the objectives sought by probation of education and rehabilitation." *Id.*) In Porth v. Templar, 453 F.2d 330 (10th Cir. 1971), a condition of probation prohibiting the defendant from speaking about the constitutionality of federal income tax laws was held to be invalid as an infringement on freedom of speech. *Id.* On the other hand, the court in *Porth* did uphold a condition of probation which prohibited the defendant from encouraging others from violating laws, a type of speech that is arguably not within the protection of the first amendment. *Id.*

Also, under Arizona law, there exists a robust "fundamental right to raise [one's own] child."[49] Furthermore, "[t]he right to custody and control of one's children has long been recognized as a fundamental one" in Arizona.[50]

II. Free Exercise Of Religion

The first amendment of the United States Constitution provides for the "free exercise" of religion.[51] As the Supreme Court has noted, "[t]his Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs . . . . [M]oreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief."[52]

There have been no cases dealing with the free exercise clause and court-ordered birth control. Nevertheless, the free exercise doctrine, as set forth by the United States Supreme Court, is applicable to the instant issue. In *Sherbert v. Verner*,[53] for example, Adell Sherbert, a Seventh-Day Adventist, was fired by her employer for refusing to work on Saturdays, and the state declined to award her unemployment compensation.[54] The Supreme Court held that the state action was an unconstitutional infringement on Sherbert's freedom of religion.[55] The Court noted that by declining benefits, the state was essentially forcing Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand."[56]

In addition, "[w]here the state conditions receipt of an important

49. Webb v. Charles, 125 Ariz. 558, 611 P.2d 562 (Ct. App. 1980).

50. *In re* Appeal in Pima County v. Howard, 112 Ariz. 170, 540 P.2d 642, 643 (1975); *see also In re* Appeal in Cochise County, 133 Ariz. 157, 161, 650 P.2d 459, 462 (1982) ("Arizona recognizes that the right to control and custody of one's children is fundamental" *Id.*); *In re* Appeal in Gila County, 130 Ariz. 530, 534, 637 P.2d 740, 744 (1981) ("There can be no doubt that the right to custody and control of one's children is a fundamental one." *Id.*)

51. U.S. CONST. amend. I.

52. Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983). The free exercise clause is also applicable to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940).

53. Sherbert v. Verner, 374 U.S. 398 (1963).

54. *Id.* at 401.

55. *Id.* at 404.

56. *Id.*

benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."[57] For example, the government cannot require school children to salute the United States flag if they have religious objections to doing so.[58]

A. Courts' Power to Order Probationers to Violate their Religion

Just as "a condition of probation which requires the probationer to adopt religion or to adopt any particular religion would be unconstitutional,"[59] it would likewise be unconstitutional for a court to require a probationer to engage in activity which violates the tenets of her religion. For example, in *Jones v. Commonwealth*, a state trial court had ordered two convicted juvenile defendants to "attend Sunday School and Church each Sunday" as a condition of probation.[60] The Supreme Court of Appeals of Virginia reversed, stating that this condition of probation was unconstitutional.[61] Similarly, a Louisiana court held a condition of probation requiring church attendence unconstitutional.[62] Therefore, if the use of contraception violates a probationer's religion then a court ordering such probationer to use birth control is essentially ordering him or her to violate the tenets of their religion.

B. Religious Basis for Beliefs

It is true that "[o]nly beliefs that are rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[63] As we have men-

57. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981).

58. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Arizona courts have a long history of interpreting the free exercise clause to give Arizona citizens full protection from governmental intrusion. *See, e.g.*, State v. Davis, 58 Ariz. 444, 120 P.2d 808 (1942).

59. Owens v. Kelley, 681 F.2d 1362, 1365 (11th Cir. 1982).

60. Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (Sup. Ct. App. 1946).

61. *Id.*

62. State v. Morgan, 459 So. 2d 6 (La. Ct. App. 1984).

63. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 713 (1981).

tioned, Debra Forster is Catholic. Since the Catholic Church's prohibition on birth control is based on religious grounds,[64] and not on mere philosophical or personal grounds which would not have protection under the first amendment,[65] the constitutionality of court-ordered birth control is quite dubious. In fact, the Catholic Church's prohibition on birth control was recently reaffirmed in strong language.

C. Burden on Probationer to Assert Free Exercise Infringement

Just as "[c]ourts are not arbiters of scriptural interpretations,"[66] a court may similarly not delve into questions concerning the scope of a person's religious beliefs.[67] "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with the position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[68]

It is true that Debra Forster had not articulated her religious beliefs with much clarity and precision. However, "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[69] To obtain first amendment protection, a person need only demonstrate that he or she is a member of a legitimate religious organization and that the tenets of the organization are in conflict with some governmental action.[70]

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64. Indeed, the Catholic Church's prohibition on birth control has been reaffirmed in strong language. POPE PAUL VI, OF HUMAN LIFE (HUMANAE VITAE) (1968).

65. Indeed, just as the Amishs' belief not to have their children attend public school beyond the eighth grade was a matter of "deep religious conviction," based on a "literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world . . . .'", Wisconsin v. Yoder, 406 U.S. 206, 216 (1972) (*quoting Romans* 12:2), so is the Catholic Church's ban on birth control biblically based. *See* POPE PAUL VI, *supra* note 64.

66. *Thomas*, 450 U.S. at 716.

67. *Id.* at 715.

68. *Id.*

69. United States v. Ballard, 322 U.S. 78, 86 (1944).

70. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 206, 234 (1972): "Aided by a history of three centuries as an identifiable religious sect . . . the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, . . . and the hazard's presented by the State's enforcement of a statute generally valid as to others." *Id. Compare with Thomas*, 450 U.S. at 718.

> The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must

D. Court-Ordered Birth Control for a Catholic Probationer

Debra Forster is married and is a baptized Catholic. While court-ordered birth control would not violate the religious freedoms of many non-Catholics, it certainly infringes on the religious beliefs of a Catholic probationer. The only methods of contraception that are sanctioned by the Catholic Church are abstinence and "natural" methods.[71]

Sexual abstinence is not a "method" at all.[72] Furthermore, it is unthinkable that a court could possibly have the power to order a married woman to abstain from having sexual intercourse with her husband; such an order would certainly infringe on Ms. Forster's privacy in addition to her religious freedom.[73] Natural methods of contraception, including fertility awareness techniques and the withdrawal method are ineffective.[74] For example, "[a]mong 100 women limiting intercourse by [fertility awareness] methods, about 24 may become pregnant over a year of actual use."[75]

Logically, the underlying purpose of an order like Term #20 is for the probationer not to become pregnant.[76] Since only the most effective means of preventing pregnancy are "unnatural" methods that are forbidden by the Catholic Church,[77] the only way that a probationer like Ms. Forster could comply with the purpose of such

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be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.

Id.

71. *See*, Pope Paul VI, *supra* note 64.

72. Even if abstinence is not a birth control "method," practising sexual abstinence would probably constitute compliance with court-ordered birth control. Of course, there are also sexual behaviors which are associated with little or no risk of pregnancy. Some of these behaviors, such as anal intercourse, though, may be illegal and may also run afoul of religious dogma. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1411 (1987)

73. The Catholic Church considers that conjugal relations between husband and wife have important meaning with respect to marital harmony and fidelity. *See* POPE PAUL VI, *supra* note 64, at 4.

74. M. POTTS & P. DIGGERY, *supra* note 38, at 78, 99.

75. PLANNED PARENTHOOD, *supra* note 32, at 2.

76. State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sept. 2, 1988). Certainly, if it were claimed that the underlying purpose of Term #20 is merely that Debra Forster use birth control, this is not a compelling state interest that can justify the infringement on her constitutional rights. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

77. POPE PAUL VI, *supra* note 64.

conditions of probation would be to disobey the tenets of her Church by using an effective, unnatural method of birth control.[78]

Debra Forster was forced to choose between following the precepts of her religion by not practicing birth control and thus violating her probation, or, abandoning this basic precept of her religion in order to comply with probation.

III. STATE'S COMPELLING INTERESTS VS. FUNDAMENTAL RIGHTS

The fact that court-imposed birth control intrudes on rights of privacy and religion does not end the inquiry. According to constitutional doctrine, a balancing test is to be used. That is, an intrusion into privacy or religious freedom can be justified by a compelling state interest. Since the precise nature of balancing state interests within the contexts are similar, we discuss them both in the following sections.

A. Privacy Rights

In *Roe v. Wade*,[79] the Supreme Court laid down a balancing test to be used when fundamental rights are infringed. Specifically, any governmental action limiting fundamental rights may be justified only by a "compelling state interest."[80]

In *Forster*, the only possible state interest in requiring Debra Forster to use birth control would be to protect potential children from child abuse.

However, in *Rodriguez v. State*,[81] where the defendant was convicted of aggravated child abuse and, as conditions of probation, ordered not to marry or get pregnant, the court struck down the order, significantly noting that the conditions "add nothing to decrease the possibility of further child abuse or other criminality."[82] In *Smith v. Supreme Court*, the Arizona Supreme Court implied that

78. Not only does Term #20 infringe on Debra Forster's current religious freedoms, but because the probation is of lifetime duration, the Term also infringes on her future freedoms. Even if Ms. Forster were not an extremely devout Catholic now, Term #20 would effectively prevent her from *ever* fully complying with the doctrines of her Church.

79. *Roe*, 410 U.S. at 163.

80. *Id.* at 155.

81. Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979).

82. *Id.* at 10.

the state does *not* have a legitimate interest in future children.[83] The *Smith* court struck down court-ordered sterilization noting that "[t]he sterilization ordered herein was to protect future children from abuse, and not society from defective children."[84] Indeed, while the state may act to protect the well-being of already existing children who reside in the state,[85] the state has no legitimate interest in children who do not, and may never, exist.[86]

B. Free Exercise Rights

Similarly, any burden on free exercise must be reviewed under a test which balances the burden on religion against the state's interest.[87] In *Wisconsin v. Yoder*,[88] for example, it was held to be an unconstitutional infringement on the freedom of religion for the state to require that children of Amish parents attend public school beyond the eighth grade.[89] The Court acknowledged the state's power and responsibility regarding education, but held that the state's interest "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. . . ."[90] Infringements on religious freedom "must be justified only by proof by the State of a compelling interest."[91] Indeed, "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[92] Arizona courts have also applied this rigorous standard, requiring the existence of a "compelling state interest" to justify an infringement

83. Smith v. Supreme Court, 151 Ariz. 67, 725 P.2d 1101 (1986).

84. *Id.* at 69, 725 P.2d at 1103.

85. *In re* Appeal in Maricopa County, 120 Ariz. 82, 84, 584 P.2d 63, 65 (Ct. App. 1978).

86. *See, e.g.*, People v. Hazelwonder, 138 Ill. App. 3d 213, 485 N.E. 2d 1211 (App. Ct. 1985). The court approved a condition of probation which restricted the rights of the defendant to visit his minor child. The interest of the state was in protecting an *existing* child.

87. R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW § 21.6 (1986).

88. Wisconsin v. Yoder, 406 U.S. 205 (1972)

89. *Id.* at 234.

90. *Id.* at 214.

91. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987).

92. *Yoder*, 406 U.S. at 215.

on the free exercise of religion.[93]

In *Forster*, the impact on Debra Forster's freedom of religion was profound in its implications and of lifetime duration. Again, while the state generally has strong interests involving the well-being of existing children, the only possible interest of the state here is some amorphous, abstract concern for children who may never come into existence. Thus, the government had no compelling interest that could justify the infringement on Mrs. Forster's religious freedom.

C. Least Restrictive Means

Even if there is a compelling state interest, any government action that infringes on a fundamental right must be "narrowly drawn."[94] Indeed, a government interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[95]

Within the context of the Free Exercise Clause, the Supreme Court has held "[t]he mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accomodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interst.[96]

Even if the state has an interest in protecting a probationer's unborn children, the mandate of compulsory birth control is not the least restrictive means available to satisfy that interest. A less restrictive means of protecting probationer's future children would be future foster placement, termination of parental rights and/or adoption proceedings. In the *Forster* case, especially because Debra was still very young, counseling services or parenting skills classes

93. *In re* Marriage of Gove, 117 Ariz. App. 324, 329, 572 P.2d 458 (Ct. App. 1977). *See also* State v. Whittingham, 19 Ariz. App. 27, 29, 504 P.2d 950, 952 (Ct. App. 1973). "It is well settled that the First Amendment right to freedom of religion grants an individual the right to the free exercise of his chosen religion without governmental intervention or interference unless a 'compelling state interest'. . . is proven." *Id.*

94. Roe v. Wade, 410 U.S. 113, 178 (1973).

95. Shelton v. Tucker, 364 U.S. 479, 488 (1960). For example, in People v. Pointer, 151 Cal. App. 3d 1128, 1141, 199 Cal. Rptr. 357, 366 (Ct. App. 1984), the court concluded that "the condition of probation prohibiting conception is overbroad, as less restrictive alternatives are available that would feasibly provide the protections that trial court believed necessary." *Id.*

96. Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981).

could enable her to be a suitable parent in the future. None of these less restrictive alternatives would infringe upon Debra's religious freedoms.

IV. CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[97] The cruel and unusual clause of the Constitution is applicable to the states through the fourteenth amendment.[98] Furthermore, the wording of Article 2, Section 15 of the Arizona Constitution is identical to the eighth amendment of the United States Constitution.[99]

The eighth amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society."[100] While the state may punish its citizens, it must treat those it punishes with respect for their intrinsic worth as human beings.[101] Court-ordered birth control as a condition of probation may violate the cruel and unusual clause of both the United States and Arizona Constitutions. A dangerous precedent would be set if the government were allowed to require a defendant to use birth control as a condition of probation. This "[c]ruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister."[102]

A. The Resultant Stigmatization and Alientation of Court-Ordered Birth Control

If a punishment offends fundamental notions of human dignity, it may be classified as cruel and unusual even when its primary or only effect is psychological.[103] Sentences that seek to cast out a defendant from society have universally been found to be cruel and

97. U.S. CONST. amend. VIII.
98. Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 460 (1947).
99. ARIZ. CONST. art. II, § 15.
100. Trop v. Dulles, 356 U.S. 86, 101 (1957).
101. Furman v. Georgia, 408 U.S. 238, 270 (Brennan, J., concurring) (1971).
102. Weems v. United States, 217 U.S. 349, 373 (1910).
103. Robinson v. California, 370 U.S. 660 (1961).

unusual.[104]

Term #20 could thus be considered cruel and unusual because it would subject Debra Forster to undue stigmatization and alienation. The probation condition of enforced barrenness would result in social isolation for Debra Forster; such forced condition would stigmatize her in the eyes of the community.[105]

In *The Scarlett Letter*, Nathaniel Hawthorne explored the cruel and stigmatizing effects of forcing a woman to wear a scarlet "A" stitched to her clothing.[106] Particularly because of the intense local and national publicity, and because the entire nation has been told of the conditions of her probation, Term #20 would have a similar effect on Debra Forster. Indeed, forced contraception or involuntary sterilization has been called "a brand of infamy,"[107] that will subject the probationer to "shame and humiliation and degradation and mental torture."[108]

B. Associated Health Risks of Forced Birth Control

Every method of birth control is associated with the risk of pain and a danger to health.[109] For a court to require a probationer to involuntarily subject herself to these risks is cruel and unusual.[110]

The most effective birth control methods, the birth control pill[111]

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104. *Furman*, 408 U.S. at 273. *Accord Trop*, 356 U.S. at 86 (Supreme Court held that denationalization for the crime of wartime desertion was cruel and unusual, even though the punishment did not involve any physical mistreatment, because denationalization causes the individual to be alienated from organized society. *Id.* at 101).

105. *See* Note, *Stiking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV. 800, 816 (1976) ("The demeaning effect of arbitrary intrusions into the parolee's privacy will be reflected in the attitudes of his relatives and friends." *Id.*).

106. N. HAWTHORNE, THE SCARLET LETTER (1859).

107. Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918).

108. Davis v. Berry, 216 F. 413, 417 (S.D. Iowa 1914).

109. *See generally* LONG-TERM STUDIES ON SIDE-EFFECTS OF CONTRACEPTION (A. Lindberg & P. Reichertz eds. 1978)

110. *See* Gunter v. State, 153 Ariz. 386, 388, 736 P.2d 1198, 1199 (Ct. App. 1987) ("Deliberate indifference to a prisoner's serious medical needs may constitute the unnecessary and wanton infliction of pain that the eighth amendment proscribes." *Id.*)

111. Oral contracptives can cause nausea, vomiting, bleeding, urinary tract infection, vaginal discharge, chloasma, headache, depressions, mastalgia, weight fluctuations, and circulatory problems. C. PORTER, R. WAIFE & H. HOLTROP, *supra* note 33, at 49-67. More seriously, there is some evidence showing a relationship betwen pill usage and stroke, hemorrhage, hypertension, gallstones, and heart attack. *Id.* Indeed, the use of oral contraceptives can aptly

and the intrauterine device (IUD),[112] involve severe physical intrusions. Cases on toxic shock syndrome,[113] as well as bladder infection,[114] have been reported among diaphragm users, and condoms and vaginal spermicides may cause vaginal irritation.[115] Finally, the risks associated with surgical sterilization as a method of birth control are profound.[116]

C. Equal Protection

"The basic rule of equal protection in criminal cases is that no person should be subject to a greater or different punishment than another in similar circumstances."[117] The only readily available birth control device for men is a condom, which does not involve significant bodily intrusion.[118] Female birth control methods, on the other hand, are more dangerous and are necessarily more intrusive in that they require an ingestion of chemicals or the insertion of a foreign device into the vagina. If a male defendant were convicted of child abuse and were ordered to use birth control for the rest of his life as a condition of probation, the invasion on his privacy would not be as great, the health dangers associated with birth control use would not be as severe, and the punishment would not be so cruel and unusual. Thus, court-ordered birth control for women raises issues of equal protection, both independently and in conjunction with the eighth amendment.

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be characterized as "dangerous." *See* P. BOFFA, PATHOLOCICAL EFFECTS OF ORAL CONTRACEPTIVES (1973); Masterson, *Oral Contraceptive Agents: Current Status*, 155 AM. J. SURGERY 619 (1988).

112. Dangers associated with the IUD include uterine perforation, ectopic pregnancy, and pelvic inflammatory disease. D. EDELMAN, G. BERGER & L. KEITH, *supra* note 34, at 34, 55. Note also that the severe health dangers associated with the IUD have been the subject of much tort litigation. *E.g.*, Lindsey v. A. H. Robbins Co., 715 F.2d 1265 (7th Cir. 1983).

113. M. POTTS & P. DIGGERY, *supra* note 38, at 133.

114. PLANNED PARENTHOOD, *supra* note 32, at 3.

115. C. PORTER, R. WAIFE, & H. HOLTROP, *supra* note 33, at 146, 150. "Two preliminary studies have found an increased incidence of congenital abnormalities in the offspring of women who used vaginal spermicides near the time of conception." *Id.* at 153-54.

116. *See generally* M. SAIDI & C. ZAINIE, *supra* note 39.

117. State v. Steelman, 120 Ariz. 301, 585 P.2d 1213 (1978).

118. G. ZATUCHNI, INTERNATIONAL WORKSHOP ON MALE CONTRACEPTION: ADVANCES AND FUTURE PROSPECTS (1986).

D. The Implication of Thompson vs. Oklahoma

Debra Forster was barely seventeen years old when she committed the acts for which she was eventually convicted and put on probation.[119] In Arizona, a seventeen year old child is considered a minor for most purposes.[120] In *Thompson v. Oklahoma*,[121] the Supreme Court held that although the death penalty is not per se unconstitutional, the eighth amendment prohibits the execution of a person who was a minor at the time of the offense.[122] Even if forced birth control were constitutional, it is certainly unconstitutional when applied to a defendant who was a minor at the time the offense was committed.

V. INVOLUNTARY STERILIZATION

In *Skinner v. Oklahoma*, the Supreme Court declared that "[m]arriage and procreation are fundemental to the very existance and survival of the race."[123] In fact, parents have a "fundamental liberty interest" in the care, custody and management of their child.[124] Term #20 would have denied Debra Forster these fundamental constitutional rights.

Specifically, because the intent of a condition like Term #20 is to prohibit the female probationer from ever becoming pregnant, this essentially has the same effect as, court-ordered involuntary sterilization.[125] In complying with Term #20, Mrs. Forster would not have been permitted to procreate or to care for future children and thus, she would have been denied fundamental constitutional rights.[126]

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119. *See* Sentencing Memorandum, at 5, State v. Forster., No. CR-87-10445 (Maricopa Co., Ariz., June 7, 1988).

120. For example, a seventeen year older may not serve on a jury. ARIZ. REV. STAT. ANN. § 21-301(D) (Supp. 1987).

121. Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

122. *Id.*

123. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

124. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

125. Sterilization is "a procedure by which a human . . . is made incapable of reproduction." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2238 (3d ed. 1976). The court mandating Term #20 constitutes such a "procedure."

126. *See also supra* pp. 2-8, for further discussion on why court-ordered birth control infringes on the constitutional right of privacy.

A. Legal Court-Ordered Sterilization

Although some jurisdictions have permitted court-ordered sterilization for incompetents, sterilization has been found to be unconstitutional if it is coercive or not in the best interests of the person being sterilized.[127] "[B]efore sanctioning the sterilization of an incompetent, the court must take great care to ensure that the incompetent's rights are zealously guarded."[128] Court-ordered sterilization is permitted only after the strictest possible judicial review to ensure that the procedure is in the best interests of the person involved. Sterilization is constitutionally impermissable as punishment or as a term of probation.

B. Involuntary Sterilization as Cruel and Unusual Punishment

The method by which a punishment is carried out is subject to judicial scrutiny under the cruel and unusual clause.[129] Because involuntary sterilization is associated with devastating psychological effects, its punitive use constitutes cruel and unusual punishment. "[T]he power to sterilize, if excercised, may have subtle, far-reaching and devastating effects."[130]

In *Davis v. Berry*, the court struck down a statute that allowed sterilization of a prisoner who had suffered two felony convictions.[131] The court emphasized the mental cruelty associated with forced sterilization, stating that:

> The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation the mental suffering are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages.[132]

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127. Wyatt v. Aderholt, 368 F. Supp. 1383 (N.D. Ala. 1974).

128. *In re* C.D.M., K.C.M., & B.L.M. v. State, 627 P.2d 607, 612 (Alaska 1981).

129. McKellar v. Ariz. State Dep't of Corrections, 115 Ariz. 591, 593, 566 P.2d 1337, 1339 (1977).

130. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

131. Davis v. Berry, 216 F. 413, 416 (S.D. Iowa 1914).

132. *Id.*

Federal courts have emphasized that involuntary sterilization is an impermissible mutilation, not only because of the physical intrusion, but mainly because of the loss of procreative power.[133] In *Mickle v. Henrichs*, for example, the court noted that even in 1916, the vasectomy operation could be performed under local anesthetic in only a few minutes and with no physical discomfort or impairment of sexual ability.[134] Nevertheless, the court concluded that "[v]asectomy in itself is not cruel . . . but, when resorted to as punishment, it is ignominious and degrading, and in that sense is cruel."[135] Similarly, the court in *Davis*, compared a court-ordered vasectomy with court-ordered castration and noted that although castration is more severe, the vasectomy "in its results is much the coarser and more vulgar," because of the loss of power to procreate.[136]

The Arizona Attorney General, in considering the constitutionality of a bill prescribing the penalty of castration for the commission of rape upon a child victim, ruled that such a law would be unconstitutional as a violation of the cruel and unusual clauses of the United States and Arizona Constitutions.[137] The Attorney General stressed the mental cruelty associated with punitive sterilization and concluded that:

> We are in complete sympathy with the proponents for legislative action of a positive type to prevent repetition by rapists covered in the proposed bill. However, in compliance with a request for a legal opinion as to the constitutionality of a proposed bill, we must remove personal feelings, as well as emotions, and supplant them with both sober and considered legal conclusions. Therefore, it must be our opinion in this instance, based on the legal authority contained therein, that the proposed bill is unconstitutional.[138]

Similarly, involuntary sterilization of Debra Forster through court-imposed birth control would have been unconstitutional.

133. Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918).
134. *Id.*
135. *Id.* at 690.
136. *Davis*, 216 F. at 416.
137. Op. Ariz. Att'y Gen. 56-13, at 29 (1956).
138. *Id.* at 29.

Considering, then, that involuntary sterilization has been held to be unconstitutional even for very serious crimes such as rape,[139] the infliction of involuntary sterilization is disproportionate to the crime of attempted child abuse, and is thus cruel and unusual.[140] Furthermore, a punishment may be found to be disproportionate to the offense "whether imposed without or within prison walls."[141] And even if a sentence or condition of probation is authorized by statute, the penalty may still be cruel and unusual.[142]

As involuntary sterilization, Debra Forster's proposed punishment is certainly "cruel," it is also undoubtedly "unusual." The Supreme Court struck down a Georgia death penalty for the crime of rape, noting that Georgia was the only state authorizing the death penalty for rapists of adult women.[143] Concerning the instant case, we are unaware of any other court in the United States that has upheld involuntary sterilization as a condition of probation.[144] In fact, as we have discussed, even where serious offenses are involved, courts have rejected punishments that impinge on reproductive freedom even in cases involving the most heinous of crimes.[145]

C. Jurisdiction to Impose Sterilization in Arizona

The recent case of *Smith v. Superior Court*,[146] is directly relevant to the instant matter. In *Smith*, the Arizona Supreme Court held that a Superior Court Judge did not have jurisdiction to require that

139. *Id.*

140. Both the United States Supreme Court in Weems v. United States, 217 U.S. 349, 367 (1910) and the Arizona Supreme Court in State v. Espinosa, 101 Ariz. 474, 421 P.2d 322 (1966) (*quoting* State v. Taylor, 82 Ariz. 289, 294, 312 P.2d 162, 166 (1957)) have held that a punishment is unconstitutionally cruel and unusual if it is disproportionate to the offense for which it is imposed.

141. Adams v. Carlson, 488 F.2d 619, 636 (7th Cir. 1973).

142. *See* State v. Day, 148 Ariz. 490, 715 P.2d 743 (1986); State v. Mulalley, 127 Ariz. 92, 618 P.2d 586 (1980).

143. Coker v. Georgia, 433 U.S. 584 (1977).

144. A test for determining whether a punishment is unconstitutionally cruel and unusual includes an examination of the offense, the harshness of the penalty, the sentences imposed in the same jurisdiction, and the sentences imposed in other jurisdictions. State v. Williams, 144 Ariz. 433, 445, 698 P.2d 678, 690 (1985); Solem v. Helm, 463 U.S. 277, 290-91 (1983).

145. Mickle v. Henricks, 262 F. 687, 688 (D. Nev. 1918). *See, e.g.*, State v. Brown, 284 S.C. 407, 409, 326 S.E.2d 410, 412 (1985) (surgical castration overturned for defendants convicted of a brutal sexual assault). These reflect the tendency of courts to "restrain cruel innovations in the way of punishment" even when confronted with irredeemable defendants.

146. Smith v. Superior Court, 151 Ariz. 67, 725 P.2d 1101 (1986).

the defendants be sterilized as a condition of reduced sentence.[147] Similarly, an Arizona Superior Court Judge does not have jurisdiction to order sterilization or birth control as a condition of probation.

VI. VAGUENESS

A. Due Process

There is a general legal principle that statutes and regulations must be sufficiently clear and definate so as to provide fair notice and warning.[148] To punish someone for violating a vague statute by depriving them of liberty or property, amounts to a constitutional due process infringement.[149]

Indeed, the due process clause of the fourteenth amendment requires that the law give sufficient warning so that people can conform their conduct to its dictates.[150] Specifically, in order to be constitutional, a statute must give a "person of ordinary intelligence fair notice that his contemplated conduct is forbidden. . . ."[151] Although most of the constitutional decisions dealing with vagueness concern criminal statutes, the same principle applies to a vague conditon of probation.

Certainly, one's liberty interests are at stake when violating either a criminal statute or a condition of probation, and "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."[152] The problem of vagueness is particularly acute in situations like the instant case where the uncertainty "threatens to inhibit the exercise of constitutionally protected rights."[153] As the United States Supreme Court has stated:

> It is a basic pinciple of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . . [B]ecause we assume that man is free to steer between lawful

147. *Id.*
148. Smith v. Goguen, 415 U.S. 566 (1974).
149. Grayned v. City of Rockford, 408 U.S. 104 (1972).
150. Rose v. Locke, 423 U.S. 48, 50 (1975).
151. United States v. Harris, 347 U.S. 612, 617 (1954).
152. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).
153. Colautti v. Franklin, 439 U.S. 379, 391 (1979).

> and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[154]

Arizona courts follow these same principles.[155] In *State v. Berry*, the Arizona Supreme Court stated:

> [I]n order for a penal statute to be constitutional it must be sufficiently definite and certain to inform members of society what they may, and what they may not, legally do. If the statute is found to be indefinite and uncertain then it is in conflict with the "due process" clauses of both our Federal and State Constitutions and must be declared void.[156]

B. Vagueness of Debra Forster's Condition of Probation

According to term #20 of Debra Forster's probation order, she was to "remain on some method of birth control" for life.[157] Furthermore, Forster was required to periodically supply "written evidence" of her birth control use to her probation officer.[158] If Forster were deemed to be in violation of probation, she would have been in grave danger of having her liberty taken away.

Problems arise because the precise form of birth control to be used is undefined and the nature of the documentation is left unspecified.[159] Indeed, there is no question that Forster was forced

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154. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (footnotes omitted).

155. State v. Tocco, 156 Ariz. 116, 750 P.2d 874 (1988). "The basic rule in reviewing a statute for vagueness is to determine whether the offense is defined in terms that people of average intelligence can understand, since no one may be required at the risk of his liberty to speculate as to the meaning of a penal statute." State v. Serrano, 145 Ariz. 498, 500, 702 P.2d 1343, 1345 (Ct. App. 1985).

156. State v. Berry, 101 Ariz. 310, 312, 419 P.2d 337, 339 (1966).

157. Sentence of Probation, at 28, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., May 24, 1988).

158. *Id.*

159. Also, in issuing Term #20, Judge Ellis-Budzyn may not have been fully cognizant of the various informational barriers, Allgier, *Informational Barriers to Contraception*, in ADOLESCENTS, SEX, AND CONTRACEPTION 143 (D. Byrne & W. Fisher eds. 1983), and emotional barriers to contraception use that have been identified by social scientiests. Fisher, Byrne & White, *Emotional Barriers to Contraception*, in ADOLESCENTS, SEX, AND CONTRACEPTION, *supra*, at 207.

to "speculate as to the meaning" of her probation.[160] Term #20 did not specify that Debra Forster must use an *effective* means of birth control. That raises the question of whether Forster could have satisfied her probation by proving that she adheres to an *ineffective* method of birth control such as withdrawal? Or would Debra Forster have been in compliance with the probation condition only if she does not get pregnant?

Also, because no method of birth control is 100% effective, Debra Forster could have used a theoretically effective method of birth control, gotten pregnant, and presumably been in violation of probation.[161] In addition, some methods of birth control are in the control of the male partner.[162] Would Debra Forster have been in compliance with probation if her husband used a condom, or even the withdrawal method, but the method fails?

Because the consequences of violating probation are so severe and are of lifetime duration, probationers like Debra Forster must also consider future possibilities. For example, must she use some method of birth control even if she is later unable to bear children because of disease, illness, or menopause?

Even if Debra Forster used relatively effective methods of birth control, she would have been unable to "prove" her compliance with the order, especially if she became pregnant. No amount of written "documentation" could distinguish a condom that failed from an improperly used condom or from a condom left sitting in a drawer. No documentation can prove that the rhythm method was really used, that purchased oral contraceptives were actually swallowed, or that the man actually attempted to withdraw his penis prior to ejaculation.

C. Abortion as Birth Control

Since Debra Forster's probation did not specify the method of birth control and since abortion is a means of controlling birth, Forster could have obtained an abortion to comply with the terms

160. State v. Serrano, 145 Ariz. at 500, 702 P.2d at 1345 (1985).

161. Oral contraceptives are ineffective among women who have difficulty remembering to take the pill every day. C. PORTER, R. WAIFE & H. HOLTROP, *supra* note 33, at 30. The IUD has an estimated failure rate of 3%. *Id.* at 77. Condoms, and other barrier methods, can also be ineffective, especially if used improperly. *Id.* at 145-49.

162. *See generally*, G. ZATUCHNI, *supra* note 118.

of her probation.[163] Indeed, because of the ready availability of abortion in the United States since *Roe v. Wade*, many women, particularly those who have had multiple abortions, consider abortion to be a form of birth control.[164] "There is a strongly held view that abortion is performed too readily in this country and that some women are using it as a substitute for contraception."[165]

In order to risk being held in violation of probation, Debra Forster may choose to have an abortion, even if she wanted to bear the child. Such a situation, amounting to court-ordered abortion, would unconstitutionally infringe on Debra Forster's privacy and religious fredoms, would subject her to profound health risks making the punishment cruel and unusual, and would establish a frightening legal precedent.[166]

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163. Although the terms "birth control" and "contraception" are often used interchangably, there may be an important distinction. While abortion may be excluded from the category of "contraception" in that it literally does not prevent conception, abortion is certainly a method of "birth control" in that it prevents a birth from happening. Term #20 of Debra Forster's probation order mandates some method of "birth control." State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sup. Ct., Sept. 2, 1988). In contrast, the probation order in People v. Pointer, 151 Cal. App. 3d 1128, 1133, 199 Cal. Rptr. 357, 360 (Ct. App. 1984) required the defendant "not conceive" during the probationary period. In Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979), the probationer was ordered not to become pregnant, while in State v. Livingston, 53 Ohio App. 2d 195, 372 N.E.2d 1335, 1336 (Ct. App. 1976), the order was that the probationer "not have another child." Note that the conditions of probation were struck down in all three of these cases even though they were not as vague as Term #20.

164. In fact, commentators have noted that "[t]he relation between contraceptive practice and abortion has been clouded for social as well as academic reasons , . . . [but] [i]n a very real sense, both contraception and abortion are essential for controlling fertility and meeting the goals demanded of modern living." M. POTTS & P. DIGGERY, *supra* note 38, at 315, 318.

165. I. ALLEN, FAMILY PLANNING STERILIZATION AND ABORTION SERVICES 66 (1981). In fact, considering that it is fairly common for some women to have repeat abortions, it has been noted that "the abortion procedure has, in effect, become a method of birth control, slowing the population growth by about a quarter." Allgier, *supra* note 159, at 183. (citation omitted). Furthermore, the majority of the young women sampled in a large-scale survey agreed that "abortions are so easy to get these days that I don't really worry about getting pregnant." R. SORENSON, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA (1973).

166. In People v. Pointer, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (Ct. App. 1984), where the trial judge ordered the defendant not to conceive, the appellate court struck down the condition noting that, in the event the defendant became pregnant during the period of probation the surreptitious procuring of an abortion might be the only practical way to avoid going to prison. A condition of probation that might place a defendant in this position, and, if so, be coercive of abortion, is in our view improper. *Id.* at 1140-41, 199 Cal. Rptr. at 366.

VII. CONCLUSIONS

In summary, there can be no serious dispute that court-ordered birth control as a condition of probation is unconstitutional. First, it constitutes a severe intrusion into privacy by sharply restricting intimate sexual, reproductive, and parental behavior. Short of court-imposed surgical procedures, it is difficult to imagine a clearer intrusion of constitutional privacy.

Second, for people whose religion prohibits the use of artificial contraception, court-imposed birth control constitutes a free exercise infringement. For Catholics, like Debra Forster, the prohibition against contraception is so fundamental to their religion that such a free exercise violation is particularly pronounced.

Third, for the government to intrude into people's privacy or to restrict their religious freedom, the government must have a compelling interest. Although the government may certainly have an interest in ordering some of its citizens to use contraception, the interest is far from "compelling." Furthermore, court-imposed birth control is not the least restrictive means to achieve this interest.

Fourth, court-ordered birth control could be considered cruel and unusual punishment, particularly in light of the stigmatization and associated health risks. In this regard, because contraception is inherently more hazardous for women, there is a plausible equal protection argument.

Fifth, court-ordered birth control can be likened to impermissible involuntary sterilization.

Finally, a court order to use contraception will necessarily be either unconstitutionally vague, such as the situation in the *Forster* case, or, be so specific as to further intrude into the person's privacy. Additionally, an open-ended order mandating the use of any type of birth control raises the very troubling notion that an abortion might be obtained soley to comply with the court order.

VIII. EPILOGUE

After Judge Ellis-Budzyn ordered Debra Forster to use birth control for life as a condition to probation, Mrs. Forster filed an appeal with the Arizona Court of Appeals. On August 29, 1988, counsel for Forster appeared before Judge Ellis-Budzyn to challenge the terms of probation and announced in Court that Forster was in

fact pregnant. The Arizona Civil Liberties Union appeared as amicus curiae.[167] On September 2, 1988, Judge Ellis-Budzyn issued a memorandum rescinding the offending term.[168] In its place, Judge Ellis-Budzyn imposed new terms to protect the fetus, ordering Debra Forster to submit to urinalysis testing for drugs and enroll in parenting and prenatal care classes.[169] In addition, the national media attention on Forster continued even after the legal issues were resolved.[170]

The controversy over the constitutionality of court-imposed birth control is intensifying. In Indiana, a judge recently proposed that a woman who poisoned her child be sterilized in order to receive a more lenient sentence.[171] Until appellate courts definitively rule that such practices are unconstitutional, judicial excess will continue.

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167. *See* Memorandum, at 1, State v. Forster, No. CR-87-10445 (Maricopa Co., Ariz., Sept. 2, 1988).

168. *Id.* at 3.

169. *Id.* at 3-4.

170. Debra Forster was invited to appear on *The Phil Donahue Show* for an airing on November 16, 1988. Judge Budzyn denied Forster permission to leave the state to appear on the show, ruling that she was "too vulnerable" and that appearing on television "would be like throwing her into the mouths of sharks." Judge Budzyn herself also declined an invitation to appear on the show. *Judge Says Probationer Mom Can't Appear on 'Donahue.'* Ariz. Republic, Oct. 26, 1988, at 3-2, col. 1.

171. *Plan to Sterilize Woman is Debated*, N.Y. Times, Sept. 25, 1988, at § 1, at 35, col. 1 (also discussing the *Forster* case).