

VOLUNTARY STERILIZATION OF INMATES FOR REDUCED PRISON SENTENCES

ELISE B. ADAMS*

In May 2017, a Tennessee judge issued a standing order allowing inmates to receive thirty days' jail credit in exchange for undergoing a voluntary sterilization procedure. Although the order was ultimately rescinded, this Article will address the constitutional and ethical concerns that a district court would have considered had the order not been rescinded. While inmates can always choose to waive their constitutional rights, the coercive nature of prisons—explained in the unconstitutional conditions doctrine—may compromise a prisoner's ability to provide voluntary consent. The constitutionality of the order largely depends on the level of scrutiny a court applies. Regardless of the order's constitutionality, the adverse ethical and social ramifications outweigh any potential benefits that could come from such an order. This order would also give too much power to state governments over an individual's reproductive freedoms. Instead of automatically reducing an inmate's sentence after undergoing a sterilization procedure, drug offenders should have the opportunity to choose from several different birth control options that could possibly lead to a reduced sentence.

I. BACKGROUND

What lengths would you go to snip thirty days off your prison sentence? Many inmates in White County, Tennessee asked themselves this very question in May 2017, after Judge Sam Benningfield signed a standing order¹ allowing inmates to receive jail credit in exchange for undergoing a procedure providing long-term birth control, which included either a vasectomy² for males or a Nexplanon implant³ for females—a procedure that usually makes women infertile for approximately three years.⁴ Inmates could receive two days' credit for completing

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* J.D. Candidate, Sandra Day O'Connor College of Law, Arizona State University; B.S.M., 2015, Tulane University. The author would like to thank Caroline Saunders, Louise Brinton, Erik Luna, Kaiponanea Matsumura, and Justin Weinstein-Tull for their invaluable comments and advice.

1. Sam Benningfield, J., Standing Order (May 15, 2017).
2. A vasectomy is a permanent surgical sterilization procedure that prevents sperm from entering the semen. *Vasectomy*, PLANNED PARENTHOOD (last visited October 29, 2017), <https://www.plannedparenthood.org/learn/birth-control/vasectomy>.
3. Nexplanon is a small plastic rod that is surgically implanted into the arm and provides birth control for up to three years, after which it must be removed and replaced. *What is NEXPLANON (Etonogestrel Implant)?*, NEXPLANON (last visited October 29, 2017), <https://www.nexplanon.com/what-is-nexplanon/>.
4. Benningfield, *supra* note 1.

a Neonatal Syndrome Education Program⁵ and an additional thirty days' credit if they underwent a long-term birth control procedure.⁶ While the order was in effect, thirty-two women received Nexplanon implants and thirty-eight men signed up to receive vasectomies.⁷ These men and women represented approximately thirty-two percent of the jail's daily population.⁸

To become eligible to receive the sterilization procedure⁹ and subsequent sentence reduction, inmates first had to attend the Neonatal Program, which taught them about how prenatal drug use can affect fetal development.¹⁰ Because the order itself did not specify who was eligible to receive the sentence reduction, Judge Benningfield later released a statement clarifying that those eligible for free contraceptive services would also be eligible to receive the thirty-day credit.¹¹ This statement also specified that males under the age of twenty-one could not participate in the program but did not set an age limitation for women.¹² Additionally, inmates had to receive a full physical examination and wait thirty-days before undergoing the procedure.¹³ The program was only offered to those sentenced out of the General Sessions Court,¹⁴ so inmates serving sentences for serious felony offenses were not eligible to receive the reduced sentence.¹⁵ However, sign-up sheets and pamphlets describing the order were distributed

5. The program is offered by the Tennessee Department of Health and teaches inmates about the dangers of prenatal drug use. See Hayley Mason, *Judge Under Scrutiny for Offering Reduced Sentences for Vasectomies, Birth Control Implants*, WSMV NEWS 4 (July 28, 2017), https://www.wsmv.com/news/judge-under-scrutiny-for-offering-reduced-sentences-for-vasectomies-birth/article_6126e9c1-ec01-5b38-8cc0-9f568f47fd62.html.

6. *Id.*

7. Derek Hawkins, *Judge to Inmates: Get Sterilized and I'll Shave off Jail Time*, WASHINGTON POST (July 21, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/21/judge-to-inmates-get-sterilized-and-ill-shave-off-jail-time/?utm_term=.71f72fa4f95d.

8. Jessica Lussenhop, *'We Were Guinea Pigs': Jailed Inmates Agreed to Birth Control*, BBC NEWS (Aug. 18, 2017), <http://www.bbc.com/news/world-us-canada-40955288> ("With an average daily population of 221 inmates, that represented a sizeable portion of the jail.").

9. Judge Benningfield asserts that "sterilization is never involved and is not an option as all procedures offered are reversible." Press Release, Sam Benningfield, J., <http://spartalive.com/wp-content/uploads/2017/07/Judges-Statement.pdf>. However, for clarity and efficiency, this Article will refer to the procedure as a sterilization procedure because Nexplanon is considered short-term sterilization.

10. *Id.*

11. *Id.* This is presuming that those who are fertile and of child-bearing years are eligible to receive free contraceptive services.

12. *Id.*

13. Gina Cherelus, *Tennessee Inmates Offered Less Jail Time in Return for Vasectomies*, REUTERS (July 21, 2017, 9:43 AM), <https://www.reuters.com/article/us-tennessee-vasectomy/tennessee-inmates-offered-less-jail-time-in-return-for-vasectomies-idUSKBN1A625N>.

14. The General Sessions Court mimics the duties of a federal magistrate judge. *About General Sessions Courts*, TENN. ADMIN. OFFICE OF THE CT., <http://www.tsc.state.tn.us/courts/general-sessions-courts/about> (last visited Feb. 17, 2018). The court's criminal jurisdiction "is limited to preliminary hearings in felony cases and misdemeanor trials in which a defendant waives the right to a grand jury investigation and trial by jury in Circuit or Criminal Court." *Id.*

15. Benningfield, *supra* note 9.

throughout White County Jail's general population areas, where many inmates not sentenced by the General Sessions Court resided.¹⁶

The motive behind the order was simple. Judge Benningfield asserted that he was forced to remove children from the custody of their previously incarcerated mothers "because [these children] were born addicted to drugs or dependant [sic] and neglected" as a result of their parent's drug use.¹⁷ Judge Benningfield's order was an attempt to reduce both the number of children born with health problems caused by *in utero* drug exposure as well as the number of children who would eventually end up in foster care.¹⁸

Despite his good intentions, Judge Benningfield's order received nationwide criticism from civil rights attorneys, health officials, and the general public.¹⁹ The Tennessee American Civil Liberties Union issued a statement saying that the order "violates the fundamental constitutional right to reproductive autonomy and bodily integrity by interfering with the intimate decision of whether and when to have a child, imposing an intrusive medical procedure on individuals who are not in the position to reject it."²⁰ District Attorney Bryant Dunaway, who oversees the prosecution of defendants in White County, said that it was concerning that a young defendant could receive an irreversible procedure that would ultimately impact the rest of his life.²¹ Judge Benningfield claimed he created the order after being approached by the Tennessee Department of Health.²² The Department, however, denied being involved in "developing any policy to offer sentence reductions to those convicted of crimes in exchange for their receiving family planning services."²³ The Department stated that it "[does] not support any policy that could compel incarcerated individuals to seek any particular health services."²⁴

Inmates were able to sign up to receive sterilization procedures for approximately two months before Judge Benningfield rescinded the order.²⁵ These inmates who signed up to receive the procedure and who "demonstrated to the court their desire to improve their situations and take serious and considered steps toward their rehabilitation by having the procedure" ultimately received the

16. Amended Complaint for Injunctive and Declaratory Relief at 9, *Sullivan v. Benningfield*, No. 17-cv-00052 (M.D. Tenn. filed Oct. 9, 2017), ECF No. 13.

17. Benningfield, *supra* note 9.

18. *Id.*

19. Derek Hawkins, *Tennessee Judge, Under Fire, Pulls Offer to Trade Shorter Jail Sentences for Vasectomies*, WASHINGTON POST (July 28, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/28/tennessee-judge-under-fire-pulls-offer-to-trade-shorter-jail-sentences-for-vasectomies/?utm_term=.6e85d4e1ce9d.

20. Press Release from Hedy Weinberg, Exec. Dir., ACLU-TN, *ACLU-TN Statement on White County Inmate Sterilization and Birth Control Program* (July 19, 2017), <http://www.aclu-tn.org/aclu-tn-statement-on-white-county-sterilization-program/>.

21. Veronika Bondarenko, *Tennessee Jails Have Been Shortening Sentences for Inmates who Get Vasectomies or Birth Control Implants*, BUSINESS INSIDER (July 20, 2017, 8:42 PM), <http://www.businessinsider.com/tennessee-jails-offer-vasectomies-for-reduced-sentence-2017-7>.

22. Benningfield, *supra* note 9.

23. Hawkins, *supra* note 7.

24. *Id.*

25. Sam Benningfield, J., *Order Rescinding Previous Standing Order* (July 26, 2017).

thirty-day credit, even after the program was rescinded.²⁶ Most of the women who signed up for the order actually received Nexplanon; male inmates who signed up for the order did not receive a vasectomy.²⁷ Although the order was rescinded just two months after its initial issuance, Judge Benningfield was reprimanded by the Tennessee Board of Judicial Conduct.²⁸

The question now becomes, why should we care? The order has been rescinded; Judge Benningfield has been publicly scolded and sanctioned; and other judges will think twice before offering criminal defendants any sort of benefit for undergoing a sterilization procedure. Nevertheless, the underlying issue the order attempted to resolve still exists. The United States is currently in the throes of an opioid epidemic; from 2003 to 2012, the number of drug-dependent infants grew nearly fivefold.²⁹ The cost of treating these infants is exorbitant: “[H]ospitalization costs rose to \$1.5 billion in 2012, from \$732 million in 2009.”³⁰ Because many of the parents of opioid-dependent infants are low-income, Medicaid is forced to cover eighty percent of the associated hospital costs.³¹ Judge Benningfield attempted to “fix” the problem by preventing drug-users from procreating—thereby, supposedly decreasing the number of drug-dependent babies.

This Article not only examines whether Judge Benningfield’s order is constitutional, but also discusses the social and ethical ramifications of this type of order. Part II of this Article examines the history of both involuntary and voluntary sterilization in the United States. Part III considers the unconstitutional conditions doctrine and discusses whether procreation is a fundamental right. Part III also discusses the level of scrutiny to apply and determines whether the order falls outside the scope of the judiciary. Ultimately, the order’s constitutionality is contingent on the level of scrutiny a court would employ to determine whether it infringes on an inmate’s right to reproduce. Part IV briefly discusses the social and ethical ramifications and proposes a less coercive alternative to Judge Benningfield’s order.

Even if a court determines that the order is constitutional, the detrimental social consequences greatly outweigh any potential benefits that could come from sterilizing prison inmates. The right to procreate is too critical of a right for the judiciary to regulate without legislative approval. Instead of automatically reducing an inmate’s sentence after she has undergone a sterilization procedure,

26. *Id.*

27. *See* Hawkins, *supra* note 7.

28. Press Release, The Tennessee Board of Judicial Conduct, Board of Judicial Conduct Complaints File Nos. B17-7052, B17-7055 and B17-7144 (Nov. 20, 2017), http://www.tncourts.gov/sites/default/files/docs/judge_benningfield_-_bjc_letter_of_public_reprimand_2017nov20.pdf.

Judge Benningfield was reprimanded for violating Rule 1.1 (Compliance with the Law) and Rule 1.2 (Promoting Confidence in the Judiciary) of Judicial Canon 1. *Id.* The Board acknowledged Judge Benningfield’s good intentions but ultimately concluded that his order “could unduly coerce inmates into undergoing a surgical procedure which would cause at least a temporary sterilization, and it was therefore improper.” *Id.*

29. Catherine Saint Louis, *A Tide of Opioid-Dependent Newborns Force Doctors to Rethink Treatment*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/health/opioid-addiction-babies.html>.

30. *Id.*

31. *Id.*

an inmate should be allowed to choose from a variety of options, one of which being long-term birth control, in exchange for a reduced sentence.

II. CONTEXT

A. History of Involuntary Sterilization in the United States

The United States has a tumultuous history of sterilizing convicted criminals for the purpose of limiting the transmission of criminality and other less desirable traits to subsequent generations over the last hundred years.³² The eugenics movement³³ in the United States gained popularity in the early 1900s.³⁴ During the height of this movement, eugenicists advocated that “poverty, criminality, illegitimacy, epilepsy, feeble-mindedness, and alcoholism (among others) were inherited traits that could not be altered”³⁵ and, therefore, individuals who possessed these traits should not be permitted to reproduce. In 1907, Indiana was the first state to pass a statute giving state institutions the power to sterilize convicted criminals and the mentally deficient.³⁶ However, fourteen years after the statute was passed, the Indiana Supreme Court in *William v. Smith* held that it was unconstitutional.³⁷ The *William* court found that the statute violated due process by not allowing inmates to cross-examine experts or offer evidence as to why he or she should not be sterilized.³⁸

Twenty years after Indiana enacted the first involuntary sterilization statute, the Supreme Court was tasked with determining whether a statute authorizing the sterilization of a “feeble-minded” woman was constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.³⁹ Carrie Buck, a patient involuntarily committed to the State Colony for Epileptics and Feeble Minded, was “the daughter of a feeble-minded mother . . . and the mother of an illegitimate feeble-minded child.”⁴⁰ The statute under which Buck was sterilized contained procedural safeguards to ensure “the rights of the patient [were] most carefully considered” including a hearing to determine whether

32. J. Michael Richardson, Note, *Compulsory Sterilization: Weeding Mendel’s Garden*, 22 DRAKE L. REV. 355, 355 (1973).

33. Eugenics is the theory of creating social policies to improve the quality of the human population by preventing individuals from passing on undesirable traits to offspring. Karen Norrgard, *Human Testing, the Eugenics Movement, and IRBs*, NATURE EDUCATION (2008), <https://www.nature.com/scitable/topicpage/human-testing-the-eugenics-movement-and-irbs-724>.

34. Teryn Bouche & Laura Rivard, *America’s Hidden History: The Eugenics Movement*, NATURE EDUCATION (Sept. 18, 2014), <https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444>.

35. REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA 1950-1980, at 1 (2011).

36. H. 364, 1907 Leg. (Ind. 1907); Oliver P. Schulingkamp, Comment, *Sterilization of Habitual Criminals*, 5 LA. L. REV. 124, 124-25 (1942).

37. *William v. Smith*, 131 N.E. 2, 2 (Ind. 1921).

38. *Id.*

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

40. *Id.*

sterilizing the patient was in the best interest of both the individual and society.⁴¹ Justice Oliver Wendell Holmes, in one of the most notorious and harshly worded Supreme Court decisions to date, reasoned that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for this imbecility, society can prevent those who are manifestly unfit from continuing their kind.”⁴² Noting that “[t]hree generations of imbeciles are enough,” the Court ultimately held that the statute was constitutional because the inmate was afforded due process of the law.⁴³

By 1937, ten years after *Buck v. Bell* was decided, “there were twenty-eight states with valid sterilization laws.”⁴⁴ The nationwide sterilization efforts, however, began to decline in the 1940s. After the start of World War II, “sterilization became a lower priority when physicians were sent off to fight, [giving] opponents of sterilization an opportunity to speak against it.”⁴⁵ Additionally, after the public witnessed Adolf Hitler’s attempts to create a master race through eugenics and forced-sterilization, “newfound support for human rights emerged.”⁴⁶ Public disclosure of the Tuskegee experiments⁴⁷ also triggered a turning point in the history of eugenics as Americans began to question the ethical implications involved with sterilizing indigent minorities.⁴⁸

By the 1940s the civil rights movement began gaining traction and the public began to learn of the atrocities committed in Nazi Germany during World War II. The Supreme Court was not impervious to the changing social environment. Thus, in 1942, the Supreme Court granted certiorari to *Skinner v. Oklahoma* and considered the constitutionality of the Oklahoma Habitual Criminal Sterilization Act, which permitted the sterilization of habitual criminals who had been convicted of two or more felonies.⁴⁹ In this case, the jury faced only one question when deciding whether an individual should be sterilized: whether a vasectomy could be performed on the defendant without being detrimental to his general health.⁵⁰ The Court found the Act unconstitutional, stating that “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other” it deprives the defendant of equal

41. *Id.* at 206–07.

42. *Id.* at 207.

43. *Id.*

44. Schulingkamp, *supra* note 36, at 125 n. 5. These states are Alabama, Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin.

45. Kimberly A. Smith, Note, *Conceivable Sterilization: A Constitutional Analysis of a Norplant/Depo-Provera Welfare Condition*, 77 IND. L.J. 389, 392 (2002).

46. *Id.*

47. See Michael J. Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past–Present, and Future?*, 36 CONN. L. REV. 125, 164 (2003). The Tuskegee Syphilis Experiment was a forty-year study conducted by the Public Health Service in which researchers “targeted poor African-American sharecroppers suffering from syphilis, but was presented to subjects as a study of ‘bad blood’” and is known as “the longest non-therapeutic experiment on human beings in medical history.” *Id.*

48. See *id.* at 164–65.

49. *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 537 (1942).

50. *Id.*

protection of the law.⁵¹ The Court reasoned that because “marriage and procreation are fundamental to the very existence and survival of the race,” an infringement on the right to procreate requires strict scrutiny.⁵²

Many viewed the Court’s ruling in *Skinner* as the end of the sterilization movement.⁵³ The *Skinner* Court, however, declined to explicitly overrule *Buck v. Bell* by relying only on equal protection grounds, failing to analyze the statute’s constitutionality on due process grounds. In fact, the Supreme Court has never expressly overruled *Buck*.⁵⁴ The *Skinner* Court distinguished the Oklahoma Sterilization Act from the act in *Buck* by acknowledging that Skinner was given no opportunity to be “heard on the issue as to whether he is the probable potential parent of socially undesirable offspring.”⁵⁵ The Court also failed to discuss whether the act was punitive in nature, whether it constituted cruel and unusual punishment, or whether it violated the due process clause of the Fourteenth Amendment.⁵⁶ Because the Court was particularly concerned with the permanent nature of sterilization and “did not specify whether temporary deprivations of the same procreative right would be similarly scrutinized, the description of the contested right in very general terms (as ‘procreation’) suggested that the constitutional protection might prevent other limitations on reproduction.”⁵⁷

In spite of the Court’s ruling in *Skinner*, lower level courts, state legislatures, and correctional facilities still attempt to find ways in which defendants can be sterilized.⁵⁸ The California state legislature, in 2003, publicly apologized for the “state’s past role in the eugenics movement and the injustice done to thousands of California men and women.”⁵⁹ However, the California state legislature seemingly forgot this apology; between 2006 and 2010, California prisons sterilized nearly 150 female inmates,⁶⁰ using tubal ligation,⁶¹ with thirty-nine of these inmates failing to give proper consent.⁶² Seven states currently allow the chemical or

51. *Id.* at 541.

52. *Id.*

53. Smith, *supra* note 46, at 392.

54. Steven S. Spitz, *The Norplant Debate: Birth Control or Woman Control?*, 25 COLUM. HUM. RTS. L. REV. 131, 138 (1993).

55. *Skinner*, 316 U.S. at 538.

56. *See id.*

57. Joanna Nairn, *Is There a Right to Have Children? Substantive Due Process and Probation Conditions that Restrict Reproductive Rights*, 6 STAN. J. C.R. & C.L. 1, 12 (2010).

58. *See* Toni Driver Saunders, *Banning Motherhood: An RX to Combat Child Abuse?*, 26 ST. MARY’S L.J. 203, 220–26 (1994).

59. Alexandra Minna Stern, *Eugenics, Sterilization, and Historical Memory in the United States*, 23 HISTÓRIA 195, 206 (2016).

60. *California Bans Sterilization of Female Inmates Without Consent*, NBC NEWS (Sept. 26, 2014, 9:23 AM), <https://www.nbcnews.com/health/womens-health/california-bans-sterilization-female-inmates-without-consent-n212256>.

61. Tubal ligation is a process of permanent birth control in which the fallopian tubes are cut and tied to prevent the egg from moving from the ovaries to the fallopian tubes. *Tubal Ligation*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/tubal-ligation/about/pac-20388360> (last visited Feb. 22, 2018).

62. *California Bans Sterilization of Female Inmates Without Consent*, *supra* note 60.

surgical castration of sex offenders.⁶³ As opioid users and prison populations continue to rise,⁶⁴ proponents of Judge Benningfield's order find themselves asking whether there is a real harm in preventing life-long criminals from procreating.

B. Voluntary Sterilization

To address society's interest in preventing habitual criminals from procreating, courts, legislatures, and private parties have attempted to develop creative, constitutional options that allow inmates to voluntarily undergo sterilization procedures. For instance, private programs like Project Prevention provide monetary compensation to men and women addicted to drugs and alcohol in exchange for receiving long-term birth control procedures.⁶⁵ Formally known as Children Requiring a Caring Kommunity (C.R.A.C.K.), Project Prevention pays drug-addicted women \$200 "to receive tubal ligations, intra-uterine devices (IUDs),⁶⁶ five years of Norplant,⁶⁷ or one year of Depo-Provera."⁶⁸ In 1991, a Kansas legislator proposed a bill offering to pay \$500 to any female on welfare who used Norplant and a subsequent \$50 "a year as long as the contraceptive remained implanted."⁶⁹ Although the bill was ultimately defeated, it sparked debate over whether the Government should have such a "heavy . . . hand on the scales of choice for the poor."⁷⁰

Judge Benningfield's order is not the first time courts have offered criminal defendants the opportunity to reduce their sentence in exchange for receiving a

63. See CAL. PEN. CODE § 645 (2017); FLA. STAT. § 794.0235 (2017); GA. CODE ANN. § 16-6-4 (2010); LA. STAT. ANN. § 15:538 (2012); MONT. CODE ANN. § 45-5-512 (2007); TEX. GOV'T CODE ANN. § 501.061 (West 2007); WIS. STAT. 302.11 (2016).

64. See Ezra Klein & Evan Soltas, *Wonkbook:11 Facts About America's Prison Population*, WONKBLOG: WASHINGTON POST (Aug. 13, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/13/wonkbook-11-facts-about-americas-prison-population/?utm_term=.07d3508144d4; *Opioid Overdose Crisis*, NAT'L INST. HEALTH (Mar. 2018), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis>.

65. PROJECT PREVENTION, <http://projectprevention.org/> (last visited Oct. 29, 2017).

66. An IUD is a small device inserted into the uterus to prevent pregnancy by stopping the sperm from reaching the egg. *IUD*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/birth-control/iud> (last visited Feb 25, 2018). Hormonal IUDs prevent pregnancy by: "1) thicken[ing] the mucus that lives on the cervix, which blocks and traps the sperm, and 2) . . . [stopping] eggs from leaving [the] ovaries." *Id.*

67. Norplant was the first implant device on the market; it is essentially the same device as Nexplanon. See Courtney A. Schreiber & Kurt Barnhart, *Contraception*, in YEN & JAFFE'S REPRODUCTIVE ENDOCRINOLOGY 890, 893 (7th ed. 2014).

68. Depo-Provera is a birth control shot administered by a health care professional every three months that prevents ovulation. *Birth Control Shot*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/birth-control/birth-control-shot> (last visited Feb. 25, 2018); Adam B. Wolf, Note, *What Money Cannot Buy: A Legislative Response to C.R.A.C.K.*, 33 U. Mich. J.L. Reform 173, 173-74 (1999).

69. Tamar Levin, *A Plan to Pay Welfare Mothers for Birth Control*, N.Y. TIMES (Feb. 9, 1991), <http://www.nytimes.com/1991/02/09/us/a-plan-to-pay-welfare-mothers-for-birth-control.html>.

70. Ellen Goodman, *The Politics of Norplant*, WASHINGTON POST (Feb. 19, 1991), https://www.washingtonpost.com/archive/opinions/1991/02/19/the-politics-of-norplant/cd090c53-e187-45b4-b89d-a7d1027ecad4/?utm_term=.17183bcb6f91.

sterilization procedure. In 1997 in Washington, a female defendant pled guilty to second-degree murder and assault after murdering one of her sons and attempting to murder another son.⁷¹ The Defendant agreed to undergo voluntary sterilization in exchange for the State's recommendation that she receive the low-end standard range sentence for each crime.⁷² In Tennessee, a woman convicted of sexually abusing her children agreed to sterilization as a term of her probation in lieu of prison time.⁷³ In 1998 in California, a judge gave a female defendant accused of child abuse a choice between seven years in prison or one year in local jail if she received a Norplant implant.⁷⁴ Another judge has even taken this issue a step further by offering a convicted rapist the choice between castration and thirty years in prison.⁷⁵

In contrast, higher-level courts generally disapprove of trial judges reducing sentences in exchange for voluntary sterilization absent specific statutory authorization.⁷⁶ In Arizona, after sentencing two defendants to a maximum sentence of two and a half years' imprisonment, a trial judge offered them a year-long sentence reduction if they agreed to voluntary sterilization.⁷⁷ The Arizona Supreme Court struck down the judge's offer, finding that the judge exceeded the scope of his jurisdiction because he acted without specific statutory or constitutional authorization.⁷⁸

It is difficult to determine an exact number of instances in which a judge has offered or imposed a condition of sterilization. Cases in which a defendant does not appeal a decision or in instances where judges withdraw their previous order typically go unnoticed.⁷⁹ A defendant is unlikely to question a sterilization condition out of fear of serving a longer jail sentence. Unless these conditions receive significant media attention, they remain unreported and undocumented.

71. *State v. Pasicznyk*, No. 14897-1-III, 1997 WL 79501, at *1 (Wash. Ct. App. Feb. 25, 1997).

72. *Id.*

73. Mark Curriden, *Sterilization Ordered for Child Abusers*, 79-MAY A.B.A. J. 32 (1993) ("The fact that she agreed to it, completely voluntarily, makes this case different from the rest. You can waive your constitutional rights and that's what she did that day.").

74. *See Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 725–26 (Cal. 1998) (describing the facts of the unpublished case, *People v. Johnson*) (citing *People v. Johnson*, No. F015316, 1992 WL 685375 (Cal. Ct. App. 1992)). The California Court of Appeal was set to review the validity of the Norplant probation condition, but after the defendant violated another term of her probation, the case was dismissed as moot. Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 18 (1992).

75. William E. Schmidt, *Rape Sentence: Castration or 30 Years*, N.Y. TIMES (Nov. 26, 1983), <https://www.nytimes.com/1983/11/26/us/rape-sentence-castration-or-30-years.html>.

76. *See, e.g., Briley v. California*, 564 F.2d 849, 857 (9th Cir. 1977) ("[T]here is persuasive authority that a court, at least when ordering the extreme remedy of sterilization, must have specific legislative or common-law authority for doing so."). However, these cases typically involve the sterilization of mentally defective individuals. *See e.g., Sparkman v. McFarlin*, 552 F.2d 172, 175–76 (7th Cir. 1977); *Gregory v. Thompson*, 500 F.2d 59, 62 n. 2 (9th Cir. 1974); *Wade v. Bethesda Hosp.*, 337 F.Supp. 671, 673–74 (S.D. Ohio 1971).

77. *Smith v. Superior Court of State In and For Coconino County*, 725 P.2d 1101, 1102 (Ariz. 1986).

78. *Id.* at 1103.

79. Nairn, *supra* note 57, at 3–4.

Without appellate review, judges can continue to offer creative sentencing reductions without fully contemplating the social and ethical consequences.

III. ANALYSIS

A. Unconstitutional Conditions

Constitutional rights are not absolute, which means that criminal defendants are free to waive their rights at any time. However, if an inmate chooses to waive their rights in exchange for a promised benefit, the doctrine of unconstitutional conditions comes into play to ensure that an inmate is not being coerced into giving up his or her constitutional rights. Higher level courts have found that unconstitutional conditions arise “when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”⁸⁰ The unconstitutional conditions doctrine asserts that a state or federal government may not “grant a benefit on the condition that the beneficiary surrender a constitutional right,” even if the government is not obligated to provide individuals with that benefit.⁸¹ Essentially, the government may not indirectly bribe individuals with the promise of “benefits and privileges to forego rights with which the government could not interfere directly.”⁸² When the doctrine is applicable, it requires that a court employs a strict scrutiny standard when analyzing the challenged condition if a fundamental right is infringed upon.⁸³ Under the unconstitutional conditions doctrine, to “condition a grant of a discretionary benefit on the release of a constitutional right, the Government must have an interest which outweighs the particular right at issue.”⁸⁴

This doctrine does not arise if the government “is forbidden to provide a benefit for reasons extraneous to any pressure on the beneficiary’s rights,” or if the government is obligated to provide a benefit.⁸⁵ The doctrine has two components: “the conditioned government *benefit* on the one hand and the affected constitutional *right* on the other.”⁸⁶ Four variables are analyzed to determine whether unconstitutional conditions are attached to state-proffered benefits: “(1) the nature of the right affected; (2) the degree of infringement of the right; (3) the nature of the benefit offered; and (4) the strength and nature of the state’s interest in conditioning the benefit.”⁸⁷ Coercive conditions become unconstitutional when they “pass the point at which pressure turns into compulsion.”⁸⁸

Under Judge Benningfield’s order, the unconstitutional conditions principle becomes relevant because the thirty-day benefit will be granted *only* to recipients

80. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989).

81. *Id.* at 1415.

82. John Robert Hand, *Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit Norplant Insertion*, 46 VAND. L. REV. 715, 716 (1993).

83. 16A AM. JUR. 2D CONSTITUTIONAL LAW § 411 (2018).

84. *Id.*

85. Sullivan, *supra* note 80, at 1422–23.

86. *Id.* at 1422.

87. Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 151 (1968).

88. Sullivan, *supra* note 80, at 1428.

who receive either a vasectomy or a Nexplanon implant. This condition is inherently coercive as these prisoners are already deprived of their civil liberties. Because the inmates eligible for the order are only convicted of misdemeanors, they face a maximum statutory sentence of eleven months and twenty-nine days.⁸⁹ The thirty-day reduction represents a significant portion of the maximum sentence an inmate can serve.

Judge Benningfield asserted that the sterilization program is strictly voluntary.⁹⁰ However, because the jail holds defendants for short-term sentences, many of these inmates are likely to be going through drug-withdrawals and are not in a position to make a reasoned decision regarding whether they should partake in such a serious and long-term procedure.⁹¹ For example, one inmate, after receiving the Nexplanon implant, attempted to remove the implant from her arm with a razor blade while she was still incarcerated.⁹² This order effectively gives inmates an ultimatum: either stay incarcerated, a restraint on personal freedom, or become sterilized, a restraint on personal autonomy.

Furthermore, prison inmates represent some of the most vulnerable members of society. Incarcerated women are especially vulnerable to coercive effects, with approximately forty-five percent of incarcerated women reporting histories of mental health problems, forty percent experiencing childhood physical abuse, sixty percent reporting forced sexual activity, and sixty-seven percent reporting domestic violence.⁹³ Because inmates are especially susceptible to coercive effects, precautions must be taken to ensure that prison officials do not pressure inmates into accepting unwanted offers.

Advocates of the order argue that the thirty-day sentence reduction is not a significant decrease in time and, therefore, does not fully reach the level of coercion.⁹⁴ Other prison programs offer substantially longer sentence reductions and have avoided being struck down on constitutional grounds.⁹⁵ Prisons have previously offered other kinds of invasive procedures in exchange for reduced sentences; for example, from the 1950s to the 1980s, prisoners could donate blood

89. TENN. CODE ANN. § 40-35-111 (2010).

90. Benningfield, *supra* note 9.

91. Complaint at 4, Sullivan v. Benningfield, No. 17-cv-69 (Tenn. Ch. filed Aug. 24, 2017).

92. Amended Complaint at 6, Sullivan v. Benningfield, No. 17-cv-00052 (M.D. Tenn. Oct. 9, 2017), ECF No. 13.

93. Megha Ramaswamy & Patricia J. Kelly, *Factors Associated with Sterilization use Among Women Leaving a U.S. Jail: A Mixed Methods Study*, 14 BMC PUBLIC HEALTH 773, 773 (2014).

94. Wesley Messamore, *Make Voluntary Sterilization a Requirement for Welfare*, HUMBLE LIBERTARIAN (Aug. 22, 2018), <http://www.humblelibertarian.com/2018/08/make-voluntary-sterilization.html>.

95. There are four programs offered by the Bureau of Prisons that reduce sentences. Inmates are eligible for up to a twelve-month sentence reduction when the offender completes five hundred hours in a drug program. *Frequently Asked Questions About the Residential Drug Abuse Program (RDAP)*, FAMM, <https://famm.org/wp-content/uploads/FAQ-Residential-Drug-Abuse-Program-5.3.pdf> (last visited Oct. 17, 2018). Another program offers inmates a twelve-month reduction if the inmate spends that time in a half-way house. 18 U.S.C. § 3624(c)(1) (West 2008). Inmates can also ask for compassionate release or a commutation of sentence. Nathan James, *Early Release for Federal Inmates: Fact Sheet*, CONG. RES. SERV. (Feb. 3, 2014), <https://fas.org/sgp/crs/misc/R43392.pdf>.

in exchange for good-time credit.⁹⁶ Judge Benningfield's order also did not threaten to punish inmates who did not take advantage of his order.⁹⁷ In other words, inmates were no worse off if they decided not to undergo the procedure. These arguments, however, hold little weight when considered alongside the high levels of coercion and the limitations on personal freedom. While blood donation invades an individual's right to privacy, the level of invasion is minor when compared to the order's invasion on reproductive freedom. The order far surpasses previous interference with an individual's right to privacy.

Opponents of the order point out that Judge Benningfield did not allow inmates to consider alternate forms of contraception and restricted them to a limited selection of available birth control methods.⁹⁸ While other forms of birth control are extremely popular, only 1.3 percent of female contraceptive users rely on implants like Nexplanon and 8.2 percent of male contraceptive users on a vasectomy as their choice of a contraceptive method.⁹⁹ Most inmates in this situation, when faced with an option to reduce their prison sentence, would accept the conditions of Judge Benningfield's order without considering the possible health effects. Both vasectomies and Nexplanon can have serious health effects and may not be the right birth-control option for every inmate.¹⁰⁰ Faced with the blinders of a sentence reduction, inmates are unlikely to fully consider these potential health effects. Furthermore, the prison environment may cause individuals to exercise poor judgment in an important life decision and to decide to undergo the procedure when other methods of birth control might be better suited for them. These limitations and the high levels of coercion would likely trigger the unconstitutional conditions doctrine and require a court to analyze the order's condition with a higher level of scrutiny.

B. Procreation as a Fundamental Right

If a court does not apply the unconstitutional conditions doctrine, "then no interference with any right would exist and a challenge to the law would fail."¹⁰¹ Presuming that the court found it appropriate to apply the doctrine and found an interference with a right, the next step would be for the court to determine if the right to procreate is a fundamental right and which level of scrutiny should be applied. Because the right to reproduce is not explicitly listed in the Constitution, it is necessary to determine whether this right is included within the "penumbras, formed by emanations" of the Bill of Rights that are intrinsic to individual

96. Jamila Jefferson-Jones, *The Exchange of Inmate Organs for Liberty: Diminishing the "Yuck Factor" in the Bioethics Repugnance Debate*, 16 J. GENDER RACE & JUST. 105, 132 (2013).

97. See Benningfield, *supra* note 1.

98. See Kalhan Rosenblatt, *Judge Offers Inmates Reduced Sentences in Exchange for Vasectomy*, NBC NEWS (July 21, 2017, 10:15 AM), <https://www.nbcnews.com/news/us-news/judge-offers-inmates-reduced-sentences-exchange-vasectomy-n785256>.

99. *Contraceptive Use in the United States*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states> (last visited Nov. 11, 2017).

100. Arthur Allen, *Vasectomy Risks and Benefits*, WEBMD, <https://www.webmd.com/men/features/vasectomy-risks-benefits#1> (last visited Feb. 25, 2018); *Risks and Side Effects of Nexplanon*, NEXPLANON, <https://www.nexplanon.com/side-effects> (last visited Nov. 4, 2017).

101. Hand, *supra* note 82, at 744.

liberty.¹⁰² In *Skinner*, the Court determined that “marriage and procreation are fundamental to the very existence and survival of the race.”¹⁰³ The Court, however, has more recently shied away from its previous ruling and has placed limitations on the right to reproduce.¹⁰⁴

While the right to avoid procreation through abortion or contraceptive use has received explicit legal recognition,¹⁰⁵ the right to procreate has received significantly less legal attention.¹⁰⁶ Because the Government rarely attempts to prevent individuals from reproducing, there is little litigation directly on point.¹⁰⁷ However, according to many academics, existing case law implies that a right to reproduce does exist.¹⁰⁸ The Court, in dicta, in *Meyer v. Nebraska* concluded that “[w]ithout doubt, [the liberties included in the Due Process Clause of the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children.”¹⁰⁹ The *Skinner* Court not only determined that the right to procreation exists; it also held that the freedom to procreate was a fundamental right that is entitled to the highest level of judicial scrutiny.¹¹⁰

The Court further expanded on *Skinner* in *Eisenstadt v. Baird* where it invalidated a Massachusetts statute that criminalized the disbursement of contraceptives to unmarried individuals.¹¹¹ Although the *Eisenstadt* Court’s holding relied on equal protection—rather than substantive due process grounds—it nevertheless reiterated the claims the Court made in *Skinner* and *Meyer*: “[i]f the right of privacy means anything, it is the right of the individual, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹²

Recently, the Court has moved away from the “penumbral right to privacy” and has instead found that the right to reproduce is found within the liberty interest of the Fourteenth Amendment.¹¹³ For example, in *Planned Parenthood of Southern Pennsylvania v. Casey*, the Court held that “matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to

102. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

103. *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

104. Gayle Binion, *Reproductive Freedom and the Constitution: The Limits on Choice*, 4 BERKELEY J. GENDER L. & JUST. 12, 24–27 (1988).

105. See generally, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

106. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 954–67 (1986).

107. Elizabeth Price Foley, *Human Cloning and the Right to Reproduce*, 65 ALB. L. REV. 625, 627 (2002).

108. *Id.* at 628.

109. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

110. *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

111. Foley, *supra* note 107, at 628.

112. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

113. Foley, *supra* note 107, at 629.

personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹¹⁴

While “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,”¹¹⁵ it is not likely that the fundamental right to reproduce extends within prison walls. In *Turner v. Safley*, the Supreme Court refused to apply strict scrutiny to conditions that violated prisoner’s constitutional rights because the Court did not want to “hamper [prison administrators’] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”¹¹⁶ The Court then created the reasonableness-based *Turner* standard of review, in which a “prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”¹¹⁷

The Eighth and Ninth Circuit Courts of Appeals have both applied the *Turner* standard and found that the right to procreate does not survive incarceration. In *Gerber v. Hickman*,¹¹⁸ the Ninth Circuit found that the “right to procreate was fundamentally inconsistent with incarceration” and held that it was permissible for prison officials to prevent inmates from mailing sperm to a laboratory.¹¹⁹ The *Gerber* Court rejected the argument that under *Skinner*, inmates have a constitutional right to procreate, determining that “[t]he right to procreate while incarcerated and the right to be free from surgical sterilization by prison officials are two very different things. There is simply no comparison between sterilization . . . and denial of the facilitation of artificial insemination.”¹²⁰ In *Goodwin v. Turner*, the Eighth Circuit assumed, without making a specific finding, that an inmate’s right to procreate did survive incarceration.¹²¹ In applying the *Turner* test, however, the court upheld “the prison administrators’ denial of Goodwin’s request, finding that the restriction satisfied the [*Turner* test] because it was rationally related to the legitimate penological interest of ‘treating all inmates equally.’”¹²²

114. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

115. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

116. Tanner Minot, Note, *Are We Sterilizing Prisoners?: Why Courts Should Prevent Prison Administrators from Denying Prisoners the Fundamental Right to Procreate*, 16 J. GENDER RACE & JUST. 323, 329 (2013).

117. *Turner*, 482 U.S. at 95.

118. See generally *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002).

119. Minot, *supra* note 116, at 336.

120. *Gerber*, 291 F.3d at 622.

121. *Goodwin v. Turner*, 908 F.2d 1395, 1398 (1990) (holding that the Bureau of Prisons had a legitimate penological interest in refusing to allow an inmate to “ejaculate into a clean container so that his semen could be used to artificially inseminate his wife.”).

122. Minot, *supra* note 116, at 334. Under the *Turner* standard, a four-part balancing test must be applied to determine the reasonableness of a challenged prison regulation: (1) “there must be a ‘valid, rational connection’ between the prison policy [at issue] and the legitimate government interest put forward to justify it;” (2) deference must be given to prison policies that provide alternative ways for inmates to exercise the protected right; (3) courts must consider “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;” and (4) “the absence of ready alternatives is evidence of the reasonableness of a prison regulation.” *Turner*, 482 U.S. at 89–90.

Therefore, based on prior court precedent, the fundamental right to reproduce arguably exists only outside of the prison setting. The question now becomes what standard of review applies to a condition that infringes the right to procreate both while an inmate is incarcerated and once the individual is released.

C. Standard of Scrutiny

It is likely that to successfully challenge Judge Benningfield's order under the Constitution, an individual must demonstrate that the order interferes with a right or liberty under the Due Process Clause¹²³ or some type of suspect classification under the Equal Protection Clause.¹²⁴ Courts must apply a strict standard of scrutiny to issues related to such fundamental rights.¹²⁵ Under this standard, the state may only deprive individuals of these fundamental rights when the interference is necessary and narrowly tailored to achieve a legitimate objective that furthers a compelling government interest.¹²⁶ Said differently, strict scrutiny requires (1) "that the law [or order] in question promote a compelling government interest" and (2) that there are no less intrusive alternatives available.¹²⁷

Although reproduction is a fundamental right while an individual is free from incarceration, precedent gives the impression that this right does not extend to those inside prison walls.¹²⁸ However, since the insertion of Nexplanon implants and vasectomies performed during incarceration continue to remain effective once the individual is released, a court will likely apply strict scrutiny because the order interferes with a prisoner's ability to reproduce once she is no longer an inmate.¹²⁹ Because the conditions affect the individual both while he or she is incarcerated and once released, strict scrutiny must apply. Although an inmate can get the sterilization procedure reversed immediately upon prison release, it is difficult for lower-income individuals to afford the high costs associated with reversal of a vasectomy or removal of an implant.¹³⁰

123. The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause guarantees both procedural and substantive rights. *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Under substantive due process, the Government has limited power in depriving individuals of life, liberty, or property. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO LAW REV.* 1501, 1501 (1999).

124. Hand, *supra* note 82, at 719.

125. David M. Treiman, *Equal Protection and Fundamental Rights – A Judicial Shell Game*, 15 *TULSA L. J.* 183, 184 (2013).

126. Martha J. Hess, Note, *Constitutional Law – Equal Protection – Benign Classifications Based on Race Must Be Narrowly Tailored to Achieve a Compelling Governmental Interest*, 21 *ST. MARY'S L.J.* 493, 496 (1989).

127. Hand, *supra* note 82, at 722.

128. See e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Gerber v. Hickman*, 291 F.3d 617, 622 (9th Cir. 2002).

129. Nexplanon implants remain effective for three years; after the three-year time period, it should be medically removed. *What is NEXPLANON (Etonogestrel Implant)?*, *supra* note 3. A vasectomy remains effective unless it is reversed. See *Can You Reverse a Vasectomy? 5 Things You Need to Know*, BIRTHCONTROL.COM, <https://www.birthcontrol.com/can-you-reverse-a-vasectomy/> (last visited Oct. 18, 2018).

130. An inmate who received Nexplanon inquired as to whether she could have the procedure reversed; the county informed her that she would have to pay \$250 to do so. *Ward v. Shoupe*, No. 17-

Thus, under the strict scrutiny standard, Benningfield's order is likely unconstitutional. However, the government would likely argue that because drug offenders currently incarcerated in White County could potentially give birth to drug-babies, states have a legitimate and compelling interest in controlling the number of children born with Neonatal Abstinence Syndrome (NAS), a disorder in which newborns are born with symptoms of withdrawal.¹³¹ The syndrome "can occur in 55 to 94% of newborns whose mothers were addicted to or treated with opioids while pregnant."¹³² In Tennessee alone, opioid and heroin overdose deaths have increased by eighty-seven percent since 2011 and the number of NAS cases have increased by sixty-two percent.¹³³ Nevertheless, because the state has other, less restrictive ways to control the number of infants born with NAS, the order will likely fail to meet the strict scrutiny standard and would consequently be unconstitutional. Some of these less restrictive means include accessibility to adequate drug treatment facilities and classes teaching inmates about the consequences of prenatal drug-use.

If, *arguendo*, the Court fails to find that the order interferes with a fundamental right, strict scrutiny no longer applies and the Court must next apply a lower level of scrutiny. Because the order specifies non-permanent means of birth control that can be reversed once the inmate is released, the state could argue that the fundamental right to reproduce is only restricted while an inmate is incarcerated. Therefore, a court that does not apply a strict scrutiny standard would likely apply something similar to the *Turner* standard.¹³⁴

It could be argued that the *Turner* standard only applies to "prison administrators . . . , and not the courts"¹³⁵ and would not be applicable to Judge Benningfield's order. Because the sentence reduction is applied retroactively by the judiciary but is administered and controlled by the jail, it is unclear whether the order is considered a prison regulation. However, a court in favor of the order that believes inmate sterilization can provide welfare and reproductive benefits would likely hold that the *Turner* standard applies and, thus, apply a lower level of scrutiny.¹³⁶

Opponents of the order say that it is a form of racially charged eugenics, aiming to control the population of lower-class, uneducated minorities.¹³⁷ However, this was not likely Judge Benningfield's intent, as ninety-seven percent

cv-00047, at *3 (M.D. Tenn. filed Aug. 16, 2017). Implant removal typically costs between \$0 and \$300. *How Can I Get the Birth Control Implant?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/birth-control/birth-control-implant-implanon/how-can-i-get-the-birth-control-implant> (last visited Oct. 18, 2018).

131. See Karen McQueen & Jodie Murphy-Oikonen, *Neonatal Abstinence Syndrome*, 375 NEW ENG. J. MED. 2468, 2469 (2016).

132. *Id.*

133. COURTNEE MELTON & MANDY PELLEGRIN, THE SYCAMORE INSTIT., THE OPIOID EPIDEMIC IN TENNESSEE 2 (2017).

134. See generally *Turner v. Safley*, 482 U.S. 78 (1987).

135. *Id.* at 89.

136. This is not to say, however, that a rational court would ever apply this standard. It remains the author's position that strict scrutiny should apply and the order should be found unconstitutional.

137. Lussenhop, *supra* note 8.

of the county's population is white.¹³⁸ Even though statistics are not available of the racial breakdown of inmates in the White County Jail, "the heterogeneity of the county suggests that race is likely not a significant factor."¹³⁹ While prison populations overwhelmingly represent low-income minorities, the order does not target one specific type of inmate. Therefore, the order would not need to overcome the strict level of scrutiny required under the Equal Protection Clause because it does not intentionally target individuals based on race.

Opponents of the order also question the effectiveness of sterilizing male drug users who are unable to damage the fetus from prenatal drug use. A 1991 study found that paternal drug-use may cause health complications during fetal development: "cocaine may attach itself to the sperm of men who use the drug, entering an egg at the moment of conception and damage the fetus."¹⁴⁰ This study's findings could mean that fathers may be more responsible for drug-related health effects than previously suspected. However, more recent studies, did not indicate that paternal drug use is an "important risk factor for adverse pregnancy outcomes."¹⁴¹ Regardless of whether paternal drug use affects fetal development, Judge Benningfield stated that his order was aimed primarily at the female population but extended the program to men to avoid gender discrimination.¹⁴²

Nevertheless, a male inmate could argue that the order violates the Equal Protection Clause¹⁴³ because it discriminates against individuals on the basis of gender, noting that a vasectomy is a much more invasive and permanent procedure than the insertion of a Nexplanon implant. Matters involving gender classification, however, only require courts to apply an intermediate level of scrutiny. The order does not directly discriminate against gender; it does so indirectly since men are required to undergo a more serious procedure. To reiterate, Nexplanon is not permanent because it must be removed and replaced after three years, via a simple, out-patient procedure.¹⁴⁴ In contrast, while vasectomy reversal is successful in about ninety-five percent of men, this procedure requires a general anesthetic, takes about four to five hours to complete,

138. Joshua Sager, *Modern Eugenics: Inmates Trade Time of Sentences for Sterilization*, TRUTH AGAINST THE MACHINE (Aug. 18, 2017).

139. *Id.*

140. *Cocaine-Using Fathers Linked to Birth Defects*, NEW YORK TIMES (Oct. 15, 1991), <http://www.nytimes.com/1991/10/15/science/cocaine-using-fathers-linked-to-birth-defects.html>; see also Ricardo A. Yazigi, *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 J. AM. MED. ASS'N. 1955 (1991).

141. Anders Engeland et al., *Effects of Preconceptional Paternal Drug Exposure on Birth Outcomes: Cohort Study of 340000 Pregnancies Using Norwegian Population-Based Databases*, 75 BRIT. J. CLINICAL PHARMACOLOGY 1134, 1134 (Aug. 17, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3612732/pdf/bcp0075-1134.pdf>.

142. Benningfield, *supra* note 9, at 1.

143. The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONT. amend. XIV, § 1. This clause applies "when an individual in one class has been treated differently than an individual in another class because of certain classifications." Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights during Pregnancy*, 26 LAW & INEQ. 171, 189 (2008).

144. *What is NEXPLANON (Etonogestrel Implant)?*, *supra* note 3.

and is much more expensive than the removal of Nexplanon.¹⁴⁵ Therefore, even though the order does not facially discriminate against gender, male inmates who choose to undergo one of the proposed long-term birth control (or sterilization) procedures will face significantly more cost and difficulty if they choose to reverse the procedure. However, because the state does not intentionally target a semi-suspect classification, such as gender, the order is likely constitutional under rational basis review under the Equal Protection Clause.

Under Benningfield's order, women past their reproductive age are ineligible to receive the sentence reduction.¹⁴⁶ This condition begs the question of what would happen to inmates who agree to the conditions for sentence reductions but discover that the available birth control options would be detrimental to their health. Would these inmates also be ineligible for the sentence reduction? Judge Benningfield's order did not consider this question. While this may seem unfairly discriminatory, it would likely be upheld if a court applies a minimum standard of review. For example, courts will generally apply a rational basis standard, a level of minimum scrutiny, for discrimination based on age.¹⁴⁷ Under this standard, the government may intentionally target a non-suspect classification with a law that is rationally related to a legitimate government interest.¹⁴⁸ Because discriminatory laws are almost always upheld under minimum scrutiny¹⁴⁹ and because, as previously discussed, states have an important governmental interest in preventing drug offenders from using drugs while pregnant, the order will likely pass a minimum standard of review.

D. Scope of the Judiciary

Opponents of the order also contend that it denies inmates' procedural due process as the order falls outside the scope of the judiciary.¹⁵⁰ The establishment of sentencing ranges, criminal offense classes, mitigating and aggravating factors, and all other matters related to criminal sentencing, while at the trial judge's discretion, are initially enacted by the State and Federal legislatures.¹⁵¹ Because Tennessee has not enacted a statute permitting a judge to modify the length of a defendant's sentence, the order likely violates an inmate's procedural due process rights. However, this Tennessee state legislature gave jail administrators the power to place defendants in "rehabilitative programs for which the defendant is eligible under the rules and regulations adopted by the institution."¹⁵² In other words, it is ultimately a decision for the local jail to determine who is eligible to receive the sentence reduction. However, it remains unclear whether Judge

145. Peter Jaret, *The Myths and Realities of a Vasectomy*, THE NEW YORK TIMES (June 27, 2008).

146. See Rosenblatt, *supra* note 98.

147. Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 219 (2010).

148. Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 521 (2010).

149. THOMAS LUNDMARK, POWER & RIGHTS IN US CONSTITUTIONAL LAW 194 (2008).

150. Amended Complaint for Injunctive and Declaratory Relief at 14, *Sullivan v. Benningfield*, No. 17-cv-00052 (M.D. Tenn. filed Oct. 9, 2017), ECF No. 13.

151. CRIMINAL JUSTICE STANDARDS § 18-3.1 (AM. BAR ASS'N 1994).

152. TENN. CODE ANN. § 40-35-318 (2010).

Benningfield even had the power to create a new “program” since he is not a representative of the jail. Typically, judges can only make recommendations to correctional facilities and lack the authority to determine anything other than the sentence imposed.¹⁵³

Therefore, it is ultimately the jail sheriff’s responsibility to refuse the implementation of the order. Sheriff Oddie Shoupe, however, was the individual who initially approached Judge Benningfield and requested that the judge enter an order allowing inmates to receive a reduced sentence for undergoing sterilization.¹⁵⁴ Nevertheless, in Tennessee, there is no statutory authorization allowing the county jail to enact this type of program. Thus, the order denies inmates procedural due process because a state actor, not the legislature, is preventing inmates from exercising a fundamental right.

Under procedural due process, the state must provide adequate notice and an opportunity to be heard by a neutral decision maker before depriving individuals of life, liberty, or property.¹⁵⁵ Individuals who voluntarily sign up for the order waive their procedural due process rights. Here, the individual, not the state, is depriving themselves of their right to personal autonomy. This could also be seen as a waiver of substantive due process since the individuals elect to receive the procedure and thereby deny themselves of their reproductive freedom. However, if the Court finds that the doctrine of unconstitutional conditions applies, discussed in part III, individuals are not able to knowingly waive these rights. Ultimately, the order falls outside the scope of the judiciary and is far too coercive to pass constitutional muster. Therefore, alternative solutions should be proposed to tackle both the drug abuse crisis and the increasing incidence of NAS in the United States.

IV. SOCIAL CONSEQUENCES AND AN ALTERNATIVE PROPOSAL

Instead of instituting an exchange of reproductive rights for a lesser sentence, inmates should be given the option to select a program associated with possible sentence reductions that best suits his or her specific needs. For example, the Neonatal Syndrome Education Program currently offered by the White County Jail could be expanded to be a more intensive program that not only educates inmates about how prenatal drug use can affect fetal development but also teaches parents strategies to effectively raise children in an environment devoid of narcotics. Other types of programs, like the Residential Drug Abuse Program (RDAP) offered by the Federal Bureau of Prison,¹⁵⁶ could also be made available to

153. See Statement from Kathleen M. Hawk, Director, Fed. Bureau of Prisons, Judicial Recommendations and U.S. Attorney Reports, Responses to, at 3 (June 30, 1997), https://www.bop.gov/policy/progstat/5070_010.pdf.

154. Ward v. Shoupe, No. 17-cv-00047, at *11 (M.D. Tenn. filed Aug. 16, 2017).

155. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (noting that the “central meaning of procedural due process” is the “right to notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner”).

156. RDAP is a nine-month intensive program in which inmates participate in Cognitive-Behavioral Therapy to learn about substance abuse and its effects to receive up to a twelve month sentence reduction. *Substance Abuse Treatment*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Feb. 25, 2018).

lower-level offenders. However, it would ultimately be the prerogative of each state legislature to decide which programs to offer these individuals. While long-term birth control could also be an available option in exchange for a reduced sentence, other programs, such as those listed above, must also be available to ensure that inmates do not feel coerced or compelled to relinquish their reproductive freedom.

By offering only one option to receive a significant sentence reduction, many inmates feel compelled to accept the condition in exchange for an earlier release. For example, in 1988, an Indiana judge offered a persuasive proposal when sentencing a defendant charged with murder after the defendant fed her four-year-old son a fatal dose of psychiatric drugs.¹⁵⁷ While the judge made it clear that he lacked the authority to involuntarily sterilize the defendant, he suggested that he would be more lenient in sentencing her if she received a sterilization procedure.¹⁵⁸ The judge called it a “mitigating circumstance”¹⁵⁹ and indicated that if the defendant rejected the sterilization offer, it would not negatively impact her.¹⁶⁰ The defendant received the sterilization procedure and was sentenced to ten years; the maximum sentence she could have received was twenty years.¹⁶¹ After being sentenced, the defendant claimed that she regretted her sterilization decision but felt that “it was the only way.”¹⁶²

One potential solution for this “post-sterilization regret” would be to provide inmates with more sentence reduction options other than just sterilization for the possibility of reduced sentences. More viable options from which a drug offender could choose from would lessen concerns about coercion.

It is also worth noting that because drug use¹⁶³ is the only type of offense that directly impacts fetal development, these programs will only be offered to drug offenders. Nexplanon implants or vasectomies are not substantial remedies for child abuse as the abuse involves after-birth, and not pre-birth, conduct. Sterilization is “an improper and ineffective ‘shortcut’ to a complex psycho-social problem. At its very best, [sterilization] would only temporarily address one aspect of the problem: the ability of a woman to conceive and possibly abuse her future children.”¹⁶⁴ Although these options would provide the possibility of a reduced sentence only for drug offenders,¹⁶⁵ they should be made available to all inmates who are interested in learning how to channel their thoughts, feelings and

157. *Woman Who Was Sterilized for Lighter Sentence Says She's Angry*, ASSOCIATED PRESS (Nov. 15, 1988, 1:56 PM).

158. Rachel Roth, “No New Babies?” *Gender Inequality and Reproductive Control in the Criminal Justice and Prisons System*, 12 J. GENDER, SOC. POL’Y & LAW 391, 407 (2004).

159. *Id.*

160. *Plan to Sterilize Woman is Debated*, N.Y. TIMES (Sept. 25, 1988), <http://www.nytimes.com/1988/09/25/us/plan-to-sterilize-woman-is-debated.html>.

161. *Woman Who Was Sterilized for Lighter Sentence Says She's Angry*, *supra* note 157.

162. *Id.*

163. This Article considers alcohol a drug and, therefore, offenses involving alcohol, such as Driving Under the Influence, would be included in the categorization.

164. Spitz, *supra* note 54 at 167–68.

165. This does not present a legal issue to only provide a benefit to one type of treatment as the Federal Bureau of Prisons currently offers a sentence reduction program only to drug offenders. *Substance Abuse Treatment*, *supra* note 156.

behaviors once they are released from prison. Currently, over fifty percent of inmates, regardless of what crimes they are incarcerated for, have a substance use disorder.¹⁶⁶ Therefore, while only drug offenders will reap a tangible benefit from these programs, all offenders could benefit from the skills taught in these classes.

Each state legislature would be required to statutorily enact programs that would be available to the inmates. Once an inmate receives sterilization or completes one of the various programs listed in the statute or code, she would automatically be eligible for a sentence reduction. If an offender chooses to receive a sterilization procedure in lieu of participating in a rigorous class or program, she would still receive the same sentence reduction as if she opted to receive training. In reality, some inmates may decide to receive sterilization procedures instead of attending rigorous classes and programs. Because an inmate would be given a list of sentence reduction options, the unconstitutional conditions doctrine arguably would not apply, or would at least not be as extreme, because the inmate is not compelled to receive the procedure.

Nevertheless, this solution is in no way perfect. In an ideal world, the criminal justice system should educate inmates on general sex education and, more specifically, on the dangers of using drugs while pregnant. Inmates should have access to affordable reproductive health care and sexually transmittable diseases (STD) testing both while incarcerated and once they are released. Inmates should also have access to extensive drug treatment programs not only in federal prisons but also at the state level.¹⁶⁷ However, state legislatures and jails are unlikely to provide these types of programs due to preconceived notions that they will be too costly to implement. Yet in reality, these programs would be less expensive than the associated costs of treating infants born with NAS.¹⁶⁸ Additionally, these rehabilitation programs, though initially expensive to implement, could ultimately decrease the recidivism rate which would, in turn, decrease the overhead costs of prisons.¹⁶⁹

166. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007-2009 (2017) (The 2007-2009 reports were the most recent data available on inmate substance abuse as of 2017).

167. See Bernadette Pelissier et al., *Triad Drug Treatment Evaluation Project*, 65 FED. PROBATION 3 (2001) for an in-depth analysis on the Bureau of Prisons' residential drug abuse treatment programs.

168. Compare Tammy E. Corr & Christopher S. Hollenbeak, *The Economic Burden of Neonatal Abstinence Syndrome in the United States*, 112 ADDICTION 1590, 1599 (2017) ("The economic burden is substantial with more than \$315 million spent in newborn admission costs in 2012."), with Alexander Cowell et al., *The Cost of Implementing a Jail Diversion Program for People with Mental Illness in San Antonio, Texas*, 48 EVAL. & PROGRAM PLANNING 57, 59 (2015) ("The estimated cost to start up the program over the 2001-2003 period was \$556,638.69."), and Allie Bidwell, *Report: Prison Education Programs Could Save Money*, U.S. NEWS (Aug. 22, 2013, 2:23 PM), <https://www.usnews.com/news/articles/2013/08/22/report-prison-education-programs-could-save-money> ("Educational programs cost about \$1,400 to \$1,744 per inmate each year, according to the report, and can save prisons between \$8,700 and \$9,700 per inmate, the costs associated with incarcerating them again.").

169. Jacob Reich, *The Economic Impact of Prison Rehabilitation Programs*, UNIV. OF PENN. (Aug. 17, 2017), <https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php>.

V. CONCLUSION

Judge Benningfield's order is at the very least ethically and socially immoral. Furthermore, due to the intimate nature of long-term birth control as a "private and constitutionally protective activity, the potential for unusual and serious emotional and physical consequences, and the similarities of involuntary sterilization,"¹⁷⁰ the order is also likely unconstitutional. The added element of consent and voluntariness is not enough to make the order constitutional because the highly coercive environment ensures that the order's offer is not fully considered by the inmates. The order also falls outside the scope of the judiciary and should have legislative authorization before being utilized. Instead of sterilization being the only option for a sentence reduction, inmates should be given more expanded options; thus, in addition to signing up for long-term birth control, they should also be offered alternative opportunities for attending classes or programs to become more aware of the negative impacts of drug usage on reproductive outcomes.

Eugenics and involuntary sterilization have been negatively perceived from a societal perspective for generations. From "mass sterilizations in Nazi Germany to eugenics experimentation in Tuskegee, Alabama, eugenics is anathema to any conception of morality and represents one of the most disturbing chapters in the dark history of human cruelty."¹⁷¹ Judge Benningfield's order brings us back to a time when society supported the idea that certain types of people are unfit to reproduce and should be eliminated from the population's gene pool. Although the order was ultimately rescinded, it should be taken seriously and viewed as a wakeup call for the criminal justice system to re-evaluate and provide adequate treatment options for inmates struggling with addiction.

170. Denise Edson Stich, *Alternative Sentencing or Reproduction Control: Should California Courts use Norplant to Protect Future Children from Child Abuse and Fetal Abuse?*, 33 SANTA CLARA L. REV. 1017, 1043 (1993) (discussing the constitutionality of making Norplant, a long-term birth control method similar to Nexplanon, a condition of probation).

171. *Sullivan v. Benningfield*, No. 2:17-cv-00052, at *2 (M.D. Tenn. filed Oct. 9, 2017).