

PROCREATIVE FREEDOM AND CONVICTED CRIMINALS IN THE UNITED STATES AND THE UNITED KINGDOM: IS CHILD WELFARE BECOMING THE NEW EUGENICS?

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In this article, Elaine E. Sutherland considers the procreative freedom of adults convicted of offending in the United States and the United Kingdom. Drawing on two recent cases from the United States, she examines restrictions placed on the procreative freedom of prisoners and as conditions attached to probation or parole, in the context of constitutional guarantees. How similar restrictions are, or would be, viewed in the United Kingdom in the light of the Human Rights Act 1998, are then considered. Since the justification advanced for restricting the procreative freedom of adults convicted of offending is often that it will serve the welfare of children, she warns that this laudable goal may be in danger of becoming the new eugenics.

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Introduction

Human rights instruments accord procreative freedom a high order of respect. The Universal Declaration of Human Rights¹, adopted by the United Nations in 1948, provides:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”².

A plethora of other human rights treaties have repeated these guarantees³. This is unsurprising, perhaps, since so many of these documents were drafted in the aftermath of the horrors which ravaged Europe in the 1930s and 1940s. However, it would be a mistake to take that era as the starting point for a consideration of procreative freedom. There is ample historical precedent for individuals being denied the possibility of procreating because of disability, criminality, or racial or ethnic origins. While the most notorious example of state-sponsored eugenics is, indeed, the programs perpetrated by the Nazi regime in Europe, that regime did not create the so-called science of eugenics⁴. Rather it applied it on an unprecedented scale for the purpose of what is

¹ G.A. res. 217 A(III), U.N. Doc. A/810 (1948).

² Article 16(1). Article 16 continues: (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

³ See, for example, the American Declaration of the Rights and Duties of Man, O.A.S. res. XXX (1948), article VI; the European Convention of Human Rights and Fundamental Freedoms, European T.S. No.3 (1950), article 12; the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), articles 2(1) and 23 (1); and the American Convention on Human Rights, O.A.S. Treaty Series No. 36 (1969), article 17(2).

⁴ The term was coined by Francis Galton who took the word from the Greek, *eugenes*, meaning “good in stock or hereditarily endowed with noble qualities”; Francis Galton, *Inquiries into Human Faculty and Its Development* (1883, Macmillan).

now recognized by domestic and international law as the crime of genocide⁵.

The eugenics movement began amongst the genteel, liberal intellectuals of 19th century England, when Francis Galton applied George Mendel's work on genetics in the plant world and advanced the theory that it would be "quite practicable to produce a highly gifted race of men through judicious marriages through several consecutive generation"⁶, combined with encouraging the talented to reproduce and limiting the capacity of the untalented to do so⁷. His views quickly acquired a considerable following among leading scientists and social reformers of his time and spread rapidly throughout Europe⁸. In the United States, eugenics found an enthusiastic advocate in Henry Davenport⁹ who, with the help of funding from the Carnegie Institute and others, took it

⁵ The Genocide Convention 1948, 78 UNTS 277, Article 2, defines genocide as action including killing, causing serious bodily or mental harm, or preventing births, "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

⁶ Francis Galton, *Hereditary Genius: An Inquiry into Its Laws and Consequences* (1869, Macmillan), at p.37.

⁷ Galton's first foray into print on the subject was in "Hereditary Talent and Character" (1865) 12 *Macmillan's Magazine* 157 and he expanded on his ideas in *Hereditary Genius: An Inquiry into Its Laws and Consequences* (1869, Macmillan).

⁸ The development of eugenics in other European countries took different paths. We are only too aware of where the movement led in Germany and for the Swedish experience, see, Stephanie Hyatt, "A Shared History of Shame: Sweden's Four Decade Policy of Forced Sterilization and the Eugenics Movement in the United States" 8 *Ind. Int'l. & Comp. L. Rev.* 475 (1998). For an interesting discussion of the modern position in China, see, Gail Rodgers, "Yin and Yang: The Eugenics Policies of the United States and China: Is the Analysis that Black and White?" 22 *Hous. J. Int'l. L.* 129 (1999).

⁹ Henry Davenport, *Eugenics - The Science of Human Improvement Through Better Breeding* (1910, Henry Holt) and Henry Davenport, *Heredity in Relation to Eugenics* (1911, Henry Holt).

forward to levels never envisaged by Galton and never reached in the United Kingdom¹⁰. One goal of the eugenics movement in the U.S. was the elimination or, at least, reduction, of criminality through the non-consensual sterilization of habitual criminals.

The procreative freedom of convicted criminals returned to center stage in the U.S. as a result of two recent court decisions. In the first¹¹, the Court of Appeals for the Ninth Circuit addressed what, if any, constitutional right a prisoner might have to send a sperm sample out of prison in

¹⁰ For a fascinating and detailed discussion of the history of the eugenics movement and the development of eugenic policies in the U.K. and the U.S., see, Daniel J. Kevles, *In The Name of Eugenics: Genetics And The Uses of Human Heredity* (first published, 1985, paperback edition, 1995, Harvard University Press). As Lombardo has demonstrated, eugenics manifested itself in a number in different social and legal responses in 20th century America; Paul A. Lombardo, “Medicine, Eugenics and the Supreme Court: From Coercive Sterilization to Reproductive Freedom” 13 *J. Contemp. Health and L. Pol’y.* 1 (1996). Control of immigration, particularly from southern and eastern Europe, sought to reduce further contamination of the “’American’ gene pool”; *ibid.*, at p.5. Non-consensual sterilisation of individuals with mental disability was given the imprimatur of the Supreme Court with the, now infamous, pronouncement of Holmes J. that “Three generations of imbeciles are enough”; *Buck v Bell* 274 U.S. 200 (1927). Recent apologies by the governors of Virginia and Oregon indicate that such practices continued into the second half of the 20th century; see, Peter Hardin, “Apology for Eugenics Set: Warner makes Virginia First State to Denounce Movement”, *Richmond Times-Dispatch*, May 2, 2002, p.A1 and Reuters, “Oregon Governor Apologises to Thousands Sterilized”, *The New York Times*, December 2, 2002. As we shall see, non-consensual sterilisation of certain kinds of offenders was relatively widespread until it was struck down by the U.S. Supreme Court in 1942; *Skinner v Oklahoma* 316 U.S. 535 (1942). That these laws had a disproportionate impact on the poor and the weak is beyond doubt but, then, these were precisely the people eugenicists believed should not reproduce. The racial dimension of eugenics is illustrated best by the miscegenation laws, prohibiting bi-racial marriage, in place in some sixteen states when the U.S. Supreme Court finally pronounced them unconstitutional in 1967; *Loving v Virginia* 338 U.S. 1 (1967).

¹¹ *Gerber v Hickman*. The case proceeded through various stages from 1999 to 2002 and the full citation for each of these stages is provided below along with a discussion of them.

order that his non-incarcerated wife could attempt artificial insemination. In the second¹², the Supreme Court of Wisconsin considered the constitutionality of attaching a “no-procreation” condition to granting a prisoner parole. Regrettably, the U.S. Supreme Court refused to grant writ of certiorari in each case, thus denying itself the opportunity to give the definitive word on the constitutional issues raised.

This article examines these cases in the context of procreative freedom in the U.S., and considers how the same issues are, or might be, addressed in the context of the Human Rights Act 1998, in the U.K.. On the face of it, the European Convention appears to offer greater protection to the procreative freedom of convicted criminals, than does the U.S. Constitution. However, when one examines the highly discretionary way this freedom operates in the U.K., it becomes apparent that, at least for incarcerated prisoners, procreative freedom is often more theoretical than real. What emerges is a picture of procreative freedom being denied often with the vague justification that this will serve the welfare of children. In reality, the danger is that welfare of children might become the new eugenics.

Male Prisoners and Procreative Freedom

It is in the nature of incarceration that an individual’s freedom is restricted. However, it has long

¹² *Oakley v Wisconsin*. The case proceeded through various stages from 2000 to 2002 and, again, the full citation for each of these stages is provided below along with a discussion of them.

been accepted in both the U.S.¹³ and the U.K.¹⁴ that a prisoner does not lose all rights upon imprisonment. In the U.S., it has been noted that “no iron curtain separates” prisoners from the Constitution¹⁵ and that a prisoner “retains those rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system”¹⁶. Similarly, in the U.K., Lord Wilberforce observed, “a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication”¹⁷. Conjugal visits provide the avenue for prisoners to retain their reproductive freedom by the traditional method. However, the development of assisted reproductive technology¹⁸ has opened up the possibility of

¹³ *Pell v Procunier* 417 U.S. 817 (1974) (right to freedom of speech survived incarceration); *Wolff v McDonnell* 418 U.S. 539 (1974) (due process protection remained); *Estelle v Gamble* 429 U.S. 97 (1976) (protection against cruel and unusual punishment); *Bounds v Smith* 430 U.S. 817 (1977) (access to courts retained); *O’Lone v Estate of Shabazz* 482 U.S. 342 (1987) (right to freedom of religion survived incarceration).

¹⁴ *Raymond v Honey* [1983] A.C. 1 (interception of a prisoner’s letter to his solicitor constituted a contempt of court); *R v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198 (preventing a prisoner giving interviews to journalist was an unjustified interference with the prisoner’s right to freedom of expression). Since the passage of the Human Rights Act 1998, prisoners have sought to challenge a host of restrictions. See, for example; *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 W.L.R. 1622 (search of private correspondence of prisoner); *Mellor v Secretary of State for the Home Department* [2001] H.R.L.R. 38 (right of prisoner to procreate); and *Hirst v Secretary of State for the Home Department* [2002] 1 W.L.R. 2929 (right of prisoner to exercise freedom of expression by giving radio interviews to journalists).

¹⁵ *Hudson v Palmer* 468 U.S. 517 (1985), at p.523.

¹⁶ *Pell v Procunier* 417 U.S. 817 (1974), at p.822.

¹⁷ *Raymond v Honey, op. cit.*, at p.10.

¹⁸ Broadly, the techniques include artificial insemination, the use of donated gametes (ova or sperm), *in vitro* fertilisation (IVF), and gamete intra-fallopian transfer (GIFT), and the use of a surrogate may be required in some cases.

a prisoner exercising reproductive freedom even where conjugal visits are not permitted. That they may try to take this second path, despite a prohibition on doing so, is clear from the recent rash of indictments, in the U.S., alleging that prisoners arranged to have sperm samples smuggled out of prison, sometimes by guards, in order to enable their partners to conceive and give birth¹⁹.

Procreative freedom in the U.S. has been considered by the courts within a complex web of constitutional provisions, focused particularly on the equal protection and due process guarantees of the Fourteenth Amendment and the right to privacy. Indeed, it is ironic that the issue of procreative freedom has arisen so often though cases where reproduction was precisely what the individuals involved were seeking to avoid. But we are getting ahead of ourselves. One of the earliest and, certainly, most dramatic cases to address the issue of convicted criminals and procreative freedom is *Skinner v Oklahoma*²⁰. There, a penal law providing for non-consensual sterilization of habitual criminals was struck down by the U.S. Supreme Court. An habitual criminal was defined by the relevant statute as a person who had been convicted two or more times of crimes “amounting to felonies involving moral turpitude”²¹. Mr. Skinner had been convicted of stealing chickens and, upon his second conviction for armed robbery, became a candidate for non-consensual sterilization after a hearing to determine whether he was, in fact, an

¹⁹ AP Online, “Mobster, Wife Accused of Sperm-Smuggling”, December 4, 2002 , 2002 WL 103840557.

²⁰ 316 U.S. 535 (1942).

²¹ Habitual Criminal Sterilization Act, 57 O.S. 1941, s.173.

habitual criminal and could be sterilized without detriment to his general health. What was significant, in the Court's view, was the fact that the statute expressly excluded a range of other similar crimes, including "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses" from its ambit. It is unsurprising, perhaps, that such lines should be drawn in the application of eugenics policies by those who so obviously wielded political power. However, the Court was not persuaded that there was a valid distinction between the two groups of offenders and, thus, concluded that the sterilization law offended against the Fourteenth Amendment to the U.S. Constitution by leveling unequal treatment at them. Despite the fact that the Court did not condemn eugenic policies²², Justice Douglas made the following eloquent statement regarding procreative freedom:

"We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."²³

By far the greatest strides in securing procreative freedom, in general, have come through the

²² Indeed, Douglas J., writing for the Court, gave implied validation to eugenics by observing, at p.542, "We have not the slightest basis for inferring that the line [between the two classes of offenders] has any significance in eugenics". Only Jackson J. (concurring), at pp.546-547, felt the need to express some misgivings about the intrusion of privacy inherent in such policies and, then, largely because he had reservations about how scientific some of the conclusions were.

²³ At p.541.

constitutional protection afforded to the right of privacy - a word not mentioned in the Constitution at all. Certainly, notions of privacy, in the sense of freedom from governmental interference, recur throughout the Bill of Rights²⁴, and it was from these that Justice Douglas, in *Griswold v Connecticut*²⁵, was able to deduce the right to guaranteed “zones of privacy”, including marital and family relationships. Having examined the case law on the development and application of guarantees stated explicitly in the Bill of Rights, he was able to conclude that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help to give them life and substance”²⁶. One such penumbra enabled the Court to strike down a statutory provision criminalizing the use of contraceptives by married couples. This right of privacy was extended to unmarried persons in *Eisenstadt v Baird*²⁷. It was this notion of personal privacy that led to the landmark decision in *Roe v Wade*²⁸, where a woman’s right to choose abortion was upheld, albeit subject certain state interests²⁹. The importance of

²⁴ See, the First Amendment (right of association), the Third Amendment (prohibition on quartering soldiers without consent), the Fourth Amendment (security from unreasonable searches and seizures), the Fifth Amendment (protection from self-incrimination), and the Ninth Amendment (enumeration of rights does not deny others).

²⁵ 381 U.S. 479 (1965).

²⁶ *Ibid.*, at p.484.

²⁷ 405 U.S. 438 (1972).

²⁸ 410 U.S. 113 (1973).

²⁹ The issues of contraception and abortion remains highly controversial have made numerous appearances before the Court since these decisions. See, for example, *Planned Parenthood of Central Missouri v Danforth* 428 U.S. 52 (1976) (spousal and parental consent to abortion struck down); *Carey v Population Services International* 431 US 678 (1977) (supply of contraceptives to minors upheld and spousal notification of intention to have an abortion struck down); *Maher v Roe* 432 U.S. 464 (1977) (no obligation on the state to provide for

procreative freedom and its protection through the right to privacy is best summed up in the oft-quoted words of Justice Brennan. He said,

“If 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”³⁰.

If, as the Supreme Court has accepted, procreative freedom is a fundamental right, it might be thought that it survives incarceration. That this would be the case becomes more persuasive when one considers that the U.S. Supreme Court has concluded that prisoners retain another fundamental right, the right to marry³¹. However, until recently in the U.S., the suggestion that prisoners have any constitutional right to either conjugal visits³² or access to artificial insemination³³ had been denied consistently.

A substantial, albeit temporary, departure from established case law appeared recently when

abortions); *Harris v McRae* 448 U.S. 297 (1980) (prohibition on the use of federal funds for abortions upheld); *H.L. v Matheson* 450 U.S. 398 (1981) (parental notification of abortion in respect of immature minor upheld); *Webster v Reproductive Services* 492 U.S. 490 (1989) (prohibition on the use of state facilities for abortions upheld); *Madsen v Women’s Health Center, Inc.* 512 U.S. 753 (1994) (right to unobstructed access to abortion clinics upheld).

³⁰ *Eisenstadt v Baird* 405 U.S. 438 (1972), at p.453.

³¹ *Turner v Safley* 482 U.S. 78 (1978).

³² *Anderson v Vasquez* 28 F.3d 104 (9th Cir., 1994); *Hernandez v Coughlin* 18 F. 3d 133 (2nd Cir., 1994), *Toussaint v McCarthy* 801 F. 2d 1080 (9th Cir, 1986).

³³ *Percy v New Jersey Department of Corrections* 651 A.2d 1044 (N.J., 1995); *Goodwin v Turner* 908 F.Supp. 1395 (8th Cir., 1990.).

William Gerber, an inmate in a California prison serving a life sentence plus eleven years³⁴, sought to challenge the Department of Corrections' refusal to permit him to have a sperm sample sent out of the prison, for the purpose of inseminating his 46 year-old wife. He asserted that this refusal violated his constitutional and state rights to procreate. His challenge was unsuccessful before the district court³⁵ (hereinafter "*Gerber I*"). However, in a 2-1 decision, the Court of Appeals for the Ninth Circuit took the view, as a matter of first impression, that the prisoner's right to procreate survived incarceration, and remanded the case for further consideration³⁶ (hereinafter "*Gerber II*"). In the colorful words of Silverman J., dissenting, this amounted to "holding that inmates retain a constitutional right to procreate by FedEx"³⁷. Within months, that decision was reversed, vacated and a rehearing before the Ninth Circuit, sitting *en banc*, was ordered³⁸. Upon rehearing, a 6-5 majority concluded that "the right to procreate while in prison is fundamentally inconsistent with incarceration"³⁹ (hereinafter "*Gerber III*"). Given the narrowness of the decisions, the obvious desire of a number of prisoners to procreate, and the controversy surrounding procreative freedom, one might have thought that the U.S. Supreme

³⁴ Mr. Gerber was serving a sentence of 100 years to life plus eleven years under California's "three strikes" law (Cal. Pen. Code s.667) following his conviction, in 1997, of discharging a firearm and making terrorist threats. The three strikes law itself survived challenge before the U.S. Supreme Court; *Lockyer v Andrade* 538 U.S. ____ (2003) and *Ewing v California* 538 U.S. ____ (2003).

³⁵ *Gerber v Hickman* 103 F.Supp.2d 1214 (E.D.Cal. Jun 23, 2000).

³⁶ *Gerber v Hickman* 264 F. 3d 882 (9th Cir. (Cal) Sep 05, 2001).

³⁷ *Gerber v Hickman*, 264 F. 3d 882, *op. cit.*, at p.893.

³⁸ *Gerber v Hickman* 273 F.3d 843 (9th Cir. (Cal) Dec 04, 2001).

³⁹ *Gerber v Hickman* 291 F.3d 617 (9th Cir. (Cal) May 23, 2002), at p.623.

Court would have been anxious to resolve the matter. It was not and Mr. Gerber's petition for a writ of certiorari was denied⁴⁰. Thus, for the time being, prisoners in the U.S. have no right to procreate. For our present purpose, the competing arguments advanced in *Gerber v Hickman* merit consideration.

The first question to be addressed was whether a prisoner's right to procreate survived incarceration and the differing opinions expressed on this in *Gerber II* and *Gerber III* amount to different readings of the implications of prior case law. There was broad agreement that prisoners do not lose all rights upon incarceration⁴¹. The majority in *Gerber II*, and the dissenters in *Gerber III*, placed considerable emphasis on the fundamental nature of the right to procreate⁴², in holding that it could survive incarceration⁴³. They then found that the possibilities presented by assisted reproductive technology, as opposed to any right to conjugal visits, might outweigh any legitimate penological interest in denying access to procreative opportunities. In particular, the majority in *Gerber II* addressed three concerns cited by the prison governor as justifying denial of Mr. Gerber's request. First, it dismissed the governor's assertion that to grant the request would raise equal protection issues unless female prisoners were given the same facilities

⁴⁰ *Gerber v Hickman* 123 S.Ct. 558 (Nov. 18, 2002). It is worth remembering that the U.S. Supreme Court does not give reasons for denying petitions for writs of certiorari.

⁴¹ *Gerber v Hickman* 264 F. 3d 882, at pp.886-887 and *Gerber v Hickman* 291 F.3d 617, at p.620.

⁴² *Gerber v Hickman* 264 F. 3d 882, at p.887 and *Gerber v Hickman* 291 F.3d 617, at p.624.

⁴³ *Gerber v Hickman* 264 F. 3d 882, at p.888-890 and *Gerber v Hickman* 291 F.3d 617, at pp.625-626.

to reproduce, largely on the basis that it assumed matters not before the court and, in any event, that male and female prisoners were not similarly situated in this respect⁴⁴. Second, safety risks posed by prisoners misusing the procedure to throw samples at others or sending samples to persons who did not want them, was rejected since Mr. Gerber was willing to comply with prison security procedures and, apparently, his lawyer was prepared to transport the sample⁴⁵. The governor's third objection, that acceding to the request would create "an unacceptable risk of liability for the prison" due to possible mishandling of samples and equal protection claims from female prisoners, was again rejected as untenable⁴⁶.

The majority in *Gerber III*, on the other hand, simply felt the right to procreative freedom did not survive incarceration⁴⁷. The dissenters accused them of "relying 'largely on the repetition of glittering generalities' about the nature of incarceration 'that have little, if any, application' to the facts of this case"⁴⁸, including the removal of the individual from society, deterrence, protection of the public, the rehabilitation of the offender, and retribution. Having answered the first question in the negative, the majority found no need to address the second question, whether there was a valid penological interest which was served by denial of the right⁴⁹. Thus, it appears

⁴⁴ *Gerber v Hickman* 264 F. 3d 882, at p.891.

⁴⁵ *Gerber v Hickman* 264 F. 3d 882, *ibid*.

⁴⁶ *Gerber v Hickman* 264 F. 3d 882, at pp.891-892.

⁴⁷ *Gerber v Hickman* 291 F.3d 617, at pp.620-623.

⁴⁸ *Gerber v Hickman* 291 F.3d 617, at p.624, paraphrasing Stevens J., dissenting, in *Rice v Cayetano* 528 U.S. 495 (2000) at p.527.

that the fundamental right to procreate simply does not survive incarceration in the U.S.. That being the case, there was no need to develop further criteria for how it might be exercised.

It is interesting that the child's welfare is mentioned so little in the discussions in the U.S. even by those who believe procreative freedom survives incarceration. A hint that the issue might have come before the U.S. Supreme Court was given when the Pechanga Band of Luiseno Mission Indians filed an *amicus* brief in the case⁵⁰. It appears that the brief argued for the right of Ms. Gerber, a tribe member, to have and raise children in the traditional Luiseno culture. Since the U.S. Supreme Court declined to hear the case, we will never know where that claim might have taken it. However, if one US court could find at least an arguable case for prisoners to exercise procreative freedom through the use of assisted reproductive technology, it is possible that others could do so and, indeed, that the European Court of Human Rights or courts in the U.K. could be persuaded along similar lines.

Turning to the European Convention on Human Rights, article 12 is of particular importance in the context of procreative freedom. Echoing the Universal Declaration of Human Rights, it provides:

⁴⁹ The majority did address two other issues, albeit briefly. Mr. Gerber had been unsuccessful when he sought leave amend his complaint to the district court to add equal protection and Eighth Amendment claims. The Court found no abuse of discretion in either case; *Gerber v Hickman* 291 F.3d 617, at pp.623-624. The equal protection claim was based on the fact that some prisoners in California were permitted conjugal visits while the Eighth Amendment claim related to cruel and unusual punishment.

⁵⁰ See, "Supreme Court passes up inmate sperm case", *CNN.com*, visited November 11, 2002.

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

Two other provisions of the European Convention are of particular interest in the context of procreation. Article 8, which guarantees respect for the individual’s private and family life, home and correspondence, expresses that right as being subject to certain lawful and necessary state interference. Interference is permitted “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others”. However, such interference must be “necessary”; that is, it must be justified in terms of proportionality.

Proportionality requires applying a three stage test, to assess “whether (i) the legislative objective sufficiently important to justify limiting a fundamental rights; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective”⁵¹. Article 14 provides that enjoyment of Convention rights shall be secured to the individual without discrimination and goes on to enumerate examples of prohibited discrimination.

While prisoners in the U.K. retain the right to marry while incarcerated⁵², they are not allowed

⁵¹ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 A.C. 69, *per* Lord Clyde at p.80.

⁵² It was already the practice of prison authorities in Scotland to facilitate prisoners marrying while in prison when the European Commission had the opportunity to express its support for prisoners’ right to marry in two cases emanating from England; *Draper v United Kingdom* (1980), Application No 7114/75, 10 July 1980, and *Hamer v United Kingdom* (1982) 4 E.H.R.R. 139. In each case, the male prisoner wished to marry and the Secretary of State had refused to make the necessary arrangements. The Commission found that marriage was not

conjugal visits with their partners. Clearly, this places an enormous obstacle in the way of their opportunity to procreate. It is trite law to note that the European Convention is a “living instrument”, but one can see the thinking of the, now defunct, European Commission on Human Rights on the issue of conjugal visits developing over time. In 1975, it found the denial of conjugal visits to be no breach of article 8, since it was necessary in the interests of public safety⁵³. More significantly for our purpose, it found no breach of article 12, on the basis that the right to found a family “does not mean that a person must at all times be given the actual possibility to procreate his descendants” and that the situation in which a prisoner found himself, in this respect, “falls under his own responsibility”⁵⁴. In 1978, in a case brought by two spouses incarcerated in the same prison but in separate facilities, it again found the complaint to be inadmissible⁵⁵. Again, prison security was the main reason for it finding no violation of article 8 but, in an interesting twist, the Commission noted that respect for the privacy of the couple

incompatible with the prisoner’s deprivation of liberty and, since the ceremony could be conducted under the supervision of the prison authorities, that it posed no risk to security; *Hamer v United Kingdom*, at para.67. Nor was the Commission impressed by the argument that, were certain categories of prisoner permitted to marry, sections of the public might be outraged; *Hamer v United Kingdom*, at para.62. Thus, the denial in England of the prisoner’s right to marry, under article 12 of the European Convention, was not justified. The fact that the refusal simply amounted to a delay in the prisoner being able to exercise his right to marry was similarly unjustified; *Hamer v United Kingdom*, at para.72. The Commission did not find the fact that the prisoner would not be able to consummate the marriage to be relevant to the right to marry itself; “[T]he Commission does not regard it as relevant that he could not have cohabited with his wife or consummated his marriage while serving his sentence”, *Hamer v United Kingdom*, at para.71.

⁵³ *X v United Kingdom*, Application No. 6564/74, (1975) 2 DR 105.

⁵⁴ *X v United Kingdom*, *op. cit.*, cited in *Mellor v Secretary of State for the Home Department*, at para.25.

⁵⁵ *X v Switzerland*, Application No.8166/78, (1978) 13 DR 241.

during conjugal visits would contribute to security concerns⁵⁶. Addressing article 12, it took the view that “an interference with family life which is justified under article 8(2) cannot at the same time constitute a violation of article 12”⁵⁷. By 1997, in *E.L.H. and P.B.H.v United Kingdom*⁵⁸, while the Commission stopped short of upholding any right to such visits under either article 8 or article 12, it noted “with sympathy the reform movements in several European countries to improve prison conditions by facilitating ‘conjugal visits’”⁵⁹. Given that the European Court uses accepted practice in European states as an indicator of the scope of Convention rights, it may be that, as more countries permit conjugal visits, the Court may become more willing to countenance a right to such visits in the future.

The decision in *E.L.H. and P.B.H.v United Kingdom* is significant, not only because the complaint was made by the prisoner and his non-incarcerated wife, who claimed that her article 8 and 12 rights were being violated⁶⁰, but because the Commission noted the possibility of

⁵⁶ *X v Switzerland, op. cit.*

⁵⁷ *X v Switzerland, op. cit.*, cited in *Mellor v Secretary of State for the Home Department*, at para.28.

⁵⁸ (1997) 91A DR 61. There a 37 year-old man was serving a 20 year prison sentence. His 33 year-old wife required major surgery to her fallopian tubes to enable her to conceive and, while the surgery would increase the chances of conception, the effect would last for a limited period. Accordingly, she applied for a conjugal visit to follow the surgery. Her application was refused.

⁵⁹ (1997) 91A D.R. 61.

⁶⁰ An earlier case brought by a non-incarcerated wife was rendered moot when the Secretary of State granted the applicant’s request to make the requisite facilities available to her incarcerated husband; *P.G. v United Kingdom* Application No. 10822/84, 7 May 1987.

conception by artificial insemination⁶¹. This raises the issue of prisoners fulfilling their desire to procreate through artificial insemination and what, if any, right they may have to require the prison authorities to make arrangements to enable them to do so. As a result of friendly settlements reached in two cases in the 1990s⁶², when prisoners challenged the refusal to extend such a facility to them, procreation by prisoners through artificial insemination is now countenanced in prisons in the U.K.. In Scotland, the Prison Rules say nothing about artificial insemination, each application is examined on its own facts and circumstances, and the criteria on which the decision will be taken are not set out in any public document.

In England and Wales, more information on the availability to prisoners of facilities for artificial insemination, the criteria applied, and the reasoning behind them, can be gleaned from the decision of the Court of Appeal in *Mellor v Secretary of State for the Home Department*⁶³. There, a prisoner serving a life sentence had married while in prison. Having sought, and been refused, permission to inseminate his wife artificially, he applied for judicial review of that decision and, ultimately, was unsuccessful in challenging it. The Secretary of State's position was that prison authorities only facilitate artificial insemination "in exceptional circumstances", assessed on the basis of a set of "general considerations" which, it was stressed, "are not treated

⁶¹ The Commission did not accept the couple should receive special consideration since, as Roman Catholics, they did not regard artificial insemination as acceptable.

⁶² *GS, RS v United Kingdom*, Application No. 17142/90 (10 July 1991) and *RJ and WJ v United Kingdom*, Application No. 20004/92 (7 May 1993).

⁶³ [2002] Q.B. 13.

as rigid criteria”, and other relevant factors⁶⁴. This approach was predicated on three considerations⁶⁵. First, the position was taken that “it is an explicit consequence of imprisonment that prisoners should not have the opportunity to beget children whilst serving their sentences”. Second, given that retribution was a legitimate part of penal policy, there would be “serious and justified public concern” if prisoners were allowed to procreate while in prison. Third, the child’s lack of contact with one parent, resulting from the parent’s incarceration, would be “disadvantageous to society as a whole, as well as not being in the interests of the welfare of the child”.

The first of these considerations simply restated current policy. It begs the question whether non-procreation *is* a necessary incident of imprisonment or a breach of the individual’s right to found a family. In short, it is not a reason to deny prisoners access to artificial insemination. The Court of Appeal accepted the second consideration, that there would be public concern, as a valid part of the formulation of penal policy⁶⁶. No evidence was presented to the Court to support the

⁶⁴ *Mellor v Secretary of State for the Home Department, op. cit.*, at para.17. The general considerations are: whether provision of artificial insemination facilities is the only means by which conception is likely to occur; whether the prisoner’s expected date of release is neither so near that delay would not be excessive nor so distant that he would be unable to assume responsibilities as a parent; whether both parties want the procedure and are medically fit to undergo it; whether the couple were in a well-established relationship before imprisonment which is likely to subsist after the prisoner’s release; whether the couple’s domestic circumstances and the arrangements for the welfare of the child are satisfactory; whether, having regard to the prisoner’s history and antecedents and other relevant factors, there is evidence to suggest that it would not be in the public interest to provide artificial insemination facilities in this particular case.

⁶⁵ *Mellor v Secretary of State for the Home Department, op. cit.*, at para.17.

⁶⁶ *Mellor v Secretary of State for the Home Department, op. cit.*, at para.65.

contention that there would be public concern but, even if this were so, how far should we allow the views of a vocal section of the public to impact upon the rights of individuals who are already being deprived of their liberty? Sections of the public might support all sorts of additional punitive measures in prisons, like slopping out⁶⁷ and hard labor, but that does not mean that such a regime would accord with respect for prisoners' human rights. It should be remembered that the European Commission expressly rejected the "public outrage" justification in the context of denying prisoners the right to marry⁶⁸.

It is the third consideration, concern for the child's welfare, that merits serious consideration as a possible reason to deny a prisoner the right to procreate. It is undisputed that the state has obligations to children already born to promote their welfare and to protect them from harm, obligations long accepted in both the U.K. and the U.S.. However, in denying the opportunity to procreate, it is going a great deal further by policing access to parenthood itself. Does it have any right or obligation to ensure that children are born into adequate or optimum conditions? In a somewhat tongue-in-cheek article published in 1973, McIntire discussed a fictitious proposal for the licensing of parenthood. He suggests that all women be treated with a contraceptive called "lock", with the antidote, "unlock", being administered only on proof that potential parents had

⁶⁷ *Napier v The Scottish Ministers*, 26 June 2001, unreported, but available at http://www.scotcourts.gov.uk/opinions/P739_01.html, where Lord Macfadyen held that slopping out was a contravention of the petitioner's article 3 rights.

⁶⁸ *Hamer v United Kingdom*, *op. cit.*, at para. 72 and *Draper v United Kingdom*, at para.62.

passed parenting tests, akin to driving tests⁶⁹. Under his scheme, it would be an offence to have children outside of the approved context, just as it is an offence to drive a car without the requisite license. Thus, the state would ensure that children were only born to persons who were capable of taking care of them. This would be the ultimate form of state intervention to ensure that all children at least started life with competent carers. Of course, even this level of intervention would not address a whole range of problems. As a brief observation of any street demonstrates, the fact that people have passed driving tests does not guarantee that they will put what they have learned into practice. People, and the circumstances in which they live, change and a parent who had passed the test might later become unable or unwilling to live up to the standards of parenting required. These flaws aside, the point is that governments do not attempt to regulate reproduction in this way nor, it is submitted, would such regulation be regarded as legitimate.

Thus, in subjecting a prisoner's request to exercise procreative freedom to additional tests tied to the child's welfare, the state is abrogating to itself a role it does not usually take on in respect of other potential parents. That alone might be enough to call the state's assertion that it has a right to do so into question. However, it is worth examining this imprecise welfare test a little further. The obvious difference between the prisoner-father and fathers in the general population is that the former will have less opportunity to participate actively in the child's life. If it could be shown that it is uniformly detrimental to a child to have only limited contact with one parent,

⁶⁹ Roger W. McIntire, "Parenthood Training or Mandatory Birth Control: Take Your Choice" October 1973 *Psychology Today* 34.

then it might be argued that the child's rights trump any right the prisoner, or the prisoner's partner, might have. Of course, there is no reason why a prisoner cannot play an active, if restricted, role in the child's life. He can participate in decision-making through discussions with the child and his partner. He can maintain personal contact through telephone call, letters, e-mail and visits. Granted, this is less than the parenting offered by a resident parent, but it is arguably no less than that engaged in by many separated or divorced non-resident parents. While it may not be the ideal, lone parenthood is a fact of life, and one countenanced by the legal system in allowing single people to adopt children⁷⁰ or to have children by the use of assisted reproductive technology⁷¹.

It is sometimes the case that a child living with a lone parent will be economically disadvantaged and there is evidence that poverty can affect a child's life chances adversely⁷². But the state does

⁷⁰ Adoption (Scotland) Act 1978, section 15(1) and Adoption and Children Act 2002, section 49. The 2002 Act is the successor to the Adoption Act 1976. It should be noted that section 14(1) of the 1976 Act permitted single persons to adopt.

⁷¹ While the Human Fertilisation and Embryology Act 1990, section 13(5) requires account to be taken of "the welfare of any child who may be born as a result of treatment (including the need of that child for a father)", treatment of single people is not prohibited. It can be argued that the 1990 Act puts obstacles in the way of single women and same-sex couples gaining access to assisted reproductive technology; see, Elaine E. Sutherland, "Man Not Included': Single Women, Female Couples and Procreative Freedom in the United Kingdom" (2003) C.F.L.Q. 155.

⁷² Much of the evidence here relates to the position of women and children, post-divorce. See, Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, 1985). See also, Kathleen Kiernan, "Lone Motherhood, Employment and Outcomes for Children" (1996) 10 *Int'l. J. Law and the Family* 231 and Heather Sweeting, Patrick West and Martin Richards, "Teenage Family Life, Lifestyles and Life Chances: Association with Family Structure, Conflict with Parents and Joint Family Activity" (1998) 12 *Int'l. J. Law, Policy and the Family* 15.

not usually restrict parenthood on the basis of a resources test. In any event, if potential poverty is the reason that the child's welfare is being undermined - and that involves a substantial leap by concluding that poverty precludes adequate parenting - the state has other avenues, most notably by adequate welfare provision, through which it can address the problem. If it is suggested that a lone parent faces additional stresses in child-rearing then, again, there are other ways to resolve the problem by providing support to the parent or, ultimately, through removal of the child from the parent's care. In short, none of the adverse consequences which may face the child of a prisoner-father suggest that the child's welfare justifies adopting the most intrusive option of denying prisoners access to the opportunity to become a parent.

A further point merits consideration in the context of the child's welfare being used as a justification for restricting an adult's right to procreative freedom. If the procreative freedom of a particular individual or group is restricted or denied, the result will be that some children who might have existed will never be born. To argue that this serves the welfare of these potential children is to pit non-existence against existence. The courts have long recognized the impossibility of measuring these relative states in the wrongful life cases. The argument has been made on behalf of the child born with disabilities that, had certain pre-conception or ante-natal circumstances been diagnosed, he or she would either not have been conceived or would have been aborted while a fetus. With few exceptions⁷³, courts in the U.S.⁷⁴ and in England⁷⁵ have

⁷³ *Curlender v Bio-Science Laboratories* 165 Cal. Rptr. 477 (1980); *Turpin v Sortini* 182 Cal. Rptr. 377 (1982), where the claim was restricted to special damages; *Harbeson v Parke-Davis* 659 P.2d 483 (1983, Wash.); and *Gallacher v Duke University* 638 F.Supp. 979 (1988, N.C.).

rejected such actions on the basis that they are unwilling to take the view that no life at all would be preferable to life with disabilities, that the measure of damages is impossible to assess, and judicial antipathy towards what might be perceived as promoting abortion.

Unlike the position in the U.S., the right of prisoners to procreative freedom in the U.K. is not removed at the prison gates. However, the circumstances under which it can be exercised are somewhat imprecise. Given the direction in which the European Court's thinking appears to be developing, a cynic might observe that the prison authorities in the U.K. are simply not willing to take the position of a blanket refusal, since such a position might well prove impossible to defend. While some attempt was made in *Mellor* to argue for such a ban, the authorities placed greater reliance on "general considerations" which, it was stressed, "are not treated as rigid criteria", and "other relevant factors", applied at the discretion of those authorities⁷⁶. This leaves the prisoner in the unenviable position of having to seek judicial review and carry the burden of demonstrating that the criteria were applied unreasonably in respect of him⁷⁷. When one looks at the general consideration, the child's welfare is mentioned expressly, and a number of the other

⁷⁴ *Gleitman v Cosgrove* 296 N.Y.S.2d 687 (1967); *Ellis v Sherman* 515 A.2d 1327 (Pa, 1986); *Crowe v Forum Group Inc.* 575 N.E.2d 630 (Ind, 1991).

⁷⁵ *McKay v Essex Area Health Authority* [1982] 2 All E R 771. See also, Congenital Disabilities (Civil Liability) Act 1976, s.1(2)(b). Cf. Jane E.S. Fortin, "Is the 'Wrongful Life' Action Really Dead?" [1987] J.S.W.L. 306.

⁷⁶ *Mellor v Secretary of State for the Home Department*, *op. cit.*, at para.17.

⁷⁷ It is questionable that judicial review amounts to a "fair hearing" as required by article 6 of the European Convention. Of course, the right to a fair hearing applies only if procreative freedom is, indeed, a civil right.

relevant factors relate to the issue of the child's welfare either specifically or indirectly⁷⁸. There is no doubt that the welfare of children is an important consideration, but what the present system does is subject the prisoner to additional tests, which other potential parents do not have to pass, about the stability of his relationship with his partner, family circumstances, and the like, before access to procreation will be permitted. Of course, the fact that the Court of Appeal found the decision to accord with the European Convention does not mean that the European Court would necessarily reach the same conclusion and it may be that the vagueness of the criteria will provide a future prisoner with an effective argument to challenge refusal to recognize his procreative freedom.

Female Prisoners and Procreative Freedom

One reason for denying male prisoners access to donor insemination, cited in a number of the cases from the U.S. is that, if this facility were to be made available to male prisoners, then the right to equal protection, under the Fourteenth Amendment to the US Constitution, would require that the same opportunity would have to be provided to female prisoners, resulting in significant expenditure for prison authorities and the diversion of resources from other penal obligations like security⁷⁹. This argument was rejected in *Gerber II* on the basis that male and

⁷⁸ It will be recalled that these include the prisoner's ability to assume the responsibilities of a parent and whether the couple's domestic circumstances and the arrangements for the welfare of the child are satisfactory.

⁷⁹ *Goodwin v Turner, op. cit.*, at pp. 1400-1401.

female prisoners are not similarly situated in this respect⁸⁰ and was not addressed at all in *Gerber III*.

In *Mellor*, the Secretary of State was at pains to point out that the “general considerations” taken into account “apply equally to male and female prisoners”⁸¹. The fact that the woman would require ante- and post-natal care is something of an irrelevance in the U.K., since the state provides this to all pregnant women. Nor would the cost of providing space in a mother and baby unit be sufficient reason to limit the woman’s right to procreate⁸². The real issue, again, will be the welfare of any child resulting from artificial insemination. The same objections as were expressed in respect of this test in the context of male prisoners apply. However, a further consideration deserves mention. It is the norm for the mother and baby to be together once the child is born and this can be accommodated in prison. Depending on the length of the mother’s sentence, separation may occur at some stage, but there may be other family members, including the child’s father, who are willing to look after the child until the mother’s release. Separation of mother and child is not ideal but mothers are sometimes imprisoned and, again, it happens in

⁸⁰ *Gerber v Hickman* 264 F. 3d 882, at p.891.

⁸¹ *Mellor v Secretary of State for the Home Department, op. cit.*, at para.17.

⁸² In *R. v Secretary of State for the Home Department, ex parte P* and *R. v Secretary of State for the Home Department, ex parte Q* [2001] F.L.R. 1122, two women challenged the rule, in England, that the child should leave the unit at the age of eighteen months. In a very thorough discussion of the issues involved, the Court of Appeal did not question the fundamental need to provide this facility. It concluded that, while the Prison Service was entitled to have a policy on how the Units were to operate, it was not justified in having a rigid rule on the appropriate time for separation and allowed the appeal of one of the women on the basis that her exceptional circumstances might justify a departure from the policy.

cases where incarceration is not involved. Thus, imprisonment is not, of itself, a reason to deny a woman the opportunity to procreate. It is understood that no requests for artificial insemination have been received from female prisoners in the U.K. and, until such an application is made, we can only speculate that its chance of success is, very probably, not high. Should this prediction prove to be correct, it is likely that the European Court will eventually have the opportunity to offer guidance on the matter..

To date, the U.S. courts' consideration has been predicated on the scenario of a woman using artificial insemination to conceive while in prison. However, other scenarios present themselves and have been explored in the literature⁸³. A female prisoner who was nearing the end of her fertile life might opt to have ova removed and stored, pending her release. She might then use IVF to effect fertilization of the ova with subsequent implantation in herself. She might seek to have ova removed and passed on to her male partner so that he could effect fertilization through IVF and recruit a surrogate to carry the embryo to term. The prisoner might wish to send harvested ova to her female partner with the intention that her partner would arrange for IVF and carry the fetus to term. Assuming the individuals involved did not have sufficient funds to finance these procedures themselves, they would undoubtedly occasion expenditure on the part of the state, at least in the U.K.. Whether that alone would justify the prison authorities from

⁸³ Sarah L. Dunn, "The 'ART' of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate" 70 *Fordham L. Rev.* 2561 (2002). This article predates the decision in *Gerber III*, but the arguments explored remain relevant. Some of the scenarios discussed in the article are mentioned briefly in a footnote in *Gerber II*, but the Court did not discuss them in any detail; *Gerber v Hickman* 264 F. 3d 882, at p.891, footnote 13.

refusing such treatment in all cases is, at least, open to question.

Criminal Sentencing and Restrictions on Procreative Freedom

A central target of the eugenics movement was the elimination or, at least, reduction, of criminality through the non-consensual sterilization of criminals. In response to both the discrediting of the scientific foundations for this approach and something of a public distaste for the practice, the practice fell into disfavor. As we have seen, it remains the case that imprisonment may result in interference with procreative freedom, albeit the legitimacy of such interference is open to challenge. What, then, of the legitimacy of imposing a limitation on procreative freedom as part of the sentencing process when an individual has been convicted of an offence? Courts in the U.K. do not attach conditions of non-procreation as a part of the sentencing process and, thus, there is a dearth of U.K. case law on this point. Given the willingness of politicians and other policy makers in the U.K. to seize upon “good ideas” from across the Atlantic, it may be that such conditions will be considered in the future⁸⁴. In the U.S., however, the issue has arisen in a number of cases involving prisoners being sentenced to probation or granted parole subject to a condition that he or she does not have any more children.

While courts in the U.S. are given considerable latitude in determining conditions to be attached

⁸⁴ The proposals, contained in the recent Criminal Justice (Scotland) Bill, to allow victim impact statements, prior to sentencing, is an idea borrowed from the US. The fact that the “good idea” can be summed up simply seems to increase the attractiveness for policy makers; see, for example, “three strikes and you are out”.

to parole, the discretion is not boundless. Since parole is intended to rehabilitate the offender, while taking account of public safety, any conditions imposed must be reasonably related to the crime of which the offender was convicted. The classic statement of the reasonable relationship test can be found in *People v Dominguez*⁸⁵, where a young woman was convicted of robbery. One of the conditions of her probation was that she was not to live with a man outside of marriage nor become pregnant while unmarried. In striking down this condition, the Court articulated what has come to be regarded as a standard test for the validity of conditions of probation. It said:

“A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid.”⁸⁶

This test was applied in *Rodriguez v State*⁸⁷, where a woman who had been convicted of child abuse was granted parole on the condition that she was prohibited from marrying, becoming pregnant or having custody of her children. The Florida District Court found that, while the custody condition was reasonably related to child abuse, marriage and pregnancy were not and, thus, those conditions were invalid. As we shall see, a number of courts have sought to impose a no-procreation condition where the original offence was child abuse. It might be argued that

⁸⁵ 64 Cal.Rptr. 290 (Ct. App, 1967).

⁸⁶ *Ibid.*, at p.293

⁸⁷ 378 So.2d 7 (Fla. 1979). See also *State v Livingstone* 372 N.E.2d 1335 (Ohio 1976), where the no pregnancy condition was reversed.

preventing a person from having future children *is* reasonably related to preventing child abuse since, if a person does not have any more children, he or she will not be in a position to abuse them. However, as many courts have noted, this reasoning is flawed. Having a child may often be a precondition of child abuse but, even then, it is not an essential precondition of the offence, since an individual may abuse children to whom he or she is not related at all. The fundamental point is that the causes of child abuse are manifold but simply having a child does not, in itself, *cause* child abuse any more than having private property *causes* theft.

Even where a condition is reasonably related to the offender's crime, the court in *People v Pointer*⁸⁸ found that a no-procreation condition is still be subject to special scrutiny since it infringes a fundamental privacy right. There, a mother was convicted of felony child endangerment having subjected her children to “a rigorously disciplined macrobiotic diet” which resulted in “severe growth retardation and permanent neurological damage”⁸⁹. She was sentenced to five years probation and one of the conditions of probation was that she would not conceive a child during that time. The Court of Appeals for the First District in California reversed that aspect of the sentence. While it found the condition to be reasonable⁹⁰, it noted,

“There is, of course, no question that the condition imposed in this case infringes the exercise of a fundamental right to privacy protected by both the federal and state constitutions Nor is there any question for this reason the condition must be subjected

⁸⁸ 151 Cal.App.3d 1128 (1st Cir. 1984).

⁸⁹ *Ibid*, at p.1131.

⁹⁰ *Ibid*, at p.1138.

to special scrutiny to determine whether the condition is entirely necessary to serve the dual purposes of rehabilitation and public safety”⁹¹.

Applying this test, the condition failed to pass constitutional muster as being overbroad, since less restrictive conditions, including periodic pregnancy testing, prenatal and neonatal monitoring following a positive test result, and possible removal of any child from the defendant’s custody, would serve these purposes⁹². The Court was also concerned that such a condition might be “coercive of abortion” since the only way for the defendant to avoid going to prison, if she were to become pregnant, would be to terminate the pregnancy⁹³. That approach has attracted a considerable following in California⁹⁴ and in a number of other states⁹⁵.

⁹¹ At pp.1139-1140.

⁹² At p.1141.

⁹³ At p.1140-1141. This issue is discussed in a number of the cases, often with reference being made to what was said in *Pointer*, although, strictly speaking, Ms. Pointer would have breached the condition simply by becoming pregnant and the fact that she terminated the pregnancy would make no difference to the result.

⁹⁴ In *People v Zaring* 10 Cal.Rptr.2d 363 (5th Cir. 1992), a thirty year-old mother of five was convicted of possession and use of heroin and sentenced to five years probation with the condition that she “not get pregnant during her probation” (quoted at p.267). Like the Court in *Pointer*, the Court of Appeals for the Fifth District in California found the pregnancy condition to be overbroad.

⁹⁵ In *State v Mosburg* 768 P.2d 357 (Kan. 1989), a mother who pleaded no contest to a charge of child endangerment was sentenced to two years parole subject to the condition that she did not become pregnant during that time. On appeal, the sentence was struck down as being unduly intrusive on her privacy right. In *People v Negrete* 629 N.E.2d 687 (Ill. 1994), a mother convicted of “heinous battery”, resulting in burns over 60% of her seventeen month-old son’s body, was sentenced to forty-five years imprisonment, a sentence within the range permitted by statute. While the trial judge indicated that the sentence reflected the “wanton cruelty” inherent in the offence, he went on to say that the sentence reflected “a legitimate basis for removing [the defendant] from society to a situation where she will not become pregnant again” (quoted at p.690). The Appellate Court of Illinois found that consideration of this “improper factor” (at

However, a rather different view of a no-procreation condition was taken by the Oregon Court of Appeals in *State v Kline*⁹⁶. There, the defendant was convicted of criminal child mistreatment and sentenced to 36 months probation. Having violated probation, a hearing was held to consider its revocation and, in the event, an additional condition of probation was imposed, requiring him to complete anger management and drug counseling before fathering any more children. Mr. Kline argued that this violated his fundamental right to procreate. He did not deny that there might be a compelling state interest in the protection of young children, particularly his own children, from his potential for violence associated with his anger and substance abuse problems. Rather, he argued that the interference with this fundamental right to procreate was not sufficiently narrowly tailored as to pass constitutional muster. In a rather brief judgment, the Oregon Court of Appeals disagreed, finding that the trial court had looked at all the circumstances of the case, not least the concern for the safety of children the defendant might father in the future. It noted that the procreation ban was not total and that modification or elimination of it was a possibility if and when the defendant completed treatment. On the face of it, it is difficult to agree with the Court, since any future children could have been protected from Mr. Kline by their removal from his care. The parallel with *People v Pointer*, discussed above,

p.690) warranted remand for a new sentence. In *Trammell v State* 751 N.E.2d 283 (Ind. 2001), the defendant was charged with neglect of a dependant in connection with the death of her five month-old son. She was convicted but found to be mentally ill in respect of her retardation and sentenced to eighteen years imprisonment, with eight of these years to be served on probation. It was a condition of the probation that she was not to become pregnant. As a matter of first impression, the Indiana Court of Appeals again found this condition “excessively impinges upon her privacy right of procreation”(at p.291).

⁹⁶ 963 P.2d 697 (Or. 1998).

seems inescapable.

Given the divergence in views, one might think that the US Supreme Court would have been anxious to give definitive guidance on the constitutional issues involved when it was presented with the opportunity in *Oakley v Wisconsin*. Sadly, it was not⁹⁷. What, then, happened in *Oakley v Wisconsin*? As a result of a plea agreement⁹⁸, Mr. Oakley pled no contest to three counts of intentionally refusing to pay child support. After a lengthy discussion of the circumstances surrounding the offences, the harm done to children and society by non-payment of child support, and the purposes of the criminal justice system, the trial court considered imposing a sentence of six years imprisonment. Noting that if the defendant was in prison he would not be able to pay child support, the court sentenced him to three years imprisonment on the first count, imposed and stayed an eight year term of imprisonment on the other two counts, and imposed a five-year term of probation consecutive to incarceration⁹⁹. It was a condition of probation that the defendant would not have any more children until he demonstrated that he could support

⁹⁷ 123 S. Ct. 74 (Oct. 7, 2002).

⁹⁸ The history of the plea agreements in the case is somewhat complicated. Initially, Mr. Oakley had been charged with intentionally refusing to pay child support for the nine children he had fathered with four different women. The state subsequently changed him with only seven counts in respect of his failure to pay child support, but as a repeat offender, the “repeat offender” status stemming from intimidating two witnesses, one of whom was his own child, in a child abuse case. When the state discovered that Mr. Oakley’s probation was about to be revoked, it withdrew from the plea agreement. Subsequently, a fresh plea agreement was reached, resulting in the three charges (and four others to be read into the record) to which the appeal related; *State v Oakley* 629 N.W.2d 200 (Wis. 2001), at p.202.

⁹⁹ This sentence was to run concurrently with the three-year term of imprisonment Mr. Oakley was already serving in respect of other offences.

them and his existing children. In short, after competing the terms of imprisonment, Mr. Oakley would return to prison for a further eight years if he fathered a child in breach of the condition of his probation.

The defendant challenged the condition of probation¹⁰⁰. In a 4-3 decision which, the press delighted in noting, divided on gender lines, the Supreme Court of Wisconsin upheld the sentence¹⁰¹. It was argued that, since procreative freedom was a fundamental liberty interest, interference with it was subject to strict scrutiny; that is, the state had to demonstrate that the means employed in interference were narrowly tailored to meet a compelling state interest¹⁰². In the event, the majority found the condition to be narrowly tailored to meet two distinct compelling state interests. First, after a lengthy discourse on the effects of poverty on children and the impact of non-payment of child support thereon, it found a compelling state interest in “having parents support their children”¹⁰³. Second, it noted a compelling state interest in the rehabilitation of offenders, something which could be served by flexible sentencing of the type

¹⁰⁰ The appeal also related to the withdrawal of the earlier plea agreement by the state, a matter which need not concern us here, but which was denied, and, initially, to the place of incarceration, a matter rendered moot in the course of the hearings.

¹⁰¹ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), reconsideration denied, *State v Oakley* 635 N.W.2d 760 (Wis. 2001) and *State v Oakley* 638 N.W.2d 593 (Wis. 2002).

¹⁰² *Zablocki v Redhail* 434 U.S. 374 (1978). The majority of the Court of Appeals took the view that it would be illogical to subject a condition of probation to strict scrutiny when “the more severe punitive sanction of incarceration which deprives an individual of the right to be free from physical restraint and infringes upon various other fundamental rights” is not; *State v Oakley* 629 N.W.2d 200 (Wis. 2001), pp.207-213.

¹⁰³ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), pp.203-205 and 212.

found here¹⁰⁴. Since the no-procreation condition expired at the end of the term of probation, the Court concluded that the defendant was not being denied the right to procreate in the future. In her dissent, Bradley J. expressed no quarrel with the state interest in having parents support their children¹⁰⁵. Where she departed from the majority was over whether the means of achieving that end was, indeed, sufficiently narrowly tailored, since it seemed clear that Mr. Oakley would never be in a position to support his children¹⁰⁶. In addition, she observed that the condition “entails practical problems and carried unacceptable collateral consequences”¹⁰⁷ by encouraging abortion¹⁰⁸, authorizing a “judicially-imposed ‘credit check’ on the right to bear and beget children”¹⁰⁹, and being impossible to police¹¹⁰.

Thus far, women appear to have been more successful in challenging no-procreation conditions than do men, but that simple, gender-based distinction disappears when account is taken of the advent of Norplant and its use in probation conditions. Norplant is a method of delivering a prescription contraceptive by the surgical implantation of six silicon tubes under the skin in a woman’s arm and it was given approval by the U.S. Food and Drugs Administration in 1990.

¹⁰⁴ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), pp.205-207 and 213.

¹⁰⁵ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), p.216.

¹⁰⁶ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), pp.217-218.

¹⁰⁷ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), p.216.

¹⁰⁸ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), p.219.

¹⁰⁹ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), p.220.

¹¹⁰ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), p.220.

Once inserted, it prevents pregnancy for up to five years or until it is (again, surgically) removed. Its potential, as one solution to a variety of social ills including the prevention of pregnancy amongst teenagers and mothers already in receipt of welfare, abusing drugs, or HIV positive, was seized upon prompting considerable public and academic debate¹¹¹. With lightening speed, its use appeared in criminal sentencing when Darlene Johnson, a pregnant mother of four children, was convicted of child abuse¹¹². She was sentenced to imprisonment for one year and to three years probation, with one of the probation conditions being that she be implanted with a Norplant device. Ms Johnston accepted the condition in the absence of her attorney and later appealed against it. In the event, her appeal was rendered moot when she breached one of the other conditions of her probation¹¹³. Had the *Rodriguez* test, as articulated in *Dominguez*, been applied to her case, it is certainly arguable that the condition would have been struck down. We shall never know¹¹⁴. The dearth of case law¹¹⁵ on this point since Ms. Johnston's case may be

¹¹¹ Thomas E. Bartrum, "Birth Control as a Condition of Probation: A New Weapon in the War Against Child Abuse?" 80 *Ky. L.J.* 1037 (1991/1992); Stacey L. Arthur, "The Norplant Prescription: Birth Control, Woman Control or Crime Control?" 40 *U.C.L.A. L.Rev.* 1 (1992); Janet F. Ginzberg, "Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant" 58 *Brook. L. Rev.* 979 (1992); Steven S. Spitz, "The Norplant Debate: Birth Control or Woman Control?" 25 *Colum. Hum. Rts. L. Rev.* 131 (1993); Dorothy Roberts, *Killing the Black Body: Race, Reproduction and The Meaning of Liberty* (1997, Pantheon Books), chapters 3 and 4.

¹¹² *People v Johnston*, No. 29390 (Super. Ct., Tulare County, Ca. Jan. 2, 1991). The case prompted widespread reactions, both supporting and decrying the decision, and extensive press reporting.

¹¹³ "Birth Curb Order is Declared Moot" *New York Times*, April 15, 1992, p.A23; "Child Abuser's Birth Control Case Ends: No Legal Precedent", *Chicago Tribune*, April 15, 1992, p.8.

¹¹⁴ The case against the use of Norplant as a condition of probation is not confined to this line of argument and other persuasive arguments can and, indeed, have been made that it is unconstitutional on other grounds, including the First (free exercise of religion) and Eighth (cruel

attributable to it falling out of favor due to concerns over the side-effects of Norplant itself and problems surrounding the removal of the devices¹¹⁶. Norplant has now been withdrawn by its manufacturers¹¹⁷.

Given that the US Supreme Court declined, in *Oakley*, to clarify the position on no-procreation conditions, what conclusions can be drawn from the case law? It is tempting to suggest that the Wisconsin Supreme Court is not alone in dividing along gender lines since, in the cases discussed, female defendants have been successful in having no-pregnancy conditions reversed, while male defendants have fared less well in terms of procreative freedom¹¹⁸. Is it the case that

and unusual punishment) Amendments to the US Constitution; see, Janet F. Ginzberg, “Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant” 58 *Brook. L. Rev.* 979 (1992) and Scott J. Jebson, “Conditioning A Woman’s Probation on Her Using Norplant: New Weapon Against Child Abuse Backfires” 17 *Campbell L. Rev.* 301 (1995).

¹¹⁵ Steven S. Spitz, “The Norplant Debate: Birth Control or Woman Control?” 25 *Colum. Hum. Rts. L. Rev.* 131 (1993) at p.135, n.78, discusses a number of other cases from the early 1990s where young women agreed to Norplant implantation as part of plea agreements, usually to avoid imprisonment. None of these women appear to have sought to challenge the agreement later.

¹¹⁶ *Perez v Wyeth Laboratories Inc.* 734 A.2d 1245 (1999) and *In re Norplant Contraceptive Products Liability Litigation* 165 F.3d 375 (1999). In each of these cases, the action against the manufacturer of Norplant fell at the hurdle of the “learned intermediary doctrine” under which the manufacturer discharges its duty to warn the ultimate user of a drug of dangerous propensities by supplying this information to the patient’s physician.

¹¹⁷ Shari Roan, “Norplant taken off market”, *Chicago Tribune*, August 14, 2002, p.8.

¹¹⁸ An exception can be found in the curious case of *US v Smith* 972 F.2d 960 (8th Cir. 1992). There, a defendant was successful in challenging the condition attached to a term of three years supervised release following a fifty-one month prison sentence. The offending condition required him not to have any more children *except with his wife*.

appellate courts are less willing to limit the procreative freedom of women than of men¹¹⁹? No equal protection arguments appear to have been advanced in either *Kline* or *Oakley* and the courts do not address the issue.

It will be recalled that the dissent in *Oakley* made reference to the possibility of “coercive abortion” as being one of the “unacceptable collateral consequences” of the no-procreation condition attached to his probation. A woman impregnated by a man in Mr. *Oakley*’s position might well be driven by a desire to save him from returning to prison and terminate her pregnancy and, of course, there is always the prospect of the defendant exerting substantial pressure on her to do so. This argument failed to persuade the majority of the Court but, since it

¹¹⁹ In terms of gender-specific conditions, it is worth noting the use of so-called “chemical castration” of male sex offenders as a condition of their parole. Depo-Provera, initially developed as a contraceptive for women, was found to reduce testosterone levels in men with a resulting reduction in the individual’s sex drive. A number of states, including California (Cal. Penal Code ss.645), Florida (Fla. Stat. s.794.0235), Louisiana (La. Rev. Stat. Ch. 15, s.538) and Oregon (ORS 144.625), have passed statutes providing for its use as a condition of parole for repeat sex offenders. The similarity with the cases on no procreation probation conditions, considered above, is that this too is attached as a condition of granting probation to the defendant and this too will prevent him from procreating. In addition, the interest being served is the safety of the recipient’s potential victims and the parolee’s rehabilitation through his reintegration into society. However, it is submitted, the similarity ends there. The goal of requiring the parolee to submit himself to Depo-Provera injections is not to prevent him from procreating, it is to prevent him from being sexually active. While a host of social, medical and constitutional issues surround the legality of imposing such a condition on a parolee, they are, thus, matters for discussion another day. A vast literature on the subject is growing. See, for example, Avital Stadler, “California Injects New Life into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution” 45 *Emory L.J.* 1285 (1997); Larry Helm Spalding, “Florida’s 1997 Chemical Castration Law: A Return to the Dark Ages” 25 *Fla. St. U.L.Rev.* 117 (1998); Lisa Keesling, “Practicing Medicine Without a License: Legislative Attempts to Mandate Chemical Castration for Repeat Sex Offenders” 32 *J. Marshall L.Rev.* 381 (1999); Caroline M. Wong, “Chemical Castration: Oregon’s Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?” 80 *Or. L.Rev.* 267 (2001).

did not explain why, we can only speculate. Was it that the potential for coercive abortion here was indirect and too far removed from the defendant's sentence? Certainly, this would explain why no-procreation conditions directed at women have been struck down so consistently and similar conditions, handed down to men like Mr. Kline and Mr. Oakley, have not. Is it simply a feature of the biological fact that women have more direct control over their pregnancies that produces the different results? If that is the case, then it can be argued that women and men are not similarly situated and, thus, that there is no discrimination. While such a conclusion is consistent with permitting the pregnant woman, rather than the potential father, control the decision to terminate a pregnancy, where the two are in dispute, the situation here is not a precise parallel. Prioritizing "who decides", in the context of abortion, is a response to two inconsistent, competing claims. By striking down no-procreation conditions directed at men, the legal system would not be limiting the procreative freedom of women. It would simply be extending to men the same protection of procreative freedom as is afforded to women.

Gender issues aside, what are the interests and justifications being advanced in support of the state restricting an individual's procreative freedom? Parole allows for a prisoner to be released earlier than would have been the case otherwise. Thus, the parolee can be seen as is gaining, in terms of personal liberty. In return, the legal system permits conditions to be attached. The possibility of attaching conditions to parole is a recognition of society's legitimate interest in being protected from future offending, offending that would not be a risk were the offender to remain incarcerated. In addition, conditions associated with the offenders past offences are permitted on the basis that these should facilitate the offender's rehabilitation into society. Given

the dual rationale of parole conditions, the conditions themselves must relate to the underlying reasons for them and, thus, as we have seen, courts are not permitted to attach any condition they please to parole. It would appear that, where the conditions have been upheld, the one justification advanced was the societal interest in protecting children either, in the case of Mr. Kline from his tendency from violence or, in the case of Mr. Oakley, from his failure to support them. In the former case, we have seen that this was neither the only, nor the least dramatic, way to achieve that goal, since his children could be removed from his care. In the latter case, it is doubtful that his existing nine children would be any better supported because he could not add another to their number. The fact that, in all probability, he would fail to support any future children can hardly be a justification for ensuring the non-existence of these potential children.

The second justification advanced, in Mr. Oakley's case, was that his rehabilitation would be assisted by the condition. In the words of the trial judge, the condition might rehabilitate him "from his perception that one may flout valid court orders and the judicial process with impunity"¹²⁰. With respect, since it was unlikely Mr. Oakley was ever going to be in a position to support his children, the suggestion that the condition would achieve this end was something of a vain hope. A more credible explanation for the condition imposed on him is that the majority saw an interest in society not having to support yet more of his children. For the courts to have admitted that would have come dangerously close to what Walsh J. described in Oakley as a

¹²⁰ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), pp.206-207, quoting Judge Hazlewood in the trial court.

“judicially-imposed ‘credit check’ on the right to bear and beget children”¹²¹.

A further argument, sometimes advanced for such no-procreation conditions is worth exploring, if only to dismiss it. A prisoner can be seen as consenting to parole conditions by accepting the parole package. He or she is always free to reject the condition either expressly, at the time it is being imposed, or, impliedly, by breaching the condition at a later stage. In either case, the result will be the same. The defendant will serve the remainder of the sentence. However, to suggest that a person can consent to such a dramatic restriction on his or her liberty, in a free and meaningful way, when the alternative is incarceration, is nothing short of absurd¹²².

Would a no-procreation condition survive scrutiny under the European Convention? It is submitted that it would not. Procreative freedom is a right stated expressly in article 12 and privacy, in respect of family life, is guaranteed by article 8. While states are allowed a certain margin of appreciation, derogation from Convention rights must pass the test of proportionality. Thus, any state wishing to use no-procreation conditions would have to demonstrate, first, that the condition met a sufficiently important interest and, secondly, that the condition would impair the right no more than was necessary. Turning to the first part of the test, a state might argue, as have the authorities in the U.S., that the state has an important interest both in protecting children and in the rehabilitation of offenders by reducing the offender’s chance of re-offending.

¹²¹ *State v Oakley* 629 N.W.2d 200 (Wis. 2001), p.220.

¹²² On waiver of Constitutional rights, in this context, see Jeffrey L. Kirchmeier, “Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment” 32 *Conn. L.Rev.* 615 (2000).

However, it is when we apply the second leg of the test to a no-procreation condition that the state would find itself on ground that was, at best, shaky. As numerous courts in the U.S. have accepted, the state has a range of mechanisms at its disposal aimed at the protection of children. It can supervise a parent who poses a risk to a child and, ultimately, it can remove the child from that parent's care. Arguably this is a less intrusive method of protecting children. In terms of rehabilitating offenders, it is not the presence of children which causes child abuse or non-support, it is the offender's behavior. To suggest that the presence of children causes either kind of offending is rather like arguing that property *causes* theft. The state has ample means at its disposal to effect rehabilitation of offenders without infringing the fundamental right to procreate.

Conclusion

Procreative freedom is a right accorded considerable respect by international law. This is hardly surprising when one considers the devastating consequences of failure to respect it. The eugenics movement provides a graphic example of how a blinkered belief, even when peppered with good intentions, can go so woefully wrong. When predicated on evil intentions, it takes us down the road to genocide. For these reasons, domestic law too respects procreative freedom and eschews eugenics. Despite that, there remains scope for the state, in both the U.S. and the U.K., to restrict the procreative freedom of the individual. Where it does so, it is required to justify its actions. In the U.S., the justification must pass constitutional muster by showing that it is narrowly tailored to meet a compelling state interest. In the U.K., scrutiny, couched in terms of the European

Convention on Human Rights, requires the state to demonstrate that its action is necessary to meet an important interest. While the European standard may, on the face of it, appear lower than the constitutional test in the U.S., in practice it is not. What, then, does this mean for restricting the reproductive freedom of persons convicted of offending?

For the time being in the U.S., the offender loses the right to reproductive freedom upon incarceration. For a short time, the Court of Appeals for the Ninth Circuit flirted with the possibility that the reverse might be the case and that gave it the opportunity to consider a number of justifications, advanced by the prison authorities, warranting suspension of it. These included the danger that the prisoner might abuse the opportunity in order to injure others by throwing (presumably contaminated) sperm or by sending it to an unwilling recipient; the cost to the prison authorities of facilitating artificial insemination; and the risk of liability, through the mishandling of samples. A further concern was that, were male prisoners to be given access to assisted reproduction, then equal treatment would require similar facilities be made available to female prisoners, thus incurring, possibly greater, costs and presenting problems in terms of medical care. Little mention was made of the welfare of children.

In the U.K., procreative freedom is not lost automatically at the prison gates, probably because the, now defunct, European Commission on Human Rights had sent clear signals that it was not happy about such a blanket ban. This has opened the way for individual prisoners to seek access to assisted reproductive techniques and has resulted in criteria being developed in respect of such applications. What has resulted is a, sometimes vague, collection of considerations and factors.

Chief amongst them, either directly or indirectly, is the welfare of the child.

When we turn to no-procreation conditions, we find them absent in the U.K. and it has been argued here that they would not survive European Convention scrutiny. In the U.S., no-procreation conditions have been attached to probation and parole and, in effect, are a modern equivalent of non-consensual sterilization of prisoners. These conditions are less graphic and less brutal and, thus, perhaps offend the sensibilities of today's society less than would sterilization. Their imposition on individuals who attract little public sympathy, like child abusers and deadbeat fathers, makes them all the easier for the public to countenance. While the justifications advanced for their imposition - facilitating offender rehabilitation and protecting children - are less than convincing, since less intrusive options are available in each case, we again see child welfare appearing, this time in the guise of protection.

That there is an enormous societal obligation to ensure that the welfare of children is promoted and protected, is not disputed. The United Nations Convention on the Rights of the Child¹²³ marked the culmination of international recognition of this principle and the domestic law of both the U.K. and the U.S. rightly seeks to achieve these goals. Where the reason for a particular course of action is that it is being pursued in the name of child welfare, a sympathetic response ensues. The danger is that the claim alone may suffice without any real examination of whether it is justified. To deny adult procreative freedom on the basis of children's welfare is flawed. It makes blanket assumptions about the detriment to a child of having an absent parent. It ignores

that there are ample other mechanisms whereby an individual child might be protected from the potentially present parent. It pits the child's non-existence against existence. In short, it takes a popular and worthy principle, the protection of children, and uses it to justify unwarranted intrusion on the rights of adults.

The history of the eugenics movement provides a graphic example of how something believed to be scientific and sometimes applied with good intentions could lead to wholesale denial of human rights. Let us not pretend that the protection of the welfare of the child is either simple or scientific in turning it into the new eugenics.

¹²³ G.A. res. 44/25, Annex (1989).